SERIOUS FRAUD OFFICE V STANDARD BANK PLC: DEFERRED PROSECUTION AGREEMENT

To Our Clients and Friends:

UK SFO enters into its first DPA and unveils its first enforcement of the corporate offence of failure to prevent bribery

In a judgment of November 30, 2015 in Serious Fraud Office v Standard Bank Plc: Deferred Prosecution Agreement (Case No: U20150854), the Crown Court has approved the United Kingdom's first deferred prosecution agreement (the "Standard Bank DPA") under the regime for DPAs brought into effect in the UK by section 45 and Schedule 17 of the Crime and Courts Act 2013. The full judgment, which can be found here, provides invaluable insight into the approach taken by the SFO and the courts DPAs, and the level of cooperation required of corporates seeking to ensure that an investigation is resolved by way of a DPA. The Standard Bank DPA, between the Serious Fraud Office and Standard Bank PLC (now known as ICBC Standard Bank PLC), can be found here.

This judgment and this Agreement also mark the SFO's first enforcement action under the offence of failure by a commercial organisation to prevent bribery in section 7 of the Bribery Act 2010 (the "section 7 offence") - the offence which led commentators to style the Bribery Act 2010 as "the FCPA on steroids". The judgment offers much-needed clarity on how the courts will interpret the section 7 offence and how fines for that offence will fall to be calculated.

Monday's judgment represents twin landmarks for the SFO: first, in its role as the UK's primary enforcement authority for corporate criminality, and second in its role as the UK's primary authority in the field of anti-corruption enforcement. Nonetheless, despite this notable advance for the SFO, Lord Justice Leveson's judgment leaves unanswered significant questions in both areas. This Alert will consider both the implications of this development and the remaining uncertainties.

Contrary to many reports, this development does not in fact represent the first UK enforcement of the section 7 offence. That came in the form of the Scottish Crown Office's announcement of 25 September 2015 of a Civil Recovery Order of £212,800 against Brand-Rex Limited, a developer of cabling solutions for network infrastructure and industrial applications, in respect of its failure to prevent bribery by an independent installer of Brand-Rex products. That case involved misuse of an incentive scheme operated by Brand-Rex through the improper provision of travel tickets to a customer, whose personnel used them for foreign holidays. The Crown Office dealt with the Brand-Rex case under its "self-reporting initiative", which allows for civil recovery rather than a criminal outcome, but applies only in Scotland. Furthermore, it emerged on December 2, 2015 that construction firm Sweett Group has admitted a section 7 offence relating to an ongoing investigation...
by the Serious Fraud Office into two related contracts in the Middle East, and is awaiting prosecution. The SFO also issued a press release on December 2, 2015 confirming this, and specifically confirming that the matter could be going before a court (seemingly confirming, sotto voce, that this would be dealt with by way of a DPA).

With these three section 7 offence cases coming to light within the space of ten weeks, and with three entirely different outcomes, enforcement of the section 7 offence appears to be gathering pace.

The DPA Perspective

The UK regime for DPAs

The UK regime for DPAs was introduced on April 23, 2013, although DPAs did not actually become available as enforcement tools for UK prosecutors until February 24, 2014, when the SFO and the Crown Prosecution Service finalized their Deferred Prosecution Agreements Code of Practice (the "DPA Code"), which can be found here.

Availability of DPAs

As noted in our 2013 Mid-Year Update on Corporate DPAs and NPAs, the initiative for DPAs in the UK rests with designated prosecuting agencies (including the SFO), who may invite a corporate entity, a partnership, or an unincorporated association against whom proceedings are contemplated to enter into DPA negotiations. DPAs are not available in connection with the prosecutions of individuals.

Moreover, DPAs are also only available for certain offenses, which are primarily economic in nature, including bribery, money laundering, various types of fraud (including the common law offense of conspiracy to defraud which has formed the basis of recent SFO prosecutions of traders in matters relating to manipulation of benchmark rates), and certain financial sector crimes.

As the Standard Bank judgment confirms, DPAs are available with respect to conduct pre-dating the entry into force of the 2013 Act itself.

