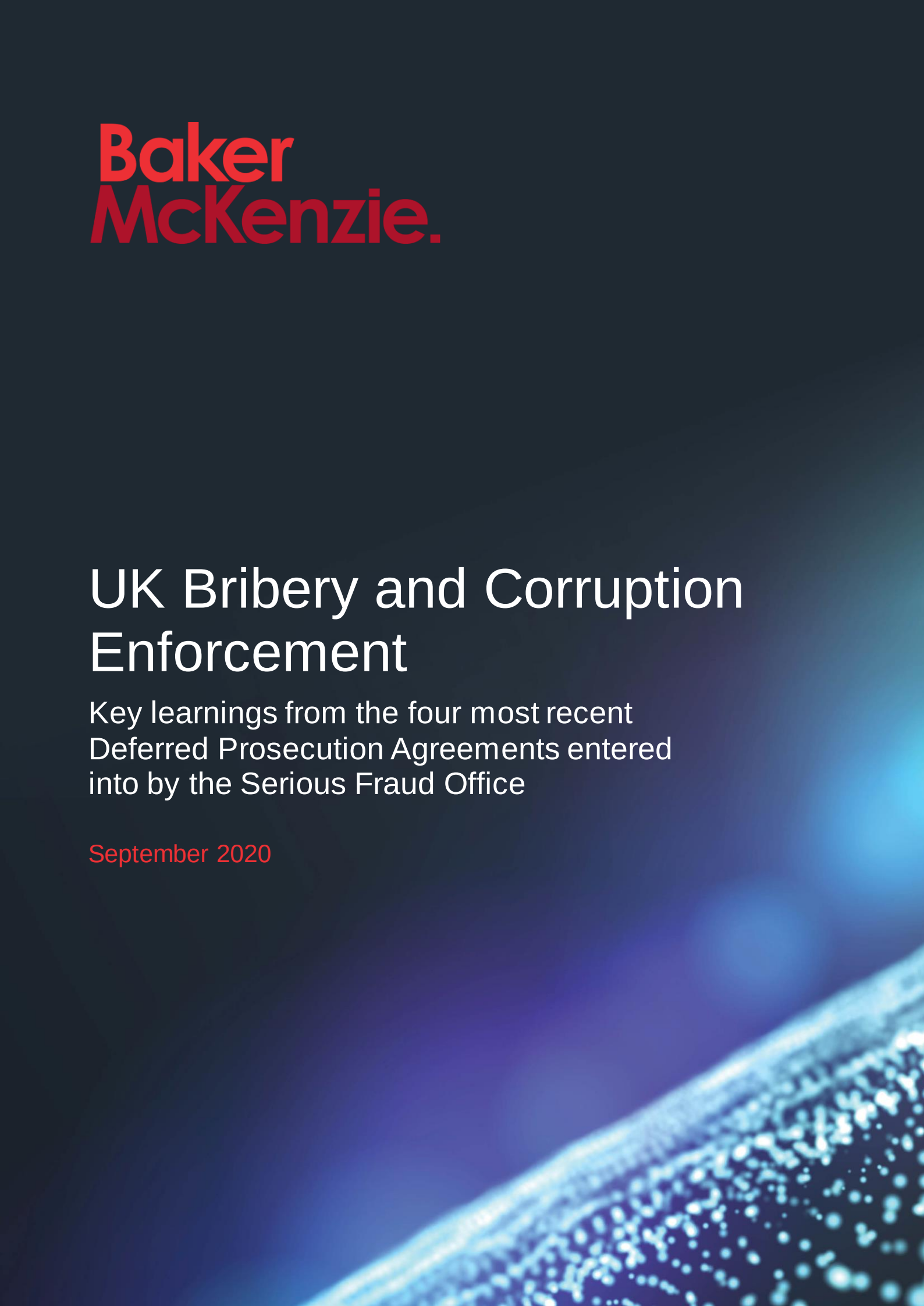
Baker McKenzie.

UK Bribery and Corruption Enforcement

Key learnings from the four most recent Deferred Prosecution Agreements entered into by the Serious Fraud Office

