



European Union Action to
Fight Environmental Crime

Fighting Environmental Crime in the UK: A Country Report

Work package 2 on “Instruments, actors, and institutions”



This project has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no 320276.

ACKNOWLEDGEMENT

The research leading to these results has been carried out as part of the research project "European Union Action to Fight Environmental Crime" (www.efface.eu). EFFACE is a collaborative effort of 11 European universities and think tanks and is coordinated by the Ecologic Institute (www.ecologic.eu). The research leading to these results has received funding from the European Union FP7 under grant agreement No 320276.

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Manuscript completed in February 2015

This document is available online at: www.efface.eu

This document should be cited as: Mitsilegas, V., Fitzmaurice, M., Fasoli, E. (2015). Fighting Environmental Crime in the UK: A Country Report. Study in the framework of the EFFACE research project, London: Queen Mary University of London.

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Abstract

In the UK there are two different legal systems: England and Wales and Scotland. The legislation in the field of environmental criminal law is highly fragmented in many statutes and regulations, mainly due to the considerable amount of reforms carried out in the last twenty years. The most relevant one is the Environmental Protection Act, which embodies a whole range of criminal sanctions enforced by the appropriate Authority. A certain level of standardization reached is a result of the transposition of EU law, particularly, the Environmental Crime Directive. It appears that in UK environmental crimes are not a priority for the Government or for the national and local policing. The rules of general criminal procedure apply to environmental crimes, although there are some rules, which are specific to environmental crimes. Most environmental crimes impose strict liability (i.e. no need to prove fault), which not only makes easier for regulators to enforce and prosecute environmental offences, but also constitutes a strong incentive for operators to take all possible risk-minimizing measures. The UK legal system provides neither a specialized legislation concerning the environmental organized crime nor, more generally, legislation dedicated to the organized crime. Due to the transposition of the European legislation in to the UK legal system, the enforcing officers, such as the police, can decide whether it is more appropriate to prosecute the crime under the domestic legislation or under the EU legislation or under both.

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LIST OF ABBREVIATIONS

| | |
|-------|--|
| BPC | Border Policing Command |
| COPFS | Crown Office and Procurator Fiscal Service |
| CPS | Crown Prosecution Service |
| CPIA | Criminal Procedure and Investigation Act |
| DEFRA | Department for Environment Food and Rural Affairs |
| EA | Environment Agency |
| EHS | Environment and Heritage Service |
| ELF | Environmental Law Foundation |
| ECT | Environmental Crime Team |
| EPA | Environmental Protection Act |
| FMP | Fixed Monetary Penalty |
| GAIN | Government Agency Intelligence Network |
| HMRC | Her Majesty's Revenue and Customs |
| NCA | National Crime Agency |
| NESS | National Environmental Security Seminar |
| NWCIU | National Wildlife Crime Intelligence Unit |
| NIEA | Northern Ireland Environment Agency |
| NWCU | National Wildlife Crime Unit |
| PEBA | Planning and Environmental Bar Association |
| PSNI | Police Service of Northern Ireland |
| PACE | Police and Criminal Evidence Act |
| RES | Regulatory Enforcement and Sanctions Act |
| ROCU | Regional Organized Crime Units |
| RSCPA | Royal Society for the Prevention of Cruelty of Birds |
| RSPB | Royal Society for the Protection of Birds |
| SAFFA | Salmon and Freshwater Fisheries Act |
| SEPA | Environment Protection Agency |
| SSSI | Site of Special Scientific Interest |
| UK | United Kingdom |
| VMP | Variable Monetary Penalties |
| WWF | World Wildlife Fund |

1 Introduction

In 2004 the Sub-committee on environmental crime established under the Environmental Audit Committee¹ stated that “[i]t is estimated that there are up to 10,000 environmental prosecutions annually. This number is comparatively small. There were in total 1.93 million offenders proceeded against in the year 2002-03 with 33,000 for burglary alone. This might suggest that, in comparative terms, environmental crime should be given less attention than many other crimes. However, Dr Leith Penny, Director of Cleansing at Westminster City Council, suggested to us that, roughly speaking, only 10% of all known environmental offences end up in court. The bald statistics fail to reflect the unique nature of environmental crime. It is distinct from other aspects of law because of the potential impact of any given incident on a large sector of the community, wildlife and habitats. There may also be long-term adverse effects on the environment and future generations, effects that go way beyond simple visual blight, and loss of amenity. With reference to the local environment, there is also increasing evidence that there is a connection between local environmental degradation and increasing incidences not only of environmental but of other crimes. Whereas many other crimes involve the concept of risk of harm—drink-driving for example—that risk in environmental crimes can often be less evident at first sight but the harm more pervasive. Environmental offences also may have significant health implications”².

More recently, Bell, McGillivray and Pedersen affirmed that “although there are significant numbers of breaches of environmental legislation, the proportion of prosecutions or other enforcement action is very slow. [...] For example, only sixteen authorities brought prosecutions for local authority air pollution control offences in a eight year period and prosecutions under the Clean Air Act 1993 form less than 1 per cent of the total number of statutory breaches. In relation to nature conservation, Natural England carried out only six prosecutions for criminal offences in SSSIs from 2007-10”³. More generally, with reference to the role of criminal law to combat environmental crimes, the Authors affirm that “[t]he criminal law can be used either to provide direct criminal sanctions for environmental harm, or in a subsidiary and complementary role within a regulatory system. It tends to be of greater influence when used in the second way. This is because the main purpose of the criminal law is to punish clearly identified wrongs. Yet, in relation to many environmental matters, it is often impossible to identify wrong without reference to other factors. For example, it is clearly desirable to have industry and many other activities that may cause pollution. The question is not a simple one of whether to have them, but a more difficult one of how much pollution is acceptable. That requires a balancing of the various factors involved against what is reasonable—a discretionary, political process, for which the regulatory system is well suited. But the criminal law is rather inadequate for such a balancing process and thus tends to be used mainly to deal either with clear acts of environmental vandalism, or to support the regulatory system once it has decided what is, and what is not, acceptable”⁴.

Small attention to environmental prosecution leads to a lack of familiarity for judges when dealing with environmental offences. As it has been recently highlighted by the Environmental Offence Guideline-Consultation, “[t]his lack of familiarity is also evidenced by the results of a survey⁵ conducted with 381

¹ The functions of the Environmental Audit Committee are to consider the extent to which the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development, and to audit their performance against sustainable development and environmental protection targets. In the previous Parliament (2005-2010), the Committee’s programme included inquiries on climate change and environmental fiscal measures (‘green taxation’), as well as sustainable development and environmental protection. Accessed October 23, 2013. <http://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/>

² *House of Commons Environmental Audit Committee - Environmental Crimes and the Courts, Sixth Report of Session 2003-04*, available at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf>. Last accessed October 23, 2013.

³ Stuart Bell et al., *Environmental Law* (Oxford: Oxford University Press, 2013), 291.

⁴ *Ibid.* 265.

⁵ Terence Moran, “Magistrates’ Courts and Environmental Regulators – Attitudes and Opportunities”, *Journal of Environmental Research* 4 (2005): 25-33. Available at

magistrates on their attitudes to environmental regulation, which found that, of the 198 magistrates who responded, in the previous five years, 108 magistrates had heard one or more cases. Though this may appear to be large, when compared to the total number of cases heard by the bench (40,000 cases a year), it is a small percentage. Magistrates' experience of sentencing environmental cases is likely to be so infrequent that there is no realistic possibility that substantial experience will be gained by any one individual. In 2011, of the offences covered by the draft guideline, only 1,602 cases were sentenced in magistrates' courts with even fewer cases, only 75, sentenced in the Crown Court"⁶.

This report covers environmental crime as regulated in England and also Wales and Northern Island. Parts of the report, such as those related to organized crime, also cover Scotland. The report includes the basic principles of the English legal system.

This report will deal with the following issues: definition of the environment, definition of environmental crime, substantive criminal law principles, substantive environmental criminal law, substantive criminal law on public servants liability in relation to environmental crimes, substantive criminal law on organized crime, sanctions in practice, responsibility of corporations and collective entities for environmental crimes, actors and institutions dealing with environmental crime, administrative environmental offences and the role of administrative authorities.

2 Definition of environment

The 1990 Environmental Protection Act defines the environment as "all, or any, of the following media, namely the air, water, and land" (Part 1, Preliminary, Section 1).

According to Bell, McGillivray and Pedersen environment "may be treated as covering the physical surroundings that are common to all of us, including air, space, waters, land, plants and wildlife. Thus the environment is defined by reference to physical, non-human, environmental media, including land, water, air, flora and fauna, and do on"⁷.

The European Commission in the First Environmental Action Program 1973-6 describes the environment as "the combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and of society, as they are or as they are felt".

3 Definition of environmental crime/environmental offence

According to the Sub-committee on environmental crime established under the Environmental Audit Committee "[e]nvironmental crime includes all offences either created by statute or developed under the common law that relate to the environment. The environment is, in simple terms, the surroundings in which we live. Section 1 of the Environmental Protection Act 1990 defines the environment as 'all, or any, of the following media, namely the air, water, and land'. That Section also defines pollution of the environment as pollution 'due to the release, into any environmental medium from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment.' Successive governments have legislated to give powers to executive agencies to protect the environment and enforce environmental legislation. International environmental

http://www.cieh.org/library/Knowledge/Better_regulation/JEHR/JEHR%20vol4%20iss1%20-%20Magistrates%20courts%20and%20environmental%20regulators.pdf. Accessed November 13, 2013.

⁶ Accessed November 8, 2013. http://sentencingcouncil.judiciary.gov.uk/docs/Environmental_Consultation_web_final.pdf

⁷ Bell et al., "Environmental Law", 7.

law and principles have been transposed into national law to ensure compliance with state commitments. Environmental crime has not been codified or consolidated into a single Act but is found in a range of separate pieces of legislation. Some of the most frequently used criminal sanctions are found in the Environmental Protection Act 1990 (as amended) and the Water Resources Act 1991⁸.

Among the literature, Bell, McGillivray and Pedersen affirm that “the most obvious way for lawyers to define environmental crime is to only include those actions or omissions that directly or indirectly damage the environment and which are prohibited by law. This has the advantage of being value-free and objective⁹. According to Watson “[t]he term covers activities and omissions as diverse as trafficking in animals and animal products, fly-tipping, fly-posting, writing graffiti, unauthorized discharges into rivers or the atmosphere, uprooting protected hedgerows, unlicensed angling, dropping litter, damaging “listed” buildings, destroying habitats and removing protected hedgerows. Many other examples could be given”¹⁰. According to Situ and Emmons, “[a]n environmental crime is an unauthorized act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanctions. This offense harms or endangers people’s physical safety or health as well as the environment itself. It serves the interests of either organizations – typically corporations – or individuals”¹¹.

4 Substantive criminal law principles

4.1 Legality principle

As to the creation of English criminal law, the main source has been the common law, as developed through decisions of the courts and by legal doctrine. English criminal law is characterized by the absence of a criminal code. Some Authors have highlighted the risk of inconsistency deriving from the difficulties in locating the applicable law¹².

“The bulk of English criminal law is now to be found in scattered statutes. There was a major consolidation of criminal legislation in 1861, and the Offences Against the Person Act of that year remains the principal statute on that subject. In recent years parliament has created a range of new crimes, from keeping a dangerous dog to stalking, from failing to comply with an anti-social behaviour order to intimidating witnesses. However, some offences are still governed by the common law and lack a statutory definition – most notably, murder, manslaughter, assault, and conspiracy to defraud. Many of the doctrines that determine the conditions of criminal liability are also still governed by the common law- not merely defences such as duress, intoxication, insanity, and automatism, but also concepts such as intention and recklessness”¹³.

“Also of significance is European Community law, not least because it has direct effect in this country and thus automatically takes precedence over domestic laws. Where a rule of English criminal law unjustifiably curtails a right conferred by community law [...], the domestic law is disapplied and the defendant should not be convicted.

⁸ House of Commons Environmental Audit Committee - Environmental Crimes and the Courts, Sixth Report of Session 2003–04, Ordered by The House of Commons to be printed Wednesday 5 May 2004, <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf>. accessed October 23, 2013.

⁹ Bell et al., “Environmental Law”, 273.

¹⁰ Michael Watson, “Environmental Crime in the United Kingdom”, *European Environmental Law Review* (2005): 186.

¹¹ Yingyi Situ and David Emmons, “Environmental Crime: The Criminal Justice System’s Role in Protecting the Environment” (California: Sage, 2000), 3.

¹² Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013), 9.

¹³ *Ibid*, 8.

European Community law has not yet had great effects on English criminal law, particularly the more serious offences [...], but its potential as a source of liability and of defences should not be overlooked¹⁴.

“It would be unwise to assume that the criminal law as stated in the statutes and the textbooks reflects the way in which it is enforced in actual social situations. The key to answering the question of how the criminal law is likely to impinge on a person’s activities lies in the discretion of the police and other law enforcement agents: they are not obliged to go out and look for offenders wherever they suspect that crimes are being committed; they are not obliged to prosecute every person against whom they have sufficient evidence. On the other hand, they cannot prosecute unless the offence charged is actually laid down by statute or at common law”¹⁵.

In the majority of the cases, the public report to the police a certain offence. Only in a minority of them the police operate ‘proactively’ starting investigations autonomously. This is not the case of other enforcement subjects, such as the Environment Agency, that have a more proactive role. “Although these agencies often react to specific complaints or accidents, much of their work involves visit to premises or buildings sites to check on compliance with the law”¹⁶. Once the police find a suspect, they have to question this person and in case release him or her if there is not sufficient evidence. If they believe they have sufficient evidence they can opt for prosecution, issuing a caution or no further action. For regulatory agencies, such as the Environment Agency, prosecution constitutes the last resort. They prefer to rely on informal and formal warnings as a mean of putting pressure on the wrongdoers.

However, “the initial decision whether or not to charge is taken under the “statutory charging scheme” introduced by the Criminal Justice Act 2003. This means that police and prosecutors work together at this stage, but it is the Crown Prosecution Service that takes the decision whether to charge and, if so, with what offence to charge the suspect” (see also further below). At this stage the prosecutor needs to check if there is enough evidence to prove the offence, if it is admissible in court and if prosecution rests in the public interest. The Code for Crown Prosecution provides guidance on this¹⁷.

4.2 Non-retroactivity principle

A person should never be convicted or punished except in accordance with an offence governing the conduct in question. The principle derives from the European Convention on Human Rights. Art. 7 provides that “no one shall be held guilty of any offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed”. The leading case on the matter is *Shaw v DPP* (1962). “The prosecution indicated Shaw with conspiracy to corrupt public morals, in addition to two charges under the Sexual Offences Act 1956 and the Obscene Publications Act 1959. The House of Lords upheld the validity of the indictment, despite the absence of any clear precedents, on the broad ground that conduct intended and calculated to corrupt public morals is indictable at common law”¹⁸. This judgment has been strongly criticized and English courts no longer claim the power to create new criminal offences. However, in *C v DPP* has been described the five criteria of judicial law-making: “1) if the solution is doubtful, the judges should beware of imposing their own remedy; 2) caution should prevail if Parliament has rejected opportunities for clearing up a known difficulty, or has legislated leaving the difficulties untouched; 3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems; 4) fundamental legal doctrines should not highly be set aside; 5) judges should not make a change unless they can achieve finality and certainty”¹⁹.

¹⁴ Ibid.

¹⁵ Ibid, 9.

¹⁶ Ibid, 10.

¹⁷ Accessed November 15, 2013. http://www.cps.gov.uk/publications/docs/code2013english_v2.pdf

¹⁸ Ashworth and Horder, “Principles of Criminal Law”, 57.

¹⁹ Ibid, 60.

4.3 The principle of maximum certainty

The principle requires that the relevant rules satisfy the ‘quality of law’ standard. Any claim that a derogation from maximum certainty is necessary for the practical administration of the law must be scrutinized carefully.

4.4 The principle of strict construction

The principle refers to the interpretation of the legislation by the courts: any doubt in the meaning of a statutory provision should be resolved in favour of the defendant. In fact, “where a person acts on the apparent meaning of a statute but the court gives it a wider meaning, it is unfair to convict that person because that would amount to retroactive lawmaking”²⁰.

4.5 The principle of individual autonomy

Each individual should be treated as responsible for his or her own behaviour. In fact, individual in general have the capacity and sufficient free will to make meaningful choices, at the same time, they should be respected and treated as agents capable of choosing their acts and omissions.

4.6 Harm principle and public wrong

Criminalization is constituted by the causing of harm accompanied by the wrongfulness of the harm. Wrongfulness is intended as culpably assailing a person’s interest. Furthermore, it is necessary a public element in wrongs. One example of public element of a wrong is the creation of racially and religiously aggravated offences of assault or harassment. Calling someone with insulting names is not usually a criminal offence but the rationale for these crimes is clearly connected with a belief that is proper for the State to promote the basic value of racial tolerance and that this value is so significant as to justify criminalization. Thus these offences can be regarded as harmful public wrongs²¹.

4.7 Criminalization as a last resort

The criminal law is a censuring and preventive mechanism next to civil liability and administrative regulation. As to the choice of the technique, the principle of subsidiarity ensures that a right is not infringed where the objective of the interference could be secured in some other (lesser) way. Criminal law should be reserved as a legislative technique of last resort, used only for seriously wrongful or harmful conduct²².

4.8 Causation

The general principle is formulated in the sense that causation is established if the result would not have occurred *but for* someone’s conduct. The leading case is the *Cato* case (1876). A person had been convicted of the manslaughter of another person, whom he had injected with a heroin compound at the first one’s request. In that occasion, the Court of Appeal stated that “as a matter of law, it was sufficient if the prosecution could establish that it was a cause, provided it was a cause outside the *de minimis* range, and effectively bearing upon the acceleration of the moment of the victim’s death”²³.

²⁰ Ibid, 67.

²¹ Ibid, 31.

²² Ibid, 33.

²³ Ibid, 106.

4.9 Mens rea

“The principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences”²⁴.

“In order to satisfy rule of law standards, an offence must have a (subjective) *mens rea* requirement in order to alert [a subject] to the fact that he is about to violate the law: some element of *mens rea* is needed in order to give fair warning, which would be absent if offences could be committed accidentally. The principle of autonomy may be interpreted as taking the point further, arguing that the incidence and degree of criminal liability should reflect the choices made by the individual. The principle of *mens rea* expresses this by stating that defendants should be held criminally liable only for events or consequences, which they intended or knowingly risked. Only if they were aware (or, as it is often expressed, ‘subjectively’ aware) of the possible consequences of their conduct should they be liable. The principle of *mens rea* may also be stated so as to include the belief principle, since in some crimes it is not (or not only) the causing of consequences that is criminal but behaving in a certain way with knowledge of certain facts. Thus where the defence is one of mistaken belief, the principle of *mens rea* would state that a person’s criminal liability should be judged on the facts as [the subject] believed them to be. Although much of the principle’s strength derives from the rule of law and the value of autonomy, this does not mean that negligence liability cannot be supported on the same basis: so long as there is an exception for incapacity, this may be fair”²⁵.

4.10 Complicity

At common law criminal actors were classified as principals and/or accessories. The leading statute is the Accessories and Abettors Act of 1861. A principal is a person whose acts fall within the legal definition of the crime, whereas an accomplice (also called ‘accessory’ or ‘secondary part’) is anyone who aids, abets, counsels, or procures a principal. Of course, two or more persons can be co-principals, so long as together they satisfy the definition of the substantive offence and each of them engaged in some part of the external element of the offence with the required fault²⁶. Both these categories of actors can be further subdivided. Principals in the first degree were persons who with the requisite state of mind committed the criminal acts that constituted the criminal offense. Principals in the second degree, also referred to as aiders and abettors, were persons who were present at the scene of the crime and provided aid or encouragement to the principal in the first degree. Accessories were divided into accessories before the fact and accessories after the fact. An accessory before the fact was a person who aided, encouraged or assisted the principals in the planning and preparation of the crime but was absent when the crime was committed. An accessory after the fact was a person who knowingly provided assistance to the principals in avoiding arrest and prosecution. It was eventually recognized that the accessory after the fact, by virtue of his involvement only after the felony was completed, was not truly an accomplice in the felony. As to the fault element the accomplice must intend to do whatever acts of assistance or encouragement are done, and must be aware of their ability to assist or encourage the principal. Secondly, the accomplice must know the essential matters that constitute the offence, namely, the facts, circumstances, and other matters that go to make up the conduct element of the principal offence²⁷.

4.11 Types and content of criminal sanctions

“The law of sentencing was consolidated in the Powers of Criminal Courts (Sentencing) Act 2000, but has since been altered in major ways by the Criminal Justice Act 2003 and other legislation. In brief, an absolute or conditional discharge may be thought sufficient for the least serious crimes or where the defendant has very

²⁴ Ibid, 155.

²⁵ Ibid, 74.

²⁶ Ibid, 419.

²⁷ Ibid, 432.

strong mitigation. For many offences a fine will be normal punishment: the size of the fine should reflect the seriousness of the offence, adjusted in accordance with the means of the offender. If the offence is serious enough to warrant it, the court may consider imposing a community sentence: that sentence may contain one or more of twelve separate requirements, including a requirement to do unpaid work, a requirement to undergo drug treatment, and a curfew reinforced by electronic monitoring. The most severe sentence is a custodial one, and a custodial sentence should be imposed only where the offence or offences are so serious that neither a fine alone nor a community sentence can be justified. The length of any custodial sentence ‘must be for the shortest term ... that in the opinion of the court is commensurate with the seriousness of the offence. If the sentence is for up to two years, the court may suspend it and may require the offender to comply with certain requirements during the supervision period’²⁸.

The constitutional arrangements for guidance on sentencing have been historically based on the work of the Sentencing Advisory Panel under the Crime and Disorder Act 1998, later, on the Sentencing Guidelines Council under the Criminal Justice Act 2003 and, finally, on the work of the Sentencing Council under the Coroners and Justice Act 2009. The Sentencing Council is responsible for preparing and monitoring sentencing guidelines with the aim of ensuring greater consistency in sentencing²⁹. Sentencing guidelines help judges and magistrates decide the appropriate sentence for a criminal offence. The sentence imposed on an offender should reflect the crime they have committed and be proportionate to the seriousness of the offence. The guidelines provide guidance on factors the court should take into account that may affect the sentence given. Sentencing guidelines are available for most of the significant offences sentenced in the magistrates’ court and for a wide range of offences in the Crown Court³⁰ (see also section 8).

4.12 Corporate liability

The theory is that corporate personality attaches to companies just as natural personality attaches to individuals. “An offence of strict liability is one which requires no doubt for conviction: any person may be found guilty simply through doing or failing to do a certain act. Thus, if a company owns the business or premises concerned, it may be convicted of failing to control emissions of pollutants, or for causing polluting matter to enter a stream, whether or not these events come about through fault on the company’s part”³¹.

In application of the delegation principle “where a statute imposes liability on the owner, licensee or keeper of premises or other property, the courts will make that person vicariously liable for the conduct of anyone to whom management of the premises has been delegated. This applies whether the defendant is an individual or a company”³². In application of the identification principle, provided that “most of the instances concerns offences of strict liability, where it is often easier to construe a statute so as to impose direct liability on a company”³³, a company can be able to dissociate itself from the conduct of their local managers, and thus avoid criminal liability. “Moreover, where large national or multi-national company is prosecuted, the identification principle requires the prosecution to establish that one of the directors or top managers had the required knowledge or culpability. Managers at such high level tend to focus on broader policy issues, not working practices. This it may be considerably easier to achieve convictions in respect of the activities of small companies than of large corporations, because there will tend to be more ‘hands-on’ management in small companies”³⁴.

²⁸ Ibid, 18. See Criminal Justice Act 2003, Part 12 on sentencing. In recent years a number of reports have looked at the issues surrounding the environmental crime. The Marcorry Report in 2006 (<http://www.berr.gov.uk/files/file44593.pdf>) and the Hampton report in 2005 (<http://www.bis.gov.uk/files/file22988.pdf>).

²⁹ Accessed November 15, 2013. <http://sentencingcouncil.judiciary.gov.uk/>

³⁰ Ibid. See also Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 2010), 55.

³¹ Ashworth and Horder, “Principles of Criminal Law”, 149.

³² Ibid, 149.

³³ Ibid, 150.

³⁴ Ibid.

5 Substantive environmental criminal law

5.1 Premise

As highlighted by Bell et al. “[h]istorically, the commission of environmental crimes by industrial operators was viewed as purely regulatory in nature and therefore ‘not criminal in any real sense’. It was thought that pollution was a natural consequence of industrial activity and the operators made a positive contribution to the local and regional economy. Arguably, attitudes to environmental harm generally, and environmental crime, more specifically have shifted over the years. [...] The change in fundamental attitudes to the environment have started to have an impact upon attitudes to environmental crime. Underlying these changes is a basic shift in the way in which environmental problems are perceived, not only by the public, but also by the enforcement agencies and even by the general category of ‘polluters’. The acknowledgement that environmental protection is important in its own right has undermined previous assumptions about the benefits of activities that cause environmental harm”³⁵.

“Many of the common environmental offences impose strict liability. Thus, to establish an offence the only thing that needs to be proved is the act or omission that forms part of the offence and there is no need to prove any negligence or fault on the part of the defendant or operator. [...] There are four main arguments for the use of strict liability – that the imposition of strict liability: promotes the public interest goal inherent in environmental legislation; acts as a deterrent, which improves the quality of environmental risk prevention measures; increases the ease of prosecution, which increases the deterrent effect; accords with the Polluter Pays Principle”³⁶. “Although there are many arguments in favour of imposing strict liability for environmental crimes, there is still a basic objection that criminalizing innocent or accidental actions is somewhat problematic. The true position is that there are very few environmental crimes that impose absolute strict liability – that is, for which there are no defences – because most offences balance the potential unfairness of such liability with certain statutory defences. The courts have tended to construe these defences narrowly in order to protect the underlying aims of environmental legislation. For example, in *Durham County Council v Peter O’Connor Industrial Services* [1993] *Env LR* 197, the Court specifically rejected the notion that taking ‘reasonable care’ to avoid the commission of an offence would amount to ‘due negligence’ because this would negate the strictness of criminal liability for environmental crime. In that case, the Court suggested, for due diligence to be established, all that could be done to ensure compliance should be done, even if that involved checking every transfer of waste from a site”³⁷.

Against this background, the legislation in the field of environmental criminal law is highly fragmented and spread in many statutes. However, the most relevant one is the Environmental Protection Act, which embodies a whole range of criminal sanctions enforced by an appropriate Authority. The main provisions contained in the legal texts are the following.

The 1990 Environmental Protection Act, which is the main instrument, is an Act of the Parliament of the United Kingdom that defines, within England and Wales and Scotland, the fundamental structure and authority for waste management and control of emissions into the environment. The other areas are fragmented and cover the following sectors: water management, air quality, forestry, hazardous substances, protection of wildlife and ship-source pollution.

5.2 Environmental Protection Act 1990

SECTION 33: Prohibition of unauthorised or harmful deposit, treatment or disposal etc. of waste **(England and Wales)**

Qualification of the offence: summary conviction.

Protected legal interest: environment.

Author: anybody (especially holder of waste management licence).

³⁵ Bell et al., “Environmental Law”, 277.

³⁶ *Ibid.*, 278.

³⁷ *Ibid.*, 281.

Criminal conducts: “(1) Subject to subsections (1A), (1B), (2) and (3) below and, in relation to Scotland, to section 54 below, a person shall not

(a) deposit controlled waste or extractive waste, or knowingly cause or knowingly permit controlled waste or extractive waste to be deposited in or on any land unless an environmental permit authorising the deposit is in force and the deposit is in accordance with the licence;

(b) submit controlled waste, or knowingly cause or knowingly permit controlled waste to be submitted, to any listed operation (other than an operation within subsection (1)(a)) that

(I) is carried out in or on any land, or by means of any mobile plant, and

(ii) is not carried out under and in accordance with an environmental permit.

(c) treat, keep or dispose of controlled waste or extractive waste in a manner likely to cause pollution of the environment or harm to human health”.

Defence: “(7) It shall be a defence for a person charged with an offence under this section to prove

(a) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence; or

(c) that the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where

(i) he took all such steps as were reasonably practicable in the circumstances for minimising pollution of the environment and harm to human health; and

(ii) particulars of the acts were furnished to the waste regulation authority as soon as reasonably practicable after they were done”.

