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Environmental compliance moving up the  
corporate agenda: new sentencing guideline

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# Environmental compliance moving up the corporate agenda: new sentencing guideline



ON 26 FEBRUARY 2014 THE SENTENCING Council published a new guideline for judges and magistrates on sentencing environmental offences. This guideline will take effect from 1 July 2014 and will apply to all individual offenders aged 18 or older and organisations that are sentenced on or after 1 July 2014, regardless of the date of the offence.

This is the first time a guideline has been produced for environmental offences which sets out 12 clear steps to be followed whenever sentencing individuals or organisations for such offences. This article considers the evolution of the factors that are now considered in the recently published guideline, 'Environmental Offences: Definitive Guideline', and examines the final form of the guideline. There is a separate guideline for corporate offenders and for individual offenders. We have principally focused on the corporate guideline, although a comparison with the guideline applicable to individuals is also considered.

One of the aims of the guideline is to help categorise offences and offenders in order that a consistent approach can be taken and that the calculation of fines is proportionate to the size of the offender and the seriousness of the offence. This follows the conclusions of the Sentencing Council that the levels of some fines were previously too low and did not reflect the seriousness of the offence committed.

Primarily the guideline focuses on what are generally the most common environmental offences arising from the:

'... unauthorised or harmful deposit, treatment or disposal etc of waste and illegal discharges to air, land and water'.

However, the guideline can also be applied to other 'relevant and analogous environmental offences' providing the courts adjust the starting point and range of the fine bearing in mind the statutory maxima for those offences.

## THE DEVELOPMENT OF SENTENCING GUIDELINES OVER TIME

Sentencing in the past has been based on a number of recognised mitigating

or aggravating factors which have been developed through case law.

These factors were established by the Court of Appeal to determine penalties in the health and safety case of *R v F Howe & Son (Engineers) Ltd* [1999] and can be seen reflected in the new guideline.

The *Sea Empress* case (*R v Milford Haven Port Authority* [2000]) then applied the same factors to an environmental offence. This was the memorable case in which the Milford Haven Port Authority was fined after the *Sea Empress* oil tanker was grounded upon rocks as she was being guided into port by a pilot employed by the Port Authority. In this case the Court held that it was not necessary to frame guidelines for sentencing, but there were a number of factors relevant to sentencing which should be considered. In applying *Howe*, the Court of Appeal considered the size, structure and financial position of the Port Authority, and concluded that, while a substantial fine was needed to mark the seriousness of the offence, it should not be so heavy to destroy the Authority's business with consequent impact upon the local economy. The Port Authority successfully argued the fine was manifestly excessive and consequently had it reduced to £750,000 from £4m.

*R v Thames Water Utilities Ltd* [2010] followed *Howe* and further considered the aggravating and mitigating factors to be taken into account.

General aggravating features were held to include:

- a) the extent to which the company fell short of its duty and thus its degree of culpability;
- b) the deliberate breaching of a duty in order to maximise profit;
- c) the skimping of proper precautions to make or save money or to gain a competitive advantage;
- d) evidence of repetition or failure to heed advice, caution, concerns or warnings;
- e) a poor attitude and/or response after the event; and

f) any previous convictions.

Mitigating features included:

- a) a good record of compliance with the law;
- b) good attitude and/or response after the event, including prompt reporting of the offence, co-operation with the enforcement authorities, the taking of prompt and effective measures to rectify any failures, and the payment of compensation; and
- c) a timely admission of guilt and a guilty plea at an early opportunity.

Thames Water Utilities was successful with its appeal and had its fine reduced from £125,000 to £50,000.

In *R v Sellafield* [2014] in January of this year, the Court of Appeal dismissed an appeal by Sellafield Ltd regarding a fine of £700,000 for offences relating to the disposal of radioactive waste. In dismissing the appeal the Court considered the same factors for determining the appropriate level of fines. It however concluded that in this case a £700,000 fine represented only 2% of the company's weekly turnover and therefore could not be criticised.

The Sellafield Ltd appeal was heard in conjunction with an appeal by Network Rail Infrastructure Ltd (*R v Network Rail Infrastructure Ltd* [2014]), another huge national company with a weekly turnover of £119m and profits of £14.4m. Network Rail was appealing against a fine of £500,000 following a collision at an unmanned level crossing which resulted in very serious injuries to a child. The Court of Appeal again considered the structure of the company and found that any fine imposed would not inflict any direct punishment on shareholders and could be said to harm the public. They concluded however, that a fine of £500,000 already reflected a sizable discount for the mitigation advanced and a materially greater fine again could not be criticised.

