

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**29 January 2021**  
**SC(21)JAN03 – Trade mark**  
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## **1 ISSUE**

1.1 From 7 July to 30 September 2020 the Council consulted on guidelines for the offence of unauthorised use of a trade mark; one for individual offenders and one for organisations.

1.2 This is the first of two meetings to consider the responses to the consultation, and the results of research carried out with sentencers. At this meeting the Council will be asked to consider possible changes to the guideline for individuals.

1.3 The plan is to sign off the definitive versions of the two guidelines and the resource assessment at the March meeting, for publication in April and to come into force on 1 July 2021.

## **2 RECOMMENDATION**

2.1 That the Council considers the responses to the consultation and the evidence from the road testing and agrees changes to culpability and harm factors at step 1 and aggravating and mitigating factors at step 2 in the guideline for individuals to address the issues raised.

2.2 That the Council confirms its intention broadly not to alter overall sentencing severity and considers if there are any equalities issues that can be addressed by the guideline.

## **3 CONSIDERATION**

*Overall*

3.1 This paper concentrates on the guideline for individuals though many of the same points apply to the guideline for organisations which will be considered at the March meeting. The draft guideline for individuals can be found here:

<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/individuals-unauthorised-use-of-a-trade-mark-draft-for-consultation-only/>

3.2 There were 41 responses to the consultation from a wide range of interested parties including those representing magistrates, district judges (MC) and circuit judges; those who investigate and prosecute these offences; academics; legal professionals; trade mark holders from industry and the charitable sector; and anti-smoking organisations. In general,

responses to the consultation were positive about the draft guidelines, recognising that they were an improvement on the current situation. 'Road testing' of the guidelines was carried out with seven Crown Court judges and 11 magistrates and again, the general response to the draft guidelines was positive. Evidence has also been drawn from 45 Crown Court transcripts covering 86 offenders.

3.3 For each element of the guideline there were some issues that were mentioned more than once, or which otherwise appear to merit close consideration. To keep this paper focussed on the more important issues, any other points are contained in **Annex A**.

#### *Culpability Individual*

3.4 In the responses to consultation there was general agreement with the culpability factors, with several respondents approving of the similarity to the fraud culpability factors. However, a significant minority of respondents made suggestions for changes and in road testing a few magistrates and several judges commented on the culpability factors.

3.5 The Magistrates' Association (MA), the Council of Her Majesty's Circuit Judges (HMCJ) and City of London Police (CLP) all suggested a factor relating to the length of time offending had been carried out. The MA and HMCJ both proposed 'activity conducted over a sustained period of time' as a high culpability factor, whereas CLP suggested that this could be a factor even for those in low culpability. In road testing, one judge suggested an aggravating factor relating to the offending having gone on for a long period of time which would indicate that it was 'endemic'.

3.6 If the Council feels that the length of time of the offending is relevant to culpability (rather than relating to harm where it would be reflected in a higher value of goods sold or possessed) it could either be included as a high culpability factor or as an aggravating factor at step 2. Including it at step 2 would reduce the danger of double counting with harm and enable it to be taken into account at all levels of culpability but would reduce the impact of the factor. There are difficulties with interpretation of a factor relating to length of time. In general, the Council prefers not to define precisely what constitutes a long (or sustained) period, but this can make it difficult for sentencers to apply the factor consistently and with confidence. This might be a reason for not making it a step 1 factor, although it does appear in the fraud guideline at step 1. Alternatively (as suggested below) it could be cited as an example of sophisticated offending/ significant planning.

3.7 Looking at the transcripts and case studies that we have, very few of them specifically refer to long standing offending as a factor. Quite a few cases arise after test purchases are made and there is perhaps not always clear evidence of how long the offending has gone on.

