Client Update
Court Approves Second UK DPA

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INTRODUCTION

On 8 July 2016, the UK Serious Fraud Office ("SFO") secured approval to finalise its second Deferred Prosecution Agreement ("DPA") in relation to bribery and corruption from Sir Brian Leveson. Sir Brian, a Lord Justice of Appeal and President of the Queen's Bench Division, also approved the SFO's first DPA with Standard Bank. The fact that he again sat as a judge in the Crown Court to consider this application makes it clear that the senior judiciary intends to continue to use the first DPAs to provide a body of authoritative guidance. This decision highlights the importance of, and the extent to which the SFO and the courts are willing to use the flexibility of the DPA instrument to reward and encourage, self-reporting and fulsome co-operation.

This application, very different from the *Standard Bank* case, raised issues of how to deal with a relatively small company with limited financial means in relation to serious criminal conduct over a prolonged period, including after the coming into force of the Bribery Act 2010 on 1 July 2011. The DPA counterparty, referred to as "XYZ", remains unnamed due to continuing related legal proceedings against former XYZ employees. The SFO and XYZ will now finalise the terms of the DPA which will be submitted to the court for final approval.

FACTUAL BACKGROUND

XYZ is a UK SME operating in the steel sector that generates most of its revenue from exports to Asia. Since February 2000, it is a wholly-owned subsidiary of a U.S. corporation; in the judgment referred to as "ABC Companies LLC". In late 2011, ABC implemented its global compliance programme within XYZ and, in late August 2012, serious issues were uncovered. On 4 September 2012, a law firm was retained to conduct an internal investigation and on 13 November, the SFO was informed that XYZ would make a written self-report when the internal

investigation had been completed. It was agreed with the SFO that the self-report would be made by 31 January 2013 when XYZ delivered a 39-page document. After this initial self-report, XYZ extended the scope of the internal investigation and provided the SFO with supplementary self-reports, a process which ran in parallel with the SFO's independent investigation which included 10 interviews under caution.

At the end of the internal investigation, it was clear that from June 2004 to June 2012, XYZ had been involved in payments and/or offers of bribes through a small group of senior employees and local agents to secure contracts, mainly in Asia. The correspondence revealed that it was the agents who instigated the offer and payment of bribes to individuals who could exert influence or control in the awarding of contracts. Of the 74 contracts examined during the course of the investigations, 28 were said to be procured as a result of the bribes. In the period 2004-2013, these contracts generated approximately £17.24 million in revenue resulting in £6,553,085 of gross profit (20.82% of the company's £31.4 million total gross profit), representing 15.81% of the company's total turnover of £109 million. XYZ estimated that its net profit on the implicated contracts was approximately £2.5 million.

The draft indictment presented to the court contains three counts: one conspiracy to commit substantive corruption offences contrary to the old Prevention of Corruption Act 1906; one conspiracy to commit substantive bribery offences contrary to the Bribery Act 2010; and one count of failure to prevent bribery, the so-called "corporate offence", also under the Bribery Act 2010.

WHY THE DPA WAS OFFERED

At this stage, the SFO sought a declaration from the court that a DPA with XYZ (as opposed to a full prosecution) was "likely to be in the interests of justice", and that the proposed terms of the DPA were "fair, reasonable and proportionate". In his judgment, Sir Brian found that both tests were satisfied.

In making his assessment, His Lordship considered a number of factors:

- **The seriousness of the offence**: The conspiracy involved significant and systematic misconduct, within a corporate culture characterised by a "wilful disregard as to the commission of offences by employees or agents with no effort to put effective systems in place". However, Sir Brian found no evidence of agents being pressured into giving bribes, and thereby risking severe consequences under local laws, but rather, the bribe payments/offers

were instigated by the agents themselves. In addition, the conduct was "there for all to see", with no corporate cover-up (beyond the use of the term "fixed commission" to conceal the nature of offers to agents).

