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# Evaluating the Effectiveness of the EU Environmental Liability and Environmental Crime Directives as Implemented by Scotland and the Rest of the United Kingdom

Mitchell Lennan 

## ABSTRACT

This article analyses critically the effectiveness of two EU Directives: Directive 2004/35/CE on Environmental Liability (ELD), and Directive 2008/99/EC on the Protection of the Environment through Criminal Law (ECD). As the effectiveness of these directives can only be judged through their implementation within a member state's jurisdiction, this article focuses on the United Kingdom—a now former member of the EU. A comparison is made between the implementation of these two directives in two discrete legal systems in the United Kingdom: that of Scotland, and the rest of the United Kingdom (rUK), that is, England, Wales, and Northern Ireland. This article begins by establishing the roots of the ELD's weaknesses by examining how the ELD has been transposed in the rUK and Scotland. It then turns to whether these weaknesses have been addressed by the implementation of the ECD. Finally, the effectiveness of the ECD regime is assessed by examining how both Scotland and the rUK deal with wildlife crime. This article ultimately concludes that despite implementing the two regimes through separate legal systems, both face similar shortcomings that limit their effectiveness.

## 1. Introduction

This article presents a critical analysis of the effectiveness of both EU Directive 2004/35/CE on Environmental Liability (ELD)<sup>1</sup> and Directive 2008/99/EC on the Protection of the Environment through Criminal Law (ECD).<sup>2</sup> It has been argued that both regimes can only be effective if fully implemented by the 27 EU member states.<sup>3</sup> However, it is not within the scope of this article to examine each member state's implementation of the two regimes in detail. Instead, this article focuses on how these two

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<sup>1</sup>Council Directive 2004/35/CE, 2004 O.J. (L 143) 56 [hereinafter ELD].

<sup>2</sup>Council Directive 2008/99/EC, 2008 O.J. (L 328) 28 [hereinafter ECD].

<sup>3</sup>Andrew Jordan, *The Implementation of EU Environmental Policy: A Policy Problem Without a Political Solution?*, 17 ENV'T & PLANNING 69, 69 (1999).

directives have been implemented in two discrete legal systems within the United Kingdom: Scotland's, and that governing the rest of the United Kingdom (rUK), which comprises England, Wales, and Northern Ireland. Legislative competence in environmental and criminal matters have been devolved to the Scottish government since 1998,<sup>4</sup> and as such, Scotland implemented the ELD and ECD separately from the rUK. Though the UK is no longer a member of the EU, the legislation analysed here remains in force. It is therefore still worth examining how this separate implementation may bring about a difference in the joint effectiveness of the ELD and ECD. This article begins by establishing the roots of the ELD's weaknesses by examining how the ELD has been transposed in the rUK and Scotland. The focus of the article then turns to whether these weaknesses have been addressed by the implementation of the ECD. Finally, the effectiveness of the ECD regime is assessed by examining how both Scotland and the rUK deal with wildlife crime. This article ultimately concludes that despite implementing the two regimes through separate legal systems, both face similar shortcomings that limit their effectiveness.

## 2. The Environmental Liability Directive

### 2.1. Overview

The aim of the ELD is to establish a framework of liability for environmental damage underpinned by the “polluter-pays” principle,<sup>5</sup> whereby the obligation and costs of remediating environmental damage fall on the operator whose activity caused the damage. To evaluate the effectiveness of the ELD, we must first identify the root causes of the directive's weaknesses. These weaknesses are primarily due to the flexibility in implementation of the ELD given to member states; state governments are given discretion on whether to implement certain provisions that give states the option to widen the scope of the ELD. States also have the option to go further by adopting more stringent provisions for the prevention and remedying of environmental damage.<sup>6</sup> This has led to a differentiation in approaches across the EU, with some member states creating a stringent regime of environmental liability, and most others opting for the “minimum implementation” approach, in which they forgo extending the scope

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<sup>4</sup>*Devolved and Reserved Matters*, THE SCOTTISH PARLIAMENT, <https://www.parliament.scot/visitandlearn/Education/18642.aspx> (last visited March 22, 2021).

