

Briefing paper

A NEW EU ENVIRONMENTAL CRIME DIRECTIVE

A diverging approach with the UK?



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EXECUTIVE SUMMARY



Environmental crime can be an emotive topic. From dead fish and pollution in rivers, to chemical spills, to destruction of habitats and the trade in species and wild flora; the most serious environmental crimes often elicit a strong response from the public. Environmental crime, particularly in the field of waste and wildlife crime, is often tied up with organised crime too. However, applying criminal sanctions in environmental crime cases is usually expensive and time consuming, and it is reserved for the most serious environmental crimes.

In many EU member states criminal prosecutions are few in number with a preference for administrative penalties. To change this, the European Commission has brought in a new EU **Environmental Crime Directive** (ECD) to require the use of criminal sanctions in certain cases, and to level up and harmonise sanctions already in place. This new Directive is a significant upgrade on the previous 2008 ECD and has several potentially very significant innovations for the UK to consider putting into practice here in future.

However, the UK in contrast already carries out many more criminal prosecutions and puts many more individuals in jail for environmental offences than its European peers and the levels of fines in the UK are comparatively high too. With jails that are full or close to capacity in the UK; environmental crime that is linked to organised criminal gangs and behaviour (which increases its complexity and difficulty in tackling); and after more than a decade of austerity and budget cuts to bodies who prosecute environmental crime, it is difficult to see how even if the UK had been a member of the EU and had been obligated to implement the new directive, that practice would have changed much, or at least quickly.

In a sense, the EU is playing catch up with the UK on using criminal sanctions to punish offenders of environmental crime. Over time though, this new directive could change the overall narrative and places may be reversed.

Despite a stronger record in the UK on using criminal sanctions than other countries in Europe, it is questionable whether the level of deterrence that such sanctions represent, or the certainty of

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their application, is sufficient to tackle many of the more significant environmental crimes we see. The introduction of the Government's Water (Special Measures) Bill, for example, is arguably a response (in part) to actual and/or perceived failures to comply with water related laws.

Putting in place a robust legal framework is part of the challenge. So is adequately funding and training enforcement bodies and providing them with a mixture of tools – both administrative and criminal (as well as encouraging compliance promotion to prevent crime) – to tackle offences as and when they occur. After that, the courts will decide.

Key conclusions

- ∞ The EU's 2024 Environmental Crime Directive causes legal divergence with the UK.
- ∞ Several elements within the new Directive add up to significant and consequential divergence, and which deserve attention by UK authorities, particularly:
 1. The new 'Qualified Offences' article.
 2. The requirement for member states to provide authorities that 'detect, investigate, prosecute or adjudicate environmental criminal offences' with 'sufficient resources'.
 3. Criminal sanctions for wildlife related crimes are now stricter in the EU versus the UK. Changes to sentencing guidelines in England may 'correct' this though in the near future.
 4. Several non-criminal sanctions have been introduced.
 5. Requirements for member states to put in place a national environmental crime strategy and report on their efforts.
- ∞ Despite the *legal* divergence, in practice, the UK carries out many more criminal prosecutions and puts many more individuals in jail for environmental offences than its European peers and the levels of fines in the UK are comparatively high too.
- ∞ The cost (in time and money) of going to court is expensive. It is doubtful that practice in England would have changed had the UK still been a member of the EU and had been obligated to implement the 2024 directive.
- ∞ Budget cuts to authorities in the UK to 'detect, investigate, prosecute or adjudicate environmental criminal offences' has meant a reduced capacity to tackle many more serious environmental crime cases worthy of attention, including those related to organised crime, ranging from waste and water to nature and marine.
- ∞ It is questionable whether the level of deterrence that criminal sanctions in the UK represent, or the certainty of their application, is sufficient to tackle many of the more significant environmental crimes we see.
- ∞ Putting in place a robust legal framework is key. So is adequately funding and training enforcement bodies and providing them with a mixture of tools – both administrative and criminal (as well as encouraging compliance promotion to prevent crime) – to tackle offences as and when they occur.



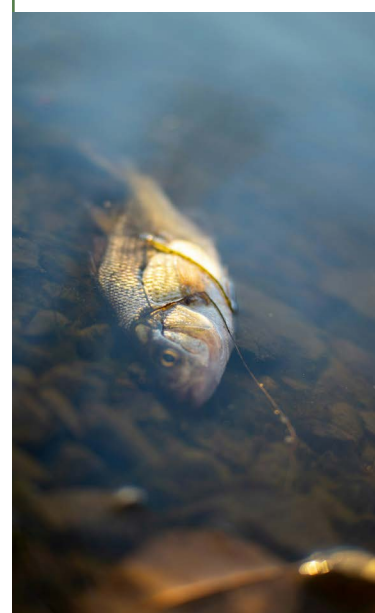
INTRODUCTION

Environmental crime can be an emotive topic. From dead fish and pollution in rivers, to chemical spills, to destruction of habitats and the trade in species and wild flora; the most serious environmental crimes often elicit a strong response from the public.¹ Environmental crime, particularly in the field of waste and wildlife crime, is often tied up with organised crime too.² Yet, the environmental crime that is prosecuted and penalties imposed takes place without much fanfare – it is the most serious and widespread damage and destruction to the environment that makes the headlines.

