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Serving Two Masters

CJEU Case Law in Swedish First Instance Courts and National Courts of Precedent as Gatekeepers

MATTIAS DERLÉN AND JOHAN LINDHOLM

1. INTRODUCTION: CJEU JURISPRUDENCE AND UNION COURTS OF ORDINARY JURISDICTION

WE HAVE COME to accept as natural the fact that the judicial enforcement of European Union (EU) law involves both national and EU courts. Twenty years ago, Temple Lang confidently declared that '[e]very national court in the European Community is now a Community law court'.[1]

The division of labour between national and European courts is in theory quite straightforward: the EU courts are primarily responsible for interpreting what EU law mandates and it is primarily the national courts' responsibility to apply and enforce EU law in 'ordinary cases', disputes between individuals and Member States, and between individuals.[2] This is, for example, clearly expressed in the Court of Justice of the European Union's (CJEU) judgment in *Zwartfeld* where the Court declared that it is 'the judicial body responsible for ensuring that both the Member States and the [Union] institutions comply with the law' and that it is 'the judicial

[1] J Temple Lang, 'The Duties of National Courts under Community Constitutional Law', (1997) 22 *European Law Review* 3 at 3.

[2] See, e.g., R Barents, 'The Rule of Law in the European Union', in R Jansen et al (eds), *European Ambitions of the National Judiciary* (The Hague, Kluwer Law, 1997) 67; Advocate General Léger's opinion in Case C-224/01 *Köbler v Austria*, EU:C:2003:207, para 66 ('It can easily be inferred from all this case law that the Court confers on the national courts an essential role in the implementation of Community law and in the protection of the rights derived from it for individuals. Indeed people like to call the national courts, according to an expression commonly employed, Community courts of ordinary jurisdiction.'); S Prechal, 'National Courts in EU Judicial Structures' (2006) 25 *Yearbook of European Law* 429 at 432.

authorities of the Member States, who are responsible for ensuring that [Union] law is applied and respected in the national legal system.'[3] In the words of the General Court in *Tetra Pak*, 'national courts are acting as [Union] courts of general jurisdiction' whose role is to 'merely be applying' Union law.[4] National courts are the 'first-in-line' courts in the Union judiciary.[5]

There are good reasons for this division of labour between the EU courts and the national courts. Much of it dates back to what can be described as the twin values on which much of the judicial enforcement of EU law rests: the uniform and effective application of Union law. A system where Union courts are primarily responsible for the interpretation of Union law helps ensure that EU law is the same in every Member State compared to a system where national courts participate and possibly adopt diverging interpretations. Similarly, a system where EU law is effectively enforced at the national level is dependent on the cooperation of the national courts.[6]

The opportunities for legal and physical individuals to reach the EU courts are in practice extremely slim; only a handful of cases reach the EU courts and consequently and in practice the judicial enforcement of EU law largely occurs at the national level. Even if the EU courts had broader jurisdiction that would allow them to hear more cases, their workloads would not permit it. For this reason, loyal cooperation between the EU courts and the national courts is essential for a full, uniform, and effective application of EU law in its day-to-day implementation. Consistent with this division of labour, national courts have a right and sometimes an obligation to request preliminary rulings from the CJEU regarding the interpretation and validity of EU law, and, consistent with this division of labour, the majority of the CJEU's caseload consists of such preliminary rulings.[7] It is also the national courts that are capable of providing the remedies and procedures through which EU law can be realised, therefore they are under an obligation to do so.[8] Another benefit of the national courts applying and enforcing EU law

[3] Case C-2/88 *Zwartfeld*, EU:C:1990:440, paras 16 and 18 respectively.

[4] Case T-51/89 *Tetra Pak Rausing SA v Commission*, EU:T:1990:41, para 42 (discussing, more specifically, the role of national courts in the field of competition law). See also, e.g., Advocate General Bot's Opinion in Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG*, EU:C:2009:429, para 55; Advocate General Cosmas's Opinion in Case C-83/98 P *France v Ladbroke Racing Ltd & Commission*, EU:C:1999:577, para 92.