September 2020



Executive summary

- Following the appointment of Lisa Osofsky as Director of the UK Serious Fraud Office ("SFO") in August 2018, there has been a notable uptick in the authority's securing of Deferred Prosecution Agreements ("DPAs") with corporates.
- In securing DPAs with Serco Geografix Ltd (July 2019), Guralp Systems Limited (October 2019), Airbus SE (January 2020) and G4S Care and Justice Services (UK) Limited (July 2020), the SFO has doubled the number of DPAs previously agreed by the authority since the introduction of the DPA regime in 2014. The increase in DPA resolutions is a trend that looks set to continue over the coming years, as the authority works through its case backlog.
- However, alongside these DPA resolutions, the SFO has experienced notable challenges in other areas, including in particular in relation to the prosecution of individuals and the closures of other investigations.
- The DPAs demonstrate the SFO working alongside other international enforcement agencies to both investigate and resolve cases.
- The DPAs also illustrate that the SFO is continuing to focus on the compliance remediation efforts of corporates, and taking creative approaches to ensure that compliance obligations are effected at a group level where appropriate.
- The cases also provide insights as to how the SFO and the Courts will assess whether entering into a DPA is in the interests of justice, weighing factors such as the level and nature of self-reporting, the degree of cooperation provided, and public policy considerations. The DPAs demonstrate that a comprehensive early self-report is no longer a true pre-requisite for a DPA to be secured.
- In respect of the cases focusing on bribery and corruption conduct, the DPAs also illustrate that the engagement of third party intermediaries to assist in the pursuit of business remains a key risk area for corporates.

1. Introduction

Since Lisa Osofsky became Director of the SFO in August 2018, the authority has entered into four DPAs with companies. With the first of these coming in July 2019 and the most recent in July 2020, in little over a year the authority has doubled the number of DPAs that had previously been entered into, since they were introduced in February 2014 under the Crime and Courts Act 2013 ("CCA 2013"). The DPAs since Osofsky's appointment have ranged from the very large (with Airbus being fined almost €1 billion) to the comparatively small (with Guralp Systems Limited only being required to pay a disgorgement of profit of approximately £2 million).

However, whilst the uptick in DPA resolutions represents a success for the SFO, the authority has continued to face other challenges. This has included closures of long-running investigations, and high-profile failures in attempted enforcement of individuals (including in the Barclays Qatar case in particular). The authority has also been subject to criticism in respect of its conduct in the Unaoil investigation, and in respect of delays to investigations caused by the COVID-19 pandemic.

Notwithstanding these challenges, we consider that the increase in DPA resolutions is a trend that is likely to continue. This briefing provides an overview of the legislative framework for DPAs in the UK, summarises key points from the four DPAs since Osofsky's appointment, and then considers the key themes and learnings that can be drawn out regarding the SFO's approach to the use of DPAs under Osofsky. With DPAs now available in respect of a wide range of economic crime offences, companies need to be aware of the trends and the risks, particularly when assessing the merits of self-reporting to the SFO and the expectations they will be subject to where resolution is achieved by way of a DPA.

2. DPAs: The legislative framework

Section 45 and Schedule 17 of the CCA 2013 provide the legislative underpinning for the UK's DPA regime. Further guidance on the application of the regime is set out in Part 11 of the Criminal Procedure Rules 2015 ("CPR 2015"). In brief, DPAs essentially involve the SFO and the company in question agreeing to 'defer' prosecution for particular economic crime-related offences. In turn, the company will commit to adhering to the terms of the DPA for the duration of the agreement. Typically, these terms might involve payment of a financial penalty, disgorgement of profit from the tainted contracts, payment of the SFO's investigation costs, and various forward-looking compliance-related commitments. If these terms are adhered to, the company will not be prosecuted for the offence(s) in question.

DPAs must be approved by the Court (in contrast to the position in the US). Under the UK regime, DPAs are subject to a two-stage test - whereby the prosecution must satisfy the Court that entering into the DPA meets both:

- the evidential stage - i.e. either that:
  - the evidential stage of the Full Code Test in the Code for Crown Prosecutors is satisfied; or
  - there is at least a reasonable suspicion based upon some admissible evidence that the company has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time - so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.
- the public interest stage - i.e. that it is in the public interest for the prosecutor not to prosecute the entity, and instead to enter into a DPA.

Furthermore, under Section 11.3 of the CPR 2015, the application for a DPA must state why:

(i) entering into an agreement is likely to be in the interests of justice, and

(ii) the proposed terms of the agreement are fair, reasonable and proportionate.

The interplay between the factors noted above (i.e. public interest considerations / the 'interests of justice' test / the proportionality of DPA terms) and how they have been considered by the Courts has been a key point of interest in all DPAs agreed by the SFO to date.

The SFO and the Crown Prosecution Service have also jointly published the Deferred Prosecution Agreements Code of Practice ("DPA Code of Practice"), which provides detailed guidance on the factors that the SFO will consider when determining whether a case should be resolved by way of a DPA.

