

Case C-144/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

9 March 2023

Referring court:

Vrhovno sodišče Republike Slovenije (Slovenia)

Date of the decision to refer:

7 March 2023

Appellant:

KUBERA, trgovanje s hrano in pijačo, d.o.o.

Respondent:

Republika Slovenija

Subject matter of the main proceedings

Proceedings relating to an application for leave to bring an appeal on a point of law (revizija), in which a party is requesting that a reference for a preliminary ruling be made to the Court of Justice of the European Union; obligation to refer one or more questions to the Court of Justice of the European Union for a preliminary ruling; consideration of the substance of a party's request that a reference for a preliminary ruling be made to the Court of Justice in the light of the requirements laid down in Article 267 TFEU; statement of reasons if, in the decision refusing the application for leave to bring an appeal on a point of law (revizija), it is found that the requirements for making such a reference are not met, in the light of the provisions of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter')

Subject matter and legal basis of the request

Interpretation of EU law; Article 267 TFEU

Questions referred for a preliminary ruling

1. Does the third paragraph of Article 267 TFEU preclude a provision of the *Zakon o pravdnem postopku* (Code of Civil Procedure) under which, in proceedings relating to the grant of leave to bring an appeal on a point of law (*revizija*), the *Vrhovno sodišče* (Supreme Court, Slovenia) 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 (*revizija*) 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?

Provisions of European Union law relied on

Article 267 TFEU, in particular the third paragraph, and Article 47 of the Charter

Provisions of national law relied on

Ustava Republike Slovenije (Constitution of the Republic of Slovenia);

Zakon o pravdnem postopku (Code of Civil Procedure; 'the ZPP').

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant, KUBERA, *trgovanje s hrano in pijačo d. o. o.* ('Kubera'), purchased, in Türkiye, 87 600 cans of Red Bull drinks manufactured in Austria and transported them by ship to the port of Koper, where the customs procedure began.
- 2 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 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 ('Regulation No 608/2013'), it suspended the customs procedure and seized the goods. It issued two decisions on 5 October 2021, 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. Kubera lodged two administrative complaints against those decisions, which were rejected.

- 3 Kubera brought two actions against those decisions, which were dismissed by the Upravno sodišče (Administrative Court). As regards Kubera's main argument that the goods were manufactured with the consent of the holder of the intellectual property rights (in so far as they were manufactured in its factory), the Administrative Court observed that this was an accelerated procedure in the context of proceedings within the meaning of Regulation No 608/2013, under which it is sufficient for the customs authority to establish the existence of a suspected infringement of intellectual property rights, on the basis of which legal proceedings are initiated. Consequently, in the present case, the customs authority did not establish which goods were involved (original or not), since that issue would be resolved in the context of the judicial proceedings. However, at the same time the Administrative Court held that it is undisputed, in the proceedings, that the goods in question are originals and, in addition, that when Article 1 of Regulation No 608/2013 is applied, a distinction should be drawn between cases where the goods are manufactured by the holder of the intellectual property rights itself and cases where the goods are manufactured with the consent of the holder of the intellectual property rights.

The essential arguments of the parties in the main proceedings

- 4 In response to the two decisions of the Administrative Court, Kubera submitted two applications for leave to bring an appeal on a point of law (revizija), raising the following question as a relevant point of law: 'May the provisions of Regulation No 608/2013 and the measures laid down therein be applied in the event that the customs inspection concerns original (authentic) goods manufactured by the holder of the intellectual property rights, or must Article 1(5) of that regulation, read in conjunction with recital 6 thereof, according to which the regulation does not apply to goods that have been manufactured with the consent of the right-holder, be interpreted as (also) excluding from the scope of that regulation goods manufactured by the holder of the intellectual property rights itself?' The appellant maintains that the regulation expressly excludes its application. It states that the goods at issue were manufactured by the holder of the industrial property rights itself and that the transaction concerned is therefore merely a parallel sale. It refers to the statement of the Administrative Court according to which it has been indisputably established that the goods are original, and disputes that court's view that a distinction should be drawn between cases where the goods are manufactured by the right-holder itself and cases where the goods are manufactured by a third party with the consent of the right-holder.
- 5 In its applications for leave to bring an appeal on a point of law (revizija), the appellant also asks the Supreme Court, in the event that Regulation No 608/2013 is interpreted in this way (that is, to the effect that there is a difference between