3.8 The Association of Chief Trading Standards Officers (ACTSO) were concerned that high and medium culpability appear to assume that the offender is operating as part of a group: ‘many counterfeiters [ ] fall within the category of lone individuals rather than operating within a group.’ They suggest adding ‘where the offending is conducted independently or as part of a group activity’ to the leading role and significant role factors. They are concerned that it will be argued that higher culpability is ‘reserved for organised group activities and not the lone individual.’ The only high culpability factor that does not relate to group offending is ‘Sophisticated nature of offence/significant planning’. In road testing some magistrates made a similar point noting that the explicit mention of group activity in the factors for category A felt as though it limited their ability to put a sole trader into that category.

3.9 The Chief Magistrate suggested that there should be a high culpability factor to cover the offender who trades in goods, knowing that are not manufactured by the trademark holder, and is reckless as to safety with an even higher penalty if the offender knew that the goods were unsafe.

3.10 There is some danger of double counting with harm in this suggestion – though what is being captured by the harm assessment is subtly different. ‘Purchasers put at risk of significant physical harm’ implies an actual risk of harm (as opposed to a potential one) irrespective of the offender’s level of understanding of the risk. There is also a possibility of double counting with other offences that may be charged alongside the trademark offence, for example under electrical safety regulations although the court would take this into account in totality.

3.11 Several of the judges in road testing perceived the culpability factors to be very ‘general’ across both guidelines and lacking specific features that related to trade mark offences - there was a feeling from some that this made it difficult to differentiate between the category levels. In the context of offences that most sentencers see only very rarely, this can be a particular issue as they have no experience to assess what constitutes ‘significant planning’ as opposed to ‘some planning’.

3.12 The culpability assessment consulted on was:

The level of culpability is determined by weighing up all the factors of the case to determine the offender’s **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

#### **A – High culpability**

- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation
- Sophisticated nature of offence/significant planning

## **B – Medium culpability**

- A significant role where offending is part of a group activity
- Some degree of organisation/planning involved
- Other cases that fall between categories A or C because:
  - Factors are present in A and C which balance each other out **and/or**
  - The offender's culpability falls between the factors as described in A and C

## **C – Lesser culpability**

- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no organisation/planning
- Limited awareness or understanding of the offence

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

3.13 By comparison the fraud culpability assessment is:

**The level of culpability is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out.**

**Culpability demonstrated by one or more of the following**

### **A – High culpability**

- A leading role where offending is part of a group activity
- Involvement of others through pressure, influence
- Abuse of position of power or trust or responsibility
- Sophisticated nature of offence/significant planning
- Fraudulent activity conducted over sustained period of time
- Large number of victims
- Deliberately targeting victim on basis of vulnerability

### **B – Medium culpability**

- A significant role where offending is part of a group activity
- Other cases that fall between categories A or C because:
  - Factors are present in A and C which balance each other out **and/or**
  - The offender's culpability falls between the factors as described in A and C

### **C – Lesser culpability**

- Involved through coercion, intimidation or exploitation
- Not motivated by personal gain
- Peripheral role in organised fraud
- Opportunistic 'one-off' offence; very little or no planning
- Limited awareness or understanding of the extent of fraudulent activity

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

3.14 One way to address the issue of the high culpability factors appearing to relate only to group offending would be to change the order of the factors so that 'Sophisticated nature of offence/significant planning' is first in the list.

3.15 Consideration has been given to whether it would be possible (and helpful) to give some non-exhaustive examples of what might indicate sophisticated offence/significant planning in the context of this offence.

- Sophisticated nature of offence/significant planning (examples may include but are not limited to: the use of multiple outlets or trading identities for the sale of counterfeit goods, the use of multiple accounts for receiving payment, the use of professional equipment to produce goods, offending over a sustained period of time)

3.16 If it was felt that a factor relating to the offender's recklessness or knowledge as to the safety risk from the counterfeit items was relevant, this could be added, again potentially with examples:

- Offender was reckless as to the potential risks to health or safety from the counterfeit goods (examples may include but are not limited to: offending relating to cosmetics, electrical goods, toys, car parts, cigarettes)

3.17 Or alternatively:

- Offender was reckless as to whether the counterfeit items complied with safety regulations (examples may include but are not limited to: offending relating to cosmetics, electrical goods, toys, car parts, cigarettes)

3.18 The MA also suggested two other additional high culpability factors:

- Abuse of position of power or trust or responsibility, such as a reputable organisation selling fake goods alongside real ones
- Large number of victims, such as an online store which sells a large number of fake goods, compared with a market stall owner who sells a much smaller scale of fake goods.

