Case C-752/18

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

3 December 2018

Referring court:

Bayerischer Verwaltungsgerichtshof (Germany)

Date of the decision to refer:

9 November 2018

Applicant (party seeking enforcement)

Deutsche Umwelthilfe eV

Defendant (party against which enforcement is sought)

Freistaat Bayern (Free State of Bavaria)

Subject matter of the main proceedings

Amendment of the air quality plan for the City of Munich; enforcement against the State on the basis of an administrative court judgment.

Subject matter and legal basis of the reference

Interpretation of EU law with regard to the guaranteeing of its effective implementation by the Member States and with regard to the obligation of the Member States to ensure effective legal protection, specifically the interpretation of the second subparagraph of Article 4(3) TEU and the second subparagraph of Article 19(1) TEU, of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, of the first sentence of Article 9(4) of the Aarhus Convention, and of Article 197(1) TFEU;

Article 267 TFEU.

Questions referred

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,

4. the obligation devolving on the Member States to ensure effective legal protection in environmental matters, which arises from 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 (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 to mean that a German court is entitled – and possibly even obliged – to impose detention on 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 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) 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 have not resulted in a significant persuasive effect even if higher amounts than before have been 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

– 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?

Provisions of EU law cited

TEU, the second subparagraph of Article 4(3), the second subparagraph of Article 19(1)

Charter of Fundamental Rights of the European Union (hereinafter: the Charter), first paragraph of Article 47, Article 52(3)

TFEU, Article 197(1)

Convention on access to information, public participation in decision-making and access to justice in environmental matters (hereinafter: the Aarhus Convention), first sentence of Article 9(4)

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, Article 23

Case-law referred to:

Court of Justice of the European Union (hereinafter: the Court of Justice): Judgments of 8 March 2011, C-240/09, paragraph 30; of 20 December 2017, C-664/15, paragraphs 56 and 57; of 19 November 2014, C-404/13, paragraph 58, of 15 March 2017, C-528/15, paragraph 37 et seq.

European Court of Human Rights (hereinafter: the ECtHR): Judgments of 19 March 1997 (AppNr 18357/91 – *Hornsby v. Greece*, paragraphs 40 and 41), of 22 March 2001 (AppNr 34044/96, 35532/97 and 44801/98, paragraph 86), of 8 November 2005 (AppNr 34056/02, paragraph 164), of 21 October 2013 (AppNr 42750/09 – *del Rio Prada v. Spain*)

Provisions of national law cited (in particular)

Grundgesetz (German Basic Law; 'the GG'), Article 2(2), 19(4), 20(3), 104(1)

Verwaltungsgerichtsordnung (Code of administrative court procedure; 'the VwGO'), Paragraphs 167, 172

Zivilprozessordnung (Code of civil procedure; 'the ZPO'), Paragraph 888(1) and (2)

National case-law cited (in particular)

Orders of the Bundesverfassungsgericht (Federal Constitutional Court) of 9 August 1999 (1 BvR 2245/98), of 13 October 1970 (1 BvR 226/70)

Judgments of the Bundesverwaltungsgericht (Federal Administrative Court) of 27 February 2018 (7 C 26.16 and 7 C 30.17) ('diesel vehicle bans')

Brief summary of the facts and procedure

1 In the territory of the city of Munich, the limit value for nitrogen dioxide (NO_2) of 40 µg/m^3, which is laid down pursuant to the second subparagraph of Article 13(1) of, in conjunction with Section B of Annex XI to, Directive 2008/50 and relates to the calendar year as the averaging period, was – in some cases hugely – exceeded in numerous locations. According to the figures of Freistaat Bayern (party against which enforcement is sought) itself, which are confined to approximately 511 kilometres of road distance within Munich, the limit value of 40 µg/m^3 was not complied with across 123 kilometres in 2015. According to these figures, the concentration of nitrogen dioxide exceeded a value of 60 µg/m^3 across 16 of those kilometres. They include Landshuter Allee, on which an annual average NO_2 value of 80 µg/m^3 was measured in 2016 and a preliminary annual average NO_2 value of 78 µg/m^3 was measured in 2017. According to the figures published by the party against which enforcement is sought, the annual average NO_2 value was between over 50 and 60 µg/m^3 across 27 kilometres; according to the figures, the concentration of nitrogen dioxide in the annual average reached values that ranged between over 40 µg/m^3 and up to 50 µg/m^3 across 80 kilometres of road distance.

