Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 14 November 2019[1]

Case C-752/18

Deutsche Umwelthilfe eV
v
Freistaat Bayern

(Request for a preliminary ruling
from the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany))

(Reference for a preliminary ruling — Environment — Atmospheric pollution — Directive 2008/50/EC — Air quality plan — Limit values for nitrogen dioxide — Effectiveness of EU law — Obligation of the national courts to take all necessary measures to ensure the implementation of a directive — Non-compliance by the administration with judicial decisions — Orders and financial penalties ineffective — Article 47 of the Charter of Fundamental Rights of the European Union — Right to an effective judicial remedy — Committal to prison of public officials — Need for compliance with Article 6 of the Charter of Fundamental Rights — Right to liberty of the person)

I. Introduction

1. This request for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany) concerns the effective implementation of EU law, and more specifically of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.[2] How is it to be ensured that national judicial decisions — in this case in the particularly sensitive area of environmental law — are complied with? Where there is a manifest intention on the part of public officials not to comply with judicial decisions which have become final, does EU law permit or require a committal order — a measure involving deprivation of liberty — to be made, if committal orders are provided for within the national legal system, but not in relation to such persons? This question requires two fundamental rights to be considered: the right to an effective judicial remedy and the right to liberty.

2. The issue has been raised in a dispute between the non-governmental organisation Deutsche Umwelthilfe e.V. and the Freistaat Bayern (*Land* of Bavaria, Germany) concerning a decision of the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria) ordering the *Land* of Bavaria to amend its air quality plan by imposing a traffic ban on diesel vehicles in the city of Munich (Germany). The *Land* of Bavaria refuses to introduce such a ban, however, despite an order for recurring financial penalties having been made against it.

1 Original language: French.

2 OJ 2008 L 152, p. 1. That directive replaced Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55).

3. Finding that it does not have adequate means available to it, under national law, to compel the *Land* of Bavaria to comply with that decision, the referring court enquires, in those circumstances, as to the extent of its obligations under EU law to ensure the implementation of Directive 2008/50, and the extent of the fundamental right to an effective judicial remedy.

4. In this Opinion, I will explain why, in my view, there is a limit to the national court's obligation, under EU law, to impose coercive measures to ensure the effectiveness of that law, particularly where such measures may infringe another fundamental right — here the right to liberty.

5. I will propose that the Court of Justice should hold that, while the national court must, as a general rule, do everything possible to ensure the effective implementation of EU law, and to that end take any measure available in national law to compel public officials to comply with a judicial decision which has become final, EU law does not require or permit the national court to adopt a measure involving deprivation of liberty where that measure is not provided for by a clear, foreseeable, accessible and non-arbitrary law.

II. Legal background

A. International law

6. Article 9 of the Aarhus Convention[3] provides for wide public access to justice in order to contribute, in accordance with Article 1 of the convention, to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.

B. EU law

7. Article 13 of Directive 2008/50, entitled 'Limit values and alert thresholds for the protection of human health' provides, in paragraph 1, that Member States must ensure that levels of nitrogen dioxide do not exceed certain limit values.

8. Article 23(1) of that directive requires Member States to draw up air quality plans where, in a given zone or agglomeration, the levels of pollutants in ambient air exceed the limit values laid down by the directive.

C. German law

9. The second sentence of Paragraph 2(2) of the Grundgesetz für die Bundesrepublik Deutschand (Basic Law of the Federal Republic of Germany), of 23 May 1949 (BGB1 1949 I, p. 1; 'the Basic Law') provides for a fundamental right to personal liberty. Under the first sentence of Paragraph 104(1) of the Basic Law, 'liberty of the person may be restricted only pursuant to a formal law and in accordance with the procedures prescribed therein'.

3 Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1; 'the Aarhus Convention').

10. The first sentence of Paragraph 167(1) of the Verwaltungsgerichtsordnung (Code of Administrative Justice; 'the VwGO') provides:

'Save where a special provision of this Law provides otherwise, enforcement is governed, *mutatis mutandis*, by book eight of the Zivilprozessordnung [Civil Procedure Code; 'the ZPO'].'

11. According to the national court, Paragraph 172 of the VwGO constitutes such a special provision. In accordance with the introductory words of Paragraph 167(1) of the VwGO, it disapplies, in principle, the enforcement provisions of book eight of the ZPO, providing as follows:

'In cases falling within the second sentence of Paragraph 113(1), Paragraph 113(5), and Paragraph 123, if the administration fails to comply with an obligation imposed on it by judgment or interim order, the court of first instance may, upon application, impose a suspended financial penalty of up to EUR 10 000, payable in default of compliance within the period determined by the court, declare, in the event of such default, that the financial penalty has become payable, and enforce it of its own motion. Such suspended penalties may be imposed, declared payable and enforced more than once in respect of the same obligation.'

12. Paragraph 888(1) and (2) of book eight of the ZPO states that:

'1. Where an act can only be performed voluntarily by the person subject to the obligation, and not by a third party, and an application is made, the court of first instance hearing the case shall, with a view to ensuring that the person concerned performs the obligation, impose a suspended financial penalty and, in the event that the penalty becomes payable but payment cannot be obtained make an order for committal to prison, or make such a committal order. A financial penalty may not exceed EUR 25 000 in amount. The provisions of Chapter 2 relating to deprivation of liberty are applicable *mutatis mutandis* to committal orders.

