Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

19 December 2019 (*)

(Reference for a preliminary ruling — Environment — Article 6, the first paragraph of Article 47 and Article 52(1) of the Charter of Fundamental Rights of the European Union — Directive 2008/50/EC — Atmospheric pollution — Ambient air quality — Air quality plan — Limit values for nitrogen dioxide — Obligation to adopt appropriate measures to ensure that any exceedance period is very short — Obligation on the national courts to take any necessary measure — Refusal of a regional government to comply with an injunction — Coercive detention contemplated in respect of senior political representatives or senior officials of the region concerned — Effective judicial protection — Right to liberty of the person — Legal basis — Proportionality)

In Case C-752/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany), made by decision of 9 November 2018, received at the Court on 3 December 2018, in the proceedings

Deutsche Umwelthilfe eV

v

Freistaat Bayern,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan, M. Safjan (Rapporteur), S. Rodin, L.S. Rossi, I. Jarukaitis, Presidents of Chambers, E. Juhász, D. Šváby, C. Vajda, F. Biltgen, K. Jürimäe and A. Kumin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 3 September 2019,

after considering the observations submitted on behalf of:

– Deutsche Umwelthilfe eV, by R. Klinger, Rechtsanwalt,

– Freistaat Bayern, by J. Vogel, W. Brechmann and P. Frei, acting as Agents,

– the German Government, by S. Eisenberg, acting as Agent,

– the European Commission, by F. Erlbacher, G. Gattinara and E. Manhaeve, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the first sentence of Article 9(4) 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 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), of Articles 4(3) and 19(1) TEU, of Article 197(1) TFEU and of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in proceedings between Deutsche Umwelthilfe eV, a non-governmental organisation promoting environmental protection, and Freistaat Bayern (the *Land* of Bavaria, Germany) concerning the enforcement of an injunction requiring the adoption of traffic bans in order to comply with the obligations flowing from 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 (OJ 2008 L 152, p. 1).

Legal context

International law

3 Article 9 of the Aarhus Convention, headed 'Access to justice', provides:

'...

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5), shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

...

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

...'

EU law

4 Recital 2 of Directive 2008/50 states:

'In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organisation standards, guidelines and programmes.'

5 Article 4 of Directive 2008/50 provides:

'Member States shall establish zones and agglomerations throughout their territory. Air quality assessment and air quality management shall be carried out in all zones and agglomerations.'

6 Article 13 of Directive 2008/50, headed 'Limit values and alert thresholds for the protection of human health', provides in paragraph 1:

'Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.

In respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein.

Compliance with these requirements shall be assessed in accordance with Annex III.

...'

7 Article 23(1) of Directive 2008/50 states:

'Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.

In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.

Those air quality plans shall incorporate at least the information listed in Section A of Annex XV and may include measures pursuant to Article 24. Those plans shall be communicated to the Commission without delay, but no later than two years after the end of the year the first exceedance was observed.

...'

8 Annex XI to Directive 2008/50 is headed 'Limit values for the protection of human health'. Section B thereof sets limit values per pollutant in terms of its concentration in ambient air, measured in different time periods. So far as concerns nitrogen dioxide, Annex XI provides:

Averaging Period	Limit value	Margin of tolerance	Date by which limit value is to be met
One hour	200 $\mu g/m^3$, not to be exceeded	... 0% by 1 January 2010	1 January 2010

	more than 18 times a calendar year		
Calendar year	40 µg/m^3	… 0% by 1 January 2010	1 January 2010

German law

9 The first sentence of Article 104(1) of the Grundgesetz (Basic Law) provides:

'Liberty of the person may be restricted only pursuant to a formal law and in accordance with the procedures prescribed therein.'

10 The first sentence of Paragraph 167(1) of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Courts; 'the VwGO') provides:

'Save where this Law otherwise provides, Book 8 of the Zivilprozessordnung [Code of Civil Procedure] shall apply, *mutatis mutandis*, to enforcement.'

