

Slovenia, Vrhovno sodišče Republike Slovenije (Supreme Court of the Republic of Slovenia), VS00065401, request for a preliminary ruling, Case C-144/23 KUBERA, Supreme, 7 March 2023

Member State

 Slovenia

Topic

mutual trust

Sector

Judicial Interaction Techniques; Role of National Higher Courts; Use of the Preliminary Reference Procedure

Deciding Court Original Language

Vrhovno sodišče Republike Slovenije

Deciding Court English translation

Supreme Court of the Republic of Slovenia

Registration N

VSRS Predlog X DoR 380/2022-6

Date Decision

7 March 2023

ECLI (if available)

N/A

National Follow Up Of (when relevant)

The case is currently pending before the CJEU.

EU legal sources and CJEU jurisprudence

Treaty on the Functioning of the European Union, Article 267

Charter of Fundamental Rights of the European Union, Article 47

Regulation (EU) No 608/2013 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

Conorzio Italian Management (C-561/19 of 6. 10. 2021), CILFIT (C-283/81 of 6. 10. 1982), Criminal proceedings against Kenny Roland Lyckeskog (C-99/00 of 4. 6. 2002), Airbnb Ireland (C-83/21 of 22. 12. 2022) and Cartesio Oktató és Szolgáltató bt (C-210/06 of 16. 12. 2008)

ECtHR Jurisprudence

Rutar and Rutar Marketing d. o. o. v Slovenia (no. 21164/20 of 15. 12. 2022)

Subject Matter

Request for a preliminary ruling; obligation to send a preliminary reference; duty to conduct a substantive assessment of the party's requests for a preliminary ruling; duty to give reasons for the decision when rejecting the application for leave to bring an appeal on a point of law.

Legal issue(s)

The main issue before the Supreme Court, in the case at hand, is that the Civil Procedure Act (hereinafter: the CPA) does not allow for the application for leave to bring an appeal on a point of law to be made, as the legal requirements from Article 367.a CPA are not met. The question thus arises whether the Supreme Court, in deciding on the application for leave to bring an appeal on a point of law, must also carry out a substantive assessment of the party's request for a preliminary reference to the Court of Justice of the European Union (hereinafter: CJEU), while taking into consideration the Supreme Court's obligation under Article 267 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). The Supreme Court further questions whether it is, pursuant to Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter: Charter), required to state the reasons for deciding to reject the application for leave to bring an appeal on a point of law.

Request for expedited/PPU procedures

N/A

Interim Relief

N/A

National Law Sources

Constitution of the Republic of Slovenia, Articles 22., 23.

Administrative Dispute Act, Article 22.

Civil Procedure Act, Articles 367., 367.a, 367.b, 367.c, 370., 371., 378., 379.

Constitutional Court, order U-I-302/09, Up-1472/09, U-I-139/10 and Up-748/10 of 12. 5. 2011

Constitutional Court, judgement Up-1133/18 of 31. 3. 2022

Supreme Court, judgement and order VS RS X Ips 479/2012 of 8. 7. 2015

Supreme Court, judgement and order VS RS X Ips 312/2015 of 28. 11. 2018

Supreme Court, judgement VS RS X Ips 148/2014 of 18. 1. 2017

Supreme Court, order X DoR 280/2020 of 18. 11. 2020

Supreme Court, order X DoR 275/2020 of 18. 11. 2020

Facts of the case

A company (KUBERA) sought to import by boat from Turkey 87.600 cans of Red Bull produced in Austria. In Luka Koper port, the Financial Administration initiated the customs procedure and seized the goods due to suspected intellectual property rights infringements. The company filed a complaint, which the Administrative Court denied. In its decision, the Administrative Court stated that under Regulation 608/2013, this is a fast procedure in which it suffices for the customs body to establish the existence of a suspicion of an infringement of intellectual property rights, as this is a sufficient basis for initiating legal proceedings. The Administrative Court also established that the goods were found to be original and emphasized the need to distinguish goods produced by the holder of the intellectual property rights compared to those produced with the consent of the intellectual property rights holder. The company applied for leave to bring an appeal on a point of law (an extraordinary legal remedy before the Supreme Court), in which it argued that Regulation 608/2013 does not apply in cases where the holder of the intellectual property rights produces the goods. It also disagreed with the Administrative Court's position that there needs to be a distinction made concerning who produces the goods. The company suggested to the Supreme Court that if it found a need for such a distinction, it should request a preliminary ruling from the CJEU to receive an interpretation of this Regulation. However, the Supreme Court found that the legal requirements from Article 367.a CPA, for allowing an appeal on points of law, were not met. Furthermore, the Supreme Court held that under national legislation, it does not have to state reasons for refusal of an appeal on a point of law. The Constitutional Court had already decided that the court should state reasons for its refusal when a party requests a preliminary ruling. Although it remains undisputed that both the Constitutional and Supreme Court find no issue in denying the application for a leave to bring an appeal on a point of law without providing reasons, the Supreme Court was unsure, whether it could refuse the party's request for an appeal on the points of law without giving reasons when such an appeal includes the party's request for a preliminary ruling. The Supreme Court therefore stayed the procedure and referred two questions for preliminary ruling to the CJEU. First, it asked the CJEU whether the third paragraph of Article 267 TFEU precludes national provisions, under which the Supreme Court does not need to assess whether the reference for a preliminary ruling from a party imposes an obligation to refer a question to the CJEU. If the previous question was to be answered in the affirmative, the Supreme Court further questioned whether Article 47 of the Charter should be interpreted in such a way so that the procedural decision refusing a party's application for leave to bring an appeal on a point of law when the party requests a preliminary ruling, constitutes a 'judicial decision' which must be duly motivated.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Supreme Court has sent a request for a preliminary ruling and the case is now pending before

