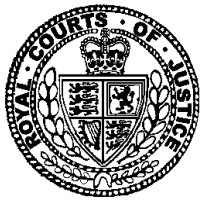

Case No: U20200108

IN THE CROWN COURT AT SOUTHWARK
IN THE MATTER OF s.45 OF THE CRIME AND COURTS ACT 2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2020

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(THE RT. HON. DAME VICTORIA SHARP)

- -

Between :

Director of the Serious Fraud Office	**Applicant**
- and -	
Airbus SE	**Respondent**

- -
- -

James Lewis QC, Allison Clare, Katherine Buckle and **Mohsin Zaidi** (instructed by **the Serious Fraud Office**) for the **Applicant**
Hugo Keith QC and **Ben FitzGerald** (instructed by **Dechert LLP**) for the **Respondent**

Hearing date: 31st of January 2020

- -

Approved Judgment

Dame Victoria Sharp P.:

Introduction

1. On 28 January 2020 I heard an application in private in which I was asked to make a declaration in preliminary approval of a deferred prosecution agreement (a DPA) reached between the Serious Fraud Office (SFO) and Airbus SE (Airbus). At that hearing, I made a declaration that it was likely to be in the interests of justice for such agreement to be made and that its proposed terms were fair, reasonable and proportionate. Today, the 31 January 2020, I made a final declaration and Order to that effect at a hearing held in public. One of the consequences of this Order is that Airbus must pay a total financial sanction of approaching one billion euros (€990,963,712 including costs) to the Consolidated Fund via the SFO within 30 days of today's date, made up of the disgorgement of profit of €585,939,740 and a penalty of €398,034,571. To put this figure into context, this financial sanction is greater than the total of all the previous sums paid pursuant to previous DPAs and more than double the total of fines paid in respect of all criminal conduct in England and Wales in 2018.

2. The total sums which Airbus must now pay in a global context however exceeds €3.5 billion. This is because the SFO investigation which has led to this DPA is part of a joint investigation with the French Parquet National Financier (PNF) conducted by a joint investigation team (the JIT) and is parallel to an investigation conducted by the United States Department of Justice (DOJ) and by the United States Department of State (DOS). Each of the prosecuting authorities has taken responsibility for a number of geographical areas or customers and has now entered into their own DPA, Judicial Public Interest Agreement (CJIP) or (in the case of the Department of State) a Consent Agreement, with Airbus SE.

3. The SFO's investigation related to bribery offences in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana. The PNF's investigation related to bribery and corruption offences in China, Colombia, Nepal, South Korea, the United Arab Emirates, Saudi Arabia (Arabsat), Taiwan and Russia. The JIT investigation into Airbus' conduct in Colombia was led by the SFO but the SFO agreed that this conduct should be included in the French CJIP to reflect French primacy in the JIT investigation. The DOJ investigation relates to bribery and corruption offences in China and violations of parts 126.1, 129 and 130 of the US International Traffic in Arms Regulations (ITAR) concerning a number of jurisdictions. The DOS's investigation relates to civil violations of ITAR concerning various jurisdictions.

4. There is to be a simultaneous resolution in all three jurisdictions by way of settlement agreements.

5. The criminality involved was grave. The SFO's investigation demonstrated that in order to increase sales, persons who performed services for and on behalf of Airbus offered, promised or gave financial advantages to others intending to obtain or retain business, or an advantage in the conduct of business, for Airbus SE. It is alleged that those financial advantages were intended to induce those

others to improperly perform a relevant function or activity or were intended to reward such improper performance and that Airbus did not prevent, or have in place at the material times adequate procedures designed to prevent those persons associated with Airbus from carrying out such conduct.

The legal framework

6. DPAs provide a mechanism by which an organisation (being a body corporate, a partnership or an unincorporated association, but not an individual) can avoid prosecution for certain economic offences through an agreement with the prosecuting authority. In this jurisdiction, the prosecuting authorities are the Director of Public Prosecutions (DPP) and the SFO. The legislative mechanism is provided by Schedule 17 of the Crime and Courts Act 2013 (the 2013 Act). The relevant rules of court are contained in Part 11 of the Criminal Procedure Rules (CrPR) and a Deferred Prosecution Code of Practice (the DPA Code) is published jointly by the SFO and the CPS. DPAs have been given extensive consideration by Sir Brian Leveson, P. as he then was, in *Serious Fraud Office v Standard Bank Plc* [2015] 11 WLUK 804, *Serious Fraud Office v Sarclad Limited* [2016] 7 WLUK 211, *Serious Fraud Office v Rolls Royce* [2017] 1 WLUK 189 and *Serious Fraud Office v Tesco Stores Ltd* [2017] 4 WLUK 558. See more recently, two decisions of William Davis J in *Serious Fraud Office v Serco Geografix Ltd* [2019] 7 WLUK 45 and *Serious Fraud Office v Guralp Systems Limited* (2019, U20190840).

7. The operation of the deferred prosecution regime was summarised in the preliminary judgment of *Standard Bank*. At paras 1-3, Sir Brian Leveson P. explained that:

> "1. The traditional approach to the resolution of alleged criminal conduct is for a prosecution authority to commence proceedings by summons or charge which then proceeds in court to trial and, if a conviction follows, to the imposition of a sentence determined by the court. By s. 45 and Schedule 17 of the Crime and Courts Act 2013 ("the 2013 Act"), a new mechanism of deferred prosecution agreement ("DPA") was introduced into the law whereby an agreement may be reached between a designated prosecutor and an organisation facing prosecution for certain economic or financial offences. The effect of such an agreement is that proceedings are instituted by preferring a bill of indictment, but then deferred on terms: these terms can include the payment of a financial penalty, compensation, payment to charity and disgorgement of profit along with implementation of a compliance programme, co-operation with the investigation and payment of costs. If, within the specified time, the terms of the agreement are met, proceedings are discontinued; a breach of the terms of the agreement can lead to the suspension being lifted and the prosecution pursued.

> 2. By para. 7-8 of Schedule 17 to the 2013 Act, after negotiations have commenced between a prosecutor and relevant organisation, the prosecutor must apply to the court, in private, for a declaration that entering into a deferred prosecution agreement in the circumstances which obtain is likely to be in the interests of justice and that the proposed terms are "fair, reasonable and proportionate". Reasons must be given for the conclusion expressed by the court and in the event of such a declaration (either initially or following further negotiation and review), formal agreement can then be reached between the parties. In that event, a further hearing is necessary for the court to declare that the agreement is, in fact, in the interests of justice and that the terms (no longer proposed, but agreed) are fair, reasonable and proportionate.
>
> 3. If a DPA is reached and finally approved, the relevant declaration, with reasons, must be pronounced in public. Thereafter, the prosecutor must also publish the agreement and the initial or provisional positive declaration (along with any earlier refusal to grant the declaration) in each case with the reasons provided. In that way, the entirety of the process, albeit then resolved, becomes open to public scrutiny. …"

8. As Sir Brian Leveson P. also explained in the final judgment in *Standard Bank,* at paras 2 and following:

> "2. In contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA. … The court retains control of the ultimate outcome. …
>
> 4. Thus, even having agreed that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate. To that end, it remains open to continue the argument in private, again on the basis that, if a declaration under para. 8(1) is not forthcoming, a prosecution is not jeopardised. Once the court is minded to approve, however, the declaration, along with the reasons for it, must be provided in open court. The engagement of the parties with the court then

> becomes open to public scrutiny, consistent with the principles of open justice …."

9. Thus more particularly (i) a prosecutor may make a further application to the court for a preliminary declaration if its previous application is declined (para 7(3) of Schedule 17 to the 2013 Act); (ii) a DPA only comes into force when it is approved by the Crown Court making a final declaration under para 8(3) of Schedule 17 to the 2013 Act; (iii) the final hearing on the merits may be in public or private, but an approval and the reasoning must be announced in a public hearing (CrPR 11.2(1)(b) and (2)), and (iv) para 12 of Schedule 17 to the 2013 Act provides for the postponement of publication of documents normally required to be published under para 8 of Schedule 17 to the 2013 Act to avoid prejudicing other proceedings. Further, pursuant to para 2(2) of Schedule 17 to the 2013 Act, the proceedings instituted against the entity are automatically suspended once the para 8 declaration is given by the Court. In most situations such proceedings will be discontinued once the DPA expires (see CrPR 11.8).

10. Whether a DPA is likely to be or is in the interests of justice and whether its terms are likely to be or are fair, reasonable and proportionate are questions to be determined by reference to all of the relevant facts and circumstances of a particular case. It will be rare for one factor alone to dictate the outcome. As identified in the preliminary judgment in *Sarclad* at para 32:

> "In making this assessment, a number of factors fall to be considered. These can be listed as follows:
>
> i) the seriousness of the predicate offence or offences;
>
> ii)the importance of incentivising the exposure and self-reporting of corporate wrongdoing;
>
> iii) the history (or otherwise) of similar conduct;
>
> iv) the attention paid to corporate compliance prior to, at the time of and subsequent to the offending;
>
> v) the extent to which the entity has changed both in its culture and in relation to relevant personnel;
>
> vi) the impact of prosecution on employees and others innocent of any misconduct."

