Debevoise & Plimpton

FCPA Update
July 2021
Volume 12
Number 12

FCPA Update

A Global Anti-Corruption Newsletter

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UK, US, and Brazil Reach Bribery-Related Settlements with Amec Foster Wheeler Energy

On June 25, 2021, the UK Serious Fraud Office ("SFO") announced that a deferred prosecution agreement ("DPA") had been agreed in principle with Amec Foster Wheeler Energy Limited ("AFWEL"). Lord Justice Edis' judgment approving the DPA was published on July 1, 2021.[1] This is the SFO's tenth DPA to date. Below, we outline some of the key issues and questions arising from the DPA. The DPA was part of a coordinated settlement that also included United States and Brazilian authorities, resulting in a combined penalty of US $177 million.

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1. Director of the Serious Fraud Office v Amec Foster Wheeler Energy Limited (July 1, 2021), https://www.sfo.gov.uk/download/amec-foster-wheeler-energy-limited-deferred-prosecution-agreement-judgment/.

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Background

In 2014, AMEC acquired Foster Wheeler Energy Limited ("FWEL"), and changed its name to Amec Foster Wheeler PLC ("Amec"), with FWEL becoming a subsidiary of Amec and re-named AFWEL. In 2017, Amec was acquired by John Wood Group PLC ("Wood"), a UK-based global engineering company.

The unlawful conduct covered by the DPA related to FWEL's use of corrupt agents in the oil and gas sector. AFWEL was charged with nine counts of conspiracy to make corrupt payments contrary to section 1(1) of the Criminal Law Act 1977 and section 1 of the Prevention of Corruption Act 1906 in four jurisdictions: Nigeria (two counts), Saudi Arabia (two), Malaysia (four) and India (one). That conduct took place between 1996 and 2010. In addition, AFWEL was charged with one count of failure to prevent bribery under section 7 of the Bribery Act 2010, relating to the bribery of individuals at Petrobras in Brazil between 2011 and 2014 in exchange for the award of a contract. There are very limited factual details available at this stage, as the anonymized Statement of Facts has not yet been published.

In the UK, AFWEL agreed to pay a financial penalty of £99.9 million and the SFO's costs of £3.4 million, together with £210,610 compensation to the people of Nigeria. AFWEL also reached settlements with authorities in the United States and Brazil, all of which related to conduct in Brazil. In the United States, AFWEL agreed a DPA with the Department of Justice and consented to a civil Cease and Desist Order with the Securities and Exchange Commission. In Brazil, settlements were agreed with the Ministério Público Federal, the Controladoria-Geral da União and the Advogado-Geral da União. Until recently (for example, in the TechnipFMC and Samsung cases), this degree of coordination among Brazilian authorities has not been possible in large international settlements, so this development is helpful for companies seeking to resolve bribery-related issues in Brazil.[2]

Prosecution of Individuals

All of the AFWEL DPA documents contain introductory wording stating that the Court made no findings of fact or assessment of the culpability of any individuals who may have been involved in the company's wrongdoing. This is the first time any SFO DPA has included this, or equivalent, wording. This statement is likely due to the SFO's failure to secure the convictions of any individuals who have been prosecuted in connection with previous DPAs, and is therefore intended to avoid

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2. We have reported on increased coordination among Brazilian authorities in the last few years. *See, e.g.*, Debevoise & Plimpton LLP, "Brazil Announces New Anti-Corruption Cooperation Framework; MPF's 5th Chamber Opposes It" (Aug. 14, 2020), https://www.debevoise.com/insights/publications/2020/08/brazil-announces-new-anti-corruption-cooperation.

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prejudicing the position of those who may be prosecuted following the AFWEL DPA. Lord Justice Edis noted documents indicating that senior employees and directors of AFWEL had engaged in corrupt activities, and that SFO decisions about whether to charge them would be made within three months.

Successor Liability

Unlike in the United States, there is currently no established principle in English law that companies can be held criminally liable for the acts of companies they acquire where such acts took place prior to the acquisition. As with the Sarclad DPA, Wood appears to have agreed voluntarily to pay the penalty imposed on AFWEL as a 'good corporate citizen' and due to its group structure and the dividends it has received as AFWEL's parent company, as well as to secure a DPA rather than risk AFWEL being prosecuted. The judgment states that Wood did not take into account the SFO investigation in its 2017 valuation of Amec, since the investigation was announced after its offer was made and the offer was based only on publicly available information. This demonstrates the potential importance of pre-transaction anti-bribery due diligence.

