

Obligation to Refer or to State Reasons for Non-Referral under Article 267(3) TFEU: Between Ideals and Reality, Distrust and Encouragement

Judgment of the Court of Justice (Grand Chamber)
of 15 October 2024 in Case *KUBERA*, C-144/23

- 1. The CJEU reaffirms its position from C-152/17, *Conorzio*, holding that Article 267(3) TFEU read in light of Article 47(2) of the Charter requires courts of last instance either to refer or to set out reasons for non-referral in line with the CILFIT doctrine.**
- 2. This duty applies to national filtering mechanisms for accessing apex courts, such as the Slovenian leave to appeal system examined in this case.**
- 3. If such a duty is applied rigorously, it threatens effective decision-making at the top of the national judicial hierarchy.**
- 4. Since there is no effective enforcement of the obligation under Article 267(3) TFEU, national apex courts are likely to adjust the idealistic expectations of the KUBERA judgment to the practical constraints they face, as illustrated by the aftermath of the case.**
- 5. The CJEU's approach should be seen less as a sign of distrust towards the national apex courts and more as an encouragement for them to engage seriously with issues of EU law.**

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<https://doi.org/10.26881/gsp.2026.2.17>

Commentary

1. Introduction

Preliminary reference procedure is the backbone of the EU judicial system. It is designed to ensure the effective and uniform application of EU law. However, national

courts do not always engage with the Court of Justice of the EU (the CJEU) for this purpose; subjective strategic considerations often shape the dialogue. Case C-144/23, *KUBERA*¹ offers a good example. The Supreme Court of the Republic of Slovenia (the Supreme Court) employed the preliminary reference mechanism in an apparent attempt to bypass a recent decision of the Constitutional Court of the Republic of Slovenia (the Constitutional Court), in which the Constitutional Court imposed on the Supreme Court the obligation to refer or justify non-referral under Article 267(3) in line with the CJEU ruling in C-152/17, *Consortio*.² The attempt failed. The CJEU sided with the Constitutional Court and did not move an inch from *Consortio*.³ It extended the scope of duty to justify non-referral, stemming from Article 47 of the EU Charter of Fundamental Rights (the Charter) to filtering mechanisms for access to the national apex courts. While the judgment and the opinion of the Advocate General have already been analysed primarily from the perspective of EU law requirements,⁴ this commentary embeds the CJEU's decision in the multilevel European judicial space and focuses on potential frictions in reception of the ruling in Member States. On the one hand, it argues that the *KUBERA* ruling is not an expression of distrust towards national courts, but rather a way to nudge national judges to perform a more careful scrutiny of arguments based on EU law. On the other hand, the analysis recognises that the idealistic position of the CJEU will be hard to square with realities of everyday adjudication even by national apex courts eager to faithfully apply EU law.

2. Background to the preliminary reference: The Supreme Court looking for ways around a ruling of the Constitutional Court

The case concerns the Slovenian system of leave to appeal, introduced in 2008 as part of broader efforts to secure the right to trial within a reasonable time, after the ECtHR found a systemic violation of Article 6 of the Convention in the pilot judgment of *Lukenda v Slovenia*.⁵ The 2008 reform of the Civil Procedure Act (Zakon o pravdnem

¹ Judgment of the Court of Justice of the EU of 15 October 2024 in Case *KUBERA*, *trgovanje s hrano in pijačo, d.o.o. v Republika Slovenija* (C-144/23, ECLI:EU:C:2024:881).

² Judgment of the Court of Justice of the EU of 6 October 2021 in Case *Consortio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* (C-152/17, ECLI:EU:C:2021:799); A. Velkaverh, "Ali bo 'spor' med Vrhovnim in Ustavnim sodiščem RS razrešilo Sodišče EU?," *Odvetnik* 2023, št. 113, pp. 14–18.

³ T. Hilpold, "Consortio Italian Management Reloaded: Court of Justice Further Strengthens the Preliminary Reference Procedure in the Case *Kubera* (C-144/23)," *EU Law Live*, 15 November 2024.

