CLIENT UPDATE

PROPOSED UK SENTENCING GUIDELINES FOR CORPORATE OFFENCES

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On 27th June 2013, the Sentencing Council (the "Council") published its proposals for the UK's first ever sentencing guidelines for bribery and money laundering, along with updated guidelines for fraud. In another first, the guidelines include sentencing principles applicable to corporate offenders. The proposals will be open for consultation for the next 14 weeks.

The Council is the independent body responsible for developing guidelines for courts in England & Wales to use when passing sentences. Courts have a statutory obligation to sentence with reference to applicable definitive guidelines produced by the Council unless "satisfied that it would be contrary to the interests of justice to do so".

CALCULATING THE FINE

The Council has proposed that punishment for these offences 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 (A), medium (B), or lesser (C) culpability.

Level B is the default level, adjusted upwards or downwards depending on the existence of certain factors, tailored to the characteristics of the offence or offender. The existence of a single factor indicating higher or lesser culpability would be sufficient to establish the corresponding level of culpability, though courts will be expected to balance all characteristics present to reach a fair assessment of the offender's culpability.

For offences committed by corporates, characteristics indicating high culpability include the corporate having played a leading role in organised unlawful activity, or governmental or law enforcement officials having been corrupted. Those indicating lesser culpability include the corporate having played a minor role in unlawful activity organised by others, or, on a charge of failing to prevent bribery (section 7 of the Bribery Act 2010), the existence of bribery-prevention measures insufficient to amount to a defence of "adequate procedures".

The Harm Figure

The court should then decide the harm caused by the offence.

Offences by Corporates

The Council provides a general definition of "harm" as being: "*the actual gross amount obtained (or loss avoided) or intended to be obtained (or avoided) by the offender as a result of the offence*". This general principle is then particularised for the three offence categories covered (i.e., fraud, bribery, and money laundering).

For corporate bribery, the Council proposes that the amount of harm will "*normally be the gross profit from the contract obtained, retained or sought as a result of the offending*". Where the charge is of failure to prevent bribery, an alternative measure is proposed: "*the likely cost avoided by failing to put in place appropriate measures to prevent bribery*".

If circumstances are such that the actual or intended gain cannot be established, the proposed measure is "*the amount that was likely to be achieved in all the circumstances*". If even that cannot be established, the suggested measure is "*10% of the relevant revenue (i.e., 10% of the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending)*".

Offences by Individuals

Although actual or intended financial loss constitutes the proposed basis for the "harm" calculation in dealing with individual offenders, the Council proposes to "promote" victim

impact as a factor to take into account in determining the basic degree of harm; as opposed to an aggravating factor to adjust it.

The Fines Matrix

With these two parameters established, the court will arrive at the appropriate starting point. In the case of offences by corporates, this is done by applying the default multiplier for the offender's level of culpability. The default multipliers are 100% for lesser culpability, 200% for medium culpability, and 300% for high culpability, but the court will take into account circumstantial and contextual aggravating and mitigating factors to arrive at a case-appropriate multiplier within the set category range (20-150% for lesser, 100-300% for medium, and 250-400% for high culpability). Aggravating factors include corporate structures tailored to commit offences and cross-border offending. Mitigating factors include the fact that the offending occurred under previous management and voluntary self-reporting. (For individuals, the starting point and adjustments are somewhat different, since harm is measured in categories, not a monetary amount, and individuals are susceptible to imprisonment.)

The fines matrix for corporates looks as follows:

Culpability level	A	B	C
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%

This matrix is expressly based on the US Sentencing Commission's Guidelines for the Sentencing of Organizations.

At that stage, the Council proposes that "*[t]he court should 'step back' and consider whether the fine calculated … meets the objectives of punishment, deterrence and the removal of gain in a fair way*", and should consider any further relevant factors "*to ensure that the fine is proportionate having regard to the size and financial position of the offending organisation and the seriousness of the offence*".

The Council recommends: "*The fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law.*

Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence."

Finally, further reductions may be made to take into account co-operation with the prosecution and guilty pleas.

VICTIM-FOCUS

It is also important to note that in all cases, the court must consider whether a compensation order to the victim is appropriate. If it is, then the compensation order must be prioritised over a fine if the offender's means are limited.

ANALYSIS

If adopted, these proposed guidelines would constitute a considerable strengthening of the English sentencing regime for corporate offenders, particularly as compared to the US regime. As the Labour Party's Policy Review, *Tackling Serious Fraud and White Collar Crime, states: "When comparing the treatment of the same company for violation of similar measures, US fines are significantly higher, for example: BAE Systems was fined five times as much in the US ($400 million, £250 million) as in the UK (£30 million) for bribery and corruption-related offences. The highest fraud fine imposed by the SFO was £2.2 million against Seven Trent Water Ltd, 1000 times lower than the highest US fraud fine ($3 billion, or £2 billion, against GSK)."*

By way of contrast, application of the methodology proposed by the Council could result in very high fines indeed, as the following two examples show:

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 £100,000 bribe in an unsuccessful attempt to win a sub-contract worth £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 Plc.s' 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 may 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 worth £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 £50,000 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*".

It should also be borne in mind that confiscation, which would be equivalent to the gross revenue improperly gained, would follow a conviction and be additional to any fine imposed.

Despite the relatively low sentences in fact imposed by UK courts for corruption offences, in the leading case, *R v Innospec Ltd*, Thomas LJ remarked: "*As fines in cases of corruption of foreign government officials must be effective, proportionate and be dissuasive in the sense of having a deterrent element, I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point …* " It could therefore be said that the level of the fines which would result from the Council's proposals, in formalising a broad alignment with existing US practice, comes with pre-emptive judicial approval.

These guidelines would also increase the certainty of corporate sentencing. For the first time, corporates would have a real idea of what sentences they can expect if they admit to (or are convicted of) criminal conduct. Insofar as bribery goes, the Council stated that the "*extremely limited number of sentences passed and lack of an existing guideline does not allow for any analysis of current practice*".

If these guidelines are adopted, corporates who would consider approaching a prosecutor to seek to benefit from the soon-to-be-introduced Deferred Prosecution Agreements ("DPAs") will know what to expect by way of financial penalty. The motivation for entering a DPA will be all the greater for allowing the corporate to avoid the confiscation regime. If adopted, therefore, the proposed guidelines will provide much needed

structure and predictability to an area sorely lacking in both. Questions remain, however, as to whether the proposed level of fines is too great a departure from existing practice. No doubt this is the aspect of the proposed guidelines industry will focus on in their responses to the consultation.

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Please do not hesitate to contact us with any questions.

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