This Application

11. At the hearing on 28 January 2020, an application was made by the Director of the SFO pursuant to para 7(1) of Schedule 17 to the 2013 Act in relation to a proposed DPA between the Director of the SFO and Airbus, and I heard extensive submissions from Mr James Lewis QC for the SFO and Mr Hugo

Keith QC for Airbus. The hearing was held in private as the legislation requires: see para 7(4) of Schedule 17 to the 2013 Act, albeit on the evening before that hearing, reports appeared in the media, apparently presaging some of the issues that were due to be considered confidentially during the course of the hearing. Having considered the submissions and the material placed before me, I made the declaration the parties invited me to make, namely that entering into the DPA was likely to be in the interests of justice and that its proposed terms were fair, reasonable and proportionate. I reserved my reasons for reaching this conclusion until the final hearing held under para 8 of Schedule 7 to the 2013 Act. I also gave leave for Airbus to make an appropriate stock market announcement in accordance with its obligations under the Market Abuse Regulation (EU) No 5961/2014.

12. The Director of the SFO has now applied for a declaration under para 8 of Schedule 17 to the 2013 Act that the DPA *is* in the interests of justice and that its terms are fair, reasonable and proportionate. Nothing has occurred that has caused me to alter my provisional view. I have therefore given final approval to the DPA. The hearing today was placed in the list for Southwark Crown Court and held in public. This judgment contains my reasons for giving provisional and final approval to the DPA and making the declarations to which I have referred. What follows is a summary only of the detailed account of the facts set out in the agreed Statement of Facts in these proceedings, and to which reference should be made for the full and agreed account.

13. In the Statement of Facts, the identity of the individuals concerned has not been included. There are ongoing investigations in respect of a number of individual suspects in this jurisdiction and abroad. It is appropriate to protect the rights of the suspects to a fair trial. In addition some of the individuals involved in the relevant conduct are based in jurisdictions where there are human rights concerns, and the death penalty exists for corruption. Further, the intermediary companies used by Airbus were often made up of a few individuals. Naming the companies would therefore be tantamount to naming those individuals. To go further than the Statement of Facts or my summary and identify the employees or others by name, would be to prejudice potential criminal proceedings and could lead to action or the imposition of a penalty which, in this country, we would regard as contravening Article 3 of the European Convention on Human Rights. The identities and positions of relevant employees and other persons referred to in the Statement of Facts have however been made known to me so that I have been able to assess their comparative seniority and, thus, the responsibility of Airbus. In the circumstances however, none are identified.

Airbus SE

14. Airbus is one of the two largest manufacturers of commercial aircraft in the world (the other being The Boeing Company). It also manufactures helicopters, military transports, satellites, and launch vehicles.

15. It is necessary to explain something of Airbus' somewhat complex corporate history and structure in order to put the DPA and the multi-national aspects of

it into context and to explain the jurisdiction in this case in respect of the criminal conduct that occurred.

16. Airbus SE is a company registered in the Netherlands. In 2000, the European Aeronautic Defence and Space Company, EADS NV, was created by the merger of three European aerospace and defence companies. In 2013, the core partnership among the shareholders of EADS NV was terminated. The industrial shareholders exited, and the collective state shareholding of France, Germany and Spain was limited to 28 percent. A new and independent board was established under an independent chairman, subject to the right of the French and German states to approve or disapprove of certain outside directors.

17. In 2014, EADS NV changed its name to Airbus Group NV. In 2015 Airbus Group NV was converted into a European public-limited company, Airbus Group SE. In 2017, Airbus Group SE changed its name to Airbus SE. Airbus SE is therefore the current name of the ultimate Airbus parent company. It is, however, the same legal entity as the prior group parent companies, EADS NV, Airbus Group NV and Airbus Group SE. The turnover for Airbus SE for the years 2011 to 2018 (using round figures) ranged between €49 billion and €66.5 billion and its profit before finance costs and income taxes for the same period, (again using round figures) ranged from €1.5 billion to €5 billion.

18. EADS France SAS was a subsidiary of EADS NV, and had a department within it, formed in 2008, called the Strategy and Marketing Organisation (the SMO). Importantly for present purposes, a sub-division of SMO, SMO International, was responsible for Business Partner (BP) appointments and International Market Development projects (IMD projects) in relation to commercial aircraft sales. EADS France SAS became Airbus Group SAS in 2014. In 2017 Airbus Group SAS was merged into Airbus SAS, and it no longer exists as a separate entity.

19. Airbus SAS is now the main commercial aircraft making entity, and the operational headquarters of Airbus Commercial, one of Airbus' primary divisions. Airbus Operations SAS is a subsidiary of Airbus SAS and wholly owns three companies concerned with operations in Spain, Germany and the UK. Airbus operations at Filton and at Broughton in the United Kingdom are managed through a subsidiary UK company, Airbus Operations Limited.

20. A Spanish company, Airbus Defence and Space SA is another subsidiary of Airbus SE. From April 2012, Airbus Defence and Space SA has owned Airbus Military UK Ltd, which has as its main purpose, the support of certain programmes in the UK. From 2014, Airbus Military UK Limited has been part of the Airbus Defence and Space Division.

21. Part of Airbus SE's business is therefore carried on in the United Kingdom; and for all material purposes, Airbus SE has continuously carried on a part of its business in the UK since 1 July 2011. It is also agreed that the two United Kingdom companies to which I have referred, that is, Airbus Operations Limited and Airbus Military UK Ltd, through Airbus SAS and Airbus Defence and Space SA, are subject to the strategic and operational management of Airbus SE. It follows from these facts, and indeed is common ground that

Airbus SE is a 'relevant commercial organisation' for the purposes of section 7 of the Bribery Act 2010.

22. Airbus SE and its subsidiaries are generally referred to as Airbus in this judgment. However, Airbus SE is the only company which is a party to the proposed DPA.

Internal compliance structures and problems within Airbus

23. Much of the conduct covered by the DPA was conducted by BPs (sometimes referred to as intermediaries, or agents). BPs were third parties used to increase Airbus' international footprint and to assist it in winning sales contracts in numerous jurisdictions. When Airbus made a successful sale of aircraft it would typically pay BPs a commission based on a percentage value of the sale, or a fixed amount per aircraft sold.

24. In 2012 Airbus commissioned a private company to review its compliance programme and was awarded an Anti-Corruption compliance certificate by this company for the design of its anti-bribery compliance program. Further, during the relevant period Airbus had a number of written policies governing payments and contractual relationships with third parties. These included policies applying to the committees and its employees specifically aimed at ensuring that third parties were used appropriately and only after sufficient due diligence had been undertaken. For example the Business Ethics Policy and Rules set out fundamental ethical principles for all employees; and detailed the due diligence process to be undertaken in relation to the appointment of BPs, noting that it was very important to be aware of 'red flags' listing examples of the same. Notwithstanding such policies and that compliance review, as it later emerged, there were serious weaknesses within Airbus' compliance and oversight structure.

25. During the period covered by the DPA, Airbus operated a series of committees which had the responsibility for reviewing the use of BPs and payment to third parties and BPs. The two entities that were central to what occurred were SMO International and an Airbus committee called the Company Development and Selection Committee (CDSC). The composition of CDSC was not fixed but included, from time to time, Airbus' Chief Financial Officer, Chief Strategy and Marketing Officer and its Chief Compliance Officer. Additionally, the SMO's own International Compliance Officer, Head of International Relations, General Counsel and others attended its meetings. CDSC was supposed to meet monthly but as it had difficulty meeting regularly, and in order to facilitate its decision making, CDSC also established two subcommittees in which the Head of SMO International Operations played a leading role. These subcommittees were the sub-CDSC which proposed the engagement of BPs for CDSC validation and the pre-CDSC which proposed IMD projects for CDSC validation.

26. The relevant responsibilities were these. SMO International was responsible for ensuring BPs were independent of Airbus' customers; for conducting compliance risk assessments and for agreements with and payments to third parties for the Commercial Division. CDSC itself was responsible for ensuring

there was compliance with Airbus' written policies and it gave formal approval to enter into BP relationships and for IMD projects. CDSC also delegated approval of BP relationships for divisions, apart from the Commercial Division, to the Head of SMO International Operations. CDSC's terms of reference stipulated that decisions taken had to ensure that the financial and legal risks associated with a third party agreement had been identified and minimised, and that governance of transactions was acceptable and did not generate any reputational risk.

27. As it later emerged however, some committee members were aware of and/or involved in the material wrongdoing. Further, the information provided to the committees was incomplete, misleading or inaccurate, in particular with regard to the process by which the BP was identified, the actual amount of compensation promised to the BP, the identity of the beneficial owner of the remuneration provided or the underlying economic justification for the IMD project. In consequence, it is plain that the committees were not able to provide effective or properly informed oversight in the manner intended.

28. At a series of meetings during the course of 2014, CDSC examined and reviewed intended and actual commitments made by SMO International to third parties, including some of which the CDSC had not known; and implemented revisions to policies and procedures including a focus on value-for-money justifications and enhanced compliance reviews. In September 2014, Airbus initiated a review of all third party relationships. An internal Corporate Audit & Forensic report on the operations of CDSC found significant breaches of compliance policies. The report concluded that most of IMD projects performed poorly and questioned whether BPs helped create viable businesses.

