The UK’s First Deferred Prosecution Agreement

December 2015

Good News for the SFO But Worrying News for Tanzania and the Fight Against Bribery
The UK’s First Deferred Prosecution Agreement

SUMMARY

The UK’s first Deferred Prosecution Agreement (DPA), approved by a senior judge on 30th November and involving Standard Bank’s alleged failure to prevent its Tanzanian subsidiary and its executives from paying bribes, has changed the UK’s legal landscape for fighting bribery and economic crime.

DPAs were introduced in the US to give the most vulnerable in society a second chance by allowing them to prove good behaviour rather than be prosecuted. They have been increasingly used in the US over the past decade to give that second chance to the most powerful in society: corporations. It is for this latter purpose that they have been introduced into the UK. Given that they represent a form of justice reserved for society’s most powerful actors and the potential for public perception that corporations are as a result above the law, accountability in how DPAs are used is essential.

The UK’s first DPA is likely to set the tone both of future DPAs and for how enforcement of the UK’s Bribery Act will develop over the next few years. While the Serious Fraud Office (SFO) clearly sought to allay some of the criticisms of DPAs, namely by ensuring there is no tax deductibility for the financial penalties, no immunity from prosecution clauses, and by providing extensive detail of the alleged wrongdoing, the UK’s first DPA has set some worryingly low standards in other key areas, namely:

- **Individual accountability** – no single individual in the UK has been held to account either by Standard Bank or the SFO for their failure to prevent the alleged bribery. This is particularly surprising given the high level of control and approval by UK individuals for the transaction. These individuals still operate at senior levels within the financial industry. At the very least, those UK individuals involved in the failing to prevent the alleged wrongdoing should be investigated by the Financial Conduct Authority with a view to removing their ‘approved person’ status.

- **Reliance on a company’s internal investigation** – almost complete reliance on the internal investigation of the company by the SFO means that neither the court nor the public will ever truly know whether the full extent of the wrongdoing was unearthed, or whether there were systemic problems within the Bank rather than this being an isolated incident.

- **Relatively low financial penalties that do not reflect adequate compensation or disgorgement of profits** – Standard Bank agreed to pay $6 million compensation to Tanzania based on the calculated harm to the country. But compensation may have been well over ten times higher - possibly as high as $80 million - if the full harm to Tanzania had been taken into account. Meanwhile, profits to be disgorged by the Bank which were set at $8.4 million did not take into account revenue streams made by the Bank on the transaction (which could have been up to $10 million) nor the market advantage achieved by the Bank as a result of the wrongdoing.
If DPAs are to act as a serious deterrent to bribery and economic crime, and to garner public confidence, they cannot be a means for individuals to be let off accountability for their actions or for companies to escape the full harm of their wrongdoing. Corruption Watch calls on the SFO and the judiciary to consider seriously if the precedents set in this DPA will genuinely deter wrongdoing and let the real victims of corruption, in this case the Tanzanian people, see justice.
The UK’s First Deferred Prosecution Agreement

The UK Serious Fraud Office’s first Deferred Prosecution Agreement (DPA) with Standard Bank PLC was approved by Lord Justice Leveson in a packed courtroom on Monday 30th November. The agreement was also the first enforcement action that the SFO has taken under the Section 7 ‘failure to prevent’ offence of the Bribery Act.

The DPA relates to charges, now suspended, that Standard Bank failed to prevent its Tanzanian subsidiary, Stanbic Tanzania and its top executives from paying bribes to senior government officials to secure the Tanzanian government’s mandate to raise $600 million of sovereign debt financing in the form of a bond. The bribes consisted of a $6 million fee paid by Stanbic to a local agent, Enterprise Growth Market Advisors Ltd (EGMA), paid out of international investors’ money raised by Standard Bank for the Tanzanian government. EGMA, according to the agreed facts, provided no real services in return for its $6 million fee. Its chairman at the time, Harry Kitilya, was Commissioner of the Tanzania Revenue Authority, which was responsible for advising the government on financing needs. Standard Bank was required to pay £21.3 million in financial penalties (including £3.9 million compensation to Tanzania). A key factor behind Standard’s eligibility for a DPA was the fact that it self-reported the alleged misconduct within days of being alerted by Stanbic Tanzania employees, and cooperated with the SFO.

