

## Final Resource Assessment

### Unauthorised use of a trade mark

#### Introduction

This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.<sup>1</sup>

#### Rationale and objectives for new guideline

In August 2008, the Council's predecessor body, Sentencing Guidelines Council's (SGC) *Trade mark, unauthorised use of etc* guideline came into force. This guideline applies to individuals only, and is only for use in magistrates' courts, as part of the Magistrates' Court Sentencing Guidelines.

In accordance with its stated aim to update and replace all SGC guidelines, the Sentencing Council has produced new guidelines for this offence: one for sentencing individuals and one for sentencing organisations, to apply in both magistrates' courts and the Crown Court.

#### Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guidelines on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment. The guideline for individuals applies to adults only and so an assessment of the impact on youth justice services has not been required.

This resource assessment covers the offence of unauthorised use of a trade mark, (Trade Marks Act 1994, section 92). Resource impacts for individuals and organisations are presented separately, to reflect the fact that there are two separate guidelines.

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<sup>1</sup> Coroners and Justice Act 2009 section 127: [www.legislation.gov.uk/ukpga/2009/25/section/127](http://www.legislation.gov.uk/ukpga/2009/25/section/127)

## Current sentencing practice

To ensure that the objectives of the guidelines are realised, and to understand better the potential resource impacts of the guidelines, the Council has carried out analytical work in support of them.

The intention is that the new guidelines will encourage consistency of sentencing and in the vast majority of cases will not change overall sentencing practice. In order to develop guidelines that maintain current practice, knowledge of recent sentencing was required.

Sources of evidence have included the analysis of transcripts of Crown Court judges' sentencing remarks of around 45 cases, sentencing data from the Court Proceedings Database<sup>2</sup> and references to case law.

During the consultation stage, some small-scale research was conducted with a group of sentencers, to examine how the draft guidelines may be applied in practice.<sup>3</sup> This research provided evidence to help further understand the likely impact of the guidelines on sentencing practice, and the subsequent effect on prison and probation resources.

Detailed sentencing statistics for the offences covered by the guidelines 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>.

## Individuals

Around 370 adult offenders were sentenced for this offence in 2019.<sup>4</sup> The most common sentencing outcome was a community order (36 per cent of offenders) followed by a fine (31 per cent).<sup>5</sup> The average (mean) fine value in 2019 was £298.<sup>6</sup>

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<sup>2</sup> The Court Proceedings Database (CPD) is an administrative database managed by the Ministry of Justice (MoJ), containing data on defendants proceeded against, convicted and sentenced at court. Every effort is made by MoJ and the Sentencing Council to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used. Further details of the processes by which the Ministry of Justice validate the records in the Court Proceedings Database can be found within the guide to their Criminal Justice Statistics publication which can be downloaded via the link: <https://www.gov.uk/government/collections/criminal-justice-statistics>

<sup>3</sup> A series of semi-structured interviews were conducted with 7 Crown Court judges and 11 magistrates. Sentencers were provided with hypothetical scenarios concerning a trade mark offence committed by both an individual and an organisation.

<sup>4</sup> The CPD is the data source for these statistics. Data on average custodial sentence lengths presented in this resource assessment are those after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying statistical bulletin and tables published here: <http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin>

<sup>5</sup> A further 17 per cent were given a suspended sentence order, 4 per cent were sentenced to immediate custody, 5 per cent were given a discharge and the remaining 6 per cent were recorded as otherwise dealt with.

<sup>6</sup> The mean fine value is calculated by adding up all of the fines values and dividing the total by the number of adult offenders or organisations sentenced to a fine. Another measure that can be helpful is the median, which is less sensitive to extreme values. The median is calculated by ordering all fine values (from lowest to highest, or highest to lowest), and choosing the middle value. The median fine value in 2019 was £228.

## Organisations

In 2019, around 40 organisations were sentenced for this offence. The most common sentencing outcome imposed on organisations was a fine (89 per cent of organisations),<sup>7</sup> although it should be noted that organisations cannot receive custodial sentences (immediate or suspended) or a community order. The mean fine value in 2019 was £771.<sup>8</sup>

## Key assumptions

To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the new guidelines and draws upon analytical and research work undertaken during guideline development. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guidelines are therefore subject to a substantial degree of uncertainty.

Historical data on changes in sentencing practice following the publication of guidelines can help inform these assumptions, but since each guideline is different, there is no strong evidence base on which to ground assumptions about behavioural change. The assumptions therefore must be based on careful analysis of how current sentencing practice corresponds to the guideline ranges presented in the new guidelines, and an assessment of the effects of changes to the structure and wording of the guidelines where previous guidelines existed.

