Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 26 June 2025 [1]

Case C-767/23 [Remling] [i]

A.M.
v
Staatssecretaris van Justitie en Veiligheid

(Request for a preliminary ruling from the Raad van State (Council of State, Netherlands))

(Reference for a preliminary ruling – Article 267 TFEU – Article 47 of the Charter of Fundamental Rights of the European Union – Scope of the obligation on national courts of last instance to state the reasons for not making a request for a preliminary ruling – National legislation allowing a court of last instance to decide cases with summary reasoning)

I. Introduction

1. In paragraph 51 of its judgment in *Consorzio*,[2] the Court of Justice considered that national courts of last instance,[3] which have decided not to refer a question of interpretation of EU law under the third paragraph of Article 267 TFEU, have an obligation to state the reasons for not making a request for a preliminary ruling, in the light of the situations set out in *CILFIT*.[4]

2. The present case requires the Court to elaborate further on that obligation by asking whether a national court of last instance *always* has to expressly state such reasons for not referring, even if it is entitled by national law to decide the case at issue with summary reasoning.

II. The main proceedings and the question referred

3. A.M. is a third-country (Moroccan) national. His wife and their two minor children are nationals of the Netherlands.

[1] Original language: English.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

[2] Judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, '*Consorzio*', EU:C:2021:799).

[3] I use the expression '(national) courts of last instance' and 'last-instance courts' to denote the courts of Member States to which the third paragraph of Article 267 TFEU is addressed. That provision refers to 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law'.

[4] See judgment of 6 October 1982, *Cilfit and Others* (283/81, '*CILFIT*', EU:C:1982:335, in particular paragraphs 9 to 21). See further points 28 to 35, in particular point 29, of this Opinion.

4. A.M. submitted an application to the competent authorities for the issuance of a document certifying his lawful residence in the Netherlands. He considered that he was entitled to a derived right of residence based on Article 20 TFEU, as recognised in the Court's case-law, inter alia, in the judgment in *Chavez-Vilchez*. [5]

5. By decision of 8 October 2019, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') rejected A.M.'s application. A.M. lodged a complaint against that decision.

6. By decision of 19 May 2020, the State Secretary dismissed A.M.'s complaint.

7. A.M. brought an action against that decision before the rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht, Netherlands).

8. By judgment of 5 March 2021, [6] that court dismissed A.M.'s action as unfounded. In particular, it considered, with reference to the Court of Justice's case-law, that the State Secretary was entitled to take the view that A.M. does not have a derived right of residence since he holds a residence permit in Spain and his children have not been forced to leave the territory of the European Union.

9. A.M. brought an appeal against that judgment before the Raad van State (Council of State, Netherlands), which is a court of last instance and the referring court in the present case.

10. According to the order for reference, A.M. contends that the lower court erred in not addressing his argument that it should have submitted a reference for a preliminary ruling to the Court of Justice, and requests the referring court to make such a reference. The referring court considers that an exception to its obligation to refer is applicable, since the answer to A.M.'s question on the interpretation of the applicable EU law can be deduced from the Court's case-law and thus represents an '*acte éclairé*'.

11. However, the referring court wishes to dismiss A.M.'s appeal by a summarily reasoned decision as provided for in Article 91(2) of the Vreemdelingenwet 2000 (Law on foreign nationals of 2000; 'the Vw 2000'). That legislation would allow it not to substantiate why it is not referring questions to the Court of Justice. Nevertheless, the referring court is uncertain whether that legislation runs counter to its obligation to state reasons for not referring under EU law.

12. The referring court explains that Article 91(2) of the Vw 2000 confers on the Raad van State (Council of State) the power to confine its decision to the finding that a complaint raised is not capable of leading to the setting aside of the judgment of the lower court, without giving any further reasons. That provision states the following:

'If the [Raad van State (Council of State), ruling on appeal,] considers that a complaint raised is not capable of leading to annulment, it may confine itself to that assessment in the grounds of its decision.'

[5] Judgment of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, '*Chavez-Vilchez*', EU:C:2017:354).

[6] NL:RBDHA:2021:15503 (read with the aid of machine translation).

13. In that respect, the referring court indicates that, when the Raad van State (Council of State) exercises its power under Article 91(2) of the Vw 2000, it will in principle state the following standard formula in its decision:

'The appeal does not result in the annulment of the court's decision. There is no need to provide further reasons for this finding.

The appeal application does not contain any questions that need to be answered in the interest of the unity of the law, of the development of the law, or of judicial protection in general (Article 91(2) of the Vw 2000).'

14. The referring court points out that the legislature introduced the possibility of appeals in immigration cases before the Raad van State (Council of State) at the same time as that court was given the power to rule on such cases with summary reasoning. The Raad van State (Council of State) is entrusted with the task of deciding questions requiring a general answer to ensure the unity and development of the law and in the interests of judicial protection. The power to provide summary reasoning in cases where such questions are not raised ensures the quality and workability of this system, as it allows the Raad van State (Council of State) to deal efficiently with a large number of appeals.

