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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

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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)?

Vrhovno sodišče Republike Slovenije, Upravni oddelek (The Supreme Court of the Republic of Slovenia, Administrative Law Department).

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

There is only one Supreme Court in Slovenia, meaning that all fields of law are addressed by this Court. In the Administrative law department of the Supreme Court are addressed cases of more than 80 administrative fields, including taxation, international protection, construction and environmental matters, (subsidiary) protection of fundamental human rights and freedoms and also legal questions of citizenship and other status rights, electoral matters, 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 Supreme Court and in certain cases Constitutional Court.

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

At Administrative department, almost 800.

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

The Administrative Law department: 15.

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 and international protection cases. No particular reason can be given.

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.

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

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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 Case C-490/16 the Supreme Court requested that request for a preliminary ruling be dealt with under the urgent procedure provided in Article 107 of the Court’s Rules of Procedure, but CJEU decided that it was unnecessary to grant that request. Later on, by decision of the President of the CJEU, the presented case was accorded priority treatment.

In case C-578/16, CJEU granted the court’s request and decided that the present reference for a preliminary ruling must be dealt with under the urgent preliminary ruling procedure.

The references for preliminary rulings in both cases were dealing with international protection.

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 Courts’ Act regulates only a few procedural rules for any court to request a preliminary ruling from CJEU. It states that any court may issue such a decision, but that the Supreme Court is obliged to do so under the rules of EU Law. In such cases the proceedings are suspended, and there is no legal remedy against such a decision taken by any court. The copies of preliminary questions are to be forwarded to the Supreme Court for its information.

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 their submissions to the Supreme court (in the appeal or revision procedure) the parties have the possibility to request/suggest to the Court that it should request a preliminary ruling from the CJEU and give their arguments in this regard. The Supreme Court will consider such a request on its merits if the procedural circumstances allow it.

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 decision to request a preliminary ruling forms a part on the judicial evaluation of legal questions of the case, meaning that there is no special procedure that would distinguish the issues arising from EU Law from those from the national law. The proposal of the party for the Supreme Court to request a preliminary ruling is therefore evaluated not as a separate procedural request that has to be decided in a separate decision of the Court, but as one of the legal arguments submitted by the parties. As explained above parties have

the possibility to state that the Supreme Court should request a preliminary ruling from the CJEU, but other than that there are no differences in the subsequent procedure from the case if the matter was raised ex officio by the Court itself. The only difference is that the Court would give its reasoned arguments about the parties' proposal in the motivation of the Court's final decision (why the case was or was not referred to the CJEU), whereas it would not always disclose all the ex officio questions raised in the proceedings, especially if the matter was not referred to CJEU.

If the request has been raised by a party in appeal or revision or is raised ex officio by the Court (when deciding on the merits of the case) and if the justice rapporteur is of the opinion that a question should be referred to the CJEU, a first draft of the request is presented to three justices, who decide whether a request shall indeed be made to the CJEU. Under just recently adopted amendment of the Act on Administrative Dispute, the Supreme Court will decide on revision (and whether the request shall be made to the CJEU) in a panel of five judges. In all cases, after the decision is made, the justice rapporteur prepares final formulation of the request for a preliminary ruling. Reasons for rejecting a parties' request for a preliminary ruling are (as mentioned above) given in the final ruling of the case. The decision to make a request is published on the Supreme Court's website.

The procedure is slightly different in cases requiring leave to revision when the Supreme Court first has to adopt a decision to grant such leave or not. Decision to grant a leave to revision is taken by three Justices. Please see also the answer to question 18.

Parties are not further involved in the decision-making process in any case. There are no specific time frames proscribed for handling claims to request preliminary rulings.

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, the Supreme Court conducts an analysis of the relevant provisions of EU Law and examines the jurisprudence of CJEU in relevant cases (mainly on the Curia website, but also in scientific texts, also in other Member States). It is also always examined whether there are already any similar pending cases before CJEU regarding questions for preliminary rulings from other States. Normally, it is not considered to be necessary to specifically examine how (all, many) other States interpret the relevant provisions in order to be able to assess whether the issue is acte éclairé/acte clair, but it is common to look at the practice of at least some of other Supreme Courts, if it is accessible.

