



**SEMINAR ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF SWEDEN IN
COOPERATION WITH ACA-EUROPE**

Stockholm, 9-10 October 2023

Questionnaire

"Preliminary rulings of the Court of Justice of the European Union – from CILFIT to Consorzio"

I Introduction

During the Finnish presidency of the ACA-Europe, 2023-2025, a number of seminars will be arranged relating to the vertical dialogue between the supreme administrative courts and the European Courts – both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights. The Finnish presidency will be a joint effort in close co-operation with Sweden and the first seminar will be held in Stockholm on the 9–10th of October 2023.

The topic for the October seminar is *Preliminary rulings of the Court of Justice of the European Union – from CILFIT to Consorzio*.

In *CILFIT* ([CURIA - List of results \(europa.eu\)](#)) the CJEU provides three situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling, namely when

- (i) the question is irrelevant for the resolution of the dispute;
- (ii) the provision of EU law in question has already been interpreted by the Court (*acte éclairé*);
- (iii) the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).

Later, in *Consorzio* ([CURIA - List of results \(europa.eu\)](#)) the CILFIT criteria were confirmed and complemented. Among other things the CJEU clarifies in *Consorzio* that the national courts must give developed reasons for deciding not to refer a question for a preliminary ruling.

The seminar will focus on issues such as the procedure in the national courts when considering to request a preliminary ruling from the CJEU, the obligation to refer vs. "margin of appreciation" and the use of the CILFIT criteria by the courts. With regard to the procedure *after* the CJEU's decision topics such as the national follow-up of the judgments, the quality and unambiguity of the judgments and whether national courts call into question or distinguish the judgments of the CJEU will be discussed. Attention will also be given to the role of inferior courts, the impact of requirements of leave to appeal or other "filters" in the national legal system and questions relating to the development of the preliminary ruling system in cooperation with the CJEU.

The purpose of this questionnaire and the ensuing seminar is to exchange experiences relating to the procedure when our courts consider requesting a preliminary ruling from the CJEU and also how we proceed after having received a judgment from the CJEU. Hopefully this



questionnaire will provide useful information for comparative purposes and identify aspects for further workshop discussions. The ultimate aim is that fruitful discussions will provide an increased and enhanced awareness of aspects concerning the preliminary ruling system.

II Background and statistics

1. What is the formal title of your court (also provide the title in English)?

Verwaltungsgerichtshof, Supreme Administrative Court.

2. Which principal branches of law are addressed at your court?

The Supreme Administrative Court has final jurisdiction in matters of administrative law. Cases involve applications for planning permits or industrial operating licences, as well as fiscal and asylum matters, to name just a few.

3. Which court or courts in your legal system falls under the obligation to refer questions to CJEU for a preliminary ruling (article 267.3 TFEU)?

In Austria, the courts of last instance which fall under the obligation to refer questions to the CJEU for a preliminary ruling according to art. 267 sec. 3 TFEU are the Supreme Administrative Court, the Constitutional Court and the Supreme Court of Justice.

4. On average, how many incoming cases are registered at your court per year?

On average between 6.500 and 7.000 cases.

5. How many preliminary rulings has your court requested from the CJEU during the period 2012 to 2022?

20.

6. Do any branches of law stand out such that preliminary rulings are requested more frequently in respect of that branch?

- Yes
 No

If "yes", state the branch or branches of law and whether there is any reason why the number of preliminary rulings within that branch or branches stands out.





Most preliminary rulings were requested in the field of taxes and duties, followed by asylum law and public service law.

7. Estimate the number of referred cases from your court during the period 2012 to 2022 that have related to the *validity* of an EU act itself.

None

8. Has your court requested an “expedited preliminary ruling procedure” (art. 105–106 Rules of Procedures of the Court of Justice) in any of the cases referred?

- Yes
- No

If “yes”, did the CJEU grant the request or requests?

- Yes
- No

Please provide an example of a case that has been dealt with according to this special procedure or a case where your court’s request has been rejected.

n.a.

9. Has your court requested an “urgent preliminary ruling procedure” (art. 107–114 Rules of Procedures of the Court of Justice) in any of the cases referred?

- Yes
- No

If “yes”, did the CJEU grant the request or requests?

- Yes
- No

Please provide an example of a case that has been dealt with according to this special procedure or a case where your court’s request has been rejected.

n.a.