<sup>5</sup>Consolidated Version of the Treaty on the Functioning of the European Union art. 191(2), October 26, 2012, 2012 O.J. (C 326) 47, 132.

<sup>6</sup>ELD, *supra* note 1, at 64.

of the ELD and go no further than the directive mandates.<sup>7</sup> Over the whole EU, transposition of the directive into national law by member states is described as “cumbersome.”<sup>8</sup> Doubt has been expressed as to whether the directive can actually realise the preventative, precautionary, and polluter-pays principles, as well as ensure the restoration of damage to the environment, due to the minimum implementation approach taken by many member states.<sup>9</sup> Prior to Brexit, the rUK government stipulated that its policy was to never go above or beyond the minimum requirements of an EU directive “unless there are exceptional circumstances, justified by a cost-benefit analysis and following extensive stakeholder engagement.”<sup>10</sup> Although the Scottish government has made no such claim, one could speculate that since Scotland is a country *within* the UK, it may have had a similar policy. We next take a closer look at how the ELD has been transposed into national law by the rUK and Scottish governments to gain insight into the effectiveness of the regime.

## **2.2. The ELD in the UK: A Comparative Approach**

The rUK government transposed the ELD into three regulations for England,<sup>11</sup> Northern Ireland,<sup>12</sup> and Wales.<sup>13</sup> Scotland transposed the ELD separately into its national law.<sup>14</sup> The UK has been criticised for undertaking a minimalist approach in its implementation of the ELD by not utilising certain provisions to extend the ELD’s scope and for using certain provisions to benefit businesses over the public and environment. Each of these provisions is next examined in turn, while comparing the rUK and Scottish legislation to assess the effectiveness of the environmental liability regime in the UK as a whole.

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<sup>7</sup>Kristel De Smedt, *Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive*, 18(1) EUR. ENERGY AND ENVTL. L. REV. 2, 13 (2009).

<sup>8</sup>*Id.* at 2.

<sup>9</sup>*Id.* at 13.

<sup>10</sup>ENVIRONMENT, FOOD AND RURAL AFFAIRS COMMITTEE, IMPLEMENTATION OF THE ENVIRONMENTAL LIABILITY DIRECTIVE, 2006–7, H.C. 694 at 10 [hereinafter EFRA Committee].

<sup>11</sup>Environmental Damage (Prevention and Remediation) Regulations 2009, 2009, S.I. 2009/153, (Eng.) [hereinafter Env’tl. Protection Reg., Eng.].

<sup>12</sup>Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009, 2009, S.R. 2009/252 [hereinafter Env’tl. Protection Reg., N. Ir.].

<sup>13</sup>Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009, 2009, S.I. 2009/995 [hereinafter Env’tl. Protection Reg., Wales].

<sup>14</sup>Environmental Liability (Scotland) Regulations 2009, 2009, S.I. 2009/266 [hereinafter Env’tl. Protection Reg., Scot.].

### 2.3. Protected Species and Habitats

Under the ELD as implemented by the rUK, “protected species” only encompasses species mentioned in Article 4(2) or Annex I of the Wild Birds Directive<sup>15</sup> or the species mentioned in Annex II and IV of the Habitats Directive.<sup>16</sup> Similarly, the definition of “natural habitats” is restricted to habitats of species,<sup>17</sup> natural habitats,<sup>18</sup> and breeding sites<sup>19</sup> mentioned in the Habitats and Wild Birds Directives.<sup>20</sup> Despite advice from competent authorities in the rUK (Natural England and Environment Agency) and environmental organisations, the rUK government has chosen not to use its discretion under the directive to extend the ELD to fully cover biodiversity and habitats that are protected under national law.<sup>21</sup> Those left out include some Sites of Special Scientific Interest (SSSIs). Specifically, these are the SSSIs not included in Section 28 of the Wildlife and Countryside Act<sup>22</sup> or those designated as Special Protection Areas (SPAs) for birds and Special Areas of Conservations (SAC) (Natura 2000 sites) created under the Wild Birds and Habitats Directives, respectively. Also left out are species and habitats listed by competent authorities under the UK Biodiversity Action Plan (BAP). Nongovernmental organisations (NGOs) such as Friends of the Earth (FoE)<sup>23</sup> and the Royal Society for Protection of Birds (RSPB)<sup>24</sup> have criticised the rUK government’s decision, claiming that failing to include nationally protected biodiversity has left 25% of SSSIs and 66% of BAP species in the rUK—including species popular among the public, such as the red squirrel—exposed and unprotected by the provisions of the ELD.<sup>25</sup> One could argue that failing to cover these species and habitats under the ELD is a missed opportunity to further the directive’s objective to make operators liable for damage.