Applying criminal sanctions is usually expensive and time consuming, and in the UK, like many other European countries, it is reserved for the most serious environmental crimes. It is often the last resort. Promoting compliance with the law and preventing crime are seen as at least equally effective and where necessary imposing administrative or civil sanctions is much more widely used.

A key area of work for IEEP UK since 2021 has been examining the significance and consequence of divergence in UK/EU environmental law after Brexit.³ Up to the point of Brexit, the EU and UK effectively harmonised their approach to environmental law, including on aspects of environmental crime⁴ but afterwards divergence could take place in a number of ways, either the EU changes its laws, leading to differences with the UK; changed UK law, leads to differences with the EU and/or there are changes in how the UK implements its law.

However, the use and application of different types of civil sanctions (discussed briefly later) and the introduction of Sentencing Guidelines in 2014 for environmental offences were significant developments. The EU has now amended its core legislation on environmental crime. There are some who argue that over recent years there has been a change in



¹ <https://europa.eu/eurobarometer/surveys/detail/3173>

² European Commission: Directorate-General for Environment, Combating environmental crimes and related infringements – Environmental compliance assurance – Guidance document, Publications Office of the European Union, 2021, <https://data.europa.eu/doi/10.2779/035969>

³ <https://ieep.uk/work-streams/divergence-in-uk-eu-environment-policy/>

⁴ It is important to note that even with EU law on environmental crime there is still much variation between Member States on the scope and application of criminal law to environmental offences. See: Farmer, A.M., Faure, M. and Vagliasindi, G.M. (2020). *Environmental Crime in Europe*. Hart Publishing (Bloomsbury). <https://www.bloomsbury.com/uk/environmental-crime-in-europe-9781509937455/>

practice in the UK in the implementation of environmental criminal law too, perhaps caused by a reduction in the resource provided to key regulatory agencies involved in detecting and prosecuting crime but that is not the focus of this paper.

As there are differing legal systems in the UK with some differences in approach, this briefing focuses its attention on England although many of the principles applied in England are the same or similar in other parts of the UK.



THE LEGAL AND POTENTIAL CONTEXT

Entering into force on 20 May 2024, a new 'Environmental Crime Directive' (ECD) (2024/1203)⁵ has been brought in to tackle the most serious and long lasting types of damage caused to the environment by criminal behaviour. It replaces an earlier directive (2008/99/EC)⁶ and is designed to be more comprehensive in the list of offences it captures within its scope, is clearer in the language and terminology used to assist Member States in tracking and prosecuting criminal acts and sets out the levels of penalties that should be applied in different circumstances.

The UK transposed the 2008 ECD in full into UK law, but as it is no longer a member of the EU will not implement the 2024 directive.

In England, there are a number of bodies involved in the enforcement chain of environmental law and the ECD is of interest to: judges, police, and regulatory bodies such as the Environment Agency (EA) and Natural England (NE), which are responsible for enforcement. To prosecute environmental crime, the EA and NE have a wide variety of laws at their disposal but in practice use a relatively small number of these. The main laws used to prosecute environmental criminal acts, are:

- ∞ The Environmental Protection Act 1990⁷
- ∞ Water Resources Act 1991⁸
- ∞ Environmental Permitting Regulations 2016⁹
- ∞ Hazardous Waste (England and Wales) Regulations 2005¹⁰
- ∞ Salmon and Freshwater Fisheries Act 1975¹¹
- ∞ Wildlife & Countryside Act 1981¹²
- ∞ The Conservation of Habitats and Species Regulations 2017¹³

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5 <https://eur-lex.europa.eu/eli/dir/2024/1203/oj>

6 <http://data.europa.eu/eli/dir/2008/99/oj>

7 <https://www.legislation.gov.uk/ukpga/1990/43>

8 <https://www.legislation.gov.uk/ukpga/1991/57>

9 <https://www.legislation.gov.uk/uksi/2016/1154>

10 <https://www.legislation.gov.uk/id/uksi/2005/894>

11 <https://www.legislation.gov.uk/ukpga/1975/51>

12 <https://www.legislation.gov.uk/ukpga/1981/69>

13 <https://www.legislation.gov.uk/uksi/2010/490>

The EA and NE publish their prosecutions¹⁴ and both set out the principles of their respective enforcement policies online. Natural England sets this out in a Compliance and Enforcement Position¹⁵ and the EA's Enforcement and Sanctions Policy.¹⁶ The policies are detailed but are framed by six overarching principles of the purpose of a sanctioning system.¹⁷ These are to:

- ∞ Change the behaviour of the offender
- ∞ Remove any financial gain or benefit arising from the breach
- ∞ Be responsive and consider what is appropriate for the particular offender and regulatory issue, including punishment and the public stigma that should be associated with a criminal conviction
- ∞ Be proportionate to the nature of the breach and the harm caused
- ∞ Take steps to ensure any harm or damage is restored
- ∞ Deter future breaches by the offender and others.

