

The Court of Justice and the Governor's Dilemma: *KUBERA* trgovanje s hrano in pijaco doo v Slovenia

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Abstract

This case note reads the judgment of the European Court of Justice (Court) in KUBERA through the perspective of the governor's dilemma, an international relations theory. In a nutshell, those governing multilevel political organisations cannot achieve all their objectives on their own. In indirect governance, the governor needs to find the right balance between empowering and controlling the intermediary. Too much empowerment might lead the intermediaries to take up their own agendas, whereas too much control might stifle their efficiency in implementing the governor's objectives. Read in this light, I argue that KUBERA is showcasing how the Court of Justice manages the dilemma between empowerment and control over supreme national courts, who are arguably its foremost intermediaries of enforcing EU law at the national level.

Introduction

Those governing multilevel political organisations cannot achieve all their objectives on their own: they can only do so through indirect governance, which means that they need intermediaries on lower levels of governance to enforce their policies and rules. In indirect governance, the governor needs to find the right balance between empowering and controlling the intermediary. Too much empowerment might lead the intermediaries to take up their own agendas, whereas too much control might stifle their efficiency in implementing the governor's objectives. Hence, we have what the international relations scholarship calls the governor's dilemma.¹

The Court encountered this dilemma in *KUBERA*:² must a supreme court of a Member State, in managing its docket through a filtering mechanism, consider submitting a preliminary reference whenever the parties raise such a request and give reasons if it refuses to do so? It decided that the Slovenian Supreme Court must consider submitting a preliminary reference and justify a refusal to do so, national procedural autonomy notwithstanding. Otherwise, it might happen that a case that is relevant from the point of view of European Union (EU) law might go unrefereed, which is for the Court of Justice problematic in light of the uniformity of EU law.

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¹ K.W. Abbott et al (eds), *The Governor's Dilemma: Indirect Governance Beyond Principals and Agents* (Oxford: Oxford University Press, 2020).

² *KUBERA* trgovanje s hrano in pijaco doo v Slovenia (*KUBERA*) (C-144/23) EU:C:2024:881; [2025] 2 C.M.L.R. 14.

KUBERA is a case essentially about the extent of control the Court should exert over supreme national courts, who are arguably its foremost intermediaries of enforcing EU law at the national level.³ They not only apply EU law in individual cases but also ensure the uniformity of national case law. Therefore, the Court as the governor has a great interest in empowering them in their role as enforcers of EU law in the Member States. For example, it did so in *Cilfit*,⁴ by somewhat relaxing the obligation under art.267(3) TFEU that apex courts submit a preliminary reference. At the same time, allowing too much discretion might incentivise those courts to shirk their obligations under EU law.⁵ The Court therefore extended, in *Conorzio*,⁶ the obligation of highest courts to state reasons when they decide to use one of the exceptions in *Cilfit*.

In this case note, I will analyse the judgment by looking at the trade-offs that the Court faces in this specific instance of the governor's dilemma. First, I will argue that, although the Court has always exercised some level of control, this has more recently been exacerbated⁷ by its control-heavy case law on judicial independence.⁸ The trade-offs of an emphasis on control might result in an increased resistance to sincere cooperation on the side of national courts. Second, I will argue, perhaps not uncontroversially, that in coopting national courts as intermediaries, the Court should direct its attention to the coherence of EU law, instead of uniformity. To do so, it will need to accept that not every EU law-relevant case before the courts of last instance needs to be referred. For this, of course, the Court of Justice as the governor needs a high level of trust in national courts as intermediaries. The sooner the Court recognises this trade-off, the better the position it will be in to build a solid and long-lasting partnership with highest national courts.

In making these arguments, I will first introduce the relevant facts of the Slovenian preliminary reference, the proposals of AG Emiliou, and the judgment. I will then expand on the governor's dilemma exemplified in *KUBERA*, after which conclusions will follow.

Background of the case

KUBERA is a Slovenian company which imports Red Bull (produced by an Austrian company) from Turkey to Slovenia. Red Bull GmbH, the holder of intellectual property rights of Red Bull cans, challenged that import claiming their rights have been breached. The cans were seized by the relevant national authorities and followed by litigation initiated by Red Bull, in order to protect their intellectual property rights. *KUBERA* submitted administrative appeals against the seizure decisions, including before the Supreme Administrative Court. The dismissals of those appeals having become final, *KUBERA* then submitted two applications for leave to appeal before the Slovenian Supreme Court, claiming that EU law

³By this I do not mean that they submit the biggest number of preliminary references in absolute terms. However, in proportion to their absolute numbers in comparison to lower courts (thus, in relative terms), they certainly refer more *per court* than lower courts, which vastly outnumber highest courts. T. Pavone, *The Ghostwriters. Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge: Cambridge University Press, 2022), pp.44–45.

⁴*CILFIT Srl v Ministero della Sanita* (283/81) EU:C:1982:335; [1983] 1 C.M.L.R. 472.

⁵For a strong stance on the danger that apex courts might increasingly fail their obligation to refer, see F.-X. Millet, "From the Duty to Refer to the Duty to State Reasons: the Past, Present and Future of the Preliminary Reference Procedure" (2023) *European Journal of Legal Studies* 7.

⁶*Conorzio Italian Management v Rete Ferroviaria Italiana SpA* (C-561/19) EU:C:2021:799; [2022] 2 C.M.L.R. 6.

⁷For such findings in migration and asylum, see H. Bekisz, "Reversing the Lens: In National Judiciaries the CJEU Trusts? Insights from EU Migration and Asylum Law" (2024) 17 *Erasmus Law Review* 117.

⁸J. Zglinski, "The New Judicial Federalism: the Evolving Relationship between EU and Member State Courts" (2023) 2 *European Law Open* 345. On the centrality of the judicial independence case law in the rule of law crisis, that resulted in the passivity and acquiescence of other EU institutions, see P.-A. Van Malleghem, "Legalism and the European Union's Rule of Law Crisis" (2025) 3 *European Law Open* 50.

was wrongly applied and that the Supreme Court should submit a preliminary reference to the Court of Justice to clarify the matter.⁹

The conditions for granting the leave to appeal before the Supreme Court are listed in art.367a(1) of the Slovenian Code of Civil Procedure and require that the Supreme Court can “be expected to decide a question of law that is important for ensuring legal certainty, the uniform application of the law or the development of the law through case-law”.¹⁰ Article 367c(2) of the same law provides that when it refuses the application for a leave to appeal, it is enough for the Supreme Court “to state in general terms that the conditions laid down in art.367a of this law have not been satisfied”.