3. DPAs prior to the appointment of Lisa Osofsky

After the introduction of the DPA regime in February 2014, the SFO entered into the following bribery-related DPAs prior to Osofsky's appointment:

- Standard Bank (November 2015) - nearly $26 million in fines and disgorgement of profits, and $6 million in compensation to the Government of Tanzania
- Sarclad Ltd (July 2016) - approximately £6.5 million in fines and disgorgement of profits
- Rolls-Royce (January 2017) - approximately £497.25 million in fines and disgorgement of profits

The Rolls-Royce DPA was particularly high-profile, illustrating the SFO's willingness to investigate complex matters over long time-periods and in multiple jurisdictions, in conjunction with enforcement authorities in other countries (notably, the US Department of Justice, and the Brazilian Ministério Público Federal). In addition to the large total penalty imposed on the company, the SFO also required significant enhancements to Rolls-Royce's compliance programme, and a commitment from Rolls-Royce to engage in full future cooperation with the SFO and other international organisations.

In addition to these bribery-related DPAs, the SFO also entered into a DPA with Tesco Stores Ltd in April 2017 regarding false accounting practices, which required the company to pay a £129 million fine and £3 million investigation costs.

4. Overview of the four DPAs since Lisa Osofsky's appointment

Before considering key learnings from the DPAs secured since Osofsky's appointment, we have summarised below key terms and background to each of the four most recent DPAs.

(i) Serco Geografix Ltd (July 2019)

Relevant conduct	
Statutory basis of offence(s)	▪ Three offences of fraud ▪ Two offences of false accounting
Relevant jurisdictions	▪ UK
Key terms of the DPA	
Financial Penalty	▪ Penalty of £19.2 million – 300% uplift for 'Category A' harm – but 50% discount to reflect cooperation and self-reporting
Disgorgement of profit	▪ £12.8 million compensation already paid to MOJ as part of £70 million civil settlement in 2013 – meaning no further disgorgement required
Costs	▪ Payment of SFO's costs of £3.7 million
Compliance	▪ Agreement by Serco Group to implement group-wide compliance enhancements ▪ Serco Group to report to SFO annually on progress
Duration	▪ 3 years

The DPA entered into by Serco Geografix Ltd ("SGL", ultimately owned by Serco Group Plc) related to false representations made to the Ministry of Justice ("MOJ"), in relation to contracts held by Serco Limited (the direct parent of SGL) for the supply of electronic monitoring equipment to the UK Government. The false representations included Serco Limited informing the MOJ that Serco Limited's anticipated profit margin from the contracts was 14%, whereas an internal version of the presentation referred to a profit margin of 24%. Under the terms of the contract, Serco Limited was required to provide the Ministry of Justice with periodic financial updates, taking into account "*actual revenues and costs incurred*".

SGL is described in the Court's Judgment as being "*the mechanism by which the re-charging exercise was carried out*", with the scheme in question involving SGL charging its parent company Serco Limited for "*£500,000 per month for costs which were complete fabrications".* This enabled Serco Limited to *"retain the profit, 50% of which was believed otherwise would have been clawed back by the Ministry of Justice*".

The Judgment notes that, although Serco Limited was "*the beneficiary of the fraud*", it was not a party to the DPA, since "*no "directing mind" of [Serco Limited] currently can be shown to have been involved in the devising and the putting into effect of the fraud*" (with the establishment of such directing mind involvement being a pre-requisite to establishing corporate criminal liability).

The MOJ initially informed the SFO about issues relating to the overcharging of the relevant contracts towards the end of 2013. While the SFO's initial investigation into this issue did not identify any wrongdoing, Serco Group Plc subsequently identified issues relating to manipulation of accounting in the contracts for the MOJ, and voluntarily reported this to the SFO in October 2013.

At the time of the DPA, SGL had been a dormant company since January 2018, *"with no expectation of future trading*". Since any forward-looking undertakings of a dormant company would therefore be of negligible value, the SFO also obtained extensive undertakings from Serco Group Plc as part of the DPA.

These parental undertakings included far reaching commitments in respect of group-wide compliance programme enhancements, described as a "*multi-year, company-wide Corporate Renewal Programme*" (as discussed further below).

(ii) Guralp Systems Limited (October 2019)

Relevant conduct	
Statutory basis of offence(s)	▪ Conspiracy to make corrupt payments (contrary to s1 Criminal Law Act 1971) ▪ Failure to prevent bribery by employees (contrary to s7 UK Bribery Act 2010 ("UKBA"))
Relevant jurisdictions	▪ Republic of Korea

Key terms of the DPA	
Financial Penalty	▪ No financial penalty imposed
Disgorgement of profit	▪ £2,069,861
Costs	▪ No provision for payment of any costs
Compliance	▪ Compliance review and enhancements ▪ Annual reporting to SFO
Duration	▪ 5 years (to reflect time requirement for payment)

The DPA entered into by Guralp Systems Limited ("Guralp") related to sustained improper conduct in respect of the engagement of a public official (named "Dr Chi") as a third party intermediary in Korea, who assisted Guralp in its sales of seismology equipment in the region between 2002 and 2015. The conduct in question included making numerous improper payments to Dr Chi, and attempts to obfuscate these payments and the nature of the parties' relationship (including through making in-person cash payments, and preparing deliberately misleading invoices). According to the Statement of Facts, during the time in which Guralp engaged Dr Chi, its revenue in Korea grew from £20,146 in 2003 to £1,453,618 in 2015.