Sanctions: “(8) A person who commits an offence under this section is liable

(a) Subject to subsection (9) below, on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding £ 50,000 or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both.

(9) A person (other than an establishment or undertaking) who commits a relevant offence shall be liable

(a) on summary conviction, to a fine not exceeding the statutory maximum; and

(b) on conviction on indictment, to a fine”.

Prosecution: ex officio or on the ground of individual request.

As far as the Scottish legal system is concerned, the same provision applies, though with the following differences under Section 33 on “Prohibition on unauthorized or harmful deposit, treatment or disposal etc. of waste”:

“(5) Where controlled waste is carried in and deposited from a motor vehicle, the person who controls or is in a position to control the use of the vehicle shall, for the purposes of subsection (1)(a) above, be treated as knowingly causing the waste to be deposited whether or not he gave any instructions for this to be done.

(10) A person who commits an offence under subsection (1)(c) above in relation to household waste from a domestic property within the curtilage of the dwelling shall be liable

(a) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both”.

In order to corroborate findings in waste management we consulted an expert from Defra (Department for Environment, Food and Rural Affairs). The expert clarified that environmental crimes have an element of organized crime. In waste management systematic organized fly-tipping has been a significant problem in the past and it is easy for waste producers either alone or in tandem with others to avoid controls. Similar concerns now exist around the illegal export of waste. A recent estimate indicate waste crime (not necessarily organized crime) cost £800m a year to legitimate business and lost tax revenue.

The expert was not aware of any major shortcomings on environmental crime law, although there are some offences that are more difficult to prove than others. The main issue about tackling waste crime is funding because under Treasury rules the cost of enforcement cannot be recovered by the regulator. Therefore funding comes from the lead government Department and it is subject to the same restrictions as other public services funding.

As to the deterrent effect of sanctions the expert was of the view that the penalty and partly the risk of being caught. In the experience of the speaker the penalties are sufficiently high for the most part. However, huge amounts of money can be made from waste crime and the courts are not always made aware of this when sentencing.

Defra also worked with the Sentencing Council on its new guidelines to courts on sentencing environmental offences. They discussed with the Sentencing Council to include guidelines on others areas of environmental crime.

5.3 Water Industry Act 1991

SECTION 70: Offence of supplying water unfit for human consumption

Qualification of the offence: summary conviction.

Protected legal interest: human health.

Mens rea: strict liability.

Criminal conduct: “(1) Subject to subsection (3) below, where a water undertaker’s supply system is used for the purposes of supplying water to any premises and that water is unfit for human consumption, the relevant persons shall be guilty of an offence and liable”.

Sanctions: “(a) on summary conviction, to a fine not exceeding £20,000; (b) on conviction on indictment, to a fine. (2) For the purposes of section 210 below and any other enactment under which an individual is guilty of an offence by virtue of subsection (1) above the penalty on conviction on indictment of an offence under this section shall be deemed to include imprisonment (in addition to or instead of a fine) for a term not exceeding two years”.

Author: “(1A) For the purposes of subsection (1) above, the relevant persons are (a) the water undertaker whose supply system is used for the purposes of supplying the water (in this section referred to as the “primary water undertaker”); and (b) any employer of persons, or any self-employed person, who is concerned in the supply of the water”.

Defence: “(3) In any proceedings against any relevant person for an offence under this section it shall be a defence for that person to show that it

(a) had no reasonable grounds for suspecting that the water would be used for human consumption; or

(b) took all reasonable steps and exercised all due diligence for securing that the water was fit for human consumption on leaving [F7the primary water undertaker's] pipes or was not used for human consumption.

(3A) For the purposes of paragraph (b) of subsection (3) above

(a) in the case of proceedings against a primary water undertaker, showing that the undertaker took all reasonable steps and exercised all due diligence as mentioned in that paragraph includes (among other things) showing that the relevant arrangements were reasonable in all the circumstances; and

(b) in the case of proceedings against any other relevant person, showing that the person took all reasonable steps and exercised all due diligence as mentioned in that paragraph includes (among other things) showing that it took all reasonable steps and exercised all due diligence for securing that all aspects of the relevant arrangements for which it was responsible were properly carried out”.

Prosecution: “(4) Proceedings for an offence under this section shall not be instituted except by the Secretary of State or the Director of Public Prosecutions”.

5.4 Clean Air Act 1991 – Dark smoke

SECTION 1: Prohibition of dark smoke from chimneys

Qualification of the offence and range of sanctions: summary conviction: “(5) A person guilty of an offence under this section shall be liable on summary conviction (a) in the case of a contravention of subsection (1) as respects a chimney of a private dwelling, to a fine not exceeding level 3 on the standard scale; and (b) in any other case, to a fine not exceeding level 5 on the standard scale”.

Protected legal interest: environment.

Specific concept of “environment”: none.

Author: building owner; responsible of the plant/fixed boiler.

Criminal Conduct: “(1) Dark smoke shall not be emitted from a chimney of any building, and if, on any day, dark smoke is so emitted, the occupier of the building shall be guilty of an offence; (2) Dark smoke shall not be emitted from a chimney (not being a chimney of a building) which serves the furnace of any fixed boiler or industrial plant, and if, on any day, dark smoke is so emitted, the person having possession of the boiler or plant shall be guilty of an offence”.

Mens rea: strict liability.

Justifications and defences: “(3) This section does not apply to emissions of smoke from any chimney, in such classes of case and subject to such limitations as may be prescribed in regulations made by the Secretary of State, lasting for not longer than such periods as may be so prescribed;

(4) In any proceedings for an offence under this section, it shall be a defence to prove

(a) that the alleged emission was solely due to the lighting up of a furnace which was cold and that all practicable steps had been taken to prevent or minimise the emission of dark smoke;

(b) that the alleged emission was solely due to some failure of a furnace, or of apparatus used in connection with a furnace, and that

(i) the failure could not reasonably have been foreseen, or, if foreseen, could not reasonably have been provided against; and

(ii) the alleged emission could not reasonably have been prevented by action taken after the failure occurred; or

(c) that the alleged emission was solely due to the use of unsuitable fuel and that

(i) suitable fuel was unobtainable and the least unsuitable fuel which was available was used; and

(ii) all practicable steps had been taken to prevent or minimise the emission of dark smoke as the result of the use of that fuel;

or that the alleged emission was due to the combination of two or more of the causes specified in paragraphs (a) to (c) and that the other conditions specified in those paragraphs are satisfied in relation to those causes respectively”.

Prosecution: ex officio.

SECTION 2: Prohibition of dark smoke from industrial or trade premises

Qualification of the offence: summary conviction.

Protected legal interest: human health.

Specific concept of “environment”: none.

Author: responsible for industrial premise.

Criminal conduct: “(1) Dark smoke shall not be emitted from any industrial or trade premises and if, on any day, dark smoke is so emitted the occupier of the premises and any person who causes or permits the emission shall be guilty of an offence.

Mens rea: strict liability.

Defences: (4) In proceedings for an offence under this section, it shall be a defence to prove—

(a) that the alleged emission was inadvertent; and

(b) that all practicable steps had been taken to prevent or minimise the emission of dark smoke.

Sanction: (5) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding £20,000.

Prosecution: ex officio or on the ground of individual request”.

5.5 Forestry Act 1967

Part II Commissioners’ Power to Control Felling of Trees - SECTION 17: Penalty for felling without licence

Criminal conduct and sanction: “(1) Anyone who fells a tree without the authority of a felling licence, the case being one in which section 9(1) of this Act applies so as to require such a licence, shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale or twice the sum which appears to the court to be the value of the tree, whichever is the higher”.

Prosecution: “(2) Proceedings for an offence under this section may be instituted within six months from the first discovery of the offence by the person taking the proceedings, provided that no proceedings shall be instituted more than two years after the date of the offence”.

5.6 Control of Major Accident Hazards Regulations 1999

Part 2: General. SECTION 4: General duty

Criminal conduct: “Every operator shall take all measures necessary to prevent major accidents and limit their consequences to persons and the environment”.

Part 6: Functions of competent authorities. SECTION 18: Prohibition of use

Qualification of the offence: administrative/regulatory offence.

Protected legal interest: environment and human health.

Author: responsible for premise/plant.

Criminal conducts: “(1) The competent authority shall prohibit the operation or bringing into operation of any establishment or installation or any part thereof where the measures taken by the operator for the prevention and mitigation of major accidents are seriously deficient. (2) The competent authority may prohibit the operation or bringing into operation of any establishment or installation or any part thereof if the operator has failed to submit any notification, safety report or other information required by or under these Regulations within the time so required”.

Prosecution: by competent authority.

5.7 Control of pesticides Regulations 1986

SECTION 4: Prohibitions

Criminal conducts and defences: “(1) No person shall advertise a pesticide unless—

(a) the Ministers jointly have given a provisional or full approval under regulation 5 in relation to that pesticide and a consent under regulation 6(a);

(b) any conditions of the approval related to advertisement and the conditions of the consent have been complied with.

(2) No person shall sell a pesticide unless—

(a) the Ministers jointly have given a provisional or full approval under regulation 5 in relation to that pesticide and a consent under regulation 6(b);

(b) any conditions of the approval related to supply and the conditions of the consent have been complied with.

(3) No person shall supply a pesticide unless—

(a)the Ministers jointly have given an approval under regulation 5 in relation to that pesticide and a consent under regulation 6(b);

(b)any conditions of the approval related to supply and the conditions of the consent have been complied with.

(4) No person shall store a pesticide unless—

(a)the Ministers jointly have given an approval under regulation 5 in relation to that pesticide and a consent under regulation 6(b);

(b)any conditions of the approval related to storage and the conditions of the consent have been complied with.

(5) No person shall use a pesticide unless—

(a)the Ministers jointly have given an approval under regulation 5 in relation to that pesticide and a consent under regulation 6(c);

(b)(i) the conditions of the approval related to use,

(ii)the conditions of the consent imposed under regulation 6(c)(i), and,

(iii)in the case of pesticides applied from an aircraft in flight, the additional conditions of the consent imposed under regulation 6(c)(ii) have been complied with”.

5.8 Water Resources Act 1991

Chapter II: abstraction and impounding. SECTION 24: Restrictions on abstraction

Qualification of the offence: summary conviction.

Protected legal interest: water resources.

Author: anybody.

Punishment: violation of administrative regulations and licenses.

Mens rea: strict liability and negligence.

Criminal conducts: “(1)Subject to the following provisions of this Chapter and to any drought order or drought permit under Chapter III of this Part, no person shall— (a)abstract water from any source of supply; or (b)cause or permit any other person so to abstract any water, except in pursuance of a licence under this Chapter granted by the Agency and in accordance with the provisions of that licence.

(2)Where by virtue of subsection (1) above the abstraction of water contained in any underground strata is prohibited except in pursuance of a licence under this Chapter, no person shall begin, or cause or permit any other person to begin— (a)to construct any well, borehole or other work by which water may be abstracted from those strata; (b)to extend any such well, borehole or other work; or (c)to instal or modify any machinery or apparatus by which additional quantities of water may be abstracted from those strata by means of a well, borehole or other work, unless the conditions specified in subsection (3) below are satisfied”.

Defence: “(4)A person shall be guilty of an offence if—(a)he contravenes subsection (1) or (2) above; or (b)he is for the purposes of this section the holder of a licence under this Chapter and, in circumstances not constituting such a contravention, does not comply with a condition or requirement imposed by the provisions, as for the time being in force, of that licence”.

Sanctions: “(5)A person who is guilty of an offence under this section shall be liable—(a)on summary conviction, to a fine not exceeding the statutory maximum; (b)on conviction on indictment, to a fine.

Prosecution: ex officio or on the ground of individual request.

Part 2: Water resources Management. Chapter II: abstraction and impounding. SECTION 25: Restrictions on impounding

Qualification of the offence: indictable and summary conviction.

Protected legal interest: water resources.

Author: everybody.

Mens rea: strict liability.

Criminal conducts: “(1) Subject to the following provisions of this Chapter and to any drought order or drought permit under Chapter III of this Part, no person shall begin, or cause or permit any other person to begin, to construct or alter any impounding works at any point in any inland waters which are not discrete waters unless - (a) a licence under this Chapter granted by the Agency to obstruct or impede the flow of those inland waters at that point by means of impounding works is in force; (b) the impounding works will not obstruct or impede the flow of the inland waters except to the extent, and in the manner, authorised by the licence; and (c) any other requirements of the licence, whether as to the provision of compensation water or otherwise, are complied with.

(2) A person shall be guilty of an offence if—(a) he contravenes subsection (1) above; or (b) he is for the purposes of this section the holder of a licence under this Chapter and, in circumstances not constituting such a contravention, does not comply with a condition or requirement imposed by the provisions, as for the time being in force, of that licence.

Sanctions: (3) A person who is guilty of an offence under this section shall be liable—(a) on summary conviction, to a fine not exceeding the statutory maximum; (b) on conviction on indictment, to a fine.

Defences: (5) Subject to subsection (6) below, the restriction on impounding works shall not apply to the construction or alteration of any impounding works, if—(a) the construction or alteration of those works; or (b) the obstruction or impeding of the flow of the inland waters resulting from the construction or alteration of the works, is authorised (in whatsoever terms, and whether expressly or by implication) by virtue of any such statutory provision as at the coming into force of this Act was an alternative statutory provision for the purposes of section 36(2) of the Water Resources Act 1963.

(6) The provisions of this Chapter shall have effect in accordance with subsection (7) below where by virtue of any such provision as is mentioned in subsection (5) above and is for the time being in force— (a) any water undertaker or sewerage undertaker to which rights under that provision have been transferred in accordance with a scheme under Schedule 2 to the M2 Water Act 1989 or Schedule 2 to the M3 Water Industry Act 1991; or (b) any other person, is authorised (in whatsoever terms, and whether expressly or by implication) to obstruct or impede the flow of any inland waters by means of impounding works (whether those works have already been constructed or not).

(7) Where subsection (6) above applies, the provisions of this Chapter shall have effect (with the necessary modifications), where the reference is to the revocation or variation of a licence under this Chapter, as if— (a) any reference in those provisions to a licence under this Chapter included a reference to the authorisation mentioned in that subsection; and (b) any reference to the holder of such a licence included a reference to the undertaker or other person so mentioned.

Prosecution: ex officio or on the ground of individual request.

Part 3: Control of pollution of water resources. Chapter II: pollution offences. SECTION 85: Offences of polluting controlled waters

Qualification of the offence: indictable/summary conviction.

Protected legal interest: water resources.

Author: anybody.

Mens rea: strict liability/fraud/recklessness.

Criminal conducts: “(1) A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.

(2) A person contravenes this section if he causes or knowingly permits any matter, other than trade effluent or sewage effluent, to enter controlled waters by being discharged from a drain or sewer in contravention of a prohibition imposed under section 86 below.

(3) A person contravenes this section if he causes or knowingly permits any trade effluent or sewage effluent to be discharged—(a) into any controlled waters; or (b) from land in England and Wales, through a pipe, into the sea outside the seaward limits of controlled waters.

(4) A person contravenes this section if he causes or knowingly permits any trade effluent or sewage effluent to be discharged, in contravention of any prohibition imposed under section 86 below, from a building or from any fixed plant—(a) on to or into any land; or (b) into any waters of a lake or pond which are not inland freshwaters.

(5) A person contravenes this section if he causes or knowingly permits any matter whatever to enter any inland freshwaters so as to tend (either directly or in combination with other matter which he or another person causes or

permits to enter those waters) to impede the proper flow of the waters in a manner leading, or likely to lead, to a substantial aggravation of—(a)pollution due to other causes; or (b)the consequences of such pollution”.

Sanctions: “(6)Subject to the following provisions of this Chapter, a person who contravenes this section or the conditions of any consent given under this Chapter for the purposes of this section shall be guilty of an offence and liable—(a)on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding £20,000 or to both; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both”.

Prosecution: ex officio or on the ground of individual request.

Part 3: Control of pollution of water resources. Chapter II: pollution offences. SECTION 86: Prohibition of certain discharges by notice or regulations

Criminal conducts: “(1)For the purposes of section 85 above a discharge of any effluent or other matter is, in relation to any person, in contravention of a prohibition imposed under this section if, subject to the following provisions of this section— (a)the Agency has given that person notice prohibiting him from making or, as the case may be, continuing the discharge; or (b)the Agency has given that person notice prohibiting him from making or, as the case may be, continuing the discharge unless specified conditions are observed, and those conditions are not observed.

(2)For the purposes of section 85 above a discharge of any effluent or other matter is also in contravention of a prohibition imposed under this section if the effluent or matter discharged— (a)contains a prescribed substance or a prescribed concentration of such a substance; or (b)derives from a prescribed process or from a process involving the use of prescribed substances or the use of such substances in quantities which exceed the prescribed amounts.

(5)The time specified for the purposes of subsection (4) above shall not be before the end of the period of three months beginning with the day on which the notice is given, except in a case where the Agency is satisfied that there is an emergency which requires the prohibition in question to come into force at such time before the end of that period as may be so specified”.

Part 3: Control of pollution of water resources. Chapter II: pollution offences. SECTION 87: Discharges into and from public sewers etc.

“(1)This section applies for the purpose of determining liability where sewage effluent is discharged as mentioned in subsection (3) or (4) of section 85 above from any sewer or works (“the discharging sewer”) vested in a sewerage undertaker (“the discharging undertaker”).

Criminal conducts: “(1A) If the discharging undertaker did not cause, or knowingly permit, the discharge it shall nevertheless be deemed to have caused the discharge if—(a)matter included in the discharge was received by it into the discharging sewer or any other sewer or works vested in it; (b)it was bound (either unconditionally or subject to conditions which were observed) to receive that matter into that sewer or works; and (c)subsection (1B) below does not apply.

(1B)This subsection applies where the sewage effluent was, before being discharged from the discharging sewer, discharged through a main connection into that sewer or into any other sewer or works vested in the discharging undertaker by another sewerage undertaker (“the sending undertaker”) under an agreement having effect between the discharging undertaker and the sending undertaker under section 110A of the Water Industry Act 1991.

(1C)Where subsection (1B) above applies, the sending undertaker shall be deemed to have caused the discharge if, although it did not cause, or knowingly permit, the sewage effluent to be discharged into the discharging sewer, or into any other sewer or works of the discharging undertaker—(a)matter included in the discharge was received by it into a sewer or works vested in it; and (b)it was bound (either unconditionally or subject to conditions which were observed) to receive that matter into that sewer or works”.

Defences: “(2)A sewerage undertaker shall not be guilty of an offence under section 85 above by reason only of the fact that a discharge from a sewer or works vested in the undertaker contravenes conditions of a consent relating to the discharge if—(a)the contravention is attributable to a discharge which another person caused or permitted to be made into the sewer or works; (b)the undertaker either was not bound to receive the discharge into the sewer or works or was bound to receive it there subject to conditions which were not observed; and (c)the undertaker could not reasonably have been expected to prevent the discharge into the sewer or works.

(3) A person shall not be guilty of an offence under section 85 above in respect of a discharge which he caused or permitted to be made into a sewer or works vested in a sewerage undertaker if the undertaker was bound to receive the discharge there either unconditionally or subject to conditions which were observed”.

Part 3: Control of pollution of water resources. Chapter II: pollution offences. SECTION 88: Defence to principal offences in respect of authorised discharges.

“(1) Subject to the following provisions of this section, a person shall not be guilty of an offence under section 85 above in respect of the entry of any matter into any waters or any discharge if the entry occurs or the discharge is made under and in accordance with, or as a result of any act or omission under and in accordance with—(a) a consent given under this Chapter or under Part II of the M1 Control of Pollution Act 1974 (which makes corresponding provision for Scotland); (aa) a permit granted, under regulations under section 2 of the Pollution Prevention and Control Act 1999, by an authority exercising functions under the regulations that are exercisable for the purpose of preventing or reducing emissions in to the air, water and land (b) an authorisation for a prescribed process designated for central control granted under Part I of the M2 Environmental Protection Act 1990; (c) a waste management or disposal licence; (d) a licence granted under Part II of the M3 Food and Environment Protection Act 1985; (e) section 163 below or section 165 of the M4 Water Industry Act 1991 (discharges for works purposes); (f) any local statutory provision or statutory order which expressly confers power to discharge effluent into water; or (g) any prescribed enactment. (2) Schedule 10 to this Act shall have effect, subject to section 91 below, with respect to the making of applications for consents under this Chapter for the purposes of subsection (1)(a) above and with respect to the giving, revocation and modification of such consents. (3) Nothing in any disposal licence shall be treated for the purposes of subsection (1) above as authorising— (a) any such entry or discharge as is mentioned in subsections (2) to (4) of section 85 above; or (b) any act or omission so far as it results in any such entry or discharge”.

Part 3: Control of pollution of water resources. Chapter II: pollution offences. SECTION 89: Other defences to principal offences.

“(1) A person shall not be guilty of an offence under section 85 above in respect of the entry of any matter into any waters or any discharge if— (a) the entry is caused or permitted, or the discharge is made, in an emergency in order to avoid danger to life or health; (b) that person takes all such steps as are reasonably practicable in the circumstances for minimising the extent of the entry or discharge and of its polluting effects; and (c) particulars of the entry or discharge are furnished to the Agency as soon as reasonably practicable after the entry occurs. (2) A person shall not be guilty of an offence under section 85 above by reason of his causing or permitting any discharge of trade or sewage effluent from a vessel. (3) A person shall not be guilty of an offence under section 85 above by reason only of his permitting water from an abandoned mine or an abandoned part of a mine]to enter controlled waters. (3A) Subsection (3) above shall not apply to the owner or former operator of any mine or part of a mine if the mine or part in question became abandoned after 31st December 1999. (3B) In determining for the purposes of subsection (3A) above whether a mine or part of a mine became abandoned before, on or after 31st December 1999 in a case where the mine or part has become abandoned on two or more occasions, of which— (a) at least one falls on or before that date, and (b) at least one falls after that date, the mine or part shall be regarded as becoming abandoned after that date (but without prejudice to the operation of subsection (3) above in relation to that mine or part at, or in relation to, any time before the first of those occasions which falls after that date). (3C) Where, immediately before a part of a mine becomes abandoned, that part is the only part of the mine not falling to be regarded as abandoned for the time being, the abandonment of that part shall not be regarded for the purposes of subsection (3A) or (3B) above as constituting the abandonment of the mine, but only of that part of it. (4) A person shall not, otherwise than in respect of the entry of any poisonous, noxious or polluting matter into any controlled waters, be guilty of an offence under section 85 above by reason of his depositing the solid refuse of a mine or quarry on any land so that it falls or is carried into inland freshwaters if— (a) he deposits the refuse on the land with the consent of the Agency; (b) no other site for the deposit is reasonably practicable; and (c) he takes all reasonably practicable steps to prevent the refuse from entering those inland freshwaters. (5) A highway authority or other person entitled to keep open a drain by virtue of section 100 of the M1 Highways Act 1980 shall not be guilty of an offence under section 85 above by reason of his causing or permitting any discharge to be made from a drain kept open by virtue of that section unless the discharge is made in contravention of a prohibition imposed under section 86 above”.

Part 3: Control of pollution of water resources. Chapter II: pollution offences. SECTION 90: Offences in connection with deposits and vegetation in rivers

Qualification of the offence: summary conviction.

Protected legal interest: water resources.

Author: anybody.

Mens rea: strict liability.

Criminal conducts: “(1)A person shall be guilty of an offence under this section if, without the consent of the Agency, he— (a)removes from any part of the bottom, channel or bed of any inland freshwaters a deposit accumulated by reason of any dam, weir or sluice holding back the waters; and (b)does so by causing the deposit to be carried away in suspension in the waters.

(2)A person shall be guilty of an offence under this section if, without the consent of the Agency, he— (a)causes or permits a substantial amount of vegetation to be cut or uprooted in any inland freshwaters, or to be cut or uprooted so near to any such waters that it falls into them; and (b)fails to take all reasonable steps to remove the vegetation from those waters”.

Sanction: “(3)A person guilty of an offence under this section shall be liable, on summary conviction, to a fine not exceeding level 4 on the standard scale”.

Defence: “(4)Nothing in subsection (1) above applies to anything done in the exercise of any power conferred by or under any enactment relating to land drainage, flood prevention or navigation.

(5)In giving a consent for the purposes of this section the Agency may make the consent subject to such conditions as it considers appropriate”.

Prosecution: ex officio.

5.9 Wildlife and Countryside Act 1981

Part I Wildlife. Protection of birds. SECTION 1: Protection of wild birds, their nests and eggs (England and Wales)³⁸

Author: anybody.

Legal protected interest: “(6)For the purposes of this section the definition of “wild bird in section 27(1) is to be read as not including any bird which is shown to have been bred in captivity unless it has been lawfully released into the wild as part of a re-population or re-introduction programme.

(6A)“Re-population” and “re-introduction” have the same meaning as in the Wild Birds Directive.

(7)Any reference in this Part to any bird included in Schedule 1 is a reference to any bird included in Part I and, during the close season for the bird in question, any bird included in Part II of that Schedule”.

Protected legal Interest and specific concept of environment: wildlife.

Criminal conducts and Mens rea: “(1)Subject to the provisions of this Part, if any person intentionally— (a)kills, injures or takes any wild bird;

(aa)takes, damages or destroys the nest of a wild bird included in Schedule ZA1;

(b)takes, damages or destroys the nest of any wild bird while that nest is in use or being built; or

(c)takes or destroys an egg of any wild bird,

he shall be guilty of an offence.

(2)Subject to the provisions of this Part, if any person has in his possession or control—

(a)any live or dead wild bird or any part of, or anything derived from, such a bird; or

(b)an egg of a wild bird or any part of such an egg,

he shall be guilty of an offence.

³⁸ For the provisions that apply to Scotland see <http://www.legislation.gov.uk/ukpga/1981/69>. Accessed November 20, 2013.

(5) Subject to the provisions of this Part, if any person intentionally or recklessly—

(a) disturbs any wild bird included in Schedule 1 while it is building a nest or is in, on or near a nest containing eggs or young; or

(b) disturbs dependent young of such a bird,

he shall be guilty of an offence”.

Defences: “(3) A person shall not be guilty of an offence under subsection (2) if he shows that— .

(a) the bird or egg had not been killed or taken, or had been lawfully killed or taken; or

(b) the bird, egg or other thing in his possession or control had been lawfully sold (whether to him or any other person).

(3A) In subsection (3) “lawfully” means without any contravention of—

(a) this Part and orders made under it,

(b) the Protection of Birds Acts 1954 to 1967 and orders made under those Acts, .

(c) any other legislation which implements the Wild Birds Directive and extends to any part of the United Kingdom, to any area designated in accordance with section 1(7) of the Continental Shelf Act 1964, or to any area to which British fishery limits extend in accordance with section 1 of the Fishery Limits Act 1976, and

(d) the provisions of the law of any member State (other than the United Kingdom) implementing the Wild Birds Directive”.

Part I Wildlife. Protection of birds. SECTION 5: Prohibition of certain methods of killing or taking wild birds (England and Wales)³⁹

Protected legal interest and specific concept of environment: wildlife.

Mens rea: strict liability.

Criminal conducts and Author: “(1) Subject to the provisions of this Part, if any person—

(a) sets in position any of the following articles, being an article which is of such a nature and is so placed as to be calculated to cause bodily injury to any wild bird coming into contact therewith, that is to say, any sprinze, trap, gin, snare, hook and line, any electrical device for killing, stunning or frightening or any poisonous, poisoned or stupefying substance;

(b) uses for the purpose of killing or taking any wild bird any such article as aforesaid, whether or not of such a nature and so placed as aforesaid, or any net, baited board, bird-lime or substance of a like nature to bird-lime;

(c) uses for the purpose of killing or taking any wild bird—

(i) any bow or crossbow;

(ii) any explosive other than ammunition for a firearm;

(iii) any automatic or semi-automatic weapon;

(iv) any shot-gun of which the barrel has an internal diameter at the muzzle of more than one and three-quarter inches;

(v) any device for illuminating a target or any sighting device for night shooting;

(vi) any form of artificial lighting or any mirror or other dazzling device;

(vii) any gas or smoke not falling within paragraphs (a) and (b); or

(viii) any chemical wetting agent;

³⁹ For the provisions that apply to Scotland see <http://www.legislation.gov.uk/ukpga/1981/69>. Accessed November 20, 2013.

