



Is compliance with EU Environmental Law
enough, where science tells (the State) to do
more, in order to protect human health and the
environment?

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***The liability to be more ambitious :
revisiting the control of legality in the light of a duty
of care.***

**Is compliance with EU Environmental Law enough, where
science tells (the State) to do more, in order to protect
human health and the environment?**

Setting the scene

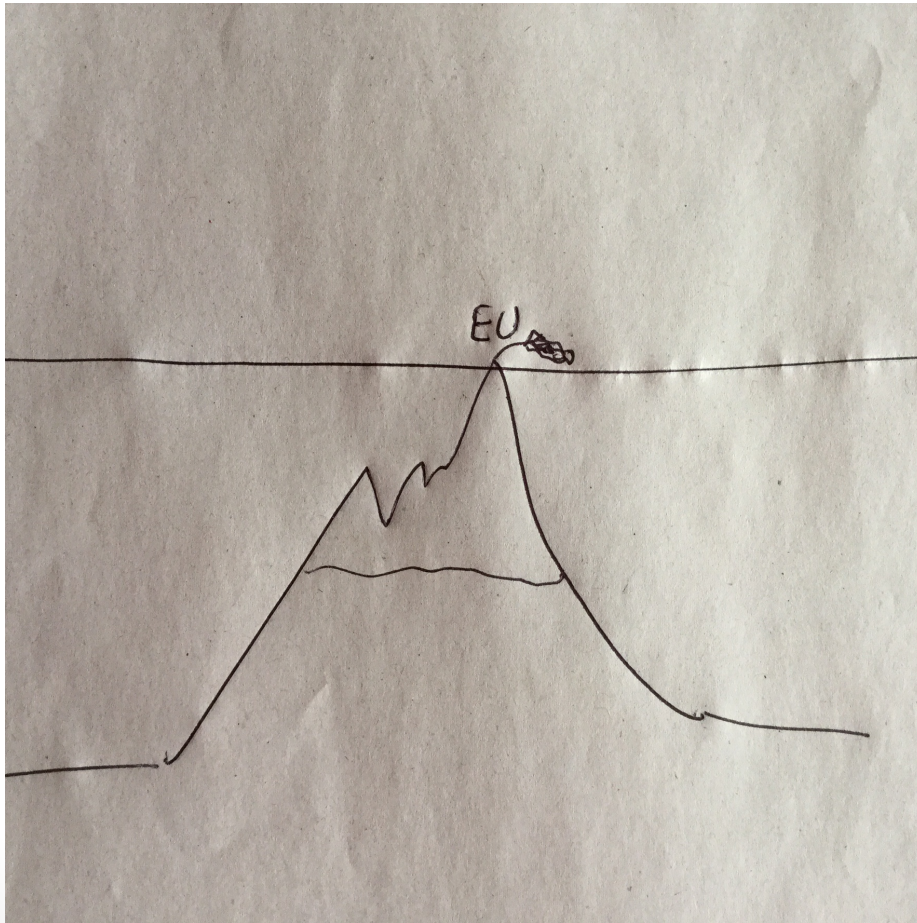
- EU law



No breach
= all set?

- Compliance by Member States
- = An achievement
- Incorporation
- Application
- Fully, on time and correctly