The Supreme Court explained that appeals on a point of law are an extraordinary remedy directed against a final judicial decision, with the purpose of unifying the case law, in the same way as the preliminary ruling procedure provided for in art.267 TFEU. Given that EU law forms part of the Slovenian legal order, the Supreme Court explained, it also ensures, through the procedure of appeals on a point of law, that EU law is applied correctly and uniformly. Yet, the Supreme Court explains that the mere fact that EU law might be applicable or that the parties requested a preliminary reference does not suffice to trigger the leave to appeal.

Indeed, in KUBERA’s case, the Supreme Court did not consider that there were reasons to grant the leave to appeal. However, the Constitutional Court of Slovenia found, in 2022, that effective judicial protection under the Charter and the Slovenian Constitution demand that the Supreme Court examine the request for a preliminary reference already while examining whether to grant the leave to appeal and to state reasons if it rejects such a request. It was this meta-level issue, rather than the intellectual property rights dispute, that triggered the Supreme Court to submit a preliminary reference, considering it is important for the interpretation of EU law.

The Supreme Court thus asked the Court of Justice two questions. First, is it required under art.267(3) TFEU that the Supreme Court considers the request of the parties that a preliminary reference be submitted already at the stage of the application for a leave to appeal, despite the relevant national law. Second, in the event it rejects such a request, the Supreme Court asks whether it is obliged to provide reasons.

The Advocate General’s Opinion

In his Opinion, AG Emiliou proposed a restrictive approach while answering the first question, which would essentially require a legislative intervention into the existing Slovenian remedy. To assuage this, the Advocate General was more lenient in answering the second question, proposing a relaxed requirement to state reasons that would accommodate the aim of efficiently managing judicial docket. He acknowledged the wide-spread use of filtering mechanisms across the Member States and recognised the need for some sort of docket management to be in place.¹¹

First, the main problem with the Slovenian remedy was that it awarded discretion to the national court incompatible with art.267(3) TFEU.¹² Second, the Advocate General considered that the filtering mechanism

⁹ KUBERA argued that the relevant national authority wrongly applied Regulation 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Regulation 1383/2003 [2013] OJ L181/15. That substantive question is not discussed in the preliminary reference or the judgment of the Court and will not be discussed in this note either.

¹⁰ The same provision specifies further: “In particular, the court shall grant leave to appeal [on a point of law] in the following cases: if it is a question of law on which the decision of the court of second instance departs from the case-law of the [Vrhovno sodišče (Supreme Court)]; or if it is a question of law on which there is no case-law of the [Vrhovno sodišče (Supreme Court)], in particular if the case-law of higher courts is not uniform; or if it is a question of law on which the case-law of the [Vrhovno sodišče (Supreme Court)] is not uniform.”

¹¹ Opinion of AG Emiliou in *KUBERA trgovanje s hrano in pijaco doo v Slovenia (KUBERA)* (C-144/23) EU:C:2024:522 at [3].

¹² Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [39]–[42].

in question does not fit into any of the *Cilfit* situations.¹³ Third, the Advocate General turned to the Court's recent judgment in *Aquino*, which, according to some governments in the procedure, provided another exception for the last instance courts' obligation to refer. There, the Court stated that when the court of last instance finds the appeal inadmissible on procedural grounds, it is not required to submit a preliminary reference.¹⁴ The Advocate General contrasted the purely formal nature of such findings of inadmissibility to the discretion that the Slovenian Supreme Court has in granting the leave to appeal.¹⁵ Therefore, filtering mechanism such as the Slovenian one obstruct both the systemic and individual objectives of art.267 TFEU, including access to justice and legal uniformity.

The Advocate General then went on a long excursion of *Conorzio*. He reopened the interpretation versus application of EU law debate, and offered a few somewhat cryptic paragraphs on the division of tasks between EU and national courts.¹⁶ He then concluded his answer to the first question: courts of last instance must refer in "those appeals in which a party has properly raised a genuine issue of interpretation of EU law, substantiating its arguments as to the existence of more than one plausible interpretation of the relevant EU provisions, and expressly invited the national court to make a reference".¹⁷

Turning to the second question, the Advocate General emphasised the obligation for courts of last instance to provide reasons when refusing leave to appeal, which he considered stems directly from art.267 TFEU, interpreted in conjunction with art.47(2) of the Charter of Fundamental Rights of the European Union.¹⁸ Therefore, when such courts choose not to refer and simultaneously refuse leave to appeal, they are making a judicial decision that must include a reasoned explanation. This requirement is essential not only for transparency but also for compliance with the right to a fair trial and protection from arbitrary judicial decisions.

The judgment

The judgment of the Court may be read in slightly the reverse. While the Court went as far as interpreting national law to find ways to reconcile it with the obligation from art.267(3) TFEU, it left no leeway for national courts when it comes to their obligation to state reasons when they refuse to submit a preliminary reference under one of the *Cilfit* exceptions.

The Court began by reaffirming that while Member States retain their competence over the organisation of their judicial systems, including procedural rules for granting leave to appeal, they must still comply with obligations under EU law, particularly art.267 TFEU. Given the centrality of the preliminary reference procedure in the system of EU law, national courts against whose decisions there is no judicial remedy are, in principle, obliged to refer questions of EU law to the Court, unless one of the three exceptions from *Cilfit* applies: the question is not necessary for resolving the case before it, the relevant EU law provision is clear, or has been clarified by the Court of Justice.¹⁹

To make that decision, a supreme court must independently assess whether it is under an obligation to refer a question to the Court of Justice, even when the question arises during the filtering stage of an appeal

¹³ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [55]–[56].

¹⁴ *Lucio Cesare Aquino v Belgische Staat* (C-3/16) EU:C:2017:209 at [44].

¹⁵ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [62]–[63].

¹⁶ It was not always easy to follow the logic in Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [103]–[104]. At [104] in particular, the Advocate General seems to agree that courts of last instance should have discretion as regards referring, something he excluded some 60 paragraphs earlier.

