CLIENT UPDATE

DEFINITIVE UK SENTENCING GUIDELINE FOR CORPORATE OFFENCES PUBLISHED

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On 31 January 2014, following a consultation process which started on 27 June 2013 and closed on 6 October, the UK's Sentencing Council (the "Council") published the final version of the sentencing guideline for corporate offenders convicted of fraud, bribery and money laundering (the "Guideline"), the UK's first ever sentencing guideline aimed specifically at corporate offenders.[1] The Guideline does not materially differ from the draft version contained in the consultation and which formed the subject of a Debevoise Client Update dated 1 July 2013.[2] The Guideline will apply to all corporate offenders sentenced from 1 October 2014, regardless of when the offences were committed or the date of the conviction.

The Council is the independent body responsible for developing guidelines for courts in England & Wales to use when passing sentence. Courts have a statutory obligation to follow the Council's guidelines unless "satisfied that it would be contrary to the interests of justice to do so".

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1 See the Council's press release at: http://sentencingcouncil.judiciary.gov.uk/news-stories.htm

2 See the Debevoise Client Update "Proposed UK Sentencing Guidelines for Corporate Offences" dated 1 July 2013 at: http://www.debevoise.com/clientupdate20130701a/

COMPENSATION AND CONFISCATION

Under the Guideline, a sentencing court's first consideration is whether to make a compensation order to victims for any injury, loss or damage suffered. Such an order should be given priority over any other financial penalties. It was already recognised that compensation was an important part of sentencing for corporate offending. For instance, in September 2009, Mabey & Johnson Ltd, the steel bridging group, was ordered to pay £658,000, £139,000 and £618,000 to Ghana, Jamaica and Iraq respectively by way of reparations for the effects of corrupt payments.

If asked for by the prosecution or deemed appropriate by the court, the court should also consider, before turning to the fine, whether to make a confiscation order under the Proceeds of Crime Act 2002. Confiscation is seen as distinct from any punishment and solely concerned with depriving offenders of any ill-gotten gains. The UK's confiscation regime has often been referred to as "draconian", but as far as corporate offenders are concerned, this has partly been a reflection of the relative leniency of the sentencing regime. Under the Guideline, however, the punishment element of any sentencing, *i.e.*, the fine, can often be expected to be far larger than the confiscation order. While the amount ordered by way of confiscation should inform the sentencing court's assessment of the totality of the fine (see below), its share of any total amount a corporate offender can expect to pay is likely to be considerably smaller than at present.[3]

CALCULATING THE FINE

After compensation and confiscation, if any, are considered, punishment for the relevant offences – fraud, bribery and money laundering – will be determined by a two-stage process, taking into account, first, culpability, and, second, the level of harm.

Culpability Level

First, the court should assess the offender's "role and motivation" in the offence and decide whether the offence was committed with high, medium or lesser culpability.

Characteristics indicating high culpability include playing a leading role in organised unlawful activity, corruption of governmental or law enforcement officials and wilful obstruction of detection (an element included following a proposal by the Crown Prosecution Service).

[3] In addition, and all things being equal, if a corporate offender negotiates a Deferred Prosecution Agreement, there will be no confiscation, the criminal confiscation regime being predicated on a conviction.

Indicators of lesser culpability include a minor role in unlawful activity organised by others and the existence of some bribery-prevention measures, but insufficient to amount to a defence of "adequate procedures" under the Bribery Act's section 7 corporate offence.

The Harm Figure

The court should then decide the harm caused by the offence expressed in monetary terms. Harm is defined differently for each of the three categories of crime:

- Fraud: "*harm will normally be the actual or intended gross gain to the offender*".
- Bribery: "*the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending.*" Where the offence was failure to prevent bribery (the Bribery Act's section 7 corporate offence), the court can also consider "*the likely cost avoided by failing to put in place appropriate measures to prevent bribery*".
- Money laundering: "*the appropriate figure will normally be the amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher*".

If actual or intended gain cannot be established, "*the appropriate measure will be the amount that the court considers was likely to be achieved in all the circumstances*". And if even that cannot be established, 10-20% of the "relevant" revenue (*i.e.*, that relating to the product or business area at issue) may be appropriate.

It is worth mentioning that the Serious Fraud Office (the "SFO") fundamentally disagreed with the Council's approach to assessing harm. In representations before the Council and Parliament's Justice Select Committee, it argued that it is almost impossible to calculate harm on such a basis and proposed that a proportion of turnover should be the primary measure of harm.