3.19 And a lesser culpability factor of 'Not motivated by personal gain'.

3.20 A magistrate respondent suggested the quantity of counterfeit items, what the items should have cost compared to price for the counterfeit goods and 'is this the way the def makes a living' as culpability factors.

3.21 The first of the MA suggestions is interesting as the guideline currently has a mitigating factor of 'Business otherwise legitimate' which could be seen to run counter to the MA suggestion and more in line with what is being suggested by the magistrate. In general, evidence from transcripts suggests that sentencers regard the existence of legitimate trading alongside the offending behaviour to be mitigating rather than aggravating. The current mitigating factor could be qualified to indicate that it would not apply if the legitimate

business had been used to mislead consumers or as a ‘front’ for the offending. This is discussed further below under aggravating and mitigating factors.

3.22 Cases where the offender was not motivated by personal gain would be rare (though not impossible – the offence is made out if ‘committed with a view to gain for himself or another or with intent to cause loss to another’) and would be likely to be covered by other lesser culpability factors.

3.23 Linked to this and the magistrate’s other point about the relative cost of the legitimate and counterfeit items, there is possibly room for a factor relating to the profitability of the offending. If so, this would probably work best at step 2. See also the discussion on harm at 3.34 below for consideration of this and the MA point about the number of victims.

**Question 1: Should the culpability factors be modified in accordance with any of the suggestions at 3.15 to 3.17 above?**

**Question 2: Does the Council wish to make any other changes to culpability factors?**

*Harm*

3.24 It was recognised in the consultation document that the harm model consulted on was ‘somewhat complex and nuanced’. Most respondents to the consultation broadly supported the approach but there were various suggestions as to how the model could be improved.

3.25 The version consulted on was:

The assessment of harm for this offence involves putting a monetary figure on the offending with reference to the **value of equivalent genuine goods** and assessing **any significant additional harm** suffered by the trade mark owner or purchasers of the counterfeit goods:

1. Where there is evidence of the volume of counterfeit goods sold or possessed, the monetary value should be assessed by taking the **equivalent retail value of legitimate versions** of the counterfeit goods involved in the offending;
2. Where there is no evidence of the volume of counterfeit goods sold or possessed:
  - a. In the case of labels or packaging, harm should be assessed by taking the **equivalent retail value of legitimate goods** to which the labels or packaging could reasonably be applied, taking an average price of the relevant products.
  - b. In the case of equipment or articles for the making of copies of trade marks, the court will have to make an assessment of the scale of the operation and assign an equivalent value from the table below.

The general harm caused to purchasers, legitimate businesses and to the owners of the trade mark is reflected in the sentence levels at step two. Examples of **significant additional harm** may include but are not limited to:

- Substantial damage to the legitimate business of the trade mark owner (taking into account the size of the business)
- Purchasers put at risk of significant physical harm from counterfeit items

	<b>Equivalent value of legitimate goods</b>	Starting point based on
<b>Category 1</b>	£1million or more	£2 million

	<b>or</b> category 2 value with significant additional harm	
<b>Category 2</b>	£300,000 – £1million <b>or</b> category 3 value with significant additional harm	£600,000
<b>Category 3</b>	£50,000 – £300,000 <b>or</b> category 4 value with significant additional harm	£125,000
<b>Category 4</b>	£5,000 – £50,000 <b>or</b> category 5 value with significant additional harm	£30,000
<b>Category 5</b>	Less than £5,000 <b>and</b> little or no significant additional harm	£2,500

3.26 The West London Bench (WLB) suggested that more guidance/examples could be given to assist sentencers in the assessment of harm. They also suggested that the guideline should provide more guidance on what is covered by the term ‘general harm’ in the harm assessment to enable sentencers to identify what amounts to ‘significant additional harm’. They proposed that general harm could be defined as:

- (a) The financial loss to the legitimate owners of the trade mark.
- (b) Any normal loss of, or impact on, reputation for the owners of the trade mark, following from its misuse.
- (c) The financial loss to legitimate businesses in the supply chain (wholesalers, retail outlets, distributors, etc.).
- (d) The financial loss suffered by purchasers who bought the counterfeit items (for example, because of substandard quality, or the counterfeit item not being worth the same in value as the legitimate item).

