Case No: U20201913

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: 30/10/2020

Before:

MRS JUSTICE MAY DBE

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Between :

Director of the Serious Fraud Office	**Applicant**
- and -	
Airline Services Limited	**Respondent**

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Crispin Aylett QC and Ms. Rachna Gokani (instructed by **the Serious Fraud Office**) for the **Applicant**
Alison Pople QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

Hearing dates: 21 & 30 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MAY DBE

Mrs Justice May DBE:

Introduction

1. On Wednesday 21 October 2020 I heard an application in private for preliminary approval of a Deferred Prosecution Agreement ("DPA") made between the Director of the Serious Fraud Office ("SFO") and Airline Services Limited ("ASL"). Following that hearing I indicated that it was likely to be in the interests of justice for such a DPA to be entered into and that its proposed terms were fair, reasonable and proportionate. Today, at an open hearing, I have made a final declaration and Order to that effect.

2. The total sum payable by ASL to the Consolidated Fund via the SFO pursuant to the DPA is £2,229,685.76, made up of disgorgement of profit of £990,971.45 and a penalty of £1,238,714.31. Under the terms of the DPA ASL is also required to make a contribution to the SFO's costs of £750,000.

3. The criminality which is the subject of the present DPA concerns three occasions of bribery of an agent in order to secure valuable contracts for ASL in the period 2011 to 2013. At the time, notwithstanding the recent passing of the Bribery Act 2010, ASL had made negligible efforts to educate its staff or to introduce processes to identify and counteract occasions of bribery. This activity, and ASL's failures in relation to it, give rise to an indictment containing three counts of failure of a commercial organisation to prevent bribery, contrary to section 7 of the Bribery Act 2010.

4. The offending came to light following an internal investigation initiated in 2015 by ASL, who thereafter self-reported to the SFO. The SFO's subsequent investigation and the ensuing negotiations with ASL gave rise to the proposal for a DPA on the terms advanced for the court's approval.

The legal framework

5. A comprehensive account of the purpose of DPAs, and the legal framework within which they sit, is to be found in the recent judgment of Dame Victoria Sharp, PQBD, in *Director of the Serious Fraud Office v. Airbus SE* [2020] WLUK 435, at [6]-[10]. I respectfully adopt her exposition and analysis of the relevant legal principles, allowing me in this judgment simply to give a short explanation of the process.

6. Section 45 and Schedule 17 of the Crime and Courts Act 2013 (the 2013 Act) provide for a mechanism by which a corporate body may enter into an agreement enabling it to avoid prosecution for certain specified offences, on terms negotiated with a designated prosecutor (being the DPP or the SFO, depending upon the offence). Before it can take effect, a DPA requires the approval of the court. For such approval to be given the court must be satisfied that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate.

7. The process for obtaining approval involves two stages. First, an application must be made for a declaration pursuant to paragraph 7 of Schedule 17 to the 2013 Act that the proposed DPA is *likely* to be in the interests of justice and that its proposed terms are fair reasonable and proportionate. That preliminary hearing is conducted in private and any declaration is given in private: see paragraph 7(4) of Schedule 17 to the 2013 Act.

8. If preliminary approval has been indicated, then the second stage of the process involves a hearing in open court allowing the necessary declarations to be made and the reasons for approval to be given: paragraph 8(6) of Schedule 17 to the 2013 Act.

9. Although paragraph 7(4) of schedule 17 to the 2013 Act provides that reasons for a decision at the preliminary stage must be given in private, where a DPA is to be approved the practice has developed of reserving such reasons to the final hearing, and for the open judgment to set out the whole reasoning. I have followed that practice in this case; this judgment accordingly sets out my reasons for making (i) the preliminary declaration in private last week and (ii) the final declaration and approval now.

