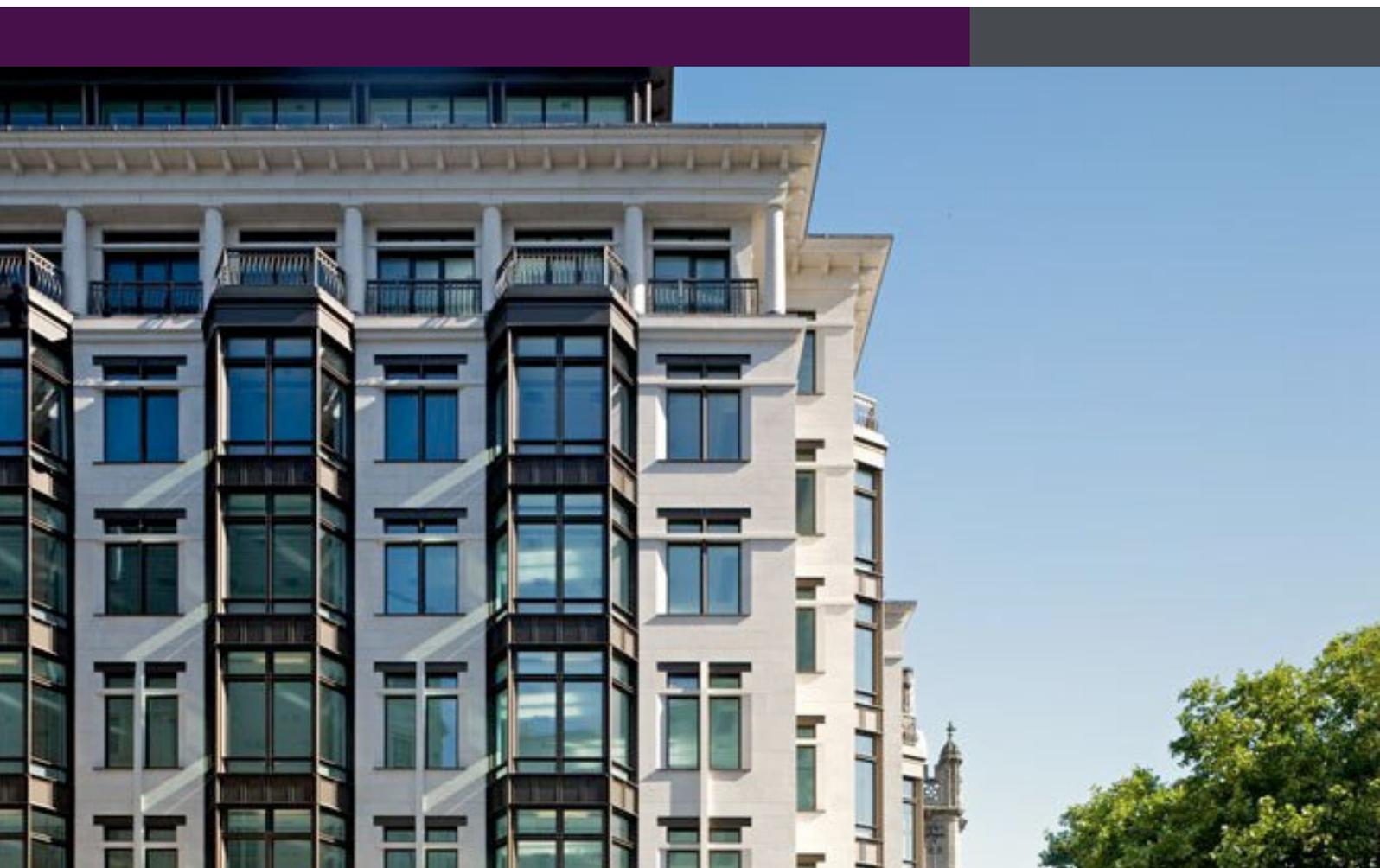


# Sentencing of Corporate Offenders in the UK

## A Practical Guide



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## Introduction

On 1 October 2014, the Sentencing Council's Definitive Guideline for Fraud, Bribery and Money Laundering Offences ("the Guideline") will come into force, providing for the first time a framework for the sentencing of corporate offenders in the UK. The Guideline, which was created as part of a package to support the introduction in the UK of Deferred Prosecution Agreements ("DPAs") earlier this year, contains a ten-step process to be followed by the criminal courts when sentencing corporations for fraud, bribery and money laundering offences.<sup>1</sup> This publication aims to provide a practical, working guide to that process, linking the reader to relevant material.