Process for entry into DPAs

The prosecuting authority has the right of initiative in respect of DPA negotiations, which it exercises in its sole discretion; there is no right for a defendant organisation to be considered for disposition by DPA.

Before inviting an organisation to enter into DPA negotiations, the prosecutor must be satisfied that (i) the offence contemplated is among those for which a DPA is available; and (ii) that the case is appropriate for a DPA, which it assesses by way of a two-stage test set out in the DPA Code, comprising an evidential stage and a public interest stage.

The evidential test requires the prosecutor to satisfy himself that either the Full Code Test in the Code for Crown Prosecutors (that there is sufficient evidence to provide a realistic prospect of conviction,
taking into account possible defences) is satisfied or there is at least a reasonable suspicion based upon some admissible evidence that the defendant organisation has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so the evidence as a whole would be capable of establishing a realistic prospect of conviction.

The public interest test requires the prosecutor to satisfy himself that the public interest be properly served by not prosecuting, but instead by entering into a DPA. The more serious the offence, the more likely it is that prosecution will be required in the public interest. The impact of the offending conduct in other countries, not just the consequences in the UK, is to be taken into account. A prosecution will usually take place unless, in the appreciation of the prosecutor, there are public interest factors against prosecution which clearly outweigh those tending in favour of prosecution.

In order to enter into a DPA, a prosecutor must apply to the Crown Court for a declaration confirming both that the DPA is in the interests of justice and that the terms proposed are fair, reasonable, and proportionate to the offense. The hearing of this application takes place in private, with a view to protecting the defendant's rights of defense in any ultimate prosecution or in related proceedings if the court is unable to give the declaration.

If the court grants the declaration on appropriateness, the prosecutor may then negotiate the terms of the DPA with the defendant organisation, after which the prosecutor applies again to the Crown Court, this time for approval of the actual terms of the concluded DPA. The hearing of that application can again be in private, but the ultimate declaration approving a DPA must be made in public, and the prosecuting agency is generally required to publish the DPA, the judge's related declarations and reasoning. The DPA becomes effective upon the Crown Court approval.

**The Effect of a DPA**

The DPA automatically suspends the indictment against the corporate defendant. The DPA is accompanied by a statement of facts prepared by the prosecutor, and specifies the date when the DPA expires. As in the United States, if the defendant complies with the DPA's terms for the duration of the DPA, the criminal proceedings will then be discontinued, and requirements imposed under the DPA will come to an end. The Act specifies the consequences of and procedures for dealing with breaches of the DPA.

**The Standard Bank case**

The Statement of Facts agreed pursuant to clause 2 of the Standard Bank DPA, and which forms the factual basis for that Agreement, can be found here. The Statement of Facts provides a highly detailed account of the underlying conduct giving rise to the DPA and of the investigations carried out by Standard Bank's legal advisers and by the SFO.
The factual background

The case related to bribery of government officials in Tanzania. In very broad outline, the Government of Tanzania wished to raise funds by way of a sovereign note private placement. Stanic Bank Tanzania Ltd ("SBT") (a subsidiary of Standard Bank Group Limited), was not licensed to deal with non-local foreign investors in the debt capital market. SBT therefore involved Standard Bank (another subsidiary of Standard Bank Group Limited) and they sought to raise the funds jointly.

Broadly, negotiations did not progress until SBT entered into an agreement with a Tanzanian company called Enterprise Growth Market Advisors Limited ("EGMA"), pursuant to which EGMA was paid a US$6 million fee representing 1% of the funds raised by Standard Bank for the Government of Tanzania. Two of the three directors and shareholders of EGMA were officials of the Tanzanian Government: namely, the Commissioner of the Tanzania Revenue Authority (a member of the Tanzanian Government) and the former Chief Executive Officer of Tanzanian Capital Markets and Securities Authority. EGMA's fee was agreed at 1% of the funds raised and the Standard Bank group fee for the arrangement was later raised from 1.4% to 2.4% (with the 1% for EGMA coming out of that).