III The procedure in national courts concerning requests for a preliminary ruling

10. Does your national legislation contain any provisions concerning the procedure relating to requests for a preliminary ruling from the CJEU?

- Yes
 No

If "yes", state the rule and briefly describe the contents.

The General Administrative Procedure Act 1991 (Allgemeines Verwaltungsverfahrensgesetz 1991, AVG) as well as the Supreme Administrative Court Act (Verwaltungsgerichtshofgesetz 1985, VwGG) contain provisions concerning requests for preliminary rulings.

Sec. 38b para. 1 VwGG stipulates that decisions to request preliminary rulings shall be served to the parties. Once the Supreme Administrative Court has adopted such a decision and until the preliminary ruling is obtained, the Supreme Administrative Court may only issue orders and take decisions which cannot be affected by the preliminary ruling or do not finally settle the issue and cannot be delayed. This is also provided for in sec. 38a para. 1 AVG in relation to requests for preliminary rulings by authorities and - read in conjunction with sec. 17 of the Proceedings of Administrative Courts Act (Verwaltungsgerichtsverfahrensgesetz, VwGVG) - in relation to requests by first instance administrative courts.

Sec. 38b VwGG and 38a AVG both also include conditions for withdrawal of a request for a preliminary ruling. In addition, the Supreme Administrative Court may also withdraw the request for a preliminary ruling if the question has already been answered by the CJEU in another judgment and the CJEU asks whether - in view of this judgment - the request is maintained by the Supreme Administrative Court.

However, these provisions only concern the main proceedings. If a case depends on the answer to questions previously referred to the CJEU, the Supreme Administrative Court, according to sec. 38 AVG in conjunction with sec. 62 para. 1 VwGG, suspends the proceedings until the CJEU has decided on the request for a preliminary ruling.

11. Does your court have any routine documents, guidelines, etc., for the procedure concerning requesting a preliminary ruling?

- Yes
 No

If "yes", briefly state the contents of these documents (for example, whether they regard the procedural handling and/or the substantive assessment in order to ensure compliance with the case law of the CJEU).

n.a.





12. What possibilities are available to a party in the case in your court to claim that the court shall request a preliminary ruling from the CJEU?

The parties may claim that the Supreme Administrative Court shall request a preliminary ruling from the CJEU, for example in their complaint.

13. Estimate how common it is that your court make a request for a preliminary ruling after the question has been raised by a party relative to when the question is raised *ex officio* by the court.

- Most commonly, the question is raised by a claim brought by a party
- Most commonly, the question is raised *ex officio* by the court
- Both are equally common

14. Briefly describe what the procedure looks like when your court consider requesting a preliminary ruling from the CJEU.

For example, if there are any time frames for handling a claim from the parties regarding a preliminary ruling, if and how the parties in the case are involved, if a rejection of a request for a preliminary ruling is examined in a separate decision or in conjunction with the final ruling in the case, the number of judges involved in the decision, etc.

The parties may claim that the Supreme Administrative Court requests a preliminary ruling from the CJEU in their complaint (see question 12). A copy of this complaint is served to the other parties of the proceedings. If a complaint is deemed suitable for further examination, the parties are requested to comment on the complaint in a separate statement.

If a request for a preliminary ruling is taken into consideration, a draft request is prepared by one justice (the so-called rapporteur). In general, a panel of five justices deliberates and decides on the draft request in a session not open to the public in which amendments and changes to the request may be made. If deemed necessary, a public hearing may be held prior to the decision. The decision to file a request with the CJEU is served to the parties and published on the Supreme Administrative Court's website.

If a claim from the parties regarding a preliminary ruling is not taken into consideration, the decisions to reject that claim is taken in the final ruling. This decision is taken by either three or five justices (depending on, for example, whether the complaint is admissible or jurisprudence relating to the relevant legal question exists).

The parties do not have the opportunity to comment on the draft request.

There are no time frames for handling claims from parties regarding a preliminary ruling.



15. Briefly describe which considerations (in substance) that are made when your court examines the question whether to request a preliminary ruling or not from the CJEU?

For example, how the court proceeds to determine whether the provision in question has already been interpreted by the CJEU or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt (*acte éclairé/acte clair*), if it is common for your court to specifically investigate how other countries have interpreted the provision, how such an investigation then is carried out, if other language versions are consulted, etc.

