

The paradox remains

Who is to blame for the SFO's failure to prosecute Sarclad individuals? ask **Rebecca Ridley and Carl Newman**

On 16 July 2019, subsequent to a 2016 deferred prosecution agreement (DPA) between Sarclad Limited (Sarclad) and the UK Serious Fraud Office (SFO), three former employees of Sarclad were acquitted of conspiracy to corrupt and conspiracy to bribe. DPAs are becoming increasingly common in the UK, yet convictions against the individuals involved in the underlying criminality are yet to be seen. As such, compliance officers will need to carefully assess their approach upon discovering criminality within an organisation.

The use of DPAs

On 24 February 2014, DPAs were introduced in the UK under Schedule 17 of the Crime and Courts Act 2013, following demands to increase the powers available to prosecuting authorities. A DPA is a formal agreement reached between a prosecuting authority (the SFO or the Crown Prosecution Service) and an organisation to suspend prosecution for a defined period, where there has been wrongdoing for which it could be prosecuted, provided that the organisation meets certain requirements. These agreements are subject to judicial agreement. Since 2014, five companies have entered into DPAs with the SFO, with financial penalties in excess of £650m.

Sarclad DPA

In July 2016, following three self-reports from Sarclad (previously known only as 'XYZ Limited') to the SFO, a DPA was reached. The criminality related to the systematic use of bribes to secure contracts for the metals company worth over £17m, over eight years, leading Sir Brian Leveson in his 2016 judgement with respect to the DPA, to describe the bribery within the company as "prolific" and "grave".

Under the terms of the DPA, Sarclad admitted offences of conspiracy to corrupt, contrary to s1 Prevention of Corruption Act 1906; conspiracy to bribe, contrary to s1 Bribery Act 2010; and failure to prevent, contrary to s7 Bribery Act 2010. The company agreed to pay financial orders of £6,553,085, comprising:

- £6,201,085 disgorgement of gross profits
- £352,000 financial penalty.

The DPA also required Sarclad to fully cooperate with the SFO going forward, including ongoing reporting regarding its compliance programme. Further, Heico Companies LLC, Sarclad's US-registered parent company, also paid £1,953,085 towards the dividends it received over the period of criminality. The terms of the DPA have now been met and the DPA has been concluded.

The Sarclad DPA was the first occasion in which individuals were implicated by self-reporting. The implicated individuals were: Michael Sorby (former managing director), Adrian Leek (former sales manager) and David Justice (former sales manager). They were subsequently accused of bribery and conspiracy to corrupt. However, following a ten-week trial at Southwark Crown Court, all three were acquitted on 16 July 2019.

Why are individual convictions proving so difficult to secure when the companies have already admitted wrongdoing?

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secure any convictions. This trend of SFO failings begs the question: *why are individual convictions proving so difficult to secure when the companies have already admitted wrongdoing?*

Naturally, consideration of the SFO's responsibility must be undertaken. DPAs were introduced, at least in part, to help settle costly criminal investigations against companies. It is arguable that the SFO is favouring entering into DPAs with companies, with significant financial orders attached, rather than subjecting the criminality to the scrutiny of a full trial, thereby utilising DPAs as a conduit for generating money.

Moreover, the case of Sarclad, in particular, has attracted widespread criticism for its handling by the SFO, regarding the SFO's reluctance to pursue documents during the DPA negotiations. The SFO failed to obtain the full interview notes from Sarclad following employee interviews as part of the company's internal investigation, conducted by its own lawyers. Instead, the SFO relied on interview summaries, claiming its decision not to pursue its request for disclosure of the interview notes from Sarclad (despite requests from defence representatives of implicated individuals) was an exercise of legitimate prosecutorial discretion.

One of the implicated employees began judicial review proceedings, challenging the SFO's decision in this regard. Whilst the application was dismissed, Holroyde LJ and Green J expressed real reservations in respect of the position adopted by the SFO in the case. Furthermore, Mr Sorby's legal representative has suggested that the SFO too readily accepted the version of events presented to it by Sarclad's parent company, rather than undertaking its own, independent investigation. Accordingly, there is

also an argument to be made that the SFO is allowing DPAs to be concluded on the basis of evidence that is insufficient to secure individual convictions, bringing its oversight into question.

