Client Update
First UK DPA Starts to Answer Questions About Bribery Act Enforcement

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On 30 November 2015, Sir Brian Leveson, President of the Queen's Bench Division, approved the UK's first Deferred Prosecution Agreement ("DPA"), concluded between the UK's Serious Fraud Office ("SFO") and ICBC Standard Bank plc ("Standard Bank"), a joint venture between South Africa's Standard Bank Group Ltd. and the Industrial and Commercial Bank of China ("ICBC"). The DPA also represents the first enforcement action in the English courts under Section 7 of the Bribery Act 2010 (the "Bribery Act"), the so-called "corporate offence".

DPAs were introduced into English law in February 2014. A DPA is an agreement between a prosecutor and a company being considered for prosecution for certain specified financial crimes. In exchange for suspension and then, at the expiry of the DPA's term, abandonment of the prosecution, the company agrees to comply with certain conditions, typically including financial payments, changes to systems and procedures, and ongoing co-operation with the prosecutor. UK DPAs provide for a high level of court engagement and the need for the court to consider the appropriateness of the DPA in the particular case. For further information about DPAs, please refer to our Client Update of 24 February 2014.

This update provides a summary of the factual background to the DPA, as well as the court's reasons for approval. A more detailed analysis will be published shortly.

FACTUAL BACKGROUND

The conduct that forms the subject of the DPA took place in 2012, prior to the acquisition by ICBC of its 60% stake in 2015 to create the merged entity, Standard Bank.

Early in 2012, the Government of Tanzania mandated Standard Bank and its sister company Stanbic Bank Tanzania Ltd ("Stanbic") to raise funds by way of a private placement. Standard Bank was involved because Stanbic was not licensed to deal with non-Tanzanian investors in the debt market. Standard Bank and Stanbic's combined fee was 2.4%, 1% of which was to be paid to a Tanzanian company, Enterprise Global Market Advisors Limited ("EGMA"). EGMA had three shareholders, one of whom was the Commissioner of the Tanzania Revenue Authority, and thus a foreign public official. There was no sign that EGMA provided any services in connection with the transaction. Standard Bank did not conduct due diligence or KYC checks on EGMA, leaving those entirely to Stanbic.

Standard Bank and Stanbic raised $600 million. The two banks received a total fee of $14.4 million, $6 million of which was paid to EGMA into a Stanbic account in March 2013. Almost all of that amount was withdrawn in cash shortly thereafter. The speedy and suspicious nature of that withdrawal led staff at Stanbic to contact the Standard Bank Group's head office in South Africa towards the end of March, after which the group acted quickly. At the beginning of April, the head office in South Africa began an internal investigation. It informed Standard Bank in the UK some time in the first half of the month. On 18 April 2013, before Standard Bank had even begun its own internal investigation, it reported the matter to the UK's Serious and Organised Crime Agency, followed by a report to the SFO on 24 April. Standard Bank agreed with the SFO that it would conduct its internal investigation and share the results with the SFO. Following a further report on its investigation by Standard Bank in July 2014, the SFO commenced its own investigation, concluding that there was a reasonable suspicion that Standard Bank had failed to prevent bribery by its "associated persons", under Section 7 of the Bribery Act.

Through its investigations, the SFO determined that Stanbic and/or some of its senior executives—all of which it considered to be "associated persons" of Standard Bank—had committed bribery by promising and/or giving EGMA 1% of the placement amount in order to induce a representative or representatives of the Tanzanian government to show favour to Standard Bank and Stanbic in appointing them to run the private placement. It determined that the "associated persons" had made the bribe in order to obtain or retain business or a business advantage for Standard Bank, thus engaging Standard Bank's liability under the corporate offence of the Bribery Act. The SFO further concluded that Standard Bank lacked "adequate procedures", and thus would not have a realistic prospect of raising that defence under Section 7 of the Bribery Act.

This case is therefore the first to consider and give some meaning to what is and is not an associated person. Under the corporate offence, an associated person of a commercial organisation is one who provides services for or on behalf of that organisation, which is to be determined on the basis of all available facts, not formal relationships. The judge stated that Stanbic, which is not a subsidiary of Standard UK, was "*a sister company in respect of which Standard Bank had no interest, oversight, control or involvement … the management of which is unconnected to the Bank*". Nonetheless, he agreed with the SFO that Stanbic (and/or its senior executives) were associated persons of Standard Bank. While the judge did not provide a basis for this conclusion, the agreed statement of facts between SFO and Standard Bank stated that Standard Bank and Stanbic "*carried out different but complementary roles within the transaction*" and that Standard Bank "*could not complete the transaction without [Stanbic] and vice versa*".

