The G4S DPA: a more flexible approach to resolving SFO investigations?

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The degree of oversight that has been imposed in G4S's f44.5 million DPA has seen it described as "unprecedented and more stringent" than any that have gone before it, but companies should not be too quick to assume that the agreement sets a precedent for future cases, write Camilla de Silva and Tom Bowen at Simmons & Simmons in London.

On 17 July 2020, the High Court of England and Wales approved the SFO's eighth deferred prosecution agreement (DPA), a £44.5 million settlement with G4S Care & Justice (G4S C&J), a subsidiary of G4S.

The DPA concerned three counts of fraud perpetrated by G4S C&J against the UK Ministry of Justice (MoJ) following the systematic overreporting of costs by the company between 2005 and 2012 in relation to a prisoner monitoring contract. By doing so, G4S C&J was able to minimise its apparent profits and avoid triggering a mechanism under the contract by which the benefit of cost efficiencies would be shared, thereby extracting further revenue from the MoJ. Following an expression of concern from the MoJ in December 2013, in January 2014 G4S C&J reported to the SFO material which indicated that the company had failed to provide accurate financial reports to the MoJ. A criminal investigation was then commenced. In March 2014, as part of a separate civil process, G4S C&J paid compensation to the MoJ in the sum of £121.3 million. It has now agreed to pay a further £44.5 million – a fine of £38.5 million plus the SFO's full costs – and carry out an extensive corporate renewal programme as part of the three-year DPA.

The DPA represents the culmination of more than six years of investigatory work by the SFO into fraud relating to the provision of electronic monitoring or tagging services to the MoJ, which also led to the DPA entered into between the SFO and Serco Geografix in 2019. An investigation into potentially culpable individuals in the G4S case remains open, and the judge noted when approving the DPA that there was "at least [a] prospect of proceedings against individuals in the foreseeable future".

The G4S case represents a significant development in the use of DPAs by the SFO, as it relied on a broader interpretation of co-operation than has previously been seen. The judge said when approving the DPA that the agency included "unprecedented and more stringent" compliance and oversight measures as conditions of the agreement. The DPA and judgment also provide some interesting insights into how the SFO, the courts and the government treat key suppliers of public services accused of criminal conduct.

Cooperation

Previous DPAs have been contingent on the offending corporate's ability to demonstrate high levels of cooperation, often from an early stage in the SFO's investigation process and often, though not always, involving a self-report, or at least bringing the SFO's attention to issues it would otherwise not have been aware of. The SFO has previously set very high expectations in this regard, as can be seen from the extensive and non-exhaustive list of "good practices" included in its 2019 corporate cooperation guidance.

By contrast, while G4S C&J was described by the SFO as having co-operated with its investigation, the judge found that its level of cooperation was "less than full... until a relatively late stage" and could not be described as "exemplary" until in October 2019 when "the company's level of cooperation intensified very significantly". The court acknowledged that this delayed cooperation, coupled with the seriousness of the alleged offending, "point to the public interest being properly served by the prosecution of G4S C&J". However, the judge ultimately found that the "overall level of cooperation" was what mattered when assessing whether a DPA was appropriate and that an "[i]nitial reluctance to co-operate fully can be dealt with when considering the discount on any financial penalty". Consistent with that, G4S C&J was granted a discount of 40% on its penalty, as compared with the 50% awarded under all but one of the previous DPAs. Reflecting the cooperation that was provided, this was still higher than the 33% discount that would be awarded in the event of an early guilty plea, which is the minimum discount under a DPA. But it is notable that the difference in the level of discount between "exemplary" cooperation and that which was "less than full" is not particularly substantial; the SFO may not have left themselves much room for manoeuvre when dealing with varying levels of cooperation in future DPAs.

Interestingly, another factor that supported the approval of the DPA was G4S C&J's reporting of the fraudulent conduct to the SFO "without delay". Notably, this was not, and was not described as, a self-report; suspicions had already been raised by the MoJ and the SFO were aware of related issues.

