Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 18 June 2024[1]

Case C-144/23

KUBERA, trgovanje s hrano in pijačo, d.o.o.
v
Republika Slovenija

(Request for a preliminary ruling from the Vrhovno sodišče (Supreme Court, Slovenia))

(Reference for a preliminary ruling – Third paragraph of Article 267 TFEU – Obligation on national courts or tribunals of last instance to make a reference for a preliminary ruling – Exceptions to that obligation – *CILFIT* case-law – Filtering mechanism – Supreme Court of a Member State – Grant of leave to bring an appeal on a point of law – Decision refusing an application for leave to bring an appeal – Article 47 of the Charter – Right to a fair trial – Statement of reasons)

I. Introduction

1. The difficulties encountered by judicial bodies, both at national and at international level, in managing their dockets efficiently, due to the large number of disputes brought before them, is certainly not a recent phenomenon. For obvious reasons, the problem has always been felt more acutely by the courts which sit at the apex of the judicial system, which are generally assigned task of ensuring the consistency and accuracy of the case-law.[2]

2. The risks which an excessive workload may give rise to are clear and, thus, need no more than a brief mention: inter alia, significant delays in dealing with cases, lower quality of the judicial decisions, prolonged state of legal uncertainty and higher litigation costs for the individuals involved and, more indirectly, for society as a whole.

3. One of the mechanisms which has traditionally been used to permit the highest courts to keep control of their dockets and thus limit the abovementioned risks is to endow them with the ability to select, to a greater or lesser degree, the cases (or, in some systems, also the legal questions) they wish to hear and decide.[3] A research note drawn up by the Research and Documentation Directorate of the Court of Justice of the European Union in April 2013 showed that, in the last

[1] Original language: English.

[2] See, for example, Norkus, R., 'Introductory report –The filtering of appeals to the supreme courts', Network of the Presidents of the Supreme Judicial Courts of the European Union, Dublin, 2015, p. 2, referring to an example dating from the 16th century.

[3] One of the most renowned of such mechanisms is that based on the writ of *certiorari* for appeals before the United States Supreme Court (introduced by the Judiciary Act of 1891).

decades, there has been a certain trend, across the Member States of the European Union, towards establishing *filtering mechanisms* for appeals before the highest court. In fact, some forms of filtering mechanisms now exist in several Member States. [4] In addition, in 2019 the Statute of the Court of Justice of the European Union ('the Statute') [5] was amended in order to introduce a filtering mechanism for appeals relating to decisions by certain EU agencies and offices. [6]

4. However, that note also shows that, in some Member States, the introduction of similar mechanisms has been deemed problematic (or rejected outright) since, although they may help national courts to manage their dockets more effectively, those mechanisms also have the effect of limiting the access to court of certain litigants. That may, accordingly, create some tension with regard to the right to an effective judicial remedy, as recognised in the relevant national laws, Article 6 of the European Convention of Human Rights ('the ECHR') and – last but not least – Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

5. The present case brings to the fore one rather specific aspect in that respect. Indeed, the Court is asked whether and, if so, under what conditions, the existence of filtering mechanisms at national level could be reconciled with the *obligation* which national courts of last instance have, under the third paragraph of Article 267 TFEU, to make a reference for a preliminary ruling to the Court when an issue of interpretation of EU law is raised in a procedure pending before them.

II. National law

6. Article 367(1) of the *Zakon o pravdnem postopku* (Civil Procedure Act; 'the ZPP'), [7] applicable to administrative disputes by virtue of Article 22(1) of the *Zakon o upravnem sporu* (Administrative Proceedings Act), [8] in the version applicable in the main proceedings, reads:

'The parties may lodge an appeal for review against a final judgment delivered at second instance within 15 days of notification of the decision of the Supreme Court to allow the appeal.'

7. Under the terms of Article 367a of the ZPP:

'(1) The court shall allow an appeal for review if the decision of the Supreme Court can be expected to decide a question of law that is important for ensuring legal certainty, the uniform application of the law or the development of the law through case-law. In particular, the court grants leave to appeal in the following cases:

– if it is a question of law on which the decision of the court of second instance departs from the case-law of the Supreme Court; or

4 Research Note 13/006.

5 See Article 58a of the Statute, as amended by Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2019 L 111, p. 1). For the sake of completeness, I should add that the scope of that provision has been enlarged with the adoption by the EU legislature, in April 2024, of a new regulation amending the Statute, in line with the proposal to that effect submitted by the Court of Justice of the European Union in December 2022.

6 In essence, under that mechanism, appeals brought in cases which have already been considered twice, first by an independent board of appeal and then by the General Court, are not to be allowed to proceed before the Court of Justice unless it is demonstrated that they raise an issue that is significant with respect to the unity, consistency or development of EU law.

7 Uradni list RS, No 73/07.

8 Uradni list RS, No 105/06.

– if it is a question of law on which there is no case-law of the Supreme Court, in particular if the case-law of higher courts is not uniform; or

– if it is a question of law on which the case-law of the Supreme Court is not uniform.

(2) The Supreme Court shall decide to grant leave to appeal on the basis of a party's application for leave to appeal.'

8. Article 367b of the ZPP states:

'(1) An application for leave to appeal shall be filed by a party within 30 days of service of the final judgment of the court of second instance.

(2) An application for leave to appeal shall be lodged with the Supreme Court.

…

(4) In the application for leave to appeal, the party must set out in a precise and specific manner the point of law in dispute and the rule of law alleged to have been infringed, the circumstances demonstrating the importance of the issue and a brief statement of the reasons why the court of second instance unlawfully ruled on the issue; it must describe in a precise and specific manner the alleged procedural irregularities and, in the same way, demonstrate the existence of case-law of the Supreme Court from which the decision allegedly departed, or the inconsistency of the case-law.'

9. Article 367c of the ZPP provides:

'(1) A panel of three judges of the Supreme Court shall decide by order on the application for leave to appeal.

(2) It shall be sufficient, in order to state the reasons for a decision rejecting an application for leave to appeal, for the court to state in general terms that the conditions laid down in Article 367a of this Act have not been met.

(3) In the order granting leave to appeal, the court or tribunal shall indicate in which part or on which specific points of law leave to appeal is to be granted.

(4) There shall be no appeal against a decision to allow or refuse to allow an appeal.'

10. Article 370 of the ZPP states:

'(1) An appeal may be brought on the ground of a material breach of provisions governing proceedings before the court of first instance which the party relied on before the court of second instance, on the ground of a material breach of provisions governing proceedings before the court of second instance or on the ground of an error of law.

(2) An application for judicial review may not be made on the basis of an erroneous or incomplete finding of fact.'

11. Article 371 of the ZPP reads:

'The reviewing court shall review the contested judgment only in so far as and in relation to the specific questions of law in respect of which leave to appeal was granted.'

III. Facts, procedure and the questions referred

12. KUBERA, trgovanje s hrano in pijačo d. o. o. ('Kubera'), the applicant in the main proceedings, purchased in Türkiye cans of the drink Red Bull manufactured in Austria and transported them by ship to the port of Koper (Slovenia), where the customs procedure began.

13. On 15 September 2021, the Finančna uprava Republike Slovenije (Financial Administration of the Republic of Slovenia) issued an opinion by which, on account of a suspected infringement of an intellectual property right, within the meaning of Article 17 of Regulation (EU) No 608/2013,[9] it suspended the customs procedure and seized the goods. Subsequently, on 5 October 2021, the same public authority issued two decisions by which it decided to seize Kubera's goods pending the decision on the dispute brought by the right-holder, Red Bull GmbH (Austria), to protect its intellectual property rights.

14. Kubera first lodged two administrative complaints against those decisions, which were rejected. Subsequently, it brought two actions against those decisions, which were dismissed by the Upravno sodišče (Administrative Court, Slovenia) on the basis of, inter alia, Article 1 of Regulation No 608/2013.

15. In response to those decisions of the Upravno sodišče (Administrative Court), Kubera submitted two applications for leave to bring an appeal on a point of law before the Vrhovno sodišče (Supreme Court, Slovenia), raising as a relevant point of law the interpretation of Article 1(5) of Regulation No 608/2013, read in conjunction with recital 6 thereof. In those applications, Kubera also asked the Vrhovno sodišče (Supreme Court), in the event that Regulation No 608/2013 was not interpreted in the manner it suggested, to stay the proceedings and to refer the matter to the Court of Justice. In that regard, Kubera argued that the issue raised in the case at hand had not been addressed in the EU case-law or in national case-law, despite its significance in establishing the limits of the customs authorities' powers.