"The Court emphasized that FWEL's criminal conduct was so serious that if the individuals involved were still connected with the company, a DPA would not have been appropriate."

The Court emphasized that FWEL's criminal conduct was so serious that if the individuals involved were still connected with the company, a DPA would not have been appropriate. It was vital that, through the two takeovers, Wood was 'twice removed' from the ownership and management of FWEL. Other factors relevant to the Court's determination that a DPA was in the interests of justice were Wood's full cooperation with the SFO's investigation, its implementation of a robust corporate governance system, and its commitment to ensure that business was carried on without corruption in the future.

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Handling of Investigation and Self-Reporting

Lord Justice Edis found that FWEL had a "widespread and high level culture of criminality" and that "corruption appears to have been endemic." In particular, he condemned the FWEL Board's "deplorable" failure to self-report to the SFO following investigation reports produced by the company's lawyers from 2007 to 2009. While Lord Justice Edis acknowledged that companies have no legal obligation to self-report, he stated that FWEL should have done so "as a matter of ethical corporate governance." However, this was not taken into account in determining the financial penalty. The Court also criticised FWEL's "ineffective" measures to address the corruption identified in the reports, noting that the wrongdoing continued despite the Board's knowledge of it.

Penalty Calculation

The penalty calculation in this case was unusual and complex. It incorporated various discounts, including reductions for a guilty plea, cooperation, and Wood being 'twice removed' from FWEL. The penalty also included a 10 percent totality reduction for the conduct (except the Malaysian charges), as the total fine was deemed disproportionate when the sentences for the different offences were added together. This is the first time that a UK DPA has included a specific totality reduction percentage, rather than a more holistic approach in applying the totality principle when following the steps set out in the sentencing guidelines. However, the judgment does not explain how this figure was determined.

AFWEL agreed to pay £210,610 compensation to Nigeria due to FWEL's corrupt payments to Nigerian police and tax officials to settle an allegation of tax evasion. The compensation was calculated as the difference between the tax claimed and the amount paid. This is only the second time that a company has agreed to pay compensation in a UK DPA to those impacted by its offenses. Other DPA judgments note the typical difficulty in bribery cases of identifying the victims and quantifying the bribes paid and the resulting loss.

Undertakings

Unlike previous DPAs, Wood gave the undertakings and guaranteed AFWEL's performance of all its obligations, as well as taking on the same commitments across the entire Wood group. The undertakings are broadly similar to those found in previous DPAs, including enhancing Wood's ethics and compliance program and continuing to cooperate with the SFO.

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Related U.S. Settlements

AFWEL also entered into a Cease-and-Desist Order with the SEC ("SEC Order") for alleged violations of the anti-bribery, books and records, and internal controls provisions of the FCPA related to its conduct in Brazil.[3] The SEC's jurisdiction was based on the fact that AFWEL's corporate predecessor (FWEL) had traded on NASDAQ during the relevant period. Simultaneously, AFWEL entered into a DPA[4] ("DOJ DPA") with DOJ based on an information[5] charging one count of conspiracy to violate the anti-bribery provisions of the FCPA. AFWEL agreed to pay penalties and interest amounting to $22.7 million to the SEC and $18.375 million to DOJ, although both amounts will be discounted over 50% to credit parts of the payments made to UK and Brazilian authorities.

As noted above, unlike in the United Kingdom, successor liability is an accepted concept in U.S. law and the AFWEL enforcement action is a good example of the long-tail liability that can result. AFWEL (and its owner Wood) are two generations of corporate ownership removed from the entity responsible for the behavior (FWEL), although the investigation was already underway at the time Wood purchased the company. Wood is not an issuer,[6] and therefore is not itself subject to the FCPA. However, it is a signatory to the DOJ DPA and subject to the forward-looking undertakings - except ongoing cooperation - therein.[7] Thus, in addition to the loss associated with the penalties paid by its subsidiary, Wood has also inherited three years' worth of continuing obligations to DOJ. Wood was credited for cooperation with both agencies, and was independently credited with the remediation at AFWEL by DOJ.[8]

