HITTING THE SUITE SPOT: SENTENCING FRAUDS

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Abstract

Much of the critique of social fairness relates to the relative non-prosecution of elite individual and corporate crimes compared with crimes by lower class offenders. Sentencers can punish only those who are prosecuted and convicted. However there is concern about ‘fairness’ which is difficult to analyse in relation to different sorts of offences; and a tension between retribution for past acts or incapacitation/rehabilitation for future acts. After examining sentencing patterns for fraud offences in the UK and the US, the article concludes that if offenders perceive that they will have both a low chance of conviction and a light sentence for complex, multi-jurisdictional frauds obtaining sums of money that are vast compared with other types of crime for gain, then unless this shift is an intentional policy objective (as a choice between evils), there is little reason for them to avoid committing fraud. It ends by questioning whether there should be an approximated/harmonised set of punishments for European VAT carousel fraudsters, or American/Canadian telemarketing and Ponzi fraudsters, and where should it be anchored.

Purpose: to generate data on sentencing within a framework that enables clearer understanding of the sentencing policy options.

Design/methodology/approach – descriptive statistics on sentencing, and the relationship of this to principles of sentencing and sub-types of fraud/organised crime offenders

Findings – Fraud cases seldom attract severe sanctions where, as in the case of frauds against the EU, there are institutional victims and no apparent systemic risk, despite the prevalence and incidence of such frauds and the high value to offenders.

Originality/value – data on sentencing fraud not readily available, placed within a framework of the purposes and effects of sanctions on different sorts of fraudster.

Keywords fraud, white-collar crime, sentencing, EU, tax evasion, deterrence

Paper type Research paper
**Introduction**

Much of the critique of social fairness relates to the relative non-prosecution of elite individual and corporate crimes compared with crimes by lower class offenders. Sentencers can punish only those who are prosecuted and convicted. However there is also, by virtue of the very public nature of the sentencing process, a concern about ‘fairness’ which is difficult to analyse in relation to different sorts of offences. There are also, of course, more philosophical differences related to the question of whether it is ‘better’ to have retribution for past acts or incapacitation/rehabilitation for future acts.

Whether one’s primary interest is explaining sentencing practices or in normatively advocating a different approach to sentencing, it is helpful to examine what modest evidence there is and to relate it to offence seriousness and offender backgrounds. Frauds are often associated with a social elite category of ‘white-collar crime’ but are actually committed by a broad range of social types ranging from the poor and marginalised (social security) through blue-collar petty and ‘organised’ offenders (cheque, credit card and small-scale insurance frauds) to longer-term swindles by elites or by professional confidence tricksters (e.g. telemarketers, EU carousel and MTIC fraudsters) who may or may not be labelled as ‘organised criminals’, and to elites who use their power and/or assumed integrity to obtain and launder corrupt ‘donations’ in exchange for granting contracts or to defraud consumers/investors. To ‘legal realists’, their denotation is of course defined by laws which have been subject to pressures for amendment under the banner of ‘globalisation’: thus the perils or alleged perils of transnational crimes have made intermediaries criminally liable for failing to identity clients or report suspected transactions and the need to ‘modernise’ both substantive and procedural law to deal with recent forms of crime has led to various reforms in many countries.

Shapiro famously suggested that we ‘collar the crime, not the criminal’, but there is no need here to review those wider debates. Rather the aim is to explore some key features of the sentencing of ‘serious frauds’ in a limited comparative context, concentrating upon the UK and US, where more comprehensive data are available (at least in the English language), to show how the dilemmas referred to above are played out in the context of their national legal systems, norms and cultures. If this complicates some ideologically monotonous models of crime control, then this is a positive contribution to comparative criminology and criminal justice, and it is hoped that this will stimulate others to develop a comparative approach in a wider range of countries and types of society than I have been able to cover in this paper.

One reason why people may be interested in fraud sentencing is to test (or demonstrate) the lenient treatment of ‘the powerful’. It is not obvious how we adjudicate between hypotheses that (1) there is a bias against prosecuting the powerful and (2) inequality is an unintended (and often unseen) product of wider criminal justice processes such as plea bargaining that are uneven in their application here, provided that we have some empirical baseline, comparative analysis, insider ‘whistle-blowing’ and changes in prosecutorial conduct over time (e.g. at times of (i) general ‘moral panic’ about corruption or white-collar crimes, or (ii) efforts to get rid of elite rivals (in France, Russia and the US as well as in the developing world) may help us. We might also, where possible, take account of those cases pursued by advice and civil injunctions, in accordance with the future-oriented model positively advocated by regulation advocates, though it is not obvious how one weights these in terms of severity in order to assess their fairness. (In countries that use the principle of legality rather than of opportunity in prosecutions, this raises more complex questions that we do not have to deal with here.) With these methodological caveats, let us examine sanctioning processes.
The distinguishing character of fraud is that it is in essence a means of generating gains to which we are not entitled legally. In some frauds, the harm may be great but future risks may be small (unless the offenders can commit crimes via nominees or, more colloquially, via ‘straw men’). Another source of controversy lies in whether judges (and indeed ‘society’ and ‘the’ media) have under-valued the seriousness of some or all types of fraud. Yet another may arise from the social position of the perpetrator – whether social elite or organised criminal – that may also (a) actually have and/or (b) defensibly have an impact on social judgements of culpability and of harmfulness, as well as on judicial perceptions of the impact of conviction and sentence on offenders. The aim of this study is to bring together some relevant evidence about fraud sentencing, nowhere coherently compiled, and to relate these to principles of sentencing. In relation to fraud, we know relatively little about what factors influence deterrence and some important consequences for some high-status offenders arise from conviction or even bad publicity alone, irrespective of sentence level: for this sub-set of fraudsters, ‘the process is the punishment’. Whether such consequences (or rather, since they may not be known at the time of sentence, expected consequences) should be taken into account in imposing sentence is a contested issue. If the seriousness of the harm (plus intention) are the only issues, then it may not matter, but if criminal backgrounds actually are and/or ought to be relevant to sentence, then variations include:

1. people with no other criminal involvements who intentionally or recklessly commit offences in the context of their businesses;
2. specialist fraudsters who do not commit other types of offence; or
3. multi-offence type persistent or ‘organised’ ‘enterprise criminals’.