29. The heightened scrutiny of BP engagements led, in October 2014, to a freeze on all payments arranged by SMO International to BPs and IMD projects in relation to the Commercial Division. The freeze was extended to the Airbus Defence & Space, and Airbus Helicopters divisions in May 2015. A Liquidation Committee was set up to review and approve or reject all outstanding commitments. It included members of the former CDSC – some of whom were involved with and/or aware of the wrongdoing – supplemented with representatives of the Commercial Division, Contracts and Treasury departments and Group General Counsel. The Legal & Compliance function was re-structured and given far greater prominence and authority under a newly-appointed General Counsel from 1 June 2015, who became a member of the governing Group Executive Committee.

30. In April 2015 Airbus published new rules regarding future third party engagements and passed primary responsibility for business development engagements from SMO International to the divisions. The SMO was formally closed on 1 March 2016.

The Investigation

31. As part of its business, Airbus obtained export credit financing from Export Credit Agencies (ECA), including UK Export Finance (UKEF), a Government body. On 24 April 2015, UKEF wrote to Airbus regarding UKEF's anti-bribery

due diligence procedures in respect of agents and made specific reference to UKEF's obligation to report all suspicious circumstances to the SFO. The letter also raised the lack of information that had been provided in respect of Airbus' BP in Sri Lanka (see count 2 on the Indictment).

32. In late 2015 Airbus conducted a review of the accuracy and completeness of its declarations relating to the use of BPs in applications for export credit financing. Issues with export credit declarations were first reported to UKEF in January 2016. Following further investigation a more detailed report was made to UKEF in March 2016, on the understanding that the information could be shared with other relevant United Kingdom agencies. This disclosure sought to correct inaccurate information previously provided to UKEF and included red flags for corruption, and was made at a time when Airbus had been notified that UKEF were under an obligation to report any suspicions of corruption. Following notification that UKEF felt it appropriate to contact the SFO and its strong preference that Airbus also make a notification to the relevant authority, both UKEF and Airbus reported to the SFO on 1 April 2016. Airbus through its legal advisors, and the SFO first met on 6 April 2016.

33. On 15 July 2016 the SFO opened a criminal investigation into Airbus and associated persons (the Investigation). Airbus were informed of this on 5 August 2016 prompting a disclosure by Airbus to financial markets.

34. On 31 January 2017 the SFO and the PNF entered into a JIT agreement, the purpose of which was to facilitate investigations into bribery and corruption allegations in relation to Airbus, its BPs, former and current employees and other third parties. French law No 68-678 of 26 July 1968 (the French Blocking Statue or FBS) prohibits certain disclosures of information by French persons and entities in foreign judicial and administrative proceedings. Under 694-4 of the French Code of Criminal Procedure, French Judicial authorities are also entitled to exclude from their responses in mutual legal assistance requests, information that would be detrimental to the essential interests of France. In the present case, the French authorities concluded this included making specific contract values public. The French authorities also controlled the supply of documents to the SFO to ensure compliance with the FBS.

35. The JIT's investigation was vast in scale and in scope. It covered all of the BPs engaged by the Airbus divisions until 2016 - more than 1,750 entities across the world. The JIT focussed particularly on about 110 BPs for which red flags had been identified, from amongst which the JIT selected several investigation priorities. The PNF focused its investigations on Airbus and/or its divisions' conduct in the United Arab Emirates, China, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, and Kuwait. The SFO focused its investigations on Airbus and/or its divisions' conduct in South Korea, Indonesia, Sri Lanka, Malaysia, Taiwan, Ghana, Colombia and Mexico. Within this scope, the PNF and SFO selected a representative sample of the markets and concerns involved.

36. I deal with the issue of Airbus' co-operation with the Investigation below at paras 68 to 74. It is however to be noted: (i) that the scale of the case and number of documents collected by Airbus from custodians relevant to the Investigation

(in excess of 30.5 Million documents) required both Airbus and the JIT to develop new and proportionate procedures for the identification and review of the documentation; (ii) that Airbus made the JIT aware of its findings, producing contemporaneous evidence and through presentations and the like, which were reviewed by the SFO; (iii) that these presentations concentrated on the priority customers and jurisdictions identified by the JIT; (iv) that the SFO examined the internal investigation documents (including interviews with Airbus employees and BPs, Airbus having waived legal professional privilege on a limited basis) and (v) that in addition, the SFO undertook its own independent investigation.

37. It is equally important to note that as the Statement of Facts records, the SFO interrogated and validated the Airbus narrative as well as conducting its own investigation as it was mindful of the need to identify the full extent of the offending. Steps taken included reviewing, including by digital review potentially relevant documents; conducting interviews in the UK; attending and asking questions at interviews in France; issuing notices under section 2 of the Criminal Justice Act 1987 for the provision of bank accounts in the United Kingdom and material held by third parties; sending Mutual Legal Assistance and intelligence requests to overseas jurisdictions and agencies for banking and company information and obtaining copies of documents seized by overseas agencies in connected investigations. Further, the SFO has, so far as possible, independently sourced information to challenge or confirm the information provided to it, and instituted an independent procedure to interrogate and validate Airbus documents to test the veracity and completeness of the provision of those documents.

The brief facts relating to the counts on the Indictment

38. Each of the counts on the Indictment concerns similar conduct, the detail of which can be found in the Statement of Facts. In brief, persons associated with Airbus, not exclusively its employees, offered very substantial sums of money by way of bribes to third parties in order to secure the purchase of aircraft, by civil airline companies, in counts 1 to 4; and by the Government of Ghana, in count 5.

Count 1: Malaysia

39. The first count alleges that contrary to section 7 of the Bribery Act 2010, between 1 July 2011 and 1 June 2015, Airbus SE failed to prevent persons associated with Airbus SE from bribing others concerned with the purchase of aircraft by AirAsia and AirAsia X airlines from Airbus, namely directors and/or employees of AirAsia airlines where the said bribery was intended to obtain or retain business or advantage in the conduct of business for Airbus SE.

40. AirAsia and AirAsia X are two major airlines in Southeast Asia, headquartered in Malaysia and were significant customers of Airbus at the time of the offences. Between October 2005 and November 2014, AirAsia and AirAsia X ordered 406 aircraft from Airbus, including 180 aircraft secured during the indictment period by way of improper payment (made by EADS France SAS, later Airbus Group SAS), and the offer of a further improper payment. The improper

payment consisted of $50 million (and Airbus employees also offered but did not pay an additional $55 Million) paid to directors and/or employees of AirAsia and AirAsia X airlines as sponsorship for a sports team. The sports team was jointly owned by AirAsia Executive 1 and AirAsia Executive 2 but was legally unrelated to AirAsia and AirAsia X. The additional improper payment was prevented by the October 2014 freeze on payments to BPs described at para 29 above.

Count 2: Sri Lanka

41. The second count alleges that contrary to section 7 of the Bribery Act 2010, between 1 July 2011 and 1 June 2015, Airbus SE failed to prevent persons associated with Airbus SE from bribing others concerned with the purchase of aircraft by SriLankan Airlines from Airbus, namely directors and/or employees of SriLankan Airlines, where the said bribery was intended to obtain or retain business or advantage in the conduct of business for Airbus SE.

42. Sri Lankan Airlines (SLA) is the national carrier of Sri Lanka. At the material time, the Government of Sri Lanka owned 99.1 percent of SLA.

43. In 2013, Airbus engaged the wife of a person concerned with the purchase of aircraft from SLA through a straw company (the Company of Intermediary 1). Pursuant to the engagement, Airbus employees offered up to $16.84 million to the Company of Intermediary 1 to influence SLA's purchase of 10 Airbus aircraft and the lease of an additional 4 aircraft. In fact, only $2 million of the $16.84 million was paid. The Company of Intermediary 1 was approved by Airbus employees as a BP. To disguise the identity of the person behind the BP, Airbus employees misled UKEF.

44. UKEF expressed dissatisfaction with an application made by Airbus in November 2014 for export credit financing, and then with the details about the BP (the relevant agent) which Airbus subsequently submitted. UKEF asked a series of questions about the BP, including why they had been employed as such, when their CV suggested they had little aviation experience and that they were domiciled and paid outside Sri Lanka. During the course of February 2015, Airbus provided misleading and untrue answers to the questions that had been asked. In late February UKEF personnel spoke to Airbus employee 10 and Airbus employee 8 [senior]. This call did not alleviate UKEF's concerns. Airbus employee 10 then reported to Airbus employee 12 and Airbus employee 4 [very senior]. On about 12 March 2015, Airbus withdrew the application to UKEF. On 1 April 2016, UKEF reported this and other matters disclosed to it by Airbus to the SFO.

Count 3: Taiwan

45. The third count alleges that contrary to section 7 of the Bribery Act 2010, between 1 July 2011 and 1 June 2015 Airbus SE failed to prevent persons associated with Airbus SE from bribing others concerned with the purchase of aircraft by TransAsia Airways from Airbus, namely a director and employee of TransAsia Airways, where the said bribery was intended to obtain or retain business or advantage in the conduct of business for Airbus SE.

