Op-Ed

Tanja Hilpold

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When AG Emiliou presented his Opinion in the case *Kubera* (which I analysed in an earlier Op-Ed), the question arose whether certain characteristics of the preliminary reference procedure would be revised. In the past, similar attempts were undertaken (see, *inter alia*, the Opinion of AG Bobek in the case *Consorzio Italian Management*) and experts looked with great interest to Luxembourg to see whether such an endeavour would eventually succeed. Once again, this was not the case: In *Kubera*, the Court of Justice (or 'the Court') remained steadfast in its position established in *Cilfit* and *Consorzio Italian Management.* This being the result of the proceeding, the judgment in *Kubera* nonetheless deserves close scrutiny for the following reasons: It further reinforced the obligation of national courts of last instance to examine whether they have to make a reference for a preliminary ruling and it clarified that this obligation also applies within proceedings for granting leave to appeal before national courts of last instance and within similar 'filtering' mechanisms. In the present case, the Court reached the conclusion that the Slovenian 'selection' system before the Slovenian Supreme Court can be interpreted in accordance with Article 267(3) TFEU.

The judgment in *Kubera* is, in principle, to be applauded but nonetheless some questions in this context, and in particular with regard to the possible scope of filtering mechanisms, remain open and could give rise to further controversy in the future. It is argued here that the Court of Justice could have gone further and could have required more transparency from national court systems when filtering mechanisms are applied.

1. The judgment in a nutshell

The main question that arose concerned the compatibility of national 'filtering' mechanisms for access to national supreme courts with Article 267(3) TFEU, and thus with the obligation of national last instance courts to assess whether they must refer a question to the Court. In a nutshell, the Court remained indifferent as to whether national courts choose to introduce such filtering mechanisms, provided that the obligations deriving from EU law are respected, particularly the requirements flowing from Article 267 TFEU, as they have been further

specified by the Court's case-law. The Court did not retreat a single inch from its position adopted in *Consorzio Italian Management* and *Cilfit*. National courts of last instance must analyse – at whatever stage in the national proceedings – whether their obligation to make a reference for a preliminary ruling is triggered.

Let's briefly summarise the contours of the present case. The Slovenian Code of Civil Procedure (ZPP) provides for a procedure for granting leave to appeal to the Supreme Court. According to Article 367a(1) ZPP, the court shall grant leave to appeal if it can be expected that the decision of the Supreme Court would be important for ensuring legal certainty, the uniform application of the law or its development. The examples listed in this ZPP article cover deviations within national law and national case-law or the absence of case-law of the Supreme Court. The question arose as to how this filtering mechanism can be reconciled with Article 267(3) TFEU. Are these provisions compatible with each other? Yes, they are, according to the Court, which adopts a very Solomonic approach. First of all, it states that it is up to the referring national court to assess whether the national filtering mechanism can be interpreted in accordance with Article 267 TFEU, as only national courts or tribunals can interpret national law (para. 53). Then, the Court goes further, trying to provide some guidance. It comes to the conclusion that the Slovenian provisions establishing a filtering mechanism for access to the Supreme Court can be interpreted in conformity with EU law.

2. **Interpretation in conformity with EU law – the right approach in the present case?**

According to the Court, the circumstances listed in the ZPP which require leave to appeal to be granted are not exhaustive. The ZPP does not seem to prevent the Supreme Court from determining already within the procedure for granting leave to appeal whether it is obliged to make a reference for a preliminary ruling. The Court stated that this assessment 'would not involve a more detailed examination than that which the (…) (Supreme Court) is required to carry out under Article 367a(1) and Article 367b(4) of the ZPP' (para. 57). If a party raises a question concerning the interpretation or validity of a provision of EU law that does not fall within one of the *Cilfit* exceptions, this situation could be considered as 'important for ensuring legal certainty, the uniform application of the law or the development of the law through case-law' and thus be read into the requirements set forth in Article 367a(1) ZPP for the filtering mechanism. According to the Court, in the case at issue here, an interpretation of the national provisions in conformity with EU law suffices.

This case is an interesting example of how EU law and national law blend together and serves also as a reminder to the Member States that their procedural system must be in conformity with the obligations deriving from EU law. However, it is argued here that the Court could have gone further as regards the examination of the compatibility of national provisions on filtering mechanisms with Article 267(3) TFEU. It is doubtful whether Article 267(3) TFEU and the requirements set forth in *Consorzio Italian*

Management and *Cilfit* can always be smoothly read into national provisions providing for filtering mechanisms. As mentioned in *Kubera*, the Slovenian Supreme Court itself pointed out that a complete change of approach would be required if the obligation flowing from Article 267 TFEU had to be taken into account already within the procedure for granting leave to appeal on a point of law (para. 26). It is questionable whether national filtering mechanisms such as the one at issue here, where no reference is made to EU law and the examples refer only to national law, can seamlessly be interpreted in conformity with EU law without requiring at least a slight adjustment of the relevant national provisions. It is argued here that it would be desirable, particularly for the sake of transparency, to adjust national provisions providing for filtering mechanisms, so as to explicitly require the consideration of the obligation to make a reference for a preliminary ruling in the circumstances stipulated by Article 267(3) TFEU and further specified by the Court's case-law.