The application for a DPA in this case

10. At the private hearing last week, I received comprehensive written submissions and heard detailed submissions from Crispin Aylett QC for the SFO and Alison Pople QC for ASL. Having considered all the material put before me, and having heard oral submissions from the parties, I made the declaration which they invited me to make, namely that entering into a DPA on the terms proposed was likely to be in the interests of justice, and that the terms were fair, reasonable and proportionate. I reserved my reasons for reaching such preliminary conclusion until the final hearing today.

11. The Director of the SFO has now applied for a final declaration under paragraph 8 of Schedule 17 that the DPA which she proposes to conclude with ASL *is* in the interests of justice and that its terms are fair, reasonable and proportionate. Nothing has occurred to cause me to change my provisional view, accordingly I have today given that approval and made that declaration.

Facts

12. The facts giving rise to the three charges which are the subject of the DPA in this case are fully set out in the Statement of Facts annexed to the agreement. In what follows I shall do no more than summarise the salient points.

13. In the Statement of Facts and in this judgment certain names have been anonymised. There are two reasons for this: first, in order to safeguard the fairness of any future prosecution(s); second, because factual assertions have been included about the conduct of persons who have not been parties to negotiations with the SFO, who have not been represented at either hearing and who have not had any opportunity to comment on how their roles may have been characterised and described. Where necessary, names and identities were made known to me to permit me fully to evaluate the extent of responsibility and proper level of culpability of ASL when considering whether or not to make the declarations sought.

ASL

14. ASL is a UK company founded in 1984 whose business expanded over time to encompass the provision of a number of services for airlines, including the manufacture and adaptation of parts for aircraft interiors. ASL's head office and workshop were at all material times based in Wythenshaw, Manchester, with staff working across a number of different UK airports. At any one time there were around 1000 employees

working for the company. At its peak, the combined group of which ASL was a member had an annual turnover of approximately £60m.

15. In 2004 there was a management buyout whereby ASL was acquired by Airline Services Holdings Ltd ("ASHL"). In 2012 Airline Services and Components Group Limited ("ASCGL") acquired ASHL, and thereby (indirectly) also ASL, with the assistance of third-party funding in circumstances where the third party became a major shareholder.

16. During 2018, ASL completed the sales of both its Interiors and its Handling business divisions. ASL is now a non-trading entity. I was told that once the DPA has been complied with and after it terminates, ASL will be wound up.

Sales teams and use of agents

17. From about 2011 to early 2014 the ASL Sales Teams were split into three geographical areas: a team in the UK dealt with sales to airlines in India, Sri Lanka and Indonesia; a second team based in Germany had responsibility for sales into Germany and Turkey; lastly there was an individual based in Austria who dealt with sales into the remainder of Europe and the Middle East. Each salesperson was entitled to commission calculated by reference to the gross sales that (s)he achieved.

18. In order to secure business from the airlines, most of ASL's sales personnel used agents. ASL had a number of agreements with such agents, who were considered to have better contacts with individual airlines. These agreements specified the percentage commission which agents would obtain, based upon the price of the contract.

19. The commission arrangements between ASL and its sales personnel, and between ASL and the agents, based as such agreements were on the price rather than the profitability of the contracts, generated the obvious risk that sales personnel might commit the company to contracts that were profitable for themselves and the agents with scant regard to the interests of the company.

Contracts with Lufthansa and the use of Agent 1

20. On 7 October 2011 ASL entered into an agreement with an agent ("Agent 1") under which it agreed to pay Agent 1 10% commission (later reduced to 5%) based upon the contract price of any business won by ASL as a result of Agent 1's efforts. Most of the business secured by Agent 1 for ASL was from Deutsche Lufthansa AG and its subsidiary Lufthansa Technik AG (together referred to as "Lufthansa"). Agent 1 worked closely with senior employees of ASL based in Germany.

