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GURALP SYSTEMS LIMITED - UK SERIOUS FRAUD OFFICE'S SIXTH DEFERRED PROSECUTION AGREEMENT RESULTS IN NO PENALTY FOR COMPANY. TECTONIC SHIFT IN DPAS OR FACTUAL PECULIARITY?

To Our Clients and Friends:

Facts

The SFO alleged that three senior employees of Guralp Systems Limited ("the Company"), a UK based seismology company, conspired to corruptly make payments of approximately £1 million over a period of twelve years between 2003 and 2015 to a public official and employee of the Korea Institute of Geoscience and Mineral Resources, in return for £2 million worth of contracts. The trial of those individuals resulted in not guilty verdicts, the last of which was returned on 20 December 2019. Shortly after the announcement of those verdicts the SFO announced here for the first time that it had, on 22 October 2019, entered into a Deferred Prosecution Agreement ("DPA") with the Company, based on the facts for which the individuals were acquitted.

It should be noted that the public official who received the bribe was convicted after a trial in California in July 2017 (https://www.justice.gov/opa/pr/director-south-koreas-earthquake-research-center-convicted-money-laundering-million-dollar)..

DPA Offences

The DPA is for both an offence of conspiracy to corrupt, contrary to the Criminal Law Act 1977 and Prevention of Corruption Act 1906 and an offence of failing to prevent, contrary to the Bribery Act 2010. The choice of the conspiracy charge is explained by the fact that the conduct commenced prior to the coming into force of the Bribery Act 2010. The failing to prevent charge is in respect of that failure commencing on the date the Bribery Act came into force.

Cooperation and the Interests of Justice Test

The Court recognised the following matters as demonstrating that it was in the interests of justice for the case to be resolved by way of a DPA:

- Self-reporting in circumstances where much of the evidence relied on in the DPA and trial of the individuals was volunteered by the company.

- Removal of employees responsible for the alleged misconduct.

- No prior corporate misconduct.
- Introduction of a new compliance programme and the severing of links with distributors which presented compliance concerns.

The SFO in it application for approval of the DPA identified without elaboration further conduct that it described as demonstrating extensive cooperation:

- Deferring employee interviews until the SFO was content for the interviews to proceed.
- Providing material relating to the interviews.
- Consulting the SFO in relation to other matters including communications with customers and suppliers.
- Keeping the SFO informed of all contact with the public official and his travel arrangements.

The factors recognised by the court and the SFO are largely conventional. It should however be noted that this is the third DPA in a row where a company received credit for deferring employee interviews. The deferring of interviews is also consistent with the SFO's Corporate Cooperation Guidance previously analysed here. Such requests will no doubt be made in future cases, albeit likely not in all. A common feature in each of the DPAs in which the SFO has required this is their ostensibly domestic nature, with a small number of persons of interest.

Terms

Of note, and unlike the five prior DPAs, there is no penalty element in this DPA. There is however a full disgorgement of profit. That disgorgement has to be paid within the five year currency of the DPA. The Court stated that both the absence of a penalty and the loose arrangement for the payment of disgorgement do not set any precedent, but are a result of the impecunious financial circumstances of the Company (paragraph 42). This is not therefore a tectonic shift in the approach to financial terms.

The judgment recognises the possibility that the disgorgement will not be paid in the five year currency of the DPA. As such the judgement suggests that a variation of the DPA may be necessary (paragraph 41). However, a DPA can only be varied in respect of "*circumstances that were not, and could not have been, foreseen*" (see Crime and Courts Act 2013, Schedule 17, paragraph 10(1)(b)). Here the circumstance of not being able to pay are foreseeable.

There is a compliance reporting term that requires the Company to provide annual reports to the SFO containing various compliance metrics, including the effectiveness of training. The term does not require any SFO or third party approval of the effectiveness of the training. If the SFO concludes the training to be ineffective there is no mechanism in the DPA to compel an improvement nor would the ineffectiveness amount to a breach of the DPA.

Further, the absence of a third party approval mechanism means that the SFO is effectively entering the arena as a compliance assessor. Having taken on this role, the SFO must therefore ensure that it retains resource on the case to properly receive reports and provide criticism and feedback. If the SFO is passive and future misconduct occurs as a result of inadequate training, the Company would be able to point to the lack of any SFO criticism as implicit approval and the SFO could find itself a witness in a future trial.

There is also a requirement for the company's Compliance Officer to "*co-operate generally*" with the SFO. That appears at first glance to be a significant shift in enforcement policy. The term is not one however that creates any civil or criminal liability for the compliance officer. A compliance officer who felt that a request from the SFO was unreasonable and refused to comply with a request would not therefore be subject to any form of court sanction. Similarly the compliance officer's refusal would not amount to a breach of the DPA by the Company. This term therefore looks as if it will be difficult to enforce, though in the spirit of the company's cooperation it may not prove to be an issue.

As first used in the Serco DPA, there is a requirement to report defined future misconduct.

Conclusion

This is the second DPA resolved by the SFO this year and the second by its current Director, Lisa Osofsky. There is much about this DPA in common with its predecessors and particularly its immediate predecessor. The significant difference is the omission of a penalty, but this is case specific and explicitly stated not to set any precedent.

The recognition given by the SFO for the deferring of employee interviews has become a trend, albeit in smaller largely domestic focussed cases. It is interesting to observe however that the court did not refer to this factor in its judgment. In prior DPAs the court has adopted all the interests of justice factors advanced by the SFO in its application for the DPA. It would however be too much to infer that this factor played no role in the court's decision making. The same judge who approved this DPA previously expressly recognised it in a prior DPA as an important demonstration of cooperation.

Companies who identify misconduct over which the SFO will have jurisdiction should approach internal investigations with care. Our view is that initial interviews and other unavoidable overt steps designed to establish whether there is anything to report are reasonable. The Director of the SFO has recognised this in a number of speeches including on April 3, 2019 where she said, "*I know that companies will want to examine any suspicions of criminality or regulatory breaches – indeed they have a duty to their shareholders to ensure allegations or suspicions are investigated, assessed and verified, so they understand what they may be reporting before they report it.*"

However once initial interviews, whether alone or combined with other evidence, demonstrate misconduct that would be of interest to the SFO, then further interviews or overt steps prior to self-reporting will likely fall short of the SFO's expectations. Companies will therefore have to give careful consideration as to whether interviews should be suspended, pending consultation with the SFO.

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 UK disputes practice.

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