2 The party seeking enforcement is a non-governmental organisation that is entitled to bring actions on behalf of environmental protection organisations under German law.

3 Upon the action of the party seeking enforcement, the Verwaltungsgericht München (Administrative Court, Munich) issued a judgment upon the party against which enforcement is sought on 9 October 2012, the operative part of which – in so far as it is still relevant to the present case – reads as follows: 'The

defendant is obliged to amend the air quality plan applicable to Munich so that it contains the necessary measures to comply with the NO_2 emission limit value of 40 µg/m^3, which is averaged over a calendar year, … in the territory of the city of Munich as quickly as possible.'

4 On 8 April 2014, the party against which enforcement is sought withdrew the appeal that it had lodged against that judgment; the judgment of 9 October 2012 therefore became final.

5 In response to the request of the party seeking enforcement, the Administrative Court of Munich threatened, by order of 21 June 2016, the party against which enforcement is sought with the imposition of a penalty of EUR 10 000 if it did not comply with its obligation arising from the judgment of 9 October 2012 within a period of one year of the order being served.

6 In response to the appeal of the party against which enforcement is sought, the referring court reproduced the following text from this decision in point II of the operative part of its order of 27 February 2017:

7 '1. …

2. The defendant is threatened with a penalty of EUR 4 000 if, by the end of 31 August 2017, it does not initiate public participation for preparing a further update to the air quality plan for the City of Munich … in such a way that it publishes an announcement meeting the requirements of the second sentence of Paragraph 47(5a) BImSchG [Federal Law on emission control] in the official journal of the [competent authority], from which it is clear that such an amendment is to include traffic bans on vehicles with compression-ignition engines in relation to enumeratively listed (sections of) streets in the territory of the [City of Munich], which restrictions in terms of time and substance – stating the reasons relevant to them – may be intended for those traffic bans, and with regard to which (sections of) streets in the territory of the [City of Munich] on which the emission limit value established in Paragraph 3(2) of the 39. Verordnung zur Durchführung des Bundes Immissionsschutzgesetz [39th Ordinance for the implementation of the Federal Law on emission control] has been exceeded according to the most recent information available to the defendant a derogation from the introduction of such a traffic ban is intended, and on what grounds.

3. The defendant is threatened with a further penalty of EUR 4 000 if, by the end of 31 December 2017, it does not bring to the attention of the public an enforceable concept from which it is clear that a future amendment of the air quality plan for the City of Munich includes traffic bans on vehicles with compression-ignition engines in relation to enumeratively listed (sections of) streets in the territory of the [City of Munich], which restrictions in terms of time and substance – stating the reasons relevant to them – are to apply to those traffic banes, and with regard to which (sections of) streets in the territory of the

interested parties on which the emission limit value established [in the aforementioned] Paragraph 3(2) … has been exceeded according to the most recent information available to the defendant a derogation from the introduction of such a traffic ban is intended, and on what grounds.'

8 The aforementioned Paragraph 3(2) of the 39th Ordinance for the implementation of the Federal Law on emission control transposes into German law the limit value for nitrogen dioxide of 40 µg/m^3 established in Section B of Annex XI to Directive 2008/50.

9 As grounds for its decision, the referring court stated inter alia that the party against which enforcement is sought had failed to comply with the obligation arising from the definitive judgment of 9 October 2012 in relation to compliance with the annual average limit value for nitrogen dioxide of 40 µg/m^3 as quickly as possible. The party against which enforcement was sought had also assumed in the sixth update of the air quality plan for Munich that, without additional measures, compliance with the annual average limit value for NO_2 was expected only 'after' 2030 at the 'Landshuter Allee' measuring station and 'from' 2025 at the 'Stachus' measuring station. The introduction of traffic bans on diesel vehicles in a future update of the air quality plan was therefore absolutely essential, particularly given the established particularly large proportion of the limit value exceedances that is attributable to the nitrogen dioxide emissions caused by diesel vehicles.

