A festive gift and a missed opportunity: the real tale of the UK's first DPA

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Now that the dust has finally settled following Lord Justice Leveson's approval of the UK's first deferred prosecution agreement ("**DPA**") on 30 November 2015 (discussed here previously), what conclusions can we draw from this 'landmark' event?

This post proposes two. The first is that the Serious Fraud Office ("**SFO**") appears to have been gifted a very generous and neatly wrapped early Christmas present in the form of ICBC Standard Bank plc's ("Bank") approach to the case—from the moment the alleged wrongdoing first came to its attention, through to agreeing to engage in the DPA process and ultimately entering into the DPA itself.

The second is that, by entering into a DPA, a potential opportunity was missed for the UK courts to opine on the form and substance of the procedures that a company must have in place in order to avail itself of the "adequate procedures" defence provided for by section 7(2) of the Bribery Act 2010 ("**Act**").

A festive gift?

Lord Justice Leveson's judgment ("**Judgment**") throws light on a number of key decisions that were taken by the Bank that are likely to have been warmly received by the SFO, eager to secure its first DPA:

- The Bank immediately reported itself to the authorities: *"the disclosure was within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) its own investigation".*[1]
- Further, it was explicitly acknowledged that the conduct which was self-reported so quickly might otherwise have remained unknown to the SFO: *"Were it not for the internal escalation and proactive approach of Standard Bank and Standard Bank Group that led to self-disclosure, the conduct at issue may not have otherwise have come to the attention of the SFO."*[2]
- Having self-reported, the Bank then agreed to enter into the DPA process, notwithstanding the public interest factors listed below that may well (per the Guidance on Corporate

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Prosecutions issued by the Director of the SFO and others) have weighed in its favour and tended against a prosecution being commenced:

- The Bank had no previous convictions for bribery and corruption and nor had it been the subject of any other criminal investigations by the SFO;
- There was no evidence that the failure to raise concerns about anti-bribery and corruption risks was more widespread within the organisation;
- The evidence did not reveal that executives or employees of the Bank intended or knew of an intention to pay a bribe;
- The Bank in its current form (following its subsequent takeover by another company) is now effectively a different entity from that which committed the offence; and
- The conduct at issue involved only one isolated transaction.

A missed opportunity?

The Judgment makes clear that the Director of the SFO had concluded that the Bank did not have a realistic prospect of raising the defence (under section 7(2) of the Act) that it had adequate procedures in place designed to prevent persons associated with it (in this instance the Bank's Tanzanian sister company) from undertaking the bribery:

> *"The applicable policy was unclear and was not reinforced effectively to the Standard Bank deal team through communication and/ or training … In essence, an anti-corruption culture was not effectively demonstrated within Standard Bank as regards the transaction at issue."*[3]

It is significant then that by entering into the DPA the Bank tacitly agreed with the Director's conclusion, notwithstanding that, as at the time of the (solitary) transaction which formed the subject of the enforcement action, the Bank had in place a significant number of policies and procedures, committees, compliance functions and tailored training schedules specifically designed to mitigate bribery and corruption risk.

The Bank's acquiescence is all the more significant when placed in the context of the relevant guidance that has been issued in respect of the section 7 defence.

The Joint Prosecution Guidance (issued by the Director of the SFO and the Director of Public Prosecutions) makes clear that: "*A single instance of bribery does not necessarily mean that an organisation's procedures are inadequate…the actions of an agent or an employee may be wilfully contrary to very robust contractual requirements, instructions or guidance."*

The Ministry of Justice Guidance goes further: "*the objective [of the Bribery Act] is not to bring the full weight of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf… in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times."*

Whether a company's procedures are adequate should ultimately be a matter for the courts to decide on a case by case basis. Indeed, had the Bank elected not to engage with the DPA process,

to contest the Director's assertion as to its prospects of successfully raising the defence and looked to establish, at trial and on the balance of probabilities, that it did have adequate procedures in place, we may well have had some firmer answers as to exactly what such procedures look like.

It is a shame that this opportunity was missed and it would be unfortunate for this Judgment to be interpreted as lending support for the (logically flawed and practically unworkable) proposition that if any act of bribery has occurred, regardless of what procedures a company had in place, it must follow that those procedures were inadequate. Whilst such a conclusion may appear remote and would be extremely concerning for all companies subject to the Act, it seems clear from the Bank's decision not to run the statutory defence that the bar for establishing that a company's procedures are adequate has been set particularly high.

With the SFO's recent announcement that Sweett Group plc has admitted to, and is set to become the first company to plead guilty to, a section 7 offence, it is to be hoped that the first section 7 case which is contested in front of a jury is not too far away. Only then will companies gain some much needed clarity as to what adequate procedures really look like.

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[1] Paragraph 27 of the Approved Judgment.

[2] Paragraph 28 of the Approved Judgment.

[3] Paragraphs 20 to 22 of the Approved Judgment.

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