11 According to the explanations provided by the referring court, Paragraph 172 of the VwGO is such a provision providing otherwise which, in accordance with the introductory words of the first sentence of Paragraph 167(1) of the VwGO, precludes, in principle, application of the enforcement provisions in Book 8 of the Zivilprozessordnung (Code of Civil Procedure; 'the ZPO'). Paragraph 172 states:

'If, in cases falling within the second sentence of Paragraph 113(1), Paragraph 113(5), and Paragraph 123, the authority fails to comply with the obligation imposed on it in the judgment or interim order, the court of first instance may, upon application, impose by order 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 the ZPO is worded as follows:

'1. If an act cannot be carried out by a third party, and depends exclusively on the will of the debtor, the court of first instance hearing the case shall find, upon application, that the debtor is to be enjoined to carry out the act by means of a coercive financial penalty and, if this cannot be recovered, by means of coercive detention, or solely by means of coercive detention. Each financial penalty may not exceed EUR 25 000 in amount. The provisions of Chapter 2 relating to detention shall apply *mutatis mutandis* to coercive detention.

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

13 Paragraph 890(1) and (2) of the ZPO provides:

'1. If the debtor breaches his obligation to desist from an action or to tolerate an action, the court of first instance hearing the case shall, upon application by the creditor, impose upon the debtor, in respect of each breach, the penalty of payment of a civil fine and, if this cannot be recovered, coercive detention, or of coercive detention of up to six months. Each fine may not exceed EUR 250 000 in amount, and the coercive detention may not exceed a total of two years.

2. The order against the debtor must be preceded by a corresponding warning which, unless it is contained in the judgment setting out the obligation, shall be issued, upon application, by the court of first instance hearing the case.'

The dispute in the main proceedings and the question referred for a preliminary ruling

14 It is apparent from the order for reference that the limit value for nitrogen dioxide (NO_2) set by the second subparagraph of Article 13(1) of Directive 2008/50 in conjunction with Section B of Annex XI thereto, namely 40 $\mu g/m^3$ on average over a calendar year, has been exceeded, sometimes to a very considerable extent, at numerous locations on several kilometres of road within the city of Munich (Germany).

15 In an action brought by Deutsche Umwelthilfe, the Verwaltungsgericht München (Administrative Court, Munich, Germany) enjoined the *Land* of Bavaria, by judgment of 9 October 2012, to amend the air quality action plan applicable in respect of the city of Munich, which is an 'air quality plan' within the meaning of Article 23 of Directive 2008/50, in such a way as to include the measures necessary in order for the limit value set for nitrogen dioxide to be complied with in that city as soon as possible. That judgment has become final.

16 By order of 21 June 2016, the Verwaltungsgericht München (Administrative Court, Munich) threatened the *Land* of Bavaria with a financial penalty of EUR 10 000 if it did not comply with that injunction within one year from service of the order. In the appeal against that order, the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany), by order of 27 February 2017, threatened the *Land* of Bavaria with financial penalties in an amount of EUR 2 000 to EUR 4 000 if it did not take the measures necessary to comply with the limit values set by Directive 2008/50, including the imposition of traffic bans in respect of certain diesel vehicles in various urban zones. That order has also become final.

17 Since the *Land* of Bavaria did not comply in full with the obligations flowing from the order of 27 February 2017, the Verwaltungsgericht München (Administrative Court, Munich), upon application of Deutsche Umwelthilfe, required the *Land* of Bavaria, by order of 26 October 2017, to pay a financial penalty in the sum of EUR 4 000. The *Land* of Bavaria did not appeal against that order and paid that sum.

18 Subsequently, the *Land* of Bavaria still did not comply in full with the terms of the injunction granted against it by the order of 27 February 2017. On the contrary, representatives of the *Land* of Bavaria, including its Minister-President, publicly stated their intention not to comply with the aforementioned obligations relating to the imposition of traffic bans.

19 By orders of 28 January 2018, the Verwaltungsgericht München (Administrative Court, Munich), upon application of Deutsche Umwelthilfe, required payment by the *Land* of Bavaria of a financial penalty in the sum of EUR 4 000 because it had failed to comply with a point of the operative part of the order of 27 February 2017, and threatened to impose upon it an additional financial penalty of the same amount if it did not comply, within a fresh period, with another point of the operative part of that order. On the other hand, that court dismissed, in particular, the application for coercive detention of the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or, failing this, of its Minister-President. The *Land* of Bavaria appealed against the orders of 28 January 2018 to the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria), which dismissed the appeals by order of 14 August 2018.

