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POWERS OF NATIONAL COURTS TO ENFORCE JUDGMENT IN ENVIRONMENTAL MATTERS (CLEAN AIR AND HEALTHY ENVIRONMENT)

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Judgment of the Court (Grand Chamber) of 19 December 2019, *Deutsche Umwelthilfe eV v Freistaat Bayern*, request for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria, Germany), C-752/18, ECLI:EU:C:2019:1114

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.

With regard to the judgment in question the Court, sitting as the Grand Chamber, ruled on whether national courts have the powers to, or even are obliged to, issue an order of coercive detention against national authorities' office holders that persistently refuse to comply with a final judicial decision enjoining them to meet their obligations under EU law.

The reference for a preliminary ruling was made [i] by the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria) in the proceedings by and between Deutsche Umwelthilfe, a German non-governmental environmental protection organization, empowered to initiate group litigation in environmental matters[ii], and Freistaat Bayern (the *Land* of Bavaria), and concerned the enforcement of an injunction requiring the adoption of traffic bans in order to comply with the obligations flowing from Directive 2008/50 of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (the "Directive"). [iii]

As for the facts under dispute, the order for reference reported that the judicial findings assessed that nitrogen dioxide (NO2) limit values had been exceeded within the area of the city of Munich, sometimes to a considerable extent.

As a result of the action brought by the appellant, a first order by the Verwaltungsgericht München (Administrative Court of Munich) in October 2012 required the *Land* of Bavaria to amend its air

quality action plan for the city of Munich. It was followed by a second order in June 2016, threatening the *Land* of Bavaria with a financial penalty if it did not comply with its obligations. An appeal was lodged against such order by the *Land* of Bavaria before the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria), which dismissed it, upheld the payment of a financial penalty and enjoined the *Land* to take the necessary measures to fulfill its obligations, including the imposition of traffic bans in respect of certain diesel vehicles.

The *Land* of Bavaria did not comply in full and, as a consequence thereof, was required by a third order in October 2017 to pay a financial penalty, which it did.

Subsequently, due to the persistent refusal of the *Land* of Bavaria to take action and the public statement of representatives of the *Land* of Bavaria, including its Minister-President, that the *Land* would have not complied with the aforementioned obligations, Deutsche Umwelthilfe brought a new action before the Verwaltungsgericht München (Administrative Court of Munich).

Not only did Deutsche Umwelthilfe seek the imposition of an additional financial penalty on the Bavarian administration, but asked the court for a ruling on the application of a coercive detention measure against either the Minister for the Environment and Consumer Protection of the Bavarian *Land* or, failing this, its Minister-President. Such request was however dismissed.

Against the rejection of said request, Deutsche Umwelthilfe brought an appeal before the Bayerischer Verwaltungsgerichtshof (Higher Administrative Court of Bavaria), *i.e.* the referring court.

The referring court observed that the circumstances were as such that the imposition of additional financial penalties would have no effect on the *Land* of Bavaria's conduct, as the penalties would have been paid through an accounting operation, considering the penalty as a debit item under the *Land's* budget and crediting the same amount to its central funds, and therefore without resulting in any economic loss.

However, the referring court also found that the application of a measure of coercive detention was precluded for national constitutional reasons, and therefore it referred to the Court of Justice for a preliminary ruling.

The question referred for preliminary ruling intended to ascertain whether "*Article 47(1) 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*".[iv]

As outlined above, the Directive[v] provides for an obligation requiring Member States to ensure that the levels of certain pollutants in the ambient air do not exceed the limit values laid down by the same directive. For said purpose, in the event that in any given zones the levels of pollutants exceed the aforesaid limits, Member States are required to establish specific air quality plans for such zones[vi], where appropriate measures shall be set out to redress the situation and protect human health and the environment.

The obligation of the Member States to ensure compliance with the Directive is provided by, first, the Treaties, according to which the Member States shall take any appropriate and necessary measures to ensure the fulfillment of the obligations arising from the same or resulting from the acts of the EU institutions.[vii][viii]

Secondly, the same principle is enshrined in Article 47(1) of the Charter of Fundamental Rights of the European Union (the "Charter")[ix], which establishes that the right to an effective remedy before courts is a key principle in the protection of the rights and freedoms guaranteed by EU law.

