

Unauthorised use of a trade mark guideline

Consultation

July 2020

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The consultation will end on 30 September 2020

About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** 8 July to 30 September 2020
- Enquiries (including requests for the paper in an alternative format) to:** Tel: 020 7071 5793
Email: info@sentencingcouncil.gov.uk
- How to respond:** Please send your response by 30 September 2020 to:
Ruth Pope
Email: consultation@sentencingcouncil.gov.uk
- Additional ways to feed in your views:** This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:
www.sentencingcouncil.org.uk
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at: www.sentencingcouncil.org.uk
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.
- In addition, responses may be shared with the Justice Committee of the House of Commons.
- Our [privacy notice](#) sets out the standards that you can expect from the Sentencing Council when we request or hold personal information (personal data) about you; how you can get access to a copy of your personal data; and what you can do if you think the standards are not being met.

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Introduction

What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines which courts in England and Wales must follow when passing a sentence. The Council consults on its proposed guidelines before they come into force and makes changes to the guidelines as a result of consultations.

What is this consultation about?

The Sentencing Council is proposing to issue two guidelines for the offence of unauthorised use of a trade mark contrary to section 92 of the Trade Marks Act 1994; one for sentencing individuals and one for sentencing organisations.

Background

Unauthorised use of a trade mark is an either way offence (one that can be dealt with in magistrates' courts or in the Crown Court). The maximum sentence allowed by law is 10 years' imprisonment and an unlimited fine. There is currently a guideline for sentencing individuals convicted of the offence for use in magistrates' courts (<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/trade-mark-unauthorised-use-of-etc/>), produced by the Sentencing Guidelines Council (SGC)¹ in 2008 but there is no guideline for sentencing organisations and no guidelines for use in the Crown Court. As part of a commitment to replace all SGC guidelines, the Sentencing Council decided to develop separate guidelines for individuals and organisations which can be used in both magistrates' courts and the Crown Court.

The Council decided that the guideline for individuals should apply to adult offenders only as very few under 18s are sentenced for this offence. For the rare cases where the offender is under 18, sentencers will be referred to the Sentencing Council definitive guideline, [Sentencing children and young people – overarching principles](#).

The full legislative provisions can be found at <https://www.legislation.gov.uk/ukpga/1994/26/section/92>

In summary the offence of unauthorised use of a trade mark can be committed by possessing or selling counterfeit goods or by counterfeiting or possessing the means of counterfeiting goods with a view to making a gain or causing a loss and without the consent of the owner of the trade mark.

Cases that are prosecuted typically relate to clothing, footwear or accessories (such as handbags), but also include computer games, toys, cosmetics, cigarettes and tobacco, car parts and electrical equipment. In some cases the prosecution may relate to the possession of labels or packaging bearing trademarks rather than the counterfeit goods themselves. Cases vary from the very unsophisticated such as selling a few obviously fake

¹ The Sentencing Guidelines Council (SGC) was the predecessor body to the Sentencing Council. SGC guidelines have a different format to Sentencing Council guidelines.

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items on a market stall or online, to highly organised and profitable businesses manufacturing or importing a large quantity of high quality counterfeit 'designer' goods.

This is a relatively low volume offence with 420 adults and 32 organisations sentenced in 2018. It is an offence that sentencers are unlikely to have much experience of sentencing and the Council considered that comprehensive guidelines would therefore be of great assistance.

Responding to the consultation

Through this consultation process, the Council is seeking views on:

- the principal factors that make the offence more or less serious;
- the additional factors that should influence the sentence;
- the approach taken to structuring the draft guidelines;
- the sentences that should be passed for the offence; and
- anything else that you think should be considered.

In the following sections the proposed guidelines are outlined in detail and you will be asked to give your views. You can give your views by answering some or all of the questions below either by email to consultation@sentencingcouncil.gov.uk or by using the online [questionnaire](#).

What else is happening as part of the consultation process?

This is a 12 week public consultation. During the consultation period, the Council will hold a number of 'virtual' consultation meetings to seek views from groups with an interest in this area as well as sentencers. We are conducting research interviews with a sample of Crown Court judges and magistrates to ascertain how they would apply the guideline and to identify whether the guideline presents any practical difficulties for sentencers. Once results of the consultation and the research has been considered, the final guidelines will be published and used by all courts.

Alongside this consultation paper, the Council has produced a statistical bulletin and a resource assessment. These can be found on the Sentencing Council's website: <https://www.sentencingcouncil.org.uk/consultations/>

Question 1: What is your name?