The resource impact of the new guidelines is measured in terms of the change in sentencing practice that is expected to occur as a result of them. Any future changes in sentencing practice which are unrelated to the publication of the new guidelines are therefore not included in the estimates.

In developing sentence levels for the different guidelines, existing guidance and data on current sentence levels has been considered.

While data exist on the number of offenders and the sentences imposed, assumptions have been made about how current cases would be categorised across the levels of culpability and harm proposed in the new guidelines, due to a lack of data available regarding the seriousness of current cases. As a consequence, it is difficult to ascertain how sentence levels may change under the new guidelines.

It therefore remains difficult to estimate with any precision the impact the guideline for individuals may have on prison and probation resources. To support the development of the guideline and mitigate the risk of the guideline having an unintended impact, interviews were undertaken with sentencers during the consultation period, which provided information that helped to shape the definitive guideline.

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<sup>7</sup> A further 3 per cent received a discharge, and the remaining 8 per cent were recorded as otherwise dealt with.

<sup>8</sup> The median fine value for organisations in 2019 was £285.

## Resource impacts

This section should be read in conjunction with the guidelines available at: <https://www.sentencingcouncil.org.uk/offences/>.

### Summary

Overall, it is expected that the guidelines for individuals and organisations will encourage consistency of approach to sentencing and will not change average sentencing severity for most cases. However, there may be some increases in custodial sentence lengths for individuals sentenced for the most serious types of cases and some increase in the use of custody for cases of low value but high risk of serious harm. It has been hard to estimate the precise resource impact of the increase in severity of sentence outcomes but, given the small volumes of custodial outcomes currently, of which over 80 per cent in 2019 were suspended, it is estimated to result in the need for between 0 and 20 additional prison places per year.

For organisations, there cannot be any impact on prison or probation resources because organisations cannot receive custodial or community sentences, but there may be some increases in fine levels. However, Step 5 of the guideline asks sentencers to ‘step back’ and to consider the overall impact of all financial penalties and the means of the offending organisation. They may then adjust the sentence to account for this, and therefore reduce the fine level. Fines may therefore not increase considerably in the majority of cases, if at all.

Overall, there has been very little evidence on which to base any estimate of the impact of these guidelines due to the infrequent nature of these offences and the limited relevant details contained in the transcripts. Nevertheless, research interviews during the consultation stage and discussion with experts yielded some useful findings which have helped to shape the definitive guideline, particularly concerning the additional harm from unsafe goods.

### Individuals

The existing SGC guideline for unauthorised use of a trade mark has four levels of seriousness, based on the nature of the activity. At the lowest level of seriousness, for an offence involving a small number of counterfeit items, the starting point is a Band C fine.<sup>9</sup> At the highest level, where the offender was deemed to have had a central role in a large-scale operation, the starting point is to send the offender to the Crown Court for sentencing.

The new definitive guideline has three levels of culpability and five levels of harm, leading to a 15-category sentencing table, in which the lowest starting point is a Band B fine<sup>10</sup> and the highest is 5 years’ custody. The overall aim of the guideline is to encourage consistency of approach to sentencing and not to cause changes to the average severity of sentences.

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<sup>9</sup> The starting point for a Band C fine is 150% of the offender’s relevant weekly income.

<sup>10</sup> The starting point for a Band B fine is 100% of the offender’s relevant weekly income.

Sentencing data suggest that the majority of adult offenders sentenced for this offence currently receive non-custodial sentence outcomes; over two thirds of offenders in 2019 received either a community order (36 per cent in 2019) or a fine (31 per cent)<sup>11</sup> and, therefore, it could be assumed that these offenders fall under the lowest two levels of seriousness under the existing guideline. These levels relate to a small number of counterfeit items or a larger number of counterfeit items but where the offender had no involvement in the wider operation.

The new guideline categorises harm largely based on the equivalent retail value of legitimate goods, and not on the number of items. A sample of transcripts of judges' sentencing remarks has been used to understand the details of the types of cases coming before the courts in recent years. However, the transcripts provided very few details of the equivalent retail value of legitimate goods, as this is not something that sentencers are asked to take into account at present.

The guideline has been constructed so that only the most serious cases would fall into the top levels of harm. When looking at a small number of transcripts of cases at the more serious end of offending, and comparing the sentences imposed with the sentence that may be expected under the guideline, there is some evidence that the guideline may lead to higher sentences for some of these more serious cases where offenders are already being sentenced to immediate custody. Since transcripts are only available for offenders sentenced in the Crown Court and the majority of offenders sentenced for this offence are dealt with at magistrates' courts (76 per cent in 2019), it is likely that the transcripts represent the more serious end of offending and do not provide a representative overview of the cases coming before the courts. As such, it has not been possible to quantify the resource impact of this.

