Court Approves UK's First Deferred Prosecution Agreement

First Case Involving Application of the UK Bribery Act Corporate Offence

December 11, 2015

Anti-Corruption

On November 30, 2015, the President of the Queen's Bench Division of the English High Court, Lord Justice Leveson, approved the UK's first ever Deferred Prosecution Agreement ("DPA"), in a matter that also involves the first ever enforcement action applying the corporate offence of failing to prevent bribery under Section 7 of the Bribery Act 2010 (the "Bribery Act"). The DPA is between the UK Serious Fraud Office ("SFO") and ICBC Standard Bank plc (formerly Standard Bank plc), a UK-established financial institution. [1]

The Standard Bank case provides guidance on the circumstances in which a company may qualify for a DPA, and the DPA conditions that may be imposed. The case also provides insights into the factors that UK prosecutors and courts are likely to consider when assessing the adequacy of companies' anti-corruption compliance programmes under the Bribery Act. Further insights are likely to be forthcoming following the announcement by the SFO on December 9, 2015, that it has charged Sweett Group plc, a UK based provider of services to the construction sector, with an offence contrary to Section 7 of the Bribery Act in a case relating to the construction of a hotel in Dubai.

In addition to the DPA arising from the English criminal investigation, the US Securities and Exchange Commission ("SEC") concurrently announced that it has ordered Standard Bank to pay a civil penalty of US $4,200,000 for related violations of the US Securities Act of 1933 (the "Securities Act"). The amount payable to the SEC was reduced to take into account the terms of the UK DPA which require disgorgement of profits of US $8,400,000. Standard Bank has admitted the facts underlying the SEC's charges and agreed to cease and desist from any further violations of the Securities Act.[2]

Tanzanian prosecutors are also conducting a separate investigation into the matters that gave rise to the DPA and the US settlement. The Tanzanian authorities did not raise any objection to the resolution of the UK matter through a DPA.

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[1] The SFO and the Crown Prosecution Service acquired the power to enter into DPAs in February 2014.

[2] *See* http://www.sec.gov/news/pressrelease/2015-268.html.

Background on DPAs

The Crime and Courts Act 2013 permits organisations that are alleged to have engaged in certain categories of criminal offences to avoid a prosecution by entering into a DPA with designated prosecutors such as the SFO.[3] The SFO is responsible for investigating and prosecuting cases of serious or complex fraud, corruption and money laundering.

The effect of a DPA, under the UK process, is to suspend a criminal prosecution subject to agreed conditions, such as the payment by the company of a financial penalty, compensation to victims, disgorgement of profits, and measures designed to improve the company's compliance programme. Any breach of the terms of a DPA can result in termination of the DPA and the reinstitution of criminal charges by the prosecutor (further information on the Act and the DPA process can be found in our May 2013 e-alert.)

The Director of the SFO and the Director of Public Prosecutions have issued a Deferred Prosecution Agreements Code of Practice (the "DPA Code"), which, among other things, sets out the standards that prosecutors must apply when deciding whether to offer a DPA to an organisation that is suspected of having committed a criminal offence. Provided that the prosecutor holds sufficient evidence to secure a realistic prospect of conviction, or holds some evidence and believes that further evidence could be secured in a reasonable period of time, the prosecutor must be persuaded, before initiating DPA discussions, that the public interest factors favouring a DPA outweigh those favouring a criminal prosecution.

The DPA Code sets forth a non-exhaustive list of factors that should be considered in determining whether to pursue a DPA, including: (i) the extent to which an organisation has cooperated with prosecutors and submitted a notification of the wrongdoing within a reasonable time of the offending conduct coming to light; (ii) whether the organisation has a history of similar misconduct; (iii) whether the conduct is part of an established business practice, or an isolated incident; (iv) the level of harm caused by the conduct; (iii) the existence of a proactive compliance programme; (iv) whether the alleged offence is recent, and if the organisation committing the offence is "effectively a different entity" as a result of ownership or other corporate structure changes; and (v) whether a prosecution will have disproportionate consequences for the offending party, or "collateral effects" on the public or the offending organisation's employees, shareholders, or pension holders.