2. No advance warning shall be given of such coercive orders.'

13. Paragraph 890(1) and (2) of the ZPO require advance warning of coercive measures to be given to a person who is under an obligation not to do something, or to tolerate its being done, before that person can be fined or committed to prison.

III. The main proceedings, the question referred for a preliminary ruling and the procedure before the Court

14. Deutsche Umwelthilfe, a German non-governmental organisation empowered to initiate group litigation in environmental matters pursuant to the second subparagraph of Article 9(2) of the Aarhus Convention and the second and third sentences of Article 11(3) of Directive 2011/92/EU,[4] brought an action against the *Land* of Bavaria seeking to compel it to comply with nitrogen dioxide limit values prescribed by Directive 2008/50.

15. The order for reference indicates that, over a number of years, judicial findings have been made that the limit values have been exceeded within the geographical area of the city of Munich, sometimes to a considerable extent. The instances in which the limit values have been exceeded relate to approximately 250 roads or sections of road, with levels sometimes reaching twice the permitted values.

4 Directive of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

16. By judgment of 9 October 2012, the Verwaltungsgericht München (Administrative Court of Munich, Germany) ordered the *Land* of Bavaria to amend its 'air quality action plan' (which corresponds to the 'air quality plan' referred to in Article 23 of Directive 2008/50) in respect of the city of Munich, so as to bring it into line with those values. That judgment has become final.

17. By order of 21 June 2016, that court gave the *Land* of Bavaria advance warning of a coercive measure, threatening a financial penalty for exceeding the limit values in question. The *Land* brought an action in respect of that warning.

18. By order of 27 February 2017, the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria) dismissed the action. It found that the *Land* of Bavaria had still not complied with the judgment of 9 October 2012, and imposed a series of suspended financial penalties, totalling EUR 10 000, payable in the event that the *Land* failed to take the necessary steps to bring the values within the limits. Those measures comprised the introduction of a traffic ban on certain diesel vehicles in certain urban zones.[5] That order has also become final.

19. On the application of Deutsche Umwelthilfe, the Verwaltungsgericht München (Administrative Court of Munich, Germany) made an order of 26 October 2017, declaring that one of the financial penalties provided for in the earlier order of 27 February 2017 had become payable. The *Land* of Bavaria did not appeal against that order and paid the penalty.

20. By orders of 29 January 2018, the same court, again on the application of Deutsche Umwelthilfe, declared that another of the penalties contemplated by the order of 27 February 2017 had become payable, and imposed a further suspended financial penalty on the *Land* of Bavaria, in the amount of EUR 4 000. By contrast, that court dismissed, inter alia, an application for the committal to prison of the then Minister for the Environment and for Consumer Protection of the *Land* of Bavaria or, failing that, the Minister-President of the *Land*. Deutsche Umwelthilfe appealed to the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria) against that decision.

21. The referring court observes that the *Land* of Bavaria has still not complied with the directions addressed to it in the order of 27 February 2017, and that there is no reason to anticipate that it will comply with that order — quite the reverse, given that representatives of the *Land* of Bavaria, including its Minister-President, have publicly stated their intention not to comply with the obligation to ban diesel vehicles from certain roads. It also indicates that, in the main proceedings before the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria), the *Land* has stated that it considers it disproportionate to ban diesel vehicles from certain roads or sections of road, and accordingly that it is not appropriate to take such measures.

22. According to the referring court, in circumstances where the executive has so clearly and persistently indicated its determination not to comply with given judicial decisions, it would be entirely unrealistic to expect that further suspended penalties in a higher amount, or declarations that such penalties had become payable, would affect its conduct — particularly as the payment of financial penalties does not reduce the *Land*'s resources. Such penalties would be paid by entering the amount fixed by the court as a debit item under a given heading of the *Land's* budget and crediting the same amount to its central funds.

23. The court adds that the ZPO provides for committal to prison as a means of enforcing certain decisions, but that, for reasons of constitutional law, it does not apply to public officials.

5 The referring court states that a judgment of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) of 27 February 2018 (7 C 26.16) confirms that it is appropriate to impose such traffic bans in order to achieve conformity with the limit values laid down in Directive 2008/50.

24. Although the measures provided for in book eight of the ZPO, including committal, are available under the first sentence of Paragraph 167(1) of the VwGO where there is no special provision to the contrary, the referring court considers that Paragraph 172 of the VwGO constitutes such a provision, and precludes the use of the methods of enforcement contemplated by book eight of the ZPO.

