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City of London Law Society Corporate Crime Committee Response to Consultation on Sentencing Guidelines for Fraud, Bribery and Money Laundering Offences

INTRODUCTION

The members of the Corporate Crime Committee of the City of London Law Society ("the Committee") advise corporate clients and individuals on matters of criminal law. The members participate in the Committee as individuals and the Committee's views are not necessarily those of its members' firms or chambers.

The Committee welcomes these guidelines. It is obviously right for sentencing to be as predictable as possible, consistent with the overriding obligation to do justice according to the circumstances of each case. The guidelines should make it easier for practitioners to provide clients with appropriate advice.

The Committee generally supports the proposed methodology for calculating sentences – i.e. determining the category (and thus the starting point and range of sentence) according to the culpability of the offender and the harm caused, to be followed by considering after-the-event factors such as cooperation and plea. It may assist public understanding if the steps and categories of sentencing were explained by way of a graph or flow-chart. The Committee further supports the purpose of the sentencing methodology which is to promote consistency of sentencing in international cases.

The Committee notes that the proposed guidelines do not fully overlap with the guidance issued by the Serious Fraud Office and Director of Public Prosecutions in relation to the prosecution of corporate crime and the prosecution of offences under the Bribery Act 2010. The sentencing guidelines are more detailed, which is to be welcomed.

RESPONSES TO QUESTIONS

Section 3: Fraud

Q1-Q15

A1 – A15

The Committee does not have particularly developed views, as a group, in relation to these questions. The proposed approach appears sensible.

Section 4: Possessing, Making or Supply Articles for use in Frauds

A16 – A21 The Committee does not have particularly developed views, as a group, in relation to these questions. The proposed approach appears sensible.

Section 5: Revenue Fraud

Q22 – Q28

A22-28 The Committee does not have particularly developed views, as a group, in relation to these questions. The proposed approach appears sensible.

Section 6: Benefit Fraud

Q29 – Q38

A29-38 The Committee does not have particularly developed views, as a group, in relation to these questions. The proposed approach appears sensible.

Section 7: Money Laundering

Q39 Do you agree with the proposed approach to the assessment of culpability for money laundering offences

A39 Offences under Sections 328, 329 and 330 of the Proceeds of Crime Act 2002 can, in some cases, be committed without intent and in circumstances of negligence (because D has not acted on a mere suspicion of wrongdoing by others). The Committee believes that if D lacks the resources to investigate the source of the funds or assets in question, and/or is guilty by reason of negligence rather than intent or recklessness, the offence should be in Category C.

Q40 Are there culpability factors included that should be considered at Step 2 rather than Step 1? If so, which factors?

A40 No

Q41 Is the proposed two stage approach to harm assessment the correct way to assess the harm caused by money laundering?

A41 Yes.

Q42 **In scenario H two offenders are sentenced. Are their sentences proportionate in relation to their roles?**

A42 J's sentence is proportionate. As to K, one can imagine a situation in which K was in a vulnerable position vis-à-vis J and had no realistic way of discovering the truth as to the nature of the funds. In such a case, so long as there are no other aggravating factors, the starting point should not involve custody.

Q43 **Please give your views on the proposed sentence levels for money laundering offences.**

A43 See A42 above. In general, the Committee believes that individuals who did not benefit from the original criminal conduct and who lack specific intent as regards money-laundering (i.e. who were merely negligent as to suspicions of third parties) should not automatically face custody, absent other aggravating factors.

Section 8: Bribery

Q44 **Do the factors outlined above clearly reflect the levels of culpability involved in this type of offending? Please say what you would change and why.**

A44.1 The factors outlined reflect culpability appropriately, with an important exception The Committee agrees that deliberate, pre-planned corruption of a senior government official demonstrates a high level of culpability, however it should be emphasised that the mere status of the recipient of the bribe as a foreign public official (or law-enforcement officer) does not. To qualify under this head, D should both know that R is such an official and intend to corrupt him – i.e. cause him to do something which he should not do.

A44.2 We disagree with the proposition that "*offences contrary to section 6 Bribery Act 2010 (bribery of foreign public officials) would almost always fall into category A".* This seems to us to be too sweeping.

A44.3 In many parts of the world, states are deeply involved in commercial enterprises. Some enterprises are controlled by states in ways which are entirely opaque to outsiders. Many business people operating abroad lack the information which they could be expected to have in their home states. There may even be cases where corrupt officials entrap and/or defraud foreign business people. This is not to argue that there should be a "cultural" exception for bribery – the Act makes it clear that no such exception exists. Nevertheless, the practical difficulties of doing business abroad should find some recognition in sentencing, especially if no other aggravating factors are present. Where conduct either tends significantly to undermine good government or the legal system, this could be seen as an aggravating factor.

A44.4 These considerations are amplified when one considers the nature of a potential charge under section 6 of the Bribery Act. Section 6 imposes a less

exacting test for *mens rea* than sections 1 or 2. The required intention is merely to influence the official in his capacity as such, intending to obtain or retain business or a business advantage. There is no requirement that D's intention is to influence the official to do something improper, as would be the case if the official was based in the UK.

A44.5 The less exacting *mens rea* requirement means there will be breaches of section 6 of the Bribery Act which would breach section 1 because of the happenstance of a recipient's employment or the state's involvement in his employer.

A44.6 For example, D causes his company to pay for a factory-visit by R, the purchasing director of a state-owned company. R also has some modest entertainment such as dinner with his hosts. This could be charged under section 6, because the purpose of the advantage to R is to influence R in his purchasing decision. If R's company had been privatised in advance of D's approval no offence would have been committed because there would be nothing improper about R's (hoped-for) decision to recommend D's company's products and D would lack appropriate *mens rea* assuming no breach of duty occurred by the recipient accepting the hospitality.

