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Eighth deferred prosecution agreement approved in the UK

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The UK's eighth deferred prosecution agreement (DPA) has been approved, concluding an investigation commenced by the UK Serious Fraud Office (SFO) in 2013.

The settlement with G4S Care & Justice (UK) Ltd (G4S), a wholly-owned subsidiary of G4S plc, provides some further clarity on the SFO's approach to when DPAs will be agreed and the terms to which it will expect co-operating corporate organisations (and their parent entities) to commit.

The facts

The SFO's investigation related to the provision of electronic monitoring services provided under contracts with the UK Ministry of Justice (MOJ). The settlement relates to various misrepresentations made by G4S about the profits made between 2011 and 2013.

The DPA

Under the DPA, proceedings have been commenced and immediately paused in respect of three counts of fraud under section 2 of the Fraud Act 2006. These proceedings will be discontinued if G4S complies with all the conditions set out in the DPA, namely:

1. Payment of a financial penalty of £38,513,277 and the SFO's costs of £5,952,711;

2. Agreement to an extensive programme of review, assessment and reporting on its internal controls, policies and procedures (performance against which is to be guaranteed by its parent company, G4S plc).

The DPA will be in effect for three years from 17 July 2020.

Setting the financial terms of the DPA, Mr Justice William Davis decided that no disgorgement element was required because the gains made as a result of the misconduct were repaid as part of a civil settlement concluded in 2014.

Key messages

Even delayed co-operation can bring a DPA

Davis J noted in his judgment that G4S's co-operation with the SFO's investigation had been "less than full". Whilst G4S had co-operated from the outset, the level of its co-operation initially was less than after October 2019, when that level "intensified very significantly". However, Davis J made clear that this did not preclude a DPA, stating that "the overall level of co-operation is what matters. Initial reluctance can be dealt with when considering the discount on any financial penalty".

This can be contrasted with the case of Sweett Group, in which the SFO declined to enter into DPA discussions and pursued a successful prosecution. Davis J noted that G4S had acted promptly once reports of wrongdoing were brought to its attention in 2014. In contrast, Sweett Group was found to have "wilfully ignored" reports of corrupt practices.

"Extraordinary co-operation" means full and timely co-operation

In previous DPAs, financial penalties imposed have been reduced by up to 50 per cent where the corporate organisations concerned have been able to show that they have demonstrated "extraordinary co-operation".

In this case, approving a 40 per cent reduction to the financial penalty (the starting point being one third), Davis J commented that G4S's co-operation, whilst "unusually wide" in scope, could not be described as "extraordinary" until October 2019. At that stage, G4S provided access to documents from its internal investigation and a limited waiver of legal professional privilege (LPP). This change of approach came relatively soon after a DPA between the SFO and Serco Geografix Limited was concluded in connection with similar facts (also concerning electronic monitoring contracts with the MOJ) in July 2019. In that case, a discount of 50 per cent was applied to the financial penalty to reflect the company's early reporting and substantial co-operation.

Setting the level of reduction at this level provides some further clarity to corporate organisations assessing when and how to co-operate with a view to concluding a DPA. In this case, the financial penalty imposed was approximately £6.4 million higher than it may have been had the same approach to co-operation been adopted at an early stage. Total investigation and remediation costs will also be higher as a result of the approach taken. The documents released in connection with DPAs to date do not completely reflect the competing legal and commercial considerations for boards deciding how to handle negotiations. However, in this case, the ongoing and contemplated civil litigation in relation to the same facts and a wish to observe the SFO's and the Court's approach to similar cases may have contributed to decisions to "wait and see".

Limited waiver of legal professional privilege and access to materials from internal investigations confirmed as important ingredients of co-operation

As other corporate organisations have in previous cases, from October 2019, G4S provided access to all interviews conducted by solicitors and accountants under a limited waiver of privilege.

The SFO's Corporate Co-operation Guidance, published in August 2019, does not penalise corporate organisations for decisions not to waive privilege, simply stating that such decisions will mean that the factor against prosecution is not attained. As may be expected given the timing of the negotiations in this case, the decision of the SFO to enter into a DPA is consistent with its stated policy.

