

**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
Conсорzio"***

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 Conсорzio*.

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

Naczelny Sąd Administracyjny, the Supreme Administrative Court

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

Tax, social security, financial aid to individuals, construction permit, spatial planning, business concessions and other permits, civil registration, civil status and citizenship, foreigners cases, state property management, environmental protection and other...

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)?

Administrative courts: voivodship administrative courts and the Supreme Administrative Court

courts of general jurisdiction: district courts, courts of appeal, The Supreme Court in civil, criminal, labour and social security, intellectual property cases.

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

Around 20,000 cases

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

48. preliminary rulings



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

- Yes
- No

If "yes", state the branch or branches of law and whether there is any reason why the number of preliminary rulings within that branch or branches stands out.

Value added tax

The reason for this is that value added tax cases represent a large group of cases in the Supreme Administrative Court (around 2,000 cases incoming to the Court every year) for which legislation is primarily based on EU law.

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?

- 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.

Judgement of the CJEU of 2 March 2021, C-824/18, ECLI:EU:C:2021:153



The case dealt with under the expedited procedure concerned the right of appeal to a court in individual cases concerning the exercise of the position of judge of the court of last instance of a Member State (Supreme Court).

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.

N/A

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.

Law on proceedings before administrative courts of 30 August 2002 (Journal of Laws 2023, item 259-consolidated text) contains a provision giving rise to an obligatory suspension of proceedings before an administrative court when a question is referred to the CJEU for a preliminary ruling (article 124 § 1.5). However, national law does not regulate the manner in which a legal question is posed to the CJEU. The courts cite Article 267 of the CJEU as the legal basis.



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 - request a preliminary question and propose the content of the 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.

- 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 procedure of consideration to request for a preliminary ruling does not differ from an ordinary proceeding before the Court. A party in a proceeding before the Supreme Administrative Court may request for a question for a preliminary ruling in her cassation





appeal or later, in the pending procedure or even during a public hearing before the Court.

If the court decides to put the question to the CJEU, it shall issue an order requesting for the preliminary ruling, in which it shall at the same time declare the proceedings to be suspended. Article 124 § 1.5 of the Law on Administrative Court Proceedings stipulates that when a question is put to the CJEU, the court shall suspend the proceedings *ex officio*.

The parties to the proceedings are not consulted on the content of the preliminary question to the CJEU. The court prepares the question by itself. The role of the party is limited to propose a question. The court is not bound by this proposal and does not consult on the next steps.

The rejection of a request for the preliminary ruling is examined in the final judgement, rather than in a separate decision.

In case of preliminary ruling request, the number of judges in the panel is the same as in ordinary panel. If a case is usually examined by a 3 – judges panel, the preliminary question is requested for by the same panel. It is thus possible that a single judge panel requests for such a preliminary question to CJEU.

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.

Usually, in order to determine whether there is a need in a certain case to 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. The Court usually does not investigate how other countries have interpreted the provision in question.

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

- Yes





- No

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

17. Are there ever any contacts between your court and the government or other branches of the executive power to inform about a preliminary ruling *after* it has been requested by your court?

- Yes
- No

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

18. How does your court state the reasons for rejecting a claim for a preliminary ruling (*cf.* question 29 below regarding cases where leave to appeal or other "filters" are prescribed)?

For example, is the reasoning, as a rule, based on the criteria established in the case law of the CJEU, (inter alia *CILFIT*) or does your court refer to additional criteria which do not follow directly from the Court's case law.

The obligation of the Supreme Administrative Court to justify the rejection of a party's claim to request a preliminary ruling derives from Article 267 TFEU, which establishes the obligation to ask such a question by a court from which judgments are not subject to appeal. In justifying its refusal to ask a question, the Court usually state why the legal problem in question does not satisfy the criteria laid down in Article 267 of the CJEU and the *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01)* for a preliminary question to be referred to the CJEU.

19. Following the ruling of the CJEU in *Conorzio* and of the European Court of Human Rights in *Sanofi Pasteur v. France* and *Rutar and Rutar Marketing d.o.o. v. Slovenia*, does your court give more extensive reasons for rejecting a party's claim to request a preliminary ruling?



- Yes
- No

20. Is it possible to appeal a decision of your court to make a request for/not make a request for a preliminary ruling?

- Yes
- No

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

21. Can a lower court's decision to make a request/not make a request for a preliminary ruling be appealed to a higher court?

- Yes
- No

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

22. Are there any differences in the procedure in your court for requesting a preliminary ruling when the question is raised in a case where the expedited or urgent procedure is applied (cf. question 8 and 9 above)?

- Yes
- No
- The procedure has not been applied



If “yes”, please describe in what way the procedure differs.

Formulation of the questions submitted to the CJEU

23. Briefly describe how questions to the CJEU in general are formulated when your court requests a preliminary ruling.

For example, are the questions formulated in a narrow way in order to provide the most concrete guidance possible in the case or in a more open way in order to give the CJEU more freedom to formulate its answer?

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. In some of the preliminary questions, the court also presents its own view as to the interpretation of the provisions of EU law.

Our court in said regard applies “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01)”

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.

N/A



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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 presentation of the General Court's own view of the case is solely within the competence of the judges who make the preliminary question. It can be presumed that some judges believe that presenting their own view of the case will help the CJEU to better doubt the national court. Failure to include their own view of the case, on the other hand, may be due to the divergent views of judges from the panel that is asking the question.

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.

N/A

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)?

N/A

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

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?

N/A

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 preliminary ruling, the Court takes up the suspended proceedings ex officio. The parties to the proceedings have the opportunity to comment on the preliminary ruling. The parties have the opportunity to comment on the submissions made by the other parties in that regard. The final judgment is issued in the same panel of 3 judges that made the request for preliminary ruling. In its final judgment, in its legal grounds the panel refers in detail to the argumentation of the Court of Justice and indicates how it applies the preliminary ruling to the pending case and how it affects the final outcome of 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)?

- Yes
- No

Not our Court but the courts of lower instance – first instance regional administrative courts has had difficulties understanding the specific consequences of the ruling from the CJEU on legal questions in the national case – the example is the preliminary ruling <https://curia.europa.eu/juris/document/document.jsf?text=&docid=73220&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=530887>

This circumstance has led to an inconsistency in case-law. It was only the decision of the Supreme Administrative Court that led to a unification of the case-law on the legal issue





which was the subject of the question referred for a preliminary ruling from the CJEU in C-414/07 case *Magoora* (ECLI:EU:C:2008:766).

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

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.

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

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

33. During the period 2012 to 2022, has it occurred that your court has considered it necessary to make a renewed request for a preliminary ruling concerning the same questions?

- Yes
- No

If "yes", briefly describe what gave rise to the renewed request.

V Miscellaneous



34. Has it occurred that an infringement procedure has been commenced against your Member State as a consequence of the fact that a preliminary ruling was not requested by a court in your State?

- Yes
- No

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

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

- Yes
- No

If "yes", briefly describe the matter and whether the proceedings led to legislative amendments or changes in routines for addressing questions regarding preliminary rulings by your court.