These are reminiscent of and reflect the principles of EU environmental law and terminology in the ECD that penalties should be effective, proportionate and dissuasive. It also makes clear that criminal prosecution is generally the last resort after other, non-criminal civil sanctions have been considered. It is worth noting however that there are sometimes cases so severe that prosecutors consider sending cases straight to criminal prosecution, for example a recent case in England is a chemical spill of sodium cyanide and zinc cyanide in a stretch of canal near Walsall in the West Midlands.¹⁸

The level of penalties applicable for environmental offences is supported by guidelines from the Sentencing Council¹⁹ and judges are obliged to follow these guidelines (Sentencing Act 2020, s.59) 'unless the court is satisfied that it would be contrary to the interests of justice to do so'. This means that these guidelines are very influential in determining sentences.

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¹⁴ For Natural England, <https://www.gov.uk/government/publications/register-of-enforcement-action-taken-by-natural-england> and for the Environment Agency, <https://www.data.gov.uk/dataset/6f06910a-8411-4117-9905-6284f1997c33/environment-agency-prosecutions>

¹⁵ <https://assets.publishing.service.gov.uk/media/5a7e43bded915d74e62252d8/compliance-enforcement-position.pdf>. See also, <https://www.gov.uk/guidance/enforcement-laws-advice-on-protecting-the-natural-environment-in-england>

¹⁶ <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy#introduction>

¹⁷ The principles were first contained in the Macrory report, Regulatory Sanctions: Making Sanctions Effective (Cabinet Office, 2006), https://www.regulation.org.uk/library/2006_macrory_report.pdf

¹⁸ <https://www.gov.uk/government/news/chemical-spill-in-walsall>

¹⁹ <https://www.sentencingcouncil.org.uk/wp-content/uploads/Environmental-offences-definitive-guideline-Web.pdf>

Definitions and other textual changes

The 2024 ECD amends and adds much to the wording of the 2008 directive. A part of the criticism of the 2008 directive was the vagueness of several concepts included in the text,²⁰ such as “substantial damage”, “non-negligible quantity”, and “significant deterioration”.²¹ The 2024 directive has attempted to rectify this by providing further clarification. Arguably, it will be for the courts and court cases to determine how effective these clarifications have been.

The new ‘qualified offences’ article however is a major addition to the new directive. This is discussed below, but includes terminology such as ‘widespread’, ‘substantial’ and ‘long-lasting’ in its description. How this will be interpreted and applied will be of major interest to many independent observers.

Scope

The scope of the 2024 directive is much broader than the 2008 directive. It increases the number of activities, contravention of which when committed intentionally or with at least serious negligence, constitutes criminal behaviour from 8 to 20 offences. **Table 1** below sets these out.

²⁰ See 3.1.4 of the Evaluation Study on the implementation of the directive: https://commission.europa.eu/document/download/5fe5a3b7-e6e6-4de2-8a8b-cca3f8f49844_en?filename=milieu_implementation_report_2013.pdf

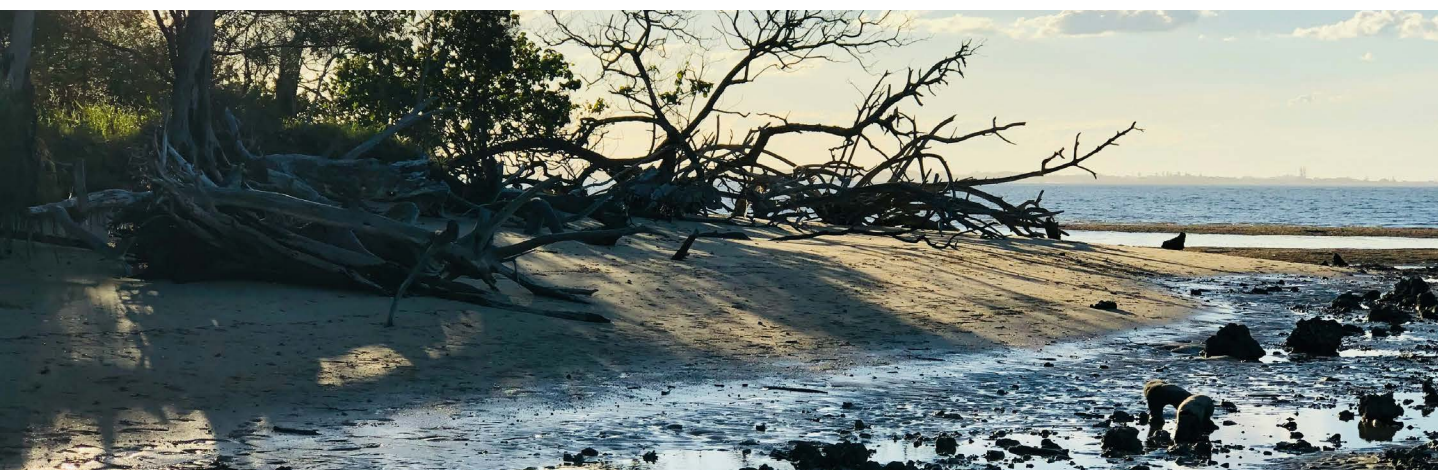
²¹ It should be noted that the ECD cross refers to other directives (habitats, water, etc.) which use terms such as “significant”, so that the difficulty of interpretation does not always arise within the ECD itself.