Thirdly, the legal framework is made complete by the provision reaffirming such right in EU environmental law, namely 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")[x], whereby it is stated that adequate measures, including injunction relief, shall be provided to ensure effective judicial protection in such field.[xi]

The principle above shall however be interpreted according to the conditions laid down in that respect in Article 52 of the Charter, which allows limitations to the exercise of the same rights and freedoms enshrined in the Charter to protect the rights and freedoms of others.

Such balancing among rights came into question in the present case by virtue of the plea made by the applicant, whereby it requested the application of a coercive measure. Therefore, the Court had to weigh the right to effective remedy under Article 47(1) of the Charter, against the right to liberty and security of person set forth under Article 6 of the same Charter.

In that respect, the Court ruled that when a national authority persistently refuse to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation stemming from EU law, it is for the national court having jurisdiction to assess if the circumstances meet the requirements to legitimate the issue of an order a coercive detention of the office holder in power.

Such requirements being, firstly, that there is a domestic law empowering the court to deprive a person of his or her liberty and that such law contains a legal basis for adopting such a measure that is sufficiently accessible, precise and foreseeable in its application in order to avoid all risks of arbitrariness.[xii]

Secondly, that the requirements flowing from the application of the principle of proportionality[xiii] are met. In this respect, the Court recalled that compliance with the principle of proportionality occurs when the court succeeds in carrying out a fair balance between fundamental rights[xiv] - specifically, in present case, the right to liberty (Article 6 of the Charter) and the right to effective judicial protection (as guaranteed both by Article 47 of the Charter and by Article 9(4) of the Aarhus Convention).

Therefore, where the court claims not to have any means to secure compliance with the principle of effectiveness of EU law, and the right to an effective remedy under Article 47 of the Charter – as in the present case due to constitutional issue preventing the application of coercive detention to office holders involved in the exercise of official authority - it is for the national court, first, to interpret domestic law in a way to make it consistent with the principle of effective judicial protection under EU law. If that is not possible, the national court must disapply the domestic law which is contrary to EU law with direct effect in the case pending before it.

However, the above shall not allow the national court to dismiss the interpretation of domestic law compliant with constitutional law, and thereby infringing another fundamental right protected by EU law. Indeed, as said above, not even the right to an effective remedy is an absolute right and the two fundamental rights must therefore be weighed one against the other.

Only in the event the referring court assesses that the limitations on the right to liberty resulting from the application of coercive detention comply with the conditions laid down by EU law under Art. 52(1) of the Charter as said above, that the court shall authorize and, in case, even require recourse to such a measure.

Finally, the Court added that an infringement of Directive 2008/50 may be found by the Court in an action for failure to fulfil the obligations under EU law or give rise to the incurrence of State liability for the resulting loss or damage.

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[i] Art. 267, Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 326, 26.10.2012.

[ii] Article 9(2) 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) and Article 11(3) of Directive 2011/92/EU 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 L 26, 28.1.2012, p. 1–21). See paragraph 14 of the Opinion of AG SAUGMANDSGAARD ØE.

[iii] OJ 2008 L 152, p. 1-44.

[iv] Paragraph 29 of the judgement.

[v] Art. 13(1) Directive 2008/50.

[vi] Art. 23(1) Directive 2008/50.

[vii] See in particular Art. 4(3) Consolidated version of the Treaty on European Union (TEU), OJ C 326, 26.10.2012 and Art. 197 TFEU.

[viii] In that regard, as noted by the Court, the lack of harmonization of national enforcement mechanisms of Eu law provisions – by virtue of the principle of procedural autonomy – does not mean that such mechanisms shall be exempt from complying with the principle of equivalence and the principle of effectiveness. Namely, such national enforcement mechanisms shall be "*less favourable than those governing similar domestic actions*" (principle of equivalence) and they shall not "*make it impossible or excessively difficult to exercise the rights conferred by EU law*" (principle of effectiveness), as recalled by the Court (paragraph 33) in citing its judgment of 26 June 2019, *Kuhar*, C-407/18, EU:C:2019:537, paragraph 46.

[ix] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

[x] 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).

[xi] A principle that in environmental cases appears to be of an utmost importance, as failure to adopt the measures required by environmental laws endangers human health.

[xii] See judgment of 15 March 2017, *Al Chodor*, C-528/15, EU:C:2017:213, paragraphs 38 and 40 cited in the present judgement.

[xiii] According to which "*limitations to fundamental rights may be made only if they are necessary and genuinely meet objective of general interest recognized by the Union or the need to protect the rights and freedoms of others*".

[xiv] See judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 60 cited in the present judgement.