Failure to prevent bribery

The first DPA

November 2015

The Bribery Act 2010 has been in force for over four years. For much of that time, businesses have waited for clarification of the s7 offence of failure to prevent bribery. In 2013, new legislation (in force from early 2014) allowed for deferred prosecution agreements (DPAs) to be agreed with corporates that committed various offences, including the s7 offence. Finally, near the end of 2015, the first DPA has been agreed.

Bribery Act 2010 – s7 offence

As a reminder of the offence under s7 Bribery Act, a "relevant commercial organisation" commits an offence if a person associated with it bribes another person intending to get or keep business, or an advantage in the conduct of business for the organisation.

What is a Relevant Commercial Organisation?

A Relevant Commercial Organisation is:

- any body corporate or partnership that is formed under the laws of any part of the UK and carries on a business (wherever that business is); and
- any body corporate or partnership, wherever formed, that carries on a business, or part of a business, in the UK.

What is an Associated Person?

An Associated Person of a Relevant Commercial Organisation is a person who performs services for or on behalf of the relevant organisation. It does not matter in what capacity it does so – employees are presumed to be Associated Persons, and agents and other intermediaries, subsidiaries or other contracting parties may be Associated Persons depending on the circumstances.

What is bribing?

Bribing is acting in a way that would constitute an offence under either s1 (bribing another person) or s6 (bribing a foreign public official), critically leaving out of account whether the action is within the territorial scope of the Bribery Act.

So this means that an overseas agent, which is not itself within the jurisdiction of the Bribery Act, can cause its principal to breach s7 even though there is no breach of s1 or s6 that can be prosecuted.

Breach of s7 – defences and sanctions

The Bribery Act requires the Secretary of State (in this case the Ministry of Justice) to publish guidance on "adequate procedures". If Relevant Commercial Organisations put adequate procedures in place to prevent their Associated Persons from bribing, then they will have a defence against prosecution for the s7 offence.

Where the offence is committed, it is committed only by the organisation and not additionally by any individual within it, and is punishable with a fine.

The prosecution authorities will decide whether to take action depending on whether the case

meets the prosecution guidelines, that is that:

- there is a realistic prospect of conviction; and
- if there is a realistic prospect of conviction, it is in the public interest to prosecute.

Where do DPAs come in?

The prosecuting authorities also have a Code of Practice required under the Crime and Courts Act, which they must use when considering whether a DPA is appropriate. If the parties agree on a DPA, it must be sanctioned by the court before it can apply. Binding codes also address the contents of a DPA, and the consequences for breach of it. DPAs can be used to impose fines, remedial actions or a combination of penalties. If an offender complies with an agreed DPA, no prosecution for the offences it covers will be possible. The prosecutor will proffer charges for the criminal offence, but drop them when the DPA expires, provided the conditions of the DPA have been met.

The first English DPA

Although the Bribery Act applies across the UK, Scotland has its own criminal prosecution system, and its Crown Office entered into a DPA in relation to offences that took place prior to the Bribery Act.

Now, on 30 November, SFO obtained court approval for the first DPA relating to the s7 offence.

The facts

In 2012 the Government of Tanzania (GoT) wished to raise public funds to support its five-year development plan and other infrastructure commitments. Standard Bank plc (now known as ICBC Standard Bank Plc) (the Bank) and Stanbic Bank Tanzania Ltd (Stanbic) (sister bank to the Bank) submitted a proposal which included a fee of 1.4 per cent of the gross proceeds.

Nothing further happened until Stanbic entered into an agreement with a Tanzanian company called Enterprise Growth Market Advisors Limited (EGMA). Two of the three directors and shareholders of EGMA were the Commissioner of the Tanzania Revenue Authority (so a member of the GoT) and the former Chief Executive Officer of Tanzanian Capital Markets and Securities Authority. Stanbic agreed a fee with EGMA of 1 per cent of the funds raised, and so raised the placement fee to 2.4 per cent. After EGMA's appointment (which was not evidenced, and indeed not raised with the Bank until after Stanbic had discussed it with the GoT), things progressed.