46. TransAsia Airways (TNA) was Taiwan's first private airline. It ceased operations in 2016. Between 2010 and 2013 Airbus channelled payments through Company of Intermediary 2 and Company of Intermediary 3 (both BPs) to a TNA director and employee for their personal benefit. During the same period TNA bought 20 aircraft from Airbus and the payments were intended to "reward improper favour" as it is described in the Statement of Facts, from TNA's director and employee in respect of these purchases.

47. The complex arrangements that were made with regard to the improper payments to the intermediaries and then to the TNA director and employee, and the split in payments contemplated, are described at paras 109 to 124 of the Statement of Facts. As is apparent, a total of $2,432,500 was paid to the Company of Intermediary 2 and $11,902,500 was paid to the Company of Intermediary 3. These arrangements were disguised and described by coded language used in emails passing between the wrongdoers, who included Airbus employee 1 [senior].

Count 4: Indonesia

48. The fourth count alleges that contrary to section 7 of the Bribery Act 2010, between 1 July 2011 and 1 June 2015, Airbus SE failed to prevent persons associated with Airbus SE from bribing others concerned with the purchase of aircraft by PT Garuda Indonesia and Citilink Indonesia from Airbus, namely directors and employees of PT Garuda Indonesia and Citilink Indonesia, where the said bribery was intended to obtain or retain business or advantage in the conduct of business for Airbus SE.

49. PT Garuda Indonesia (Persero) Tbk (Garuda) is the national airline of Indonesia. In 2006 the Indonesian Government owned 100 percent of Garuda. Citilink Indonesia (Citilink) is Garuda's "low-cost" subsidiary. The Government's stake in Garuda decreased to just over 60 percent in 2016. Airbus and Garuda have conducted business together since 1979.

50. Between 2011 and 2014, a BP of Airbus (Intermediary 4) paid in excess of $3.3 million to or for the personal benefit of employees of Garuda and/or Citilink or their family members. Those Garuda/Citilink employees were key or significant decision makers in respect of Airbus business during that period, namely Garuda/Citilink's purchase of 55 Airbus aircraft. The last of the relevant purchase agreements was dated 20 December 2012 and was for 25 A320s. The payments were intended to secure or reward improper favour by those Garuda/Citilink employees in respect of that business.

51. The payments made (and the manner in which they were made) are set out at paras 159 to 169 of the Statement of Facts. They included payments by Intermediary 4 to a notary acting in the purchase of a residential property in Jakarta by a relative of Garuda Executive 1; payments to Garuda Executives 2 and 3 and a payment of $1,351,915 to a company beneficially owned by Garuda Executive 1 and his wife and incorporated in the British Virgin Islands. In consequence of money laundering concerns raised by Garuda Executive 1's bank as to the source of the latter payment, a substantial amount of the total of

these payments was eventually remitted to an account of Intermediary 4 in Singapore.

Count 5: Ghana

52. The fifth count alleges that contrary to section 7 of the Bribery Act 2010, between 1 July 2011 and 1 June 2015 Airbus SE failed to prevent persons associated with Airbus SE from bribing others concerned with the purchase of military transport aircraft by the Government of Ghana, where the said bribery was intended to obtain or retain business or advantage in the conduct of business for Airbus SE.

53. Between 2009 and 2015 an Airbus defence company engaged Intermediary 5, a close relative of a high ranking elected Ghanaian Government official (Government Official 1) as its BP in respect of the proposed sale of three military transport aircraft to the Government of Ghana. A number of Airbus employees knew that Intermediary 5 was a close relative of Government Official 1, who was a key decision maker in respect of the proposed sales. A number of Airbus employees made or promised success-based commission payments of approximately €5 million to Intermediary 5. False documentation was created by or with the agreement of Airbus employees in order to support and disguise these payments. The payments were intended to induce or reward "improper favour" by Government Official 1 towards Airbus. Payments were eventually stopped due to the arrangement failing the due diligence processes required by the Liquidation Committee.

54. Airbus, through one of its Spanish defence subsidiaries, conducted two campaigns to sell its C-295 military transport aircraft to the Government of Ghana: the first campaign ran from 2009 to 2011, the second from 2013 to 2015. Intermediary 5, a UK national with no prior expertise in the aerospace industry, acted as the BP for Airbus in both. Company D was the corporate vehicle through which Intermediary 5 and his associates provided services to Airbus. His associates were Intermediaries 6 and 7, also UK nationals and there is no evidence they had any aerospace experience either. In August 2011, the purchase agreement for the sale of the two C-295 aircraft was signed by the Spanish defence subsidiary and the Government of Ghana, and it contained a declaration of compliance with the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as a declaration that no more than €3,001,718.15 would be paid to BPs in connection with the contract (broadly, a 5 percent commission).

55. After Company D made a formal BP application to Airbus in May 2011, Airbus commissioned an external due diligence report. In September 2011 this report identified Intermediary 5 as a shareholder of Company D. The report raised the possibility that he was a close relative of Government Official 1 and concerns that there was a risk of non-compliance with the OECD Convention. The reaction of a number of Airbus employees, including senior employees, and those involved in compliance, in an email chain in October 2011, is set out at para 188 of the Statement of Facts. In short, it was that the business should be conducted through a new third party, a company, already audited and engaged in the same area. A Spanish company, already an Airbus BP (Intermediary 8)

and which had no previous links or experience of working in Ghana for any Airbus entity, was duly selected. A number of Airbus employees (two of them senior, and one involved in compliance) thus agreed to deliberately circumvent the proper compliance process by falsely representing that the work in the First Campaign had been done by Intermediary 8, which could, in turn, make the money available to Intermediary 5 and others. Further, the sum paid to Intermediary 8, and then by Intermediary 8 to Intermediary 5 exceeded (in the latter case by about €850,000) the agreed commission amount set out in the declaration of compliance referred to above.

56. Similar false representations to those detailed above were made in February 2014 and then in May 2015, in respect of work allegedly done by Intermediary 8 in respect of a further proposed purchase by the Government of Ghana of a C-295. In this case however, the Liquidation Committee requested further due diligence before any payments were made; an external due diligence report was completed in respect of Intermediary 8, and Intermediary 8 declined to participate in interviews by external counsel Airbus had engaged to conduct extended due diligence interviews. Intermediary 8 therefore failed due diligence; Airbus did not enter into a second written contract or make any further commission payments (disputing Intermediary 5's later claim that he was owed €1,675,000).

Previous Investigations and Conduct

57. In February 2018 Airbus entered into a civil administrative settlement relating to an investigation undertaken by the Munich public prosecutor. Airbus paid €81.25 million by way of disgorgement and an administrative fine of €250,000. The Munich prosecutor's investigation focussed on potential corruption concerning the sale by Airbus Defence and Space GmbH, of Eurofighter aircraft to Austria in 2003. The settlement set out that Airbus Defence and Space GmbH acted negligently by failing to ensure proper internal controls to prevent the misuse of company assets/breach of trust by employees who were found to have paid money to providers without documented services. The prosecutor confirmed in the settlement that it had found no evidence of bribery payments. In all the circumstances, this conduct is not material in my view to the matters I have to consider in determining this application.

The interests of justice analysis

58. Having set out the relevant factual and legal background in this case, I can now turn to the interests of justice analysis. The DPA Code which the Director of Public Prosecutions and the Director of the SFO are required to issue, must give guidance on the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case: see para 6(1)(a) of Schedule 17 to the 2013 Act. In addition, CrPR 11.3(3)(i) requires any application for a DPA to explain why such an agreement is likely to be in the interests of justice and complies with the other requirements.

59. The DPA Code identifies that the public interest factors that can affect the decision to prosecute, usually depend on the seriousness of the offence, which includes the culpability of the relevant entity (P), and the harm to the victim;

and that a prosecution will usually take place unless there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution: see Section 2.5 of the DPA Code. Section 2.6 of the DPA Code provides that:

> "In applying the public interest factors when considering whether to charge, seek to enter a DPA or take no further criminal action the prosecutor undertakes a balancing exercise of the factors that tend to support prosecution and those that do not. This is an exercise of discretion. Which factors are considered relevant and what weight is given to each are matters for the individual prosecutor. It is quite possible that one public interest factor alone may outweigh a number of other factors in the opposite direction. Decisions will be made on an individual case by case basis."

60. Materially for present purposes, amongst the other (non-exhaustive) factors identified in favour of prosecution that the prosecutor may take into account when deciding whether to enter into a DPA, and which the SFO had regard to in this case, are the fact that the conduct alleged is part of the established business practice of P; the adverse impact on the conduct and integrity or confidence of markets, and local or national governments and regulatory sanctions against P for similar conduct: see Section 2.8.1 of the DPA Code.

61. As against that, the public interest factors against prosecution that a prosecutor may take into account and which the SFO concluded outweighed the public interest factors in favour of prosecution in this case, include P's co-operation with the SFO investigation; substantial remedial measures taken by P; the potential disproportionate consequences for P of a conviction under domestic law and the law of another jurisdiction; the likely collateral effects on the public, P's employees and shareholders or P's and/or institutional pension holders of a conviction and the fact that there is no previous criminality: see Section 2.8.2 of the DPA Code.

62. In my view, the factors identified as relevant here by the SFO are those that are material and can form the proper background to an assessment of the statutory requirement in paras 7(1) and 8(1) of Schedule 17 to the 2013 Act, namely that entering into a DPA is likely to be and is, in the interests of justice and that the proposed and actual terms are fair reasonable and proportionate.

