QUARTERLY COMMENTARY: THE UK'S FIRST DEFERRED PROSECUTION AGREEMENT

The close of 2015 saw the UK's first Deferred Prosecution Agreement (DPA). On 30 November 2015, Lord Justice Leveson approved the DPA between the SFO and ICBC Standard Bank plc (Standard Bank), sparing the UK-headquartered bank from being prosecuted under section 7 of the Bribery Act 2010 for one count of failing to prevent bribery by employees or associated persons so long as it meets financial orders to the tune of over US$25 million and, over the next three years, implements a comprehensive corporate compliance programme.

As far as bribery goes, Standard Bank's conduct, which was the subject of three years of investigation by the SFO, squarely fitted the bill. In 2013, its Tanzanian sister company made payments of some US$6 million to Tanzanian public officials in exchange for favourable treatment in relation to a sovereign note private placement programme worth US$600 million. Under the terms of the DPA, assuming that Standard Bank meets its obligations, the indictment will be permanently suspended in 2018.

The UK's first ever DPA has been praised as a milestone in the policing of corporate offending in the UK, and, on any view, it surely reflects a step forward. As explained in the Ministry of Justice's consultation document on DPAs issued in 2012, DPAs have been widely used in the US with corporate offenders for close to 20 years and in that time they have become a powerful tool for expeditiously holding corporations to account for wrongdoing without exacerbating the risk of their collapse, and compelling them to take compliance seriously. Accordingly, apart from sparing the already under-resourced SFO of the costs and complications of running a corporate prosecution, the advent of DPAs in the UK has the potential to prompt a necessary cultural shift in the UK's corporate sector.

The Standard Bank DPA is particularly significant in that, in his two carefully reasoned judgments accompanying the court's seal of approval, Lord Justice Leveson made a series of important observations about the differences between the DPA framework in the UK and the US. Emphasising that all DPAs in the UK will be subject to rigorous court scrutiny to ensure that they are "in the interests of justice" and "fair, reasonable and proportionate", the court addressed in considerable detail whether or not the Standard Bank DPA met this test. Factors considered pertinent to the court's conclusion that a DPA was appropriate in this case were that the SFO's investigation had been prompted by Standard Bank's self-report, the offending conduct was isolated, Standard Bank's cooperation with the regulator had been full and ongoing and that, save for one instance in 2014 when Standard Bank was fined by the Financial Conduct Authority for failures in its anti-money laundering policies, it had no prior adverse history with the regulators. Citing the observations of Lord Justice Thomas in *R v Innospec Ltd* [2010] Lloyd's Rep FC 462, the court further considered that the proposed DPA was appropriate as the financial penalties reflected in the agreement were comparable to those which would have been sought by US regulators if the case had been resolved there.

The court's detailed discussion of the factors supporting the use of a DPA is helpful and will serve as a guide for future DPAs in the UK. The court's considered approach coupled with the its assertion of its control over the DPA process differs markedly from the judicial approach to DPAs in the US, which occasionally has been criticised for simply "rubber stamping" deals brokered between the defence and prosecution. It also differs markedly from the circumstances surrounding the civil settlement of criminal proceedings for bribery recently negotiated between Brand-Rex, a mid-sized cabling company, and Scotland's Crown Office and Procurator Fiscal Service. Although not technically a DPA, the civil settlement had a similar effect, except that, strikingly, it escaped rigorous scrutiny by the court and the settlement sum was a paltry £200,000.

All this, however, is not to say that the Standard Bank DPA is beyond criticism. Spanning 55 pages, the agreed Statement of Facts reflected carefully negotiated factual admissions which fall well short of any admission of guilt by Standard Bank for the offence of bribery under section 7 of the Bribery Act 2010. Indeed, the closest Standard Bank comes is a signed *recognition* of the SFO's bribery *allegations* in para 202 of the agreed Statement of Facts, as opposed to a clear acceptance of criminal liability. Is this really enough? After all, the leniency programme offered by the Competition and Markets Authority in respect of cartel activity requires commercial organisations to first confess and accept their illegal conduct before they may be considered for immunity from criminal prosecution. There is, in principle, no reason why DPAs relating to equally serious offences such as bribery should be treated any differently. Arguably, requiring corporations to make admissions of criminal liability in the publicly available agreed Statement of Facts before they receive the enormous benefits that flow from a DPA would compel corporations to take their wrongdoing more seriously.

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