The DPA noted that Guralp is a small company with limited financial resources, and which supplies products that provide an important public service. In light of the fact that a significant financial penalty could close the company, the SFO only imposed a requirement for Guralp to disgorge its profits, over an extended repayment period - and no specific financial penalty was imposed.

Guralp reported the conduct to the SFO in October 2015, after conducting an internal investigation.

(iii) Airbus SE (January 2020)

Relevant conduct	
Statutory basis of offence(s)	▪ Five counts of failure to prevent bribery by associated persons (contrary to s7 UKBA)
Relevant jurisdictions	▪ SFO investigation = Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana – Parallel investigations by authorities in France (China, Colombia, Nepal, South Korea, UAE, Saudi Arabia, Taiwan and Russia), and the US (China; ITAR offences in a number of jurisdictions)
Key terms of the DPA	
Financial Penalty	▪ €398,034,571 – Category A uplift of 300% for counts 1 - 4; Category B uplift for count 5 – 50% discount to reflect "*exemplary cooperation and remediation*"
Disgorgement of profit	▪ €585,939,740
Costs	▪ €6,989,401
Compliance	▪ Far-reaching enhancements already made since becoming aware of matters; further forward-looking commitments ▪ No appointment of compliance monitor (although monitor imposed as part of French settlement)
Duration	▪ 3 years

The SFO's DPA with Airbus SE ("Airbus") is the largest DPA that the SFO has secured to date. Under the terms of the DPA, Airbus agreed to pay €991 million to the SFO, which formed part of a total global fine of €3.6 billion. As part of this global settlement, Airbus entered into agreements with each of the SFO, the US's Department of Justice ("DOJ") and Department of State ("DOS") and France's Parquet National Financier ("PNF").

The SFO's investigation focused on Airbus's failure to prevent bribery by Business Partners (which the Judgment notes were "*sometimes referred to as intermediaries, or agents*"). The conduct identified included:

- the appointment of third party intermediaries with close links to certain key decision-makers in respect of particular sales of aircraft to airlines or government agencies;
- payments (or offers of payments) to these individuals to influence these decisions and attempts to disguise either the identity of the individuals or the nature of the payments; and
- payments made directly to the key decision-makers or their family members as rewards or incentives for orders of Airbus aircraft.

Airbus initially reported the conduct in question to the SFO in April 2016. Airbus made this report at the same time as UK Export Finance ("UKEF"), the UK's export credit agency, after UKEF informed Airbus of its obligation to report suspicions of corruption to the SFO.

(iv) G4S Care and Justice Services (UK) Limited (July 2020)

Relevant conduct	
Statutory basis of offence(s)	▪ Three offences of fraud
Relevant jurisdictions	▪ UK
Key terms of the DPA	
Financial Penalty	▪ Penalty of £38.5 million – 300% uplift for 'Category A' harm – with 40% discount to reflect cooperation and self-reporting
Disgorgement of profit	▪ £21.4 million compensation already paid to MOJ as part of 2014 £22.1 million settlement - meaning no further disgorgement required
Costs	▪ Payment of SFO's costs of £5.9 million
Compliance	▪ Agreement by G4S Plc to implement group-wide compliance enhancements ▪ Imposition of external compliance monitor
Duration	▪ 3 years

The DPA entered into with G4S Care and Justice Services (UK) Limited ("G4S CJS") relates to the same matter concerning the UK MOJ as the Serco DPA, and involves similar conduct around providing misleading indications of profit margins to the MOJ.

As with Serco, the MOJ initially informed the SFO in December 2013 about potentially fraudulent conduct relating to the contracts. The SFO's initial investigation did not identify any wrongdoing. However, the Court's Judgment notes that G4S CJS subsequently self-reported the conduct to the SFO in January 2014, after the MOJ had raised concerns to G4S CJS. The Judgment also notes that, after this self-report, G4S CJS broadly showed limited cooperation towards the SFO. This changed in October 2019 (shortly after the Serco DPA was secured), after which point the level of cooperation from G4S CJS "*intensified very significantly*".

Although G4S CJS remains a trading entity (in contrast to the dormant SGL in Serco, as discussed above), the SFO also obtained far-reaching undertakings from G4S Plc, the parent company of the group, as part of the DPA.

