UK CLIENT MEMORANDUM | ENGLISH LAW UPDATES

Sentencing Council Publishes New Draft Sentencing Guidelines: Fraud, Bribery, Money Laundering and Corporate Offenders

August 9, 2013

AUTHORS

Peter Burrell | Michael Thorne

On 27 June 2013, the Sentencing Council for England and Wales (the "Council") published Draft Guidelines for Sentencing Fraud, Bribery and Money Laundering, including specific guidelines for sentencing corporate offenders (the "Guidelines"). The Guidelines are the first of their kind in England and Wales to cover bribery, money laundering and corporate offenders. They are set to replace previous guidelines for fraud offences, issued by the old Sentencing Guidelines Council in 2009. This article focuses in particular on the new Guidelines for corporate offenders. Also set out in the Appendix to the article below are two worked examples representing a fictional 'best case' and 'worst case' scenario.

The Guidelines will also be used by prosecutors to help determine the appropriate level of penalty for an organisation entering into a deferred prosecution agreement ("DPA"). We have published a separate article discussing the current draft DPA guidelines in detail, available here.

Key Points

- Sentencing Guidelines may help to inform the level of fines agreed under the new DPA framework.
- Self-reporting and cooperation with investigations are among the factors, in addition to entering a guilty plea, that can lead to a reduction in a fine.
- Whilst the Guidelines are deliberately designed to be flexible and open to interpretation on a case-by-case basis, they will help to provide a corporate offender with grounds for contesting sanctions imposed, where such

sanctions are considered unfair. They should also help corporations make better informed decisions about financial provisions where a corporation faces prosecution, as well as the consequences of self-reporting in terms of the likely impact on financial penalties.

- Specific consideration is given in the Guidelines to sentencing under the corporate offence of failure to prevent bribery, contained in the Bribery Act 2010 ("Section 7"). A high culpability (raising the level of penalty) can be attributed in cases where no effort is made to put policies and procedures in place to prevent bribery, as compared to a low culpability (lowering the level of penalty) where some effort is made to put controls in place, but such effort is insufficient justify a Section 7 defence of having 'adequate policies and procedures' to prevent bribery (see Steps Two and Three, set out below).

Corporate Offenders

The Guidelines for corporate offenders cover fraud, money laundering and bribery offences committed by *corporations*, which include any organisation, body partnership or charity. As well as taking account of existing regimes for regulatory and criminal sanctions in England and Wales, the Council notes that it has taken into account the sentencing guidelines for corporations published by the US Sentencing Commission, as well as the civil and criminal penalties imposed in the US.

Whilst the Guidelines provide a framework within which financial penalties for corporations will be determined, it is likely that fines may vary a great deal depending on the underlying facts of a particular case and the nature of the corporate offender concerned. Public pressure has mounted on the UK Serious Fraud Office in recent years to secure more high-profile convictions, and there has been a similar push to ensure that any sanctions imposed on corporate offenders are significant enough to act as a deterrent. The Guidelines reflect this by allowing a court to impose significant fines on larger corporations in line with the approach taken in the US.

Structure of the Guidelines

The Guidelines are structured in 'steps', each of which can increase or decrease a corporate offender's financial liability. The following is a summary of the process:

Step One – Compensation

Whilst compensation of victims will not be appropriate in all cases, it is the first decision that a court should make, before imposing a fine.

Step Two – Offence Category

Culpability: The Guidelines set out a list of non-exhaustive characteristics that the court should ascribe to a corporation's role and motivation in the commission of an offence when determining if the corporation's culpability is 'high', 'medium' or 'low'. Culpability for a Section 7 offence is set out specifically, with a category of 'high' being ascribed to offenders with a '*culture of willful disregard of commission of offences by employees or agents with no effort to put effective systems in place*', through to 'low' requiring: 's*ome effort made to put bribery prevention* *measures in place but insufficient to amount to a defence.*' In contrast to the equivalent factors for individuals, the factors that may be taken into account for corporates are non-exhaustive. The Council notes that the reason for this is, in part, the lack of a body of case law in England and Wales on which to base the factors.

Harm Figure: Harm is represented by a financial figure based on the amount the corporate offender gained (or intended to gain) from the offence. Again, the factors in the Guidelines are not prescriptive, and vary according to the type of offence.

Fraud: The actual or intended gross gain to the offender.

Bribery: The gross profit from the contract obtained, retained or sought. An alternative measure for Section 7 offences may be the cost avoided by failing to put in place adequate policies and procedures to prevent bribery (if greater).

