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

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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)?

Högsta förvaltningsdomstolen, the Supreme Administrative Court.

Bundesverwaltungsgericht, Federal Administrative Court.

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

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

Administrative Law without tax law and social law.

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 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).

The Federal Administrative Court, the Federal Court of Justice, the Federal Fiscal Court, the Federal Labour Court and the Federal Social Court.

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

Slightly more than 7,000 cases.

1,000 - 1,500

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

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16.

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

   X **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.

Environmental law and migration law. The reasons can only be estimated: The number of cases and even more so the density of regulation in EU law. (*nota bene*: Fiscal cases are another large group of preliminary rulings, but they are treated at the Federal Fiscal Court).

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?

   X Yes

   ○ **No**

   If "yes", did the CJEU grant the request or requests?

   ○ Yes

   X No

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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.

The Federal Administrative Court asked for an expedited procedure by the Court of Justice relying on Art. 105 of the Rules of Procedure by its order of march 23, 2017 (ECLI:DE:BVerwG:2017:230317B1C17.16.0). The Court of Justice rejected the petition based on Art. 105 (para. 55), and gave its preliminary ruling on March 19, 2019 - two years after the Art. 105 request (C-297/17, C-318717, C-319/17 and C-438/17).

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?

- o Yes
- X **No**

If "yes", did the CJEU grant the request or requests?

- o Yes
- o 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?

- o **Yes**
- X No

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

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**
    - X 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 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 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.

The parties can at any stage of the proceedings suggest a request for a preliminary ruling. There is no need for a formal request of the parties themselves since any court is under the obligation to examine *ex officio* if a request of a preliminary ruling is necessary. If a court should infringe its obligation to pose a request of a preliminary ruling to the Court of Justice this would be considered a deprivation of the jurisdiction of the "lawful judge" (which in this case would be the Court of Justice) provided for by the German Constitution. This could be challenged before the Federal Constitutional Court.

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**
- X 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.

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.

There is no specific procedure. The court could at any time of the proceedings - and after hearing the parties - intercept the proceedings and request the preliminary ruling. Usually, but not necessarily this would take place after the public hearing of the case. The court would - instead of giving its final decision - render a decision to intercept proceedings and request a preliminary ruling of the Court of Justice.

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 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.

The court will apply the CILFIT criteria to the case. In this context the most difficult task is to decide what really is claire or éclairé.

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

   - ○ Yes
   - X **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?

   - X Yes
   - ○ **No**

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

The Federal Ministry of Justice is informed of every request after it has been adopted.

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.

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.

The court applies the criteria developed by the Court of Justice and will explain its findings in the final ruling. More or less extensive reasoning is part of the courts culture. It is also provided for by the law.

19. Following the ruling of the CJEU in *Consorzio* 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
   - X **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?

   - X Yes
   - ○ **No**

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

See answer to question 12.

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?

   - X Yes

- **No**

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

If a party seeks to challenge a lower court's decision to not request a preliminary ruling by the Court of Justice it has to challenge the final ruling of this court in the regular appels' proceedings. Part of the reasoning will be that the case must be subject to a preliminary ruling. If the party is right with this argumentation the higher court will have to request the preliminary ruling. If it is not right the claim/appeal will be rejected.

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
- X 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?

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.

The wording of the question has to grasp its relevance for the case. Otherwise it could not be asked, it would be inadmissible. This usually causes a certain degree of precision in the wording. Since the Court of Justice does not always answer the questions the way they were

asked ("with these questions the national court really wants to know…") the court tries to find a wording of the questions which allow little deviations by the Court of Justice. In rare cases questions were asked a second time since the first ruling by the Court of Justice did not fully give the answers looked for - at least from the point of view of the national court.

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)?

X **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 (please see the response to question 23 as regards the contents of a request).

Before a request of a preliminary ruling the parties are to be heard. The court will consider their arguments in its reasoning to the Court of Justice, if these arguments are of relevance.

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)?

X 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 correct answer would have been "sometimes". This is very much under the discretion of the deciding judges.

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?

X **Yes**
o 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 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.

The German Administrative Court procedure has a double filter system which provides for a leave to appeal procedure as an access barrier before the Higher Administrative Courts and before the Federal Administrative Court. In both instances leave to appeal may be granted by the iudex a quo (the court responsible for the contested decision) as well as by the iudex ad quem (the court competent to decide the appeal). Either one of them can make a decision granting leave to appeal which is binding for the court which has to decide the case.
German Administrative Court procedure is generally governed by the principles of ex officio investigations and iura novit curia. This means that the court will investigate the facts of the case out of its own motion and it will apply the law which it deems applicable to the case, irrespective of the pleadings of the parties. Yet, in the leave to appeal procedure the law obliges the court to only consider the asserted reasons with the arguments brought forth by the complaint. Even if the court sees ground for the merits of the case it will have to reject the complaint if it has not properly presented the respective argument. If leave to appeal is granted the principles of investigation ex officio and iura

novit curia will fully apply, with the restriction that the Federal Administrative Court does not investigate facts in appeals cases.
The reasons which the law provides for granting leave to appeal may be divided into two groups. They are listed in the Code of Administrative Court Procedure, Sec. 124 para. 2 for the Higher Administrative Courts and in Sec. 132 para. 2 for the Federal Administrative Court. One group of reasons has to do with single case justice whereas the second group lays the focus on the unified interpretation and application of the law. Reasons for granting leave to appeal which belong to the first group are serious doubts as to the correctness of the judgment, special factual or legal difficulties or procedural shortcomings. The two first mentioned reasons are only to be considered granting leave to appeal to the Higher Administrative Courts, which also bear responsibility for the investigation of facts and are therefore much closer linked to single case justice. Before the Federal Administrative Court procedural shortcomings are the only reasons for granting leave to appeal related to single case justice. They may also be the basis for directly remitting the case to the Higher Administrative Court. The main focus of the Federal Administrative Court is that of the unified interpretation and application of federal law. Therefore two further reasons for granting leave to appeal are the fundamental significance of the case and the deviation from a judgment of the Federal Administrative Court. The latter two reasons are also being applied granting leave to appeal to the Higher Administrative Court.

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)?

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.

No.

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

There is no serious ground for an estimation. In all appeals cases leave to appeal has to be granted. Next to this, there are some first instance cases at the Federal Administrative Court, especially in the field of important urban and regional planning. Some of the requests for preliminary rulings stem from these cases.

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?

Please see the response to question 18.

See answer to question 26.

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. *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.*

After the judgment of the Court of Justice the previously intercepted procedure is reactivated. The parties will have the right to give further comments, sometimes they consider the case "solved" after the preliminary ruling. If not, the court will have (another) public hearing and decide the case.

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)?

X **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)*.*

See answer to question 23. There was also the case that the Federal Administrative Court found that the Court of Justice had not well understood the question it had been asked (Federal Administrative Court, Judgment of November 30, 2020, ECLI:DE:BVerwG:2020:301120U9A5.20.0, para 31: "...The Court of Justice may not have been fully aware of the purpose of the relevant referred question, as this question related exclusively to the two announcement errors, but not to other procedural errors in connection with the prohibition of deterioration under water law. However, the Court of Justice made it clear that ..."

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.

See answer to question 23. It is most important that the Court of Justice gives a clear answer to the question that was asked. Therefore, it should not reformulate the question.

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
X **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**

X 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

X 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.