Sentencing Council

This document summarises the changes made to guidelines and the explanatory materials to the Magistrates' Court Sentencing Guidelines (MCSG) on 1 October 2020. A fuller explanation of the changes can be found in the Response to consultation document.

Drive whilst disqualified

Summary of changes:

1. *Addition of note before the table*
2. *Amendment of wording in final column of table*
3. *Addition of wording (in blue box) relating to disqualification after table*
4. *Addition of wording relating to no statutory maximum period of disqualification*

The changes have been made to ensure that the period of disqualification takes account of: the new offence; any unexpired term of the existing disqualification; and any extension required if custody is imposed.

Previous version:

Step 2 – Starting point and category range

Having determined the category at step one, the court should use the appropriate starting point to reach a sentence within the category range in the table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Level of seriousness	Starting Point	Range	Penalty points/disqualification
Category 1	12 weeks' custody	High Level community order – 26 weeks' custody	Disqualify for 12 – 18 months beyond expiry of current ban (Extend if imposing immediate custody)
Category 2	High level community order	Medium level community order -12 weeks' custody	Disqualify for 6 – 12 months beyond expiry of current ban (Extend if imposing immediate custody)
Category 3	Low level community order	Band C fine – Medium level community order	Disqualify for 3 – 6 months beyond expiry of current ban **OR** 6 points

- **Must endorse and may disqualify. If no disqualification impose 6 points**
- **Extend disqualification if imposing immediate custody**

Version in force from 1 October 2020:

Step 2 – Starting point and category range

Having determined the category at step one, the court should use the appropriate starting point to reach a sentence within the category range in the table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Note: Check the period which remains on the existing disqualification, and the expiry date. This information is necessary as all disqualification periods must begin on the day of sentence – there is no provision for consecutive disqualifications.

Level of seriousness	Starting Point	Range	Penalty points/disqualification
Category 1	12 weeks' custody	High Level community order – 26 weeks' custody	*Disqualify for 12 – 18 months for this offence (plus any additional periods as set out below)
Category 2	High level community order	Medium level community order -12 weeks' custody	*Disqualify for 6 – 12 months for this offence (plus any additional periods as set out below)
Category 3	Low level community order	Band C fine – Medium level community order	*Disqualify for 3 – 6 months for this offence (plus any additional periods as set out below) **OR** 6 points

In every case the court must endorse and may disqualify. If not disqualifying the court must impose 6 points

***Disqualification**

To determine the overall period of disqualification –

1) determine the appropriate period of disqualification for this offence from the table above;

2) add any unexpired period of disqualification as at the date of sentence for this offence;

Where immediate custody is being imposed (for this or any other offence sentenced at the same time), to ensure that the offender serves all of the period of disqualification imposed for this offence once released from custody –

3) add a period of disqualification equivalent to half of the custodial sentence imposed. See the guidance on extending disqualification when imposing custody

There is no statutory maximum period of disqualification.

Breach of a community order

Summary of changes:

1. *Removal of 'extend length of order' from the table*
2. *Addition of note under the table*
3. *Amendment in point a. in technical guidance*

The changes have been made to ensure that the wording in the guideline is consistent with legislation and in particular to avoid the impression that extending the length of a community order is a standalone way of dealing with a breach.

Previous version:

Overall compliance with order	Penalty
Wilful and persistent non-compliance	Revoke the order and re-sentence imposing custodial sentence (even where the offence seriousness did not originally merit custody)
Low level of compliance	Revoke the order and re-sentence original offence **OR** Add curfew requirement 20 – 30 days* **OR** 30 – 50 hours additional unpaid work/extend length of order/add additional requirement(s) **OR** Band C fine
Medium level of compliance	Revoke the order and resentence original offence **OR** Add curfew requirement 10 – 20 days* **OR** 20 – 30 hours additional unpaid work/extend length of order/add additional requirement(s) **OR** Band B fine
High level of compliance	Add curfew requirement 6 – 10 days* **OR** 10 – 20 hours additional unpaid work/extend length of order/add additional requirement(s) **OR** Band A fine

* curfew days do not have to be consecutive and may be distributed over particular periods, for example at weekends, as the court deems appropriate. The period of the curfew should not exceed the duration of the community order and cannot be for longer than 12 months.