The investigation

The mandate to raise funds was placed with Standard Bank and SBT and US$600 million was raised. The Statement of Facts indicates that there is no evidence that EGMA provided any services in relation to the transaction. However, EGMA had opened a bank account with SBT and its fee of US$6 million was paid via SBT into this account. The majority of this amount was subsequently withdrawn in cash at a speed that raised alarm within the staff at SBT. The matter was referred to the head of the Standard Bank Group Ltd and Standard Bank was notified and legal advisers quickly instructed. Within three weeks of the first report, Standard Bank had informed both the Serious and Organised Crime Agency (it might be presumed by means of a suspicious activity report) and the SFO.

The SFO, following appraisal of the internal investigation, and having conducted its own interviews, found that there was a reasonable suspicion that Standard Bank had failed to prevent bribery contrary to Section 7 of the Bribery Act 2010, and that there were also reasonable grounds for believing that further investigation would provide further evidence that would be capable of establishing a realistic prospect of conviction. Consequently, the SFO considered the "evidential test" under the DPA regime to be satisfied.

The hearing of 30 November 2015

The hearing of this application was before The Right Honourable Sir Brian Leveson, President of the Queen's Bench Division of the High Court, who recently came to prominence in his role as Chair of the UK's Public Inquiry into the Culture, Practice and Ethics of the Press. Lord Justice Leveson was sitting in this hearing as Southwark Crown Court.

The hearing was fairly cursory in nature, with Counsel for the SFO describing the factual background to the matter and the terms of the DPA. Submissions from Counsel for Standard Bank were limited to
a brief confirmation of their support for the application. Judgment was then issued, outlining the reasons why dealing with this matter by way of DPA is in the interests of justice, and why the terms of the proposed DPA are reasonable.

Overall, the impression given by the hearing was one of fait accompli, perhaps unsurprisingly given the fact that this was the second of two hearings, the first of which was held in private. Lord Justice Leveson regularly commented that the purpose of this hearing was to formally approve the DPA and open up its terms to public scrutiny, rather than resolve any outstanding disputes between the parties.

It is noteworthy, given that this high level of judicial involvement in the DPA regime resulted from trenchant criticism in a previous case, pre-dating the Act, from Lord Justice Thomas towards prosecutors entering into deals with defendants, that Lord Justice Leveson, at paragraph 66 of his judgment, made the following concluding remarks:

"It is obviously in the interests of justice that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all 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."

**Notable features of the Standard Bank DPA**

The Standard Bank Agreement gives some insight into the kinds of provisions that commercial organisations considering the possibility of self-reporting potentially criminal conduct can expect to be included in a DPA.

The Statement of Facts is incorporated into the Standard Bank DPA in clause 2 and clause 3 provides broadly that that Statement of Facts will stand as an admission in any prosecution in the event that the Standard Bank DPA is terminated.

The key "penalty" terms of the Standard Bank DPA, which were determined by the court to be both in the interests of justice and fair, reasonable and proportionate are as follows:

i. Payment of compensation of US$6 million plus interest in US$1,046,196.58 to the Government of Tanzania. This represents the amount of the fee paid to EGMA, plus interest thereon calculated by reference to the interest paid on the instrument, bearing in mind that the US$6 million was deducted from the US$600 million raised by means of the placement;
ii. Disgorgement of profit on the transaction of US$8.4 million, representing the full amount of transaction fees received by Standard Bank and SBT, without any deduction for costs;

iii. Payment of a financial penalty of US$16.8 million; and

iv. Payment of the SFO's costs in connection with the investigation at £330,000 (almost $500,000).

In respect of each of these payment obligations, the Standard Bank DPA prohibits Standard Bank from seeking any tax reduction in any jurisdiction in connection with the relevant payments.

As part of the Standard Bank DPA, Standard Bank has agreed to cooperate "fully and honestly" with the SFO and, "as directed by the SFO, with any other agency or authority, domestic or foreign, and Multilateral Development Banks, in any and all matters relating to the conduct arising out of the circumstances the subject of the Indictment", and to make disclosure of non-privileged documents to such authorities on the same basis, in respect of its activities in this respect and those of "its present and former directors, employees, agents, consultants, contractors and sub-contractors". This is a far-reaching co-operation obligation, and it will be interesting to see whether overseas investigating authorities and global development banks seek to engage the SFO's assistance in this respect.