Question 2: What is your email address?

Question 3: What is your organisation?

Guideline for individuals

Developing the guideline

The draft guideline can be seen at www.sentencingcouncil.org.uk/offences/magistrates-court/item/individuals-unauthorised-use-of-a-trade-mark-draft-for-consultation-only

The guideline follows the usual format for Sentencing Council guidelines, with the principal factors that determine seriousness considered at step one, leading to a sentence starting point at step two which is then adjusted for aggravating and mitigating factors. Steps three to eight deal with matters such as any reduction for a guilty plea, adjustment for the totality of offences and ancillary orders.

A number of Court of Appeal (Criminal Division) cases for this offence were considered; none is a guideline case but all consider the role of the offender and the sophistication of the operation to be relevant to sentence. Some more recent cases refer to the Fraud definitive guideline as providing useful assistance.

In the case of Khan and others [2013] EWCA Crim 802 the Court of Appeal noted that 'when considering sentence in a case of this type the court must take into account, amongst other things, that: (1) offences of this type are difficult, time consuming and expensive to detect; (2) they undermine reputable companies who are entitled to be protected; (3) the court should consider how professional the offending was; (4) there should be an estimation of the likely or actual profit; (5) the need for an element of deterrence must be borne in mind.'

Step one

Step one - Culpability

The proposed approach to culpability (see next page) is similar to that used in the [Fraud offences](#) guidelines.

Culpability

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.

Question 4: Do you agree with the proposed culpability factors? If not please suggest changes.

Step one - Harm

The assessment of harm for this offence is challenging because the harm caused takes several forms. The essence of the offence is that it causes harm to the owner of the trade mark, but it can also cause harm to purchasers of counterfeit items.

The extent of the harm caused to the trade mark owner will depend on many factors including the scale of the unauthorised use of the trade mark relative to the size of the legitimate business of the trade mark owner. That harm may take the form of business lost as a direct result of purchasers buying unauthorised goods rather than legitimate goods, and also the loss of reputation that follows from the misuse of trade marks.

The harm to purchasers can be financial but can also involve risk of or actual physical harm particularly where the goods do not meet the required safety standards.

The Council decided that in order to provide a clear and consistent method of assessing harm, the guideline needed to use financial values. The difficulty was in establishing what aspect of the case to quantify. From a sample of transcripts of sentencing remarks in the Crown Court it was noted that judges variously refer to the value of the counterfeit goods,

the equivalent value of legitimate goods, the turnover of the operation and the profit from the operation; others refer to the number of counterfeit items. Trading Standards suggested that the equivalent value of legitimate goods would be relatively easy to establish in practice and could be used to represent the financial harm in a case.

The Council agreed that the equivalent value of legitimate goods should be used as a proxy for harm with a mechanism for increasing the level where there is significant additional harm (for example from unsafe goods). A small number of cases relate to labels, packaging or equipment rather than to counterfeit goods themselves and the harm assessment also needs to cater for these cases. The harm assessment proposed for this guideline is therefore necessarily somewhat complex and nuanced.

Harm

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

	Equivalent value of legitimate goods	Starting point based on
Category 1	£1million or more or category 2 value with significant additional harm	£2 million
Category 2	£300,000 – £1million or category 3 value with significant additional harm	£600,000
Category 3	£50,000 – £300,000 or category 4 value with significant additional harm	£125,000
Category 4	£5,000 – £50,000 or category 5 value with significant additional harm	£30,000
Category 5	Less than £5,000 and little or no significant additional harm	£2,500

Question 5: Do you agree with the proposed method of assessing harm? If not please suggest changes.

Step two

Step two – sentence levels

In proposing the sentence levels for this offence, the Council has had regard to: data on sentences passed taken from the Court Proceedings Database (CPD) maintained by the Ministry of Justice; an analysis of a sample of around 45 transcripts of sentencing remarks from the Crown Court; the SGC unauthorised use of a trade mark guideline and the sentence levels for fraud offences.

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.

Detailed sentencing statistics for the offence covered by the draft guideline have been published on the Sentencing Council website at the following link:

<http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year.>

The statutory maximum sentence for this offence is 10 years. The draft guideline provides for a range of non-custodial sentences, with an offence range of a discharge to 6 years' custody (there has only been one case sentenced to more than 6 years in the last 10 years). Applying the draft guideline to cases taken from a small sample of Crown Court transcripts suggested that it would maintain sentence levels for offending at the lower end of seriousness (in the Crown Court), but could increase sentence levels for a small number of more serious cases.