(d)uses as a decoy, for the purpose of killing or taking any wild bird, any sound recording or any live bird or other animal whatever which is tethered, or which is secured by means of braces or other similar appliances, or which is blind, maimed or injured;

(e)uses any mechanically propelled vehicle in immediate pursuit of a wild bird for the purpose of killing or taking that bird; or

(f)knowingly causes or permits to be done an act which is mentioned in the foregoing provisions of this subsection and which is not lawful under subsection (5),

he shall be guilty of an offence”.

Defences: “(4)In any proceedings under subsection (1)(a) it shall be a defence to show that the article was set in position for the purpose of killing or taking, in the interests of public health, agriculture, forestry, fisheries or nature conservation, any wild animals which could be lawfully killed or taken by those means and that he took all reasonable precautions to prevent injury thereby to wild birds.

(4A)In any proceedings under subsection (1)(f) relating to an act which is mentioned in subsection (1)(a) it shall be a defence to show that the article was set in position for the purpose of killing or taking, in the interests of public health, agriculture, forestry, fisheries or nature conservation, any wild animals which could be lawfully killed or taken by those means and that he took or caused to be taken all reasonable precautions to prevent injury thereby to wild birds.

(5)Nothing in subsection (1) shall make unlawful—

(a)the use of a cage-trap or net by an authorised person for the purpose of taking a bird included in Part II of Schedule 2;

(b)the use of nets for the purpose of taking wild duck in a duck decoy which is shown to have been in use immediately before the passing of the M1Protection of Birds Act 1954; or

(c)the use of a cage-trap or net for the purpose of taking any game bird if it is shown that the taking of the bird is solely for the purpose of breeding;

but nothing in this subsection shall make lawful the use of any net for taking birds in flight or the use for taking birds on the ground of any net which is projected or propelled otherwise than by hand”.

Prosecution: ex officio or on the ground of individual request.

Part I Wildlife. Protection of birds. SECTION 6: Sale etc. of live or dead wild birds, eggs etc. (England and Wales)⁴⁰

Protected legal Interest and specific concept of environment: wildlife.

Mens rea: strict liability.

Criminal conducts and Author: “(1)Subject to the provisions of this Part, if any person—

(a)sells, offers or exposes for sale, or has in his possession or transports for the purpose of sale, any live wild bird other than a bird included in Part I of Schedule 3, or an egg of a wild bird or any part of such an egg; or

(b)publishes or causes to be published any advertisement likely to be understood as conveying that he buys or sells, or intends to buy or sell, any of those things,

he shall be guilty of an offence.

(2)Subject to the provisions of this Part, if any person who is not for the time being registered in accordance with regulations made by the Secretary of State—

(a)sells, offers or exposes for sale, or has in his possession or transports for the purpose of sale, any dead wild bird other than a bird included in Part II or III of Schedule 3, or any part of, or anything derived from, such a wild bird; or

(b)publishes or causes to be published any advertisement likely to be understood as conveying that he buys or sells, or intends to buy or sell, any of those things,

⁴⁰ For the provisions that apply to Scotland see <http://www.legislation.gov.uk/ukpga/1981/69>. Accessed November 20, 2013.

he shall be guilty of an offence.

(3) Subject to the provisions of this Part, if any person shows or causes or permits to be shown for the purposes of any competition or in any premises in which a competition is being held—

- (a) any live wild bird other than a bird included in Part I of Schedule 3; or
- (b) any live bird one of whose parents was such a wild bird,

he shall be guilty of an offence.

(5) Any reference in this section to any bird included in Part 1 of Schedule 3 is a reference to any bird included in that Part which—

- (a) was bred in captivity,
- (b) has been ringed or marked in accordance with regulations made by the Secretary of State, and
- (c) has not been lawfully released into the wild as part of a re-population or re-introduction programme.

(5A) “Re-population” and “re-introduction” have the same meaning as in the Wild Birds Directive.

(5B) Regulations made for the purposes of subsection (5)(b) may make different provision for different birds or different provisions of this section”.

Prosecution: ex officio or on the ground of individual request.

Part I Wildlife. Protection of birds. SECTION 8: Protection of captive birds

Qualification of the offense: summary conviction.

Protected legal interest: wildlife.

Specific concept of environment: none.

Author: anybody.

Criminal conducts: “(1) If any person keeps or confines any bird whatever in any cage or other receptacle which is not sufficient in height, length or breadth to permit the bird to stretch its wings freely, he shall be guilty of an offence.

(3) Every person who—

(a) promotes, arranges, conducts, assists in, receives money for, or takes part in, any event whatever at or in the course of which captive birds are liberated by hand or by any other means whatever for the purpose of being shot immediately after their liberation; or

(b) being the owner or occupier of any land, permits that land to be used for the purposes of such an event, shall be guilty of an offence”.

Defences: “(2) Subsection (1) does not apply to poultry, or to the keeping or confining of any bird—

- (a) while that bird is in the course of conveyance, by whatever means;
- (b) while that bird is being shown for the purposes of any public exhibition or competition if the time during which the bird is kept or confined for those purposes does not in the aggregate exceed 72 hours; or
- (c) while that bird is undergoing examination or treatment by a veterinary surgeon or veterinary practitioner”.

Prosecution: ex officio or on the ground of individual request.

Part I Wildlife. Protection of birds. SECTION 9: Protection of certain wild animals (England and Wales)⁴¹

Qualification of the offense: summary conviction.

Protected legal interest: wildlife.

⁴¹ For the provisions that apply to Scotland see <http://www.legislation.gov.uk/ukpga/1981/69>. Accessed November 20, 2013.

Criminal conducts, Author and Mens rea: “(1) Subject to the provisions of this Part, if any person intentionally or recklessly kills, injures or takes any wild animal included in Schedule 5, he shall be guilty of an offence.

(2) Subject to the provisions of this Part, if any person has in his possession or control any live or dead wild animal included in Schedule 5 or any part of, or anything derived from, such an animal, he shall be guilty of an offence.

(4) Subject to the provisions of this Part, a person is guilty of an offence if intentionally or recklessly—

(a) he damages or destroys any structure or place which any wild animal specified in Schedule 5 uses for shelter or protection;

(b) he disturbs any such animal while it is occupying a structure or place which it uses for shelter or protection; or

(c) he obstructs access to any structure or place which any such animal uses for shelter or protection.

(4A) Subject to the provisions of this Part, if any person intentionally or recklessly disturbs any wild animal included in Schedule 5 as—

(a) a dolphin or whale (cetacea), or

(b) a basking shark (cetorhinus maximus),

he shall be guilty of an offence.]

(4A) Subject to the provisions of this Part, any person who, intentionally or recklessly, disturbs or harasses any wild animal included in Schedule 5 as a—

(a) dolphin, whale or porpoise (cetacea); or

(b) basking shark (cetorhinus maximus),

shall be guilty of an offence.

(5) Subject to the provisions of this Part, if any person—

(a) sells, offers or exposes for sale, or has in his possession or transports for the purpose of sale, any live or dead wild animal included in Schedule 5, or any part of, or anything derived from, such an animal; or

(b) publishes or causes to be published any advertisement likely to be understood as conveying that he buys or sells, or intends to buy or sell, any of those things,

he shall be guilty of an offence.

(5A) Subject to the provisions of this Part, any person who knowingly causes or permits to be done an act which is made unlawful by any of the foregoing provisions of this section (other than subsection (5)(b)) shall be guilty of an offence”.

Defences: “(3) A person shall not be guilty of an offence under subsection (2) if he shows that—

(a) the animal had not been killed or taken, or had been killed or taken at or from a place in Scotland otherwise than in contravention of the relevant provisions; or

(b) the animal or other thing in his possession or control had been sold at a place in Scotland (whether to him or any other person) otherwise than in contravention of those provisions; or

(c) that the animal or other thing in his possession or control had been killed at, taken from or sold at a place outwith Scotland and—

(i) that the act of killing, taking or sale would not, if it had been committed in Scotland, have been in contravention of the relevant provisions; or

(ii) that the animal or other thing had been brought from the place where it was killed, taken or sold in accordance with the relevant regulations

and in this subsection "the relevant provisions" means the provisions of this Part and of the Conservation of Wild Creatures and Wild Plants Act 1975

(3A) In subsection (3)—

“the relevant provisions” means such of the provisions of the Conservation of Wild Creatures and Wild Plants Act 1975 (c. 48) and this Part as were in force at the time when the animal was killed or taken or, as the case may be, the animal or other thing was sold, and

“the relevant regulations” means—

- (a) Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade, and
- (b) Commission Regulation 1808/2001/EC on the implementation of that Council Regulation, as amended from time to time (or any Community instrument replacing either of them)”.

Prosecution: ex officio or on the ground of individual request.

Part I Wildlife. Protection of birds. SECTION 11: Prohibition of certain methods of killing or taking wild animals (England and Wales)⁴²

Qualification of the offense: summary conviction.

Protected legal interest: wildlife.

Criminal conducts and Author: “(1) Subject to the provisions of this Part, if any person—

- (a) sets in position any self-locking snare which is of such a nature and so placed as to be calculated to cause bodily injury to any wild animal coming into contact therewith;
- (b) uses for the purpose of killing or taking any wild animal any self-locking snare, whether or not of such a nature or so placed as aforesaid, any bow or cross-bow or any explosive other than ammunition for a firearm;
- (c) uses as a decoy, for the purpose of killing or taking any wild animal, any live mammal or bird whatever ; or
- (d) knowingly causes or permits to be done an act which is mentioned in the foregoing provisions of this section, he shall be guilty of an offence.

(2) Subject to the provisions of this Part, if any person—

- (a) sets in position any of the following articles, being an article which is of such a nature and so placed as to be calculated to cause bodily injury to any wild animal included in Schedule 6 which comes into contact therewith, that is to say, any trap or snare, any electrical device for killing or stunning or any poisonous, poisoned or stupefying substance;
- (b) uses for the purpose of killing or taking any such wild animal any such article as aforesaid, whether or not of such a nature and so placed as aforesaid, or any net;
- (c) uses for the purpose of killing or taking any such wild animal—
 - (i) any automatic or semi-automatic weapon;
 - (ii) any device for illuminating a target or sighting device for night shooting;
 - (iii) any form of artificial light or any mirror or other dazzling device; or
 - (iv) any gas or smoke not falling within paragraphs (a) and (b);
- (d) uses as a decoy, for the purpose of killing or taking any such wild animal, any sound recording;
- (e) uses any mechanically propelled vehicle in immediate pursuit of any such wild animal for the purpose of driving, killing or taking that animal, or
- (f) knowingly causes or permits to be done an act which is mentioned in the foregoing provisions of this subsection,

he shall be guilty of an offence.

(3) Subject to the provisions of this Part, if any person—

- (a) sets in position or knowingly causes or permits to be set in position any snare which is of such a nature and so placed as to be calculated to cause bodily injury to any wild animal coming into contact therewith; and
- (b) while the snare remains in position fails, without reasonable excuse, to inspect it, or cause it to be inspected, at least once every day,

⁴² For the provisions that apply to Scotland see <http://www.legislation.gov.uk/ukpga/1981/69>. Accessed November 20, 2013.

he shall be guilty of an offence.

Defence: (7) In any proceedings for an offence under subsection (2)(f) relating to an act which is mentioned in subsection (2)(a) it shall be a defence to show that the article was set in position for the purpose of killing or taking, in the interests of public health, agriculture, forestry, fisheries or nature conservation, any wild animals which could be lawfully killed or taken by those means and that he took or caused to be taken all reasonable precautions to prevent injury thereby to any wild animals included in Schedule 6”.

Prosecution: ex officio or on the ground of individual request.

Part I Wildlife. Protection of birds. SECTION 13: Protection of wild plants (England and Wales)⁴³

Qualification of the offense: summary conviction.

Protected legal interest: wild plant.

Specific concept of environment: wild plants.

Prosecution: ex officio or on the ground of individual request.

Criminal conducts, mens rea and author: “(1) Subject to the provisions of this Part, if any person—
(a) intentionally picks, uproots or destroys any wild plant included in Schedule 8; or

(b) not being an authorised person, intentionally uproots any wild plant not included in that Schedule, he shall be guilty of an offence.

(2) Subject to the provisions of this Part, if any person—

(a) sells, offers or exposes for sale, or has in his possession or transports for the purpose of sale, any live or dead wild plant included in Schedule 8, or any part of, or anything derived from, such a plant; or

(b) publishes or causes to be published any advertisement likely to be understood as conveying that he buys or sells, or intends to buy or sell, any of those things, he shall be guilty of an offence”.

Defence: “(3) Notwithstanding anything in subsection (1), a person shall not be guilty of an offence by reason of any act made unlawful by that subsection if he shows that the act was an incidental result of a lawful operation and could not reasonably have been avoided”.

Part I Wildlife. Protection of birds. SECTION 14: Introduction of new species etc. (England and Wales)⁴⁴

Qualification of the offense: summary conviction.

Protected legal interest: wild animals and wild plants.

Mens rea: strict liability.

Prosecution: ex officio or on the ground of individual request.

Criminal conducts, mens rea and author: “(1) Subject to the provisions of this Part, if any person releases or allows to escape into the wild any animal which—

(a) is of a kind which is not ordinarily resident in and is not a regular visitor to Great Britain in a wild state; or

(b) is included in Part I of Schedule 9, he shall be guilty of an offence.

(2) Subject to the provisions of this Part, if any person plants or otherwise causes to grow in the wild any plant which is included in Part II of Schedule 9, he shall be guilty of an offence”.

Defence: “(3) Subject to subsection (4), it shall be a defence to a charge of committing an offence under subsection (1) or (2) to prove that the accused took all reasonable steps and exercised all due diligence to avoid committing the offence.

⁴³ For the provisions that apply to Scotland see <http://www.legislation.gov.uk/ukpga/1981/69>. Accessed November 20, 2013.

⁴⁴ Ibid.

(4)Where the defence provided by subsection (3) involves an allegation that the commission of the offence was due to the act or default of another person, the person charged shall not, without leave of the court, be entitled to rely on the defence unless, within a period ending seven clear days before the hearing, he has served on the prosecutor a notice giving such information identifying or assisting in the identification of the other person as was then in his possession. .

(5)Any person authorised in writing by the Secretary of State may, at any reasonable time and (if required to do so) upon producing evidence that he is authorised, enter any land for the purpose of ascertaining whether an offence under subsection (1) or (2) is being, or has been, committed on that land; but nothing in this subsection shall authorise any person to enter a dwelling”.

Part I Wildlife. Protection of birds. SECTION 14ZA: Sale etc. of invasive non-native species

Qualification of the offense: summary conviction.

Protected legal interest: plant and animals

Criminal conducts and Author: “(1)Subject to the provisions of this Part, a person is guilty of an offence if he sells, offers or exposes for sale, or has in his possession or transports for the purposes of sale—

(a)an animal or plant to which this section applies, or

(b)anything from which such an animal or plant can be reproduced or propagated.

(2)Subject to the provisions of this Part, a person is guilty of an offence if he publishes or causes to be published any advertisement likely to be understood as conveying that he buys or sells, or intends to buy or sell—

(a)an animal or plant to which this section applies, or

(b)anything from which such an animal or plant can be reproduced or propagated”.

Defence: “(5)Subsections (3) and (4) of section 14 (defence of due diligence etc.) apply to an offence under this section as they apply to an offence under that section”.

Prosecution: ex officio or on the ground of individual request.

Part I Wildlife. Protection of birds. SECTION 14A: Prohibition on sale etc. of certain animals or plants

“(1)This section applies to— (a)any animal of a type mentioned in subsection (1) or (1A) of section 14 specified in an order made by the Scottish Ministers for the purposes of this section; and .

(b)any plant— (i)which does not ordinarily grow in Great Britain in a wild state or which is a hybrid of such a plant; or (ii)of a type mentioned in subsection (2) of section 14 specified in such an order”.

Criminal Conducts and Author: “(2)Subject to the provisions of this Part, any person who— (a)sells, offers or exposes for sale or has in the person’s possession or transports for the purpose of sale any animal or plant to which this section applies; or (b)publishes or causes to be published any advertisement likely to be understood as conveying that the person buys or sells, or intends to buy or sell, any such animal or plant, is guilty of an offence”.

Part I Wildlife. Protection of birds. SECTION 15A: Possession of pesticides

Qualification of the offense: summary conviction.

Protected legal interest: integrity of environment.

Mens rea: strict liability.

Criminal conduct and Author: “(1) Any person who is in possession of any pesticide containing one or more prescribed active ingredient shall be guilty of an offence.

Defence: “(2) A person shall not be guilty of an offence under subsection (1) if the person shows that the possession of the pesticide was for the purposes of doing anything in accordance with—

(a)any regulations made under section 16(2) of the Food and Environment Protection Act 1985 (c. 48), or

(b)the Biocidal Products Regulations 2001 (S.I. 2001/880) or any regulations replacing those regulations

(3) In this section— “pesticide” has the meaning given in the Food and Environment Protection Act 1985 (c. 48), and “prescribed active ingredient” means an ingredient of a pesticide which fits it for use as such and which is of a type prescribed by order made by the Scottish Ministers”.

Prosecution: ex officio or on the ground of individual request.

Part I Wildlife. Protection of birds. SECTION 21: Penalties, forfeitures etc. (England and Wales)⁴⁵

Range of sanctions: “(1) Subject to subsection (5), a person guilty of an offence under any of sections 1 to 13 or section 17 shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(4) A person guilty of an offence under section 14 or 14ZA shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

(4AA) Except in a case falling within subsection (4B) a person guilty of an offence under section 19XB(1), (2) or (3) shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4B) A person guilty of an offence under section 19XB(1)(a) or (2)(a) in relation to a wildlife inspector entering premises to ascertain whether an offence under section 14 or 14ZA is being or has been committed shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to a fine.

(4C) A person guilty of an offence under section 19XB(4) shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

(5) Where an offence to which subsection (1) applies was committed in respect of more than one bird, nest, egg, other animal, plant or other thing, the maximum fine which may be imposed under that subsection shall be determined as if the person convicted had been convicted of a separate offence in respect of each bird, nest, egg, animal, plant or thing.

(6) The court by which any person is convicted of an offence under this Part—

(a) shall order the forfeiture of any bird, nest, egg, other animal, plant or other thing in respect of which the offence was committed; and

(b) may order the forfeiture of any vehicle, animal, weapon or other thing which was used to commit the offence and, in the case of an offence under section 14 or 14ZA, any animal or plant which is of the same kind as that in respect of which the offence was committed and was found in his possession.

(7) Any offence under this Part shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender is found or to which he is first brought after the commission of the offence”.

In UK wildlife crime is handled by a special unit (National Wildlife Crime Unit - NWCU) made of a team of intelligence officers, analysts an indexer and operational staff, comprising a total of 13 people that handle the information coming from the police and the other law enforcement agencies. Outside the NWCU the activity is made of intelligence, analysis and supporting operations. The unit classifies crimes under different levels: Level 1 (local crime); Level 2 (cross-border in UK or transnational crime); Level 3 (serious and organized crime).

In order to corroborate findings in wildlife crime we consulted an expert from the NWCU. The expert affirmed that in order to assure coordination between the different teams, units and the other law enforcement agencies throughout the Country, all forces and agencies are legally required to apply the National Intelligence Model (intelligence operations are interested in people, object, location and events) in order to “speak the same

⁴⁵ Ibid.

language” and to assure coordination. Compared to the other EU Countries, in UK there is a very good coordination and communication between the different authorities (e.g. between the customs authorities, border forces and the police). In fact, before starting dealing with a case, they sit down together and they decide which is the most appropriate authority to prosecute the case (not worrying about point scoring etc.). They “speak the same language” when it comes with intelligence and enforcement; they review cases together and they support each other.

The expert also added that the NWCU liaise with Interpol: the National Crime Agency hosts the Interpol Desk for the environmental crimes that is a central authority, a legal gateway for info in and out. This UK Desk liaises with the Desks established in the other EU and non EU Countries. In fact, any exchange of information and evidence to support an investigation into another Country has to go through this gateway. A major problem is for the Interpol Desk in UK to liaise with non-English speaking Countries.

5.10 Rules for the Implementation of Ship-Source Pollution Directive in UK⁴⁶

Chapter II Oil Pollution. General provisions for Preventing Pollution. SECTION 131: Discharge of oil from ships into certain United Kingdom waters

Qualification of the offence: summary conviction or conviction on indictment.

Criminal conducts and Author: In this section “relevant discharge” means—

(a) a discharge of oil or a mixture containing oil which is made—

(i) from a ship which is an offshore installation, and

(ii) into United Kingdom national waters which are navigable by sea-going ships, or

(b) a discharge of oil or a mixture containing oil which is made—

(i) from a ship which is not an offshore installation, and

(ii) into United Kingdom national waters which are navigable by sea-going ships but which do not form part of the sea.”

1) If there is a relevant discharge, then, subject to the following provisions of this Chapter, the following shall be guilty of an offence, that is to say—

(a) the owner or master of the ship, unless he proves that the discharge took place and was caused as mentioned in paragraph (b) below;

(b) from the ship but takes place in the course of a transfer of oil to or from another ship or a place on land and is caused by the act or omission of any person in charge of any apparatus in that other ship or that place, the owner or master of that other ship or, as the case may be, the occupier of that place.

(2) Subsection (1) above does not apply to any discharge from an offshore installation which—

(a) is made into the sea; and

(b) is of a kind or is made in circumstances for the time being prescribed by regulations made by the Secretary of State.

(3) A person guilty of an offence under this section shall be liable—

(a) on summary conviction, to a fine not exceeding £250,000;

(b) on conviction on indictment, to a fine.

⁴⁶ See the documentation including the explanatory memorandum at <http://www.legislation.gov.uk/uksi/2009/1210/contents/made>. Accessed November 20, 2013.

In this section “offshore installation” means any mobile or fixed drilling or production platform or any other platform used in connection with the exploration, exploitation or associated offshore processing of sea bed mineral resources.”

(4) In this section “sea” includes any estuary or arm of the sea.

(5) In this section “place on land” includes anything resting on the bed or shore of the sea, or of any other waters included in United Kingdom national waters, and also includes anything afloat (other than a ship) if it is anchored or attached to the bed or shore of the sea or any such waters.

(6) In this section “occupier”, in relation to any such thing as is mentioned in subsection (5) above, if it has no occupier, means the owner thereof.

Defence of owner or master charged with offence under section 131: “(1) Where a person is charged with an offence under section 131 as the owner or master of a ship, it shall be a defence to prove that the oil or mixture was discharged for the purpose of—

- (a) securing the safety of any ship;
- (b) preventing damage to any ship or cargo, or
- (c) saving life,

unless the court is satisfied that the discharge of the oil or mixture was not necessary for that purpose or was not a reasonable step to take in the circumstances.

(2) Where a person is charged with an offence under section 131 as the owner or master of a ship, it shall also be a defence to prove—

- (a) that the oil or mixture escaped in consequence of damage to the ship, and that as soon as practicable after the damage occurred all reasonable steps were taken for preventing, or (if it could not be prevented) for stopping or reducing, the escape of the oil or mixture; or
- (b) that the oil or mixture escaped by reason of leakage, that neither the leakage nor any delay in discovering it was due to any want of reasonable care, and that as soon as practicable after the escape was discovered all reasonable steps were taken for stopping or reducing it”.

Defence of occupier charged with offence under section 131: “Where a person is charged, in respect of the escape of any oil or mixture containing oil, with an offence under section 131 as the occupier of a place on land, it shall be a defence to prove that neither the escape nor any delay in discovering it was due to any want of reasonable care and that as soon as practicable after it was discovered all reasonable steps were taken for stopping or reducing it”.

Chapter II Oil Pollution. General provisions for Preventing Pollution. SECTION 143: Prosecutions and enforcement of fines.

“(1) Proceedings for an offence under this Chapter may, in England and Wales be brought only—

- (a) by or with the consent of the Attorney General, or
- (b) if the offence is one to which subsection (4) below applies, by the harbour authority, or
- (c) unless the offence is one mentioned in subsection (4)(b) or (c) below, by the Secretary of State or a person authorised by any general or special direction of the Secretary of State.

(2) Subject to subsection (3) below, proceedings for an offence under this Chapter may, in Northern Ireland, be brought only—

- (a) by or with the consent of the Attorney General for Northern Ireland,
- (b) if the offence is one to which subsection (4) below applies, by a harbour authority, or
- (c) unless the offence is one mentioned in subsection (4)(b) or (c) below, by the Secretary of State or a person authorised by any general or special direction of the Secretary of State.

(3) Subsection (2) above shall have effect in relation to proceedings for an offence under section 131 relating to the discharge of oil or a mixture containing oil from a ship in a harbour in Northern Ireland as if the references in paragraph (c) to the Secretary of State were references to the Secretary of State or the Department of the Environment for Northern Ireland.

(4) This subsection applies to the following offences—

(a) any offence under section 131 which is alleged to have been committed by the discharge of oil, or a mixture containing oil, into the waters of a harbour in the United Kingdom;

(b) any offence in relation to a harbour in the United Kingdom under section 135 or 136; and

(c) any offence under section 142 relating to the keeping of records of the transfer of oil within such a harbour.

(5) The preceding provisions of this section shall apply in relation to any part of a dockyard port within the meaning of the Dockyard Ports Regulation Act 1865 as follows—

(a) if that part is comprised in a harbour in the United Kingdom, the reference to the harbour authority shall be construed as including a reference to the Queen's harbour master for the port;

(b) if that part is not comprised in a harbour in the United Kingdom, the references to such a harbour shall be construed as references to such a dockyard port and the reference to the harbour authority as a reference to the Queen's harbour master for the port.

(6) Any document required or authorised, by virtue of any statutory provision, to be served on a foreign company for the purposes of the institution of, or otherwise in connection with, proceedings for an offence under section 131 alleged to have been committed by the company as the owner of the ship shall be treated as duly served on that company if the document is served on the master of the ship.

In this subsection "foreign company" means a company or body which is not one to which any of sections 695 and 725 of the Companies Act 1985 and Articles 645 and 673 of the Companies (Northern Ireland) Order 1986 applies so as to authorise the service of the document in question under any of those provisions.

(7) Any person authorised to serve any document for the purposes of the institution of, or otherwise in connection with, proceedings for an offence under this Chapter shall, for that purpose, have the right to go on board the ship in question".

5.11 The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996

Part III: Requirements for Control of Operational Pollution – Control of Discharge of Oil

SECTION 11A: exceptions for damage to a ship or its equipment in internal or territorial waters

Defences: "11A. The provisions of regulations 12, 13 and 16 shall not apply to any discharge from an excepted ship into a part of the sea which is within the United Kingdom or its territorial waters of oil or oily mixture which results from damage to a ship or its equipment if—

(a) the damage was not caused by a person connected with the excepted ship's business acting—

(i) with intent,

(ii) recklessly, or

(iii) with serious negligence;

(b) all reasonable precautions were taken after the damage, or discovery of the discharge, to prevent or minimise the discharge; and

(c) neither the owner nor the master of the excepted ship acted—

(i) with intent to cause damage, or

(ii) recklessly and with knowledge that damage would probably result".

Part III: Requirements for Control of Operational Pollution – Control of Discharge of Oil

SECTION 11B: exceptions for damage to a ship or its equipment in other waters

Defences: "11B (1) The provisions of regulations 12, 13 and 16 shall not apply to any discharge from a UK excepted ship into a part of the sea other than the United Kingdom or its territorial waters of oil or oily mixture which results from damage to a ship or its equipment if—

- (a) the damage was not caused by a person connected with the UK excepted ship's business acting—
 - (i) with intent,
 - (ii) recklessly, or
 - (iii) with serious negligence;
- (b) all reasonable precautions were taken after the damage, or discovery of the discharge, to prevent or minimise the discharge; and
- (c) neither the owner nor the master of the UK excepted ship acted—
 - (i) with intent to cause damage, or
 - (ii) recklessly and with knowledge that damage would probably result.
- (2) The provisions of regulations 12, 13 and 16 shall not apply to any discharge from a non-UK excepted ship into a part of the sea other than the United Kingdom or its territorial waters of oil or oily mixture which results from damage to a ship or its equipment if—
 - (a) all reasonable precautions were taken after the damage, or discovery of the discharge, to prevent or minimise the discharge; and
 - (b) neither the owner nor the master of the non-UK excepted ship acted—
 - (i) with intent to cause damage, or
 - (ii) recklessly and with knowledge that damage would probably result”.