⁴ *Ibid.*; T. Hilpold, "Vigilantibus Non Dormientibus lura Succurrunt: Are National Filtering Mechanisms for the Access to the Preliminary Ruling Procedure Admissible? AG Opinion in Case C-144/23 *Kubera*," *EU Law Live*, 30 July 2024; E. Paulet, "Clarifying the Obligation of Last Instance Courts under Article 267(3) of the Treaty and Article 47(2) of the Charter: *Kubera* (C-144/23)," *EU Law Live*, 8 November 2024; S. Sever, "AG Emiliou's Opinion in *Kubera*: Articles 267 TFEU and 47 of the Charter Reinterpreted in the Light of National Filtering Mechanisms," *EU Law Live*, 25 July 2024.

⁵ *Lukenda v Slovenia*, App. no. 23032/02, 6 October 2005.

postopku, ZPP)⁶ introduced a filtering mechanism, according to which access to the Supreme Court is granted only to applicants that can show that their case raises a legal question the relevance of which transcends the individual case, since it “is important for ensuring legal certainty, uniform application of law or further development of law through case-law” (Article 367a of the ZPP). Where no such question is identified, the Supreme Court may summarily reject the application for leave to appeal on the points of law by merely stating that the requirements of Article 367a have not been met (Article 367c(2) of the ZPP). In cases where the duty to refer under Article 267(3) TFEU was not at stake, the filtering system was found to be in compliance with the Constitution,⁷ and comparable arrangements of other member states were deemed compatible with the Convention.⁸ The Supreme Court applied the legislation in an unchanged manner in cases, where parties requested that a preliminary reference be sent to the CJEU.

One such case reached the Constitutional Court. In Decision Up-1133/18 of 31 March 2022, the Constitutional Court annulled the decision of the Supreme Court for failure to present reasons for rejecting the leave to appeal after the applicant had requested a preliminary ruling. Relying on the CJEU ruling in *Conorzio*,⁹ the Constitutional Court ruled that the Supreme Court must offer a justification explaining why the case falls within one of the CILFIT exceptions.¹⁰

Under the ruling of the Constitutional Court, the Supreme Court was therefore required to present reasons for non-referral, except if the request was manifestly unfounded, unsubstantiated, or abusive.¹¹ A failure to do so would be a ground for the Constitutional Court to quash the Supreme Court’s decision and remand the case for fresh adjudication. To avoid or at least narrow such review of the Constitutional Court, the Supreme Court referred the present case to the CJEU for a preliminary ruling. It argued that the CJEU has not yet interpreted the requirements of Article 267(3) TFEU and Article 47 of the Charter in the context of national filtering mechanisms such as the one at hand.¹² And indeed, the case raised the novel and extremely relevant question of how to reconcile a legitimate concern for effective and high-quality decision-making at the top of the judicial hierarchy with the requirement of presenting reasons for not referring, first set out in *Conorzio*, a case that did not concern such filters. More specifically, can a national Article 267(3) court reject the application for leave to

⁶ Zakon o pravnem postopku, Official Gazette of the Republic of Slovenia no. 26/99 (...) and no. 92/24.

⁷ Constitutional Court of the Republic of Slovenia, Order U-I-302/09, Up-1472/09, U-I-139/10, Up-748/10, 12 May 2011. For further references to the relevant case law of the Constitutional Court, see Constitutional Court of the Republic of Slovenia, Decision Up-1133/18 of 31 March 2022, fn. no. 16 and 17.

⁸ See e.g. *Kukkonen v Finland* (no. 2), App. no. 47628/06, 13 January 2009; *Bufferne v France*, App. no. 54367/00, 26 February 2002; *Nerva v the United Kingdom*, App. no. 42295/98, 11 July 2000.

⁹ *Conorzio* (C-152/17) (n 2).

¹⁰ Constitutional Court of the Republic of Slovenia, Decision Up-1133/18, 31 March 2022, para. 30.

¹¹ *Ibid.*, paras. 32–33.

¹² Request of the Supreme Court of the Republic of Slovenia of 7 March 2023 in Case X DoR 380/2022.

appeal without providing any justification as to why it turned down the party's request for a preliminary ruling when the case does not raise an "important legal question" in the sense of national legislation? The Supreme Court argued that KUBERA's case does not raise important questions of law, yet according to the standard set by the Constitutional Court, it would have to either refer or justify non-referral by invoking one of the CILFIT exceptions.

3. Questions for the preliminary ruling and the judgment of the CJEU

The Supreme Court therefore referred two preliminary questions to the CJEU: (1) whether Article 267(3) TFEU precludes the Slovenian filtering mechanism that allows the Supreme Court to reject the application for leave to appeal, solely on the ground that the legal question is not considered important, without examining whether the obligation to refer from the said provision applies; and if so, (2) whether Article 47(2) of the Charter requires the Supreme Court to present reasons for not referring the case to the CJEU.¹³ While this commentary outlines the decision of the CJEU, its focus is primarily on issues that merit special attention as potential points of friction between national apex courts and the CJEU.