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.

In general, to what extent the court gives reasons for a decision to reject the party's request depends on the circumstances of the individual case, but it is always based on CILFIT criteria. The final decision on the merits of the case will at least state whether the question raised is irrelevant, there already is sufficient guidance since the provision has been previously interpreted by the CJEU, or the correct interpretation of Union law is so obvious that there is no room for reasonable doubt.

But, when the proposal for the Court to request a preliminary ruling is raised by a party in cases requiring leave to revision, the Supreme Court first adopts a decision regarding such leave. In these cases the importance of legal issues arising from European Union law is assessed in the same way as those arising from national law – and in the context of broader importance of the case for the rule of law, legal certainty and uniformity of jurisprudence. If the Court decides not to grant leave to revision (please also see the response to question 27), it doesn't state the reasons doing so, so that such decisions do not have any motivation but that the Court has decided not to grant the leave. This is also valid if a party has proposed to make a reference for a preliminary ruling and raised questions of application of EU law. This means that the Supreme Court has exactly the same approach as with regard to Slovenian law, which is consistent with the principle of non-discrimination with regard to the protection of rights under EU law in national legal remedies.

However, just recently, with the development of jurisprudence, a distinction between the positions of the Constitutional Court and the Supreme Court, appeared on the above-mentioned point. The Constitutional Court ruled that the European Union law (specifically TFEU and the Charter) requires that Supreme Court provides reasons for not granting the leave to revision, which relate to the (dismissal of) party's proposal to make a reference to CJEU. That means that issue of making a preliminary reference based on the submitted proposal of a party (or not), should in view of the Constitutional Court already be considered in the decision-making process of granting a leave to revision.

Because of this development the Supreme Court has considered that an important question of the interpretation of EU law has arisen and has submitted an interesting reference for a preliminary ruling to CJEU. The questions are (unofficial translation):

1. *Does the third paragraph of Article 267 of the TFEU conflict with the regulation of the Civil Procedure Act, according to which the Supreme Court in the process of deciding whether to grant leave to revision does not perform an assessment, whether its obligation to refer a preliminary reference to Court of the European Union results from the submitted proposal of the party?*

   If the answer to the first question is positive, then also:

   2. Should Article 47 of the Charter regarding the requirement for courts' decisions to be reasoned, be interpreted in such a way that a procedural decision based on the Civil Procedure Act, rejecting a party's request for granting a revision, is a "court's decision" that must give reasons, why the party's proposal to refer a preliminary question to the European Court of Justice in the case is not to be accepted?

The matter is listed before CJEU with the number C-144/23 (Kubera).

19. Following the ruling of the CJEU in *Consorzio* 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**

Please also see the response to previous question.

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 only, and very limited option for a party is a constitution complaint. In Slovenia, the Constitutional Court decides on constitutional complaints stemming from the violation of human rights and fundamental freedoms by

individual acts. This includes complaints against the decisions of the Supreme Court. So, only if the Supreme Court doesn't respond to a party's claim for requesting preliminary ruling and doesn't fulfill its duty give related reasons, this could mean a violation of the rights to equal protection and access to the court under the Constitution.

Please see also the answers to questions 14 in 18.

Bottom line, the Constitutional Court may not interfere with the assessment of the Supreme Court regarding whether the proposal is relevant for decision-making from the point of view of the interpretation of the substantive or procedural law of the European Union, or whether the conditions for the referral to be made have been met or not in accordance with the CILFIT (Consorzio) doctrine.

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?

If the Administrative Court, which is not obliged to refer questions to CJEU (267.2 TFEU), decides to request a preliminary ruling and suspends its procedure due to the referral to the CJEU, no appeal against this decision can be made.

But if the Administrative Court doesn't follow party's claim to make a request for a preliminary ruling this can be contested in legal remedies against its final decision. The party can then argue (answer to question 26) before the Supreme Court that a violation has occurred, because Administrative Court didn't adequately respond to the application of European Union law in the case in question. The Administrative Court is obliged give a response to such a claim if it is relevant for the case and can do this by stating its own legal positions regarding the correct application of European Union law, otherwise the Supreme Court can determine a procedural violation and refer the case back to it.
Besides this possibility, the party can also repeat the claim in legal remedies to the Supreme Court.