Although it is not officially a guideline for DPAs (which will only be made where there is no conviction and are therefore beyond the statutory remit of the Sentencing Council), the Guideline is intended to be used as a point of reference when financial penalties within DPAs are being considered and

negotiated. The legislation underpinning DPAs provides that the financial penalty agreed should be broadly comparable to the fine that a court would have imposed on conviction following a guilty plea.<sup>2</sup> For further information on DPAs, see our earlier publication *Deferred Prosecution Agreements: A Practical Guide*.

However, as long as the difficulties of establishing corporate criminal liability remain, it is questionable whether the availability of DPAs and the coming into force of the new Guideline will lead to a significant change in the way that corporate offenders are dealt with in the UK. David Green QC, the Director of the Serious Fraud Office, has repeatedly spoken out in favour of extending the principle contained in section 7 of the Bribery Act (failure of a corporation to prevent bribery by its employees) to other financial crimes. Such a change in the law, were it to be introduced, would make the prosecution of corporations far easier to achieve and therefore

significantly increase the incentives for corporations to enter into DPAs. It appears that this proposed extension of the criminal law is making some political friends and may now be much more likely to happen than not, but its scope and timing remain unclear.

As recognised by the Sentencing Council in its consultation on the Guideline, there have been few criminal prosecutions of organisations for the offences covered and there is consequently no established corporate sentencing practice in the UK. In designing the Guideline, the Sentencing Council drew instead upon a variety of sources including: regulatory and civil penalty regimes used by the UK enforcement authorities; the existing sentencing guidelines for corporate manslaughter; and civil and criminal penalties imposed in other jurisdictions, notably the US ([click here](#) for further information on the sentencing of corporations for economic crime in the US).

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<sup>1</sup> "Corporation" covers any organisation or body, including partnerships and charities. The Guideline also sets out processes relating to the sentencing of individuals, but these are outside the scope of this publication.

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<sup>2</sup> Paragraph 5(4) of Schedule 17 of the Crime and Courts Act 2013.

The Guideline applies to corporate bodies sentenced on or after 1 October 2014, and the offences covered are:

- Bribery offences contrary to sections 1, 2, 6 and 7 the Bribery Act 2010 (including the failure of a commercial organisation to prevent bribery)
- Money laundering offences contrary to sections 327, 328 and 329 of the Proceeds of Crime Act 2002
- Conspiracy to defraud
- Fraud offences contrary to sections 1, 6 and 7 of the Fraud Act 2006
- False accounting contrary to section 17 of the Theft Act 1968
- Cheating the public revenue
- Fraudulent evasion of VAT contrary to section 72 of the VAT Act 1994
- Fraudulent evasion of duty contrary to section 170 of the Customs and Excise Management Act 1979

The diagram on the following page shows the ten-step process to be followed by the criminal courts when sentencing corporate offenders for the offences above. By clicking on each step, the reader will be taken to the corresponding notes. Links to relevant materials are set out below.

[\*Sentencing Council's Definitive Guideline for Fraud, Bribery and Money Laundering Offences\*](#)

[\*Fraud, Bribery and Money Laundering Guideline: Consultation\*](#)

[\*Fraud, Bribery and Money Laundering: Corporate Offenders – Response to Consultation\*](#)

[\*Deferred Prosecution Agreements: A Practical Guide\*](#)

This publication has been prepared by the WilmerHale Investigations and Criminal Litigation team, which specialises in the full spectrum of white collar crime and financial services enforcement work.

# Sentencing Corporate Offenders in the UK Process Overview

*Click on each numbered step of the sentencing process to be taken to the corresponding notes*



# Sentencing Corporate Offenders in the UK

## Accompanying Notes

To be read in conjunction with the Process Overview

### 1 COMPENSATION

The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such an amount as the court considers appropriate, having regard to the evidence and to the means of the offender. Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty. Reasons should be given if a compensation order is not made.

The court's power to make a compensation order is contained in [section 130 of the Powers of Criminal Courts \(Sentencing\) Act 2000](#).

### 2 CONFISCATION

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate. Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation – see [Step 1](#)).

The court's power to make a confiscation order is contained in sections 6 and 13 of the [Proceeds of Crime Act 2002](#).