In response to the first question, the CJEU was unpersuaded by the proposals of Advocate General Emiliou. Instead, it reinforced the approach established in *CILFIT* and its progeny. Perhaps the most noteworthy proposal of the Advocate General was to qualify the duty from Article 267(3), so that it would apply only "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."¹⁴ In essence, AG Emiliou proposed that the focus shifts from ascertaining whether a national court of last instance has fulfilled its Article 267(3) obligation, to evaluating whether the procedural rights of the parties have been adequately safeguarded. This would have amounted to no less than a paradigm shift, since the CJEU's longstanding view is that Article 267(3) is an objective guarantee to ensure the effectiveness and uniform interpretation of EU law, and not a subjective procedural right available to the parties.¹⁵

The CJEU very clearly did not take up the proposal of the Advocate General. On the contrary, it reaffirmed what seems to be an *ex officio* duty of Article 267(3) courts to assess whether a preliminary question should be sent to Luxembourg. As the Court explained:

Such legislation or national practices can thus lead to a situation in which a question concerning the interpretation or validity of a provision of EU law, despite being raised by a party

¹³ *KUBERA* (C-144/23) (n 1), paras. 29, 30, 61.

¹⁴ Opinion of Advocate General Emiliou of 18 June 2024 in Case *KUBERA, trgovanje s hrano in pijačo, d.o.o. v Republika Slovenija* (C-144/23, ECLI:EU:C:2024:522), para. 121.

¹⁵ *KUBERA* (C-144/23) (n 1), paras. 33, 35–37 and the references contained therein.

before the *Vrhovno sodišče* (Supreme Court) or *having to be raised by that court in the light of the legal issue highlighted by that party*¹⁶ and not being a question that is covered by the [CILFIT] exceptions, would not be submitted to the Court of Justice, contrary to the obligation imposed on that national court by the third paragraph of Article 267 TFEU. Such a situation is capable of undermining the effectiveness of the system of cooperation between the national courts and tribunals and the Court of Justice established in Article 267 TFEU, and the achievement of the objectives which that article is intended to achieve, particularly that of preventing a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States.¹⁷

The CJEU also rejected the claim that the requirement to raise an “important legal question,” as set out in Slovenia’s leave to appeal system, constitutes an admissibility requirement comparable to those addressed in C-3/16, *Aquino*¹⁸ and *Conorzio*. In those cases, the CJEU held that a national court “may decline to refer a question to the Court of Justice for a preliminary ruling on grounds of inadmissibility specific to the procedure before that national court or tribunal, subject to compliance with the principles of equivalence and effectiveness.” The CJEU clarified that those cases concerned “conditions of admissibility of a purely procedural nature,” whereas the Slovenian requirement relates to the substantive importance of the legal issue at stake.¹⁹

Further, the CJEU invoked the principle of consistent interpretation and argued that construing the Slovenian provisions in light of Article 267(3) “does seem possible,” as this followed from the case of the Constitutional Court, though it ultimately left the final determination to the Supreme Court.²⁰

Turning to the second question, the CJEU reaffirmed the position adopted in *Conorzio*, holding that national Article 267(3) courts must provide reasons for non-referral whenever “an application for leave to appeal on a point of law raises a question concerning the interpretation or validity of a provision of EU law.”²¹ Importantly, the Court again seems to have rejected AG Emiliou’s view: it held that the duty to justify a non-referral arises regardless of whether the party explicitly requested the national court to initiate the preliminary ruling procedure.

4. Aftermath of the KUBERA ruling: A cool reception from the Supreme Court?

The Supreme Court followed the CJEU’s instructions by adopting a consistent interpretation of the ZPP in its Order X DoR 380/2022-30 of 29 January 2025. It also

¹⁶ Emphasis added by the author.

¹⁷ *KUBERA* (C-144/23) (n 1), paras. 45–46; see also paras. 36–37, 63.

¹⁸ Judgment of the Court of Justice of the EU of 15 March 2017 in Case *Lucio Cesare Aquino v Belgische Staat* (C-3/16, ECLI:EU:C:2017:209).

