

**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)?

Supremo Tribunal Administrativo - *Supreme Administrative Court*.

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

The Supreme Administrative Court is responsible for the judgement of disputes arising from administrative and tax legal relations in matters of public health, housing, education, environment, spatial planning, urbanism, quality of life, cultural heritage, when committed by public entities, as well to monitor the legality of rules issued by Public Administration bodies, under the provisions held by the Administrative or Tax Law (cf. article 4 of the Statute of the Administrative and Tax Courts).

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)?

In a case of reference for interpretation, the courts deciding in last instance are obliged to make a preliminary ruling to prevent the development of national case-law contrary to Community law.

In a case of a reference for validity, all courts (whether 1<sup>st</sup> instance, 2<sup>nd</sup> instance or Supreme Courts) are subject to the unconditional duty to refer the preliminary ruling to the CJEU, as national courts have no jurisdiction to evaluate European Union acts.

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

A total of 4 944 cases were brought before the Supreme Administrative Court in the three-year period of 2019-2021, being the annual average of 1 648 cases.

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

According to the data that was possible to collect, in the period under review, the Supreme Administrative Court issued 45 requests for preliminary rulings: 34 cases are now closed, and 11 cases are still pending<sup>1</sup>.

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

<sup>1</sup> Data gathered next to the European Union Judicial Network.



- 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.

Within the scope of the administrative litigation, the Supreme Administrative Court has, mainly, examined matters related to freedom of establishment and reprivatisation (TAP case); public works contracts (public procurement); freedom to provide services; bank resolution and liability (BES case), etc.

In the framework of tax litigation, the Supreme Administrative Court has, mainly, dealt with matters related to value added tax (VAT), personal income tax (IRS); circulation tax; dividends taxation, etc.

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

In the decision of 23 June of 2022, the Supreme Administrative Court ask the CJEU whether "the national law solution is in conformity with the EU Law, regarding the public procurement procedures in which there is a recourse to other entities' capacities to perform a service. Are the subcontractor's qualification documents or the submission of a declaration of commitment by the subcontractor, needed to be required, only, after the award of the contract?"

In this context, given the case urgent nature - article 36, no. 1, c) of the Procedure Code of the Administrative Courts and article 2 of the Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending the Council Directives 89/665/EC and 92/13/EC regarding the efficiency improvement of the resource procedures concerning the award of public contracts - it was requested that the case be dealt under the





expedited procedure provided by article 105, no. 1 of the Rules of Procedure of the Court of Justice.

Following this, the CJEU, by order of 10 January 2022, understood, regarding the request for an expedited procedure that: "having regard to the Court of Justice' decision to rule by reasoned order, in accordance with article 99 of the Rules of Procedure, there is no need to meet this request " (Decision no. C-469/22).

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)

Although the marked answer is negative, it should be noted that there is a "Practical Guide for Preliminary Ruling", published by the Centre for Judicial Studies (CEJ)<sup>2</sup>, which describes

<sup>2</sup> Available at <https://cej.justica.gov.pt/LinkClick.aspx?fileticket=vXTwRKirRk%3d&portalid=30>





how the request should be dealt with and, more specifically, how to send a 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 may raise the question of the reference for a preliminary ruling before the national judge, but only the national judge may refer the matter to the CJEU.

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.

In the Portuguese legal system, a reference for a preliminary ruling may be made at any time during the proceedings, after an adversarial procedure.

The question in the preliminary ruling has the nature of an incident in the main proceedings and, until the desired ruling is issued, the proceedings shall be suspended with regard to the delivery of the decision on the merits, without prejudice to pursue its regular course of action, in all matters that do not conflict with it (cf. articles 269 and 272 of the Code of Civil Procedure<sup>3</sup> applicable *ex vi* article 1 of the Procedure Code for the Administrative Courts (CPTA)<sup>4</sup>.

At the Supreme Administrative Court, the preliminary rulings are, for the most part, appreciated by a three-judge panel.

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?

<sup>3</sup> Approved by Law no. 41/2013, June 26, last amended by Law no. 23/2023, January 16.

<sup>4</sup> Approved by Law no. 15/2002, February 22, last amended by Law no. 56/2001, August 16.



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 national judge, which has the initiative power to reference a preliminary ruling, before deciding to make a reference, first assesses whether there is a question of interpretation or validity of a provision of European Union Law and, secondly, it assesses: (i) whether the resolution of that question is necessary for the decision of the dispute; (ii) whether there is an interpretation previously provided by the CJEU ("*acte éclairé*"); and (iii) whether the rule of European Union Law is entirely clear ("*acte clair*").