5. Key learnings from the four recent DPAs

1. Increasing assertiveness of the SFO

The fact that four DPAs have been agreed in little over a year - including the record-breaking Airbus settlement - is indicative of a growing assertiveness on the part of the SFO. As noted in the opening paragraph of the Court's Judgment in respect of the Airbus DPA, the total amount of the financial sanction "*is greater than the total of all the previous sums paid pursuant to previous DPAs and more than double the total of fines paid in respect of all criminal conduct in England and Wales in 2018*".

The SFO's increasing assertiveness has been further manifested in the following ways:

- International collaboration: In Airbus, the SFO successfully coordinated its investigation with French and US authorities, over the course of a number of years and in multiple jurisdictions. In particular, the SFO cooperated significantly with the French PNF, with the two agencies forming a Joint Investigation Team ("JIT"). The purpose of such cooperation was to set up a global investigation strategy, facilitate the collection of evidence worldwide and ensure information sharing between prosecuting authorities. The investigating authorities effectively partitioned jurisdictions and issues to investigate, working in close collaboration with one another. The SFO was also able to work successfully with the French authority to ensure that the requirements of the French Blocking Statute were adhered to. As a result of this collaborative enforcement approach, the fine of €991 million formed part of a larger global settlement of €3.6 billion - with Airbus also agreeing to pay French authorities a total penalty of approximately €2.1 billion, and US authorities a total penalty of approximately €526 million.

  The SFO also worked with other international authorities in Guralp, making requests for mutual legal assistance to two overseas jurisdictions.

- Investigatory steps: The DPAs since Osofsky's appointment have further illustrated that the SFO is willing to extensively investigate misconduct (and what expectations the SFO will have for companies when conducting their own investigations).

  In particular, in Airbus the SFO's investigation as part of the JIT (with the French PNF) was described in the Court's Judgment as being "*vast in scale and in scope*". Airbus was allowed to conduct its own investigation into Business Partner relationships and present findings to the JIT. The investigation covered "*all of the [Business Partners] engaged by the Airbus divisions until 2016 - more than 1,750 entities across the world*". More than 30.5 million documents were collected, from over 200 custodians. However, the SFO was not just a passive recipient of this information - and instead "*interrogated and validated the Airbus narrative as well as conducting its own investigation as it was mindful of the need to identify the full extent of the offending*".

  In Guralp, after the company had self-reported the conduct in October 2015, the SFO embarked on its own "*independent and comprehensive*" investigation. This included nine interviews under caution, 24 witness interviews, and 51 requests for information under s2 of the Criminal Justice Act 1987. These figures are notable when placed within the context of the relatively small scale of the case.

- Jurisdictional assertiveness: A non-UK company will be jurisdictionally within scope of the offence of failure to prevent bribery by associated persons (under s7 of the UKBA) if it carries on a business or part of a business in the UK. In Airbus, the SFO took the position that Airbus was within jurisdictional scope, despite the facts that (i) it is a French / Dutch domiciled company, and (ii) the bribery conduct in question took place overseas through overseas subsidiaries (with only one count being connected to subsidiaries in the UK, which was the issue that prompted UKEF to inform Airbus of its concerns and prompted the reporting to the SFO). The SFO's position was that UK jurisdiction was established by virtue of the fact that part of Airbus's business was carried on in the UK (in particular through the operations of two UK subsidiaries which were "*subject to the strategic and operational management*" of the parent company). In the context of its cooperation with the SFO, Airbus was willing to accept this (arguably expansive) interpretation of the jurisdictional test and the related associated person analysis. This acceptance was then noted by the SFO as a key factor of the company's cooperation - with the Court's Judgment noting that Airbus's cooperation included that it had "*accepted that the Bribery Act had provided the SFO with*

extended extraterritorial powers and potential interest in the facts post 2011", and had "*reported conduct which had taken place almost exclusively overseas, which […] is an exemplary step for a French and Dutch domiciled company*".

- Group-wide compliance enhancements: As discussed further below in point iii, the SFO has also become increasingly assertive in requiring forward-looking compliance enhancements to apply to the whole company group. Where this cannot be achieved through the corporate entity that is the party to the DPA, such as the SFO was able to achieve in Airbus, it has looked to more innovative approaches to achieve the same end, such as in Serco and G4S.

In parallel with these DPA resolutions, it should also be noted that the SFO has closed a number of investigations. Although the high-profile closures of some investigations has caused controversy (including the closures of investigations into Rolls-Royce (individuals) and GlaxoSmithKline (corporate) in February 2019, and more recent closures of investigations into ABB Ltd (May 2020) and De La Rue (June 2020)), such closures may also free up the time and resources to allow the SFO to secure further DPA resolutions going forward.

In addition to the DPAs agreed over this period, the SFO has also taken bribery-related enforcement action outside of a DPA context - against both F.H. Bertling (fined £850,000 in June 2019 for bribery conduct in Angola) and GPT (charged with corruption in July 2020).