In order to determine whether there is a need to request a preliminary ruling, the Supreme Administrative Court principally analyses the relevant provisions of European and national law and the respective jurisprudence of national supreme courts and the CJEU. If necessary, it may also consult jurisprudence of other supreme courts within the EU. It also examines if the question arising in relation to EU law is relevant for the resolution of the dispute. Furthermore, it verifies whether similar questions regarding EU law have already been referred to the CJEU.

16. Is the government or other branches of the executive power ever involved *before* your court requests a preliminary ruling?

- Yes
 No

If "yes", describe which contacts that may occur.

If a complaint against a decision of a first instance administrative court is deemed suitable for further examination, the administrative authority which issued the decision under review before the first instance administrative court has the possibility to comment on the complaint. In addition, the higher authority is entitled to comment on the complaint. This complaint may contain a claim by the party that the court shall request a preliminary ruling. By commenting on this complaint or by attending an oral hearing, administrative authorities are involved before the court issues a final ruling which might be preceded by a request for a preliminary ruling.

17. Are there ever any contacts between your court and the government or other branches of the executive power to inform about a preliminary ruling *after* it has been requested by your court?





- Yes
- No

If "yes", describe which contacts that may occur.

Sec. 38b para. 1 VwGG stipulates that decisions to request preliminary rulings shall be served to the parties. As a party to the proceedings, the administrative authority which issued the decision under review by the first instance administrative court is therefore informed about the request for a preliminary proceeding.

18. How does your court state the reasons for rejecting a claim for a preliminary ruling (cf. question 29 below regarding cases where leave to appeal or other "filters" are prescribed)?

For example, is the reasoning, as a rule, based on the criteria established in the case law of the CJEU, (inter alia *CILFIT*) or does your court refer to additional criteria which do not follow directly from the Court's case law.

There is no national provision explicitly stating whether the Supreme Administrative Court has to state the reasons for rejecting a claim for a preliminary ruling. When the Supreme Administrative Court rejects a party's claim to request a preliminary ruling, the Court either states the reasons for the rejection of the claim or the reasoning for the rejection of the claim may be deduced from the summary reasoning of the judgement.

19. Following the ruling of the CJEU in *Conorzio* and of the European Court of Human Rights in *Sanofi Pasteur v. France* and *Rutar and Rutar Marketing d.o.o. v. Slovenia*, does your court give more extensive reasons for rejecting a party's claim to request a preliminary ruling?

- Yes
- No

20. Is it possible to appeal a decision of your court to make a request for/not make a request for a preliminary ruling?

- Yes
- No

If "yes", to what extent can such an appeal be granted?

n.a.



21. Can a lower court's decision to make a request/not make a request for a preliminary ruling be appealed to a higher court?

- Yes
- No

If "yes", can such an appeal be granted?

n.a.

22. Are there any differences in the procedure in your court for requesting a preliminary ruling when the question is raised in a case where the expedited or urgent procedure is applied (cf. question 8 and 9 above)?

- Yes
- No
- The procedure has not been applied

If "yes", please describe in what way the procedure differs.

n.a.

Formulation of the questions submitted to the CJEU

23. Briefly describe how questions to the CJEU in general are formulated when your court requests a preliminary ruling.

For example, are the questions formulated in a narrow way in order to provide the most concrete guidance possible in the case or in a more open way in order to give the CJEU more freedom to formulate its answer?

When the Supreme Administrative Court requests a preliminary ruling, the court usually formulates a number of questions phrased as precisely and concisely as possible. The questions can be unrelated individual questions or, more often than not, a question followed by a second, alternative question asked in the event of a certain response to the first question.

The questions are followed by a detailed statement of the grounds leading to a request for a preliminary ruling, including, in this order, a description of the main proceedings as well as the relevant facts, an account of the EU law and national provisions which are raised, the presentation of the problem as well as a description of why there is a need to make a request for a preliminary ruling.



24. Are the parties usually given the opportunity to comment on the request for a preliminary ruling before the request is submitted to the CJEU (*cf.* the CJEU's recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 2019/C 380/01, para. 13)?

- Yes
- No

If "yes", briefly describe the material in the case on which the parties are given the opportunity to comment.

n.a.