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3. *In the matter of AMEC FOSTER WHEELER Ltd.,* Securities Exchange Act Rel. No. 92259, Admin. Proc. File No. 3-20373 (June 25, 2021), https://www.sec.gov/news/press-release/2021-112 (hereinafter "SEC Order").
4. *United States v. Amec Foster Wheeler Energy Limited*, Deferred Prosecution Agreement, Cr. No. 21-CE-298 (KAM) (June 25, 2021), https://www.justice.gov/opa/pr/amec-foster-wheeler-energy-limited-agrees-pay-over-18-million-resolve-charges-related-bribery (hereinafter "DOJ DPA").
5. *United States v. Amec Foster Wheeler Energy Limited*, Document 5, Information, Cr. No. 21-CE-298 (KAM) (June 25, 2021), https://www.justice.gov/opa/pr/amec-foster-wheeler-energy-limited-agrees-pay-over-18-million-resolve-charges-related-bribery (hereinafter "Information").
6. SEC Order at ¶ 2.
7. *See* DOJ DPA at ¶¶ 8 (conditional release from liability), 9-10 (compliance program undertakings), 11-12 (three-year compliance reporting obligation).
8. SEC Order at ¶¶ 35-36; DOJ DPA at ¶ 4(d)-(e).

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DOJ, both in the DPA and the Information, asserts jurisdiction over AFWEL under "15 U.S.C. § 78dd-3," the section of the statute covering acts committed "while in the territory of the United States," by non-issuers and non-domestic concerns.[9] This may be an error in both documents, as AFWEL's predecessor was subject to jurisdiction as an issuer.[10] Assuming it is not an error (as it appears twice in DOJ's papers), it is both an unnecessary and a surprisingly broad assertion of dd-3 jurisdiction, as it is unclear whether there were any "overt acts" "in the territory of the United States" other than a meeting *by a co-conspirator*, emails through U.S. servers, and funds wired through U.S. correspondent bank accounts.[11]

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9. DOJ DPA at ¶ 1; Information at ¶ 48.
10. The SEC Order describes the DOJ DPA as being entered into pursuant to 15 U.S.C §78dd-1, *see* SEC Order at ¶ 37.
11. Information at ¶ 49.

France Moves to Boost Its White Collar Enforcement

On July 7, 2021, a French National Assembly Committee led by MPs Raphaël Gauvain and Olivier Marleix published a long-awaited 180-page evaluation report about France's anti-corruption law of December 9, 2016 (the so-called "Sapin II Law").[1] While recognizing the significant progress made by France in its fight against corruption and tax fraud over the last five years, MPs suggest further strengthening the existing legal framework. Their 50 recommendations cover various topics, including the French-style deferred prosecution agreement; the self-reporting of corporate crimes; corporate criminal liability criteria; the introduction of a new pre-trial guilty plea; French extra-territorial enforcement of corruption crimes; and the role of the French anti-corruption agency. We provide below the main highlights of the report.

Expanding the Use of the French-Style DPA. The Sapin II Law created the French-style deferred prosecution agreement (known as "CJIP"), which provides prosecutors with the ability to offer companies, whether or not under formal investigation, to enter into pretrial settlements involving criminal violations of anti-corruption and tax legislations. A company must agree to pay a fine proportionate to the benefit derived from the misconduct, up to 30 percent of its average annual turnover over the past three years. The company may also be required to compensate the victims and/or agree to implement an enhanced compliance program. A CJIP may only be finalized with approval of a judge following a public hearing. The judge's role is to verify that the statutory requirements for a CJIP have been met. The company does not have to acknowledge any guilt, and the judge's approval order does not have the effect of a conviction.

With 12 CJIP resolutions in about four years, for a total recovery of EUR 3 billion, the report characterizes this new mechanism as an effective tool to resolve cases of financial misconduct. Given that success, MPs say expanding the scope of CJIP to additional corporate crimes should now be considered. They also make various recommendations to make CJIP resolutions even more appealing, which are discussed below.

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1. Rapport d'information n° 4325 sur l'évaluation de l'impact de la loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, dite "loi Sapin 2", https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b4325_rapport-information.

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Encouraging Self-Reporting and Cooperation. Self-reporting a crime to enforcement authorities is not common practice in France. Back in June 2020, the French Ministry of Justice stated that self-reporting corruption appears to be in companies' best interest as it may help to have the case resolved through a CJIP, rather than at trial. The Ministry, however, acknowledged that France still has to adopt a practical approach to encourage companies to actually self-report.