2. Interests of justice test: Self-reporting, cooperation, and public procurement considerations

The four DPAs since Osofsky's appointment have been particularly instructive in terms of how the SFO and the Courts will consider the 'interests of justice' test, and the proportionality of DPA terms. Although the identities of the relevant Judges have changed in the last four DPAs (compared to the first four DPAs overseen by Sir Brian Leveson QC) and there have been some differences in judicial approach, a number of consistent themes nonetheless cut across the Judgments. We have considered three key points in this analysis below:

- Self-reporting: During the tenure of David Green as Director of the SFO, the organisation's messaging to corporates was clear: without a self-report, a company should not expect a DPA. Although Rolls-Royce had managed to secure a DPA in January 2017 without a self-report, the SFO presented this as an anomaly, with a DPA being justified in that case on account of Rolls-Royce's extensive cooperation. In early 2018, David Green set out the SFO's position: "*No self-reporting - no DPA*".[1]

  While all four of the DPAs since Osofsky's appointment have involved some degree of self-reporting, it is likely that three of these cases would not have met the previous standard of what constitutes a genuine self-report, as outlined by David Green at the outset of the DPA regime. In the cases of Serco and G4S, the SFO initially became aware of the overcharging issues after being informed of this by the UK MOJ - even though both companies subsequently self-reported the actual fraud-related conduct that was the subject of the DPAs. In Airbus, the company and UKEF reported the issues at the same time to the SFO, after UKEF had informed Airbus of its obligation to report suspicions of corruption to the organisation.

  Arguably, the four DPAs have conclusively established that a DPA can still be available absent a self-report meeting the expectations outlined by David Green, if sufficient cooperation is subsequently shown. Whilst a genuine self-report undoubtedly remains an important consideration in securing a DPA, it now seems that the Courts will consider the existence of a self-report (whether truly genuine or otherwise) as a factor of cooperation more broadly - with the Court's Judgment in Airbus noting that there is "*no necessary bright line between self-reporting and co-operation*".

[1] https://globalinvestigationsreview.com/article/1166243/david-green-no-self-report-%E2%80%93-no-dpa?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=9238267_JAC%20Headlines%2005%2F03%2F2018&dm_i=1KSF,5I0AJ,NRRNTA,LBTG3,1#.Wp8XmrYXa5A.mailto

- Cooperation: The reduced emphasis on self-reporting as a pre-requisite for a DPA has only enhanced the focus on cooperation and what it means, particularly given the need for corporates to secure benefit through this route where a genuine self-report has not taken place.

  In particular, Airbus demonstrated "*exemplary*" cooperation with the SFO's investigation. Notably, the SFO appears to have given credit to Airbus for:

  – the prompt and timely provision of information that would otherwise not have been known to the SFO, including material from overseas;

  – acceptance of the SFO's jurisdictional reach under the UKBA (as discussed above);

  – the use of technology assisted review to expedite the investigation;

  – provision of material, including interview transcripts, under a limited waiver of privilege, as well as a schedule of documents withheld on the basis of privilege and the reasons why; and

  – agreeing its approach to internal investigation interviews with the SFO and the PNF.

  The extent of this cooperation allowed the Court to conclude that the DPA was in the interests of justice, despite the egregious nature of the conduct over an extended time period.

  While Serco, Guralp and Airbus all involved 50% discounts to financial penalties, G4S CJS only received a 40% discount. This reflects the "*less than full co-operation*" provided by the company, between the time of the self-report and October 2019. The Court's Judgment notes that it was only after this point that the "*level of co-operation intensified very significantly*" - including through providing access to all interviews conducted by solicitors and accountants (with a limited waiver of privilege), responding voluntarily to the SFO's investigative requests, providing the SFO with digital and hardcopy material, and assisting the SFO to obtain or trace third party evidence and material.

  In considering whether this limited initial cooperation meant that a DPA would not be in the interests of justice, the Court noted that "*the overall level of co-operation is what matters*". Rather than rendering a DPA unobtainable, the Court instead stated that "*[i]nitial reluctance to co-operate fully can be dealt with when considering the discount on any financial penalty*".

  The fact that G4S CJS was still able to secure a DPA in the absence of a genuine self-report and less than full-cooperation through the majority of the investigation arguably represents a further lowering of the 'interests of justice' hurdle. Furthermore, it should be noted that the 40% discount awarded to G4S CJS is still higher than what would otherwise be granted for a guilty plea.

- Public procurement considerations: The four DPAs since Lisa Osofsky's appointment have grappled to varying degrees with considerations around the impacts of convictions for bribery / fraud offences on the companies in question - including in particular whether this is likely to lead to the companies suffering mandatory or discretionary debarment from public sector contracts in the UK or overseas.

