

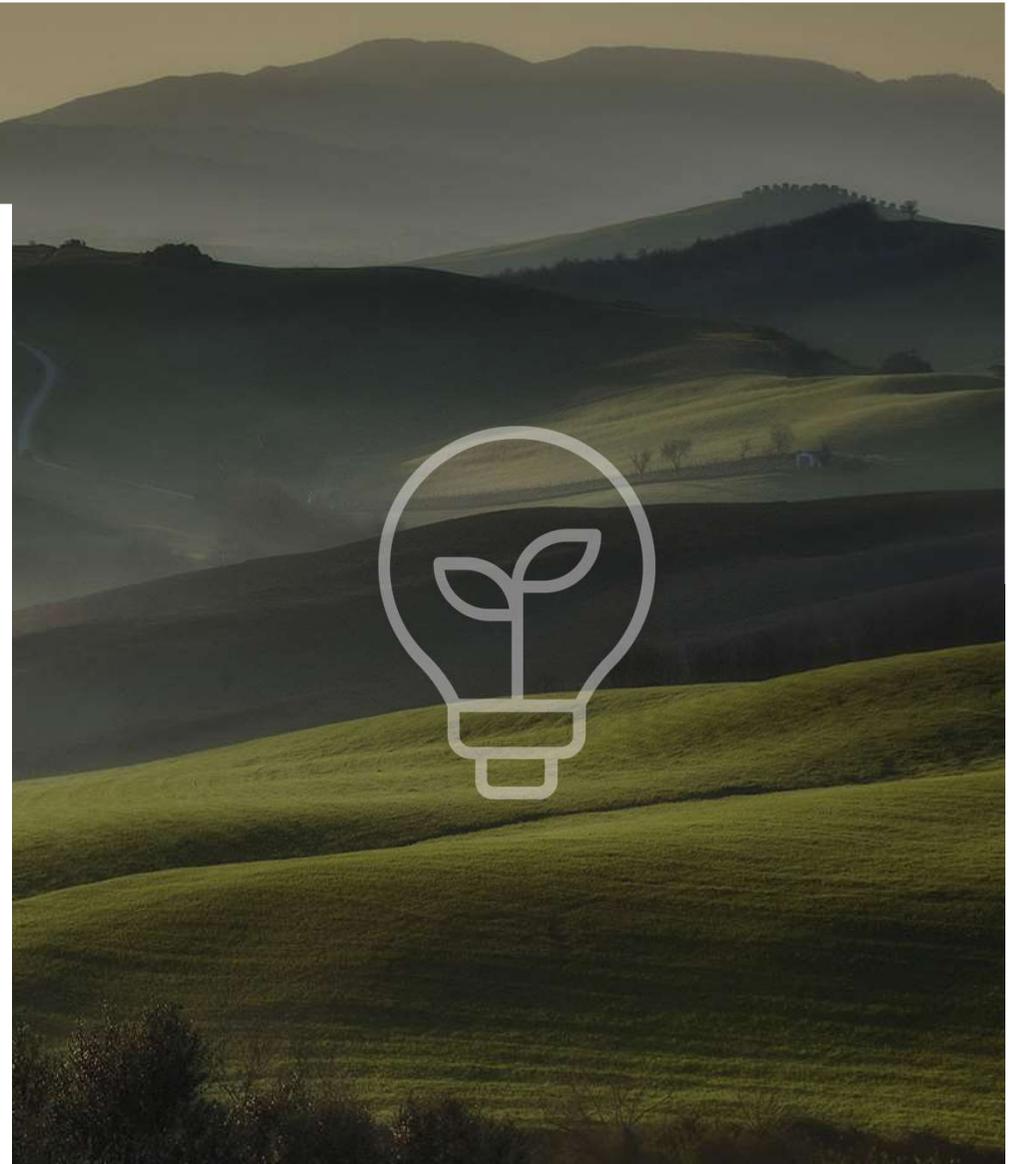


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# How vulnerable are companies and directors to criminal sanctions for environmental non-compliance, (supported by recent case law and practical examples)?

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## Company liability in criminal law

A company has its own legal personality or legal identity, which is separate from the identities of its directors; *Salomon v Salomon and Co Ltd* [1897] AC 22.

Nonetheless, *individual liability* for a criminal offence can arise in several ways, including under the:

- a. Doctrine of vicarious liability** – for an employee’s negligent actions committed in the course or scope of the employee’s employment or are closely connected with what the employee is authorised by the employer to do (see e.g. *Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* [2023] UKSC 15).
- b. Principle of identification.** Someone who at the material time was the “directing mind and will” of the company: *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. Applied: *Woodhouse v Walsall Metropolitan Borough Council* [1994] Env. L.R. 30).