Table 1 **2024 ENVIRONMENTAL CRIME DIRECTIVE**
An expanded list of offences and penalties

Offence	Offence that was included in 2008 directive	Penalties for natural persons (maximum term of imprisonment)	Maximum term of imprisonment of at least 10 years if they cause death	Legal Person – fines
a. Emissions to air, soil and water that cause or is likely to cause death, injury or substantial damage to an ecosystem, animal or plants	✓	at least 5 years	✓	5% of total worldwide turnover or €40 million
b. Placing on the market of products that cause or is likely to cause death, injury or substantial damage to an ecosystem, animal or plants	✗	at least 5 years	✓	
c. REACH	✗	at least 5 years	✓	
d. Mercury	✗	at least 5 years	✓	
e. Environmental Impact Assessment	✗	at least 5 years	✗	
f. Waste – collection, transport, treatment disposal (incl. hazardous)	✓	at least 5 years	✓	
g. (Trans-) Shipment of Waste	✓	at least 5 years	✗	
h. Ship Recycling	✗	at least 5 years	✗	
i. Pollution from ships	✗	at least 5 years	✗	
j. Industrial pollution (related to Seveso and Industrial Emissions Directive)	✓	at least 5 years	✓	
k. Offshore oil and gas operations	✗	at least 5 years	✓	
l. Radioactive substances	✓	at least 5 years	✓	

Table 1 **2024 ENVIRONMENTAL CRIME DIRECTIVE**
 An expanded list of offences and penalties (cont.)

	<i>Offence that was included in 2008 directive</i>	<i>Penalties for natural persons (maximum term of imprisonment)</i>	<i>Maximum term of imprisonment of at least 10 years if they cause death</i>	<i>Legal Person – fines</i>
m.	Water abstraction	✓	at least 3 years	✓
n.	Habitats & Birds Directives – the killing, destruction, possession, sale of species	✓	at least 3 years	✓
o.	Trade in wild fauna and flora	✓	at least 3 years	✗
p.	Trade in deforested products	✗	at least 5 years	✗
q.	Habitats Directive – deterioration of habitats within a protected site or disturbance of species	✓	at least 3 years	✗
r.	Invasive Alien Species	✗	at least 3 years	✓
s.	Ozone Depleting Substances	✓	at least 5 years	✗
t.	Fluorinated Gases	✗	at least 5 years	✗



Penalties

The 2024 directive differs significantly from the 2008 directive with regard to penalties. Where the 2008 directive allowed significant leeway and discretion for Member States over what they considered to be 'effective, proportionate and dissuasive criminal penalties', the 2024 directive is much more prescriptive.

Seen as an attempt to harmonise penalties across the EU, the directive sets out what the maximum penalties should be for those activities listed (Article 5). Most of the penalties listed are punishable by a maximum term of imprisonment of at least 3 or 5 years depending on which of the actions it relates to, whether it is long lasting, the extent of the damage, and/or the reversibility of the damage. Qualified Offences are punishable by a maximum term of imprisonment of at least 8 years with those that cause death at least 10 years.

The Directive is also significant because it clearly sets out that those offences listed in the Directive constitute a criminal offence where it is 'unlawful' and 'intentional' (Article 3(2)) and in specific cases where it is conducted with at least 'serious negligence' (Article 3(4)). However, in the UK, many environmental offences are drafted in 'strict liability' terms meaning that no intentional or reckless action needs to be proven. The degree of intention and recklessness is then often reflected in the level of sentence handed down.

In England, the 2016 Environmental Permitting (England and Wales) Regulations,²² the Environmental Protection Act 1990²³ & Water Resources Act 1991²⁴ which cover many of the activities listed in the new ECD, all provide for criminal sentences up to 5 years (where there is a conviction on indictment) and up to 12 months (for summary conviction)²⁵ with the possibility of applying a fine too, which is generally unlimited. In a sense therefore, in England, the desired severity of the criminal sanctions is already in place.

