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July 8, 2019

THE SFO'S FIFTH DPA – HIGH FIVE OR DOWN LOW? TOO SLOW!

To Our Clients and Friends:

On July 4, 2019 the UK Serious Fraud Office ("**SFO**") secured approval for its fifth Deferred Prosecution Agreement ("**DPA**") before the Crown Court sitting at Southwark. The DPA is with Serco Geografix Limited ("**SGL**"), a security company that contracts with the UK Ministry of Justice ("**MOJ**") to electronically monitor suspects and offenders. The DPA relates to three charges of fraud and two of false accounting. The facts of the case are summarised by the SFO in its official press release, which is accompanied by a copy of the judgment of the Court.

In order for the SFO to obtain approval for a DPA it is required to satisfy the Court that a DPA is in the *"interests of justice"* and that the proposed terms of the DPA are *"fair, reasonable and proportionate*". Certain features of the SFO's arguments and the Court's approval in this case are novel and worthy of appreciation.

Interests of Justice

Seriousness

The conduct at issue was serious: the victim was a central government department (the MOJ) and the Judge considered the nature of the conduct to be "ingrained". There were nonetheless countervailing factors which meant that the Court agreed with the SFO that a DPA was in the interests of justice. These included prompt self-reporting, cooperation with the SFO, absence of past misconduct, the historic nature of the conduct, the voluntary provision by SGL of compensation and SGL's implementation of remedial compliance measures.

Cooperation

With respect to cooperation, as in the Tesco Stores Limited case, at the request of the SFO, SGL's parent company Serco Group PLC ("**Serco**") conducted no employee interviews as part of its internal investigation, limiting its investigation to document production. This permitted the SFO to secure "first accounts" from interviewees and avoided the creation of privileged interview records. One cannot say that such a request reflects a settled trend, as there are more recently-commenced investigations in which companies have not received a request not to conduct interviews. It is worth noting, however, that in two DPAs concluded to date, the acquiescence by the company to such a request has weighed positively in favour of a DPA being concluded. Such requests will no doubt be made in future cases, albeit likely not in all. They are most likely to be made in cases of a purely domestic nature with a small number of persons of interest.

Collateral Consequences

In support of the DPA being in the interests of justice, the SFO also argued that a conviction would have a disproportionate impact on the company, due to its reliance upon public sector contracts and the consequent public sector contracts debarment risk. The DPA Code of Practice ("**Code**") permits the taking into account of disproportionate harm on a company of a conviction, but in a qualified fashion, in that it recognises that there is a public interest in the operation of a debarment regime. The Code additionally permits the taking into account of the collateral harm of a conviction to blameless third parties. The judgment suggests that the SFO focussed on the former argument rather than the latter, submitting that debarment would be unfair in this case in light of the remediation steps the company had taken. The judge expressed concern that, in this respect, he was effectively being asked to make a decision as to whether the company should be debarred, and that "quasi-political" decision was not one for him to make. In order to address this issue (which appears to have arisen on the Judge's preliminary review of the papers) the SFO adduced evidence that the MOJ and Cabinet Office, as public sector procurers, saw no reason to debar in this case, primarily on account of the remedial actions taken by Serco. As the approval of a DPA would not be determinative of the question of debarment, the judge concluded he could approve the DPA. Had the SFO focussed instead on collateral third party harm this issue may have been avoided altogether. Such an approach was approved in the DPA with Rolls-Royce PLC in 2017.

It is also of interest that the Court concluded that a DPA could amount to a finding of grave professional misconduct under debarment rules and that the facts of the DPA, as admitted by SGL, must amount to such misconduct. Debarment for grave professional misconduct is, however, discretionary under the Public Procurement Rules 2015.

Strength of the Evidence

The Code requires the SFO to state which of two permitted evidential thresholds have been reached when applying for the DPA. In this case the lower of the two thresholds is identified. This means that, at the time of the DPA, the SFO was not of the view that there was sufficient evidence to charge SGL, but was of the view that in reasonable time that evidential standard would be reached. This may explain why individuals have not yet been charged, and why the SFO committed to making individual charging decisions within six months. Despite the evidential standard for charging having not been reached, the Judge commented in the judgment that the evidence demonstrates involvement of unspecified senior individuals in the fraudulent scheme and that there was a clear case against the company. With that weight of judicial assessment the SFO may proceed to charging decisions against the individuals sooner rather than later.