16. In the main proceedings, the Vrhovno sodišče (Supreme Court) takes the view that the provisions of the ZPP ('the national legislation at issue') do not allow the application for leave to bring an appeal on a point of law to be granted, on the ground that the conditions laid down for that purpose by that code are, in principle, not satisfied. However, that court wonders whether, when deciding on the application for leave to bring an appeal on a point of law, it is also required to assess the substance of the party's request that a reference for a preliminary ruling be made to the Court of Justice, in accordance with the requirements laid down in Article 267 TFEU, and whether, if a Supreme Court has found that the conditions for making the reference as requested are not met, it is required, under Article 47 of the Charter, to state the reasons for that assessment in the order refusing the application for leave to bring an appeal on a point of law.

[9] Regulation of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (OJ 2013 L 181, p. 15).

17. Against that backdrop, the Vrhovno sodišče (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the third paragraph of Article 267 TFEU preclude a provision of the [Code of Civil Procedure] under which, in proceedings relating to the grant of leave to bring an appeal on a point of law …, the Vrhovno sodišče ([Supreme Court]) is not to consider the issue of whether, as a result of a party's request that a reference for a preliminary ruling be made to the Court of Justice of the European Union, it is required to refer one or more questions to the Court of Justice for a preliminary ruling?

If Question 1 is answered in the affirmative:

(2) Must Article 47 of the Charter, regarding the obligation to state the reasons for judicial decisions, be interpreted as meaning that a procedural decision refusing a party's application for leave to bring an appeal on a point of law … under the Code of Civil Procedure constitutes a "judicial decision" which must state the reasons why the party's request that a reference for a preliminary ruling be made to the Court of Justice of the European Union should not be granted in the case at hand?'

18. Written observations have been submitted by Kubera, the Slovene Government and the European Commission. The German, Latvian, Netherlands, Slovene and Finnish Governments, as well as the Commission, also presented oral argument at the hearing on 6 March 2024.

IV. Analysis

A. First question

19. By its first question, the referring court essentially asks whether the third paragraph of Article 267 TFEU precludes a national provision or practice according to which, in proceedings relating to the grant of leave to bring an appeal on a point of law, a national court of last instance is not obliged to consider whether it may be required to refer one or more questions to the Court of Justice for a preliminary ruling, notwithstanding a party's request to that effect.

20. To be clear, the issues raised by that question concern only questions on the *interpretation* of EU law,[10] raised before a national court of last instance, where a filtering mechanism granting the court in question some *discretion* in selecting the cases that will be heard and adjudicated upon is applicable.

21. In essence, two positions have been put forward before the Court in the present proceedings. Simplifying them somewhat, they are as follows.

22. On the one hand, the Latvian, Netherlands, Slovene and Finnish Governments – albeit with some nuances in their respective positions – suggest a negative answer to the first question referred. They take the view that, if a national court of last instance decides, in the light of the

[10] In the present Opinion, I shall not discuss references concerning the *validity* of EU acts since that matter is of no relevance to the case at hand. It suffices to point out that it follows from settled case-law that national courts – including those that are not of last instance – do not enjoy any discretion when they entertain doubts as to the validity of an EU act. National courts do not have the power to annul the act in question and, consequently, are obliged to refer the matter to the Court of Justice under Article 267 TFEU. See, in particular, judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452, paragraph 20).

criteria laid down in national law, that an appeal should not be allowed, no issue of EU law has been properly raised. Indeed, the court in question does not examine the substantive arguments put forward by the appellant and merely dismisses the appeal on procedural grounds. In those circumstances, the referral obligation cannot be triggered. Therefore, provided the principles of equivalence and effectiveness are complied with, filtering mechanisms such as that at issue are – those governments argue – per se compatible with EU law. In that regard, they rely mostly on the judgment of the Court in *Aquino*.[11]

23. On the other hand, Kubera, the German Government and the Commission propose a positive answer to the first question referred. They are of the view that filtering mechanisms such as that at issue are not compatible with EU law unless, at some point in the procedure (at the preliminary stage or at the successive stage), the national court considers the issue as to whether, as a result of a party's request to seise the Court under Article 267 TFEU, its obligation to make a reference is triggered. Accordingly, where an issue of EU law has been duly raised, that court is to make a reference – those parties contend – regardless of whether the filtering criteria set out in national law are met. Those parties rely, in particular, on the judgments of the Court in *CILFIT* and *Consorzio*.[12]

24. In the present Opinion, I shall explain why I take the view that the correct interpretation of the third paragraph of Article 267 TFEU lies somewhat in the *middle ground* between the two positions described above. After some preliminary observations (1), I will start by explaining why I cannot fully share the views expressed by the Latvian, Netherlands, Slovene and Finnish Governments, which propose what is in my view a rather loose reading of that provision (2). Next, I will clarify why the interpretation of the provision proposed by Kubera, the German Government and the Commission is in principle correct but somewhat too strict (3). On the basis of the above, I will, lastly, propose an answer that the Court should give to the first question referred (4).

1. Preliminary observation: EU law is neutral vis-à-vis filtering mechanisms

25. As mentioned in the introduction to this Opinion, a lively debate exists – among lawyers and policymakers – about the opportunity for mechanisms which allow the highest courts to filter the appeals brought before them. However, that is an element which, at this first stage, is not immediately relevant for the present case, since EU law can only be 'neutral' in that regard.

26. According to settled case-law, the organisation of justice in the Member States – including the establishment, composition, powers and functioning of the national courts – falls within the competence of the Member States. That said, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law.[13]

[11] Judgment of 15 March 2017 (C-3/16, EU:C:2017:209) ('*Aquino*').

[12] Judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335) ('*CILFIT*'), and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799) ('*Consorzio*').

[13] See, to that effect, judgments of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 38), and of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraph 63).

27. In addition, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures – political and constitutional – which implies that those States enjoy wide discretion in how they structure their judicial system. [14]

28. Furthermore, in accordance with the principle of procedural autonomy, in the absence of harmonisation of national procedures, it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. [15] That is so, provided that those national rules are no less favourable than those governing similar domestic situations (principle of equivalence) and do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness). [16]

29. Last but not least, I should add that the Court has made clear that the EU Treaties are not intended to create new remedies in the national courts to ensure the observance of EU law other than those already laid down by national law. The opposite is true only where it is apparent, from the overall scheme of the national legal system in question, that no legal remedy exists which makes it possible to ensure, even indirectly, respect for an individual's rights under EU law. [17] Accordingly, it is generally for the national courts to interpret the procedural rules governing actions brought before them in such a way as to enable those rules, wherever possible, to ensure compliance with EU law. [18]

30. On the basis of the above, I agree with the governments which stress the ample room for manoeuvre which the Member States have in this matter. It is indeed for each Member State to decide whether any filtering mechanism should be established and, if so, choose the appropriate model, conditions of application and specific procedural rules thereof.

31. However, as follows clearly from the case-law referred to above, the fact remains that, in exercising their competence in this area, the Member States are still required to comply with EU law. In the next section of this Opinion, I will explain why the arguments concerning the per se compatibility of filtering mechanisms such as that at issue with EU law fail to convince me.

2. Filtering mechanisms: discretion 'through the back door'?

32. As explained above, some of the governments argue, in a nutshell, that filtering mechanisms are compatible with EU law provided that the requirements of equivalence and effectiveness are complied with. Having said that, they place special emphasis on the requirement of equivalence: as long as questions of national law and of EU law are treated in an equivalent manner, a filtering mechanism should be considered to be, in principle, compatible with the third paragraph of Article 267 TFEU.

[14] See, to that effect, judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraph 73).

[15] See, for example, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 142 and the case-law cited).

[16] See, inter alia, judgment of 15 April 2021, *État belge (Circumstances subsequent to a transfer decision)* (C-194/19, EU:C:2021:270, paragraph 42 and the case-law cited).

[17] See, in particular, judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraphs 40 and 41 and the case-law cited).

[18] To that effect, ibid., paragraph 44.

33. The point of departure of such reasoning is broadly correct: as in other matters of national judicial proceedings, the principle of procedural autonomy is, in principle, the cardinal point of departure. There is also no element in the file which may cast doubt on the fact, vigorously stressed by the Slovene Government, that in its domestic legal system the principle of *equivalence* is complied with.[19] I understand that, when applying the criteria on leave to appeal set out in national law, the Vrhovno sodišče (Supreme Court) is to deal with questions of national law and of EU law in an equivalent manner.