15. The referring court emphasises, inter alia, that such summary reasoning is used only if there is no ground for setting aside the contested judgment, nor are there questions requiring a preliminary reference. It further notes that summary reasoning does not affect the judicial protection of the foreign national concerned, as there is a full statement of reasons at first instance and the ruling of the Raad van State (Council of State) is based on a comprehensive assessment of the appeal, even if that assessment does not appear in summary reasoning.

16. The referring court considers that the power to provide summary reasoning under Article 91(2) of the Vw 2000 complies with the obligation to state reasons under Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6(1) of the European Convention on Human Rights (ECHR).[7] In particular, that court infers from the case-law of the European Court of Human Rights (ECtHR) that, if the law authorises a court to rule without providing further reasons for its decision, the assessment of the request for a preliminary ruling forms part of the assessment of the case as a whole and the court is not required to provide separate reasons for not making a reference.[8]

17. The referring court nevertheless asks whether such summary reasoning is consistent with the third paragraph of Article 267 TFEU, read in the light of Article 47 of the Charter, or whether, on the basis of paragraph 51 of the Court's judgment in *Consorzio*, it is required to give a more detailed statement of the reasons why it is not obliged to make a reference, and in particular whether it must explain which exception to that obligation applies and why. That court considers that its practice of summary reasoning is sufficient, since it implies the existence of such an exception.

[7] In that regard, the referring court mentions both its ruling of 5 March 2015 (NL:RVS:2015:785), in which it considered that Article 91(2) of the Vw 2000 was not contrary to Article 47 of the Charter and Article 6(1) ECHR, read in conjunction with Article 13 ECHR, and its ruling of 3 April 2019 (NL:RVS:2019:1060), which confirmed that previous ruling and examined Article 91(2) of the Vw 2000 in greater detail.

[8] The referring court mentions, in particular, the ECtHR's judgments of 24 April 2018, *Baydar v. The Netherlands* (CE:ECHR:2018:0424JUD005538514; '*Baydar*'), and of 11 April 2019, *Harisch v. Germany* (CE:ECHR:2019:0411JUD005005316; '*Harisch*').

18. Under those circumstances, the Raad van State (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the third paragraph of Article 267 [TFEU], read in the light of the second paragraph of Article 47 of the [Charter], be interpreted as precluding national legislation such as Article 91(2) of the [Vw 2000], under which the Afdeling bestuursrechtspraak van de Raad van State (Administrative [Jurisdiction] Division of the Council of State), as a national court whose decisions are not amenable to appeal, can rule summarily, without substantiating which of the three exceptions to its obligation to refer occurs, on a question raised about the interpretation of EU law, whether or not in conjunction with an explicit request for a preliminary ruling?'

III. The procedure before the Court

19. Written observations were submitted to the Court by A.M., the Netherlands and Finnish Governments and the European Commission.

20. By decision of the President of the Court of Justice of 24 July 2024, the present case was suspended until the delivery of the Court's judgment in *KUBERA*.[9] The proceedings before the Court were resumed on 18 October 2024.

21. A hearing was held on 4 March 2025 at which all of the interested parties, along with the German and Italian Governments, presented oral argument.

IV. Analysis

22. The present case invites the Court to clarify the scope of the obligation of national courts of last instance to state the reasons why they have decided not to refer a question to the Court of Justice on the interpretation of EU law that is concerned in the case.

23. As the Court has established only relatively recently that such an obligation exists in EU law, I will begin my analysis with a brief explanation of the evolution and main features of the relevant case-law of the Court so far (A). I will then discuss the rationale for the obligation to reason from the perspectives of Article 267 TFEU and Article 47 of the Charter (B). On that basis, I will assess the question referred in the present case (C).

A. Case-law of the Court of Justice

24. To begin with, since the founding of the European Union,[10] and as currently laid down in the third paragraph of Article 267 TFEU, national courts of last instance are under the obligation to refer questions to the Court of Justice on the interpretation, as well as the validity, of EU law when such questions are raised before them.

[9] Judgment of 15 October 2024 (C-144/23, '*KUBERA*', EU:C:2024:881).

[10] See former Article 177, third paragraph, EEC and former Article 234, third paragraph, EC; but see Article 41 of the ECSC Treaty, which did not provide for preliminary rulings in the same way. By virtue of Article 106a of the EAEC Treaty, Article 267 TFEU applies to that treaty.

25. That obligation is a result of the modality chosen by the framers of the Treaties to ensure uniformity in EU law. EU law is applied by a panoply of different courts of currently 27 Member States, functioning as European courts.[11] This creates a significant risk that different judges will attribute different meanings to the same EU rule. A similar risk also exists within each internal legal system of an individual Member State when different courts apply rules of domestic law. Therefore, before joining the European Union, Member States already had methods of ensuring uniformity of law within their legal systems which, in one procedural way or another, rested on their highest courts.[12] By introducing the obligation of such last-instance courts to request an interpretation of EU law from the Court of Justice, Article 267 TFEU co-opted the national courts of last instance in the task of ensuring the uniformity of EU law.