Levelling effect

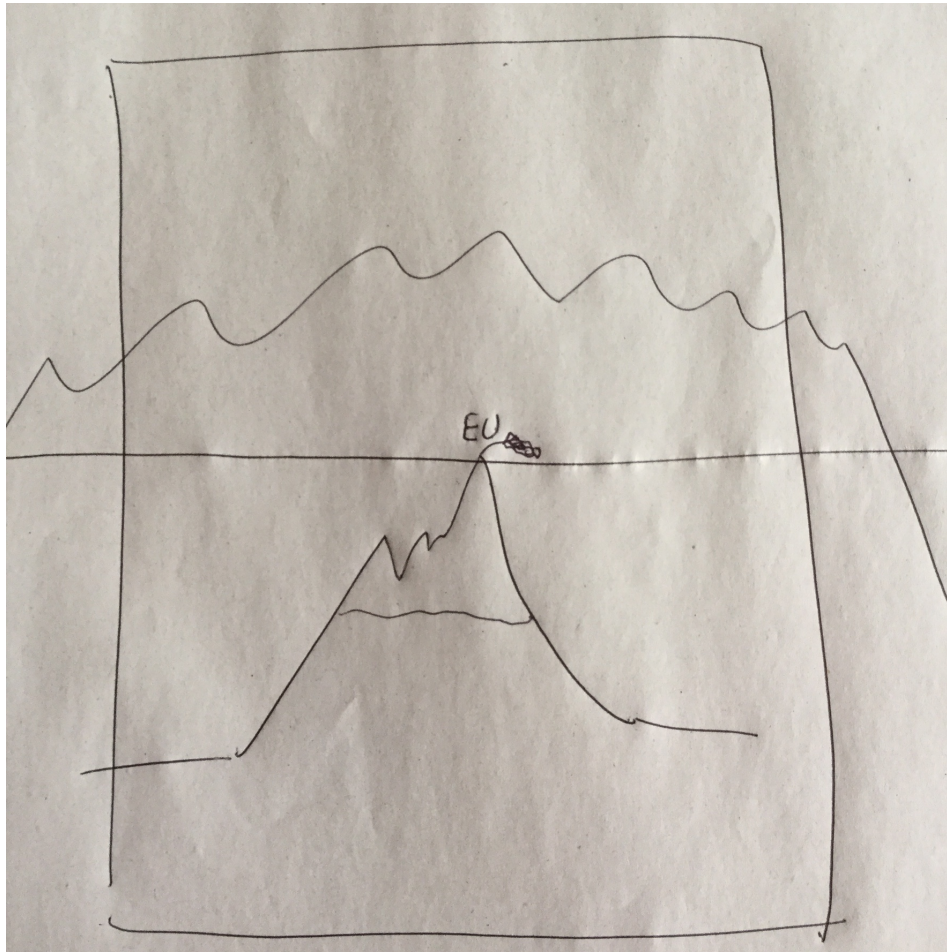


- EU legality check
= The ultimatum?
- **Compliance-solving approach**

Why would a State do more?

- **He wants to**
- **+ He can do so**
- European Union rules do not seek to effect complete harmonisation in the area of the environment (*Fornasar, Deponiezweckverband*) – **It's for each Mst to decide**
- **193 TFUE** permits more stringent protection measures
- provided that they are compatible with the EU and FEU Treaties (and are notified to the European Commission)
- to the extent that a measure of domestic law pursues **the same objectives** and comply with EU law, in particular its general principles, which include the principle of **proportionality** *Túrkevei Tejtermelő C-129/16* – 13 July 2017
- Proportionality to what? **To the goal (more stringent protection)** being pursued

Why should a State need to do more?



- Step back and embrace the larger picture
- **“Problem-solving approach”**

Strengthening

A matter of discretion or a duty to?



- Legal determinants of AMBITION
- Beyond mere statutory duty

Air quality

- Standards
- Measurement

Climate change

Court of Auditors July 2018 Report on Air Quality

Our health still insufficiently protected

“Several of the EU’s air quality standards are **weaker than the evidence on health impacts of air pollution suggests**”.

“We found that **some EU policies do not yet sufficiently well reflect the importance of improving air quality**, while noting that EU funding provides useful support”

« **Setting weak standards does not provide the right framework for protecting human health.** It means that **some locations with poor air quality are compliant with EU law** ».

There are insufficient guarantees that air quality are being measured by the **Member States** in the right locations.