34. Yet, it is quite clear that the above is necessary but not sufficient for the purposes of the present analysis. In my view, those governments err when they pay almost no attention to the requirement of *effectiveness* which is, instead, of crucial importance in the present context in two regards: (i) as an *effet utile* of the provision and (ii) as adequate protection of the rights of the individuals involved in the dispute. A number of elements lead me to that take view: that interpretation runs counter to the obligation set out in that provision (a), is inconsistent with the well-established *CILFIT* case-law (b and c) and, more generally, disregards the nature and purpose of the preliminary ruling procedure (d). I shall examine those aspects in turn.

(a) The wording of the third paragraph of Article 267 TFEU

35. According to the second paragraph of Article 267 TFEU, where a question concerning the interpretation of provisions of EU law is raised before any national court, that court '*may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon'.[20] In turn, the third paragraph of the same provision states that 'where such a question is raised in a case pending before a [court or tribunal of last instance], that court or tribunal *shall* bring the matter before the Court'.[21]

36. In the light of the wording of that provision, the Court has consistently stated that Article 267 TFEU gives national courts the *widest discretion* in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law which are necessary for the resolution of the case before them. However, in the case of courts of last instance, that discretion is '*replaced*, subject to certain exceptions recognised by the Court's case-law, by an *obligation* to make a reference … for a preliminary ruling'.[22]

37. In this context, it should not be overlooked that national courts derive the power to make a reference for a preliminary ruling from the Treaty itself. It is Article 267 TFEU which gives any court in any Member State the authority – and, where adjudicating at last instance, imposes an obligation upon them – to refer questions for a preliminary ruling to the Court of Justice. That authority (and the related obligation) cannot be qualified by national law.[23]

38. It follows that a rule of national law cannot *prevent* a national court from exercising the discretion, or complying with the obligation, set out in Article 267 TFEU, since those features are an inherent part of the system of cooperation established by that provision. Furthermore, the Court has also held that a national rule which has the effect of *dissuading* national courts from

[19] I shall come back to this issue below, in points 117 to 120 of this Opinion.

[20] Emphasis added.

[21] Emphasis added.

[22] See, recently, judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442, paragraphs 155 and 156 and the case-law cited). Emphasis added.

[23] See, to that effect, Opinion of Advocate General Poiares Maduro in *Cartesio* (C-210/06, EU:C:2008:294, points 15 and 21).

referring questions to the Court for a preliminary ruling may, when detrimental to the prerogatives granted to national courts by Article 267 TFEU and thus likely to undermine that cooperation, be incompatible with EU law. [24]

39. It seems to me that filtering mechanisms which allow, to a greater or lesser extent, national courts to pick and choose cases may, in some circumstances, prevent national courts from making a reference, or at the very least dissuade them from doing so, each time a case falls outside the filtering criteria set out in national law.

40. For example, under a mechanism such as that at issue, the national court will consider the substance of the issue of EU law raised by a party and, as a consequence, whether the conditions set out in the third paragraph of Article 267 TFEU are satisfied, *only if* it comes to the conclusion that the questions raised are 'important'. In the other cases, the national court will not even consider whether the obligation set out in that provision may be triggered – and that decision is largely the result of a *choice* made by the national court itself. Indeed, general criteria for the admission of appeals such as the importance of the case inevitably involve evaluations which are to some degree discretionary.

41. It may well be true that, as legal philosopher Ronald Dworkin wrote, 'discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction [and] it is therefore a relative concept'. [25] Nevertheless, the fact that national courts do not enjoy unfettered discretion, being to some extent constrained by the criteria set out in the national legislation, does not detract from the fact that even that *relative discretion* – to decide whether a question raised is important enough – is not permitted under the Treaty.

42. As explained, Article 267 TFEU establishes a clear distinction between courts of last instance and other courts. Whereas the latter enjoy (wide) discretion to make a reference, the former do not. Essentially, through a filtering mechanism, national law is giving back to the national courts of last instance the discretion which the EU Treaty sought to exclude.

43. In that regard, however, it has been argued that the obligation to make a reference under the third paragraph of Article 267 TFEU is limited to questions for which – as stated in the second paragraph of the same provision – 'a decision … is necessary to enable [the referring court] to give judgment'. If the national court does not consider the questions raised to be important, then that court would not – so the argument goes – need an answer from the Court of Justice to give a final ruling in the case.

44. I do not agree with that view. The Court has consistently held that the concept 'give judgment', within the meaning of the second paragraph of Article 267 TFEU, 'must be interpreted broadly in order to prevent many procedural questions from being regarded as inadmissible and from being unable to be the subject of interpretation by the Court. That concept must therefore be understood as encompassing the whole of the procedure leading to the judgment of the referring court so that the Court of Justice is able to interpret all procedural provisions of EU law that the referring court is required to apply in order to give judgment.' [26]

[24] See, for example, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraphs 93 and 94 and the case-law cited).

[25] Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, 1978, p. 31.

[26] See, for example, judgment of 11 June 2015, *Fahnenbrock and Others* (C-226/13, C-245/13 and C-247/13, EU:C:2015:383, paragraph 30 and the case-law cited).

45. Therefore, the fact that the question raised by a party may concern an issue of procedure, including one to be dealt with *in limine litis* before the referring court rules on the substance of the dispute [27] (*in casu*, in order to decide whether leave to appeal should be granted), and that the decision adopted by the referring court in that respect does not take the form of a 'judgment' or of a decision on the merits of the case, [28] does not detract from the 'necessity' of the question.

46. Nor could it be argued that a decision of the Court of Justice on an issue of interpretation raised by a party is not necessary in so far as the national court of last instance has decided that such an issue is, according to the criteria set out in national law, not sufficiently important to warrant an appeal. As I will explain later, 'necessity' must be understood as the ability of the issue to influence the outcome of the case (put very simply: who wins, who loses and why). The opposite would be tantamount, as stated in point 41 above, to giving the national court the authority to decide which issues should be referred to the Court under Article 267 TFEU and which should not, even where those issues could be decisive for the outcome of the case at hand.

47. In fact, the interpretation of the criterion of 'necessity' has been developed by the Court in its *CILFIT* case-law, to which I shall now turn.

(b) The CILFIT case-law

48. In its case-law, the Court has recognised the existence of three exceptions to the obligation to make a reference laid down in Article 267 TFEU. Those exceptions have first been 'codified' in the well-known judgment in *CILFIT*: (i) the question raised is irrelevant ('necessity'); (ii) the EU law provision in question has already been interpreted by the Court ('*acte éclairé*'); or (iii) its interpretation is so obvious as to leave no scope for any reasonable doubt ('*acte clair*'). [29]

49. The scope of those exceptions has been clarified and refined in the subsequent case-law of the Court.

50. As regards the *necessity* exception, the Court has constantly stated that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute. The decision to be given by the referring court must, accordingly, be capable of taking account of the answer provided by the preliminary ruling. [30] Consequently, a national court of last instance is not required to make a reference when it takes the view that the question is not relevant, 'that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case'. [31] That may be the case, for example, where the dispute can be solved on the basis of national law alone, or the provisions of EU law invoked concern an ancillary aspect of the dispute, which is not determinative of the outcome. [32]

[27] See, for example, judgment of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931, paragraph 49).

[28] See, inter alia, judgments of 3 July 2019, *Eurobolt* (C-644/17, EU:C:2019:555, paragraph 32), and of 4 September 2019, *Salvoni* (C-347/18, EU:C:2019:661, paragraph 46).

[29] Judgment in *CILFIT*, paragraph 21.

[30] See, recently, judgment of 23 November 2023, *Commissioner-General for Refugees and Stateless Persons (Family unity)* (C-614/22, EU:C:2023:903, paragraphs 15 and 16 and the case-law cited).

[31] See, for instance, judgment of 18 July 2013, *Consiglio Nazionale dei Geologi* (C-136/12, EU:C:2013:489, paragraph 26).

[32] Generally on the 'necessity' exception, with further references, see Broberg, M., and Fenger, N., *Broberg and Fenger on Preliminary References to the European Court of Justice*, 3rd ed., Oxford University Press, 2021, pp. 208 and 209.