Moreover, Standard Bank has agreed to bear the expense of (and implement the recommendations of) an independent review, to be conducted by a major accounting firm, of its internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable corruption laws, with specific focus on (i) circumstances where third party intermediaries are involved with transactions in which Standard Bank is involved; (ii) its anti-bribery and corruption training system measures to monitor training completion; and (iii) the effectiveness of the anti-bribery and corruption training provided and the level of anti-bribery and corruption awareness raised among its employees. The independent reviewer is to co-operate with the SFO, provide the SFO with copies of its reports and notify the SFO on Standard Bank's progress in implementing the independent reviewer's recommendations.

It is noteworthy that, in his judgment, Lord Justice Leveson stated that, following recent Financial Conduct Authority (the "FCA") proceedings against Standard Bank for deficiencies in its money-laundering procedures, the FCA commissioned a "Skilled Person" review of the effectiveness of Standard Bank's remedial actions under section 166 of the Financial Services and Markets Act 2000. Lord Justice Leveson noted that that section 166 review had "highlighted how Standard Bank had taken extensive steps in regard to recruitment, risk classification and due diligence on customers, and a very clear "tone from the top" to remediate the pre-existing failures". He also noted that the Standard Bank DPA allowed the court "to oblige Standard Bank to enhance its anti-bribery and corruption policies and procedures and how they are practically implemented . . . ." It is open to speculation whether the recent conduct of the section 166 review may have played a part in leading the SFO and the Court to prefer the appointment of an "independent reviewer", rather than the perhaps more onerous burden of a monitorship, an alternative that is available as part of the DPA regime.
The term of the Standard Bank DPA is three years, which was deemed sufficient to implement the obligations relating to cooperation and corporate compliance.

The Standard Bank DPA also contains a provision to the effect that, in the event that Standard Bank transfers its business operations to a third party, the relevant agreement will include a provision binding the successor to the obligations in the Standard Bank DPA.

Standard Bank is also prohibited from making or authorising any of its affiliates to make any public statement contradicting the Statement of Facts.

**Insight into the level of co-operation expected of a potential candidate for a DPA**

Since the entry into force of the DPA regime, senior officials at the SFO have repeatedly made clear that the bar for companies to be considered for potential DPAs will be set at a high level,[3] clarifying that the SFO expects corporate self-reporting going beyond reporting the wrongdoing of employees and other persons associated with the company, and extending to reporting acts adverse to the company itself, potentially even requiring admissions of company-level offenses. As SFO Director David Green Q.C. has said, consideration of a company for a potential DPA will depend on three things: "cooperation, cooperation and cooperation".[4]

These assertions appear to have been borne out to a considerable extent by the Standard Bank DPA. Lord Justice Leveson was clearly positively influenced by the fact that Standard Bank self-reported to the SOCA and the SFO prior even to commencing its internal investigation. He also noted that the conduct might not have come to the SFO's attention had it not been for Standard Bank's "internal escalation and proactive approach". As we noted in our 2014 Year-End Update on NPAs and DPAs, the public comments of senior SFO officials had suggested that the SFO would look unfavorably on early investigative steps taken by a company that might prejudice the SFO's later investigation.

However, other suggestions from SFO officials, such as that the SFO may expect companies to waive privilege over internal witness interview memoranda, or that non-lawyers should conduct initial witness interviews to avoid subsequent concerns regarding collateral waiver of privilege over those memoranda, do not appear to have been insisted upon in the Standard Bank case.[5] In this case, the SFO appears to have accepted summaries of witness evidence gathered in Standard Bank's own internal investigation, and to have conducted its own interviews with relevant witnesses, who Standard Bank made available. If this represents a rowing back from suggestions that waiver of privilege might be expected of potential DPA candidates, this will be welcomed both by industry and by members of the legal profession active in the field of investigations.