25. It acknowledges that the Bundesverfassungsgericht (Federal Constitutional Court, Germany) has held that, in principle, administrative courts must treat themselves as free from the restrictions arising from Paragraph 172 of the VwGO where that is appropriate. It states that, in an order of 9 August 1999 (1 BvR 2245/98), the Bundesverfassungsgericht (Federal Constitutional Court, Germany) observed that the use of other means of coercion available under Article 167 of the VwGO, in conjunction with the ZPO, was 'necessary, having regard to the requirement for effective judicial protection, at least where a suspended financial penalty limited to DEM 2 000 [around EUR 1 000 — the upper limit at the time of the order] is not apt to protect the rights of the person concerned'. That order states that:

'If, for example, it is clear from past experience, unequivocal statements, or the fact that imposing suspended financial penalties has proved ineffective on several previous occasions, that the administration will not bow to the pressure of such a penalty, then the requirement of effective judicial protection demands that '*mutatis mutandis*' use is made of the civil procedure rules, as authorised by Paragraph 167 of the VwGO, and that more severe coercive measures are imposed, in order to compel the administration to obey the law … . It is ultimately for the administrative court to decide which, if any, of the more severe means of coercion contemplated by Paragraphs 885 to 896 of the ZPO … are to be used at the enforcement stage, in what order they are to be used, and in what form … '.

26. Those paragraphs include provision for performance of the obligation by a third party, which the referring court does not envisage as a possibility in the present case, and committal to prison under Paragraph 888 of the ZPO.

27. However, the referring court takes the view that committing public officials of the *Land* of Bavaria to prison, under Paragraph 888 of the ZPO, would be contrary to the requirement, stated by the Bundesverfassungsgericht (Federal Constitutional Court) in its order of 13 October 1970 (1 BvR 226/70), that the objective now being pursued in having recourse to that article must have been envisaged by the legislature when that law was enacted. Having regard to the legislative history of Paragraph 888 of the ZPO, the referring court does not consider that to have been the case.

28. For that reason, it is stated that, even after the order of the Bundesverfassungsgericht (Federal Constitutional Court) of 9 August 1999 (1 BvR 2245/98), the German courts have repeatedly held that committal orders cannot lawfully be made against public officials of the executive.

29. The referring court raises the issue, however, of whether EU law permits or requires a different view of the legal situation under consideration in the main proceedings.

30. According to the referring court, if EU law required a committal order to be made in circumstances such as those of the main proceedings, the German courts would have to disregard the obstacle presented by the constitutional case-law. The referring court states that the national court would be under a duty to give full effect to the provisions of EU law, and if necessary to disapply, of its own motion, any conflicting provision of national legislation, and that there would be no need for that court to request or await the prior setting aside of such a provision, by legislative or other constitutional means, or of any conflicting national case-law.

31. In those circumstances the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Are

1. the requirement laid down in the second subparagraph of Article 4(3) of the Treaty on European Union (TEU), according to which the Member States must take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union,

2. the principle of effective implementation of EU law by the Member States, which is established in, inter alia, Article 197(1) of the Treaty on the Functioning of the European Union (TFEU),

3. the right to an effective remedy guaranteed by the first paragraph of Article 47 of the [Charter of Fundamental Rights of the European Union],[6]

4. the obligation devolving on the Contracting States to ensure effective remedies in environmental matters, which arises from the first sentence of Article 9(4) of the [Aarhus Convention],

5. the obligation devolving on the Member States to ensure effective legal protection in the fields covered by EU law, which is established in the second subparagraph of Article 19(1) TEU,

to be interpreted as meaning that a German court is entitled — and possibly even obliged — to impose detention on persons involved in the exercise of the official authority ('the public officials') of a German Federal *Land* in order thereby to enforce the obligation of that Federal *Land* to update an air quality plan, within the meaning of Article 23 of Directive 2008/50/EC, with specific minimum content if that Federal *Land* has been ordered to carry out an update with that specific minimum content by way of a final judgment, and

– the Federal *Land* has been threatened with and subjected to financial penalties on several occasions without success,

– threats of financial penalties and impositions of financial penalties do not result in a significant persuasive effect even if higher amounts than before are threatened and imposed, for the reason that the payment of penalties does not involve actual losses for the Federal *Land* sentenced by a final judgment, but rather, in this respect, there is merely a transfer of the amount imposed in each case from one accounting item within the *Land*'s budget to another accounting item within the *Land*'s budget,

– the Federal *Land* found guilty by way of a final judgment has stated to the courts and publicly — inter alia before parliament via its most senior political office-holders — that it will not fulfil the judicially imposed obligations in connection with air quality planning,

– while national law does in principle provide for the institution of detention for the purpose of enforcing judicial decisions, national constitutional case-law precludes the application of the relevant provision to a situation of the nature involved here, and

6 OJ 2007 C 303, p. 1 ('the Charter').

– for a situation of the nature involved here, national law does not provide for coercive instruments that are more expedient than threats and impositions of financial penalties but are less invasive than detention, and recourse to such coercive instruments does not come into consideration from a substantive point of view either?'

32. Deutsche Umwelthilfe, the *Land* of Bavaria and the European Commission have submitted written observations to the Court. Those parties and interested parties, as well as the German Government, were represented at the hearing which was held on 3 September 2019.

IV. Analysis

A. Preliminary observations

33. The question posed by the referring court in relation to the effective implementation of EU law concerns the measures which a national court may or must take in respect of the administration having regard to two kinds of obligation — those obligations imposed on the administration by secondary legislation (in this instance Directive 2008/50), and those imposed on that administration by judicial decisions already taken with respect to it, with a view to enforcing that law.

