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Kirkland Alert

## UK Serious Fraud Office Agrees to Deferred Prosecution Agreement with Serco

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On 4 July 2019, Serco Geografix Limited (“SGL”), a now dormant, wholly owned subsidiary of Serco Group (“Serco”), entered into a Deferred Prosecution Agreement (“DPA”) with the UK’s Serious Fraud Office (the “SFO”) under which SGL will pay a £19.2 million penalty and the SFO’s costs. In so doing, the SFO has concluded its long-running and high-profile investigation into Serco.

Under the terms of the DPA, SGL has admitted to three offences of fraud and two offences of false accounting. The DPA has seen prosecution immediately suspended as long as SGL fulfills certain requirements.

Alongside the financial penalty, which reflects a discount of 50% as a result of Serco’s self-reporting and co-operation, Serco has also undertaken to co-operate with the SFO, including in the prosecution of individuals. It has also agreed to continue to improve its group-wide ethics and compliance functions, and to provide annual reports on the same to the SFO. No damages or disgorgement of profit will be payable to the UK’s Ministry of Justice (the “MoJ”) on the basis that it has already been fully compensated as part of a £70 million civil settlement in December 2013.

Importantly for Serco, in avoiding a criminal conviction, the DPA also helps to ensure that it can continue to provide services to the UK government.

### The Facts of the Case

The SFO investigation into Serco related to Serco Limited’s (“SL”) contract with the MoJ pursuant to which SL provided electronic monitoring equipment to the UK government to monitor offenders. In late 2013, in a much publicised scandal, the MoJ referred Serco to the SFO over concerns that Serco had falsely charged the MoJ for

tagging individuals that were either in jail, deceased or had in fact left the country. The associated investigation led Serco to identify a fraudulent scheme between 2011 and 2013 whereby SGL charged SL fictitious costs in order to artificially deflate the profit SL was making on its contract with the MoJ and thereby avoid the MoJ recouping certain of those profits.

In the ordinary course, a detailed Statement of Facts would be published at the same time as the DPA and the court's judgement. However, in light of the possible criminal proceedings against individuals and the potential for the publication of the Statement of Facts to prejudice any such proceedings, the court has postponed the document's publication until at least December 2019, when a charging decision in respect of individuals is due.

## The Basis for the DPA

In order for the court to approve a proposed DPA, it must be in the interests of justice and the terms of the agreement must be fair, reasonable and proportionate. As regards the interests of justice, the court noted that the underlying conduct "has a serious impact on the integrity" of the public procurement process and "reflects business practices apparently ingrained in the company." However, the court ultimately found that a number of factors weighed in favour of the DPA being in the interests of justice, including the prompt reporting by Serco of the conduct, its "substantial co-operation," the age of the conduct and the remedial measures taken by Serco since the matter was reported to the SFO.

The court also emphasised the importance of the undertakings provided by the ultimate parent company of Serco, noting that it "is an important development in the use of DPAs." With the exception of certain offences such as bribery and corruption, a company can only be held criminally liable for the acts of those individuals acting on its behalf where they represent the "directing mind and will" of the company. In practice, this means that directors and senior managers will often need to be involved in, or aware of, the criminality. This has led to much criticism and has, in practice, hampered the SFO's ability to prosecute companies for non-bribery offences, particularly large, complex companies. This seemingly proved to be the case in the Serco investigation as, despite SL being the beneficiary of the misconduct, the evidence could only establish that the directing minds of the smaller company, SGL, were party to the scheme. However, as a dormant subsidiary, SGL was not in a position to provide undertakings as to Serco's compliance programme and ongoing co-operation. In Serco's parent company agreeing to make these undertakings, it enabled the public

interest of a DPA to be satisfied where it otherwise could not have been. As the court noted, without the undertakings, “it is very unlikely that the goals of a DPA could have been achieved in the circumstances of this case.”

The SFO had argued that the public interest would not have been served by prosecution since that would have resulted in SGL and/or SL being debarred from public procurement contracts, thereby depriving SL of 90% of its revenue. The court effectively disagreed with the SFO and noted that if the consequence of the DPA was to ensure that Serco could continue to provide services to the UK government, in circumstances where it would not have been able to do so in the event of a conviction, the court would likely not have approved the DPA. After close scrutiny, however, the court found that its approval of the DPA was not, in any event, the determining factor in any decision by the UK government as to whether Serco could continue to provide such services.

## Key Takeaways

The DPA, which is only the fifth that the SFO has secured since their introduction in 2013, provides a number of key takeaways.

Firstly, it continues to highlight the importance of co-operating with the SFO’s investigation should a company wish to secure a DPA. Interestingly, in co-operating with the SFO, not only did Serco provide “[u]nrestricted access” to email accounts and “some waiver of privilege...in respect of accounting material,” but it also agreed not to conduct any interviews as part of its internal investigation. This arguably restricts Serco’s own ability to fully investigate, and ultimately remediate, the misconduct identified. In each of the DPAs to date, there have arguably been elements of inconsistency as to what is and is not required for a company to be considered as co-operating. It will therefore be interesting to see whether the guidance on self-reporting promised by the new Director of the SFO, Lisa Osofsky, provides any clarity on this point.

Secondly, in a theme that has been consistent across the various DPAs, the court placed significant emphasis on the compliance enhancements that Serco has made since the misconduct took place. This has included a complete change of senior management, increased internal and external audits, and the implementation (under independent supervision) of a Corporate Renewal Programme approved by the UK government.

The DPA is the first secured under Osofsky's tenure and represents a key positive development following recent high-profile setbacks for the SFO. The timing of the DPA is also noteworthy. The investigation had been running since late 2013 and the DPA comes relatively early in Osofsky's tenure, at a time when she has spoken publicly on numerous occasions about trying to speed up the SFO's investigations. The DPA also comes amid recent criticism of the SFO's use of the tool in light of failed and discontinued actions against individuals in connection with the Tesco and Rolls-Royce DPAs. The Serco DPA may therefore serve as a sign of things to come in terms of the SFO's continuing desire to use DPAs as a disposal mechanism.

Finally, it is interesting to note that the SFO has said a charging decision in respect of individuals will be made by 18 December 2019. This is the first time that the SFO has articulated such a deadline in respect of DPAs, and it seems likely that it is at least a partial response to the recent criticism around the Tesco and Rolls-Royce DPAs. Whether or not charges are brought against individuals, in time for the December 2019 deadline or otherwise, remains to be seen. However, failure to do so will likely lead to further criticism of the DPA process.

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- [08 July 2019 Article INSIGHT: U.S. Trade Secret Prosecutions—Should Chinese Companies be Worried?](#)
- [03 July 2019 Kirkland Alert China to Release an “Unreliable Entity List”](#)

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