¹⁷ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [108], [110], [121].

¹⁸ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [125].

¹⁹ *KUBERA* (C-144/23) EU:C:2024:881 at [34]–[36].

on a point of law. A filtering mechanism does not turn the lower court into one of last instance.²⁰ The supreme court remains, even during the leave to appeal procedure, the court of last instance to whom the obligation from art.267(3) TFEU applies. The Court noted that the relevant national legislation requires the supreme court to consider whether the legal issue contributes to legal certainty or the development of the law but does not explicitly reference EU law. This could, according to the Court, result in EU law questions remaining unanswered by the Court of Justice, which is problematic because it might lead to the lower court's interpretation of EU law remaining in force.²¹

The Court then addressed the arguments concerning its judgments in *Aquino* and *Conorzio*, where courts of last instance were able not to refer a preliminary reference given that they were deciding on “conditions of admissibility of a purely procedural nature”.²² That is different from the sort of assessment the Slovenian Supreme Court undertakes when deciding on whether it should grant the leave to appeal. It is here that the Court turned to interpreting national law, something that traditionally pertains to national courts in the division of tasks in the preliminary reference procedure.²³ The Court stated that the conditions for granting leave to appeal do not appear to prevent an interpretation in conformity with EU law, whereby the national court should incorporate an assessment of questions concerning EU law into its analysis of the importance of legal issues before it.²⁴ In conclusion, the Court's answer to the first question is that national law cannot preclude the court of last instance from considering, when deciding whether to grant leave to appeal, whether a question of EU law requires a preliminary reference to be submitted to the Court.

In its brief answer to the second question, the Court did not take up the proposals of its Advocate General that the duty to state reasons should be adjusted to the circumstances of the case. Instead, the court of last instance must, if it refuses to submit a preliminary reference to the Court, provide an explanation concerning the exact *Cilfit* exception it is basing its decision on.²⁵

Analysis

As described in the Introduction, the Court of Justice may be seen as the governor who needs national courts as intermediaries in ensuring the application of EU law at the national level.²⁶ I rely on the governor-intermediary scheme to describe the realities of a highly judicialised legal order, in which the Court of Justice commands the meaning of EU law and relies heavily on national courts to ensure the application of that meaning on the national level. National courts are in that context the perfect intermediaries based on their expertise (relating to their specific knowledge of national legal systems), their legitimacy (individuals could now enforce their EU law rights before institutions they know and trust: their national courts), and their operational capacity (given that national courts operate in a well-established procedural and institutional framework that facilitates the direct enforcement of EU law).

²⁰ *KUBERA* (C-144/23) EU:C:2024:881 at [39] referring to *Criminal Proceedings against Lyckeskog* (C-99/00) EU:C:2002:329; [2004] 3 C.M.L.R. 29 at [16] and *Cartesio Oktato es Szolgaltato bt* (C-210/06) EU:C:2008:723; [2009] 1 C.M.L.R. 50 at [76].

²¹ *KUBERA* (C-144/23) EU:C:2024:881 at [44].

²² *KUBERA* (C-144/23) EU:C:2024:881 at [49].

²³ See, for example, *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA v International Factors Italia SpA (IFITALIA)* (C-295/97) EU:C:1999:313; [2000] 3 C.M.L.R. 825 at [29]; *Krizan v Slovenska inspekcija zivotnega prostredia* (C-416/10) EU:C:2013:8 at [58].

²⁴ *KUBERA* (C-144/23) EU:C:2024:881 at [54]–[57].

²⁵ *KUBERA* (C-144/23) EU:C:2024:881 at [65].

²⁶ The concept of the governor used here is neutral as to the political or democratic legitimacy to hold power over the intermediary. Although I would not be the first to state that national courts are under a mandate to meet their obligations under EU law for which they necessarily need the guidance of the Court of Justice. See M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford: Hart Publishing, 2006).

At the same time, the Court controls national courts through the preliminary reference procedure and authoritative interpretations of EU law. In this constellation, the Court of Justice inevitably also faces the governor's dilemma: too much control over national courts risks undermining their willingness to submit preliminary references and their capacity to ensure the enforcement of EU law. But too little control is also a risk: national courts may increasingly start prioritising national over EU law.

At the same time, national courts, and in particular those at the top of the judicial hierarchy, usually have specific ways of managing their workload, such as through various mechanisms of filtering appeals that they ultimately hear.²⁷ Increasingly the appeal to the final judicial instance in the hierarchy is not an absolutely guaranteed constitutional right, but may be subject to some (inclusionary) standard of relevance²⁸ or an (exclusionary) standard of political questions that are not to be decided by the judicial branch.²⁹ In fact, it is not only that the Member States should in principle be free to put in place such mechanisms as part of their procedural autonomy. It is also the case that a well-running procedural system contributes to effective judicial protection and the national courts' mandate in ensuring the application of EU law.

In my analysis of the judgment, I will focus on how the Court dealt with its governor's dilemma, and the choices it made on the right balance between empowerment and control. This means that my analysis will be purely institutional. The focus will be on what the judgment reveals (or hides) about how the Court sees the relationship between itself and highest national courts. In the sections ahead I will first turn to the Court's focus on control over empowerment, and the trade-offs that that choice brings about. I will then suggest an alternative vision of the preliminary reference procedure that would be more productive for the Court when dealing with the governor's dilemma.

Control, not empowerment

The preliminary reference procedure is the main way in which the Court as the governor ensures the application of EU law in the Member States.³⁰ Determining the parameters and more specific rules concerning the use of the procedure is therefore one important way in which the Court as the governor exercises its control over national courts as intermediaries. This is particularly the case when it comes to its relationship with highest national courts, who are, unlike lower national courts, under an obligation to submit a preliminary reference under art.267(3) TFEU. However, this obligation was relaxed³¹ by the Court in 1982 in *Cilfit*³² by introducing three exceptions: (i) highest courts are not obliged to submit a preliminary reference when the question would be irrelevant for resolving the case before them; (ii) when the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*); (iii) or when it has already been interpreted by the Court of Justice (*acte éclairé*).³³ In *Tolley*, the Court

²⁷ On these more generally, see L.J. Giannini, "Access Filters and the Institutional Performance of the Supreme Courts" (2022) 12 *International Journal of Procedural Law* 190.

