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Dear Lisa

Strengthening the UK's Deferred Prosecution Agreement regime

We would like to congratulate you on securing the very significant global settlement in relation to Airbus last week. It is particularly encouraging that the SFO has made excellent use of its good relations with prosecutors in other jurisdictions and has used the extra-territorial application of the Bribery Act to such good effect. We strongly urge you to ensure that the ongoing investigation into GPT Special Project Ltd is concluded swiftly and effectively.

As you will know, civil society groups are keen to ensure that the DPA regime in the UK operates in a manner that provides real deterrence to economic crime and real incentives for companies to self-report wrongdoing.

Now that the Serious Fraud Office has used DPAs in seven cases and the regime has been in place for nearly 6 years, we believe it is time for the SFO to evaluate the issues arising from their use in the UK to ensure greater consistency and fairness in how the regime applies and to ensure that the regime does indeed provide real deterrence to corporate criminality.

We urge the SFO to look closely with partners in the Attorney General's office and the Crown Prosecution Service at the following areas:

1. **Whether the regime is genuinely encouraging self-reporting or creates perverse incentives for companies to wait until wrongdoing has been uncovered to cooperate.**

The purpose of the DPA regime is clearly stated to be to incentivise the exposure and self-reporting of corporate wrongdoing. We have strong concerns however, that the current regime, coupled with disparities in how the UK court system deals with corporate offending, provides no such incentive.

We are concerned this lack of incentive for companies to come forward may be one of the factors behind a reported drop in the SFO's caseload, if accurate.

As the Airbus judgement makes clear, the "core purpose" behind creating the DPA regime was to "incentivise the exposure and self-report of corporate wrongdoing". However, since the Rolls Royce DPA, the UK's DPA regime has provided a 50% discount on penalty for companies where they have provided significant cooperation even in circumstances where they have not self-reported. In several instances, enforcement authorities (either here or abroad) have been investigating or were aware of allegations of wrongdoing before the company started cooperating with the SFO. The shift away from self-reporting being a condition for a DPA has now been made explicit in the Airbus judgement when it states: "there is no necessary bright line between self-reporting and co-operation."

While 'extraordinary' or 'exemplary' cooperation should rightly be encouraged and incentivised and may legitimately be the basis for resolution of corporate wrongdoing with a DPA, the failure to differentiate penalty discounts for those companies that self-report and cooperate and those that start cooperation once they are under investigation seriously reduces the incentive for companies to self-report their wrongdoing in the first place.

The US system clearly differentiates between these two, and in both the Rolls Royce and Airbus cases only provided a 25% discount in contrast to the UK regime's 50% discount. The UK regime is out of step with the more established US regime in this regard.

We would be strongly opposed to any further penalty discount being given beyond 50% and we have real concerns at the recent decision in the Guralp DPA to impose no penalty at all and to only seek disgorgement of profit. We note that the House of Lords Bribery Act Committee also specifically rejected any further penalty discount in DPAs.

We therefore urge the SFO to work to bring the UK regime in line with the US and ensure that companies that have not self-reported but have provided exemplary cooperation receive only a 25% discount in penalty rather than a 50%. In contrast with the US regime, however, and in keeping with the unique nature of the UK regime, we also urge the SFO to strongly reconsider whether seeking no penalty at all in the context of a DPA is an effective deterrent to corporate wrongdoing.

2. Whether there is effective senior level accountability for corporate wrongdoing

We welcome the fact that the SFO has sought in many cases to bring prosecutions against those who held senior level positions in companies at the time that the wrongdoing occurred, and that this has not always been easy to do.

As you will be aware, there is strong public concern that in order to ensure that DPAs are not seen as an easy way out for companies, senior executives should face penalties where they have run a company that engages in such wrongdoing.

We urge the SFO both to be transparent about the lessons that need to be learned from the recent spate of acquittals of individuals following a DPA, and to ensure that all means, both criminal and civil, are used to ensure such accountability.

In particular, we urge the SFO to explore how companies can be required in the context of DPA negotiations to seek the removal of any financial benefits they have provided outgoing senior management in order to contribute to the corporate fine. This is particularly important where criminal charges are unlikely to be able to be brought against senior management. We also urge the SFO to explore civil law means for holding senior management to account where criminal prosecution is impossible.

3. **Whether penalties applied reflect the full wrongdoing**

We welcome the fact that the penalty in the Airbus case is the largest corporate fine globally for bribery and domestically for any corporate.

There is a legitimate question however as to whether the calculations made in assessing the penalty and disgorgement that Airbus should be required to pay took into account the full profit that Airbus made as a result of bribes and inducements paid.

We note that the specific counts with respect to which prosecution is deferred and on which profit was calculated were based on "a representative sample of the markets and concerns involved." The Code clearly states that the SFO must be satisfied that the full extent of the wrongdoing has been identified when entering into a DPA. While there are legitimate reasons from an investigative stand-point to manage a such a large case by looking at representative samples, we would be concerned if the SFO in the process were not ensuring that the full extent of the wrongdoing and the full profit derived from this is identified by the company.