34. The problem with which the referring court is faced is that the means of coercion available to it in national law are not adequate to compel the public officials to comply with its decisions and, in so doing, with EU law.

35. The provisions cited by the referring court in connection with the first kind of obligation are Article 4(3) TEU, which lays down the principle of sincere cooperation between the European Union and the Member States, and requires the latter to take all appropriate steps to ensure that the obligations arising from the acts of the institutions are performed, and Article 197(1) TFEU, which emphasises that effective implementation of EU law by the Member States is essential for the proper functioning of the European Union.

36. In support of the second kind of obligation, the national court refers to the right to an effective judicial remedy set out in Article 47 of the Charter and in Article 9 of the Aarhus Convention. This right gives rise to an obligation on the part of the Member States to provide, in accordance with the second subparagraph of Article 19(1) TEU, remedies sufficient to ensure effective legal protection in the fields covered by EU law.

37. As is apparent from the referring court's presentation of the legal background, the measures available for the enforcement of judgments, in German *civil* law, include financial penalties, orders for the performance of the obligation by a third party, and committal orders. As for German *administrative* law, this allows for financial penalties to be imposed with a view to compelling the administration to comply with the direction issued to it in the judicial decision. Such penalties are lower in amount than they are in civil law. If financial penalties prove ineffective then it is possible, according to the national court, to have recourse to the civil law rules. which provide, inter alia, for financial penalties of up to EUR 25 000, as opposed to EUR 10 000. Committal orders cannot, however, be made against public officials. As indicated in point 27 of this Opinion, this is said to follow from German constitutional law, as interpreted by the Bundesverfassungsgericht (Federal Constitutional Court).

38. I note at this stage that Deutsche Umwelthilfe does not accept that description of the national legal framework.[7] Nevertheless the Court, when a question is referred to it by a national court, must base itself on the interpretation of national law as described to it by that court.[8] Thus, irrespective of the criticisms made by the parties to the main proceedings of the referring court's interpretation of national law, this reference for a preliminary ruling must proceed on the basis of that court's interpretation of that law.

39. It is apparent from the file submitted to the Court that the reason why the coercive methods used against the State and its administration in German national law are more moderate than in civil law is that the State usually complies with judicial decisions addressed to it. Deutsche Umwelthilfe itself regards the present case as exceptional indeed.

40. I would nevertheless note, as the referring court, Deutsche Umwelthilfe and the Commission have done so, that while the present case may be exceptional, it is not inconsequential. On the contrary, the refusal of public officials of the *Land* of Bavaria to comply with the final judicial decisions at issue in the main proceedings may have serious consequences for people's health and lives,[9] and for the rule of law.[10]

41. Against that background, what the national court must be taken to be asking, by the question which it has referred, is essentially whether EU law, and in particular the second subparagraph of Article 4(3) TEU, Article 197(1) TFEU, Article 47(1) of the Charter, Article 9 of the Aarhus Convention and the second subparagraph of Article 19(1) TEU, are to be interpreted as meaning that in order to ensure the effective implementation of Directive 2008/50 and, to that end, to compel public officials to comply with a final judicial decision, the national court may or must adopt a measure depriving those officials of their liberty, such as a committal order, if such a measure exists in national law, even if its use in relation to such persons is not provided for by a clear and foreseeable national law.

42. In answering that question, I will first consider the scope of the national court's obligations in terms of ensuring the effectiveness of EU law (section B below), and then the limits potentially imposed on those obligations in the light of the fundamental right to liberty (section C).

B. The obligation to ensure the effectiveness of EU law

43. The Court has previously had occasion to consider the measures which a national court is required to take, by virtue of the principle of sincere cooperation laid down in Article 4(3) TEU and the right of litigants to effective judicial protection laid down in Article 47 of the Charter, in the event that a Member State fails to comply with Directive 2008/50, and in particular with Articles 13 and 23 of that directive.

7 Deutsche Umwelthilfe argues that there is a legal basis for making committal orders for the imprisonment of public officials, this being contained in Paragraph 167 of the VwGO, which recognises the possibility of having recourse to civil law. Thus, according to Deutsche Umwelthilfe, the doubts expressed by the referring court do not concern the law as laid down in Paragraph 167, but the case-law of the Bundesverfassungsgericht (Federal Constitutional Court). The *Land* of Bavaria and the German Government consider that provision is made as regards the enforcement measures available against the administration in Paragraph 167 of the VwGO, which makes civil law applicable in the absence of a special provision. In their view, Paragraph 172 of the VwGO is such a provision, and the effect of the amendment made to that paragraph following the order of the Bundesverfassungsgericht (Federal Constitutional Court) of 9 August 1999 (1 BvR 2245/98), which takes account of that order by increasing the ceiling applicable to financial penalties imposed on the administration — so as to make them more effective — is that it is no longer possible to have recourse to civil law measures of greater coercive force.

8 See, to that effect, judgment of 14 June 2017, *Online Games and Others* (C-685/15, EU:C:2017:452, paragraph 45) and, in particular, judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraph 25).