26. As recognised by the Court, the obligation provided for in the third paragraph of Article 267 TFEU is, thus, in particular designed to prevent a body of national case-law that is not in accordance with the rules of EU law from coming into existence in any Member State.[13]

27. Nevertheless, from the beginning, last-instance courts have not had an obligation to initiate the preliminary ruling procedure in all cases, but only when the question on the interpretation of EU law is 'raised' before them. A question is 'raised' if a court finds it to be relevant and to require interpretation. Thus, even if a party to the proceedings has raised an issue of EU law, that does not mean that such an issue is 'raised' within the meaning of the third paragraph of Article 267 TFEU.[14]

28. Early on, in *CILFIT*, the Court explained in which situations a national court, even though of last instance in a given case, need not refer.[15] Even though this case-law is often described as if the Court introduced certain 'exceptions' to the otherwise unconditional obligation to refer,[16] to my mind, those 'exceptions' are in fact nothing more than a clarification of the meaning of the requirement that the question of EU law be 'raised' before a national court. Thus, those 'exceptions' simply explain the situations in which a national court of last instance may consider that a question of EU law was not 'raised' before it.

29. In *Consorzio*, the Court summarised those situations enounced in *CILFIT* as follows: 'According to the Court's settled case-law, a national court or tribunal against whose decisions there is no judicial remedy under national law cannot be relieved of that obligation [to refer]

[11] See, in that respect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 32 and 33).

[12] In that respect, Advocate General Capotorti explained in his Opinion in *Cilfit and Others* (283/81, EU:C:1982:267; 1982 ECR 3432, in particular p. 3440) that 'courts of last instance give final decisions which cannot be amended and which are capable of influencing trends in the lower courts of the same country. In other words, the "hard core" of national case-law consists of judgments delivered by courts of last instance'.

[13] See, for example, judgment of 24 May 1977, *Hoffmann-La Roche* (107/76, EU:C:1977:89, paragraph 5), restated in numerous cases, most recently in *KUBERA* (paragraph 35).

[14] The Court has explained this already in *CILFIT* (paragraph 9). See also judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 28), and *Consorzio* (paragraph 54).

[15] See *CILFIT* (in particular paragraphs 10 to 21). However, the Court already set out certain situations in which a national court of last instance was relieved from the obligation to refer in the judgment of 27 March 1963, *Da Costa and Others* (28/62 to 30/62, '*Da Costa*', EU:C:1963:6; 1963 ECR 31, in particular p. 38), in which it considered that 'the authority of an interpretation under [Article 267 TFEU] already given by the Court may deprive the obligation [to refer] of its purpose and thus empty it of its substance'.

[16] The Court itself sometimes refers to 'exceptions'. See, for example, judgments of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 32), and *KUBERA* (paragraphs 55 to 58, 63 and 64). However, in *Consorzio*, the Court referred to 'situations' in which a national court of last instance may refrain from referring (see paragraphs 39, 50, 51, 57 and 58 of that judgment), and it retains that wording when referring back to that judgment (see, for example, *KUBERA* (paragraphs 37, 38 and 62)).

unless it has established that the question raised is irrelevant or that the EU law provision in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt'. [17]

30. The first of these situations differs from the other two in the sense that a national court of last instance is not just excused from its obligation to refer, but it cannot in fact refer at all if the answer to the question is not relevant for resolving the case pending before it. Indeed, it is common ground that the Court can give preliminary rulings only if the answer can be used by the referring court to resolve its case. [18] Thus, if EU law is not relevant for resolving the dispute, the Court of Justice has no jurisdiction to interpret it. From the point of view of the national court of last instance in assessing whether it is obliged to refer, when a question of EU law is raised by a party, but the court considers it to be irrelevant for resolving the dispute, that question is not 'raised' within the meaning of the third paragraph of Article 267 TFEU.

31. The other two situations may be understood as scenarios in which EU law is relevant in a dispute pending before a national court of last instance, but where there is no reasonable doubt as to the correct application of EU law, so there is no need to refer. In the first scenario, the applicable EU law at issue might already have been clarified by the Court of Justice to a sufficient degree so as to leave no doubt as to how to apply it in the situation pending before the last-instance court. This is usually referred to as the '*acte éclairé*' situation. [19] In the second scenario, even if no relevant interpretation of the applicable rule of EU law by the Court of Justice exists, the rule itself might be so clear that it leaves no reasonable doubt as to its correct interpretation. This is usually referred to as the '*acte clair*' situation. [20]

32. The practical difficulty arises from the fact that the assessment of whether the applicable rule of EU law – whether or not it has already been interpreted in the case-law of the Court of Justice – leaves no reasonable doubt as to its correct application to a particular set of facts is not a scientific exercise that can follow precise rules. In *CILFIT*, the Court explained that, before concluding that there is no reasonable doubt as to the correct interpretation and application of the rule in a given case, a last-instance court must be convinced that the matter is equally obvious to the last-instance courts of the other Member States and to the Court of Justice. [21]

33. The essence of the test that last-instance courts must apply is that they must satisfy themselves that there could not be a different interpretation of the same EU rule in other Member States or by the Court of Justice. In that case, there is no problem for the uniformity of EU law. To my mind, that test is to be applied in both situations of '*acte éclairé*' and '*acte clair*'. In the former situation, a last instance court must be persuaded that the existing case-law would indeed be applied in the same way to the particular situation at hand also by last-instance courts of other Member States. Concretely, in the present case, the referring court should ask itself whether the only possible interpretation of the *Chavez-Vilchez* case-law is that A.M. does not enjoy a

[17] *Consorzio* (paragraph 33).