3. What is a national court of last instance?

The present judgment also sheds further light on the meaning of the formulation 'decision of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law'. The Court clarified that the existence of filtering mechanisms cannot transform a lower court into a 'court of last instance' (see in this regard also the case *Lyckeskog*). The obligation to refer a question to the Court and the obligation to state reasons, therefore, do not apply to the lower courts. Decisions of a national court or tribunal that may be challenged before a national supreme court do not constitute 'decisions of a court or tribunal against whose decisions there is no judicial remedy under national law' (para. 39). As seen before, the Court is neutral towards filtering mechanisms provided that national courts of last instance examine whether they have to submit a question for a preliminary ruling to the Court. This leads to the conclusion that the possibility of access to the national court of last instance must be guaranteed if questions concerning the interpretation or validity of a provision of EU law arise. They cannot be 'filtered out' at an earlier stage without having been examined by the court of last instance. By specifying the term 'court of last instance', the Court brought clarity to a long-disputed issue that had undermined to a considerable extent the effectiveness of access to the preliminary reference procedure.

4. Re-conceptualisation of the object and purpose of the preliminary ruling procedure?

This judgment is of pivotal importance not only for what it expressly states but also for what it implicitly omits in respect to the AG's proposals. While AG Emiliou affirmed that 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' is ongoing, this evolution is not discernible in the judgment itself (for a further analysis of AG Emiliou's approach see my previous Op-Ed). In particular, AG Emiliou suggested that a differentiation between 'interpretation' and 'application' of EU law has to be made and that the duty of last instance courts to make a

reference for a preliminary ruling refers only to questions concerning the 'interpretation' and not the 'application' of EU law – a distinction that cannot be found in the final judgment.

Furthermore, the Court of Justice did not follow the principle of *vigilantibus non dormientibus iura succurunt* mentioned in the AG's Opinion. The latter affirmed that litigants 'cannot expect national courts of last instance to regularly raise *ex officio* issues of EU law which they did not raise'. According to the Court in *Kubera*, questions concerning the interpretation or validity of a provision of EU law are to be raised by a party before the last instance court or have to be raised by this court in the light of the legal issue highlighted by that party (para. 45).

5. Obligation to state reasons

As is well known, ever since *Consorzio Italian Management*, national courts of last instance must state reasons when they refuse to make a reference for a preliminary ruling. The Slovenian Supreme Court inquired whether this obligation also applies to decisions refusing an application for leave to appeal. AG Emiliou – while in principle confirming the duty to state reasons also when assessing the application for leave to appeal – put forward some proposals as regards the extent of this obligation. For example, he suggested that the 'reasoning may (…), in certain circumstances, also be implicit' (point 129 of the Opinion).

The Court, however, was very clear in reaffirming what has already been set out in *Consorzio Italian Management:* Article 267 TFEU, read in the light of Article 47(2) of the Charter, imposes an obligation on national courts of last instance to state reasons when they decide not to refer a question to the Court. This also applies to decisions of national last instance courts taken at the stage of the examination of the application for leave to appeal that contain a party request to make a reference for a preliminary ruling. In the statement of reasons, these courts must indicate either that the question of EU law raised is irrelevant for the resolution of the dispute or that the EU law provision concerned has already been interpreted by the Court, or that the interpretation of EU law is so obvious as to leave no scope for any reasonable doubt (para. 55).

This approach is to be applauded. First of all, decisions refusing a leave to appeal end the procedure before the national court and prevent questions on the interpretation or validity of a provision of EU law from reaching the Court of Justice. The obligation to state reasons must therefore also apply in these cases. Furthermore, developing formulas that would limit the scope of the obligation to state reasons, as proposed by AG Emiliou, could open dangerous loopholes in effective judicial protection (see my previous Op-Ed in this regard). The Court has clearly refrained from doing so.

6. Conclusion

The importance of this judgment cannot be overstated. It serves as an excellent example of how EU law is increasingly permeating national procedural law, underscoring that Member States have to ensure that their national procedural law is in conformity with the obligations deriving from EU law.

However, it is argued here that the Court could have gone further in providing overdue clarifications regarding national filtering mechanisms. For the time being, these mechanisms probably constitute one of the most significant threats to the effectiveness of the preliminary reference procedure. With all due respect for the need at the national level to make procedural systems more efficient, access to the EU Courts for preliminary rulings – in any case still difficult and precarious – must remain preserved, at least at the level last guaranteed in *Consorzio Italian Management*.

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Tanja Hilpold is a PhD Candidate in EU Law at the University of Luxembourg. E-mail: tanja.hilpold@uni.lu

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