21. At the same time as acting for ASL, Agent 1 was also retained by Lufthansa as a consultant project manager within a department named Product Competence Centre Cabin Interior and In-flight Entertainment. A senior employee at Lufthansa allocated work and gave instructions to Agent 1. On behalf of Lufthansa, Agent 1 worked on projects for the improvement of the interior of Lufthansa's fleet of Airbus 340s and Boeing 747s. Agent 1's duties included working on Lufthansa's Requests for Proposals (invitation to tender documents) before they were sent out to potential bidders, evaluating bid documents and making recommendations to the Decision Committee regarding the bids that came in.

22. ASL was one of a number of companies submitting bids to Lufthansa for such work. Agent 1 would have been privy to commercially sensitive information submitted by rival companies submitting tenders in competition with ASL. In due course, ASL was awarded contracts with Lufthansa for both the Airbus 340 and Boeing 747 aircraft.

23. On 14 October 2011 and 28 November 2011 ASL entered into over-arching General Terms of Agreement with Lufthansa. These were framework agreements pursuant to which ASL entered into four supplemental agreements with Lufthansa referable to particular projects. ASL made payments to Agent 1 in respect of three of these four supplemental agreements. In the course of carrying out the work under these supplemental agreements ASL secured further work from Lufthansa, thereby increasing the value of the contracts.

24. The total value of work obtained as a result of entering into the three supplemental agreements in respect of which payments were made by ASL to Agent 1 was £7,387,227.00. The overall gross profit to ASL was £990,971.45.

25. These three supplemental agreements, together with the role played by Agent 1 in relation to them, each give rise to a charge against ASL of failing to prevent bribery contrary to section 7 of the Bribery Act 2010. I set out brief details of each below.

First Supplemental Agreement – Count 1

26. The first supplemental agreement ("SA1") gives rise to Count 1 on the indictment.

27. On 12 April 2011, ASL was invited to participate in Lufthansa's tender process for seat modifications to accommodate a new in-flight entertainment system for the Airbus 340 fleet. In the course of this tender process Agent 1 provided confidential information to ASL allowing it to improve its initial bid, supported ASL through the process and helped ASL to win the contract. Further details of Agent 1's assistance to ASL are given in the Statement of Facts. Whilst Agent 1 was ostensibly acting for and on behalf of Lufthansa, within ASL he was described as *"our man"*, and as *"supporting us (behind the scenes)"*.

28. SA1 was signed in November 2011. Including further work consequent on SA1 this contract came to be worth £2,785,246.67 to ASL, with a gross profit accruing to ASL of £122,021.81.

Third Supplemental Agreement – Count 2

29. The third supplemental agreement ("SA3") is the subject of Count 2.

30. On 14 September 2011, following a recommendation from Agent 1, Lufthansa invited ASL to submit a proposal to supply brand panels for Lufthansa's regional fleet of aircraft. On 5 October 2011 a meeting took place at which Agent 1 was formally mandated on behalf of Lufthansa to discuss Lufthansa's issues concerning this project. Just two days later, on 7 October 2011, Agent 1 signed the agency agreement with ASL. Thereafter Agent 1 worked "*behind the scene"* (sic) for ASL during the period of SA3, including providing ASL with confidential information and advising ASL to increase its contract price (against the interests of Lufthansa).

31. SA3 was dated 28 March 2012 and was worth £588,113.31 to ASL, with a gross profit accruing of £245,008.51.

The Fourth Supplemental Agreement – Count 3

32. The Fourth Supplemental Agreement ("SA4") gives rise to the third and last count on the indictment.

33. On 17 January 2012, Agent 1 informed ASL that Lufthansa would be issuing tenders for modifications to seats on its fleet of Boeing 747s. On 6 February 2012 Agent 1 provided ASL with a list of rival bidders. On 8 February 2012 Agent 1 visited ASL's German office; subsequent emails show that during that visit Agent 1 provided ASL with confidential information from Lufthansa and offered to help ASL with its bid. As before, emails to ASL from Agent 1 came from his personal email address. On 28 February 2012 Lufthansa invited ASL to tender; thereafter Agent 1 assisted with the bid, including travelling to ASL's head office in Manchester and providing ASL with a copy of Lufthansa's communications with a rival company.