However, there are some exceptions.

The new ECD lists some nature related laws too which are now punishable by a minimum maximum term of imprisonment of at least 3 years. In the Wildlife and Countryside Act 1981, the UK penalties are less severe – 6 months to 2 years and/or a fine. For sentences related to



²² <https://www.legislation.gov.uk/ukxi/2016/1154/contents>

²³ <https://www.legislation.gov.uk/ukpga/1990/43/contents>

²⁴ <https://www.legislation.gov.uk/ukpga/1991/57/contents>

²⁵ Summary conviction in general lay terms is a criminal offence that is considered less serious and is resolved without a jury and usually tried in a Magistrates Court. A conviction on indictment is more serious and usually carries a heavier sentence and is tried in a Crown Court with a jury.

ozone depleting substances and fluorinated gases, the ECD mandates a minimum maximum term of imprisonment of at least 5 years whereas English law mandates fines only. In this way the ECD takes EU legislation ahead of the development of UK law.

It is important to note that fines issued as criminal sanctions (or civil sanctions) are separate from any liability costs that might arise (e.g. under the Environmental Liability Directive), where a legal entity may be required to pay for the cost of clean-up or restoration of damage. However, in practice there may be a blurring of the boundary between the two regimes.

Box 1 Civil vs Criminal Sanctions

In England (and the rest of the UK), the cost of prosecution, which leads to the application of criminal sanctions, is expensive and time intensive.

In practice, more and more environmental crime is now punished using civil sanctions. See also the **Annex**. In England, the regulatory agencies have an array of civil sanctions at their disposal. They can for example issue Fixed Monetary Penalties, Variable Monetary Penalties (VMP), Compliance Notices, Restoration Notices (requiring an offender to put right the damage caused), Stop Notices (requiring that an activity causing harm to stop immediately), and Enforcement Undertakings (a voluntary offer by an offender to put right their offending and sometimes involves compensation to local charities to environmental restoration schemes).

In December 2023, the then Conservative Government announced that it had removed the penalty cap of £250,000 on VMP's and that fines were now unlimited (according to the size of the company involved and the severity of the crime).

There has also been a move towards 'ring-fencing' the proceeds from environmental crime in order to use that to restore damage caused by illegal acts. The Water Restoration Fund (using fines from England's water and sewerage companies) is the most significant example, but local authorities are also now able to use receipts from Fixed Penalty Notices issued with regard to waste crime (mainly fly-tipping) to clean up their local area.²⁶

Non-criminal penalties

The 2024 ECD calls for Member States to put in place 'effective, dissuasive and proportionate types and levels of non-criminal penalties and that non-criminal penalties for qualified criminal offences are made more severe. It lists several such non-criminal penalties: the

²⁶ The Waste Enforcement (Fixed Penalty Receipts) (Amendment) (England and Wales) Regulations 2024, <https://www.legislation.gov.uk/uksi/2024/365/introduction/made>

requirement to restore the environment and/or pay compensation for damage caused, fines, exclusion from access to public funding (tender processes for example), disqualification from holding a leading position within a legal person (e.g. a company), withdrawal of permits or authorisations related to the offence, temporary bans on running for public office and where there is public interest, publication of the offence.

The ECD makes clear these are not exhaustive, and that Member States can take necessary measures, but such non-criminal penalties are widely used in some countries already. The UK is one of these.

In England, many of these non-criminal penalties have been incorporated within the sanctions policies of regulatory bodies for many years already. A particularly powerful tool is the Proceeds of Crime Act which came into law in 2002 and since 2022 the Environment Agency has had access to the Police National Computer, Police National Database and National Automatic Number Plate Recognition Service to help them with their investigations and prosecutions. The EA can also impose a 'Restoration Notice', impose financial penalties and impose Stop Notices (ordering an activity to be ceased immediately). A prosecutor may make an application to the courts for a Directors Disqualification Order which is akin to the inclusion in the ECD of a 'disqualification for holding a leading position in a legal person'. However, exclusion to access to public funding or temporary bans on running for public office do not appear in UK law.

Article 10 also requires that Member States put in place measures that allow competent authorities to freeze and confiscate the proceeds of crime. In the UK, such practice is common and has been in place for some time already.

Qualified Offences

The 2024 ECD captured headlines in the environmental community, because of wording surrounding an article relating to 'Qualified Offences' which did not appear in the 2008 ECD. A reference to the term 'ecocide' in the accompanying text to the Directive (though not in the legal articles themselves) was considered a significant win by eNGOs who have campaigned on strengthening laws to tackle the most grievous forms of environmental crime. It has also provided a boost to the growing international ecocide movement,²⁷ though many will note that it still falls short of what they think is required.

“Those qualified criminal offences can encompass conduct comparable to ‘ecocide’, which is already covered by the law of certain Member States, and which is being discussed in international fora.”