10 The order of 27 February 2017 became final on the date of its publication.

11 In the meantime, it has been clarified at the highest judicial level by two decisions of the Bundesverwaltungsgericht (Federal Administrative Court) of February 2017 that traffic bans on diesel vehicles can be ordered on the basis of the applicable national law. The Federal Administrative Court ruled that air quality planning that merely sets out measures on the basis of which the limit values for nitrogen dioxide would not be complied with until after 2020 infringes the second subparagraph of Article 23(1) of Directive 2008/50. In addition, the same court ruled that (restricted) traffic bans on (specific) diesel vehicles must be adopted for reasons pertaining to EU law if they proved to be the only suitable measures for complying with exceeded NO_2 limit values as quickly as possible. The referring court stresses that, in those decisions, the Federal Administrative Court also clarified that road-specific traffic bans (i.e. bans that relate only to specific streets or sections of streets) are only moderately invasive and constitute the less restrictive means in comparison with zonal traffic bans on diesel vehicles (i.e. bans that relate to an extensive, coherent transport network made up of numerous major and minor roads).

12 The party against which enforcement is sought complied with the obligation imposed on it in point II.1 of the operative part of the order of 27 February 2017. As it did not comply with its obligation arising from point II.2 of that judgment, however, the Administrative Court of Munich imposed a penalty of EUR 4 000 by

order of 26 October 2017, on the application of the party seeking enforcement. The party against which enforcement is sought did not file an appeal against that decision and paid the penalty imposed.

13 On 21 November 2017, the party seeking enforcement initiated a further set of enforcement proceedings before the Administrative Court of Munich, by means of which it once again seeks the enforcement of the obligation imposed on the party against which enforcement is sought in point II.2 of the operative part of the order of 27 February 2017. In this dispute, the party seeking enforcement essentially requested, in the main request, that the party against which enforcement is sought be required to carry out the acts referred to in point II.2, specifically by means of detention, to be enforced against the Bavarian Minister of State for the Environment and Consumer Protection. This application was rejected by an order of the Administrative Court of Munich of 29 January 2018.

14 The party seeking enforcement filed an appeal against this. That appeal is pending before the referring court. Before that court, the party seeking enforcement essentially requests, inter alia in the main request, that the party against which enforcement is sought be required to carry out the acts referred to in point II.2 of the operative part of the order of 27 February 2017 by means of detention, to be enforced against the Bavarian Minister of State for the Environment and Consumer Protection.

15 Even in the period following this, however, the party against which enforcement is sought has yet to comply with the obligations imposed on it in points II.2 and II.3 of the order of 27 February 2017.

The view taken by the party against which enforcement is sought

16 The party against which enforcement is sought believes that the inclusion of vehicle bans in air quality plans is politically undesirable and disproportionate. It is convinced that (even the less restrictive) road-specific traffic bans are disproportionate and therefore not required by law, as they are unsuitable in view of the burdens caused by diverted traffic and are also unnecessary given that there are equally effective alternative measures. Although the party against which enforcement is sought will be involved in the assessment and public participation required by the referring court, the latter takes the view that that assessment and public participation will be carried out with the aim of demonstrating the disproportionality of road-specific traffic bans on diesel vehicles. In addition, the party against which enforcement is sought refers to the power to exhaust all redress procedures and file appeals.

17 The referring court considers this to be obsolete, however, as it is no longer possible for an appeal to be filed against either the judgment of 9 October 2012 or the order of 27 February 2017, because both decisions have become final. The final nature of these decisions means that the party against which enforcement is

sought is bound by, and must comply with, the judicial pronouncements contained in them.

Brief summary of the basis for the reference

18 If the executive power (in this case the party against which enforcement is sought) does not comply with a court order that has been issued to it in a final judicial decision, under the law of the Federal Republic of Germany the administrative courts are restricted in cases of the kind at issue to threatening it with financial penalties, setting a deadline for completion of the omitted act, and, if the threat is also unsuccessful, to impose the financial penalty.