### 3 DETERMINING THE OFFENCE CATEGORY

The court will determine the offence category with reference to the offender's culpability and the harm caused.

#### CULPABILITY

For the purposes of sentencing, a corporation's culpability is assessed as either "high", "medium" or "lesser". The Guideline states that culpability may be demonstrated by one or more of the following non-exhaustive characteristics. Where there are characteristics present which fall under different categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

#### High culpability (A)

- Corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)
- Wilful obstruction of detection (for example destruction of evidence, misleading investigators, suborning employees)
- Involving others through pressure or coercion (for example employees or suppliers)
- Targeting of vulnerable victims or a large number of victims
- Corruption of local or national government officials or ministers

- Corruption of officials performing a law enforcement role
- Abuse of dominant market position or position of trust or responsibility
- Offending committed over a sustained period of time
- Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place<sup>1</sup>

#### Medium culpability (B)

- Corporation plays a significant role in unlawful activity organised by others
- Activity not unlawful from the outset
- Corporation reckless in making false statement<sup>2</sup>
- All other cases where characteristics for categories A or C are not present

#### Lesser culpability (C)

- Corporation plays a minor, peripheral role in unlawful activity organised by others
- Some effort made to put bribery prevention measures in place but insufficient to amount to a defence<sup>3</sup>
- Involvement through coercion, intimidation or exploitation

<sup>1</sup> Only applies to a conviction for an offence under section 7 of the Bribery Act 2010.

<sup>2</sup> Only applies to a conviction for an offence under section 72 of the VAT Act 1994.

<sup>3</sup> Only applies to a conviction for an offence under section 7 of the Bribery Act 2010.



## HARM

Harm is represented by a financial sum calculated by reference to the amount obtained or intended to be obtained (or loss avoided or intended to be avoided).

Offence	Calculation of Harm
Fraud Conspiracy to defraud Cheating the Revenue Fraudulent evasion of duty or VAT	The appropriate figure will normally be the actual or intended gross gain to the offender.
Bribery Act offences	The appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences under section 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery.
Money laundering	The appropriate figure will normally be the amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher.
General	Where the actual or intended gain cannot be established, the appropriate measure will be the amount that the court considers was likely to be achieved in all the circumstances.

If there is insufficient evidence of gain or loss, the court may calculate the harm figure as 10-20 per cent of the organisation's relevant revenue. It is suggested in the Guideline that the "relevant revenue" may be the worldwide revenue derived from the product or business area to which the offence relates, for the period of the offending. There is no guidance as to how the court should determine the "product or business area to which the offence relates", and this may prove to be a significant

challenge given the wide range of corporate structures that exist.<sup>4</sup>

There may be large cases of fraud or bribery in which the true harm is to commerce or markets generally. The Guideline makes clear that these may

justify adopting a harm figure beyond the normal measures set out in [Step 3](#).

<sup>4</sup> The Sentencing Council stated, in its response to the consultation on the Guideline, that the section on harm was drafted "with the intention of encouraging corporate offenders to co-operate with the court by providing sufficient information to calculate the harm".



## 4 STARTING POINT AND CATEGORY RANGE

Having determined the culpability level at **Step 3**, the court will use the table below to determine the appropriate starting point.

The harm figure calculated at **Step 3** is multiplied by the relevant percentage figure representing culpability.

	Culpability Level		
	A (High)	B (Medium)	C (Lesser)
Harm figure multiplier	Starting point <b>300%</b>	Starting point <b>200%</b>	Starting point <b>100%</b>
	Category range <b>250% to 400%</b>	Category range <b>100% to 300%</b>	Category range <b>20% to 150%</b>

Once it has determined the appropriate starting point, the court will consider any adjustment within the corresponding category range for any aggravating or mitigating features. It will do this

with reference to the non-exhaustive list of factors below, and it may move outside the identified category range if it considers it appropriate to do so.

