

Client Alert

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First UK Deferred Prosecution Agreement Agreed by SFO

By Kevin Roberts, Duncan Grieve, and Tola Adeseye

At a hearing on November 30, 2015, Southwark Crown Court approved the first deferred prosecution agreement (DPA) in the UK. DPAs have been available for use by the Serious Fraud Office (SFO) since February 2014, following their introduction in the Crime and Courts Act 2013. Lord Justice Leveson approved the DPA proposed by the SFO with London-based ICBC Standard Bank (the Bank). The Bank had been the subject of an indictment alleging failure to prevent bribery contrary to section 7 of the Bribery Act 2010. In agreeing the DPA, the Bank accepted responsibility for failing to prevent bribery and agreed to pay penalties totaling \$32.2 million, as well as to an independent review of its anti-bribery policies.

BACKGROUND

DPAs allow for the suspension of prosecutorial action against a company for a fixed period of time where the defendant company agrees to comply with conditions set by the prosecutor. In May 2015, the SFO signaled its intention to begin using DPAs by announcing that it had issued its first invitation letters to companies under investigation, offering the opportunity to enter into DPA negotiations. The Bank's DPA marks the first application by the SFO for approval of a DPA and the first use of this mechanism to settle an offence under section 7 of the Bribery Act 2010.

THE OFFENCE

In agreeing to the DPA, the Bank accepted responsibility for failing to prevent bribery in a 2012-2013 transaction involving the Government of Tanzania and its Tanzanian sister company, Stanbic Bank Tanzania (SBT). In a deal that raised \$600 million for the Tanzanian government, payments amounting to \$6 million were made to government officials by two senior executives at SBT and were presented as fees owed to a third-party consultancy firm, which had no involvement in the transaction.

JUDICIAL APPROVAL PROCESS

There has been speculation on the willingness of the judiciary to support DPAs as an alternative to prosecution in the UK. The judge indicated that he had determined that the offence was one that was appropriate to be subject to a DPA and highlighted the factors submitted by the Director of the SFO that led to this conclusion. The Bank was considered to have played an unintentional role in the bribery (although significant) by having inadequate mechanisms to prevent the offence. Furthermore, the offence involved a single transaction rather than widespread criminality. This was seen to be the type of conduct for which a DPA would not be opposed.

Considerable weight was also attached to the fact that the Bank had both self-reported to the SFO as soon as the wrongdoing was discovered and had cooperated fully in the subsequent investigation. The judge stated that the

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Bank's self-report was fundamental to his decision to endorse the DPA, referring to the speed of the self-reporting and the totality of the information that was provided to the SFO. The successful negotiation of this DPA was also aided by the Bank having no previous convictions for bribery and corruption.

DPA CONDITIONS

As for the terms of the DPA, the requirements falling upon the Bank are as follows:

- i. Payment of a financial penalty of \$16.8 million;
- ii. Payment of compensation to the Tanzanian government of \$6 million plus interest of \$1,046,196.58;
- iii. Disgorgement of profit made on the transaction of \$8.4 million;
- iv. Payment of the costs incurred by the SFO (which amounted to £330,000);
- v. At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures; and
- vi. Cooperation with the relevant authorities in all matters relating to the offence.

KEY TAKEAWAYS

- The case is a timely reminder of the extra-territorial reach of the Bribery Act 2010. The acts occurred in Tanzania and involved a Tanzanian group company and the Tanzanian government. The factual nexus between the Tanzanian group company and its London sister company on this particular transaction was enough for the SFO to have jurisdiction.
- The UK courts will only sanction DPAs where it is deemed to be in the interest of justice and fair, reasonable and proportionate. DPAs will not be appropriate in all cases, but the court will take into account factors such as early self-reporting, cooperation with authorities and comprehensive remedial action.
- The SFO carefully constructed this DPA in a manner that was likely to be palatable to the court. It remains to be seen what level of judicial support more contentious cases will receive.
- DPAs are likely to include strict conditions, including a financial penalty, comprehensive remedial action and ongoing reporting requirements. Failure to comply with these conditions may result in the termination of the DPA and the reinstatement of criminal proceedings against the organisation. Companies will need to assess carefully the pros and cons of self-reporting in the hope of avoiding prosecution by agreeing a DPA.

Please see the [Deferred Prosecution Agreement](#), the [Statement of Facts](#), the [preliminary judgment](#) and [final judgment](#) regarding the agreement.

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