19 The party against which enforcement is sought is free to continue to express its view that road-specific traffic bans on diesel vehicles – the inclusion of which in an update of the air quality plan for Munich is expected of it by the referring court, amongst other things – are disproportionate. In any event, however, it is obliged to comply with final decisions.

20 That said, the referring court is not satisfied that the party against which enforcement is sought intends to do so. Rather, it has expressed clearly, both outside court and in court proceedings in the declarations enclosed in the files, that it would not comply with the obligation imposed on it in a legally final manner in, inter alia, the aforementioned point II.2 of the cited order. In this respect, the referring court refers to a governmental declaration made by the Minister-President of the party against which enforcement is sought as well as a newspaper article and the written submissions of the party against which enforcement is sought in the present proceedings.

21 This failure to comply with final decisions breaches not only national law, but also EU law.

3. Infringement of the rule of law

From a national perspective:

22 The binding effect of final judicial decisions is a part of the principle of the rule of law under the Grundgesetz (Basic Law; the GG). The binding effect of final judicial decisions is also a fundamental requirement of effective judicial protection. The referring court takes the view that the conduct of the party against which enforcement is sought runs counter to the principles arising from Article 20(3) of the GG and the first sentence of Article 19(4) of the GG.

From the perspective of European law and, in particular, EU law in relation to the principle of the rule of law and the right to an effective remedy:

23 As the rule of law pursuant to the first sentence of Article 2 TEU is one of the values on which the European Union is founded, Article 47 of the Charter also guarantees the right to an 'effective remedy' and, moreover, the second subparagraph of Article 19(1) TEU obliges the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, the failure to comply with final judgments and decisions also has significance under EU law. The referring court takes the view that the right of non-governmental organisations to adequate and effective remedies, which is guaranteed by the first sentence of Article 9(4) of the Aarhus Convention, is a subjective right guaranteed by EU law. Article 47, first paragraph, of the Charter is therefore applicable. Irrespective of this, if Article 47, first paragraph, of the Charter were to be regarded as being inapplicable, a failure to comply with final judicial decisions that is challenged by a non-governmental organisation within the meaning of the second and third sentences of the second subparagraph of Article 9(2) of the Aarhus Convention would in any event adversely affect the party seeking enforcement in a claim arising directly from the first sentence of Article 9(4) of the Aarhus Convention.

24 The referring court believes that its view is confirmed by a decision of the ECtHR (judgment No 18357/91 – Hornsby v. Greece) and regards the considerations set out by the ECtHR in that decision to be transferable to EU law in the light of Article 52(3) of the Charter.

From an EU-law perspective in relation to an infringement of Directive 2008/50 as a result of the fact that not all appropriate measures to comply with the limit value prescribed in the directive have been taken:

25 The approach of the party against which enforcement is sought runs counter to the requirement in the first sentence of the second subparagraph of Article 23(1) of Directive 2008/50 that the exceedance period of a limit value prescribed under EU law must be kept as short as possible.

26 The air quality planning of the party against which enforcement is sought is inefficient: compliance with the limit value for the maximum permissible annual average of nitrogen dioxide pollution of 40 µg/m^3 established in Directive 2008/50 became mandatory from 1 January 2010. Even prior to this, EU law had drawn up air quality requirements in this regard, which, however, were less strict on account of margins of tolerance. On account of the gradual reduction of the margins of tolerance over the course of more than a decade, the party against which enforcement is sought had sufficient time to take the precautions required to comply with this limit value.

27 Almost nine years have passed since the date from which the currently applicable limit value applies, over four years have passed since the judgment of 9 October

2012 became final on 8 April 2014, and significantly more than a year and a half has passed since the order of 27 February 2017 became final. The party against which enforcement is sought has itself essentially acknowledged the inadequacy of its air quality planning for the purpose of making a drastic improvement with regard to the level of nitrogen dioxide pollution in the area of busy roads.