Fines

Community orders

Custodial sentences

Technical guidance

a. If imposing more onerous requirements the length of the order may be extended up to 3 years or six months longer than the previous length, which ever is longer (but only once).

b. If imposing unpaid work as a more onerous requirement and an unpaid work requirement was not previously included, the minimum number of hours that can be imposed is 20.

Version in force from 1 October 2020:

Overall compliance with order	Penalty
Wilful and persistent non-compliance	Revoke the order and re-sentence imposing custodial sentence (even where the offence seriousness did not originally merit custody)
Low level of compliance	Revoke the order and re-sentence original offence **OR** Add curfew requirement 20 – 30 days* **OR** 30 – 50 hours additional unpaid work/add additional requirement(s) **OR** Band C fine
Medium level of compliance	Revoke the order and resentence original offence **OR** Add curfew requirement 10 – 20 days* **OR** 20 – 30 hours additional unpaid work/add additional requirement(s) **OR** Band B fine
High level of compliance	Add curfew requirement 6 – 10 days* **OR** 10 – 20 hours additional unpaid work/add additional requirement(s) **OR** Band A fine

* curfew days do not have to be consecutive and may be distributed over particular periods, for example at weekends, as the court deems appropriate. The period of the curfew should not exceed the duration of the community order and cannot be for longer than 12 months.

The court may extend the length of requirement(s) or the length of the order to allow time for the completion of requirement(s): simply extending the length of the order is not a standalone option for dealing with a breach, see also Technical guidance below.

Fines

Community orders

Custodial sentences

Technical guidance

a. If imposing more onerous requirements the length of the order may be extended by up to 6 months – even if that has the effect of extending the order beyond 3 years. The power to extend can only be exercised once.
b. If imposing unpaid work as a more onerous requirement and an unpaid work requirement was not previously included, the minimum number of hours that can be imposed is 20.

Breach of a community order / Totality

Summary of changes:

Amendment to third paragraph in the section 'Offender convicted of an offence while serving a community order'

The change has been made to reflect the position that (at present) the legislation relating to breach of a community order creates a power to commit the offender but not the new offence to the Crown Court. Prospective legislative changes are likely to create such a power. The revised wording is designed to apply both before and after the legislative changes are made.

Previous version:

Offender convicted of an offence while serving a community order

The power to deal with the offender depends on his being convicted whilst the order is still in force; it does not arise where the order has expired, even if the additional offence was committed whilst it was still current.

If an offender, in respect of whom a community order made by a magistrates' court is in force, is convicted by a magistrates' court of an additional offence, the magistrates' court should ordinarily revoke the previous community order and sentence afresh for both the original and the additional offence.

Where an offender, in respect of whom a community order made by a Crown Court is in force, is convicted by a magistrates' court, the magistrates' court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence and the additional offence.

The sentencing court should consider the overall seriousness of the offending behaviour taking into account the additional offence and the original offence. The court should consider whether the combination of associated offences is sufficiently serious to justify a custodial sentence.

If the court does not consider that custody is necessary, it should impose a single community order that reflects the overall totality of criminality. The court must take into account the extent to which the offender complied with the requirements of the previous order.

Version in force from 1 October 2020:

Offender convicted of an offence while serving a community order

The power to deal with the offender depends on his being convicted whilst the order is still in force; it does not arise where the order has expired, even if the additional offence was committed whilst it was still current.

If an offender, in respect of whom a community order made by a magistrates' court is in force, is convicted by a magistrates' court of an additional offence, the magistrates' court should ordinarily revoke the previous community order and sentence afresh for both the original and the additional offence.

Where an offender, in respect of whom a community order made by a Crown Court is in force, is convicted by a magistrates' court, the magistrates' court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence. The magistrates' court may also commit the new offence to the Crown Court for sentence where there is a power to do so.