The majority of cases (86 per cent in 2018) are sentenced in magistrates' courts for which there are no transcripts of proceedings and it is therefore difficult to assess how the guideline would apply in such cases. However, a number of cases that would otherwise be sentenced in magistrates' courts are committed to the Crown Court for sentence because confiscation is sought and it has therefore been possible to apply the draft guideline to a small number of less serious cases which would fall into harm category 5.

Further work will be done during the consultation period with sentencers and Trading Standards (who prosecute this offence) to test the sentence levels (and the factors) to ensure that the guideline works as intended.

There is a note below the table pointing out that this is an offence where it may be appropriate to combine a community order with a fine.

Harm	Culpability		
	A	B	C
Category 1 £1 million or more Starting point based on £2 million	Starting point 5 years' custody Category range 3 – 6 years' custody	Starting point 3 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody
Category 2 £300,000 – £1million Starting point based on £600,000	Starting point 4 years' custody Category range 2 – 5 years' custody	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody
Category 3 £50,000 - £300,000 Starting point based on £125,000	Starting point 2 years' custody Category range 1 – 3 years' custody	Starting point 1 year's custody Category range 26 weeks' – 2 years' custody	Starting point High level community order Category range Low level community order – 26 weeks' custody
Category 4 £5,000- £50,000 Starting point based on £30,000	Starting point 1 year's custody Category range 26 weeks' – 2 years custody	Starting point High level community order Category range Low level community order – 26 weeks' custody	Starting point Band C fine Category range Band B fine – Medium level community order
Category 5 Less than £5,000 Starting point based on £2,500	Starting point High level community order Category range Low level community order – 26 weeks' custody	Starting point Band C fine Category range Band B fine – Medium level community order	Starting point Band B fine Category range Discharge – Band C fine
This is an offence where it may be appropriate to combine a community order with a fine			

Question 6: Do you agree with the proposed sentence levels? If not please suggest changes.

Step two – aggravating and mitigating factors

Having reached a starting point the next stage is to consider adjusting the sentence for aggravating and/or mitigating factors.

The court should then consider further adjustment for any aggravating or mitigating factors. The following list is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors

- Purchasers put at risk of harm from counterfeit items (where not taken into account at step one)
- Attempts to conceal/dispose of evidence
- Attempts to conceal identity
- Failure to respond to warnings about behaviour
- Offences taken into consideration
- Blame wrongly placed on others
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision

The proposed aggravating factors listed above are similar to those in the Fraud guideline and are considered to be those that are mostly likely to apply to this offence. Sentencers are not restricted to the items listed, if other relevant factors are present, these can be taken into account.

The factor 'Purchasers put at risk of harm from counterfeit items (where not taken into account at step one)' would apply where there is risk of harm but not the 'risk of significant physical harm' required to move up a harm category at step one.

Question 7: Do you agree with the proposed aggravating factors? If not please suggest changes.

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Remorse
- Good character and/or exemplary conduct
- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending
- Business otherwise legitimate
- Lapse of time since apprehension where this does not arise from the conduct of the offender
- Serious medical condition requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

The proposed mitigating factors listed above are largely those that appear in most Sentencing Council guidelines and are non-exhaustive. The three factors that are particularly relevant to this offence are:

- Offender co-operated with investigation, made early admissions and/or voluntarily reported offending
- Business otherwise legitimate
- Lapse of time since apprehension where this does not arise from the conduct of the offender

These have all been cited in cases as factors that reduce the sentence. It also appears to be common for offenders convicted of this offence to be otherwise law abiding and in many cases to be of positively good character. It is not unusual for offenders to have caring responsibilities which courts have taken into account in sentencing.

Question 8: Do you agree with the proposed mitigating factors? If not please suggest changes.

Steps three to eight

These are largely standard steps in Sentencing Council guidelines. Step six contains information and guidance particular to this offence:

Step 6 – Confiscation, compensation and ancillary orders

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.

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 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**.

Question 9: Do you agree with the proposed steps three to eight? If not please suggest changes.

Guideline for organisations

Developing the guideline

The draft guideline can be seen at www.sentencingcouncil.org.uk/offences/magistrates-court/item/organisations-unauthorised-use-of-a-trade-mark-draft-for-consultation-only

An organisation that is a legal entity can be prosecuted for this offence and around 30 are sentenced each year. The majority (75 per cent in 2018) are sentenced in magistrates' courts. An organisation cannot be sent to prison or given a community order and therefore the only sentences available are a fine or a discharge. The statutory maximum fine is unlimited.