David Green, the SFO’s Director, described the DPA as “a template for future agreements.”¹ Ben Morgan, the SFO’s joint head of Bribery and Corruption, said that the process had “arguably... resulted in a better outcome for all involved”, including the people of Tanzania.²

The DPA is clearly a win-win situation for the SFO and Standard Bank: the SFO will get enormous credit for delivering a key plank of the government’s economic crime strategy; Standard Bank gets a significantly mitigated fine, with none of its UK individuals or the UK company itself implicated in the actual wrongdoing. However, the DPA raises serious questions about the deterrent value of both of section 7 of the Bribery Act and DPAs themselves, particularly where no individuals are held accountable, and whether the DPA has fully served the interests of the real victims of the wrongdoing: the people of Tanzania.

1. THE GOOD POINTS

The UK’s first DPA does set some good precedents, with the SFO clearly seeking to address concerns about DPAs that have arisen both in the UK and globally. These include:

• The approval hearing, which the DPA Code of Practice states would almost always be in private, was a public event.
• The SFO provided a 55 page Statement of Facts admitted by the company, including selected transcripts of interviews and a very high level of detail of the conduct involved.
• The Statement of Facts identified either by name or role the key players in the alleged conduct.
• Compensation was given to Tanzania, to the tune of the $6 million alleged bribes.
• The DPA requires the company to cooperate and disclose documents, as directed by the SFO, with “any other agency or authority, domestic or foreign ... in any and all matters relating to the conduct.. described in the Statement of Facts.”
• The DPA stipulates that Standard Bank will not seek tax reduction on any of the money it pays out by way of compensation, disgorgement or fine (tax deductibility of fines in the US under Deferred Prosecution Agreements has been highly controversial).
• The SFO has sought to peg its fine level to US levels and specifically asked the US DOJ for confirmation that it had done so.
• The SFO approached the Tanzanian anti-corruption authorities, the Prevention of Crime and Corruption Bureau (PCCB) to check whether it had any objections to the SFO going ahead with resolving the investigation into Standard Bank with a DPA before the final approval hearing.
• There is an explicit clause making clear that there is no immunity from prosecution for conduct not disclosed, or for individuals (a clause in the BAE settlement regarding Tanzania providing such immunity had drawn heavy judicial and public criticism).
• The DPA includes a ‘muzzle clause’, which prevents those charged in the DPA with contradicting the narrative of facts in public.

Standard Bank was required to give a warranty that it had not provided the SFO with misleading or ‘incomplete’ information regarding the conduct disclosed and that it will notify the SFO of any further material it becomes aware of while the DPA is in force that would have been relevant to that conduct.

2. THE BAD POINTS

However, Corruption Watch has real concerns that this DPA also sets some bad precedents in key areas and raises some serious questions about enforcement of the Bribery Act, the new Sentencing Guidelines and their deterrent effect. These are as follows:

1. No individual accountability

Lord Justice Leveson stated in his judgement that “no allegation of knowing participation in an offence of bribery is alleged either against Standard Bank or any of its employees.” Responsibility for the offence of bribery is placed squarely on the shoulders of Standard’s Tanzanian subsidiary and its executives (both of whom have subsequently left the Bank).

From the Statement of Facts, the lack of individuals being held to account in the UK would appear on the face of it, surprising. The head of the relevant team at the UK office, Standard Bank PLC, appears to have specifically authorised the use of a local agent when negotiations over Standard Bank being given a mandate to raise a bond for Tanzania were stalling (para 101). In her resignation letter of June 2013,
the Acting Head of Corporate and Investment Banking at Stanbic Tanzania, Shose Sinare, said she witnessed a call between her CEO in Tanzania, Bashir Awale, and the head of the UK team at Standard Bank, where “approvals to proceed [were] granted” by the head of the UK team, saying “this is normal/standard practise for Africa...we have seen this before in other transactions... It’s fine we should proceed” (para 189).

The team at the Standard Bank PLC in the UK drew up the collaboration agreement with the local agent, supposedly because the local Tanzanian team did not have the capacity or knowledge to do so (para 133 ff). The team appear to have deliberately avoided giving any detail about the role of the agent to the compliance team within Standard Bank UK, to the Mandate Approval Committee. According to its settlement with the US Securities and Exchange Commission (SEC), it also failed to inform institutional investors of EGMA’s role and fee, in violation of the US Securities Act, 1933. Staff in Standard Bank UK also helped draft the Mandate and Fee letters for the transaction. The Mandate letter was specifically drafted to avoid any mention of a partner or third party, while the Fee letter specified that the Government of Tanzania would pay Standard Bank, Stanbic and a ‘local partner’ a fee of 2.4% without naming who the local partner was.

Additionally, the head of the relevant team gave contradictory answers to the SFO and the internal investigation as to when he first knew the name of the local agent, EGMA (para 102). And it is not clear how seriously the SFO cross-examined the head of team’s account that he did not need to conduct due diligence on a third party being added to the transaction at a late stage in the negotiations. That raises the question as to whether his testimony would have withstood scrutiny in court.

