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First UK Deferred Prosecution Agreement — How High is the Bar?

Introduction

On 30 November 2015, Standard Bank plc ("Standard Bank") (now known as ICBC Standard Bank plc) became the first company to enter into a Deferred Prosecution Agreement ("DPA") with the UK Serious Fraud Office ("SFO"). The DPA received final court approval at a hearing presided over by Lord Justice Leveson.

Agreeing the very first DPA — and its first disposal of the Section 7 offence — with a multinational bank represents a significant step forward for the SFO.

Previous *Kirkland Alerts* discussed the details of the UK DPA regime.[1] A DPA is a court-approved agreement between a designated prosecutor and a commercial organisation to suspend criminal proceedings for a defined period of time. The organisation is required to comply with various terms throughout the life of the DPA in order to secure a complete discontinuance of the criminal allegation. As set out in the Deferred Prosecution Agreements Code of Practice (the "Code"),[2] a DPA will only be offered when a DPA, rather than a criminal prosecution, is in the public interest.

The Standard Bank DPA also represents the first disposal by the SFO of the Section 7 offence under the UK Bribery Act 2010 (the "Bribery Act"). In short, the SFO alleged that Standard Bank failed to prevent bribery by "associated persons" — namely Stanbic Bank Tanzania Ltd ("Stanbic") (Standard Bank's sister company in Tanzania) and Stanbic's CEO and Head of Corporate and Investment Banking.

Agreeing the very first DPA — and its first disposal of the Section 7 offence — with a multinational bank represents a significant step forward for the SFO. The case provides a number of potentially important insights on what might be viewed as the SFO's high expectations of organisations in respect of the DPA regime and compliance procedures more generally.

Facts of the case

The facts are fully set out in both Lord Justice Leveson's Judgment and the agreed Statement of Facts.[3]

The relevant conduct took place in 2012 and 2013 — prior to the acquisition by the Industrial and Commercial Bank of China ("ICBC") of a majority 60% stake in the company from South Africa's Standard Bank Group Ltd ("Standard Bank Group"). In 2012, the Government of Tanzania granted Standard Bank and Stanbic the joint mandate to raise funds by way of a sovereign note private placement.

The combined fee initially proposed by Standard Bank and Stanbic was 1.4% of the gross proceeds raised. However, by August 2012, negotiations had stalled. Matters

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did not progress until the proposed fee to be paid by the Government was increased to 2.4% in order to provide for 1% to be paid to a "local partner" — Enterprise Growth Market Advisers Limited ("EGMA"). One of EGMA's three shareholders and directors was at all relevant times Commissioner of the Tanzania Revenue Authority and a serving member of the Government of Tanzania. Another Director had been CEO of the Tanzanian Capital Markets and Securities Authority between 1995 and 2011. In his Judgment, Lord Justice Leveson found simply that "*[t]he only inference*" was that the underlying arrangement with EGMA was corrupt.

Following the introduction of EGMA, the deal progressed quickly and completed in March 2013 with a gross fundraising of US $600 million — resulting in a fee of US $1 million being paid to EGMA. Within days, most of the money had been withdrawn in large cash amounts and has not been traced. Concerns about the withdrawals were the trigger for internal escalation and, in very short order, Standard Bank's self-report to the SFO.

The agreed particulars of the Section 7 offence included in the DPA are that Standard Bank failed to prevent persons associated with it — Stanbic and two senior Stanbic executives — from committing bribery with the intention to benefit Standard Bank. The predicate bribery committed by the associated persons is articulated in terms of the Section 1 Bribery Act offence, namely: (a) promising and/or giving EGMA 1% of the monies raised; and (b) intending thereby to induce unspecified representatives of the Government of Tanzania to perform improperly a relevant function or activity — namely showing favour to Standard Bank and Stanbic.

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DPA Terms

As the approved DPA is publicly available,[4] we do not repeat its terms in detail. However, in summary, the key terms are:

(a) Term: 3 years.

(b) Financial: payment of $6 million compensation to the Government of Tanzania plus $1.046 million in interest; payment of a financial penalty of $16.8 million; payment of the SFO's costs of £330,000; and disgorgement of profits of $8.4 million.

(c) Full cooperation by Standard Bank with any future investigations by the SFO or other agencies.

(d) The appointment of PwC to report and make recommendations in relation to, in particular: third-party relationships and anti-bribery and corruption training.

Commentary

The case provides potentially helpful guidance and insights in a number of respects.

