Anti-Corruption Report
An Acuris company

anti-corruption.com

February 19, 2020

DEFERRED PROSECUTION AGREEMENTS

Is the Guralp Systems Limited No-Penalty DPA a Tectonic Shift or Factual Peculiarity?

By Sacha Harber-Kelly and Steve Melrose, *Gibson, Dunn & Crutcher*

On December 20, 2019, the SFO announced that it had entered into a deferred prosecution agreement (DPA) with Guralp Systems Limited (the Company), a small privately owned, U.K.-based seismology company employing approximately 110 individuals.

The announcement of the DPA coincided with the acquittal of three senior employees of the Company, the jury's finding thus revealing an inconsistency with the facts agreed between the SFO and the Company in support of the DPA. Additionally, consistent with the agreed facts, the public official who received the payments from the Company was convicted in California in July 2017 of money laundering in respect of the payments he received from the Company.

As juries are not required to give reasons for their verdicts and may not speak in respect of their deliberations, any commentary on why it acquitted would be conjecture. We examine the DPA to determine whether it might be the beginning of a tectonic shift in SFO enforcement or is a product of the peculiar facts of the case.

See "SFO Guidance Moves Toward Transparency but Offers No Guarantees" (Sep. 18, 2019).

The Facts of the Case

The Statement of Facts accompanying the DPA supports an allegation that three senior employees of the Company, including its founding owner, conspired to corruptly make payments of approximately $1 million between 2003 and 2015 to a public official and employee of the Korea Institute of Geoscience and Mineral Resources.

The Bribes

Between 2003 and 2009 the Company paid the official eight cash payments totalling just over $70,000, and between 2005 and 2015, 31 payments by bank transfer to an account in the United States, totalling almost $1 million.

In return for these payments, the public official provided the Company the following favours:

- recommendation of its products to Korean public and quasi-public entities leading to sales that would not have otherwise been acquired, including attestations of reliability during a time when technical difficulties occurred with some of the Company's products;
- advice on pricing strategy and public procurement processes which included the inflation of list prices and a no-discounts policy;

- drafting technical specifications for equipment which were consistent with those of the Company's products and ensuring other government entities brought their specifications into line; and
- confidential information, including competitor presentations.

Profit

From 2003 to 2015, the Company's annual revenue for its Korean business grew from £20,146 to £1,453,618, and totalled approximately £6 million. It was not alleged that all of this business was obtained by corruption, though it was accepted that the growth was at least partly in consequence of the foregoing favours. The Company also agreed that its profits from the corrupt conduct amounted to £2,069,861.

Compliance Failures

The Company conceded that prior to 2012 it did not have an anti-bribery and corruption (ABC) policy in place, did not provide ABC training to its staff nor perform due diligence of its agents or distributors. Although the Company did subsequently adopt an ABC policy in 2012, it was not effective in preventing the payments to the public official. The Statement of Facts states that despite the existence of the ABC policy, two senior employees agreed in 2012 with the public official a form of words to obfuscate the reasons for the payments.

Indicted Offences

For this conduct the Company was indicted for two offences. Firstly, an offence of conspiracy to corrupt, contrary to the Criminal Law Act 1977 and Prevention of Corruption Act 1906. 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 (Bribery Act).

Second, the Company was indicted for failing to prevent bribery, contrary to section 7 of the Bribery Act. The indictment charges the Company with failure to prevent the continuation of the bribe payments to the public official from July 1, 2011, the day the Bribery Act came into force.

The Court's Approval of the DPA

In order to conclude a case by way of a DPA, the SFO must make an application to the Court for approval. Before giving its approval, the Court must be satisfied that a DPA is, firstly, in the interests of justice and, secondly, that its terms are fair, reasonable and proportionate.