It seems plausible that for the first category, the crucial sentence points influencing guilty pleas and deterrence are (i) whether they will go to prison or not and (ii) (a much harder point to specify), whether they expect at the time(s) when offences are contemplated that they will go to prison for some period that really concerns them more than the alternative. The alternative might be personal or corporate bankruptcy, in which case the temptation to take a chance might be greater. For the second category, the ‘tipping point’ for deterrence is whether, in their minds, expected probability of conviction is high enough and sentences are long enough to outweigh the benefits from crime. For the third, the comparison is usually of conviction and imprisonment risks between fraud and other types of crime that the offenders would be likely to commit. In addition, some fraudsters (and money launderers providing services to criminals) – for example, professional people such as accountants, notaries and lawyers – may be caught up on the fringes of ‘organised crime groups’ without themselves readily falling into this category, as when they facilitate corporate vehicles or specific transactions for major criminals.

Wheeler, Mann and Sarat have noted what (based on interviews with US Federal judges in the 1970s) they term the ‘paradox of leniency and severity’ in the sentencing of white-collar crimes. On the one hand, judges generally do regard the breach of trust by people in high positions as deeply reprehensible (except where it can plausibly be portrayed as inadvertent); on the other, they are normally faced with sentencing people for whom the offence is ‘out-of-character’ (i.e. they have not been convicted previously) and who have often lost a well-paid job simply as a consequence of conviction or even for breach of in-house rules. In some cases, not only are they much less wealthy but also – where authorisation is mandatory – they may be prevented by the fact of conviction or disciplinary sanctions alone from committing the offence again, at least directly in their own names. This is a very rare situation for judges in substantial crimes for gain, since such offenders normally have a string of previous convictions or have been portrayed by the police and the media as a cunning ‘Mr. Big’. The latter can always be given a long sentence for being a mastermind, but this does not happen to fraudsters, except in some Value-Added
Tax carousel frauds or long-firm frauds - fraudulent bankruptcies - connected with organised crime syndicates. Judges are torn, then, between concern to reflect the seriousness of the crime and human concern about the ‘fall from grace’ of the offender, for they can imagine how they would feel were they in his (or, more rarely, her) position. Judges may sometimes see defendants from privileged backgrounds and/or living in privileged neighbourhoods as being more affected by social degradation than they actually are: but errors can be made in either direction. One area where there are few parallels with most ‘ordinary’ offenders is that professional sanctions can also create the possibility of incapacitation without custody. However here, too, it is important to make distinctions within fraud: it is much harder to cut off those who defraud the financial interests of the EU (and bankruptcy or credit card fraudsters) from crime opportunities so readily as people who need authorisation as ‘fit and proper persons’ to practise their professions; and though some payments to social security fraudsters can be cut off, other opportunities to defraud might be available to them. Paraphrasing Anatole France, street and household crimes are open to all.

**Length of custodial sentences for fraud and forgery and other acquisitive crimes**

The comparability issue is particularly difficult because popular, media and political constructions of harm prioritise offences involving actual, threatened or perceived threatened violence, and both burglary and, especially, robbery contain those elements. Moreover, fraud offenders – particular those committed by individual or corporate elites – typically have fewer previous convictions than is the norm for other offences and in a system where prior criminality (or convictions) are important, this makes a big difference. There is no obvious metric for balancing very large sums obtained by fraud (or theft) against violence (though we implicitly do so in current practice and in the way we talk about the ‘fairness’ of sentences). It is difficult to steal non-violently very large amounts of money or property without an abuse of trust (e.g. the Bank of England employees who in the early 1990s stole from Bank cages millions of pounds in notes that were supposed to have been destroyed could not have done this without being employees).

In terms of officially recorded crime and sentencing categories, the best comparison for Fraud and Forgery is Theft and Handling: but in both categories, the aggregate statistics are comprised of very large numbers of smaller cases, though ‘small’ in fraud is often seen in relation to multi-million pound cases rather than in relation to much smaller average values in thefts and burglaries.

**A victim-based typology of sentencing in Serious Fraud Office cases**

The UK Serious Fraud Office (SFO) deals with the top layer of ‘serious or complex frauds’ other than tax frauds, starting at a minimum of €1 million losses but usually significantly more. However it only deals with about 15 trials annually, so the total of fraudsters sentenced is not large, and given that many involve multiple defendants, there is significant within-case variation that makes presenting average sentences a little misleading. One might take the ‘top sentence’ in each case as a better indicator, though there are issues about whether sentencing theorists or practitioners have properly conceptualised the importance of support roles (and the deterrence of potential supporters who may be necessary to fraud commission or may be potential whistle-blowers).