- **Self-reporting and co-operation**: significant emphasis was given to the "promptness" of the self-report and "full and genuine co-operation" with the SFO, including the provision of oral summaries of first accounts of interviewees. XYZ provided comprehensive information as a result of an extensive internal investigation by an independent law firm and it was noted that the offending might have remained unknown had it not been for the self-report.
- **History of similar conduct**: XYZ did not otherwise have a history of bribery or corruption and had never been the subject of a criminal investigation.
- **Corporate compliance programme**: it was accepted that XYZ's compliance programme was inadequate during the period of the offending. However, from 2011 it implemented ABC's global compliance programme which led to the discovery of the offending and, ultimately, the self-report. Sir Brian also noted that there was no question that the parent company, ABC, knowingly profited from XYZ's criminality and behaved with "complete propriety" when it was discovered.
- **Change in culture**: XYZ is culturally a different company to that which committed the offences.
- **Impact of prosecution on innocent third parties**: given the financial position of XYZ and the unfavourable outlook for the steel industry, a prosecution of XYZ would likely have led to its insolvency, harming the interests of employees and others innocent of any misconduct. In addition to the financial implications of a conviction, Sir Brian also mentioned the consequential disbarring of XYZ from public procurement under both UK and EU law.

Under the proposed terms approved by Sir Brian, XYZ will be required to pay a total of £6,553,085, equal to XYZ's gross profit and divided as follows:

- Disgorgement of gross profits of £6,201,085 to be paid in instalments over five years. ABC will contribute £1,953,085 towards the disgorgement, by way of repayment of a significant proportion of dividends it received from XYZ.
- A financial penalty of £352,000. It was agreed that this was the maximum XYZ could pay without becoming insolvent.

Although it was ultimately a theoretical exercise, Sir Brian went through the exercise of calculating the financial penalties with reference to the Sentencing

Council Guidelines for corporate offenders. His Lordship agreed with the SFO's submission that the correct culpability starting point was High. There were three characteristics of high culpability demonstrated by XYZ. *First*, XYZ played a leading role in organised, planned unlawful activity where offering of bribes was an accepted way of doing business by senior executives during the relevant time period. *Second*, the offending was committed over a sustained period of time during which XYZ secured 28 contracts as a result of offering bribes through agents. *Third*, XYZ's culture prior to 2012 could be characterised as wilful disregard as to the commission of offences by employees or agents with no effort to put effective systems in place.

As to harm, Sir Brian took the standard measure under the Guidelines, gross profit from the contracts obtained, *i.e.*, £6,553,085.

Sir Brian then considered the factors which increased or reduced the seriousness of the offending. The fact that the 28 implicated contracts accounted for £17.2 million of total sales, the attempts to conceal the misconduct through using terms such as "fixed commission" in correspondence, and the offences being committed across various jurisdictions contributed towards the aggravating factors. On the other hand, XYZ's extensive co-operation and immediate remedial action in terminating senior management and six agents acted as mitigating factors.

The parties submitted (and Sir Brian does not appear to have disagreed) that a harm multiplier of 250% (the lower end of the high culpability range) was appropriate. This would result in a financial penalty of just under £16.4 million. Sir Brian then considered the relevant discounts and found that the self-report and admission should secure XYZ a reduction of one-third but added that the reduction should be increased to 50% "as representing additional mitigation" and "not least to encourage others how to conduct themselves when confronting criminality".

Sir Brian then performed the "stepping back" exercise and on examination of XYZ's financial position, that it had spent £3.8 million in fees for its own investigation, self-report, co-operation with the SFO, and "self-cleansing", Sir Brian concluded that a fine of £352,000 was appropriate, corresponding to the sum the SFO's accountants had concluded was reasonably available to XYZ.

XYZ will also be required to co-operate with the SFO in all matters relating to the conduct, and review and maintain its existing compliance programme under the terms of the DPA.

CONCLUSION

The latest DPA illustrates the potential benefits of promptly, fully and genuinely co-operating with the SFO. It is also a practical illustration of a constructive approach from the SFO to internal investigations, placing some perhaps more difficult comments from senior SFO officials in welcome context.

In relation to the financial orders, the "XYZ decision" highlights the possible flexibility of the terms of a DPA in order to achieve a balance between punishing the offending company and depriving it of the benefits of offending, and the interests of innocent third parties.

In a context where the DoJ has recently launched its so-called "pilot programme", offering increased discounts on financial penalties to companies that self-report FCPA violations quickly and co-operate thoroughly, the following passage in Sir Brian's judgment is worth quoting in full:

> *"[I]t is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile."*

The possibility of a greater than 1/3 discount off the starting point fine is a welcome development in circumstances where doubts had been expressed following *Standard Bank* that there was much financial incentive to entering into a DPA as compared to pleading guilty to an indictment.

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Please do not hesitate to contact us with any questions.