Specifically, in global cases spanning such widespread alleged wrongdoing, we urge the SFO to ensure that calculation of profit from which penalty and disgorgement are derived reflects the full scale of wrongdoing. The UK's approach of only calculating profit in relation to specific contracts which may only reflect a representative sample risks creating an incentive for companies that seek to cooperate with the SFO in order to be eligible for a DPA, to select contracts of lesser value to admit wrongdoing on.

We also note the proactive emphasis that the DOJ places on civil forfeiture as part of its penalty regime, and urge the SFO to look more closely at whether proceeds of Airbus' alleged corruption may be within UK jurisdiction and should be forfeited.

4. **Whether the compensation principles are being effectively applied in DPAs**

The Crime and Courts Act clearly establishes that a DPA may impose on companies a requirement to compensate victims of the alleged offence. However, compensation has only been pursued and given in one (the first DPA), Standard Bank.

In both the Rolls Royce and Airbus case, the SFO has not sought compensation in the terms of the DPA. In both cases, the judgement has suggested that this is because compensation orders should only be applied in clear and simple cases. We note, however, that under the terms of a DPA, the SFO is not seeking a compensation order but would simply be imposing a requirement, allowed to them under the Act, to compensate victims.

We are therefore very concerned that this requirement is being interpreted in such a way as to result in no compensation being sought within DPAs. It leads to the unfortunate situation where the more egregious, widespread and complex a bribery scheme, the less likely compensation will be sought despite the greater harm self-evidently caused by such a scheme.

5. **Whether there is enough transparency in the DPA regime to engender public confidence: final approval hearings and compliance with the DPA**

We note that the SFO has taken a different approach to publication of DPAs and particularly the Statement of Facts in each different DPA. We believe it is essential that a more consistent approach to this is agreed and taken. We are particularly disappointed that the Guralp DPA's final approval hearing was heard in private and regard this as a regressive step. There is no reason why reporting restrictions and the delay of publication of the Statement of Facts are not sufficient to ensure that the prosecution of individuals is not compromised.

We are also concerned that the final approval process by UK courts of a DPA could come to be seen as a 'rubber-stamping' exercise. We urge the SFO to ensure that the final approval hearing is heard in open court, with the full reasoning open to the public, to ensure that a judges' scrutiny of the DPA is itself subject to public scrutiny and open justice principles.

Additionally, we are concerned that there is too little transparency around whether the full terms of the DPA have been met by a company. In particular, the question of whether full remediation has been achieved through the course of the DPA is a matter of real public interest. We strongly urge the SFO to ensure that the reports provided to the SFO about whether compliance reforms have been properly implemented are published, with commercially confidential information suitably redacted and that the SFO provide a detailed update when a DPA ends about how its terms have been fulfilled.

6. **Whether Article 5 of the OECD Convention is being sufficiently respected with regard to the consideration of the 'national economic interest'**

We would like to register serious concern about the report commissioned from Deloitte by Airbus about the potential collateral consequences of a prosecution that was put before the Judge and entertained in calculations about the interest of justice being served by a DPA. The Deloitte report, as quoted in the judgement, appears to have described the risk of exclusion from public procurement in the EU based on a theoretical implementation of statute rather than what happens in practice. It does not appear to make clear for instance that there is no legal obligation on a company in the UK to declare a conviction for Section 7 of the Bribery Act, making the risk of discretionary debarment highly unlikely. Additionally,

we are deeply concerned that the report clearly strayed into factors prohibited by Article 5 of the OECD Convention by looking at the costs to the national economy that a prosecution would theoretically cause.

We strongly urge the SFO to look at removing consideration of the impact of a conviction on the ability of a company to get public contracts from the Code of Practice. We note the strong stance taken on this in the Serco DPA. As Mr Justice Davis stated, for the courts to take a stance on a private company 'vis-à-vis public procurement' would involve them "*in a quasi-political decision. That is not the function of a judge in any context and certainly not in the context of the approval of a course which leads to a company not being prosecuted for serious fraud*." We see no reason why the same does not hold true for bribery and corruption.

Since the DPA Code of Practice was introduced, the Public Contract Regulations have been amended to enable procurement authorities to take into account whether a company has self-cleaned. This has made the Regulations significantly more proportionate, but the Code has not been updated to reflect this.

Debarment is a significant consequence of wrongdoing and one that the OECD Convention against Bribery specifically requires State Parties to consider. Where prosecutors make decisions about whether to prosecute based on whether a company may face debarment, there is a risk that they undermine the authority of procurement officials to make such decisions themselves. As you will be aware, the OECD specifically recommended that the UK remove reference to the exclusion from EU public procurement contracts from the Code for Crown Prosecutors in its Phase 3 report – a recommendation that has not yet been implemented by the UK.

We would also like to seek your assurance that in choosing which "representative samples" of markets to investigate the SFO's decision was not influenced in any way by whether those jurisdictions apply debarment for corruption.

Finally, we note that Article 5 is still not legally binding in the UK, and strongly urge you to work with the Attorney General's office to make sure ways are found to ensure that it is.

We look forward to engaging with you constructively about our recommendations and about how the UK's DPA regime can be made as effective as possible.

Yours sincerely

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