

SETTLEMENT IN U.S. HIGHLIGHTS RELEVANT SENTENCING CONSIDERATIONS FOR BRIBERY OFFENCES

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A recent settlement involving a United States aerospace company sheds light on sentencing in the context of enforcement actions involving allegations of bribery of foreign public officials.

On October 24, 2016, Embraer S.A. ("Embraer"), a Brazilian aircraft manufacturer, agreed to pay \$205 million and enter a Deferred Prosecution Agreement ("DPA") to resolve allegations that the company breached the Foreign Corrupt Practices Act ("FCPA").^[1] In the DPA, Embraer admitted that it used third parties to bribe government officials across the world in order to obtain government contracts.^[2] Embraer also admitted that it did not voluntarily disclose the FCPA violations to the Securities and Exchange Commission and that it had an inadequate compliance program at the time of the criminal conduct.^[3] In particular, the company did not require proof that services had been performed before paying third parties, did not conduct adequate due diligence before hiring consultants and agents, and did not appoint anyone to ensure that payments were subject to controls.^[4] The Department of Justice ("DOJ") agreed to defer prosecution on condition that Embraer enter the DPA, pay a criminal penalty, and retain an independent compliance monitor.^[5]

To determine an appropriate monetary penalty under the terms of the DPA, the DOJ applied the United States Sentencing Guidelines. The guidelines set out an appropriate fine range for a given offence.^[6] The DOJ provided credit to Embraer because the company cooperated in the investigation and accepted responsibility for its criminal conduct. Embraer was given a higher "culpability score" under the guidelines because the company had employees and a high-level individual who participated in, condoned or were willfully ignorant of the offence.^[7] The DPA specifically noted that Embraer did not discipline a senior executive who was aware of bribery discussions and responsible for overseeing the employees who engaged in those discussions.^[8] In its press release, the

DOJ stated that it imposed a penalty that reflected Embraer's "full cooperation but incomplete remediation."^[9]

The terms of the DPA highlight an important factor that the DOJ considers when sanctioning a corporation for foreign corrupt practices. The DOJ expects corporations to appropriately discipline employees who know about criminal conduct or supervise the employees involved in the conduct. If a corporation fails to do so, the DOJ considers that to be an aggravating factor in crafting a penalty.

The DOJ's expectation regarding corporate discipline could have implications for sentencing in Canada under the Corruption of Foreign Public Officials Act. While the anti-bribery regime in Canada is not identical to the regime in the United States, Canadian courts may look to the Embraer settlement (or other settlements of a similar nature) for guidance about relevant aggravating and mitigating factors on sentencing. The DOJ's assessment of Embraer's conduct is consistent with the enumerated sentencing considerations for corporations under s. 718.21 of the Criminal Code. Under s. 718.21(h), a court that imposes a sentence on an organization shall take into consideration any penalty imposed by the organization on a representative for their role in the commission of the offence.^[10]

The DOJ's assessment of Embraer's conduct is also consistent with the approach that Canadian courts have taken to sentencing. Canadian courts closely scrutinize all relevant aggravating and mitigating circumstances relating to an offence or an offender. For example, in *R v Maxzone Auto Parts (Canada) Corp*, the Court expressed serious concerns about the evidentiary record that was submitted in the proceedings in support of a jointly recommended sentence.^[11] The Court suggested that it must be able to look to a detailed evidentiary record to satisfy itself that a fine constitutes a "just sanction" having regard to the sentencing objectives listed in s. 718 of the Criminal Code, the provisions in s. 718 and jurisprudence on sentencing.^[12]

As Canada's commitment to pursuing cases under the Corruption of Foreign Public Officials Act^[13] continues to grow, Canadian corporations should pay careful attention to Embraer's settlement. The settlement should serve as a warning to corporations that their failure to appropriately discipline employees who know about, or are involved in, criminal misconduct could be an aggravating factor subsequently considered by courts when imposing a sentence.

Footnotes

[1] U.S. Securities and Exchange Commission, Press Release, 2016-244, "Embraer

Paying \$205 Million to Settle FCPA Charges" (24 Oct 2016), online:

<https://www.sec.gov/news/pressrelease/2016-224.html>.

[2] DPA, United States v Embraer S.A., No. 0:16-cr-60294 (S.D. Fla. Oct. 24, 2016).

[3] DPA, United States v Embraer S.A., No. 0:16-cr-60294 (S.D. Fla. Oct. 24, 2016) at para 4.

[4] DPA, United States v Embraer S.A., No. 0:16-cr-60294 (S.D. Fla. Oct. 24, 2016) at Attachment A para 67

[5] DPA, United States v Embraer S.A., No. 0:16-cr-60294 (S.D. Fla. Oct. 24, 2016) at para 4(j).

[6] DPA, United States v Embraer S.A., No. 0:16-cr-60294 (S.D. Fla. Oct. 24, 2016) at para 7.

[7] DPA, United States v Embraer S.A., No. 0:16-cr-60294 (S.D. Fla. Oct. 24, 2016) DPA at paras 5-7.

[8] DPA, United States v Embraer S.A., No. 0:16-cr-60294 (S.D. Fla. Oct. 24, 2016) at para 4(e).

[9] Department of Justice, Press Release, "Embraer Agrees to pay More than \$107 Million to Resolve Foreign Corrupt Practices Act Charges" (24 Oct 2016), online:

<https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges>.

[10] Criminal Code, RSC 1985, c C-46, s 718.21(h).

[11] R v Maxzone Auto Parts (Canada) Corp, 2012 FC 1117 at para 44.

[12] R v Maxzone Auto Parts (Canada) Corp, 2012 FC 1117 at para 109.

[13] Corruption of Foreign Public Officials Act, SC 1998, c 34.

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