However, despite firm criticisms of the SFO's approach, there is no doubt that its failure to convict individuals is at least in part attributable to the legal framework within which it must rightly operate. DPAs are entered into on the basis of evidence of wrongdoing, whereas a criminal conviction requires meeting the criminal standard of proof (i.e. 'beyond reasonable doubt'). Unlike in the US, in the UK there is no DPA regime for individuals. As such, a criminal trial of an implicated individual can often result in the production of disclosure not previously analysed and flaws in previous evidence coming to light, which, when coupled with the higher burden of proof demanded, can result in two different outcomes.

Such decisions raise the question of implementing individual DPAs, which would allow authorities the opportunity to place control on individuals with their incentivised cooperation. However, given the clear policy reasons as to why individuals should not be offered paralleled immunity, there is no appetite for any reform of this area. Consequently, we are left with, in effect, a two-tiered system of justice, whereby evidence used to conclude a DPA is inadequate when scrutinised under a criminal trial of an individual.

Furthermore, the imposition of corporate criminal liability in the UK requires prosecutors to identify and prove the guilt of a 'directing mind and will' of the company. Given the difficulty for prosecutors in satisfying this 'identification principle', DPAs have offered a method by which prosecutors have been able to hold companies to account with their ►

Failure to convict individuals

This decision represents the third occasion in which the SFO has failed to secure convictions against individuals implicated under a DPA. In January 2017, following a four-year investigation, the SFO entered into a DPA with Rolls Royce Motor Cars Limited (Rolls Royce) in respect of bribery and corruption, spanning over 30 years and seven jurisdictions. Following a lengthy investigation, the SFO decided not to prosecute either the individuals or the company itself, favouring a DPO instead. Later that year, in April 2017, Tesco Stores Limited (Tesco) was ordered to pay a financial penalty of £129m as part of its DPA relating to false accounting practices. Despite the SFO taking the decision to prosecute three senior employees, again it was unable to

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incentivised cooperation. It may be that the new ‘failure to prevent’ bribery and tax evasion offences introduced by the Criminal Finances Act 2017 will offer the SFO a new route to securing corporate criminal convictions and then, at the very least, some criminal convictions will be able to be secured, even if these do not relate to specific individuals.

Implications for compliance officers

The recent Sarclad decision poses many questions for compliance officers regarding the approach to take in the event that corporate criminality is discovered, not least the issue of legal professional privilege.

Compliance officers should be mindful that not all professionals have the benefit of legal professional privilege and, as such, external lawyers should be instructed at the earliest opportunity, preferably before the commencement of an internal investigation, in order that disclosure obligations of any such professional third parties can be appropriately managed and explained. The results of any internal investigation must also be treated with caution. Even in the face of seemingly damning evidence, this information will need to be assessed and the decision made whether to self-report to the relevant prosecuting authorities, or instead to prepare a sturdy defence case for a criminal trial in the hope of securing an acquittal. Otherwise, companies may risk being too eager to admit corporate liability on the basis of alleged acts of employees that cannot be proved at trial.

However, for those companies

operating in the regulated sphere, reporting obligations, for example in respect of systems and control failures, will need to be considered. Sarclad does not operate in the regulated sector and was therefore under no obligation to report its failings to regulatory bodies. Furthermore, in light of the SFO’s recently published Corporate Co-operation Guidance, in which it states explicitly that “co-operation will be a relevant consideration in the SFO’s charging decisions”, it is clear that a proactive approach upon discovery of criminal wrongdoing can assist the SFO in determining which course of action is in the public interest and, accordingly, in its decision whether or not to prosecute.

Evidently, a lesson to be learned from Sarclad is that the results of an internal investigation require objective review. Initial conclusions should not be automatically accepted and a consideration of how any evidence produced would appear before a jury in court, along with the high burden of the criminal standard of proof, must be taken into account. This needs to be in the context of corporate liability, as well as individual liability, as the strength of

any evidence will need to overcome the burden of proof in a criminal trial in both instances. Compliance officers should also be live to issues around legal privilege and disclosure at the start of any investigation and on an ongoing basis.

More generally, compliance officers should ensure that effective internal policies and procedures relating to anti-money laundering, bribery and corruption, tax evasion and conflicts (among others) are in place and that staff regularly undergo training in respect of these matters, as their adequacy could prove a valuable defence for the company should criminality be discovered.

An opportunity for review

For now, it seems as though the paradox of companies accepting criminal wrongdoing based upon the actions of their employees, whilst separate criminal convictions against such employees cannot be secured, looks to set to remain. Perhaps Sarclad should be used as an opportunity to review the use of DPAs, including the sufficiency of the evidence used to support them. Otherwise, companies might start concluding that facing the evidential burden of a criminal trial is more risk averse than self-reporting to the SFO. ●



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