The table below shows the number of convictions and company director disqualifications achieved in SFO cases overall in recent years.
In recent years, there has been an increased focus in the UK (and in inadequately implemented EC Framework Decisions) on recovery of the proceeds of crime. The UK has a better record than most EU countries, but it is still not strong. A reason for tolerance is that many cases take some years to complete. But in SFO cases 2008-09, the following results were obtained:

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<td>Defendants convicted</td>
<td>37</td>
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<td>3</td>
<td>1</td>
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<td>7</td>
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<td>Disqualified as a company director</td>
<td>15</td>
<td>4</td>
<td>7</td>
<td>12</td>
<td>22</td>
</tr>
</tbody>
</table>

Confiscation orders obtained 11
Total value of confiscations £5,539,323.00
Civil Settlement £2,250,000.00
Compensation to be paid out £3,790,394.00
Paid out to date £835,688.00

I have analysed cases up to 2005 in greater detail. Altogether, counting suspended prison sentences as zero (since none were known to be activated), the 109 persons convicted in SFO cases 2000-2005 received an average of 31.7 months imprisonment. Out of the 53 cases in which convictions were obtained in this period, the average sentence of the most severely sentenced person per case was 37.7 months’ imprisonment. Eight persons received sentences longer than five years; 19 people received 4-5 year sentences; 22 people (mostly co-defendants in cases where others were imprisoned) received non-custodial sentences; the median sentence was three years’ imprisonment.

People interested in the relationship of sentencing to social class or status of victims as well as to the harms caused might find it helpful to relate sentencing in serious fraud cases to the types of victim involved. The following cannot satisfactorily serve as a framework for explaining sentencing – since factors such as amount of money, plea (and stage at which plea was offered), and previous convictions are relevant to sentence but are not available. The categories I initially chose are frauds against

1. government (including the EU);
2. consumers (e.g. intellectual property by deceiving that goods are genuine)
3. trade creditors
4. financial services firms
5. general public investors
6. business investors
7. market abuse (including insider dealing)
8. procurement fraud/bribery

However, after reviewing the SFO cases 2000-2006, I have collapsed some of these categories, though there are a few cases in which, for example, an investment fraud also defrauds trade creditors. One could add permutations including frauds by employees and/or outsiders, frauds against UK/non-UK persons, and the social status/prior convictions/prior business record of offenders which may be relevant to
sentence. Previous conviction data are not usually available, but previous experience suggests that few offenders in SFO cases have prior records; in many cases, the amounts involved are also unavailable, but they should be at the high end of the seriousness scale to qualify as SFO cases in the agency’s case vetting process. It should also be noted that in most cases, the guilty pleas are quite late in the day and, if the contemporary advice of the UK Sentencing Council were to be followed, this would mean very little sentence discount for them. It is not possible within the confines of this brief review to examine the subtext behind these last minute plea changes, but – absent the desire to save privately paid defence costs - their offering and acceptance by the prosecution and judge implies that some benefit was received.

For frauds against business creditors, the average was 27.4 months; investment frauds against business investors, 37.7 months; investment frauds on individuals, 40.4 months; market abuse, 12 months (though in one of the two cases, all four defendants received suspended prison sentences, showing how distorted averages can be); procurement fraud/corruption, 19.9 months; and frauds on government, 36.8 months (but only three cases). In 17 cases (about a third), at least one defendant was disqualified from company directorship, for an average of over 7 years. This reflects not just legal powers but also a belief that this is an appropriate financial punishment (reducing future earnings) and will be effective as incapacitation. The latter is an open question: it certainly would affect those who need to play an upfront role as a director, but the extent of ‘shadow directorships’ among those subject to disqualification is unknown and very difficult to discover even in principle.  

**Sentencing in tax fraud cases**

Sanctions in tax cases have been a focus for critical social commentary on the evasion of penalties. However there is a broader practical point, which is that tax fraudsters are able to repay their losses plus penalties, and this is a significant distinction from both ‘ordinary’ offenders and social security fraudsters. VAT and MTIC frauds became so high profile within the UK and Europe generally during 2006 that one would expect sentencing to rise substantially because of changes in the perception of its harmfulness to the UK economy and society, and there are some recent cases in which long sentences have been imposed: however this is a sociological prediction, not a normative justification. One VAT fraudster who was extradited in 2009 from Switzerland on the basis that his was a serious theft offence, not ‘just’ tax evasion, had escaped in the middle of his 9 year sentence for carousel fraud.

In 2005-2006, there were just 18 convictions for VAT and EC fraud with jail terms totalling 72 years, but this rose to 45 convictions the following year and jail terms of 194 years. In 2007-2008, 36 convictions brought with them 214 years of prison sentences (http://www.dailymail.co.uk/money/article-1195944/Payback-time-Riviera-Ray-forced-repay-9-5m.html). Unfortunately, data presented in this form is more rhetorically than analytically useful. The first of the three linked prosecutions in 2008-9 was a £20 million MTIC fraud, Operation Emersed. The 12 defendants included Craig Johnson from Operation Shepherd and Stephen Hancock from Operation Shoot. The total sentences handed down amounted to 119 years. Operation Shepherd, the second fraud, resulted in 7 convictions. At the time of their trial, this was the largest MTIC fraud ever prosecuted, valued at approximately £68 million; they received a total of 39 years in prison. In the last of the three frauds – Operation Shoot – four defendants were convicted of controlling a series of ‘buffer’ companies designed to give an air of legitimacy to the fraudulent transactions. Between them, they deprived the Exchequer of £50 million and were sentenced to 19 years imprisonment. On 20 November 2008, prosecutors from Revenue and Customs Prosecution Office Asset Forfeiture Division were granted a confiscation order for £26 million against Craig Johnson, the second
largest confiscation order ever obtained by them.\textsuperscript{15}

RCPO states\textsuperscript{16} that following MTIC mobile phone frauds that defrauded the taxpayer of over £55 million, in August 2008, the defendants were convicted and sentenced to nine years and three months and six and a half years respectively. In 2009, RCPO has 26 MTIC cases awaiting trial and at the pre-charge advisory stage. The largest of these is Operation Euripus, a £250 million case. The first trial is led to three defendants being sentenced to a total of 19.5 years' imprisonment. In Operation Dossal, a confiscation order of almost £4 million was made; in Operation Maypole, three defendants unsuccessfully appealed against a £4.7 million confiscation order.