20 However, the appeal lodged by Deutsche Umwelthilfe against the order of 28 January 2018, by which its application for coercive detention was dismissed, is still pending before the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria). According to the referring court, there is no reason to expect that the *Land* of Bavaria will comply with the order of 27 February 2017 by adopting the traffic bans at issue.

21 The referring court states that, where the executive demonstrates so clearly its determination not to comply with certain judicial decisions, the view must be taken that the setting and payment of fresh financial penalties, of a higher amount, are not liable to alter that conduct. Indeed, payment of a financial penalty does not result in any economic loss for the *Land* of Bavaria. On the contrary, the financial penalty is paid by entering the amount fixed by the court as a debit item under a given heading of the budget of the *Land* concerned and crediting the same amount to its central funds.

22 The referring court takes the view that, although, in principle, it could be conceivable to ensure compliance with the obligations and judicial decisions at issue by ordering the coercive detention of certain members of the government of Upper Bavaria (Germany), the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or the Minister-President of that *Land*, for reasons of constitutional law that instrument, provided for by the ZPO, is not applicable here.

23 Whilst, under the first sentence of Paragraph 167(1) of the VwGO, the measures provided for in Book 8 of the ZPO, including coercive detention, may be applied save where the VwGO otherwise provides, Paragraph 172 of the VwGO is such a provision that provides otherwise, precluding application of the enforcement measures set out in Book 8 of the ZPO.

24 The referring court acknowledges that the Bundesverfassungsgericht (Federal Constitutional Court, Germany) has previously held that the administrative courts are, in principle, under a duty to take the view, where appropriate, that they are not bound by the restrictions resulting from Paragraph 172 of the VwGO.

25 Nevertheless, according to the referring court, if the coercive detention of office holders involved in the exercise of official authority were ordered on the basis of Paragraph 888 of the ZPO, that would be tantamount to failing to have regard to the requirement, stated by the Bundesverfassungsgericht (Federal Constitutional Court) in its order of 13 October 1970, that the intention of the legislature when it adopted a provision which is used as the legal basis for a deprivation of liberty must have encompassed the objective for the fulfilment of which that provision is now applied. According to the referring court, in the light of the history of Paragraph 888 of the ZPO, the requirement thereby set is not met so far as concerns office holders involved in the exercise of official authority.

26 The referring court is nevertheless uncertain whether EU law demands a different assessment of the legal situation at issue in the main proceedings.

27 It states that, if the ordering of coercive detention in a situation such as that at issue in the main proceedings is required under EU law, the German courts are not permitted to take account of the obstacle that the aforementioned constitutional case-law represents.

28 In those circumstances, the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are

– the requirement laid down in the second subparagraph of Article 4(3) [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,

– the principle of effective implementation of EU law by the Member States, which is established in, inter alia, Article 197(1) [TFEU],

– the right to an effective remedy guaranteed by the first paragraph of Article 47 of the [Charter],

– 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],

– 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 coercive detention on office holders involved in the exercise of the official authority … 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], with specific minimum content if that

Federal *Land* has been ordered, by way of a final judgment, to carry out an update having that specific minimum content, and

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

– threats of financial penalties and the imposition 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* against which a final judgment has been given, 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* against which a final judgment has been given has stated to the courts and publicly — inter alia before parliament via its most senior political office-holder — that it will not fulfil the judicially imposed obligations in connection with air quality planning,

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

– for a situation of the nature involved here, national law does not provide for coercive instruments that are more expedient than threats and imposition 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?'

Consideration of the question referred

29 By its question, the referring court seeks, in essence, to ascertain whether EU law, in particular the first paragraph of Article 47 of the Charter, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50, EU law empowers or even obliges the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority.