Part III: Requirements for Control of Operational Pollution – Control of Discharge of Oil.

SECTION 12: ships other than oil tankers and machinery space bilges of oil tankers

Qualification of the offence: summary conviction.

Protected legal interest: marine environment.

Punishment of violation of administrative regulation.

Mens rea: Strict liability.

“12. (1) Subject to regulation 11 this regulation applies to—

- (a)(i) United Kingdom ships other than oil tankers; and
- (ii) United Kingdom oil tankers in relation to discharges from their machinery space bilges (unless mixed with oil cargo residue) but excluding cargo pump room bilges;

wherever they may be, and—

(b) subject to regulation 38, to—

- (i) other ships, other than oil tankers; and
- (ii) other oil tankers, in relation to discharges from their machinery space bilges (unless mixed with oil cargo residue) but excluding cargo pump room bilges,

wherever they may be.

Criminal conducts and Author: “(2) Subject to paragraph (3), a ship to which this regulation applies shall not discharge oil or oily mixture into any part of the sea unless all the following conditions are satisfied—

- (a) the ship is proceeding on a voyage;
- (b) the ship is not within a special area;
- (c) the oil content of the effluent does not exceed 15ppm; and
- (d) the ship has in operation the filtering equipment and the oil discharge and monitoring and control system, required by regulation 14.

(3) In the case of a ship referred to in regulation 14(7) (that is to say, a ship delivered before 6th July 1993) which by virtue of that regulation is for the time being not required to be fitted and is not in fact fitted with the equipment required by regulation 14(1), (2) or (3), paragraph (2) shall not apply until—

(a) 6th July 1998; or

(b) the date on which the vessel is so fitted;

whichever is earlier. Even so, until that date (that is to say, the earlier of the two said dates) the ship shall not discharge oil or oily mixture into the sea unless all the following conditions are satisfied—

(i) the ship is not within a special area;

(ii) the ship is more than 12 miles from the nearest land;

(iii) the ship is proceeding on a voyage;

(iv) the oil content of the effluent is less than 100ppm; and

(v) the ship has in operation approved oily-water separating equipment of a design which is approved in accordance with the specification set out in the Recommendations on International Performance and Test Specifications for Oily Water Separating Equipment and Oil Content Meters.

(4) No discharge into the sea shall contain chemicals or other substances in quantities or concentrations which are hazardous to the marine environment or contain chemicals or other substances introduced for the purpose of circumventing the conditions of discharge prescribed by this regulation.

(5) Insofar as any oil or oily mixture has not been unloaded as cargo and may not be discharged into the sea in compliance with paragraphs (2) or (3), it shall be retained on board and discharged into reception facilities.

Defence: (6) Subject to paragraph (7), this regulation does not apply to discharges which occur landward of the line which for the time being is the baseline for measuring the breadth of the territorial waters of the United Kingdom.

(7) Notwithstanding paragraph (6), discharges prohibited by paragraph (4) shall continue to be prohibited when made in the sea on the landward side of the line referred to in paragraph (6)."

Prosecution: ex officio or on the ground of individual request.

Part III: Requirements for Control of Operational Pollution – Control of Discharge of Oil SECTION 13: oil tankers

Qualification of the offence: summary conviction.

Protected legal interest: marine environment.

Punishment of violation of an administrative regulation.

Mens rea: Strict liability.

“(1) Subject to regulation 11 this regulation applies to—

(a) every United Kingdom oil tanker; and

(b) subject to regulation 38, every other oil tanker wherever it may be.

Criminal conducts and Author: “(2) Subject to paragraph (3) an oil tanker to which this regulation applies shall not discharge any oil or oily mixture (except those for which provision is made in regulation 12) into any part of the sea unless all the following conditions are satisfied—

(a) the tanker is proceeding on a voyage;

(b) the tanker is not within a special area;

(c) the tanker is more than 50 miles from the nearest land;

(d) the instantaneous rate of discharge of oil content does not exceed 30 litres per mile;

(e) the total quantity of oil discharged into the sea does not exceed $\frac{1}{3,000}$ of the total quantity of the particular cargo of which the residue formed a part, or, in the case of existing tankers, the total quantity of oil discharged does not exceed $\frac{1}{1,500}$ of the total quantity of the particular cargo of which the residue formed a part; and

(f)the tanker has in operation an oil discharge monitoring and control system and a slop tank arrangement as required by regulation 15”.

Defences: “(3) The provisions of paragraph (2) shall not apply to the discharge of clean or segregated ballast or unprocessed oily mixture which without dilution has an oil content not exceeding 15 ppm and which does not originate from cargo pump room bilges and is not mixed with oil cargo residues.

(6) Subject to paragraph (7), this regulation does not apply to discharges which occur landward of the line which for the time being is the baseline for measuring the breadth of the territorial waters of the United Kingdom.

Prosecution: ex officio or on the ground of individual request.

Part III: Requirements for Control of Operational Pollution – Control of Discharge of Oil SECTION 16:
methods for the prevention of oil pollution from ships operating in special areas

Qualification of the offence: summary conviction.

Protected legal interest: marine environment.

Mens rea: Strict Liability.

“(1) For the purposes of these Regulations the special areas are the Mediterranean Sea area, the Baltic Sea area, the Black Sea area and the Antarctic area, defined as follows—

(a)“the Mediterranean Sea area” means the Mediterranean Sea including the gulfs and seas therein with the boundary between the Mediterranean and the Black Sea constituted by the 41°N parallel and bounded to the west by the Straits of Gibraltar at the meridian of 5°36’W;

(b)“the Baltic Sea area” means the Baltic Sea with the Gulf of Bothnia, the Gulf of Finland and the entrance to the Baltic Sea bounded by the parallel to the Skaw in the Skagerrak at 57°44.8’N;

(c)“the Black Sea area” means the Black Sea with the boundary between the Mediterranean and the Black Sea constituted by the parallel 41°N;

(d)“the Antarctic area” means the sea area south of 60° south latitude,

and any designated by the Secretary of State in a Merchant Shipping Notice following a Resolution of the Marine Environment Protection Committee of the International Maritime Organisation.

Criminal Conducts and Author: “(2) Subject to the provisions of regulation 11 and paragraph (3), there shall be prohibited—

(a)in the Antarctic area, any discharge into the sea from any United Kingdom ship of oil or oily mixture; and

(b)in every special area other than the Antarctic area—

(i)any discharge into the sea of oil or oily mixture from any United Kingdom oil tanker or from any United Kingdom ship of 400 GT or above other than an oil tanker; and

(ii)any discharge into the sea of oil or oily mixture from a United Kingdom ship of less than 400 GT other than an oil tanker, except when the oil content of the effluent without dilution does not exceed 15 ppm.

(3) (a) Paragraph (2) shall not apply to the discharge of clean or segregated ballast.

(b)Paragraph (2)(a) shall not apply to the discharge of processed bilge water from machinery spaces, provided that all the following conditions are satisfied—

(i)the bilge water does not originate from cargo pump room bilges;

(ii)the bilge water is not mixed with cargo oil residues;

(iii)the ship is proceeding on a voyage;

(iv)the oil content of the effluent, without dilution, does not exceed 15 ppm of mixture;

(v)the ship has in operation an oil filtering system complying with regulation 14(5) and equipment complying with regulation 14(6);

(vi)the oil filtering system is equipped with a stopping device which will ensure that the discharge is automatically stopped if the oil content of the effluent exceeds 15 ppm parts of the mixture.

(4) (a) No discharge into the sea shall contain chemicals or other substances in quantities or concentrations which are hazardous to the marine environment or contain chemicals or other substances introduced for the purpose of circumventing the conditions of discharge specified in this regulation.

(b) Where residues of oil or oily mixture may not be discharged into the sea in compliance with paragraphs (2) or (3), they shall be retained on board and shall only be discharged into reception facilities.

(5) Nothing in this regulation shall prohibit a ship on a voyage only part of which is in a special area from discharging outside the special area in accordance with regulations 12 and 13.

(6) A United Kingdom ship shall not enter the Antarctic unless—

(a) it is fitted with a tank or tanks of sufficient capacity for the retention on board of all sludge, dirty ballast, tank washing water and other oily residues and mixtures while operating in the area; and

(b) it has concluded arrangements to have such oily residues and mixtures discharged into a reception facility after it has left the area.

(7) Subject to regulation 38, this regulation, other than paragraph (6), applies to ships which are not United Kingdom ships as it applies to United Kingdom ships”.

Defences: “(3) (a) Paragraph (2) shall not apply to the discharge of clean or segregated ballast.

(b) Paragraph (2)(a) shall not apply to the discharge of processed bilge water from machinery spaces, provided that all the following conditions are satisfied—

(i) the bilge water does not originate from cargo pump room bilges;

(ii) the bilge water is not mixed with cargo oil residues;

(iii) the ship is proceeding on a voyage;

(iv) the oil content of the effluent, without dilution, does not exceed 15 ppm of mixture;

(v) the ship has in operation an oil filtering system complying with regulation 14(5) and equipment complying with regulation 14(6);

(vi) the oil filtering system is equipped with a stopping device which will ensure that the discharge is automatically stopped if the oil content of the effluent exceeds 15 ppm parts of the mixture.

(5) Nothing in this regulation shall prohibit a ship on a voyage only part of which is in a special area from discharging outside the special area in accordance with regulations 12 and 13.

Prosecution: ex officio or on the ground of individual request.

Part IX: Powers of Inspect, deny entry, detention and penalties. SECTION 36: penalties

“(1) If any ship fails to comply with any requirement of these Regulations (other than regulations 12, 13 and 16) the owner and the master of the ship shall each be guilty of an offence and punishable on summary conviction by a fine not exceeding the statutory maximum and on conviction on indictment by a fine.

(2) If any ship fails to comply with any requirement of regulation 12, 13 or 16, the owner and the master shall each be guilty of an offence and section 131(3) of the Merchant Shipping Act 1995 shall apply as it applies to an offence under that section, so that each of the owner and the master shall be liable on summary conviction to a fine not exceeding £50,000 or on conviction on indictment to a fine.

(3) It shall be a defence for a person charged under paragraph (1) of this regulation to show that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(4) Where an offence under this regulation is committed, or would have been committed save for the operation of paragraph (3), by any person due to the act or default of some other person, that other person shall be guilty of the offence, and a person may be charged with and convicted of an offence by virtue of this paragraph whether or not proceedings are taken against the first-mentioned person”.

Part IX: Powers of Inspect, deny entry, detention and penalties. SECTION 36A: penalties for contravening regulations 12, 13 and 16

“(1) Subject to paragraph (3), if any ship fails to comply with any requirement of regulation 12, 13 or 16, the owner and the master shall each be guilty of an offence and section 131(3) of the Act shall apply as it applies to an offence under that section, so that each of the owner and the master shall be liable on summary conviction to a fine not exceeding £250,000 or on conviction on indictment to a fine.

(2) Subject to paragraph (3), if any oil or oily mixture is discharged from a ship in contravention of any requirement of regulation 12, 13 or 16, any person who causes or contributes to that discharge is guilty of an offence and section 131(3) of the Act shall apply as it applies to an offence under that section, so that such person shall be liable on summary conviction to a fine not exceeding £250,000 or on conviction on indictment to a fine.

(3) Where a UK excepted ship fails to comply with any requirement of regulation 12, 13 or 16 because of a discharge into a part of the sea other than the United Kingdom or its territorial waters of oil or oily mixture which results from damage to a ship or its equipment, neither the owner nor the master nor a crew member acting under the master’s responsibility shall be guilty of an offence under this regulation in respect of that failure if—

(a) all reasonable precautions were taken after the damage, or discovery of the discharge, to prevent or minimise the discharge; and

(b) neither the owner nor the master acted—

(i) with intent to cause damage, or

(ii) recklessly and with knowledge that damage would probably result.

(4) In this regulation, “UK excepted ship” has the meaning given in regulation 11C.”

(14) In regulation 37, except in paragraph (3)(c)(ii), for “master or owner” and “owner or master”, wherever they occur, substitute “defendant”.

(15) In regulation 37(3)(c)(ii), omit “by or on behalf of the master or owner”.

Part IX: Powers of inspect, deny entry, detention and penalties. SECTION 37: enforcement and application of fines

“(1) Any document required or authorised, by virtue of any statutory provision, to be served on a foreign company for the purposes of the institution of or otherwise in connection with, proceedings for an offence of contravening regulation 12, 13 or 16 alleged to have been committed by the company as the owner of a ship shall be treated as duly served on that company if the document is served on the master of the ship; and any person authorised to serve any document for the purposes of the institution of, or otherwise in connection with proceedings for an offence under these Regulations (whether or not in pursuance of the foregoing provisions of this paragraph) shall, for that purpose, have the right to go on board the ship in question.

(2) In paragraph (1), a “foreign company” means a company or body which is not one to whom any of the following provisions applies—

(a) section 695 and 725 of the Companies Act 1985(1);

(b) Article 645 and 673 of the Companies (Northern Ireland) Order 1986(2),

so as to authorise the service of the document in question under any of those provisions.

(3) A person exercising the power of detention conferred by regulation 35(2)(a) in respect of an alleged contravention of regulation 12, 13 or 16 shall immediately release the ship if—

(a) no proceedings for the offence in question are instituted within the period of 7 days beginning with the day on which the vessel is detained;

(b) such proceedings, having been instituted through exercise of the power conferred by paragraph (1) within that period, are concluded without the master or owner being convicted;

(c) either—

(i) the sum of £55,000 is paid to the Secretary of State by way of security; or

(ii) security which, in the opinion of the Secretary of State, is satisfactory and is for an amount not less than £55,000 is given to the Secretary of State, by or on behalf of the master or owner; or

(d) where the master or owner is convicted of the offence, any costs or expenses ordered to be paid by him, and any fine imposed on him, have been paid, or;

(e) the release is ordered by a court or tribunal referred to in Article 292 of the United Nations Convention on the Law of the Sea 1982, and any bond or other financial security ordered by such a court or tribunal is posted.

(4) The Secretary of State shall repay any sum paid in pursuance of paragraph (3)(c) or release any security so given—

(a) if no proceedings for the offence in question are instituted within the period of 7 days beginning with the day on which the sum is paid; or

(b) if such proceedings, having been instituted within that period are concluded without the master or owner being convicted.

(5) Where a sum has been paid, or security has been given, by any person in pursuance of paragraph (3)(c) and the master or owner is convicted of the offence in question, the sum so paid or the amount made available under the security shall be applied as follows—

(a) first in payment of any costs or expenses ordered by the court to be paid by the master or owner; and

(b) next in payment of any fine imposed by the court;

and any balance shall be repaid to the person paying the sum, or giving the security.

(6) For the purposes of this regulation in its application to England and Wales and subject to paragraph (8) in its application to Northern Ireland—

(a) proceedings for an offence are instituted—

(i) when a justice of the peace issues a summons or warrant under section 1 of the Magistrates' Courts Act 1980(3) in respect of the offence,

(ii) when a person is charged with the offence after being taken into custody without a warrant,

(iii) when a bill of indictment is preferred by virtue of section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933(4);

and where the application of this paragraph would result in their being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times; and

(b) proceedings for an offence are concluded without the master or owner being convicted on the occurrence of one of the following events—

(i) the discontinuance of the proceedings;

(ii) the acquittal of the master or owner;

(iii) the quashing of the master or owner's conviction for the offence;

(iv) the grant of Her Majesty's pardon in respect of the master or owner's conviction for the offence.

(7) For the purposes of this regulation in its application to Scotland—

(a) proceedings for an offence are instituted—

(i) on the granting by the sheriff of a warrant in respect of the offence on presentation of a petition under section 12 of the Criminal Procedure (Scotland) Act 1975(5);

(ii) when, in the absence of a warrant or citation, the master or owner is first brought before a court competent to deal with the case;

(iii) when, in the case where he is liberated upon a written undertaking in terms of section 18(2)(a), 294(2)(a) or 295(1)(a) of the Criminal Procedure (Scotland) Act 1975, the master or owner appears at the specified court at the specified time;

(iv) when, in a case mentioned in paragraph (iii) above where the master or owner fails to appear at the specified court at the specified time, the court grants warrant for his apprehension;

(v) when summary proceedings are commenced in terms of section 33 1(3) of the Criminal Procedure (Scotland) Act 1975; and

(b) proceedings for an offence are concluded without the master or owner being convicted on the occurrence of one of the following events—

(i) the court pronounces a verdict of not guilty or not proven against the master or owner in respect of the offence;

(ii) the proceedings are expressly abandoned (other than pro loco et tempore) by the prosecutor or are deserted simpliciter;

(iii) the conviction is quashed;

(iv) the accused receives Her Majesty's pardon in respect of the conviction.

(8) In its application to proceedings in Northern Ireland, paragraph (6)(a) above shall have effect as if—

(a) in sub-paragraph (i), for the references to section 1 of the Magistrates' Courts Act 1980 there were substituted a reference to Article 20 of the Magistrates' Courts (Northern Ireland) Order 1981(6); and

(b) for sub-paragraph (iii) there were substituted—

“(iii) when an indictment is presented under section 2(2)(c), (e) or (f) of the Grand Jury (Abolition) Act (Northern Ireland) 1969(7).”

(9) Where a fine imposed by a court in proceedings against the owner or master of a ship for an offence under regulations 12, 13 or 16 above is not paid or any costs or expenses ordered to be paid by him are not paid at the time ordered by the court, the court shall, in addition to any other powers for enforcing payment, have power to direct the amount remaining unpaid to be levied by distress or arrestment and sale of the ship, her tackle, furniture and apparel.

(10) Where a person is convicted of an offence under regulations 12, 13 or 16 above, and the court imposes a fine in respect of the offence, then if it appears to the court that any person has incurred, or will incur, expenses in removing any pollution, or making good any damage, which is attributable to the offence, the court may order the whole or part of the fine to be paid to that person for or towards defraying those expenses”.

5.12 The Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996

SECTION 5: Discharge of cargo tanks

“(a) The discharge of any noxious liquid substance into the sea is prohibited, except where permitted by Schedule 2 in Merchant Shipping Notice No NLS 1.

(b) Tanks shall be washed, or prewashed, and the tank washings shall be dealt with, as prescribed in Schedule 2 in Merchant Shipping Notice No NLS 1”.

SECTION 6: Loading and carriage in bulk of dangerous or noxious liquid substances

Qualification of the offence: summary conviction.

Protected legal interest: marine environment.

Mens rea: Strict liability.

Criminal conduct, Author and Defences: “No ship shall load in bulk, or carry in bulk, any dangerous or noxious liquid substances or substances subject to a tripartite agreement unless—

(a)(i) there is in force in respect of that ship a valid INLS Certificate, a BCH Code Certificate, an IBC Code Certificate or an appropriate Certificate covering the substance in question; and

(ii) the loading and carriage of that substance is in accordance with the terms of that Certificate; or

(b)(i) either the Secretary of State or the government of a State Party to the SOLAS or MARPOL Conventions has given written permission for its carriage; and

(ii) any conditions subject to which that permission was given are complied with; or

(c) if the substance is an oil-like substance—

(i) there is in force in respect of the ship a valid IOPP Certificate or a UKOPP Certificate suitably endorsed for the substance in question;

- (ii) the loading and carriage of that substance is in accordance with the terms of that certificate; and
- (iii) of Category C or D it is handled and carried in accordance with Schedule 3 in Merchant Shipping Notice No NLS 1”.

Prosecution: ex officio or on the ground of individual request.

SECTION 11: Responsibilities of owner and master

“(1) The owner and master of every ship to which this regulation applies shall ensure that—

(a) the condition of the ship and its equipment shall be maintained so as to conform to the appropriate Regulations;

(b) after any survey of the ship required by these Regulations has been completed, no material change shall be made to the structure, equipment, fittings, arrangements and materials which were subject to the survey, without the approval of the Secretary of State except by direct replacement;

(c) whenever an accident occurs to a ship or a defect is discovered, either of which affects the safety or integrity of the ship, the safety of the crew or the efficiency or completeness of the equipment required by these Regulations—

(i) it shall be reported at the earliest opportunity to the Secretary of State;

(ii) if a United Kingdom ship is in a port outside the United Kingdom it is also reported immediately to the appropriate authority of the country in which the port is situated.

(2) Whenever an accident or defect is reported to the Secretary of State under subparagraph (c), the Secretary of State shall cause investigations to be initiated to determine whether a survey by a surveyor is necessary and shall, if appropriate, require such a survey to be carried out.

(3) This regulation applied to—

(i) United Kingdom ships; and

(ii) except as regards subparagraph (1)(a) above, other ships which have been surveyed pursuant to these Regulations”.

SECTION 14: Penalties

“(1) If there is any contravention of these Regulations other than a contravention of regulation 5 the owner and master of the ship shall each be guilty of an offence punishable on summary conviction by a fine not exceeding the statutory maximum, or on conviction on indictment, by a fine.

(1ZA) If any noxious liquid substance is discharged from a ship in contravention of regulation 5(a), then section 131(3) of the Merchant Shipping Act 1995 shall apply as it applies to an offence under that section, so that any person who causes or contributes to that discharge is guilty of an offence punishable on summary conviction by a fine not exceeding £25,000 or on conviction on indictment by a fine.”

(1A) If there is any contravention of regulation 5b in respect of a ship the owner and master of the ship shall each be guilty of an offence and section 131(3) of the Merchant Shipping Act 1995 shall apply as it applies to an offence under that section, so that each of the owner and master shall be liable—

(a) on summary conviction, to a fine not exceeding £25,000; or

(b) on conviction on indictment, to a fine.

(1B) Sections 143(6) (which provides for the service of documents on foreign companies required or authorised by any statutory provision in connection with proceedings for an offence under section 131) and 146 (which provides for the enforcement and application of fines imposed for offences under Chapter II of Part VI) of the Merchant Shipping Act 1995 shall apply to an offence for a contravention of regulation 5 as they apply to an offence under section 131 of that Act.”.

(2) It shall be a defence for a person charged with an offence under these Regulations other than a contravention of regulation 5(a) to prove that he took all reasonable steps to ensure that the regulations in question were complied with”.

6 Substantive criminal law on public servants liability in relation to environmental crimes/offences

In UK there is no specific act dedicated to the liability of public servants in environmental offences. However, under UK law misconduct in public office is considered a common law offence. The details of the offence are set out by the crown prosecution Service (CPS)⁴⁷: misconduct in public office is an offence at common law triable only on indictment. It carries a maximum sentence of life imprisonment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office⁴⁸.

In UK the Law Commission, which is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed⁴⁹, is currently carrying out preliminary work on the misconduct in public office offence. As reported by the Law Commission in fact misconduct in public office is a common law offence but there is no exhaustive definition. As a result the boundaries of the offence are uncertain and despite there being relatively few prosecutions each year a disproportionately high number of those cases are the subject of appeal. Areas of difficulty identified in recent appeals include the fact that the fault element of the offence varies according to the conduct that is the subject of prosecution and that there is uncertainty as regards the liability of private individuals who discharge public functions. In 2010 the Committee on the Issue of Privilege (Police Searches on the Parliamentary Estate) recommended that the Law Commission revisit its 1997 proposal to create a statutory offence⁵⁰.

7 Substantive criminal law on organised crime

Environmental crimes tend to be “organized”. In fact “environmental crime involves the production and/or distribution of goods and services that are illegal by their classification. Such enterprise crime is more effectively conceptualized as a market than a form of social deviance: criminal activities are structured around multilateral exchanges involving producers, processors, retailers and final consumers where supply and demand for services interact in a free-market relationship”⁵¹.

However, there is no legal definition of organized crime in UK legislation. The UK legal system provides neither a specialized legislation concerning the environmental organized crime nor, more generally, legislation dedicated to the organized crime. In fact there is no provision for a specific offence concerning the membership of a criminal organization: the existing criminal law offences and regulations, such as conspiracy laws, are considered to be sufficient to prosecute organized crime acts.

The main part of the legislation made applicable to organized crime cases concerns the field of investigatory powers, law enforcement and prosecution. In fact organized crime cases cannot be differentiated from other criminal cases because of the way they are judged in legal terms but because of the way they are investigated.

In the absence of a common definition, what can be found are certain features, which are commonly mentioned in the context of organized crime. These features include profit orientation, networking, planning, persistence and

⁴⁷ Accessed December 10, 2013. http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/

⁴⁸ Ibid.

⁴⁹ Accessed December 10, 2013. <http://lawcommission.justice.gov.uk/index.htm>

⁵⁰ Accessed December 10, 2013. <http://lawcommission.justice.gov.uk/areas/misconduct.htm>

⁵¹ The Royal Institute of International Affairs, *Report on International Environmental Crime*, 2002. Accessed December 3, 2013. http://ec.europa.eu/environment/archives/docum/pdf/02544_environmental_crime_workshop.pdf

involvement in illicit markets”⁵². Nevertheless, attempts to develop a common description have been made by various actors and institutions. By way of example, the newly established National Crime Agency describes organized crime in the following manner: “[d]efining organised crime in terms of specific threats is a practical way of understanding and tackling it. While some organised criminals may specialise in a particular criminal trade, many are entrepreneurial and opportunistic by nature. Significant numbers of crime groups, especially the larger, more established ones, are involved in two or more profit-making criminal activities. The one threat on this list which is common to nearly all significant groups of organised criminals is money-laundering”⁵³. Furthermore, the 2013 *Serious and Organized Crime Strategy* released by Home Office⁵⁴ states that “there is no legal definition of organized crime in England and Wales. For the purposes of this strategy, organized crime is serious crime planned, coordinated and conducted by people working together on a continuing basis. Their motivation is often, but not always, financial gain. Organized crime is characterized by violence or the threat of violence and by the use of bribery and corruption: organized criminals very often depend on the assistance of corrupt, complicit or negligent professionals, notably lawyers, accountants and bankers. Organized crime also uses sophisticated technology to conduct operations, maintain security and evade justice”⁵⁵.

Against this background, as it has been reported, the UK Government “embarked on a grand experiment in taking a more whole-of-government, joined-up, multi-agency approach in dealing with the myriad forms of entrepreneurial criminality. The creation of the Serious organized Crime Agency [now National Crime Agency] in 2006 exemplifies this joint-up, multi-agency perspective”⁵⁶. Organized crime in fact requires responses across the whole of government and beyond. It is not just a matter for the police and NCA. Many other departments need to be involved, with local authorities, the private sector and communities. Organized crime also requires an international response with close allies and multilateral organizations⁵⁷.

As far as the action taken at the national level is concerned, the National Crime Agency⁵⁸ has been established under the crime and Courts Act 2013⁵⁹ in order to lead the work against serious and organized crime. NCA is a non-ministerial department that receives funding directly from HM treasury. As to the Agency enforcement powers, NCA officers have the ability to conduct investigations across all its responsibilities, including environmental crimes in so far as they are organized. Compared to precursor agencies, a greater proportion of NCA officers will be ‘triple warranted’, holding the powers of a police constable, immigration officer and customs officer to arrest, search, seize, require information and recover criminal assets⁶⁰. “The success of the NCA depends on the closest collaboration with the police and other law enforcement agencies, notably the major metropolitan police forces in England and Wales (Metropolitan Police Service, West Midlands Police, Greater Manchester Police, Merseyside Police and West Yorkshire Police), Police Scotland and the Police Service of Northern Ireland (PSNI), and with the security and intelligence agencies. The basis of these relationships must be

⁵² Research of BfU in association with Max-Planck-Institute coordinated by Tania Fröhlich, *Organised Environmental Crime in the EU Member States, Final Report*, 2003, 431, available at http://ec.europa.eu/environment/legal/crime/pdf/organised_member_states.pdf. Accessed December 3, 2013. See also Geoff Dean, Ivar Fashing and Peter Gottschalk, *Organized Crime, Policing Illegal Business Entrepreneurialism* (Oxford: Oxford University Press, 2010), 169.