\textbf{Approaches to Sentencing}

In retributivism, there are two dimensions of sentencing - harm and culpability - around which various aggravating and mitigating factors are clustered. As regards the harm of fraud (collective, singular) or of frauds (types of – but how to classify for these purposes?), the courts have been fairly silent except in relation to ‘abuse of trust’ as an aggravating factor, warranting a higher sentence. In general sentencing guidelines, the targeting of ‘vulnerable victims’ is another aggravating factor, but the question is what counts as vulnerability in relation to frauds? Wasik\textsuperscript{17} (p. 116) argues that corporate victims generally are less harmed than are other categories of victim, but without some measurement criteria, this is no more than a plausible assertion, even disregarding the distress caused to bank staff when there is a robbery or a staff kidnapping. In a sense, his generalisation is a tautology, since a business can feel no direct pain: only its staff, directors, and shareholders can do. \textit{A priori}, one would expect greater impact/harm where there is an element of being deceived while making a personal judgement, and/or where victims feel foolish in the eyes of their peers (if the latter should come to know). There are potential implications for personal careers of individual victims (such as Finance/HR Directors) from being conned in a corporate setting, but these have not been analysed in any discussions of sentencing, which tend to focus on offenders rather than on victims.

In practice, not always consciously, media anathematisation\textsuperscript{18} – ‘evil offenders’ or ‘deserving victims’ - may have an impact on fraud sentences because of some neo-Durkheimian need to express the normative boundaries of the ‘volonté générale’: what penal philosophers term the denunciatory principle. Some classes of victim may be held to be especially vulnerable, and small businesses have been so treated by the English Court of Appeal in relation to burglary and robbery, since they cannot afford to take the kinds of precautions that larger firms can, they keep substantial quantities of cash and have long opening hours\textsuperscript{19}. Other general categories such as elderly persons are treated as especially vulnerable: although this has not been the subject of judicial rulings, in the case of fraud, one might argue that they have less working time to recoup their losses and therefore that the severity of harm might typically (though not invariably) be greater. (Contrariwise, they have a shorter period to live and thus may have less time to suffer a lower standard of living.) How one translates broken dreams and damaged expectations (and bribery, domestic and transnational) into standardised criteria – especially monetary value – might be a matter of some dispute, but damage to mental and physical health has been measured more prosaically by health economists in terms of QUALYS.\textsuperscript{20}

A 2009 consultation paper sets out some thinking about the approach to be taken in tax evasion cases\textsuperscript{21}, recommending a maximum sentence of 10 years for frauds prosecuted under the Fraud Act 2006 and 7 years for other cases, plus normally confiscation or compensation where appropriate. The Guidelines
argue (p.22):

5. In most VAT frauds the offender intends to evade VAT. However, it is possible to commit the offence in section 72(3) of the VAT Act (and accordingly also the offence in section 72(8) of the same Act) by recklessly making a false statement for the purposes of VAT. The Council guideline *Overarching Principles: Seriousness* states that an offender who acts recklessly is less culpable than an offender who acts intentionally. The proposals for the sentencing of frauds against HM Revenue and Customs take as a starting point an offender who acts intentionally. Where the offender has acted recklessly, courts should adjust the assessment of seriousness to take account of this lower level of culpability.

6. As the determinants of seriousness include bands based on amounts of money, an amount is identified on which the starting point is based. Where the sums are larger or smaller within the band, this should lead to upward or downward movement from the starting point as appropriate. Where the amount the offender intended to obtain cannot be established, the appropriate measure will be the amount that was likely to be achieved in all the circumstances.

7. A further determinant of seriousness is whether the fraud was a single fraud or a multiple fraud. Where one false declaration or a failure to disclose a change in circumstances results in multiple payments, this should be regarded as multiple fraud.

8. The maximum penalty for most of the offences covered by this guideline is 7 years imprisonment. Where fraud under the 2006 Act is charged and the maximum penalty is 10 years, the proposed sentencing ranges leave headroom for offences involving multi-million pound frauds to be sentenced outside the range and up to the maximum.

9. When assessing the seriousness of an offence, a court must always have regard to the full list of aggravating and mitigating factors in the Council guideline *Overarching Principles: Seriousness*.... Identified below are additional aggravating factors likely to be particularly relevant to this type of fraud:

   • making repeated importations, particularly in the face of warnings from the authorities;
   • dealing in goods with an additional health risk because of possible contamination; and
   • disposing of goods to under-aged purchasers.
## Fraud against HM Revenue and Customs