  The approach of the Court to this question has to some extent evolved over the course of these DPAs. In Serco, Mr Justice Davis strongly stated that this issue should not sway the Court's assessment:

  "*For me to take a course which would amount to a favourable determination of the position of a private company vis-à-vis public procurement would involve me 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.*"

  Nonetheless, despite this statement, the impact of debarment from public sector contracts does seem to have been considered by the SFO and the Court in subsequent cases. For example:

  – In Airbus, the Court considered in detail the wider effects that such a debarment would have, supported by financial analysis by Airbus of the value of contracts that could be precluded if the company was debarred. The Court considered risks relating to "*the financial position of Airbus, its financing arrangements, and to the internal health of the company caused by the loss of key revenue streams and the loss of market presence in the duopolistic marketplace in which Airbus operates*". The Court also considered the findings of an external report commissioned by Airbus, which noted that debarment could put many thousands of jobs at risk in the UK, US, Germany, France and Spain - and could "*lower the Gross Domestic Product in each of those countries by over €100 billion*".

– In G4S, the Court noted that the company "*depends very substantially on public contracts within the United Kingdom*". The Court then referred to witness evidence from the Chief Commercial Officer within the MOJ, which had stated that "*exclusion of the company would have a detrimental effect on the market for the provision of prisoner and escort services and of new prisons*".

While there therefore remains some ambiguity around the extent to which Courts will place weight on public procurement considerations, these cases illustrate that, for companies seeking a DPA, there is scope for advocacy in terms of highlighting the detrimental effects of any prosecution.

3. Compliance enhancements: Focus on a group-wide approach

Compliance remediation continues to be a key pillar alongside self-reporting and cooperation in securing a DPA, as reflected in the DPA Code of Practice. The DPAs broadly illustrate the SFO taking into account (i) the state of the company's compliance programme at the time of offending; (ii) the current state of the compliance programme; and (iii) how the compliance programme could further evolve going forward.

In respect of compliance enhancements going forward, the SFO has adapted its approach across the last four DPAs. Sometimes this goal will be achieved through the identity of the company being prosecuted; where this is not possible it seems the SFO will adopt the Serco / G4S model, to ensure that forward-looking compliance commitments apply at a group level - and not just to the subsidiary entity involved in the misconduct. In Serco, the undertakings provided by Serco Group Plc effectively negated the fact that the actual Serco subsidiary that had been involved in the misconduct (SGL) was now a dormant entity with no intention of trading in future. However, in G4S, similar group-wide compliance undertakings were provided by G4S Plc (the parent company of the group) - despite the fact that G4S CJS remains a trading entity. In G4S, the fact that the parent company "*has implemented and will continue to implement a far-reaching programme of corporate renewal*" is seen as a key factor in the DPA being in the interests of justice (and therefore mitigating the aforementioned issues around G4S CJS's limited initial cooperation).

Compliance enhancements discussed in the four DPAs are broad, and it is beyond the scope of this briefing to consider these points in detail. However, we have summarised certain key points below around the importance of compliance monitoring and oversight (both from an internal and external perspective).

- Importance of oversight committees: The Airbus Judgment provides details of internal committees that were responsible for "*reviewing the use of [Business Partners] and payments to third parties and [Business Partners]*". However, it later emerged that "*some committee members were aware of and/or involved in the material wrongdoing*". A significant amount of the misconduct in the Airbus case appears to have derived from these control failings, and the lack of an effective independent oversight committee in respect of engagements with third parties. The SFO's DPA with Airbus notes that the company has sought to address this since 2015, by "*creating a sub-committee of the Board, titled the Ethics & Compliance Committee to provide independent oversight of the company's Ethics and Compliance programme*".

  Similarly, in G4S, one of the key compliance enhancements referred to in the DPA was that G4S Plc had "*[c]reated a Board Risk Committee - separate from G4S plc's Audit Committee - to provide risk-related oversight of G4S plc's most significant contracts and most material investment and commercial decisions*".

- Imposition of external monitors / compliance scrutiny: No monitor was imposed in the Airbus case, although the Court did note that Airbus would be subject to a monitor imposed by the French PNF. However, in G4S, the SFO imposed an external reviewer on the company group ("*to review and to report on the compliance measures being taken by those companies*"). The Court's Judgment notes that "*[t]he intensity of the external scrutiny as set out in the DPA is greater than in any previous DPA*".

  This outcome is consistent with the DPA Code of Practice, which outlines the considerations that go to determining whether a monitor should be imposed, noting the lateness of the cooperation and the later stage that any remediation will therefore have reached. This case also highlights the importance for corporates heading towards a DPA to invest in external verification of compliance programme remediation activities as a way of reducing the risk of a monitorship at the point of a DPA.