3.27 They also suggested that the guideline should provide further examples of significant additional harm.

3.28 The Law Society thought that the calculation of volume can be complex and suggested adding the words below in italics to the harm guidance:

1. Where there is evidence of the volume of counterfeit goods sold or possessed, the monetary value should be assessed by taking the equivalent retail value of legitimate versions of the counterfeit goods involved in the offending; Evidence of volume may be assessed, *for example, by looking at the evidence of the length of time the operation has been trading in the illegally trade marked goods, as well as the numbers of illegally trade marked items found on the premises at particular times, numbers of transactions/sales/ purchases of the items/goods evidenced, and the amount of money made during the period. This list is not exhaustive.*

3.29 An individual respondent queried how the harm categorisation would work in the ‘case of small number of products, not necessarily of high value, where there is potential physical harm to an end user unaware that goods are counterfeit’. They also wanted

clarification that 'Purchasers put at risk of significant physical harm from counterfeit items' would cover other end users.

3.30 City of London Police were concerned about the burden of proving 'significant' harm:

1. 'An investigation into counterfeit car airbags involved the prosecution proving that 400 had been sold but seizing only a proportion on a search. A proportion of that smaller number were tested and showed that they were not fit for purpose, however there was no means to test the hundreds that had already been sold and sent to consumers (as there was no way to trace them).
2. An investigation into a defendant selling counterfeit perfume for a number of years may involve testing some bottles seized, but there would be no way for the defendant or the prosecution to show that the bottles had always contained the same mix of chemicals (those seized on a search may or may not be dangerous).

I would argue that cases like these lend themselves to asking whether the defendant took steps to satisfy him/herself that the items he/she was selling was safe or not. The reality is that perfume bottles could contain anything - some chemicals would cause harm and others would not - and that therefore the defendant put the consumer at risk of "some" harm, rather than "significant" harm.'

3.31 ACTSO noted 'It can be difficult to assess retail value of genuine goods in some cases. This may be if there is no retail "equivalent" or where there are large mixed counterfeit goods seizures, including multiple brands and multiple types of items.' They suggest adding wording to the harm assessment 'to specifically mention situations where the value cannot be determined for any reason and in those cases permit the court to make an assessment and assign an equivalent value'.

3.32 HMCJ stated 'The method of assessing financial harm is not controversial albeit the court will be assisted in any sentencing process by schedules setting out the alleged financial harm and the basis of any calculation. This is likely to be an area of dispute from the Defence and will require careful consideration at this stage of the sentencing exercise.'

3.33 In road testing the harm model generally met with approval as it was felt to be tailored to the offence. There were some inconsistencies in the harm categorisation, but this was probably due to the way the scenarios were presented rather than to a difficulty in interpreting the guideline. One judge felt that there should be a greater distinction between the types of counterfeit goods: 'When you're dealing with medicines, brake pads, where people can die...that needs to be represented better.'

3.34 Another issue that was raised by one judge in road testing and has been noted in a case example provided by Trading Standards is the situation where an offender is selling counterfeit items at a small profit at a price that is a tiny fraction of the retail price of a genuine product. The example seen was a market stall holder selling a watch bearing the



'Rolex' logo for £25, where a genuine Rolex watch would retail for £25,000. This would lead to a disproportionately high harm categorisation.

3.35 Many of the practical concerns raised about the operation of the harm assessment should be dealt with by the prosecution providing the court with the information needed to make the correct categorisation. The model was developed in conjunction with Trading Standards on the basis that equivalent retail value was a figure that could be provided to the court (backed up by statements from trade mark owners).