9 It is apparent from the order for reference and the Proposal for a Directive of the European Parliament and of the Council of 21 September 2005 on ambient air quality and cleaner air for Europe (COM(2005) 447 final) that concentrations of nitrogen dioxide which are significantly higher than those permitted by law affect people's day-to-day health and their life expectancy.

10 See point 49 of this Opinion.

44. In that regard, it is apparent from the judgments in *Janecek*,[11] *ClientEarth*[12] and *Craeynest and Others*,[13] that where a State fails to comply with its obligations as regards the drawing up of an air quality plan, and an application is made by the individuals concerned, the national courts must take *all necessary measures*, such as, if *provided for by national law*, making an order, with a view to ensuring that the competent authority draws up the plan in accordance with Directive 2008/50.[14]

45. Those judgments provide only a partial answer to the question of the effective implementation of EU law in circumstances such as those of the main proceedings. As in the cases which gave rise to those judgments, the issue of implementation of EU law does not relate to the transposition of Directive 2008/50 by the Member State concerned, but to the concrete steps taken by the State to comply with that directive. In the present case, however, there is also the issue of non-compliance by the administration with judicial decisions requiring it to take certain specific action, namely to impose traffic bans in respect of certain roads.

46. The question arises of whether the national court's obligation to take 'all necessary measures' to ensure compliance with Directive 2008/50 extends, in such a case, to imposing a measure involving the deprivation of liberty, such as a committal order.

47. That question arises with particular force in the present case, because the infringement of EU law is especially serious. The fact that the State has not complied with a judicial decision requiring it to take certain action in order to comply with that directive infringes the fundamental right of litigants to an effective judicial remedy, as guaranteed by Article 47 of the Charter.

48. As was held in the judgments in *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*[15] and *Torubarov*,[16] the right to an effective remedy guaranteed by Article 47 of the Charter would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party; the execution of a judgment must, therefore, be regarded as an integral part of the 'effective remedy' referred to in that article.

49. A refusal to comply with a judicial decision on the part of a State is also liable to undermine the rule of law, which is one of the values on which the European Union is founded.[17] Respect for the rule of law is required of all EU citizens, and first and foremost of representatives of the State, given the particular responsibilities which — precisely because of their functions — they have in that area.[18] The German Government itself acknowledged this at the hearing, observing that a judicial decision must self-evidently be complied with by the executive. Deutsche Umwelthilfe also stated that the State generally complies with judicial decisions, with moderate financial penalties usually being sufficient to bring about compliance on the part of the administration.

50. However, where such financial penalties, as provided for in national law in respect of the administration, are not indeed sufficient to compel the Member State to comply with a judicial decision implementing a directive, can — or must — the national court have recourse to measures other than those available to it under national law?

11 Judgment of 25 July 2008 (C-237/07, EU:C:2008:447).

12 Judgment of 19 November 2014 (C-404/13, EU:C:2014:2382).

13 Judgment of 26 June 2019 (C-723/17, EU:C:2019:533).

14 Judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 56).

15 Judgment of 30 June 2016 (C-205/15, EU:C:2016:499, paragraph 43).

16 Judgment of 29 July 2019 (C-556/17, EU:C:2019:626, 'the *Torubarov* judgment', paragraph 57).

17 See judgments of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 43), and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 30 and 31).

18 See, by analogy, judgment of 11 July 2006, *Commission* v *Cresson* (C-432/04, EU:C:2006:455, paragraph 70).

51. According to the order for reference, the measures already imposed, in accordance with national law — financial penalties in the total sum of EUR 10 000 — have had no effect on the *Land* of Bavaria. Moreover, the only other measures which can be envisaged by the referring court, namely financial penalties of up to EUR 25 000, would be no better in terms of meeting the requirement of effectiveness, given that such penalties have no impact on the budget of the *Land*,[19] and that its public officials have openly stated that they had no intention of imposing the traffic bans ordered by the referring court.

52. In that regard, it is apparent from the judgment in *Craeynest and Others*[20] that the necessary measures which the national court is required to take, in order to ensure compliance with the obligations imposed by Directive 2008/50, are in principle limited to those provided for by national law.

53. Similarly, it is settled case-law of the Court that the enforcement of a decision of a national court relating to an EU act falls, in principle, within the scope of the procedural autonomy of the Member States. In the absence of rules of EU law governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.[21] However, that procedural autonomy is subject to the condition that such detailed rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).[22] The principle of equivalence is not relevant in the present case.

54. In the main proceedings in this case, the measures taken by the national court are not such as to ensure the effective application of Directive 2008/50, and the corollary of that situation is that it is practically impossible for Deutsche Umwelthilfe to exercise its rights under that directive.

55. The question arises of whether, in such circumstances, EU law provides the tools to overcome the obstacles presented by national law. It is necessary, in that respect, to establish whether the principle of the primacy of EU law constitutes such a tool.