4. Third parties remain a key risk area in bribery cases

Both Guralp and Airbus highlight the fact that the appointment and engagement of third party intermediaries remains a key bribery risk area for companies. In both cases, the investigations focused on the engagement of third parties and the companies' respective failings in implementing an effective control framework in respect of this. Furthermore, both DPAs involved the companies making significant forward-looking commitments around engagement of third parties in future. In particular:

- In Guralp, the improper conduct in question related to the engagement of Dr. Chi, which the Court's Judgment refers to as a "*corrupt relationship*". Over the course 12 years, Guralp made payments of more than $1 million to Dr. Chi. This included eight separate cash payments (including in-person cash drop-offs at Heathrow Airport) and bank transfers. The Judgment refers in detail to individuals at Guralp agreeing on "*deliberately opaque*" wording for Dr. Chi's invoices. The Statement of Facts also notes that Dr. Chi "*was particularly keen to keep the fact that Guralp was making payments to him a secret from his employer and his colleagues*". In return for these payments, Dr. Chi's assistance included (i) recommending Guralp's products to other public and quasi-public companies in Korea; (ii) advising on pricing strategy and public sector procurement in Korea; (iii) influencing technical specifications required of seismic equipment so that they aligned with the specifications of Guralp's equipment; and (iv) providing confidential information to Guralp, including "*a presentation provided by one of GSL's competitors to [the Korea Institute of Geoscience and Mineral Resources] and details of a rival company's pricing policy*".

  The Court's Judgment notes that, after reporting the issues concerning Dr. Chi to the SFO, Guralp then undertook a review of other distributors. Consequently, "*GSL's relationship with five distributors in different locations was terminated following compliance concerns raised either during the investigation by the outside law firm or in the course of the SFO's investigation*". The Judgment notes that these steps "*were taken on a safety-first basis without clear evidence of any criminal conduct*", and "*despite the fact that GSL had conducted a significant amount of business with the distributors*".

  Furthermore, under the terms of the DPA, Guralp's Compliance Officer is required to report to the SFO on an annual basis on the company's progress in implementing anti-bribery and corruption policies and procedures. As part of this annual report, the Compliance Officer must inform the SFO of (inter alia):

  – "*[c]ircumstances where third party intermediaries (such as agents, distributors, consultants and local partners) are involved with transactions in which GSL participates in a consortium or any other form of association in order to conduct its operations, irrespective of the existence of any formal contractual or direct payment relationship between those parties and GSL*"; and

  – "*[the] extent and results of any due diligence performed on third party intermediaries (such as agents, distributors, consultants and local partners)*".

- In Airbus, both the internal investigation by Airbus and the subsequent investigations by the SFO (including as part of the JIT with the French PNF) heavily focused on engagement of third party intermediaries / "*Business Partners*". As previously noted above, the JIT's investigation *"covered all of the [Business Partners] engaged by the Airbus divisions until 2016 - more than 1,750 entities across the world".* The JIT' then focused on *"about 100 [Business Partners] for which red flags had been identified*".

  The Court's Judgment further notes that an aspect of Airbus's "*exemplary*" cooperation was that it "*stopped using [Business Partners] to assist with sales in the Commercial Division, and greatly restricted the use of [Business Partners] in other divisions, leading to a 95 percent reduction across the Group by 2015*".

  Furthermore, the DPA notes that a key element of Airbus's compliance enhancements since 2015 has included "*the prohibition on the use of external consultants in any commercial aircraft sales campaign*".

6. Conclusion

The DPAs that the SFO has entered into since the appointment of Osofsky in August 2018 demonstrate that the authority is becoming more assertive in respect of DPA resolutions, and increasingly demanding in the compliance enhancements that it will expect as part of a DPA. In addition, the DPAs illustrate the SFO taking a more flexible approach towards self-reporting as part of its evaluation of cooperation by corporates.

Notwithstanding these successful DPA resolutions, the SFO has continued to be subject to criticism in respect of its approach to investigations and enforcement. Companies should be aware of the risks and the SFO's enforcement record and trends when considering whether engaging with the SFO with a view to securing (in the worst case) resolution by way of DPA is the right step to take.

Authors

Tristan Grimmer
Partner
+ 44 20 7919 1476
tristan.grimmer@
bakermckenzie.com

Charles Thomson
Partner
+ 44 20 7919 1879
charles.thomson@
bakermckenzie.com

Julian Godfray
Associate
+ 44 20 7919 1378
julian.godfray@
bakermckenzie.com

www.bakermckenzie.com

Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 65 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

Baker & McKenzie International is a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner or equivalent in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee similar outcomes.

Baker McKenzie.