

**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
Conorzio"***

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 Conorzio*.

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

The Supreme Court of the United Kingdom

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

The Supreme Court's jurisdiction is relatively wide: the Supreme Court hears civil appeals from England and Wales, Scotland and Northern Ireland, and criminal appeals from England and Wales, Northern Ireland and in certain circumstances from Scotland. The Supreme Court's jurisdiction is set out more fully in its Practice Direction 1, available here: [The Supreme Court of the United Kingdom | Practice direction 1 - The Supreme Court](#).

A breakdown of the Supreme Court's judgments by subject for the period 1 April 2021 to 31 March 2022 is available here: [Annual Report and Accounts 2021–2022 \(supremecourt.uk\)](#) (see page 101). This is the most recent period for which data is publicly available.

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)?

*Article 267(3) binds the highest available court or tribunal in the particular proceedings, rather than the highest court or tribunal in the jurisdiction (see, for example, Hoffmann-la Roche AG v Centrafarm Vertriebs-Gesellschaft Pharmazeutischer Erzeugnisse mbH (Case 107/76) [1977] 2 CMLR 334, paras 5-6). There is, therefore, no definitive list of courts which fell under the obligation to refer under article 267(3) prior the UK's withdrawal from the EU on 31 December 2020 ("**end of the transition period**")^{1;2}. As the Supreme Court is a court*

¹ Notably, prior to the end of the transition period, the Civil Procedure Rules for England and Wales stated that a reference "should not normally be made" in the High Court by a Master or District Judge, or in the County Court by a District Judge (Civil Procedure Rules, Rule 68.2, as in force on 29 December 2020).

² The withdrawal of the UK from the EU on 31 January 2020 was followed by a transition period which ran from 31 January 2020 to 31 December 2020 during which substantive EU law continued to apply directly in the UK (see the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7 ("**Withdrawal Agreement**"), article 127). Throughout the transition period, the preliminary ruling procedure remained in force (see the Withdrawal Agreement, article 131).



of last instance, it was obliged to refer relevant questions of EU law to the CJEU prior to the end of the transition period.

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

For the financial years 2017/18 to 2021/22, the average number of incoming cases registered at the Supreme Court was 287 per year (see the Supreme Court and Judicial Committee of the Privy Council Annual Report and Accounts 2021-2022, page 90).

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

17.

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.

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.

No such references were made.

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**

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.

Although not formally referred under the urgent preliminary ruling procedure, the Supreme Court in its judgment of 14 February 2018 in SM (Algeria) v Entry Clearance Officer, UK Visa Section [2018] UKSC 9 "hoped" that the reference would be dealt with as a matter of urgency. The CJEU gave its ruling on 26 March 2019.

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.

*Since the end of the transition period, courts and tribunals in the UK are prohibited by section 6(1)(b) of the European Union (Withdrawal) Act 2018 ("**2018 Act**") from making references to the CJEU. However, this must be read subject to the provisions of sections 7A and 7C of the 2018 Act, which give effect to the Withdrawal Agreement.*

Article 158 of the Withdrawal Agreement makes provision for certain references from courts and tribunals in the UK concerning Part Two of the Withdrawal Agreement (see the Withdrawal Agreement, articles 9 to 39). Article 158(2) provides that the CJEU shall have jurisdiction to give preliminary rulings on such references and that the legal effects in the UK of such preliminary rulings shall be the same as the legal effects of preliminary rulings given pursuant to article 267 TFEU.





Additionally, the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement (“Protocol”) makes special provision for future references to the CJEU. Article 12(1) provides that the authorities of the UK shall be responsible for implementing and applying the provisions of EU law made applicable by the Protocol to and in the UK in respect of Northern Ireland. Article 12(4) then provides that “[a]s regards the second subparagraph of paragraph 2 of this Article, Article 5 and Articles 7 to 10, the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.”

The Withdrawal Agreement also envisages the possibility of a reference concerning the interpretation and application of EU law referred to in articles 136 and 138 of the Withdrawal Agreement relating to continuing budgetary obligations (see article 160).

In England and Wales, prior to the end of the transition period, the rules governing the making of references in civil litigation for most courts (but, notably, not the Supreme Court) were contained in Part 68 of the Civil Procedure Rules and Practice Direction 68 (until 30 December 2020). The rules governing the making of references in criminal litigation (in courts below the Supreme Court) were contained in Part 44 of the Criminal Procedure Rules (until 5 October 2020). Each of these sets of rules contained the principal requirements for requesting a preliminary ruling. There is no equivalent to these sets of rules following the end of the transition period.

