

Fraud, bribery and
money laundering:
corporate offenders
Response to Consultation

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Foreword



I would like to thank all those who responded to the questions on corporate offenders within the Fraud, Bribery and Money Laundering consultation and those who attended the consultation events hosted by the British Bankers Association and Herbert Smith Freehills LLP.

There have been very few criminal prosecutions of organisations for the offences covered by this guideline and therefore no body of case law from which guidelines may be drawn. In those circumstances we are particularly grateful to those who have taken the time to share their experience and expertise.

This guideline was created as part of a package to support the introduction of Deferred Prosecution Agreements (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. It will, in any event operate as a definitive guideline in cases where organisations are prosecuted for, and convicted of offences covered by these guidelines.

Lord Justice Treacy
Chairman, Sentencing Council

Introduction

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence.

The Sentencing Council was created to bring together the functions of the two previous bodies, the Sentencing Guidelines Council (SGC) and Sentencing Advisory Panel (SAP). The Sentencing Council is a more streamlined body with a broader remit to take forward work on sentencing not only through guidelines but also through the development of a robust evidence base and engaging with the public to improve knowledge and understanding about sentences. The Council brings together wide experience in sentencing and comprises eight judicial members and six non-judicial members.

In 2012 the Ministry of Justice consulted on the introduction of Deferred Prosecution Agreements (DPAs) for dealing with corporate offenders involved in economic crime. At this time the Lord Chancellor wrote to the Council in relation to a proposal that it was the appropriate body to issue guidance for the new DPAs system. A DPA is an agreement made between a prosecutor and an organisation under which a criminal prosecution is deferred pending compliance with terms and conditions that may include payment of substantial financial penalties.

The statutory function of the Council extends only to issuing guidelines on disposals following conviction;¹ as DPAs do not fall within this remit it was not possible for the Council to produce such guidance without amending its statutory functions. In the event, the Council agreed to expedite its planned work on bribery, fraud and money laundering and to include within these guidelines guidance for sentencing both individual and corporate offenders.

There have been very few criminal prosecutions of organisations for the offences covered by this guideline and consequently no established sentencing practice for organisations. The only punishment available for an organisation convicted of these offences is a fine. There is currently no guideline for sentencing organisations convicted of financial crimes. The new guideline covers fraud, money laundering and bribery offences committed by companies or other corporate bodies, for example, local authorities. In the guideline the term 'corporation' is used to describe the offender; the term covers any organisation or body including partnerships and charities but it does not cover individuals. A separate guideline for individuals convicted of fraud offences will be published later in 2014.

1 ss.118-136 Coroners and Justice Act 2009

The Council's underlying principles when drafting this guideline were that:

- any profit must be removed;
- the penalty must have a real economic impact on the offender including on the shareholders.

A consultation was held for 14 weeks between 27 June and 6 October 2013. In addition to an online and hard copy consultation the Council held a number of engagement events, two of which specifically focussed on the proposals for sentencing corporate offenders.

The guideline for offences committed by corporations that was included within the consultation is not a guideline for DPAs but may be used to inform the level of financial penalty that forms part of a DPA; paragraph 5(4) of Schedule 17 of the Crime and Courts Act 2013 provides that such a penalty should be broadly comparable to the likely fine that would be imposed following a conviction after a guilty plea and both prosecutors and organisations will be able to consider the guideline when determining the appropriate level.

Given that this work was undertaken in large part due to the need to provide guidance for DPAs the Council decided to separate the consideration of consultation responses between the guidelines for corporate offenders and individual offenders in order that the corporate offenders guideline could be finalised in time for when the first DPAs are anticipated to be made. The guideline is therefore being published online to be referred to by judges operating the DPA scheme but is not in force. **The guideline for corporate offenders will not come into force until the guidelines for individuals come into force on 1 October 2014.**

Summary of responses

Summary of responses

This report summarises the responses to the questions asked in the consultation paper as well as those expressed during the consultation events, and sets out the Sentencing Council's decisions on key points raised and the next steps for the guideline.

Forty-six respondents addressed the questions on the proposed corporate guideline. In addition the Serious Fraud Office (SFO) provided a detailed submission with an alternative proposal.

The Council is required by statute² to consult both the Government and the Justice Select Committee. A response was received from the Lord Chancellor on behalf of the Government and a seminar style session was convened by the Justice Select Committee who then submitted their findings.

The majority of respondents welcomed the introduction of a guideline for sentencing corporate offenders convicted of fraud, bribery and money laundering offences and were supportive of the approach in the proposal. There were a small number of responses that were in favour of a guideline but were negative with regard to the multipliers and what they regarded as some disproportionately harsh factors. These respondents were exclusively industry representatives and defence lawyers.