30 According to the referring court, this question arises in the context of the Court of Justice's case-law according to which, where a Member State has failed to comply with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by Article 22 of the directive, it is for the national court having jurisdiction, should a case be brought before it, to take, in regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter (judgment of 19 November 2014, *ClientEarth*, C-404/13, EU:C:2014:2382, paragraph 58).

31 In the present instance, the referring court, applying that case-law, has already ordered the *Land* of Bavaria to adopt traffic bans in respect of certain diesel vehicles in various urban zones of the city of Munich, in order for the limit value for nitrogen dioxide set in Section B of Annex XI to Directive 2008/50 to be complied with as soon as possible.

32 In view of the *Land* of Bavaria's refusal to comply with that injunction, which has become final, the main proceedings relate specifically to an application by Deutsche Umwelthilfe for that injunction to be enforced by ordering the coercive detention of the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or, failing that, of its Minister-President.

33 In that regard, it should be noted, in the first place, that, in the absence of harmonisation of national enforcement mechanisms, the details of their implementation are governed by the internal legal order of the Member States by virtue of the principle of procedural autonomy of those States. Nevertheless, the means of implementation must meet two conditions, namely that they are no less favourable than

those governing similar domestic actions (principle of equivalence) and that they do not make it impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 26 June 2019, *Kuhar*, C-407/18, EU:C:2019:537, paragraph 46 and the case-law cited).

34 In the second place, when the Member States implement EU law, they are required to ensure compliance with the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter (judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 69), a provision which constitutes a reaffirmation of the principle of effective judicial protection. In the case of actions intended to secure compliance with environmental law, in the particular on the initiative of environmental protection associations as in the main proceedings, that right to an effective remedy is also enshrined in Article 9(4) of the Aarhus Convention.

35 According to the Court's case-law, national legislation which results in a situation where the judgment of a court remains ineffective because that court does not have any means of securing observance of the judgment fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter (see, to that effect, judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, paragraph 72).

36 That right would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain ineffective to the detriment of one party (judgments of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 43 and the case-law cited, and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, point 57).

37 More specifically, according to the case-law of the European Court of Human Rights which relates to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 — and in the light of which Article 47 of the Charter should be interpreted (judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, EU:C:2016:499, paragraph 41 and the case-law cited) — the fact that the public authorities do not comply with a final, enforceable judicial decision deprives that provision of all useful effect (see, to that effect, ECtHR, 19 March 1997, *Hornsby v. Greece*, CE:ECHR:1997:0319JUD001835791, §§ 41 and 45).

38 The right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health (see, by analogy, judgment of 25 July 2008, *Janecek*, C-237/07, EU:C:2008:447, paragraph 38).

39 In addition, in order to ensure effective judicial protection in the fields covered by EU environmental law, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention and with the objective of effective judicial protection of the rights conferred by EU law (see, to that effect, judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraphs 50 and 51).

40 To that end, it is incumbent upon the national court to ascertain, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by that law, whether it can arrive at an interpretation of domestic law that would enable it to apply effective coercive measures in order to ensure that the public authorities comply with a judgment that has become final, such as, in particular, high financial penalties that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded.

41 That said, in the present instance the referring court considers that it cannot secure compliance with the principle of the effectiveness of EU law and the right to an effective remedy unless EU law empowers or even obliges it to disregard the reasons of a constitutional nature which, in its view,

prevent the application of coercive detention to office holders involved in the exercise of official authority.

42 In that regard, it should be recalled that, where it is unable to interpret national law in compliance with the requirements of EU law, the national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it (judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 21, and of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraphs 58 and 61).

43 Nevertheless, that case-law of the Court cannot be understood as meaning that the principle of effectiveness of EU law and observance of the right, guaranteed by the first paragraph of Article 47 of the Charter, to effective judicial protection oblige the national court to disapply a provision of national law or not to follow the only interpretation of that provision which seems to it to accord with the national constitution if, in so doing, it infringes another fundamental right guaranteed by EU law.