Seriousness

63. The nature of the offending, including the harm caused, the duration of the conduct, the circumstances giving rise to it, the sophistication of the methods used, whether or not a cover-up was attempted, the seniority of the people involved, the payments wrongly made, whether public officials were involved and whether the offending was multi-jurisdictional are all relevant factors in the assessment of seriousness. In *Sarclad* it was said that the more serious the

offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interests of justice: see paras 33 to 35 of the preliminary judgment. Nonetheless, the level of seriousness has to be balanced against the other matters which are or may be relevant in the individual case.

64. The seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave. The conduct took place over many years. It is no exaggeration to describe the investigation it gave rise to as worldwide, extending into every continent in which Airbus operates. The number of countries subject to intense criminal investigation by the various agencies, and the scale and scope of the wrongdoing disclosed in the Statement of Facts demonstrate that bribery was, to the extent indicated, endemic in two core business areas within Airbus.

65. Bribery usually involves two sides: those willing to pay a bribe and those willing to take a bribe. As I have identified, Airbus did have bribery prevention policies and procedures in place at the material time. However, prior to September 2014, those policies and procedures were easily bypassed or breached and there existed a corporate culture which permitted bribery by Airbus business partners and/or employees to be committed throughout the world. In this case, on the Airbus side, the wrongdoing involved a number of very senior, senior and other other employees, including employees with compliance responsibilities. The conduct by some included the creation of false invoices, false payment and other compliance material and the deliberate circumvention of both Airbus' internal compliance procedures and external compliance procedures. In some cases, the wrongdoing involved public officials and employees/directors of companies in which nation states held a significant interest. The weakness of senior corporate oversight, and the seriousness of the offending overall, must be considered in the context of the increased awareness internationally of the pernicious nature of corrupt business practices; and the obvious vulnerabilities of businesses operating in and selling in international markets, as Airbus does.

66. Calculation of the financial gain all this involved is not an easy exercise. However, for the purposes of assessing the sum for disgorgement of profit in this case, it can be taken that this was, to put it at its lowest, very considerable. The gross profit made in consequence of this wrongdoing has been agreed for these purposes at between €585,939,740 and €983,540,822, depending on what allowance is made for the deduction of relevant costs. The market in which Airbus operates is, as Mr Keith QC acknowledged, dominated by two main companies. Given the nature and scale of what occurred, it cannot be gainsaid that Airbus' failure to prevent this financially motivated offending has resulted in substantial harm to the integrity and confidence of markets.

67. The real question therefore is whether in these circumstances, and given this extremely high level of seriousness, the interests of justice are nevertheless served by a DPA rather than a prosecution.

Self-reporting and co-operation

68. A core purpose of the creation of DPAs was to 'incentivise' the exposure and self-report of corporate wrongdoing: see *Sarclad* at para 16 of the final judgment. Self-reporting, as it is called, and the subsequent level and quality of co-operation can therefore be critical factors when considering the interests of justice. It would be wrong to look at the issue of self-reporting purely from the perspective of the first report of wrongdoing, however. Even if the prosecuting authorities became aware of the relevant conduct by the actions of a third party, if subsequent self-reporting or co-operation overall, is of a high quality and brings significant wrongdoing to light that would not otherwise have come to the attention of the authorities, this will be a significant factor in favour of a DPA: see *Rolls Royce* para 22 of the final judgment and *Sarclad* at paras 37 to 38 of the preliminary judgment. To that extent, there is no necessary bright line between self-reporting and co-operation.

69. In this case, it is apparent from everything that I have seen, after what might be described as a slow start, when, it must have been apparent to others within Airbus that all was not well within SMO International, that Airbus have co-operated with the prosecuting authorities conducting the investigations, to the fullest extent possible.

70. I have described this as a slow start, because of the concerns there obviously were within Airbus from at least October 2014, when the freeze referred to at para 29 above, was imposed in respect of payments to BPs and third parties. It can reasonably be supposed that this would not have happened without some serious concerns internally as to the propriety of those payments or the integrity of the oversight structures. Airbus then conducted internal investigations into what had occurred and took the steps identified in paras 29 to 31 above. These steps may have been hampered by the continued presence on the relevant committees of some of the wrongdoers and the provision of false and inaccurate information to them. Nevertheless, the steps taken prevented some substantial corrupt payments being made or agreements associated with them, being entered into (see paras 53 and 56 above for example).

71. In the event however, as already described, matters did not come to the attention of the SFO until April 2016 and the true catalyst for this was the watchfulness of UKEF (to its credit). The internal review by Airbus, which followed from its engagement with UKEF, resulted in Airbus' fulsome disclosure in March 2016 of matters of concern to UKEF, including red flags for corruption, at a time when Airbus had been notified of UKEF's obligations to disclose to the SFO; and secondly, direct engagement with the SFO from 1 April 2016.

72. On the issue of reporting, it is to be noted that through its engagement with the SFO related in the first instance to matters concerning UKEF, Airbus also accepted that the Bribery Act 2010 provided the SFO with extended extraterritorial powers and with a potential interest in the facts post 2011. This was an unprecedented step for a Dutch and French domiciled company to take, in respect of the reporting of conduct which had taken place almost exclusively overseas.

73. Airbus could have moved more quickly. Having said this, since engaging with the SFO, Airbus has provided the fullest co-operation. Whether the co-operation is to be described as extraordinary, or exemplary, the adjectives used respectively by Mr Keith QC and Mr Lewis QC during the course of submissions, seems to me make little difference of substance to the overall issues I have to consider. In my judgment, the co-operation provided was exemplary.

74. The list of all that has been done by Airbus is a long one but in view of the seriousness of the predicate conduct, and my overall conclusion on the interests of justice in this case, it is important to set it out. Airbus has (i) comprehensively confirmed the existence of corruption concerns across its Commercial, Defence and Space and Helicopter divisions; (ii) identified to the JIT a comprehensive compilation of red flag cases across divisions of which the JIT was not aware; (iii) accepted that the Bribery Act had provided the SFO with extended extraterritorial powers and potential interest in the facts post 2011; (iv) reported conduct which had taken place almost exclusively overseas, which, as I have already said, is an exemplary step for a French and Dutch domiciled company; (v) performed and presented an analysis of all BP relationships in the company's records; (vi) provided a list of former BPs, which included an anti-corruption risk assessment, including red flags not otherwise known to the authorities, from which the JIT could select its priorities for investigation; (vii) collected in excess of 30.5 million documents post de-duplication relevant to the JIT investigation, from over 200 custodians; (viii) signalled a clear commitment from the new Airbus Board and its Ethics & Compliance Committee (responsible for the internal investigation) to fully co-operate with the JIT investigation and provided an open invitation for the JIT to discuss any concerns directly with the Committee; (ix) coordinated and cooperated with the JIT in all respects regarding the conduct of investigative interviews; (x) provided the first accounts of all relevant individuals (xi) provided extensive and detailed presentations with supporting documentation, organograms and chronologies detailing relevant emails, contracts, interview accounts, contextual background, invoices, payments and accounting records; (xii) deployed predictive coding technology to assist in the prioritization and identification of relevant contemporaneous documents; (xiii) facilitated access to 30.7 million documents collected from custodians relevant to the JIT investigation, and enabled the JIT to perform a review of these documents independent of Airbus. Independent investigation by the SFO did not identify any company document not identified by Airbus' own investigation; (xiv) provided all contemporaneous documents requested (subject to applicable laws) and adopted a co-operative position in respect of privilege and French *secret professionnel* (the French equivalent of legal professional privilege) within such contemporaneous documents; (xv) provided a schedule of contemporaneous documents withheld on the basis of privilege, including the reasons for asserting privilege, which were verified by the SFO; (xvi) set up the International Market Development taskforce with a mandate to identify noncore subsidiaries that were of potential concern and notified the JIT of International Market and Development Projects that were of potential concern from a compliance perspective and the actions that Airbus wished to take in respect of those projects to ensure they did not conflict with JIT actions; (xvii) provided key documentation and information concerning

bank accounts into which Airbus monies flowed at an early stage of the investigation to facilitate swift access to mutual legal assistance by the SFO; (xviii) revised the top management of Airbus and parted with a substantial number of individuals by dismissal, voluntarily or in compromised circumstances permitted by French law; (xix) stopped using BPs to assist with sales in the Commercial Division, and greatly restricted the use of BPs in other divisions, leading to a 95 percent reduction across the Group by 2015; (xx) provided reports of the Independent Compliance Review Panel's assessment of Airbus' compliance processes, organisation and culture; (xxi) made external accountants and internal personnel available to present and explain financial processes and money flows; (xxii) consulted with the JIT regarding the deployment of sensitive evidence in Arbitration proceedings with former BPs so as to ensure no prejudice was caused to ongoing investigations; (xxiii) liaised with the JIT regarding media strategy and (xxiv) kept the JIT abreast of the implementation of Airbus' new compliance program, including instances where it has detected activity that causes concern.

Remedial measures and cultural change

75. As was noted in *Rolls Royce* at para 60 of the final judgment, the DPA regime, can include requirements not available as penalties following a successful prosecution, and provides an opportunity to require an organisation to become a flagship of good practice.