3.36 The points about clarifying what is covered by 'general harm' and what comes under 'additional harm' may be valid, bearing in mind the fact that most sentencers are unfamiliar with the offence.

3.37 A revised version of the harm wording to deal with the points raised in consultation and road testing is suggested below (additions highlighted):

The assessment of harm for this offence involves putting a monetary figure on the offending with reference to the **value of equivalent genuine goods** and assessing **any significant additional harm** suffered by the trade mark owner or purchasers/ **end users** of the counterfeit goods:

1. Where there is evidence of the volume of counterfeit goods sold or possessed, the monetary value should be assessed by taking the **equivalent retail value of legitimate versions** of the counterfeit goods involved in the offending (**where this cannot be accurately assessed an estimated equivalent retail value should be assigned**);
2. Where there is no evidence of the volume of counterfeit goods sold or possessed:
  - a. In the case of labels or packaging, harm should be assessed by taking the **equivalent retail value of legitimate goods** to which the labels or packaging could reasonably be applied, taking an average price of the relevant products.
  - b. In the case of equipment or articles for the making of copies of trade marks, the court will have to make an assessment of the scale of the operation and assign an equivalent value from the table below.

**Note: the equivalent retail value is likely to be considerably higher than the actual value of the counterfeit items and this is accounted for in the sentence levels, however, in exceptional cases where the equivalent retail value is entirely disproportionate to the actual value, an adjustment may be made.**

The general harm caused to purchasers/ **end users** (**by being provided with counterfeit goods**), to legitimate businesses (**through loss of business**) and to the owners of the trade mark (**through loss of revenue and reputational damage**) is reflected in the sentence levels at step two.

Examples of **significant additional harm** may include but are not limited to:

- Substantial damage to the legitimate business of the trade mark owner (taking into account the size of the business)
- Purchasers/ **end users** put at risk of **significant** physical harm from counterfeit items

3.38 If the Council adopts the suggestion to add a culpability factor relating to recklessness as to safety, the comments above relating to insufficient weight being given to safety concerns would be addressed.

3.39 Consideration was given to adding a note to the effect that the prosecution should provide the court with the information needed to assess harm, but on reflection this is the case in every sentencing exercise and so there is maybe no reason to specifically mention it in this guideline.

**Question 3: Does the Council wish to adopt any of the suggested changes to harm at 3.37 above?**

**Question 4: Should any other changes be made to harm?**

*Aggravating and mitigating factors*

3.40 Most respondents to the consultation agreed with the proposed aggravating factors and in road testing they were generally applied consistently and as expected.

3.41 WLB proposed adding two aggravating factors that relate to culpability which could possibly be covered by the proposed additional culpability factor at 3.16 or 3.17:

- Evidence of intentional or reckless risk to life.
- Deliberate targeting of children or vulnerable persons by virtue of the nature of the counterfeit goods (for example, counterfeit and potentially dangerous toys or medicines).

Other suggestions from WLB related to harm:

- Significant ongoing effect on those harmed
- Evidence of community impact

3.42 There were various other suggestions for aggravating factors relating to harm. A magistrate suggested an aggravating factor relating to damage to the business of the owner of the trademark. For example, if the actions have damaged the business to the extent that staff had to be let go. The MA suggested an additional factor: 'reputational damage to the owner of the trade mark (where not considered in Step One)'. The Dogs Trust suggested adding 'unauthorised use of a charity trademark'. Some respondents commented on the aggravating factor, 'Purchasers put at risk of harm from counterfeit items (where not taken into account at step one)' suggesting variously that this was something that should be considered earlier in the process or that it should be clearer how it might differ from the consideration at step 1.