28 The lack of efficiency is attributable to the lack of appropriateness of the measures taken: of the seven previously adopted versions of the air quality plan drawn up for Munich, only two – namely the first and fifth updates – contained a single measure that may be regarded, at least to some extent, as a valuable contribution to the reduction of the level of nitrogen dioxide pollution. These are the ban on heavy lorry traffic through the urban area, included in the first update, and the reduction of the maximum permissible speed on a section of Landshuter Allee. According to the explicit explanation in the second update, the gradual introduction of a green zone in Munich, which was announced for the first time in the second update, served at least in the first place to reduce the content of fine particulate matter in the air The green zone was unable to make a decisive contribution to the reduction of NO_2 concentrations for the simple reason that even diesel vehicles were still allowed to drive into that zone under certain conditions. The party against which enforcement is sought itself now concedes that, owing to their high NO_2 emission level, there is a need to replace older diesel vehicles with lower-emission vehicles.

29 It is not possible to foresee when the limit value will be complied with: the referring court investigates the seventh update of the air quality plan for Munich in this connection. Amongst other things, it presents a statement made by representatives of the German automotive industry on 2 August 2017, according to which the NOx emissions (these are not identical to NO_2 emissions) of approximately 5.3 million passenger cars equipped with diesel engines in emission categories Euro 5 and Euro 6 are to be reduced by an average of 25% to 30% by the end of 2018 by means of modifications to the vehicle software. However, again according to the party against which enforcement is sought, from the outset the implementation of this statement was made subject to the proviso that, on the one hand, the relevant retrofitting technology be approved by the competent authority in Germany and, on the other hand, the vehicles be made accessible to the manufacturers. Mention is also made of a commitment made by the three German automotive groups to create self-funded incentives to accelerate the replacement of diesel vehicles belonging to an emission class below the Euro 5 standard with vehicles with the most modern exhaust aftertreatment systems or vehicles with electric motors.

30 Other measures included in the concept for a seventh update include a fund for ‘Sustainable Urban Mobility’. According to the statements of the party against which enforcement is sought itself, this subsidy measure is intended to make possible the ‘development of individual master plans to design measures for sustainable and emission-free mobility’. Also included is the ‘Express Cycle Path Pilot Project’, which is supported by several municipalities or their associations. It

should be mentioned in this respect that, in so far as this concept for a seventh update mentions state subsidies that in some cases have already been awarded and in other cases are intended for the future, the party against which enforcement is sought has made them subject to a budgetary proviso. It is also necessary to assess the conversion of rolling stock on railways passing through the territory of Munich from diesel traction to other means of propulsion.

31 Citing the decisions of the Federal Administrative Court of February 2018, the referring court states in this regard that air quality planning that makes the entry into force of measures which are dependent upon conditions that cannot be controlled by the planner itself (the party against which enforcement is sought), and the introduction of which, moreover, is also uncertain, infringes the obligation arising from the second subparagraph of Article 23(1) of Directive 2008/50 to take the air quality measures that are currently the most suitable for complying with exceeded limit values as quickly as possible.

32 All the aforementioned measures or projects have one thing in common, namely that, in breach of the obligation arising from the first sentence of the third subparagraph of Article 23(1) of Directive 2008/50, in conjunction with point 8(b) of Section A of Annex XV to that directive, the party against which enforcement is sought does not provide in the concept any indication as to when the elements of the concept are to be implemented. The information required pursuant to point 8(c) of Section A of Annex XV to Directive 2008/50, as to when the individual elements of the concept will take practical effect and what approximate decrease in the level of nitrogen dioxide pollution the party against which enforcement is sought expects from them, is also almost entirely missing.

33 The fact that the party against which enforcement is sought itself is aware of the lack of suitability of its manifestation of a serious air quality plan to achieve compliance with the limit value of 40 µg/m^3 in Munich within a reasonable period of time is demonstrated by the fact that the concept for a seventh update does not contain a statement as to when the party against which enforcement is sought expects to establish conditions in Munich that comply with EU law on the basis of its approach.

34 There is therefore a lack of effective implementation within the meaning of Article 197(1) TFEU. Nor can it be said that the approach described complies with the requirement provided for in the second subparagraph of Article 4(3) TEU, pursuant to which the Member States are to take any appropriate measure to ensure fulfilment of the obligations resulting from the acts of the institutions of the European Union (here: Directive 2008/50).

