

Punishing corporate offenders for bribery and corruption offences - the Sentencing Guideline in action.

In the last three months, in a flurry of judicial activity, three British companies have been sentenced for bribery and corruption offences and have been subjected to fines and other penalties. The circumstances in which the sentences were handed down differed but in each case the sentencing judge applied the Definitive Guideline for fraud, bribery and money laundering offences (the "Guideline"). While there remain areas of discretion for sentencing judges such that absolute certainty for defendants can never be guaranteed, the Guideline is intended to provide more consistency and transparency in sentencing decisions. It is interesting, therefore, to compare these three sentences and see what decisions the courts reached while following the Guideline in each case, and to assess how much of the decision-making process is still left to individual judges when it comes to penalising business crime.

The three decisions concerned a bank, a printing company and a large international property services business respectively. Below we deal with each in turn, provide a brief summary of the facts of each case and assess the use made of the Guideline.

The Guideline

The Guideline came into force on 1 October 2014 and applies to all sentences passed after that date, regardless of the date of offence. It is mandatory for the court to follow the Guideline unless it considers it contrary to the interests of justice to do so.¹ Under the Guideline, the first step in any sentencing process will be for the court to consider whether it should make an order requiring the offender to pay compensation for any loss or damage suffered as a result of the offence. The court may then consider whether a confiscation order is appropriate, either on application by the prosecutor or of its own volition.

Only after both these have been considered may the court look at imposing a fine on the defendant. The Guideline provides clear steps and benchmarks for the court to follow.

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¹ The Guideline was issued by the Sentencing Council and is available [here](#).

First, the court must assess the culpability of the offender based on a hierarchy of relevant factors. Once culpability has been assessed as either at a “high”, “medium” or “lesser” level, the court must then determine the amount of harm that has resulted from the offence. For bribery, fraud and money-laundering offences this will be the amount obtained or intended to be obtained (or loss avoided or intended to be avoided) by the misconduct. The amount of harm will be multiplied by the culpability level – the Guideline gives a range of percentages for each by which to multiply the harm to give a range of potential fines. Finally the court must consider whether there are any factors which suggest there should be an adjustment in the level of fine proposed.²

Standard Bank plc

The offence and penalty

On 30 November 2015 Sir Brian Leveson gave judicial approval to the UK’s first deferred prosecution agreement (“DPA”),³ agreed between the Serious Fraud Office (“SFO”) and ICBC Standard Bank Plc, previously known as Standard Bank plc (“Standard Bank”).

The DPA was agreed following allegations that Standard Bank had breached section 7 of the Bribery Act 2010 (“BA”) in relation to a US\$600 million sovereign note private placement, organised jointly by Standard Bank and its sister company, Stanbic Bank Tanzania Ltd (“Stanbic”) for the Government of Tanzania. A US\$ 6m “placement fee” was paid to a local company (“EGMA”) controlled by persons with close links to the Tanzanian government and with influence in the banking sector. The obvious conflict and risk attached to the payment of the fee was not addressed by Stanbic or Standard Bank and shortly after the US\$6 million fee was paid into an account held for EGMA, it was withdrawn in large cash amounts.⁴

In a first for English law, there was a formal admission in this case of a failure to prevent bribery by an associated person contrary to section 7(1) BA. Standard Bank accepted that it could not avail itself of the “adequate procedures” defence to escape liability, particularly because of deficiencies in its policies around introducers and inadequacies in its training.

The DPA required Standard Bank to comply with the recommendations of an independent auditor, to continue to cooperate with the SFO and to pay a total financial settlement of US\$32.2 million, including compensation for the government of Tanzania, confiscated profits and fines. Sir Brian Leveson assessed and ultimately approved the DPA’s terms.⁵

Sir Brian Leveson considered that the financial penalty imposed as part of a DPA must broadly reflect the fine which would be imposed following a conviction after a guilty plea. He therefore concluded that the terms of the

² For a more detailed analysis of the Guideline, please see our client note, [here](#).

³ For further information on DPAs, please see our client note [here](#).

⁴ For further details of the facts of the case, please see our client note [here](#).

⁵ The preliminary and final decisions were released on 4 November and 30 November 2015 respectively. Links to documents relating to the DPA and the court’s approval can be found on the SFO’s press release about the case, [here](#).

