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This article was first published in *Mining Journal*, 11 April 2016

What companies need to know in relation to DPAs

By Alistair Graham, Partner and Chris Roberts, Senior Associate

Alistair Graham
Partner, London
E: alistair.graham@mayerbrown.com
T: +44 20 3130 3800

Chris Roberts
Senior Associate, London
E: croberts@mayerbrown.com
T: +44 20 3130 3543

At the end of November 2015 the Court approved the first ever Deferred Prosecution Agreement ("**DPA**") in the UK, between the Serious Fraud Office ("**SFO**") and Standard Bank plc (now ICBC Standard Bank plc) ("**the Bank**") for the corporate offence of failing to prevent bribery (in breach of section 7 of the Bribery Act 2010 ("**section 7**")).

What is a DPA?

DPAs have only been part of UK law since 2014. A DPA is an agreement between the SFO and a company (and only a company – individuals cannot enter into a DPA) by which the SFO agrees not to prosecute in exchange for which the company admits an alleged offence, cooperates with the SFO and pays any fines or other penalties, as well as, in some instances, being subject to the appointment of a monitor. Only the SFO can offer a DPA (the company cannot ask for one), and the DPA must be approved by the Court as being "fair, reasonable and proportionate". The first DPA was such an important development that it was approved by the President of the Queen's Bench Division of the High Court, Sir Brian Leveson. He handed down his judgment approving the DPA on 30 November 2015.

The facts behind the first DPA

The Bank entered into a joint mandate with what was at the time a sister company in Tanzania, Stanbic Bank Tanzania Limited ("**Stanbic**"), to raise funds of US$600 million for the Government of Tanzania by way of a sovereign loan note. The fee was to be 2.4% of the funds raised, i.e. approximately US$14.4 million. Of this 1%, or c. US$6 million, was to be paid to a third party Tanzanian "facilitation agent". It subsequently emerged the facilitation agent was a 'shell' company to enable the US$6 million to be paid to Tanzanian government officials, allegedly to ensure that the mandate for the loan note was given to Stanbic and the Bank.

The Bank left it to Stanbic to perform all the "know your client" checks for the facilitation agent. However Stanbic only performed the checks required for it to open a bank account. The SFO contended, and the Bank did not dispute, that because of this delegation of responsibility the Bank's procedures had not been adequate, such that it had no defence to the charge of failing to prevent bribery. When the US$6 million fee was removed in three large tranches by the officers of the facilitation agent, Stanbic employees escalated their concerns that the payment may have been a bribe, which were also communicated to the Bank.

The Bank then notified the SFO of the allegations before it began any internal investigation. In his judgment approving the DPA, Leveson highlighted this early self-reporting as an important mitigating factor, as well as the Bank cooperating with the SFO by:

- agreeing with the SFO how the internal investigation (performed by an independent law firm) would be conducted;

- providing all the documentation captured by that investigation to the SFO;
- facilitating the SFO's interviewing of witnesses; and
- strengthening its anti-bribery policies and procedures.

Following this investigation, the Bank faced an offence of failure to prevent bribery by persons associated with the Bank (being Stanbic and the relevant corporate officers at Stanbic) in breach of section 7.

Under the terms of the DPA Standard Bank had to agree to: disgorgement of the Bank's profit arising as a result of the mandate which had been won by the bribe; compensation; payment of a financial penalty; paying the SFO's costs; commissioning and submitting to an independent review of its anti-bribery and corruption policies and procedures; and cooperating with all relevant authorities in relation to the offence. Even excluding the last two requirements – where the cost is unknown – Standard Bank had to pay more than US$30 million. However, as a DPA is not a criminal conviction for the purposes of the EU Public Procurement Directive, the Bank is not automatically debarred from bidding for public contracts. Just as importantly, the Bank had certainty that there would not be a contested trial and that the SFO was satisfied no further action was needed in relation to the facts in question. This meant the Bank could draw a line under the offence and get back to its business.

Section 7 – failing to prevent bribery

Section 7 introduced a new corporate offence where a company fails to prevent bribery by an "associated person", defined as a person who performs services for or on behalf of the company. This is a very wide category of person and crucially is not limited to employees of a company but includes (for example) agents or employees of subsidiary companies. The company has a defence to the charge if it can prove that it had in place "adequate procedures" designed to prevent associated persons from paying a bribe. However there is not yet any case law on what procedures are "adequate".

What lessons can a board take from these developments?

Most companies are unlikely to face such clear examples of potential corruption as the Bank did. Given the emphasis in Leveson's judgment on how early the Bank had raised the issue with the SFO, no doubt companies will want to report allegations as early as possible. However if the company is listed this would require a public announcement, with implications for the share price.

Any board considering whether or not it should cooperate with the SFO with a view to the SFO offering a DPA should bear in mind that not only did the SFO see the report produced for the Bank following the independent investigation, but the SFO sanctioned that investigation. Leveson's judgment made clear that this meant that the SFO was provided not only with the documents it requested, and access to the investigating law firm's document review platform, but also with a "summary of first accounts of interviewees" before the Bank "facilitated the interviews of current employees". This clearly gives the SFO access to all information under investigation by a law firm nominally instructed by the board.

However a board must make the best decision for the company in all the circumstances and will have to judge when it is the right time to report its suspicions to the SFO, with all the consequences that follow.

Conclusion

The facts giving rise to the Bank's DPA fell neatly into the type of case for which a DPA was intended. These have shown the high hurdles – especially the high level of cooperation with the SFO – that a company must clear before a DPA will be offered by the SFO, let alone one being successfully negotiated before being approved by the Court.

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