In a Judgment approving the DPA, Mr. Justice William Davis (the Court) observed that the conduct involved serious and sustained criminality by senior employees over an extended period of time, involving substantial payment to a public official and which resulted in significant profits, particularly for a small company, all to the detriment of competitors. Despite the gravity of the conduct, the court found that there were five countervailing factors which meant that it would be in the interests of justice to defer prosecution of the company:

1. self-reporting in the form of a detailed presentation by the Company's lawyers and in circumstances where much of the evidence relied on in the SFO's investigation was volunteered by the Company;

2. removal of employees responsible for the alleged misconduct;
3. the absence of prior corporate misconduct, though the Court recognised that, given the longevity of the misconduct, this factor carried limited weight;
4. introduction of a new compliance programme and on a safety-first basis, the severing of links with distributors which presented compliance concerns; and
5. that a DPA would ensure the forward co-operation of the Company in the prosecution of the individuals.

In its application for approval of the DPA, the SFO identified without elaboration further conduct that it described as demonstrating extensive co-operation:

1. deferring employee interviews until the SFO was content for the interviews to proceed;
2. providing material relating to the interviews that the company conducted;
3. consulting the SFO in relation to other matters including communications with customers and suppliers; and
4. keeping the SFO informed of all contact with the public official and his travel arrangements.

Lessons on Co-Operation

While the DPA and the Court's approval do not go into significant detail about the co-operation provided by the Company, there are lessons to be gleaned from the elements of co-operation that were mentioned.

Deferral of Interviews

This is the third DPA in which a company has received credit for deferring employee interviews. The deferring of interviews is also consistent with the SFO's Corporate Co-operation Guidance (the Co-operation Guidance) published in August 2019. The Co-operation Guidance provides that companies should "to avoid prejudice to the investigation consult in a timely way with SFO before interviewing potential witnesses or suspects."

The Co-operation Guidance does not acknowledge that a company may need to conduct interviews in order to establish whether there is any conduct to engage with the SFO over. The Director of the SFO, Lisa Osofsky, has, however, recognised in a number of speeches that to do so may be necessary. In April 2019, Director Osofsky stated that, "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."

It is not the SFO's intention to direct internal investigations, but instead to secure first right of refusal over interviews, in order to either secure an individual's first account, or prevent a suspect being tipped off. A request not to interview is comparable to the de-confliction of witness interviews in the DOJ's FCPA Corporate Enforcement Policy (CEP). If the SFO makes such a request in practice, it is then reasonable to assume that it will conduct an interview promptly to ensure that the company may proceed to interview for its own fact gathering purposes, including disciplinary or remedial action. As this DPA demonstrates, a company's disciplinary and remedial action are central considerations for assessing whether a DPA is in the interests of justice.

Those conducting investigations may therefore conduct interviews in order to establish whether there is anything to report. If those interviews, whether alone or combined with other steps, demonstrate misconduct that would be of interest to the SFO, then any further interviewing prior to self-reporting will likely fall short of what is suggested by the Co-operation Guidance and what will be given credit for in a DPA. Companies therefore should give careful consideration whether to suspend interviews, pending consultation with the SFO. Requests by the SFO to suspend interviews in future cases should be expected.

See "DOJ's FCPA Corporate Enforcement Policy: Cooperation and Compliance Expectations" (Feb. 7, 2018).

Provision of Material Relating to Interviews

The issue of the Company providing material relating to the interviews that it conducted is not elaborated upon and no reference is made by the SFO or the Court as to whether this material may have involved a waiver of legal professional privilege. Obtaining early accounts from persons central to the events under investigation has long been a key focus of the SFO. The provision to the SFO of interview accounts, particularly where there is a waiver of privilege, is identified in the Co-operation Guidance as attracting considerable co-operation credit.

See "In New Guidance, SFO Indicates It Wants Companies to Waive Privilege" (Oct. 16, 2019).

Other Co-Operation

It appears that the Company also co-operated with the SFO to protect the integrity of the investigation and facilitate the apprehension of the public official. It did this by managing with the SFO the Company's external communications, presumably so as not to tip off persons of interest to the existence of the investigation and by providing intelligence in respect of the public official's travel. Acknowledgement by the SFO of this active involvement is novel and demonstrates the extent of the assistance that the SFO will request and credit where provided. It also demonstrates that companies may be creative in what they offer by way of co-operation and in return receive credit.

See "In New Guidance, SFO Outlines Internal Investigation Expectations" (Nov. 13, 2019).

