

XYZ Ltd DPA: Anonymity Removed and Individuals Acquitted

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Until now, many details had remained confidential about the Serious Fraud Office's ("SFO") second-ever Deferred Prosecution Agreement ("DPA"), including the identity of the defendant company, referred to only as XYZ Ltd.¹ On 16 July 2019, the three employees allegedly responsible for the misconduct were acquitted at Southwark Crown Court and the full details of the DPA have now been published.

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Background. We now know that the DPA, which received approval in July 2016, was with Sarclad Ltd ("Sarclad"). Sarclad is an SME based in England which is a supplier to, predominantly, the steel industry. It sells its products globally, and relies on a network of agents in foreign countries. In February 2000, it was acquired by Heico Companies LLC ("Heico"), a U.S.-registered corporation.

According to the now published Statement of Facts ("SoF"), between June 2004 and June 2012 (*i.e.*, before and after the Bribery Act 2010 came into effect), Sarclad was involved in the systematic payment of bribes through agents to secure contracts in foreign jurisdictions. The SoF notes that the employees responsible were the Managing Director (a "controlling mind" of the company, whose actions could be attributed to it under English law corporate liability principles), and two senior sales managers. These alleged corrupt practices came to light following self-reports made in 2013 by Sarclad through its solicitors as a result of an internal investigation following the implementation of its parent company's compliance programme.

The DPA concerns a three-count indictment covering 28 allegedly corrupt contracts. Count one was of conspiracy to corrupt under the pre-Bribery Act legislation covering 24 contracts (in respect of which the "controlling mind" test would have been relevant). Counts two and three were under the Bribery Act, one conspiracy to bribe and one of failing to prevent bribery, each covering two contracts.

Sarclad agreed to disgorgement of gross profits of £6,201,085 (£1,953,085 contributed by Heico, corresponding to dividends received from Sarclad during the period of the

¹ "Court Approves Second UK DPA", Karolos Seeger, Robin Lööf, 13 July 2016, <https://www.debevoise.com/insights/publications/2016/07/court-approves-second-uk-dpa>.

offending), and a financial penalty of £352,000, the highest sum it was deemed able to pay without going bankrupt.

Analysis. These acquittals add a further high-profile instance where the SFO has been unable to back up a DPA with successful prosecutions of the individuals whose alleged misconduct formed, and was expressly identified as, the basis of the corporate resolution, in particular insofar as Sarclad's pre-Bribery Act liability is concerned. The SFO Director, Lisa Osofsky, has publicly stated that she is reviewing how the SFO investigates and, crucially, presents cases at trial. The Sarclad case, one she inherited, would seem to underscore the necessity of that review.



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