A44.7 Leaving aside the question of whether such cases should be charged at all, from a sentencing perspective it would be wrong to place such offences in category A without other aggravating factors. The Committee would argue that cases in which D's state of mind was essentially naïve and/or careless as to the status of the recipient as a foreign public official, and there are no other category A factors, should generally be in category C.

Q45: **Do you agree with the approach to assessing harm as outlined above? Are the harm factors identified sufficiently clear whilst providing courts with the flexibility to reflect the widely different types of harm that could result from this type of offending? Please say what you would change and why.**

A45: The Committee agrees with the harm factors identified and believes that they are clearly explained in the proposed guidance.

Q**46 Do you agree with the aggravating and mitigating factors for bribery proposed at step two? If not please specify what you would change and why.**

A46: The Committee agrees with these aggravating and mitigating factors save that the Committee is not convinced that the commission of an offence across borders should in itself be an aggravating factor in an overseas corruption offence. This seems to rest on the questionable assumption that there is automatically more culpability in bribery abroad than at home. There may be concern that foreign cases place a greater burden on prosecution agencies but this is not a proper basis for sentence unless D has obstructed the investigation or structured the offending to make it more difficult to

prosecute.

Q 47. Please give your views on the proposed sentencing levels for Bribery Act offences. Please specify what you would change and why.

A47: The proposed sentencing levels seem broadly appropriate.

Section 9: Corporate Offenders

The composition of the Committee means that, inevitably, members take a particular interest in the sentencing of corporate offenders. The Committee welcomes the clarity on sentencing which the proposed guidelines can be expected to bring. It agrees with the traditional approach proposed, i.e. to establish categories by reference to culpability and harm, with aggravating or mitigating factors then applied.

For reasons already explained in A.44 above, the Committee does not believe that the corruption of public officials or law-enforcement officers should, in itself, demonstrate high culpability.

Q 50: Do you agree with the approach to assessing harm as outlined above ? Does the approach strike the right balance between flexibility and certainty? Please say what you would change and why.

A50: As to harm, the Committee agrees with the approach of establishing a base figure of the amount gained or expected to be gained (or loss avoided) as a result of the offence. If that is difficult to calculate, a default position of 10% of global revenue seems defensible. There is a useful parallel with the practice of regulating competition law. The cap on penalties for cartel activity to be imposed by the European Commission is 10% of the worldwide turnover of the offending company (not benefitting from leniency provisions).

Q51: Do you agree with the approach to calculating the financial penalty by applying a multiplier to the harm figure? Do you think that the multipliers are set at the right level? Please say what you would change and why.

A51: The Committee agrees with the approach and that the multipliers seem reasonable.

Q52: Do you agree with the aggravating and mitigating factors for corporate offenders proposed at step three? If not, please specify what you would change and why.

A52: The Committee agrees, in particular, that attempts by companies to hide wrongdoing or to create artificial structures with the express purpose of facilitating criminality are aggravating features. However, as noted previously (A46), the Committee disagrees that committing offences across borders should, of itself, be an aggravating factor.

Q53: Please give your views on the proposed step four. Do you think that it achieves the objectives of punishment, deterrence and removal of gain in a fair way? Please specify what you would change and why.

A53: The Committee agrees that the means of a corporate offender might, in some cases, be taken into account when calculating a fine. In cases where the conduct took place at a distance from central management and/or the culpability is lower this may mean tempering fines so as to avoid unnecessary harm to third parties (excluding shareholders).

The Committee agrees that whether a fine will have the effect of putting an offender out of business should normally be a relevant consideration.

However, the Committee is not unanimous in its views as to whether it "may be an acceptable consequence" for a fine to have the effect of putting an offender out of business "in some bad cases". Some feel that the court should avoid putting an offender out of business in virtually all circumstances, citing the harm to employees and creditors which such a course would cause. The point is made that other agencies such as the Insolvency Service are charged with the regulation of UK-registered companies. Others feel that there may be some cases when justice requires the imposition of a heavy fine and the fact that this might tip a firm into insolvency should not be a bar to such a sentence. If it were otherwise the deterrent effect of fines would be reduced.

The Committee is in agreement that the continued existence of a firm which has provided effective remediation should not be at risk and we expect that such firms will not qualify as a "bad case". Putting a firm out of business should never be a goal of sentencing and that, in general, courts should be wary of unintended consequences in this area.

Q54: Do you think that any further guidance should be offered at steps five to nine? Are there any particular ancillary orders that are relevant to corporate offenders that should be mentioned at step seven?

A54: It would be useful for the Council to offer more guidance on the inter-relationship between the imposition of fines and the potential use of confiscation and compensation orders. For example, it is not clear whether the calculation of a fine will take into account the fact that a compensation or confiscation order is in prospect. Such orders might be said to reduce the

harm attributable to the offence.

The Committee makes the same suggestion as regards regulatory penalties. Of course the actions of regulators are not within the control of the sentencing court and the nature of a penalty may not be known at the time the sentence is being imposed. Nevertheless penalties may have a significant impact on corporate defendants and courts should strive to consider all the material circumstances in order to avoid injustice.

Q55: Overall do you consider that the draft corporate guidance provides the sentence and the parties with sufficient guidance and flexibility? Please specify what you would change and why.

A55: See comments above.

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THE CITY OF LONDON LAW SOCIETY
CORPORATE CRIME & CORRUPTION COMMITTEE

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