Financial Terms of the Settlement

The starting point for terms in any DPA will usually be to calculate the financial terms. Paragraph 7.2 of the DPA Code of Practice provides that "it will normally be fair, reasonable and proportionate for there to be a financial penalty. It is particularly desirable that measures should be included that achieve redress for victims, such as payment of compensation."

The Sentencing Guidelines for corporate bribery confirm that corporate sentencing has three elements: compensation, confiscation and penalty.

Compensation

Compensation involves making good the financial loss sustained by a victim of the crime. In this case the victim would be the Korean public and quasi-public bodies.

The Powers of the Criminal Courts (Sentencing) Act 2000 requires the consideration of compensation and the giving of reasons where it does not make an order. The Sentencing Guidelines also provide that "Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty." Further the General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases, which are agreed by the Crown Prosecution Services (CPS), the National Crime Agency (NCA) and the SFO, make a commitment to compensate victims of bribery including overseas states. It further commits to pursue whatever legal mechanisms are available to secure it.

An order for compensation requires clear evidence that establishes an easily economically quantifiable loss. This may not prove possible. An example of where it would be possible is if it could be proven that a contract price had been inflated in order to provide surplus funds to pay a bribe, which seems to be the case in this instance. The Statement of Facts states that the public official created price lists that were inflated by about 40 percent and made provision for his fees. The SFO was also able to quantify the amount of bribes paid to the public official.

Despite this, the Company was not ordered to pay compensation and neither the Statement of Facts nor the Judgment mention compensation nor why it was decided not to be appropriate. Whilst this is not the first time that a compensation order has not been made, it is the first where the reasons have not been given.

Confiscation

Confiscation (or disgorgement of profit) must be dealt with before, and taken into account when assessing, any other financial order, except compensation. There is in this case full disgorgement of profit for an agreed amount of £2,069,861. Due to the impecunious circumstances of the Company it has been given five years to pay with no payment schedule. The time thought necessary for the payment of the disgorgement necessitated the length of the DPA to be commensurately long.

The Judgment acknowledges the possibility that the disgorgement will not be paid and suggests that a variation of the DPA may be necessary. However, according to the Crime and Courts Act 2013, a DPA can only be varied in respect of "circumstances that were not, and could not have been, foreseen." The acknowledgement of that possibility in circumstances where the Court had access to the Company's financial statements, including the profit and loss and cash flow forecasts for 2019 through 2024, suggests that the possibility of the Company not being able to pay are foreseeable. The Court however also correctly recognised that in the event of non-payment the Company may have to be prosecuted.

Penalty

For a corporate offence of bribery, the penalty is ordinarily a multiple of the gross profit. In order to determine the multiplier the conduct is first categorised as one of high, medium or low culpability by reference to a non-exhaustive list of factors. In this case, the Court assessed the Company's culpability on the basis of the summarised facts as high. A high culpability offence carries a multiplier

of between 250 and 400 percent. Where it falls in that range is determined by a further non-exhaustive list of considerations such as co-operation, lack of prior enforcement and termination of culpable employees, all of which reduce the multiplier. The bribing of government officials will increase it. In this case the Court concluded that the appropriate multiplier would be 300 percent, which would give a penalty of £6 million. This would then be discounted by one third for not contesting the case, resulting in a penalty of £4 million.

The Court recognised that this was a case where it might be an acceptable consequence to put the Company out of business. However, on account of the small number of employees involved in the agreed misconduct, the turnaround by the company under new management and the specialist nature of the Company's services, that outcome was spared the Company. Unusually, and unlike the five prior DPAs, the Court decided that due to the precarious financial circumstances of the company there should be no penalty.

In reaching that conclusion, the Court made clear that both the absence of a penalty and the extended arrangement for the payment of disgorgement were unusual, fact-specific and did not set any precedent.

Compliance Terms of the Settlement

In addition to requiring disgorgement, the DPA does require the Company to self-report on its compliance programme, co-operate with the SFO in the future and self-report any future misconduct.

No Independent Compliance Monitor

The DPA contains a compliance reporting term that requires the Company to provide annual reports to the SFO containing various compliance metrics, including measurements of the effectiveness of training, though no SFO or third-party compliance monitor approval is required. If it were concluded that the training was 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 an external compliance monitor means that the SFO will effectively assume this function. Having taken on this role, the SFO must therefore ensure that it retains resources 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.

