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Sixth UK Deferred Prosecution Agreement: No Seismic Shifts but Some Important Messages

New managers who proactively report historical corruption and demonstrate a clean break with the past maximise the prospects of their organisation securing a negotiated settlement with UK criminal enforcement authorities.

Prosecutors and courts' priorities when negotiating the terms of deferred prosecution agreements ("DPAs") in the UK are ensuring that profits of misconduct are disgorged and that appropriate compliance arrangements are in place to avoid recurrence. UK DPAs will not always involve the imposition of punitive financial penalties.

It is not a foregone conclusion that a DPA agreed with a cooperating corporate organisation will lead to convictions for individuals involved in the misconduct in question.

The sixth DPA to be approved in the UK, details of which were publicised in late December 2019, confirms these key messages.

The facts, the DPA and prosecution of former executives

Güralp Systems Limited ("GSL"), a small UK-registered and -based company specialising in developing and providing technology for seismic measurement, entered into a DPA with the UK Serious Fraud Office ("SFO") in October 2019.

The DPA relates to payments made between November 2003 and May 2015 to a senior South Korean public official ("the Public Official", who was a Principal Researcher within and then the head of a government-funded earthquake research institute in South Korea). According to the Statement of Facts now published alongside the DPA, payments amounting to approximately £2 million were made to the Public Official, leading him improperly to assist GSL by:

1. recommending its products and protecting GSL's reputation;
2. advising GSL on pricing and strategy;
3. influencing the setting of equipment specifications; and
4. providing GSL with confidential information.

The DPA received final approval as the trials of two of GSL's former directors and its former Head of Sales (together "the Former Executives") were commencing. Reporting restrictions prevented any commentary on the DPA whilst those proceedings continued. In December 2019, all three of the Former Executives were acquitted of all counts after a nine-week trial.

Perhaps at least partially in recognition of significant difficulties it has experienced with establishing conspiracies involving corporate organisations in other cases, the SFO chose to deal with GSL and the Former Executives separately. GSL was not charged as a co-conspirator with the Former Executives. The DPA is based on:

1. a separate count alleging that GSL conspired with the Public Official and with the Former Executives to make corrupt payments; and
2. a further count of failing to prevent bribery (based on the same conduct).

Key messages

When DPAs were introduced in the UK almost six years ago, the deliberately brief implementing legislation and associated guidance left prosecutors and courts with considerable discretion to decide whether and when to enter into and approve DPAs and on which terms. Practice and procedure on key questions have continued to develop organically through decided cases.

The DPA now approved in respect of GSL has provided some further guidance. In particular, the DPA and Statement of Facts and the Court's judgment cast some further light on when and how suspected historical misconduct discovered by corporate organisations' new management should be self-reported, what prosecutors and the Court will consider to be an appropriate level of ongoing cooperation, which changes should be made to compliance arrangements and how financial penalties imposed as part of DPAs will be calculated.

SFO and Courts' expectations of cooperating corporate organisations remain high…

The Judge commented that "*on the face of it the activity of GSL richly merits prosecution*". Nonetheless, he was persuaded that it was in the interests of justice to enter into a DPA largely as the result of the actions of the new Executive Chairman of GSL upon forming suspicions about payments to the Public Official.

In particular, he identified terminating all contractual and other relationships with the Public Official, instructing lawyers to undertake a swift and thorough internal review and self-reporting concerns to the SFO and the U.S. Department of Justice as hallmarks of cooperation justifying a DPA.

In this case, these immediate decisive steps appear to have been important in giving the SFO (and in due course the Court) the required confidence that misconduct was confined to relations with the Public Official and was not part of a pattern of how GSL dealt with public officials in other jurisdictions.

The Judge, approving the DPA, emphasised how the actions of GSL's new management in proactively investigating and self-reporting suspected misconduct in circumstances where they "*presumably could have covered up what had gone on and/or allowed the corrupt practices to continue*" was a key factor in convincing him that a DPA was appropriate. He distinguished the DPA with GSL from the five which preceded it, drawing particular attention to factors in those previous cases which could be considered to have left the corporate organisations concerned with little practical alternative but to bring matters to authorities' attention.

…although exactly how high remains unclear

In August 2019, the SFO published its Corporate Cooperation Guidance, in which it elaborated on what it expects of corporate organisations in order for it to contemplate entering into a DPA. Although GSL and its representatives had been cooperating for over three years prior to the introduction of the Corporate Cooperation Guidance, their approach exhibits many of the hallmarks of cooperation which the SFO has now explicitly set out.