In this respect, Lord Justice Leveson noted that "Standard Bank fully cooperated with the SFO from the earliest possible date by, among other things, providing a summary of first accounts of interviewees, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform. . . . Suffice to say, this self-reporting and co-operation militates very much in favour of finding that a
DPA is likely to be in the interests of justice." This observation will inevitably serve as a benchmark in future cases.

**Relevance of Standard Bank being under new ownership**

In his judgment, Lord Justice Leveson notes that the DPA Code provides that it is a relevant consideration in determining whether a matter should be dealt with by way of a DPA that the organisation in question in its current form is effectively a different entity from that which committed the offence. His Lordship noted the acquisition by ICBC of a majority shareholding in Standard Bank in February 2015, and the subsequent appointment of a new Board. He also noted that the business group involved in the relevant conduct had been transferred out of Standard Bank. He concluded that "Standard Bank is therefore a substantially different entity to the one that failed to prevent the bribery."

**Key outstanding questions relating to the operation of the regime for DPAs**

*The application of DPAs in cases requiring proof of mens rea*

The offence under section 7 of the Bribery Act 2010 which forms the basis of the Standard Bank DPA is an offence of strict liability, which does not require the prosecutor to establish any mental element on the part of the defendant organisation. Rather, the offence is established where a person who is shown to be "associated" with the relevant commercial organisation is proven to have committed an act of bribery intending thereby to obtain or retain business or a business advantage for the commercial organisation. The only relevant mental element is that of the associated person, not that of the defendant organisation.

This is highly significant in the context of the DPA regime, as a prosecutor considering a DPA must be satisfied that the evidential test is met (see above). In cases unlike those under the section 7 offence requiring proof of mens rea on the part of the defendant corporation, this will require the SFO to be satisfied that the U.K. requirement that the relevant mens rea be attributable to a person representing the "controlling mind" of the company (the "attribution test") is either met or capable of being met upon further investigation. Satisfying the attribution test, however, usually requires prosecutors to find a senior corporate executive or board member who can be shown to have had the requisite mens rea. As SFO Director David Green QC has stated, email communications can often be traced no higher than middle management ranks and rarely implicate senior corporate officials, with the result that companies themselves are often protected from criminal liability for wrongdoing by employees.

This test is plainly more difficult for prosecutors to meet than U.S. respondeat superior principle, which frequently leads to a company being fixed with criminal responsibility for the conduct of low-level employees being imputed to a company as long as that conduct was within the scope of their employment.

In practice, the attribution test may well operate as a natural barrier to the SFO's ability to extend the reach of the DPA regime beyond the strict liability section 7 offence. It will be interesting to see whether forthcoming DPAs will extend to offences involving proof of mens rea. Indeed, an open
question is whether the SFO and the courts might consider that the involvement in wrongdoing of the kinds of senior officials necessary to meet the attribution test would militate strongly in favour of prosecuting a corporate entity, rather than offering it the benefit of a DPA.

The Standard Bank DPA as a sign of things to come

It is noteworthy that, the very day following the announcement of the Standard Bank DPA, the SFO's joint head of bribery and corruption, Ben Morgan, speaking at a conference in London,[6] issued a warning to those who might assume that the SFO's future enforcement action may be focused on DPAs to the exclusion of prosecution:

"Please don't mistake our willingness to go down this route on this case for a desire to force a DPA onto every corporate case that we take on . . . . In some, quite specific situations they will be appropriate, and we will always have in mind their possible use, but they are not the answer to everything. It is a high bar, for a DPA to be suitable, and where it is not met we have the appetite, stamina and resources to prosecute in the ordinary way."