[18] For a recent example, see judgment of 21 March 2023, *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)* (C-100/21, EU:C:2023:229, in particular paragraphs 53 to 55), in which the Court found that a question was inadmissible because the referring court did not explain why the interpretation of EU law sought was necessary to enable it to resolve the dispute before it.

[19] See *Consorzio* (paragraph 36 and the case-law cited). This situation reflects the one recognised by the Court already in 1963 in its judgment in *Da Costa* (see footnote 15 to this Opinion).

[20] See *Consorzio* (paragraph 39 and the case-law cited). This situation was recognised by the Court for the first time in *CILFIT*.

[21] See *CILFIT* (paragraph 16). The reference to last-instance courts (instead of just courts) of other Member States was added in *Consorzio* (paragraph 40).

derived right of residence because he has a residence permit in Spain, which is why his children are not forced to leave the territory of the European Union, even if they would have to leave the Netherlands.

34. In relation to the '*acte clair*' situation, the Court of Justice elaborated, in its judgment in *CILFIT*, on several criteria which national courts of last instance must take into consideration. [22] Since that judgment was made, which was more than 40 years ago, those criteria have often been criticised. [23]

35. Even if one can agree that the literal application of the *CILFIT* criteria makes 'coming across a "true" *acte clair* situation … just as likely as encountering a unicorn', [24] the very purpose of stating those criteria was to emphasise the attention that national courts of last instance must give to the matter before deciding not to refer. In that sense, the Court explained that last-instance courts 'must take upon themselves, independently and with all the requisite attention, the responsibility for determining whether the case before them involves one of the situations in which they may refrain from referring to the Court a question concerning the interpretation of EU law that has been raised before them'. [25]

36. In *Consorzio*, the Court confirmed that a national court of last instance could only escape the obligation to refer in one of the three *CILFIT* situations. [26] The Court also reiterated that the task of deciding that the question of interpretation of EU law was not 'raised' before the last-instance court is ultimately a decision that can only be taken by that court itself, while being fully aware of the possible consequences for the uniform interpretation of EU law throughout the European Union. [27]

37. The novelty of *Consorzio* is that, in paragraph 51 of that judgment, the Court added another obligation of the national courts of last instance that was not mentioned in *CILFIT* or its progeny: the obligation placed on such courts to state the reasons why they consider that one of the *CILFIT* situations relieves them of the obligation to refer ('the obligation to reason'). [28]

[22] In *CILFIT*, the Court explained that, before concluding that a provision of EU law does not leave any reasonable doubt as to its correct application, a national court of last instance must take into consideration the specific characteristics of EU law and the particular difficulties to which its interpretation gives rise (such as, for instance, that it is drafted in many equally authentic languages or that the terms it uses might differ in meaning from the same terms used in national legal systems), and that that court has to pay attention to the risk of divergences in judicial decisions within the European Union. See paragraphs 16 to 21 of that judgment.

[23] That includes by a number of Advocates General, as described in the Opinion of Advocate General Bobek in *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:291, points 100 to 103).

[24] As famously described by Advocate General Wahl in his Opinion in Joined Cases *X and van Dijk* (C-72/14 and C-197/14, EU:C:2015:319, point 62).

[25] *Consorzio* (paragraph 50 and the case-law cited).

[26] For a detailed discussion, see, for example, Broberg, M. and Fenger, N., 'If you love somebody set them free: On the Court of Justice's revision of the *acte clair* doctrine', *Common Market Law Review*, Vol. 59(3), 2022, pp. 711-738; 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*, Vol. 15(3), 2022, pp. 29-61; Maher, I., 'The *CILFIT* criteria clarified and extended for national courts of last resort under Art. 267 TFEU', *European Papers*, Vol. 7(1), 2022, pp. 265-274; Millet, F.-X., '*Cilfit* still fits – ECJ 6 October 2021, Case C-561/19, *Consorzio Italian Management*', *European Constitutional Law Review*, Vol. 18(3), 2022, pp. 533-555; Petrić, D., 'How to make a unicorn or "there never was an '*acte clair*' in EU law": Some remarks about Case C-561/19 C*onsorzio Italian Management*', *Croatian Yearbook of European Law & Policy*, Vol. 17, 2021, pp. 307-328.

[27] For a discussion of whether such a decision is, or should be, a subjective decision of the national court which takes into consideration the needs of the particular case, or a more objective decision which takes into consideration the interest in the uniform application of EU law, see Opinion of Advocate General Bobek in *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:291, points 69 to 87).

[28] Even before *Consorzio*, Advocate General Bot considered that the judgment in *CILFIT* imposed a duty to state reasons where last-instance courts refrained from referring questions to the Court of Justice. See his Opinion in *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:390, points 90 and 94).