⁵³ Accessed December 3, 2013. <http://www.nationalcrimeagency.gov.uk/crime-threats>

⁵⁴ Accessed December 3, 2013, <https://www.gov.uk/government/publications/serious-organised-crime-strategy>

⁵⁵ Accessed December 3, 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf

⁵⁶ Dean et al, “Organized Crime, Policing Illegal Business Entrepreneurialism”, 171.

⁵⁷ *Serious and Organized Crime Strategy*, 2013, 25. Accessed December 3, 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf

⁵⁸ Accessed December 3, 2013. <http://www.nationalcrimeagency.gov.uk/>

⁵⁹ Accessed December 3, 2013, <http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted>

⁶⁰ *Serious and Organized Crime Strategy*, 2013, Accessed December 3, 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf

the sharing of intelligence and operational capabilities to pursue common and agreed priorities”⁶¹. “The NCA will comprise four operational commands responsible for organized crime, economic crime, borders and international work, and child exploitation and online protection. It will have a new National Cyber Crime Unit. The NCA will also have a unit to coordinate investigations into the most serious corruption cases in the UK. At the core of the NCA will be a new multi-agency intelligence hub which will draw intelligence together on all these issues, and inform tasking and the allocation of operational resources”⁶².

As far as combating organized crime at the regional level is concerned, “[t]here are currently nine police Regional Organized Crime Units (ROCU) in England and Wales which provide capability to investigate serious and organized crime across police force boundaries. Chief constables, supported by police and crime commissioners, are leading a program to increase ROCU capabilities, specifically in the areas of intelligence collection and analysis, asset recovery, fraud, cybercrime, prison intelligence and the provision of witness protection. The Home Office is investing additional funding in these capabilities and we expect significant change by the end of 2014. ROCUs will work alongside 18 regional NCA offices. [...] The ROCUs also have an important leadership role in facilitating information-sharing across agencies and departments about serious and organized crime. Each ROCU will have a Government Agency Intelligence Network (GAIN) coordinator at both a strategic and tactical level. The core membership of the GAIN includes the police, national law enforcement agencies and other agencies such as Trading Standards and the Environment Agency”⁶³. On the other hand, at the local level “[m]ost of the work against serious and organized criminals in this country will continue to be conducted by police forces. Police teams responsible for organized crime, police intelligence assets and other specialist police units will continue to be vital and, in numerical terms, police resources will continue to outnumber significantly those of the NCA and ROCUs. The NCA will inform, coordinate, lead and support but the relationship with police forces must at all times be close and collaborative”⁶⁴.

As far as the UK border is concerned, “[a] significant proportion of serious and organized crime involves the movement of people, goods and money across the UK’s border. Criminals look continuously to exploit potential vulnerabilities in our border security arrangements. The border also provides an opportunity for law enforcement to intervene against and disrupt serious and organized crime. The Border Policing Command (BPC) of the NCA will lead work against serious and organized crime at the border, including organized immigration crime and human trafficking. The NCA will be responsible for compiling a new classified Border Risk Assessment (covering all threats) and control strategy, which for the first time will inform and coordinate all joint law enforcement operational activity. The NCA will work closely with the Border Force which is responsible for detecting threats and seizing illicit goods, checking immigration status, searching baggage, vehicles and cargo for illicit goods or illegal immigrants, patrolling the UK coastline and searching vessels. Border Force has an important intelligence gathering function”⁶⁵.

With particular reference to international cooperation, the Strategy highlights the important collaboration with Europol. In the last 12 months UK law enforcement agencies have been involved in more than 300 major Europol operations against serious and organized crime⁶⁶. Furthermore, it is stated that “the EU has a legislative framework for cooperation between its member states on serious and organized crime. Under the terms of the Lisbon Treaty, the Government is required to decide by 2014 whether we opt out of, or remain bound by, all of those EU police and criminal justice measures adopted prior to the entry into the Treaty. In July, the Prime Minister informed the EU Council of Ministers that the Government has decided to opt out of all pre-Lisbon police and criminal justice measures (more than 130 in total). The opt-out will take effect on 1 December 2014. This does not affect those measures we have joined since the Lisbon Treaty entered into force on 1 December 2009. The Home Secretary has announced that the UK will seek to rejoin a set of 35 pre-Lisbon measures which we regard as important for our cooperation on policing and criminal justice”⁶⁷.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid, 29.

⁶⁴ Ibid.

⁶⁵ Ibid, 31.

⁶⁶ Ibid, 42.

⁶⁷ Ibid, 41.

In 2013, next to the *Serious and Organized Crime Strategy*, Home Office published another study dedicated to the social and economic costs of organised crime in UK. A specific part of this study is dedicated to the organised environmental crime and to the organised wildlife crime which cause pollution and damage communities and businesses in the UK⁶⁸.

The relevant parts of this study are the following:

“Organized environmental crime

Scope

Several types of environmental crime occur in the UK. Organised crime groups are involved in elements of environmental crime, including waste crime, which includes the illegal dumping of waste products, such as end of life vehicles and metal (Environment Agency, 2011). Illegal dumping of construction and demolition waste can also include hazardous waste such as asbestos (ibid.). Intelligence suggests that some criminal groups trafficking electronic-waste (e-waste) are also involved in crimes such as theft, human trafficking, fraud, drugs supply, firearms supply and money laundering. There is also a link between organised crime and illegal export of e-waste to countries in Africa and Asia. The e-waste can be stripped down and valuable parts taken such as gold, copper, steel and other metals that can be reclaimed from the electrical waste. Not all environmental crime is organised and there are limited data available, particularly concerning the proportion of activity that is organised, so estimating the scale and social and economic costs of organised environmental crime has not been possible. Instead, available data are set out to give an indication of possible scale, and social and economic costs.

Scale

The Environment Agency reports that there were 661 active illegal waste sites in April 2011, 540 of which were active sites within 200 metres of a sensitive receptor. In 2010 the Environment Agency prevented 4,500 tonnes of waste from being illegally exported and carried out 280 successful prosecutions, resulting in fines at a total value of £943,000 for illegal waste activity.

The Environmental Investigation Agency estimates that up to 50% of all computers discarded in the UK enter illegal trade streams as e-waste (Environmental Investigation Agency, 2011). When new European Union rules came into force in the UK in 2007, many companies entered the market as recyclers, expecting up to 1.5 million tonnes of electrical and electronic waste needing to be recycled every year (ibid.). By 2009 the volume of e-waste recorded was only one-third of what was projected, with the bulk of the remainder siphoned off onto the black market.⁶⁵

Costs

The social and economic costs of organised environmental crime are likely to include the costs of enforcement to prevent the illegal export and dumping of waste, the costs of removing illegally dumped waste, and the human cost due to the damage to health from hazardous waste. E-waste can be highly hazardous to both the environment and human health due to the substances it contains. For example, older computers and televisions can contain large amounts of lead. It has also been suggested that young children abroad have been involved in the stripping of materials from exported waste (ibid.) As well as the physical and environmental costs, there will be the costs of enforcement, including the regulation of waste sites and shipments, and any prosecutions resulting from organised illegal activity.

[...]

Organized wildlife crime

Scope

⁶⁸ Hannah Mills, Sara Skodbo and Peter Blyth, *Understanding Organized Crime: Estimating the Scale and the Social and Economic Costs Research Report*, Home Office 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246390/horr73.pdf Accessed December 2, 2013.

Wildlife crime in the UK involves the illegal trade in endangered species and damage to protected UK species and habitats. It can threaten critically endangered plants and animals. In 2010 the National Wildlife Crime Unit (NWCUC) had six priority areas:

- badger persecution;
- bat persecution;
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) issues (specifically trade in caviar, ivory, ramin (a tropical hardwood), tortoises and traditional medicines);
- freshwater pearl mussels;
- poaching (including deer and fish poaching and hare coursing); and
- raptor persecution (especially golden eagle, white-tailed eagle, red kite, hen harrier and goshawk) (NWCUC, 2010).

The often high level of profit available from wildlife crime has become attractive to some organised crime groups, who often operate on a global scale (ibid.).

It has not been possible to estimate the scale or social and economic costs of organised wildlife crime. Instead, data that give some indication of the potential scale are included.

Scale

The NWCUC has identified several UK based organised crime groups involved in wildlife crime. (NWCUC, 2010) In 2010 the NWCUC assisted with two successful cross-border operations coordinated by Interpol. Operation TRAM targeted the illegal trade in traditional medicines containing wildlife products, involved 18 countries across five continents and resulted in seizures of more than £8 million worth of illegal medicines worldwide. Operation RAMP involved participants from 51 countries across five continents in an effort to fight illegal trade in reptiles and amphibians and led to more than £20 million worth of animals and product being seized.

Costs

The social and economic costs of organised wildlife crime are likely to include the costs of enforcement in preventing the illegal trade in endangered species, the costs of protecting the endangered species from poachers and thieves, reductions in tourism, and the costs of any prosecutions resulting from organised illegal activity”⁶⁹.

8 General criminal law influencing the effectiveness of environmental criminal law: sanctions in practice

Regulatory bodies usually impose administrative sanctions (see section 13). Nevertheless, sanctions can be imposed also through the criminal process such as fines, imprisonment or community sentences following a successful prosecution for an environmental offence (see also section 4). Additionally, it has to be noted that the consequences of the damage to the environment can also result from international liability Conventions (oil pollution and nuclear activities) and at the European level from the Environmental liability Directive.

8.1 Fines

Fines are roughly proportionate to the environmental offences committed. The amount is established according to a number of factors, such as, the environmental and financial impact of the violation, the clean up costs, the amount of money that the violator would have spent if acting legally.

It has been highlighted that “[i]n recent years, there has been a growing sense of dissatisfaction with the sanctions imposed upon those who commit environmental crime. Various critics, including the Environment Agency itself,

⁶⁹ Ibid.

have questioned the extent to which the sanctions imposed are sufficient to act as a punishment and deterrent. In response to these concerns, DEFRA commissioned research to establish an accurate picture of sentencing for environmental crime in England and Wales in the years 1999-2002. The overall conclusions were that the vast majority of environmental offences that are taken to court are dealt with at a low level [almost 90% or prosecutions are dealt with by the Magistrate's Courts] and are punished with relatively small fines [the average fines is from £1,979 to £2,730 which is far lower than the minimum fines generally applied by these Courts: £5,000], which do not appear to be effective sanction when compared with the profits that can be generated from activities that cause environmental damage⁷⁰. This is caused by the lack of judicial experience in environmental matters but also difficulties in applying strict liability. However, "[t]hese low levels of fines have a knock-on effect, in the sense that they tend to reinforce the view that environmental offences are morally neutral in the eyes of the judiciary"⁷¹. "In the 1990s, the maximum level of fines in the magistrates' court was raised to take into account the need for the lower court to have wider powers to reflect the seriousness of the offences that do not merit being heard in the Crown Court. EPA 1990 increased the level of fines for a number of pollution control offences, from £2,000 to £20,000, although it was not until much later that the maximum fine for damage to SSSIs (Site of Special Scientific Interest) was raised from a derisory £2,500 to £20,000 (Wildlife and Countryside Act 1981, s. 28P(1) as amended by the Countryside and Rights of Way Act 2000, Sch.9). Under the Environmental Permitting regime (Environmental Permitting (England and Wales) Regulations 2010, reg. 39), the maximum fine for breach is £50,000"⁷².

Although many environmental offences are triable either in the magistrates' Courts or the Crown Court, the option to try a matter in the latter "with the opportunity to seek an unlimited fine and even imprisonment in the case of individual offenders-has not often been taken. It is, however, becoming slightly more common for matters to be committed to the Crown Court for sentencing"⁷³.

8.2 Community sentences

Community sentences are alternative measures to custody and can be issued for minor criminal offences, where the damage caused is not so serious and the breach is isolated. They combine punishment (usually a fine) with activities carried out in the community.

8.3 Custodial sentences

Custodial sentences apply only to the most serious offences and are imposed when the offence committed is "so serious that neither a fine alone nor a community sentence can be justified for the offence"⁷⁴. A custodial sentence may also be imposed where the court believes it is necessary to protect the public.

Custodial sentences are most likely to be appropriate where there is a high incidence of the two main factors of the criminal offence:

- culpability is high where the breach (or breaches) concerned were deliberate, repeated, large scale, highly organized, financially motivated and highly profitable. Failure to comply with advice, cautions or warning from regulatory bodies is also taken into consideration.
- harm is high where serious injury results from the conduct of the offender. Courts also consider with care the existence of a causal link between the failure to comply with the requirements and the harm caused.

The length of the sentence depends on the seriousness of the offence and on the maximum penalty for the crime allowed by law. However, there are two main categories of prison sentences available to Courts:

- prison sentences that entail a specified and fixed length of imprisonment (in this case, if it is an up to 12 months sentence, half of it is spent in prison while the second half is spent in the community 'on licence'; if the

⁷⁰ Bell et al., "Environmental Law", 301.

⁷¹ Ibid, 302.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Section 152(2) Criminal Justice Act of 2003.

sentence is of more than 12 months, the release usually follows after the offender has served half of the term in prison;

- indeterminate prison sentences where the date of release is decided by the Parole Board after a minimum term of imprisonment (called ‘tariff’)⁷⁵.

Custodial sentences for environmental crimes have been analyzed in *R v O’Brien and Enkel* (2000) Env LR 156. On that occasion the Court of Appeal clarified the factors that must be taken into consideration when applying custodial sentences: repeated or blatant offence; offences committed in a public place or in circumstances under which the public had been exposed to hazardous substances.

It has been reported that “in terms of pollution control offences, the vast majority of sentences of imprisonment are passed in relation to waste management offences, whereas in other areas, such as water pollution and integrated pollution prevention and control (IPPC), the prevalent punishment is financial. The reason for this is closely connected to the identity of the polluter, with typical prosecutions for water and IPPC offences involving major companies, with consequent restrictions on the nature of the sentence that can be passed and a significant proportion of serious waste management offences being committed by single ‘cowboy’ operators. In addition to the wider use of custodial sentences, the use of alternative measures should be noted as well”⁷⁶.

8.4 Probation

When an offender is serving a community sentence or has been released from prison on licence or on parole, he or she can be put on probation, which is a period of supervision ordered by a Court instead of serving time in prison. While on probation, the offender may have to: do unpaid work; complete an education or training course; get treatment for addictions, like drugs or alcohol; have regular meetings with an ‘offender manager’⁷⁷.

8.5 Sentencing guidelines

In order to combat the lack of familiarities among magistrates with sentencing of environmental offences, the Sentencing Council, which is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence recently, has produced a sentencing guidance for promoting a consistent approach to the sentencing in courts across England and Wales. The guideline has been introduced as, currently, there is limited guidance in the Magistrates’ Court Sentencing Guidelines or in Court of Appeal authority. The guidelines aim to ensure that the level of fines given to offenders is proportionate to the seriousness of the offences they have committed so they are punished, deterred from committing more crime and if they have obtained an economic benefit by committing the offence, receive an appropriate financial penalty (see also section 4).

In March 2013 a set of draft guidelines for environmental cases has been prepared⁷⁸. The draft guideline covers sentencing for the unauthorized deposit of waste (fly-tipping)⁷⁹ under Section 33 of the Environmental Protection Act 1990, and illegal discharges to air, land and water under Regulations 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2010. It also applies to offences committed under section 1 Control of Pollution Amendment Act 1989 (transportation of controlled waste without registering); section 34

⁷⁵ Accessed February 20, 2014. <https://www.gov.uk/types-of-prison-sentence>

⁷⁶ Bell et al., “Environmental Law”, 303.

⁷⁷ <https://www.gov.uk/guide-to-probation/overview>. Accessed February 19, 2014.

⁷⁸ Accessed November 8, 2013. http://sentencingcouncil.judiciary.gov.uk/docs/Environmental_Consultation_web_final.pdf See also the Justice Select Committee report. Accessed November 8, <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/604/604.pdf>

⁷⁹ See the fly-tipping statistics for England, DEFRA (2012-2013). Accessed November 27, 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251325/FINAL_Statistics_Notice_Fly-tipping_England_2012-13FOR_PUBLICATION-v2.pdf. See also Fly-tipping incidents and action taken in England. Accessed November 13, 2013. <https://www.gov.uk/government/statistical-data-sets/env24-fly-tipping-incidents-and-actions-taken-in-england>

Environmental Protection Act 1990 (breach of duty of care); and section 80 Environmental Protection Act 1990 (breach of an abatement notice).

The guidelines report that “[t]he sentencing data for 2011 indicate that for these offences, 67 per cent of all offenders received a fine; 18 per cent received a conditional discharge; seven per cent of offenders received a community order; three per cent received a suspended sentence order; just over two per cent received immediate custody and under one per cent of offenders were sentenced to an absolute discharge. Research with sentencers showed that respondents felt that, for individual offenders, a fine was the most suitable disposal type for offences. It is the Council’s view that since these offences are mainly committed for economic gain that, where the custodial threshold is not passed, a fine will normally be the most appropriate disposal. This is the case even where the community order threshold has been passed. A fine is the only disposal available to the sentencer where the offender is a company or a body delivering public or charitable services”⁸⁰.

8.6 Statute of limitation

The statute of limitation consists in time limit after which court actions cannot be taken. The laws which enact these time limits are known as ‘statutes of limitations’. As far as criminal matters are concerned, Section 127 of the 1980 Magistrates Court Act provides that: “a magistrates’ court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose”.

9 Responsibility of corporations and collective entities for environmental crimes

9.1 Premise

In 2004 the Sub-committee on Environmental Crime held an inquiry into Corporate Environmental Crime. It defined ‘corporate environmental crime’ as any environmental crime that has been committed by any corporate body. [...] This can include offences as wide-ranging as, for example, fly-tipping (the illegal dumping of waste), fly-posting (plastering public spaces with advertising posters which blight the area), and pollution incidents, whether that be as a result of chemicals, farm slurry or general sewage waste, being discharged into the watercourse⁸¹. Bell, McGillivray and Pedersen highlight though that “[t]he most significant acts of environmental harm through breaches of pollution control legislation tend to be caused by companies, simply because of the scale of the industrial operations. There are, however, important exceptions to this general rule in areas, such as wildlife crime, pollution from agricultural sources, and fly-tipping waste. Indeed, figures suggest that individuals are responsible for the majority of environmental crimes as a whole. These figures are, however, slightly misleading, because they exclude local authority prosecutions, but include a significant proportion of individual wildlife offences (for example, egg collecting and animal cruelty) and from some sectors in which individual offenders are far more prevalent (for example, agriculture)”⁸². Many issues derive from the distinction between individual and corporate offenders. As reported “the number of prosecutions of corporate offenders does not correlate with corporate non-compliance with environmental law. In other words, although there may be fewer corporate defendants, the offences for which they are being prosecuted will tend to be at the serious end of the spectrum of environmental harm and there will be many more companies who are in breach, but not

⁸⁰ Accessed November 8, 2013.
http://sentencingcouncil.judiciary.gov.uk/docs/Environmental_Consultation_web_final.pdf.

⁸¹ *House of Commons Environmental Audit Committee – Corporate Environmental Crime, Second Report of Session 2004-05*. Accessed November 5, 2013.
<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmenvaud/136/136.pdf>

⁸² Bell et al., “Environmental Law”, 282.

prosecuted”⁸³. Furthermore, because of the structure of many large companies it is difficult to identify the root cause of many pollution incidents and, finally, “the prosecution of corporate offenders can be justified by the existence of the deterrence factor of the bad publicity associated with the prosecution for environmental crimes, and the development of a ‘name and shame’ policy for such offenders. This justification does not exist to the same extent for individual offender”⁸⁴. Regarding the reasons surrounding the commission of corporate environmental crimes, the Sub-committee on Environmental Crime affirms that “[t]he crime may occur because the business concerned is ignorant of its environmental obligations. It may also occur all too often as a result of negligent behaviour, for example, where businesses are poorly managed, staff are inadequately trained or equipment and infrastructure has not been maintained to the required standard, allowing a pollution incident to occur. But perhaps the most depressing cause is when corporate environmental crime is the result of a deliberate and intentional illegal act, a decision taken in the full knowledge that the act is illegal and will result in environmental harm”⁸⁵. As to the nature of the corporate liability, “some offences apply directly to companies – for example, where offences relate to the breach of licence conditions and the licence is held in the name of the company. In other situations, however, it is the acts or omissions of individual employees that will incur criminal liability”. In *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, it has been established that corporate liability would only be envisaged where the employees responsible were of sufficient seniority to act. On the other hand, the actions of more “operational” staff would entail criminal liability of the company only “if it is clear that the relevant statutory purposes would be defeated if a company could not be prosecuted for the acts of its employees” (see the cases on illegal waste management *National Rivers Authority v. Alfred McAlpine Homes East Ltd* [1994] Env LR 198 and *Shanks and McEwan (Teesside) Ltd v. Environment Agency* [1997] Env LR 305).

As to the responsibility of Directors “generally, in the UK, when companies commit environmental offences, prosecutions are brought against that company rather than against any individual who might have responsibility within that company. This is in contrast to the practice of many civil law countries, where the doctrine of corporate liability is not particularly well developed and where it is far more common for individual managers of companies to be prosecuted. The ‘British’ approach is not, however, restricted by law. Under many environmental statutes, directors and managers can be prosecuted individually in certain circumstances. Any director, manager, secretary, or other similar officer of corporate body can be prosecuted personally if the offence is committed with their consent or connivance, or is attributable to their neglect (EPA 1990, sec. 157; Water resources Act 1991, sec. 217; Environment Permitting (England and Wales) Regulations 2010, reg. 41 and the Town and Country Planning Act 1990, sec. 331). To establish personal liability for directors, there must be both: a) an offence committed by the company; and b) consent, connivance, or neglect by the individual. The liability applies primarily, but not exclusively, to ‘directors’, although the name is not critical. Section 251 of the Companies Act 2006 defines the term that covers ‘shadow directors’ and de facto directors - that is, those who do not take the title ‘director’, but who effectively run the business. As for other categories, the case law suggests that what matters is whether the individual has sufficient responsibilities to amount to the ‘controlling mind’ of the organization (*Woodhouse v Walsall Metropolitan Borough Council* [1994] Env LR 30)”⁸⁶.

As to the application of the due diligence defence, the question arises as to whether it applies to actions taken by the company or by the employee. The case law suggests that even if the company provided rigorous training and supervision in order to prevent pollution, it will be held responsible for the failures of its employee to follow the instructions received. “Thus it would be harder to prove that a large undertaking has exercised sufficient due diligence to amount to a defence, because higher standards will be expected. Greater resources are expected to be available to maintain standards in a large company. The ‘due diligence’ must relate to conduct aimed at preventing the offence, not to putting matters right afterwards. The burden of proving due diligence is on the defendant”⁸⁷.

However, early in 2004, the Sub-committee on environmental crime, on corporate offences concluded that “[e]ven putting aside the often extreme difficulty of finding and successfully prosecuting the individual behind the decision that led to an environmental crime, **the current sentencing system is just not flexible and imaginative enough adequately to punish corporate bodies or those in senior managerial positions within**

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ *House of Commons Environmental Audit Committee – Corporate Environmental Crime, Second Report of Session 2004-05*, 9.

⁸⁶ Bell et al., “Environmental Law”, 284-285.

⁸⁷ Ibid., 281.

them. It is disgraceful that some companies openly boast about their crimes as though they manifested some sort of commercial talent or marketing genius. The Government must adopt a much tougher stance with businesses—regardless of their size and nationality—which flagrantly flout the law⁸⁸.

The relevant procedural rules on corporate environmental crime are included in Acts dedicated to the following sectors: air quality, environmental permitting and water management. These Acts address the responsibility of corporations and collective entities.

9.2 Clean Air Act 1993

SECTION 52. Offences committed by bodies corporate

Qualification of the offence: indictable conviction.

Protected legal interest and specific concept of environment: none.

Mens rea: Strict liability.

Criminal conduct and Author: “(1)Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and be liable to be proceeded against and punished accordingly.

(2)Where the affairs of a body corporate are managed by its members this section shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate”.

Prosecution: ex officio or on the ground of individual request.

9.3 Environmental Permitting (England and Wales) Regulations 2010

SECTION 41. Offences by bodies corporate

Qualification of the offence: indictable conviction.

Protected legal interest and specific concept of environment: none.

Mens Rea: Strict liability.

Criminal conduct and Author: “(1) If an offence committed under these Regulations by a body corporate is proved: (a)to have been committed with the consent or connivance of an officer; or (b)to be attributable to any neglect on the part of an officer, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) If the affairs of a body corporate are managed by its members, paragraph (1) applies in relation to the acts and defaults of a member in connection with the member’s functions of management as if the member were a director of the body.

(3) In this regulation, “officer”, in relation to a body corporate, means a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity.

Prosecution: ex officio or on the ground of individual request.

⁸⁸ Emphasis in the original. *House of Commons Environmental Audit Committee - Environmental Crimes and the Courts, Sixth Report of Session 2003–04*, 16.

9.4 Water Resources Act 1991

SECTION 217. Criminal liabilities of directors and other third parties

Qualification of the offence: indictable conviction.

Protected legal interest and specific concept of environment: none.

Mens rea: Strict liability.

Criminal conduct and Author: “(1)Where a body corporate is guilty of an offence under this Act and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, then he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(2)Where the affairs of a body corporate are managed by its members, subsection (1) above shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(3)Without prejudice to subsections (1) and (2) above, where the commission by any person of an offence under the water pollution provisions of this Act is due to the act or default of some other person, that other person may be charged with and convicted of the offence whether or not proceedings for the offence are taken against the first-mentioned person.

Prosecution: ex officio or on the ground of individual request.

9.5 Water Industries Act 1991

SECTION 22A: Penalties

“(1) Where the Authority is satisfied—

(a) in the case of any company holding an appointment under Chapter 1 of this Part, that the company—(I) has contravened or is contravening any condition of the appointment; (ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding a licence under Chapter 1A of this Part of any condition of the licence; or (iii) has failed or is failing to achieve any standard of performance prescribed under section 38(2) or 95(2) below; or

(b) in the case of any company holding a licence under Chapter 1A of this Part, that the company— (I) has contravened or is contravening any condition of the licence; or (ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding an appointment under Chapter 1 of this Part of any condition of the appointment, the Authority may, subject to section 22C below, impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

(2) Where the Authority, the Secretary of State or the Assembly is satisfied

(a) in the case of any company holding an appointment under Chapter 1 of this Part, that the company (I) has contravened or is contravening any statutory or other requirement which is enforceable under section 18 above and in relation to which he or it is the enforcement authority; or (ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding a licence under Chapter 1A of this Part of any such requirement; or

(b) in the case of any company holding a licence under Chapter 1A of this Part, that the company (I) has contravened or is contravening any statutory or other requirement which is enforceable under section 18 above and in relation to which he or it is the enforcement authority; or (ii) has caused or contributed to, or is causing or contributing to, a contravention by a company holding an appointment under Chapter 1 of this Part of any such requirement, he or it may, subject to section 22C below, impose on the company a penalty of such amount as is reasonable in all the circumstances of the case.

(3) In a case in which (a) subsection (1) above applies by virtue of paragraph (a)(ii) or (b)(ii) of that subsection, or (b) subsection (2) above applies by virtue of paragraph (a)(ii) or (b)(ii) of that subsection, references in the following provisions of this section and sections 22B and 22C below to a contravention include references to causing or contributing to a contravention.

(4) Before imposing a penalty on a company under subsection (1) or (2) above the Authority, the Secretary of State or the Assembly (the “enforcement authority”) shall give notice

(a) stating that it proposes to impose a penalty and the amount of the penalty proposed to be imposed;

(b) setting out the condition, requirement or standard of performance in question;

(c) specifying the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of a penalty and the amount of the penalty proposed; and

(d) specifying the period (not being less than twenty-one days from the date of publication of the notice) within which representations or objections with respect to the proposed penalty may be made, and shall consider any representations or objections which are duly made and not withdrawn.

(5) Before varying any proposal stated in a notice under subsection (4)(a) above the enforcement authority shall give notice

(a) setting out the proposed variation and the reasons for it; and

(b) specifying the period (not being less than twenty-one days from the date of publication of the notice) within which representations or objections with respect to the proposed variation may be made, and shall consider any representations or objections which are duly made and not withdrawn.

