



**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
Consortio"***

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 Consortio*.

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

Korkein hallinto-oikeus, Högsta förvaltningsdomstolen, the Supreme Administrative Court

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

Land use and building, environment, tax, public procurement, competition, immigration and international protection, compulsory care of children, social welfare and health care, financial aid to individuals, education, municipal, and a number of other administrative matters.

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 Administrative Court, the Supreme Court, the Labour Court, the Insurance Court.

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

On average around 4 000 cases.

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

32.

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.





The requests for preliminary rulings have covered several branches of law, with an emphasis on various economic matters. Numerically, the largest case group has been tax cases (mostly VAT and income tax). In addition, there have been a few requests for preliminary rulings concerning the recognition of professional qualifications, a few immigration related cases as well e.g. cases concerning procurement, and the conservation of wild fauna (hunting of wolves). Common for these are that they are case groups where the legislation is primarily or to a large extent based on EU law.

7. Estimate the number of referred cases from your court during the period 2012 to 2022 that have related to the *validity* of an EU act itself. ‘

1 (KHO 2017:22).

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.

The SAC requested an urgent preliminary ruling procedure in a case concerning the application of the Schengen Agreement and directive 2013/32/EU (Asylum Procedures Directive) in KHO 2017:66. The request was rejected by the CJEU (C-240/2017).

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).

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 can demand that the court request a preliminary ruling, in their appeal or at a later state of the proceedings.

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.

A decision to refer a case to the CJEU is made by five justices after a presentation of the case by a referendary. A draft of the request is produced by the composition. The parties are given the opportunity to comment on the draft. After this, the case is presented to the five justices who will make an interim decision to refer the case to the CJEU and who will produce the final formulation of the request. The interim decision is published as a so called “yearbook” decision on the website of the court.

If a case that is referred to the CJEU requires leave to appeal, the court adopts a position on the question of leave to appeal before a decision is taken regarding the draft request and the parties are heard.

A decision to reject a claim to request a preliminary ruling can be taken by two, three or five justices, depending on whether the case requires leave to appeal or not. If a case is decided on the merits, the decision to reject the claim to request a preliminary ruling is given in connection with the final ruling. In cases requiring leave to appeal, the decision to reject a claim is normally given without prior communication with the parties.

There are no specific time frames prescribed 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.

The court normally analyses the relevant legislation and CJEU case-law. Of course, if there would be relevant pending cases before the CJEU, that would be noted. Depending on the case, the court might also look at relevant jurisprudence from other member states, as





well as other sources relevant to the matter, to assess how a particular provision of EU legislation has been interpreted in other member states.

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.

Although there are no national provisions with concern to stating the reasons specifically for rejecting a claim to request for preliminary ruling, the Administrative Judicial Procedure Act requires the court to indicate the reasons for its decision, which includes the decision to reject a claim to request a preliminary ruling. The reasons for a decision concerning leave to appeal may, however, be stated by referring solely to the provisions applied, unless the nature of the matter requires other reasoning.

If leave to appeal is not granted, the court will, as a rule, not give reasons for rejecting a claim to request a preliminary ruling. However, this is not without exception, as the





particulars of an individual case ultimately determine the extent of the reasoning given for a rejection, bearing in mind also the rulings of the CJEU and ECHR referred to below in question 20.

In cases where the court rules on the substance, the extent of the reasoning for a decision to reject a claim to request a preliminary ruling depends on the case at hand. The reasoning is based on the criteria established in the case law of the CJEU and will 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.

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

- ☐ Yes
- ☐ **No**

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

- ☐ Yes
- ☐ **No**

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

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

- ☐ Yes
- ☐ **No**

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

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





- ☐ Yes
- ☐ **No**
- ☐ **The procedure has not been applied**

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

Formulation of the questions submitted to the CJEU

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

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

The specificities of the individual case will obviously affect the formulation of the request. Usually, the request will include a description of the subject-matter of the dispute and a synopsis of the relevant facts, a summary of the parties’ central arguments, applicable national provisions as well as relevant EU law and case law of the CJEU. In addition, the request will include a description of why there is a need for a preliminary ruling, followed by the precisely formulated questions to the CJEU.

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.

The parties are given the opportunity to comment on the court’s draft of the request for a preliminary ruling.

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.

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.

Leave to appeal is required in most of the cases that come to the court. There are some exceptions, of which matters concerning the taking into care of a child form the biggest group. Other exceptions to the general requirement of leave to appeal include e.g. decisions of government plenary sessions, which are appealed directly to the Supreme Administrative Court, as are preliminary rulings by the Central Tax Board.

Leave to appeal shall be granted if 1) it is important to refer the matter for decision by the Supreme Administrative Court for the application of law in other similar cases or due to uniformity of legal practice; 2) there is special cause for referring the matter for decision by the Supreme Administrative Court due to a manifest error that has occurred in the matter; or 3) there are some other serious grounds for granting leave to appeal.

The Supreme Administrative Court may also grant leave to appeal in respect of only part of the administrative court decision that is subject to the request for review.

If leave to appeal is not granted, the decision by the lower court becomes final.

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)?

No, the procedure is essentially the same. Leave to appeal is required in the majority of cases received, and therefore the majority of requests for preliminary rulings are made in cases in which leave to appeal is required. A decision to request a preliminary ruling is examined before a decision not to grant leave to appeal or before a ruling on the





substance in a case where leave to appeal has been granted. The procedure when it comes to requesting a preliminary ruling is the same regardless of whether leave to appeal is required or not.

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 13 out of 32 cases. In this connection, we note that the comprehensive system of leave to appeal was introduced in the beginning of 2020. Therefore, the quoted number does not completely accurately reflect on the current situation, as some of the requests for preliminary ruling were made in connection with cases which, at the time, were direct appeals, but would today fall within the system of leave 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?

Please see response to question 18.

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.

After the CJEU has issued its decision, the parties are given the opportunity to comment on the ruling, as well as submissions made by the other parties. After hearing the parties, the referendary will analyse and prepare the case for session by drafting a memorandum and draft decision. The case is presented orally for – as a rule- five justices, who will decide in the case.

The final ruling will be communicated to the CJEU. In most cases, the ruling will also be published on the court's website.

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.

There have been some instances (e.g. C-73/07 Satakunnan Markkinapörssi Oy ja Satamedia Oy) but not in the period covered by this questionnaire (2012-2022).

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.