In *Serious Fraud Office v ENRC* [2018] EWCA Civ 2006, Sir Brian Leveson warned that Courts may consider the effect of an organisation's non-waiver over witness accounts when deciding whether a proposed DPA is in the interests of justice. That warning is reiterated in the Corporate Co-operation Guidance. Whilst not ubiquitous in settlements to date, limited waivers of privilege are now an established feature in many DPAs. Each case in which they appear as a feature underlines that DPAs in which privilege over witness accounts and other internal investigation materials is not waived will be rare.

Further clarity on the "interests of justice" test

Davis J noted that dishonest activity in the course of carrying out business under a public contract results in a substantial adverse impact on public confidence in the process, and that the company had engaged in dishonest conduct over a number of years. He found that this, coupled with the company's co-operation coming late in the day, weighed in favour of prosecution. However, reflecting similar decisions in other DPAs conducted to date, in finding that a DPA was appropriate in the circumstances he noted that these factors were counterbalanced by the company's (albeit delayed) substantial co-operation, remedial measures taken and promised, the fact that the offending conduct occurred under previous directors or managers, the disproportionate consequences of prosecution on various parties including employees and shareholders, and the relative age of the conduct.

Eligibility for procurement processes front of mind during negotiations

As was the case with other companies with which the SFO has recently reached DPAs, including Serco and Rolls-Royce, a significant portion of G4S's revenue is dependent on public procurement. This will have been front of mind for G4S when dealing with the SFO. A conviction for fraud, in these circumstances, would not have resulted in mandatory exclusion from public procurement processes. However, corporate organisations which have agreed DPAs may be excluded from such processes under discretionary criteria set out in the Public Contracts Regulations 2015 in the UK and equivalent legislation in other jurisdictions. Awards of public contracts to both of those corporate organisations (and/or associated companies) since both of those DPAs have been concluded have illustrated that DPAs are not typically by themselves an impediment to continuing to provide services to government.

Consideration of evidence from the UK Government's Chief Commercial Officer about the potential impact of prosecution and conviction on the ability of Serco and G4S to enter into public contracts was a feature of the approval process in respect of the DPAs agreed with both companies. It seems likely that courts will expect to receive such evidence on these points in future similar cases.

Remediation is key

The SFO's decision to enter into DPA discussions, and in particular the finding that to do so was in the interests of justice, rested heavily on significant ongoing remediation efforts undertaken by G4S plc, the parent company. Davis J notes that such efforts are all the more crucial because the subsidiary remains a "substantial trading entity", and that "the company has […] undertaken a root and branch self-cleaning process which is continuing. This [...] factor is of particular significance. It will protect the public in the longer term in a manner more effective than any prosecution could expect to achieve."

Remediation efforts in this case include substantial changes to the company's senior management, the creation of a board Risk Committee, a change in reporting lines and expansion of the group audit function with an increased emphasis on risk assessment.

A guarantee of oversight by a parent company in respect of ongoing compliance was a novel feature of the Serco DPA. Its repetition here demonstrates that the SFO may rely on this model in the future to secure the best possible outcomes from DPAs in terms of ensuring that subjects are good corporate citizens of the future.

Davis J further commented that the remedial steps which have been and will be taken "can only be enforced under the aegis of a DPA" and that "the public interest in the remedial steps is very high".

SFO indicating its commitment to monitorships

Many commentators expected the use of monitors to increase under Lisa Osofsky's directorship given her background as a US federal prosecutor and a monitor in private practice. That expectation increased further in January 2020, when the SFO released guidance on its approach to compliance programmes which foreshadowed the greater use of monitors suggesting that, in certain circumstances, external monitors will be required to assess improvements to compliance programmes prescribed by DPAs.

This case bears out the predictions: an external and independent "Reviewer" (a monitor in all but name) will be appointed, through a process similar to that used in the United States for the appointment of Monitors, to provide what Ms Osofsky referred to as "unprecedented, multi-year scrutiny and assurance."

This represents a departure from earlier UK DPAs, which have allowed corporates to report their progress to the SFO, rather than being subject to active monitoring.