

**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  
Consortio"***

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 9–10<sup>th</sup> of October 2023.

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

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 *Consortio* ([CURIA - List of results \(europa.eu\)](#)) the CILFIT criteria were confirmed and complemented. Among other things the CJEU clarifies in *Consortio* 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)?

Højesteret, The Supreme Court.

*Högsta förvaltningsdomstolen, the Supreme Administrative Court.*

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

The Danish judicial system is a three-tier system with 24 District Courts, 2 Courts of Appeal and the Supreme Court.

The District Courts, the Courts of Appeal and the Supreme Court all have general authority. The courts have the authority to decide on all legal disputes, irrespective of the subject matter or nature of the dispute, i.e. no matter whether it relates to civil law, criminal law or public law.

*Tax, social security, financial aid to individuals, compulsory care of children, among others, and various other administrative decisions which have been appealed.*

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)?

The Supreme Court, the Courts of Appeal (when processing cases that can only be brought before the Supreme Court with the permission of the Appeals Permission Board) and the Danish Labour Court falls under the obligation to refer questions to CJEU for a preliminary ruling.

*The Supreme Administrative Court, the Supreme Court (criminal and civil law), the Migration Court of Appeal in the Administrative Court of Appeal in Stockholm (migration issues), the Administrative Court of Appeal in Stockholm (cases relating to electronic communications), the Labour Court (employment and labour disputes), the Land and Environment Court at the Svea Court of Appeal (environmental issues), the Patent and Market Court of Appeal at the Svea Court of Appeal (patents and market issues).*

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



Around 350 cases per year.

*Slightly more than 7,000 cases.*

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

From 2012-2022: 8.

16.

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.

*Value added tax and income tax.*

*Value added tax cases are a relatively large case group in the court in respect of which legislation is primarily based on EU law. As regards the income tax cases, one possible explanation may be that these cases often lead to questions which concern cross-border activities and, consequently, give rise to complex/difficult EU law questions.*

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.

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?



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- 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.

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.

### 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.

There is no specific regulation in Danish Law concerning the procedure to request for a preliminary ruling from the CJEU. However, according to paragraph 353 (1) (x), of the Danish Administration of Justice Act the court of first instance will convene the parties to a pre-trial hearing unless the court finds such hearing unnecessary. In the notice convening the hearing the court will state the questions to be discussed at the hearing, including reference to the CJEU for a preliminary ruling if relevant for the case.



*Provisions are found in lagen (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol ("the Act on Certain Provisions Regarding Preliminary Rulings from the Court of Justice of the European Union"). The act contains the principal requirements according to which a court covered by the obligation to request a preliminary ruling must give reasons for rejecting a claim to request 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).

**Yes, the Court has an internal guideline-document regarding preliminary ruling which in terms of content is like the one Högsta Förvaltningsdomstolen has described below.**

*Yes, the court has internal routine documents regarding the practical, procedural handling of cases in which a decision has been taken to request a preliminary ruling including, among other things, that the parties shall have the possibility to comment on a draft request before a request is made, the forms to be used, the manner in which information will be provided to the CJEU, the manner in which the case will be handled following the request for a preliminary ruling to the CJEU.*

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 can request a preliminary ruling from the CJEU in their appeal to the Court or later during the proceedings, but it is the court that decides whether the request shall be allowed.**

*The parties have the possibility to, in their appeal to the court – and later during the proceedings – claim that the court shall request a preliminary ruling from the CJEU.*

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.

In most cases where the question of preliminary ruling is raised by a party a deputy judge will conduct an analysis of the relevant provision for the Court to be able to assess whether the issue is acte éclairé/acte clair or if a request for a preliminary ruling is needed. There are no specific time frames proscribed for handling claims to request preliminary rulings, but it is prioritized that the initial analysis is made shortly after appeal to the Court.

If the Court decides (normally by five Justices) that a matter is to be referred to the CJEU, a first draft of the request for a preliminary ruling is produced. The parties are then given the opportunity to comment on the draft. Thereafter, the draft is presented to the five Justices who decide the final formulation of the request for a preliminary ruling. The decision to make a request is published on the Court's website. Decisions to reject the claim are normally taken in the final ruling of the case.