## Key categories of corporate environmental offences

There is a wide range of offences for breach of environmental legislation. Some of the most common relate to:

- **Environmental Permitting** – the principal regime for regulating the environmental impacts of a wide range of industrial activities. The main offences are:
  - a. Carrying out an activity that requires a permit without said permit (regulation 38(1) of the Environmental Permitting (England and Wales) Regulations 2016);
  - b. Breaching permit conditions (regulation 38(2));
  - c. Several other offences relating to compliance with notices, record-keeping and provision of information (regulation 38(3)).
- **Waste** - the main waste offences are:
  - a. Carrying out a waste operation without an environmental permit;
  - b. The unauthorised deposit of waste (section 33(1) Environmental Protection Act 1990); or
  - c. Waste 'duty of care' offences (section 34).
- **Water discharges** - It is an offence to discharge pollutants into controlled waters or groundwater without an environmental permit.



## Directors' liability for environmental offences

### ***Consent, connivance or neglect***

A director or other officer commits an offence, as well as the company, if the offence committed by the company was either:

- a. Committed with the consent or connivance of the director or officer.
- b. Attributable to the neglect of the director or other officer.

The courts have clarified the terms 'consent', 'connivance' and 'neglect':

- a. **Consent.** A director is taken to have consented to the commission of an offence by the company when they are well aware of what is going on and have agreed to it; *Huckerby v Elliott* [1970] 1 All ER 189.
- b. **Connivance.** A director who is aware of what is going on, but gives tacit agreement only, not actively encouraging what happens but letting it continue and saying nothing about it, will be deemed to have 'connived'; *Huckerby*.
- c. **Neglect.** Neglect occurs where the person fails to perform a duty that they know or ought to have known about; *Re Hughes* [1943] 2 All ER 269.





Environmental regimes that contain 'consent', 'connivance' and 'neglect' provisions include:

- a. Environmental permitting offences, waste offences, water discharge offences and other offences under the permitting regime (regulation 41, Environmental Permitting (England and Wales) Regulations 2016).
- b. Environmental damage offences (regulation 34, Environmental Damage (Prevention and Remediation) (England) Regulations 2015).
- c. Packaging offences (section 95(2), Environment Act 1995).

EA guidance sets out the enforcement options for different offences. This includes consideration of the question whether a director or other officer can be liable for a particular offence if it is committed with the officer or director's consent, connivance or neglect.



## Enforcement, prosecution and sentencing

### *Environmental regulators and prosecutors*

The principal environmental regulators are:

- a. The Environment Agency ('EA');
- b. Natural Resources Wales;
- c. Local authorities;
- d. Natural England;
- e. Marine Management Organisation;
- f. CPS.

When prosecuting offences, regulators are expected to follow the 2014 Sentencing Council's guidelines for environmental offences.

In *R v Anderson (Gordon)* [2022] EWCA Crim 1465 the Court of Appeal considered the application of the environmental offences Sentencing Guidelines to a Director .





## **R v Anderson (Gordon) [2022] EWCA Crim 1465**

- Gordon Anderson, sole director of waste and recycling company Paperback Collection and Recycling (“PCR”), pleaded guilty to offences of excess storage and depositing of waste, contrary to the Environmental Permitting (England and Wales) Regulations 2016. PCR was convicted of an offence contrary to regulation 38 and Mr Anderson was convicted of an offence contrary to regulation 41; [1]-[18].
- Following the guilty pleas, Mr Anderson was sentenced to 15 months’ imprisonment, suspended for 18 months, a 15-year Director’s Disqualification Order, together with 250 hours of unpaid work; [3].
- Mr Anderson appealed against the sentence of 15 months’ imprisonment and the 15-year Director’s Disqualification Order



- Mr Anderson submitted that the judge had impermissibly pierced the corporate veil in taking into account the benefit to PCR as the financial gain of himself personally; [33].
- **“Corporate Veil:”** A metaphorical concept that the rights and duties of a corporation are solely the responsibility of the company alone, having its own ‘legal personality. Generally prohibited to ‘pierce the corporate veil’ and to disregard this concept in order to obtain a remedy against someone other than the company.
- The Court rejected this argument as “misconceived;” [64]. The judge was assessing the correct punishment to be imposed as a consequence of Anderson’s criminality and the concept of piercing the corporate veil *“had no relevance to the fact-finding exercise the judge needed to undertake in assessing culpability and harm regarding the particular director’s conduct.”* The sentencing judge was entirely correct to have regard to the motives, intent and conduct of the director in the context of the business activities of the company.