35 The referring court states the following: In light of the justification for the draft for a Law amending the Bayerisches Immissionsschutzgesetz (Bavarian Law on emission control) presented by the Government of the *Land* of Bavaria, it appears as though the party against which enforcement is no longer making any attempt whatsoever to comply with the limit value of 40 µg/m^3, and is more interested in

relaxing that limit value or authorising exceptions to it that have previously not been provided for.

36 This justification reads as follows: 'The exceedances of the emission limit values for nitrogen dioxide in locations with high volumes of traffic and unfavourable conditions for the dispersion of pollution in the air (street canyons) will continue to persist even in the long term. They currently constitute a considerable problem, unless disproportionate traffic bans are to be applied.'

37 Here, the party against which enforcement is sought therefore acknowledges that traffic bans (on diesel vehicles) constitute the only means of bringing an end to the unlawful situation of an excessive annual average limit value for nitrogen dioxide that will continue to persist 'in the long term'. In a State based on the separation of powers and the rule of law, moreover, it is for the courts to make the final decision on the question of whether such traffic bans are disproportionate.

4. Infringement of State obligations of protection

38 The referring court refers to the fact that human life and health are being constantly harmed as a result of the persistent exceedances of the NO_2 limit values in Munich.

39 Owing to the failure to carry out the acts – which are required by law and ordered by the courts – to reduce the amount of nitrogen dioxide pollution in the air to the statutorily permissible level, an incalculable number of people in Munich must continue to suffer, for an unnecessarily long time, a decline in life expectancy, quality of life and health that such exposure entails in particular if the maximum permissible concentration is hugely exceeded in some cases and that deplorable situation has already existed for decades. Environmental epidemiological studies have identified an association between an increasing NO_2 concentration in the ambient air with an increase in overall mortality, mortality due to cardiovascular diseases, hospital admissions and emergency consultations on account of respiratory diseases and asthma, as well as hospital admissions on account of chronic bronchitis. Further studies indicate that an increase in the NO_2 concentration of 16 µg/m^3 would entail a 17% increase in overall mortality, a 50% increase in cardiopulmonary mortality and a 55% increase in cardiovascular mortality. These figures on the risks to life and health that are associated with impermissibly high levels of exposure to nitrogen dioxide are also supported by a report released by the World Health Organisation in 2013.

40 In view of the harmful effects of excessive nitrogen dioxide concentrations on the lives and health of the people affected by it, public officials who do not take all the required measures to prevent this ongoing damage breach their public-service duty to protect and promote the legal interests of 'human life' and 'human health'. Under national law, this duty is derived from Article 2(2) of the GG, while the ECtHR derives the obligation of the Member States to take the necessary measures to protect the lives of persons subject to their jurisdiction from the first

sentence of Article 2(1) ECHR. The referring court assumes that, pursuant to Article 52(3) of the Charter, the protection afforded by Article 2(1) and Article 3(1) of the Charter is not less far-reaching.

5. Fundamental importance of this case

41 For the referring court, this resides in the deliberate breach – which it has established – of final judicial decisions by the executive power, which the referring court considers to be unacceptable.

6. Remedy via coercive measures: Lack of persuasive effect of further threats and impositions of penalties

42 If the executive power demonstrates its determination not to comply with certain judicial decisions, both towards parliament and towards the public with clarity and perseverance, as has happened in the present case, the referring court takes the view that it is out of the question that the threat or imposition of further and higher penalties will do anything to change this conduct. This is because the payment of penalties does not involve an actual loss of assets for the party against which enforcement is sought. Rather, it settles them in such a way that the amount imposed by the court is merely charged to a specific individual item in the State budget and the same amount is booked as revenue in the accounting office of the party against which enforcement is sought.

