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UK Prosecutor Secures First Deferred Prosecution Agreement for Bribery

We consider the implications for corporations under UK and US law, and the future of global criminal and civil investigations.

On November 26, 2015, the UK Serious Fraud Office (SFO) secured its first Deferred Prosecution Agreement (DPA) against UK-based ICBC Standard Bank Plc (Standard Bank) for failure to prevent one of its sister companies from bribing Government of Tanzania (GoT) officials, an offence under Section 7 of the Bribery Act 2010 (the Failure Offence). [1]

Standard Bank agreed to pay approximately US$33 million in compensation, disgorgement of profits, penalties and costs. In addition, Standard Bank settled charges with the US Securities and Exchange Commission (SEC) under an administrative order for an additional US$4.2 million penalty related to the same conduct. The US Department of Justice (DOJ) reportedly worked with the SFO in this matter.

This case illustrates the SFO's new powers to resolve criminality with a DPA, under court supervision and alongside overseas authorities, as well as the importance of corporations maintaining adequate anti-corruption policies and procedures. This first DPA also underscores the potential advantages — in appropriate cases — of early self-reporting and cooperation. We summarize below the factual background, the terms of the DPA and key takeaways for corporations.

What happened?

In 2012, Standard Bank and its sister company, Stanbic Bank Tanzania Limited (Stanbic), submitted a proposal to the GoT in connection with the GoT's efforts to raise public funds. The proposal stalled until Stanbic increased the fee to be paid to Standard Bank and Stanbic from 1.4% to 2.4%, with the additional 1% to be paid to a "local partner," Enterprise Growth Market Advisors Ltd. (EGMA). EGMA's chairman, who was also an EGMA shareholder, was Commissioner of the Tanzanian Revenue Authority and a member of the GoT.

EGMA provided no services in relation to the transaction. The English court therefore inferred that Stanbic and two of its senior management intended to bribe the Commissioner through the arrangement. Stanbic opened an account for EGMA and conducted Know Your Customer (KYC) checks, but failed to document the Commissioner as a Politically Exposed Person (PEP). In November 2012, Standard Bank and Stanbic won the mandate, and in February 2013, Standard Bank and Stanbic transferred US$600 million to the GoT's account in New York. In March 2013, Stanbic deposited the US$6 million fee into EGMA's account.

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In late March 2013, Stanbic alerted Standard Bank to its concerns over the matter, and Standard Bank consulted with external counsel and initiated an investigation. The next day, Standard Bank self-reported to the UK authorities. Its external advisers ultimately submitted a detailed investigation report to the SFO.

Why did the SFO seek a DPA?

In pursuing a case against Standard Bank, the SFO determined that there was a realistic prospect of conviction of Standard Bank under the Failure Offence (as Standard Bank was an English company to which the offense applied) and that Standard Bank likely could not establish the defence of "*adequate procedures*,"[2] based on the quality of its compliance program.[3] The SFO did not pursue a case against Stanbic, likely because of lack of jurisdiction. However, the SFO considered the case against Standard Bank suitable for a DPA based on several factors[4]:

- There was no indication that anyone within Standard Bank knew that the EGMA fee constituted a bribe. Rather, Standard Bank's criminality lay in the failure to prevent bribery by Stanbic and Stanbic's senior management.

- Standard Bank self-reported immediately to the SFO and adopted a "*genuinely pro-active approach*." The court found that the self-report carried particular weight because the wrongdoing might not otherwise have come to the SFO's attention. Standard Bank then conducted a detailed investigation, which it also disclosed to the SFO, and fully cooperated with the SFO's investigation.

- There was no history of similar conduct by Standard Bank.

- Standard Bank had made significant enhancements to its compliance program since a Financial Conduct Authority review in 2011.

- Standard Bank was under different ownership than at the time of the misconduct: in February 2015 the Industrial and Commercial Bank of China (ICBC) had acquired a majority stake and appointed a new board.

The SFO applied to the English court for approval to enter into the DPA on the basis that it was in the interests of justice.[5] The court granted approval on 26 November 26 2015.

What sanctions did the English court approve?

The SFO sought and the English court approved the following sanctions[6]:

- Compensation for losses. The court confirmed that compensation to victims was a "*priority*" and "*a necessary starting point*." In this case, compensation comprised paying the GoT an amount equal to EGMA's US$6 million fee, plus interest of around US$1.15 million.

- Disgorgement of gains. The court agreed that Standard Bank should disgorge its 1.4% fee (US$8.4 million), measured by reference solely to Standard Bank's revenue and without allowance for Standard Bank's costs.

- Financial penalty. The court applied the Sentencing Council Guidelines[7] to calculate financial penalties that would be "*broadly comparable*" to a fine following a conviction, considering the following factors.