38. Given that the present case in fact requires the interpretation of the scope of the obligation to reason, it is worth citing that paragraph of *Consorzio*: 'it follows from the system established by Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter, that, if a national court or tribunal against whose decisions there is no judicial remedy under national law takes the view, because the case before it involves one of the three [*CILFIT*] situations …, that it is relieved of its obligation to make a reference to the Court under the third paragraph of Article 267 TFEU, 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 to the national court or tribunal of last instance as to leave no scope for any reasonable doubt'. [29]

39. In *KUBERA*, the Court was asked, for the first time since *Consorzio*, to interpret the obligation to reason. After ruling that a specific type of procedure for leave to appeal does not relieve a national court of last instance of having to assess whether it is obliged to refer, the Court confirmed the obligation to reason as it was stated in paragraph 51 of *Consorzio*. However, the Court did not elaborate further on the scope of that obligation. [30]

40. Consequently, the case-law as it currently stands requires national courts of last instance to provide reasons, in the light of the *CILFIT* situations, why they decide not to make preliminary references to the Court of Justice. In my view, providing such reasons requires elaboration as to *why* EU law is not relevant in a given case, *why* the existing case-law of the Court resolves the circumstances of the case at hand, or *why* the last-instance court considers that the courts of other Member States could not arrive at a different interpretation. In other words, it is not sufficient merely to point to one of the three *CILFIT* situations, but rather it is up to the court to explain why that is the case.

41. The present case raises the question whether such express reasoning is also necessary in situations in which national law enables courts to decide certain types of cases with summary reasoning.

42. In order to answer that question, I consider it necessary to delve into the justifications for the obligation to reason that is incumbent on national courts of last instance.

B. Rationale for the obligation to reason

1. Justification from the perspective of Article 267 TFEU

43. To recall, by obliging national courts of last instance to refer questions on the interpretation of EU law to the Court of Justice, Article 267 TFEU aims at fulfilling the objective of ensuring the uniformity of EU law in all the Member States. [31]

[29] *Consorzio* (paragraph 51).

[30] The Court dealt with the obligation to reason in paragraphs 61 to 65 of *KUBERA*, and ruled that, where a national court of last instance decides to refuse an application for leave to appeal containing a request to refer a question of EU law to the Court of Justice, that decision must comply with the obligation to state reasons as set out in paragraph 51 of *Consorzio*.

[31] See, in that respect, the case-law cited in footnote 13 to this Opinion.

44. The third paragraph of Article 267 TFEU thus imposes an obligation to refer on national courts of last instance in the public interest. That is why that Treaty provision does not endow individuals with a correlative right to require a court of last instance to refer.[32] Indeed, the Court has consistently held that the parties to a case do not enjoy any right to have a question referred.[33]

45. As individuals do not have the right, on the basis of Article 267 TFEU, to have a question referred, the obligation to reason cannot be justified on such grounds.[34]

46. In that respect, the German Government submits that the reasoning behind not making a reference for a preliminary ruling pursues a dual objective. First, it aims to ensure that national courts of last instance comply with the obligation to refer, incumbent on them under the third paragraph of Article 267 TFEU; this is a purely objective obligation and does not confer a subjective right to a preliminary ruling. Second, it enables parties to understand why the national court in the case did not refer the matter to the Court of Justice; this, however, does not stem from Article 267 TFEU, but instead is an expression of the right to a fair trial.

47. I agree with that position. Therefore, in its public interest rationale, which can be linked to Article 267 TFEU, the justification of the obligation to reason is that it ensures careful and due consideration by a national court of last instance of the grounds that may excuse it from its obligation to refer.

48. To my mind, therefore, the novel – or at least novel under EU law[35] – obligation to reason imposed on national courts of last instance in *Consorzio* is an appropriate tool to ensure that those courts properly assess the need to refer, thereby contributing to the uniformity of EU law.

49. Such an obligation to reason compensates for difficulties in setting out simple rules that indicate when national courts of last instance are relieved of their obligation to refer. There is probably not a lawyer who has not experienced that to explain to others what he or she considers to be the correct understanding of the law often clarifies his or her own reasoning and sometimes even changes it. In a similar vein, in having to set out their reasons for not referring, national courts of last instance are faced with having to confirm or change their position as to the correct application of EU law in the case at hand.

[32] Not enjoying that right does not mean that individuals who are parties to proceedings before national courts have no interest in the enforcement of the obligation to refer. By appealing a case to a national court of last instance, they might have some legitimate expectations that a reference will be made precisely because of the existence of this objectively motivated obligation, especially if the deciding court does not intend to follow their understanding of how a particular EU rule should be applied in their case. This possibility to influence indirectly a national court of last instance to engage with the Court of Justice might in fact motivate their decision to bring a case one level further in the procedural hierarchy.

[33] As the Court has held, the system established by Article 267 TFEU does not constitute a means of redress available to the parties to a case pending before a national court. See, for example, *CILFIT* (paragraph 9), and *Consorzio* (paragraph 54). Equally, the fact that the parties to the main proceedings in a given case did not raise a point of EU law before the referring court does not preclude the latter from bringing the matter before the Court of Justice. See, for example, judgments of 16 June 1981, *Salonia* (126/80, EU:C:1981:136, paragraph 7), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 65).