In the now-approved DPA and the accompanying joint statement of facts, Standard Bank agreed with the SFO's conclusions. As per the rules regulating DPAs, the SFO prepared a draft indictment against Standard Bank for breach of the Section 7 corporate offence, suspending it immediately for a period of three years, during which time Standard Bank is required to make certain payments, improve its compliance programme and provide continued co-operation to the SFO. On fulfillment of all conditions and the expiry of the three-year term, the SFO is then bound to discontinue its prosecution.

ANALYSIS

Judicial oversight of DPAs in the UK involves a two-fold determination:

- Is the DPA in the *interest of justice*?
- Are the terms of the DPA *fair, reasonable and proportionate*?

Sir Brian Leveson found both of these tests to have been satisfied.

Interests of Justice

In determining that the DPA was in the interests of justice, the court took into consideration the following four elements:

1. **The seriousness of the criminal conduct**: Although the underlying bribery was serious, neither Standard Bank nor any of its staff were guilty of bribery, but rather of the corporate offence of failing to prevent it. The judge noted that the evidence did not demonstrate that anyone within Standard Bank knew or intended that Stanbic executives intended to pay a bribe.

2. **Self-reporting and cooperation**: Standard Bank self-reported to the SFO, and did so expeditiously. Sir Brian Leveson placed "*considerable weight*" on the fact that Standard Bank reported "*within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) its own investigation*". The judge also praised Standard Bank's "*genuinely proactive approach to the matter*". The cooperation included: identifying and making available for interview relevant witnesses; conducting an internal investigation; disclosing relevant documents to the SFO; and adequately responding to the SFO's requests for information and material.

3. **Similar previous conduct**: There were no prior convictions against Standard Bank for bribery and corruption. It was also relevant that, while there were previous failings in Standard Bank's anti-money laundering and anti-corruption procedures, it had made significant enhancements to those procedures in the previous four years.

4. **Structure of the organisation**: The bank in its current form was effectively a different entity with new board members who had no involvement in the transactions in question.

Reasonableness of the Terms

The six conditions agreed by Standard Bank, along with the three-year term of the DPA, were found by the court to have been fair, reasonable and proportionate, for the following reasons:

1. **Compensation of $6 million plus interest of $1.15 million to be paid to the Government of Tanzania**: This equates to the fee paid to EGMA by Stanbic and, as such, represents additional money the government would have received.

2. **Disgorgement of profit of $8.4 million**: This was the fee earned by Standard Bank from the transaction, with no allowance being made for its costs.

3. **Payment of a financial penalty of $16.8 million**: This amount is significant because it is the first application of the sentencing guidelines for corporate offenders convicted of fraud, bribery and money laundering.[1] The court

[1] Under the terms of a DPA, the amount agreed in financial penalties with a corporate entity must be comparable to the fine that a court would have imposed following a conviction after a guilty plea. Reference in calculating the financial penalty must therefore be made to the sentencing guidelines, which calculate penalties through a combination of harm (the gross profit earned) and culpability.

agreed with the SFO's assessment that Standard Bank's culpability was on the high side of medium culpability, equating to a penalty of 300% of the gross profit. The court also agreed that the fine should be reduced by a factor of one-third on account of Standard Bank's co-operation, since that was the reduction that would be available for an early guilty plea. Finally, the court also took into account communications from the US Department of Justice that the penalty proposed by the SFO was comparable to what would have been imposed in the United States.

4. **Past and future co-operation with the relevant authorities**: The court considered this co-operation, particularly inasmuch as it assisted with the investigation and prosecution of culpable individuals, was in the public interest and critical.

5. **Policies and procedures**: Standard Bank agreed to commission policies and procedures to comply with the Bribery Act and other applicable anti-bribery and corruption laws, and to submit to an independent review of its existing internal anti-bribery and corruption controls. The court considered this clearly appropriate.

6. **Payment of the SFO's costs of £330,000**.

The SFO has announced that it hopes to have secured a second DPA by the end of the year.

Separately, the US Securities and Exchange Commission ("SEC") charged Standard Bank with failing to meet disclosure obligations in relation to the $6 million fee paid to EGMA, alleging that the offering documents and statements to potential investors failed to disclose the payment, and were therefore "materially misleading". Standard Bank agreed to pay $4.2 million to the SEC in settlement of the charges.

As noted, a more detailed analysis of these significant decisions, and their implications for other companies, will be published shortly.

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Please do not hesitate to contact us with any questions.