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.

Yes, if possible, those cases are treated with priority, meaning they are resolved before other cases, submitted to the Supreme Court.

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 are formulated depends on the given case. The questions are usually formulated as precisely and concisely as possible, but there are always reasons given in the request that describe the wider context of the case and questions submitted, so that CJEU can give a broader answer if it deems necessary.

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 reason for not stating the court's own view is that it could be seen as prejudging the final outcome of the case. But in practice it is quite often possible do deduce the reasoning of the Supreme Court behind the questions 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**
    - 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.

In specific cases, determined by law, the Supreme Court decides as a court of first and last instance. In this way the Supreme Court e. g. decides on the legality of acts issued by electoral bodies for election to the National Assembly, the National Council and for electing the President of Slovenia.
Other than that, there are two types of legal remedies against a decision of the Administrative Court.

One is the appeal (pritožba) which is possible to the Supreme Court in cases specifically determined by an act of parliament and is possible with both a view to the facts and to the law, with certain limitations. The appeal has no filter but is possible only in cases determined by the act of parliament.

The second is the revision (revizija), that is subject to a special leave by the Supreme Court and preliminary assessment of its importance for the unification and development of the law. The leave to revision must be granted and it is possible solely with a view to the law and generally limited to answering a specific legal question of general importance for future development of judicial and administrative practice. In cases where the appeal is allowed by law, there can be no revision.

There is a special procedure to grant leave for a revision of a judgement of Administrative Court, where the Supreme Court decides in a panel of three justices. In the case of a positive decision the party is informed regarding the legal questions that will be examined in revision proceedings and is therefore instructed to bring the appropriate arguments in the subsequent revision lodged by it against the judgement of Administrative Court. Under just recently adopted amendment to the Act on Administrative Dispute, the Supreme Court will decide on revision (and whether the request shall be made to the CJEU) in a panel of five judges (before that, three).

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)?

The procedure described above in question 14 applies in all cases before the Supreme Court but only if it is deciding on the merits of the case, meaning in appeal or in revision against a decision of the Administrative court. In revision this means after leave has been granted - as to the question regarding the procedure to grant leave to revision, please look at the answer 18.

Leave to revision is required in the vast majority of all cases received by the Supreme Court. The basis for the decision to allow the revision derives from the objective importance of the case, above all ensuring the uniformity of judicial practice and the related resolution of important legal issues by the Supreme Court. It is obviously not excluded that the stated objective meaning is also based on issues related to European Union law, but the mere fact that European Union law will (perhaps) be used in the revision procedure or that a request for a preliminary ruling is made is not sufficient to grant the revision.

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?

In 4 cases, since the changes of the revision procedure under which the parties must file a request for leave for revision against a final ruling issued by the Administrative Court has only been valid from 2017.

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?

Yes. If the Supreme court decides not to grant leave to revision, it doesn't state any reasons for that decision and it is not relevant if the party has (also) submitted a claim for a preliminary ruling or not. Please also see the responses to questions 18 and 27.

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 usually not given the opportunity to comment on the ruling. But the possibility to give them a chance to comment or to give Supreme Court additional reasoning is not excluded.
The justice rapporteur in the case thereafter conducts a deeper legal analysis of the questions in the case in light of the judgment from the CJEU. Thereafter, the case is presented orally, for three (or five) justices who, following one or more deliberations, issue a ruling in the case.
The Supreme Court's final ruling, together with information regarding the case number of the CJEU, is sent (by e-mail) 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.

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.

In our view one of the factors which may affect clarity is the question of whether CJEU has (not) correctly understood the national legal regime because of specific language and terminology. We therefore try to provide adequate explanations. In practice the AG opinions contribute to clearer understanding of the CJEU reasoning.

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.

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.

But it has to be mentioned that just recently, in the judgment in the case of Rutar and Rutar Marketing, d. o. o., vs. Slovenia (21164/20, 15.12.2022) the ECtHR decided that first-instance misdemeanor court, which was the only one to decide the case on the merits, was obligated to give reason for its refusal to request a preliminary ruling from CJEU. ECtHR ruled that Slovenia has to pay applicant damages because of the omission.

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