The Fines Matrix

In order to calculate the starting point of the fine, the court must apply the "harm figure multiplier", corresponding to the corporate offender's culpability level, to the harm figure.[4] The basic harm figure multiplier is 100% for lesser culpability, 200% for medium culpability and 300% for high culpability, but the court must adjust this starting point by applying aggravating and mitigating factors to arrive at the harm figure multiplier within the category range that is appropriate in the individual case. The ranges are 20-150% for lesser culpability, 100-300% for medium culpability and 250-400% for high culpability.

[4] For clarification, this starting point "*applies to all offenders irrespective of plea or previous convictions.*"

Aggravating factors include corporate structures set up to commit offences and cross-border offending. Mitigating factors include the fact that the offending occurred under previous management and that the corporate offender co-operated and self-reported or made early admissions.

The fines matrix looks as follows:

Culpability level	A (high)	B (medium)	C (lesser)
Harm figure multiplier	Starting point 300%	Starting point 200%	Starting point 100%
	Category range 250% to 400%	Category range 100% to 300%	Category range 20% to 150%

At this stage, the Guideline mandates that the court should consider any other relevant factors and "step back" to consider the effect of its orders. The court should ensure that its order, in combination with any orders for compensation and/or confiscation, in a fair way achieves the objectives of removal of gain, appropriate additional punishment and deterrence. The court should also ensure that the fine is proportionate to the offender's position and the seriousness of the offence, but at the same time "*substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law*". The court should consider whether the fine might put the offender out of business, but the Guideline recognises that such a result may be appropriate in certain cases.

Finally, further reductions may be made to take into account cooperation with the prosecution and any Guilty pleas.

ANALYSIS

As we explained in our previous Client Update, this Guideline constitutes a considerable strengthening, in theory, of the English sentencing regime for corporate offenders, particularly as compared to the US regime.

By way of contrast, application of the methodology in the Guideline could result in very high fines indeed, as illustrated by the two theoretical examples below:

Example 1

"UK Plc" pleads Guilty to a failure to prevent one of its agents from offering to pay the vice-president of a foreign main contractor a £500,000 bribe in an unsuccessful attempt to win a sub-contract that would generate an estimated gross profit of £50 million. As UK Plc has some, but insufficient, anti-bribery measures, it is accepted by the court that it has acted with lesser culpability. That may mean a starting point for UK Plcs' fine based on a harm multiplier of 100%, *i.e.*, £50 million. However, UK Plc discovered the attempted bribe itself and reported it to the SFO. The harm multiplier will therefore be adjusted downwards to a minimum of 20%, *i.e.*, a fine of £10 million with a possible further reduction of up to a third on account of the timely Guilty plea.

Example 2

"UK Ltd." is a mid-sized defence contractor with declining sales. "Foreign government" announced that it was reviewing UK Ltd.'s largest export contract, generating a gross profit of £10 million, because of quality issues. Following the review, Foreign government announces that it confirms UK Ltd.'s contract. The SFO raids the offices of UK Ltd. and discovers evidence that the CEO approved a £200,000 payment to the quality controller responsible for the review for a favourable report. UK Ltd. denies the bribery charge and is convicted after trial. The court finds that the company had acted with high culpability. That would mean a starting point for UK Ltd's fine based on a harm multiplier of 300%, *i.e.*, £30 million. In addition, the trial revealed that UK Ltd.'s board had turned a blind eye to the CEO's plans. The court decides to make an example of UK Ltd., applies the maximum harm multiplier (400%) and fines it £40 million, stating that this was "*one of those rare cases where justice requires the bankruptcy of the offender*".

This level of fines, if actually achieved, would be a real departure from existing practice, a point made by some of those (industry representatives and defence lawyers in particular) responding to the consultation.

Be that as it may, with the Guideline in place, corporates that consider approaching a prosecutor to seek to benefit from a Deferred Prosecution Agreement ("DPA") now know broadly what to expect by way of financial penalty. The link between the Guideline and DPAs is explicit. In his foreword to the Council's Response to Consultation, its chairman, Lord Justice Treacy, states: "*This guideline was created as part of a package to support the introduction of [DPAs]. Whilst it is not a guideline for DPAs, as they will only be made where there is not a conviction, the Council hopes it will be of assistance as a point of reference when fine levels within DPAs are being considered and negotiated.*"

DPAs are due to come into force this month.

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Please do not hesitate to contact us with any questions.

February 3, 2014