UK's Serious Fraud Office Secures First Deferred Prosecution Agreement

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On 30 November 2015, Lord Justice Leveson formally approved the UK's first deferred prosecution agreement (DPA) since the legislative scheme for such arrangements came into force on 24 February 2014. The introduction of DPAs was seen as a landmark moment in the SFO's capacity to pursue corporate wrongdoing effectively.

This first DPA is between the Serious Fraud Office (SFO) and ICBC Standard Bank (ICBC) and relates to an offence of failing to prevent bribery, contrary to section 7 of the Bribery Act 2010. Under the agreement, ICBC is required to pay a financial penalty of $16.8 million, as well as disgorgement, compensation and costs.

The Conduct

The SFO alleged that Standard Bank (purchased by ICBC in February 2015), between 1 June 2012 and 31 March 2013, failed to prevent persons associated with it from committing bribery, contrary to section 7 of the Bribery Act 2010. The misconduct arose from the Government of Tanzania's attempt to raise public funds through a sovereign note. Essentially, Standard Bank and Stanbic Bank Tanzania, which shared the same parent company, together sought to secure from the Tanzanian Government the instructions to raise the funds.

Those efforts only progressed after Stanbic entered into a contract with a Tanzanian company for 'consultancy' services, under which a payment of $6 million was made. That payment was a bribe: the directors of the company were politically connected individuals and the payment was immediately withdrawn in cash. Standard Bank had relied on Stanbic to conduct due diligence into the recipient company. In so doing, and having failed to identify that parties associated with the recipient company were politically exposed persons (PEPs), it was found to have had inadequate measures to protect against bribery. As stressed in the judgment, neither Standard Bank, nor its employees, were implicated in knowingly participating in an actual bribery offence.

The Court's Role

A guiding element of the DPA scheme, in contrast to the US, is the requirement for a high level of

judicial oversight and sanction. In authorising the agreement, the presiding judge must determine whether the DPA is in the interests of justice. Three key factors, which led Lord Justice Leveson to conclude that a DPA was in the interests of justice, were as follows:

1. *the seriousness of the offence itself:*

The misconduct, a section 7 Bribery Act offence, is not considered the most egregious offence on the spectrum of corporate misfeasance. It is effectively a strict liability offence that requires no criminal state of mind.

2. *the extent of Standard Bank's cooperation:*

As soon as the transaction was flagged as suspicious, Standard Bank initiated an internal inquiry. Prior to the conclusion of that inquiry, it promptly reported the matter to the SFO, with whom the results of the investigation were subsequently shared. It is worth noting that the disclosure was made on 24 April 2013, one day before the legislation underlying DPAs received Royal Assent. This imminent legislative change may well have played a hand in the approach taken by Standard Bank's Board.

3. *the organisation in its current form was substantially different from the entity responsible for the misconduct:*

Since 1 February 2015, ICBC has been a 60% majority shareholder in Standard Bank. Following the majority share acquisition, a new Board was appointed.

A further consideration, raised by Lord Justice Leveson when weighing up the interests of justice, concerned the extent to which Standard Bank had engaged in similar conduct. It had previously been subject to regulatory action by the UK Financial Conduct Authority (FCA), which found, amongst other failings, that Standard Bank had failed to pursue adequate and proportionate enhanced due diligence for PEP customers in the context of anti-money laundering (not bribery and corruption). These compliance failings were considered to be different in nature, and factually unconnected. Accordingly, the FCA action appears not to have prevented the interests of justice test being met.

Aside from acting as a gatekeeper in deciding whether it is appropriate for a DPA to be offered, Lord Justice Leveson also stressed the "pivotal role" played by the Court in assessing what terms would be appropriate. Under the DPA scheme the judge is responsible for determining the appropriate financial penalty, having consulted and applied the relevant sentencing guidelines which came into force on 1 October 2014.

Direction of Travel

It is perhaps no surprise that this case was chosen as the first DPA. From the perspective of both the SFO and ICBC, the decision to pursue a DPA appears uncontroversial. The political danger for the SFO was always going to be the perception that the DPA scheme would be used as a mechanism through which companies could avoid the profound consequences of a criminal conviction. On the facts of this case, particularly the determination that there was no substantive

bribery offence committed by Standard Bank, it is unlikely that the decision will be met with any public or political discontent.

From ICBC's perspective, having acquired Standard Bank in 2015, there was no doubt a desire amongst the new Board to address the past—with relative certainty of outcome—and move on. Indeed, Lord Justice Leveson's judgment articulates very neatly why the interests of a company may best be served by transparency and the pursuit of a DPA:

"For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees as well as those with whom it deals by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business."

Because of its particular circumstances, this first DPA does not provide substantial insight into how DPAs will be negotiated in the future and the likely appetite of companies to accept them. If boardrooms in the UK come to share Lord Justice Leveson's assessment—that recognition of one's failings may ultimately enhance a company's reputation—then perhaps DPAs will readily be taken up, particularly in cases brought under section 7 of the Bribery Act. However, given the high threshold for establishing corporate criminal liability in the UK more generally—and the UK government's recent indication that reform in this area is no longer on the cards—it remains an open question whether the SFO's recent success will lead to a significant increase in the number of self-reports.

For more information on the DPA process please click here.

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