In Scotland, the definitions of protected species and habitats are identical to the legislation in the rUK.<sup>26</sup> BAP species and habitats, apart from those covered by the Wild Birds or Habitats Directives, are not covered under

<sup>15</sup>Council Directive 79/409/EEC, 1979 O.J. (L 103) 1 [hereinafter Wild Birds Directive].

<sup>16</sup>Council Directives 92/43/EEC, 1992 O.J. (L 206) 7 [hereinafter Habitats Directive].

<sup>17</sup>Wild Birds Directive, *supra* note 15, at 3.

<sup>18</sup>Habitats Directive, *supra* note 16, at 8.

<sup>19</sup>Wild Birds Directive, *supra* note 15, at 3, 18.

<sup>20</sup>Envtl. Protection Reg., Eng., *supra* note 11, at art. 2, ¶ 1; Envntl. Protection Reg., Wales, *supra* note 13, at art. 2, ¶ 1; Envntl. Protection Reg., N. Ir., *supra* note 12, at art. 2, ¶ 1.

<sup>21</sup>ELD, *supra* note 1, at 59. See Friends of the Earth Scotland, *Scottish Executive Environment Group Consultation on the Environmental Liability Directive: A Response from Friends of the Earth Scotland*, March 23, 2006, [https://foe.scot/wp-content/uploads/2017/08/Env\\_Liability\\_response.pdf](https://foe.scot/wp-content/uploads/2017/08/Env_Liability_response.pdf) [hereinafter FoE Response].

<sup>22</sup>Wildlife & Countryside Act, 1981, c. 69, § 28 (UK), <https://www.animallaw.info/sites/default/files/Wildlife%20and%20Countryside%20Act%201981.pdf> [hereinafter Wildlife & Countryside Act].

<sup>23</sup>Friends of the Earth, <https://www.foe.co.uk> (last visited March 22, 2021).

<sup>24</sup>The Royal Society for the Protection of Birds, <https://www.rspb.org.uk> (last visited March 22, 2021).

<sup>25</sup>FoE Response, *supra* note 21, at 1.

<sup>26</sup>Envntl. Protection Reg., Scot., *supra* note 14, at art. 2, ¶ 1.

the environmental liability regulations in Scotland. All SSSIs apart from Natura 2000 sites (SACs and/or SPAs) are excluded from protection. Under this legislation, there is a situation in which an SSSI can contain a Natura 2000 feature and, as such, only the Natura 2000 feature is protected under the ELD. This means that in a situation in which more than one species or habitat are damaged at the same time, the different species or habitats could be under different levels of protection. As a Natura 2000 feature, one or more species could have its damage remedied under the ELD and another would not. This has been regarded as “confusing, unfair and inequitable” by conservation groups during a consultation by the Scottish government.<sup>27</sup>

Both examples just described of the rUK and Scottish systems illustrate how separate implementation of the ELD within a single member state can result in a differentiation in approaches. Ultimately, the directive’s potential has been limited by the minimalist implementation approach taken by the rUK and Scottish governments in regard to protecting biodiversity under the scope of the ELD.