²⁸ R. Norkus, *The Filtering of Appeals to the Supreme Courts* (2015) 4. Introductory report for the Network of the Presidents of the Supreme Judicial Courts of the European Union.

²⁹ J. Harrison, "The Political Question Doctrines" (2017–2018) 67 *American University Law Review* 457.

³⁰ A. Stone Sweet, "The Juridical Coup d'Etat and the Problem of Authority: CILFIT and Foto-Frost" in M. Poiares Maduro and L. Azoulai (eds), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), p.201.

³¹ A. Kornezov, "The New Format of the Acte Clair Doctrine and Its Consequences" (2016) 53 *C.M.L. Rev.* 1317.

³² The Court had already in 1963 first introduced an exception to the obligation to refer, in situations where a materially identical question had already been submitted to the Court of Justice. See *Da Costa en Schaake NV v Nederlandse Belastingadministratie* (28–30/62) EU:C:1963:6; [1963] *C.M.L.R.* 224.

³³ For an argument that this resulted in an "extensive, unmonitored discretion", see Millet, "From the Duty to Refer to the Duty to State Reasons: the Past, Present and Future of the Preliminary Reference Procedure" (2023) *European Journal of Legal Studies* 14. For a more detailed treatment of the three exceptions, see P. Dermine and A. Bobić, "Of Winners and Losers: A Commentary of the Bundesverfassungsgericht ORD Judgment of 6 December 2022" (2024) 20 *European Constitutional Law Review* 163, 179–183.

of Justice further stated that it is for the national court to decide at which point in the proceedings it should submit a preliminary reference.³⁴

Over time, the Court has imposed two limits on the highest courts' use of the *Cilfit* exceptions. The first control mechanism was introduced by the Court in *Conorzio*: when highest national courts do avail themselves of the *Cilfit* exceptions, they now need to provide reasons for doing so.³⁵ This obligation is strict, applicable without any exceptions, to counterbalance the discretion granted to highest national courts on whether they consider a reference necessary in the first place. Although in *KUBERA* the Advocate General proposed a sort of a sliding scale of the extent to which such a refusal must be reasoned, the Court simply reiterated its decision from *Conorzio*. Arguably, such an obligation provides a higher level of judicial protection to the parties.³⁶

The obligation to state reasons when highest national courts decide not to refer might, in my view, risk a control-based trade-off for the Court as the governor, because it might impose insurmountable or great (workload or administrative) costs on the intermediaries. From the perspective of the Court, assuming that highest national courts use their discretion to refer in accordance with the principle of sincere cooperation, there is no reason to assume they cannot justify their decision not to refer. However, what seems as a simple obligation to reason, might from the perspective of the intermediaries turn into a high burden in cases which the filtering mechanism was supposed to quickly remove the case from their docket.³⁷ Here therefore the control mechanism of the Court might create difficulties for the intermediaries domestically in disposing of their functions as last instance courts.³⁸ The proposal of AG Čapeta in *Remling* seems to me to strike a better balance between control and empowerment in respect of filtering mechanisms: according to her opinion, EU law does not in principle preclude summary reasoning, when it is an endorsement of the reasoning of the court of previous instance.³⁹

The second mechanism of controlling whether last instance courts comply with *Cilfit* is the infringement procedure. In *European Commission v French Republic* in 2018, the Court found that the failure of a last instance court to submit a preliminary reference constitutes an infringement of EU law that may be enforced through the infringement procedure under art.258 TFEU.⁴⁰ The judgment, however, does not examine whether the French Conseil d'État used one of the *Cilfit* exceptions, but concluded that, on substance, it

³⁴ *Secretary of State for Work and Pensions v Tolley* (C-430/15) EU:C:2017:74 at [32]. In *KUBERA*, the Court confirmed that it is for the national court “to assess whether it is in the interests of the proper administration of justice for that question not to be referred until after both parties have been heard”. *KUBERA* (C-144/23) EU:C:2024:881 at [58].

³⁵ The European Court of Human Rights already decided, within the context of art.6 ECHR, that highest courts that do not submit a preliminary reference must state reasons for that decision. See *Ullens de Schooten and Rezabek v Belgium* (3989/07) and (38353/07) 20 September 2011. For an analysis of this obligation in the case law of the ECtHR, see M. Broberg, “National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom” (2016) 22 *European Public Law* 243, 244–249.

³⁶ Although, it is also the consistent approach of the Court that the preliminary reference is not a subjective right of the parties. *Conorzio* (C-561/19) EU:C:2021:799 at [51] (connecting the obligation to state reasons to art.47 of the Charter) and at [54] (stating that submitting a reference is not a subjective right of the parties). For a reintroduction of art.47 of the Charter into the conversation about the rationale and functioning of the preliminary reference procedure in respect of highest national courts, see Opinion of AG Čapeta in *Remling* (C-767/23) EU:C:2025:486 at [52]–[61].

³⁷ M. Bobek, “Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe” (2009) 57 *The American Journal of Comparative Law* 33, 49.

³⁸ On the public versus private function of last instance judicial review (maintaining the uniformity of the case law versus the right of the parties to review), see Bobek, “Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe” (2009) 57 *The American Journal of Comparative Law* 40–41.

³⁹ Opinion of AG Čapeta in *Remling* (C-767/23) EU:C:2025:486 at [62]–[67].

