

## Serco DPA: individuals, and corporate parental responsibility, in the spotlight

By Oliver Powell  
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**THE POSSIBILITY** of individual prosecutions of senior executives for corporate white-collar crime has arisen once more as a result of a Deferred Prosecution Agreement reached between a subsidiary of multinational outsourcing specialist Serco Group plc (“**Serco Group**”) and the Serious Fraud Office (“**SFO**”).

The DPA, the fifth to be agreed in the UK, also heralds the likelihood that in future parent companies may be expected not just to take responsibility for wayward subsidiaries, but may need to extend remediation group-wide if a DPA is to be in the public interest.

SGL agreed to pay a fine of £19.2m, and the SFO’s costs of £3.7m. Serco Group agreed to implement wide-ranging compliance changes across not just SGL but the entire group, and to report to the SFO annually on these changes throughout the three-year life of the DPA.

The DPA arises from the SFO’s investigation of Serco Geografix Ltd (“**SGL**”), a UK subsidiary of Serco Group which for several years provided electronic tagging services to the Ministry of Justice (“**MoJ**”). SGL took responsibility for three offences of fraud and two of false accounting. The offences arose because SGL misled the MoJ for three years to 2013 about how much profit it was making from its provision of electronic tagging, so as to stop the MoJ from using that information to cut the cost of the project to the taxpayer. Serco Group discovered the behaviour at SGL in the course of investigations connected to another SFO enquiry, which has now closed without charge, and self-reported its findings.

In approving the DPA on Thursday 4 July 2019, Mr Justice Davis described this as a “*quite deliberate fraud*” in which SGL had “*cooked the books to allow [the group] to retain the profit... which would otherwise have been clawed back by the MoJ*”.

### **Individual prosecutions**

Perhaps more significantly, Mr Justice Davis’s judgment noted that the evidence “*demonstrates that individuals within SGL who can properly be described as directing minds of the company were party to the scheme... They discussed by email how the fictitious charges should be described.*”

The force of the judgment’s language raises questions about whether the SFO will proceed to prosecutions of individuals, a topic of interest given the lack of individual prosecutions arising from DPAs to date. In particular, observers will recall that the SFO investigation of Rolls-Royce (the third DPA) closed with no individual charges, while in its prosecution of three senior executives of Tesco following the fourth DPA, its case against two of them was thrown out and the case against the third was abandoned.

The Statement of Facts in the Rolls-Royce matter had identified senior executives by role, whereas the Tesco statement went so far as to name those who were ultimately prosecuted.

Following Tesco, SFO joint head of fraud Hannah van Dadelszen said in an interview that the agency would seek to learn from the experience, particularly with a view to how to prove the requisite knowledge in individuals without having to rely on inference.

It will therefore be instructive to see if Mr Justice Davis’s comments about documentation in his judgment foreshadow more robust evidence in any prospective SGL-linked individual prosecution.

### **Parental responsibility**

The treatment of Serco Group as a whole in this DPA is likely to be of note. SGL is now a dormant firm. Its direct owner was Serco Ltd (“**SL**”), which remains active in UK public procurement and is a Serco Group subsidiary. Serco Group has given

the SFO undertakings that the remediation and other obligations adopted by SGL will apply to the enterprise as a whole.

Mr Justice Davis called Serco Group's enterprise-wide obligations "a key component of the DPA", without which "it is very unlikely that the goals of a DPA could have been achieved in the circumstances of this case". Admittedly, those circumstances are of a moribund corporate defendant. However, Mr Justice Davis described this as "an important development in the use of DPAs". It seems fair to anticipate, therefore, that group-wide obligations may well feature in future DPAs as well.

#### **Other points of interest:**

- SGL's fine was calculated on the basis of its benefit of £12.8m. Following the Sentencing Guidelines for corporate fraud, this was subject to a 300% uplift for Category A harm - the firm having engaged in deliberate wrongdoing over a long period - but then discounted by 50% to reflect its co-operation and self-reporting. Mr Justice Davis indicated that this figure should now be seen as the standard discount for self-reported DPAs with proper co-operation.
- Serco Group had already paid a significant civil settlement to the MoJ. The element of that settlement which related to the criminal behaviour exceeded the profit, so the SFO argued - and the Court agreed - that no further disgorgement or compensation was required.

- The SFO had suggested to the Court that the DPA was proportional in part because a conviction might disallow future involvement by SL in public procurement. Mr Justice Davis took exception to this proposal, saying that had that been the only reason for the DPA he would have turned it down. This, he said, was a matter for public administration, not for the justice system.
- As part of its co-operation, Serco Group had agreed not to mount an internal investigation. Instead it engaged an external law firm to undertake a full document review and report its findings to the SFO, and at least partially waived privilege.

#### **Conclusion**

As with all DPAs to date, both the judgment and the accompanying statement of facts will repay careful and detailed reading.

Not only with regard to individual prosecutions and parent-subsidary responsibility, but more broadly, this DPA continues the tradition set by Sir Brian Leveson P - who has given the judgment on each of the four preceding DPAs - of providing material which codifies and clarifies the application of DPAs.

*For the reader's ease of reference: the SFO's [press release](#) is accompanied by a [zip file](#) containing the DPA itself and Serco Group's accompanying undertaking. [The judgment](#) can be downloaded separately.*

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#### **The Authors**

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#### **Postscript**

**Michael Bowes QC** was leading counsel instructed on behalf of the Serious Fraud Office in *SFO v Serco Geografix Limited*. He is Head of the Business Crime Group at OTC. He specialises in business crime, civil fraud, financial services and international sanctions. He acts for corporate clients and senior managers in global investigations and for the SFO, FCA, CMA and Lloyd's of London. He is instructed in several current major financial cases, both civil and criminal and in several substantial cross-border corruption investigations. He advises companies in respect of US and EU sanctions. He is a co-author of the *Practitioner's Guide to Global Investigations* (GIR, 2nd ed.2018).

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