34. In this way Agent 1 supported ASL's bid at the expense of competitors. He went on to provide assistance to ASL in putting together the various tenders that ASL submitted to Lufthansa and kept ASL updated on the progress of the decision-making process. In one email dated 8 August 2012 Agent 1 referred to "*put[ting] my job on risk by providing you confidential informations* (sic)*."*

35. In an email sent on 23 August 2012 Agent 1 informed ASL that a competitor had just proposed a significant pricing discount, following which ASL offered a further price reduction through a credit on spares. On 3 September 2012 Lufthansa confirmed that ASL would be awarded the contract. This was a direct response to ASL's email revising its pricing.

36. SA4 was signed on 2 October 2012; as with the other agreements Agent 1 continued to support ASL with performance under the contract, via his personal email address. SA4 came to be worth £3,336.987.72 with a gross profit accruing to ASL of £622,837.

ASL's anti-bribery procedures

37. ASL's compliance procedures during the relevant period from 2011 to 2013 were woefully inadequate. In December 2010 ASL had engaged external legal advisors to assess its compliance with the pending implementation of the Bribery Act 2010. This review identified that the use of a relatively small number of overseas agents represented a high bribery risk to ASL. The advisors made a number of recommendations to address this risk.

38. In order to assist ASL with implementing such recommendations the advisors provided ASL with a number of checklists and other documents, including in particular a draft "Anti-corruption Policy and Guidelines" document for use internally within ASL.

39. On 27 June 2011 a single event of training in relation to the Bribery Act 2010 was held for some of ASL's senior managers and regional sales managers. The training included reference to the draft "Anti-corruption Policy and Guidelines". However in September 2011 a senior executive of ASL informed the external advisors that ASL would be

adopting "a different approach". That saw the end of the external advisors' work with ASL on compliance with the Bribery Act provisions.

40. Save for that one training session in June 2011, ASL did not seek to communicate its "Anti-corruption Policy and Guidelines" to staff at any time prior to January 2014. Nor did ASL seek to implement any of the remaining recommendations made by the external legal advisors. It is agreed that from the implementation of the Bribery Act 2010 on 1 July 2011 to the beginning of 2015, ASL did not have in place any adequate procedures in order to prevent bribery.

Internal investigation

41. Concerns within ASL led it in 2014 to instruct external solicitors to examine a series of unrelated contracts involving a different agent and a different airline ("Agent X/Airline Y"). Although these solicitors reported allaying ASL's original concerns in relation to Agent X, the process incidentally threw light upon the activities of Agent 1 in Germany. At this point ASL once more instructed external solicitors to investigate.

42. The results of that investigation prompted ASL to make self-disclosure to the SFO, which ASL did initially on 30 July 2015. The SFO thereafter conducted its own investigation, using material provided by ASL both voluntarily and through use by the SFO of its compulsory powers.

43. On 16 December 2015 the Director of the SFO authorised the opening of a criminal investigation.

44. ASL has continued to provide documentary material to the SFO. The SFO has conducted interviews with some former members of the ASL Board, senior management and relevant employees. At the request of the SFO, German law enforcement authorities have interviewed the senior employee at Lufthansa who was responsible for managing and overseeing the tendering process for the procurement of the relevant contracts with ASL and Lufthansa.

45. I was told that the SFO's investigation has ranged far and wide over the business dealings of ASL during the period 2011 to 2015 with many different airlines and across many different jurisdictions. As part of that wide-ranging examination, the SFO re-examined ASL's relationship with Agent X and Airline Y. I understand that the SFO came to a different conclusion to that of ASL's external advisors at the time; however this aspect of the SFO's investigation has not resulted in there being a sufficiency of evidence such as meets either of the tests set out at 1.2(i) of the DPA Code of Practice. The SFO has decided further investigation into that business activity would not be in the public interest. The charges associated with the activities of Agent 1 adequately address the overall criminality of ASL.

