Double First for SFO provides template for corporate bribery settlements

On 30 November, the first deferred prosecution agreement ("DPA") reached between the UK Serious Fraud Office ("SFO") and a co-operating corporate defendant received final approval from the Court. The DPA has been reached in the first concluded case in which action has been taken against a corporate organisation for the offence of failing to prevent bribery committed by two officials of a foreign associated company of a UK bank, under section 7 of the Bribery Act 2010.

The facts

Under the terms of the agreement now approved ("the DPA"), the SFO has laid but not proceeded with charges against Standard Bank plc (now known as ICBC Standard Bank plc, referred to in this briefing as "Standard Bank") in respect of a failure to prevent bribes totalling US$6 million being paid in 2012 and 2013 by two senior executives of Stanbic Bank Tanzania Ltd ("Stanbic") (a sister company of Standard Bank plc) to Enterprise Growth Market Advisors Ltd ("EGMA"), a Tanzanian company connected with foreign public officials in connection with the private placement of sovereign notes to raise funds for the Government of Tanzania. EGMA was a Tanzanian company founded, owned and managed by Tanzanian public officials.

The DPA

The DPA now reached and approved imposes a financial penalty of US$16.8 million and requires the disgorgement of US$8.4 million in profit and the payment of US$6 million in compensation to the Government of Tanzania. In addition, it requires Standard Bank to continue to co-operate with the SFO and other agencies and authorities in connection with their inquiries into the same conduct and to commission and submit to, at its own expense, an independent review of its existing anti-bribery and corruption controls, policies and procedures. The scope of such review is to be agreed with the SFO and Standard Bank is required, within 12 months of the date of the final report, implement, to the satisfaction of the independent reviewer, the advice or recommendations contained in it.

By the usual standards of investigations and proceedings involving the SFO, the DPA has been concluded quickly. Following prompt self-reporting to the SFO within days of the discovery of the suspected misconduct in April 2013, an internal investigation was conducted (into which the SFO had significant input), leading to the submission of a report to the SFO in July 2014.

DPAs in the UK

In essence, DPAs provide for criminal charges to be laid but not proceeded with provided the corporate organisation concerned complies with a set of agreed conditions. For full commentary about DPAs, their history, their proposed use and how they are distinguishable from those in the US, see our previous briefings.*

Following negotiations, a private hearing took place on 4 November 2015 at which representatives of both the SFO and Standard Bank were required to certify that the lengthy (55 page) statement of facts accurately and completely represented the relevant facts and matters giving rise to the DPA. At that hearing, having satisfied himself that the relevant statutory requirements were met, Lord Justice Leveson indicated his agreement in principle. Finally, on 30 November 2015, a hearing took place in public at which the agreed facts were rehearsed and the terms of the

DPA publicly ratified. The Joint Code of Practice issued by the SFO and the Crown Prosecution Service ("the Joint Code") provides that such a hearing will "almost always" take place in private. In this case though, the Judge indicated that he was so certain after the preliminary hearing that the DPA was in the interests of justice that he was prepared to allow the subsequent hearing to take place in public. Whether this approach will be followed in future hearings remains to be seen.

If the terms of the agreement are complied with over the next three years, the prosecution will be discontinued.

Also on 30 November 2015, following co-ordinated action, the US Securities and Exchange Commission announced the imposition of a financial penalty of US$4.2 million on Standard Bank for related failings to disclose the payments giving rise to the DPA.

Analysis

Under the Crime and Courts Act 2013 ("CCA 2013") and the Joint Code and once DPA negotiations have started, in order for a court to approve a DPA, two main criteria must be fulfilled.

Firstly, prosecutors and the Court must be satisfied that it is in the "interests of justice" for prosecution to be deferred rather than immediate. Secondly, the terms on which it is proposed that prosecution should be deferred must be "fair, reasonable and proportionate".

Whilst, as David Green QC CB, Director of the SFO, acknowledged in his press release accompanying its release, the DPA provides a "*template for future agreements*", it is not determinative of the circumstances in which these criteria will be fulfilled and some key questions remain.

The "interests of justice" test

A key (although unsurprising) message emerging from this case is that, in practice, the "interests of justice" test is difficult to satisfy. The DPA was approved as a number of public interest factors coalesced to provide a strong argument in favour of prosecution being deferred.

Specifically, the Judge agreed with the parties that the fact that no employees of the defendant entity were involved in the conduct (or even had knowledge of it), that it has no previous relevant convictions and that its corporate structure is now very different to its structure at the time of the relevant conduct in 2012 and 2013 all militated strongly in favour of the DPA being appropriate (although he was careful to note that the latter should not be viewed as a necessary requirement). These factors will not be present in every future case where a corporate organisation seeks a DPA.

However, the most important factors leading the SFO and the Judge to decide that it was in the "interests of justice" to enter into and approve the DPA in this case were the immediacy of self-reporting and the extensive nature of the voluntary co-operation provided to the SFO. Neither the Judge nor the SFO have wasted the opportunity to send (or in the case of the latter, reiterate) clear messages to corporate organisations about the benefits of early reporting and full co-operation thereafter. Emphasising the benefits of proactive co-operation, the Judge held the case up as an example of the reasons why "*it should* [not] *be thought that, in the hope of getting away with it*, [corporate organisations are] *better served by taking a course which* [does] *not involve self-reporting, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow*". However, as is the case with the other factors identified above, such unfettered co-operation as appears to have been forthcoming in this case is unlikely to be replicated in every future case, particularly in relation to questions such as who may take first accounts from witnesses and whether privilege may be asserted over relevant documents.