¹⁹ *KUBERA* (C-144/23) (n 1), paras. 47–50.

²⁰ *Ibid.*, paras. 51–59.

²¹ *Ibid.*, paras. 63–64.

fulfilled the obligation to state reasons for non-referral, relying on the *acte clair* exception to reject the application for leave to appeal.

Nevertheless, we can observe signs of potential friction. The Supreme Court appears to have tacitly embraced aspects of AG Emiliou's proposal. First, it ruled that the obligation under Article 267(3) TFEU arises only where the party has explicitly proposed a preliminary question.²² This goes against the *KUBERA* ruling. Second, it held that it must first determine whether the application for leave to appeal meets the procedural conditions from Article 367b(4), which requires the claim to be presented in a convincing, precise, and specific manner.²³ While such procedural requirements are a legitimate feature of any meaningful filtering mechanism – and the CJEU has acknowledged that purely procedural grounds of inadmissibility can justify a refusal to refer – an overly strict approach by the Supreme Court would go against the *KUBERA* ruling. It would make the parties carry a heavy burden that the CJEU does not impose. If such an interpretation is adopted, the Supreme Court may be able to carve out an exception that may eat away at the duty to refer under Article 267(3) of the TFEU. That said, it may still be premature to speculate how the Supreme Court's case law will develop in the future.²⁴

5. National apex courts caught between ideals and reality

Before placing blame on the Supreme Court, it is important to recognize that the CJEU's ruling in *KUBERA* is not without its flaws. In paragraph 57, the CJEU asserted that Article 267(3) "would not involve a more detailed examination" than the one the Supreme Court already conducts under national law. This claim is simply not true. The Supreme Court explained in its referral that determining whether a case raises an "important legal question" is a discretionary assessment aimed at selecting cases of systemic relevance to the legal order. Not all cases that give rise to a duty to refer under Article 267(3) meet that threshold of such objective importance.

Moreover, the CJEU's case law, especially concerning the *acte clair* exception, demands an exceptionally rigorous standard. AG Wahl famously remarked that "coming across a "true" *acte clair* situation would, at best, seem just as likely as encountering a unicorn."²⁵ If national courts of last instance would faithfully adhere to

²² Supreme Court of the Republic of Slovenia, Order X DoR 380/2022-30 of 29 January 2025, para. 19.

²³ Request of the Supreme Court of the Republic of Slovenia of 7 March 2023 in Case X DoR 380/2022, para. 20.

²⁴ At the time of writing (25 April 2025), only three relevant decisions are publicly available, two of which were adopted before the leading Supreme Court case in *KUBERA*: Order V Ips 1/2024 of 10 December 2024; Order III DoR 92/2024 of 10 December 2024, Order X DoR 238/2022 of 29 January 2025.

²⁵ Opinion of Advocate General Nils Wahl of 13 May 2015 in joined cases *X and T.A. van Dijk* (C-72/14 and C-197/14, ECLI:EU:C:2015:319), para. 62. Bobek endorsed this stance in his opinion in *Consortio* (Opinion of Advocate General Michal Bobek of 15 April 2021 in Case *Consortio Italian Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA* (C-152/17, ECLI:EU:C:2021:291), para. 103.

their duty under Article 267(3), this would, on the one hand, impose a heavy burden, which AG Bobek sees as “utterly unfeasible.” On the other hand, preliminary rulings would flood Luxembourg. In his opinion in *Conorzio*, Bobek observed:

Among those tasked with applying [Article 267(3) TFEU], and in particular those who are actually enforcing it, no one appears to be following the guidance of the Court. This is, in my view, not because they seek, in one way or another, to disregard the Court. It is rather a natural self-preservation mechanism. *Impossibile nulla est obligatio*.