46. Senior management figures at ASL at the relevant time left the board and the company soon after the first internal investigations in 2014 and 2015. As I have already indicated, following the sales of its Handling and Interiors businesses in 2018 ASL stopped trading. ASL is now effectively dormant, remaining only as a shell supported by its major investor for the purposes of permitting the SFO to conduct this investigation and to conclude the DPA.

Interests of justice

47. Having set out the brief facts relating to each of the counts on the indictment, together with the history of ASL's own investigations and self-reporting I turn to consider the interests of justice.

48. Under paragraph 7(1)(a) (preliminary hearing) and paragraph 8(1)(a) (final hearing) of Schedule 17 of the 2013 Act, the first matter for this court to address is whether it is in the interests of justice for the Director of the SFO to enter into a DPA with ASL. The DPA Code of Practice which the Director of Public Prosecutions and the Director of the SFO are required to issue ("the DPA Code"), gives guidance on the general principles to be applied in determining whether a DPA is likely to be appropriate in a given case: see paragraph 6(1) of Schedule 17. The DPA Code sets out public interest factors in favour of, and against, prosecution at paragraphs 2.81 and 2.82 respectively. In respect of offences under the Bribery Act 2010 reference is also made to the Bribery Act Guidance: see paragraph 2.10 of the DPA Code.

49. Crim PR 11.3(3)(i) requires any application for a DPA to set out why such an agreement is likely to be in the interests of justice. Mr Aylett QC started by drawing attention to the following matters in favour of prosecution:

    (i) Agent 1 was engaged because of his inside knowledge of Lufthansa's operation.

    (ii) Agent 1 held a position of responsibility within Lufthansa, evaluating technical proposals and making recommendations to the decision committee. He was able, in short, to exercise direct influence over which bidder would be awarded Lufthansa's business.

    (iii) The senior management within ASL at the time presided over a culture of wilful disregard of the commission of bribery offences by employees and agents. The senior management through to January 2015 failed to implement an effective compliance programme despite having sought, and been given, a guide and recommendations by which it could do so.

    (iv) There was an obvious risk of substantial financial harm to other bidders and to Lufthansa.

    (v) The underlying bribery offences were committed across jurisdictions.

50. As Mr Aylett rightly pointed out, these factors are such that in the absence of strong countervailing public interest factors, a prosecution against ASL ought to proceed.

51. He submitted, however, that there are strong factors telling against an immediate prosecution here, and which make a DPA appropriate:

    (a) ASL alerted the SFO to the offending in a timely manner, by self-reporting immediately concerns which had been identified by external advisors called in for the purpose of examining the Lufthansa/Agent 1 business.

    (b) ASL has actively cooperated with the SFO throughout the subsequent investigation, for example by facilitating interviews with ASL staff and through the timely and comprehensive provision of material requested (save that which attracted legal professional privilege).

(c) ASL is essentially a different company to that which carried out the offending, with a differently constituted board (see [46] above).

(d) The offending is not recent, dating from the period 2011-2013.

(e) Aside from concerns raised about the business involving Agent X/Airline Y, which the SFO evaluated differently to ASL's own external advisors but which the SFO does not intend to take further (see [45] above), ASL has no prior history of similar, or indeed any, offending or regulatory misconduct.

(f) ASL took immediate steps to identify the deficiencies of its (then negligible) compliance programme.

(g) The offending did not include corrupting any public officials and did not cause major disruption to, or loss of confidence in, markets or governments.

(h) ASL did not make very significant gains in terms of profitability of the contracts the subject of the three counts on the indictment (relative to sums involved in other cases where DPAs have been approved).