51. With regard to the *acte éclairé* exception, the Court held that such a situation occurs both when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case, and when previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical. [33]

52. Finally, as far as the *acte clair* exception is concerned, the Court explained that, before concluding that the correct interpretation of a provision of EU law is so obvious as to leave no scope for any reasonable doubt, the national court of last instance should make sure that 'the matter is equally obvious to the courts of the other Member States and to the Court of Justice'. [34] When interpreting EU provisions, national courts should take account of 'the characteristic features of [EU] law[,] the particular difficulties to which the interpretation [of the latter] gives rise' and the risk of divergences in judicial decisions within the European Union. [35]

53. In particular, the Court urged national courts to bear in mind, inter alia, that EU legislation (i) is drafted in several languages and that the different language versions are all equally authentic and should thus be read harmoniously since one particular version cannot be the sole basis of interpretation, and (ii) uses terminology which is peculiar to it and legal concepts that do not necessarily have the same meaning as the corresponding concepts that may exist in the law of the Member States. In addition, the Court emphasised that EU hermeneutics require the interpreter to place the EU provision in question in its context and examine it in the light of the relevant body of EU law, with regard to be had to the objectives thereof and to its state of evolution on the date on which that provision is to be applied. [36]

54. Furthermore, the Court stated that the fact that other national courts have given contradictory decisions in relation to the EU provisions in question does not, in and of itself, trigger the obligation to make a reference. However, the existence of conflicting lines of case-law at the national and/or pan-European level may be indicative of the difficulties of interpretation frequently encountered by the national courts in the various Member States, which might then require a court of last instance to make a reference. [37]

55. Against that background, I do not see how filtering mechanisms such as that at issue may 'fit' neatly into one of those exceptions. It seems to me that in all of those scenarios the national court of last instance has to examine first the issue of EU law raised by the party in order to be able to decide whether one of the exceptions apply. In essence, *CILFIT* requires national courts to ask themselves the following. Is it necessary to address the issue raised in order to give a final ruling in the dispute? Does that issue need not to be addressed in so far as the meaning and scope of the EU provision relied on is clear enough or has been sufficiently clarified by the Court's case-law?

56. However, under mechanisms such as that at issue, a national court of last instance may never reach the stage where those questions are examined. There is an intermediate step in the reasoning that it follows: checking whether the issue raised is 'important' (or fulfils the other filtering criteria set out in national law). If the answer is in the negative, the court does not have to verify whether one of the *CILFIT* exceptions applies, and the proceedings are terminated.

[33] See the judgment in *CILFIT*, paragraphs 13 and 14.

[34] See, inter alia, judgment of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, paragraph 48).

[35] See paragraph 17 of the judgment in *CILFIT*.

[36] See paragraphs 18 to 20 of the judgment in *CILFIT*.

[37] See, for example, judgments of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraph 45), and of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564, paragraph 55).

57. That said, some of the governments are of the view that the *CILFIT* case-law does not oppose such a result, and rely on the judgment in *Aquino* to that end. I will address that argument below.

(c) Aquino

58. In *Aquino*, the Court found that a court of last instance may, in principle, decline to make a reference to the Court where an appeal on a point of law is dismissed on grounds of *inadmissibility* specific to the procedure before that court. Indeed, in such a case the question raised relating to EU law would be of no relevance, since the answer to that question could not have any effect on the outcome of the dispute. [38]

59. Taken at face value, the judgment of the Court may appear to confirm the position of the governments which plead for a relatively loose interpretation of the third paragraph of Article 267 TFEU. For example, the filtering criteria set out in the national legislation at issue are couched in terms of 'admissibility' of the appeals.

60. Nevertheless, to my mind that would be an incorrect reading of the judgment in *Aquino*.

61. The dispute which gave rise to the reference in *Aquino* concerned a situation in which an applicant's request to seise the Court of Justice under Article 267 TFEU was made, at first instance, in a procedural document which the national court could not take into account because it was filed out of time. Moreover, the request by the applicant was subsequently reiterated on appeal, but that appeal was not examined as to its substance (or even its admissibility) since, in conformity with the relevant procedural rules, a statutory presumption of discontinuance on the part of the applicant was found to be applicable. [39]

62. The grounds of inadmissibility which the Court considered in *Aquino* were thus of a formal nature and, as a matter of principle, they prevented the national court from carrying out any examination of the substantive arguments put forward by the parties. The judgment of the Court followed a well-established line of case-law in which it has been made clear that national rules laying down formal conditions for the admissibility of actions – such as those on time limits, representation by lawyers, preliminary procedural steps, court fees and so forth – are generally compatible with EU law, provided they are consistent with the abovementioned requirements of equivalence and effectiveness. [40]

63. The situation at issue in *Aquino* was, thus, different from the one at issue in the present proceedings which, as explained, involves a discretionary decision of the national court as to whether a case should be heard, in the light of the 'importance' of the legal issue put forward by a party in its appeal for review. Consequently, there is, in my view, a qualitative difference between formal criteria of admissibility which, if not complied with, prevent the national court in question from examining the issue of EU law raised by the appellant altogether, and substantive criteria of admissibility (such as the importance of the case) which – by contrast – involve a certain examination of that issue, in order to determine whether the court in question wishes to rule upon them.

[38] See, in particular, paragraph 56 of the judgment in *Aquino*.

[39] See, in particular, paragraphs 20, 23, 24, 27 and 54 of the judgment in *Aquino*.

[40] See, inter alia, judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraphs 61 to 66); of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 44); and of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraph 53).

64. In the former case, the fact that the issue of EU law raised will not be examined by the national court is usually the result of the appellant's lack of diligence, since he or she failed to comply with the relevant procedural rules. By contrast, in the latter case the appellant has, so to speak, done all he or she could do in order to have the issue raised examined by the national court so that, where the conditions of the third paragraph of Article 267 TFEU are satisfied, that issue could be referred to the Court of Justice. It is, thus, the national court that takes upon itself the responsibility to decide – on the basis of the criteria laid down in national law (filtering mechanism) and not those based on EU law (*CILFIT* case-law) – whether to make a reference.

65. I would add, in passing, that I also find it difficult to agree with the argument that, when having to assess whether a case fulfils the criteria for the leave to appeal to be granted, a national court can avoid any *substantive* examination of the issue of EU law raised by the appellant.

66. I understand that, in such a preliminary phase of the procedure, the national court is only meant to identify the *legal question* that the case raises, and not to find *the answer* thereto. Nevertheless, it seems to me that, frequently, it would be hard to establish the importance of the question without considering, at least in an preliminary manner, the answer which that question was given by the lower court.

67. For example, under the filtering mechanism at issue, would the Vrhovno sodišče (Supreme Court) be able to rule on (i) whether a question of EU law raised by an appellant is 'important for ensuring legal certainty, the uniform application of the law or the development of the law through case law', or one on which (ii) the decision of the lower court departed from the case-law of the supreme court; and whether (iii) 'there is no case-law of the supreme court', or (iv) 'the case-law of the supreme court is not uniform', unless some consideration to the merit of that question is given? I must say I have my doubts.

68. The above shows that the principle deriving from *Aquino* cannot apply in the present circumstances. In *Aquino* there was no issue with the effectiveness of the third paragraph of Article 267 TFEU, unlike in the situation at issue in the present case.

69. That difference also appears clear from the text of the judgment in *Aquino*. The Court noted that, 'the formulation of a question to be referred to the Court was of no relevance, since the answer to that question *could not have any effect* on the outcome of the case'.[41] That would clearly not be true with regard to a dispute which is decided on the basis of a given interpretation of EU law and for which an appeal is actually possible, but simply considered not to raise questions which are important enough to be reviewed. In such a case, the Court of Justice's answer to the issue raised by the appellant could, unlike in *Aquino*, be potentially decisive for the outcome of the dispute.

70. Moreover, in *Aquino* the Court also made the limited scope of its ruling clear and unambiguous, stating that 'national procedural rules [such as those on grounds of inadmissibility of appeals] cannot affect the powers which a national court derives from Article 267 TFEU, nor can they release that court from its *obligations* under that provision'.[42]

71. It should not be overlooked that the judgment in *Aquino* was delivered without an Opinion of the Advocate General, which means that the Court considered, in accordance with the fifth paragraph of Article 20 of the Statute, that 'the case raise[d] no new point of law'. To my mind, if

[41] Paragraph 46 of the judgment. Emphasis added.