#### THE NEW GUIDELINE

The new guideline features twelve steps and will come into effect on 1 July 2014, after which, the courts will be required to consider each of the 12 sentencing steps

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whenever dealing with environmental offences. These steps are as follows.

#### Steps one and two: compensation orders and confiscation

The court must initially consider whether to make an order for the offender to pay compensation for personal injury, loss or damage resulting from the offence. Where an offender's means are limited, payment of compensation must take priority over any other financial penalty. If no compensation order is made, reasons must be given.

After compensation has been dealt with, and under step two, the court (Crown Court only) must consider confiscation if it thinks this appropriate or if asked for by the Crown.

#### Step three: determining the offence category

This was originally drafted as step one and has retained the focus on considering both the *harm* that has been caused and the *culpability* of the offender in committing the offence in accordance with certain factors set out in the guideline.

Harm is split into four categories (category one being the most harmful, category four being the least) and takes into account the risk of greater harm as a factor.

Culpability is equally split into four categories:

- (i) deliberate, ie where the offender intentionally breaches the law;
- (ii) reckless;
- (iii) negligent; and
- (iv) low or no culpability.

#### Step four: starting point and fine category range

By applying the offence categories (as calculated in step three) to a sliding scale based on the size of the offending company, the starting point of the fine in pounds and the range of fine can then be calculated.

Originally the draft guideline had considered categorising three company size categories; small, medium and large, but the final form of the guidelines has expanded the range to divide companies into five categories:

- 1) micro: turnover or equivalent of not more than £2m;
- 2) small: turnover or equivalent of between £2m and £10m;
- 3) medium: turnover or equivalent of between £10m and £50m;
- 4) large: turnover or equivalent of £50m and over; and
- 5) very large.

When calculating the size of the offending organisation, the guideline specifies that, for companies, 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, all for the last three years. As most companies are required to file audited accounts at Companies House, providing this information to the court should not be an issue but it is stipulated that:

'Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.'

Similar rules apply to partnerships but public bodies, health trusts and charities can expect their accounts to be scrutinised to a lesser degree.

As the number of categories for the size of the offender has increased, so the starting points and ranges of fine have evolved. Notably, the size of the quoted maximum fine has increased significantly from £2m

in the draft guideline to £3m but given that there is a new category of very large organisations, the guidelines then go on to remove all fine limitations by stating:

‘Where a defendant company’s turnover or equivalent very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence.’

Table one below shows the range of fine and starting points for the most serious offences with the highest culpability, for large, medium, small and micro organisations.

Not many offences fall within the top category, however the fine for lesser and more common offences may still be significant for an offender. Table two shows the range and starting points for the level of fine for those offences which may not necessarily be the most serious, or where the level of culpability of the defender is not particularly high.

The sentencing factors that were developed through the case law previously discussed are still applicable and have been incorporated into the guideline. Once the starting point for the fine has been calculated within step four, the court

then has to consider any aggravating and mitigating factors from a definitive list.

Aggravating factors include; a history of offending; obstruction of justice; previous warnings by the Environment Agency; the offence being committed near a sensitive area, such as housing or schools; and deliberate concealment by the offender.

Mitigating factors include; a previous good record; evidence of steps taken to remedy the problem; little or no financial gain resulting from the commission of the offence; self-reporting; good character; remorse; and compensation paid voluntarily to remedy the harm caused.

**Steps five to seven**

After setting the level of the fine, the guideline requires the court to:

‘... step back and... review whether the sentence as a whole meets, in a fair way, the objectives of punishment, deterrence and removal of gain derived through the commission of the offence’.

In the draft guideline this was originally contained in a single step three but is now split into three separate steps – five to seven.

Step five requires the court to ensure that a combination of compensation; confiscation if appropriate; and the fine has removed any economic benefit gained through the offence. While there may not be an obvious economic benefit in all cases, in the example given of water pollution, there may have been savings made by the offender by, for example, not installing or maintaining adequate binding or security. Any costs avoided will be considered as economic benefit.

Step six requires the court to consider whether the fine based on turnover is proportionate to the offender’s means. This may involve downward adjustment but could also work towards increasing fines. Corporate bodies should note this wording, taken from the guideline:

‘The combination of financial orders must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance. *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.*’ (emphasis added).

This reiterates the point that these offences are being considered seriously and has caused concern that fines facing large companies may be likely to be higher than previously experienced once the guideline come into effect.

