

1 Culpability

1.1 Other suggestions were: Magistrates on the West London Bench (WLB) sought clarification, possibly by way of examples, of what a significant role would be to distinguish it from a leading role. They were also concerned about where to place an offender who performed more than a limited role under direction but might not be considered to have a significant role. It is recognised that as magistrates see these cases only very rarely it may be difficult to judge the role of offenders and thereby to assess the appropriate level of culpability, but this assessment will need to be made on the facts of each case (taking account of the wording below the culpability factors about balancing characteristics) and it is not clear that examples would assist.

1.2 The International Trademark Association (INTA) stated: 'Section B could be clearer. It seems to suggest that an offender automatically falls into Section B where the offender had a significant role in the offending group or some degree of organisation/planning. Section B should be defined as falling between sections A and C and then these activities should be given as examples of activities that fall between A and C.'

1.3 Culpability B has been deliberately worded as it is – the Council intended that it should operate in the way INTA suggests it does, subject to the requirement to balance characteristics.

1.4 A magistrate respondent suggested 'I don't think you need the third bullet point in Medium Culpability if using the qualifying statement above about making a fair assessment. The statement above should be at the top in the blue box to be read at the beginning of the assessment.' This is strictly speaking true – but experience has shown that in order to ensure that all sentencers balance the factors as intended a clear direction in medium culpability is required.

1.5 A magistrate respondent suggested adding a high culpability factor 'something along the lines of being a part of the production process - which suggests significant and wilful involvement'. The difficulty with this suggestion is that the production process could be very unsophisticated and where it does involve planning and sophistication it should fall into culpability A as the factors currently stand.

1.6 A magistrate respondent suggested the culpability A factor ('Involvement of others through coercion, intimidation or exploitation') could read: 'instigated/approved the involvement of others'. The difficulty with this suggestion is that the current wording is consistent with that used elsewhere in guidelines.

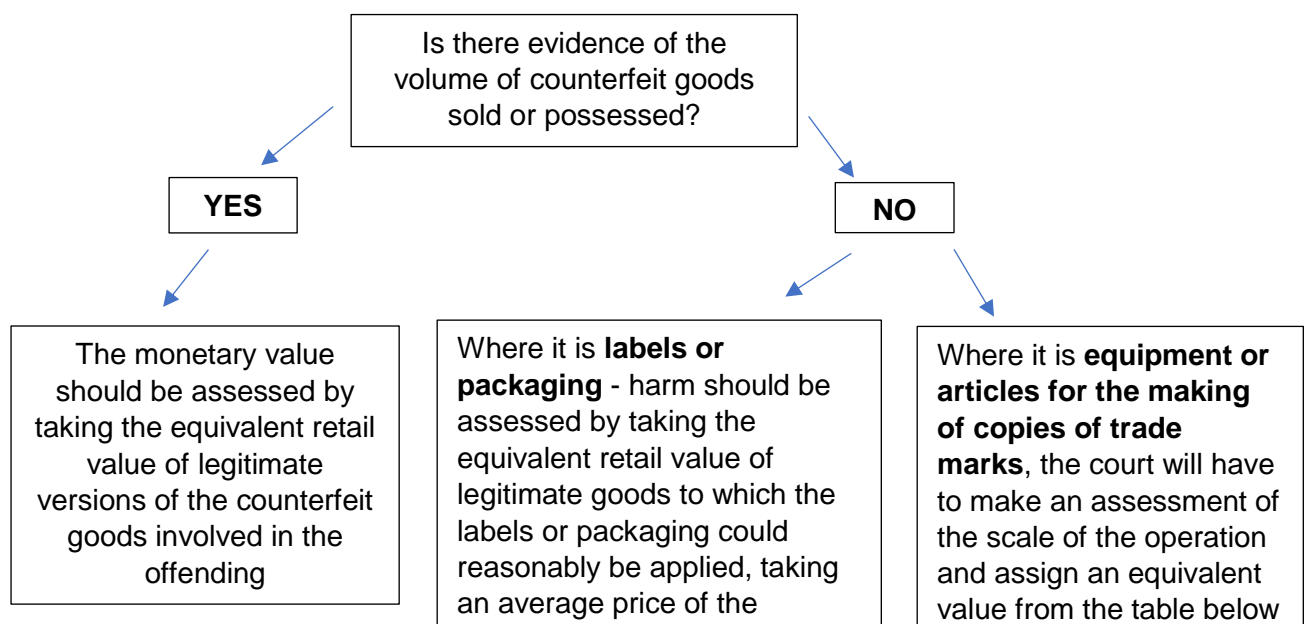
1.7 The City of London Police proposed additions to culpability factors relating to:

1. The offender receiving advice or warnings that their activity is criminal. They state: 'Trademark law is a field in which civil solicitors and private companies routinely deliver cease and desist notices to offenders - in such circumstances where notices have been ignored this should increase culpability.'
2. Any indication of subverting or corrupting a system – 'I am aware of a number of occasions where criminals have received counterfeit goods from investigators in order to destroy them and have instead resold them.'

1.8 The first of these suggestions is covered at step 2 by the aggravating factor 'failure to respond to warnings about behaviour'. The second is not a scenario that has been seen in any of the transcripts or reported cases, but it may be felt that this is adequately covered by 'Sophisticated nature of offence/ significant planning'.

2 Harm

2.1 The legal committee of HM Council of District Judges (Magistrates' Courts) agreed 'with the proposed method of assessing harm but find the general assessment of harm part somewhat verbose and not easy to follow. We entirely agree that these elements are necessary in this part of the guideline, but believe it would be far easier for sentencers to follow this in some form of flow chart or table format, for example along the lines of':



2.2 One magistrate respondent suggested using the wholesale value rather than the retail value to assess harm, another wondered if reputational harm should be included and a third thought the assessment should reflect the harm to consumers who purchase goods in the belief that they are genuine.

3 Aggravating and mitigating factors

3.1 There were suggestions for adding aggravating factors that appear in the fraud guideline: the Magistrates' Association and Council of Her Majesty's Circuit Judges (HMCJ) suggested 'offences committed across borders' and HMCJ also suggested 'Steps taken to prevent any victim reporting or obtaining assistance and/or from assisting or supporting the prosecution' (although they accepted that this would only apply rarely). The first of those suggestions was in an earlier draft of the guideline but was removed because it was felt that it risked double counting with the culpability factor relating to planning and sophistication.

3.2 Another suggestion for an aggravating factor was: 'violence displayed towards enforcers.' This is not an issue that has been seen in transcripts and if it occurred and did not lead to separate charges, the fact that the factors are non-exhaustive means that a court would be able to take it into account.

3.3 There were several comments about the mitigating factor, 'Lapse of time since apprehension where this does not arise from the conduct of the offender'. HM Council of District Judges (Magistrates' Courts) said that it should refer to the offence date rather than date of apprehension. Two magistrate respondents disagreed with the factor, one stating that it was common and did not usually result in a reduction. City of London Police expressed concern that this would be a common occurrence because of the delays caused by Covid. There is an expanded explanation for this factor which reads:

Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence if this has had a detrimental effect on the offender.

Note: No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case.

3.4 A magistrate disagreed with the factor, 'Offender co-operated with investigation, made early admissions and/or voluntarily reported offending' unless it leads to the conviction of another as it would overlap with the guilty plea reduction. Another magistrate did not understand the factor, 'Serious medical condition requiring urgent, intensive or long-term treatment' in relation to this offence or how it would be proved in magistrates' courts.

3.5 GlaxoSmithKline suggested that good character should be irrelevant.

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