DPA should be considered alongside the Guideline, even though Standard Bank had not been convicted of an offence and was not being sentenced in criminal proceedings.

Compensation

Sir Brian held that a payment for compensation was “*a necessary starting point for any DPA*”. He considered the compensation required to be the US\$6m “placement fee” paid to EGMA as this fee would otherwise have been paid to the government of Tanzania. To this he added just over US\$1.5m in interest.

Confiscation

Although he did not expressly cite the Guideline as one of his considerations, Sir Brian’s approach to confiscation mirrored that of the Guideline exactly. He found the appropriate amount to be confiscated to be the full amount of the fee which Standard Bank and Stanbic had received for acting as joint lead managers on the transaction, equivalent to US\$8.4 million. No allowance was made for the costs incurred by Standard Bank in relation to the transaction. However, it has been argued by commentators that the confiscation did not go far enough, as it did not take into account any profits made by Standard Bank on the trading of the bond on the secondary market, or any improvement of the market position of Standard Bank as a result of its role on the placement.

Calculating the financial penalty

Sir Brian considered Standard Bank’s culpability to be increased by the involvement of government officials and pointed to “*the significant albeit not intentional role*” that Standard Bank played in the bribery. Although the bank had procedures in place, they were insufficient to address the relevant bribery risks, which had not been properly considered. The judge held that culpability could be assessed either at a high level and multiplied by a figure in the lower or middle part of the penalty range for such an offence, or at a medium level but subjected to a multiplier at the higher end of the penalty range. The SFO had opted for the latter approach, which the judge considered reasonable. In his assessment, Sir Brian acknowledged the flexibility of the factors set out in the Guideline, which he said “*are not intended to constitute watertight compartments but rather a continuum to be used by the court properly to assess culpability*”.

The harm figure had already been assessed at US\$8.4 million. The penalty for an offence of this type with a medium level of culpability is within a range of 100% to 300%. Sir Brian considered the relevant factors and concluded that a multiplier of 300% was appropriate in the circumstances, equivalent to a fine of US\$25.2 million. He noted that regulatory enforcement measures had already been in train at the time, (the FCA had been conducting an anti-money laundering investigation), which he considered to be an aggravating factor. He also considered there to have been substantial harm to the public, as the US\$6 million which was paid to EGMA would otherwise have been paid to the Tanzanian government to fund development work.

However, Sir Brian also noted a number of mitigating factors, including the decision by Standard Bank to self-report, its cooperation with the SFO investigation, its lack of previous convictions and the assessment that there was no evidence of wider failures within the bank. It was also noted that the offence took place when Standard Bank was under different ownership and that the relevant business unit was no longer owned by Standard Bank. Save for the fact that the relevant business unit was no longer owned by the bank, these factors are all included in the non-exhaustive list of aggravating and mitigating factors to determine the level of harm caused by an offence set out in the Guideline. However, taking into account the profitability of Standard Bank at the relevant time and the penalty which was also to be imposed in the US, he concluded that the 300% multiplier factor imposed was appropriate.

Sir Brian also considered step seven of the Guideline, which requires a reduction to be applied to a fine imposed for a guilty plea. As a result of the prompt self-reporting of Standard Bank and its subsequent cooperation with the SFO, the judge considered a full reduction of one third was appropriate in the circumstances.

Smith & Ouzman Ltd

The offence and penalty

The sentencing of Smith & Ouzman Ltd ("S&O") is notable as the first conviction after trial of a corporate for offences of bribery of foreign public officials, brought by the SFO. S&O is based in Eastbourne and specialises in the printing of security documents, such as ballot papers and certificates. It was found that S&O had made corrupt payments of just over £395,000 to public officials in Kenya and Mauritania between November 2006 and December 2010 contrary to section 1(1) of the Prevention of Corruption Act 1906, the legislation which preceded the Bribery Act 2010.

At trial, in November 2014, the company and two executives were convicted of corruption offences. While the individuals were sentenced on 12 February 2015, S&O itself was not sentenced until 8 January 2016, when Recorder Andrew Mitchell QC ordered the company to pay £2.2 million, consisting of a fine of over £1,300,000, a confiscation order of almost £900,000 and £25,000 in costs.