<table>
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<tr>
<th>Nature of offence</th>
<th>Amount obtained or intended to be obtained</th>
<th>Starting point based on:</th>
<th>Range:</th>
<th>Nature of offence</th>
<th>Amount obtained or intended to be obtained</th>
<th>Starting point based on:</th>
<th>Range:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fraudulent from the outset, professionally planned and either fraud carried out over a significant period of time or multiple frauds</td>
<td>£500,000 or more</td>
<td>Starting point: 5 years custody</td>
<td>4-7 years custody</td>
<td>Fraudulent from the outset and either fraud carried out over a significant period of time or multiple frauds</td>
<td>£100,000 or more and less than £500,000</td>
<td>Starting point: 4 years custody</td>
<td>3-5 years custody</td>
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<td></td>
<td>£20,000 or more and less than £100,000</td>
<td>Starting point: 2 years custody</td>
<td></td>
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<td>£5,000 or more and less than £20,000</td>
<td>Starting point: 12 weeks custody</td>
<td>18 months-3 years custody</td>
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<td>Less than £5,000</td>
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<td></td>
<td>Starting point: Community order (LOW)-5 weeks custody</td>
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<td>Fraudulent from the outset and either fraud carried out over a significant period of time or multiple frauds</td>
<td>Starting point: 4 years custody</td>
<td>3-7 years custody</td>
<td>Range:</td>
<td>Not fraudulent from the outset and either fraud carried out over a significant period of time or multiple frauds</td>
<td>Starting point: 3 years custody</td>
<td>2-4 years custody</td>
<td>Range:</td>
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<td>Starting point: 3 years custody</td>
<td>2-4 years custody</td>
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<td>Starting point: 2 years custody</td>
<td>12 months-3 years custody</td>
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<td>Starting point: 15 months custody</td>
<td>18 months-30 months custody</td>
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<td>Starting point: 36 weeks custody</td>
<td>12 months-18 months custody</td>
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<td>Starting point: 12 weeks custody</td>
<td>Community order (HIGH)-12 months custody</td>
<td>Range:</td>
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<td>Starting point: 6 weeks custody</td>
<td>Community order (MEDIUM)-26 weeks custody</td>
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<td>Community order (LOW)-6 weeks custody</td>
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<td>2-8 years custody</td>
<td>Range:</td>
<td>Single fraud, not fraudulent from the outset</td>
<td>Starting point: 12 weeks custody</td>
<td>Community order (MEDIUM)</td>
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<td>Starting point: 12 weeks custody</td>
<td>6 weeks-12 months custody</td>
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<td>Range:</td>
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### Additional aggravating factors (duty evasion)

1. Making repeated importations, particularly in the face of warnings from the authorities
2. Dealing in goods with an additional health risk because of possible contamination
3. Disposing of goods to under-aged purchasers
Much more attention has been paid to sanctions in the US, where the Sentencing Commission\textsuperscript{22} was specifically tasked post-Enron to review white-collar crime sentencing, and where the US sentencing statistics generate more readily analysable data. No countries present sentencing data in a particularly illuminating way for the purpose of testing the relationship between sentence and the sorts of victims harmed – the understandable result of their using legal rather than victim or behavioural categories as a method of classification. We hear most about the high profile cases, but it is easy to get these and the aggregate US sentences for white-collar crimes out of context. American sentencing levels (and imprisonment per capita population) are so much higher than anywhere in Europe that it is tempting to advocate using sentence ratios for fraud versus other crimes as indicators of (un)equal treatment rather than to look at fraud sentences in isolation as retribution or deterrence. On the other hand, for a sub-set of fraud offenders – business elites – it might be defensible to think of deterrence or retribution in isolation from other sentences, since unlike more generic ‘crime entrepreneurs’\textsuperscript{23}, the substitute would seldom be other forms of offending. (However, the symbolic nature of sentencing as a gesture of moral and social censure cannot be so isolated, since even if social elites saw a short prison sentence in an open prison with tennis courts - ‘Club Fed’ - as agonising and humiliating, the public and their earthly representatives – the media – might see it differently.) For those habitual offenders in a position to commit frauds of particular types, on the other hand, the relative consequences of conviction may stimulate a shift towards/away from particular offences\textsuperscript{24}. When looking at the relative attractiveness of plausible crimes, one might have to think here in terms of clusters of transferable skills and contacts possessed by different offenders: not just bank directors but also junior staff may find it easy to commit fraud while in post but once dismissed – depending in how transparent their employment history is – they may find it very difficult to reoffend.

The federalisation of US criminal law (e.g. ‘wire fraud’) means that many minor cases are included in the US data, concealing the high-end sentences in both mean and median sentences. This broad spread led Weisburd et al.\textsuperscript{25} to characterise the Federal cases they examined as “crimes of the middle classes”, as opposed to upper classes, though a significant proportion of offenders were blue collar in background so even this narrows the description\textsuperscript{26}. Hence the longer average and median sentences for embezzlement and tax offences in the Southern District of New York – where the big Wall Street cases tend to be handled - compared with the Federal system nationally in 2003: though these averages of under two years’ imprisonment are still not long compared with sentences in the well publicised scandal cases, and for all the rhetoric about deterrence in the US, are little different from British fraud sentencing. However, not all major frauds are prosecuted federally, and there is more scope for departure from guidelines in the State system.