3.43 Allowing for the fact that aggravating factors are non-exhaustive and depending on what decisions are made relating to the harm assessment at step 1, the existing factor could be amended slightly to read:

- Purchasers/ end users put at risk of harm from counterfeit items (where not taken into account at step 1)

3.44 WLB also queried whether the location of the sale could be an aggravating factor, suggesting that selling through an ostensibly legitimate outlet was worse than, for example, a market stall. A magistrate and GlaxoSmithKline suggested removing the mitigating factor, 'Business otherwise legitimate'. This reflects points made at 3.21 above under culpability factors. A magistrate respondent also considered that the location of the sale was relevant but came to the opposite conclusion reasoning that purchasers through a website or legitimate trader would be better protected than someone who bought something for cash from a market stall. Another suggested that the location (e.g. selling outside a school) could be relevant. On reflection, these issues are perhaps already covered by culpability factors relating to the sophistication of the offending and the harm assessment which would take account of a situation where a purchaser suffered additional harm, for example, as a result of being deceived as to the safety of an item.

3.45 The Sentencing Academy suggested adding a mitigating factor relating to voluntary reparations. This does not appear to be a common feature of cases but there is one example of it in the transcripts we have.

3.46 As mentioned above respondents questioned the factor 'business otherwise legitimate'. This is a factor that appears in seven of the 45 transcripts. In the consultation version of the guideline the following expanded explanation has been added to this factor:

Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this may indicate lower culpability and thereby a reduction in sentence.

This factor will not apply where the offender has used a legitimate activity to mask a criminal activity.

3.47 This expanded explanation was devised for use in the fraud guidelines for the factors 'Activity originally legitimate' and 'Claim not fraudulent from the outset' and does not apply so well in the Trade mark guideline (although there is at least one example in the transcripts of a case where the judge mentions that the business was originally legitimate). An alternative would be to remove the expanded explanation but to reword the factor to:

- Business otherwise legitimate (this factor will not apply where the offender has used a legitimate activity to mask a criminal activity).

3.48 HMCJ suggested a mitigating factor of 'Little or no prospect of success (especially in respect of convincing victims that goods are counterfeit)'. It is not clear that focussing on whether or not purchasers were deceived is helpful – save in as far as it relates to safety

issues. In many cases purchasers know the goods they are buying are, or are likely to be, counterfeit and there is unlikely to be evidence of this before the court one way or the other. However, depending on the decisions made in relation to the harm assessment, there may be an argument for adding a factor along the lines of that at step 1 in the Fraud guideline: 'Not motivated by personal gain' or the factor at step 2 of the General guideline 'Little or no financial gain'. The expanded explanation for this is:

Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may be reduced where it can be shown that the offender **did not seek to gain financially** from the conduct and did not in fact do so.

3.49 Consideration could be given to balancing this with an aggravating factor of 'High level of profit from the offence' which appears in the General guideline with the expanded explanation:

- A high level of profit is likely to indicate:
  - high culpability in terms of planning and
  - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses
- In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
- See the guidance on fines if considering a financial penalty

3.50 High level of profit is a factor that is mentioned in at least two of the transcripts. However, the Council may feel that a significant level of profit will be present in most cases (especially those in high culpability) and that it would risk double counting to include it as an aggravating factor. In cases where it was a factor that had not been taken into account at step 1, courts could still take it into account even if it is not specifically listed.

**Question 5: Does the Council wish to adopt the suggested changes at 3.43, 3.47 and 3.48 above?**

**Question 6: Should any other changes be made to aggravating or mitigating factors?**

#### *Sentence levels*

3.51 The consultation document stated:

The Council's intention is broadly to maintain current sentencing practice while promoting greater consistency.

In 2018 44 per cent of adult offenders sentenced received a community sentence, 33 per cent received a fine, 11 per cent received a suspended sentence, 5 per cent were sentenced to immediate custody and 3 per cent were given a discharge. In 2018 the average (mean) immediate custodial sentence length (after any reduction for a guilty plea) was ten months and no sentences exceeded 36 months.

3.52 Consultation responses were generally supportive of the proposed sentence levels but with suggestions from some that sentences were too low and from other that they were

too high. In road testing several judges felt that sentence levels seemed high compared to other 'serious' criminal offences; one commented:

'I thought it was a bit harsh. Before I looked at the guideline, I assumed when I read it that he was going to get just a financial penalty, rather than a custodial...immediate custodial sentence.'