The Supreme Court has its own rules of procedure. Rule 42 of the Supreme Court Rules and Practice Direction 11 (available here: [The Court of Justice of the European Union | Practice direction 11 - The Supreme Court](#)) continue to govern the making of references to the CJEU. Practice Direction 11 was amended following the end of the transition period.

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).

Rule 42 of the Supreme Court Rules and Practice Direction 11 set out the relevant procedure. Rule 42 is concerned to a limited extent with the procedural handling of a request for a preliminary ruling. Practice Direction 11 is more concerned with the substantive assessment (see, for example, paragraphs 11.1.3 and 11.1.4), but also, to some extent, the procedural handling of requesting a preliminary ruling (see, for example, paragraph 11.1.6).



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 the Supreme Court, following the end of the transition period, no particular rules apply as to how parties may claim that the court should refer a question for a preliminary ruling from the CJEU (see Practice Direction 11). This was also the case prior to the end of the transition period (see Practice Direction 11, as in force on 30 December 2020)³. However, there is an opportunity on the Supreme Court's standard form application for permission to appeal and on its standard form notice of objection and notice of acknowledgment for a party to indicate that they are asking the Supreme Court to make a reference to the CJEU, with room for further detail to be given (see pages 9 and 6, respectively).

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 considers 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.

One or more parties to a case will normally indicate that they are seeking that the Supreme Court refer a question for a preliminary ruling from the CJEU (see question 12 above). Assuming that is the case, the application will first be considered by an appeal panel of three Justices. The Supreme Court may order a reference to the CJEU before determining whether to grant permission to appeal (Practice Direction 11, paragraph 11.1.6). Rule 42(2) of the Supreme Court Rules provides that where the appeal panel decides to make a reference under article 267 before determining the application, it will give consequential directions as to the form of the reference and the staying of the application (but it may if it thinks fit dispose of other parts of the application at once). When the Supreme Court refuses

³ c.f. the position in most other courts in England and Wales (see Rule 68.2 of the Civil Procedure Rules as in force on 29 December 2020 and Rule 44.2 of the Criminal Procedure Rules as in force on 4 October 2020).





permission to appeal in a case where the application includes a contention that a question should be referred to the CJEU, the Supreme Court gives additional reasons for its decision not to grant permission to appeal (see Supreme Court Rules, Rule 42(1) and Practice Direction 11, paragraph 11.1.5).

If the Supreme Court grants permission to appeal but decides not to make a reference to the CJEU at that stage, it may hear the parties' submissions on the question of whether or not to make a reference at the hearing or may request written submissions in advance of the hearing. Hearings are normally held before panels of five Justices.

When the Supreme Court intends to make a reference, it will give consequential directions as to the form of the reference and the staying of the appeal, and the parties are invited to submit an agreed draft of the question(s) to be referred. A further statement of facts and issues, for the use of the CJEU, may also be requested from the parties. The Supreme Court then makes the reference, with or without judgments. At this stage the appeal may also be disposed of in part (see Supreme Court Rules, Rule 42(3) and Practice Direction 11, paragraph 11.1.7).

The decision to make a reference is published on the Supreme Court's website. There are no specific time frames prescribed for handling claims to refer questions for 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.

The factors taken into account may include all of the above, depending on the circumstances and the arguments presented by the parties. The Supreme Court examines carefully whether the determination of a point of EU law really is necessary for deciding the case, as it is conscious that making a reference will introduce further delay for its resolution.

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.

The Supreme Court will sometimes decide that an appeal should be brought to the attention of, for example, the Attorney General, and may direct the parties to bring the proceedings to their attention or may do so itself. This practice is not particular to references for preliminary rulings.

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 extent to which the Supreme Court gives reasons for a decision to reject a party's request for a reference for a preliminary ruling depends on the individual case. Any reasoning given will be based on the established case law of the CJEU (see Practice Direction 11, paragraphs 11.1.3 and 11.1.4).

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?

- Yes**
- No

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?