What is clear is that the general level of sentences in the US Federal and other Sentencing Guidelines has a powerful effect on the earlier decision stages, including plea negotiation and ‘proffers’ and the new trend towards ‘deferred prosecutions’ used to elicit changes within institutions which, if prosecuted, might lose their licenses (e.g. KPMG in the tax shelter case). It is unlikely that senior staff and companies such as AIG, Andersens, Enron and WorldCom would have co-operated with the prosecutors or settled tax/SEC/New York cases if it were not for the prospect of lengthy prison sentences plus no sentencing discount unless they both confess first and implicate others. It is inconceivable that so many people in Enron would have been prosecuted or pleaded guilty were that case to have happened in the UK. This is stimulated by the pressures placed on businesses that wish to avoid indictment or to reduce financial penalties not to pay their staff’s criminal defence costs, for fear of being viewed as ‘unco-operative’ within the controversial Thompson guidelines, which mean that corporations do not receive credit for cooperation if they are not deemed by the prosecutors to be behaving appropriately\textsuperscript{27}. The “Prisoner’s Dilemma” model has been
incorporated into administrative penalties for cartel and allied offences at the British and European Commission as well as American level. Equity apart, much may depend on how plausible it is that fraudsters (of what ‘types’ and in what contexts?) are part of some wider offender/rule-violator networks, and there is no extant analysis of this issue.

The importance of the super-tough sentences in generating compliance can be overstated, even if one considered that this was a sufficient principled justification for imposing them. If white-collar defendants’ prime motivation is to avoid a conviction that will have serious career consequences and/or public stigma, then unless they feel they have little or no chance of avoiding conviction (in which case, the benefit to prosecutors is correspondingly lower except at a very early stage), the expected sentence levels on not guilty pleas may be relatively unimportant unless they are very high (as Jamie Olins found when sentenced to 24 years without parole in the Dynegy case, reduced to 6 years after a successful appeal)\(^28\). As Kenneth Mann’s\(^{29}\) valuable (if dated) US Federal study of white-collar defences in pre-guidelines days shows, the system of ‘proffering’ and informal discussions with prosecutors occurred in the context of there being assets to trade: but given variations in types of fraudster, it must be considered carefully whether this model is readily transferable to European EC fraud offender sets and if so, to whom. It might be expected to work best where there are rings of offenders or Enron-style hierarchies to unravel.

**Fraud Sentencing in Continental Europe**

Systematic research on European fraud sentencing practices is absent. However my informal consultations led to response from a Dutch colleague, who noted:

> “High level fraud cases with ’respectables’ in the dock usually end with a ’conditional’ prison term (or on parole) and a community service order. Lower class fraudsters (like *koppelbazen*) go to prison, but rarely get more than two years. The Ahold fraudsters are just on trial for ’cooking the books’. The offenders in the building scandal (cartel forming, documentary fraud and corruption + participation in a criminal organisation) received probation plus fine. One investment fraudster (about €120 million damages) is in pre-trial custody and I predict an 18 month sentence, of which 8 months will be on probation minus pre-trial detention term. One can get statistics from the Central Statistics Office if one searches on the legal articles ’documentary fraud’ and ’tax fraud’. But given the low public and political interest, these statistics have never been requested since 1992.”

In May 2006, a Dutch court subsequently fined Cees van der Hoeven, Ahold’s former chief executive, and A. Michiel Meurs, its former finance chief, €225,000 each after convicting them of fraud, but it rejected prosecutors’ request to imprison them, giving them both 9 month sentences suspended for two years. Jan Andreae, former executive board member in charge of Ahold’s European operations, was sentenced to four months in jail, suspended for two years, and was fined €120 million. Ahold had overstated its earnings by more than $1 billion from 1999 to 2002, mostly by inflating sales at its U.S. Food service unit.

In Sweden, where sentencing generally is not severe by UK standards, a former chief executive of Sweden’s biggest insurance group Skandia, was in May 2006 sentenced to two years in prison for agreeing to large bonuses for executives without board approval, a case that had aroused serious cultural
concern in Sweden. Petersson, who was chief executive of the group from 1997 to 2003, had removed a ceiling on an executive bonus programme without authorisation in 2000, which led to executives receiving an extra Skr156m (€21m) in payments. Petersson had not been a beneficiary of the bonus programme.

“Lars-Eric Petersson was not authorised to take away the ceiling...by doing so, he abused his position of trust in Skandia, causing damage to Skandia itself”, the court said. The court found no evidence to support a second charge that Petersson had increased his pension by Skr37m, also without board approval and rejected the prosecutor’s request to ban Petersson from holding other industry positions.

Huber noted in her review of the way that Germany dealt with economic crimes:

“Sanctioning practice in white collar cases is difficult to establish, because the statistic does not indicate any details as to certain sectors of white-collar-crimes. However, fines are prevailing, 80 to 90% of the sentences are fines when it come to the regular white collar offences contained in the Penal Code: bankruptcy and environmental offences, handling of employers’ salaries. When a prison sentence is imposed at all it is mostly suspended; in less than 10% of sentences for offences which count for economic crime the imprisonment was unconditional. Out of the additional penalties contained in the Penal Code only prohibition to work in one’s profession (§§ 70 ff StGB) is of certain significance though the preventive potential of this measure is considered to be high. Forfeiture and confiscation of assets and objects however (§§ 73 ff StGB) are used more often (food and wine laws, copy right law). Further to mention is the fine against collective entities for breaches of competition law. Under § 30 OWiG the amount of the fine can be three times as high as the advantage reached by the offence or violation of regulatory rules (OWiG).

[Examples are fines of 284 Million against the producers of power cable who entered into a cartel, or against the producer of traffic signs of 3.7 Million].

A characteristic of the economic chambers is the generally lower tariff than that we find in judgments of the regular courts. In particular when one compares the penalties after a full trial and those which are the consequence of a guilty plea, the inconsistency is most striking.”

In the first of the Parmalat trials, in Milan in 2005, 11 defendants pleaded guilty in ‘plea bargains’. The longest sentence, two years and six months, was given to Fausto Tonna, a former chief financial officer. Gian Paolo Zini, a lawyer who set up some offshore companies that were used to hide billions of dollars in debt and losses, was given two years. However these sentences may be served in the community, a decision to be made by another judge. Two of those sentenced are related to Parmalat’s founder and former chairman, Calisto Tanzi: Stefano Tanzi, his son, and Giovanni Tanzi, his brother, both former board members. They were both sentenced to one year and 11 months in prison.

