

Guidance Would Be A Fine Thing



Sam Boileau, partner, and **Laura Mackett**, lawyer, at Dentons discuss the risks of companies failing to comply with environmental and safety law and the possible fines that can be imposed



Waste operators that fail to comply with environmental or safety law risk incurring financial penalties. For companies the potential size of such penalties, and therefore the level of liability risk associated with breaches, has been an area of some uncertainty.

There are a number of reasons for this. Most importantly, whilst there have been generic sentencing guidelines and principles for regulatory offences for many years, there has been an absence of clear guidance for Judges on how to impose sentences on companies for environmental and safety offences. This has tended to result in Judges taking a cautious approach. One upshot of this is that Judges have over the years been criticised for imposing inadequate fines on companies for breaches of environmental law.

This lack of certainty has been problematic for companies, especially those, like waste management companies, for whom environmental compliance is the heart of their business. Such companies generally strain every sinew to avoid breaching the law, but by the very nature of their businesses, identifying and rectifying compliance issues is part of what they do, therefore they need to understand the risks.

And it is worth noting that we are talking about a category of liability that cannot be insured. As a matter of public policy it is unlawful to insure against a criminal fine. So this is a risk that companies have to bear directly.

Two recent developments shed some

much-needed light on how companies can expect to be sentenced in relation to environmental and safety offences.

Firstly, there has been an important Court of Appeal decision on sentencing (*R v Sellafield Limited* and *R v Network*

Rail Infrastructure Limited), in which the Court gave some guidance on how large companies should be sentenced for environmental and safety offences.¹

Secondly, the Sentencing Council recently issued detailed guidelines on sentencing for environmental offences. These establish a series of starting points and ranges for fines and the circumstances in which the court should impose them. The series of fines listed ranges from £200 to £3m. We will take a look at both developments in this article.

Court of Appeal Decision

This Court of Appeal (CoA) case was an appeal against two significant fines imposed on two large companies. Since both companies perform specific and unique functions, the case is in some respects of limited general application. However, the Court of Appeal judgment contains some very important guidance relating to the sentencing of large companies, which all major operators should take note of. Of particular importance to many companies will

be the significance attributed to company accounts, company structure and corporate governance issues. It is already common practice for convicted companies to be asked to provide financial information to the court in

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order to assist it to arrive at a sentence. However, in practice the purpose of this exercise was often limited to assessing a corporate defendant's ability to pay a suitable fine.

The CoA has now made clear that the significance of financial accounts goes much deeper than the ability (or otherwise) of a company to pay. It is relevant, first of all, in the context of the general statutory purposes of sentencing as contained in the Criminal Justice Act 2003, which includes punishment, the reduction of crime and the protection of the public.

The CoA also made clear that the fine must reflect the seriousness of the offence and must, further, reflect the financial circumstances of the offender. The court ruled that this principle applies however large the company's turnover. Lord Thomas stated that "the fact the defendant to a criminal charge is a company with a turnover in excess of £1bn makes no difference to this basic approach".

The CoA went on to consider what other financial information is, or can be, relevant to sentencing a large

company. With respect to a very large company it will "always be necessary... to examine with great care and in some detail the structure of the company, its turnover and profitability as well as the remuneration of the directors."

In terms of the level of fine to be imposed on companies, the CoA reiterated the already established principle that "...the objective of prosecutions for health and safety offences in the workplace is to achieve a safe environment for those who work there and for other members of the public who may be affected. A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders".

Sentencing Council

ON 26 February 2014 the Sentencing Council published a "Definitive Guideline", setting out detailed sentencing guidelines for environmental offences. The guideline, which covers companies as well as individuals, applies to defendants sentenced on or after 1 July 2014 for breach of various environmental offences, regardless of the date of offence.

The guideline provides a step-by-step approach to calculating a fine. Broadly, the approach is similar to already established principles of sentencing in this area of law; ie, the fine depends on, amongst other things, the offence category (harm and culpability); the finances of the company; and the statutory objectives of punishment.

The guideline establishes a matrix system, with four categories of each of the following factors: harm (1, 2, 3 and 4), culpability (low/no culpability, negligent, reckless and deliberate) and company size, as determined by turnover (micro, small, medium and large). For every combination of each of these variables, the guideline lists a starting point and range for the fine. For example, Table 1 lists the fines for "large" companies (ie, companies with a turnover that exceeds £50m).

The guideline is likely to be welcomed by Judges, who will feel reassured to be given a "starting point" figure and a range from which to work when deciding upon a sentence. As with the Court of Appeal case mentioned

Large	Starting point	Range
Deliberate		
Category 1	£1,000,000	£450,000 - £3,000,000
Category 2	£500,000	£180,000 - £1,250,000
Category 3	£180,000	£100,000 - £450,000
Category 4	£100,000	£55,000 - £250,000
Reckless		
Category 1	£550,000	£250,000 - £1,500,000
Category 2	£250,000	£100,000 - £650,000
Category 3	£100,000	£60,000 - £250,000
Category 4	£60,000	£35,000 - £160,000
Negligent		
Category 1	£300,000	£140,000 - £750,000
Category 2	£140,000	£60,000 - £350,000
Category 3	£60,000	£35,000 - £150,000
Category 4	£35,000	£22,000 - £100,000
Low/No culpability		
Category 1	£50,000	£25,000 - £130,000
Category 2	£25,000	£14,000 - £70,000
Category 3	£14,000	£10,000 - £40,000
Category 4	£10,000	£7,000 - £250,000

Table 1: Fines for large companies²

previously, one of the main implications of this new guidance is the increased importance of company accounts in the sentencing process: these will become a key part in establishing the starting point for corporate fines in all environmental prosecutions.

The guideline may also receive a qualified welcome from companies, providing a degree of predictability to regulatory liability risk that hitherto was not present, at least in straightforward cases. On the other hand, given the judicial approach to environmental sentencing to date, it is fair to say that the guideline is likely to result in an increase in the overall size of fines, especially for larger companies.

Importantly, despite the detailed matrix system, the guideline reserves for the sentencing judge – as it should – a wide degree of discretion. For example, a Judge:

- need not award a fine within the stipulated ranges if it would be contrary to the interests of justice to do so (s.125(1) Coroners and Justice Act 2009)
- may impose a greater fine if a fine within the stipulated range would not remove the financial benefit of the offending
- may impose a lesser fine if a fine within the stipulated range would make it difficult or impossible for a company to comply with environmental law.

One area which the guideline does not assist with is the difficult question of how very large companies should be dealt with. The guidance states that where a defendant company's turnover "very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence". So, for companies with turnovers measured in the hundreds of millions or billions, the guideline indicates that fines of over £3m are to be expected in serious cases, but the guidance does not give a starting point or a range.

In view of the rising severity of criminal penalties, companies may wish to explore enforcement undertakings as an alternative to prosecution where this is possible. This is a form of civil sanction under the Regulatory Enforcement and Sanctions Act 2008 that can sometimes be pursued instead of a formal prosecution. It is currently not available for many waste offences, but there are proposals to expand its use, so waste companies should watch this space. [CIWM](#)

References

1. [2014] EWCA Crim 49
2. Sentencing Council: Environmental offences, Definitive Guideline, page 7

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