The sentencing court should consider the overall seriousness of the offending behaviour taking into account the additional offence and the original offence. The court should consider whether the combination of associated offences is sufficiently serious to justify a custodial sentence.

If the court does not consider that custody is necessary, it should impose a single community order that reflects the overall totality of criminality. The court must take into account the extent to which the offender complied with the requirements of the previous order.

Explanatory materials – 'Victim' surcharge

Summary of changes:

1. *Change of all references of 'victim surcharge' to 'surcharge'*
2. *On Surcharge page: addition of wording starting from 'This is a mandatory' to the first paragraph of the guidance*
3. *On Prosecution costs page: slight amendment to final paragraph re order of priority.*

The changes have been made to ensure that sentencers apply the legally correct order of priority when an offender does not have sufficient means to pay all financial penalties and to use the statutory language and avoid giving the false impression that the surcharge goes to the victim of the offence.

Previous version:

Victim surcharge

Show all parts of this guide

When sentencing for offences committed on or after 1 October 2012 a magistrates' court must order the Victim Surcharge in the following ways (Criminal Justice Act 2003, s.161A; CJA 2003 (Surcharge) Order 2012; CJA 2003 (Surcharge) (Amendment) Order 2014; CJA 2003 (Surcharge) (Amendment) Order 2016, CJA 2003 (Surcharge) (Amendment) Order 2019 and CJA 2003 (Surcharge) (Amendment) Order 2020).

Version in force from 1 October 2020:

Surcharge

When sentencing for offences committed on or after 1 October 2012 a magistrates' court must order the Surcharge in the following ways (Criminal Justice Act 2003, s.161A; CJA 2003 (Surcharge) Order 2012; CJA 2003 (Surcharge) (Amendment) Order 2016) and CJA 2003 (Surcharge) (Amendment) Order 2019. This is a mandatory requirement set out in section 161A of the Criminal Justice Act 2003. Courts can reduce the amount of the surcharge (if necessary to nil) if – and only if – an offender cannot pay both the surcharge and one or more of the following orders:

- compensation order,
- unlawful profit order,
- slavery and trafficking reparation order.

If a defendant can afford to make payment in addition to one or more of those orders, the court **must** impose a surcharge, rather than another financial order such as costs.

Previous version:

Where the court wishes to impose costs in addition to a fine, compensation and/or the victim surcharge but the offender has insufficient resources to pay the total amount, the order of priority is:

1. compensation;
2. victim surcharge;
3. fine;
4. costs.

Version in force from 1 October 2020:

Where the court wishes to impose costs in addition to any of the following: a fine; compensation; the surcharge, but the offender has insufficient resources to pay the total amount, the court **must** apply the following order of priority:

1. compensation;
2. surcharge;
3. fine;
4. costs.

Explanatory materials – high income offenders

Summary:

The text on the 'Assessment of financial circumstances' page of the explanatory material relating to high income offenders has been replaced with a simple reminder not to exceed the statutory maximum.

The change has been made to reflect the fact that there is no justification for a high income offender paying a smaller proportion of their income as a fine than any other offender.

Previous version:

High income offenders

Where the offender is in receipt of very high income, a fine based on a proportion of relevant weekly income may be disproportionately high when compared with the seriousness of the offence. In such cases, the court should adjust the fine to an appropriate level; as a general indication, in most cases the fine for a first time offender pleading not guilty should not exceed 75 per cent of the maximum fine. In the case of fines which are unlimited the court should decide the appropriate level with the guidance of the legal adviser.

Version in force from 1 October 2020:

High income offenders

The court should ensure that any fine does not exceed the statutory maximum for the offence.

Exceptional hardship in 'Totting up' disqualifications

Summary:

The guidance has been expanded to provide greater assistance to sentencers and to be more transparent for all users.

Previous version:

3. 'Totting up' disqualification

Show all parts of this guide

Disqualification for a minimum of six months must be ordered if an offender incurs 12 penalty points or more within a three-year period (Road Traffic Offenders Act ("RTOA") 1988, s.35). The minimum period may be automatically increased if the offender has been disqualified within the preceding three years. Totting up disqualifications, unlike other disqualifications, erase all penalty points.

