

First UK Deferred Prosecution Agreement provides important lessons for APAC corporates

In a landmark judgment, the UK courts have approved the first ever application by the Serious Fraud Office (SFO) for a deferred prosecution agreement (DPA) reached with a defendant facing charges under the UK Bribery Act 2010 (UKBA). The agreement illustrates the high degree of international co-operation in bribery investigations and has important lessons for corporates in how best to deal with regulators and prosecutors when facing accusations of bribery. The conduct in question took place outside the UK, highlighting both the extra-territorial effect of the UKBA, and the SFO's stated commitment to enforcing the legislation worldwide.

The DPA

DPA's have been available in the UK since February 2013, but this is the first occasion on which one has been approved. Under the terms of the DPA, the charges against ICBC Standard Bank plc (Standard Bank), in respect of a failure to prevent bribes, will be suspended for three years. Standard Bank agreed to pay penalties, compensation and costs totalling US\$32 million relating to bribery by two senior executives of its former sister company, Stanbic Bank Tanzania (Stanbic), in connection with a US\$6 million private placement for the Government of Tanzania in 2012-13. The placement generated transaction fees of US\$8.4 million shared between the two banks.

The DPA also 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 submit to, at its own expense, an independent review of its existing anti-bribery and corruption controls, policies and procedures, to be carried out by PwC. Standard Bank is required to implement the recommendations of PwC's final report within 12 months of its publication.

The terms of the DPA were ratified at a public hearing on 30 November before Lord Justice Leveson. On the same day, 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.

Key issues

- First case in which SFO has taken action against a commercial organisation for failing to prevent bribery under s.7 UKBA. The bribery occurred outside the UK.
- The case highlights the importance of prompt engagement and co-operation with regulators and prosecutors.
- Each commercial organisation must have its own adequate procedures for preventing bribery.
- Cooperation between the SFO and the US Securities and Exchange Commission, which imposed a financial penalty of US\$4.2 million for breaches of the FCPA arising from the same facts.

UK DPAs

- DPAs provide a way for organisations to avoid prosecution for certain offences provided the corporate organisation concerned complies with a set of agreed conditions.
- It is a requirement in the UK (not the US) that the court examine the proposed agreement in detail before deciding whether or not to approve it.
- Hearings are usually held in private so as not to jeopardise the possibility of prosecution.
- If approved the court must give its reasons in open court.

employees of the defendant were involved in the conduct (or even knew about it), that it had no previous convictions and that there had been significant improvements to its compliance policies and procedures since the offences were committed.

Fair, Reasonable and Proportionate

In terms of the financial penalties to be levied, the Judge agreed with the parties that the most appropriate way of calculating the penalty would be to multiply the "harm" figure (US\$8.4 million), by 300 per cent, taking into account the serious nature of the conduct. The penalty was then discounted by a third to reflect the co-operation of the bank and its fulsome and prompt admissions. The penalty is supposed to be *"broadly comparable to the fine that a court would have imposed"* following conviction after a guilty plea.¹

This analysis may leave room for higher penalties in future cases where co-operation may not be as fulsome and where individuals within an organisation are aware of bribery but fail to prevent it. The Judge noted that one of the reasons why he considered the level of the penalty to be *"fair, reasonable and proportionate"* was that the US Department of Justice had confirmed *"that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the US and has intimated that if the matter is resolved in the UK, it will close its inquiry."*

Pre-Conditions for a UK DPA

Two main criteria must be fulfilled in order for a court to approve a DPA under the relevant UK law and codes of practice. First, prosecutors and the Court must be satisfied that it is in the "interests of justice" for prosecution to be deferred. Second, the terms on which it is proposed that prosecution should be deferred must be "fair, reasonable and proportionate".

Interests of Justice

The most important factors leading the SFO and the Judge to decide that it was in the "interests of justice" to approve the DPA were the promptness of the self-reporting, the fully-disclosed internal investigation and the extensive co-operation with the SFO. There had been prompt and significant escalation of the matter within the group and continuous co-operation as the investigation took place. The SFO director David Green applauded Standard Bank *"for their frankness with the SFO and their prompt and early engagement with us."*

Such unfettered co-operation is unlikely to be replicated in every future case, particularly in relation to questions such as whether the defendant may assert privilege over relevant documents and who may take the first accounts from witnesses.

The Judge also noted the fact that no

The UK Bribery Act 2010 – The Corporate Offence

- The Act created a new corporate criminal offence of failing to prevent bribery by an associated person (s.7).
- The corporate offence applies to corporate bodies formed outside the UK if they carry on business, or part of a business, in the UK, even where the underlying conduct takes place outside the UK.
- A person is associated with a commercial organisation if that person performs services for, or on behalf of, the organisation.
- The associated person need not be connected to the UK nor does it require an act to have taken place in the UK.

¹ Schedule 17, UK Crime and Courts Act 2013

This suggests that in future cases tariff levels imposed in the US will influence the level for fines for offences under the UKBA.

The corporate offence

This is the first case in which the SFO has taken action against a commercial organisation for failing to prevent bribery under s.7 UKBA. Given the extra-territorial nature of the Act (the bribery in this case was in Tanzania), the case has important lessons for corporates with business interests in the UK who face exposure to liability for wrongdoing by their employees or associates anywhere in the world.

First, the SFO and the Judge have taken a wide approach to the definition of an "associated person" for the purposes of s.7. s.8 provides that a person is "associated" with a commercial organisation for the purposes of s.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 (s.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 (s.8(4)). An associated person may, for example, be an employee, agent or subsidiary (s.8(3)).

In this case, Stanbic and Standard Bank were cooperating on the transaction, but there was no formal agreement between them specifying that Stanbic was performing services for Standard Bank. The SFO and 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 due diligence on the Tanzanian entity which received the bribes, in circumstances where the entity was being engaged and paid by Stanbic.

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 s.6 UKBA.

Dealing with the new enforcement landscape

The threat of prosecution for the corporate offence is no longer a theoretical concept. The SFO announced on 2 December 2015 that the Sweett Group plc (a provider of professional services in connection with construction and infrastructure projects) has admitted an offence under s.7 UKBA regarding conduct in the Middle East. It remains to be seen if this matter will also be dealt with by means of a DPA.

As noted in our November 2010 briefing², the corporate offence creates a compelling reason for companies doing business in the UK to take strenuous precautions to guard against acts of bribery being committed on their behalf, and to ensure that their anti-corruption compliance programmes meet the highest standards and reflect the statutory guidance.

The judgment itself highlights the need for commercial entities to have a robust compliance regime in place and to be ready to engage with prosecutors at the earliest opportunity. In his judgment, Lord Justice Leveson said that the bank had "far better served its shareholders, customers and employees by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking." 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.

² [The New UK Bribery Act: why foreign companies need to be prepared](#)

Before engaging with regulators, proper consideration should be given to how to approach the issue of legal privilege. Notes of interviews with witnesses taken by external lawyers would normally attract privilege. However, the SFO has indicated that in order to be deemed as "co-operative", the organisation concerned should waive privilege over the factual contents of such statements. The threat goes wider – by giving up just one document or piece of information, the organisation may find that it has inadvertently waived privilege over all the legal advice it has received. Corporates may wish to consider seeking legal advice as appropriate with regards to this and the other significant issues raised by the judgment.

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