(i) ASL is now effectively a dormant company. Since its core business was split up and sold off (see [46] above) ASL has remained inactive. The current board has chosen not to wind ASL up (as it otherwise might have done in these circumstances), instead acting to keep the company in existence in order to resolve matters relating to ASL's past criminal conduct.

52. Balancing the factors which Mr Aylett has identified, I am satisfied that the public interest lies against prosecution. ASL's offending behaviour was egregious, it took place over a sustained period of time and was repeated over three separate agreements. These are undoubtedly aggravating factors. But ASL mounted its own investigation, since which time it has done all that it could have been expected to do having uncovered the offending behaviour: it made a timely self-report and has since provided full cooperation to the SFO. This is an important consideration given that the core purpose of the creation of DPAs was to "incentivise" the exposure and self-report of corporate wrong-doing: see the *Airbus* case at [68], referring to *SFO v Sarclad* [2016] 7 WLUK 211 and *SFO v Rolls Royce* [2017] 1 WLUK 189.

53. I have also taken account of the fact that the offences are firmly in the past in circumstances where there is no possibility of repeat. Senior management in post at the time of the offending have long since left the company and the active business divisions of ASL have all been sold. The remaining corporate shell is being maintained and supported by its main investor solely for the purpose of agreeing, and then discharging, its obligations under the DPA. This latter point appears to me to be particularly telling when considering the public interest; I note that in the DPP's "Guidance on Corporate Prosecutions" (referred to at paragraph 2.10 of the DPA Code) there is given as an additional factor against prosecution:

"h. The company is in the process of being wound up"

54. The only reason why ASL has not been wound up to-date is in order to conclude the DPA and to pay whatever sum it will be required to pay under its terms. Once that has been done, ASL will be wound up.

55. It is for these reasons I came to the view that I did at last week's private hearing held in accordance with paragraph 7 of Schedule 17 of the 2013 Act, and why I have concluded today that it is proper to make a declaration under paragraph 8(1)(a) of Schedule 17 of the 2013 Act.

Fair, reasonable and proportionate

56. I turn next to the requirements of paragraph 7(1)(b) (preliminary hearing) and 8(1)(b) (final hearing) of Schedule 17 to the 2013 Act, namely whether the proposed terms are fair, reasonable and proportionate.

57. Paragraph 5 of Schedule 17 of the 2013 Act sets out the terms which must, and those which may, be included in the DPA. Crim PR 11.3 (f) and (g) (i) and (ii) require the application for a DPA to describe the proposed terms, explain how they comply with the DPA Code and the applicable Sentencing Guideline and to elucidate how they are fair, reasonable and proportionate.

58. A copy of the DPA in the terms which I have approved is annexed to this judgment. It is not necessary to set out the terms in any detail. I shall address the fair, reasonable and proportionate requirement by considering the terms under the following general heads:

- Duration
- Cooperation
- Disgorgement of Profit, and
- Financial Penalty

Duration

59. Under paragraph 5(2) of Schedule 17 to the 2013 Act a DPA must specify an expiry date, being the date on which the DPA will cease to have effect (if it has not already been terminated for breach). The DPA in this case provides for ASL to be subject to a minimum period of 1 year. As a non-trading entity ASL would not benefit from a long period of instalment payments; ASL is to make payment of the sums required under the DPA within 7 days and could not be assisted by a longer term.

60. Regarding any outstanding investigations the SFO believes that it has obtained all information and material that is required from ASL in order to progress any ongoing investigation into individuals (in this or other jurisdictions). Mr Aylett told me that, should it prove necessary, 1 year will provide sufficient time for any outstanding lines of enquiry to be pursued with ASL. In the meantime, keeping ASL active for these restricted purposes, since it is otherwise a non-trading entity, will incur costs. In these circumstances the SFO believes that it would be disproportionate to extend the term any further than 1 year.