[42] Paragraph 47 of the judgment. Emphasis added.

the interpretation of *Aquino* was that suggested by some governments, the case would have required an Opinion, in so far as it implied a significant extension of the scope of one of the *CILFIT* exceptions.

72. My reading of the case-law also appears to be corroborated by two other elements. In his Opinion in *Wiener SI*, Advocate General Jacobs proposed that the Court limit the scope of *CILFIT*,[43] requiring national courts of last instance to make a reference only where 'general question[s]' of interpretation or questions of 'general importance' are raised.[44] Such a criterion – which resembles to some extent that concerning the importance of the case under the filtering mechanism at issue – was, however, not endorsed by the Court.

73. More recently, in *Consorzio*, the Court referred and confirmed *Aquino*, with respect to a national procedural rule according to which the subject matter of the dispute was determined by the pleas in law put forward at the point in time at which the action was brought.[45] Again, the national procedural rule concerned a formal ground of admissibility of the action and was not one which granted the national court some latitude in the selection of the cases.

74. In the light of the above, I am not convinced by the governments' arguments based on *Aquino*. Having dealt with this point, I shall now explain why I am of the view that their interpretation of the third paragraph of Article 267 TFEU would also sit uneasily with the Court's established case-law concerning the nature and purpose of the preliminary ruling procedure.

(d) The nature and purpose of the preliminary ruling procedure

75. As the Court has consistently stated, the EU judicial system, as conceived by the drafters of the Treaties, has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU. By setting up a mechanism of dialogue between one court and another, specifically between the Court of Justice and the national courts, that procedure has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.[46] As the Court stated, the aim of the procedure is to ensure that, *in all circumstances*, EU law has the same effect in all Member States and thus to avoid divergences in its interpretation which the national courts have to apply.[47]

76. The system established is, accordingly, one of direct cooperation between the Court of Justice and the national courts, as part of which the latter are closely involved in the correct application and uniform interpretation of EU law *and also* in the protection of individual rights conferred by it.[48] With regard to this second aspect, I would emphasise that the preliminary ruling procedure is part and parcel of the system of remedies established by the drafters of the Treaties to ensure that,

[43] See, in particular, points 58, 59 and 64 of that Opinion (C-338/95, EU:C:1997:352).

[44] For those expressions, see ibid., points 38, 55 and 64 and points 20, 58 and 62, respectively.

[45] See paragraphs 60 to 65 of the judgment in *Consorzio*.

[46] See, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014 (EU:C:2014:2454, paragraph 176 and the case-law cited).

[47] See, for example, judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 64 and the case-law cited).

[48] See the judgment in *Consorzio*, paragraph 29 and the case-law cited.

as provided for in Article 19(1) TEU and Article 47 of the Charter, every person whose EU-law-based rights are adversely affected by an action (or inaction) of either the EU institutions or the national authorities, may be able to obtain effective judicial protection. [49]

77. That said, I am obviously conscious of the fact that the preliminary ruling procedure is a form of dialogue between courts and cannot be regarded as 'a means of redress available to the parties to a case pending before a national court'. [50] The parties to the national proceedings have, indeed, no subjective right to ask a national court to make a reference for a preliminary ruling to the Court of Justice. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of EU law does not mean that the court or tribunal concerned is compelled to consider that such a question has been 'raised' within the meaning of Article 267 TFEU. [51]

78. That notwithstanding, I am of the view that it follows from the third paragraph of Article 267 TFEU, read in the light of Article 19(1) TEU and Article 47 of the Charter, that, in each case, 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' should a priori be *identifiable*. That is so because all litigants should be able, where the appropriate conditions are satisfied, to have the questions of interpretation of EU law which they have duly raised in the national proceedings, and upon which their outcome may hinge, heard by the authoritative interpreter of EU law: the Court of Justice of the European Union. For that reason, there must always be a court, within the national judicial system, which acts as a court of last instance and thus is responsible for checking, in a given dispute, whether the conditions provided for in the third paragraph of Article 267 TFEU are satisfied.

79. In that regard, it is important to stress that elements such as the monetary value of the dispute, the small scale of the alleged law breach or the importance of the legal issues raised by the case are immaterial under the third paragraph of Article 267 TFEU. The only element that matters is whether or not, with respect to the issue of EU law raised, the *CILFIT* exceptions apply.

80. In this context, I would stress again that, when making a reference for a preliminary ruling, national courts are not only operating as national courts, but also as 'EU law judges', on the basis of the powers deriving from (and, as the case may be, under the obligation laid down in) Article 267 TFEU. The procedure which those courts trigger pursues, as explained, a dual objective: (i) a *macro objective*, of a prominent public nature, to ensure the unity, consistency and autonomy of EU law; and the inextricably linked (ii) *micro objective*, mainly of a private nature, to guarantee the effective judicial protection of individuals in the field of EU law. [52]

81. Against that backdrop, it seems to me to be quite clear that filtering mechanisms which give national courts of last instance leeway with regard to the cases and/or the legal issues that will be heard on appeal may frustrate the achievement of both objectives 'in all circumstances'. [53] Decisions of lower courts are upheld by the higher courts without any verification as to whether

[49] See, to that effect, judgments of 3 December 1992, *Oleificio Borelli* v *Commission* (C-97/91, EU:C:1992:491, paragraphs 13 and 14), and of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 93).

[50] See judgment of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 28 and the case-law cited).

[51] See, recently, Opinion of Advocate General Szpunar in *Airbnb Ireland and Airbnb Payments UK* (C-83/21, EU:C:2022:545, point 86 and the case-law cited).

[52] See my Opinion in *Profi Credit Polska (Reopening of proceedings concluded with a final judicial decision)* (C-582/21, EU:C:2023:674, point 83) with reference to the Opinion of Advocate General Bobek in *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:291, point 55) ('the Opinion in *Consorzio*').

[53] See above, point 75 of this Opinion.

their interpretation of the relevant EU provisions was correct, notwithstanding the fact that an appellant may have duly alleged and proven that alternative interpretations of those provisions are plausible.

82. The result is that a wrong interpretation of EU law may solidify in the national case-law, giving rise to divergences in judicial decisions within the European Union. In addition, a party to the dispute is deprived of the possibility that his or her arguments concerning the proper interpretation of the relevant provisions of EU law upon which his or her arguments are based is heard by the Court of Justice.

83. My findings in that regard are not called into question by the argument, made by some parties at the hearing, that those problems could be avoided by considering that, when leave to appeal is not granted, the lower court would have to be considered to be the court of last instance for the purposes of Article 267 TFEU. Those parties rely on the Court's case-law according to which a lower court may be considered to be acting in that capacity where, in a specific dispute, its decision is final given that no judicial remedy against it exists. [54]

84. However, that case-law is not applicable in situations such as that at issue. As the Court has held in *Lyckeskog*, a lower court cannot be considered to act as a 'court of last instance' where an appeal against that decision is possible but the examination of the merits of such an appeal is subject to a prior declaration of admissibility by the higher court. [55] That is a sensible approach: after all, how could the lower court know, when reviewing the merits of a case, whether or not the higher court would allow a future appeal?

(e) Intermediate conclusion

85. In the light of the above considerations, I agree with the Latvian, Netherlands, Slovene and Finnish Governments that Member States enjoy wide discretion with regard to the introduction and design of filtering mechanisms which permit their courts of last instance to select the cases they wish to hear and decide on appeal. I also agree with those governments that, under the principle of procedural autonomy, the compatibility of such mechanisms with EU law depends mainly on whether the principles of equivalence and effectiveness are complied with. It is, finally, reasonable to argue that, within that context, the principle of equivalence is of cardinal importance: when deciding whether to grant leave to appeal, national courts ought to deal with issues of national law and issues of EU in the same way.

86. However, for the reasons I have explained above, I doubt that the principle of effectiveness is always complied with where filtering mechanisms grant the national courts of last instance some degree of discretion to pick and choose cases. Such mechanisms may permit those courts to avoid checking whether the conditions laid down in the third paragraph of Article 267 TFEU are satisfied. Accordingly, those mechanisms have, de facto, the effect of substituting the obligation to make a reference set out in that provision with mere discretion. [56]

87. Having said that, does that mean that filtering mechanisms such as that at issue are necessarily incompatible with EU law?

[54] See, to that effect, judgments of 15 July 1964, *Costa* (6/64, EU:C:1964:66, p. 592); of 15 September 2005, *Intermodal Transports* (C-495/03, EU:C:2005:552, paragraph 30); and the judgment in *Aquino*, paragraph 34.