[5] M Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing, 2006) 59.

[6] See T Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford, Oxford University Press, 2015) 404.

[7] See, e.g., M Derlén and J Lindholm, 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2015) 16 *German Law Journal* 1073. Most direct actions are infringement proceedings against Member States that have failed their obligations under Union law, most commonly to implement Union law correctly and in time.

[8] See, e.g., C-50/00 P *Unión de Pequeños Agricultores v Council*, EU:C:2002:462, para 41.

against individuals and Member States is that these are assumed to respect the national courts more than the EU courts.[9]

This does not mean that the relationship between the EU courts and the national courts is simple or static. Tridimas aptly describes their interaction as 'dialectical, full of circumspection and deference, albeit occasionally tense, and based on an incomplete and somewhat unstable political bargain'.[10] National courts wield considerable power as the effective application and enforcement of Union law depends on their continued and loyal cooperation.[11]

The fact that national courts are Union courts of general jurisdiction has multiple consequences and can, and should, be examined from multiple perspectives. One well-studied aspect is that it changes the national courts' relationship with the national political bodies that are responsible for their very existence. To use a well-worn expression, Member State courts are servants of two masters: the EU and the Member State.[12]

This chapter will focus on a different aspect, namely the relationship between the national and EU courts within the EU judiciary. This relationship has also been discussed extensively in the literature at hand, most frequently by focusing on the preliminary rulings institute.[13] That national courts request preliminary rulings and that the CJEU hands them down is important, even vital, for the division of labour between the EU and national courts to function well.[14] It is not, however, sufficient for the uniform and effective application and enforcement of Union law by national courts in all Member States. The unifying function of centralised interpretation depends on the ability and willingness of national courts to consider and loyally apply the EU courts' body of jurisprudence. This is the focal point of this chapter: to what extent do lower national courts make their own, independent examination of CJEU case law?[15]

[9] See, e.g., A Komninos, 'Civil Antitrust Remedies Between Community and National Law' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2009), 366.

[10] See Tridimas above n 6 at 403–404.

[11] Ibid. See also Lang above n 1 at 5.

[12] See, e.g., M Bobek, 'The Effects of EU Law in the National Legal Systems', in C Barnard and S Peers (eds), *European Union Law* (Oxford, Oxford University Press, 2014) 142; M Bobek, 'Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States' (2008) 1 *Review of European Administrative Law* 51.

[13] See, e.g., M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (Oxford, Oxford University Press, 2010); J Komarek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32 *European Law Review* 467; A Stone Sweet and T L Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References 1961–1995' (1998) 5 *Journal of European Public Policy* 66.

[14] The importance of the preliminary rulings institute has been clear since some of the CJEU's earliest decisions. See Case 16/65 *Firma G. Schwarze v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1965:117.

[15] The term 'CJEU case law' refers herein to the jurisprudence of both the Court of Justice and the General Court.

2. THEORY: A THREE-TIERED EU JUDICIARY?

The description of the division of labour within the EU judiciary focuses primarily on the difference in function of EU courts on one hand and national courts on the other.[16] This gives the impression of a two-tiered EU judiciary where, somewhat simplified, the EU courts issue judgments on the interpretation of EU law and the national courts apply that jurisprudence in local disputes.

There are good arguments for rejecting the two-tiered model of the EU judiciary, since it ignores the fact that different national courts have different roles and functions and thereby oversimplifies the situation. An alternative, more complex but also more correct model acknowledges that the EU judiciary has at least three tiers: the EU courts, the highest national courts[17] and the lower national courts.[18]

The fact that EU law does not provide the highest national courts with any special privileges[19] does not mean that they should be lumped together with all the other national courts for the purpose of describing, understanding, and analysing the EU judiciary. The special nature of the highest national courts in relation to the EU courts is widely recognised, not least in the legal literature.[20] It has been argued that higher national courts have 'fought back' against the erosion of their power that emanates from the CJEU.[21]

The interaction between the highest and lower national courts and its consequences for the EU legal order has received less attention. One reason for this may be that the EU courts have staunchly held on to the idea that all national courts are Union courts of general jurisdiction[22] and steadfastly refused to give the highest national courts a role between themselves and

[16] See, e.g., Barents above n 2 at 64–65 (describing 'the two pillars of the Community judicial system'); *cf* P Craig, 'The Jurisdiction of the Community Courts Reconsidered' in P de Búrca and J Weiler (eds), *The European Court of Justice* (Oxford, Oxford University Press, 2001) 178 ('It is clear that properly understood we have three types of Community Court, not just two: the ECJ, the CFI, *and* national courts.').

