Alistair Haggerty reflects on the sentence imposed on Valero Energy UK Ltd following the fatal explosion at the Pembroke Dock Oil Refinery.

Sentences for very large organisations in Health and Safety cases

Following the case of R (Health and Safety Executive) v Valero Energy UK Ltd and B&A Contracts Ltd, in which Andrew Langdon QC, Jim Bennett and Alistair Haggerty acted for the prosecution, Alistair Haggerty considers the sentence imposed and the implications for the future.

Background

On the 2nd June 2011, workers at the Pembroke Dock Oil Refinery were carrying out routine maintenance work on a storage tank on the site. Unbeknown to them, highly flammable vapour had been accumulating in the tank for some time. This ignited, causing an explosion which severed the 5-tonne tank roof and projected it 55 metres. The resulting fireball engulfed the workers, killing four of them. A fifth worker survived, but with life-changing injuries.

At the time of the incident, the refinery was owned and operated by Chevron Limited ('**Chevron**'), but it was subsequently sold to Valero Energy UK Limited ('**Valero UK**'). Valero UK and B&A Contracts Limited (one of the contractors carrying out maintenance work on the site) both pleaded guilty to offences under sections 2 and 3 of the Health and Safety at Work Act 1974 and were sentenced on the 6th June 2019 by Mr Justice Lewis at Swansea Crown Court.

The Sentencing Guidelines

The judge sentenced both organisations in accordance with the Definitive Sentencing Council Guideline for Health and Safety Offences. This requires the court to set a fine, according to the nature of the offence and the financial circumstances of the organisation, by following a series of steps:

1. Step one: the court needs to first determine the level of culpability and the seriousness of the harm risked by the conduct of the organisation. Harm is assessed on a scale of 1 – 3, with 1 being the most serious harm.
2. Step two: the court should identify the relevant table for the offender, according to the size of the organisation. To determine this, the court is required to focus on the organisation's annual turnover. There are five categories of organisation assessed by turnover: micro, small, medium, large and very large.
3. Step three: the court may be required to refer to other financial factors to ensure that the proposed fine is proportionate.
4. The court then needs to consider any further aggravating or mitigating factors and make the appropriate reduction where there has been a guilty plea.

Application of the Guidelines in this Case

In relation to B&A, the sentencing exercise was relatively straightforward; they were, and still are, a "micro" company within the guideline (with an annual turnover of not more than £2 million).

The position was more complicated with regards to Valero UK. In the year ending the 31st December 2011, Chevron had an annual turnover of £9.4 billion. It was therefore a very large organisation according to the guideline. However, following the sale of the refinery, and subsequent restructuring of the corporate group, the annual turnover for Valero UK for the year ending 2017 was £27.6 million, placing it within the medium organisation category. Valero UK is a subsidiary of the Valero Energy group, which has an annual turnover in excess of Chevron's £9.4 billion. Moreover, when the refinery was sold by Chevron, the parties agreed that Chevron Global Energy Inc would indemnify Valero UK for any fine imposed in this case.

The question facing the judge was, therefore, how to fix an appropriately punitive fine which reflected the financial realities. The approach suggested in the leading case of *R (Health and Safety Executive) v Tata Steel UK Ltd* [2017] EWCA Crim 704, was initially to fix the level of fine according to the size of the organisation before the court (step two of the sentencing guidelines), and then adjust the fine to take into account the resources of a linked organisation or parent company (step three). Nevertheless, the approach proposed by the prosecution and defence, and approved by the judge in the present case, was to sentence Valero UK according to Chevron's financial position in 2011. In other words, to treat Valero UK as a very large organisation, with a relevant annual turnover of £9.4 billion, for the purposes of step two.

In his sentencing remarks, Lewis J said:

> 'It would be artificial and inappropriate to approach the sentencing on the basis that the first defendant should be treated as a medium organisation rather than a very large organisation. That would ignore the fact that the explosion happened when it was owned and operated by Chevron. More importantly, there would be a need to recognise the fact that the parent company had agreed to indemnify the first defendant for any fine'.

The sentencing guidelines provide tables, and starting points, for fines for micro, small, medium and large organisations. There is no such table or starting points specified for very large organisations. Indeed, the guideline simply states that "*where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence*".

In this case, Lewis J held that the culpability for Valero UK was high and that it fell within harm category 1. Furthermore, as the offences resulted in four fatalities, the judge placed the offending at the top of the range for this category of offence. For a large organisation, with a turnover of more than £50 million, the top of the range for a harm category 1 offence is a fine of £6 million.

Valero UK's relevant turnover substantially exceeded the £50 million threshold for a large organisation. The judge chose to reflect this by increasing the starting point for the fine from £6 million to £7.5 million. Lewis J observed that this increase of £1.5 million is just under half the difference between the top of the range for harm category 2 (£2.9 million) and harm category 1 (£6 million). Lewis J then reduced this figure by one-third to take account of Valero UK's guilty plea, leaving an overall fine of £5 million.

Implications

What does the approach taken in this case mean for future assessments of fines, especially in relation to very large organisations?

First, it demonstrates that the courts are willing to take a more pragmatic approach to assessing the size of an organisation. It was agreed by all sides that it would have been artificial to regard Valero UK as a medium organisation when Chevron, who owned the refinery at the time, was a very large organisation.

Second, it suggests that the courts are reluctant to depart too radically from the guideline when determining the level of fine, even for very large organisations. The guidelines give the courts a wide discretion as to how they assess the level of fines for very large organisations. This was underlined in *R v Whirlpool UK Appliances Ltd* [2017] EWCA Crim 2186, in which the court held that, "*having determined that an organisation is very large, the calculation of a fine through the structure of the guideline does not at this stage dictate an arithmetic approach to turnover. There is no linear approach*". Nevertheless, the guiding principles articulated in the *Whirlpool* case were that the fine must be proportionate and, citing the guidelines themselves, must be sufficiently substantial to have a real economic impact.

In the present case, Lewis J added £1.5 million to reflect the fact that the defendant was a very large, as opposed to a large, organisation. He did this with direct reference to the guidelines and by extrapolating the figures proposed for large organisations. An alternative approach to the issue of proportionality would have been to fix the fine in proportion to the relevant annual turnover of the organisation. However, a complication of such an approach is that a choice would have to be made between the annual turnover for Chevron (who provided the indemnity) and Valero UK, the defendant company with its much-reduced turnover.

Third, it is important to note that the judge specifically referred to the indemnity between Chevron and Valero UK as a relevant factor in assessing the financial realities. This is something that may be of interest to those acting for companies in corporate mergers and acquisitions, in the event that potential liability under the Health and Safety Act has been identified.

This case is just one example of how the courts have approached the issue of fines in health and safety cases since the introduction of the sentencing guidelines in 2016. This remains a developing area, especially in relation to very large organisations.

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(*June 2019*)

To read more about the case, click on of the links below:

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https://www.itv.com/news/wales/2019-06-06/companies-fined-over-6-million-for-fatal-pembroke-refinery-oil-explosion/

https://press.hse.gov.uk/2019/06/06/valero-energy-uk-fined-5-million-after-four-people-died-in-an-oil-explosion/