Also convicted were two other former chief financial officers, Luciano Del Soldato and Alberto Ferraris, as well as internal auditors and former board members. Two of those sentenced are related to Parmalat’s founder and former chairman, Calisto Tanzi: Stefano Tanzi, his son, and Giovanni Tanzi, his brother, both former board members. They were both sentenced to one year and 11 months in prison.

It is apparent that US sentences in dramatic cases are typically far longer than would have occurred in the UK – after all, the US public has been conditioned to view anything less than capital punishment as ‘letting the offender off’! - but it is important to appreciate that this is a relatively recent phenomenon since the turn of the century, reflecting the perceived need for deterrence for prevalent offences as well as strong feelings of retribution towards persons and companies that have caused serious harm.
Ex hypothesi, whether regulatory sanctions (or formal monitoring) really deter fraudsters depends on what ‘sort of people’ they are. Let us look at the sort of variation I have in mind. Criminologists are broadly agreed that among the factors influencing involvement in crime are

1. personal values (though it is astonishing how readily ethical values can be reconciled with financial self-interest, via rationalisations);
2. attachment to the social networks of respectability (which degree of attachment regulators and judges may misinterpret or be misled about); and
3. expectations of being sanctioned - prosecuted, convicted and punished, both in formal (exclusion from the profession or from contractor lists) and in informal terms (being snubbed by friends, losing business contacts through imputed disreputability, etcetera).

Even the most unpleasant tycoons accused of white-collar crime generally want others to think that they are not crooks. Part of the ‘techniques of delinquency’ of those who do offend are beliefs - prevalent among offenders generally - that their acts cause no real harm to anyone: hence the importance of the imagery of seriousness in the media and among those whose opinions they may value, though the ingenious can always differentiate their contemplated or past acts as belonging to the lower range of harmful or even harmless actions.

But the symbolic and practical messages that are sent out to white-collar offenders have an impact on deterrence as well as retribution and shaming: hence the controversy over the Queen Mother shaking hands at a Covent Garden fund-raising party with Guinness convict Gerald Ronson while he was on parole, and the tendency of the media to treat fraud as a glamour issue rather than emphasising harm to victims.

Stigma, or perceptions of the emotional and social trauma likely to be experienced by white-collar offenders as a result of conviction per se, may play an important role in judges’ views about the appropriateness of sentence, though other factors may submerge its practical effect. Though it may be impossible to determine until after the fact whether shaming is going to be reintegrative or disintegrative - a serious problem for the explanatory power of his model - Braithwaite has plausibly argued that reintegrative shaming is the key to successful crime control. But the effects of this depend on how much intending or more vaguely potential fraudsters care about such reactions. The issue of time also has to be taken into account: stigma may be intense for a few weeks but except for media targets for lifetime condemnation, if they tough it out, the media soon lose interest. Moreover, if the stigmatised is useful to others in business or politics, then s/he will re-emerge because of realpolitik.

American economists Karpoff and Lott observe (p.758-9) that ‘the reputational cost of corporate fraud is large and constitutes most of the cost incurred by firms accused or convicted of fraud’. However, the authors and the other economists they cite take no note of the symbolic values of (i) fairness vis-à-vis penalties in non-white collar crime cases and (ii) maintaining or generating general confidence in investment among the ‘little people’ who, whatever their importance as a proportion of stock owners, may own only a small proportion of the total securities, and whose discontent that ‘white-collar crooks are getting away with it’ may not show up in share prices – mass consumer boycotts are rare - but may show up in politicians’ minds. The issue of fairness across types of crime never enters into the analysis.

It is hard to disentangle the pure reputational effects from those connected with expected financial and legal losses (as well as the diversion of executives’ time) from sanctions. Thus, hypothetically, if it were not for internationalisation of share markets, one might expect smaller price falls in high-penalty countries like the US than in low-penalty ones like the UK used to be.
The morally neutralising effect of money anyway gives many persons who might still be stigmatised by traditional élites the capacity to elude such stigma while living in some luxury. The ease and anonymity of international travel makes social exile to more tolerant social circles abroad less isolating than it would have been in former times, while modern technology such as air conditioning, power generators and chilled transportation of fresh food makes the reproduction of physical comfort an easy matter wherever in the globe one lives. The longing for ‘home’ may be more a problem for working class professional criminals and their families ‘on the run’ from Interpol warrants than for businesspeople, but such longings may be variable culturally, even if ‘fish and chips’, ‘bratwurst’, pasta or ‘Swiss chocolate’ (as well as more refined food, beer and wines) are available in most of the world now.

Avoiding cultural imperialism, the conceptualisation of what shaming might be expected to achieve nonetheless remains obscure. Is it primarily social pressure to impact on social prestige (in which case, this has to be affected or cared about, the latter implying some psychodynamic effect analogous to guilt but injected situationally from the outside rather than from the internalised super ego)? Or is it some commercial incapacitation that operates through social mechanisms?