Factors increasing seriousness	Factors reducing serious or reflecting mitigation
Previous relevant convictions or subject to previous relevant civil or regulatory enforcement action	No previous relevant convictions or previous relevant civil or regulatory enforcement action
Corporation or subsidiary set up to commit fraudulent activity	Victims voluntarily reimbursed/compensated
Fraudulent activity endemic within corporation	Corporation cooperated with investigation, made early admissions and/or voluntarily reported offending
Attempts made to conceal misconduct	Offending committed under previous director(s)/manager(s)
Substantial harm (whether financial or otherwise) suffered by victims of offending or by third parties affected by offending	Little or no gain to corporation from offending
Risk of harm greater than actual or intended harm (for example in banking/credit fraud)	
Substantial harm caused to integrity or confidence of markets	
Substantial harm caused to integrity of local or national governments	
Serious nature of underlying criminal activity (money laundering offences)	
Offence committed across borders or jurisdictions	

[<< Back to Process Overview](#)



The Guideline makes clear that the court should determine the level of fine in accordance with [section 164 of the Criminal Justice Act 2003](#), which requires that the fine reflect the seriousness of the offence and that the court take into account the financial circumstances of the offender. Companies will be expected to provide their annual accounts for the last three years, to enable the court to make an accurate assessment of their financial status.

## 5 ADJUSTMENT OF FINE

Having determined the level of fine (see [Step 4](#)), the court considers whether there are any further factors which indicate that an adjustment is required. The Guideline states that the court should “step back” at this stage and consider the overall effect of its orders, the combination of which ought to achieve the removal of all gain; appropriate additional punishment; and deterrence. In determining whether the fine should be increased or reduced, the court may consider the following, non-exhaustive list of factors:

- Whether fine fulfils the objectives of punishment, deterrence and removal of gain
- Value, worth or available means of the offender
- Whether fine impairs offender’s ability to make restitution to victims
- Impact of fine on offender’s ability to implement effective compliance programmes

- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
- Impact of fine on performance of public or charitable function

The fine must be substantial enough to have a real economic impact. However, the court should ensure that the fine is proportionate, having regard to the size and financial position of the organisation and the seriousness of the offence. A relevant factor will be whether the fine will put the organisation out of business, although the Guidance makes clear that this may be an acceptable consequence in some “bad cases”.

In considering the ability of the organisation to pay any financial penalty, the court can allow time for payment or order that it be paid in instalments.

## 6 FACTORS INDICATING A REDUCTION

Having considered whether an adjustment of the fine is required (see [Step 5](#)), the court will consider any additional factors which tend towards a reduction of the fine, such as assistance to the prosecution. The court should take into account sections 73 and 74 of the [Serious Organised Crime and Police Act 2005](#), by virtue of which an offender may receive a discounted sentence as a result of assistance given (or offered) to the prosecutor or investigator.

## 7 REDUCTION FOR GUILTY PLEAS

The court should take into account any potential reduction in the level of fine for a guilty plea, in accordance with [section 144 of the Criminal Justice Act 2003](#) and the [Guilty Plea Guideline](#).

## 8 ANCILLARY ORDERS

The court must consider whether to make any ancillary orders. This could include, for example, a deprivation order and/or a serious crime prevention order.<sup>5</sup>

## 9 TOTALITY PRINCIPLE

If sentencing an offender for more than one offence, the court will consider whether the total sentence is just and proportionate to the offending behaviour.

## 10 REASONS

[Section 174 of the Criminal Justice Act 2003](#) imposes a duty on the court to give reasons for, and to explain the effect of, any sentence passed.

<sup>5</sup> Under section 19 of the Serious Crime Act 2007.

## The New UK Sentencing Guideline: a step towards cross-border harmonisation?

Investigations conducted jointly by authorities on either side of the Atlantic have become commonplace, particularly those focused on multi-national corporations suspected of overseas corruption. The new UK sentencing guideline (“the UK Guideline”) is a further step, together with the introduction of deferred prosecution agreements (“DPAs”) earlier this year, towards greater assimilation with the US in the area of corporate criminal law enforcement. The UK Guideline aims to increase certainty of outcome whilst recognising the need for flexibility, and it is no doubt hoped that companies will be more inclined to engage with UK prosecuting authorities as a result. In drawing upon the equivalent guideline issued by the United States Sentencing Commission, it may also open the way for a greater degree of parity with corporate sentences in the US, where the authorities are perceived to be better equipped to punish corporate offending than in the UK. However, as long as the threshold for corporate criminal liability in the UK remains comparatively difficult to surmount, the UK authorities may yet struggle to keep up with their US counterparts.