An analysis of a small number of transcripts of sentencing remarks for cases involving organisations indicates that organisations are often prosecuted alongside individuals (usually a sole director of a company). The Council decided that as far as possible the guideline for organisations should mirror that for individuals but it would be necessary to structure the guideline slightly differently (similar to the [corporate fraud guideline](#)).

Steps one and two

The first two steps are compensation and confiscation because the sentence for organisation will always be a financial penalty and section 13 of the Proceeds of Crime Act 2002 requires that confiscation be dealt with before, and taken into account, when assessing any other fine or financial order, except compensation which takes priority.

Step 1 – Compensation

The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such an amount as the court considers appropriate, having regard to the evidence and to the means of the offender.

Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty.

Reasons should be given if a compensation order is not made.

(See section 130 Powers of Criminal Courts (Sentencing) Act 2000)

Step 2 – Confiscation

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate.

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).

(See Proceeds of Crime Act 2002 sections 6 and 13)

Question 10: Do you agree with the proposed steps one and two for organisations? If not please suggest changes.

Step three

Step three – culpability

At step three, culpability factors are based on those in the individual guideline but with some aspects relating to offending by organisations borrowed from the corporate fraud guideline.

Culpability

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

- Organisation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)
- Involving others through pressure or coercion (for example employees or suppliers)

B – Medium culpability

- Organisation plays a significant role in unlawful activity organised by others
- 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

- Organisation plays a minor, peripheral role in unlawful activity organised by others
- Involvement 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.

Question 11: Do you agree with the proposed culpability factors? If not please suggest changes.

Step three - harm

The harm assessment is the same as for the individual guideline (see pages 6 and 7 above). This will ensure that in situations where organisations and individuals are sentenced together the assessment of harm will be consistent.

Question 12: Do you agree with the proposed approach to harm? If not please suggest changes.

Step four

Step four – sentence levels

At step four the fraud guideline uses a multiplier of financial gain to arrive at a financial penalty – this method would not work with the proposed assessment of harm as the equivalent value of legitimate goods. The Council therefore decided to provide a sentence table of fines as in the health and safety and environmental guidelines for organisations. These guidelines provide four fine tables: one each for micro, small, medium and large businesses. It was apparent from the transcripts analysed that most of the organisations prosecuted for trade mark offences were relatively small businesses usually with only one or two director/ owners. As far as could be ascertained these would be micro businesses with a turnover not more than £2 million.

The proposed sentence table is therefore based on the assumption that the offending organisation is a micro business with a note to advise sentencers to consider adjusting the sentence at step five if this is not the case. In proposing the sentence levels for this offence, the Council has had regard to: data on sentences passed taken from the CPD; an analysis of a sample of transcripts of sentencing remarks from the Crown Court; and the sentence levels for health and safety offences.

The gradation of the fines is designed to reflect the gradation of sentences in the guideline for individuals.

The proposed fine levels have been compared with actual fines. From CPD sentencing statistics for 2018, of the 27 cases where a fine was imposed, it seems that the majority (70 per cent) of fines are £1,000 or lower for the principal offence (after any reduction for a guilty plea) and only three cases resulted in a fine over £2,000. One third of these organisations (9 cases) were sentenced for more than one trade mark offence in 2018. Looking at the aggregate fines for organisations (including those which were sentenced for only one offence) the majority (about 55 per cent) of the total fine amounts are still £1,000 or lower, with a further third falling between £1,000 and £4,000. The remaining ten per cent (3 cases) were fined a total greater than £4,000 but no organisations received a fine total greater than £8,000 (after any reduction for a guilty plea).

It is evident from the transcripts that in many cases the offending organisation had very limited means or that all the available funds would be used to satisfy a confiscation order. Fines were sometimes therefore for very low or nominal amounts.

The guideline for organisations includes an additional step on adjusting the fine at step five (discussed at pages 17 and 18 below).

Having determined the category at step three, the court should use the table below to determine the starting point within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Where the value is larger or smaller than the amount on which the starting point is based, this should lead to upward or downward adjustment as appropriate.

The fine levels below assume that the offending organisation has an annual turnover of not more than £2 million. In cases where turnover is higher, adjustment may need to be made at Step 5 below including outside the offence range.