    - First, the court considered Standard Bank's *culpability*, finding Standard Bank at the high end of medium culpability, based on its view that in dealings with foreign public officials, Standard Bank

should have anticipated the risk of corruption. The court found that Standard Bank's anti-corruption culture was not effectively demonstrated, because: the transaction was with the government of a high-risk country; Stanbic performed only basic KYC checks; and Standard Bank both failed to identify the presence of a PEP and failed to address the addition of EGMA's fee.

  - Second, the court considered the *harm*. Penalties for cases of medium culpability can be multiplied by a range of 100%-300%, depending on the level of harm caused by the bribery, the starting point being 200%. In evaluating the harm in this case, the court noted Standard Bank's serious failings and the seriousness of the underlying bribery as aggravating factors, but the self-reporting and cooperation as mitigating factors. The court applied the maximum multiplier of 300%, resulting in a figure of US$25.2 million. The court considered that the overall effect of this analysis would achieve the objectives of appropriate punishment and deterrence. [8]

  - Third, the court considered Standard Bank's prompt *self-reporting and cooperation*, and allowed a full one-third reduction, which would have been available on an early guilty plea, leading to a final discounted penalty of US$16.8 million.

- Cooperation. Standard Bank agreed to cooperate "*fully and honestly*" with the SFO, any other agency or authority, and Multilateral Development Banks, in any matters arising from the facts, in particular in relation to investigations of individuals.

- Corporate Compliance. Standard Bank agreed to enhance its anti-corruption compliance program and engage an independent expert to monitor, report and make recommendations regarding the company's compliance program.

- SFO Costs. Finally, Standard Bank agreed to pay the SFO's costs, amounting to £330,000.

In its judgment, the court also confirmed its own "*pivotal role*" in the DPA, in contrast to the role of the judiciary in other jurisdictions, including the US. Explaining that the court had conducted a detailed analysis of the offense and financial penalties, it noted there was "*no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest.*"

What impact did related US and GoT actions have on the English court's decision to approve the DPA?

The court tested the overall outcome by reference to "*the approach which would have been adopted by the US authorities had the Department of Justice (DOJ) taken the lead in the investigation and pursuit of this wrongdoing*." The court noted in its judgment that the DOJ had "*confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the United States and has intimated that if the matter is resolved in the UK, it will close its inquiry*." The court also considered that the Tanzanian Prevention and Combatting Corruption Bureau had opened its own investigation and confirmed it did not object to the DPA. In view of this, the court considered the above sanctions fair, reasonable and proportionate.

How does this compare with the US approach for resolving bribery cases under the FCPA?

Because the English court considered how the DOJ would have resolved the action if it had led the investigation, considering how US authorities may have handled this matter is useful. In negotiating the settlement terms of an Foreign Corrupt Practices Act (FCPA) enforcement action, the DOJ applies its

internal guidelines,[9] as well as the US Federal Sentencing Guidelines[10] that apply to all US federal criminal cases.

Many of the DOJ Guidelines align with those considered by the English court in the Standard Bank case, including:

- The nature and seriousness of the offense
- The pervasiveness of wrongdoing within the corporation
- The corporation's history of similar misconduct
- The corporation's willingness to cooperate in the investigation of its agents
- The effectiveness of the corporation's pre-existing compliance program
- The corporation's timely and voluntary disclosure of wrongdoing
- The corporation's remedial actions

In addition, the DOJ considers collateral consequences, the adequacy of remedies such as civil or regulatory enforcement actions, and the adequacy of the prosecution of responsible individuals.

Like the UK Sentencing Council Guidelines, the US Federal Sentencing Guidelines set forth a multi-step process for calculating a penalty, which generally awards points based on the severity of the offense and various aggravating factors, while subtracting points for certain mitigating factors. The US Federal Sentencing Guidelines largely align with the penalty assessment the English court applied. In the FCPA context, the preliminary penalty range is developed based on the specific offense charged (anti-bribery violations typically result in a higher range); the amount of bribes paid/loss to the victim; and the involvement of "high level personnel." US authorities then apply mitigating factors, similar to those the English court adopted, to develop a range, with significant discretion to move within the range. The discounted value of the financial penalty and the use of DPA (as opposed to a guilty plea) mirror the mitigation credit US authorities often offer for self-disclosure, cooperation and remediation.

Similarly, the US SEC issued guidance just last month confirming its practice of only entering into DPAs or non-prosecution agreements (NPAs) in cases where the offending company voluntarily self-disclosed the matter. Like the UK and DOJ guidelines, the SEC guidance indicated that several factors are considered before entering into an NPA or DPA, including self-policing, remediation and cooperation with law enforcement authorities.[11]

How did the US Government ultimately resolve the case?