56. Under that principle, EU law takes precedence over the law of the Member States, and requires all Member State bodies to give full effect to the various provisions of EU law.[23] National courts are, therefore, required to interpret their national law, to the greatest extent possible, in conformity with the requirements of EU law, so as to ensure that EU law is fully effective.[24]

57. While the principle of interpreting national law in conformity with EU law has certain limits and, in particular, cannot serve as the basis for an interpretation of national law *contra legem*, it nevertheless requires, to the greatest extent possible, that the whole body of domestic law is taken into consideration, and that the interpretative methods recognised by domestic law are applied, with a view to ensuring that EU law is fully effective, and achieving an outcome that is consistent with the objective it pursues.[25]

19 See point 22 of this Opinion.

20 Judgment of 26 June 2019 (C-723/17, EU:C:2019:533, paragraph 56).

21 Judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 39).

22 Judgment of 26 June 2019, *Craeynest and Others* (C-723/17, EU:C:2019:533, paragraph 54 and the case-law cited).

23 Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 53 to 54).

24 Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 55).

25 See, to that effect, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 74, 76 and 77).

58. National courts are thus required to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a directive, and to disapply, on their own authority, any interpretation which they are required to follow under their national law, if that interpretation is not compatible with the directive in question. [26]

59. Where it is unable to interpret national law in compliance with the requirements of EU law, a national court hearing proceedings against a public authority may be required, under the principle of primacy of EU law, to disapply any provision of national law which is contrary to a provision of EU law with direct effect; that is to say, a provision of EU law which is sufficiently clear, precise and unconditional to confer on individuals a right capable of being relied on as such before a national court. [27]

60. In that way, the principle of primacy of EU law has made it possible to overcome numerous procedural obstacles arising from national law, in proceedings based on EU law. In some cases, it has led to the national court applying procedural rules and adopting measures in situations not provided for by national law. [28]

61. In the recent *Torubarov* judgment, concerning an application for international protection, the Court held that national legislation which resulted a situation in which the referring court had no means of ensuring compliance, by the administrative authorities concerned, with its judgment, failed to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter. [29] It held that the national court was required to disapply, if necessary, national legislation that would prevent it from substituting its own decision for a decision of an administrative body which did not comply with its previous judgment. [30]

62. As in the present case, the referring court considered that the coercive means available to it in national law were not adequate to ensure that the administration complied with its judgment and that EU law was fully effective. There is, therefore, an analogy between the present case and the *Torubarov* judgment.

63. Those considerations having been set out, what consequences should follow, in the present case, from the principle of the primacy of EU law?

64. As is apparent from points 58 and 59 of this Opinion, the national court is bound as far as possible to disapply case-law which represents an obstacle to the full application of EU law, and even legislation which creates such an obstacle, when it is hearing a dispute between an individual and the State concerning a provision of EU law with direct effect. [31]

26 See, to that effect, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 78).

27 See judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 58 and 61).

28 See judgments of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257, paragraph 23); of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraphs 26 and 36, second indent); of 21 November 2002, *Cofidis* (C-473/00, EU:C:2002:705, paragraph 38) and of 14 March 2013, *Aziz* (C-415/11, EU:C:2013:164, paragraph 64).

29 *Torubarov* judgment (paragraphs 71 and 72).

30 *Torubarov* judgment (paragraph 74).

31 In relation to Article 23 of Directive 2008/50, the Court has held that that provision imposes a clear obligation to establish an air quality plan that complies with certain requirements; an obligation capable of being relied on by individuals as against public authorities (see judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraphs 53 to 56 and the case-law cited). With regard to Article 47 of the Charter, the Court has held that in the context of a dispute relating to a situation governed by EU law, that article is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 78, and the *Torubarov* judgment, paragraph 56).

65. The referring court states that it considers it possible to interpret its national law in such a way as to ensure that the provisions of EU law have full effect in the main proceedings. To that end, it proposes to use the mechanism of interpreting national law in conformity with EU law referred to in point 56 of this Opinion, and to apply it to the enforcement measures provided for by the body of national law taken as a whole.

66. Since financial penalties in a total amount of EUR 10 000 have proved ineffective, and since the imposition of higher penalties of up to EUR 25 000 cannot be expected to produce the desired effect either, the referring court considers it appropriate to make a committal order. That court indicates that this would involve applying a decision of the Bundesverfassungsgericht (Federal Constitutional Court) of 1999,[32] under which consideration may be given to the use of the more coercive measures available in German civil law, while disapplying another decision of that court, of 1970,[33] under which committal orders may not be made against public officials. What has prevented such orders from being made is, it is contended, the lack of a clear and precise law which meets certain formal requirements in relation to such persons. Paragraph 888 of the ZPO, it is argued, does not meet those requirements, and as the German Government stated at the hearing, in response to a question from the Court, the German courts have never imposed a measure involving deprivation of liberty on a public official on the basis of that provision.

67. The question nevertheless arises as to whether the national court must go to the lengths referred to in interpreting national law so as to give full effect to Article 23 of Directive 2008/50 and Article 47 of the Charter, by disapplying case-law, or even legislation, which protects litigants. I do not think that this is the case.