[34] As indicated by the Netherlands, German, Italian and Finnish Governments and the Commission, the obligation to reason stems from Article 47 of the Charter, and not from Article 267 TFEU, which does not grant rights to individuals.

[35] The requirement to give reasons for not referring under the third paragraph of Article 267 TFEU was already elaborated in the case-law of those Member States which developed a constitutional control of the obligation to refer, either as part of the control of the respect for the right to a lawful judge or of the right to a fair trial. For a description and assessment of those national developments, see, for example, Broberg, M. and Fenger, N., *Broberg and Fenger on Preliminary References to the European Court of Justice*, 3rd ed., Oxford University Press, Oxford, 2021, in particular pp. 235, 236, 241 and 242; Lacchi, C., *Preliminary References to the Court of Justice of the European Union and Effective Judicial Protection*, Larcier, Brussels, 2020, in particular Chapter 3; Wallerman Ghavanini, A. and Rauchegger, C., 'Effective judicial protection before national courts: Article 47 of the Charter, national constitutional remedies and the preliminary reference procedure', in Bonelli, M., Eliantonio, M. and Gentile, G. (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective*, Hart, Oxford, 2022, pp. 45-60, in particular pp. 50-54. That requirement was also imposed by the ECtHR under Article 6 ECHR. See further points 54 and 73 to 76 of this Opinion.

50. Errors in appraisal are still, of course, possible. Nevertheless, in my view, if a national court of last instance adequately explains the reasons for not referring, it may be absolved from liability, including *Köbler* liability. [36]

51. In sum, the rationale for the obligation to reason from the perspective of the third paragraph of Article 267 TFEU is to make a national court of last instance seriously consider whether there is an issue in the interpretation of EU law in the case, thus contributing to the uniformity of EU law.

2. Justification from the perspective of Article 47 of the Charter

52. The second paragraph of Article 47 of the Charter guarantees the fundamental right to a fair trial. According to the Court's case-law, observance of that right requires, among other things, that all judgments be reasoned. This enables the party to see why a judgment has been pronounced and to bring an appropriate remedy. [37]

53. The second paragraph of Article 47 of the Charter corresponds, according to the Charter Explanations, to Article 6(1) ECHR. In that respect, the case-law of the ECtHR to which the interested parties have referred in the present case is relevant for understanding the rationale for the obligation to reason from the perspective of Article 47 of the Charter.

54. In its case-law on Article 6(1) ECHR, the ECtHR has clearly explained that the right to a reasoned decision protects the individual from arbitrariness, which is achieved by enabling the parties to understand the judicial decision that has been given. In addition, the reasoning serves the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. [38] As the possibility of refusal on the part of national courts of last instance to refer questions of interpretation of EU law to the Court of Justice is limited to the *CILFIT* situations, the ECtHR considered that it is in that context that such courts must state the reasons why they have found it unnecessary to seek a preliminary ruling. [39]

55. Similar to Article 6(1) ECHR, under the second paragraph of Article 47 of the Charter, the obligation of national courts of last instance to give reasons, in the light of the *CILFIT* situations, for their decisions not to refer is correlative of a subjective right of a party, which essentially consists in the right to understand why the law was applied in a certain way in the case without a reference.

56. Importantly, such a right to understand the reasons not to refer in the light of the *CILFIT* situations should be regarded as arising in any situation involving the possible application of EU law, whether or not a party has made a request for a preliminary ruling. That right is different

[36] Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513).

[37] See, for example, judgment of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 53), and Opinion of Advocate General Kokott in *Trade Agency* (C-619/10, EU:C:2012:247, points 84 and 85). See also, in that regard, Opinion of Advocate General Poiares Maduro in Joined Cases *Sweden and API* v *Commission* and *Commission* v *API* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2009:592, point 32), in which he considered that 'a primary purpose of the right to a reasoned judgment is to enable the public to understand the reasons for the Court's decision and the process through which it was reached.'

[38] See, for example, *Baydar* (§ 39); *Harisch* (§ 33); and ECtHR, judgment of 15 December 2022, *Rutar and Rutar Marketing d.o.o. v. Slovenia* (CE:ECHR:2022:1215JUD002116420, § 62).

[39] See, for example, ECtHR, judgments of 20 September 2011, *Ullens de Schooten and Rezabek v. Belgium* (CE:ECHR:2011:0920JUD000398907, § 62); of 8 April 2014, *Dhahbi v. Italy* (CE:ECHR:2014:0408JUD001712009, § 31); and of 30 April 2019, *Repcevirág Szövetkezet v. Hungary* (CE:ECHR:2019:0430JUD007075014, § 50).

from the right to have a question referred, which a party does not enjoy on the basis of either Article 267 TFEU or Article 47 of the Charter. It is rather the right to have a decision not to refer explained, which the party enjoys on the basis of Article 47 of the Charter.

57. The case-law of the ECtHR involving Article 6(1) ECHR has so far concerned cases in which a party has asked for a reference. However, the fact that those cases were decided in such a context does not exclude the application of that case-law to situations in which EU law was concerned in the case but where a party did not request a reference.

