

## Section two: Developing the guideline

### Research

The Council commissioned NatCen Social Research to undertake research on online fraud.<sup>6</sup> In particular the research explored the ways that online fraud is being committed, its impact on victims, and attitudes to concepts relating to sentencing fraud offences. The research looked specifically at two fraud offences – confidence fraud and possessing, making or supplying articles for use in frauds – and comprised three phases: an evidence review; in-depth interviews with organisations involved in addressing fraud; and focus groups and interviews with victims of online fraud.

The research found that victims had suffered financial, emotional and psychological impacts as the result of fraud. Some victims reported that fraud had damaged relationships with others and could cause considerable inconvenience for them. The wider impact on society of online fraud was highlighted; professional organisations thought that the damage to public confidence in using legitimate online business could have a far-reaching impact on the UK economy.

The findings from this research informed the development of the guidelines and particularly the proposal that emphasis is placed on the impact these offences have on victims when assessing harm at step one.

### Assessing seriousness

The guideline sets out a step-by-step decision making process for the court to use when sentencing each type of offence. This means that all courts are following a consistent approach to sentencing across England and Wales.

The particular circumstances of each offence covered by the draft guideline which reaches court will be different. The draft guideline aims to help the court to decide how serious an offence is and what the sentence should be.

The first two steps that the court follows when deciding the sentence are about assessing the seriousness of an individual offence. These two steps are described below.

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<sup>6</sup> Kerr, J., Owen, R., McNaughton Nicholls, C. and Button, M. (2013) *Research on Sentencing Online Fraud Offences*, Sentencing Council Research Series 01/13, London: Sentencing Council, <http://sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm>

**STEP ONE****Determining the offence category**

The first step that the court will take is to consider the principal factors of the offence. The draft guideline directs the court to consider the factors relating to the **culpability** of the offender in committing the offence and the **harm** that has been caused. Culpability relates to the role the offender has played and the sophistication with which the offence was carried out. Some offences may have characteristics which fall into different categories. In these cases culpability is to be assessed by balancing the characteristics and reaching an assessment of the offender's overall culpability.

In the case of these types of offences, harm is, broadly speaking, assessed in terms of the financial value involved in the offence and the effect on the victim but there are variations to the approach within each guideline. Each draft guideline lists the principal factors relevant to the offence, in relation to harm and culpability. These are the factors that the Council considers are the most important in deciding the seriousness of the offence. The offence category reflects the severity of the offence and sets the starting point and range of sentences within which the offender is sentenced. The list of factors at step one is exhaustive (except in the draft corporate guideline).

**STEP TWO****Starting point and category range**

Once the court has determined the offence category the next step is to decide upon a provisional sentence using the relevant starting point and category range. The court must then consider any relevant aggravating and mitigating factors and the weight that they are to be given. The factors at step two are non-exhaustive.

The ranges and starting points in the draft guidelines have been proposed based on statistical data collected by the Ministry of Justice where the way in which the data is collected allows sentence levels to be separated by offence. The ranges and starting points have then been tested against case law and in research interviews conducted with the judiciary. For some offences the data is of limited assistance in determining sentence ranges and starting points due to the way offences are categorised. For example, a variety of different types of fraudulent activity may be charged under section 1 Fraud Act 2006. In these instances the ranges and starting points have been proposed on the basis of a combination of the current guidelines (where applicable), reported cases, press reports and details of other cases provided by the Crown Prosecution Service.

Once the court has determined the starting point and taken into account relevant aggravating and mitigating factors there are six further steps to follow. The steps listed below apply to all the draft guidelines for individual offenders. The steps that are to be followed when sentencing corporate offenders are at page 65.

**STEP THREE****Consider any factors which indicate a reduction, 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 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR****Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.<sup>7</sup>

**STEP FIVE****Totality principle**

Where an offender is before the court for more than one offence, the court must consider whether the sentences passed should be consecutive or concurrent. The court must also consider whether the total sentence is just and proportionate to the overall offending behaviour. Further guidance on the totality principle can be found in the Sentencing Council guideline *Offences taken into consideration and totality: definitive guideline*.<sup>8</sup>

**STEP SIX****Confiscation, compensation and ancillary orders**

The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so. Where the offence has resulted in loss or damage the court must consider whether to make a compensation order.

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

The court may also consider whether to make ancillary orders. These may include a deprivation order, a financial reporting order, a serious crime prevention order and disqualification from acting as a company director.

<sup>7</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Reduction\\_in\\_Sentence\\_for\\_a\\_Guilty\\_Plea\\_-Revised\\_2007.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf)

<sup>8</sup> [http://sentencingcouncil.judiciary.gov.uk/docs/Definitive\\_guideline\\_TICs\\_\\_totality\\_Final\\_web.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Definitive_guideline_TICs__totality_Final_web.pdf)

**STEP SEVEN****Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence passed.

**STEP EIGHT****Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.