<u>Self-Reporting and Co-Operation</u>: As provided by the Code, one of the key public interest factors tending in favour of a DPA is self-reporting to the SFO "*within a*

reasonable time" of the offending coming to light and adopting a "*genuinely proactive approach*" to co-operating with the SFO. The Standard Bank DPA provides the first practical illustration of the SFO's possible expectations in this respect and suggests that it has set a high bar. Of particular note are the following:

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(a) Stanbic staff first raised concerns on 26 March 2013. These were immediately escalated to Standard Bank Group in South Africa. Sometime between 2 and 17 April 2013, Standard Bank in London was notified. On 18 April 2013, lawyers for Standard Bank notified the Serious and Organised Crime Agency[5] and on 24 April 2013 reported to the SFO.

(b) The Judgment gives considerable weight to the timing of the self-report: within days of suspicions coming to its attention and before Standard Bank's lawyers had even commenced an internal investigation. Further credit is given for the fact that the matters disclosed may not otherwise have come to the attention of the SFO.

(c) Co-Operation: Following the self-report, lawyers for Standard Bank conducted an internal investigation that had been sanctioned by SFO. The SFO substantially relied on the factual findings of the investigation; thereby saving the SFO a great deal in costs (the SFO's costs were relatively modest at £330,000 — reflecting the fact that much of the burden was borne by the Bank). Other hallmarks of effective cooperation cited in the Judgment were: providing a summary of first accounts of interviewees (but, it appears, not the interview notes themselves), facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform.

In all, the Judge had no difficulty in finding that "*this self-reporting and co-operation militates very much in favour of finding that a DPA is likely to be in the interests of justice.*" On first blush, the details suggest that the nature of the self-report and co-operation by Standard Bank was of an exemplary nature — it would be a very high bar indeed if, for example, organisations which hope to obtain a DPA are always required to self-report before their own investigation has even commenced. However, the SFO has previously indicated that whilst engagement must be early, it need not be prior to any internal investigation:

> "*We expect early engagement. We don't want to hear from you every five minutes, and we accept you need enough time and space to have an initial look at an allegation that comes to your attention. But nor do we want the first time we hear from you to be at the end of a major internal investigation, months if not years after the conduct in question has surfaced, and in particular after multiple witnesses have been interviewed and re-interviewed extensively. There is a balance between those two extremes that you will have to judge for yourselves, but the nearer the beginning of your own investigative work you speak to us, the happier we will be.*"[6]

We must therefore await future cases in order to gain a greater indication of where the SFO 'draws the line' on timing. However, remarks made by the SFO following the Standard Bank DPA suggest that the other hallmarks of cooperation noted above simply reflect its high expectations for organisations that hope engage in the DPA process:

> "*We have been saying for some time that we thought the bar on cooperation would be a high one if it is to satisfy the court that a DPA is in the interests of justice, and, in this case at least, that appears to have been right.*"[7]

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Compliance programs: As noted above, it is a defence to the Section 7 offence if an organisation had in place 'adequate procedures' designed to prevent bribery by its associated persons. On the facts, the SFO and the Court were in no doubt that Standard Bank did not have a realistic prospect of raising this defence. The case therefore provides some helpful colour which might be of relevance to organisations within the scope of the Section 7 offence, in particular:

(a) Policies and procedures: Standard Bank had an 'Introducers and Consultants' policy. However, none of the Standard Bank deal team thought that it applied. The policy was not clear on its face as to whether it applied to the circumstances in which EGMA was engaged.

(b) Communication and training: Even if the Introducers and Consultants policy did apply, it was inadequately communicated to employees and/or they were not properly trained on its application. None of the Standard Bank employees appear to have proactively identified or considered the bribery and corruption risks in the transaction — which, on stepping back, were clearly high.

(c) Third parties and due diligence: As a result of the inadequate policy and implementation/communication of that policy, Standard Bank undertook no enhanced due diligence process in relation to EGMA — despite the high risk profile of the transaction.

(d) Group relationships: There was a lack of understanding as to the compliance responsibilities when a consultant was engaged on a transaction involving Standard Bank and a sister company such as Stanbic. In effect, Standard Bank relied on Stanbic to conduct due diligence. That due diligence was manifestly inadequate (it merely took the form of account-opening KYC checks). As a result, EGMA, and the clear red flags presented, 'fell through the cracks' in the compliance framework.

In light of the above, corporates may wish to:

(a) Revisit the wording of anti-bribery and corruption policies to consider whether they are clear as to their application to the 'real world' business of the organisation.

(b) Ensure that those policies are effectively communicated to all relevant staff.