58. In any event, the obligation to refer as imposed by Article 267 TFEU is not dependent on a party's request to refer. Therefore, under Article 47 of the Charter, last-instance courts owe parties an explanation as to why they did not refer, even if no party requested they do so. [40]

59. In sum, the rationale for the obligation to reason from the perspective of the second paragraph of Article 47 of the Charter is to enable the parties in a case to understand the reasons for the judgment made, including a decision not to refer, thus guaranteeing their right to a fair trial.

60. It follows from the above that the justifications for imposing the obligation to reason on last-instance courts are different under Article 267 TFEU than under Article 47 of the Charter. Unlike the rationale from the perspective of Article 267 TFEU, which flows from objective considerations aimed at ensuring the public interest in the uniformity of EU law, the rationale from the perspective of Article 47 of the Charter flows from subjective considerations aimed at ensuring the individual right of a party to the proceedings.

61. Given the different rationales, different conclusions may be reached on the necessary extent of the reasoning.

C. The obligation to reason and summary reasoning

62. To recall, the *Consorzio* and *KUBERA* case-law confirm the existence of the obligation on last-instance courts to provide for an explanation as to why they did not refer. Such an explanation should enable the understanding of which of the *CILFIT* situations the courts consider to be applicable and why.

63. Must that reasoning always be explicit or is summary reasoning possible?

64. The empowerment of courts under national law to decide cases with summary reasoning also has a justification. As indicated by the referring court and the Netherlands Government, summary reasoning in situations such as the present case is a necessary compromise to allow for the introduction of appeals in immigration cases. A comprehensive requirement to state reasons would upset the balance that the national legislature has built into the system, in affording legal

[40] See Broberg and Fenger, cited in footnote 26 to this Opinion, p. 725.

protection to individuals by opening up appeals in immigration cases, on the one hand, and resorting to summary reasoning in order to prevent the legal system from becoming bogged down, on the other. [41]

65. Therefore, to answer the question raised in the present case, it is necessary to balance the interests in having such summary reasoning in the national legal systems with the interests under EU law that national courts of last instance provide reasons for their decisions not to refer to the Court of Justice.

66. Under Section B, I have explained that the rationale for the obligation to reason is different under Article 267 TFEU than under Article 47 of the Charter. If, on one side of the scale, there are the justifications for summary reasoning and, on the other side, there are the justifications for the obligation to reason, then the result of the balancing exercise might be different based on whether that obligation to reason is justified under Article 267 TFEU or under Article 47 of the Charter.

67. In that respect, the public interest in ensuring the uniformity of EU law, which justifies the obligation to reason under Article 267 TFEU, might be satisfied if the national court of last instance takes into consideration the *CILFIT* situations, but has not given its reasons for the decision not to refer. To satisfy that public interest, it is important that the court seriously considered the *CILFIT* situations, and not that the parties to the proceedings understand that court's line of thought. Thus, Article 267 TFEU does not preclude summary reasoning.

68. On the contrary, if the reasons for not referring are not at least implied in the decision of the national court of last instance to a sufficient degree that the parties to the proceedings understand the outcome of the decision, the interest which justifies the obligation to reason under Article 47 of the Charter would not be satisfied.

69. Thus, in the light of the second paragraph of Article 47 of the Charter, some reasoning must exist, even if that reasoning is only implied. That does not automatically exclude summary reasoning so long as it is adequate for the parties to understand why the court has not referred.

70. What summary reasoning is adequate reasoning under Article 47 of the Charter?

71. It follows from the case-law of the Court and of the ECtHR that the assessment whether the reasoning is adequate depends on the circumstances of the particular case.

72. According to the Court, the extent of the obligation to give reasons may vary according to the nature of the decision and must be examined in the light of the proceedings taken as a whole and all the relevant circumstances. [42]

[41] The Netherlands Government indicated at the hearing that, in 2024, the Raad van State (Council of State) decided 4 200 immigration cases on the merits, of which 2 200 used summary reasoning, about 1 300 used summary reasoning with supplementary wording, and 300 were subject to a fully reasoned judgment; the remaining approximately 400 cases were dismissed as inadmissible or due to procedural errors. According to that government, there are two kinds of summary reasoning: in addition to the standard formula, it is possible to have summary reasoning which supplements that standard formula; for example, this may include the reasoning of the court in the decision, such as stating that there is an '*acte éclairé*' in the particular case.

[42] See, for example, judgment of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraph 60).

73. That is the conclusion that also follows from the case-law of the ECtHR.[43] That court has held that, depending on the circumstances, it may be acceptable under Article 6(1) ECHR for a last-instance court to decide with summary reasoning in situations where, for example, the reasons for rejecting the request for a preliminary ruling are implicit or can be discerned from other parts of the decision.[44]

74. In particular, in *Baydar*,[45] the ECtHR ruled that there was no violation of Article 6(1) ECHR with regard to the summary reasoning by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The ECtHR considered that, in the context of accelerated procedures under the Netherlands legislation at issue in that case,[46] no issue of principle arises under Article 6(1) ECHR when an appeal is dismissed with summary reasoning where it is clear from the circumstances of the case that the decision was not arbitrary or otherwise manifestly unreasonable. The ECtHR found that the decision at issue was not arbitrary or unreasonable because the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) had duly examined the applicant's written grounds of appeal as well as both the Advocate General's advisory opinion and the applicant's written reply thereto.