⁴⁰ *European Commission v French Republic* (C-416/17) EU:C:2018:811.

decided contrary to the Court's judgments on the matter.⁴¹ As Millet points out, such a strict standard of control is at odds with the discretion the three *Cilfit* exceptions grant to highest national courts.⁴²

The Court has since found an infringement due to a failure to refer only once more, in respect of the now departed UK Supreme Court and its obligation to refer during the transitional period before Brexit took full effect.⁴³ The judgment is illuminating because the Court not only found that the phrase "affected by the provisions of the Treaties" from art.351(1) TFEU has not been interpreted before;⁴⁴ the Court in fact proceeded to explain why that interpretation is *important* from the perspective of the essential characteristics of the EU legal order.⁴⁵ Mind you, not "necessary for the resolution of the case" before the national court, but important for EU law itself. This is a higher bar to meet, and thus arguably a more lenient approach towards national courts of last instance in controlling their obligation to refer. It is unclear in the judgment whether such a threshold of importance is now attached to all infringement cases of a failure to refer. If it is not, the infringement procedure remains a strong control tool for the Court of Justice, although it is for the Commission to bring a case.⁴⁶ If it is, the control tool not only has a threshold similar to the Slovenian extraordinary remedy, but more importantly, allows a margin of error for some cases not being referred.⁴⁷

From the perspective of the trade-offs behind the governor's dilemma, the Court would be wise to pursue the second interpretation in the future. A strict obligation to refer might reduce the relationship of trust between the Court and highest national courts, who might be disincentivised from fulfilling their enforcement role diligently. At the same time, this approach might incentivise the Commission to use the infringement procedure against court decisions, in what might be seen as supranational executive interference into judicial independence. In such a scenario, the Court's intermediaries might lose authority at the national level, a characteristic which otherwise makes them excellent intermediaries in the first place.

These two limits pertain to the long context of *Cilfit*, but they must also be read in the broader context of the developments in the EU judicial space. In the last decade, the Court has taken it upon itself⁴⁸ to resolve the semi-authoritarian trends spreading across a number of Member States. While offending governments turned to a wide range of anti-democratic activities, such as stifling media pluralism, attacking the independence of higher education institutions,⁴⁹ the NGO sector and the judiciary, the EU's response has been confined almost exclusively to the legal (judicial) arena. Starting from *Portuguese Judges*,⁵⁰ where the Court extended the applicability of art.19(1) TEU to all areas covered by EU law (rather than requiring that a concrete case be within the scope of EU law), it prepared the groundwork for the general applicability of its judicial independence jurisprudence in future cases.

⁴¹ *European Commission v French Republic* (C-416/17) EU:C:2018:811 at [111].

⁴² Millet, "From the Duty to Refer to the Duty to State Reasons: the Past, Present and Future of the Preliminary Reference Procedure" (2023) *European Journal of Legal Studies* 15–16.

⁴³ *European Commission v United Kingdom* (C-516/22) EU:C:2024:231; [2025] 1 C.M.L.R. 2.

⁴⁴ *European Commission v United Kingdom* (C-516/22) EU:C:2024:231 at [146].

⁴⁵ *European Commission v United Kingdom* (C-516/22) EU:C:2024:231 at [147].

⁴⁶ A development that did not materialise in the aftermath of the *Weiss* judgment of the German Federal Constitutional Court, but one which the Court of Justice might have hoped for.

⁴⁷ Which is reminiscent of the margin of error that national constitutional courts accord the Court of Justice when they conduct *ultra vires* review of EU law. See, for example, German Federal Constitutional Court Case 2 BVerfG *Honeywell* (2661/06) Order of 6 July 2010 at [66].

⁴⁸ Partially certainly due to the inertia/inability of the political sphere to address it.

⁴⁹ Although the Court has ruled that the Hungarian law, which requires higher education institutions to have a seat in Hungary, is contrary to EU law, this has not prevented the Central European University to move to Vienna. See *European Commission v Hungary* (C-66/18) EU:C:2020:792.

⁵⁰ *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* (C-64/16) EU:C:2018:117; [2018] 3 C.M.L.R. 16.

What is more, the Court has turned its value-based jurisprudence into the EU's constitutional identity.⁵¹ In this case law, the Court has made decisions that concern national rules and practices on judicial appointments, remuneration, disciplinary proceedings, and much besides.⁵² The case law increasingly started to use terminology such as “the essential characteristics of EU law”,⁵³ which applies, as mentioned, in all fields covered by EU law. In other words, the essential characteristics of EU law, something that is arguably deeply entrenched in a constitutional system, are becoming ever more specific, taking the form of detailed controls over national judicial procedures. Although these decisions were made in the context of the rule of law crisis with the aim of strengthening national courts in respect of the executive, they inevitably strengthen the position of the Court of Justice vis-à-vis national courts.⁵⁴

In *KUBERA* then, I read the Court as being faced with a threat to its control over highest national courts (art.267(3) TFEU) by a filtering procedure that is simply designed to ensure the manageability and consistency of national case law. The Court, by interpreting national law⁵⁵ (something it is not empowered to do under the Treaties), argued that the Slovenian filtering mechanism must not prevent the Supreme Court from considering the request of the parties to submit a preliminary reference. In *Lyckeskog*, where the Swedish Supreme Court appeared to have had a similar discretion, the Court of Justice had no issue with it, in fact assuming that the Supreme Court would in any event consider the importance of EU law.⁵⁶ I would argue that in 2002, when that case was decided, the Court was not burdened with its own rule of law jurisprudence and, as I see it, could still have taken judicial independence at the national level for granted.⁵⁷ *KUBERA* displays a fundamental mistrust that the Court of Justice has developed over the years of the rule of law backsliding in some Member States, manifesting itself here as the doubt that the Slovenian Supreme Court is aware of its responsibility under EU law. This, I believe, aligns well with broader trends in how the Court of Justice manages the preliminary reference procedure.⁵⁸

The Court as the governor therefore opted for doubling down on control. This may seem sound in the short term, while, for example, the Polish judicial landscape is still finding a way to deal with “neo-judges”⁵⁹ installed by the previous regime. However, an exclusive focus on courts and their independence from the executive is at the same time increasing their *dependence* on the Court of Justice. For example, Doroga

⁵¹ For example, in *European Commission v Poland* (C-204/21) EU:C:2023:442; [2024] 1 C.M.L.R. 38 at [67]; *Valancius v Lietuvos Respublikos Vyriausybė* (C-119/23) EU:C:2024:653; [2025] 1 C.M.L.R. 32 at [47].

⁵² Most recently, see *Financijska agencija v HANN-INVEST doo* (C-554/21, C-622/21 and C-727/21) EU:C:2024:594; [2025] 1 C.M.L.R. 29.

⁵³ *Slovakia v Achmea BV* (C-284/16) EU:C:2018:158; [2018] 2 C.M.L.R. 40 at [33].

⁵⁴ For a more extensive treatment of this argument, see A. Mickonyte, “Effects of the Rule-of-Law Crisis in the EU: Towards Centralization of the EU System of Judicial Protection” (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* 815.