#### **2.4. Favouring Business Over the Public?**

Because it has applied a minimum implementation policy, the rUK government has been accused of favouring business over the welfare of the public. Favouring business ignores the potential socioeconomic benefits of extending the scope of the ELD unless such exemptions would lift burdens from businesses.<sup>28</sup> Therefore, it is worth assessing whether there is evidence of this in the rUK and in Scottish environmental liability legislation to examine how it limits the effectiveness of the ELD in the UK.

Optional provisions within the ELD allow states to deviate from the polluter-pays principle, which can arguably limit the effectiveness of the regime. Under the ELD, member states can make available to operators the opportunity not to bear the cost of remediating environmental damage caused by activities listed in Annex III of the ELD. These are the “permit” and the “state-of-the-art” defences.” “Permit” defences apply when damage to the environment was a result of an activity under instruction of a public authority or a permit. “State-of-the-art” defences apply when environmental damage was caused by an activity that, under the best available scientific and technical knowledge, would not be expected to cause damage to the

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<sup>27</sup>*Environmental Liability Directive, The Scottish Government’s 2nd Consultation NGO Coalition Response*, <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/Doc/244256/0068280.pdf>.

<sup>28</sup>Gerd Winter, Jan H. Jans, Richard Macrory, and Ludwig Krämer, *Weighing up the EC Environmental Liability Directive*, 20(2) J. ENVTL. L. 163, 185 (2008). See EFRA Committee, *supra* note 10, at 3.

environment. Both defences require that the operator not be at fault or negligent while undertaking activities listed in Annex III of the ELD.<sup>29</sup>

The rUK and Scottish governments have allowed both the permit and the state-of-the-art defences for operators undertaking activities that would otherwise fall under the strict liability provision of the ELD. FoE considers the state-of-the-art defence particularly “dangerous” in relation to new technology such as genetically modified organisms (GMOs) and nanotechnology. FoE is concerned that this defence may give businesses a perverse, “better not to know” incentive to explore these new technologies without considering the potential environmental harms that may result.<sup>30</sup> Such a situation is troubling, of course, as this is essentially the antithesis of the precautionary principle. It is important to note that the Welsh government has removed the permit defence from the Welsh environmental liability regulations.<sup>31</sup>

As laid out in the preceding, the shortcomings of the ELD can be a result of the rUK and Scottish governments’ failure to utilise the optional provisions within the directive. Scholars argue that the minimalist approach taken indicates a lack of intent to “strengthen and harmonise national legislation concerning liability for environmental damage.”<sup>32</sup> We look now to how the provisions of the ECD compliment the ELD.

### 3. The Environmental Crime Directive

Under the ECD, member states are required to harmonise their national legislation on environmental crime.<sup>33</sup> It can be argued that many environmental crimes are global and transboundary in nature; therefore, weak or inadequate legislation in one state limits the effectiveness of a more diligent neighbouring state. This is the rationale behind the use of criminal law enforcement to tackle environmental crime and the insufficient sanctions of member states.<sup>34</sup> Article 3 ECD lists offences that have the potential to cause serious damage to human health and the environment.<sup>35</sup> Instead of making new activities illegal, the directive relies on member states to make these listed activities criminal offences, provided they are committed “intentionally or at least with serious negligence,” with member states left free to define *inter alia* the exact meaning of “serious negligence.”<sup>36</sup> This section first examines the ECD in the UK as a whole. Then, focusing first

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<sup>29</sup>ELD, *supra* note 1, at 62.

<sup>30</sup>FoE Response, *supra* note 21, at 1.

<sup>31</sup>Envtl. Protection Reg., Wales, *supra* note 13.

<sup>32</sup>Winter et al., *supra* note 28, at 185.

<sup>33</sup>See ECD, *supra* note 2.

<sup>34</sup>Anna Odby, *Recent EU Developments in Environmental Criminal Law from a UK Perspective—Part I*, BLOOMBERG EUROPEAN L. J. (2009).

<sup>35</sup>ECD, *supra* note 2, at 29–30.