75. In *Harisch*,[47] the ECtHR held that there was no violation of Article 6(1) ECHR on account of the summary reasoning of the Bundesgerichtshof (Federal Court of Justice, Germany). The ECtHR considered that, given that the court below had provided detailed reasoning regarding the refusal to refer, the applicant was able to understand the decision of the Bundesgerichtshof (Federal Court of Justice). Consequently, taking into account the purpose of the duty to provide reasons under Article 6 ECHR and examining the proceedings as a whole, the ECtHR was satisfied that, in the circumstances of the case, the refusal to refer was sufficiently reasoned.

76. To conclude, it follows from the foregoing case-law of the ECtHR on Article 6(1) ECHR that an explicit and specific statement of reasons for not referring in the decision of a court of last instance is not always required. By virtue of judgments, such as those in *Baydar* and *Harisch*, that case-law appears to accept the possibility of summary reasoning by courts of last instance. Such reasoning is possible if, in the circumstances of a particular case, the parties are assured of having been heard and are able to understand why their request for a reference has been refused.

77. That reasoning can, to my mind, be transposed to the interpretation of Article 47 of the Charter. Under that provision, as indicated by the Finnish Government, the extent of the reasoning that is required cannot be stated in advance, as every case is different.[48]

78. In that respect, national law *cannot mandate* summary reasoning but *may enable* national courts to use such reasoning. The national court of last instance must have the power of appraisal as to whether summary reasoning is sufficient in any given case.

[43] See *Baydar* (§ 40); *Harisch* (§ 34); and ECtHR, judgment of 15 December 2022, *Rutar and Rutar Marketing d.o.o. v. Slovenia* (CE:ECHR:2022:1215JUD002116420, § 58).

[44] See, for example, *Baydar* (§§ 42 and 43), and ECtHR, judgments of 13 February 2020, *Sanofi Pasteur v. France* (CE:ECHR:2020:0213JUD002513716, § 71), and of 13 July 2021, *Bio Farmland Betriebs S.R.L. v. Romania* (CE:ECHR:2021:0713JUD004363917, § 51).

[45] See *Baydar* (§§ 45 to 53).

[46] That legislation is not the same as that allowing for summary reasoning in the present case.

[47] See *Harisch* (§§ 37 to 43).

[48] Similarly, Advocate General Emiliou considered that the extent of the obligation to reason varies according to the relevant circumstances: see his Opinion in *KUBERA* (C-144/23, EU:C:2024:522, points 122 to 133).

79. The national legislation at issue seems to satisfy such requirements. It is, therefore, for the last-instance court to assess in each case whether the standard formula for summary reasoning in immigration cases is sufficient or whether more extensive reasoning is necessary in order to allow the party to the proceedings to understand why that court has not referred, taking into consideration all the relevant circumstances.

80. If, for example, a national court of last instance follows the outcome and reasoning of a lower court, then summary reasoning, based on a standard formula, such as the one used in the practice of the referring court, might be sufficient. This is so if that formula implies that the decision of the lower court adequately explained why EU law is not relevant for resolving the case at hand, how EU law has been clarified in the Court of Justice's case-law, or why, in the absence of such case-law, the correct application of EU law does not raise any reasonable doubt.

81. However, if the national court of last instance agrees with the outcome of the case but not with the reasoning of the lower court, or if no reasoning exists which could point to the possible reasons not to refer, then the last-instance court could not rely on such a standard formula but must expressly explain its position.

82. An additional issue that was raised by the interested parties in the proceedings before the Court was whether it would be sufficient if the last-instance court merely refers to one of the three *CILFIT* situations.

83. It follows from the previous discussion that merely stating which of those situations the court applied when deciding not to refer is not sufficient in itself. The party to the proceedings must be able to understand *why* that situation was deemed applicable. That being said, it is not at all necessary to explicitly state which of the *CILFIT* situations the court is applying, provided that it may be readily deduced from the reasoning.

84. To sum up, Article 267 TFEU, read in the light of Article 47 of the Charter, does not preclude summary reasoning, provided that the parties understand why the last-instance court decided not to refer in view of the *CILFIT* situations.

85. It is for the last-instance court, including the referring court in the present case, to assess whether summary reasoning suffices or whether additional reasoning is warranted in the circumstances of the case.

V. Conclusion

86. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Raad van State (Council of State, Netherlands) as follows:

The third paragraph of Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union,

does not preclude national legislation such as Article 91(2) of the Vreemdelingenwet 2000 (Law on foreign nationals of 2000), under which the Afdeling bestuursrechtspraak van de Raad van State (Administrative Jurisdiction Division of the Council of State, Netherlands), as a national court whose decisions are not amenable to appeal, can rule summarily, without substantiating which of

the three exceptions to its obligation to refer occurs, on a question raised about the interpretation of EU law, whether or not in conjunction with an explicit request for a preliminary ruling, provided that such summary reasoning enables the parties to understand the reasons why that court decided not to refer the question of interpretation of EU law to the Court of Justice.