7. Recourse to enforcement provisions of civil procedure not possible for constitutional reasons

43 In addition to financial penalties amongst other things, German law also recognises, as a coercive measure, detention as a substitute to penalties or as an independent coercive measure. To a certain extent, the enforcement provisions of civil procedure are applicable *mutatis mutandis* in German administrative enforcement law. The first sentence of Paragraph 888(1) of the ZPO provides as follows: 'If an act cannot be carried out by a third party, and depends exclusively on the will of the debtor, the trial court of first instance must find, upon application, that the debtor is to be required to carry out the act by means of a penalty and, if this cannot be collected, by means of detention, or solely by means of detention.'

44 In a decision from 1999, the Federal Constitutional Court referred to the requirement to 'interpret and apply the enforcement provisions of the Code of Administrative Court Procedure in such a way that effective protection of the rights of the individual is also guaranteed vis-à-vis the administration'.

45 This means: 'If, for instance on the basis of previous experience, clear statements or multiple unsuccessful threats of penalties, it is clearly evident that the authority is not yielding to the pressure of the penalty, the principle of effective legal protection requires that use be made of the "corresponding" application of

provisions of civil procedure, which is possible pursuant to Paragraph 167 of the VwGO, and more incisive coercive measures be taken in order to induce lawful conduct on the part of the authority […]. It is … for the administrative court to assess which of the more incisive coercive measures set out in Paragraphs 885 to 896 of the ZPO […] are to be used in the enforcement …, if necessary, which order they are to be used in, and in what form …'.

46 Recourse to Paragraph 888 of the ZPO alone can be considered in the present case.

47 However, the imposition of detention by administrative courts on public officials of the party against which enforcement is sought as a more extensive enforcement measure is currently precluded by the fact that Paragraph 888 of the ZPO does not meet the requirements imposed by the Federal Constitutional Court (in a landmark decision in 1970) on rules that authorise the deprivation of liberty. According to the Federal Constitutional Court's interpretation of the Basic Law, which – subject to contrary provisions of EU law – is binding on the referring court, 'the Basic Law in the area of deprivation of liberty' pertains to 'a formal legislative framework founded in particular on the rule of law'.

48 Were detention to be ordered against the public officials of the party against which enforcement is sought on the basis of Paragraph 888 of the ZPO, it is true that it would not constitute an analogous application of that provision, as it would not be applied for that purpose to a circumstance not covered by its wording. However, the requirement laid down by the Federal Constitutional Court (in the decision of 1970) – according to which the intent of the legislature when it created the provision that is used as the legal basis for the deprivation of liberty must have also encompassed the objective for the fulfilment of which it is now used – would be violated. According to the history of the development of this provision, this is not the case as regards public officials of the State.

49 As it is therefore not possible to impose detention on public officials, the final decision of 27 February 2017 remains de facto unenforceable.

8. Lack of relevance of the constitutional obstacle for reasons arising from EU law?

50 If the imposition of detention were to be required by EU law in a case of the type in question, the courts should not take account of the fact that, under German constitutional law, deprivation of liberty cannot be ordered if, although such a measure is covered by the wording of a statutory provision, that rule was not intended to legitimise the specific encroachment in question according to the concepts which guided the incumbent legislature when it created it.

51 The reason for this is that it follows from the case-law of the Court of Justice (judgment of 20.12.2017, C-664/15, EU:C:2017:987, paragraphs 56 and 57) that national courts which are called upon, within the exercise of their jurisdiction, to

apply rules of EU law are under a duty to give full effect to those rules, if necessary refusing of their own motion to apply any conflicting provision of national legislation, and it is not necessary for the court to request or await the prior setting-aside of such a provision by the legislature or other constitutional means.

52 Pursuant to the judgment of the Court of Justice of 19 November 2014 (C-404/13, EU:C:2014:2382, paragraph 58), 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 (the European Commission raised objections to an application by the Federal Republic of Germany in this regard in point 3 of Article 1 of its Decision of 20 February 2013 – C(2013) 900 final – in relation to the Munich metropolitan area, with regard, inter alia, to the annual NO_2 limit value of 40 µg/m^3), it is for the courts of the Member State 'to take, with 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.'