<sup>36</sup>See *id.*

on the issue of civil penalties and then turning to the issue of wildlife crime, this section proceeds to look critically into the ECD's effectiveness in working with the ELD. Again, as with the previous section concerning the shortcomings of the ELD, this is a comparative analysis that examines the legislation of the rUK followed by the legislation in Scotland.

### **3.1. The ECD in the UK**

Rather than being codified as a single act in the UK, environmental criminal law is a *mélange* of different pieces of legislation, including the 1990 Environmental Protection Act<sup>37</sup> and the 1991 Water Resources Act.<sup>38</sup> This means the ECD in its “informal” transposition did not conceive new national laws.<sup>39</sup> Although it can be argued that Article 3 ECD shifts the burden of proof onto the prosecutor regarding “intent or serious negligence,” the UK makes extensive use of strict liability offences. This allows for conviction based on the commission or omission of the act alone, without requiring proof of intent, negligence, or recklessness. This is one area where UK environmental criminal law goes further than the provisions of the ECD, making prosecutions and enforcement easier and, depending on the crime, acting as a specific or general deterrent.<sup>40</sup> We focus next on the investigatory bodies of the rUK and Scotland, how their powers have improved because of the ECD, and how this has in turn improved the joint effectiveness of the ELD and ECD.

### **3.2. Investigation and Prosecution**

Investigation and prosecution are handled differently by the Environment Agency (EA)<sup>41</sup>—the rUK's most important investigatory and regulatory body for environmental crimes—and the Scottish Environmental Protection Agency (SEPA)<sup>42</sup>—Scotland's EA counterpart. Although SEPA is responsible for air pollution control in Scotland, it can only claim prosecutions via the Crown Office and Procurator Fiscal Services (COPFS), and is unable to claim any expenses;<sup>43</sup> the EA can bring prosecutions and claim expenses, but is not responsible for air pollution control, which instead falls under

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<sup>37</sup>Environmental Protection Act, 1990, c. 43 (UK).

<sup>38</sup>Water Resources Act, 1991, c. 57 (UK).

<sup>39</sup>Milieu Ltd., *Evaluation Study on the Implementation of Directive 2008/99/EC on the Protections of the Environment through Criminal Law by Member States 22* (2014) [hereinafter Milieu Ltd.].

<sup>40</sup>*Id.*

<sup>41</sup>Gov.UK, *Organizations*, ENVIRONMENT AGENCY <https://www.gov.uk/government/organisations/environment-agency/about> (last visited March 22, 2021).

<sup>42</sup>See Scottish Environment Protection Agency, *Regulations: Environmental Crime Protocol*, <https://www.sepa.org.uk/regulations/how-we-regulate/policies/environmental-crime-protocol> (last visited Mar. 22, 2021).

<sup>43</sup>*Id.*



local authority. The case law is limited regarding environmental crime in the UK, as prosecution is only used as a last resort after a failure to comply voluntarily with regulators.

This brings us to the topic of civil sanctions. It has been noted that the UK relied too heavily on criminal prosecutions, which were often disproportionate reactions to the gravity of the offences committed.<sup>44</sup> As Pereira indicates, the UK previously limited the ability of regulatory bodies to directly apply sanctions, with the only options available to regulators being deterrent administrative measures that gave the regulator the power to revoke licenses and close operations.<sup>45</sup> Civil penalties, however, resemble criminal fines rather than civil damages from the private law sector; their benefit is that their primary purpose is to act as a deterrent while still punishing the offender.<sup>46</sup> We will now compare the rUK and Scottish legislation regarding civil sanctions for regulatory bodies to gain a clearer view of the effectiveness of this regime.