61. I am satisfied that, for the reasons given, the period of 1 year is fair, reasonable and proportionate.

Cooperation

62. Under paragraph 7.7(iii) of the DPA Code it is expected that a DPA will include a term providing for future cooperation. As ASL has access to a large amount of material which might be relevant to any prosecution of individuals it is obviously right, and in the public interest, that it should be required to assist any investigations or prosecutions of individuals concerned in the offending. Under the terms of the DPA, for the period of 1 year, ASL agrees to keep custody and/or control of the material gathered during its own and the SFO's investigations into the activities of its Interiors business. ASL will also agree to use its best endeavours to obtain any material outside of its custody held by the purchasers of its Interiors business (which was sold in February 2018).

63. The reasonable assistance which ASL undertakes to give pursuant to the DPA extends not only to law enforcement agencies in this jurisdiction but also those overseas, as directed.

Disgorgement

64. Paragraph 5(3)(d) of Schedule 17 of the 2013 Act refers to disgorgement of profit as a requirement to be included in a DPA, see also paragraph 7.9 of the DPA Code.

65. ASL's disgorgement of profit of £990,971.45 is provided for at Part B of the DPA. This figure represents the total gross profit accruing to ASL as a result of the three agreements with Lufthansa which are the subject of the counts on the indictment. I was told that the figures for each have been reviewed by an independent forensic accountant instructed by ASL and also by an accountant employed by the SFO. ASL and the SFO have agreed the gross profit figure.

66. I am satisfied that inclusion of a term requiring disgorgement, and the figure arrived at, is fair, reasonable and proportionate.

Financial Penalty

67. Paragraph 5(3)(a) of Schedule 17 of the 2013 Act identifies the payment of a financial penalty as a requirement to be included in a DPA; reference to such a penalty is also included at paragraph 7.8 of the DPA Code. Paragraph 5(4) of Schedule 17 provides that

> "the amount of any financial penalty…must be broadly comparable to the fine that a court would have imposed on [the company] on conviction for the alleged offence following a guilty plea."

68. In setting any fine, a court is required to take into account the financial circumstances of the offender: see CrimPD VII Q4 and the Sentencing Guideline for Corporate Offenders, General Principles. The SFO has thoroughly checked ASL's accounts and has sought updates from the company. As part of this process ASL's largest shareholder has confirmed that it is willing to support ASL by ensuring that it has funds to meet the amount(s) that it is required to pay under the DPA.

69. The amount of the financial penalty must be assessed by reference to the Sentencing Council Guideline on Corporate Offenders. The guideline dealing with bribery offences sets out the factors to be considered when assessing Culpability and Harm at Step 3. The figure for harm "will normally be the gross profit from the contract obtained, retained or sought". This will usually be the same as the disgorgement amount, and that is the case here.

70. The Harm figure is then subject to a multiplier reflecting the degree of culpability. Here, ASL's culpability falls into the highest Category A (offending committed over a sustained period of time, culture of wilful disregard of commission of offences). At Step 4 under the guideline the starting point of 300% is then subject to upward or downward adjustment by reference to a number of identified aggravating and mitigating factors. Mr Aylett told me that in this case the mitigating factors (no previous convictions or regulatory enforcement action, prompt self-reporting, extensive cooperation, offences committed under previous management) were assessed as outweighing the aggravating ones so as to justify taking 250% as the final multiplier. There are no matters requiring further adjustment under the "step back" provisions at Step 5 of the guideline, accordingly the appropriate financial penalty has been set at £2,477,428, subject to a discount.

71. It is necessary to apply a discount to this figure as the financial penalty should be comparable to a fine imposed upon conviction after a guilty plea. Ordinarily, a guilty plea would engage a maximum one third discount, or 33%. However it has been recognised in DPA cases that a further discount may be appropriate, for the reasons given by Leveson LJ in *Sarclad*, at [69]:

> "In addition, given that the admissions are far in advance of the first reasonable opportunity having been charged and brought before the court, that discount can be increased as representing additional mitigation. In the circumstances, a discount of 50% could be appropriate not least to encourage others how to conduct themselves when confronting criminality…"

72. Mr Aylett pointed out that in this case, in addition to early reporting and acceptance of wrongdoing, ASL has demonstrated a very high degree of cooperation, including a (limited) waiver of legal professional privilege in respect of ASL's own investigation into the Lufthansa agreements and the previous one into the activities of Agent X/Airline Y. He also drew my attention to the requirement, identified at Step 9 of the Guideline, to consider the totality of offending where, as here, there is more than one offence.