Counsel for S&O had argued that since the offences had been committed under the Prevention of Corruption Act 1906 and not under the BA, the Guideline did not apply. However, Recorder Mitchell QC disagreed and in his sentencing, he made considerable use of the Guideline. His sentencing remarks have not yet been published and so the consideration of his application of the Guideline below is based on secondary reports of his decision.

Compensation

Recorder Mitchell QC did not order any compensation in this case. He acknowledged that the people of Kenya and Mauritania were the victims of

the offence but he based his decision not to award compensation on the lack of any request for compensation from the Kenyan or Mauritanian governments and on the lack of any assurance that any compensation paid would be delivered into the “*right hands*”.

Confiscation

Instead, Recorder Mitchell QC moved straight to a consideration of the second stage of the Guideline, confiscation of profits. He ordered the confiscation of £881,158 from S&O, calculated by an analysis of the gross profit made on the related contracts (£438,933), to which he added the value of the bribes paid, resulting in the final amount for confiscation of £881,158.

Calculating the financial penalty

Following the process set out in steps three and four of the Guideline, Recorder Mitchell QC considered the culpability of S&O and applied a multiplier factor for the harm caused. He considered the culpability of S&O to be in the “high” category, basing this decision on a number of factors, including:

- the considerable involvement of S&O’s directors in the planning and organising of the bribes;
- the payment of the bribes to public officials;
- the continuation of the practices over a sustained period;
- the abuse of S&O’s dominant market position; and
- the intention to make financial gain on the payment of the bribes.

As a result of the classification of the culpability as “*high*”, the starting point for the multiplier for the harm caused was 300% and the relevant range of possible multipliers was between 250% and 400%. Recorder Mitchell QC concluded that a multiplier of 300% was appropriate and he applied this to the “gross profit” figure of £438,933 calculated previously, resulting in a fine of £1,316,799.

Although the fine imposed on S&O was not amended further, the judge “stepped back” as required by the Guideline and took account of the submission that the sum was considerable in the context of the size of S&O’s business. Acknowledging that he did not wish to put S&O out of business, Recorder Mitchell QC ordered that the fine was to be paid over five years, in six monthly instalments.

Sweett Group plc

The offence and penalty

The third case in the series concerns Sweett Group plc (Sweett), a long-established British company specialising in the provision of construction and property management services. Sentencing took place on 12 February 2016 and 19 February 2016 at Southwark Crown Court, before HHJ Martin Beddoe.

Following allegations in the Wall Street Journal of irregularities in Sweett's involvement in a contract-bidding process for a hospital in the Middle East in 2010, Sweett had commissioned an internal investigation into the activities of its wholly-owned subsidiary, Cyril Sweett International ("CSI"). This investigation uncovered a potential bribery offence by CSI relating to a service contract for a Dubai hotel.

The allegation was that CSI had made a payment of £680,000 to North Property Management ("NPM"), a company run by a local business man, Khaled Al Badie. The payment to NPM was said to be in respect of "hospitality development services" and "feasibility studies" but no such work was ever undertaken. Al Badie also sat on the investment board of a Dubai-based company, AAAI, which later awarded a consultancy contract for a deluxe hotel complex, worth £1.6 million, to CSI. It was alleged that the payment to NPM was a bribe to Al Badie in return for the awarding of the hotel contract. In fact, HHJ Beddoe found that the contract with NPM was "*a sham*" and nothing more than "*a vehicle to provide a bung*" to Al Badie.

The allegations came to the attention of the SFO. In July 2015 Sweett acknowledged to the SFO that it did not have adequate procedures in place to prevent persons associated with it (in this case, its Dubai subsidiary, CSI) from committing bribery and on 9 December 2015 the SFO announced that it had formally charged Sweett with an offence under section 7 of the Bribery Act 2010. Sweett indicated that it would be pleading guilty to the offence, which proceeded straight to sentencing. Sweett has now closed down its operation in the Middle East and North Africa.

The judge ordered Sweett Group to pay £2.25 million in total, comprising £850,000 in confiscation, a £1.4 million fine and £95,000 in costs to the SFO. No order was made in respect of compensation.