[55] Judgment of 4 June 2002 (C-99/00, EU:C:2002:329, paragraphs 16 to 19).

[56] See, *mutatis mutandis*, Opinions of Advocate General Tizzano in *Lyckeskog* (C-99/00, EU:C:2002:108, point 63), and of Advocate General Poiares Maduro in *Cartesio* (C-210/06, EU:C:2008:294, point 20).

3. Filtering mechanisms: interpreting and applying the national framework in conformity with CILFIT *and* Consorzio

88. Now, I will explain why I do not think that that is generally the case. I am in fact of the view that, in most cases, interpreting and applying the relevant national rules in conformity with the principles laid down in the Court's case-law will ensure the compatibility of those mechanisms with EU law. In doing so, those courts would be, in essence, applying the filtering criteria set out in national law whilst taking into account the specific characteristics of EU law.

89. In my view, that follows especially from the recent judgment of the Court in *Consorzio*. Given the importance of that ruling, I find it appropriate to recall its main tenets (a), before explaining why it appears particularly relevant in the present case (b).

(a) Consorzio

90. The process of clarification of the exceptions to the obligation to make a reference laid down in Article 267 TFEU culminated in the recent judgment of the Grand Chamber of the Court in *Consorzio*. That judgment is particularly noteworthy for a number of reasons.

91. To begin with, after thorough reflection and despite the suggestions from a number of Advocates General to revise its approach in whole or in part,[57] the Court decided to broadly confirm the *CILFIT* case-law.

92. In addition, the Court found – probably drawing inspiration from the case-law of the European Court of Human Rights ('the ECtHR')[58] – that it follows from the system established by Article 267 TFEU, read in the light of Article 47 of the Charter, that, if a national court of last instance takes the view that, because of one of the *CILFIT* exceptions, it is relieved of its obligation to make a reference, 'the statement of reasons for its decision must show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case-law or, in the absence of such case-law, that the interpretation of EU law was so obvious … as to leave no scope for any reasonable doubt'.[59]

93. Finally, the Court took the opportunity to develop certain aspects of the *acte clair* exception. Although those developments are generally consistent with the key principles underlying its earlier decisions, they are by no means of lesser significance. I would like to draw attention to *five* aspects of the judgment in question.

94. First, the Court has, to some extent, limited the scope of the requirement for courts of last instance to ensure that the answer to the EU law issue which they consider obvious is equally obvious to the other courts of the European Union. Paragraph 40 of the judgment in *Consorzio* refers to 'the other courts or tribunals *of last instance* of the Member States and to the Court of Justice'.[60]

[57] See, in particular, Opinions of Advocate General Jacobs in *Wiener SI* (C-338/95, EU:C:1997:352); of Advocate General Ruiz-Jarabo Colomer in *Gaston Schul Douane-expediteur* (C-461/03, EU:C:2005:415); of Advocate General Wahl in Joined Cases *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:319); and – last but not least – of Advocate General Bobek in *Consorzio*.

[58] See below, points 122 to 133 of this Opinion.

[59] Paragraph 51 of the judgment in *Consorzio*.

[60] Emphasis added.

95. Second, the Court also clarified the scope of the national courts' obligation to take into account the fact that EU provisions are drafted in several languages and that all language versions are authentic. As the Court explained, a court of last instance cannot be expected to examine 'each of the language versions of the provision in question'. It should nonetheless 'bear in mind those divergences between the various language versions of that provision *of which it is aware*, in particular when those divergences are *set out by the parties* and are verified'. [61]

96. Third, the Court also attempted to clarify the degree of uncertainty that is required to trigger the obligation to make a reference. The Court stated that 'the mere fact that a provision of EU law *may be* interpreted in another way or several other ways, in so far as none of them seem *sufficiently plausible* to the [national court concerned] … is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision'. [62]

97. Fourth, the Court shed some light on the importance that must be attached to the existence of diverging lines of case-law on the interpretative issue in question. In that respect, it stated that 'where [a] national court … of last instance is made aware of the existence of diverging lines of case-law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court … *must be particularly vigilant* in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue …'. [63]

98. Fifth, although in some past decisions the Court had required national courts to establish that 'the correct *application* of EU law is so obvious as to leave no scope for any reasonable doubt', [64] the judgment in *Consorzio* referred to the need to establish 'that the correct *interpretation* of EU law is so obvious as to leave no scope for any reasonable doubt'. [65] Probably influenced in that respect by Advocate General Bobek's considerations, [66] the term 'application' is seldom found in the text of the judgment, [67] which also expressly distinguished between the activities of application and interpretation of the law. [68]

99. I will now explain why certain aspects of that judgment are of particular relevance for the legal issue under discussion.

(b) The role of the parties, the necessity of the criterion and the concept of acte clair

100. It seems to me that, especially when the clarifications provided by the Court in the judgment in *Consorzio* are taken into account, the case-law on the exceptions to the obligation laid down in the third paragraph of Article 267 TFEU can largely 'accommodate' filtering mechanisms such as that at issue.

[61] Paragraph 44 of the judgment in *Consorzio*. Emphasis added.

[62] Paragraph 48 of the judgment in *Consorzio*. Emphasis added. On this matter, see also the Opinion of Advocate General Bobek in *Consorzio*, points 150 to 157.

[63] Paragraph 49 of the judgment in *Consorzio*. Emphasis added.

[64] See, for example, judgments of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraphs 38 and 40), and of 9 September 2015, *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:564, paragraph 55). Emphasis added.

[65] Paragraph 33 of the judgment in *Consorzio*. Emphasis added.

[66] See his Opinion in *Consorzio*, points 139 to 159.

[67] See the references in passing in paragraphs 28 and 29 thereof.

[68] See paragraph 30 thereof. I shall come back to this point below.

101. First, unlike some commentators,[69] I do not believe that the re-wording of a number of passages of existing case-law, in which the Court engaged in *Consorzio* – shifting the focus from the *application* to the *interpretation* of EU law – is the result of a stylistic exercise. In my view, it is instead indicative of a progressive re-conceptualisation of the object and purpose of the preliminary ruling procedure and, consequently, of the scope of the obligation laid down in the third paragraph of Article 267 TFEU.

102. I am well aware that the distinction between interpretation and application is not always an easy one to make and that the two activities are often intertwined.[70] However, I am convinced that there is a conceptual difference between the two. I will not dare to give a scientifically precise definition of those concepts. For the present purposes, it suffices to point out that 'interpretation' is a form of intellectual activity,[71] essentially consisting in determining, at a certain level of abstraction, the meaning and scope of a legal provision.[72] By contrast, 'application' is the activity of making a legal provision, whose meaning and scope have been determined, operational in a given dispute by drawing the specific consequences for a particular set of facts.[73]

103. It should not be overlooked that the Court itself has drawn a distinction between the two concepts in this very context. According to settled case-law, national courts and the Court of Justice have a *distinct* but complementary role within the system established by Article 267 TFEU: the former are to *apply* EU law to the dispute, whereas the latter is to *interpret* EU law in order to assist the former. Both roles are – the Court emphasised – indispensable to the preservation of the very nature of the law established by the Treaties.[74]

104. The wording of Article 267 TFEU is, after all, quite clear in that the object of the preliminary ruling procedure is (leaving aside questions of validity) to give rulings on the 'interpretation of the Treaties'. Broadening the scope of the procedure beyond that is also unnecessary for that procedure to achieve its dual purpose. On the one hand, cases of potential misapplication of EU rules do not undermine the unity, consistency and autonomy of EU law. On the other hand, it would be a significant overreach to consider that, in order to ensure effective judicial protection of individuals, the Court of Justice should carry out, under Article 267 TFEU, some sort of micro-surveillance of the daily application of EU law by thousands of national courts.

105. The fact that the Court is willing, in some cases, to exercise its role under Article 267 TFEU in an expansive manner, in order to assist the referring courts as best as it can, and thus agrees to provide an answer which is tailor-made on the facts of the case, cannot be taken as an indication of the real object and purpose of the procedure.[75] The Court may, but need not, provide answers on the outcome of specific cases. As a result, national courts of last instance, too, may, but need not, make a reference in those cases.[76]

[69] See, for example, Cecchetti, L. and Gallo, D., 'The unwritten exceptions to the duty to refer after Consorzio Italian Management II: "CILFIT Strategy" 2.0 and its loopholes', *Review of European Administrative Law*, 2022, pp. 29 to 61.