the CJEU, thus there has not yet been a decision made by the national court. As for the reasons for sending reference for a preliminary ruling, the Supreme Court noted that the appeal process is two-fold. In the first part, the Supreme Court assesses whether it should grant the application for an appeal on points of law, depending solely on the legal importance of the issue at hand. This means that the court takes into account whether solving the question posed ensures the uniformity of case law and will lead to a resolution of important legal issues. Only after that can the Supreme Court decide on merits. However, for the Supreme Court to be able to assess whether it is obliged to send the reference for a preliminary ruling and that there are no applicable exceptions such as *acte clair* and *acte éclairé*, it would need to skip the first part of the assessment and move directly to studying the substance of the case. This would mean a complete change in the legal regime of access to the Supreme Court from the one introduced by the legislator in the development of the litigation procedure in the CPA. However, the Supreme Court noted that under the current national legal system, a lower instance court could decide on the merits of a case where it interprets the EU law, subsequently, if the decision is appealed before the Supreme Court and the conditions for the application of leave to bring an appeal on a point of law are not met, the lower instance court's interpretation of EU law would be final, as no court would send a request for a preliminary ruling. The Supreme Court therefore seems to have implicitly acknowledged that if it is not obliged to substantiate its refusal of the party's request for the preliminary ruling, which is included in the application for leave to bring an appeal on the points of law, the result could be that no court would substantively assess the merits of the party's request for the preliminary ruling. This could be problematic from the perspective of Article 6 ECHR and Article 47 of the Charter. The Supreme Court further noted that neither the CJEU nor ECtHR have dealt with such procedural decisions as in the case at hand and thus it remains unclear whether there is a need for the Supreme Court to issue a substantiated decision on the party's request for preliminary ruling when denying the application for leave to bring an appeal on a point of law. Based on these considerations, the Supreme Court deemed that the referred questions are important and should be answered by the CJEU.

Relation of the case to the EU Charter

The Supreme Court summarised the recent view of the Slovenian Constitutional Court from the decision Up-1133/18 of 31 March 2022, in which it imposed a duty on the Supreme Court to state the reasons for the decision not to admit the application for leave to bring an appeal on points of law, stating that such an obligation arises from Article 267 TFEU and Article 47 of the Charter. In that decision, the Constitutional Court held that the Supreme Court should rule with sufficient clarity on the reference for a preliminary ruling from the CJEU made by the party, taking into account the criteria laid down in Article 267 TFEU and the case law of the CJEU. The Supreme Court noted that even if it has a duty to assess the party's proposal for the sending of a reference for a preliminary ruling, it is not self-evident that it has a duty to disclose its assessment in the reasoning of the procedural order. Based on this, the Supreme Court concluded it needed the correct interpretation of Article 267 TFEU and Article 47 of the Charter.

Relation between the EU Charter and ECHR

The Supreme Court cited the European Court of Human Rights (hereinafter: ECtHR) case of *Rutar and Rutar Marketing d.o.o. v Slovenia* to showcase that a reasoned response to a party's request for a preliminary ruling is in principle considered part of the obligation under the right to a fair trial established in Article 6 of the ECHR.