The announcement from Sweett Group that it has admitted and is currently awaiting prosecution for a section 7 offence tends to bear this out. By the same score, the SFO has stated that it expects two DPAs to be announced this year; so a further DPA can be expected in coming weeks. Certainly, however, the SFO appears to be very serious about maintaining its "high bar" by way of co-operation for a DPA, with Morgan urging companies to ensure meaningful, pro-active and early co-operation:

"There is no magic language that can be sprinkled over lawyers' correspondence that changes our assessment of the substance of the cooperation a company has actually offered. And when it comes to a DPA, that assessment is crucial. We will only invite a company into DPA negotiations if our director is persuaded that they have offered genuine cooperation. . . . Every law firm we deal with tells us their corporate client is going to cooperate fully with our investigation. . . . Only a percentage of them actually do, in our assessment. So, the message for you is, if your instructions to your external lawyers are to cooperate with us, make sure they are really doing that."

Lord Justice Leveson's judgment provides significant support for the SFO's approach of insisting on the highest level of co-operation before it will consider a DPA to be appropriate.

What is also clear is that the SFO is determined to ensure that DPAs are not seen as a form of "soft option" for corporate wrongdoers. The application of a financial penalty of $16.8 million is among the highest fines imposed in enforcement of UK criminal laws. It is also the largest fine ever imposed for corruption in the UK. When set alongside the disgorgement, compensation, costs, co-operation and compliance obligations also imposed on Standard Bank, it is clear that the agreement of a DPA will have serious consequences for the defendant organisation. Indeed, the overall package of financial obligations (penalty, disgorgement, compensation and costs) is the second highest ever imposed for corruption, trailing only behind the £30.5 million (today equivalent to close to $46 million) imposed on BAE in 2010.
The Bribery Act 2010 perspective

Insight into the application of the section 7 offence

The Standard Bank DPA specifies that it relates to a draft Indictment numbered U20150854 charging Standard Bank with the following offence:

"STATEMENT OF OFFENCE

Failure of a commercial organisation to prevent bribery, contrary to section 7 of the Bribery Act 2010

PARTICULARS OF OFFENCE

Standard Bank PLC, now known as ICBC Standard Bank PLC, between the 1st day of June 2012 and the 31st day of March 2013, failed to prevent a person or persons associated with Standard Bank PLC, namely Stanbic Bank Tanzania Limited and / or Bashir Awale and / or Shose Sinare, from committing bribery in circumstances in which they intended to obtain or retain business or an advantage in the conduct of business for Standard Bank PLC, namely by

(i) Promising and/or giving EGMA Limited 1% of the monies raised or to be raised by Standard Bank PLC and Stanbic Bank Tanzania Limited for the Government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for this payment; and

(ii) Intending thereby to induce a representative or representatives of the Government of Tanzania to perform a relevant function or activity improperly, namely, showing favour to Standard Bank PLC and Stanbic Bank Tanzania in the process of appointing or retaining them in order to raise the said monies."

Section 7 of the Bribery Act 2010 provides as follows:

"Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending--

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct."
For the purposes of section 7, "relevant commercial organisations" include, broadly, UK partnerships and companies which are UK nationals or which "[carry] on a business, or part of a business" in the UK (section 7(5)). A person is "associated" with a relevant commercial organisation if it "performs services for or on behalf of" that organisation in any capacity (sections 8(1) and (2)). Sections 8(3) and (4) of the Bribery Act 2010 specify that an organisation's employee, agent or subsidiary may be associated with it, but such association is to be determined from all the relevant circumstances, not simply the nature of the relationship between the organisation and the person alleged to be an associated person.

There is no allegation of knowing participation in a positive offence of bribery alleged against Standard Bank, or even against any of its employees. The offence is limited to an allegation of failure to prevent bribery committed by associated persons (namely, its sister company with which it was jointly dealing with the Government of Tanzania, and employees of that sister company), and having inadequate systems to prevent associated persons from committing bribery.

It is notable in this respect that among the inadequacies in Standard Bank's procedures referred to in the Statement of Facts and in the judgment were its insufficient training of its own employees about their relevant obligations and the absence of necessary procedures when two entities within the Standard Bank group were involved in a transaction and where one such entity engaged a third party consultant to deal with host state government entities.