Responses to each question

Q48 Do you agree that consideration of compensation should be at step one for corporate offenders? If not, please give your reasons.

All of the 35 respondents who answered this question agreed with the proposal that compensation should be at step one. A small number suggested guidance as to how to calculate the compensation was needed. The Council did not consider guidance was relevant here and this step is therefore not amended from the consultation proposal.

Q49 Do you agree with the culpability factors proposed for these offences committed by corporations and do you agree that the list of factors should be non-exhaustive? If not, please specify what you would change and why.

Thirty-eight respondents answered this question; 33 of them agreed with the culpability factors and that they should be non exhaustive. The Council has generally taken the stance that step one factors should be exhaustive. However, as this guideline has been devised without the benefit of a body of case law on which to base culpability factors and the Council recognises that cases could come before the courts with features that are not contemplated by the guideline the factors are non-exhaustive.

A number of additional factors were proposed by consultees that were considered by the Council. There was little overlap amongst the suggestions, a number of which the Council felt were already encompassed within the factors as drafted. However, GC100 proposed '*involvement through coercion, intimidation or exploitation*' be added. This is a factor that appears as an indicator of low culpability within the draft guidelines for individual offenders. The Council agreed that there was merit in copying this over to the corporate offenders guideline and have done so.

The Crown Prosecution Service (CPS) suggested several additional factors; the Council agreed that '*wilful obstruction of detection (for example destruction of evidence, misleading investigators, suborning employees)*' should be added as a factor indicating high culpability.

Q50 Do you agree with the approach to assessing harm as outlined for corporate offenders? Does the approach strike the right balance between flexibility and certainty? Please say what you would change and why.

The approach to assessing harm was the most controversial proposal within the consultation. However, the majority of respondents agreed with the approach. Of the nine who either disagreed entirely or suggested amendments, four stated that they strongly disagreed with the general section in the harm assessment arguing that it was disproportionate. This section was drafted with the intention of encouraging corporate offenders to co-operate with the court by providing sufficient information to calculate the harm. This intention was not lost on the Council of HM Circuit Judges who said in their response:

'We think it should be more strongly worded to encourage the drawing of adverse inferences against corporate offenders who do not provide the necessary information. Many of them can be secretive and devious about this. We suggest wording along the lines of "in default of satisfactory and credible information the sentencing court should assume not less than 10%".'

The government also proposed that a tougher sanction should be available where the necessary information to arrive at a proportionate harm figure is not available, proposing that 10 per cent should be the minimum with a scale ranging up to 20 per cent to encourage co-operation. The Council agreed with this proposal and the original 10 per cent has been replaced with 10-20 per cent.

The SFO fundamentally disagreed with the approach. They made representations to both the Council and the Justice Select Committee that their alternative model should be adopted. The Justice Select Committee agreed with their suggestion.

The alternative proposal submitted by the SFO does not include an assessment of harm. Instead a four stage process as follows is adopted:

- disgorgement;
- compensation;
- punishment;
- ancillary orders (costs).

The SFO promulgated the argument that it is almost, if not entirely, impossible to calculate harm caused by these offences and that the proposals for doing so do not sufficiently capture the harm. They went on to argue that the determinant of the level of the punishment should be turnover.

The Council gave considerable consideration to the SFO's submission, one aspect of which was extremely helpful test cases. In analysing the submission and using the proposed guideline to work through the test cases the Council rejected the view that harm could not be successfully assessed and that using turnover to determine the punishment is the right approach to take when sentencing these types of offences. The Council felt that using a percentage of revenue or turnover as the starting point for a fine in these cases would result in the level of fine being determined more by corporate structure than by the merits of the case. The Council also considered that such a regime would impact disproportionately on corporations with high turnover but low profitability.

Several respondents found the terminology, specifically the references to '*gross amount*', '*gross profit*' and '*gross gain*' used in this section confusing. These different terms are used deliberately to describe the different ways these offences will benefit the offenders and so have been retained other than '*gross gain*' which has been amended to '*amount obtained (or loss avoided)*' in the fraud and general sections. Some minor drafting changes have been made to this section to provide greater clarification.

Q51 Do you agree with the approach to calculating the financial penalty by applying a multiplier to the harm figure? Do you think that the multipliers are set at the right level? Please say what you would change and why.

All of the 34 respondents who specifically answered this question agreed with the approach. Four respondents (SAB Miller, Herbert Smith Freehills LLP, International Chamber of Commerce, Freshfields Brukhaus Deringer) considered the starting points and ranges too high; four (all magistrates benches) considered them too low. Two respondents thought the size of the business should be taken into account when setting the multipliers. Given that once the

aggravating and mitigating features have been considered the court can 'step back' at step five and adjust the level of fine the Council decided that the ranges and starting points should not be amended as there is sufficient flexibility within the model.