25. In a request for a preliminary ruling, does your court usually state its own view on the answer to be given to the question referred (*cf.* the CJEU's recommendations, para. 18)?

- Yes
- No

Briefly describe the reasons why your court does or does not usually state its view on the answer to be given to the question referred.

The Supreme Administrative Court does not consider a statement of its own view on the matter necessary, as the CJEU has a monopoly on the interpretation of EU law and Art. 94 of the Rules of Procedure of the CJEU does not require such a statement to be included in the request for a preliminary ruling.

Leave to appeal and other "filters"

26. Does your national legal system prescribe any requirement of leave to appeal or other forms of "filters" in order for a case to be admitted for adjudication in your court?

- Yes
- No

If "yes", briefly describe the regime and state whether it applies generally or only to certain types of cases. If "no", please go to question 30.

The Supreme Administrative Court is competent to rule on complaints against decisions by a first instance administrative court. For a case to be admitted for adjudication, the complaint must depend on the resolution of a so-called "legal question of fundamental





importance". This is especially the case if the first instance administrative court deviated from the case law of the Supreme Administrative Court in its decision, if such case law does not exist or if the legal question to be resolved is not answered uniformly in the Supreme Administrative Court's case law.

The complaint is absolutely inadmissible if the first instance administrative court's decision concerns an administrative penal provision or a fiscal penal provision stipulating that a fine of up to € 750 and no custodial sentence could be imposed and a fine of up to € 400 was actually imposed in the contested decision. Pursuant to § 25a VwGG, this does not apply to complaints that are submitted by an administrative authority.

27. Is the preliminary ruling procedure different when the question is raised in a case requiring leave to appeal or another "filter" (cf. question 14 above)?

As stated in question 26, leave to appeal is required for all cases received by the Supreme Administrative Court. Therefore, there are no different preliminary ruling procedures.

28. Please estimate in how many cases, out of the total amount of cases in which your court has made a request for a preliminary ruling from the CJEU during the period 2012 to 2022, leave to appeal or other "filters" have been required in order for the case to be admitted for adjudication?

See question 27.

29. Is the reasoning different as regards rejections of a claim to make a request for a preliminary ruling in cases in which leave to appeal or other "filters" are prescribed?

See question 27.

IV The process after having received the judgment of the CJEU

30. Briefly describe the handling after your court has received the judgment from the CJEU regarding a preliminary ruling.

After receiving the CJEU's decision, the rapporteur prepares a draft decision taking into account the decision of the CJEU. This draft decision is then discussed and voted on by the respective panel.

This ruling is sent to the parties as well as the CJEU and is published on the Supreme Administrative Court's website.





31. Has it occurred that your court has had difficulties understanding the specific consequences of the ruling from the CJEU on legal questions in the national case i.e. to use the CJEU's answer as a basis for the decision in the case? (*cf.* the CJEU's recommendations, para. 11)?

- Yes
- No

If "yes", describe how common it is and please provide an example of a case where such difficulties have occurred.

n.a.

32. Briefly describe the factors, if any, which your court considers have had an impact on the clarity of the judgment of the CJEU.

For example, is it relevant that the CJEU has reformulated the referred questions, whether the Advocate General has commented, whether your court has itself given an account of its own position as to the manner in which the referred questions are to be answered, etc.

The Supreme Administrative Court appreciates the opinions of the CJEU's Advocates General as well as the different language versions of the CJEU's rulings.

33. During the period 2012 to 2022, has it occurred that your court has considered it necessary to make a renewed request for a preliminary ruling concerning the same questions?

- Yes
- No

If "yes", briefly describe what gave rise to the renewed request.

n.a.

V Miscellaneous

34. Has it occurred that an infringement procedure has been commenced against your Member State as a consequence of the fact that a preliminary ruling was not requested by a court in your State?

- Yes
- No



If "yes", briefly describe the matter and whether the proceedings gave rise to amended legislation or altered routines for addressing questions regarding preliminary rulings.

n.a.

35. Has your Member State been ordered to pay damages in a matter as a consequence of the fact that a court has failed to make a request for a preliminary ruling or that a court did not rule in accordance with an issued preliminary ruling?

- Yes
- No

If "yes", briefly describe the matter and whether the proceedings led to legislative amendments or changes in routines for addressing questions regarding preliminary rulings by your court.

n.a.