The period of a totting up disqualification may be reduced or avoided for exceptional hardship or other mitigating circumstances if the court thinks fit to do so. No account is to be taken of hardship that is not exceptional hardship or circumstances alleged to make the offence not serious. Any circumstances taken into account in the preceding three years to reduce or avoid a totting disqualification must be disregarded (RTOA 1988, s.35).

Consult your legal adviser for further guidance on minimum periods and exceptional hardship applications.

Version in force from 1 October 2020:

Guideline users should be aware that the Equal Treatment Bench Book covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

Incurring 12 or more penalty points within a three-year period means a minimum period of disqualification must be imposed (a 'totting up disqualification') – s.35 Road Traffic Offenders Act (RTOA) 1988.

The minimum period is:

- **six months** if no previous disqualification is to be taken into account
- **one year** if one previous disqualification is to be taken into account
- **two years** if more than one previous disqualification is to be taken into account.

A previous disqualification is to be taken into account if it is:

- not less than **56 days**; and
- **imposed** within the three years immediately preceding the **date on which the current offence** (or most recent of the current offences) **was committed**.

Totting up disqualifications, unlike other disqualifications, erase all penalty points.

The court should first consider the circumstances of the offence, and determine whether the offence should attract a discretionary period of disqualification. But the court must note the statutory obligation to disqualify those repeat offenders who would, were penalty points imposed, be liable to the mandatory "totting" disqualification, and should ordinarily prioritise the "totting" disqualification ahead of a discretionary disqualification.

If the offender has 12 or more penalty points the court **must** order the offender to be disqualified for not less than the minimum period **unless** the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified – s.35(1) RTOA 1988.

In deciding whether there are grounds to reduce or avoid a totting up disqualification the court must **not** take into account:

(a) any circumstances that are alleged to make the offence (or any of the offences whose penalty points are to be taken into account) not serious,

(b) hardship, other than exceptional hardship, or

(c) any circumstances which, within the three years immediately preceding the conviction, have been taken into account to reduce or avoid a totting up disqualification.

– s.35(4) RTOA 1988

When considering whether there are grounds to reduce or avoid a totting up disqualification the court should have regard to the following:

- It is for the offender to prove to the civil standard of proof that such grounds exist. Other than very exceptionally, this will require evidence from the offender, and where such evidence is given, it must be sworn.
- Where it is asserted that hardship would be caused, the court must be satisfied that it is not merely inconvenience, or hardship, but **exceptional** hardship for which the court must have evidence;
- Almost every disqualification entails hardship for the person disqualified and their immediate family. This is part of the deterrent objective of the provisions combined with the preventative effect of the order not to drive.
- If a motorist continues to offend after becoming aware of the risk to their licence of further penalty points, the court can take this circumstance into account.
- Courts should be cautious before accepting assertions of exceptional hardship without evidence that alternatives (including alternative means of transport) for avoiding exceptional hardship are not viable;
- Loss of employment will be an inevitable consequence of a driving ban for many people. Evidence that loss of employment would follow from disqualification is not in itself sufficient to demonstrate exceptional hardship; whether or not it does will depend on the circumstances of the offender and the consequences of that loss of employment on the offender and/or others. Useful information can be found in the Equal Treatment Bench Book (see in particular Chapter 11);

Where it finds that there are grounds for mitigating the 'normal consequences of the conviction', the court may consider whether this can be achieved by ordering a period of disqualification which is shorter than the statutory minimum or by ordering that the offender should not be disqualified at all.

Where the court does not find grounds for mitigating the normal consequences of the conviction then a period of disqualification of at least the statutory minimum **must** be imposed.

Consult your legal adviser for further guidance on minimum periods and applications for avoiding or reducing the minimum period.

Equal Treatment Bench Book (ETBB)

As illustrated in the *'totting-up'* guidance above, a reference to the ETBB has been included in any page of the explanatory materials that involves the exercise of judicial discretion.