### 3.3. Civil Sanctions

The Regulatory Enforcement and Sanctions Act (2008) gave powers to the Secretary of State for the Environment to create and grant powers for regulatory bodies to apply civil penalties.<sup>47</sup> The EA, with other regulatory bodies, was thus granted powers to apply civil sanctions to deal with non-compliance of environmental regulations under the Environmental Civil Sanctions Order 2010 (England), along with an identical order for the EA Wales.<sup>48</sup> Regulatory bodies are now able to issue orders of compliance, restoration, stop notices, fixed and variable monetary penalties, and enforcement undertakings. This advance in enforcement power has arguably strengthened the ability of regulatory bodies in the rUK to deal with non-compliance and breaches of environmental law in a manner that is more flexible and in line with the principle of proportionality.<sup>49</sup>

The Regulatory Reform Act 2014 (Scotland) empowered Scottish Ministers to grant regulatory bodies the ability to enforce certain civil sanctions.<sup>50</sup>

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<sup>44</sup>RICHARD MACRORY, REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE 3 (2006); Milieu Ltd., *supra* note 39, at 21.

<sup>45</sup>RICARDO M. PEREIRA, ENVIRONMENTAL CRIMINAL LIABILITY AND ENFORCEMENT IN EUROPEAN AND INTERNATIONAL LAW 83 (2015).

<sup>46</sup>Milieu Ltd., *supra* note 39, at 22.

<sup>47</sup>Regulatory Enforcement and Sanctions Act, 2008, c. 13 (UK).

<sup>48</sup>Environmental Civil Sanctions (England) Order 2010, 2010, S.I. 2010/1157; Environmental Civil Sanctions (Wales) Order 2010, 2010, S.I. 2010/1821.

<sup>49</sup>Department for Environment, Food, and Rural affairs (DEFRA), *Civil Sanctions for Environmental Offences, Guidance to Regulators in England on How the Civil Sanctions Should be Applied, and Draft Guidance for Wales* 3 (2010), [http://www.fwr.org/WQreg/Appendices/Civil\\_Sanctions\\_defra-wag-guidance.pdf](http://www.fwr.org/WQreg/Appendices/Civil_Sanctions_defra-wag-guidance.pdf); Milieu Ltd., *supra* note 39, at 22.

<sup>50</sup>Regulatory Reform (Scotland) Act, 2014, (A.S.P. 3), Part 2, § 12.

As such, SEPA was granted the power to impose fixed or variable monetary penalties, accept enforcement undertakings, and impose penalties of non-compliance regarding said undertakings.<sup>51</sup> This is considerably more limited than the powers granted to the EA, as powers to order compliance and issue stop notices still lie with the COPFS. However, SEPA has relied on the COPFS and the courts to issue monetary penalties; therefore, the power granted to issue fixed and variable penalties, with guidance from the Lord Advocate, is a marked improvement.<sup>52</sup> This act, however, does not grant any extra power to Scottish Natural Heritage (SNH), as was recommended by the Rural Affairs, Climate Change and Environment Committee of the Scottish Parliament.<sup>53</sup> SNH has some limited enforcement power relating to wildlife crime, and this is discussed in the following. Additionally, under the act, courts, when making a compensation orders relating to persons committing an offence, must consider any financial gain the offender received because of the crime in calculating the fine to be ordered. This is in line with the ECD provisions on effective and dissuasive punishments in Article 7. Although the instruction to consider the financial gain of a crime committed when calculating a fine is appropriate for punishing environmental crime, one could argue that by failing to extend the regulatory powers to SNH as it has to SEPA, the Scottish government missed an opportunity to further improve the Scottish environment regime.

The level of freedom for regulatory bodies is notably different between Scotland and the rUK. In the rUK, with some exceptions, criminal proceedings cannot be undertaken after a civil penalty has been served. This is beneficial, as it can be said to lift both the burden and reliance on the criminal prosecution system while still holding the offenders liable. Both nations benefit from the concept of variable monetary penalties, which allows for the penalty sum to be adjusted to reflect the nature and severity of the crime, the attitude of the offender, and so on. This gives the regulators a new level of discretion and, when compared with the previous “administrative penalties” that were fixed and enforced by the criminal justice system on behalf of the regulator, can arguably increase the effectiveness of how environmental crimes are dealt with in the UK. Indeed, the provisions of the ECD and ELD appear to complement one another, improving the effectiveness of the environmental justice system of the UK. Our focus now turns to how the environmental liability and crime regimes treat wildlife crime.