The mandate was placed and $600 million raised. EGMA opened an account with Stanbic into which its US$6 million was paid. Soon after, it withdrew most of the amount in cash, which led to Stanbic raising concerns with its parent, which in turn raised concerns with the Bank, which in turn appointed lawyers to help it investigate. Within weeks, the Bank had contacted both the Serious Fraud Office (SFO) and the (then) Serious and Organised Crime Agency (SOCA).

What happened next

SFO soon determined there was a reasonable suspicion, based on admissible evidence, that the Bank had failed to prevent bribery contrary to s7 Bribery Act. It also felt that further investigation would lead to more evidence, and there would then be a realistic prospect of conviction in line with the prosecution guidelines.

What was the basis of SFO's view?

SFO considered that the Bank failed to prevent Stanbic and/or its CEO and Head of Corporate and Investment Banking from committing bribery to get or keep business or a business advantage for the Bank by:

- promising and/or giving EGMA 1 per cent of the moneys raised when EGMA was not providing any or any reasonable consideration for the payment; and
- intending thereby to induce a representative(s) of the GoT to perform a relevant function or activity improperly by favouring the Bank and Stanbic's appointment.

The two key individuals at Stanbic (one of whom was sacked in 2013 and the other of whom resigned) would have committed offences under the Bribery Act had they fallen within its jurisdiction.

The judge also noted that Stanbic had marked the relationship with EGMA as "high risk", while the Bank had taken no measures to carry out any customer due diligence on EGMA or the transaction. Despite being joint lead manager with Stanbic, the Bank's teams did not believe they needed to carry out their own checks, nor did they raise any questions about the transaction despite the presence of a significant number of red flags.

Adequate procedures?

Normally, companies in the Bank's position would seek to rely on the defence of having in place adequate procedures to prevent bribery (albeit they had failed). However, here, the judge said SFO considered, on the basis of the material disclosed, it did not have a realistic prospect of raising this defence. The applicable policy was unclear and was not reinforced effectively to the Bank deal team through communication and/or training. In particular, 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 group entity engaged an introducer or a consultant.

The DPA

The DPA will take effect for three years from the date of its declaration, and, subject to the Bank complying with it, SFO will discontinue criminal proceedings at the end of those three years. SFO is not barred from taking any action against individuals or the Bank for conduct not disclosed to it before the date of the agreement or, of course, if any information the Bank provided was inaccurate, misleading or incomplete.

The requirements the court has decided meet the conditions for allowing a DPA are:

- payment of compensation of US$6 million plus interest of US$1,046,196.58;
- disgorgement of profit on the transaction of US$8.4 million;
- payment of a financial penalty of US$16.8 million (the court applied a multiple of 300 per cent to the total fee for culpability and harm and then reduced it by one third to account for the earliest admission of liability);
- past and future co-operation with the relevant authorities in all matters relating to the conduct arising out of the circumstances of the draft indictment;
- at the Bank's own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws; and
- payment of the costs incurred by SFO (currently £330,000).

Other factors

In addition to the DPA:

- the Tanzanian authorities are reported to be investigating Stanbic and have not objected to the arrangements described above; and
- the US Securities and Exchange Commission has been informed and has concluded its own investigation. It is to accept a civil money penalty for violations of the Securities Act.

The judge also noted the civil penalty imposed by the Financial Conduct Authority (FCA) against the Bank in 2014. This was for breach of the Money Laundering Regulations and related to failings in, among other things, enhanced due diligence procedures when dealing with Politically Exposed Persons. The judge noted that, while there was a common theme, the FCA action related to anti-money laundering policies, while the DPA relates to anti-corruption procedures. It also noted the significant efforts the Bank had made to improve its policies overall as a result of the skilled persons review FCA had ordered.

The right thing to do

In the face of sometimes contradictory guidance from SFO on the benefits of self-reporting, the judge concluded by saying it was important to appreciate that the Bank would not 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.

What next?

This announcement will be greeted with great interest. However, the industry still awaits what it really wanted – confirmation on what procedures would be considered adequate for an organisation not to be prosecuted if an Associated Person bribed on its behalf.

SFO has intimated that more DPAs are likely to be on the way, so the message continues to be … watch this space.

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