The Agreed Facts in the Standard Bank Case

The Parties

Standard Bank plc ("Standard Bank") was, at the time relevant to the conduct in question, a UK-incorporated subsidiary of Standard Bank Group Limited, a South African financial institution that focused on global commodities, fixed income, currency and equities products.[4] Standard Bank Group Limited also was, in the relevant time period, the ultimate parent company of Stanbic Bank Tanzania Limited ("Stanbic"), a Tanzanian-incorporated company. Standard Bank and Stanbic were sister companies.

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[3] The Crime and Courts Act only applies in England and Wales; it does not extend to Scotland.

[4] On February 1, 2015, the Industrial and Commercial Bank of China Limited ("ICBC") acquired a 60% controlling interest in Standard Bank from the Standard Bank Group Limited, which retained a 40% interest. ICBC was not involved in any of the transactions at issue in the case, and had no interest in Standard Bank during the period when the transactions were conducted.

The Proposed Fundraising Transaction

In 2012, the Government of Tanzania sought to raise public funds to support infrastructure development projects in the country. In February 2012, Standard Bank and Stanbic jointly pitched to support the Government in the fundraising by way of a sovereign note private placement. At that time, they quoted a combined fee for the work of 1.4 per cent of the total proceeds raised.

Over subsequent months, the proposed deal lost momentum. In September 2012, however, Stanbic submitted an updated proposal on behalf of itself and Standard Bank in which it quoted a revised fee of 2.4 per cent of the total proceeds raised — one per cent of which would be paid to a local partner, Enterprise Growth Market Advisors Limited ("EGMA").

Although the revised proposal envisaged an important role in the transaction for Standard Bank – its involvement was necessary as Stanbic was not licensed to deal with non-local foreign investors in debt capital markets – Stanbic did not disclose EGMA's involvement or the revised fee proposal to Standard Bank until after it had submitted the updated proposal to the Government.

The Local Partner's Government Connections

The chairman of EGMA and one of its three shareholders and directors, Harry Kitilya, served during the relevant period as Commissioner of the Tanzania Revenue Authority, a Tanzanian government body. Stanbic's regulator has subsequently stated that, as the transaction was within Mr. Kitilya's jurisdiction, he should not have become involved as an external consultant.

In addition to Mr. Kitilya, the managing director of EGMA, Fratern Mboya, had served as the chief executive of the Tanzanian Capital Markets and Securities Authority between 1995 and 2011. One of the referees identified on Mr. Mboya's curriculum vitae was a government official involved in the potential fundraising transaction.

Pre-Transaction Due Diligence

While a decision on the updated proposal was still pending, EGMA opened a bank account with Stanbic, in September 2012. In connection with the account opening process, Stanbic conducted Know Your Client ("KYC") checks. The KYC process consisted of an account opening form, a bank checklist, a company search showing the directors, the collection of limited company and personal identification documents, and a reference check.

The checks revealed the identities of the EGMA shareholders and directors referenced above. The check did not, however, include any information on EGMA's anticipated turnover or its source of funds, or any analysis of the risks associated with the involvement of politically exposed persons ("PEPs"). In addition, while the documentary record acknowledged the "high risk" nature of the account opening, it did not explain the basis for that risk assessment.

Prior to commencing the fundraising transaction, Standard Bank was told by an officer of Stanbic that Stanbic had completed KYC checks on EGMA. It was not until the day after the mandate letter was signed, however, that Stanbic emailed the KYC checklist to Standard Bank. Moreover, the document that Stanbic communicated to Standard Bank did not reveal information concerning the involvement of PEPs as EGMA shareholders and directors.

The Fundraising Transaction Moves Ahead

By November 2012, about two months after Stanbic had indicated to the Government that it would engage EGMA as a local partner, the Government formally granted Standard Bank

and Stanbic the mandate for the fundraising. By agreement between the Government, Standard Bank and Stanbic, Stanbic alone contracted with and made the payment to EGMA. EGMA was not mentioned in the mandate letter signed by the Government, but a fee letter issued by the Government stated that Standard Bank and Stanbic were acting “in collaboration with” an unidentified partner.

The structure of the transaction enabled EGMA to receive US $6,000,000 in Government funds via Stanbic, without any need for a direct payment from the Government to EGMA.