68. In practice, there may be limits to the full effectiveness of EU law. The national court, which has the task of applying EU law, sometimes has to balance a number of fundamental rights.[34] In some cases, full application of a provision of EU law must give way to a general principle of law[35] or a fundamental right.[36]

69. Since committal orders involve deprivation of liberty, it is important to ascertain whether it is compatible with Article 6 of the Charter, which guarantees the right to liberty, for an element of national law to be disapplied, as envisaged by the referring court, in order to give full effect to a directive and secure the right to an effective judicial remedy.

C. The account taken of the fundamental right to liberty

70. Article 6 of the Charter provides for a fundamental right to liberty reflecting that set out in Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').[37]

32 Order of 9 August 1999 (1 BvR 2245/98). The case giving rise to that order concerned the refusal of a local authority to rent a room to a particular political party. The Bundesverfassungsgericht (Federal Constitutional Court) held that the measures provided for by the VwGO, and particularly Paragraph 172, might prove inadequate and that, in such a case, the rules of the ZPO could be applied '*mutatis mutandis*' ('in entsprechender Anwendung') under Paragraph 167 of the VwGO. The Bundesverfassungsgericht (Federal Constitutional Court) gave examples of enforcement measures based on the ZPO, all of which concerned performance of the obligation by a third party (for example, the room being opened by a bailiff). The order makes no reference to committal.

33 Order of 13 October 1970 (1 BvR 226/70).

34 See, in relation to a balance struck between the right to privacy and the right to freedom of expression, judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia* (C-73/07, EU:C:2008:727, paragraphs 52 and 53).

35 See judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 53).

36 See judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraphs 33, 34, 36 and 39).

37 The Explanations relating to the Charter (OJ 2007 C 303, p. 17) state that the right to liberty in Article 6 of the Charter is the right guaranteed in Article 5 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope (see under the heading 'Explanation on Article 6', first paragraph).

71. That right to liberty must be read in the light of Article 52(1) of the Charter, under which any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms.

72. The need for a law is confirmed by settled case-law of the European Court of Human Rights ('the ECtHR'), to which reference should be made, in accordance with Article 52(3) of the Charter, since the right in question corresponds to a right guaranteed by the ECHR. That case-law, and in particular the judgment in *Del Rio Prada v. Spain*,[38] stresses the quality of law, emphasising that any deprivation of liberty must have a legal basis and that the law in question must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness. The Court of Justice restated those criteria in the judgment in *Al Chodor*, stating that a legal basis is required and that it must meet criteria of clarity, foreseeability, accessibility and protection against arbitrariness.[39]

73. I note that Paragraph 104 of the Basic Law, to which the national court refers, contains similar requirements, providing that liberty of the person may only be restricted pursuant to a law, which must meet certain criteria as regards formalities.

74. In the present case, however, there is a clear and firm indication from the referring court that its national law does not incorporate any such law as regards deprivation of liberty by means of a committal order for the purposes of compelling public officials to comply with a judicial decision which has become final.

75. That description of national law has admittedly been the subject of argument in the written observations submitted by the parties and at the hearing before the Court. However, besides the fact that it is not for the Court to question the referring court's interpretation of national law,[40] I would point out that it is apparent from the exchanges that, at the very least, there is serious doubt as to the interpretation of the national law, and thus to the degree to which it is clear and foreseeable.

76. Deutsche Umwelthilfe and the referring court consider that the problem of foreseeability could be overcome by giving advance warning of coercive measures to the persons concerned. However, the referring court itself states that the ZPO does not make provision for such warnings in relation to positive obligations, such as the obligation to impose a traffic ban relating to certain vehicles.[41]

77. Furthermore, the order for reference indicates that there is a further point of appreciable uncertainty, concerning the persons in respect of whom a committal order can be made.

78. The referring court refers to several persons, namely, at the level of the *Land*, the Minister-President and the Minister for the Environment and Consumer Protection, and at the level of the administrative region of Upper Bavaria, the President and Vice-President of the government. It adds that, as a precaution, it would be appropriate to extend the measure to include managerial staff of the *Land* and the administrative region of Upper Bavaria, as the responsible organs of the *Land* have parliamentary immunity and this, unless it was withdrawn, would defeat a committal order.

79. It is clear from that enumeration that the principal public officials of the *Land* might avoid committal. On the other hand, committal orders could be made against senior officials of the administrative region of Upper Bavaria — who, according to the referring court, are required to follow instructions from the *Land* — and persons holding management positions in the competent

38 ECtHR, 21 October 2013, *Del Rio Prada v. Spain* (EC:ECHR:2013:1021JUD004275009, paragraph 125 and the case-law cited) and, in particular, the judgment of the ECtHR of 25 June 1996, *Amuur v. France* (EC:ECHR:1996:0625JUD001977692, paragraph 50).

39 Judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraphs 38 and 40).

40 See point 38 of this Opinion.

41 See points 12 and 13 of this Opinion. Paragraph 888(2) of the ZPO does not provide for advance warning of coercive measures. Under Paragraph 890(1) and (2) of the ZPO, there is provision for such warnings in relation to obligations to refrain from doing an act, or to tolerate its being done.

departments of the *Land* and the administrative region of Upper Bavaria. In relation to those individuals, however, the referring court states that consideration would still need to be given as to whether it is reasonable to require them to implement the judicial decision in circumstances where they would be acting contrary to the view of the individual above them in the hierarchy.