76. I have already referred to the weaknesses in oversight within Airbus that existed in the years under consideration. However, starting in late 2014 Airbus implemented a number of measures. It is submitted that these have transformed Airbus into what is, for present purposes (in relation to issues of compliance, culture and the like) effectively a different company to the one that it was at the time the offences alleged in the indictment occurred. I am satisfied this is the case.

77. As Sir Brian Leveson P. observed in *Tesco Stores Ltd* at para 53 of the final judgment:

> "It is important to underline that a company is a structure which can only operate through its directors, employees and agents. Stripping out the human beings, a company itself can have no will or ability to decide how it should behave. Thus, as I made clear in SFO v Rolls-Royce and another (U20170036) at [48], it is "of real significance" whether or not those who were implicated in or should have been aware of illegal behaviour, or of a culture which permitted illegality to thrive, remain members of the senior management."

78. Airbus has changed its management team, appointing a new Chief Executive Officer, supported by a new Chief Finance Officer and new General Counsel (the latter was present in court during the hearings before me). None of the new

Executive Committee or Board of Directors is implicated in the conduct set out in the Statement of Facts. The Board of Directors is largely a different board (8 of the 12 positions being held by directors appointed after the relevant conduct occurred) from that which presided over Airbus during the indictment period. The SFO has confirmed it has no evidence that the current Executive Committee members knew of the corrupt practices or culture of Airbus. Airbus has also conducted disciplinary investigations against existing and former employees. Since 2015 it has parted with sixty three of its top and senior management employees: thirty one have been dismissed, and thirty two have left voluntarily or retired.

79. In addition, Airbus has made significant changes to its internal processes. As with co-operation, in view of the weight I attach to this factor in the overall assessment of the interests of justice, it is necessary to identify precisely what has occurred. Airbus has commissioned an Independent Compliance Review Panel (ICRP) to complete an independent review of Airbus' ethics and compliance procedures. The members of this panel are Lord Gold, a former partner at Herbert Smith Freehills; Noelle Lenoir, a former member of the *Conseil Constitutionnel* (the French Constitutional Court) and Theo Waigel, a former German Federal Minister of Finance. The ICRP's instructions have included reviewing Airbus' policies and procedures, conducting site visits with employees and carrying out focus groups with employees. The ICRP has produced two reports to date. The first report in 2018 noted the considerable progress made by Airbus and made fifty five recommendations. The second report, in 2019, noted that "the company is now in a very different place than it was two years ago". The ICRP is due to issue another report later this year. Further, the Airbus Ethics and Compliance teams have been restructured to ensure functional independence from the business. Amongst other things, there has been a merger of legal and compliance functions and the change of the reporting line to the newly appointed General Counsel; the creation of a sub-committee of the Board, entitled the Ethics & Compliance Committee to provide independent oversight of the company's Ethics & Compliance programme; and appointed a new Ethics & Compliance Officer with changed reporting lines directly to the General Counsel and the Ethics & Compliance Committee.

80. In addition, Airbus has (i) created numerous new compliance roles and extensively recruited highly experienced senior compliance professionals; (ii) revised its Anti-Bribery and Corruption policies and procedures in response to recommendations by external stakeholders, the ICRP, PwC and Agence Française Anticorruption (AFA), the French state anti-corruption agency which is positioned within the Ministry of Justice and headed by a Magistrate; (iii) launched a company-wide, systemic and comprehensive ABC Risk Assessment; (iv) significantly reduced the use of external consultants across the Airbus group of companies, and has stopped the use of consultants in relation to sales of aircraft within the Commercial Aircraft Division; (v) redesigned the 'onboarding', due diligence and ongoing monitoring for all third parties with a business relationship with the Airbus group; (v) implemented a targeted ABC 24 month training plan under the supervision of the Ethics and Compliance Engagement Team for all employees identified in high and medium risk

exposed positions; (vi) redesigned the internal financial controls under the guidance of the new Chief Financial Officer; (vii) commissioned the independent review and testing of its compliance structures and procedures by the ICRP, PwC and the AFA; and (viii) taken steps to remove all wrongdoers from employment with Airbus.

81. The current Board is to be commended for the process of remediation it has undertaken. It is important to note that in light of the changes to which I have referred, and the appointment of the AFA, as a term of the French CJIP, the SFO is not recommending the appointment of an external monitor as part of the DPA in this case.

Collateral effects

82. The disproportionate non-penal legal consequences for an organisation or the likely collateral effects of a prosecution and conviction on an organisation's employees or on the public (for this purpose, this can include the wider industry, investors, pension scheme members, third parties and other stakeholders) is plainly an important consideration. As was explained in in *Sarclad* at para 45 of the preliminary judgment, the Government has made:

> "…a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile."

83. There are limits to this however; and it is plainly not the case that the fact that a company is a large one, or that the collateral consequences are accordingly severe, means it is immune to prosecution. No company is too big to prosecute. Moreover, the national economic interest is irrelevant to the analysis of the question whether or not a DPA is in the interests of justice: see *Tesco Stores Ltd* at para 63 of the final judgment. Having said that however, a relevant factor may be, and indeed is in this case, the efficient use of public resources. As Sir Brian Leveson P. put it at para 65 of the final judgment in *Tesco Stores Ltd*:

> "65. Of less importance, but still relevant, is the efficient use of public resources to investigate the endemic problems of serious fraud. Those resources most significantly are resources of expertise and time, both of which are hard pressed.
>
> 66. Another aspect of using public resources efficiently (as I have made clear in each of the DPAs that have been negotiated) is to encourage and incentivise the self-reporting of wrong-doing by corporate entities in a

> similar situation to Tesco Stores and Tesco plc: see para. 2.9 of the Code."

84. On the issue of the potential disproportionate consequences of a conviction, on behalf of Airbus, it has been said that a criminal conviction would have a number of materially adverse consequences. There is nothing I have seen in the evidence that has been placed before me which suggests that these consequences are not accurately described. These consequences include the following. A conviction for a section 7 bribery offence could result in discretionary debarment from tendering for UK public sector contracts under the Public Contracts Regulations 2015, which implement the EU Procurement Directive (it is not an offence which requires mandatory exclusion in the Regulations) thus excluding the company from participation in procurement procedures.[1] It could also occur in other EU jurisdictions. Further, Mr Keith QC identified that it would be likely that a conviction would result in a mandatory debarment from tendering for public sector contracts in the Netherlands, India, Turkey and the UAE amongst other jurisdictions; and that discretionary debarment in this jurisdiction, would, in any event, increase the risk of discretionary debarment in many other jurisdictions.

85. What matters here is not the potential loss of contracts *per se*, but the effect this will have on the company financially and on its (innocent) employees, and the wider effects this will have on innocent third parties. Airbus has undertaken an analysis of the value of contracts which it might be precluded from tendering for if debarred, the effects of which could last up to fifteen years. On a worst case scenario, the estimated future revenue at risk globally across the Commercial, Defence and Space and Helicopter divisions could exceed €200 billion, which could decrease the value of production of Airbus in the United States, the UK, France, Germany, and Spain by over €200 billion.

86. Secondly, there are obvious associated risks to debarment on the scale contemplated, including to the financial position of Airbus, its financing arrangements, and to the internal health of the company caused by the loss of key revenue streams and the loss of market presence in the duopolistic marketplace in which Airbus operates. These would inevitably affect Airbus' thousands of employees in the United Kingdom, its share price, and thus pensioners and the thousands of companies and jobs which rely on Airbus, as part of its supply chain. The collateral effects spread more widely, however. A Deloitte report, commissioned by Airbus, has estimated for example that if Airbus was debarred from public procurement for five years, the ongoing effects over fifteen years, could put many thousands of jobs at Airbus at risk. Across that timeframe, and absent debarment, many thousands of jobs could be sustained, in the UK, the United States, Germany, France and Spain. The

[1] It should be noted that the position is therefore not the one contemplated in *Serco Geografix* at para 27, where concern seems to have been expressed that a DPA made in circumstances where debarment in this jurisdiction would be mandatory, would amount to a favourable determination of the position of a private company vis-à-vis public procurement and would or might involve the court in a quasi-political decision. Whether discretionary debarment follows from the facts giving rise to a DPA, remains a discretionary decision of HM Government.

indirect impact on the economies of these countries could be substantial: Deloitte estimates it could lower the Gross Domestic Product in each of those countries by over €100 billion. In addition, there could be adverse consequences for the reduction in competition in future public tenders, leading to additional public spending of many billions of euros..

Conclusions on the interests of justice

87. Notwithstanding the seriousness of the conduct in this case, I consider the public interest factors against prosecution clearly outweigh those tending in favour of prosecution. In particular, I have had regard to the exemplary co-operation of Airbus in the manner identified, including its submission to the SFO in respect of conduct overseas and of which the SFO would not otherwise have known. Airbus has, to use a colloquial phrase, truly turned out its pockets and is now a changed company to that which existed when the wrongdoing occurred. In addition, on the evidence before me, the effects of a prosecution on Airbus and the collateral effects on thousands of innocent third parties, corporate and individual, would be disproportionate notwithstanding the egregious nature of the conduct engaged in.