Drawing on this, MPs make several recommendations including the need to provide better guarantees to companies that a CJIP resolution will be offered if they self-report and fully cooperate. In line with the U.S. practice, they also recommend the publication of sentencing guidelines for companies to better anticipate the benefits of self-reporting and cooperation.

The report also calls for a better protection of the documents and information provided by the company *prior* to any CJIP discussions so that companies are better encouraged to self-report and cooperate with enforcement authorities without fear that they would use the documents in court if settlement talks break at some stage.

Loosening Corporate Criminal Liability. Under French criminal law, legal entities can only be held criminally liable for offenses committed *on their behalf by their organs or representatives*. According to the report, these legal requirements would make it too difficult for criminal courts to find companies guilty of corruption. Hence their recommendation to loosen these statutory conditions. The rationale is that companies will be more willing to self-report and enter into CJIP resolutions if they face more peril at trial.

It remains to be seen if France will actually review its corporate criminal liability regime in force since 1994. Especially since French criminal courts do make their own loosened interpretation of the exiting statutory conditions, including in corruption cases. Recently, for instance, the Court of Cassation affirmed that a holding company could be found guilty of corruption committed by its subsidiary's executives.[2]

Introducing a New Pretrial Guilty Plea for Individuals. The CJIP resolution is available to legal entities only. Individuals may enter a pre-trial guilty plea ("CRPC") that also has to be approved by a judge. But contrary to what exists for CJIPs, French law gives the judge some room to dismiss a CRPC deal – for instance, when "the facts" or "the public interest" warrant a full criminal trial.

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2. French Court of Cassation, June 16, 2021, No 20-83.098, https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/768_16_47307.html.

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That lack of procedural alignment between legal entities and individuals creates a host of issues including the difficulty to reach coordinated resolutions for both companies and their executives. The recent *Bolloré case* is a good illustration, where the judge approved the CJIP between the PNF and the corporate defendants, but dismissed the CRPC between the PNF and the executives, who may now have to face trial.

The report highlights the risk that executives would have very little appetite to self-report corporate crimes and to cooperate if they cannot be part of a coordinated resolution. MPs therefore recommend the creation of a new CRPC mechanism, where judges would have less flexibility to dismiss the pre-trial guilty plea deal, but that would apply only where the individual defendants self-reported and fully cooperated.

"While recognizing the significant progress made by France in its fight against corruption and tax fraud over the last five years, [the evaluation report] suggest[s] further strengthening the existing legal framework."

Boosting Extraterritorial Enforcement. The Sapin II Law provides for the extraterritorial jurisdiction of French enforcement authorities over acts of corruption committed abroad by "someone conducting, in whole or in part, business in France." The French Ministry of Justice explained that this should cover at least foreign companies having a subsidiary, branches, commercial offices, or other establishments in France, even if those entities in France have no distinct legal personhood.[3]

In their report, MPs regret that despite such a far-reaching extra-territorial jurisdiction, French enforcement authorities rarely go after foreign companies conducting part of their business in France. As a result, they call for a better detection of corruption acts committed abroad by such foreign entities. In particular, they ask for better information sharing among French embassies networks, judicial authorities and intelligence services.

Other Recommendations. The report includes various other recommendations, such as: (i) the introduction of some statutory framework for the conduct of internal investigations; (ii) the transfer of anticorruption compliance obligations

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3. Circular No. JUSD2007407 on criminal justice policy in the fight against international corruption (June 2, 2020), https://www.legifrance.gouv.fr/download/pdf/circ?id=44989.

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enforcement from the French anti-corruption agency to another French enforcement agency entity known as *Haute Autorité pour la Transparence de la Vie Publique* (HATVP); and (iii) upgrades of the existing French whistleblower protection rules and of the lobbying activities framework.

This important evaluation report makes a number of recommendations that go in the right direction of strengthening the French white collar enforcement landscape. It now remains to be seen what the French government will actually make of it. Some of the 50 recommendations represent significant changes that likely won't be actively handled before the presidential and parliamentary elections of mid-2022. But some of the recommendations may find their way into the whistleblower protection bill that will be debated in the fall. And some others may simply be introduced through new guidelines from the French Ministry of Justice or the PNF.

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FCPA Update

FCPA Update is a publication of
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