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<sup>51</sup>The Environmental Regulation (Enforcement Measures) (Scotland) Order, 2015, S.I. 2015/383, Part 3.

<sup>52</sup>Andrea Ross, *Legislation and Policy: Regulatory Reform (Scotland) Bill*, 15 ENVTL. L. REV. 290, 291 (2013).

<sup>53</sup>*Id.*

### 3.4. Case Study: Crimes Committed Against Wildlife and Habitats

The ECD requires that harm to species and sites protected under the Habitats and Birds Directives be made a criminal offence.<sup>54</sup> This is in agreement with a judgement in Ireland where the court held that despite the Habitats Directive's conception over two decades ago, the introduction of criminal sanctions has been necessary for the Habitats Directive to be implemented correctly.<sup>55</sup> Although much of the required legislation already exists in the UK,<sup>56</sup> it has been viewed as overly complicated, contradictory, and requiring professional specialisation on behalf of the authority. It is thus seen to create barriers in wildlife management.<sup>57</sup>

In Scotland, the Wildlife and Natural Environment Bill<sup>58</sup> was introduced in 2010. The resulting Act<sup>59</sup> granted the regulatory body SNH the power to issue resolution notices following unlawful action resulting in damage to an SSSI.<sup>60</sup> The offender must restore the site voluntarily, and failure to do so constitutes an offence of non-compliance with the resolution order. After outlining shortcomings in the protections of SSSIs in Scotland in the previous section, this is an example of the ELD and ECD working in unison. The offender is held liable for the damage, given punitive action and the responsibility to repair the damage, and will face prosecution for failure to do so. Reid comments that such power gives "SNH much more direct control over securing restoration of a damaged site" as previously, action by the offender to restore any damage was either voluntary or enforceable only after SNH convinced the procurator fiscal to prosecute.<sup>61</sup> As outlined previously, the rUK EA has more extensive regulatory powers to enforce compliance and punish non-compliance regarding protected habitats. However, this can be viewed as progressive on Scotland's part, and we may see SEPA and SNH with more regulatory powers in the future.

Another example highlighting the ELD's and ECD's complimentary relationship is Scotland's vicarious liability legislation, which was introduced in 2012.<sup>62</sup> This legislation created a new offence of "causing or permitting" environmental harm and placed a new related obligation of due diligence on employers. This is in line with Article 6 of the ECD regarding making

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<sup>54</sup>Wild Birds Directive, *supra* note 15; Habitats Directive, *supra* note 16.

<sup>55</sup>O'Connor v. Dir. of Pub. Prosecutions [2015] IEHC 558 at ¶ 89 (H. Ct.) (Ir.).

<sup>56</sup>E.g., Wildlife & Countryside Act, *supra* note 22.

<sup>57</sup>Law Commission, *Wildlife Law*, <http://www.lawcom.gov.uk/project/wildlife-law> [hereinafter Law Commission] (last visited March 22, 2021).

<sup>58</sup>Wildlife and Natural Environment (Scotland) Bill 2010, SP Bill 52 (3d Sess. 2010).

<sup>59</sup>Wildlife and Natural Environment (Scotland) Act, 2011, (A.S.P. 6).

<sup>60</sup>Nature Conservation (Scotland) Act, 2004, (A.S.P. 6), Part 2 §§ 19(1), (3).

<sup>61</sup>Colin Reid, *Wildlife Reforms in Scotland* 12(4) ENVTL. L. REV. 253, 261 (2010).

<sup>62</sup>Wildlife & Countryside Act, *supra* note 22, at § 18A.

legal persons liable for environmental crimes, a provision not included in the ELD.

