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CLIENT PUBLICATION

FINANCIAL INSTITUTIONS INVESTIGATION & ENFORCEMENT | July 13, 2016

UK Serious Fraud Office Secures Its Second DPA

The President of the Queen's Bench Division of the High Court has given final approval to the Serious Fraud Office's ("SFO") second ever Deferred Prosecution Agreement ("DPA"). This follows the Standard Bank DPA concluded in November 2015, approximately two years after the introduction in the UK of DPAs, by the Crown and Courts Act 2013.

A DPA may be negotiated with a party where, broadly, there are reasonable grounds to believe that there is a realistic prospect of conviction and that entering into a DPA is in the public interest. However, before it can be finalised, the prosecutor must apply to the court for a declaration that entering into a DPA is likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate. The prosecutor must then make a further application to court for approval once the terms of the DPA are finalised.[1]

The DPA approved last week is with a UK SME ("XYZ") which has not been named due to ongoing legal proceedings. Investigations had revealed the systematic use of bribes, by a substantial proportion of the company's agents, in obtaining contracts to supply the company's products. Specifically, 28 contracts worth a total of over £17 million were implicated. XYZ was facing charges for conspiracy to corrupt and conspiracy to bribe under section 1 of the Criminal Law Act 1977 together with failing to prevent bribery under section 7 of the Bribery Act 2010 ("UKBA"). Under the DPA, XYZ is to pay £6,201,085 in disgorgement of profits and a £352,000 financial penalty.

The judgment is of particular interest for its comments about and emphasis on the significance of cooperation with the SFO. Despite commenting that "*in terms of gravity*, [the conduct] *is of an entirely different order to that considered in SFO v Standard Bank*," where there was failure to prevent just a single instance of bribery, the judge was prepared to approve the DPA. He placed "*very considerable weight*" on the cooperation demonstrated by XYZ and commented that self-reporting and implementing effective compliance structures "*must be rewarded and be seen to be worthwhile*."

The Value of Cooperation With the SFO

The judge described XYZ as having pursued a "*genuinely proactive approach to the wrongdoing it uncovered*" which "*militates very much in favour of finding that a DPA is likely to be in the interest of justice*." The subject of particular comment were—

- *The Timeline*: Concerns had come to light in August 2012 and a law firm was retained to undertake an investigation in early September. An initial oral report not naming XYZ was made to the SFO within a month and a meeting with the SFO took place a month later at which the lawyers confirmed that a written report would be submitted by 31 January 2013. This report, providing "*comprehensive information*," was based on

[1] Copies of the preliminary and final judgments in the present case can be obtained on the SFO's website at the following address: https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/

the results of an extensive internal investigation. XYZ continued with its investigations following the initial report, identifying all 28 of the implicated contracts to the SFO.

- *Approach to witness evidence*: The DPA Code of Practice provides that cooperation includes identifying witnesses, disclosing their accounts and making them available for interview. XYZ had provided oral summaries of interviewees' initial accounts and facilitated the interview of employees. The question of what a defendant must disclose in relation to witness interviews and the extent to which it can claim privilege and still be deemed to be cooperating with the SFO has been the subject of some uncertainty.

The Importance of Remedial Action

As a further factor weighing in favour of the DPA being in the interests of justice, the judge noted that XYZ is "*a culturally different company to that which committed the offences subject to the present DPA application*." In particular, XYZ had terminated two senior employees implicated in the conduct, severed ties with suspect agents and withdrawn from two suspect potential contracts.

The Role of XYZ's Parent Company

The position of XYZ's (US) parent company, ABC—which had purchased XYZ in 2000—may be of some interest. In particular, the judge noted that ABC had been "*entirely ignorant*" of the issues at XYZ and ABC's conduct once those issues were discovered was "*beyond reproach*." Referencing the possibility of a parent becoming liable under s.7 of the UKBA for conduct of its subsidiary, the judge described an extreme example where a parent had set up a subsidiary as a vehicle through which corrupt payments might be made.

ABC had received close to £2 million in dividends from XYZ, but had done so innocently. It volunteered to pay a sum reflecting this towards XYZ's disgorgement obligation, but the judge specifically noted that there is no obligation on an innocent parent to take such a step.

We will provide a further update following the publication of full details of the DPA.

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