Furthermore, in reflecting on the findings of the consultation and research with sentencers, the Council made changes to the harm assessment to ensure that proportionate sentences would result where the goods were unsafe. Where there is risk of death or serious physical harm, sentencers are advised that the offender should be placed in at least harm category 3, even if the equivalent retail value of the goods is below £50,000, which would ordinarily place the offender in a lower harm category. There is a chance this may lead to an additional small increase in the proportion of offenders being given custodial sentences (immediate custody or suspended sentence orders). Given that over 80 per cent of the custodial outcomes in 2019 were suspended, it has not been possible to estimate precisely what the resource impact is likely to be. Nevertheless, due to the low volumes for this offence and in particular the low volume of immediate custody outcomes, it is estimated this will lead to fewer than 20 additional prison places per year. However, this is estimated to be an upper bound, as it is based on evidence of the severity of offending sentenced in the Crown Court. As explained earlier, most offenders are sentenced at magistrates' courts for this offence, and so the impact is likely to be lower than the analysis suggests. It is not possible to estimate how much lower the impact is likely to be, therefore, the actual impact is expected to be somewhere in the range of between 0 and 20 prison places per year.

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<sup>11</sup> Additionally, 17 per cent of offenders received a suspended sentence, 4 per cent received an immediate custodial sentence, 5 per cent received a discharge and the remaining 6 per cent were otherwise dealt with.

## Organisations

There is no existing guideline for sentencing organisations for unauthorised use of a trade mark.

The definitive guideline has three levels of culpability and five levels of harm, leading to a 15-category sentencing table, in which the lowest starting point is a £1,000 fine and the highest is a £250,000 fine. However, all starting points are based on an assumption that the offending organisation has an annual turnover of not more than £2 million, so sentencers are advised to adjust these starting points at Step 5 if the turnover is higher. Sentencers are also advised to adjust their sentence upwards within the category range for the most serious offences (category 1 harm) in instances of significant additional harm. The aim of the guideline is to encourage consistency of approach to sentencing, and to ensure that appropriate and proportionate sentences are imposed on organisations.

Sentencing data show that of the fines imposed on organisations for this offence in 2019, 72 per cent received a fine of £500 or less, and only 9 per cent received a fine of over £2,000 (3 organisations).

In the same way as for the guideline for sentencing individuals, harm is largely based on the equivalent retail value of legitimate goods. Transcripts of Crown Court judges' sentencing remarks were used to analyse the details of the cases coming before the courts. However, again, as most offenders are sentenced in magistrates' courts (67 per cent in 2019), the transcripts are expected to represent the most serious end of offending and so are unlikely to be representative of all cases coming before the courts.

Despite the very little evidence available on which to base an estimate, it is anticipated that the assessment of culpability and harm may lead to higher starting point sentences than most offending organisations currently receive. Nevertheless, since organisations cannot be given custodial or community sentences, there will be no impact on prison or probation resources. Any impact is therefore likely only to be as a result of changing fine levels.

As with the guideline for individuals, after reflecting on the findings of the consultation and research with sentencers, the Council was keen to ensure that the guideline would provide for proportionate sentence outcomes where the goods in question were unsafe. In the definitive guideline for organisations, sentencers are guided that the offender should be placed in at least harm category 3 in cases where there is risk of death or serious physical harm, even if the equivalent retail value of the goods is below £50,000, which would ordinarily place the offender in a lower harm category. However, at Step 5 of the guideline, sentencers are asked to step back and consider the overall effect of any financial orders on the organisation. Orders for costs, confiscation, compensation, etc, should be considered alongside the level of fine, and sentencers are told to consider adjusting the fine to ensure the total impact is proportionate having regard to the size and financial position of the offending organisation and the seriousness of the offence. It is expected that in many cases, sentencers will take account of these factors and reduce fine levels from the initial starting point. There may then be less of an impact, if any, on the overall levels of fines imposed on organisations.

## Risks

### **Risk 1: The Council's assessment of current sentencing practice is inaccurate**

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guidelines come into effect.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes the research that has been conducted with sentencers during the consultation period, and discussions with prosecuting authorities.

### **Risk 2: Sentencers do not interpret the new guidelines as intended**

If sentencers do not interpret the guidelines as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing new guidelines to try to ensure that sentencers interpret it as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of sentencing remarks for around 45 cases have also been studied to ensure that the guidelines are developed with current sentencing practice in mind. Research with sentencers and discussions with prosecuting authorities carried out during the consultation period have helped to identify possible issues with the guidelines, and amendments have subsequently been made to the definitive guidelines.