Terms of the DPA

88. I have also concluded that the terms of the DPA are fair reasonable and proportionate. These terms will now be made public. In summary they are as follows. The DPA will come to an end three years from the date of the declaration which I have made today. Airbus will pay a total financial sanction of €983,974,311 to the SFO for onward transmission to the Consolidated Fund, within 30 days of this declaration. Airbus will continue to make improvements to its ethics and compliance policies and procedures. There will be ongoing co-operation and self-reporting by Airbus and Airbus will pay the reasonable costs of the SFO's investigation in relation to the alleged offences and the DPA (€6,989,401).

89. Paragraph 5 of Schedule 17 to the 2013 Act provides as follows:

> "(1) A DPA must contain a statement of facts relating to the alleged offence, which may include admissions made by P.
>
> (2) A DPA must specify an expiry date, which is the date on which the DPA ceases to have effect if it has not already been terminated under paragraph 9 (breach).
>
> (3) The requirements that a DPA may impose on P include, but are not limited to, the following requirements—
>
> (a) to pay to the prosecutor a financial penalty;
>
> (b) to compensate victims of the alleged offence;
>
> (c) to donate money to a charity or other third party;

> (d) to disgorge any profits made by P from the alleged offence;
>
> (e) to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;
>
> (f) to co-operate in any investigation related to the alleged offence;
>
> (g) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA. The DPA may impose time limits within which P must comply with the requirements imposed on P.
>
> (4) The amount of any financial penalty agreed between the prosecutor and P must be broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea.
>
> (5) A DPA may include a term setting out the consequences of a failure by P to comply with any of its terms."

90. This question is determined on the basis of the terms of the DPA and the individual circumstances of the case. In respect of this aspect of the regime, Sir Brian Leveson P. explained in *Standard Bank Plc* at para 21 of the final judgment that:

> "…the court has assumed a pivotal role in the assessment of… [the DPA's] terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. In that way, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest…"

Duration

91. A DPA must be of sufficient length such that the proposed terms are effective and their aims accomplished: see *Sarclad* at para 50 of the preliminary judgment. I am satisfied that length in this case of three years is sufficient. This is because the relevant payments under the DPA will be made within 30 days of my declaration under para 8, extensive remedial measures have already been taken by Airbus and the AFA has been appointed to monitor Airbus, for the duration of the agreement.

International Settlement

92. The parties have been required to work within the framework of the overall financial settlement agreed across the three jurisdictions. In light of this, the approach taken reflects to an extent French primacy in the investigation. It is important, from the court's perspective, that international co-operation is encouraged. In *R v Innospec* 2010 WL 3580845, the point was made that coherence in the level of financial penalties across different jurisdictions in cases of corporate wrongdoing is important so that forum shopping for the settlement of these kinds of cases is avoided. Nevertheless, the approach taken in this case still falls to be analysed in accordance with the sentencing provisions and other relevant rules of this jurisdiction.

The Financial Sanction

93. The relevant sentencing guideline is the Fraud, Bribery and Money Laundering Sentencing Guideline: Corporate Offenders (the Guideline). The Guideline states at Step 5 that the combination of orders made, compensation, confiscation and fine ought to achieve the removal of all gain, appropriate additional punishment and deterrence.

Compensation

94. As explained in *Sarclad* at para 52 of the preliminary judgment:

> "Priority must be given to payment of compensation over fines: see SFO v Standard Bank, at [39], reflecting para. 5(3)(b) of Schedule 17, para 7.2 of the DPA Code of Practice, s. 130(12) of the Power of Criminal Courts Act 2000 ("2000 Act") and the Definitive Guideline issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences ("the guideline"): in relation to corporate offenders."

95. In this case, the SFO is not applying for compensation, and on the facts, I consider it is right not to do so. Step I of the Guideline refers to section 130 of the Powers of Criminal Courts (Sentencing) Act 2000, and states the court must consider making a compensation order, and reasons should be given if a compensation order is not made. However, it is plain that the machinery of a compensation order is intended for clear and simple cases: see *R v Michael Brian Kneeshaw* (1974) 57 Cr.App.R 439 and *R v Kenneth Donovan* (1981) 3 Cr.App.R. (S) 192. See further the guidance provided in *R v Ben Stapylton* [2012] EWCA Crim 728 and *SFO v XYZ* (U20150856) 8 July 2016 at para 41.

96. The SFO has referred me to its joint statement of principle with the CPS and the National Crime Agency dated 1 June 2018, which says that it will consider the question of compensation in every case. It also acknowledges that compensation for victims should be sought when addressing corporate offending, and where this is not possible, reasons must be given. In this case, three reasons are given

for its decision not to ask for compensation, with which I agree. First, the SFO cannot easily identify a quantifiable loss arising from the criminal conduct concerned. Secondly, there is no evidence that any of the products or services which Airbus sold to customers were defective or unwanted, so as to justify a legal claim for the value of an adequate replacement. Thirdly, the DPA does not prevent any victims that there may be, from claiming compensation.

Disgorgement

97. The DPA includes a provision for the disgorgement of €585,939,740, representing the gross profit of conduct covered by the five counts on the Indictment. I have been taken through the calculations made in the course of submissions. I am satisfied with the careful methodology used. I am also satisfied that the figure thereby arrived at is one that fairly reflects the gross profit made by the wrongdoing reflected by those counts. Airbus instructed specialist financial consultants, Forensic Risk Alliance (FRA) to analyse underlying financial material and to prepare submissions on gross profit for the SFO. The SFO in turn instructed specialist financial consultants (BDO) to review FRA's methodology and sample tested the underlying documents. Representatives of Airbus and FRA have provided satisfactory certifications that the figures used are fair and accurate; and on this basis the figures for disgorgement and penalty are based on the agreed position following analysis by both FRA and BDO. It is the agreed position that the gross profit figure is higher in the case of each count for the basis of fine calculation than it is for the purposes of disgorgement. This is because the parties have sought to reflect the principles of totality and proportionality, to which the court must have regard when conducting any sentencing exercise, and the wider global resolution of the case, by limiting the inclusion of certain costs attributable to each contract in relation to the fine calculation.

98. It is also agreed that the gross profit earned prior to implementation of the Bribery Act 2010 on 1 July 2011 does not fall to be disgorged and that only profit from deliveries which have occurred by 31 March 2020 should be included. Airbus asserts that it is difficult to forecast profitability accurately beyond this point and the SFO accepts that for industry-specific reasons, there is declining certainty of delivery over time. It should be noted that no aircraft were delivered between 1 July 2011 and 31 March 2020 in relation to Sri Lanka contract 2, Malaysia contract 8 and Indonesia contract 5 and no disgorgement of profit is therefore sought in respect of those contracts. Further, the SFO has not sought disgorgement of profits in respect of Ghana contract 1 because Airbus will be fined an equivalent amount by the DOJ for suspected criminal violations of ITAR.

The Financial Penalty

99. Para 5(4) of Schedule 17 to the 2013 Act requires any financial penalty to be comparable to a fine imposed on conviction after a guilty plea. This para must be read with section 143 of the Criminal Justice Act 2003 (requiring the court to consider the offender's culpability and any intended or foreseeable harm caused) and the particular Sentencing Guideline that prescribes an approach to be followed, unless it is contrary to the interests of justice to do so: see s. 125(1)

of the Coroners and Justice Act 2009. Further, Step 4 of the Guideline requires the sentencing court to take account of the financial circumstances of the defendant: see also CrPR PD VII Q.4.

100. Step 3 of the Guideline, states that harm is to be represented by way of a financial sum, and for offences of bribery the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. It goes on to state that for section 7 Bribery Act 2010 offences "*An alternative measure for offences under section 7 may be the likely costs avoided by failing to put in place appropriate measures to prevent bribery*". As the SFO points out, gross profit is the basis of penalty calculations in all cases where corruption offences have been sentenced, and it is not suggested there is any reason to depart from that basis in this case. It is to be noted that the calculation of gross profit used does not necessarily reflect the way in which gross profit would be approached by accountants, for the purposes of accountancy reporting standards.

101. I have already addressed the fact that fewer deductions from the gross profit figures have been made in respect of the financial basis for a fine for each count than have been made for the calculation of gross profit for disgorgement. The approach to permissible deductions for the purpose of the gross profit penalty calculation for the Commercial Division is consistent with the position taken by the PNF in its penalty calculation. The fine has been calculated on the basis of the gross profit earned from aircraft delivered between 1 July 2011 and until 31 March 2020. The appropriate figure taken as a basis of the fine calculation in respect of the Commercial Division (before applying any multiplier or discount) is €954,334,060.

102. Although the harm figure is generally calculated by reference to a 31 March 2020 delivery date, that cannot apply where it would result in a nil harm figure, and hence a nil fine element in respect of a contract obtained through bribery. As already indicated, the Guideline provides that for offences under the Bribery Act "*the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending*" [emphasis added]. However for reasons of totality and proportionality and to assist in the wider global resolution of this case, this approach is not taken in the DPA. Instead, the following approaches have properly been taken. In the case of Sri Lanka contract 2, there is no separate penalty because the offending in respect of contract 1 is closely linked in time to the offending in contract 2 and already appropriately dealt with by the fine imposed in respect of Sri Lanka contract 1. In respect of Indonesia contract 5, the appropriate figure forming the basis of the fine is the value of the relevant promised fee to the business partner in respect of the contract, namely $10 million (which for the purpose of the financial calculation has been converted into Euros as at 20 December 2012). In respect of Malaysia contract 8, the appropriate figure forming the basis of the fine is the value of the bribe offered or promised, namely $55 million (which for the purpose of the financial calculation has been converted into Euros as at 15 December 2015).