An illustrative example of vicarious liability being applied to wildlife crime in Scotland is in the case of raptor persecution. If an estate owner employs a gamekeeper who causes harm—usually through traps or poisoning—to birds of prey (or any protected species) on the land, the estate owner can be vicariously liable.<sup>63</sup> Two recent cases in Scotland have set a precedent on this issue. In 2014, a landowner was found vicariously liable and fined for wildlife crimes committed by his gamekeeper, who poisoned a buzzard and was in possession of pesticides requiring a prescription. The landowner was fined £625, and a six-figure sum was removed from his Single Farm Subsidy. The following year, a gamekeeper given a custodial sentence of four months for using traps illegally and for the killing of a protected raptor species similar crime, with the judge commenting that raptor persecution is a huge problem for the UK and a “deterrent approach was appropriate.”<sup>64</sup> Indeed, this is again in line with the provisions of the ECD, which requires member states to ensure that legal persons held liable under Article 6 are punishable by “effective, proportionate and dissuasive penalties.” While the ECD does not specify the type or level of sanctions, the courts in Scotland appear to have no problem applying deterrents regarding raptor persecution. This is an effective use of the provisions of the ECD, which compliments the shortcomings of the ELD regarding the liability of legal persons. Despite facing similar problems with raptor persecution, no such provisions exist in the rUK. This is disappointing, as raptor persecution by gamekeepers on country estates is widespread but very difficult to detect.<sup>65</sup> The vicarious liability provisions, therefore, can ensure that persons are held liable and brought to justice. It is thus arguable that Scotland is leading the way in this area, with the hope that the rUK will follow suit.

A plan to scrap the current national and EU wildlife crime legalisation and bring everything under one umbrella statute (implemented separately by Scotland and the rUK) has been proposed.<sup>66</sup> This would use a mix of civil sanctions and regulatory measures, and would extend the sentence for the “most serious” wildlife crimes to two years in prison.<sup>67</sup> One could argue that as the whole UK shifts away from criminal persecution to civil sanctions in this area, the introduction of a more coherent set of wildlife

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<sup>63</sup>*Id.*

<sup>64</sup>Both cases are discussed in Ian Thomson, *The Illegal Killing of Birds of Prey in Scotland*, 3(1) SCOTTISH JUSTICE MATTERS 19, 20 (2015).

<sup>65</sup>*Id.*

<sup>66</sup>Law Commission, *supra* note 57.

<sup>67</sup>*Id.*

crime laws makes the system more effective overall. In addition, it can be said that while the relevant legislation required by the ECD already existed in the UK, transposing the ECD into law in Scotland and the rUK provided the opportunity for a critical examination of wildlife crime legislation, with a view to improving its effectiveness across the UK as a whole.

As laid out in the preceding, the issue of wildlife crime within the UK is appropriate to illustrate how the effectiveness of the ECD, which complements the provisions of the ELD, depends on its implementation by EU member states. While the regulatory bodies in the rUK have more enforcement power than in Scotland, Scotland has made effective use of vicarious liability law to tackle wildlife crime.

#### **4. Conclusions**

This article has offered a critical appraisal of the environmental liability and environmental crime directives through the lens of two discrete legal systems within the United Kingdom. Although the United Kingdom is no longer a member of the EU, this article has illustrated that the ELD is limited in its effectiveness by the optional provisions that member states can choose not to implement, such as failure to bring nationally protected species and habitats under the ELD and allowing the permit and state-of-the-art defences. The ECD, however, is complementary to some of the shortcomings of the ELD, which has resulted in both Scotland and the rUK introducing greater enforcement powers to their regulatory bodies. This helps to ensure that offenders are held liable through the issuance of punitive civil sanctions, with non-compliance then leading to criminal prosecution. Illustrated through the example of wildlife crime, we have seen that although the scope of regulatory powers is more limited in Scotland, it leads the way in its vicarious liability law, which ensures the employers or agents who authorised an environmental crime are held liable. Indeed, it can be said that the two directives individually have their limitations, but together are complimentary, which is testament to their effectiveness.

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