(6) As soon as practicable after imposing a penalty, the enforcement authority shall give notice

(a) stating that he or it has imposed a penalty on the company and its amount;

(b) setting out the condition, requirement or standard of performance in question;

(c) specifying the acts or omissions which, in the opinion of the enforcement authority, constitute the contravention or failure in question and the other facts which, in the opinion of the enforcement authority, justify the imposition of the penalty and its amount; and

(d) specifying a date, no earlier than the end of the period of forty-two days from the date of service of the notice on the company, by which the penalty is required to be paid.

(7) The company may, within twenty-one days of the date of service on it of a notice under subsection (6) above, make an application to the enforcement authority for him or it to specify different dates by which different portions of the penalty are to be paid.

(8) Any notice required to be given under this section shall be given

(a) by publishing the notice in such manner as the enforcement authority considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them;

(b) by serving a copy of the notice on the company;

(c) by serving a copy of the notice on the Council; and

(d) where the notice is given by the Secretary of State or the Assembly, by serving a copy of the notice on the Authority.

(9) Any sums received by the enforcement authority by way of penalty under this section shall be paid into the Consolidated Fund.

(10) The power of the enforcement authority to impose a penalty under this section is not exercisable in respect of any contravention or failure before the commencement of this section.

(11) No penalty imposed by an enforcement authority under this section may exceed 10% of the turnover of the company (determined in accordance with provisions specified in an order made, after consulting the Assembly, by the Secretary of State).

(12) The power of the Secretary of State to make an order under subsection (11) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(13) An enforcement authority shall not impose a penalty under this section where it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998”.

10 General procedural provisions

In general, in England and Wales the most important prosecution authority (next to the other regulatory agencies, such as the Environment Agency) is the Crown Prosecution Service⁸⁹ (Criminal Justice Act 2003). The CPS is responsible for public prosecutions of people charged with criminal offences (it also decides when a conditional caution may be appropriate)⁹⁰.

A case will only be prosecuted, first, if there is sufficient evidence to provide a realistic prospect of conviction against each defendant on each charge, and second, if it is in the public interest to prosecute. As to the sufficient evidence, it is wrong to be prosecuted if the evidence is insufficient. The essence of the wrongness lies in the protection of the innocent: if this principle is taken seriously, it should mean not merely that innocent people are not convicted, but also that should not be prosecuted. As to the public interest requirement, The Code for Crown Prosecutors (para 4.12) states that “a prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal. The more serious the offence or the offender’s record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest”.

Once the above conditions have been satisfied, the decision to prosecute (or not to do so, as the case may be) is essentially within the discretion of the CPS or the other regulatory authority.

As it has been highlighted “many of the decisions to be taken by criminal justice agencies are characterized by discretion rather than by binding rules”⁹¹. Discretion derives first of all from a lawful enforcement power of established rules. Furthermore, it has been noted that “[t]hose enforcing rules may seek to attain the broad aim of a legal mandate in general terms, but the specific question of whether and how a particular rule applies in a particular circumstances will inevitably be reserved for, or assumed within, the discretion of the legal actor concerned. [...] [W]hether there are rules or areas of discretion, occupational cultures and working practices may exert an influence on how people with power in the criminal process actually operate. One way of trying to combat this is through codes of ethics, but their prospects of success are variable. One institutional approach to ensuring that the various authorities fulfil their functions and exercise their powers as they ought to is through systems of accountability”⁹².

As to the general accountability of the public authorities involved in the criminal procedural system, “[m]ethods of accountability should include proper scrutiny of general policies, rules, and/or guidelines for decision making, active supervision of practice, avenues for challenging decisions and openness rather than secrecy at key stages”⁹³. “Accountability is an important feature of a criminal justice system. It encourages transparency, it may enhance the protection of the rights of individuals, and it helps to ensure that the power entrusted to law enforcement authorities is not abused. However, it is wrong to rely on post hoc accountability methods to secure these desirable goals”⁹⁴.

With particular reference to the accountability of Agencies (such as the Environment Agency) the tendency has been for Parliament to avoid deciding issues of public policy and to leave them to each agency itself. They are in fact “relatively free to determine their own policies: although some of their procedures are authorized by statute, there is no overall body that reviews the policies and practices of these agencies, despite their tremendous significance for the reach of the criminal process”⁹⁵.

⁸⁹ Accessed November 5, 2013. <http://www.cps.gov.uk/>

⁹⁰ See conditional cautioning on the cps website. Accessed November 5, 2013. <http://www.cps.gov.uk/publications/others/conditionalcautioning04.html>

⁹¹ Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), 79.

⁹² Keith Hawkins, *Law as a Last Resort, Prosecution Decision-Making in a Regulatory Agency* (Oxford: Oxford University Press, 2003), 424-425.

⁹³ Ibid.

⁹⁴ Ashworth and Redmayne, *The Criminal Process*, 79-80.

⁹⁵ Ibid, 80.

11 Procedural provisions on environmental crimes

In UK there are no specific criminal courts that prosecute environmental crimes. Therefore, general criminal procedure rules apply to breaches of environmental legislation that constitute criminal offences.

UK criminal legislation includes guilty plea among the factors that can mitigate the entity of the final punishment.

Section 144 of the Criminal Justice Act of 2003 provides that when determining a sentence regarding an offender who has pleaded guilty to an offence in proceedings before the same or another Court, it must taken into account:

- (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
- (b) the circumstances in which this indication was given.

The level of reduction reflects the stage at which the offender indicated a willingness to admit guilt to the offence for which he is eventually sentenced:

- (i) the largest recommended reduction will not normally be given unless the offender indicate willingness to admit guilt at the first reasonable opportunity; when this occurs will vary from case to case (see Annex 1 for illustrative examples);
- (ii) where the admission of guilt comes later than the first reasonable opportunity, the reduction for guilty plea will normally be less than one third;
- (iii) where the plea of guilty comes very late, it is still appropriate to give some reduction;
- (iv) if after pleading guilty there is a Newton hearing and the offender's version of the circumstances of the offence is rejected, this should be taken into account in determining the level of reduction;
- (v) if the not guilty plea was entered and maintained for tactical reasons (such as to retain privileges whilst on remand), a late guilty plea should attract very little, if any, discount.

12 Procedural provisions – actors and institutions mentioned in legal texts

This section deals with issues concerning the actors and institutions responsible for investigation (A) and prosecution (B) of environmental crimes. It covers the area of England, Wales, Northern Ireland and Scotland.

12.1 Investigation bodies

The most significant investigating body for England and Wales (E and W) is the Environment Agency (EA)⁹⁶ and for Scotland is the Environment Protection Agency (SEPA)⁹⁷. As to the main differences between these two Agencies, the EA is responsible for flood warning and defence, whereas SEPA is responsible only for flood warning (the local authorities are responsible for flood defence). SEPA is responsible for local air pollution control, whereas this is a local authority function in England and Wales. The EA can bring its own prosecutions and claim legal expenses in successful cases, whereas SEPA must submit cases through the Procurator Fiscal and cannot claim expenses.

The Environment Agency is an independent corporate body (Environment Act 1995, s. 1(1)) whose main aim is to minimize harm to the environment. It has a range of enforcement and other powers available. It is responsible, inter alia, for waste management, water pollution, the integrated pollution prevention and control regime and

⁹⁶ Accessed October 30, 2013. <http://www.environment-agency.gov.uk/>

⁹⁷ Accessed October 30, 2013 <http://www.sepa.org.uk/default.aspx>.

radioactive substances⁹⁸. EA has statutory responsibilities and powers to investigate environmental crime in conjunction with relevant legislation: Police and criminal evidence Act 1984 (PACE), Salmon and Freshwater Fisheries Act 1975 (SAFFA), Human Rights Act, Data Protection Act, Criminal Procedures and Investigation Act (CPIA), Regulation of Investigatory Powers Act 2000. Major Investigation forms part of the Environment Agency's strategy. The EA investigates the illegal activities of criminals and their associates who are involved in environmental crime particularly in respect of illegal waste and fisheries offences. To support this process the EA has an enforcement and investigation structure that includes investigators and support staff within a national crime team that have the capability for deployment on a national and international basis. Also, they have within the EA regions, local Environmental Crime Team (ECT) staff that investigate and deploy on a more local/regional basis. By way of example, Operation Broadway, which has been running for seven months, is one of the National Environmental Crime Team's major ongoing investigations dealing with the illegally-hoarded used tyres that pose a serious fire risk and as a blaze would produce toxic fumes and air pollution. In February 2-13 Environment Agency investigators, supported by Lancashire Police and Greater Manchester Police forces, raided three sites across the North of England to seize evidence as part of this operation⁹⁹. Furthermore, as to preventing illegal e-waste export, the National Intelligence Team and a National Environmental Crime Team are tasked with preventing the illegal export of e-waste. They use an intelligence-led approach to target the most prolific, serious and organised illegal waste exporters. This has led to a 98 per cent success rate of finding electrical waste when stopping targeted shipping containers. They share intelligence with the police, Her Majesty's Revenue and Customs (HMRC), the Borders Agency, local authorities and key waste sector representatives. They also share intelligence with 42 countries worldwide through the INTERPOL Global E-waste Crime Group and work with other European and US competent authorities and regulators¹⁰⁰.

The Environment Agency has a wide range of investigating powers. Section 108 of the Environment Act 1995 provides that an officer appointed by the Agency can, when there is no emergency: enter premises (provided they are not residential) at any reasonable time; be accompanied into premises by a police constable, should the officer apprehend that they will be obstructed in their duty; make any investigation as necessary, including measurements, taking samples and photographs, and questioning individuals (answer give to such questions will not be admissible in any prosecution brought against that person, although they can be-and, in practice, are-used against another person, such as an employer; carry out experimental borings, and install and maintain monitoring equipment (with at least seven day's notice). "In situations in which occupants are likely to refuse entry, the officer can seek a warrant prior to entry into premises. Documents that are subject to legal professional privilege are exempt from these requirements. In cases of emergency, entry can be gained at any time-with force, if necessary. In such circumstances, no prior notification is required when setting up monitoring equipment or carrying out experimental borings. [...] It is an offence to obstruct intentionally an authorized officer in the exercise of his or her duties"¹⁰¹. "In addition, there are specific powers to requisition information in writing in relation to individual functions (for example, EPA 1990, s. 71). The answers to such requisitions are not subject to the rule against self-incrimination-referred to in c. 108- because the section impliedly excludes this protection on the basis that the purpose of the legislation would be defeated if a person could refuse to answer written requisitions. In exercising these powers, the Agency cannot go on a 'fishing expedition'-that is, it must have some evidence that justifies its seeking written answers"¹⁰². The Authors also add that "although these powers are extensive, the Agency does not have a total freedom to investigate breaches of environmental law. Unlike the police, EA officers have no general right of arrest or to require the names and addresses of suspects, although there is a limited right to stop, search, and seize vehicles (for example, in relation to suspected transportation of controlled waste without registration – Control of Pollution (Amendment) Act 1989, ss. 5 and 5A, as amended by the Clean Neighborhoods and Environment Act 2005, s. 37). Although the power to secure written answers is wide, there is no requirement for suspects to take part in interviews. In non-emergency cases, the Agency is also unable to gain entry to residential premises or take heavy equipment on to any premises without seven day's notice either the

⁹⁸ House of Commons Environmental Audit Committee- Environmental Crimes and the Courts, Sixth Report of Session 2003-04, at 8. Accessed October 23, 2013. <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf>.

⁹⁹ Accessed October 30, 2013 <http://www.environment-agency.gov.uk/news/145563.aspx?page=6&month=2&year=2013>

¹⁰⁰ Accessed October 30, 2013 <http://www.environment-agency.gov.uk/business/sectors/129696.aspx>

¹⁰¹ Stuart Bell et al., *Environmental Law* (Oxford: Oxford University Press, 2013), 288-289 and section 109 of Environment Act 1995.

¹⁰² Bell et al., "*Environmental Law*", 289.

consent of the occupier or a warrant”¹⁰³. Furthermore, Section 109 of the Environment Act 1995 states that should officers, while entering the premises, find substances that could constitute the cause of an imminent danger of serious pollution of the environment, they may seize them and cause them to be rendered harmless (whether by destruction or otherwise). They have also to prepare and sign a written report giving particulars of the circumstances in which the substance was seized.

As to the funding received by the Agency, it comes from different sources: “a good proportion-about two-thirds-is grant-in-aid, is received directly from the Department of Environment, Food and Rural Affairs (DEFRA). This emphasizes the difficult nature of the Agency’s relationship with its primary funder: while it is not part of central government, it does rely upon DEFRA to fund key sources, such as staffing, and research and development, and the Agency will experience quite significant cuts in funding as part of the current Government’s spending review. A second income stream funding operational flood defence schemes comes from levies raised on local authorities. The final significant proportion of funding-just less than a third- is recovered through operating receipts-that is, money generated from charging schemes and licence fees related to pollution control system”¹⁰⁴.

The Environment Protection Agency (SEPA) is a non-departmental public body, accountable through Scottish Ministers to the Scottish Parliament. SEPA was established in 1996 by the Environment Act 1995 and is responsible for the protection of the natural environment in Scotland. Investigation forms part of the SEPA’s responsibilities. By way of example, SEPA tackles illegal waste management activities, which can cause significant environmental harm and loss of business for responsible operators. SEPA, in partnership with police forces and other agencies undertakes targeted operations to tackle illegal landfill sites, unlicensed skip hire operators, large scale and persistent dumping of waste, unlawful collection, storage and breaking of scrap cars and unauthorized collection, storage and export of waste electrical and electronic equipment¹⁰⁵.

Among the other bodies involved in investigations there are the police, responsible for investigating wildlife crime and certain cases of criminal damage. As to the former, it has been highlighted that effective wildlife crime policing requires a degree of specialization¹⁰⁶. This is due to the fact that wildlife legislation is a labyrinth of fairly old and very complex legislation that the average police officer would be unrealistic to be expected to have knowledge of¹⁰⁷. Most police forces deploy specialized wildlife crime officers¹⁰⁸. The public has an obvious concern about wildlife crime, which may lead to greater prioritization of wildlife crime. However, there is still a risk for funding for wildlife crime, posed by future tough decisions on local police resources¹⁰⁹. Against this background, in 2006 the National Wildlife Crime Unit (NWCU) has been established¹¹⁰. The NWCU is a strategic national police unit that gathers intelligence on wildlife crime and provides analytical and investigative support. It is currently funded by DEFRA, the Home Office, ACPO, ACPO Scotland, the Scottish government and the Northern Ireland Environmental Agency. The NWCU coordinates enforcement activity in relation to cross-border and organized crime, both at the national and international levels, to collate intelligence and to produce analytical assessments¹¹¹. It is assisted in relation to the illegal international trade in endangered species by HM Customs and Excise, and by NGOs such as the Royal Society for the Prevention of Cruelty of Birds (RSPCA) and WWF. Domestic groups, such as RSCPA, Royal Society for the Prevention of Cruelty to Animals (RSPCA), the Bat Conservation Trust, and others, assist in the detection of domestic wildlife crimes¹¹².

¹⁰³ Ibid, 289.

¹⁰⁴ Ibid, 127.

¹⁰⁵ Accessed October 30, 2013 <http://www.sepa.org.uk/waste.aspx>

¹⁰⁶ *House of Commons Environmental Audit Committee Wildlife Crime Third Report of Session 2012–13, Volume I*, at 29, Last accessed October 23, 2013. <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf>.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Accessed November 13, 2013. <http://www.nwcu.police.uk/>

¹¹¹ *House of Commons Environmental Audit Committee Wildlife Crime Third Report of Session 2012–13*, at 30.

¹¹² Bell et al., “Environmental Law”, 287.

As it has been reported “most police investigations of offences are ‘reactive’, that is, reacting to information from the public about possible offences. Only in a minority of cases do the police operate ‘proactively’. Other law enforcement officials may have a larger proactive role. [...] Various inspectorates are required to oversee the observance of legal standards in industry and commerce”¹¹³ such as the Environment Agency. “Although these agencies often react to specific complaints or accidents, much of their work involves visits to premises or building sites to check on compliance with the law. It is therefore proactive work: the number of offences coming to an inspectorate’s attention is largely a reflection of the number of visits and inspections carried on out, and the response depends on the general policies and specific working practices of that inspectorate”¹¹⁴.

“It is not rules but discretionary decisions which characterize the early stages in the criminal process. Police decision-making is largely discretionary, structured only by the cautioning guidelines, local arrangements for dealing with young defendants, police force orders, and internal police supervision. As research into public order policing confirms, there are considerable variations in policy and practice, not just between police force areas but also among police divisions in the same force, and this determines the nature and volume of cases placed before the CPS for consideration for prosecution. The same is largely true of the regulatory and other agencies which have the power to prosecute”¹¹⁵.

Home office¹¹⁶ and Border force¹¹⁷ officers are also involved in the investigation of the environmental crimes, especially wildlife crime¹¹⁸.

12.2 Prosecution bodies

Regarding who is the prosecuting body, in UK there are no specialist environmental criminal courts.

In England and Wales (E and W) and Northern Ireland (N.I.) environmental criminal cases start in the magistrates’ court (presided over by lay magistrates or a District Judge - there is not a jury in a magistrates’ court) if the defendant pleads not guilty to the charges. Serious cases (or when the defendant pleads not guilty to the charges) are instead tried in the Crown Court by a judge and jury. Provided that the majority of environmental crimes are “strict liability” (where the offences do not require proof of *mens rea* or guilty mind, in respect of one or more elements of the offending act, but simply proof that the relevant act has been committed), nearly the totality of environmental cases are dealt with by Magistrates. Appeals from magistrates in E and W and N.I. are heard by a judge in the crown (county N.I.) court. If the appeal is as to the law, then the defendant can require the magistrates to state a case for the High Court. Appeals from the crown or county court are to the Court of Appeal (Criminal) Division. Appeals from the Court of Appeal go to the Supreme Court¹¹⁹. In Scotland minor criminal cases are dealt with by the Justice of the Peace courts, whereas more serious cases are tried in the Sheriff’s court by a Sheriff and jury. The most serious cases are heard in the High Court of Justiciary by a judge and jury.

Appeals from the sheriff are heard by the Court of Session (Inner House). Appeals from there go to the UK Supreme Court.

Criminal prosecutions start by the issue of an information in the magistrates’ court (E and W according to the Criminal procedure Rules) or by complaint to the Sheriff court or justice of the peace court (Scotland).

The UK trial is adversarial: the prosecution attempts to prove its case beyond reasonable doubt and the defence seeks to undermine the prosecution’s case and to create reasonable doubt. It should be noted that the task of the defence is not to prove the innocence of the defendant but to prevent the prosecution from proving guilt. No evidence, from prosecution or defence is legitimate that cannot be confronted in open court and cross-examined

¹¹³ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013), 10.

¹¹⁴ Ibid.

¹¹⁵ Ibid., 13.

¹¹⁶ Accessed November 13, 2013. <https://www.gov.uk/government/organisations/home-office>

¹¹⁷ Accessed November 13, 2013. <https://www.gov.uk/government/organisations/border-force>

¹¹⁸ Accessed November 13, 2013. <https://www.gov.uk/government/news/border-force-clamps-down-on-illegal-trade-in-endangered-species>

¹¹⁹ Ashworth and Horder, “Principles of Criminal Law”, 7.

by the other side. All the information and testimony that counts is that which is orally presented in court. Any written information such as witness statements to police has to be repeated in court and the speaker can be challenged and cross examined. The evidence of the witnesses in major criminal cases is evaluated by a jury. While the judge may comment on the evidence of fact, the jury is the sole arbiter of the facts in the case. In all other trials the magistrate, judge or inspector (reporter) evaluates the evidence given.

It is not compulsory to have a lawyer in any environmental judicial review. Lawyers who specialise in environmental law can be found through Chambers & Partners¹²⁰ or the Legal 500¹²¹. The Environmental Law Foundation (ELF) specialises in environmental law and the UK Environmental Law Association (UKELA) is a body of environmental lawyers. The Planning and Environmental Bar Association (PEBA) is a body of barristers in England and Wales who do environmental and planning cases. As to the participation of experts in criminal cases their role is to provide the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of those criteria to the facts proved in evidence.

Regarding who can initiate criminal prosecution, in UK they are brought by private individuals or by public authorities.

12.2.1 England and Wales

As to private prosecution, see further below.

As far as prosecution brought by public authorities is concerned, in England and Wales the power of prosecution in environmental matters is exercised, for example, by Environment Agency, local authorities, Natural England, the Drinking Water Inspectorate, the Forestry Commission, the Health and Safety Executive, HM Customs and Excise, Health and Safety Executive or the National Wildlife Crime Unit. However, it has been highlighted that “over 90 per cent of all non-local authority prosecutions for environmental crime are brought by Environment Agency”¹²².

The Environment Agency has a published enforcement and prosecution policy¹²³. The EA decides to prosecute in relation to “incidents or breaches with significant environmental consequences; operating without the required licence, consent, or authorization; persistent or excessive breaches of statutory requirements; failure to comply with formal requirements to remedy environmental harm; ‘reckless disregard’ of environmental management or quality standards; obstructing Agency staff in the gathering of information. Other influential factors are whether an incident was foreseeable, the intent of the offender, previous offences, and the deterrent effect of prosecuting”¹²⁴. The Enforcement and sanctions guidance specifies that the sanction of prosecution is available for all criminal offences by law. The legislation which establishes the penalty provisions gives the courts considerable scope to punish offenders and to deter others. In some cases imprisonment and unlimited fines may be imposed. Where the EA decides that a criminal sanction is appropriate it will assess the case in accordance with the requirements of the Code for Crown Prosecutors before commencing a prosecution. It is recognized that prosecution should only be embarked upon after full consideration of the implications and consequences. Where it is decided that a prosecution is the most appropriate choice of sanction, the EA must meet the test set out in the Code for Crown Prosecutors, to determine whether there is sufficient evidence and be satisfied that the prosecution is in the public interest¹²⁵. However, it has been highlighted that “the courts have made it clear that, in general terms, the decision to prosecute (or not to do so, as the case may be) is essentially within the discretion of the regulatory authority and cannot be subject to challenge on anything other than on the ground of *Wednesbury* unreasonableness¹²⁶ (although there is potential for a challenge in circumstances under which a regulator such as

¹²⁰ Accessed November 13, 2013. <http://www.chambersandpartners.com/guide/uk/1/25>

¹²¹ Accessed November 13, 2013. <http://www.legal500.com/books/1500>

¹²² Bell et al., “Environmental Law”, 286.

¹²³ Last accessed 30 October, 2013. <http://a0768b4a8a31e106d8b0-50dc802554eb38a24458b98ff72d550b.r19.cf3.rackcdn.com/geho0910bszj-e-e.pdf> and http://www.environment-agency.gov.uk/static/documents/Business/1430_10_External.pdf

¹²⁴ Bell et al., “Environmental Law”, 298.

¹²⁵ Accessed October 31, 2013 http://www.environment-agency.gov.uk/static/documents/Business/Enforcement_and_Sanctions_Guidance.pdf

¹²⁶ *Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] EWCA Civ 1.

the Environment Agency fails to follow an unambiguous enforcement or prosecution policy). The published enforcement and sanctions policy adopted by the Agency is worded in such a way as to leave considerable discretion in determining whether to prosecute. The width of that discretion would be sufficient to ward off claims that the policy was unambiguous enough to found a successful challenge to any decision to prosecute or not¹²⁷. By way of example, in *Wandsworth LBC v Rashid* [2009] EWCA 1844 (Admin) “a shop owner who had been prosecuted for placing waste from his shop on the pavement outside his shop due to flooding was successful before the magistrate’s court in arguing that the prosecution was an abuse of process as the local authority had not offered guidance and education prior to prosecuting him as indicated in its enforcement policy”¹²⁸.

While exercising its enforcement discretion, the Agency applies a cooperative approach towards those who are regulated. In *Environment Agency v Stanford* [1999] Env LR 286 “a scrap metal dealer notified the EA that his activities were exempt from the need for a waste management licence. An Agency officer visited the site and informed him that the activities were unlawful and that he was committing an offence. Instead of prosecuting, the officer gave advice on the various steps that were required to make activities exempt. On subsequent visits, Agency officers gave the impression that no prosecution would be commenced if the works were carried out within a specified time period. The works were not carried out and the Agency prosecuted. The dealer tried to argue that the prosecution was an abuse of process and should be dismissed, because of the promises that had been made by the various officers. The argument was dismissed on the ground that the Agency had never promised not to prosecute; indeed it was clear that it had always stated that the conduct was unlawful”¹²⁹.

It has been highlighted in fact that “many of these agencies regard their main aim as securing compliance rather than convictions. The Environment Agency, for example, states: ‘we regard prevention as better than cure. Our general approach is to engage with business to educate and enable compliance’. [...] Most of these agencies regard prosecution as a last resort: the criminal law remains as a background source of the pressure towards compliance which the agencies are able to exert”¹³⁰.

12.2.2 Scotland and Northern Ireland

As it has been highlighted “in Scotland, all prosecutions are brought by the Crown Office and Procurator Fiscal Service (COPFS), which has lacked expertise in relation to the enforcement environmental offences”¹³¹. Thus, unlike England and Wales, where enforcement and prosecution are undertaken by the Environment Agency, the right to prosecute is effectively held solely by COPFS and the final decision to prosecute is determined outside the Scottish Environment Protection Agency¹³². “This separation of enforcement and prosecution and, in particular, the lack of specialist environmental expertise within COPFS, explains why the number of prosecutions for environmental crimes is much lower in Scotland than that in England. For example, in Scotland, there were sixty-three referrals to the COPFS by SEPA in 2008-9, thirty three in 2009-10, and thirty-seven in 2010-11. These figures are significantly lower than the number of prosecutions brought by the Environment Agency over the same period. Attempts have been made to address this imbalance, including the introduction of trained environmental prosecutors within COPFS to liaise with SEPA, and to coordinate enforcement and prosecutions, and the introduction of an agreed protocol on concluding investigations and prosecutions”¹³³.

¹²⁷ Bell et al., “Environmental Law”, 299.

¹²⁸ Ibid, 299.

¹²⁹ Ibid, 297.

¹³⁰ Ashworth and Horder, “Principles of Criminal Law”, 12.

¹³¹ However, a new team of specialist prosecutors has been appointed to handle Wildlife and Environmental Crime. Accessed December 13, 2013. <http://www.crownoffice.gov.uk/media-site/media-releases/245-new-team-of-specialist-prosecutors-to-be-appointed-to-handle-wildlife-and-environmental-crime>. More statistics are available at <http://www.scotland.gov.uk/Publications/2013/09/2382/10> and in the SEPA enforcement report 2011-2012 <http://www.sepa.org.uk/pdf/130304%20-%20Enforcement%20Report%20-%20FINAL1.PDF>

¹³² The Crown Office and Procurator Fiscal Services (COPFS) and SEPA are committed to ensuring effective liaison so that reports from SEPA achieve the best outcome for the environment and the public interest. See http://www.sepa.org.uk/about_us/policies/environmental_crime_protocol.aspx. Accessed December 13, 2013.

¹³³ Bell et al., “Environmental Law”, 295.

“In Northern Ireland, there has been criticism of the enforcement of environmental law. In part, this is because of the low priority historically given to environmental issues and the inadequacies of the institutional framework for enforcement bodies. The body with responsibility for enforcing environmental law in Northern Ireland is the Northern Ireland Environment Agency (NIEA), which is an Executive Agency of the Department of the Environment. Like in Scotland, responsibility for prosecution lies with the Public Prosecution Service for Northern Ireland rather than with the Agency as in England. [...] In addition, the poor performance of the NIEA and its predecessor the Environment and Heritage Service (EHS) in enforcing environmental law has been the subject of criticism both within and outside government. Other factors that have historically contributed to poor levels of enforcement in Northern Ireland include the lack of detailed policy guidance, in the form of an enforcement and prosecution policy, and insufficient resources. There is, however, the more fundamental issue of the late implementation of European Directives, and the consequent disparity between Northern Irish environmental legislation and that of the rest of the UK, which has often meant that actions that would have been considered to be an offence in England, for example, were not illegal in Northern Ireland. Recent developments aimed at tackling these deficiencies have, however, seen the establishment of an Environmental Crime Unit within the NIEA as well as the drawing up of an NIEA Enforcement policy”¹³⁴.

