

Defences and Criteria of Allocation of Liability

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Environmental Liability and Crime

EFFACE Workshop

Brussels, 6 November 2014

Roadmap

1. Defenses distinguished from other exceptions to liability
2. Defenses/exceptions and administrative and criminal liability (ELD v ECD)
3. Specific defenses/exceptions under ELD and ECD compared
4. Special situations of allocation of liability
5. Conclusions

1. Defenses distinguished from other exceptions to liability

Defenses and exceptions

- **Defense is not the same as other exceptions**
- Two main differences:
 - **Burden of proof:** in case of defense, in principle, defendant must prove the existence of the conditions giving rise to the defense
 - **Judiciary's obligation:** judge does not have to apply defense ex officio, but reviews only if defendant invokes it
 - But there may a difference between administrative/civil and criminal law in this regard

Defenses and exceptions

- Thus, defenses are **special potential exceptions**
- Defenses are made available, in general, where:
 - specific facts, cases, circumstances, or conditions **justify not imposing liability**; and
 - **defendant generally possesses best available information** on those facts
- If these two conditions are not met, is other exception to liability more appropriate?

Exceptions

- **This is also a technical issue:** whether an exception is necessary, depends also on the description of the primary requirement or prohibition
 - “killing a **non-negligible quantity** of protected species” (no exception) versus
 - “killing a quantity of protected species, **except if negligible**” (exception for negligible quantity)
 - What is the difference, if any?

2. Defenses/exceptions and administrative and criminal liability (ELD v ECD)

Environmental Policy Principles

- **Polluter pays principle** (Article 130 R EU Treaty)
 - Who is the polluter? The operator?
 - Why should the polluter pay? Incentives and cost internalization theory
- **Prevention principle** (Article 130 R EU Treaty)
 - What does it mean?
 - “An ounce of prevention is worth a pound of cure”
 - A way to address certain risk?

Administrative and Criminal Liability

- ELD is **administrative liability** and pursues both the **polluter pay principle** and **prevention principle**
 - Liability serves to both restore and prevent damage; financial incentives for prevention
 - But ELD also directly prevents damage through preventive obligations in case of an imminent threat of damage occurrence of such damage
 - Compliance with the law is not a defense, except ...

Administrative and Criminal Liability

- Criminal liability pursue **preventive principle** and, maybe secondarily, **polluter pays principle**
 - Directive does not say so, but refers to “**better protection of environment**” (prevention)
 - Any person is liable if it commits listed offences (i.e. (“**unlawful**” conduct) “**intentionally**” or with “**serious negligence**”
 - Unlawful means in violation of EU environmental legislation listed in annex
 - “Intentional” may refer to conduct, rather than offence, but if intent is construed in an objective manner difference narrows

Administrative and Criminal Liability

- Criminal liability pursues **preventive principle** and, maybe secondarily, **polluter pays principle**
 - **Prevents non-compliance**, not necessarily environmental damage
 - Environmental **damage is not necessarily a requirement**
 - Where **compliance prevents** damage, Environmental Crimes Directive indirectly prevents damage
 - Note that **ELD is not covered** by the Environmental Crime Directive: **why not?**
 - ELD is typically enforced through administrative process back up by civil court enforcement of administrative order to pay or cease and desist

3. Specific defenses/exceptions under ELD and ECD compared

ECD/ELD Defences/Exceptions

- **ELD sets forth defences but ECD does not!**
 - How can that be?
 - **Defences are provided under Member State national criminal laws**
 - ECD requires that Member States treat covered conduct as crimes or offenses punishable by proportionate and dissuasive sanctions, but does not rule out defences
- **Both ELD and ECD set forth exceptions**

ECD Exceptions

- **ECD sets forth a few specific exceptions:**
 - destruction of protected wild fauna or flora species, except for “negligible quantity” and “negligible impact on the conservation status of the species»
 - trading in protected wild fauna or flora species, except for “negligible quantity” and “negligible impact on the conservation status of the species»
- Compare to “shipment of waste,” where this involves “a non-negligible quantity»

ECD “Defences”

- Constituent elements of crimes and offenses effectively give defendant arguments to escape criminal liability:
 - **Compliance with the law** implies that the element of “unlawfulness” is not met
 - **If there is no intent and negligence is not serious**, there is no environmental crime
 - **If conduct does not fall under listed conduct**, there is no environmental crime

ELD Defences and Exceptions

- **“Mandatory”** (non-optional) and **optional** defenses/exceptions
 - May non-optional defenses/exceptions not be transposed or applied by Member State based on “minimum harmonization” rationale?
- **Defences** and **exceptions** (such as oil pollution, nuclear, etc.)
 - ELD does not distinguish clearly; term “defence” is not used (except in “national defence” as exception)
 - **Only with respect to optional defences does ELD assign burden of proof to operator**

ELD Defences and Exceptions

- Exceptions (Art. 2(1)(a) and 4) cover situations where
 - **international or other EU law apply** (oil pollution, nuclear);
 - **national defence or international security** is at issue; or
 - damage **expressly authorized** under Habitats Directive or national law
- Defences (Art. 8) cover **situations beyond operator's reasonable control** where **prevention is impossible**:
 - War: “an **act of armed conflict**, hostilities, civil war or insurrection”
 - Natural force majeure: “a **natural phenomenon of exceptional, inevitable and irresistible character**”

ELD Defences

- Operator “shall **not be required to bear the cost** of preventive or remedial actions” when he can **prove** that the environmental damage or imminent threat of such damage:
 - was **caused by a third party** and occurred despite the fact that **appropriate safety measures** were in place; or
 - resulted from **compliance with a compulsory order** or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.
- **Is operator required to take measures in these cases?**

ELD Optional Defences

- Member States “may allow **the operator not to bear the cost of remedial actions**” where he **demonstrates** that he was **not at fault** or negligent and that the environmental damage was **caused by**:
 - emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under national laws pursuant to Annex III legislation;
 - an emission or activity which the **operator demonstrates** was **not considered likely to cause environmental damage** according to the **state of scientific and technical knowledge** at the time when the emission was released or the activity took place.

4. Special situations of allocation of liability

ECD Special Allocation Rules

- Liability under ECD is imposed on **any natural and legal persons committing an offence**
 - **Legal person** may be held liable, in addition to natural persons, if **offence is committed for its benefit** by any **person who has a leading position**
 - Legal person may also be held liable merely for **lack of appropriate supervision or control**
 - In addition, persons **inciting, aiding and abetting** are guilty of offence

ELD Special Allocation Rules

- ELD imposes liability on the **operator(s)**
 - Definition refers to **control** and **national law**
 - Operator definition may effectively create **joint and several liability** in some cases
 - In case of “**diffuse pollution,**” **causal link** between the damage and the activities of **individual operators** should be established

ELD Special Allocation Rules

- ELD deals with “**cost allocation in cases of multiple party causation**”
 - **National law** may set forth specific rules imposing **joint and several liability** or special rules regarding the **apportionment of liability between the producer and the user of a product**
 - Where **several instances of environmental damage** have occurred, the authority shall be entitled to decide **which instance of environmental damage must be remedied first**

Conclusions

Conclusions

- **Defences and exceptions are included in both ELD and ECD, but are also a matter of technique, rather than principle**
 - Rationale and justifications differ
- **Whether an element is an exception or defence is not always entirely clear, but critically important**
 - Burden of proof and judicial obligation

Thank you for your attention!
Questions?
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