

UK Serious Fraud Office Reaches Deferred Prosecution Agreement with Amec Foster Wheeler Energy – Some Key Takeaways

14 July 2021

On 25 June 2021, the UK Serious Fraud Office (“SFO”) announced that a deferred prosecution agreement (“DPA”) had been agreed in principle with Amec Foster Wheeler Energy Limited (“AFWEL”). Lord Justice Edis’ judgment approving the DPA was published on 1 July 2021. This is the SFO’s tenth DPA to date. Below, we outline some of the key issues and questions arising from the DPA.

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

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

In the UK, AFWEL agreed to pay a financial penalty of £99.9 million and the SFO’s costs of £3.4 million, together with £210,610 compensation to the people of Nigeria. The DPA was part of a coordinated global resolution resulting in a combined penalty of US \$177 million. AFWEL reached settlements with authorities in the United States and Brazil, all of which related to conduct in Brazil. In the United States, AFWEL agreed a DPA with the Department of Justice and consented to a civil Cease and Desist Order with the Securities and Exchange Commission. In Brazil, settlements were agreed with the Ministério Público Federal, the Controladoria-Geral da União and the Advogado-Geral da União. Until recently (for example, in the TechnipFMC and Samsung cases), this degree of coordination between the Brazilian authorities has generally not been

possible in large international settlements, so this is helpful for companies seeking to resolve bribery issues in Brazil.¹

Prosecution of individuals. All of the AFWEL DPA documents contain introductory wording stating that the Court made no findings of fact or assessment of the culpability of any individuals who may have been involved in the company's wrongdoing. This is the first time a SFO DPA has included this, or equivalent, wording. This statement is likely due to the SFO's failure to secure the convictions of any individuals who have been prosecuted in connection with previous DPAs, and is therefore intended to avoid prejudicing the position of those who may be prosecuted following the AFWEL DPA. Edis LJ noted documents indicating that senior employees and directors of AFWEL had engaged in corrupt activities, and that SFO decisions about whether to charge them would be made within three months.

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

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

Handling of investigation and self-reporting. Edis LJ found that FWEL had a "widespread and high level culture of criminality" and that "corruption appears to have been endemic". In particular, he condemned the FWEL Board's "deplorable" failure to self-report to the SFO following investigation reports produced by the company's lawyers from 2007 to 2009. While Edis LJ acknowledged that companies have no legal

¹ Increased coordination between the Brazilian authorities in the last few years has been highlighted; see <https://www.debevoise.com/insights/publications/2020/08/brazil-announces-new-anti-corruption-cooperation>

obligation to self-report, he stated that FWEL should have done so “as a matter of ethical corporate governance”. However, this was not taken into account in determining the financial penalty. Edis LJ also criticised FWEL’s “ineffective” measures to address the corruption identified in the reports, noting that the wrongdoing continued despite the Board’s knowledge of it.

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

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

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

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