

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



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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)?

The Supreme Court of Ireland.

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

As set out in Article 34 of the Irish Constitution, the Supreme Court is the court of final appeal in all matters of law and also the final arbiter of constitutional issues. Therefore, the Supreme Court is competent to rule on any branch of law when it arises before the court.

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 Constitution of Ireland (Article 34) provides for the establishment of three "Superior Courts" of Ireland, made up of the Supreme Court, Court of Appeal, and High Court. The superior courts have an obligation to refer a question to CJEU for a preliminary ruling (where necessary) before it concludes a case.

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

There were on average 165 applications for leave to appeal filed per annum in the Supreme Court over the past four years.



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

There was a total of 28 Article 267 referrals made during this period (including one case referred twice, *Klohn v. An Bord Pleanála & Anor*).

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

- Yes**

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.

Areas such as environmental law and planning law would stand out as a branch where preliminary rulings would be more frequently requested. However, preliminary rulings can arise in any area of law before the 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.

In the vast majority of cases in which preliminary references have been made by the Supreme Court, the determination of the case raises question(s) concerning the correct interpretation of EU law, usually an EU Directive, and not as to the validity of an EU act itself.

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**

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

- Yes**



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.

In cases C-428/15 (*Child and Family Agency v. JD*), C-508/18 (*Minister for Justice and Equality v. OG and PI*), C-509/18 (*Minister for Justice and Equality v. PF*) and C-480/21 (*The Minister for Justice and Equality v. WO and JL*) and C-142/22 (expedited or urgent procedure requested)

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**

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

- Yes**

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.

In cases C- 376/14 (*C v. M*) and C-479/21 (*SN and SD v. Governor of Cloverhill Prison*).

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?

- No**

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

- No**

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?



A party to a case can make submissions to the court as to whether a reference is necessary. However, the decision as to whether to refer lies with the court. In [Kelly v. National University of Ireland \[2008\] IEHC 464](#), the High Court stated “[...] no party to an action has the right to insist upon a reference being made or to assert a right of veto against the making of such a reference.” Likewise, the Supreme Court in [Merck Sharp & Dohme Limited v. Clonmel Healthcare Limited \[2022\] IESC 11](#) noted that a national court, in assessing whether or not to refer questions regarding the interpretation of European law to the CJEU, “cannot be compelled to do so by either the CJEU or the parties in question.”

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.

- **Both are equally common**

14. Briefly describe what the procedure looks like when your court consider requesting a preliminary ruling from the CJEU. ¹

The question of whether there should be a preliminary reference in a particular case may be raised by the parties in their written submissions. Alternatively, the court itself may raise the issue during the appeal hearing. Normally the court will reserve its judgment after the oral hearing of the case and when it delivers judgment and has decided that there requires to be a reference it appends to its judgment a draft of the reference it proposes to make.

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?²

¹ 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.

² 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 refers to the decision of the CJEU in [Conorzio Italian Management](#) (Case C-561/19, EU: C:2021: 799) and, in view of the comments of that court (at paragraph 51) regarding the extent of that duty, will make an assessment as to whether a request to the CJEU should be made.

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

- No

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?

- No

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)?³

While a party to a case can make submissions to the court as to whether a reference is necessary, ultimately, a decision as to whether to refer lies with the court.

In refusing such submissions, the court will have regard to the obligation of the court of last instance to refer a question to the CJEU for a preliminary ruling. The leading authority of the court's obligation to make a preliminary reference is [Merck Sharp & Dohme Limited v. Clonmel Healthcare Limited \[2022\] IESC 11](#). In that judgment, the court (in reference to Case 283/81 CILFIT) ruled that this obligation was not absolute and arose unless, *inter alia*, "the correct application of Community law is so obvious as to leave no scope for any reasonable doubt". Likewise, the court highlighted in that judgement, in reference to the ruling of the CJEU in Case C-561/19 Consorzio Italian

³ 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.