“A PARTICULARLY POWERFUL TOOL IS THE PROCEEDS OF CRIME ACT”

²⁷ <https://www.stopecocide.earth/>

The Directive describes a qualified offence as criminal if there is destruction, widespread and substantial damage which is irreversible or long lasting to an eco-system of considerable size or environmental value within a protected site or to the quality of air, soil or water. Importantly, for a qualified offence to have occurred an *intention* to cause such damage will have to be established and the preamble to the directive lingers on the notion of intent to underline and explain the directive's meaning. How this will be interpreted and considered in future cases alongside the understanding of what is 'considerable' or 'widespread' will be of major interest going forward and will be a test of how effective this directive is.

For qualified offences the directive sets out a minimum maximum term of imprisonment of at least 8 years.

The qualified offences articles in the 2024 ECD mark a significant divergence with the UK/ England because there is no such provision in environmental law. However, many environmental crimes in England does not end up in criminal sanctions anyway, with the preference being initially to use civil sanctions. The cost and timeliness of taking cases to court as well as the heavier burden of proof are part of the reason why and it is doubtful that if the UK was still in the EU and had been obligated to implement the new ECD, that practice would have changed significantly from what it is now. In other words, the higher sentences may have been available, but it is unlikely that they would be used very often. Indeed, courts in the UK are in fact very used to sending offenders to prison for environmental offences, often for considerable periods of time and so in practice courts in the member states may take some time to utilise these new provisions so as to replicate what is already happening in the UK.

Legal persons

The 2024 directive is significant in that, as opposed to the 2008 directive, it sets out strong penalties for legal persons (Articles 6 and 7).²⁸ The 2024 directive is intended to level up and harmonise practice across the EU member states and requires both criminal and non-criminal fines and penalties to be in place for illegal behaviour. The 2024 directive sets out several measures related to restorative justice, exclusion from public benefits and funding, the closure or winding up of establishments, withdrawal of permits and authorisations for business, and the publication of penalties imposed on the legal entity.

The penalties for legal persons for criminal offences listed in the 2024 ECD are significant. Fines up to €40 million or 5% of total worldwide turnover of the company can be levied.

²⁸ A 'legal person', in general lay terms, means a legal entity, company, corporation or charity whereas a 'natural person' by contrast is an individual.

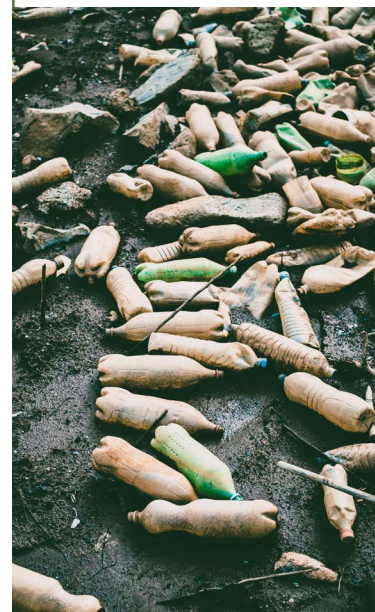
In England, enforcement action can be taken against an individual, a company or both (where for example a director has committed an offence). The level of fines can be significant. In 2021, a successful prosecution was brought by the Environment Agency against Southern Water Services where a fine of £90 million was imposed.²⁹ Though exceptional – most fines are in the tens and hundreds of thousands – the ability of the regulator to seek significant levels of fines exists already. It is worth noting that further amendments to *The Sentencing Guidelines* for ‘very large’ (as opposed to just ‘large’ companies)³⁰ are expected soon and this suggests that the levels of fines to be recommended will be even higher than they are at present.

Resources, training and coordination of competent authorities

The 2024 directive sets out (Article 17) the need for member states to provide national authorities with sufficient number of qualified staff with the financial, technical and technological resources that can ‘detect, investigate, prosecute or adjudicate environmental criminal offences’. The 2008 did not specify this and led the European Commission to conclude that this was one of the key reasons behind a seeming increase in environmental crime.³¹ The term ‘sufficient’ however is somewhat malleable and provides member states with enough leeway to make this article less helpful than the aspiration might be.

Similarly, in Article 18, the need to provide training to judges, prosecutors, police and judicial staff and competent authorities staff (meaning regulatory bodies), is set down where it was not in the 2008 directive. However, the EU could ultimately only enforce this requirement against a member state by infraction proceedings. However, that is not to say that the Commission might not bring pressure to bear upon a member state which was singularly failing to provide any or enough training for its competent authorities.