⁵⁵ *KUBERA* (C-144/23) EU:C:2024:881 at [55]–[57].

⁵⁶ *Criminal Proceedings against Lyckeskog* (C-99/00) EU:C:2002:329 at [17], “Under Paragraph 10 of Chapter 54 of the Rättegångsbalk, the Högsta domstol may issue a declaration of admissibility if it is *important* for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court”. (emphasis added).

⁵⁷ An excellent study by Scholtes explores the practice of the Venice Commission (considered an authoritative body by the Commission and the Court; see *Poland v European Parliament* (C-157/21) EU:C:2022:98; [2022] 2 C.M.L.R. 27 at [342]) and how it divides European states into “core” and “developing” democracies, and accordingly finds some practices (for example, the executive appointing judges) as democratic in the former states, while problematic in the latter, and how this aligns with the mental map dividing the European core and periphery. J. Scholtes, “The Venice Commission and the mental map of European constitutionalism” (2025) *Hague Journal of the Rule of Law* 1.

⁵⁸ See Opinion of AG Bobek in *Conorzio* (C-561/19) EU:C:2021:799 at [124].

⁵⁹ M. Stambulski, “Schrödinger’s Judges. Challenges to the Rule of Law Restoration in Poland” (2024), *Verfassungsblog*, <https://verfassungsblog.de/schrodingers-judges/>.

and Bercea show that judicial associations in Romania developed a strategic use of the preliminary reference procedure concerning “the most heated and politically charged questions concerning the judiciary”.⁶⁰ Why would national courts want to submit such questions, which should arguably be mediated entirely in the domestic public sphere, to the Court? The risk is that the Court’s intermediaries, stifled by too much control, lose the confidence in their own role as EU law enforcers. Weak intermediaries are a serious problem for the governor.⁶¹

Coherence, not uniformity

How otherwise could the Court have approached the governor’s dilemma? The idea behind this section is not to propose any sort of overhaul of the *Cifit* jurisprudence or its reform. There seem to be some lines of jurisprudence, no matter how inadequate for their contemporary purpose, that the Court simply does not change, but rather continuously carves out a patchwork of individual exceptions.⁶² Not only is it highly unlikely that the Court would abandon this jurisprudence, despite multiple Advocates General proposing a change.⁶³ The Court in my view needs a tool that allows it a certain degree of discretion as to the extent of control it will exert over its intermediaries at different points in time, and *Cifit* seems to me as good as any to fulfil that function. My critique in this section will rather be directed to what the Court of Justice took away from the Slovenian court, by focusing on uniformity, rather than coherence, of EU law. In other words, what would be more beneficial to the governor, than the commitment of its intermediaries to the coherence of the legal order they are tasked to enforce?

The way I see it, in its relationship with highest national courts, the Court should build a relationship of trust⁶⁴ that focuses not on uniformity, but rather on the coherence of EU law. In its Opinion on the accession to the ECHR, the Court stated that EU law’s fundamentals would have been jeopardised had the EU acceded to the ECHR, because it would undermine the mutual trust that the Member States are obliged to extend to each other.⁶⁵ The same trust should bind the Court of Justice as well: the governor must trust its intermediaries; otherwise, how will they successfully carry out their tasks and ultimately achieve the governor’s objectives?⁶⁶

Coherence of EU law would be better served by a more cooperative relationship between the Court of Justice and national apex courts. In the face of the significant number of cases they are adjudicating on a daily basis, it is counterproductive to demand of them to stick to an obligation to refer that may only be dispensed with a full obligation to reason. Indeed, in the context of a filtering system such as the one in

⁶⁰ S. Doroga and R. Bercea, “The Role of Judicial Associations in Preventing Rule of Law Decay in Romania: Informal Communication and Strategic Use of Preliminary References” (2023) 24 *German Law Journal* 1393, 1396. For an argument that judges in Croatia “use EU law to protect their independence”, see N. Bačić Selanec, I. Goldner Land and D. Petric, “Rule of Law in the EU and the State of Croatian Judiciary” in J. Puljiz and H. Butkovic (eds), *Crisis Era European Integration. Economic, Political and Social Lessons from Croatia* (Abingdon-on-Thames: Routledge, 2024), p.90.

⁶¹ Abbott et al (eds), *The Governor’s Dilemma: Indirect Governance Beyond Principals and Agents* (2020), p.17, “If the governor can remove experts’ authority or overrule their decisions, experts will display anticipatory obedience rather than professional rigor in employing their knowledge, information, and creativity.”

⁶² I am thinking here of doctrines such as *Meroni* (on delegating power to agencies), *Plaumann* (on standing in direct actions), or *Marshall* (on the lack of horizontal direct effect of directives), where sticking to the principle seems to have become an end in itself.

⁶³ For an overview of critical opinions of Advocates General, see Opinion of AG Bobek in *Conorzio* (C-561/19) EU:C:2021:799 at [99]–[110].

⁶⁴ Similarly, see J. Komarek, “In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure” (2007) 32 *E.L. Rev.* 467.

⁶⁵ *Opinion pursuant to Article 218(11) TFEU (2/13)* EU:C:2014:2454; [2015] 2 *C.M.L.R.* 21 at [194].

⁶⁶ Abbott et al (eds), *The Governor’s Dilemma: Indirect Governance Beyond Principals and Agents* (2020), pp.14–15.

Slovenia, the obligation to reason as required by the Court in *KUBERA* pretty much means that the Slovenian Supreme Court may no longer use the filtering mechanism whenever a case concerns EU law.

