

FRAUD – section x¹

[Insert into the dishonesty compendium]

Within the member states and territories of the ECSC, offences of fraud are varied and include (i) Abuse of position; (ii) False representations (iii) Failing to disclose information (iv) Conversion, (v) Deception, (vi) False Accounting (vii) Forgery and related offences that involve the intentional use of deception illegally to deprive another person or entity of money, property, or legal rights. It also includes the possession of tools for perpetrating frauds. There are often different maxima. For the purposes of this guideline, the word ‘fraud’ will be used generically to cover all types, and whether as conspiracy or a substantive offence.

STEP 1

The first step in constructing a sentence is to establish the starting point for the offence.

A fraud case requires an assessment of the seriousness of the offence and its consequences by reference to the harm caused. In assessing seriousness, this should include reference to the culpability of the offender.

To establish the starting point for the offence within the relevant range, there are four stages within Step 1.

¹ As at [date of publication].

FIRST STAGE

The first stage is to consider consequence by assessing the harm caused by the offence. Harm is assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender. In assessing consequence regard should be had to the loss and damage, physical or psychological, caused or intended to be caused, or as risk of harm that might foreseeably have been caused, by the offence. Where an attempt or conspiracy, the court should consider the intended consequence and seriousness.

Risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or much less) actual harm, the normal approach is to move to the next category of harm down. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.

Categories arising from consequence are as follows:

CONSEQUENCE- category 1 – high

- Serious undermining of the proper function of local or national government, business or public services
- Serious detrimental effect on individuals and/or the community
- Serious impact on shared sense of honesty
- High level of inconvenience caused to the victims or others
- Substantial intended financial gain to offender or another or loss caused to others
- Actual Loss (above \$250000 in the High Court, above \$100,000 in the Magistrates Court)

CONSEQUENCE - category 2 - medium

- Significant undermining of the proper function of local or national government, business or public services
- Significant detrimental effect on individuals and/or the community
- Significant impact on shared sense of honesty
- Significant intended financial gain to offender or another or loss caused to others
- Risk of category 1 harm
- Actual Loss (\$50000 to \$250,000 in the High Court, \$5,000 to \$10,000 in the Magistrates Court)

CONSEQUENCE - category 3 - lesser

- Limited detrimental impact on individuals, the community, government, business or public services.
- Limited intended financial gain to offender or another or loss caused to others
- Limited impact on shared sense of honesty
- Risk of category 2 harm
- Actual Loss (\$10000 to \$50,000 in the High Court, \$500 to \$5000 in the Magistrates Court)

CONSEQUENCE - category 4

- No impact on individuals, the community, government, business or public services.
- Risk of category 3 harm
- Actual Loss (Up to \$10000 in the High Court, and up to \$500 in the Magistrates Court)

SECOND STAGE

The second stage is to consider seriousness by assessing the culpability of the offender. Culpability should assess the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out. Levels of culpability may be demonstrated by one or more of the following:

SERIOUSNESS – level A – high

- Damage to the country's standing in the international community
- Calculated to undermine the whole elaborate system of credit
- Offence involved multiple victims or a series of criminal acts
- A leading role where offending is part of a group activity
- Breach of a high degree of power or trust
- Sophisticated nature of offence/significant planning
- Offending conducted over sustained period of time
- Motivated by expectation of substantial financial, commercial or political gain

SERIOUSNESS – level B - medium

- A significant role where offending is part of a group activity
- Some degree of planning involved
- Breach of some degree of trust
- All other cases where characteristics for levels A or C are not present

SERIOUSNESS – level C - lesser

- Involved through coercion, intimidation, or exploitation
- Minor role in group offending
- Not motivated by personal gain
- Opportunistic 'one-off' offence, very little or no planning
- Limited awareness or understanding of extent of fraudulent activity

THIRD STAGE

Having determined the consequence and culpability find the starting point by consulting the grid below.

Maximum sentence is 'x'.

Percentages are approximations and may not divide neatly, so that some adjustment is permissible.

	Seriousness – level A - High	Seriousness – level B - Medium	Seriousness – level C - Lesser
Consequence – category 1	SP 75% x Range 60-90% x	SP 60% x Range 45-75% x	SP 50% x Range 35-65% x
Consequence – category 2	SP 50% x Range 35-65% x	SP 40% x Range 25-55% x	SP 20% x Range 10-30% x
Consequence – category 3	SP 35% x Range 20–50% x	SP 20% x Range 10-30% x	SP 10% Range non- custodial – 25%
Consequence – Category 4	SP 20% x Range 5-35% x	SP 10% x Range non-custodial – 25% x	SP 5% Range non- custodial – 20% x

FOURTH STAGE

Having determined the starting point, consider the following non-exhaustive list of aggravating and mitigating factors of the offence and adjust upwards or downwards if required, taking care not to double-count factors considered in stages 1 and 2.²

AGGRAVATING FACTORS of the offence

- Attempts to conceal/dispose of evidence
- Offence committed across borders
- Degree of sophistication and planning and deception
- Pressure exerted on another party
- Offence committed to facilitate other criminal activity
- Offence motivated by greed or desire for luxury

MITIGATING FACTORS of the offence

- The loss or damage caused by the offence was minimal

² In some types of fraud, aggravating factors which are inherent to an offence cannot be taken into account unless they exceed the usual case.

STEP 2

Adjust the figure within the range for the aggravating and mitigating factors affecting the offender.

AGGRAVATING FACTORS of offender

- Previous convictions for dishonesty offences
- Relevant convictions for other offences
- Offence committed whilst on bail
- Steps taken to prevent the victim reporting or obtaining assistance from and/or from assisting or supporting the prosecution
- Blame wrongly placed on others

MITIGATING FACTORS of offender

- Good character
- Youth and/or lack of maturity where it explains offending
- Genuine remorse
- Assistance given to the authorities
- Good prospects of rehabilitation, whether by reason of age or otherwise

STEP 3

Credit should be given for a guilty plea as appropriate. A reduction of one-third should be given for a guilty plea entered at the earliest practicable opportunity. Credit will usually reduce significantly the later the plea.

STEP 4

Adjust the figure on assessing totality if sentencing for more than one offence.

STEP 5

Credit must be given for time spent on remand for the relevant offence, to be calculated with precision³.

STEP 6

Finally, consider ancillary and restraining orders, confiscation, compensation, etc, if applicable.

Pass the Sentence

The court must give reasons explaining the construction of the sentence in a way that can be readily understood by the defendant, in particular justifying any departure from the guideline.

³ See the requirements for assessing time on remand in **Gomes v The State 2015** UKPC 8, see para 12; **Shonovia Thomas v The Queen** Appeal no.6 of 2010; and **Romeo Da Costa Hall v The Queen 2011** CCJ 6.