The Inference of Corruption and the Assessment of Standard Bank’s Procedures

According to the Statement of Facts, there was no evidence that EGMA provided any services in relation to the transaction, no records were found to indicate why its services would have been required from a commercial standpoint, and no contemporaneous documents were found to explain who instigated EGMA’s involvement in the transaction. Neither was there any evidence indicating that the Government, Standard Bank or Stanbic had queried why EGMA’s services were required, or had sought to negotiate its fee. As the court noted, the “only inference” that could be drawn from the foregoing circumstances is that the fee was intended “to induce Harry Kitilya, and perhaps other members of the Government of Tanzania, to show favour to Stanbic and Standard Bank’s proposal.”

The Statement of Facts noted that “[t]here were bribery risks inherent in the arrival of a third party in a transaction with a government department,” but there was no evidence that Standard Bank or Stanbic had raised questions or concerns about EGMA or the peoplefbvan behind the company. In particular, Stanbic did not inform Standard Bank of the connections between the EGMA and the current and former members of the Government, and Standard Bank asked no questions in that regard.

Although the transaction required Standard Bank and Stanbic to act together, the Standard Bank deal team members involved in the transaction did not understand whether they were required to conduct separate or supplementary due diligence on EGMA. As noted in the Statement of Facts:

> “Despite the payment of the US $6 million being made as part and parcel of a deal in which [Standard Bank] and [Stanbic] acted jointly, [Standard Bank]'s policies did not clearly require it to conduct any enquiry into EGMA. Despite a number of indicators of significant bribery risk, nor did anyone within [Standard Bank] raise any questions or concerns about EGMA, its role or fees. The [Standard Bank] deal team relied on [Stanbic] to conduct Know Your Customer [KYC] and to raise any concerns as regards EGMA.. . . The arrival of a local third party at this stage of the deal for such a substantial fee did not provoke any recorded discussion about the identity of the local partner, those behind the company, its expertise, why it was needed, the size of its fee or anything about the substance of this fundamental change in the transaction.”

Although the Statement of Facts notes that the Standard Bank deal team “believed that there was no requirement for [Standard Bank] to conduct its own KYC and/or due diligence on EGMA,” it also notes that there was a desire on the part of the deal team members to avoid having to perform their own KYC, noting that “the final formal structure of the deal was in part dictated by [Standard Bank]'s wish not to trigger an obligation on their part to KYC EGMA (because this would be time consuming and might jeopardise the deal,...”

Completion of the Transaction

The fundraising transaction was publicly announced to the market in February 2013. In March 2013, Stanbic paid EGMA's US $6,000,000 fee into EGMA's bank account at Stanbic. Within 10 days of the payment, most of the money had been withdrawn in large cash amounts with the consent and assistance of Stanbic's chief executive officer and acting head of corporate and investment banking.

Four separate Stanbic staff members raised concerns regarding the cash withdrawals, which prompted an internal investigation by the African parent company. Standard Bank was told about that investigation in April 2013, which led the company to report the matter to the Serious Organised Crime Agency (now the National Crime Agency) and the SFO, and to commence its own internal investigation. Standard Bank engaged external counsel to conduct the internal investigation, and the investigation report was shared with the SFO.

Findings in Relation to the Section 7 Offence

The SFO concluded that the admissible evidence established a reasonable prospect of conviction for the offence of failing to prevent bribery, contrary to Section 7 of the Bribery Act[5]. The SFO also concluded that the public interest would likely be met by a DPA, and commenced negotiations with Standard Bank.

Notably, the Statement of Facts indicates that the "available evidence does not prove" that Standard Bank personnel had sufficient involvement in the EGMA arrangement to incur liability under the core bribery offences in Sections 1 and 6 of the Bribery Act.

"Associated Persons" and the Predicate Bribery Offence

The Standard Bank case represents, on the facts presented, a relatively straightforward application of the "associated person" standard in Section 7 of the Bribery Act. The SFO asserted that Stanbic was a person associated with Standard Bank because: (i) Stanbic and Standard Bank were jointly identified as "lead manager" under the Government of Tanzania mandate letter; (ii) the fee was payable jointly to both companies, and was split equally between them; (iii) the two companies performed different but complementary roles; (iv) the deal teams closely collaborated on the transaction; (v) Standard Bank had responsibility for drafting much of the contractual documentation; and (vi) the fee letter was signed by both entities and stated that they were acting in collaboration with a local partner.