the two situations), to stay the proceedings and to refer the matter to the Court of Justice. It also adds that the issue raised has not been addressed in EU case-law or in Slovenian case-law. It maintains that the issue is crucial in order to clearly delimit the powers of the customs authorities and, consequently, to provide legal certainty for legal entities.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 6 The Supreme Court is faced with the issue of due process as regards a party's request that a reference for a preliminary ruling be made to the Court of Justice in proceedings concerning an application for leave to bring an appeal on a point of law (revizija). Given that, in the present case, the provisions of the ZPP do not allow the application for leave to bring an appeal on a point of law (revizija) to be granted and the bringing of such an appeal to be permitted, on the ground that the conditions laid down for that purpose by that code are not satisfied, the Supreme Court questions whether, when deciding on the application for leave to bring an appeal on a point of law (revizija), 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 the 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 (revizija).
- 7 Appeals on a point of law (revizija) are governed by the ZPP, which provides that such an appeal is an extraordinary remedy that may be brought against a final judgment and that is to be ruled on by the Supreme Court. Appeals on a point of law (revizija) concern the consideration of infringements of the substantive law and procedural rules applied by the lower court. It is not possible to appeal against the Supreme Court's decision in proceedings concerning an appeal on a point of law (revizija) before a higher court for the purpose of assessing the lawfulness of the application of substantive or procedural law to the case. Under the ZPP, leave to bring an appeal on a point of law (revizija) must be granted following a specific application by a party to that effect, with only the Supreme Court having jurisdiction to rule on the admissibility of the application. Proceedings concerning an appeal on a point of law (revizija) are therefore divided into two stages, namely permitting the bringing of that appeal and considering the substance of the case. Each of the stages of the proceedings, which are substantially different, has a specific purpose. The decision on granting leave to bring an appeal on a point of law (revizija) takes place prior to the consideration of the substance of the case in the proceedings concerning that appeal, and permitting the bringing of the appeal on a point of law (revizija) is therefore a procedural prerequisite. What matters, for the purpose of permitting the bringing of such an appeal, is whether the case is, by reason of its objective importance, such as to require an assessment of the substance of the points of law by the Supreme Court. It is therefore the wider public interest that matters, and not only a party's interest in a case being judged

differently. However, that public interest consists in ensuring that the administration of justice is consistent from a systemic point of view, so as to guarantee the consistency of case-law and legal practice in the broad sense, through the legal positions taken by the Supreme Court when ruling on proceedings concerning an appeal on a point of law (revizija) as the highest court with the power to set precedents.

- 8 If the application for leave to bring an appeal on a point of law (revizija) is refused, the decision refusing the application under the ZPP need not state the reasons for the decision, but it is sufficient for the court to point out in general terms that the legal conditions are not satisfied. On the other hand, if the Supreme Court permits the bringing of such an appeal, it must indicate in its decision the extent to which (or the specific points of law on the basis of which) the application for leave to bring an appeal on a point of law (revizija) is granted. The Supreme Court rules on the appeal on a point of law (revizija), the bringing of which has been permitted, after a consideration of the substance of the case. Since this is an extraordinary remedy, the purpose of which is the assessment of the legal aspects and not the factual aspects of the case, infringements of both procedural and substantive law may be considered in the context of such an appeal. In the event that the Supreme Court finds such infringements, it may set aside or alter the judgment (or order) under appeal and itself rule on the case. Given its role as a court whose positions set precedents, the Supreme Court's decisions on appeals on a point of law (revizija) and the legal positions it takes have a wider effect than the mere resolution of a dispute in a specific case.
- 9 In the present case, the Supreme Court is therefore faced with the issue of how, as the highest court in the country, it is required, during the abovementioned procedural stages, to fulfil its obligation to cooperate in applying EU law consistently through the questions referred to the Court of Justice for a preliminary ruling. As a result of the obligations assumed by the Republic of Slovenia when it acceded to the European Union, the Supreme Court, given its legal position, must refer questions for a preliminary ruling on the interpretation of EU law as the highest court against whose decisions there is no judicial remedy, in accordance with the third paragraph of Article 267 TFEU. That said, it should be pointed out that both an appeal on a point of law (revizija) under the ZPP and the obligation to refer questions to the Court of Justice pursue an essentially similar objective, namely to make the case-law consistent and to base it on existing legal precedents. The Supreme Court takes note of the development of the case-law concerning the interpretation of Article 267 TFEU contained in a recent judgment of the Court of Justice of 6 October 2021, *Consorzio Italian Management* (C-561/19).
- 10 The basis for the decision to grant leave to bring an appeal on a point of law (revizija) is Article 367a of the ZPP, which, in the context of the preliminary consideration, derives from the objective importance of the case – that is, above all, from the need to ensure the consistency of case-law and of the related resolution by the Supreme Court of relevant points of law. It is not inconceivable