- Mr Anderson also argued that the disqualification period of 15 years was excessive. The Court agreed and, in giving their judgment, cited *Re Sevenoaks Stationers (Retail) Ltd* [1990] 3 WLR 1165 which identified three brackets in relation to disqualifications under section 6 of the Company Directors Disqualification Act 1986: Top (over 10 years), Middle (6 – 10 years) and Minimum (2 – 5 years); [45].
- 15 years was the maximum disqualification period and should be “reserved for particularly serious cases.” Anderson was a man of otherwise good character who, albeit late in the day, had pleaded guilty and who had never previously been subject to a disqualification order. The Court therefore decided that his sentence should fall in the middle bracket and that a period of 6 years’ disqualification was considered appropriate; [66].



## Case Study - EA Prosecutions of Water Companies

### ***Bold ambition but a lack of enforcement...***

- In the EA's Environmental Performance Report in 2021 it reviewed the environmental performance of the nine water and sewerage companies in England. It suggested a shocking deterioration in performance. Similar sentiments were expressed in the 2023 Report. An increase in prosecutions was promised and directors of companies would be held to account.
- There have been some landmark sanctions, such as the landmark £90 million fine against Southern Water, imposed on 9 July 2021, and a total of £141 million in fines secured against water and sewerage companies between 2015 and 2022.
- However, such actions do not represent the broader picture: data shows a 76.4% decrease in EA prosecutions from 2000 to 2010 and 2011 to 2021 respectively.





## ***Alternatives to prosecution***

The EA has made great use of alternative methods of punishing offenders. The original £250,000 limit on variable monetary penalties (“VMPs”, a form of discretionary civil fine) that the EA could impose directly on operators was lifted by The Environmental Civil Sanctions (England) (Amendment) Order 2023 with effect from 1<sup>st</sup> December 2023 and the range of offences for which VMPs can be imposed has been expanded.

Further, instead of prosecution, the EA may also consider accepting a voluntary offer made by an offender to put right both the effects of their offending and the impact on third parties, in an effort to make sure the offence cannot happen again. The EA confirmed it will only consider accepting an enforcement undertaking where it considers:

- a. It is not in the public interest to prosecute.
- b. The offer itself addresses the cause and effect of the offending.
- c. The offer protects, restores or enhances the natural capital of England.



## The European Perspective

### *The EU's Environmental Crime Directive*

- The Environmental Crime Directive entered into force on 20 May 2024 and has to be implemented by Member States within two years (Article 28).
- Aims to establish minimum rules on the definition of criminal offences and penalties in order to improve the protection of the environment.
- While an offence titled "ecocide" was not introduced by the Environmental Crime Directive, the accompanying recitals refer to "cases comparable to ecocide."
- For example, the so-called 'qualified offences' (Article 3(3)): offences causing the destruction of, or widespread and substantial damage to, an ecosystem or a habitat within a protected site, or widespread and substantial damage to air, soil, or water quality.





## ***France and Belgium***

- In 2021, France introduced the Climate Resilience Act which lays down criminal offences for causing “serious and lasting damage to health, flora, fauna or the quality of the air, soil or water”.
- On 22 February 2024, Belgium became the first European country to legally recognise ‘ecocide’ as a national and international crime.

## ***Equivalent progress in the UK***

- In November 2023, Baroness Boycott proposed a new private members’ Bill (“the Ecocide Bill”) to the UK House of Lords, just weeks after Scottish Labour and Co-op MSP, Monica Lennon, introduced a similar private members’ Bill (“the Ecocide Prevention Bill”) in the Scottish Parliament. Both Bills sought to deter mass environmental damage and destruction and aim to protect all natural resources such as air, water, soil, habitats, and wild flora and fauna.
- However, neither Bill was carried over to the current Parliament following July’s general election and the likelihood of the government introducing such a Bill within its present legislative timetable appear slim.



## Concluding Remarks

### *A slow but definite increase in ambition*

- Presently companies and directors are indeed vulnerable to criminal sanction for environmental non-compliance, though enforcement remains low.
- The likelihood of a civil sanction being applied, or an enforcement undertaking being agreed, is greater.
- That said, ambition is building for significant legislative change, albeit more so in Europe than domestically. Companies should therefore pay attention to legislative updates to be sure of their legal duties towards the environment.
- One of the best ways for companies to protect themselves and their directors and officers alike from liability for environmental contraventions is to have in place a properly functioning environmental management system.
- Directors and senior officers need to play an active role in ensuring that duties are discharged, failing which they risk being found guilty of neglect in the event of a serious environmental breach.





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