



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-752/18  
Deutsche Umwelthilfe eV v Freistaat Bayern

## **According to Advocate General Saugmandsgaard Øe, imprisonment cannot be used against the public officials responsible, including the Minister-President, in order to compel them to introduce traffic bans on diesel vehicles in Munich**

*The fundamental right to liberty may be limited only on the basis of a law which clearly provides for such a possibility in respect of those officials, which does not appear to be the case in Germany*

The Freistaat Bayern (Land of Bavaria, Germany) refuses to comply with a German judicial decision ordering it to introduce traffic bans on diesel vehicles on certain roads in Munich, where the nitrogen dioxide limit values set by the directive on air quality<sup>1</sup> had been exceeded for many years, sometimes to a considerable extent. The judicial decision in question, which has become final, was obtained by Deutsche Umwelthilfe, a German non-governmental organisation empowered to initiate group litigation in environmental matters.

The Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany), hearing the case, found that the only coercive measure provided for by German law in respect of the administration, namely the imposition of penalty payments, is not sufficient to compel the Federal *Land* to comply with the judicial decision in question. The payment of such a penalty would not reduce the Land's resources, since the expenditure in question would constitute a credit to its central funds.

The Bayerischer Verwaltungsgerichtshof asked the Court of Justice, therefore, whether the national court's obligation under EU law to take 'all necessary measures'<sup>2</sup> to ensure that the directive is complied with<sup>3</sup> may include the obligation to apply a measure involving the deprivation of liberty, such as a committal order. It explains that German law provides, in principle, for committal orders to be made, but that such orders cannot be made against public officials, there being no clear and precise law in that regard.

In today's Opinion, Advocate General Henrik Saugmandsgaard Øe observes, first of all, that the refusal of public officials of the Land of Bavaria to comply with the judicial decision at issue may have serious consequences for people's health and lives, and for the rule of law, which is one of the values on which the EU is founded. Furthermore, such a refusal infringes the fundamental right of litigants to an effective judicial remedy, as guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter').

**However, according to the Advocate General, there may be limits, in practice, to the full effectiveness of EU law and the right to liberty as provided for in the Charter constitutes such a limit.**

<sup>1</sup> 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).

<sup>2</sup> Cases: [C-237/07 Janecek](#), see Press Release No. [58/08](#), [C-404/13](#); ClientEarth see Press Release No. [153/14](#) and [C-723/17](#); Craeynest and Others see Press Release No. [82/19](#).

<sup>3</sup> 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. According to the Court's case-law, that clear obligation may be relied on by individuals as against public authorities; see the judgment in *ClientEarth*, cited above.

The Advocate General recalls that the fundamental right to liberty, guaranteed by the Charter, may be limited only on the basis of a clear and foreseeable law, which does not appear to exist in Germany in respect of public officials.

In addition, there is further appreciable uncertainty concerning the persons in respect of whom a committal order can be made.

The Bayerischer Verwaltungsgerichtshof referred 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 region of Upper Bavaria, the President and Vice-President. It added that, as a precaution, it would be appropriate to extend the measure to include managerial staff of the *Land* and the region of Upper Bavaria, since the responsible organs of the *Land* have parliamentary immunity and this, unless it were withdrawn, would defeat a committal order.

The principal public officials of the Land might, therefore, avoid committal. By contrast, committal orders could be made against senior officials, but, according to the Bayerischer Verwaltungsgerichtshof, 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.

**The Advocate General concludes that, even supposing that a committal order would achieve the desired outcome, namely compliance with the nitrogen dioxide limit values — which seems to him to be far from certain — to make such an order against officials of the *Land* would be contrary to the fundamental right to liberty, in the absence of any law for that purpose, or at the very least any clear and foreseeable law.** 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 requirements of the fundamental right to liberty.

**Consequently, as serious a matter as it may be for public officials to refuse to comply with a final court decision, the Advocate General considers that the obligation of the national court to do everything within its competence to give full effect to directives, including environmental directives, cannot 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.**

The Advocate General also observes that it is a matter for the national legislature, if it considers it desirable, to provide for such a law. Furthermore, there is a coercive measure at EU level, namely proceedings for failure to fulfil obligations, which may result in financial penalties being imposed on the Member State concerned. In fact, infringement proceedings in relation to air pollution, notably in the city of Munich, brought by the Commission against Germany, are currently pending before the Court of Justice.<sup>4</sup>

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*Unofficial document for media use, not binding on the Court of Justice.*

*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

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<sup>4</sup> Pending case [C-635/18](#), Commission v Germany.

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