Confiscation

The sum for confiscation was assessed to be the gross profit CSI expected to gain from the hotel contract, some £1.6m less costs, which came to approximately £851,000. HHJ Beddoe ordered that this be paid within three months of the order.

Calculating the financial penalty

HHJ Beddoe had no hesitation in finding that the offending conduct fell within the high level of culpability. He pointed to a number of factors for this decision:

- the offending conduct had continued over a period of time, some 18 months in total;
- while there was no evidence that senior management at Sweett knew about the bribe, they "wilfully ignored" warning signs. For example, the company had taken no action following two reports by KPMG raising concerns about the way in which CSI was operating;

- there had been no real effort, since the BA come into force, to implement measures to prevent wrongdoing of this sort from occurring;
- the contract with NPM was “*so obviously a bribe*” that the judge considered that “*bribery seemed to be considered an acceptable practice at least by some in senior management of CSI (for which [Sweett] was directly responsible)*”.

The harm engendered by the wrongdoing was held to be the profit intended to be made by it, already assessed as £850,000.

The starting point for high culpability is 300%. However, the Guideline also sets out factors that can reduce the seriousness of the offence or reflect mitigation. HHJ Beddoe took into account the fact that Sweett had no previous convictions for similar conduct and had progressively cooperated with the SFO, leading him to adopt a figure at the bottom of the range for high culpability of 250%. Sweett had pleaded guilty before trial, so the fine was reduced by a third in accordance with the relevant policy. However, the judge refused to accept arguments that Sweett’s financial position meant that figure should be reduced further, saying that since the company had spent £2.5 million investigating the allegations in the first place, it had shown it could afford to pay a £1.4 million fine. In addition, he was of the view that the fine would not prevent Sweett from implementing an adequate compliance programme or affect Sweett’s employees adversely. However, he ordered that the fine could be paid in instalments over the next two years.

Themes in sentencing practice

What themes can be drawn out about sentencing practice from these three cases and what should future defendants expect?

- The “culpability” factors appear relatively clear and measurable, although there remains the problem of assessing the role played by the company as opposed to the individuals acting on its behalf. Proving that the “directing will and mind” of the company was involved in the wrongdoing remains an issue for prosecutors, who are continuing to call for the law in this area to be reviewed.
- In some cases the “harm” caused can be determined relatively precisely, such as the value of a contract won but in others, for example, where “harm” falls to be determined as a percentage of “relevant revenue”, it can be hard to ascertain.
- A significant judicial discretion remains in assessing where on the range of penalty the wrongdoing falls. The starting point for high culpability is the same as the upper level for medium culpability. In these cases Standard Bank’s conduct, assessed as “medium culpability”, merited the same percentage fine (300%) as Smith & Ouzman, whose conduct had been assessed as “high culpability”. Sweett, whose conduct was also assessed as “high culpability”, was penalised by a lesser percentage (250%).

- The judges in these three cases all recognised the need to serve the public interest in their sentences, including refraining from imposing such a high fine that the company went out of business and ensuring that sufficient resources remain available to the company so that it could implement an effective compliance policy (itself a matter of public interest).
- While compensation is the first issue to consider under the Guideline, in only one of the three cases was an order made for compensation. In bribery cases there may not always be an identifiable victim to compensate.

Lessons for companies

- Assess the relevant risk: all these cases involved high risk jurisdictions, while two of the three involved dealings with public officials or politically exposed persons.
- Ensure adequate procedures are in place: in two of the cases the company was penalised for failing adequately to supervise and monitor the activities of its subsidiaries. Ignoring obvious risks, even if not actually aware of wrongdoing, will not be excused.
- Prosecutors expect co-operation: advice should always be taken on the potential outcomes of a failure to comply with external investigations. Internal investigations, where there is a possibility of later external enforcement action, should be undertaken with appropriate legal advice.
- The ability of companies to carry out their own internal investigations into matters also being investigated by the SFO: conflicting opinions have been expressed by lawyers and prosecutors and advice should always be sought in these circumstances.
- The question of whether first account witness statements are privileged from disclosure to investigating authorities is a hot topic at the moment: conflicting opinions have been expressed by lawyers and prosecutors and advice should always be sought in these circumstances.

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