that that objective importance may also be based on issues relating to EU law, but the mere fact that EU law may (potentially) be applied in the context of an appeal on a point of law (revizija) is not sufficient to permit the bringing of such an appeal.

- 11 In deciding whether to grant leave to bring an appeal on a point of law (revizija), it is necessary to assess the relevance of points of law deriving from EU law in the same way as those deriving from national law, but it is irrelevant, for the purposes of that assessment, that the appellant has also requested that a reference for a preliminary ruling be made to the Court of Justice of the European Union. Under the ZPP, there is no obligation for the Supreme Court, during proceedings relating to an application for leave to bring an appeal on a point of law (revizija), to decide whether or not it is necessary to refer one or more questions to the Court of Justice for a preliminary ruling, either at the request of a party or of its own motion. Similarly, under the law, the Supreme Court is not required, at that stage of the proceedings, to decide whether, in the proceedings concerning such an appeal, which has been permitted to be brought, it will refer one or more specific questions for a preliminary ruling. Indeed, the legal assessment of the substance of the case depends on the subsequent submissions of the parties to the proceedings concerning that appeal and on their substantive treatment in the context of the appeal (which has been permitted to be brought).
- 12 The development of national case-law has revealed a distinction between the positions of the Ustavno sodišče (Constitutional Court) and those of the Supreme Court as to how to correctly interpret and apply the ZPP rules on granting leave to bring an appeal on a point of law (revizija) when, in its application for leave to bring such an appeal, a party requests that a reference for a preliminary ruling be made to the Court of Justice of the European Union. In such a case, the Constitutional Court, in a recent decision, imposed on the Supreme Court a different approach for assessing the conditions of admissibility of proceedings concerning an appeal on a point of law (revizija), based on the interpretation that such a change in practice is dictated by EU law. According to the Constitutional Court, the issue of whether to make a reference for a preliminary ruling to the Court of Justice (third paragraph of Article 267 TFEU) on the basis of a request by a party (applying for leave to bring an appeal on a point of law (revizija)) should have already been dealt with in the context of the proceedings for granting leave to bring such an appeal.
- 13 According to the Constitutional Court, in accordance with Article 47 of the Charter, the Supreme Court, even in cases where it does not permit the bringing of an appeal on a point of law (revizija), must state the reasons why it has not made a reference for a preliminary ruling. Consequently, the Supreme Court should (also), in the context of proceedings relating to an application for leave to bring an appeal on a point of law (revizija), have ruled with sufficient clarity on the party's request that a reference for a preliminary ruling be made to the Court of Justice, taking into account the criteria laid down by (i) Article 267 TFEU and (ii) the case-law of the Court of Justice. According to the Constitutional Court, that

obligation to state reasons also applies where a national procedural rule provides that the court may give reasons for its decision only by referring to the fact that the legal requirements for hearing the case are not met (summary statement of reasons). According to the Constitutional Court, the statement of reasons for the Supreme Court's decision not to permit the bringing of an appeal relating to aspects of EU law, including refusing to grant the party's request that a reference for a preliminary ruling be made to the Court of Justice of the European Union, must make it possible to verify that the requirements of the obligation to make such a reference under the third paragraph of Article 267 TFEU are met in a manner consistent with those requirements. The Supreme Court may, therefore, give reasons for its decision not to permit the bringing of an appeal on a point of law (*revizija*) by referring only to a failure to meet the requirements laid down in Article 367a of the ZPP, but must respond to the party's request that a reference for a preliminary ruling be made to the Court of Justice of the European Union.