Article 19 sets out the need for coordination and cooperation between competent authorities in the member states to ensure best practice, the exchange of information, assistance and peer to peer learning is useful – this was not set down in the 2008 directive. Several European wide networks help to facilitate and implement this article on behalf of the member states – The European Network of Prosecutors for the Environment (ENPE),³² ENVICrimeNet,³³ The EU Forum of Judges for the Environment (EUFJE)³⁴ and The European Union Network for Implementation and Enforcement of Environmental Law (IMPEL).³⁵



29 <https://www.judiciary.uk/wp-content/uploads/2022/07/Southern-Water-Sentencing-Remarks.pdf>

30 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Environmental-offences-definitive-guideline-Web.pdf>, pp.8

31 https://www.eurojust.europa.eu/sites/default/files/assets/report_environmental_crime.pdf

32 <https://www.environmentalprosecutors.eu/>

33 <https://www.envicrimenet.eu/>

34 <https://www.eufje.org/index.php?lang=en>

35 <https://www.impel.eu/en>

Box 2 England, a Labour Government and the water environment

The current Labour Government has proposed **The Water (Special Measures) Bill**³⁶ with the aim of tackling pollution to rivers, lakes and coastal waters. This is significant because part of this Bill is concerned with strengthening sanctions related to perceived failures by [mainly] sewerage undertakers to adequately conduct their business.

The Bill proposes several amendments to key water laws such as the 1995 Environment Act and 1991 Water Resources Act. A key change, and perhaps the most significant, is the effective lowering of the burden of proof with regard to the imposition of civil penalties. This gives regulators much more flexibility and power to tackle water pollution.

The Bill also introduces articles of law that make it a criminal offence to impede an investigation by an environmental regulator and introduces the concept of ‘automatic’ penalties for certain offences, though how this works in practice (what would constitute and result in an ‘automatic’ penalty?) is unclear.

*IEEP UK has written substantive reports on EU/UK divergence with regard to the EU’s 2024 Urban Waste Treatment Directive and its implications.*³⁷

Inciting, Aiding, Abetting and Attempt

The 2024 directive differs from the 2008 directive in an article relating to the incitement, aiding and abetting of environmental crime (Article 4). The 2024 directive makes clear that Member States should also treat the attempt to incite, aid or abet environmental crime as an offence too, whereas the 2008 did not.

National strategy

The 2024 directive (Article 21) requires Member States to put in place a national strategy on combatting environmental crime by May 2027. It requires Member States to say how cross-border cases will be dealt with, whether the objectives and arrangements for environmental crime are being attained, how authorities are being supported (with the right amount of resource) and that such a strategy is updated at least every 5 years.

In England, there is no overarching national strategy on tackling environmental crime that would fulfil the criteria set out in the new 2024 EU directive. The Enforcement & Sanctions Policy (*see footnote 14*) goes some way to this for the Environment Agency and Natural

³⁶ <https://bills.parliament.uk/publications/56099/documents/5020>

³⁷ <https://ieep.uk/publications/diverging-wastewater-policy-the-implications-of-changes-to-eu-policy-for-the-uk/> and here, https://ieep.uk/wp-content/uploads/2024/01/Sewage-Policy-Briefing_Nigel-Haigh-Andrew-Farmer_January-2024-1.pdf

England's Compliance & Enforcement position is 13 years old (*see footnote 13*). This would therefore constitute an element of divergence although we may expect something shortly from the new Government which has committed to improving environmental protection in England's water environment.

Statistical data

The 2024 directive includes a new requirement (Article 22) to collect, publish and share with the European Commission statistical data on a number of different items such as the number of criminal offences registered, the number of prosecutions, convictions, and the types of penalties etc. In England, this information is already collected (*see footnote 12*). However, the 2024 directive will for the first time provide the Commission with EU wide data for comparative and analytical purposes which the UK will not be a part of.

Box 3 Sanctions, Statistics and Deterrence

A key element of the 2024 ECD is to require Member States to provide statistical data on for example the number and types of offences as well as the penalties issued, the absence of which from the earlier 2008 Directive was a perceived weakness. The European Commission, in the course of reviewing the effectiveness of the 2008 Directive found that statistics and data in relation to environmental crime was 'very limited and when available often fragmentary and neither consistent nor comparable in other Member States'.³⁸

What data and statistics there were however showed great variation with regard to the level of sanctions and in some cases appeared 'very low'.³⁹ The European Network of Prosecutors for the Environment concluded in relation to the EU Member States that, "fines are by far the most commonly used sanction for environmental offences, and it is extremely rare for prison sentences to be issued" and where sanctions were available were not necessarily given upon conviction.⁴⁰

In contrast, in England the publication of data and information related to environmental crime has been published for some time already and clearly shows a strong record of sanctioning against those perpetrating



38 European Commission Staff Working document, Evaluation of Environmental Crime Directive, 28.10.2020, https://commission.europa.eu/document/download/e9bc5c87-f34d-47da-b56e-4b65874093dd_en?filename=environmental_crime_evaluation_report.pdf, pp.79

39 Ibid., pp.80. See also Annex 11 of that report, https://commission.europa.eu/document/download/1dbee004-20a1-460a-b9e3-dd6762b70089_en?filename=environmental_crime_evaluation_report_annexes.pdf which details statistics on the levels of sanctions imposed.