### THE BENEFIT OF CERTAINTY

It has commonly been said that the sentencing process for corporate offenders in the UK lacks transparency, creating significant uncertainty as to the likely consequences of conviction. In contrast, the US federal system has a more prescriptive and mathematical sentencing

process that allows companies and their legal advisors to estimate the likely range of sentence for any given conduct.<sup>1</sup> The need for a greater degree of certainty to be injected into the UK system became more pressing upon the introduction of DPAs, given that their terms require judicial endorsement. Faced with greater certainty of outcome, companies may be less hesitant to self-report misconduct and better equipped to make informed decisions during the plea-bargaining process.

So, does the new UK Guideline provide a level of certainty similar to that afforded by its US equivalent? The United States Sentencing Guidelines for corporate defendants (“the US Guidelines”) provide for criminal fines based upon (1) the misconduct in question and (2) the defendant’s culpability. Each offence subject to the US Guidelines is assigned a “base offence level,” which corresponds to a dollar amount.<sup>2</sup> Crucially, either this amount or the amount of gain to, or loss caused by, the defendant as a result of its offence serves as the base fine, whichever is greatest. A defendant may therefore anticipate what base level fine will be applicable with a certain degree of confidence. For example, the base level fine for a Foreign Corrupt Practices Act violation involving a bribe that benefited

the defendant by more than \$20 million is likely to be \$28.5 million.

Like the UK Guideline, the base fine is then multiplied by a defendant’s “culpability score” to establish a fine range. All defendants start with a score of five; points are then added or subtracted based on the presence of various factors, for example previous history, presence of an effective compliance and ethics programme, self-reporting/cooperation, and acceptance of responsibility.<sup>3</sup> The resulting culpability score corresponds to a minimum and maximum multiplier applied to the base fine.<sup>4</sup>

Where within the recommended range the fine should fall is determined by a consideration of eleven factors, including: the need for the fine to reflect the purposes of sentencing, the organisation’s role in the offence, the collateral consequences of conviction and the presence or absence of an effective compliance and ethics programme.<sup>5</sup> In addition, the US Guidelines identify circumstances warranting a departure from the recommended range, for example where the defendant provides substantial assistance to authorities, or where the offence results in death or threatens national security, the environment, or a market.<sup>6</sup>

On their face, therefore, the respective guidelines bear similarities. However, there are salient differences which are likely to make sentencing less predictable

<sup>1</sup> It is worth noting that the US Guidelines are advisory rather than mandatory in nature and that, although judges must consult them when determining sentence, different courts have historically accorded different weight to them. In the UK, a court must follow any relevant sentencing guidelines unless it is contrary to the interests of justice to do so (Coroners and Justice Act 2009, s.125).

<sup>2</sup> USSG § 8C2.4.

<sup>3</sup> *Id.* § 8C2.5(b)-(g).

<sup>4</sup> *Id.* § 8C2.6

<sup>5</sup> *Id.* § 8C2.8.

<sup>6</sup> *Id.* § 8C4.1-.11.



in the English courts. Firstly, the UK Guideline leaves the determination of how much weight is to be accorded to any given factor relevant to culpability up to the discretion of the judge. In contrast, the US Guidelines assign specific numerical weight to various factors bearing on the presumptive fine range. Secondly, the US system allows for an adjustment of the fine at the end of the process under specific, enumerated circumstances. The UK Guideline is less prescriptive, allowing for adjustment where the penalty is deemed insufficient to fulfil the purposes of punishment or deterrence.<sup>7</sup>

## INSTITUTIONAL DIFFERENCES

To the extent that the UK Guideline is less prescriptive and precise than its US equivalent, any resulting uncertainty is compounded by institutional and procedural differences. A company's willingness to self-refer and enter openly into plea discussions is inevitably dampened if the court can subsequently interfere with any agreement reached. English courts have shown little compunction about challenging bases of pleas which do not adequately reflect the alleged misconduct. Thomas LJ commented in the *Innospec* case on the need for a court to “*rigorously scrutinise in open court in the interest of transparency and good governance the basis of that plea*

*and see whether it reflects public interest.*<sup>8</sup> In the BAE case, Justice Bean refused to accept any interpretation of the basis of plea which excluded the conclusion that payments had been improperly used. In contrast, BAE Systems pleaded guilty in the US courts, without judicial challenge, to conspiring to make false statements to the government, even though the underlying conduct involved allegations that BAE made payments to third parties that were likely shared with foreign officials.