53 However, this judgment did not clarify whether the ordering of detention against public officials of the executive is one of the necessary measures if, although national law provides a sufficient legal basis for it according to its wording (in this case: Paragraph 888 of the ZPO), that provision was not intended to confer on the courts the power to impose detention on public officials in the past, nor is it intended to do so at present. This question must be regarded as requiring clarification all the more so given that – not unlike the second sentence of Article 2(2) of the GG – Article 6 of the Charter confers a right to liberty on individuals; pursuant to the first sentence of Article 52(1) of the Charter – once again not unlike the third sentence of Article 2(2) of the GG and the first sentence of Article 104(1) of the GG – a limitation of this right requires a legal basis.

54 Drawing on the judgment of the European Court of Human Rights of 21 October 2013 (AppNr 42750/09 – *del Río Prada v. Spain*), the requirements that must be met by a law authorising the deprivation of liberty in order to be able to comply with Article 52(1) of the Charter were given substance by the Court of Justice in the judgment of 15 March 2017 (C-528/15, EU:C:2017:213, paragraph 37 et seq.).

55 From the perspective of the referring court, it does not appear to be clear whether an order of detention against public officials of the executive, which is based on Paragraph 888 of the ZPO and serves to enforce final judicial decisions, would be compatible, in particular, with the requirement of 'predictability' of a measure depriving a person of liberty. On the other hand, the referring court takes the view that the fact that public officials under consideration for detention previously had no need to expect such a measure could be overcome by the fact that detention is ordered only after the public official to be detained has been threatened with such detention in advance and has continued to fail to fulfil the obligations arising from the decisions to be enforced, even within a deadline to be attached to the threat.

9. Possible addressees of an order of detention

56 These may be legal persons, which therefore include the party against which enforcement is sought or its bodies. If the outcome of the present request for a preliminary ruling were to be that the imposition of detention is permissible in the given case, the considerations that would then be required as regards the selection of detainees would include, at the least, public officials of the authority responsible for implementing the Bavarian Law on emission control (hereinafter: competent authority) who have the task of drawing up the air quality plan in question.

57 However, account must be taken of the fact that the refusal to include traffic bans on diesel vehicles in the air quality plan for Munich is an expression of the political will of the Government of the *Land* of Bavaria, and the competent authority is subject to the instructions of the technically superior ministry – in this case, the Bavarian Ministry of State for the Environment and Consumer Protection.

58 The right of the ministry to issue instructions and the obligation of the competent authority to follow instructions mean that public officials of the Bavarian Ministry of State for the Environment and Consumer Protection – first and foremost the Minister of State for the Environment and Consumer Protection – potentially also belong to the circle of people who could come into consideration as being responsible for the infringements to be brought to an end by means of enforcement.

59 Finally, the Minister-President of the German *Land* of Bavaria could also be regarded as being responsible. This would be the case if the refusal of the party against which enforcement is sought to include traffic bans on diesel vehicles in an update of the air quality plan for Munich were an expression of the authority of that public official to set guidelines.

10. Safeguarding the principle of proportionality

60 Ordering detention with the objective of inducing the party against which enforcement is sought to perform air quality planning in accordance with EU law in compliance with final judicial decisions would not infringe the principle of proportionality.

61 In light of the high value attached to the legal rights of ‘human life’ and ‘human health’ as well as the desire to safeguard the rule of law and the effectiveness of judicial protection, a temporary encroachment on the personal freedom of movement of public officials who belong to the Government of the *Land* of Bavaria cannot be regarded as unreasonable. The same applies with regard to the requirement to safeguard the claim of validity of EU law and the obligation of each Member State to take any appropriate measure to implement directives (see the second subparagraph of Article 4(3) TEU), including in Bavaria.

11. Request for a prioritised decision

62 Contrary to a request of the party seeking enforcement, the referring court refrains from requesting that the case be dealt with under the expedited procedure pursuant to Article 105(1) of the Rules of Procedure, but asks that the case be given priority pursuant to Article 53(3) of the Rules of Procedure. The referring court takes the view that such an approach would constitute an advantageous compromise between the indisputable requirement to expedite the case, which is also in the general interest, and the requirement to examine the factual and legal situation in depth.