Harm	Culpability		
	A	B	C
Category 1 £1 million or more	Starting point £250,000	Starting point £100,000	Starting point £50,000
Starting point based on £2 million	Category range £150,000 - £450,000	Category range £50,000- £200,000	Category range 25,000 - £100,000
Category 2 £300,000 – £1million	Starting point £150,000	Starting point £50,000	Starting point £30,000
Starting point based on £600,000	Category range £75,000 - £250,000	Category range 25,000 - £100,000	Category range £15,000 - £50,000
Category 3 £50,000 - £300,000	Starting point £50,000	Starting point £25,000	Starting point £10,000
Starting point based on £125,000	Category range £25,000 - £100,000	Category range £15,000 - £50,000	Category range £5,000 - £25,000
Category 4 £5,000- £50,000	Starting point £25,000	Starting point £10,000	Starting point £5,000
Starting point based on £30,000	Category range £15,000 - £50,000	Category range £5,000 - £25,000	Category range £2,000 - £10,000
Category 5 Less than £5,000	Starting point £10,000	Starting point £5,000	Starting point £1,000
Starting point based on £2,500	Category range £5,000 - £30,000	Category range £2,000 - £10,000	Category range £250 - £5,000

A question relating to the sentence levels follows consideration of step five below.

Step four – aggravating and mitigating factors

Having reached a starting point, the next stage is to consider adjusting the sentence for aggravating and/or mitigating factors. These factors are similar to those for individuals but have been adapted for organisations.

Having determined the appropriate starting point, the court should then consider adjustment within the category range for aggravating or mitigating features. The following list is a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point.

Factors increasing seriousness

- Previous relevant convictions or subject to previous relevant civil or regulatory enforcement action
- Organisation or subsidiary set up to commit counterfeiting activity
- Counterfeiting activity endemic within organisation
- Purchasers put at risk of harm from counterfeit items (where not taken into account at step one)
- Attempts to conceal/dispose of evidence
- Attempts to conceal identity
- Failure to respond to warnings
- Blame wrongly placed on others

Factors reducing seriousness or reflecting mitigation

- No previous relevant convictions or previous relevant civil or regulatory enforcement action
- Organisation co-operated with investigation, made early admissions and/or voluntarily reported offending
- Business otherwise legitimate
- Little or no actual gain to organisation from offending
- Lapse of time since apprehension where this does not arise from the conduct of the offender

Question 13: Do you agree with the proposed aggravating and mitigating factors? If not please suggest changes.

Step four – additional information

Step four also includes information (taken from existing guidelines for corporate offenders) on the general principles to follow on setting a fine and obtaining financial information about the organisation.

General principles to follow in setting a fine. The court should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

Obtaining financial information

Where the offender is a company or a body which delivers a public or charitable service, it is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

1. *For companies*: annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.
2. *For partnerships*: annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. If adequate accounts are not produced on request, see paragraph 1.
3. *For local authorities, fire authorities and similar public bodies*: the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.
4. *For health trusts*: the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities*: it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

Step five

Adjustment of fine

Step five requires the court to 'step back' to ensure that the overall financial penalty is appropriate. Arguably this is the most important step in the guideline as it involves taking an overview of the financial orders made, in the context of the offending and of the financial means of the offending organisation. It has been seen from the transcripts that courts are often carrying out this exercise in sentencing (for example, taking into account the need to ensure that all gain is removed or considering the interests of employees).

Having arrived at a fine level, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine including outside the category range. The court should 'step back' and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve:

- the removal of all gain
- appropriate additional punishment, and
- deterrence

The fine may be adjusted to ensure that these objectives are met in a fair way. The court should consider any further factors relevant to the setting of the level of the fine 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 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.

In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

The court should consider whether the level of fine would otherwise cause unacceptable harm to third parties. In doing so the court should bear in mind that the payment of any compensation determined at step one should take priority over the payment of any fine.

Below is a **non-exhaustive** list of additional factual elements for the court to consider. The court should identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

Factors to consider in adjusting the level of fine

- Fine fulfils the objectives of punishment, deterrence and removal of gain
- The value, worth or available means of the offender
- Fine impairs offender's ability to make restitution to victims
- Impact of fine on offender's ability to implement effective compliance programmes
- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
- Impact of fine on performance of public or charitable function

Question 14: Do you agree with the proposed sentence levels? If not please suggest changes.

Question 15: Do you agree with the guidance at Step five? If not please suggest changes.

Steps six to ten

These reflect the equivalent steps in the guideline for individuals adjusted to take account of the fact that compensation and confiscation have been considered at steps one and two.