*If the Court decides that a matter is to be referred to the CJEU, a first draft of the request is produced which is decided by five Justices. The parties then have the opportunity to comment on the draft. Thereafter, the case is again presented to the five Justices who decide whether a request shall indeed be made to the CJEU and on the final formulation of the request for a preliminary ruling. The decision to make a request is published on the court's website.*

*In cases requiring leave to appeal, the court first adopts a position regarding the question of leave to appeal and grants leave to appeal in the case before a decision is taken regarding the draft request and the communication with the parties in accordance with the above is initiated. Decisions to grant leave to appeal are taken by three Justices.*

*If the court decides to reject a claim to request a preliminary ruling, the decision is taken by one, three or five Justices (depending on for example, whether the case require leave to appeal or not). Decisions to reject the claim are normally taken in the final ruling of the case. In cases where leave to appeal is required, the decision to reject a claim, as a rule, is not preceded by any communication with the parties.*

*There are no specific time frames proscribed for handling claims to request preliminary rulings.*



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.

The Supreme Court initially applies the same procedure as Högsta Förvaltningsdomstolen when the Court examines the question whether to request a preliminary ruling or not from the CJEU (please see answer to question 14).

*In order to determine whether there is a need to make a request for a preliminary ruling, the court principally conducts an analysis of the relevant provision and an examination of the manner in which it, or neighbouring questions, have been interpreted by the CJEU as well as whether there are any pending cases regarding preliminary rulings from other countries. Normally, it is not necessary to specifically examine how other countries interpret the provision in order to be able to assess whether the issue is *acte éclairé/acte clair*.*

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.

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.



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.

The extent of the Courts reasons for rejecting parties claims of a preliminary ruling depends on the need in the individual case. Whether the court gives comprehensives reasons or concise reasons is decided upon the criteria established in the case law of the CJEU.

*When the court rejects a party's claim to request a preliminary ruling, the court must, in accordance with the "Act on Certain Provisions Regarding Preliminary Rulings from the CJEU", state the reasons therefor.*

*To what extent the court gives reason for a decision to reject at party's claim depends on the need in the individual case. However, the decision will at least state whether the question raised is irrelevant, there already is sufficient guidance since the provision has been previously interpreted by the CJEU, or the correct interpretation of Union law is so obvious that there is no room for reasonable doubt.*

*In general, there is more scope for giving detailed reasons for rejecting a claim in cases where the court conducts a substantive examination. In such cases, the court's examination of the case as a whole will also show the court's assessment of the legal situation and of previous rulings of the CJEU.*

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?





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?

A lower court's decision to make a request for a preliminary ruling cannot be appealed to a higher court. A lower court's decision to not request preliminary ruling can be appealed to a higher court. Stated by the Supreme Court in the ruling UfR 2010.1389H.

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.

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?

Usually the request contains a section of the Union Law that the preliminary question involves. Thereafter a brief description of the relevant circumstances and the national rules in the area, the position of the parties, a description of why there is a need to make a request for a preliminary ruling. The Courts general considerations about why a preliminary request is necessary in relation to the decision of the main proceedings. Lastly, the precise question for which the Court wishes to obtain an answer. The questions are usually formulated as precisely and concisely as possible.



*The manner in which the questions in a request for a preliminary ruling is formulated depends on the individual case. In general, a request usually contains an account of the Union law and national provisions which are raised, a brief description of the relevant circumstances, the position of the parties, a description of why there is a need to make a request for a preliminary ruling and the concrete/precise question for which the court wishes to obtain an answer. The questions are usually formulated as precisely and concisely as possible.*

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.

**The parties are given the opportunity to comment on the court's draft of the request for a preliminary ruling in its entirety.**

*The parties are given the opportunity to comment on the court's draft of the request for a preliminary ruling in its entirety (please see the response to question 23 as regards the contents of a request).*

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 reason for not stating the court's own view is that it could be seen as prejudging the final outcome of the case.*

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.

Leave to appeal is required in most of the Court's cases. An application for leave to appeal must be submitted to the Appeals Permission Board within four weeks from the perfecting of the order from which leave to appeal is sought. As a rule, leave to appeal presupposes that the case raises issues of principle. Leave to appeal may be limited to certain issues of principle, if it is considered that these issues can be decided separately in a manner convenient for the parties and the court.

Leave to appeal is not required regarding judgements delivered by either the Court of Appeal of Eastern Denmark or the Court of Appeal of Western Denmark as the court of first instance.

Judgments delivered by the Maritime and Commercial Court may only be appealed to the Supreme Court if the outcome of the case is of fundamental legal importance and of general importance to the application and development of the law or has significant societal implications in general, or if there are other special reasons why the case should be heard by the Supreme Court as the appellate court. The Supreme Court must ensure on its own initiative that these conditions for appealing to the court have been met.

