New sentencing guideline for corporate offenders emphasises importance of adequate ABC procedures

The punishment of corporations for financial crime has previously been a somewhat ad hoc affair. Guidelines published by the Sentencing Council to assist judges when they are handing down penalties have not hitherto included specific guidance on appropriate fines for economic offences such as bribery, corruption and fraud. This has resulted in different bases of assessment being used by different courts, leading to inconsistency of punishment and a lack of certainty for defendants.

This gap has been now filled to a large extent with the publication by the Sentencing Council of a new definitive guideline for financial offences committed by corporate offenders1 (the “Guideline”). The Guideline will come into force on 1 October 2014 and apply to all corporate offenders who are sentenced on or after that date. While there remain areas of discretion for sentencing judges such that absolute certainty for defendants can never be guaranteed, the Guideline should provide more consistency and transparency in sentencing decisions.

The Guideline contains sentencing rules applicable on conviction for offences of fraud, bribery and money laundering, including offences under various tax statutes and that of common law conspiracy2. As well as other factors, the Guideline links sentencing policy directly to the failure or otherwise of offending corporates to implement adequate anti-bribery and corruption (“ABC”) policies, giving corporates yet another reason, if one were needed, to ensure their in-house procedures are appropriate.

The sentencing process

Under the Guideline, the first step in any sentencing process will be for the court to consider whether it should make a compensation order requiring the

1 The text of the “Definitive Guideline: Fraud, bribery and money laundering: corporate” published on 31 January 2014, is available here.
2 Included in the Guideline are conspiracy to defraud and cheating the public revenue at common law and statutory offences under sections 1, 6 and 7 of the Fraud Act 2006; section 17 Theft Act 1968; section 72 of the Value Added Tax Act 1994; section 170 of the Customs and Excise Management Act 1979; sections 1, 2, 6 and 7 of the Bribery Act 2010; and sections 327, 328 and 329 of Proceeds of Crime Act 2002.
offender to pay compensation for any personal injury, loss or damage resulting from the offence. The court should have regard to the evidence and to the means of the offender when making its order. The court may then consider whether a confiscation order is appropriate, either on application by the prosecutor or of its own volition.

Only after compensation and confiscation have both been considered may the court look at imposing a fine on the defendant. It is in this category of penalty that the Guideline is most detailed and provides clear benchmarks for the court to take into account when making its order.

Assessing the fine

The process of calculating the actual fine has a number of steps: first the court must assess the offence category with reference to culpability and harm; it must then consider whether there are any factors which indicate an adjustment in the level of fine proposed. Lastly the court will consider if there are any factors which merit a reduction in the proposed penalty.

Determining the offence category: culpability and harm

The court must determine whether the offending corporation has demonstrated a high, medium or lesser level of culpability in the commission of the offence by looking at its role and motivation. Playing a leading role in planned unlawful activity, involving others through pressure or coercion or wilfully disregarding the commission of offences by employees or agents, with no effort to implement an effective anti-corruption system, would all denote a high level of culpability. Conversely, where a corporation has been forced to take part by intimidation from another, for example, this may result in a finding of lower culpability.

The court will then look at the harm caused by offence. Harm is calculated by reference to a specific table contained in the Guideline. For example, for bribery offences, the appropriate harm figure will normally be the gross profit from the contact obtained, retained or sought as a result of the bribe. For money laundering offences, the amount laundered or alternatively the likely cost avoided by failing to put an effective anti-money laundering programme into place, will be the appropriate amount. Where it is not possible to establish the actual or intended gain or amount saved, the court may adopt a percentage, 10-20% is suggested, of the revenue derived from the product or business area to which the offence relates as the harm figure. Where large scale offences of fraud or bribery damage commerce or markets generally, the court may be justified in adopting a harm figure beyond the measures set out in the Guideline.

Level of penalty

In order to determine the level of fine, the harm figure will be multiplied by a percentage according to the culpability level of the offence. A table in the Guideline provides the appropriate multiplier of the harm figure according to each culpability level. For example, the harm figure multiplier for an offence with culpability level B (medium level) will be 100%-300%, with a starting
point of 200%. If the offence in question was bribery, therefore, and the contract obtained by the bribery was assessed to be worth £1 million, the starting point for any fine would be £2 million. Factors may increase or decrease the seriousness of the offence or reflect mitigation. Previous convictions or regulatory enforcement action for similar misconduct may increase the seriousness and therefore the level of the fine. Where there has been no loss to victims or the misconduct occurred under previous a directorship, seriousness may be reduced.

The court must then consider whether there are any factors which indicate an adjustment in the level of fine proposed, such as whether the overall level of the orders it proposes to make (compensation, confiscation and fine) achieve the aims sought: removal of all gain; appropriate additional punishment; and deterrence, and also that the punishment is fair and proportionate. Lastly the court will consider if there are any factors which merit a reduction in the proposed penalty, such as cooperation by the defendant, a guilty plea and so on.

Comment

While any increased certainty for corporates facing prosecution for financial crimes is to be welcomed, the Guideline still leaves considerable room for judicial discretion when it comes to sentencing policy. The imminent arrival of deferred prosecution agreements as a means of settling liability for financial misconduct makes it all the more important that companies can assess their options in a transparent manner.

The importance of this for corporates is only likely to increase given the concerted calls from those such as the director of the Serious Fraud Office ("SFO"), who advocate extending corporate liability for employees into areas such as fraud and other financial wrongdoing, in a manner akin to the section 7 corporate offence under the Bribery Act 2010. Recent studies suggest that businesses are still failing to implement adequate ABC systems and too many are operating a culture where anti-corruption issues are not taken sufficiently seriously. The first prosecutions under the Bribery Act 2010 have commenced, with the SFO indicating that it has several more investigations under way. Companies that fail to adopt proper systems and then find themselves involved in financial crime, may find the sums saved in not putting a proper ABC policy in place vastly outweighed by the penalties imposed.
New sentencing guideline for corporate offenders

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