The adequate procedures defence

Due to the need (as discussed above) to satisfy the evidential test set out in the DPA Code, as the offence in this case fell under section 7, the SFO and Lord Justice Leveson were required to consider not only whether Standard Bank had failed to prevent the acts of bribery of its subsidiary and the latter's employees, and whether this had been done with an intent to secure business or a business advantage in Standard Bank's favour, but also whether Standard Bank would have available to it the "adequate procedures" defence in section 7(2). In this regard they considered Standard Bank's existing procedures to prevent the bribery in question.[7]

Standard Bank was found by the SFO not to have adequate measures in place to guard against the risk of potential corrupt practices known to affect this type of business. It appears from the judgment that the SFO and the Court considered relevant in this respect the following matters:

(i) "The applicable policy was unclear and was not reinforced effectively to the Standard Bank deal team through communication and/or training. In particular, Standard Bank's training did not provide sufficient guidance about relevant obligations and procedures where two entities within the Standard Bank Group were involved in a transaction and the other Standard Bank entity engaged an introducer or a consultant."

(ii) that Standard Bank relied on SBT, "a sister company in respect of which Standard Bank had no interest, oversight, control or involvement", to conduct due diligence in relation to EGMA and itself made no enquiry about EGMA or its role in the transaction. It was relevant in this context that Standard Bank was engaged with SBT as joint lead manager, that the
transaction was with the government of a high bribery risk country, and involved receipt by a third party of US $6 million, with only very limited KYC.

(iii) The KYC carried out by SBT did not involve "enhanced due diligence processes to deal with the presence of any corruption red flags". There were also failings in not identifying the presence of politically exposed persons.

(iv) The absence of an "anti-corruption culture" within Standard Bank with regard to this transaction.

These controls weaknesses appear to have afforded the SFO and the Court significant comfort in confirming that the evidential test for a DPA was met in this case.

For organizations considering the implications of this judgment (which focuses, inevitably, on the specific facts of the Standard Bank case) for the application of the adequate procedures defence generally, the importance of efforts to establish a strong tone from the top and culture of compliance emerges strongly. The judgment appears to indicate that Companies seeking to establish the defence in section 7(2) will have to tailor their employee training, their due diligence procedures, their manner of collaborating with sister companies and subsidiaries, and their dealings with third parties to the particular risks being faced in their business, taking into account country risk, market risk, counter-party risk and transaction risk. They will take responsibility for the operation and effectiveness of their own procedures and the assessment of their own risks, and will not rely on due diligence carried out by third parties (even sister companies). They will treat higher-risk situations with greater caution, and they will be able to point to the broader prophylaxis of a deeply-embedded compliance culture and well-trained employee population. Moreover, they will ensure measures are in place to confirm that employee training is completed, refreshed and kept-up-to date. These themes are not new, having been anticipated in the Ministry of Justice's 2011 Guidance on the adequate procedures. Sir Brian Leveson's judgment appears, in our view, to have confirmed the value of that Guidance.

**Insight into the level of penalties for offences under section 7 of the Bribery Act 2010**

In his judgment, Lord Justice Leveson outlines how the financial penalty which forms part of the Standard Bank DPA was calculated, in application of the relevant Sentencing Council Guideline (the Definitive Guideline on Fraud, Bribery and Money Laundering Offences, in force since October 2014). That calculation required consideration both of Standard Bank's culpability in committing the offence and of the harm thereby caused or intended.

As regards culpability, while the corruption of government officials tended towards this case being treated as being in a high category of culpability, Lord Justice Leveson was at pains to emphasise that the specific allegation in this case was a breach of section 7 of the Bribery Act 2010, and as such, a failure to put in place appropriate mechanisms to prevent the bribery in question and "not a substantive bribery offence". He noted in particular that the evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe. Given Standard Bank's lead role in the transaction, the uncertainty within the deal team as to the purpose of the payment to EGMA, and the failures of Standard Bank's bribery prevention measures in a transaction in which bribery risk "should
have been anticipated", Lord Justice Leveson expressed the view that the "correct culpability starting point should either be high culpability, which is later adjusted to the lower or middle part of that category range by the appropriate harm figure multiplier, or medium culpability, which is later adjusted to the higher part of that category range by the appropriate harm figure multiplier". He noted that the SFO had opted for the latter view, and that, as the categories are not "watertight compartments" but part of a continuum, he considered this approach reasonable.