Whatever the case, part of the effect of shaming depends on how much the particular business wants to continue operating. Few pre-planned fraudsters (as we assume that EU fraudsters typically are) will care, unless the publicity somehow incapacitates them – after all, they have already successfully neutralised their crimes to their own ethical satisfaction, and though confrontation by the views of others may shake those neutralisations, they may regard this still as unrealistic or hypocritical. Those who turn to fraud when their businesses are about to go bust may not care anyway, for they are focused narrowly on ‘staying alive’ or ‘saving a few pennies for my wife and children’ (though there are likely to be personality and cognitive dimensions here). The main people who care about shaming are (a) those social lives are embedded and are sufficiently distanced to appreciate the impact, and (b) those who fear that they may be excluded economically from markets.

The capacity to boost shame in contemporary societies is limited not just by the partial reactions of business and political élites (for example, in the UK, to the ‘fat cat’ allegations about gross overpayment to directors, especially to directors of privatised utilities and nearly-collapsed banks), but also by the ability of the sociopathic to enjoy themselves in isolation from the censurers. In this sense, issues such as the move from ascribed to achieved status are important, as are the motivations of the fraudsters in the first place.
Concluding Comments

If offenders perceive that they will have both a low chance of conviction and a light sentence for complex, multi-jurisdictional frauds obtaining sums of money that are vast compared with other types of crime for gain, then unless this shift is an intentional policy objective (as a choice between evils), this is cause for reflection on existing sentencing practices, but it is also cause for reflection on the ‘justice gap’ in fraud. The relativities as between fraud and other sentences are salient, especially (in the deterrence mode) to those choosing between different crime types within their capacities, but also to justice between different sets of both offenders and victims. On the expectations and beliefs of both sets, we have little information, so the systematic information is not yet there to make any clear evidence-based decisions as to potential impact of sentencing upon different sorts of fraudster. Nor, following the ‘corporate death’ of Arthur Andersen, do we have any clear idea of whether ‘deferred prosecutions’ currently fashionable in the US carry with them a credible threat that will produce either special or general deterrence. (Although the mandated organisational reforms ought to lead to better behaviour in the future, if the diagnosis of the causes of misconduct is accurate, the collateral damage from the collapse of major international institutions might be immense.) How does this model adapt to those European and other jurisdictions that do not have corporate criminal liability or a system that allows for corporate or individual *pentiti* to be exculpated or to receive a formally lower negotiated sentence? Should there be an approximated/harmonised set of punishments for European VAT carousel fraudsters, or American/Canadian telemarketing and Ponzi fraudsters, and where should it be anchored?

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5 Some retributivists might think it inappropriate to take involvement in ‘organised crime’ into account, because the harmfulness of ‘the act’ is not a judgement about the harmfulness of the setting of which the person committing it is a part. Yet if the previous convictions of the individual are relevant to sentence (as some — e.g. von Hirsch, A., *Censure and Sanctions*, 1993 — believe), why not also the gang/group setting of which the individual is willingly a part? This might affect the sentencing of those types of frauds linked to organised groups, such as some payment card and EU carousel/MTIC/Value-Added Tax frauds.
6 The information compiled by government may be taken as an indicator — albeit also a legacy — of what government now and in the past considered to be important. By this criterion, the sentencing of serious fraud has never been seen as anyone’s core or even subsidiary business.
7 i.e. we do not know scientifically the extent to which it makes a difference to deterrence whether a fraudster gets a 3, 4 or 10 year sentence, but it seems implausible from general sentencing research or commonsense that a jump from a suspended to a two year jail sentence will have the same or less effect that a jump from a two to four year sentence, etcetera. Likewise, there will be differences in the risk appetite of businesspeople contemplating offences, and we do not know the ‘tipping point’ at which perceived probabilities of detection will deter, nor what fraudsters believe about those risks, which will vary by type of offence as well as personality.
8 Of course it does not apply only to frauds. Academics and other professionals may be sanctioned socially and professionally as a result of conviction for any offences, and it is sociologically as well as philosophically interesting under what circumstances the judgement about ‘gross moral turpitude’ or ‘bringing the institution/ profession into disrepute’ is actually made.
10 Though they may have had prior regulatory violations for which they and/or their firms have been sanctioned or dealt with ‘by advice’, but which are not normally admissible as to character. In the US, this might raise constitutional issues in the same way that
introducing evidence of harm that has not met the criminal standard in the eyes of a jury or has not been admitted by the accused.


12 If the companies to which they are shadow directors get into visible trouble, there may be a reasonable chance that their involvement will be uncovered (if there are financial traces or if anyone ‘grasses’); however we may overestimate the extent to which director disqualification and even de-authorisation from financial services actually incapacitate.


14 In 2010, the RCPO will be merged into the Crown Prosecution Service.


16 Ibid.


24 A Cardiff University doctoral study by Diih (2005) See also the essays by Bottoms and by Ashworth & Player in the same volume.


27 Stating that the government “let its zeal get in the way of its judgment” and “violated the Constitution it is sworn to defend,” Southern District of New York Judge Lewis Kaplan in United States v. Stein, 51 05 Crim. 0888, found that prosecutors had violated the Fifth and Sixth amendments by “causing KPMG to cut off legal fees and other defense costs upon indictment.” (See, e.g. New York Law Journal, 28 June 2006 - http://www.law.com/js/article.jsp?id=1151399128531.) He was highly critical of prosecutors’ interpretation of the Thompson guidelines as oppressive.

28 The technicalities of this are unimportant to a non-US audience (see Pollack, B and Murphy-Johnson, D, 2006. “Commentary: ‘Sufficient, But Not Greater Than Necessary’: Sentencing Fraud After Olins”, Andrews Litigation, March – Appendix 4). Part of Olins’ appeal rested on the unconstitutionality of what amounted to trial without jury in an American context, the judge using estimates of harm that had not been considered by the jury when reaching its verdict.