73. Taking all this into account, it is submitted that the final penalty figure of £1,238,714.31 fulfils the objectives of punishment and deterrence.

Costs

74. The final element of the financial terms of the DPA relates to the SFO's costs. Under paragraph 5(3)(g) of Schedule 17 of the 2013 Act there is reference to the inclusion of a term requiring payment of the prosecutor's reasonable costs "in relation to the alleged offence or the DPA". Here, the terms of the DPA require ASL to make a contribution of £750,000 to the SFO's costs. Mr Aylett told me that this was the best estimate of

costs referable to that part of the SFO's wider investigation which concerned the "alleged offences", being the three counts included on the indictment; it also takes account of the company's financial circumstances.

75. I am satisfied that the terms requiring payment of these sums – disgorgement of £990,971.45, financial penalty of £1,238,714.31 and costs of £750,000 – are fair, reasonable and proportionate.

Compensation

76. There is no provision in the DPA for the payment of compensation. Under section 130 of the Powers of Criminal Courts Act 2000 a court is required to consider making an order for compensation in particular cases, and to give reasons in the event that compensation is not ordered. The Sentencing Guideline for Corporate Offenders specifically refers to section 130 and to the necessity of considering compensation in relation to offences such as those which underpin this DPA.

77. The SFO, having considered compensation, concluded that the inclusion of a term to deal with it would not be appropriate here, on account of the following:

    (1) The SFO has not been able to identify a quantifiable loss arising from any of the criminal conduct which the DPA is intended to resolve. Case law supports there being no order for compensation when there is no quantifiable loss: *R v. Ben Stapylton* [2012] EWCA Crim 728 at [11]; *R v. Vivian* 68 Cr App R 53.

    (2) There is no evidence that the products or services which ASL provided were defective/unwanted, so as to justify a legal claim for the value.

    (3) It has not been possible to identify which of the competing bidders for Lufthansa's business may have been successful in place of ASL.

    (4) If any person or company believes themselves to have sustained a loss as a result of the events of bribery dealt with by the DPA then it would be open to them to bring a civil claim: *R v. Kenneth Donovan* (1981) 3 Cr App R (S) 192.

78. I am satisfied that these reasons amply justify the exclusion from the DPA of a term dealing with compensation.

Conclusion

79. DPAs are still relatively rare, this being the ninth to be approved since the enactment of the 2013 Act. The present DPA requires ASL to disgorge all profit made from the business obtained through bribery and also to pay a significant financial penalty. The penalty, and the discount, serve to convey two important messages: the first is that corporate offending will be visited by the imposition of a very heavy financial penalty over and above the disgorging of profits wrongly made; the second, via the discount of 50% on that penalty, conveying a positive and substantial incentive toward self-reporting and cooperation where offending is detected.

80. Pursuant to paragraph 8(1) of Schedule 17, 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 ASL with 3 counts under section 7 of the Bribery Act 2010. I note that, pursuant to paragraph 2(2) of Schedule 17 of the 2013 Act, these proceedings are automatically suspended. The terms of the DPA should now be enforced in default of which an application can be made under paragraph 9(1) of Schedule 17.

81. I wish to record my grateful thanks to all counsel – Mr Aylett QC and Ms Gokani for the SFO and Ms Pople QC for ASL – for their assistance with the facts and the law over the course of both hearings. The DPA, the Statement of Facts and this judgment containing the reasons for making the required declarations should now be published.