

**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



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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)?

*Qorti Kostituzzjonali (Constitutional Court); Qorti tal-Appell (Court of Appeal).*

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

The Constitutional Court deals mostly with human rights cases. The Constitutional Court is an appellate court but it also has original jurisdiction in certain matters, mostly dealing with electoral law.

The Court of Appeal hears appeals from courts of civil jurisdiction, including family law, property and successions. It also hears appeals on administrative matters including judicial review of administrative action.

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)?

No appeal lies from decisions of the Constitutional Court, the Court of Appeal and the Court of Criminal Appeal. These courts are therefore obliged to refer questions to the CJEU when the occasion therefor arises.

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

Constitutional Court: 220 in 2022 Court of Appeal: 460 in 2022.

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

Constitutional Court: Two (2) Court of Appeal: nil (0).

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.

Telecoms and method of judicial appointments.

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

None.

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

**No**

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

n/a

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?

**No**

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

n/a

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**



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

The matter is regulated by the "Reference made to the Court of Justice of the European Communities by Tribunals Order" - Legal Notice 282 of 2008 (Subsidiary Legislation 460.21) reproduced hereunder:

1. The title of this Order is the Reference made to the Court of Justice of the European Communities by Tribunals Order

2.(1) It shall be the responsibility of a Maltese tribunal, not the parties, to settle the terms of the reference to the Court of Justice of the European Communities. The reference shall identify as clearly, succinctly and simply as the nature of the case permits the question to which the tribunal seeks an answer. It is very desirable that language should be used which lends itself readily to translation.

(2) The referring tribunal shall in a single document scheduled to the order:

- (a) identify the parties and summarise the nature and history of the proceedings;
- (b) summarise the salient facts, indicating whether these are proved or admitted or assumed;
- (c) make reference to the rules of national law (substantive and procedural) relevant to the dispute;
- (d) summarise the contentions of the parties so far as relevant;
- (e) explain why a ruling of the Court of Justice of the European Communities is sought, identifying the EC provisions whose effect is in issue;
- (f) formulate, without avoidable complexity, the question(s) to which an answer is requested.

(3) Where the document is in effect a decree, as will often be convenient, passages which are not relevant to the reference shall be omitted from the text scheduled to the order. Incorporation of appendices, annexures or enclosures as part of the document shall be avoided, unless the relevant passages lend themselves readily to translation and are clearly identified.

(4) The referring tribunal shall ensure that the order of reference, when finalised, is promptly passed to the Registrar, Civil Courts and Tribunals, so that it may be transmitted to Luxembourg without avoidable delay.

(5) The title of the referring tribunal shall also be clearly stated.



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

**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).

No. LS 460.21 reproduced above is sufficiently detailed and clear..

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 request for a preliminary ruling may be made by the parties by application at any stage of the proceedings.

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**

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 party requesting a preliminary reference makes the request by written application before the court, stating the reason/s therefor and possibly also submitting a draft reference. A copy of the application is served on the opposite party which is given time to reply. The court (composed of all three judges who usually sit in the court) then considers the request and by motivated decision either accepts or rejects the request. If the request is granted the court prepares the reference and may, prior to submitting it, invite the parties to comment thereon or make suggestions for changes or additions. The final document is



then sent to the court registrar for onward transmission to the CJEU. There are no time frames set out by law.

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 court first examines whether an answer to the proposed questions is necessary or relevant for the determination of the main issue before it. It then proceeds to apply the other *CILFIT* criteria to determine whether a reference is necessary.

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

**Yes** (only when they are a party to the litigation)

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

Government or other branches of the executive may be involved only if they are parties to the suit in which request for reference is made. In that case they are treated like any other litigant as described in the answer to Q. 14 above.

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**

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

n/a



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 decision whether to accept or reject the request for a reference is always motivated. The main criteria are whether it is necessary or relevant for the purposes of the main issue before the court and whether the matter is sufficiently and unambiguously clear or has been already ruled upon in previous decisions 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** (the reason to accept the request is normally evident from the reference itself; a decision to reject the request is motivated in the decree rejecting the request)

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**

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**

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

Yes. Obviously, if the appeal cannot be granted there would be no point in appealing!



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)?

**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 matter is regulated in detail in SL 460.21 (Q. 10 above)

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 parties are given the opportunity to comment on the court's draft of the request for a preliminary ruling in its entirety (Q. 14 above).

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)?

**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.







SL 460.21 does not require that the referring court should state its own views on the question referred to 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**

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 not required for appealing final decisions of a lower court which dispose of all the merits of the action.  
Leave of appeal is required to appeal a decision which disposes of only part of the merits.  
Leave of appeal is also required to appeal certain interlocutory decrees.

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)?

Since the decision granting or rejecting a request for reference is delivered by interlocutory decree, leave of appeal is required.

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?

n/a. Appeal is only possible from decisions of lower courts. No appeal lies from decisions of the Constitutional Court and the Court of Appeal

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 court proceeds with the hearing of the case and treats the ruling as a binding statement of the law to be applied.

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**

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

n/a

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

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

Although CJEU judgments are not always paragons of clarity and sometimes the questions put are not answered directly (or the questions are "corrected" by the CJEU), on the whole they do provide sufficient direction.

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**

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?



**No**

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

n/a

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

**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.