Q52 Do you agree with the aggravating and mitigating factors for corporate offenders proposed at step three? If not, please specify what you would change and why.

Aggravating factors

Four respondents (International Chamber of Commerce, City of London Law Society, Dechert LLP, Simmons and Simmons LLP) disagreed that '*offence committed across borders or jurisdictions*' should be included as an aggravating factor. The arguments advanced were that it was not aggravating unless it was deliberate in an attempt to thwart investigation and that if this was the case it would be considered as part of the assessment of culpability. The Council disagreed with this argument and have retained this factor.

Mitigating factors

Five respondents (Freshfields Brukhaus Deringer, South Cambridgeshire Bench, SAB Miller, Herbert Smith Freehills LLP and International Chamber of Commerce) felt that '*early active co-operation particularly in complex cases*' was either unclear or surplus as it would be encompassed by '*corporation co-operated with investigation, made early admissions and/or voluntarily reported offending*'. The Council agreed with this argument and deleted this factor.

A number of additional factors were proposed by consultees to both the aggravating and mitigating factors. As the list is non-exhaustive and the majority of respondents agreed with all the factors, the Council concluded that no additions would be made to the aggravating and mitigating factors.

Q53 Please give your views on the proposed step four for corporate offenders. Do you think that it achieves the objectives of punishment, deterrence and removal of gain in a fair way? Please specify what you would change and why.

Twenty four of 29 respondents to this question agreed that the objectives are met in a fair way. Some of those who stated they agreed overall made observations about specific factors that they disagreed with.

SAB Miller, International Chamber of Commerce, Fraud Lawyers' Association and Herbert Smith Freehills LLP disagreed with the exclusion of the impact on shareholders. The Council were not persuaded by the arguments put forward to consider the impact on shareholders in some circumstances. A guiding principle of the guideline is that the penalty must have a real economic impact on the corporation and that impact must extend to shareholders.

Following consultation the Council concluded it may be of assistance to the court to include a reminder of the power of the court to order that a fine be paid in instalments when considering the effect of the fine. This has been included at this step.

Q54 Do you think that any further guidance should be offered at steps five to nine? Are there any particular ancillary orders that are relevant to corporate offenders that should be mentioned at step seven?

Several respondents suggested director disqualifications for key individuals should be

included; this is not possible as an individual will not have been convicted. Financial reporting orders were also suggested but these are not available for corporations. Victim Support proposed the victim surcharge be included. The Council has chosen not to mention the victim surcharge as an ancillary order in all other guidelines as the court has no discretion as to when to make this order. This position has been maintained in this guideline.

Several respondents suggested confiscation orders should be included. They were in fact included on the cover sheet as an instruction rather than a step in the guideline that was consulted on. The Council concluded it would be clearer to incorporate confiscation as a step and have inserted it as step two. The remaining steps have therefore been renumbered.

Q55 Overall, do you consider that the draft corporate guideline provides the sentencer and the parties with sufficient guidance and flexibility? Please specify what you would change and why.

Of 29 responses to this question only one disagreed.

Conclusion and next steps

The consultation has been an important part of the Council's consideration of this guideline. Responses have informed changes made to the definitive guideline. The guideline will come into force on 1 October 2014.

Annex A

Consultation respondents

Baker & McKenzie LLP
Bedfordshire Magistrates
Birmingham Magistrates
Chartered Institute of Loss Adjusters
City of London Law Society
Clifford Chance
Corkerbinning
Council of Circuit Judges
Council of District Judges
Crown Prosecution Service
Criminal Bar Association
Dechert LLP
Essex Magistrates
East Kent Magistrates
Fraud Advisory Panel
Fraud Lawyers' Association
Freshfields Brukhaus Deringer
GC100
Gwent Magistrates
Herbert Smith Freehills
International Chamber of Commerce
Justices' Clerks' Society
Kingsley Napley Solicitors
London Criminal Courts Solicitors' Association
Macclesfield Magistrates
National Bench Chairmen's Forum
NHS Protect
North East Sussex Magistrates
North London Magistrates
Peters and Peters
Probation Chiefs' Association
QEB Hollis Whiteman Chambers
SAB Miller
South East London Magistrates
Simmons and Simmons LLP
Somerset Magistrates
South Cambridgeshire Magistrates
Swansea Magistrates
Teesside Magistrates
Transparency International
Trustmark
Victim Support
West & Central Hertfordshire Magistrates
Wolverhampton Magistrates