The tolerance of the SFO (and indeed judges) of challenges during the negotiation and approval stages in future cases remains an open question and the boundaries of what the SFO will regard as the requisite levels of co-operation in order for a DPA to be possible remain to be tested.

Whether proposed terms are "fair, reasonable and proportionate"

Applying the provisions of the Sentencing Council's Definitive Guideline on Corporate Offenders to calculate the appropriate level of financial penalty, the Judge agreed with the parties' assessment that, applying the public interest factors referred to above, the misconduct could correctly be classified as at a "medium" level of culpability. He further agreed that the correct starting point was to multiply the "harm" figure (being US$8.4 million, the total fee retained by Standard Bank and Stanbic from the placement) by 200 per cent and that, taking into account the serious nature of the conduct, the

correct approach was to multiply the "harm" by 300 per cent.

This analysis leaves room for higher penalties in future cases where conduct giving rise to prosecutions under section 7 of the Bribery Act 2010 is assessed to fall into the "high" culpability bracket (such as, for example, where individuals within a corporate organisation are aware of bribery but fail to prevent it, which was found not to have been the case in this instance) if the "*interests of justice*" test can be satisfied.

After the application of full credit to reflect the full and timely admissions made in this case, the amount of the penalty was reduced by one third (the equivalent to reduction that would have applied to reflect an early guilty plea had the matter been prosecuted), leading to a financial penalty of US$16.8 million.

Acknowledging the concerns raised by Lord Justice Thomas in *R v Innospec* about differential levels of fines in the UK and US, the Judge was careful to note that one of the reasons why he considered the level of the penalty to be "*fair, reasonable and proportionate*" was that the Department of Justice had confirmed that it is commensurate with that which would have been imposed had the same conduct been prosecuted as breaches of the Foreign Corrupt Practices Act. This suggests that in future cases tariff levels imposed in the US will set the level for UK bribery fines.

The corporate offence of failing to prevent bribery

This is the first case in which the SFO has taken action against a commercial organisation for failing to prevent bribery under section 7 of the Bribery Act 2010. We note three points in relation to the case under section 7.

First, the SFO and the Judge have taken a wide approach to the definition of an "associated person" for the purposes of section 7. Section 8 provides that a person is "associated" with a commercial organisation for the purposes of section 7 if that person performs services "for or on behalf of" the commercial organisation. The capacity in which those services are performed does not matter (section 8(2)). Whether or not a person is performing services on behalf of the commercial organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship (section 8(4)). An associated person may, for example, be an employee, agent or subsidiary (section 8(3)).

In this case the SFO found that Stanbic was associated with Standard Bank within the meaning of section 8 "in all the circumstances", illustrated by factors including the fact that they were together the "lead manager", that the fee was due to them directly and jointly as lead manager and was split 50/50 between them, their different but complementary roles within the transaction and the close liaison between members of both deal teams.

Whilst these factors clearly show that Stanbic was acting *with* Standard Bank, there does not appear to have been any formal agreement providing that Stanbic would provide services for Standard Bank. The SFO and the Judge appear to have concluded that where parties act jointly they are providing services for and on behalf of each other.

Second, the statement of facts and the judgment serve as a reminder that each commercial organisation must have its *own* adequate procedures for preventing bribery. Standard Bank wrongly believed that there was no requirement for it to conduct its own "know your customer" ("KYC") and/or due diligence on EGMA in circumstances where EGMA was being engaged and paid by another Standard Bank Group entity (in this case Stanbic) which performed its own KYC checks.

Third, it is noteworthy that the DPA records that Stanbic intended to induce Foreign Public Officials to perform a "*relevant function or activity*" improperly by showing favour to Stanbic and Standard Bank. The SFO did not rely on the lower threshold of "*intending to influence*" a Foreign Public Official under section 6 of the Bribery Act 2010.

By adopting this approach, the SFO has avoided the criticism that the threshold applicable under section 6 is too low.

The enforcement landscape

DPAs are now a concrete part of the enforcement landscape rather than simply a theoretical concept. Echoing the messages being promulgated by various enforcement authorities worldwide, the Judge underlined their place in enhancing levels of trust and confidence in the financial services sector, stating that the DPA "*can serve to underline the enormous importance which is rightly attached to the culture of compliance with the highest ethical standards that is so essential to banking in* [the UK]".

The SFO indicated in September 2015 that he expected two DPAs to be concluded by the end of the

calendar year. It and others have previously stated that they expect numbers to rise to approximately 10 to 12 per year in due course. However, corporate organisations should not expect them to be used routinely. The SFO has been clear that it remains first and foremost a criminal prosecutor rather than a regulator and that it will continue to demand very high levels of co-operation as a prerequisite for considering DPAs as an option for resolving corporate misconduct.

Contacts

Roger Best
Partner
T: +44 20 7006 1640
E: roger.best@cliffordchance.com

Judith Seddon
Partner
T: +44 20 7006 4820
E: judith.seddon@cliffordchance.com

Luke Tolaini
Partner
T: +44 20 7006 4666
E: luke.tolaini@cliffordchance.com

Oliver Pegden
Senior Associate
T: +44 20 7006 8160
E: oliver.pegden@cliffordchance.com

Chris Stott
Senior Associate
T: +44 20 7006 4231
E: chris.stott@cliffordchance.com

Patricia Barratt
Director of Anti-Bribery Compliance
T: +44 20 7006 8853
E: patricia.barratt@cliffordchance.com

* May 2012 – "UK Government unveils plans for deferred prosecution agreements"
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May 2013 – "Deferred prosecution agreements pass into law in the UK"
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June 2013 – "Deferred prosecution agreements: Draft SFO/CPS Code of Practice and Sentencing Guideline"
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