6. Conclusions: Distrust towards rogue courts or a de-biasing tool for the faithful?

Following the *KUBERA* judgment, the judge rapporteur at the Supreme Court published a thought-provoking editorial in a Slovenian legal weekly, arguing that the CJEU’s decision reflects distrust towards national apex courts, an approach he considered understandable in light of ongoing rule of law backsliding. However, this interpretation seems to rest on an implicit assumption that there are effective remedies to enforce the Article 267(3) obligation outside national legal systems, while this is arguably not the case. EU law offers only two questionable avenues, namely the state liability and the infringement action.²⁶ The potential for enforcement before the ECtHR under Article 6 of the Convention is also limited since the Strasbourg court focuses on “whether national courts of last instance have duly explained why they consider that the *CILFIT* criteria have been fulfilled without (...) examining the merits as to whether that is indeed the case.”²⁷ The CJEU therefore cannot but trust national courts, and the *KUBERA* ruling does not alter this defining feature of the preliminary ruling mechanism. Why, then, does the CJEU insist on an obligation to state reasons for non-referral? Clearly, the CJEU wants to make sure that relevant EU law issues are taken seriously by national courts. Setting out reasons for any decision promotes reflection and ultimately enhances the quality of decision-making.²⁸ In this sense, the obligation to provide reasons is probably less about enabling judicial review and more about encouraging diligence among national courts of last instance.

²⁶ For a more detailed discussion of the two remedies, see Opinion of AG Bobek in C-152/17, *Conorzio* (n 25) paras. 111–121.

²⁷ *Ibid.*, para. 109.

²⁸ See, for example: Z. Liu, “Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China,” *The Journal of Legal Studies* 2018, vol. 47, no. 1, pp. 83–118.

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Summary

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Obligation to Refer or to State Reasons for Non-Referral under Article 267(3) TFEU: Between Ideals and Reality, Distrust and Encouragement

Déjà vu: the CJEU rejects the Advocate General's proposal to revisit the contested CILFIT doctrine. Instead, it confirms its position from C-152/17, *Consorzio*, that courts of last instance are required to provide reasons for not making a reference under Article 267(3) TFEU. This judgment extends that duty to the context of national filtering mechanisms for accessing apex courts, such as the Slovenian leave to appeal system examined in this case. The ruling imposes a far-reaching obligation under Article 267(3), one that may risk undermining the legitimate goals of national filtering systems. As the aftermath in Slovenia illustrates, national courts are likely to grapple with the implications of this decision. Nevertheless, they remain largely unrestrained in how they exercise their duty under Article 267(3), which suggests that the obligation to provide reasons functions more as an encouragement for careful consideration than as a justiciable standard subject to external review.

Keywords: C-144/23 KUBERA, CILFIT criteria, duty to state reasons for refusing an application for leave to appeal, national filtering mechanisms, scope of the obligation on national courts or tribunals of last instance to make a reference for a preliminary ruling under Article 267(3) TFEU.

Streszczenie

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Obowiązek skierowania pytania prejudycjalnego lub przedstawienia uzasadnienia jego nieskierowania na podstawie art. 267 ust. 3 TFUE – między ideałem a rzeczywistością, nieufnością a zachętą

Déjà vu: TSUE nie zgodził się z propozycją Rzecznika Generalnego, aby ponownie pochylić się nad kontrowersyjną „doktryną CILFIT”. Zamiast tego potwierdził swoje stanowisko z wyroku C-152/17, w sprawie *Conсорzio*, zgodnie z którym sądy ostatniej instancji są zobowiązane do uzasadnienia odmowy przekazania pytań w trybie prejudycjalnym na podstawie art. 267 ust. 3 TFUE. Komentowany wyrok rozszerza ten obowiązek na kontekst krajowych mechanizmów filtrowania warunków dostępu do sądów najwyższych, takich jak – w przypadku komentowanej sprawy – słoweński system dopuszczalności apelacji. Wyrok nakłada daleko idący obowiązek na mocy art. 267 ust. 3, który może podważyć uzasadnione cele przyświecające krajowym systemom filtrowania. Jak pokazują implikacje w Słowenii, sądy krajowe prawdopodobnie będą miały niełatwe zadanie zmierzenia się z konsekwencjami takiego rozstrzygnięcia. Niemniej jednak sądy te nadal w znacznym stopniu zachowują swobodę w wykonywaniu obowiązku wynikającego z art. 267 ust. 3. Sugeruje to, że obowiązek uzasadnienia odmowy skierowania pytania będzie pełnił raczej funkcję zachęty do starannej oceny zasadności jego przekazania, niż stanowił standard prawny podlegający zewnętrznej kontroli instancyjnej.

Słowa kluczowe: sprawa C-144/23 (*Kubera*), kryteria CILFIT, obowiązek uzasadnienia odmowy uwzględnienia wniosku o uznanie apelacji za dopuszczalną, krajowe mechanizmy filtrowania, zakres obowiązku sądów krajowych najwyższej instancji przekazania pytań w trybie prejudycjalnym na podstawie art. 267 ust. 3 TFUE.