[70] See, for example, Opinion of Advocate General Stix-Hackl in *Intermodal Transports* (C-495/03, EU:C:2005:215, points 86 to 88).

[71] Kelsen, H., *Pure Theory of Law*, 2nd ed., 1967, p. 348.

[72] See Opinions of Advocate General Capotorti in *Cilfit and Others* (283/81, EU:C:1982:267, p. 3436), and of Advocate General Bobek in *Consorzio*, point 145.

[73] See, to that effect, Permanent Court of International Justice, *Case concerning the Factory at Chorzów (Claim for indemnity – Jurisdiction)* (Dissenting Opinion of Judge Ehrlich) PCIJ Rep Series A No 9 (1927), 39.

[74] See, to that effect, the judgment in *Consorzio*, paragraphs 30 and 31 and the case-law cited.

[75] See, for example, judgment of 9 March 2021, *Radiotelevizija Slovenija (Period of stand-by time in a remote location)* (C-344/19, EU:C:2021:182, paragraph 23).

[76] Naturally, were the Court to consider that it lacks jurisdiction to answer the questions as articulated by the referring court, because they are too case-specific, it may either reformulate them in order to extrapolate some questions of law or declare them to be inadmissible, either in whole or in part.

106. Second, it is clear that the judgement in *Consorzio* has strengthened the role of the parties in respect of the preliminary ruling procedure.[77] It is first and foremost for them to raise an issue of EU law and provide the competent national court with sufficient information (and, where appropriate, evidence) that a reasonable doubt exists with regard to the interpretation of the EU rules in respect of which the national court is invited to make a reference.[78] In that respect, the appellant is not merely required to show that the relevant provision of EU law can be conceivably read in more than one manner by – if I may say so – a court which is reasonably informed and exercising ordinary care. The bar has been set higher in *Consorzio*: there must be more than one interpretation that appears 'sufficiently plausible' to a particularly experienced bench (since the standard in that regard is that of 'the courts or tribunals of last instance of the Member States and … the Court of Justice').

107. Litigants cannot expect national courts of last instance to regularly raise *ex officio* issues of EU law which they did not raise. Nor can they expect those courts to engage with requests to seise the Court of Justice which are vague, confusing or unsubstantiated. The principle *vigilantibus non dormientibus iura succurrunt* (the law assists those who are vigilant, not those who sleep on their rights) is certainly applicable in this context. Additionally, national courts cannot be required to engage with arguments and requests for referral which are not genuine, consisting in an abuse of procedure or having a purely dilatory purpose.[79]

108. Therefore, the ambit in which frictions between national filtering mechanisms, such as that at issue and Article 267 TFEU, may potentially exist is restricted to those appeals in which a party has properly raised a genuine issue of interpretation of EU law, substantiating its arguments as to the existence of more than one plausible interpretation of the relevant EU provisions, and expressly invited the national court to make a reference.

4. Conclusion on the first question

109. In the light of the above, I take the view that the third paragraph of Article 267 TFEU lays down a clear and unconditional obligation for national courts of last instance, subject only to the exceptions set out in the *CILFIT* case-law.

110. Accordingly, when an appellant has properly raised a genuine issue of EU law, substantiating its arguments as to the existence of more than one plausible interpretation of the relevant EU provisions, and expressly invited the national court of last instance to make a reference, that court has no discretion with regard to verifying *whether* the conditions triggering its obligation to make a reference are satisfied. A national mechanism which introduces some degree of discretion in that respect is, to my mind, incompatible with EU law.

111. That notwithstanding, I should point out that the above does not mean that each time that obligation is triggered the national court is required to grant leave to appeal and assess the merits of the case. As the Court has stated in *Lyckeskog*, if a question arises as to the interpretation of EU

[77] Similarly, Millet, F-X., 'Cilfit still fits', Vol. 18, Issue 3, *European Constitutional Law Review*, 2022, pp. 533 to 555.

[78] See, in particular, paragraphs 44, 49 and 51 of the judgment in *Consorzio*.

[79] See paragraphs 24 and 64 of the judgment in *Consorzio*. More generally, on the prohibition of abuse of rights in EU law, see, recently, judgment of 21 December 2023, *BMW Bank and Others* (C-38/21, C-47/21 and C-232/21, EU:C:2023:1014, paragraphs 281 to 283).

law before a national court of last instance which operates a filtering mechanism such as that at issue, that court 'will be under an obligation … to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage'. [80]

112. Indeed, according to settled case-law, it is in principle for a referring court to decide at *what stage* in the proceedings it is appropriate to refer a question to the Court of Justice for a preliminary ruling. [81] As the Court has held, 'whilst it may well be in the interests of the proper administration of justice for a question not to be referred for a preliminary ruling until after both parties have been heard, it must nevertheless be recognised that the fact that they have been heard beforehand is not among the conditions required to set in motion the procedure under Article 267 TFEU'. [82]

113. Having said that, the case-law does afford the national courts of last instance leeway *when* carrying out that verification. Applying the *CILFIT* criteria to a given dispute is by no means a mechanical exercise. It involves evaluating a number of elements which – both when each is taken in isolation and even more so when they are finally considered in combination – necessarily leave the national courts some room for manoeuvre.

114. There have been, in the past, diverging views as to whether that room for manoeuvre was significant enough for the national courts of last instance to carry out their judicial tasks in a reasonable and effective manner. [83] In that respect, I would merely say that, following the judgment in *Consorzio*, that room for manoeuvre has certainly been widened and, as far as the issue which lies at the heart of the present case is concerned, it has been widened on points of a certain level of importance.

115. This leads me to the following conclusion.

116. I am of the view that, on the one hand, filtering mechanisms such as that at issue, when applied automatically to cases which raise genuine issues of EU law, are incompatible with the third paragraph of Article 267 TFEU. The mere fact that a case does not fall within the filtering criteria set out in national law cannot permit the national courts of last instance to avoid considering – as the referring court worded it – 'whether, as a result of a party's request that a reference for a preliminary ruling be made … it is required to refer one or more questions to the Court of Justice for a preliminary ruling'.

117. On the other hand, however, I also believe that national courts should be able to interpret and apply the national procedural rules in question in such a way as to enable those rules to ensure compliance with the third paragraph of Article 267 TFEU, as interpreted by the Court in *CILFIT* and *Consorzio*.

118. That is certainly the case for national systems – such as that at issue – in which the filtering criteria laid down in national law appear largely to reflect the situations envisaged in the *CILFIT* exceptions. In fact, the three specific scenarios listed in Article 367a of the ZPP – questions of

[80] Judgment of 4 June 2002 (C-99/00, EU:C:2002:329, paragraph 18). See also Opinion of Advocate General Tizzano in *Lyckeskog* (C-99/00, EU:C:2002:108, point 46).

[81] See, recently, judgment of 4 May 2023, *Bundesrepublik Deutschland (Court electronic mailbox)* (C-60/22, EU:C:2023:373, paragraph 41 and the case-law cited).

[82] Judgment of 1 February 2017, *Tolley* (C-430/15, EU:C:2017:74, paragraph 32).

[83] Cf., for example, the Opinions of Advocate General Jacobs in *Wiener SI* (C-338/95, EU:C:1997:352, point 58), and of Advocate General Ruiz-Jarabo Colomer in *Gaston Schul Douane-expediteur* (C-461/03, EU:C:2005:415, point 58), with the Opinion of Advocate General Tizzano in *Lyckeskog* (C-99/00, EU:C:2002:108, point 63).

law on which (i) 'the decision of the court of second instance departs from the case-law of the Supreme Court', (ii) 'there is no case-law of the Supreme Court, in particular if the case-law of higher courts is not uniform', and (iii) 'the case-law of the Supreme Court is not uniform' – are essentially covering the *acte clair* and *acte éclairé* exceptions.

119. Accordingly, if those filtering criteria are applied with, I would say, a robust injection of the principle of equivalence, the national court would be de facto following the *CILFIT* case-law. After all, it is self-evident that Article 267 TFEU cannot have the effect of discouraging national courts of last instance from concentrating, most of all, on questions that, as stated in Article 367a of the ZPP, are 'important for ensuring legal certainty, the uniform application of the law or the development of the law through case law'.