[17] Most obviously supreme, general and administrative courts and specialised constitutional courts.

[18] You could argue for a model with additional tiers, including a distinction between the Court of Justice and the General Court at the EU level and a special category of national courts between the courts of first instance and courts of precedent (appellate courts). However, such further divisions are unnecessary for the purpose of answering the questions posed in this chapter.

[19] Article 267 TFEU distinguishes between national courts 'against whose decisions there is no judicial remedy under national law' and other national courts, but places them in a weaker position vis-à-vis the CJEU than other national courts, not stronger.

[20] See, e.g., AM Slaughter et al (eds), *The European Court and National Courts—Doctrine and Jurisprudence* (Oxford, Hart Publishing, 1998); See Claes above n 5.

[21] See AM Slaughter, 'Judicial Globalization' (1999–2000) 40 *Virginia Journal of International Law* 1103 at 1104–1105.

[22] See Case T-51/89 *Tetra Pak Rausing SA v Commission*, EU:T:1990:41, para 42 ('*the* national courts are acting as Community courts of general jurisdiction'. Emphasis added). See Claes above n 5 at 15.

the lower national courts. This is most explicitly made clear in the CJEU's decision in *Simmenthal II* where the Court held that the Italian *pretore* was obligated by Union law to set aside national law and that the special role preserved for the *Corte costituzionale della Repubblica Italiana* under the Italian constitution was irrelevant when the legal rules applied in the case were of a Union nature. The reason underlying this position is made clear: the full, uniform, immediate, and effective application of Union law in all Member States.[23] Thus, according to the Court of Justice, all national courts are required to apply EU law, including CJEU case law, directly and immediately. This leaves no room for a special relationship between higher and lower national courts and also entails that lower national courts shall consider and apply CJEU case law independently and without considering the opinions of higher national courts.[24]

Under the model expressed in CJEU case law, ordinary national courts functioning as Union courts of general jurisdiction shall apply and enforce Union law, including CJEU case law, independently when adjudicating individual disputes. In so doing, the national courts and the Union courts communicate directly with each other and there is no 'detour' by way of the higher national courts.[25]

Although there are, as is made clear in *Simmenthal II*, good arguments for this model, we do not believe that you can realistically expect lower national courts to completely separate themselves from the higher national courts on matters of Union law. While national judges play a role in the Union judiciary, they are heavily influenced by the national legal culture and have both been trained in and are accustomed to paying close attention to the opinions of the highest national courts. The lower courts' decisions are also much more likely to be reviewed by the higher national courts than by the EU courts and the former, unlike the latter, have the power to overturn them.

Imagine a situation where a Swedish court of first instance is faced with a dispute that involves a question of EU law and where there is relevant CJEU case law governing these questions. If the question is novel, in the sense that it has never formerly been dealt with by Swedish courts of precedent, we would expect the lower court to consider CJEU case law directly and independently. However, if Swedish courts of precedent have addressed the matter, we think it would be naïve to think that the lower court would not at some level be affected. In this manner, and in contrast to the model described above, we imagine and suspect that higher national courts by

[23] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, EU:C:1978:49, esp. paras 14–20.

[24] From a Swedish perspective, this is similar to the right of every court and public authority to perform judicial review, without waiting for or referring the matter to a higher court. See further, A Eka and D Gustavsson, 'Lagprövning och andra frågor om normkontroll—rapport från en expertgrupp' (2007) *Svensk Juristtidning* 769.