3.53 Most magistrates in road testing thought that the sentences were 'about right' – although there was some inconsistency in the sentences arrived at.

3.54 In their response to consultation ACTSO stated that the 'proposed ranges mean that a very high proportion of Trading Standards prosecutions are likely to end up being dealt with through community orders and fines or at the most a 26-week (6mth) custodial sentence even if they played a significant role. The suggestion is to increase Category 5 to Less than 10k with a starting point of £3k and alter Category 4 £10-£30k with a lower starting point of £15k or 20k and alter the other categories proportionately/appropriately.'

3.55 The Sentencing Academy suggested that more use should be made of non-custodial sentences at the lower end. They are concerned that the guideline may nudge cases over the custody threshold. In particular they consider that sentences in 4A and 1C could be too high.

3.56 If changes are made to culpability and harm factors as suggested above, this may change the categorisation for some cases. The likely effect of any changes on sentence outcomes will be presented to the March meeting to enable decisions to be made about sentence levels.

3.57 The draft resource assessment published alongside the consultation concluded that the guidelines would not change sentencing severity for most cases, but that there may be some increases in custodial sentence lengths for individuals sentenced for the most serious types of cases.

3.58 At this stage it would be helpful to have an indication of whether the intention remains to maintain current sentence severity for most cases.

#### **Question 7: Does the Council wish to maintain current sentence levels?**

Steps 3 to 8

3.59 There was evidence from consultation responses and from road testing that magistrates often did not understand the difference between confiscation and forfeiture orders at step 6. The MA and Justices Clerks Society suggested that the guideline should make it clear that if confiscation is being considered the case must be committed to the Crown Court. Other respondents sought more information about disqualification as a

company director and deprivation orders. HM Council of District Judges (Magistrates' Courts) suggested that the information on s97 forfeiture order could be re-worded to make it more understandable.

3.60 A suggested amended version is provided below (additions highlighted)

The court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.

Confiscation orders under the Proceeds of Crime Act 2002 may only be made by the Crown Court. An offender convicted of an offence in a magistrates' court must be committed to the Crown Court where this is requested by the prosecution with a view to a confiscation order being considered (Proceeds of Crime Act 2002, s.70).

Where the offence has resulted in loss or damage the court must consider whether to make a **compensation order**.

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

#### **Forfeiture – s.97 Trade Marks Act 1994**

~~On the application for forfeiture by a person who has come into possession of goods, materials or articles in connection with the investigation or prosecution of the offence,~~

The prosecution may apply for forfeiture of goods or materials bearing a sign likely to be mistaken for a registered trademark or articles designed for making copies of such a sign. The court shall make an order for the forfeiture of any goods, material or articles only if it is satisfied that a relevant offence has been committed in relation to the goods, material or articles. A court may infer that such an offence has been committed in relation to any goods, material or articles if it is satisfied that such an offence has been committed in relation to goods, material or articles which are representative of them (whether by reason of being of the same design or part of the same consignment or batch or otherwise).

The court may also consider whether to make other ancillary orders. These may include a [deprivation order](#) and [disqualification from acting as a company director](#).

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium, Part II Sentencing](#)

3.61 In the proposed version above links have been added for 'deprivation order' and 'disqualification from acting as a company director', to the relevant pages of the MCSG explanatory materials. Whilst this information is aimed at magistrates, it would also be applicable in the Crown Court. The information on forfeiture is designed to closely reflect the [legislation](#) in a comprehensible form.

**Question 7: Does the Council wish to adopt the proposed amendments to step 6?**

## **4 EQUALITIES**

4.1 The consultation document stated:

The data indicate that the majority of offenders are male and the largest age group is 30 –39 years. There are very little data recorded on the ethnicity of offenders but the impression gained from reading transcripts of sentencing remarks is that a significant proportion may be from a BAME background. The Council is concerned to ensure that the guidelines operate fairly across all groups.

4.2 It went on to point out the steps that the Council has already taken to address concerns around equality and diversity (referring to the ETBB in all guidelines, provision of expanded explanations, road testing guidelines) and invited suggestions for matters that should be addressed.

