

**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 9–10<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 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)?

*Consiglio di Stato – Council of State*

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

*Administrative law in disputes concerning public services, urban planning and construction, environmental protection, public procurement for awarding contracts for public works, supplies and services, competition law, electronic communications and, in general, independent authorities, administrative authorities (national, regional and local), army, navy, air force and police personnel, concession contracts, state concessions (beaches, ports, etc.), civil service recruitment procedures, career and status of judges, etc.*

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 Court of Cassation, the Council of State and the Court of Auditors.*

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

*10.209 p.a.*

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

*About 300.*

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.

*Public contracts, competition law, environmental law*



*Public contracts, competition and environmental cases are a relatively large case group in the court in respect of which legislation is primarily based on EU law (directives and regulations). One possible explanation may be that these cases involve many relevant procedural and substantive 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.

4.

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.

*C-402/18 Tedeschi e Consorzio Stabile Istant Service*

*This request for a preliminary ruling concerns the interpretation of Articles 49 and 56 TFEU, Article 25 of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in relation to national legislation limiting the possibility of subcontracting to 30% of the total amount of the contract and preventing the prices which apply to subcontracted services from being reduced by more than 20% by comparison with the prices stipulated in the decision awarding the contract.*

*The Council of State justified the request for an “expedited preliminary ruling procedure” alleging that the case involved a matter of principle; furthermore, the public contract at issue in the main proceedings was intended to ensure the smooth functioning of “La Sapienza” University in Rome.*

*The President of the Court of Justice rejected the request (order of 18 September 2018), considering that the nature of the case did not require to be dealt with within a short time.*

*The decision is based - in short - on the following reasons.*





*First, the significant number of subjects and legal relationships potentially affected by the judgement of the Court is not an event suitable to justify the expedited preliminary ruling procedure.*

*Second, this procedure could not be determined by just the urgent need for ending public works planned.*

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.

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).



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.*

*According to the latest jurisprudence (Council of State, IV Section, 4 April 2022, n. 2446) this possibility should be granted up to 30 days clear (or 15 in special proceedings regulated under articles 119 e 120 of the administrative trial code), before the date of the public hearing. It is the same term established for submitting final briefs.*

*Sometimes the parties make a request for a preliminary ruling in public hearing, considering that the question may be raised “ex officio” as well.*

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 request is discussed immediately after the public hearing and decided, as usual, by a panel of five judges, together with all the other issues involved.*

*After the public hearing the decision to reject a claim is not preceded by any communication with the parties.*

*The decision (with all its grounds) shall be made official, through its publication, within the following 45 days.*

*There are no specific time frames for handling claims 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 make a request for a preliminary ruling, first, the court assesses whether the request for a preliminary ruling is relevant in the case. It is not common to specifically investigate how other member States have interpreted the provision and other language versions rarely are consulted. Generally, the court identifies the relevant provisions and verifies the manner in which it, or neighbouring questions, have been interpreted by the CJEU or, in some cases, by Commission interpretative communication.*

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.

*When the court rejects a party's claim for a preliminary ruling, usually refers to "Cilfit" criteria. Sometimes the Court finds the claim for a preliminary ruling not relevant in the case or not useful for dealing with the legal situation.  
Generally, this happens when EU law does not apply to the case or the claim concerns issues of fact raised in the main proceedings.*

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**

*However, it should be noted that recently the CJEU (Grand Chamber, 21 December 2021, in case C-497/20, *Randstad Italia*), rejected the request for a preliminary ruling referred by the Supreme Court of Cassation seeking to establish whether EU law must be interpreted as precluding a provision of the Constitution of the Italian Republic (article 111, paragraph 8) which has the effect that individual parties cannot challenge the conformity with EU law of a judgment of the highest court in the administrative order (the Council of State) by means of an appeal before the highest court in the Italian judicial order (the Supreme Court of Cassation).*

*The CJEU considered that eighth paragraph of Article 111 of the Constitution, as interpreted in judgment No 6/2018 by the Italian Constitutional Court, limits, according to the same procedural rules, the jurisdiction of the Supreme Court of Cassation to hear and determine appeals against judgments of the Council of State, regardless of whether these are based on provisions of national law or of EU law.*

*In those circumstances, the CJEU held that such a rule of domestic law does not breach the principle of equivalence.*



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**

*However, it should be noted that the lower court's decision could be challenged on the basis of non-compliance with EU law and the parties have the possibility to, in their appeal to the Council of state – claim that the Court shall request a preliminary ruling from the CJEU.*

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

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**

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?

*According to the "Recommendations to national courts on the use of the preliminary ruling procedure", the Consiglio sets out the legal context (both Union law and national provisions), the facts, the main arguments of the parties and the Court's point of view. The questions are usually formulated in order to give the CJEU more details as possible and allow the Court to give a wide and complete ruling that helps to resolve the dispute.*





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.

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 Court's own view is considered as a form of cooperation with the CJEU.*

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.

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)?



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?

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?

#### 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.*

*Precisely, with a view of public hearing the parties may submit documents up to forty clear days before the hearing, briefs up to thirty clear days and present replies up to twenty clear days.*

*The Court thereafter conducts a deeper legal analysis of the questions in the case in light of the judgment from the CJEU. Thereafter, directly after the public hearing the case is discussed and the decision (with all its grounds) shall be made official, through its publication, within the following 45 days.*

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 case C-561/19, Consorzio Italian Management.*

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.

*Generally, clarity is affected by 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. Anyway, the interpretation of the judgement sometime is made easier by the opinion of the Advocate General, both in the event that his proposal has been accepted either than it has been rejected.*

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.

*As an example, after the judgment 23 January 2018, Hoffmann-La Roche and Others (C-179/16), the Council of State, by judgment No 4990/2019, dismissed the appeals. The Roche group and the Novartis group requested the Council of State, under Article 106 of the Code of Administrative Procedure, to review that judgment, arguing that it was vitiated by an error of fact within the meaning of Article 395(4) of the Code of Civil Procedure. The Council of State referred three questions to the Court of Justice for a renewed preliminary ruling. In particular, the third question sought to ascertain whether Article 4(3) and Article 19(1) TEU, and Article 267 TFEU, read in the light of Article 47 of the Charter, must be interpreted as precluding provisions of procedural law of a Member State which have the effect that, where the supreme court of the administrative system of that Member State gives a decision settling a dispute in which it had made a request to the Court for a preliminary ruling under Article 267 TFEU, the parties to that dispute may not seek a revision of that decision of the*



*national court based on the contention that the latter disregarded the interpretation of EU law provided by the Court in response to that request.*

*The Court of Justice held that the procedural rules of national law do not breach the principle of equivalence and the principle of effectiveness (Judgment 7 July 2022, C-261/21)*

## 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.

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**