- 14 In the practice of the Supreme Court to date, it is not disputed that, in proceedings concerning an application for leave to bring an appeal on a point of law (*revizija*), that court may not request a preliminary ruling from the Court of Justice on questions that may (potentially) be substantively dealt with only in the case of such an appeal. Nor would the decision of the Court of Justice on a question referred for a preliminary ruling have any useful effect for a party or the court in proceedings relating to an application for leave to bring an appeal on a point of law (*revizija*). Consequently, parties are entitled to request that a reference for a preliminary ruling be made to the Court of Justice of the European Union only in the course of proceedings relating to an appeal of that kind concerning a relevant admissible point of law. On the other hand, it is true that, in the event that the bringing of such an appeal is not permitted, the Supreme Court does not rule on requests by a party that a reference for a preliminary ruling be made to the Court of Justice of the European Union; nor does it set out the reasons for this in the grounds of its order. Therefore, it is possible that, in the case between the parties, the interpretation of EU law accepted by the lower court would prevail, notwithstanding the fact that the requirements laid down in Article 267 TFEU ('*acte clair, acte éclairé*') for refusing a party's request that one or more questions be referred to the Court of Justice for a preliminary ruling would not be met. In such a case, which may also occur in the context of the present administrative dispute, no court would decide whether to refer one or more questions under the third paragraph of Article 267 TFEU and the interpretation accepted in the final judgment of a lower court would be valid. Although the Supreme Court is aware that the Member States enjoy a certain degree of procedural autonomy, as is also apparent from the case-law of the Court of Justice, the issue is relevant and must be referred to the Court of Justice for a ruling.
- 15 Therefore, in order to rule in the present case, the Supreme Court needs an answer from the Court of Justice to the question whether the requirements of EU law preclude Slovenian legislation which, in the decision granting leave to bring an appeal on a point of law (*revizija*), does not require an independent assessment of whether the Supreme Court is under an obligation to refer one or more questions

to the Court of Justice for a preliminary ruling at the request of one of the parties. It is therefore necessary to question whether the third paragraph of Article 267 TFEU precludes a provision of the ZPP under which the Supreme Court, in proceedings relating to an application for leave to bring an appeal on a point of law (revizija), is not to assess whether the party's request that a reference for a preliminary ruling be made to the Court of Justice of the European Union gives rise to an obligation to make such a reference.

- 16 Only if the answer to the first question is in the affirmative and, therefore, if the Supreme Court is required, according to the Court of Justice, to carry out such an assessment of the party's request during the proceedings relating to an application for leave to bring an appeal on a point of law (revizija), does an additional question arise regarding the obligation to state reasons for the decision not to permit the bringing of such an appeal which, according to the practice of the Supreme Court to date under the ZPP is not reasoned. As regards that specific procedural decision of the Supreme Court not to permit the bringing of such an appeal, the issue arises as to the relevance of the position of the Court of Justice, in paragraph 51 of the judgment in *Consorzio Italian Management*, on the mandatory content of a decision of a court regarding those aspects of the obligation laid down in the third paragraph of Article 267 TFEU, and of the position of the European Court of Human Rights, which considers that the reasoned response of a court to a party's request forms part of the obligations arising from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECtHR, 15 December 2022, *Rutar and Rutar Marketing d.o.o. v. Slovenia*). Consequently, the Supreme Court takes the view that it is necessary to ask the Court of Justice whether Article 47 of the Charter must be interpreted, as regards the requirement to state the reasons for judicial decisions, as meaning that an order refusing an application for leave to bring an appeal on a point of law (revizija) under the ZPP constitutes a 'judicial decision' which must contain 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 must not (or should not) be granted.