Management, Catania Multiservizi SpA v Rete Ferroviaria Italiana SpA [2021],
that:

“ [...] a reference is an obligation in European law which a court of final appeal should always bear in mind as its sole responsibility, whether contended for, mentioned, or opposed by the parties before that court in any relevant controversy. Furthermore, the form of the reference and the questions raised are a matter for the court holding that responsibility.”

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?

- 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?

- No**

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?

- No**

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)?

- No**

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.⁴

It is solely a matter for the Supreme Court to decide if there requires to be a preliminary reference in a particular case. If the court decides to request a preliminary ruling to the CJEU, it (generally) formulates the question(s) itself and gives the parties an opportunity to submit observations on the question(s) proposed. However, it is solely a matter for the court to decide whether any observations submitted would result in any change to the question(s).

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

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

The Supreme Court is a Court of Final Appeal, and subject to certain specific exceptions, has appellate jurisdiction only (Article 34.5.1. of the Irish Constitution). The Supreme Court hears appeals from the Court of Appeal and "leapfrog" appeals from the High Court. There is no right of appeal to the Supreme Court. Instead, the court itself determines which appeals it will hear from either the Court of Appeal or the High Court based on considerations of importance and justice.

The Application for Leave ("AFL") is a prescribed form that a party who wishes to appeal a decision from the Court of Appeal of the High Court completes. The AFL form requires the Applicant to set out the matters alleged to be of general public importance and in the interests of justice that justify an appeal to the Supreme Court ([Practice Direction SC 19](#) sets out the procedure to be followed to file an application for leave to appeal). An AFL also affords applicants an opportunity, "If it is contended that it is necessary to refer matters to the Court of Justice of the

⁴ 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?



European Union” to “identify the matter and set out the question or questions which it is alleged it is necessary to refer”.

The preliminary reference request itself is very similar to a regular judgment. A judgment is written and delivered in court where the parties are told that the court is referring a question of law to the CJEU. Sometimes the parties are invited to contribute to the phrasing of the questions.

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

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.

For urgent and expedited preliminary references, sometimes the judge will provide a sample answer (in accordance with the Article 107.2 of the Rules of Procedure of the Court of Justice) so as to assist the CJEU better understand the context, urgency and importance of the question asked, as well as to underline the implications or legal effect that an answer from the CJEU might have.

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

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.

As outlined above, Article 34 of the Irish Constitution prescribes the jurisdiction of the Supreme Court. Article 34.5.1° provides that the final court of appeal shall be called the Supreme Court. Article 34.5.3 of the Irish Constitution prescribes the threshold that is to be met in order for an ‘ordinary’ appeal to be considered by the Supreme Court, as follows:



“The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the Court of Appeal if the Supreme Court is satisfied that:

- (i) the decision involves a matter of general public importance, or
- (ii) in the interests of justice, it is necessary that there be an appeal to the Supreme Court.”

Article 34.5.4 of the Irish Constitution prescribes the threshold that must be met in respect of a ‘leapfrog’ appeal, that is, an appeal directly to the Supreme Court from a decision of the High Court. Article 34.5.4 provides, in respect of ‘leapfrog’ appeals that:

“[...] the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:

- i. the decision involves a matter of general public importance;
- ii. the interests of justice.”

While both ‘ordinary’ and ‘leapfrog’ appeals require the Supreme Court to be satisfied that either ‘the decision involves a matter of general public importance’ or that it is ‘in the interests of justice it is necessary that there be an appeal to the Supreme Court’, according to the provisions of Article 34.5.4, in the case of ‘leapfrog’ appeals, the Supreme Court must also be satisfied that there are ‘exceptional circumstances warranting a direct appeal to the Supreme 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)?

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?



As outlined above (question 5), there have been 28 Article 267 referrals made during this period. In all cases leave to appeal would have been required in order for the case to be admitted for adjudication.

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

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.

The case is generally listed for case management before the case management judge to determine what issues, if any, remain for determination in the case. If there are any issues remaining, directions are usually given as to the filing of written submissions and other necessary documentation, and the matter is then listed for hearing before the court. If there are no issues, the matter is listed for final orders (usually on the consent of the parties) before the court.

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)?

No

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 to 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?

- No**

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?

- No**

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?

- No**