Overall considerations

The preceding sections have outlined the Council's proposals for the guidelines and have invited comments on each aspect of the draft guidelines. This section considers issues that cut across the guidelines.

Impact of the guidelines

The guidelines have been developed with current sentencing practice in mind and it is not the Council's intention to increase or decrease sentence levels overall. A [resource assessment](#) has been produced which sets out the likely impact of the draft guidelines on prison and probation resources.

The Council is carrying out research with judges, magistrates and prosecuting authorities to test whether the guidelines work as expected, but would welcome comments from consultees on whether the draft guidelines are likely to change sentence levels and whether any change would be desirable.

Question 16: Do you have views on the impact these guidelines may have on sentence outcomes?

Equality and diversity

The Public Sector Equality Duty (PSED) is a duty set out in section 149 of the Equality Act 2010 (the 2010 Act) which came into force on 5 April 2011. It is a legal duty which requires public authorities (and those carrying out public functions on their behalf) to have "due regard" to three "needs" or "limbs" when considering a new policy or operational proposals. Complying with the duty involves having due regard to each of the three limbs:

The first is the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act.

The second is the need to advance equality of opportunity between those who share a "protected characteristic" and those who do not.

The third is to foster good relations between those who share a "protected characteristic" and those who do not.

Under the PSED the protected characteristics are: race; sex; disability; age; sexual orientation; religion or belief; pregnancy and maternity; and gender reassignment. The protected characteristic of marriage and civil partnership is also relevant to the consideration of the first limb of the duty.

Section 149 of the Equality Act 2010 contains further detail about what is meant by advancing equality of opportunity and fostering good relations.

The Council has had regard to its duty under the Equality Act in drafting these proposals, specifically the effect of the proposals on victims and offenders with protected characteristics.

The Council has produced information on the demographic makeup (specifically age, ethnicity and sex) of offenders sentenced for unauthorised use of a trade mark at Annex A. It should be noted that there are limitations on the reliability of the demographic data (see Annex A for details) and therefore the data should be regarded as indicative only.

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.

Sentencing guidelines ensure that there is a consistency of approach to sentencing which encourages fair and proportionate sentencing but guidelines alone cannot preclude disparity of outcomes for different groups. The Council is committed to taking steps to address concerns around equality and diversity in sentencing across all guidelines. Steps already taken include:

- Adding a reference to the Equal Treatment Bench Book in all guidelines:

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

- Adding expanded explanations to many aggravating and mitigating factors. These include explanations for the mitigating factors for ‘age and/or lack of maturity’ and ‘sole or primary carer for dependant relatives’.
- Testing draft guidelines with judges and magistrates to check whether certain factors could have a disproportionate influence on sentence outcomes (whether in relation to protected characteristics or otherwise).

The Council would welcome suggestions from consultees as to any equality and diversity matters that it should address in the development of these guidelines.

Question 17: Are there any equality and diversity issues that can be addressed in these guidelines?

General observations

We would also like to hear any other views you have on the proposals that you have not had the opportunity to raise in response to earlier questions.

Question 18: Do you have any other comments on either of the guidelines?

Annex A

For further details on these statistics please see the accompanying statistical bulletin published at <https://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics.

Table 1: Demographics of adult offenders sentenced for unauthorised use of a trade mark, by gender, age and perceived ethnicity, 2018

Adult offenders (excludes organisations)

Gender	Number of adults sentenced	Percentage of all adults sentenced ¹
Male	248	88%
Female	33	12%
Not recorded/not known	136	
Total	417	100%

Age Group ²	Number of adults sentenced	Percentage of all adults sentenced ³
18 to 21 years	13	3%
22 to 29 years	89	23%
30 to 39 years	141	36%
40 to 49 years	84	22%
50 to 59 years	39	10%
60 years or older	24	6%

Perceived Ethnicity ^{4,5}	Number of adults sentenced	Percentage of all adults sentenced ⁶
White	17	53%
Black	0	0%
Asian	8	25%
Other	7	22%
Not recorded/not known	385	
Total	417	100%

Notes

- 1) Percentage calculations do not include cases where the sex was unknown.
- 2) In some cases where the age of the adult was unknown, the age has been set to 25 in the source data.
- 3) Percentage calculations do not include cases where the age was unknown.
- 4) The "perceived ethnicity" is the ethnicity of the offender as perceived by the police officer handling the case.
- 5) For a high proportion of adults sentenced (92%), their perceived ethnicity was either not recorded or it was not known. Therefore, the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.
- 6) Percentage calculations do not include cases where the perceived ethnicity was unknown.