Challenging a basis of plea, whilst relatively common in the English courts,<sup>9</sup> is rare in the US. The US system allows prosecutors a greater role in shaping the litigation and dictating its eventual outcome, and courts are less inclined to intervene. Plea discussions in the US are regularly held prior to indictment such that the papers subsequently filed in court reflect only the charges to which the defendant has already agreed to plead.<sup>10</sup>

Precise and mathematical guidelines facilitate and encourage these plea negotiations. They serve as a point of reference for predicting a defendant's risk exposure, and thereby influence the terms of the indictment and the conduct described therein. For example, defendants in the US can sometimes negotiate pleas to certain offences so as to avoid damaging collateral consequences (such as debarment from procurement

contracts or exclusion from federally funded health care programs) that would accompany a plea to other charges.

In addition, US plea agreements may provide a binding recommendation for a sentence, where the judge must impose the recommended sentence (or a sentence within the recommended range) if he or she accepts the plea.<sup>11</sup> Thus, a defendant may guarantee what penalty it will face after entering its plea.<sup>12</sup>

## COMPARABLE PENALTIES?

In the *Innospec* case, Thomas LJ emphasised the need for financial penalties imposed in different jurisdictions for bribery offences to be comparable. The public policy driving this position is a protection against companies effectively “forum shopping” when deciding to which authority to report. Until there has been an opportunity to observe how the UK Guideline operates in practice, it is difficult to conduct a comparative analysis of the US and UK guidelines in order to determine the extent to which this ambition has been fulfilled. However, on the basis of the following observations one can have some degree of confidence that the UK Guideline is at least conducive to achieving a greater degree of parity than has existed to date:

<sup>7</sup> It should be noted that both guidelines allow for an uplift where the total penalty imposed (inclusive of confiscation/compensation and restitution or other remedial measures, respectively) is less than the total amount the company profited. In the US this uplift is mandatory, whereas under the UK Guideline it is discretionary.

<sup>8</sup> Paragraph 27 of sentencing remarks of Thomas LJ in *R v Innospec* (2010). Full text can be found [here](#).

<sup>9</sup> A judge's discretion as to whether or not to endorse a basis of plea is formalised in part IV of the Consolidated Criminal Practice Direction.

<sup>10</sup> This is still relatively rare in the UK, despite the publication in 2009 of the Attorney General's Guidelines on Plea Discussions in Cases of Serious and Complex fraud.

<sup>11</sup> Fed. R. Crim. P. 11((c)(1)(C). Alternatively, plea agreements may contain a non-binding recommendation for sentence. Fed. R. Crim. P. 11((c)(1)(B). In that case, the judge may accept the plea without having to follow the recommendation (and the defendant may not withdraw its plea, even if a non-recommended sentence is imposed).

<sup>12</sup> However, the court will accept a recommended sentence only if it is within the US Guidelines or departs for justifiable reasons. USSG § 6B1.2(b) & (c).

- The UK Guideline's starting point is the amount obtained or intended to be obtained from the offending behaviour (or loss to be avoided or intended to be avoided). The US Guidelines will use that figure if it is higher than that attached to the relevant base offence level.
- The culpability multipliers appear to be relatively similar, both sharing a maximum multiplier of 400 per cent.
- The factors listed for adjusting the penalty at **Steps 5 and 6** in the UK Guideline overlap, to some degree, with factors affecting penalties under the US Guidelines. The UK factors are also non-exhaustive, and thus there is in theory no reason why a court could not rely on the public policy point raised by Thomas LJ in justifying an adjustment to achieve parity.

That said, underpinning any negotiations with the SFO will be a careful consideration of whether, absent any form of settlement, a criminal prosecution would be likely to follow. As the government acknowledged in its consultation on DPAs, it is difficult to prosecute companies for criminal offences in the UK because the threshold for criminal liability attaching to a corporate entity is high. This inevitably means that the balance of power is more evenly weighted between prosecutor and defendant in the UK than it is in the US, with the result that prosecutors may yet struggle to achieve the results of their US counterparts.

## CONCLUSION

The UK Guideline provides much needed clarity over the sentencing process that companies can expect when considering their options upon the discovery of misconduct, and may also go some way towards addressing concerns over forum-shopping as articulated in *Innospec*. However, in successfully combatting multi-national misconduct in the US and the UK, the need for cooperation and parity of approach will only increase. As we continue to ask ourselves why the US authorities are more successful in holding companies to account than their UK counterparts, the next focus for criminal law reform in the UK may well be the area of corporate liability.

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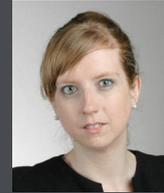


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