

SFO Marches On With Another DPA As US Parallels Emerge

By **Mark Taylor**

Law360, London (March 28, 2017, 5:58 PM BST) -- For the second time in a matter of months, a major corporation has agreed to a multimillion-dollar settlement with Britain's fraud squad to avoid prosecution, which lawyers say signals a renewed vigor from U.K. enforcers in targeting financial crime and corruption.

The U.K. Serious Fraud Office on Tuesday secured a \$161 million deferred prosecution agreement with Britain's largest supermarket retailer, Tesco PLC, for skewing the prices of its shares and bonds with false accounting, on the heels of a similar agreement with Rolls Royce PLC for a variety of offenses in January.

"I think we can expect to see many more instances of prospective corporate prosecutions being avoided by the use of deferred prosecution agreements," said Nick Brett, criminal law partner at Brett Wilson LLP. "It is significant that the most recent DPAs involve U.K. corporate household names. In a practical sense, the potential advantages to both parties are obvious both financially and in terms of restricting reputational damage."

The under-pressure SFO partnered with the Financial Conduct Authority to clobber Tesco on multiple fronts, in what is the first example of the FCA's obtaining compensation from a listed company for market abuse.

Tesco now faces shelling out \$106 million to investors for its mistakes on top of a separate \$125 million class action for misdeeds which date to 2014.

Lawyers believe the SFO is beginning to deliver on comparisons with feared U.S. enforcement agencies with its latest aggressive move.

"Whilst parallel actions by multiple regulators and prosecutors are common in the United States they have not been usual in the U.K.," said Guy Wilkes, financial services partner at Mayer Brown International LLP.

"If this is the start of a new trend it will not be welcome," he said. "Dealing with investigations by multiple agencies with often conflicting objectives presents difficulties for subjects under investigation and can be a source of unfairness."

Wilkes said one point of difference between the U.K. and the U.S. is that at least in this case, the FCA has taken account of the substantial penalty to be paid pursuant to the SFO's DPA and decided not to add to it by imposing its own fine.

"In the United States regulators have tended to be untroubled by the unfairness of multiple fines arising out of the same set of facts," Wilkes said.

Lawyers say there are unanswered questions as to why the SFO is investigating corporates already under the jurisdiction of the FCA, a securities regulator, and this may hinge on the uncertain future of the fraud squad.

The SFO is fighting for its life in several probes into its effectiveness, including an audit by the government, but has so far resisted calls from politicians to disband it, and lawyers believe the next step may be to take on individuals accused of wrongdoing.

"It shows U.K. agencies mimicking their U.S. counterparts in making these arrangements," said Raj Chada, criminal defense partner at London law firm Hodge Jones & Allen. "There is one important difference, however: The U.K. authorities have yet to show that the DPA scheme can work with individual prosecutions of senior executives. That might be for the future."

Lawyers say the partnership would toughen the regulatory regime in the U.K. and back up bold talk by the office, which told Law360 it was keen to target London's financial district, the scene of high-profile corporate crime and sleaze in recent years.

"The steady onward march of DPAs in the U.K. shows that equipping the right prosecutor with the right tools can make a real difference," said Robert Amaee, partner at Quinn Emanuel Urquhart & Sullivan. "DPAs have so far netted the U.K. fines and disgorgement in excess of £650 million, and that's after just four of them with others waiting in the wings."

It will also pave the way for more agreements, Amaee said.

"We may well see a significant growth in the use of DPAs, if the government's recent consultation on corporate criminal liability for serious economic crimes does, as is expected, lead to a widening of the law," he said.

The government announced plans to introduce DPAs in October 2012, and they were included in the Crime and Courts Act 2013, which received royal assent in April 2013.

Under a DPA, the prosecutor still charges a company with a criminal offense and the company has to both admit wrongdoing and pay a fine. But in exchange, the company won't face a trial and possible conviction, and thus will avoid sanctions and reputational damage.

In the Rolls-Royce case, the British manufacturing giant's arms business signed a DPA in January after a four-year investigation into bribery and corruption.

Tesco reached the fourth such agreement with British authorities since 2015. The first, from that year, was with Standard Bank PLC, and the second was with a company that's currently unnamed due to related legal proceedings that remain ongoing.

While the practice is commonplace in the U.S., it is a relatively new development in Britain, one the corporate environment it still becoming acclimated to, lawyers say.

"For a publicly listed company that is customer facing, a DPA will often be an attractive option," said Alison Geary, counsel in WilmerHale's U.K. investigations and criminal litigation practice. "In addition to a discount on penalty, DPAs offer certainty and the opportunity for the organization to put the matter behind it and move on."

If approved by the Crown Court at a public hearing on April 10, the deferred prosecution agreement with Tesco will then become effective.

Lawyers also highlighted the significance of the FCA market abuse charge against Tesco. The watchdog had until now not used its powers, as it cited section 384 of the Financial Services and Markets Act, to require a listed company to pay compensation for market abuse.

It said Tesco Stores and Tesco PLC both admitted market abuse over a trading update on expected profits on Aug. 29, 2014, which gave a false or misleading impression about the value of shares and bonds. Their worth remained inflated until Tesco corrected the statement almost a month later, on Sept. 22.

The supermarket was already battling a £100 million class action over the scandal, and may now have to pay more than £85 million in compensation to investors as part of the FCA deal.

"The arrangement with the FCA is of particular interest," said Ian Hargreaves, partner in the Covington & Burling LLP global anti-corruption practice. "Although we are not privy to the details of the compensation package offered to shareholders and bondholders and how this overlaps (if at all) with the civil claims and the claimants bringing those claims, it may nullify or significantly reduce such claims in compensating those who have a claim in damages against Tesco," Hargreaves said.

He said it was understood the FCA is not imposing a fine in return for the compensation package being agreed and the litigation against Tesco may now be significantly reduced and/or compromised on the basis of the package. This would reduce Tesco's exposure to significant further legal costs both in relation to its own costs and those of the claimants.

"Yes — the fine is not insignificant, but if it and the compensation package can bring this matter to a conclusion now or at least narrow the issues/claims in the civil cases, it will be well worth it," Hargreaves said.

-- Additional reporting by William Shaw, Alex Davis and Melissa Lipman. Editing by Rebecca Flanagan and Emily Kokoll.