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Tesco trial collapse highlights dangers of an early deferred prosecution agreement

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On 6th December 2018, the trial of two Tesco Stores Limited ("Tesco") executives accused of false accounting collapsed. The judge concluded that the SFO's evidence, taken at its highest, was such that a jury could not properly convict. The SFO subsequently offered no evidence at the trial of a third director, leading to a third not guilty verdict. Tesco entered into a deferred prosecution agreement ("DPA") in relation to the same false accounting charges in April 2017 and its decision to do so may now be subject to question. The acquittals may also have a number of implications for the wider DPA regime.

SFO to reconsider cases it thinks suitable for a DPA?

The SFO framed its case against Tesco based on charges of accounting fraud. This created intellectual and evidential problems for the SFO. Accounting fraud is an offence which requires the conviction of a senior executive, or "directing mind and will", to bind the guilt of the corporate. In simple terms, the corporate cannot be guilty without the guilt of the senior executive.

The SFO must demonstrate that the individual committed the relevant illegal conduct and acted dishonestly. This is a high threshold to surmount, as was demonstrated in the Tesco trial, where the evidence was not strong enough, even when taken at its highest, to prove that the defendants had *dishonestly* produced false accounts.

The public may be forgiven for questioning whether the DPA was even required in circumstances where there was no culpable directing mind and Tesco were, therefore, not guilty of false accounting.

Accounting fraud contrasts with the corporate offence of "failure to prevent bribery" under section 7 of the Bribery Act 2010 ("UKBA") which does not depend on the guilty mind of a senior executive. Instead, under this Act, it is sufficient to demonstrate that the wrongdoing occurred through a person associated with the corporate and that the corporate failed to put in place adequate procedures to prevent that type of conduct.

The collapse of the recent Tesco trial due to lack of evidence may refocus the mind of the SFO, causing it to offer DPAs only in cases of the easier to prove "failure to prevent" corporate offence under the UKBA, to mitigate the reputational risk and intellectual confusion that arises from the Tesco case.

Corporates dissuaded from engaging in DPAs with the SFO

The DPA system requires the company to conclude the DPA process at a very early stage and realistically long before the extent of evidence in an investigation becomes clear. This is undoubtedly attractive to a corporate eager to account for future risk. However, conducting the DPA at this stage carries inherent risks to both the corporate and the SFO. The prosecutor has a duty to continue to investigate and disclose material that assists both prosecution and defence up to and including trial. Consequently, evidence may later materialise that changes how the prosecutor is able to put their case in court.

If a corporate pleads guilty to a fraud offence, such as accounting fraud, at an early stage and secures a DPA, there is a risk that a jury, on examination of the complete and possibly fuller evidence later on, will not be satisfied beyond reasonable doubt that the relevant individual is guilty.

Corporates must carefully assess the evidence against them before concluding a DPA. In cases which do not involve "failure to prevent" offences, they may be hesitant to enter into a DPA given the difficulties of prosecuting these offences. The importance of making the correct decision is reinforced by the expense of a DPA (£129,000,000 in Tesco's case) and the requirements of extensive co-operation with the SFO.

Further demands to introduce "failure to prevent" offences for other economic crimes?

Currently, failure to prevent offences extend only to failure to prevent bribery under the UKBA 2010 and failure to prevent facilitation of tax evasion under sections 45 and 46 of the Criminal Finances Act 2017. There have been calls to expand "failure to prevent" offences to other economic crimes such as fraud. Lisa Osofsky, the newly appointed head of the SFO, and the President of the Queen's Bench Division and Head of Criminal Justice, Brian Leveson, have advocated for this before the House of Lords Committee on the Bribery Act 2010[1] and the government has indicated its support.[2] Nevertheless, change in this area may depend on the Committee's report, which is due by 31 March 2019.[3] Any such reform would make the prosecution of corporates for offences such as fraud easier, and thus may persuade corporates to enter into DPAs in respect of those offences more readily.

However, until then, corporates may think twice before entering into such a DPA. Certainly, Tesco (and its investors) may be left scratching their heads over what exactly they paid over a hundred million pounds for.

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1 Bribery Act 2010 Committee, oral evidence 13 November 2018, page 7-8 and 11

2 Bribery Act 2010 Committee, oral evidence 4 December 2018, page 22/23

3 Bribery Act 2010 Committee – role