Corporate renewal and prosecutorial oversight

The most novel element of the DPA is the extensive corporate renewal programme agreed to by both G4S C&J and its parent, G4S. Significant steps had already been taken prior to the approval of the DPA, including now-standard measures such as "significant personnel changes", enhancements to compliance and auditing structures and the conduct of external expert reviews. More interesting are the further remedial measures that have been agreed and described by the court as "steps which only can be enforced under the aegis of a DPA" in which the public interest is "very high".

First, G4S has undertaken to maintain controls, policies and procedures to ensure fair and accurate accounting and to effectively prevent and detect fraud, theft and bribery throughout its operations including, but not limited to, G4S C&J. Second, both G4S and G4S C&J have committed to appoint and work with an external reviewer in relation to an ongoing programme of corporate renewal. That reviewer will report to the SFO on the extent of G4S and G4S C&J's compliance by the end of this year and prior to the conclusion of the DPA. Following each report, the reviewer will produce a board-certified plan detailing any improvements required to be undertaken by G4S and G4S C&J. Any refusal or failure by G4S or G4S C&J to undertake those improvements may, at the sole discretion of the SFO, amount to a breach of the DPA. Altogether, the court described the intensity of the external scrutiny required as "greater than in any previous DPA".

A more flexible approach for the future?

Corporates may be encouraged by the apparent willingness of the court and the SFO, in this case, to show flexibility around the circumstances of reporting and co-operation when considering whether a DPA is in the interests of justice. Notably, the G4S investigation was a purely domestic matter. It will be interesting to see how the SFO could pursue such a flexible approach on cooperation and self-reporting on one of their (more common) cross-jurisdictional DPAs where it is necessary to work with other foreign enforcement agencies, some of which – notably the US Department of Justice –have more rigid procedures around what constitutes a self-report and cooperation.

The SFO has also been commended for its creativity in adopting an approach to corporate renewal that has a distinctly American character, imposing a scheme similar to a US-style monitorship – perhaps influenced by the fact that the case team was reportedly headed by a secondee from the US Department of Justice. However, it remains to be seen whether this approach will be mirrored in cases which do not involve suppliers of essential public services.

The judge was decisive in rejecting as irrelevant any risk that the company would be debarred from participating in UK public contracts in the event of a conviction for the alleged offences. This was on the basis that such collateral effects "will be unconnected with the fact that the company has entered into a DPA rather than has been the subject of a prosecution". His view was supported by evidence from the Cabinet Office that "whether G4S C&J is convicted as opposed to entering into a DPA is not the issue" – rather, it is concerned with the governance changes made by G4S and, in particular, whether they satisfy the provisions for "self-cleaning" under the Public Contracts Regulations 2015 (by which a company demonstrates its reliability despite the existence of a ground for debarment). This is also borne out by the terms of the DPA, which expressly provide that the agreement does not bind any component of the UK government (other than the SFO).

Nonetheless, the importance of the context for this case is made clear in the judge's finding that the unprecedented level of external scrutiny provided for in the DPA was "necessary and appropriate given the exposure of both G4S C&J and the parent company to government contracts" and "an important factor in providing reassurance to the SFO, to relevant government departments and to the wider public". It is apparent also from both the judgment and the DPA that the Cabinet Office's ongoing engagement with the company on the topic of corporate renewal and its determination, subject to the DPA being approved, that it would be appropriate for government departments to continue to contract with G4S were at the very least influential factors.

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The outcome in this case suggests that, where a corporate has adopted a slow or inconsistent approach to cooperation, the opportunity to impose, oversee and administer extensive compliance and remedial measures offered by a DPA may persuade the SFO and the court that such an agreement better serves the interests of justice than a prosecution and conviction. The ramifications for corporates' strategies when engaging with the SFO could be significant, but companies that are not dependent on public sector procurement or financing should be cautious before assuming that they too would be granted the same opportunity to mitigate the effects of delayed or inadequate cooperation by subsequent commitments to undertake even extensive compliance or remedial measures.

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