In the event leave to appeal is not granted, the decision of the lower court stands.

*Leave to appeal is required in most of the court's cases in order for the case to be able to be tried on the merits.*

*However, leave to appeal is not required, for example, in certain cases in which the Supreme Administrative Court, as a court of first instance, re-tries the decision of the lower court. This includes, among other things, cases concerning judicial review of certain decisions by the government and cases involving advance rulings in respect of certain tax issues.*

*The Supreme Administrative Court may grant leave to appeal either where there is a need for legal precedent regarding the question involved in the case or there are extraordinary reasons for such an examination. Extraordinary reasons for granting leave to appeal may be that the outcome in the administrative court of appeal is due to a grave omission or a mistake which is not related to the legal examination. This may involve, for example, situations in which the court has applied the wrong law or a decision has been taken by someone who does not have the authority to do so. Leave to appeal may be limited to apply to a certain issue in the case of which is of importance for the guidance of the application of*



*law (precedential issue). In the event leave to appeal is not granted, the decision of the lower court stands.*

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)?

No.

*Leave to appeal is, as mentioned earlier, required in the vast majority of all cases received by the Supreme Administrative Court. A clear majority of the claims regarding requests for a preliminary ruling are thus made in cases in which leave to appeal is required. The question whether a request for a preliminary ruling shall be made is examined prior to a decision to not grant leave to appeal or before it conclusively decides a case after leave to appeal has been granted. The routines described above in question 14 apply in all cases in the court, irrespective of whether a requirement for leave to appeal has been prescribed or not.*

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?

In 2 of 8 cases permission from the Appeals Permission Board has been required for the case to be admitted for adjudication (please see the response to question 26).

*In 9 of 16 cases, while other cases pertain to so-called advance rulings (tax law).*

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?

No.

*Please see the response to question 18.*

#### 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.



When the CJEU has issued its judgment, the parties to the national case are given the opportunity to comment on the ruling. Thereafter, the parties are also given the opportunity to comment on the submissions made by the other parties.

Then the youngest Justice (in terms of appointment) participating in the specific case will conduct a deeper legal analysis of the questions in the case considering the judgment from the CJEU. Thereafter, the case is presented orally for five Justices who, following one or more deliberations, issue a ruling in the case.

*When the CJEU has issued its judgment, the parties to the national case are given the opportunity to comment on the ruling. Thereafter, the parties are also given the opportunity to comment on the submissions made by the other parties.*

*The judge referee in the case thereafter conducts a deeper legal analysis of the questions in the case in light of the judgment from the CJEU. Thereafter, the case is presented orally, as a rule, for five Justices who, following one or more deliberations, issue a ruling in the case.*

*The Supreme Administrative Court's final ruling, together with information regarding the case number of the CJEU, is sent by e-mail to the CJEU.*

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.

*As a rule, it has not been difficult, but there have been some exceptions. For example, the court had some difficulties understanding the ruling from the CJEU in Skellefteå Industrihus ([CURIA - List of results \(europa.eu\)](#)).*

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.



*In addition to the examples already provided, mention may be made of whether the CJEU has provided a direct answer to the questions referred or whether the CJEU has instead provided a more general account of the relevant EU law regime and subsequently left the application up to the national court in the individual case.*

*Clarity is also affected by whether the request was handled by the CJEU by means of a simplified procedure in which the answer to the questions referred are to follow the established case law or otherwise admits of no reasonable doubt, but it is not yet clear how the questions will be answered in the individual case. Other factors which may affect clarity are whether the language versions of the preliminary ruling differ and whether CJEU has not correctly understood the national legal regime or the factual circumstances in the case.*

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.

#### 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.

*The Commission initiated an infringement procedure against Sweden in 2004. In an explanatory statement to the Swedish government the Commission submitted that the low number of cases in which Swedish courts make requests for preliminary rulings from the CJEU constituted a Treaty violation. In addition, the Commission emphasised that the fact that the Supreme Court and the Regeringsrätten (now, the Supreme Administrative Court) did not reason their decisions to not grant leave to appeal in a case made it impossible for the Commission to verify compliance with the obligation to make requests for preliminary rulings in accordance with the CILFIT criteria. This all led to Sweden adopting new*



*legislation that imposed an obligation for courts of last instance to state the reasons in cases where they rejected a party's claim to request a preliminary ruling from the CJEU (see the reply above to question 10). Following the legislative amendment, the Commission concluded the infringement procedure.*

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.

