Defences and Criteria of Allocation of Liability

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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 be 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 \textit{justify not imposing liability}; and
  – defendant generally \textit{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 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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