(c) Consider the adequacy of training provided in relation to such policies. Staff should also be trained on how to identify and respond to red flags. In respect of training, the Statement of Facts indicates that much of the training provided to Standard Bank employees took the form of infrequent online modules (referred to by some staff as 'quizzes'). The implication is that such training is not necessarily sufficient in all cases. Best practice for employees in high-risk functions would be regular, tailored training, delivered in-person.

(d) Ensure that there is a clear allocation and understanding of compliance responsibilities as between different group companies. To go some way to achieving a uniformity of approach, it may be preferable to have one global, group-wide policy (or a number of policies) which apply to activity undertaken by any group companies, anywhere in the world.

Change in corporate identity: The conduct in question took place before the acquisition in 2015 by ICBC of a 60% interest in Standard Bank. Following this, a new Board was appointed with a majority of new appointees. Further, the business group involved was transferred out of Standard Bank and remains wholly owned by Standard Bank Group. As such, Standard Bank is now a "*substantially different entity*" to the one that failed to prevent bribery. While this is another factor which, applying the Code, pointed towards a DPA being in the public interest, the Judgment considered that this was a "*relevant but by no means necessary requirement for a DPA*." Much more weight would appear to have been placed on the nature of cooperation exhibited by Standard Bank.

Financial penalty: It is notable that the financial penalty was reduced by one third to reflect the prompt self-report and cooperation with the SFO. This reduction made the penalty broadly comparable to the fine that would have been levied for the alleged offence following a guilty plea at a very early stage. Of potentially greater significance, however, is (bearing in mind the observations of the UK Court in *R v Innospec Limited* that fines should be comparable to those in the U.S.), the fact that the Judgment states that the U.S. Department of Justice:

> "*…confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter dealt with in the United States and has intimated that if the matter is resolved in the UK, it will close its enquiry.*"

This could have great implications if the same approach is adopted in future — the suggestion is, perhaps, that if conduct is resolved in the UK and a financial penalty is imposed which is comparable to the penalty that would have been imposed in the U.S., there may be no further criminal action in the U.S. However, much remains

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to be seen and there may still be civil action in the U.S. — in this case the SEC also fined Standard Bank of $4.2 million for violations of U.S. securities laws — and the potential for action by regulators in other jurisdictions.

These remarks — and the terms of the DPA — go some way to setting out the positive case for self-reporting to the SFO conduct about which it might not otherwise find out.

Conclusion — The case for DPAs?

At the very end of the Judgment, Lord Justice Leveson provides some very interesting commentary which articulates the commercial upside to the course of action taken by Standard Bank:

> "*I have no doubt that [Standard Bank] has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business.*"

This was later echoed by the SFO: "*there are aspects of this resolution that make very good commercial sense indeed…*"[8] These remarks — and the terms of the DPA — go some way to setting out the positive case for self-reporting to the SFO conduct about which it might not otherwise find out. It remains to be seen whether a future case reinforces the downside risks that can arise when an organisation chooses to follow a different path.

Finally, the SFO has emphasised that it should not be assumed that each and every case will be suitable for a DPA. The implication from the Standard Bank case is that a DPA may present a high bar and that cases falling short of this may continue to be prosecuted in the normal way.

Indeed, it is notable that, shortly after the DPA was approved, the SFO announced that Sweett Group plc, an AIM-listed construction company, had admitted a Section 7 offence regarding conduct in the Middle East.[9] As further details emerge in due course, the Sweett Group case (which, it appears from the SFO announcement, will not be resolved by a DPA) may provide helpful contrasts with the DPA agreed with Standard Bank.

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1 http://www.kirkland.com/siteFiles/Publications/Alert_052913.pdf and http://www.kirkland.com/siteFiles/Publications/Alert_022514.pdf

2 http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf

3 https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf and http://www.sfo.gov.uk/media/290243/sfo%20v%20icbc%20sb%20plc%20-%20statement%20of%20facts.pdf

4 http://www.sfo.gov.uk/media/290239/deferred%20prosecution%20agreement%20-%20standard%20bank.pdf

5 Now the National Crime Agency. This report would likely have been triggered by notification requirements under UK money laundering legislation (the Proceeds of Crime Act 2002).

6 http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/first-dpa-and-use-of-s7-bribery-act.aspx

7 http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/first-dpa-and-use-of-s7-bribery-act.aspx

8 http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2015/first-dpa-and-use-of-s7-bribery-act.aspx

9 http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2015/sweett-group-plc-admits-to-bribery-offence.aspx

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