Hypothesis

- **Unfit**

By comparison to **science** (state-of-the-Art)

Exposure

Knowledge
Awareness
Guidelines

WHO
Guidelines

IPCC
Reports

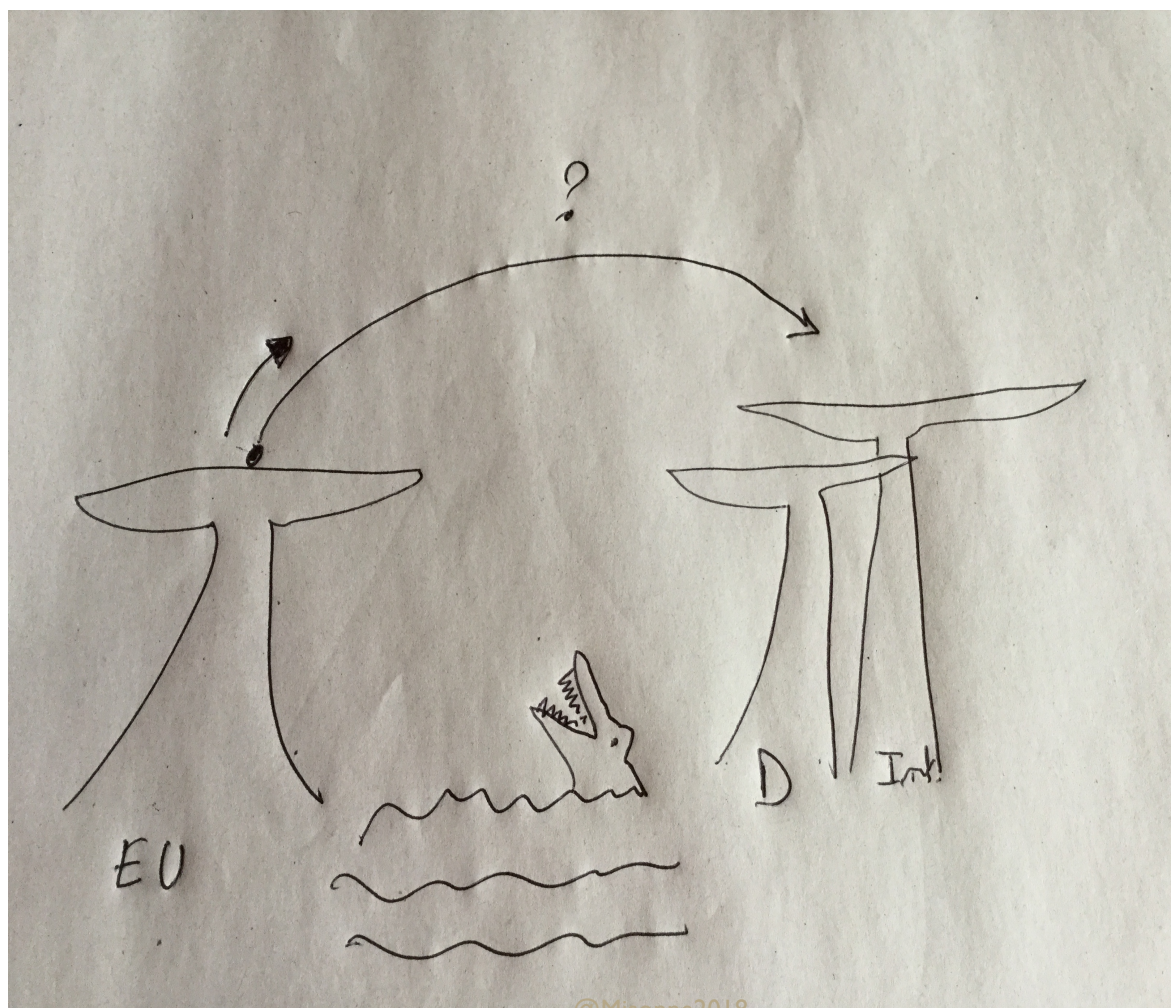
The lack of
AMBITION

International
objectives

Is mere
compliance still
satisfactory?

Where citizens expect more

The answer is not in EU law, or is it?