4.3 There were no clear themes to the responses to this consultation question. Some focussed on the wider victims of the offending: two respondents said that the guidelines should highlight the harmful consequences of counterfeit tobacco especially on lower socio-economic groups; one respondent said there should be a category relating to counterfeit aids for the disabled; another said, 'slave trade/sweat shops/minimum wage'. Others made general comments about the desirability of fairness in sentencing without offering suggestions for how the guidelines could address this. One magistrate suggested that consideration should be given to, 'Whether or not others involved come from within a family group. The overall impact on other members of the family may be disproportionate as a consequence. For example father and two sons who are breadwinner, sentenced to prison may leave other family members destitute.'

4.4 This is not an offence for which we have sufficient data to draw any conclusions about disparity in sentencing to enable the inclusion of any specific information in the guidelines.

**Question 8: Are there any further steps that can be taken to address issues of equality in this guideline?**

## **5 IMPACT AND RISKS**

5.1 There is a risk that by consulting on comprehensive guidelines for this offence, the Council has raised expectations that the offence will be dealt with more rigorously than in the past.

5.2 The impact of the definitive guidelines will depend on the decisions made at this meeting. A revised resource assessment for the definitive guidelines will be provided at the March meeting.

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## 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.

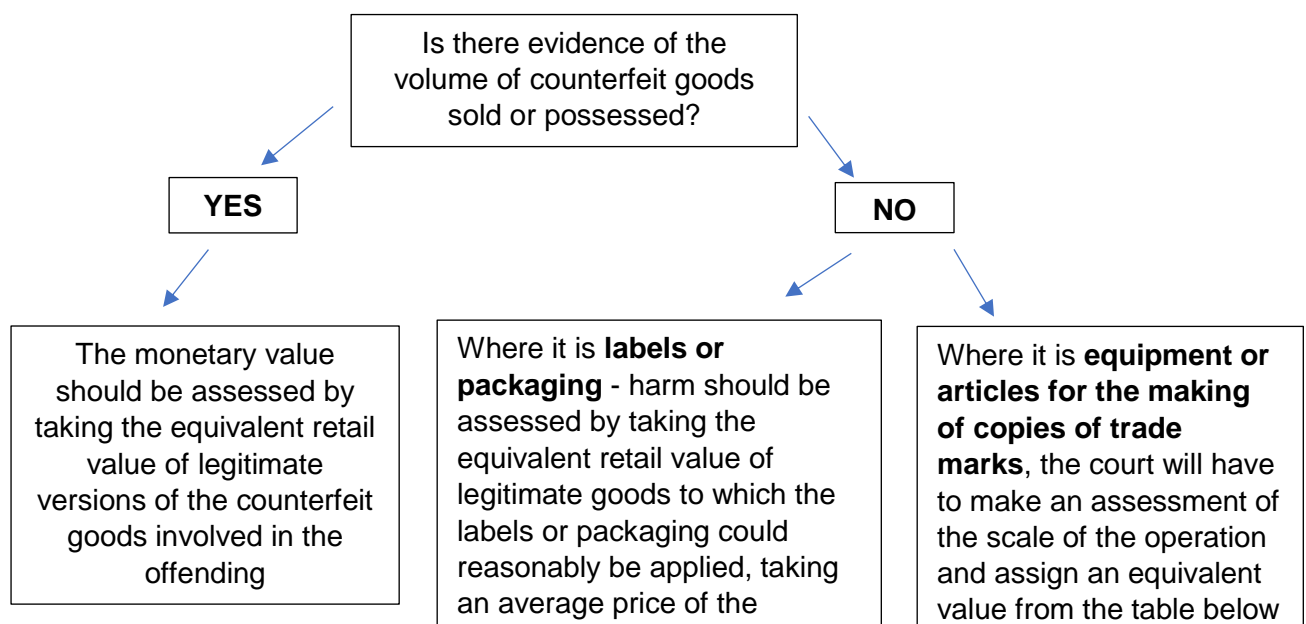
1.7 The City of London Police proposed additions to culpability factors relating to:

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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