It should be noted that at the national level, the usage of Article 367.c CPA when refusing the application for leave to bring an appeal on a point of law and without providing substantive

reasoning for such decision is not disputed, as the Constitutional Court has upheld its constitutionality in decisions no. U-I-302/09, Up-1472/09, U-I-139/10 and Up-748/10 of 12. 5. 2011. Even though the Supreme Court only referred to the above-cited ECtHR case, it is noteworthy that other caselaw of the ECtHR seems to allow the highest national courts to refuse to examine the merits of the case by merely invoking the legal basis for such a decision without providing reasons for it (see cases; *Gorou v Greece* (No. 2) Grand Chamber, para 41 and *Kukkonen v. Finland* (no. 2), para 24. In the case *Burg and others v. France*, the ECtHR clearly stated that the claim of an Article 6 violation is inadmissible, even though the French Court of Cassation dismissed an appeal on a point of law lodged by the applicants, ruling that the ground for the appeal was “not such as to warrant admitting the appeal”.

The Supreme Court further concluded that the jurisprudence of the ECtHR, as well as that of the CJEU, have not yet dealt with such a procedural situation, namely that the highest national court summarily rejected the application for leave to appeal which included the party’s request for a preliminary ruling without providing legal reasoning.

Use of Judicial Interaction technique(s)

preliminary reference, consistent interpretation

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The Supreme Court makes citations of its own jurisprudence. It also underlines that in other EU member states similar procedural solutions are in place and that the decision in this case is not relevant only to Slovenia, but to other countries as well.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Supreme Court makes citations and discusses the Slovenian Constitutional Court’s jurisprudence, as well as the case law of the CJEU and ECtHR. It discusses the Constitutional Court’s interpretation of Article 267 TFEU and Article 47 of the Charter. The Supreme Court uses the CJEU case law to analyse the issue relating to the sending of a preliminary reference. It specifically notes the CJEU’s interpretation of the duties imposed by the third paragraph of Article 267 TFEU.

Strategic use of judicial interaction technique (purpose aimed by the national court)

The Supreme Court stated that it requires an interpretation of EU law by the CJEU to proceed with the case and fulfil its obligation to ensure a uniform application of EU law through the preliminary reference procedure, by receiving an interpretation of the right to an effective remedy and to a fair trial, enshrined under Article 47 of the Charter, and solve the seeming conflict between the national legal system and the obligations imposed under Article 267 TFEU. Since the Constitutional Court provided its own interpretation of EU law, being the highest court in the country, its decisions cannot be challenged by the Supreme Court under national law. However, the Supreme Court has achieved this through the preliminary reference, presumably in hope that the CJEU would enable its interpretation to prevail. Furthermore, the Supreme Court stated that the Constitutional Court interpreted EU law without making a reference for a preliminary ruling and did not even give reasons for doing so. It thus seems that the Supreme Court is implicitly accusing the Constitutional court of exceeding its competence to the detriment of the CJEU. In turn, this

created a conflict between the interpretation of EU law by the two national courts. Now the CJEU is the only court that can definitively resolve this conflict.

[Impact on Legislation / Policy](#)

The case is still pending before the CJEU, but the Opinion of the Advocate General Emiliou (hereafter: AG) has already been issued. The AG suggested that where a party has properly raised a genuine question of EU law; substantiated its arguments as to the existence of more than one sufficiently plausible interpretation of the relevant provision of EU law; and expressly invited the national court to make a reference, the national court should consider whether it may be required to make a reference for a preliminary ruling. In reply to the second question, he suggested that a decision of a court of last instance refusing leave to bring an appeal on a point of law and terminating the proceedings is a judicial decision. Therefore, the court is obliged to give reasons for why it considered that it is not obliged to refer under Article 267 TFEU. The AG then further added that the extent of the obligation to state reasons depends on the relevant circumstances stating that a greater level of detail in argumentation of the court may be necessary 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.

[\(Link to\) full text](#)

The Supreme Court, request for a preliminary ruling by the CJEU, X DoR 380/2022-6 of 7 March 2023:

[https://www.sodnapraksa.si/?q=sklep&database\[SEU\]=SEU&_submit=i%C5%A1%C4%8Di&rowsPerPage](https://www.sodnapraksa.si/?q=sklep&database[SEU]=SEU&_submit=i%C5%A1%C4%8Di&rowsPerPage)

Opinion of AG Emiliou:

<https://curia.europa.eu/juris/document/document.jsf;jsessionid=F36CB5900B43E536F77C64965DC28651>

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[History of the case: \(please note the chronological order of the summarised/referred national judgments.\)](#)

1. Administrative Court, judgment, no. I U 291/2022-9 of 27. 9. 2022
 2. [Supreme court, request for the preliminary ruling by the CJEU, X DoR 380/2022-6 of 7 March 2023](#)
 3. [Opinion of AG Emiliou of 18 June 2024, case C-144/23, KUBERA](#)
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