12.3 Other regulatory agencies

Next to the main bodies that have been described, there are other regulatory agencies that in UK are involved in the fight against environmental crimes. These are the following:

a) Natural England¹³⁵ is the non-departmental public body of the UK government that plays a significant part in policing the protection of habitats in collaboration with the police that have the primary responsibility for investigating offences that relate to species. Among the primary responsibilities: nature conservation, species and habitats protection, protection of geological features, landscape protection and rural affairs. Key legislation: Natural Parks and Access to Countryside Act 1949; Countryside Act 1968; Wildlife and Countryside Act 1981; Countryside and Rights of Way Act 2000; Natural Environment and Rural Communities Act 2006; Conservation of Habitats and Species Regulations 2012).

b) Forestry Commission¹³⁶ is a non-ministerial government department responsible for forestry in England and Scotland (since 1 April 2013 Forestry Commission Wales has merged to become Natural Resources Wales). There are now separate Commissions for England and Scotland. This division assists the Commission with reporting to, and acting on the policies of, the devolved authorities. Cross-border issues can be dealt with by the Forestry Commission as a whole and are under the leadership of the new Director Central Services. Director Scotland and Director England are part of their own National Committees, which oversee the implementation of policies as they relate to the devolved authorities. Forestry Commission England reports to the Westminster Parliament. Forestry Commission Scotland reports to, and receives funding from, the Scottish Parliament. Both are responsible for commercial forestry operations and forest management in their respective nations; Forestry Commission Scotland is also explicitly responsible for the expansion of Scottish forests. The responsibilities and powers of the Forestry Commissioners (England) are derived mainly from the Forestry Act 1967 and Plant Health Act 1967, but there are a number of other applicable Acts and Statutory Instruments, including the Forestry Commission Byelaws 1982. The Environment Agency, Forestry Commission and Natural England work together in partnership on a daily basis all over England. Each has a distinctive role and an important part to play in helping to manage, sustain and improve the environment¹³⁷.

c) Health and Safety Executive¹³⁸ is a non-departmental public body of the United Kingdom. It is the body responsible for the encouragement, regulation and enforcement of workplace health, safety and welfare, and for research into occupational risks in England and Wales and Scotland. Responsibility in Northern Ireland lies with

¹³⁴ Ibid, 296.

¹³⁵ Accessed November 6, 2013. <http://www.naturalengland.org.uk/>

¹³⁶ Accessed November 6, 2013. <http://www.forestry.gov.uk/website/forestry.nsf/byunique/infid-753fy2>

¹³⁷ Accessed November 6, 2013. http://www.naturalengland.org.uk/about_us/whatwedo/partnership/casestudies/default.aspx

¹³⁸ Accessed November 6, 2013. <http://www.hse.gov.uk/>

the Health and Safety Executive for Northern Ireland. HSE inspectors normally enforce health and safety standards by giving advice on how to comply with the law. They can order people to make improvements and if necessary, prosecute them. Inspectors follow HSC's Enforcement Policy Statement to decide on the most appropriate action to take¹³⁹.

d) Drinking Water Inspectorate¹⁴⁰ is a section of Department for Environment, Food and Rural Affairs (DEFRA) set up to regulate the public water supply companies in England and Wales. It produces an annual report showing the quality of and problems associated with drinking water. Its remit is to assessing the quality of drinking water in England and Wales, taking enforcement action if standards are not being met, and appropriate action when water is unfit for human consumption. The offences for which the Inspectorate can initiate proceedings are criminal offences. Prosecutions are taken forward in the name of the Chief Inspector where there is reliable evidence that an offence has been committed, where the company does not have a defence that it took all reasonable steps and exercised all due diligence, and when such a prosecution is regarded as being in the public interest. For those events that do not justify full Court proceedings the Inspectorate may issue a caution, which the Court could take into account in any future offences¹⁴¹.

e) Water and sewerage undertakers are private companies subject to regulation on economic issues, water pricing, and competition from the Water Services Regulation Authority. Key legislation: Water Resources Act 1991; Water Industry Act 1991; Water Act 2003.

f) HM Customs and Excise¹⁴² was, until April 2005, a department of the British Government. It was responsible for the collection of Value added tax (VAT), Customs Duties, Excise Duties, and other indirect taxes such as Air Passenger Duty, Climate Change Levy, Insurance Premium Tax, Landfill Tax and Aggregates Levy. It was also responsible for managing the import and export of goods and services into the UK. HMCE was merged with the Inland Revenue (which was responsible for the administration and collection of direct taxes) to form a new department, HM Revenue and Customs (HMRC), with effect from 18 April 2005.

g) The Environmental Audit Committee is appointed by the House of Commons to consider to what extent the policies and programs of government departments and non-departmental public bodies contribute to environmental protection and sustainable development; to audit their performance against such targets as may be set for them by Her Majesty's Ministers; and to report thereon to the House. In 2003 the Environmental Audit Committee established the Sub-committee on environmental crime in order to pursue a number of different inquiries beneath the umbrella of environmental crime. So far inquiries have been conducted on Environmental Crimes and the Courts¹⁴³, Fly-tipping, Fly-posting, Litter, Graffiti and Noise¹⁴⁴, Corporate Environmental Crime¹⁴⁵ and on Wildlife crime¹⁴⁶.

¹³⁹ Accessed November 6, 2013. <http://www.hse.gov.uk/pubns/hse41.pdf>

¹⁴⁰ Accessed November 6, 2013. <http://dwi.defra.gov.uk/index.htm>

¹⁴¹ Accessed November 6, 2013. <http://dwi.defra.gov.uk/press-media/incidents-and-prosecutions/>

¹⁴² Accessed November 6, 2013. <http://www.hmrc.gov.uk/>

¹⁴³ *House of Commons Environmental Audit Committee - Environmental Crimes and the Courts, Sixth Report of Session 2003-04.* Accessed October 23, 2013. <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/126/126.pdf>

¹⁴⁴ *House of Commons Environmental Audit Committee - Environmental Crime: Fly-tipping, Fly-posting, Litter, Graffiti and Noise, Ninth Report of Session 2003-2004.* Accessed November 5, 2013. <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/445/445.pdf>

¹⁴⁵ *House of Commons Environmental Audit Committee - Corporate Environmental Crime, Second Report of Session 2004-2005.* Accessed November 6, 2013. <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmenvaud/136/136.pdf>

¹⁴⁶ *House of Commons Environmental Audit Committee - Wildlife Crime, Third Report of Session 2012-13, Volume I.* Last accessed October 23, 2013. <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/140/140.pdf>

12.4 The role played by individuals and NGOs

In UK the NGOs encompass a wide range of bodies including groups with an international agenda, such as Greenpeace and Friend of the Earth and national groups, such as the National Trust and the Royal Society for the protection of Birds (RSPB)¹⁴⁷, the National Federation of Badger Groups¹⁴⁸. “The UK has a long tradition of NGOs being involved in different aspects of environmental law and policy. A number of NGOs have their origin in the nineteenth century. In the early stages, three main groups formed, focusing on nature conservation (the RSPB in 1889), the countryside (the Commons, Open Spaces and Footpaths Preservation Society in 1965), and animal welfare (the Royal Society of the Prevention of Cruelty to Animals (RSPCA)) in 1824. An increase in the interest in environmental issues has been reflected by the dramatic growth in membership of environmental NGOs since the 1970s, with membership of some groups such as Friends of the Earth and Greenpeace in the hundreds of thousands and over a million members of the RSPB”¹⁴⁹.

NGOs play an important role in investigating and exposing environmental harm and offender wrongdoing. Agencies such as the Environmental Investigation Agency¹⁵⁰ investigate environmental crimes and channel resources into protection and prosecution across a range of environmental areas, including, for example, pollution issues, illegal trade in endangered species¹⁵¹. Furthermore, they provide valuable information for professional enforcement officers, which can help shape their tactics and strategies¹⁵².

As far as prosecution is concerned, according to Bell, Mc Gillivray and Pedersen “NGOs have developed a leading role in challenging government and regulatory agencies through the use of judicial review actions, for example in challenging plans for a third runway at *Heathrow (R (Hillingdin LBC) v. Secretary of State for Transport* [2011] EWHC 626 (Admin) (Greenpeace, WWF-UK and others) and the hasty reduction of feed-in-tariff support for solar photovoltaic energy generation (*Secretary of State for Energy and Climate Change v. Friends of the Earth* [2012] EWCA Civ 28)”¹⁵³. In fact, as reported, in UK “[t]he power to prosecute some environmental crimes does not rest only with the statutory enforcement agencies. The general right to bring a private prosecution for any offence is preserved in s. 6(1) of the Prosecution of Offenders Act 1985. Indeed, there are specific powers to bring private prosecution for statutory nuisances (EPA 1990, s. 82). This general right is, however, restricted in certain statutes. Private prosecutions are relatively rare, although not unknown. Groups such as the Royal Society of the Prevention of Cruelty to Animals (RSPCA) and local badger utilize private prosecutions in relation to wildlife crime and animal cruelty offences. Indeed, the RSPCA has been formally recognized by the Department for Environment, Food and Rural Affairs (DEFRA) as ‘approved prosecutor’ in relation to certain animal welfare offences under the Protection of Animals (Amendment) Act 2000. This is very much the exception rather than the rule. There are many factors that discourage private groups or individuals from taking action, including funding and costs issues, the need to gather and present expert evidence, and the fear of the technical aspects of preparing and presenting a criminal case. In addition, many of the factors that influence the regulatory bodies in taking enforcement action, such as the relatively low penalties imposed by the courts, shape private attitudes to prosecutions. Although private prosecutions are uncommon, they are still important. For example, a member of the public brought a private prosecution against Anglian Water for gross water pollution that resulted in a fine of £200,000. It was notable in that case that the Court of Appeal appeared to discourage the bringing of private prosecutions in such cases. Scott Baker LJ took the view that it was ‘unfortunate’ that the private prosecutor had not allowed the Environment Agency to take over the proceedings.

¹⁴⁷ Accessed October 31, 2013 <http://www.rspb.org.uk/>

¹⁴⁸ Accessed October 31, 2013 <http://www.badger.org.uk/Content/Home.asp>

¹⁴⁹ Bell et al., “Environmental Law”, 130-131.

¹⁵⁰ Last accessed October 24, 2013. <http://www.eia-international.org/>

¹⁵¹ Rob White, “What is to be Done About Environmental Crime?”, in *The Routledge Handbook of International Crime and Justice Studies*, ed. Bruce A Arrigo and Heather Y. Bersot (London and New York: Routledge International Handbooks, 2014), 463.

¹⁵² By way of example, see the Environmental Investigation Agency submission to the UK Government’s consultation on illegal timber. Last accessed October 24, 2013. <http://www.illegal-logging.info/sites/default/files/uploads/EIASubmissiontoDefraIllegalTimberRegConsultation080509.pdf>. See also the activities of Basel Action Network <http://www.ban.org/>.

¹⁵³ Bell et al., “Environmental Law”, 131.

There appeared to be nothing to indicate why this should have been the case and the appeal had been brought against sentence, rather than conviction, which would seem to indicate that prosecution has been brought meritoriously. In a number of other cases, the threat of private prosecution by groups such as friends of the Earth and Greenpeace has acted as a trigger for action by the regulatory bodies. For example, in relation to the Sea Empress pollution incident, the threat of private prosecution by Friends of the Earth brought pressure to bear upon the Environment Agency, which appeared to be reluctant to prosecute. The subsequent successful prosecution by the Agency resulted in one of the largest ever fine for water pollution”¹⁵⁴.

More generally, regarding the small number of private prosecution brought to Courts it has been highlighted that “the rationale for retaining the right was that it serves as a safeguard against unjustified or unfair prosecutorial decisions, particularly inertia on the part of either police or Crown Prosecution Service”¹⁵⁵.

As far as legal standing is concerned, anyone has standing to bring private criminal prosecution where such an action is available and there are no differences in sectorial legislation. In England and Wales an applicant/claimant must demonstrate sufficient interest and an arguable case in law to access judicial review proceedings and the “interest” is very widely interpreted. In Scotland, the claimant must show both title and interest, which means that a party has to show that there is some legal capacity and direct interest in the subject matter¹⁵⁶. “More generally, it is clear that somebody with a private interest in land affected by an administrative decision would have ‘sufficient interest’ or standing. This can be expanded to include those who are living in proximity to an area that is affected by a decision, although there would appear to be some limitations. It is, however, more difficult to show that a person has the necessary standing by virtue of an interest in the environment as a whole, because it is not generally accepted that there are ‘environmental rights’ available to the public at large. This raises the question of representational, or public interest, standing. In the planning system, many actions have been brought by local interest groups in which sufficient interest can be demonstrated by objecting to proposals or giving evidence at a local inquiry, and an analogy can be drawn in relation to groups bringing challenges in connection with local environmental issues, such as environmental permits, statutory nuisances, or local air quality. The position of general environmental interest groups, such as Friends of the Earth or Greenpeace, is more problematic, because there is no necessary geographic connection with the matter being challenged. Representative bodies bring a significant number of judicial review actions, with a good percentage being brought by environmental NGOs. The courts have taken an increasingly liberal approach to standing for representational bodies”¹⁵⁷.

As to the redress for individuals, “under s. 130 of the Powers of the Criminal Courts Sentencing Act 2000, the courts have the power to award compensation to anyone who has directly suffered as a result of an environmental offence. These powers have rarely been used. The Sentencing Advisory Panel suggested that, in cases in which there is a specific victim [...], a court should always consider a compensation order, although not before imposing a fine. The significance of the use of compensation orders is, however, reduced as a result of the existence of many statutory powers of clean up and cost recovery available to regulatory agencies in defined situations (for example, EPA 1990, s. 59, or Water Resources Act 1991, s. 161A) and the fact that there is currently a limit of £5,000 for each order”¹⁵⁸.

12.5 Institutional cooperation

As far as the institutional co-operation within the State is concerned, generally, any non-compliance with the Regulators’ measures is generally an offence that can be prosecuted. This gives an idea of how deeply administrative enforcement and criminal law are intertwined.

¹⁵⁴ Ibid, 289.

¹⁵⁵ *Jones v Whalley* [2006] UKHL 41.

¹⁵⁶ UNECE Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, Implementation Report Submitted by the United Kingdom, 2011, at 20. Accessed October 31, 2013. http://www.unece.org/fileadmin/DAM/env/pp/reporting/NIRs%202011/UK_NIR_2011.pdf

¹⁵⁷ Bell et al., “Environmental Law”, 338-339.

¹⁵⁸ Bell et al., “Environmental Law”, 305.

Cooperation between administrative and criminal authorities is significant because of the incessant changing of features of environmental crimes. As it has been reported by DEFRA “[t]he nature of environmental crime is changing, with offences becoming more complex and serious, involving organized and geographically dispersed illegal activity. The Environment Agency has seen the number of such cases increasing in recent years, including:

- non-compliance with permit conditions repeated across multiple sites, where a company level management improvement is needed;
- an increase in waste crimes (e.g. fly-tipping of trade and construction wastes);
- increase in illegal waste exports as a result of changing legislation and growing foreign markets coupled with poor regulation in non-OECD countries;
- increased poaching and extra pressure on salmon stocks;
- wide geographical distribution of environmental crimes (both waste and fisheries);
- evidence of more organized, career criminals committing environmental offences but also involved in other criminal activity”¹⁵⁹.

The cooperation between administrative authorities and criminal ones is particularly evident with regard to the National Wildlife Crime Intelligence Unit (NWCUI), which is part of the National Criminal Intelligence Service and serves as the focal point for the exchange of information on wildlife crime at the regional, national and international level¹⁶⁰.

Other regulatory agencies define their own cooperation. By way of example, Natural England underlines that “[m]uch of our compliance and enforcement work is delivered in partnership with other agencies, including the Police, and Crown Prosecution Service (CPS), Chemicals Regulation Directorate, Environment Agency, Forestry Commission and the Rural Payments Agency. We will reduce burdens on business by developing data sharing agreements with our key partners”¹⁶¹. Furthermore, it is specified that “[a]t a national level partnership working is aided through the Partnership for Action Against Wildlife Crime. We also provide evidence to the Wildlife Crime Law Enforcement Working Group to allow the determination of UK wildlife crime priorities, and we support partnership initiatives to priorities such as bat and raptor crime. We exchange intelligence with the National Wildlife Crime Unit and support them in producing a range of impact assessments to be used at sentencing by the CPS and other prosecuting agencies”¹⁶². See above for cooperation between enforcement authorities and prosecution authorities in Scotland and Northern Ireland.

As far as the co-operation with other States, EU and international institutions is concerned, since the majority of environmental crimes are transnational, cooperation in investigation and implementation of international legal instruments is crucial.

UK environmental agencies collaborate with INTERPOL in order to achieve better results in tackling environmental crimes, such as fisheries crimes, illegal trafficking of e-waste, oil spills in marine environments and other forms of pollution crime¹⁶³. By way of example, in August 2013 INTERPOL hosted officials from UK environmental agencies to promote further collaboration with the world police body and to review the global tools and services INTERPOL provides to its 190 member countries. Representatives from the National Crime Agency, the Scottish Environmental Protection Agency, the Border Policing Command, the National Wildlife Crime Unit, the United Kingdom Border Force, the Maritime and Coast Guard Agency, the Marine Management Organization and Environment Agency UK met with INTERPOL’s specialized units such as Criminal Intelligence Analysis, Trafficking in Illicit Goods and Counterfeiting, Operational Police Support and Environmental Crime. An important outcome of the visit was the proposal to initiate a National Environmental Security Seminar (NESS) in the UK. The purpose of a NESS is to bring together national experts and decision-

¹⁵⁹ DEFRA, *The Effectiveness of Enforcement of Environmental Legislation, Report No DEFRA 7208*, 2006, available at <http://archive.defra.gov.uk/environment/policy/enforcement/pdf/envleg-enforce-wrreport.pdf>. Accessed December 3, 2013.

¹⁶⁰ Accessed December 3, 2013. <http://www.nwcu.police.uk/>

¹⁶¹ Natural England, *Compliance and Enforcement Position*, 2011, available at http://www.naturalengland.org.uk/Images/compliance-enforcement-position_tcm6-29090.pdf. Accessed December 3, 2013.

¹⁶² Natural England, *Enforcement Guidance*, 2011, available at http://www.naturalengland.org.uk/Images/enforcement-guidance_tcm6-29091.pdf. Accessed December 3, 2013.

¹⁶³ Accessed December 3, 2013. <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime>.

makers responsible for environmental compliance and enforcement in order to forge a multi-agency cooperative and coordinated approach to combating national and global environmental crime. A NESS is designed to lead to the establishment of a National Environmental Security Task Force¹⁶⁴.

Another example is constituted by the collaboration established by DEFRA with the CITES Secretariat. DEFRA and CITES signed a memorandum of understanding in order to remove the obstacles relating to the direct exchange of information between such agencies and the CITES Secretary. DEFRA and CITES want in fact to encourage and facilitate a direct contact between enforcement agencies and CITES Secretariat¹⁶⁵.

13 Administrative environmental offences: instruments

The UK legislation provides a wide range of administrative mechanisms that can be enforced by the administrative authorities. The permitting system under the 2010 Environmental Permitting Regulations lists a series of measures applicable in case of a breach of a permit condition. These are the followings:

- Suspension notice: Regulation 37 states that if the regulator ascertains a serious risk of pollution it is entitled to suspend the activity related to the permit. The suspension of the authorization lasts until the operator takes the recommended measures in order to remedy the risk. A suspension notice has to specify:
 - i) the risk of serious pollution;
 - ii) the steps that must be taken to remove the risk;
 - (iii) the timeframe within which the steps must be taken;
 - (iv) the immediate effect of the suspension permit.
- Revocation of an environmental permit under Regulation 22: the regulator may revoke an environmental permit in whole or in part serving a notice to the operator specifying:
 - (a) the reasons for the revocation;
 - (b) in case of partial revocation— (i) the extent to which the environmental permit is being revoked, and (ii) any variation to the conditions of the environmental permit; and
 - (c) the date in which the revocation will take place (which must not be less than 20 working days after the date on which the notice is served).

(4) Unless the regulator withdraws a revocation notice, an environmental permit ceases to have effect on the date specified in the notice—

 - (a) in the case of a revocation in whole, entirely; or
 - (b) in the case of a partial revocation, to the extent of the part revoked.

(5) In the case of a partial revocation, the regulator may replace the environmental permit with a consolidated environmental permit reflecting the variation

(6) Any variation made by a regulator under this regulation—

 - (a) is taken to be a regulator-initiated variation under regulation 20(1); and
 - (b) may only be made in accordance with regulation 20.

(7) Paragraphs 17, 18 and 19 of Part 1 of Schedule 5 apply in relation to the decision to make a regulator-initiated variation and the notification of such a decision.

(8) If a waste operation, stand-alone water discharge activity or stand-alone groundwater activity is registered as an exempt facility, that part of an environmental permit (or if applicable, the whole

¹⁶⁴ Accessed December 3, 2013. <http://www.interpol.int/News-and-media/News-media-releases/2013/N20130830>

¹⁶⁵ Accessed December 3, 2013. <http://www.cites.org/common/disc/sec/CITES-UK.pdf>

permit) that relates to the waste operation, water discharge activity or groundwater activity is revoked on the date of registration.

These administrative enforcement mechanisms can be imposed whether or not a crime has been committed. These sanctions, which can be very harmful for companies, are not frequently imposed. This is because the sanctioning system is still very much based on criminal law, which offers important guarantees for the violators. Hence, in the case of an administrative sanction, although there is the right to appeal against suspension or revocation notices, the effect of the notice is not suspended¹⁶⁶.

Regulation 38 specifies what it has to be considered as an offence under the 2010 Environment Permitting Regulations:

(a) in case of contravention of a regulation;

(b) when it is knowingly caused or knowingly permitted the contravention of a regulation and in particular:

- failing to comply with or to contravene to an environmental permit condition;

- failing to comply with the requirements of an enforcement notice or of a prohibition notice, or of a suspension notice or of a landfill closure notice or of a mining waste facility closure notice.

(c) in case of failure to comply with a notice under regulation 60(1) requiring the provision of information, without reasonable excuse, or to make a statement which the person knows to be false or misleading in a particular material, or recklessly to make a statement which is false or misleading in a particular material, where the statement is made—

- in purported compliance with a requirement to provide information imposed by or under a provision of these Regulations,

- for the purpose of obtaining the grant of an environmental permit to any person, or the variation, transfer in whole or in part, or surrender in whole or in part of an environmental permit, or

- for the purpose of obtaining, renewing or amending the registration of an exempt facility;

- intentionally to make a false entry in a record required to be kept under an environmental permit condition;

- with intent to deceive: (i) to forge or use a document issued or authorised to be issued or required for any purpose under an environmental permit condition, or (ii) to make or have in the person's possession a document so closely resembling such a document as to be likely to deceive.

Furthermore, with regard to an establishment or an undertaking, Regulation 38(5) specifies that it is an offence failing to comply with the procedure established for the exempt waste operations.

In order to introduce a more efficient and risk-based sanctioning regime, in 2008 the UK Government adopted the Regulatory Enforcement and Sanctions Act (RES), which introduced the new civil sanctions¹⁶⁷. Civil Sanctions are considered as an alternative to criminal prosecution for many regulators, such as the Environment Agency, Health and Safety Executive and Natural England.

These civil sanctions are:

- Compliance notice: it requires compliance within a specified time limit;

- Restoration notice: it requires measures to restore the damage caused;

- Fixed monetary penalties (FMP): a low fine issued for minor offences;

- Enforcement undertaking: the offender offers to undertake specific steps to amend the non-compliance;

- Variable Monetary Penalties (VMP): monetary penalty for serious offences;

- Stop Notice: it requires an immediate halt to activities causing serious harm.

¹⁶⁶ Bell et al., "Environmental Law", 300.

¹⁶⁷ Richard Macrory, *Regulatory Justice, Making Sanctions Effective, Final Report*, 2006, available at <http://www.berr.gov.uk/files/file44593.pdf>. Accessed December 13, 2013.

As far as FMP and VMP are concerned, the 2008 RES specified that the regulator is allowed to impose these penalties if the person has committed the offence beyond any reasonable doubt. This is to remind that civil sanctions have the purpose to address criminal offences and they are an alternative to criminal enforcement.

Fixed Monetary Penalties are fines of relatively low amount that can be imposed by the regulator for a specified minor offence and cannot be used in conjunction with any other sanction¹⁶⁸. These fines aim at bringing the operator back to remedy the minor breach. Thus, if there is a voluntary acceptance of paying penalties within a certain time, a 50% discount is provided. This mechanism provides a more efficient procedure through voluntary compliance. Section 40 of RES provides for the procedure that has to be followed by the regulator when imposing a FMP. A notice of intent has to state: the grounds of the penalty, the sum, the possibilities to object and the deadline for payment or objection. After the penalty has been paid, or the liability has been discharged, the operator cannot be convicted for the same offence.

Variable monetary penalties are proportionate monetary penalties that the regulator may impose for the more serious cases of non-compliance where it decides that prosecution is not in the public interest. VMP aim at removing financial benefits that may come from non-compliance with the relevant regulation. The Environment Civil Sanctions Guidance consider them as an 'extrema ratio' when other enforcement measures are unable to guarantee compliance. Since the amount of the penalty is variable, it is very important that the enforcer takes into consideration the Hampton principles (proportionality and risk assessment).

"Various studies have been undertaken to explore the use of alternative sanctions in relation to environmental and other regulatory offences. Notably, these studies have been undertaken within a broad deregulation initiative started under the Regulatory Reform Act 2001, reflecting the fact that alternative sanctions are seen as a way of improving the regulatory system as opposed to more effective punishment (although there is a clear link between the two). The formal process of review began as part of a wider initiative found in the Hampton Review of regulatory inspections and enforcement. This review suggested, among other things, that regulatory enforcement should be more flexible, and should be based firmly on a proportionate and targeted view of risks. This process was refined further with a review of regulatory penalties. The review developed the Hampton review's conclusions and made recommendations that suggested a broader, more flexible set of alternative sanctions for regulatory offences. One of the key areas considered by the review was the differentiation between those offences that are 'regulatory' in nature – that is, those of which criminal intent or negligence is the cause – and cases involving serious harm to the environment or human health. Some of the key recommendations were incorporated into the Regulatory Enforcement and Sanctions Act 2008. Part 3 of the Act provides for the adoption of civil sanctions [...]. The Environment Civil Sanctions Orders 2010 (there are separate orders in place for England and for Wales) extend the civil sanctions regime to a series of environmental regulations"¹⁶⁹.

"While the civil sanctions system was put in place partly to make for a more flexible approach to enforcement, it has not been uncontroversial. Critics have, for instance, pointed out that civil sanctions confer too much power on the regulatory agencies at the expenses of the courts. On the other hand, the environmental tribunal forming part of the First-Tier Tribunal hears appeals against civil sanctions. One fundamental problem with the use of civil sanctions, though, is that, in the case of a regulatory body such as the Environment Agency, the lack of any explicit accountability mechanism raises the question of how the use of such powers is to be monitored in the public interest"¹⁷⁰. "A further consideration is whether the use of civil sanctions will, in time, diminish the role played by the criminal law in enforcing environmental law even further. In the extreme this may eventually have consequences for how environmental offences are perceived and whether 'environmental crimes' are thought of as morally wrong. This will naturally depend on the extent to which the civil sanctions regime is used"¹⁷¹.

As highlighted by Michael Woods and Richard Macrory: "relying too heavily as a matter of habit on criminal enforcement can [...] lead to the undermining of the concept of criminality by its extension to morally neutral 'offences'; the trivialisation of criminal cases through the use of inappropriate 'defences' in front of sympathetic

¹⁶⁸ Regulatory Enforcement and Sanctions Act of 2008.

¹⁶⁹ Bell et al., "Environmental Law", 306-307. See also Michael Woods and Richard Macrory, *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach* (Centre for Law and Environment, UCL, 2003); Michael Watson, "The Enforcement of Environmental Law: Civil or Criminal penalties?", *Environmental Law and Management* 17 (2005): 3-6; Richard Macrory, "New Approaches to Regulatory Sanctions", *Environmental Law and Management* 20 (2008): 210-214.

¹⁷⁰ Bell et al., "Environmental Law", 307.

¹⁷¹ *Ibid.*

judges; the practical difficulties arising from regulators having to meet the criminal standard of proof in terms of costs, time and resources, and the ‘lottery’ of the fines applied by the courts which fails to provide proper recompense for the damage caused to the environment”¹⁷². They conclude that civil penalties are easier to administer, more flexible and more appropriate.