Step seven gives the court flexibility to look at further factors that warrant adjustment of fines. A non-exhaustive list of such factors is given and includes the impact on customers, local economy and employment of staff and on the ability of the offender both to make restitution to

**TABLE ONE: FINES FOR THE MOST SERIOUS OFFENCES**

Organisation size	Most serious offence and highest culpability range	Starting point
Large	£450,000-£3m	£1m
Medium	£170,000-£1m	£400,000
Small	£45,000-£400,000	£100,000
Micro	£9,000-£95,000	£50,000

**TABLE TWO: FINES FOR LESS SERIOUS OFFENCES**

Organisation size	Range for negligent and Category two offence	Starting point
Large	£60,000-£350,000	£140,000
Medium	£25,000-£140,000	£55,000
Small	£6,000-£55,000	£13,000
Micro	£1,000-£13,000	£6,500

*R v F Howe & Son (Engineers) Ltd*  
[1999] 2 All ER 249

*R v Milford Haven Port Authority*  
[2000] JPL 943

*R v Sellafield; R v Network Rail Infrastructure Ltd*  
[2014] EWCA Crim 49

*R v Thames Water Utilities Ltd*  
[2010] EWCA Crim 202

victims and to improve conditions within the organisation to comply with the law. It also states that, for public or charitable bodies, the fine should normally be substantially reduced if the organisation can show that the proposed fine would have a significant impact on the provision of its services.

**Steps eight to 11**

There are four further steps set out in the guideline containing extra considerations which the court must take. These include consideration of:

- a) any factors which indicate a reduction, such as assistance to the prosecution (ss73 and 74 of the Serious Organised Crime and Police Act 2005);
- b) reduction for a guilty plea (s144 of the Criminal Justice Act 2003);
- c) whether to make any ancillary orders such as forfeiture of vehicles, deprivation of property or remediation; and
- d) whether the total sentence is just and proportionate to the offending behaviour if sentencing an offender for more than one offence, or where the offender is already serving a sentence.

**Step 12**

Finally, step 12 highlights the court's duty, imposed by s174 of the Criminal Justice Act

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2003, to give reasons for, and explain the effect of, the sentence. It is envisaged that the sequential form of the guideline will help offenders understand how courts have reached the level of punishment set.

**WHAT ABOUT INDIVIDUAL OFFENDERS?**

As with corporate offenders, individuals will have their means tested and financial circumstances taken into account when sentencing. This follows the current court procedure; a recent example being *Mssrs Wright and Frost* who in January 2014 were fined a total of £340 and ordered to pay £1,100 costs for damage their 4x4 caused to an SSSI in Derbyshire (ENDS Report 46g, March 2014, p27). The magistrate stated the only reason they did not order the defendants to pay much higher costs was because they did not have the means to pay.

The steps for individuals follow broadly the same formula with the offence category being set with respect to

broadly the same culpability and harm categories in step three. The most notable change is in step four where, depending on the level of offence category, the punishment sliding scale rises through six 'fine bands' as set out in table three below, and the more culpable offences will result in custodial sentences.

Now that the final form of the guideline has been published, it is clear that there is a high risk of significant penalties for both individuals and corporate bodies charged with environmental offences. Given the breadth of the range that each level of fine covers, even once culpability and harm have been taken into account, it is clear that the level of fine can still be significantly influenced by any mitigating steps taken after an offence is committed. In this regard, the importance of having clear policies and procedures in place for companies, not only to prevent environmental offences but to mitigate any that do occur, is clear. Obtaining specialist legal advice on the steps to be taken can also assist with maximising the effectiveness of any actions in mitigation. Of course, the decision to prosecute is at the discretion of the environmental regulator in each case, and early advice and prompt mitigation might deter a prosecution altogether, potentially in favour of civil sanctions or restorative mechanisms (see our article 'Restoring environmental damage: putting a price on ecosystem services', *IHL*216, December 2013/January 2014).

It will be interesting to see how the guideline is applied when it comes into force in July and, in particular, whether the levels of fines set will differ greatly from those we have seen to date.

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**TABLE THREE: SLIDING SCALE OF FINES FOR INDIVIDUALS**

Fine band	Range	Starting point
Band A	25-75% of relevant weekly income	50% of relevant weekly income
Band B	75-125% of relevant weekly income	100% of relevant weekly income
Band C	125-175% of relevant weekly income	150% of relevant weekly income
Band D	200-300% of relevant weekly income	250% of relevant weekly income
Band E	300-500% of relevant weekly income	400% of relevant weekly income
Band F	500-700% of relevant weekly income	600% of relevant weekly income