Because of jurisdictional issues, the conduct by Standard Bank and Stanbic did not violate the FCPA. Instead, on November 30, 2015, the SEC charged Standard Bank with violating Section 17(a)(2) of the Securities Act, an administrative anti-fraud provision that, in a civil context only, requires that the SEC demonstrate negligence. Specifically, Section 17(a)(2) makes it unlawful for any person in the offer or sale of securities to use the US mails or interstate commerce, directly or indirectly, to "*obtain money or property*" by using material misstatements or omissions.[12] In this case, the SEC found that Standard Bank violated Section 17(a)(2) by failing to disclose the payments Stanbic made to EGMA in connection with the sale of the sovereign debt the GoT issued and sold in the US.[13] The SEC ordered Standard Bank to pay disgorgement of US$8.4 million (to be satisfied by the DPA with the SFO), and to pay a further

US$4.2 million in civil monetary penalties to the SEC. In this case, US authorities looked beyond the FCPA to obtain relief — albeit a relatively small settlement amount through an administrative action — against a party for conduct related to foreign bribery.

What does this mean for international corporations?

- The SFO is willing to investigate top-end fraud, and is empowered and willing to settle matters, if appropriate and approved by the English court.

- Corporations carrying on business in the UK may be criminally liable under the Failure Offence for bribery by third parties — including a sister company and senior personnel of that sister company — at least if such third parties are "*performing services for or on behalf of*" the company subject to UK jurisdiction.

- UK and US authorities continue to grant credit for prompt self-reporting and ongoing cooperation, through reductions in financial penalties and resolution through DPAs. Indeed, the SEC has expressly stated that self-disclosure is *mandatory* for a DPA or NPA. Corporations will, however, continue to face a difficult decision when managing early reports of potential wrongdoing before the facts have been fully investigated: self-reporting may have advantages, but corporations must balance those advantages against the risks of disclosing information that might ultimately demonstrate no criminality or violations, which authorities would not have otherwise discovered.

- Corporations must maintain anti-corruption compliance programs that address unique risks, including risks that third parties could commit bribery on their behalf. The defence of "*adequate procedures*" may be limited, and did not appear to be strong for Standard Bank. The defence is only relevant if bribery has occurred (which triggers the Failure Offence), and so the organization's procedures must have failed to prevent the bribery. While what kind of procedures are considered "*adequate*" remains to be seen, such a situation could be if a "rogue agent" circumvents adequate procedures and controls.

- The SFO, with the approval of the English court, is willing to enter into a DPA if it is in the interests of justice, including if the corporation lacked knowledge of the corrupt conduct, which may be common where the Failure Offence is concerned.

- Financial sanctions in DPAs could be significant, including treble damages in the UK; however, financial sanctions likely will be reduced based on self-reporting, cooperation, remediation and admission of wrongdoing.

- In addition to financial penalties, corporations may face further consequences in entering into DPAs. Corporations must admit wrongdoing, which may expose them to civil claims, and potentially regulatory consequences. Corporations may also be required to submit to external assessments of compliance enhancements and to cooperate with investigations by other authorities, including investigations into individuals. Finally, a DPA will not prevent other authorities from taking enforcement action, as occurred here through the SEC.

- Corporations analysing exposure under US laws should recognize that, even if they are not subject to the FCPA, US regulators may still use alternative enforcement mechanisms in foreign bribery cases. While this case is not a template for future SEC bribery cases, the SEC's administrative settlement shows its creativity in addressing conduct that the SEC takes seriously (and taking into account the

UK resolution), but where they did not have subject matter jurisdiction to bring charges under the FCPA.

- The SFO continues to coordinate with its foreign counterparts, including the DOJ and SEC, and the English court may look to approaches US authorities employ in assessing DPAs. The settlements reached in this case demonstrate the strong relationship between US and UK authorities. Indeed, SEC and DOJ leadership have been working for years with foreign regulators and law enforcement to obtain evidence and secure justice in the appropriate jurisdiction. This suggests an increase in multi-jurisdictional prosecutions.

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Endnotes

1 The court has published the DPA, the court's preliminary judgment and final judgment, and an agreed Statement of Facts.

2 For details on the offense see our *Client Alert*, and on the defence our further *Client Alert*.

3 The details of the policy and procedure are set out in the agreed Statement of Facts.

4 For details of the SFO's powers to enter into a DPA, see our *Client Alert*, and the DPA Code of Practice and for the factors see paragraph 2.8.2 of the DPA Code of Practice.

5 In accordance with the test laid down in Schedule 17 to the Crime and Courts Act 2013 and paragraph 11.3(3)(i)(i) of the Criminal Procedure Rules 2015.

6 See paragraph 7 of the DPA Code of Practice.

7 For details, see our *Client Alert* and the Sentencing Guidelines and Crime and Courts Act 2013, Schedule 17.

9 See, *e.g.*, http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.

10 See http://www.ussc.gov/guidelines-manual/guidelines-manual.

11 See https://www.sec.gov/litigation/investreport/34-44969.htm.

12 15 U.S. C. § 77q(a)(2).

13 In the Matter of Standard Bank PLC, Admin. Proc. File No. 3-16973 (Nov. 30, 2015), available at http://www.sec.gov/litigation/admin/2015/33-9981.pdf.