When the Supreme Court intends to make a reference, it will give consequential directions as to the form of the reference and the parties are invited to submit an agreed draft of the





*question(s) to be referred (see Supreme Court Rules, Rule 42(2) and (3) and Practice Direction 11, paragraph 11.1.7). The Supreme Court will approve the draft and an order will be drawn with the relevant question(s), which will be sent to the CJEU (see Rules 42(4)). An example of such an order in the case of *Zipvit Ltd v Commissioners for Her Majesty's Revenue and Customs* is available at [Zipvit Ltd \(Appellant\) v Commissioners for Her Majesty's Revenue and Customs \(Respondent\) \(europa.eu\)](#). The manner in which the question(s) are formulated depends on the individual case.*

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.

See questions 14 and 23 above.

25. In a request for a preliminary ruling, does your court usually state its own view on the answer to be given to the question referred (cf. the CJEU's recommendations, para. 18)?

- 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 Supreme Court does not normally state its view on the answer(s) to be given to the question(s) referred, although occasionally it will do so (particularly where there is a divide in the panel: see, for example, the case of *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue* and another [2012] UKSC 19). The reason for not normally stating the court's own view is that it could be seen as prejudging the final outcome of the case.*

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.

Generally, leave is required in order for cases to be admitted for adjudication at the Supreme Court. Permission to appeal is granted for applications that, in the opinion of the appeal panel of three Justices, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. The appeal panel gives brief reasons for refusing permission to appeal (see Practice Direction 3, paragraph 3.3.3, available here: [Applications for permission to appeal | Practice direction 3 - The Supreme Court](#)).

The Supreme Court also has jurisdiction to hear and determine certain questions relating to the powers and functions of the legislative and executive authorities established in Scotland and Northern Ireland by the Scotland Act 1998 and the Northern Ireland Act 1998 respectively, and questions as to the competence and functions of those established by the Government of Wales Act 2006. Such questions may sometimes be "referred" to the Supreme Court in a procedure that does not require leave to appeal from the Supreme Court (see those Acts and, for example, Practice Direction 10 (available here: [Devolution jurisdiction | Practice direction 10 - The Supreme Court](#)) for further information).

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 is not different, save that, in a case where permission to appeal is required the Supreme Court may make such a reference before determining whether to grant permission to appeal (see, Practice Direction 11, paragraph 11.1.6).

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?

Every case in respect of which the Supreme Court made a reference for a preliminary ruling from the CJEU during the period 2012 to 2022 required, or would have required, permission to appeal.



29. Is the reasoning different as regards rejections of a claim to make a request for a preliminary ruling in cases in which leave to appeal or other "filters" are prescribed?

When the Supreme Court refuses permission to appeal in a case where the application includes a contention that a question should be referred to the CJEU, the Supreme Court gives additional reasons for its decision not to grant permission to appeal, reflecting the reasoning in CILFIT (see Practice Direction 11, paragraph 11.1.5). Please also see question 18 above.

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.

Within 28 days of the CJEU's judgment, the parties in the case must file written submissions on whether a further hearing before the Supreme Court is necessary, or on how the appeal is to be disposed of. If a further hearing is required before the Supreme Court, the parties may file supplemental cases (Practice Direction 11, paragraph 11.1.9). There are various deadlines which apply to the filing of cases and other documents (Practice Direction 11, paragraphs 11.1.10 and 11.1.11).

The costs of the reference are included in the order of the Supreme Court disposing of the appeal. If necessary, costs are assessed by the Costs Officers (Practice Direction 11, paragraph 11.1.13).

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.

In the great majority of cases, the dialogue between the Supreme Court and the CJEU has been effective and the CJEU has provided clear answers to the questions referred which have enabled the Supreme Court to resolve the issues in the pending appeal. The Supreme





Court has, infrequently, faced difficulties in understanding the specific consequences of a ruling from the CJEU.

For example, in its judgment in Case C-404/13 R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs EU:C:2014:2382, the CJEU reformulated the first two of the four questions referred in a way which, as Lord Carnwath put it when the case returned to the Supreme Court, “introduced a degree of ambiguity” and which “had the unfortunate effect of enabling each party to claim success in the issue” (R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28, at para 6).

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.

We would add nothing further to the list above, save the following observation taken from an article by a previous Supreme Court Justice (Lord Mance): “[t]he Court of Justice speaks with authority, but its reasoning is condensed and often limited, even though it has over the years become less so than formerly. Its committee style of judgment restricts the Court’s ability to introduce nuance or to express itself always with absolute clarity. Consensus may only be achievable at a relatively low common denominator”.

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.