44 Indeed, and as is apparent from Article 52(1) of the Charter, the right to effective judicial protection is not an absolute right and may be restricted, in particular in order to protect the rights and freedoms of others. A coercive measure such as coercive detention entails a limitation on the right to liberty, guaranteed by Article 6 of the Charter.

45 In order to answer the question referred for a preliminary ruling, it is accordingly necessary, in the third place, to weigh against one another the fundamental rights at issue in the light of the requirements laid down in the first sentence of Article 52(1) of the Charter.

46 As regards the requirements that the legal basis for a limitation on the right to liberty must satisfy, the Court has already stated, in the light of the judgment of the European Court of Human Rights of 21 October 2013, *Del Río Prada v. Spain* (CE:ECHR:2013:1021JUD004275009), that a law empowering a court to deprive a person of his or her liberty must, so as to meet the requirements of Article 52(1) of the Charter, be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness (judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraphs 38 and 40).

47 Those conditions apply in respect of any type of deprivation of liberty, including where it results from the need to enforce a penalty imposed by a judicial decision, irrespective of the possibility for the person concerned of avoiding the deprivation of liberty by complying with an injunction imposed by that decision or an earlier decision.

48 Whilst it is apparent from the oral argument at the hearing before the Court that doubts remain as to whether the conditions that would allow the coercive detention provided for by German law to be ordered in respect of office holders involved in the exercise of official authority are fulfilled, it is for the referring court alone to determine whether the relevant national provisions are, in the light of their wording and substance, sufficiently accessible, precise and foreseeable in their application and thus enable all risk of arbitrariness to be avoided.

49 If that is not so, the national court cannot order coercive detention solely on the basis of the principle of effectiveness and of the right to effective judicial protection. Any limitation on the right to liberty must be provided for by a law that meets the requirements recalled in paragraph 46 of the present judgment.

50 As regards the requirements stemming from the principle of proportionality, it is to be borne in mind that, where several fundamental rights are at issue, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights, striking a fair balance between them (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 60 and the case-law cited).

51 As the Advocate General has observed in point 86 of his Opinion, since the ordering of coercive detention entails a deprivation of liberty, recourse may be had to such an order only where there is no

less restrictive measure that enables the objective pursued to be attained. It is therefore for the referring court to determine whether national law governing enforcement can be interpreted in conformity with the right to effective judicial protection, to the effect that it would authorise the referring court to adopt measures that do not impinge upon the right to liberty, such as those referred to in paragraph 40 of the present judgment.

52 It is only if the referring court were to conclude that, in the context of the balancing exercise referred to in paragraph 45 of the present judgment, the limitation on the right to liberty which would result from coercive detention being ordered complies with the conditions laid down in that regard in Article 52(1) of the Charter that EU law would not only authorise, but require, recourse to such a measure.

53 It should also be pointed out that the foregoing reasoning is without prejudice, in particular, to the possibility that an infringement of Directive 2008/50 such as that identified by the referring court as giving rise to the dispute in the main proceedings may be found by the Court in an action for failure to fulfil obligations under EU law.

54 Furthermore, it should be remembered that the full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible, as that principle is inherent in the system of the treaties on which the European Union is based (see, to that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraphs 20, 39 and 52, and of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 18 and the case-law cited).

55 That principle applies to any case in which a Member State breaches EU law, whichever public authority is responsible for the breach (judgment of 28 July 2016, *Tomášová*, C-168/15, EU:C:2016:602, paragraph 19 and the case-law cited).

56 In the light of all the foregoing, the answer to the question referred is that EU law, in particular the first paragraph of Article 47 of the Charter, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50, it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

EU law, in particular the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from 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, it is incumbent upon the national court having jurisdiction to order the coercive detention of office holders involved in the exercise of official authority where

provisions of domestic law contain a legal basis for ordering such detention which is sufficiently accessible, precise and foreseeable in its application and provided that the limitation on the right to liberty, guaranteed by Article 6 of the Charter of Fundamental Rights, that would result from so ordering complies with the other conditions laid down in that regard in Article 52(1) of the Charter. On the other hand, if there is no such legal basis in domestic law, EU law does not empower that court to have recourse to such a measure.

[Signatures]

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* Language of the case: German.