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State Responsibility

- National authorities knew but did not strengthen the regime

**International -
European
Convention
Human
Rights**

**Domestic
Law**

**Any limit to the State's discretion
(not to act beyond minimal
harmonization)?**

ECHR - Not promising

- **severe environmental pollution** may affect individuals' **well-being and prevent them from enjoying their homes** in such a way as to affect their private and family life adversely, without, however, seriously endangering their health (Lopez Ostra, 1994)
- **admissibility: minimum threshold of severity** required in order to find a violation (ex: of Article 8 of the Convention)
- **Substance:** positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights
- **A fair balance has to be struck** between the competing interests of the individual and of the community as a whole, and in any case **the State enjoys a certain margin of appreciation**
- **Compliance with EU Law = a fair balance (probably)**

ECHR, Greenpeace e.V. and Others v. Germany, 12 May 2009 (pre-Dieselgate)

- About **car-type approval and emissions of diesel vehicles**
- « the Federal Bureau of Motor Vehicles and Drivers rejected the request. It held that the general operating licenses were issued **in accordance with German and European legislation** »
- The applicants complained about the German authorities' **refusal to take (other) measures** to curb respirable dust emissions of diesel vehicles. They submitted that the measures taken by the authorities were **insufficient and ignored the grave danger of these emissions to people's health** (art.8, art.2)
- **The complexity of issues regarding environmental protection renders the Court's role primarily a subsidiary one and its power of review is necessarily limited**
- The **choice of means** as to how to deal with environmental issues is a matter falling within the Contracting State's **margin of appreciation in environmental matters**
- the Court finds that **the applicants have not shown** – and the documents submitted do not demonstrate – that the Contracting State, **when it refused to take the specific measures requested by the applicants**, exceeded its discretionary power by failing to strike a fair balance between the interests of the individual and of the community as a whole. Assessing all the material in its possession, the Court finds that the case does not disclose any appearance of a violation of Article 8.
- Declares the application **inadmissible**.

Domestic law

- Urgenda'case shadow
- NB. Not confirmed yet

Questioning compliance

Statutory duty

Key reference: a EU Directive

Ex: Client Earth Case, CJEU 2014

The Judge gives an order to act

Questioning Ambition

What?

Key reference: Civil Code

Ex: Urgenda, The Netherlands, 2015

The Judge gives an order to act

CIVIL CODE

1382 CC

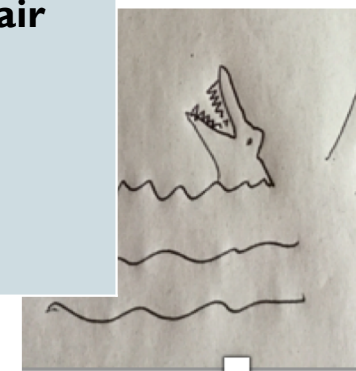
- Fault
- Damage
- Causal link

Duty of care

**“Bonus pater/mater
familias”**

Take the **state-of-the-
Art** into account

Worked with IPCC Reports	Did not work with WHO Guidelines
Urgenda June 2015 – Dutch tribunal The Hague (1st instance) State of the Art (IPCC) informed the judge's assessments of the State's duty of care and urgency to act	Adem December 2017 – (same) Dutch tribunal The Hague - Constraining power of WHO guidelines? None – Guidance and support for policy options - The State does not meet WHO Guidelines? Does not mean it did not strike a fair balance (human rights discourse) - §4.89: The judge verifies that WHO-Guidelines were taken into account in fixing that fair balance - What if did not?





Is compliance with EU Environmental Law enough, where science tells (the State) to do more, in order to protect human health and the environment?

- Enough/sufficient for whom?
- About what one can require from the State
- Legality = tends to be a regulatory compliance check, where already harmonized at EU level
- But other approaches are possible
- **Problem solving approach** - Duty of care
- How far does the State need to care?
- **How can a lack of proactivity be challenged in Court?**



Questions the **fundamentals** of domestic law

What about a generic obligation to remedy the ecological damage (and prevent it)?

And the links between ‘public’ and ‘private’ law



Thank you!

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