The lack of charges against UK individuals in this case raises serious questions about whether the SFO focused enough resources on investigating whether an individual offence occurred within the UK company or whether allowing DPAs for Section 7 of the Bribery Act may provide perverse incentives for prosecutors not to pursue individuals. If the SFO can prove fairly easily that there is admissible evidence that a company failed to prevent an offence, there is arguably little reason for them to spend additional time, resources and energy in pursuing the harder job of gathering evidence to a criminal standard against individuals. It also raises questions as to whether there is a need for an individual offence modelled on Section 7 to ensure that individuals do not escape responsibility for turning a blind eye to corruption or wilfully disregarding procedures in a manner that would facilitate corruption.

This particular DPA appears to set a precedent that UK employees can approve and draw up agency agreements on behalf of foreign subsidiaries, conduct no due diligence on those agreements, conceal the use of agents from a compliance function and institutional investors, and face no individual penalty. It is questionable whether such a precedent will act as a genuine deterrent to individuals not to engage in high risk behaviour with regards to foreign bribery. It also suggests that the Bribery Act in practice may be significantly weaker in its application than the US Foreign Corrupt Practices Act. Under the FCPA, reckless disregard and wilful blindness are enough to establish liability for knowledge of an offence.

From the Statement of Facts, it does not appear that staff in the UK office faced any disciplinary action within Standard Bank for their role in the failure of Standard’s procedures to prevent the offence. Nor is

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it clear that any individuals have been referred to the Financial Conduct Authority to investigate whether they breached their duties.

Lack of accountability of individuals will seriously undermine public confidence in DPAs and is a bad precedent. Leveson himself stated in his judgement “it is obviously in the public interest that individuals involved in the conduct at issue are investigated and prosecuted”. The US has recently sought to emphasise, with the Department of Justice’s Yates memo, that DPAs must be dependent on companies giving evidence up on individuals and that enforcement officials should prioritise ensuring that individuals are pursued.

2. Reliance on an internal company investigation

Lord Justice Leveson stated during the approval hearing that the SFO had correctly relied upon Standard Bank PLC’s internal investigation for its evidence for the Statement of Facts and in so doing firmly establishes that the SFO may now rely on company internal investigations for the purposes of a DPA. The SFO states that in addition to the Bank’s internal investigation it conducted some interviews but that “no documentation has been requested or obtained” from the Government of Tanzania or from the local agent, EGMA (footnote 2).

Relying on company internal investigations is controversial. As the head of enforcement at the Financial Conduct Authority noted in a recent speech, where enforcement bodies or regulators appear to rely on internal investigations it can give the perception that they have let firms ‘mark their own homework’. Such investigations can be controversial even when an independent law firms is employed, as in Standard Bank’s case. A December 2013 court ruling in the SFO’s case against Victor Dadaleh, saw a senior judge criticise the SFO for effectively ‘out-sourcing’ its investigation to a law firm – though in this case the law firm was working for the company that the SFO alleged Dadaleh had paid bribes to.

There are problems with relying on a company’s internal investigation. The first is that the law firm conducting the investigation is entirely reliant on what documents the company gives it and is paid by the company in part to limit its liability. It is always a risk therefore that an internal investigation will not provide the full picture of the extent of wrongdoing. The law firm conducting an internal investigation does not have the powers of search and seize that the SFO has. That these powers do not seem to have been used by the SFO despite the fact that, according to the Statement of Facts, the SFO were not in a number of instances given full access to documents or telephone records (footnote 7, para 188 k., footnote 11) is a matter of concern. Certainly with regard to investigating individual culpability, for instance, it is not clear whether the SFO had access to or sought the personal mobile phone and text records of UK staff.

The second is that it potentially leads to a truncated and incomplete investigation. In this case, it is not clear what effort the SFO made to get additional evidence from Tanzania or other jurisdictions, such as interviews with the Tanzanian employees alleged to have paid the bribes, or to what extent it sought additional evidence from the company and whether this was provided. A more detailed and continued investigation may have revealed where the bribes were paid to and further details about what level of culpability UK employees of the bank held.

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It is also not clear to what extent the internal investigation was either mandated by the SFO or the company to examine the extent to which a failure to conduct due diligence on agents and apply anti-bribery and corruption procedures was prevalent within Standard Bank UK or more broadly. One of the mitigating factors in assessing the fine against Standard was that as Leveson put it, “there is no evidence that the failure to raise concerns about anti-bribery and corruption risks ... was more widespread within the organisation” (para 52). It is not clear whether there is no evidence of that because no evidence was sought either by the internal investigation or the SFO.