80. It follows from the foregoing that, even supposing that a committal order would achieve the desired outcome, namely compliance with a final order and thus full application of Directive 2008/50 — which seems to me to be far from certain — to make such an order against officials of the *Land* would be contrary to the fundamental right to liberty guaranteed by Article 6 of the Charter, because it is not contemplated by any law, or at least by any clear and foreseeable law.

81. Despite the issue of the effectiveness of EU law, and in particular the interference with the right to an effective judicial remedy arising from the particular circumstances, it is not open to the national court not to comply with the fundamental requirements of Article 6 of the Charter.

82. As the German Government noted at the hearing before the Court, where a dispute concerns a right arising from a directive, the court hearing it must interpret national law in a manner consistent with EU law, and may be required to disapply a national law which would otherwise prevent it from doing so. However, that interpretation of national law must certainly not lead to infringement of the fundamental right to liberty.

83. I share the German Government's view that individual liberty cannot be restricted without a sufficient legal basis. Any such restriction must be based on a law that is clear, foreseeable, accessible and non-arbitrary. Otherwise, the restriction of liberty might, in turn, seriously undermine the rule of law.

84. Therefore, as serious a matter as it may be for public officials to refuse to comply with a final court decision, I do not consider that the obligation of the national court to do everything within its competence to give full effect to directives, including environmental directives, and to secure the fundamental right to an effective judicial remedy, can be fulfilled in a manner which is contrary to the fundamental right to liberty. That obligation cannot, therefore, be understood as permitting the national court — still less requiring it — to disregard the fundamental right to liberty. [42]

85. I therefore invite the Court to rule that a court's obligation to interpret its national law, to the fullest extent possible, in such a way that it is consistent with EU law, and potentially to disapply a law which would, in practice, present an obstacle to the full effectiveness of EU law, is subject to an absolute limit where that interpretation collides with the fundamental right to liberty guaranteed in Article 6 of the Charter.

86. Furthermore, even in a situation where committal orders are provided for by law, it is important to observe, as I pointed out in my Opinion in *Al Chodor*, that, in my view, deprivation of liberty must be a measure of last resort. [43] Thus, it should only ever be used where all other measures have been considered and the principle of proportionality has been observed.

87. I note that it is not indeed clear, in the present case, that the referring court has used all the means available to it under national law. It was suggested at the hearing that other measures could be considered, such as financial penalties of EUR 25 000, potentially recurring at short intervals. The possibility was also raised that such financial penalties could be payable to a third party, or even the applicant in the main proceedings, rather than to the *Land*. It is a matter for the referring court to determine whether such measures could be imposed.

42 I refer to the Opinion of Advocate General Bobek in *Dzivev and Others* (C-310/16, EU:C:2018:623, points 123 and 124), where the need to strike a balance between the need for effectiveness and the need to protect fundamental rights was emphasised.

43 See my Opinion in *Al Chodor* (C-528/15, EU:C:2016:865, paragraph 55).

88. In the absence, in national law, of coercive measures which are effective in terms of enforcing judgments, it is in any event a matter for the national legislature, if it considers it relevant or desirable, to provide (or not to provide) for a measure involving deprivation of liberty such as the committal of public officials. Member States may come to different decisions in that regard, depending on their societal choices and their assessment of the capacity of such a measure to achieve the result provided for by the directive in question. [44]

89. I note that even if the referring court were completely powerless, under its national law, to ensure that the defendant complied with its final judicial decisions, and hence with Directive 2008/50, the European Union would still have a means of coercion available to it. It would be possible to bring proceedings for failure to fulfil obligations against the Member State in such a case; indeed, the Commission has initiated such proceedings in relation to air pollution, notably in the city of Munich. [45] If the Member State were found to have infringed Directive 2008/50, and if it did not comply with the decision of the Court, then it would be open to the Court, under Article 260(2) TFUE, to order it to pay a lump sum as regards the past and to make penalty payments as regards the future, at a deterrent level, payable, as the case may be, in respect of each day of non-compliance by the Member State.

V. Conclusion

90. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany) as follows:

EU law, and in particular the second subparagraph of Article 4(3) TEU, Article 197(1) TFEU, Article 47(1) of the Charter of Fundamental Rights of the European Union, Article 9 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and the second subparagraph of Article 19(1) TEU, must be interpreted as meaning that the national court is not required, or even permitted, for the purposes of ensuring the effective implementation of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe and, to that end, of compelling public officials to comply with a final judicial decision, to impose a measure involving deprivation of liberty, such as a committal order, upon those officials, if provision has not been made for such a measure to be imposed on such persons by a clear, foreseeable, accessible and non-arbitrary national law.

44 In an article published in the *Frankfurter Allgemeine Zeitung* on 18 July 2019, the President of the Bundesverwaltungsgericht (Federal Administrative Court) expressed the view that a committal order was not an appropriate measure in relation to representatives of an organ of the administration, such as the Minister-President of a *Land*. The public would expect state and regional organs and senior officials to continue to perform all their functions.

45 See pending case C-635/18, *Commission* v *Germany*.