

**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 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



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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)?

Înalta Curte de Casație și Justiție a României– The High Court of Cassation and Justice of Romania

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

As the highest court in Romania, the High Court of Cassation and Justice has the prerogative to ensure a unified interpretation and application of the law, having the power to pronounce, within the framework of two procedural mechanisms of unification of jurisprudence (the appeal in the interest of the law and the preliminary ruling on a question of law), decisions that are binding for all other courts. From this perspective, the High Court of Cassation and Justice exercises general jurisdiction over all legal issues arising from the application of the rules of positive law. As a court of law, the High Court of Cassation and Justice has jurisdiction in three main areas of law: civil law, criminal law and administrative and fiscal law.

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 High Court of Cassation and Justice, and, under national law, the courts of appeal and tribunals for those decisions which cannot be appealed against, according to their jurisdiction. Romania's judicial system comprises four types of courts: territorial courts of first instance (courts of first instance), ordinary tribunals and specialised tribunals, courts of appeal¹ and the High Court of Cassation and Justice. The High Court of Cassation and Justice hears, at first instance, criminal cases brought against certain categories of persons and appeals brought against first instance judgments concerning the same persons, as well as appeals in certain civil and administrative cases.

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

¹ Courts of appeal hear both cases referred to them at first instance (more complex cases) and on appeal, where appeals are lodged against decisions handed down by lower courts.



Over the last 3 years, more than 13,000 files have been registered each year.

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

25.

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.

Tax law, in particular in relation to the common system of value added tax, given the diversity and complexity of the cases.

There are a large number of value added tax cases before the courts and the applicable law is based on EU law, especially in cross-border activities.

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 five (related) references for preliminary rulings under Article 267 TFEU in criminal matters, the High Court of Cassation and Justice requested the CJEU to adjudicate on the preliminary references in these cases under the accelerated procedure, arguing in essence





that the situation of the defendants in the main proceedings requires a response within a short period of time and that the passage of time risks compromising the possible execution of the sentence.

In view of the nature of the questions referred, the President of the Court ordered that the cases be given priority, pointing to the existence of uncertainty as to the interpretation and application of European Union law in a large number of criminal law cases in which the expiry of the limitation period and, therefore, a systemic risk of impunity are at issue.

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.

The legal framework is provided by Law No 340/2009 on the formulation by Romania of a declaration based on Article 35(2) of the Treaty on European Union.

The court may, ex officio or on request, make a reference for a preliminary ruling on a question raised in a case of any kind, concerning the validity or interpretation of an act referred to in Article 35(1) of the Treaty on European Union, if it considers that a decision on the question is necessary to enable it to give a ruling in the case. A reference for a preliminary ruling shall be mandatory if the application is made to a court against whose



decision there is no longer any judicial remedy, if such a reference is necessary to enable it to give a judgment in the matter. In this case, the suspension of proceedings is also mandatory, and this provision is also included in the current Code of Civil Procedure.

According to the law, only the decision by which the court decides on the suspension of proceedings can be appealed to the superior court, not the decision rejecting the application to the CJEU.

The suspended case is resumed after communication of the judgment of the Court of Justice.

The court may not close the proceedings before the CJEU has delivered its judgment.

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?

In cases before the High Court, the parties may ask the court to make a reference for a preliminary ruling to the Court of Justice of the European Union.

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.



If a party or the court ex officio refers the case for a preliminary ruling, the panel deciding upon the case may grant a time-limit for the debate on the application for a preliminary ruling and the parties shall have the opportunity to present and defend their case. After the closure of the deliberations, the panel shall deliberate and decide by way of ruling whether to grant or reject the application. Should the court make a reference for a preliminary ruling to the Court of Justice of the European Union, it shall also order that the case be adjourned until a preliminary ruling is given. Consequently, we could not consider that there is a special procedure in the case of a reference for a preliminary ruling by the CJEU, since the rules applicable to any other procedural incident apply.

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 considering whether it is necessary to make a reference for a preliminary ruling, the High Court analyses the national and European Union law provisions which are relevant to the case, the relevance of the questions referred for a preliminary ruling with regard to the specifics of the case and carries out a thorough examination of the case-law of the CJEU on how to interpret the questions of law raised; it may also take into account any pending cases before the CJEU related to similar references for preliminary rulings made by courts in other countries.

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 conditions for submitting a reference for a preliminary ruling reflect the provisions of Title III of the Rules of Procedure of the Court of Justice. In its settled case-law, the High Court has consistently held that a reference for a preliminary ruling to the CJEU must be capable of clarifying certain questions relating to the interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union, which the national court may subsequently apply to the factual context before it.

In accordance with the considerations and jurisprudential landmarks of doctrinal value expressed by the CJEU, applications for a preliminary ruling were generally rejected if they exceeded the criteria set out in this regard and if they did not contain any sound arguments pointing to the objective need for interpretation of the Union law for the decision to be taken by the court or any serious dilemma concerning the interpretation of European law in relation to national rules.

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

According to the law, any ruling (which includes the ruling) of the court must be well considered.

Consequently, the judgement in which the court dismisses a party's request for a preliminary ruling will also contain the reasons why the court considered that a preliminary reference was not necessary, since the matters referred to can be determined from the interpretation of the relevant rules, in so far as they are not novel or difficult to interpret.



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 preliminary references are formulated properly depends on the degree of complexity of each individual case. A reference usually contains a summary of the object of the main litigation, as well as the factual background, the national provisions applicable to the case and those of Union law involved, the position of the parties, and the





considerations which have created the context as to the interpretation or validity of certain provisions of Union law.

The criteria for the use of terms in the way a question is set out aims to ensure that the style is precise and concise, as far as possible.

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.

During the debate on the reference for a preliminary ruling, the parties have only the right to discuss and argue the factual and moot cases set out in the application and to express their procedural position as to whether or not the application for a preliminary ruling should be granted or rejected, which is conferred by the principle of adversarial proceedings laid down by law, but they may not comment on the content of the reference for a preliminary ruling, as the court has the right to make such a 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.

The court's presentation of its position would be the equivalent of a real pre-judgment by delivered by the court on the final decision in the case, which would render the judge incompatible under the relevant legal provisions.

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.

Once the Court's judgment has been received, the case is reopened and may be followed by the delivery of the judgment or by the continuation of the case, depending on the type of response and the stage of the dispute.

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.

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.

No elements were found to have a significant impact on the clarity of the drafting of CJEU judgments, also in relation to the punctual wording of requests for preliminary rulings. However, one of the factors that could influence the clarity of the judgment would be the difference between the language versions of the preliminary ruling.

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.





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