3. Lack of evidence of full nature of harm of the offending presented to the court

The bond that Standard Bank PLC won the mandate to issue for the Government of Tanzania was very controversial when it was issued. The bond was unrated and unlisted, and drawn up in a way that was of interest to a limited number of investors. It was heavily criticised by people within the financial sector at the time. One banker described the bond as a “disaster” to Reuters in March 2013 and another described it as a “lose-lose situation” for everyone involved apart from a specific group of investors. An IMF study stated that the deal “compares poorly relative to the trading level of its peers” and that it was characterised by “poor pricing”. It has been suggested to Corruption Watch that the bond issued by Standard Bank resulted in a potential additional cost to Tanzania of more than $80 million in excess interest and fees when compared to more traditional financing forms which were proposed to the government of Tanzania at the time.

This evidence which was not put to the court was crucial in two respects: firstly, for establishing whether the DPA was in fact in the public interest. Under the DPA Code of Practice, a key public interest factor in proceeding with a prosecution as opposed to a DPA includes “substantial adverse impact to the integrity or confidence of markets, local or national governments”. Without evidence of the adverse impact of the alleged wrongdoing being put before a Judge considering a DPA for approval, it is hard to see how the Judge can fully assess whether the terms of a DPA are “fair, reasonable and proportionate” or in the interests of justice.

Secondly, the evidence is crucial with regard to calculating the level of financial penalty the company should pay. Evidence as to the full financial loss to Tanzania would have been crucial to a fairer compensation order to Tanzania, which has been left with a large debt for a badly priced bond, which was arguably mandated by the Government of Tanzania in part because of the bribery involved. It would also have been relevant in assessing the level of harm in relation to what fine should have been imposed. Detailed evidence of the impact that the corruption once made public would have on investor confidence in the country was not considered. The SFO could for instance have presented expert evidence to the court, such as from the IMF and World Bank, about the impact that the badly priced bond had on Tanzanian economic governance, and the impact of corruption on investor confidence.

4. Lower financial penalty than could have been achieved

The DPA with Standard Bank is the first time that the new Sentencing Guidelines on corporate economic offences have been applied in practice to a company in relation to the Bribery Act. The way that compensation, fine and disgorgement of profit are calculated in this DPA therefore sets a significant}

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5 Reuters, “Cheap Tanzania bond shocks market”, 1/3/2013
precedent for how financial penalties will be determined both under DPAs and in relation to Section 7 offences.

**Disgorgement: under-calculation of profit**

As noted above, clearly the compensation to Tanzania could have been significantly higher if evidence of the full harm had been calculated. Additionally, it appears that the disgorgement of profit could also have been higher if a fuller analysis of the financial benefit received by Standard from the conduct in question had been undertaken. The disgorgement of profit in this case as agreed between the SFO and Standard Bank was $8.4 million which represented the fee that Standard Bank was paid as lead manager in the transaction. This amount does not however take into account the revenue that Standard Bank made by trading the bond in the secondary market, which could have amounted to an additional $5-10 million.

It also does not take into account any financial advantage that Standard Bank might have achieved over other competitors. In particular, the Statement of Facts notes that after EGMA was introduced as a local partner, while the Government of Tanzania and Standard were negotiating the value of the bond to be issued, the message was relayed to Standard Bank UK that the bond needed to be for $550 million “because ...[the Government of Tanzania] are literally going to close the door to everyone” (para 115). According to Reuters, the bond perplexed the financial community because the Government of Tanzania had an unofficial mandate with Citigroup for a Eurobond. This implies that other Banks may also have been developing bond products for the Government of Tanzania in which case the payments to EGMA may have given Standard a significant market advantage.

As Leveson states in his judgement, the disgorgement of profit “is clearly underpinned by public policy which properly favours the removal of benefit in such circumstances.” The full benefit to Standard Bank should have included factors such as market advantage achieved and full revenue but these do not appear to have been adequately assessed or calculated.

**Fine: over emphasis on mitigatory factors**

i) **Self-report**

In assessing mitigating factors, heavy emphasis was placed both by the SFO and Leveson on the fact that Standard Bank had self-reported and that without such self-disclosure “the conduct at issue may not otherwise have come to the attention of the SFO.” It is clearly to Standard Bank’s credit that within days of the alleged wrongdoing coming to its parent company’s attention it notified authorities, and it is right that it should receive credit and mitigation for that. However, it appears that the SFO may have overstated the fact that it would not otherwise have known of the wrongdoing.