Money Laundering: The amount laundered or the likely cost avoided by failing to put in place an effective anti-money laundering programme (if greater). For overlapping bribery and money laundering charges, the "amount laundered" could be the gross amount of the value of a tainted contract, i.e. revenue - not profit - based.

In addition, the Guidelines suggest that where the harm is difficult to establish, the court may apply a figure of 10% of the worldwide revenue derived from the product or business area to which the offence relates. This factor can be used by the court to encourage offenders to provide the information it requires to help it assess harm and is based on the current Financial Conduct Authority ("FCA") penalty regime where it represents a 'medium level' financial penalty.

Step Three – Starting Point and Range of Fine

Starting Point: The next stage a court will take is to determine the Starting Point for the fine. This is determined by applying the Culpability rating against the Harm Figure. A 'high' Culpability sees a starting point of the fine being 300% of the Harm Figure, with a range of 250%-400% suggested, whilst a 'low' culpability sees a starting point of 100% of the Harm Figure, with a range of 20%-150% suggested.

Range of Fine: The court then has discretion to adjust the Starting Point for the fine by giving 'appropriate weight' to any relevant aggravating or mitigating factors. A non-exhaustive list is provided in the Guidelines. The mitigating factors include, among others:

- cooperation with investigation;
- early admission of guilt; and/or
- voluntary reporting of the offence to the authorities.

Step Four – Size and Financial Position of Offending Organisation

An additional step in the Guidelines allows the court discretion to vary a fine based on a corporation's size and financial position, as well as the seriousness of the offence and any unacceptable harm that the fine might cause to third parties. Notably, the Guidelines set out that the fine should fulfill the objective of punishment and deterrence by having *"a real economic impact which will bring home to both management and shareholders the need to operate within the law."* This is likely to lead to more substantial fines being imposed on larger corporations as a means of deterrence. Likewise, in certain circumstances corporations will also be able to argue against more substantial fines where they can show that the fine would have a detrimental effect on staff, service users, customers, the local economy or the corporation's ability to implement an effective compliance programme. Impact on shareholders is specifically excluded and the Guidelines note that in some cases putting an offender out of business would be an acceptable consequence.

Steps Five to Nine – Additional Points

The Guidelines also allow for existing factors in English criminal law to be considered in finalising the sentence. These include assistance provided to the prosecution, reduction for guilty pleas, ancillary orders and whether, in cases involving more than one offence, the total sentence is just and proportionate to the offending behaviour. Finally, a court is required under the Criminal Justice Act 2003 to give reasons for, and explain the effect of, its sentence. The criminal confiscation regime has not changed and prosecutors will still be looking to remove the proceeds of criminal activity.

Conclusion

Overall, the publication of the Guidelines is a positive step and will help corporates better assess risk and make decisions with regards to self reporting and the benefits of entering into a DPA. They are a further step towards the UK's implementation of a corporate crime framework similar to that in the US. In particular, the low threshold for corporate criminal liability under the Section 7 offence is expected to make it easier for the Serious Fraud Office ("SFO") to bring prosecutions in the UK against corporates. Financial penalties are also likely to start reflecting the fines imposed by US regulators. This was perhaps to be expected following the comments of Lord Justice Thomas in R v Innospec Limited, in which he reflected on the sentencing of Innospec for corruption offences:

> "As fines in cases of corruption of foreign government officials must be effective, proportionate and be dissuasive in the sense of having a deterrent element, I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point, such a fine being quite separate from and in addition to depriving Innospec Ltd of the benefits it had obtained through its criminality."

The Guidelines are open for consultation until 4 October 2013. The full draft text of the Guidelines and an online questionnaire for responding to the consultation are available on the Council's website.

Set out below, as an Appendix to this memorandum, is a worked example of how the same basic offence may be sentenced differently based on the underlying circumstances.

APPENDIX

Worked Examples

Whilst we recognise that it is difficult to accurately reflect the detailed factors that a judge will take into account in a particular case, involving arguments put forward by counsel for both the defendant and prosecutor, we have attempted to set out a 'best case' and 'worst case' scenario below. These are based on the same underlying criminal offence, with varying aggravating or mitigating factors. The scenarios demonstrate where significant impact may be had on the level of fine imposed based on factors such as having policies and procedures in place to prevent financial crime, self-reporting and cooperation with the prosecution. They also demonstrate the wide discretion a judge may use when sentencing different types of corporate offenders.

Basic Facts

A commercial organisation is found guilty of a Section 7 offence of failure to prevent bribery. In the circumstances, it is shown that the organisation won a contract worth £ 30,000,000 on which it made a profit of £10,000,000, through paying a bribe.