14 The role of administrative authorities

The legal doctrine has defined enforcement in the environmental legal context as “the set of actions that governments or others take to achieve compliance within the regulated community and to correct or halt situations that endanger the environment or public health. Enforcement by the government usually includes inspections, negotiations and legal action. It may also include compliance promotion”¹⁷³.

The role of the administration in the UK entails “responsibility for making, implementing, and enforcing environmental law and policy”¹⁷⁴. This means that the administrative authorities go further than policymaking: their role entails compliance with legal standards as well as environmental permits. While there is no explicit legal duty to take enforcement action (discretion), these authorities inspect, review permits and enforce compliance.

Some principles have to be respected by all authorities such as those contained in the Regulators’ Compliance Code¹⁷⁵. The Code came into force in 2008 and it is a statutory requirement for all the regulators. It is based on the recommendations made in the Hampton Report¹⁷⁶ and it requires the regulators to enforce legislation applying an approach based on proportionality and risk assessment. On the basis of the risk assessment (identification and measurement of capacity to harm) the regulators enforce the legislation and target their resources where they will be most effective and where risk is highest.

Against this background, there are several enforcement bodies in the UK, covering different fields of environmental legislation. Despite the attempts to unify, there is still a consistent fragmentation in environmental administration in UK. This often leads to an overlap in institutional responsibilities.

The main bodies are the followings (see also above):

- DEFRA: Department for the Environment, Food and Rural Affairs.
- Environment Agency: it deals with land contamination, environmental permitting, pesticides, waste management, water abstraction and water pollution.
- Drinking Water Inspectorate: it deals with drinking water quality.
- Forestry Commission: it deals with illegal felling of trees.
- Natural England: Wildlife crime, prevention and remediation of environmental damage.
- Health and Safety Executive: it is a non-departmental public body, which is responsible for the encouragement, regulation and enforcement of workplace health, safety and welfare, and for research into occupational risks in England and Wales and Scotland.

¹⁷² Woods and Macrory, “Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach”, 9.

¹⁷³ Wasserman (1992) in DEFRA, *The Effectiveness of Enforcement in Environmental Legislation, Report NO. 7208*, 2006. Accessed December 13, 2013. <http://archive.defra.gov.uk/environment/policy/enforcement/pdf/envleg-enforce-wrcreport.pdf>

¹⁷⁴ Bell et al., “Environmental Law”, 260.

¹⁷⁵ *Regulators’ Compliance Code, Statutory Code of Practice for Regulators*, 2007, available at <http://www.berr.gov.uk/files/file45019.pdf>. Accessed December 3, 2013.

¹⁷⁶ Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement*, 2005. Available at <http://www.bis.gov.uk/files/file22988.pdf>. Accessed December 3, 2013.

- Local Authorities: they play an important role through urban planning, air quality and management, noise control and especially statutory nuisance. According to section 79 of EPA they have a duty to investigate the area of their competence in order to get more information about statutory nuisance.
- In addition to DEFRA's sponsored bodies, such as the Environment Agency and Natural England, there are eleven bodies that form part of DEFRA, which have inspection and enforcement duties: Agricultural Wages Team; Egg Marketing Inspectorate; Fish Health Inspectorate; Global Wildlife Division (including the Wildlife Inspectorate, and Licensing and Bird Registration); Horticultural Marketing Inspectorate; Plant Health and Seeds Inspectorate; Plant Varieties and Seeds Division; Rural Development Service – Dairy Hygiene Inspectorate; National Wildlife Management Team; Sea Fisheries Inspectorate and State Veterinary Service.

As far as DEFRA is concerned, its priorities are mainly promoting green economy and enhancing the environment in order to achieve a better quality of life¹⁷⁷. The role of DEFRA is of a primary importance since it is not only confined to the policy level, but it also involves the enforcement of the environmental legislation¹⁷⁸. DEFRA also has a central position in waste crime. It works with the Sentencing Council on sentencing guidelines for the courts on fly-tipping and illegal site operation. DEFRA chairs the National Fly-Tipping Prevention Group using police intelligence to identify people concerned with the illegal export of waste. Like all the other Departments, DEFRA is headed by a Minister, the Secretary of State, who is in charge of the majority of the powers conferred to the Department. The areas under his responsibility include EU international relations, emergencies, climate change, and pollution control. With regard to the relationship with the Environment Agency, the Secretary of State is responsible for the general direction of the Agency, issuing any directions of a specific or general character and requiring the Agency to take specific enforcement action in relation to environmental permits. The Secretary of State, through Circulars and Guidance, gives a crucial assistance to the interpretation and the application of the environmental legislation. Hence, he has a notable control over the regulators' activity, directing and guiding their functions.

The Environment Agency, as regulatory authority, has a primary responsibility in enforcing environmental law. The Environment Agency's primary role is "to make sure that air, land and water are looked after by everyone in today's society, so that tomorrow's generations inherit a cleaner, healthier world"¹⁷⁹. Its central role in enforcing environmental law is due to the wide range of areas it regulates. Its principal responsibilities include: pollution control, industrial regulation, waste management, nature conservation, species and habitat protection and landscape protection. The main enforcement powers of Environment Agency are:

- enforcement notices and works notices where contravention can be prevented or needs to be remedied (this stage is still at the 'cooperative level');
- prohibition notices (where there is an imminent risk of serious environmental damage);
- suspension or revocation of environmental permits and licenses;
- variation of permit conditions;
- injunctions: orders of a court directing an individual (or company) to either: stop a particular activity (a prohibitory injunction); carry out a particular activity (a mandatory injunction). Failure to comply with an injunction is punishable by an unlimited fine and/or up to two years' imprisonment carrying out remedial works.
- criminal sanctions, including prosecution;
- civil sanctions, including financial penalties (see section 13).

The power of the Environment Agency is also due to its role within the permitting system. The public control is in fact mainly implemented through a permitting system under the 2010 Environmental Permitting Regulations. This legislation provides a rationalized permitting system for several environmental regimes, which before 2007

¹⁷⁷ UK Cabinet Office, *List of Ministerial Responsibilities (Including Executive Agencies and Non-Ministerial Departments)* November 2012, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79363/List_Ministerial_Responsibilities-Nov-12.pdf. Accessed December 3, 2013.

¹⁷⁸ Philip Hampton, *Reducing Administrative Burdens, Effective Inspection and Enforcement*, 2004, available at <http://media.ft.com/cms/e23921a4-4463-11d9-9f6a-00000e2511c8.pdf>. Accessed December 3, 2013.

¹⁷⁹ Accessed December 3, 2013. <http://www.environment-agency.gov.uk/default.aspx>

were only fragmentally regulated. Part 4 of the Regulation is dedicated to “Enforcement and Offences” and it deals with the procedure to follow in case the regulator considers that an operator “has contravened, is contravening or is likely to contravene an environmental permit condition”¹⁸⁰. The procedure, which follows an attempt of compliance through persuasion and a warning letter, is characterized by a cooperative approach between the regulator and the regulated, and it entails different stages:

- Enforcement Notice: it specifies the type of contravention or what makes the contravention likely. It also includes specific directives on what to do, when and how, in order to remedy the contravention. Non-compliance with the notice constitutes an offence.
- Suspension Notice: if there is a risk of serious pollution, the regulator may serve a notice communicating the suspension of the environmental permit until the operator takes steps in order to remedy the contravention.
- Prosecution: the Environment Agency has to consider, according to the Code for Crown prosecutors, if there is a sufficient available evidence to raise a prospect of conviction.

According to the principle of proportionality, in following this procedure the Environment Agency takes into account different factors, such as: environmental consequences of the breach, existing of license/authorization, failure to comply with e.g. the enforcement notice, or obstructing the gathering of information¹⁸¹.

However, it is crucial to balance the cooperative approach with the sanctioning one¹⁸². Regulation in environmental matters is in fact moving towards a more flexible administrative enforcement (such as e.g. inspections¹⁸³) instead of prosecution. The objective is in fact to prevent harm to the environment, rather than to punish a breach.

Environmental regulators can also adopt administrative sanctions, such as suspension and revocation of environmental license. These measures can be even more harmful than criminal ones for perpetrators of unlawful activities, since they prevent e.g. a company to carry on its own activity (see section 13)¹⁸⁴.

In general terms, the Regulators’ Compliance Code requires sanctions and penalties to be applied according to the following principles:

- Aim to change the behaviour of the offender.
- Aim to eliminate financial gain or benefit from non-compliance.
- Be responsive and consider what is appropriate for the particular offender and offence.
- Be proportionate to the nature of the offence and the harm caused.
- Aim to repair the harm done by the offence, where appropriate.
- Aim to deter non-compliance in future¹⁸⁵.

¹⁸⁰ Environmental Permitting Regulations, 2010, Part 4, Enforcement and Offences.

¹⁸¹ Bell et al., “Environmental Law”, 298.

¹⁸² Ibid, 292.

¹⁸³ Through inspections authorities are able to gain important information on ongoing or future breaches. The Regulators’ Compliance Code provides, in accordance to Hampton principles, a set of rules for inspectors: “regulators should ensure that inspection and other visits, such as compliance or advice visits, entities only occur in accordance with a risk assessment methodology, except where visits are requested by regulated entities, or where a regulator acts on relevant intelligence. Regulators should use only a small element of random inspection in their program to test their risk methodologies or the effectiveness of their interventions. Regulators should focus their greatest inspection effort on regulated entities where risk assessment shows that both: a compliance breach or breaches would pose a serious risk to a regulatory outcome; and there is high likelihood of non-compliance by regulated entities” (Regulators’ Compliance Code, Statutory Code of Practice for Regulators, 2007 available at <http://www.berr.gov.uk/files/file45019.pdf>. Accessed December 12, 2013).

¹⁸⁴ Bell et al., “Environmental Law”, 300.

¹⁸⁵ Regulators’ Compliance Code, Statutory Code of Practice for Regulators, 2007.

15 Implementation of Environmental liability Directive and links between environmental liability and responsibility for environmental crimes

UK has transposed the Environmental Liability Directive through various Regulations adopted in 2009 that coexist with the already existing legislation dealing with the system for preventing and remediating water pollution and land contamination; the regime for remediation the contamination from historic and future pollution incidents and the system for remediating and restoring biodiversity damage¹⁸⁶.

The ELD was transposed in England through the Environmental Damage (Prevention and Remediation) Regulations 2009 as amended in 2010; in Wales, through the Environmental Damage (Prevention and Remediation) regulations 2009; in Scotland, through the Environmental Liability Regulations 2009 as amended in 2011; in Northern Ireland, through the Environmental liability (prevention and Remediation) Regulations 2009 as amended in 2011. Too many various enforcing authorities are involved under these Regulations, such as the EA and the local authorities.

The key features of the national provisions implementing the ELD in UK are the followings:

- The legislation covers ‘significant environmental damage’ which is restricted to: damage to species and habitats under conservation legislation; sites and species designated under national conservation law such as sites of special scientific interest (SSSIs) (although damage to SSSIs is not covered in Scotland); damage to waters protected under the water framework directive as implemented and soil damage (personal injury, damage to private property and economic loss are not covered). The ELD covers in fact a range of damages that falls short of what already exists at the national level under the contaminated land regime, which extends to more general ecosystem damages. It has been reported that the ELD applies to less than 1 per cent of all pollution incidents reported by the Environment Agency¹⁸⁷.

- Liability of the operator is in principle strict (but only for certain activities regulated under EU environmental law such as IPPC processes), whereas fault-based liability is applied with reference to any operational activity causing damage to species and habitats. The strictness of liability may be limited if the damage is authorized under a permit or if the state-of-the-art scientific knowledge indicated that damage was not likely. UK opted to allow for these defenses although in Wales neither of these applies to deliberate releases of GMOs.

- If the enforcing authority decides that the damage is environmental damage it must notify the operator of any activity or activities that caused the damage that (a) the damage is environmental damage; (b) the responsible operator’s activity was a cause of the environmental damage; (c) the responsible operator must submit proposals, within a time specified by the enforcing authority, for measures that will achieve the remediation of the environmental damage; and (d) the responsible operator has a right to appeal. Once it receives the proposals from the responsible operator, the enforcing authority must consult (a) anyone who has notified an enforcing authority under regulation 29, and (b) any person on whose land the remedial measures will be carried out, and may consult any other person appearing to be necessary. Following consultation the enforcing authority must serve a remediation notice on the responsible operator that specifies (a) the damage; (b) the measures necessary for remediation of the damage, together with the reasons; (c) the period within which those measures must be taken; (d) any additional monitoring or investigative measures that the responsible operator must carry out during remediation; and (e) the right of appeal against the remediation notice. Failure to comply with a remediation notice is an offence (sections 18 and 20 of the Environmental Damage (Prevention and Remediation) Regulations 2009).

- A difference between the ELD, as implemented, and the existing national rules on pollution prevention and clean-up is that the former gives affected individuals or NGOs the right to press the regulatory authorities to take

¹⁸⁶ Implementation Challenges and Obstacles of the Environmental Liability Directive, Annex - Part A: Legal Analysis of the National Transposing Legislation, European Commission – DG Environment 16 May 2013, at 357.

¹⁸⁷ Bell et al., “Environmental Law”, 391.

action. The regulator must then give its reasons for either choosing (or declining) to act and the NGO has the right to question on the basis of the regulator's decision (either in a court or another competent body)¹⁸⁸.

- A breach of the national provisions implementing the ELD constitutes a criminal offence punished through a summary conviction (fine not more than £5000, imprisonment not more than 3 months (Scotland: not more than 1 year), or both; or through a conviction on indictment (unlimited fine, imprisonment not more than 2 years, or both). If the breach is committed by directors and officers they may be convicted if the company's offence is committed with their consent or connivance or is attributable to their neglect (but in Scotland the partner of a Scottish partnership may be convicted if the partnership's offence was committed with their consent or connivance or is attributable to their neglect. Equivalent provisions apply to the member or a person purporting to act as a member, or a Scottish limited liability partnership)¹⁸⁹.

In order to acquire an unofficial view from the EU Commission, an interview with an expert from the Directorate-General for Justice, has been conducted. As to the position on the approximation of sanctions level, the expert said that the European Commission is currently assessing whether the Member States have implemented the directive 2008/99 correctly; it will take some time until this process will be finalised. Thus it is too early to answer this issue for the time being.

As to the main challenges Member States are facing in implementing the criminal law provisions of Directive 2008/99, according to the expert these are the followings:

- Few cases known by prosecution: Application of administrative law preferred; Gaps in communication between environmental authorities and prosecution; Insufficient experience/ training of law enforcement officers; Corruption.
- Fewer accusations: Problems to prove evidence/ identify the actor; Insufficient experience and training of prosecutors; Low priority due to limited resources (time, money, expertise).
- Even fewer convictions: Problems with evidence; Lack of clearness of environmental crime law; Dismissal on grounds of opportunity; Insufficient experience/ training of judges; Reluctance to break with traditions.
- Lenient sanctions: Environmental crime regarded as less serious than traditional crime areas; Insufficient sentencing experience of judges in environmental crime cases/ little case law published. But: enterprises fear public trial more than sanction level.
- Room for improvement: Reinforcing cooperation between prosecution and environmental authorities; Training; Specialisation; Let convicted pay costs of environmental agency as part of prosecution costs; Publishing convictions.

16 Summary

In UK the legislation in the field of environmental criminal law is highly fragmented in many statutes and regulations. The complexity of the UK environmental legislation is mainly due to the considerable amount of reforms carried out in the last twenty years. However, the most relevant one is the Environmental Protection Act, which embodies a whole range of criminal sanctions enforced by the appropriate Authority.

Although there is no national legislation or code dedicated specifically to environmental crimes, there is a certain level of standardization reached at the legislative level as a result of the transposition of EU law on the matter, particularly, the Environmental Crime Directive. The experts that have been consulted believe in fact that there are no substantial shortcomings in the legal provisions concerning environmental criminal law in the UK.

Nevertheless, the interviewees have reported that in UK environmental crimes are not a priority for the Government or for the national and local policing.

¹⁸⁸ Ibid, 392.

¹⁸⁹ Implementation Challenges and Obstacles of the Environmental Liability Directive, Annex - Part A: Legal Analysis of the National Transposing Legislation, European Commission – DG Environment 16 May 2013, at 382.

The rules of general criminal procedure apply to environmental crimes, although there are some rules, which are specific to environmental crimes. There is an access available to telephonic records and bank account details in accordance with normal rules of criminal procedure. The actors involved in criminal prosecution can undertake covert surveillance in accordance with the Regulation of Investigatory Powers Act 2000 but they have no right to undertake telephone tapping as this is considered intrusive surveillance, which is reserved for the most serious of crimes.

Most environmental crimes impose strict liability (i.e. no need to prove fault), which not only makes easier for regulators to enforce and prosecute environmental offences, but also constitutes a strong incentive for operators to take all possible risk-minimizing measures.

Liability of public servants in environmental offences is not covered by any specific act. Misconduct in public offence is considered a common law offence triable only on indictment. It carries a maximum sentence of life imprisonment; it is an offence confined to those who are public office holders and it is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

As far as the relationship between the numbers of environmental criminal acts being reported, investigated, brought to trial and sanctioned, for environmental crimes, also compared to other categories of crime, the percentage is relatively small. By way of example, there were 711,000 reported fly-tipping offences in 2012/13 and there were over 2,200 prosecutions, 99 per cent of which resulted in a conviction¹⁹⁰.

As for the deficits concerning the enforcement of the national legal framework on environmental criminal law, there is a good corporate awareness of environmental obligations and performance by big businesses but this reduces for smaller operations. There is less awareness and less commitment by local authorities.

Environmental crime has an element of organized crime. For example, in waste management systematic organized fly-tipping has been a significant problem in the past and it is easy for waste producers either alone or in tandem with others to avoid controls. Similar concerns now exist around the illegal export of waste. A recent estimate indicates that waste crime (although not necessarily organized crime) cost £800m a year to legitimate business and lost tax revenue. In the UK organised criminal groups are involved in environmental criminal activities. Environmental crime is a “low risk, high profit” criminal enterprise with serious and organised criminal elements with links with other crime types such as money laundering, arms proliferation, and targeted non-residential burglaries for valuable commodities such as rhino horn.

The UK legal system, though, provides neither a specialized legislation concerning the environmental organized crime nor, more generally, legislation dedicated to the organized crime. Environmental crimes tend to be “organized” and can incur long sentences and come within the terms of the Regulation of Investigatory Powers Act 2000 (RIPA) and therefore allow for invasive forms of investigation – such as phone tapping.

According to the experts the starting point is that organized (including environmental) crime cases can be differentiated from other criminal cases because of the way they are investigated (rather than the way they are judged in legal terms). The UK embarked on an experiment in taking a more whole-of-government, joined-up, multi-agency approach to deal with the myriad forms of entrepreneurial criminality. The creation of the Serious organized Crime Agency [now National Crime Agency] exemplifies this joint-up, multi-agency perspective that involves other departments, local authorities, private sector and communities.

Differently from the other crimes in UK where the police and the other law enforcement agencies are by statute required to record a crime, this is not the case for the majority of environmental crimes, such as wildlife crime. It was reported, though, that the Home Office Minister Jeremy Brown has recently given some wildlife crimes their own coding and has said that he hopes to eventually see all wildlife crime recorded.

Funding has always been an issue with reference to environmental crimes. By way of example, the National Wildlife Crime Unit, after running the risk to be closed for lack of funding, was first moved to Scotland (Livingston) and since 2006 it has been receiving funding also from outside the police (by different agencies such as Home Office, DEFRA, ACPO, Department of the Environment of Northern Ireland and Police Scotland,

¹⁹⁰ More detail on waste crime enforcement can be found in the EA’s waste crime report, which is published at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288605/LIT_8777_8cc7d6.pdf.

Scottish Natural Heritage and Scottish Government – the unit does not receive funding from the Welsh Government though).

It has been highlighted that although on paper the relevant legal provisions exist these are rarely enforced effectively. A range of punitive legal sanctions needs to be applied in a timely manner for the best effect.

Regulatory bodies usually impose administrative sanctions outside the criminal law process. Nevertheless, sanctions such as fines, imprisonment or community sentences can be imposed also through the criminal process following a successful prosecution for an environmental offence. Furthermore, many regulatory bodies, including the Environment Agency, can apply civil sanctions, that constitute a more flexible mechanism.

The view was expressed that the level of sanctions imposed within the UK in relation to environmental crimes has a dissuasive effect. This effect was increased by the introduction of the Sentencing Guidelines for Environmental offences in July 2014. Fines are unlimited in most cases for the most serious offences and sentences of custody are available (e.g. in 2011, 20 people were sent to prison for environmental crime in England and Wales as a result of prosecutions brought by the Environment Agency). Alternatives to imprisonment include community based penalties and suspended sentences.

Some express concern that the sanctions are too easily internalized by deviant actors – those transgressing environmental law. However, this can be due to a wish for the labelling of something as criminal, rather than for actual dissuasive effect. Civil sanctions in some areas, especially where this includes the ability to prevent an individual or company engaging in a particular economic activity, could have greater effect than a likely available criminal offence.

The sanctioning regime that in 2008 introduced civil sanctions has been thought as an alternative to sanctions imposed through criminal prosecution to the benefit of many regulatory Agencies. Although some critics have pointed out that civil sanctions may confer too much power on these agencies at the expenses of the courts, in some areas, especially where this includes the ability to prevent an individual or company engaging in a particular economic activity, they can have greater effect than criminal offences. It has been reported, though, that civil sanctions in practice are not used for wildlife crimes, although they could be very useful especially for minor wildlife offences. However, some operators worry that offenders can too easily internalize these sanctions.

Directives 2008/99/EC and 2009/123/EC have been transposed into UK law. However, the effects of the transposing instruments were somewhat limited because they did not bring about major changes to national laws as the UK already had a well-established framework of legislation for environmental protection. Some additional criminal offences were however created and there may have been an increased deterrent effect associated with the introduction of criminal penalties within certain regimes. There was no discernible increase of the number of people being prosecuted or to the severity of fines imposed, for similar reasons.

The experts affirmed that the logic of the Directive 2008/99/EC with an Annex listing *acquis*, which determines the scope of the Directive was challenging for Member States who followed this approach strictly (while others implemented it more broadly not limiting the offences to the legislation in the Annex). Other challenges were reported as to the vague notions (non-negligible quantity, significant impact etc.) contained in the Directives. Often transposition was done through a multitude of different sectorial instruments, which could at times be confusing and lack the desirable legal clarity.

Since the adoption of the Environmental Liability Directive regime in the UK there has been only one incident of water damage, two incidents of damage to nationally protected biodiversity, four incidents involving imminent damage to biodiversity, ten incidents of land damage and two incidents involving an imminent threat of land damage. This limited impact might derive from the significance of the thresholds for environmental damage set by the ELD regime.

In UK there are a great number of bodies agencies and organs, both local and regional, which deal with environmental matters. This state of affairs has an adverse impact on the implementation of environmental law, which due to this is very fragmented. Environment Agency is the main regulatory authority responsible for enforcing the vast majority of breaches of environmental law and approximately 80-90 per cent of all prosecutions for environmental crime. However, prosecution rates for environmental crimes are rather low if compared with the number of breaches of environmental law. The Environment Agency has wide powers and is

generally perceived as a professional enforcer that operates to high standards. There is a perception that the EA could take a tougher approach against those who flout the law or cause nuisance to local communities.

Among the different bodies there is a considerable amount of sharing of information, including with non-state actors. In the wildlife crime world, for example, the RSPCA plays a key role, as do many other NGOs. As far as the cooperation between the police, such as the NWCUC, and other domestic agencies is concerned, Government agencies, such as Natural England, Natural Resources Wales, Scottish Natural Heritage, Joint Nature Conservation Committee, provide the police with the necessary expertise in order to prosecute e.g. wildlife crimes. At the same time, there can be tensions when the NGO's (such as WWF, TRAFFIC or IFAW) have their own investigative arms (e.g. RSPB, RSPCA). In the past NGOs were playing a major role in providing for expertise that at the time was lacking at the police level (in UK there was not wildlife law enforcement till mid 1999). Nowadays the police have a full expertise on the investigation of wildlife crimes and they can always ask the support of independent government experts for investigation. Therefore, these agencies are often not embedded any more in the investigations. However, NGOs can be very supportive in providing for extra-funding to the NWCUC, in promoting partnership with the NWCUC (e.g. the Angling Trust that deals with poaching and fish theft) and also in educating people and engaging the communities at the local level (people in fact can become criminals simply by ignorance).

A considerable problem is the lack of reporting of environmental crime and reliable data. For example, the UK Crown Prosecution has issued guidance on wildlife crime¹⁹¹ and publishes data on major offences, although these information don't separate out environmental crime¹⁹².

It may be also mentioned that prosecutors have to properly understand the importance of the issues involved and know the legislation, which is unfortunately not always the case. In order to overcome this problem when e.g. the NWCUC takes a case to the magistrates they usually produce an impact statement (which would not be required by law) based on the best scientific advice: that evidence is important to make the magistrates and the CPS to understand the importance of the case. However, some important steps have been taken: in September 2009, the Magistrates' Association published "Costing the Earth: guidance for sentencers", which is a practical handbook for a wide range of environmental sentencing issues.

Thanks to the transposition of the European legislation in to the UK legal system, the enforcing officers, such as the police, can decide whether it is more appropriate to prosecute the crime under the domestic legislation or under the EU legislation or under both. By way of example, in the wildlife crime sector, if the case involves predominantly "conservation issues" it is more likely that the officers will apply the national legislation, whereas if the case involves trade in wildlife, the CITES Regulation (in combination with the Environmental liability Directive) is more likely to be relied upon. Certain cases can lead, though, to an overlap of charges so that the police can investigate on both charges (even if at the end it is always the CPS to decide on the final charges).

It is interesting to point out that the different systems in England/Wales, on the one side, and Scotland/Northern Ireland, on the other side, are of the great significance concerning environmental enforcement and prosecution. Inside the UK there are some procedural differences: in England and Wales the police are fully responsible for the investigations from the beginning to the end and they can prepare charges that are then referred to solicitors and to the Crown Prosecution Service (they decide if there are grounds to prosecute or not). Nevertheless, a huge shortcoming consists in the fact that proceedings are usually very slow. By contrast, in Scotland the police can investigate a case but if they want to take an enforcement action involving warrants they have to get first the approval from the prosecuting solicitors (Crown Office and Procurator Fiscal Service), which decide whether to give or not to grant the warrant. Therefore, in E&W if a police inspector has sufficient knowledge and is suspicious of a crime he/she can authorize the application to go before the magistrate to get the warrant, whereas in Scotland it is not the inspector who is in charge of this but only solicitors. This renders the entire procedure very slow. Furthermore, the level of evidence needed in E&W by a police inspector is much lower than the one required in Scotland. Apart from the above- described differences are some other factors which are very

¹⁹¹ https://www.cps.gov.uk/legal/v_to_z/wildlife_offences/.

¹⁹² <http://www.cps.gov.uk/data/index.html>.

important to implementation and enforcement in the UK. The lack of expertise etc. in Scotland/Northern Ireland of the prosecution authorities appear to be insufficient within the COPFS. However, even in the in England and Wales the number of prosecutions is still rather low, meaning that there are other shortcomings, such as the lack of funding.

Our recommendations are as follows:

As in case of Poland the existing legal regimes on environmental crimes is far too complex and fragmented. This creates difficulties in complying with the system, even when there is willingness to comply. There are also too many Agencies involved and, although there is a very good degree of coordination among them, the system still remains too complex. Environmental crimes are still not the priority in the UK legal system. That should be changed and statistics should be improved. In general, police and prosecution officers should accord more importance to environmental crimes. In our view the system of penalties is also too low in comparison to other Countries. Therefore, we recommend a general simplification and review of the relevant legislation and the application of appropriate and deterrent penalties accompanied by reviewed sentencing guidelines. A long term sustained funding of national agencies and specialist units should be established. From the UK Government should arrive commitment to ensure that properly trained experts are appointed in all environmental matters. Sentencing guidelines for all environmental crimes should be adopted and a better understanding of the European legislation (such as the ELD and the Environmental Crime Directive) should be introduced. Prosecutors' networks dedicated to the exchange and improvement of best practices should be instituted.

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