No less than 4 Stanbic Tanzania employees raised the alarm with regard to EGMA when the $6 million agency fee to EGMA was withdrawn in cash over a period of 9 days. Tanzanian authorities have said that irregularities reported by the employees prompted the Bank of Tanzania to conduct a “special targeted examination audit.” The results of this audit were reported to Stanbic’s board and to Tanzania’s
Financial Intelligence Unit (FIU). The Statement of Facts refers to a ruling by Stanbic’s regulator (the Bank of Tanzania) as to Kitilya’s role in the transaction (para 16).

If this is the case, it is entirely possible that the SFO would have learned of the wrongdoing by other intelligence means. Furthermore, both the US Department of Justice (DOJ) and SEC were informed of the allegations involving Standard Bank, though it is not clear how. If they were informed of these allegations from a source independent of Standard Bank and the SFO, it is highly likely that the SFO would have become aware of the allegations, particularly as rumours about impropriety in this transaction had been circulating in the financial community. This is not to detract from the fact that Standard Bank’s parent company in South Africa took prompt action but the SFO needs to disclose whether it received information of the allegations from other sources after the self-report by Standard which would call into question its assertion that it would not otherwise have learned of the allegation.

ii) Previous record of wrongdoing

Similarly, weight was given to the fact that Standard Bank has no previous convictions for bribery and corruption. The SFO did raise the fact that Standard Bank had been subject to regulatory enforcement action by the Financial Conduct Authority (FCA) with regard to Anti-Money Laundering procedures but Leveson’s judgement states that this "related to different processes and are not connected". Standard Bank was fined £7.6 million by the FCA in January 2014 for “serious weaknesses” in its money laundering controls particularly with regard to corporate customers connected to politically exposed persons (PEPs) between 2007 and 2011. In particular, the FCA ruling states, Standard Bank failed to carry out adequate Enhanced Due Diligence (EDD) measures before establishing business relationships with corporate customers that had connections with PEPs. At the heart of Standard Bank’s failure to prevent bribery offence was the fact that it did not employ know your customer (KYC) or enhanced due diligence procedures on a corporate entity in Tanzania that was to be used as a local partner and that was run by a politically exposed person. It is hard to see how these two failings are not connected.

Additionally, the SFO did not mention the fact that the FCA action was not the only action taken against Standard Bank. In April 2014, Standard Bank was fined around £2.7 million by the South African Reserve Bank for inadequate money laundering controls. Standard Bank is also facing a class action in the US for allegedly manipulating platinum and palladium prices.

iii) Section 7 as a mitigatory factor

One of the most worrying precedents set by the DPA fine level is the fact that Leveson stated one of the reasons for accepting a lower level of culpability for Standard Bank was the fact that Section 7 of the Bribery Act is “not a substantive bribery offence.” This effectively means that the UK’s principal corporate offence for bribery will be deemed effectively a ‘lesser offence’ or an offence of lesser culpability by the courts, with a resultant mitigatory reduction in fine.

This means that unless companies are held to account for substantive offences under Section 1 and 6 of the Bribery Act (which in the case of large companies will only be possible once there have been changes

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9 That is unless the courts determine that a failure to prevent bribery offence is an offence of deliberate inaction rather than negligent harm, see R v Thames Water Utilities Ltd, [2015] EWCA Crim 960
to the corporate liability laws\textsuperscript{10}), large fines in relation to foreign bribery in the UK are likely to be unachievable and real deterrence is therefore likely to be limited.

**CONCLUSION**

The UK’s first DPA against Standard Bank raises some significant concerns about whether DPAs and Section 7 of the Bribery Act will have a genuine deterrent effect in preventing bribery. The failure to hold any individuals in the UK to account for their role in failing to prevent the bribery alleged to have taken place by Standard Bank’s Tanzanian subsidiary is a real and gaping omission. Those individuals continue to hold positions in the financial sector, and in the case of the head of the London Debt Capital Markets team, a very senior position in the financial sector with approved status by the Financial Conduct Authority. At the very least the Financial Conduct Authority must conduct an investigation into whether the relevant individuals have breached the FCA’s Code of Practice for approved persons with a view to removing approved person status.

The SFO’s reliance on the company’s internal investigation for what appears to be almost all of the evidence in the DPA raises questions about whether the full extent of the wrongdoing has been established. The financial penalty levied against Standard Bank meanwhile, appears to have gravely underestimated the harm caused to Tanzania and the full benefits that Standard Bank gained from their alleged wrongdoing. Finally, the DPA establishes that Section 7 of the Bribery Act is an offence of lesser culpability which raises questions as to whether fines for the UK’s main corporate offence for bribery will ever be of a sufficient magnitude to provide a serious disincentive for firms to bribe, particularly via third parties.