Step One - Compensation

Best Case Scenario: Despite the bribe, the value of the contract and the services provided are competitive and offer good value for money. The judge assesses, therefore, that the public authority bribed has suffered no loss.

Total: £0

Worst Case Scenario: It is determined that the contract was for the supply of goods which were not competitively priced and therefore could have been procured at a far lower cost. The judge determines that the company should pay the public authority £10,000,000 in compensation.

Total: £10,000,000

Step Two - Culpability

Best Case Scenario: The company did implement written anti-bribery policies and procedures but failed to implement these in a meaningful way. The judge determined that, despite some efforts, the company's policies and procedures were not adequate enough to amount to a defence to the Section 7 offence. The judge therefore ascribed a 'low' culpability to the company.

Worst Case Scenario: The company showed a willful disregard for the commission of the bribery offences. It has in place a written code of conduct but such code does not adequately address anti-bribery issues, is poorly drafted and was not communicated to members of staff in a meaningful way. In addition, employees were encouraged to use high-risk intermediaries to win contracts with government agencies in jurisdictions with a high-risk of bribery. The judge determines that the subsidiaries and intermediaries involved were 'associated persons' and that the bribery was 'for the benefit' of the parent company, for the purpose of the Section 7 offence. Therefore, liability for failing to prevent the corruption is attributed to the parent company. Furthermore, evidence produced at trial suggests that senior management in the company turned a blind eye to red flags raised regarding bribery in the bidding for the contract, which was ultimately tainted by a bribe paid through an intermediary. The judge ascribes a 'high' culpability to the company.

Harm Figure

Best Case Scenario: Evidence suggests that the company had no knowledge of the corrupt payments, despite failing in its policies and procedures. Furthermore, the funds gained from the contract have since been transferred out of the UK for legitimate purposes, as the company's head offices are in another jurisdiction. The judge assesses the harm figure as the value of the profit from the contract:

Total: £10,000,000

Note: Where the contract value had been lower the judge could have assessed the harm figure on the basis of the costs saved by not putting in place adequate policies and procedures to prevent bribery.

Worst Case Scenario: Members of senior management are suspicious and possibly aware that the funds received on the contract represent the proceeds of crime, since the contract has been won through corruption. As a result, the company is also convicted of money laundering and the amount laundered is determined to be the value of the contract, not the amount of profit made from it:

Total: £30,000,000

Step Three - Starting Point and Determining Range of Fine

Best Case Scenario: The starting point for a 'low' culpability rating is 100% of the harm figure: £10,000,000. The judge then takes account of the company's cooperation with the investigation, voluntary reporting of the offence and early guilty plea, and determines that the harm figure should be reduced by approximately one third of the starting point:

£10,000,000 → £6,700,000

Worst Case Scenario: The case was triggered by a whistleblower who came forward to the SFO. It was later discovered at trial that the whistleblower had previously raised his concerns internally but that the company had decided not to act on the information and had attempted to conceal the information to make sure that it did not reach the authorities. The judge adjusts the harm figure by 300%.

£30,000,000 → £90,000,000

Sentencing Council Publishes New Draft Sentencing Guidelines: Fraud, Bribery, Money Laundering and Corporate Offenders

Continued

Step Four - Size and Financial Position of Company

Best Case Scenario: The company is a mid sized company with a turnover of £20,000,000. It has been facing financial difficulties, which have been exacerbated by the criminal case. The fine would also impact the company's ability to implement an adequate compliance programme as well as impacting employees and customers disproportionately if the company went out of business as a result. On application by the company the judge agrees to reduce the fine to £3,000,000.

£6,700,000 → £3,000,000

Worst Case Scenario: The company is a large multinational headquartered in London. It has an annual turnover of £20 billion. The judge determines that a fine of £90,000,000 is insufficient in the circumstances and will not have a sufficient economic impact to act as a deterrent. The fine is doubled to £180,000,000. In addition, the judge makes an ancillary order requiring the company to implement a revised and effective anti-bribery procedure and to provide evidence of that at a set time in the future, including the costs of implementation.

£90,000,000 → £180,000,000

TOTAL LIABILITY

Best Case Scenario

Total Liability:

TOTAL FINE:	**£3,000,000**
COMPENSATION:	**£0**
TOTAL:	**£3,000,000**

Worst Case Scenario

Total Liability:

TOTAL FINE:	**£180,000,000**
COMPENSATION:	**£10,000,000**
TOTAL:	**£190,000,000**

If you have any questions regarding this memorandum, please contact Peter Burrell (+44 207 153 1206, pburrell@willkie.com), Michael Thorne (+44 207 153 1204, mthorne@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Paris, London, Milan, Rome, Frankfurt and Brussels. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.

August 9, 2013