Despite the company's cooperative conduct, a striking feature of this case is the almost six years it took to resolve. No explanation is offered for why it took so long to get to this point, as the conduct was self-reported in 2013. This lack of explanation risks speculation occurring as to the cause, such as whether the company put the SFO to strict evidential proof, and if so, that begs the question whether that is an acceptable method of engagement. Alternatively, it raises the question whether a six-year time frame is to be reasonably expected for the resolution of a self-report with subsequent cooperation. It would have

been helpful for the SFO to provide some explanation, so that those considering engagement in the future might have a greater understanding as to what to expect from the self-reporting process.

Terms

Penalty

The question of the applicable penalty was addressed in a wholly conventional way. Consistent with the Judge's opening observations regarding the seriousness of the conduct, culpability was assessed as "high level". The harm was readily identifiable as the loss in the form of the revenue abatement not given to the MOJ. The penalty was discounted by 50% to reflect Serco's cooperation, resulting in a saving in time as compared with a prosecution, and to encourage future self-reporting. Although, given that that DPA took almost six years to conclude it is not immediately clear what saving of time occurred.

Compliance Remediation

The terms of the DPA contained conditions not seen before in English DPAs. The first is that the compliance remediation obligations are assumed by Serco, the parent company of SGL, and for all of Serco's other subsidiaries, not just SGL. The breadth of the remediation is also wide in that it covers all forms of compliance programmes. Historically the remediation terms of UK DPAs have focussed solely on the failings exposed by the misconduct the subject of the DPA.

The Court notes that this assumption of group-wide remediation responsibility by a parent is a first and describes it as *"an important development in the use of DPAs."* This signals the prospect of broad remediation requirements in the future. The parent company is not however required to engage an independent compliance monitor to sign off on the suitability and implementation of the remediation. Instead, the parent company is obliged to report annually to the SFO in respect of progress. There is no requirement for SFO approval of progress and similarly no formal mechanism for addressing any SFO dissatisfaction with what is reported. This could present a significant gap in the effectiveness of this term.

Reporting of Future Misconduct

The second novel condition is a duty by Serco to report to the SFO any allegation or evidence of misconduct in respect of serious and complex fraud. As with the remediation provision this term is extremely broad, as it requires reporting in respect of the entire Serco group.

The breadth of the compliance remediation and reporting terms are said in the judgment to be due to the subsidiary SGL now being dormant, such that such terms in respect of it alone would be meaningless.

Statement of Facts

A DPA requires the publication of a Statement of Facts, either at the same time as the DPA or later in prescribed circumstances. The publication of the Statement of Facts has in this case been postponed pending charging decisions in respect of individuals before year-end. The decision to postpone

publishing raises the prospect of a repeat of the scenario in a prior DPA where the statement of facts naming individuals was published after their acquittal, or alternatively publication when a decision is taken not to charge. A preferable approach may have been to publish an anonymised Statement of Facts now, as a trial of individuals will not be for at least one and a half to two years, and the court responsible for such a trial would be empowered to make appropriate directions to a jury when necessary regarding information in the public domain.

Conclusion

A two-year hiatus in corporate crime resolutions by the SFO has now come to an end. There is much about this DPA in common with its predecessors. Those companies considering whether to self-report and cooperate going forward will, however, want to weigh in the balance the length of time that a resolution may take, the breadth of compliance remediation and reporting terms that may be imposed upon them and the risk made plain in this judgment that DPAs do not absolve a company of debarment risk – far from it; indeed, it appears they may well heighten that risk.

These final observations may make this fifth DPA less of a High Five for the SFO for encouraging more self-reporting and cooperation and more of a Down Low, Too Slow, for increasing the corporate risks, costs and burdens.

This client alert was prepared by Sacha Harber-Kelly, Patrick Doris, and Steve Melrose.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding these developments. If you would like to discuss this alert in greater detail, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following members of the firm's disputes practice:

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