120. As mentioned in the introduction to this Opinion, filtering mechanisms pursue legitimate objectives in the general interest. Interpreting EU law as requiring the national courts to disapply the national rules providing for such a mechanism each time an issue of EU law is properly raised before them would seem to me to go beyond what is, in most cases, necessary and sufficient to preserve the effectiveness of Article 267 TFEU.

121. In the light of the foregoing, I suggest that the Court answer the first question to the effect that the third paragraph of Article 267 TFEU precludes a national provision or practice according to which, in proceedings relating to the grant of leave to bring an appeal on a point of law, a national court of last instance is not obliged to consider whether it may be required to make a reference for a preliminary ruling, where a party has properly raised a genuine issue of EU law, substantiating its arguments as to the existence of more than one sufficiently plausible interpretation of the relevant EU provisions, and expressly invited the national court to make a reference. It is for the national courts to interpret the relevant procedural rules in such a way as to enable those rules, wherever possible, to ensure compliance with EU law.

B. Second question

122. By its second question, the referring court asks whether Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, should be interpreted as meaning that a decision refusing a party's application for leave to bring an appeal before a court of last instance constitutes a judicial decision which must state the reasons why the party's request that a reference for a preliminary ruling be made to the Court of Justice was not be granted.

123. As I have explained, when an issue of interpretation of EU law is properly raised before a national court of last instance, the third paragraph of Article 267 TFEU requires that court to check whether its obligation to make a reference is triggered. That means that a decision of such a court that, by refusing leave to appeal, terminates the appeal proceedings without having made a reference under Article 267 TFEU, is a judicial decision that requires – as the Court of Justice stated in paragraph 51 of the judgment in *Consorzio* – a statement of the reasons for which it considered that 'the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case-law or, in the absence of such case-law, that the interpretation of EU law was so obvious … as to leave no scope for any reasonable doubt'.

124. In the present proceedings, the parties that submitted observations discussed at length the type and level of detail required of the statements of reasons. Although that issue has not been expressly raised by the referring court, I am of the view that the present case provides a good opportunity to offer some thoughts in that respect.

125. It is important to start by pointing out that the Court derived the obligation to give reasons from Article 267 TFEU, read *in the light of* the second paragraph of Article 47 of the Charter. That provision guarantees the *right to a fair trial*, a right that also results from the constitutional traditions common to the Member States and corresponds to Article 6(1) ECHR. [84]

126. As the Court has consistently held, the observance of the right to a fair trial requires that all judicial decisions which are final be reasoned in order to enable a party to understand why a decision has been taken against him or her, so that that party may consider making use of the forms of redress which may be available. [85] In addition, more indirectly, the right to a reasoned decision also 'serves the general rule … which protects the individual from arbitrariness by demonstrating to the parties that they have been heard and obliges the courts to base their decision on objective reasons'. [86]

127. In line with those objectives, the Court has stated that 'the extent of the obligation to give reasons may vary according to the nature of the judgment and must be examined, in the light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that judgment'. [87]

128. I understand that a decision refusing leave to appeal is an act which, in the interest of judicial economy and procedural efficiency, may deal with a case in a rather summary and standardised manner. Therefore, I do not think that it ought to include a statement of reasons which includes references to the facts, the legal framework and the various grounds of appeal. In my view, under Article 267 TFEU it should normally be sufficient for the national court to (i) expressly indicate the *CILFIT* exception relied on and (ii) provide a concise explanation as to why that exception was considered to be applicable. [88] For example, where there is a well-established line of case-law, a simple reference to that case-law should normally suffice, especially when a party does not explain in detail why a departure from it would be warranted.

129. Clearly, national courts cannot be required to deal exhaustively and one by one with all the arguments articulated by the party which raised the issue of EU law. [89] In fact, the reasoning followed by such courts may, in certain circumstances, also be implicit. [90] That may be the case, for

[84] See, to that effect, judgment of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 52).

[85] See, to that effect, judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 51).

[86] See ECtHR, judgment of 15 December 2022, *Rutar and Rutar Marketing d.o.o. v. Slovenia* (CE:ECHR:2022:1215JUD002116420, § 62). See, similarly, Opinion of Advocate General Kokott in *Trade Agency* (C-619/10, EU:C:2012:247, point 34 and the case-law cited).

[87] See, for example, judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 52).

[88] Similarly, Opinion of Advocate General Bobek in *Consorzio*, point 168.

[89] See, to that effect, ECtHR, judgment of 30 June 2022, *Rusishvili v. Georgia* (CE:ECHR:2022:0630JUD001526913, § 75).

[90] See, by analogy, judgment of 4 July 2019, *FTI Touristik* v *EUIPO* (C-99/18 P, EU:C:2019:565, paragraph 17 and the case-law cited).

example, where the party's appeal is inadmissible or manifestly unfounded, [91] the reasons given to justify a reference are vague or generic [92] or the grounds for refusal can be clearly inferred from the reasons given in the remainder of the decision or from the decisions by the lower courts. [93]

130. By contrast, it cannot be excluded that, in some specific circumstances, a greater level of detail may be necessary. [94] That may be so, for example, where the party has pointed to the existence of diverging lines of case-law across the European Union or to meaningful differences in the various language versions of the relevant provisions.

131. What is crucial in that regard is whether the appellants are able to understand the grounds on which their invitation to seise the Court of Justice was refused and whether the courts which may be seised by those appellants can effectively rule on their complaints. It should not be overlooked that, even if the decisions of a court of last instance cannot, as a rule, be subject to appeal, there may well be other remedies which could potentially be used against a possible breach of the third paragraph of Article 267 TFEU.

132. On the one hand, the appellant may, where the appropriate conditions are satisfied, bring an action for State liability before the national courts. [95] On the other hand, the Commission (or other Member States) could bring infringement proceedings under Articles 258 to 260 TFEU before the Court of Justice against the Member State considered to be in default. [96]

133. In the light of the above, I take the view that Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, should be interpreted as meaning that a decision by a court of last instance which refuses leave to appeal and terminates the proceedings, despite the appellant having properly raised an issue of interpretation of EU law, is a judicial decision that requires a statement of the reasons for which that court considered that its obligation to make a reference under Article 267 TFEU was not triggered. The extent of the obligation to give reasons varies according to the relevant circumstances.

V. Conclusion

134. In conclusion, I propose that the Court answer the questions referred for a preliminary ruling by the Vrhovno sodišče (Supreme Court, Slovenia) as follows:

(1) The third paragraph of Article 267 TFEU precludes a national provision or practice according to which, in proceedings relating to the grant of leave to bring an appeal on a point of law, a national court of last instance is not obliged to consider whether it may be required to make a reference for a preliminary ruling, where a party has properly raised a genuine issue of EU law, substantiating its arguments as to the existence of more than one sufficiently plausible

[91] See, to that effect, ECtHR, judgment of 24 April 2018, *Baydar v. the Netherlands* (CE:ECHR:2018:0424JUD005538514, §§ 42 and 43), and decision of 20 January 2005, *Astikos Oikodomikos Synetairismos Nea Konstantinoupolis v. Greece* (CE:ECHR:2005:0120DEC003780602).

[92] See, to that effect, ECtHR, decision of 13 February 2007, *John v. Germany* (CE:ECHR:2007:0213DEC001507303).

[93] See, to that effect, ECtHR, decision of 26 November 2013, *Krikorian v. France* (CE:ECHR:2013:1126DEC000645907), and judgment of 11 April 2019, *Harisch v. Germany* (CE:ECHR:2019:0411JUD005005316, §§ 37 to 42).

[94] See, to that effect, judgment of 28 July 2016, *Association France Nature Environnement* (C-379/15, EU:C:2016:603, paragraph 52).

[95] See, in particular, judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 51 to 55); of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391, paragraph 32); and of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraphs 25 and 36).

[96] See judgments of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811), and of 14 March 2024, *Commission* v *United Kingdom (Judgment of the Supreme Court)* (C-516/22, EU:C:2024:231).

interpretation of the relevant EU provisions, and expressly invited the national court to make a reference. It is for the national courts to interpret the relevant procedural rules in such a way as to enable those rules, wherever possible, to ensure compliance with EU law.

(2) In accordance with Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, a decision by a court of last instance which refuses leave to appeal and terminates the proceedings, despite the appellant having properly raised an issue of interpretation of EU law, is a judicial decision that requires a statement of the reasons for which that court considered that its obligation to make a reference under Article 267 TFEU was not triggered. The extent of the obligation to give reasons varies according to the relevant circumstances.