40 Environmental Prosecution report-Tackling Environmental Crime in Europe, ENPE Network, March 2017, https://www.environmentalprosecutors.eu/sites/default/files/document/Cap%20and%20Gap%20report_FINAL_Print.pdf

environmental crime.⁴¹ It not only includes a record of substantial fines against legal persons – it is important to note that most of the largest fines are issued against water and sewerage undertakers – but also a significant number of prison sentences many for waste related crimes.

This is not to say that environmental crime in England doesn't exist or that when it does exist it is dealt with satisfactorily. It is just that there is a stronger record on using criminal sanctions than other countries in Europe. It is also not to say that the type/level of sanction is sufficient to deter other potential offenders from carrying out environmental crime. An actual and/or perceived failure to comply with water related laws has arguably been the motivation for the recent introduction of the Government's Water (Special Measures) Bill – see **Box 2**.

Clearly, getting the legal framework in place is one challenge. Putting in place an adequately funded/resourced and trained enforcement body is another as is providing them with a mixture of tools – both administrative and criminal (and compliance promotion, in other words, preventing crime) – to tackle offences as and when they occur is another. Deterrence and the certainty of punishment play a major part too. After that, it is up to the courts to decide.

⁴¹ For Natural England, <https://www.gov.uk/government/publications/register-of-enforcement-action-taken-by-natural-england> and for the Environment Agency, <https://www.data.gov.uk/dataset/6f06910a-8411-4117-9905-6284f1997c33/environment-agency-prosecutions>



CONCLUSION

It is unmistakable that the 2024 ECD represents EU/UK divergence though the significance and consequence of that divergence is less clear cut and obvious.

The 2024 ECD is also a highly significant upgrade on its 2008 predecessor. It is deeper and broader in its aims and objectives (and captures many more activities within its scope), is more prescriptive and pulls many EU countries 'up' with regard to minimum maximum sentencing levels. Mandating support (training and resources) for regulatory bodies, police, judges and police is significant too. It will take several years, after the legislation has been transposed and implemented in the Member States, before we begin to see noticeable impact though. Indeed, the requirement in the 2024 ECD for Member States to send data on prosecutions to the European Commission will help in this regard.

Having said all of this, the UK already implements many of the provisions listed in the 2024 directive, including for example on non-criminal penalties and many of the criminal penalties outlined in the ECD are not too dissimilar from what is already in place in England, (with the exception perhaps of those nature related laws and those related to ozone depleting substances and fluorinated gases). The UK already carries out many more criminal prosecutions and puts many more individuals in jail for environmental offences than its European peers. The levels of fines in the UK are comparatively high too.

In a sense therefore, the EU is 'catching up with' the UK, though it is important to note that several key elements within the 2024 directive are new and are potentially very significant innovations for the UK to consider going forward. Over time, if and when the changes in the EU take effect, this narrative could be reversed. The Qualified Offences article is perhaps the most marked contrast with the 2008 directive, with no equivalent in England as is the requirement for a National Strategy on combatting environmental crime.

However, as the cost (in time and money) of going to court is expensive, it is doubtful that practice in England would have changed had the UK still been a member of the EU and had been obligated to implement the 2024 directive. Swingeing budget cuts at the EA and NE in the last 15 years or so have forced those regulatory bodies to 'cut their cloth' according to their budget and the resource available, meaning

“““
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that fewer cases have met the threshold to go to criminal proceedings. Arguably, the new directive would have offered higher sentences for the most egregious cases of environmental crime i.e. in those Qualified Offence cases, yet these would be few and far between.

The Water (Special Measures) Bill to tackle criminal behaviour in the water sector and potential changes to Sentencing Guidelines are significant and of major interest going forward too.

Finally, it is important to note that tackling environmental offenders may not result in sanctions under environmental legislation. Sometimes gathering evidence for the environmental offence is difficult, but individual and organisations may well commit other offences (e.g. money laundering) and it may prove easier to prosecute under this legislation. Criminal actions affecting the environment may be part of wider criminal activity and authorities need to act in clever, efficient ways to address these.



Legislation providing for civil sanctions commonly used by the Environment Agency & Natural England

- ∞ Regulatory Enforcement and Sanctions Act 2008 (RES Act).
- ∞ Environmental Civil Sanctions (England) Order 2010.
- ∞ Environmental Civil Sanctions (Miscellaneous Amendments) Regulations 2010.
- ∞ Control of Mercury (Enforcement) Regulations 2017.
- ∞ Environmental Permitting (England and Wales) (Amendment) (England) (No. 2) Regulations 2023.
- ∞ Environmental Civil Sanctions (England) (Amendment) Order 2023.



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