According to the Statement of Facts, Stanbic and/or its officers had promised EGMA one percent of the money raised without EGMA providing reasonable consideration in exchange, and had intended to induce governmental representatives to favour Stanbic and Standard Bank for the fundraising transaction. The SFO therefore alleged that, but for jurisdictional reasons, Stanbic and its officers would have committed a bribery offence contrary to the Bribery Act, as they had intended to obtain or retain business, or an advantage in the conduct of business, for Standard Bank as well as Stanbic itself. The SFO did not allege that Standard Bank or its employees were knowing participants in the bribery.

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[5] Section 7 creates corporate liability for UK entities, or entities that carry on at least part of their business in the UK, that fail to prevent "associated persons" from engaging in bribery with an intent to retain business or a business advantage for the entity in question, subject to the adequate procedures defence

The "Adequate Procedures" Defence

The SFO alleged, and Standard Bank admitted, that its anti-bribery procedures had not been adequate at the time of the relevant transaction. The SFO identified several specific shortcomings, including the following:

- Although EGMA was acting in partnership with Standard Bank and Stanbic, the fact that Stanbic was the sole contracting entity and responsible for paying EGMA's fee caused Standard Bank's deal team to conclude that the Introducers and Consultants Policy did not require Standard Bank to conduct its own due diligence checks.
- Standard Bank's due diligence policies were not sufficiently clear as to their scope, and its employees did not receive adequate training on how to apply those policies in circumstances in which a third party was being engaged by a sister company.
- The SFO and the court did not express a criticism, as such, of the oft used practice of a financial institution relying on an affiliate's KYC process, but did express significant concerns with how Stanbic's KYC information was handled by Standard Bank, and its failure to conduct broader anti-corruption due diligence in the circumstances of this case.
- The KYC information communicated by Stanbic to Standard Bank did not flag the involvement of PEPs in EGMA. It described the account opening as a "high risk" transaction, but Standard Bank did not question the basis for that assessment. Moreover, the Standard Bank deal team did not take steps to consider the emerging red flags, including the late introduction of a third party, the substantial fee to be paid to the third party, and the apparent absence of a business rationale for involving a third party.
- The Standard Bank deal team allowed the formal structure of the transaction (i.e., the contractual relationship) rather than the broader risks to dictate the existence of an obligation to conduct KYC checks or other due diligence checks.
- The Standard Bank compliance team did not have the opportunity to assess risks arising from the transaction, as it was reliant on the Standard Bank deal team raising compliance concerns for their attention.

The Terms of the DPA

The DPA approved by the Court on November 30, 2015 requires Standard Bank to:

- pay compensation to the Government of Tanzania in the amount of US $6,000,000, plus interest in the amount of US $1,046,196.58;
- pay a financial penalty of US $16,800,000;
- disgorge profits of US $8,400,000;
- pay the SFO's costs of £330,000;
- commission and submit to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act and other applicable anti-corruption laws, at its own expense; and
- cooperate with the SFO and other agencies, including multilateral development banks, in any matters arising out of the subject-matter of the DPA.

The DPA will remain in force for a period of three years, to expire on November 30, 2018. The criminal indictment against Standard Bank is suspended during that three-year period.

If Standard Bank fully complies with its obligations under the DPA, the SFO will give notice to discontinue the criminal proceedings within 30 days of the expiry of the DPA. However, the SFO reserves the right to institute new proceedings following the expiry of the DPA if it believes that Standard Bank knowingly provided inaccurate, misleading or incomplete information to the SFO during the negotiations for the DPA.

Comment

The Rationale for the DPA

The Director of the SFO, David Green CB QC, has stated that this "landmark DPA will serve as a template for future agreements." Following the DPA, the SFO's Joint Head of Bribery and Corruption, Ben Morgan, said that the SFO will not seek to "force a DPA onto every corporate case" and, while DPAs will be appropriate in certain cases, "they are not the answer to everything." He noted that there is a high bar to securing a DPA, "and where it is not met [the SFO has] the appetite, stamina and resources to prosecute in the ordinary way."[6]

In relation to the Standard Bank case, the SFO Director has noted that Lord Justice Leveson's judgment includes "very helpful guidance to those advising corporates." In particular, he identified a number of factors as having influenced the court's assessment that the public interest weighed in favour of a DPA in this case.

First, there was insufficient evidence to suggest that any Standard Bank employees knew that Stanbic intended the payment to EGMA to constitute a bribe.