Now, you might say, is providing more leeway for highest national courts to promote coherence, instead of uniformity, not contrary to the very letter of art.267(3) TFEU? Despite the popularity of early theories of the preliminary reference procedure empowering lower national courts,⁶⁷ empirical takes on the patterns of submitting preliminary references now confirm with certainty that since the mid-2000s, submitting references became the job of predominantly higher and peak national courts.⁶⁸ Contrary to the narrative of a growing rift between constitutional courts and the Court of Justice,⁶⁹ the same research shows that the last twenty years have shown a marked increase in the number of first preliminary references from those courts.⁷⁰ What is more, research has also shown that the Court itself treats references from higher and peak courts as more important, by hearing them more commonly in grand chamber formation, with an Advocate General Opinion, and it is less likely to respond to their preliminary references by a reasoned order.⁷¹

The reality is that EU law forms part of national legal systems and by extension, also of national judicial procedures (daily probably in their thousands). Insisting on full uniformity of EU law is not only conceptually mistaken, but is practically impossible to control.⁷² Beyond this practical approach, my argument is that it would also benefit EU law's coherence to recognise and embrace nationally diverse readings of EU law (as Marketou calls them, local meanings of EU law).⁷³ As the Court's own research showed, highest national courts have their own interpretations of the *Cilfit* exceptions.⁷⁴ What matters in my view is not that every single supreme court has an identical approach to interpreting its obligation under art.267(3) TFEU, but rather that it sees that provision as *authoritative* and part of a coherent legal system. That using the *Cilfit* exceptions results in a certain degree of variety is unavoidable. Or, in the words of AG Wahl, "if a national court of last instance is sure enough of its own interpretation to take upon itself the responsibility (and possibly the blame) for resolving a point of EU law without the aid of the Court of Justice, it ought to be legally entitled to do so".⁷⁵

There is no escaping the fact that every judicial decision involves the use of discretion. Let us go back to the Opinion of the Advocate General, who proposed that a highest court would, in a leave to appeal

⁶⁷ According to Weiler, in relation to other branches of power; and according to Alter, in relation to their superior courts. J.H.H. Weiler, "The Transformation of Europe" (1991) 100 *The Yale Law Journal* 2403, 2426; K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001), p.48.

⁶⁸ A. Dyeve, M. Glavina and A. Atanasova, "Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System" (2020) 27 *Journal of European Public Policy* 912, 923. For an account of lower court judges themselves on the difficulties of submitting the preliminary reference, therefore considering it something that appellate jurisdictions do, see Pavone, *The Ghostwriters. Lawyers and the Politics behind the Judicial Construction of Europe* (2022), pp.52–87.

⁶⁹ Opinion of AG Spielmann in *European Commission v Poland* (C-448/23) EU:C:2025:165 at [34]–[38].

⁷⁰ Dyeve, Glavina and Atanasova, "Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System" (2020) 27 *Journal of European Public Policy* 927.

⁷¹ M. Ovádek, W. Wijtvliet and M. Glavina, "Which Courts Matter Most? Measuring Importance in the EU Preliminary Reference System" (2020) 12 *European Journal of Legal Studies* 121, 145.

⁷² See Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [104].

⁷³ See also, A. Marketou, "Les sens locaux du droit de l'Union européenne: pour un droit européen comparé" (2024) 3 *Cahiers de Méthodologie Juridique* 1349. For a summary, see A. Marketou, "Local Meanings of EU Law. The Case of Proportionality" (2025), *Verfassungsblog*, <https://verfassungsblog.de/local-meanings-of-eu-law/>.

⁷⁴ Research note "Application of the *Cilfit* Case-Law by National Courts or Tribunals against whose Decisions there is no Judicial Remedy under National Law" (May 2019), Court of Justice, https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/ndr_application_of_the_cilfit_case-law_by_national_courts_or_tribunals_against_whose_decisions_there_is_no_judicial_remedy_u.pdf.

⁷⁵ Opinion of AG Wahl in *X and van Dijk* (C-72/14 and C-197/14) EU:C:2015:319 at [69].

procedure, be obliged to entertain the request to submit a reference when a party has “properly raised a genuine issue of EU law”.⁷⁶ Requests that are genuine are those not “consisting in an abuse of procedure or having a purely dilatory purpose”.⁷⁷ To raise a genuine issue, the party is expected to substantiate “its arguments as to the existence of more than one plausible interpretation of the relevant EU provisions”.⁷⁸ Assessing whether a genuine issue of EU law has been raised by the parties, the national court will inevitably engage in an intellectual assessment of the substance of the party’s request, which cannot but involve discretion. On this, the Court would simply have to trust national courts.

Let us take a further example from the Court’s judgment. The Court tried to distinguish *KUBERA* from its decisions in *Aquino* and *Conorzio*, where examining “conditions of admissibility of a purely procedural nature”⁷⁹ did not engage an obligation to submit a reference. *Aquino*, the Court tells us, concerned “a national rule under which a ground of appeal is inadmissible if it seeks to challenge only one ground of the judgment under appeal *when the other grounds are capable on their own of justifying that judgment*”.⁸⁰ The Advocate General also found that in making this assessment, the national court would not be substantively examining the arguments of the parties.⁸¹ In *Conorzio*, a court of last instance could declare an action inadmissible where the question of the party “changes the subject matter of the dispute”.⁸²

To decide whether a ground of a judgment of a lower instance court is capable of justifying the judgment (as in *Aquino*) seems to me to be the essence of the appellate function. Whether an appeal should be allowed or not depends on whether the lower court justified its judgment in a sound manner. Hence, the national court would most certainly need to use discretion and review, to a certain extent, the lower court’s judgment. The same may be said of the highest court’s assessment as to whether the parties are seeking to change the subject matter of the dispute (as in *Conorzio*). The court will need to review the subject matter of the lower court’s judgment and review the request of the party on appeal. This exercise without a doubt also involves some discretionary assessment. They involve an intellectual activity expected of judges with a legal education, to give meaning and interpret the legal issues at stake.⁸³ In other words, even in *Aquino* and *Conorzio*, highest courts were exercising discretion. There, the Court recognised there was no need to exercise control. The same should have, in my opinion, been the outcome in *KUBERA*.

What of effective judicial protection, if not all questions of EU law are referred by national courts of last instance? Would it be protected if we allowed the Slovenian remedy, and its admissibility criterion of “importance”? In fact, the Court itself applies virtually the same threshold in its own, recently extended,⁸⁴ filtering mechanism.⁸⁵ As explained by AG Čapeta, the idea of the mechanism is that the decisions of the selected number of EU’s agencies will have already been decided in two stages (by an independent board

⁷⁶ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [110].

⁷⁷ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [107].

⁷⁸ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [108].

⁷⁹ *KUBERA* (C-144/23) EU:C:2024:881 at [49].

⁸⁰ *KUBERA* (C-144/23) EU:C:2024:881 at [48] (emphasis added).