The Code of Practice on DPAs ("the DPA Code") published jointly by the SFO and the Crown Prosecution Service prescribes that "*genuinely proactive*" cooperation is a precondition for a DPA. Corporate organisations and their representatives emulating the approach taken by GSL and its representatives are likely to pass this test. However, GSL appears to have offered the maximum possible level of cooperation, perhaps in consequence of a need to secure concessions elsewhere, for example, in relation to penalty.

Some important questions remain, in particular about the extent to which privilege may be maintained in respect of documents relating to internal investigations undertaken by corporate organisations' own lawyers. In many cases, this

will be a particularly sensitive area, particularly since it is likely that the SFO will wish to avoid any repetition of criticism it received in *R (on the application of AL) v Director of the Serious Fraud Office*[1] in respect of its acceptance of short summaries of interviews conducted as part of internal investigations.

It will be left to prosecutors and courts considering future more contentious cases to further clarify where the dividing line lies between legitimate challenge to requests made or requirements imposed by prosecutors and genuine cooperation and how such cooperation is to be recognised. In particular, the fact that this DPA does not contain a financial penalty element leaves some remaining questions about whether "*extraordinary cooperation*" retains the meaning given to it by the Court when it approved previous DPAs or whether cooperating corporate organisations must now do more in order for the level of fines to be reduced by up to 50 percent as they have been to date.[2]

One clear message that does emerge from the DPA agreed with GSL is that even very high levels of cooperation such as those demonstrated in this case do not lead to quick settlements. The DPA, once agreed between the SFO and GSL, was approved within a matter of weeks. However, it took approximately four years for the SFO to complete its investigation and for negotiations to be concluded.

Prosecutors and courts are prepared to take a pragmatic approach to penalty calculation

The DPA with GSL is the first in the UK in which no financial penalty has been imposed, although GSL must disgorge approximately £2 million (agreed to represent its profit from the misconduct in question). Exceptionally, GSL may pay these sums as and when it is able to do so and the judgment recognises that the DPA may need to be varied in due course depending on GSL's ability to pay.

The Court and the SFO took a pragmatic approach to penalty calculation similar to that taken in respect of Sarclad Limited in 2016. In particular, the Court did not rule out the possibility that fines leading to insolvency may be an appropriate consequence in some cases, but weighed this against the complete change of management and the potential wider negative consequences of a fine both for innocent employees and for agencies dependent on GSL's specialist expertise.

Proactive and "safety-first" approach to remedial compliance action can pay dividends

The Judge praised the "safety first" approach to compliance taken by GSL's new management, referring in particular to decisions to terminate relationships with particular distributors based on concerns identified during the initial investigation undertaken by GSL's lawyers and during the SFO's investigation (even where there was no clear evidence of criminal conduct).

In many cases, there may be more nuanced determinations to make about the potential costs of terminating existing contractual arrangements without clear evidence of involvement in wrongdoing. The case underlines the value, where possible, of incorporating appropriate contractual wording limiting the commercial damage of termination based on suspicion that counterparties (particularly those doing business in high risk sectors or jurisdictions) may be involved in misconduct.

As has been the case in all the other DPAs approved to date, early and proactive action to fix deficiencies in compliance arrangements has enabled GSL to avoid wide-ranging monitorship arrangements similar to those which commonly feature in U.S. DPAs. As is envisaged by the DPA Code of Practice, where third parties have been engaged to report on

[1] [2018] EWHC 856.

[2] See, for example, Sir Brian Leveson's description of the "extraordinary" cooperation provided by Rolls-Royce at paragraph 121 of his judgment of 17 January 2017 - https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.

required improvements to compliance arrangements, their remits have been narrow. In this case, as was the case for Sarclad in 2016, the SFO and the Court were content to leave GSL's Chief Compliance Officer to confirm that required improvements are being made to training, monitoring and other compliance arrangements relating to relationships with third-party intermediaries (although the guidance on evaluating corporate compliance programmes published by the SFO in January 2020 casts doubt upon whether this is an approach that the SFO will replicate in future cases).

DPAs with cooperating corporate organisations will not always lead to convictions for individuals

The case is the latest in which DPAs agreed with cooperating corporate organisations have not been followed by convictions for individuals alleged to have been involved in the underlying misconduct. Although proceedings remain ongoing in some cases, the list of cases in which, notwithstanding the cooperation provided by corporate organisations, investigations or proceedings concerning former executives have been discontinued or ended with acquittals includes some of the largest and highest profile cases pursued by the SFO in recent years.