This is the second DPA concluded under Director Osofsky where there has been no compliance monitor despite there being ongoing compliance remediation required. Within less than a month of this DPA being made public, the SFO published guidance on Evaluating a Compliance Programme, which states that where a DPA includes terms in respect of compliance it is likely for there to be a monitor appointed to report to the SFO in respect of the Company's compliance with the DPA.

The absence of compliance monitor in this case may be explicable by the Court's assessment that the current management of

the Company had done all it could to remedy the position and a compliance programme was already in place. Further the imposition of a compliance monitor would be at the Company's expense. The Court's assessment of the Company's financial position as precarious is also likely to have been a factor. However, in order to provide clear precedent and transparency it would have been helpful if the SFO made its position explicit.

See "Adelle Elia of LBI Offers Insights on Working Effectively With a Monitor" (Jul. 24, 2019).

Continued Co-Operation

The DPA also requires 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 co-operation it is unlikely to be an issue.

Reporting of Future Misconduct

As first used in the Serco Geografix Limited (Serco) DPA concluded in June 2019, there is a requirement to report defined future misconduct. This term has undoubtedly become a permanent fixture. There is also the standard requirement to co-operate with future related investigations and prosecutions.

No Tectonic Shift in Enforcement

There is much about this DPA in common with its predecessors and particularly its immediate predecessor, the Serco Geografix Ltd. DPA, announced in July 2019 and also resolved under the leadership of Director Osofsky. The most significant differences are in respect of penalty and compensation. These differences do not, however, represent a tectonic shift.

Penalty Without Compensation

The omission of a penalty is case specific and explicitly stated not to set any precedent in this instance. The absence of any discussion of compensation is unexplained. Given the statutory requirement to consider it, the omission cannot represent a shift of policy. It may be the case that as the disgorgement is paid that it will be used to pay compensation. This has occurred in a previous SFO prosecution where the disgorgement funded healthcare initiatives in the countries where the corruption occurred.

Deferring Interviews

The request by the SFO for the deferring of employee interviews has become a trend. It is interesting to observe, however, that the Court did not refer to this factor in its Judgment as being a factor contributing to the DPA being in the interests of justice. 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 expressly recognised the deferral of interviewing in the prior Serco DPA as an important demonstration of co-operation.

Admitted Facts but No Convictions

As noted above, there is an inconsistency between the Company's agreement of facts supportive of the culpability of three senior employees and their subsequent acquittal. This is not an isolated case. Individuals tried in connection to two prior DPAs (Tesco Stores Limited and Sarclad Limited) were also acquitted. In another (Rolls-Royce Plc), the investigation of the individuals was discontinued. In the other two (Standard Bank Plc and Serco), individuals have been charged but await trial (in the former case in Tanzania). In the Tesco Stores Limited case, the individuals were acquitted after a second trial judge concluded that there was no case to answer. In the first trial, the judge determined that there was a case to answer and was about to sum up the case for the jury, when a defendant became ill, necessitating abandonment of that trial.

The acquittals and discontinuance have led to criticism of the SFO and the DPA process, in general. It is submitted that these inconsistencies say more about the uncertainties of litigation and do not support a view that the DPA regime does not work or is unfair. As noted above, the public official in this case was convicted after a trial in another jurisdiction.

Value for Companies

These inconsistent outcomes demonstrate the importance of testing evidence. The radical nature of the inconsistencies, however, also demonstrate the value of DPAs for corporate suspects wary of such uncertainty. DPAs permit the conclusion of cases with certainty of outcome, without the expense, distraction, attention and delay of a trial (or two), provide significant penalty discounts and avoid conviction.

See "Are U.K. Enforcement Authorities Sending the Wrong Message to Companies?" (Oct. 18, 2017).

Sacha Harber-Kelly, a former SFO prosecutor, is a partner in Gibson Dunn & Crutcher's London office and a member of the white collar defense and investigations practice.

Steve Melrose is an associate in Gibson Dunn & Crutcher's London office and a member of the white collar defense and investigations practice.