

The Impact of Group Companies on Sentencing in Environmental, Corporate Manslaughter, Health & Safety and Food Safety and Food Hygiene Cases

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The Sentencing Council guidelines for sentencing

The Sentencing Council has in recent years introduced new sentencing guidelines for Environmental, Corporate Manslaughter, Health & Safety and Food Safety and Hygiene Offences. All follow a similar approach where the Court is required to assess the seriousness of the offence by analysing actions or omissions and the harm caused or risked, then assessing finances which, in the case of corporate defendants, primarily relates to the size of the turnover of the offending organisation.

A number of recent decisions have brought into focus what the courts approach could be where the defendant company is a member of a group of companies or has subsidiaries of its own.

What the guidelines say

All of the guidelines make clear that the primary measure to set the starting point for any fine is the organisation's annual turnover. Adjustments are then permitted for aggravating and mitigating features and the guidelines accept that other financial factors can be considered and adjustments made to ensure the fine is proportionate, including profit, directors' remuneration, loan account and pension provision and assets disclosed by the balance sheet.

The guidelines for Environmental, Corporate Manslaughter and Food Safety and Hygiene offences go on to state:-

"Normally, only information relating to the organisation before the court will be relevant, unless it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account."

And the guideline relating to Health & Safety offences states:-

"Normally, only information relating to the organisation before the court will be relevant, unless exceptionally it is demonstrated to the court that the resources of a linked organisation are available and can properly be taken into account."

There is no definition of what is a "linked organisation" and, given its normal definition, could be interpreted to extend to any organisation with common ownership, shareholdings or other interests held.

The only difference in the guideline for Health & Safety offences is the inclusion of the word "exceptionally". There is no obvious reason why Health & Safety offences should be treated any differently. Is this simply a drafting inconsistency? Or is there an expectation that in Health & Safety cases the resources of linked organisations will only be relevant in "exceptional" cases? This raises the question what would constitute an "exceptional" case allowing a court to take into account the resources of a linked organisation?

The ordinary dictionary meaning of "exceptional" includes "unusual", "uncommon", "abnormal", "out of the ordinary", "infrequent" and "rare". In the legal context the uses of the word "exceptional" has always set a high bar.

At what stage in the sentencing exercise should the finances of a linked organisation be considered?

The guidance relating to the relevance of linked assets appears within the guidelines under the section dealing with the fine starting point and category range, albeit after the guidelines set out that the primary measure for assessing the starting point will be organisation turnover and then go on to list factors which will be relevant to fine proportionality. This suggests that the Sentencing Council intend the finances of a wider group, if relevant, to only be considered when assessing proportionality. However, it is not abundantly clear and there is certainly scope for a sentencing judge to form the view that he could consider this when assessing the starting point. In any event, when considering proportionality the guidelines confirm the Court can make upwards or downwards adjustments including adjustments "outside of the range".

This raises the issue of whether the Sentencing Guidelines are skirting close to the issue of piercing the corporate veil, something which the court have repeatedly shown a reluctance to do. If linked assets are only to be considered as part of proportionality then the guidelines are perhaps less likely to be accused of offending the principles of corporate structure.

Notwithstanding these drafting curiosities, some recent decisions have considered the guidelines and in particular the resources of linked organisations and this may assist to understand the court's approach.

Recent cases

In March 2016 the Court of Appeal considered a sentence imposed at Chester Crown Court under the environmental guideline. Ineos Chlorvinyls Ltd pleaded guilty to a number of breaches of the Environmental Permitting Regulations 2010. Ineos was part of a larger group but the Judge only took into account the turnover of Ineos in deciding that it was a 'large' organisation within the guidelines (turnover £900m). Interestingly Ineos had recorded a trading loss on the most recent accounts but the Judge decided that this was not significant because it could obtain all necessary finance from its parent, Kerling Plc.

The Court of Appeal was asked to consider whether the fine was excessive and in doing so looked at the turnover and loss making position of the company and the availability of finance from the parent company. In dismissing the appeal the Court confirmed that the resources of the linked organisations could properly be taken into account. As this was a decision under the Environmental Guideline it did not require the Court to justify that it was an "exceptional" case. All that was required was a "demonstration" of the availability of resources from a linked company.

In a first instance decision in June 2016 Interfish Ltd was sentenced at Plymouth Crown Court in relation to a fatal accident in 2014. The new guideline for Health and Safety offences applied. Based on turnover Interfish Ltd was a 'medium' organisation (less than £50 million) but it had a number of subsidiaries and it also held shareholdings in a number of other organisations and it filed consolidated accounts which reflected the 'group' structure. The prosecution submitted that the Judge should take into account the resources of all of the related companies and so treat Interfish as "large" organisation (over £50m) when applying the guideline and setting the starting point. If successful this argument would have significantly increased the fine.

The defence argued there was nothing "exceptional" about Interfish's interests in the other companies or the approach to filing consolidated accounts. It was also submitted that the resources of those organisations would not necessarily be available to Interfish. HHJ Lawrie, in sentencing, did take into account the fact that there were a number of related companies but decided that Interfish was a 'medium' organisation because it did not have a 100% interest in those linked organisations whose turnover would have made a significant difference to the overall size of the defendant organisation. In the event the fine imposed was £500,000.*

The reverse situation has yet to be tested. What if Interfish had been a wholly owned subsidiary of a larger organisation? Would that be sufficient to be "exceptional"? It is not unusual for companies to be wholly owned subsidiaries. Indeed it could be said that this is normal and certainly not "exceptional".

Conclusions

The presence of linked organisations must be carefully considered at all stages, especially when preparing sentencing submissions under the relevant guidelines. The differences between starting points and ranges within the guidelines are considerable.

In particular, one needs to pay careful attention to group structures and the extent to which linked organisations are wholly owned by a common parent company or they themselves have financial interests in other organisations. Organisations which file consolidated accounts which record the turnover of subsidiaries, joint ventures and other associated companies may well find themselves more likely to face submissions that the overall group turnover should be considered in determining the starting point for sentence.

It may be easier to satisfy the court that the resources of linked organisations are not available if the ownership and director structure is different between the linked organisations, bearing in mind directors fiduciary duties to the company they manage.

If the prosecution is arguing that the finances of linked organisations should be taken into account, evidence to explain the company structure should be called to rebut this as part of the sentencing exercise.

Those defending cases to be sentenced under the Health & Safety guideline are likely to stand the best chance of success because of the addition of the word "exceptional". As the guidelines continue to be a more consistent picture may well emerge regard the court's approach to these issues.

Authors



Ian Manners

Bristol

+44 (0)117 918 2264

imanners@dacbeachcroft.com



Sally Roff

Newport

+44 (0)163 365 7780

sroff@dacbeachcroft.com