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 refusal is justified based on the exceptions set out in the "CILFIT" decision which relate to the following criteria: relevance of the question to the dispute judgment; existence of CJEU case-law on the matter ("*acte éclairé*"); complete clarity of the EU Law rule ("*acte clair*").





It is interesting to note that, the Supreme Administrative Court invoked the "CILFIT" decision, for the first time, in the late 1990's.

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?

The Procedure Code of the Administrative Courts (CPTA), referring to the powers of the rapporteur in first level proceedings in higher courts, allows (except for mere expedient orders) that the rapporteur's orders may be appealed to the conference (cf. article 27, no. 5).

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?

In Portugal there is the possibility to appeal against a preliminary reference order under article 149, no. 5 of the Procedure Code of the Administrative Courts (CPTA), which establishes the system for challenging interlocutory orders in administrative litigation, by virtue of which these orders can be challenged in the sole appeal to be lodged against the final decision, except in cases where a separate appeal is allowed under the Civil Procedure Code (CPC).

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?

Although there is no predefined way to formulate the preliminary ruling, the decision must contain: (i) a brief report on the dispute matter; (ii) the relevant national law and case-law; (iii) to list the factual material that calls for the application of European Union Law provision, identifying precisely the EU Law provisions relevant to the case; and (iii) substantiate the need for the reference.

The national court may, also, briefly state its view on the answer to be given to the questions referred in the preliminary ruling.

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.

Under the adversarial principle, the parties may comment on all aspects of the request.

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.







Within the preliminary ruling, the court should formulate the questions, clearly and distinctly, putting them in numbers and in a prominent place in the decision, preferably at the end of it. In that context, it may also briefly state its view on the answer to be given to the questions referred for a preliminary ruling. Such a statement will be helpful to the Court, particularly when it is called upon to deal with the request under an expedited or urgent manner, as indicated in paragraph 17 of the CJEU's recommendations.

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.

The Central Administrative Courts (TCA) is the normal instance for appeals, *i.e.* from the decisions made by 1<sup>st</sup> instance courts the appeal goes to the TCA's, provided that the proceedings are worth more than 5 000 euros and the contested decision is unfavourable to the appellant in an amount exceeding 2 500 euros, as provided in articles 6 and 37 of the Statute of the Administrative and Tax Courts and article 142 of the Procedure Code of the Administrative Courts (CPTA).

The powers regime of the appellate court obeys to the rules laid down in article 149 of the CPTA, more specifically:

- The appeal court, even if it declares the sentence null, does not fail to decide the subject matter of the case, knowing the fact and the law.
- If the appellate court has decided on the merits of the case, but failed to consider certain issues, the higher court shall, if it finds that the appeal is well-founded and that there is nothing to prevent it from considering those issues, it is aware of them in the same decision repealing the contested decision.
- If, for any reason, the appeal court has not dealt with the request, the appeal court, if it considers that the reason is unfounded and that there is no other reason to prevent it from hearing the case substance, deals with it in the same ruling in which it repeals the decision under appeal.
- In the mentioned situations there's room at the higher court to produce evidence, after hearing the parties within five days, is considered necessary, being applicable to the diligences ordered, with the necessary adaptations, the provisions regarding the instruction, discussion, allegations and judgement at 1<sup>st</sup> instance.

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)?



None.

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?

None.

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.

Once the preliminary question is decided, the referring court and the other courts who judge the cause at the appeal are bound by the findings of the preliminary ruling, as regards both its material and time effects.

Regarding the material effects:

a) Being an interpretative decision, the interpretation is incorporated in the rule it interprets, binding the national judge to apply it in the sense and scope defined in the preliminary ruling.

b) However, there is nothing to prevent national courts from asking new questions referred in a preliminary ruling on an act which has already been declared invalid in the past, if doubts persist regarding the grounds for or scope of the declaration of invalidity.

As regards the time effects:

The decisions by the CJEU, whether interpretative or of validity, do not have retroactive effect, given the uniform application of Community Law within the European area.

Finally, it is also stated that the final decision to be taken by the referring court must be notified to the CJEU.

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

The Supreme Administrative Court does not have available statistical data to reply, in a precise manner, to questions 31 to 35 of this questionnaire.

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.

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.