As regards harm, Lord Justice Leveson noted that under the Sentencing Council Guideline, the starting point for medium level of culpability is 200% of the 'harm' - that is to say, the gross profits, with a range of 100% to 300% (as compared with a starting point of 300% for high culpability, and a range of 250-400%). Considering aggravating factors (substantial public harm in Tanzania, serious failures against a background of FCA enforcement measures) and mitigating factors (previous clean record, prompt self-report, full cooperation, the absence of evidence of wider failures within the organisation and the fact that the organisation is now under different ownership), Lord Justice Leveson found a multiplier of 300% (at the upper end of medium culpability) to be appropriate.

The application of the 300% multiplier led to a figure of US $25.2 million. Under the Sentencing Council Guideline, the Court must "step back" and consider whether the measures imposed satisfactorily achieve "removal of all gain, appropriate additional punishment and deterrence". Lord Justice Leveson considered Standard Bank's financial position and found the penalty to be reasonable in that context.

Finally, given that paragraph 5(4) of Schedule 17 to the Act requires a financial penalty agreed under a DPA to be broadly comparable to the fine a court would have imposed on a guilty plea, Standard Bank was entitled to a one-third reduction in fine. As a result, the fine agreed in the Standard Bank DPA of $16.8 million was found to be reasonable.

Lord Justice Leveson went on to note that the U.S. 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 United States and has intimated that if the matter is resolved in the UK, it will close its inquiry", and found that this tends to support the conclusion that the terms of the Standard Bank DPA are fair, reasonable and proportionate.

Key outstanding questions relating to the operation of the section 7 offence

The guidance afforded by this judgment in relation to the approach to sentencing for the section 7 offence and to the adequate procedures defence are very welcome to both industry and the legal profession. However, a number of important elements of the section 7 offence are not addressed in detail in this judgment, and will remain a source of uncertainty for corporations in considering their exposure under that offence.

Chief among these elements is the notion of "associated persons". It is entirely unsurprising that a sister company of Standard Bank appointed jointly with Standard Bank as joint lead managers on the transaction at hand, and employees of that sister company who were part of the deal team in question, should be treated as satisfying the test for an associated person in Section 8 of the Bribery Act.
2010. As such, this case offers little in the way of guidance on the much more difficult questions as to the circumstances in which third parties, such as agents, contractors, service providers, and other representatives of a commercial organisation will be treated as "performing services for or on behalf" of the organisation, so that acts of bribery of those third parties can give rise to liability for the latter.

Similarly, the associated person must be shown to have carried out the acts of bribery in question with the intent to obtain or retain business or an advantage in the course of business for the commercial organisation. In the case at hand, Lord Justice Leveson inferred the relevant intent from the absence of any services having been provided by the recipient of the bribe, EGMA, and from the fact that the involvement of a local partner and the fee (i.e., the bribe) were only disclosed to Standard Bank sometime after it had been proposed to the Government of Tanzania.

Imponderables remain (inevitably going unaddressed in this judgment due to the co-incidence of interest of Standard Bank and SBT in the transaction with the Government of Tanzania) as to how such intent is to be established, and how (or indeed if) prosecutors are to distinguish between an associated person's bribery intended to feather his own nest from bribery intended to benefit his principal, the commercial organisation.

However, with three section 7 offence enforcements in as many months, and the potential prospect of another before the end of the year, businesses are finally being provided with some measure of certainty and insight as to the manner in which the prosecuting authorities and the courts are likely to deal with section 7 offence investigations.


[5] Alun Milford, General Counsel of the SFO, put it bluntly in a March 26, 2014 speech: "It is unhelpful of your clients to put their interest in civil proceedings ahead of assisting our criminal
investigation.": Corporate criminal liability and Deferred Prosecution Agreements, Remarks to the Annual Employed Bar Conference, March 26, 2014.


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