⁸¹ Opinion of AG Emiliou in *KUBERA* (C-144/23) EU:C:2024:522 at [62].

⁸² *KUBERA* (C-144/23) EU:C:2024:881 at [48] (emphasis added).

⁸³ Put differently, to decide on a purely procedural matter, one does not need any legal education, because the questions are very clear: is the appeal submitted within the time limit? Does the document contain the necessary information, such as which judgment is being appealed?

⁸⁴ The filtering mechanism originally applied to the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency. With the reform of the Statute of the Court of Justice, its application was also extended to the European Union Agency for the Cooperation of Energy Regulators, the Single Resolution Board, the European Banking Authority, the European Securities and Markets Authority, the European Insurance and Occupational Pensions Authority, and the European Union Agency for Railways.

⁸⁵ Statute of the Court of Justice of the European Union art 58a. For more background on the filtering mechanism, see Opinion of AG Čapeta in *European Union Intellectual Property Office (EUIPO) v KaiKai Company Jaeger Wichmann* (C-382/21 P) EU:C:2023:576 at [29]–[38].

of appeal and by the General Court).⁸⁶ The same may be said for an extraordinary appeal: according to Slovenian law, such an appeal may only be submitted against a judgment that has become final (meaning that it already involved an appeal). On substance, the Court first conducts its own “leave to appeal” procedure, in which it decides to admit an appeal only “where it raises an issue that is significant with respect to the unity, consistency or development of Union law”. Sounds familiar?⁸⁷ In conclusion, EU law has its own procedure where the interests of effective judicial protection may be considered to have been served without an additional round of appeal before the Court of Justice.

Now, critics may say that the Court of Justice fully reasons its own rejections of appeals submitted within the filtering framework. Although the orders set out the conditions for an appeal to be accepted, and thus give the impression of thoroughness, at closer inspection it becomes clear that the Court uses a standard template to which it summarily adds the arguments of the parties, resulting in some twenty to thirty paragraphs in total (including the applicable law and all other formalities).⁸⁸ This is not to say that the Court is failing in its obligation to state reasons, but rather that there are good reasons, mainly pertaining to its ability effectively to dispose of its docket, for providing summary reasoning. Overall, then, the Court of Justice is also using a mechanism similar to that of the Slovenian Supreme Court.

In conclusion, the Court of Justice, in approaching its governor’s dilemma, should see highest national courts as trustworthy partners in their role as enforcers of EU law. They do submit preliminary references, as the Slovenian Supreme Court did in *KUBERA*. They also show concern for their obligations under art.267(3) TFEU, taking into account, for example, the case law of their constitutional courts.⁸⁹ Ultimately, EU law would not be harmed if highest national courts were left with the (informal) discretion to decide which cases are important from the perspective of a coherent interpretation in their judicial system and in the EU legal system more broadly. Otherwise, the Slovenian remedy itself would be completely distorted: for matters of national law, only important cases could proceed, whereas for EU law, all cases would need to be allowed. The parties might therefore be tempted to frame their cases so as to involve EU law artificially, with no apparent benefit to EU law.

Conclusion

The criticisms put to the Court of Justice in this case note are not likely to be accepted by the Court any time soon. That much is clear from its ever-tightening grip on national courts. Still, I consider it worthwhile imagining the alternative vision of judicial cooperation presented here. As I tried to show, coherence, rather than an unrealistic insistence on uniformity of EU law, is a better anchor for the Court of Justice, as the governor, to coopt highest national courts into their role of intermediaries, as enforcers of EU law. It avoids the trade-offs of an increased control by the Court, which would involve either developing a dependence on the Court of Justice, the inability to manage their own dockets, or building resistance and non-compliance. Instead, accepting the inevitable necessity of the “local meanings of EU law” and a certain degree of discretion, while safeguarding its coherence as a legal system in its own right, builds a cooperative and trusting relationship between the governor and its intermediaries.

I see three main benefits of this approach moving forward. First, trusting highest national courts will motivate them more diligently to contemplate matters of EU law that come before them, knowing full well the responsibility they hold. In fact, from the very interactions between Slovenian Constitutional and

⁸⁶ Opinion of AG Ćapeta in *EUIPO v KaiKai Co* (C-382/21 P) EU:C:2023:576 at [29].

⁸⁷ Not only is it eerily like the Slovenian national standard, but it also reminds of the importance discussion in the above mentioned *European Commission v United Kingdom* (C-516/22) EU:C:2024:231.

⁸⁸ See, for example, *Puma v EUIPO* (C-49/25 P) EU:C:2025:385; *Dekoback v EUIPO* (C-775/24 P) EU:C:2025:169; *Peikko Group v EUIPO* (C-577/24 P) EU:C:2025:10.

⁸⁹ See the presentation of the Slovenian Supreme Court in the reference, *KUBERA* (C-144/23) EU:C:2024:881 at [24]–[26].

Supreme courts in this case we can see that high courts do not shy away from lecturing their lower peers about EU law. Second, it will empower highest national courts in their national institutional structures, not only in respect of lower courts, but also in respect of the legislator and the executive. Finally, an emphasis on coherence of EU law will reduce and disincentivise identity conflicts, in light of the Court's recent increased use of identity arguments.⁹⁰ The question will no longer be whether national or EU identity prevails, because they will no longer be pitted against each other. Rather, more trust in national supreme and constitutional courts may be seen as an invitation that, if identity building is what we are after at all, it should be built cooperatively and jointly.

A final point. The perfect balance between empowerment and control will for the governor never be set in stone once and for all. The Court of Justice will be finding itself continuously looking for that sweet spot, inherently influenced by the circumstances of the day. The rule of law crisis will pass, others might arise. It was not my aim in this short piece therefore to give the perfect recipe for the Court to resolve its governor's dilemma. The point was rather to spell out the different considerations that it may take into account when managing its relationship with its foremost intermediaries: highest national courts. The next chapter in this story awaits us soon.⁹¹

⁹⁰ For an excellent critique, see M. Nettesheim, "European 'Frankenstein Constitutionalism': TEU Article 2 as a Federal Homogeneity Clause" (2024) 118 *AJIL Unbound* 167.

⁹¹ See pending *Remling* (C-767/23) EU:C:2025:486.