103. The appropriate figure as a basis of the fine in respect of these contracts calculated on this basis is €57,962,857. This figure is included within the €954,334,060 referred to at para 101.

104. Regarding count 5, as I have mentioned, the DOJ intends to impose a fine in respect of International Traffic in Arms Regulations violations in a number of jurisdictions, including in respect of Ghana contract 1. The conduct subject to the DOJ resolution concerns misstatements made by the company when applying for licences to supply controlled defence products and services and the fine is likely to be €18,055,267. For the purposes of the fine in respect of Ghana contracts 1 and 2, the same methodology has been adopted as the DOJ to calculate the associated gross profit, in the interests of consistency with the financial sanction globally. Accordingly, the gross profit figure as a basis of the fine calculation in respect of Ghana contracts 1 and 2 for aircrafts delivered between 1 July 2011 and 31 March 2020 is €29,206,762.

105. Having determined harm, the next step is culpability. The Guideline identifies a non-exhaustive hierarchy of the culpability characteristics used to determine into which of three categories of culpability, High (A), Medium (B) or Low (C) the conduct falls. Using the appropriate culpability category, a starting point for a multiplier to the harm figure can be derived. Adjusting within the category range for aggravating and mitigating factors (again by reference to a non-exhaustive list set out in the Guideline) allows for the assessment of a final multiplier. The Guideline recognises that the culpability might be such that it is appropriate to move outside the category range altogether.

106. I agree with the categories of culpability and the harm multipliers arrived at by the parties as they reflect the level of culpability on each count.

107. The parties have taken the approach of assessing culpability, as with harm, on a count by count basis in order to ensure a comprehensive approach to different types of conduct involving different persons, industries and time periods. This is also an approach I agree with.

108. Common to all the counts is the fact that during the indictment period Airbus did have some bribery prevention policies and procedures in place. However prior to September 2014 these policies and procedures were easily bypassed or breached and there was a corporate culture which permitted bribery by Airbus in countries throughout the world. From September 2014 the situation improved in stages. A number of factors place counts 1 to 3, and count 5 in the highest category, that is Category A. For example, abuse of dominant market position, or position of trust and responsibility, the offending took place over a sustained period of time and involved senior employees. Count 4 is in Category B, medium culpability, because no Airbus employees are alleged to be party to the predicate bribery. The harm figure multiplier for Category A offending has a starting point of 300 percent with a category range of 250 to 400 percent; and for Category B offending has a starting point of 200 percent with a category range of 100 to 300 percent.

109. If a fine was to be determined separately for each count, this would result in an aggregate gross profit as a basis of fine of €983,540,822, before applying the

multiplier for each count separately and having regard to totality and discount. The parties submit and I agree that such a sum, added to the separate disgorgement figure of €585,939,740, would not be just and proportionate, taking into account the factors in the Guideline. As part of coming to this conclusion I also take into account the significant penalties that Airbus will be receiving as a result of the arrangements made with the PNF, DOJ and DOS in respect of related conduct. These cumulatively, amount to €2,608,792,455.

110. In respect of counts 1 to 4, in the interests of totality and proportionality, the multiplier to be applied to the harm figures for those counts is set at the highest level of that arrived for those counts, that is at 300 percent. For the same reasons, the parties have averaged the gross profit basis of the fines across counts 1 to 4. This leads to a harm penalty of €715,750,545. In respect of count 5, the harm penalty is €80,318,596. I agree that this approach leads to a more appropriate overall penalty, prior to consideration of discount.

111. The financial penalty should be subject to a level of discount in this case. The considerations and principles in respect of discounts in DPAs were explained in *Serco Geografix Limited* at para 39 of the final judgment:

> "It is necessary and appropriate for the financial penalty to provide a discount equivalent to the discount for a plea of guilty. In all but one of the earlier instances of approval of DPAs the financial penalty has been discounted by 50% rather than one third as would be required by the Sentencing Council guideline on full discount for plea at the earliest opportunity. This has been because engagement in the DPA process saves so much time and money on investigation and prosecution which justifies a higher discount. Moreover, the discount has been extended in other cases to encourage corporate responsibility in terms of early reporting of criminal conduct by the company. Both factors apply in this case."

112. Taking into account Airbus' agreement to resolve by a DPA the broad range of conduct in the proposed indictment, a full reduction of one third of the proposed penalty, adjusted for totality, should be allowed so as to reflect the fine that would likely be imposed upon a conviction after a guilty plea. Further, in order to take account of Airbus' exemplary cooperation and remediation, a further discount of 16.7 percent is justified taking the total discount of the penalty to 50 percent. This gives a penalty figure for all counts of €398,034,571. Airbus has made no submission that it does not have the means or ability to pay such a sum.

113. The total financial payment to be made by Airbus under the DPA and the settlements to be reached in the other investigating jurisdictions amounts to €3,592,766,766 which is significantly in excess of Airbus' annual Free Cash Flow for 2018 of €2.912 billion. Mr Keith QC has confirmed that the penalty figure, added to the disgorgement figure in this case, will have a real economic impact on the operation of the company. The DPA also, appropriately, confirms

that no tax reduction will be sought by Airbus in respect of payment of the financial penalty.

Co-operation provisions

114. The point has been made in relation to other DPAs (in *Tesco Stores Ltd* at para 73 of the main judgment for example) that as the entity subject to the DPA will normally be the main repository of relevant material for the purposes of prosecuting the individuals involved in the same criminal conduct, it is likely to be fair, reasonable and proportionate that the entity is required to provide assistance in the investigation and prosecution of those individuals. In summary, the DPA provides that Airbus will continue to co-operate with the SFO and other agencies for the duration of the agreement. Airbus further agrees that as part of its cooperation, it shall promptly report to the SFO any evidence or allegation of fraud that comes into its knowledge.

Compliance

115. The DPA includes provisions requiring Airbus to continue to implement and review its compliance improvements and the appointment of the AFA to act as monitor of Airbus' compliance for the duration of the agreement. These provisions are clearly fair, reasonable and proportionate.

Costs

116. As explained in *Rolls-Royce* at para 124 of the final judgment, in relation to costs:

> "As a matter of public policy, it is appropriate that a defendant with means to do so should pay the costs incurred by the Crown arising out of an investigation and (in those cases) prosecution: see para. 3.4 of The Criminal Practice Direction (Costs in Criminal Proceedings) Amendment No. 1. Furthermore, para. 7.2 of the DPA Code of Practice states that costs should ordinarily be sought."

117. The DPA requires Airbus to pay the SFO's reasonable costs in relation to the investigation and the entering into of this agreement. These amount to €6,989,401 for work prior to 17 January 2020 along with a sum covering the period from this date until my final approval of the DPA today. No tax deduction will be sought in respect of this payment.

End of investigations

118. Lastly, it should be noted that the DPA brings to a close the SFO's investigation into Airbus and its controlled subsidiaries, other than a separate investigation into GPT (SPM) Ltd. The SFO has also indicated that it has no intention of conducting any further investigation or prosecution of Airbus SE and its

controlled subsidiaries (other than GPT) for the matters disclosed to it prior to this DPA and in the agreements reached with the PNF, DOJ and DOS.

Conclusion

119. Finally, I should say this about the DPA, its specific terms and beneficial effects. The DPA requires Airbus to pay a significant financial penalty, thereby sending an important deterrent message to corporate wrongdoers. It also recognises and rewards what Airbus has now done to address the problem by discounting that financial penalty by 50 percent. The DPA has, in addition, given Airbus the opportunity to demonstrate its corporate rehabilitation and commitment to effective compliance over the period of the DPA, without facing the potential consequences of a criminal conviction. This ensures a major UK employer continues to operate according to high ethical and compliance standards. By entering into the DPA, the SFO avoids the significant expenditure in time and money inherent in any prosecution of Airbus, and it can use its limited resources in other important work. The DPA is likely to provide an incentive for the exposure and self-reporting of organisations in similar situations to Airbus. As the SFO submits, this is of vital importance in the context of complex corporate crime.

Order and publication

120. The SFO has confirmed that the evidential stage set out at section 1.2 (i)(b) of the DPA Code is satisfied in respect of all counts.

121. Pursuant to para 8(1) of Schedule 17 to the 2013 Act, I declare that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. I consent to the preferring of a bill of indictment charging Airbus with 5 counts under section 7 of the Bribery Act 2010. I note that, pursuant to para. 2(2) of Schedule 17 to the 2013 Act, these proceedings are automatically suspended. The terms of the DPA now fall to be enforced in default of which an application can be made under para. 9(1) of Schedule 17 to the 2013 Act.

122. I thank counsel for their assistance in this case. The various documents they have provided have been of considerable assistance in my resolution of this application. The DPA, the Statement of Facts and this judgment containing the reasons for the declarations made in this case should now be made public.