Second, Standard Bank promptly reported the matter to relevant enforcement authorities, even before commencing its own investigation. As Lord Justice Leveson noted:

> "*The second feature to which considerable weight must be attached is the fact that [the Bank] immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter. […] In this case the disclosure was within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) their own investigation.*"

The judge praised the company for its cooperation with the SFO, which included, among other things:

> "*[…] providing a summary of first accounts of interviewees, 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.*"

The SFO's Joint Head of Bribery and Corruption has subsequently reiterated that, in the SFO's view, cooperation "means prompt reporting, scoping and conducting your own investigation in conjunction with us, taking into account our interests in doing so and providing access to the kind of material we need to test the quality of evidence gathered and your own conclusions on it."

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

Third, Standard Bank had no previous bribery or corruption convictions, and it had not been the subject of any prior SFO investigations. Although Standard Bank had previously been subject to regulatory enforcement action by the UK Financial Conduct Authority ("FCA"), the FCA matter related to different aspects of the Standard Bank compliance programme. In addition, Standard Bank had made significant enhancements to its compliance policies, procedures and processes since the FCA conducted a compliance review in 2011.

Fourth, Standard Bank in its current form is effectively a different entity from that which committed the offence. Industrial and Commercial Bank of China Limited ("ICBC") acquired a controlling 60 per cent interest in Standard Bank in February 2015, and all of the misconduct at issue occurred prior to ICBC's investment.

Finally, the judge emphasized the centrality of the court's role in the DPA process, noting that:

> "*it is important to emphasise that the court has assumed a pivotal role in the assessment of [the DPA] terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. In that way, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest: furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement. Suffice to say that I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime.*"

In many respects, the facts of this case — a single instance of bribery by an overseas sister company; no allegation of any knowing participation in a bribery offence by Standard Bank or its employees; no apparent arguments raised by the company in respect of jurisdiction, associated persons or the adequate procedures defence; and the Bank's cooperative approach following discovery of the issues — made this a favourable test case for the SFO. Future proposed DPAs will not necessarily meet all of the relevant criteria, and it remains to be seen how a court would address a more finely balanced case in which there are persuasive factors weighing both for and against a negotiated settlement.

The Section 7 Offence

As to the predicate bribery offence, Lord Justice Leveson concluded that "the only inference" in the Standard Bank case was that the arrangements at issue were corrupt. In his commentary on the case, the SFO's Joint Head of Bribery and Corruption suggested that this "should act as a wake-up call for those […] who are aware of similar situations, in any sector." He observed that "it is quite easy to over-analyse circumstances surrounding the predicate bribery offence", and he suggested that "[i]t might be worth taking a step back from the layers of analysis and advice, and seeing what's staring you in the face."

As to the adequate procedures defence, Standard Bank accepted that the policies and procedures in place at the time of the offending were not adequate, especially with respect to third party due diligence and training. On this topic, the SFO's Joint Head of Bribery and Corruption said that:

> "*[…] the effectiveness of an organisation's procedures should be judged by how things manifest themselves in a particular transactional context, not in the abstract. The quality of an organisation's compliance culture isn't defined by how much money it has*

spent on trying to implement it, or how earnestly people at the top talk about it, but rather by how people at the coal face actually live it."

A key theme that emerges from the Statement of Facts, the court judgment, and the SFO's subsequent statements is that when a transaction raises obvious red flags, and an affiliate's due diligence measures appear to be inadequate or do not resolve the red flags in question, a commercial organisation and its personnel should be prepared to take affirmative measures to understand and address any apparent compliance risks.

As the SFO's Joint Head of Bribery and Corruption expressed the point:

> "*Where the risks and red flags are prevalent, it seems to me no amount of just sticking to a policy is going to be adequate, in the final reckoning. What is really needed is a culture in which people are able to spot what is in front of them, and react to it. The question people exposed to high risk situations need to ask themselves shouldn't be, 'Have I got a policy in place that makes this ok?', but rather, 'Is this, in fact, ok?*"

In short, the Standard Bank case presented, in the view of the SFO and the court, an obvious corruption-related red flag given the engagement of EGMA, which was not addressed by Standard Bank. The lack of clarity in Standard Bank's policies – which enabled the deal team to assume that Stanbic's KYC process constituted a sufficient compliance review – coupled with the bank's reliance on inadequately trained business personnel to flag compliance risks, ultimately caused Standard Bank to fall short of the "adequate procedures" standard.

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