[25] See Model A in Figure 5.1 below.

merit of their position in the national judiciary can impact the application and enforcement of CJEU case law by the lower national courts.[26]

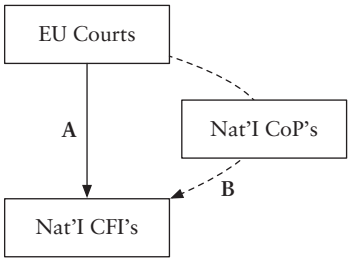

Figure 5.1: Two Models of the EU Judiciary

3. METHOD: MEASURING INFLUENCE

In this contribution, we will explore *to what extent lower national courts are influenced by higher national courts in their application of CJEU case law*. This is achieved by studying the Swedish courts.

As regards the 'lower national courts', we will analyse 402,570 decisions by Swedish courts of first instance (CFI) issued over a two-and-a-half-year period concluding at the end of 2015 (the CFI dataset). These include decisions by both administrative courts (*förvaltningsrätter*) and courts of general jurisdiction (*tingsrätter*) that handle civil as well as criminal cases.[27] If we seek to understand how CJEU case law is actually applied and enforced at the national level, as we do here, the focus ought to be on the national CFI which are responsible for the application and enforcement of Union law in the overwhelming majority of cases.

As regards the 'higher national courts', we examine 12,179 published decisions by the Swedish Supreme Court (*Högsta domstolen*) and the Swedish Supreme Administrative Court (*Högsta förvaltningsdomstolen*)[28] between Sweden's accession to the European Union in January 1995 and August 2014 (the CoP—Courts of Precedent—dataset).

We then study and compare these datasets to determine whether, to what extent, and in what situations the CoP 'influence' the CFI choice of CJEU case law (i.e. decisions by the General Court and the Court of Justice). To do so, we extract and compare references to CJEU case law found in CFI and CoP decisions. We also extract and consider CFI references to CoP decisions.

[26] See Model B in Figure 5.1 below.

[27] The total number of CFI decisions during the period studied is about 750,000. Thus, the dataset includes roughly 54% of all CFI decisions during the period in question. However, many of the decisions that are not part of the dataset were decisions in family matters (mainly divorce and custody matters), many of which were undisputed decisions based on joint applications. See Domstolsverket, Domstolsstatistik 2014. Available at: www.domstol.se/Publikationer/Statistik/domstolsstatistik_2014.pdf.

[28] Previously referred to as *Regeringsrätten*.

Thus, we use one court's references to another court's case law as a measurement of the influence that the latter court exerts over the former. These references are studied using three different methods that capture three different ways by which the CoP may influence CFI interpretation and application of CJEU case law. These are described in greater detail below, but briefly stated they are (i) overall CFI/CoP reference to CJEU case law overlap, (ii) CFI reference to CJEU case law cited by CoP, and (iii) CFI co-references to CoP and CJEU case law.

The main findings of this chapter are that, at least in the case of Sweden, higher national courts are capable of and do in practice influence the application of CJEU case law of lower national courts in individual cases, but that in practice this influence is rather limited.

4. 'WE DON'T NEED NO EDUCATION': CFI CITATION INDEPENDENCE

The first approach used here to measure the extent to which Swedish CoP influence the application of CJEU case law by Swedish CFI is what we refer to as CFI citation independence. This assesses whether the CJEU decisions referred to by the CFI are also being cited by the CoP. In other words, we examine how great the overlap is between, on one hand, the CJEU case law cited in individual CFI decisions and, on the other, the CJEU case law cited by Swedish CoP.

The underlying line of reasoning is perhaps best explained using an example. If a Swedish CFI issues a judgment citing two CJEU decisions, the question is whether it found those decisions and decided to cite them because they had previously been cited by *Högsta domstolen* (the Supreme Court) or *Högsta förvaltningsdomstolen* (the Supreme Administrative Court). There are three possible outcomes in such a situation: (i) neither of the two decisions have been cited (0% overlap), (ii) one decision has previously been cited (50% overlap), or (iii) both decisions have previously been cited (100% overlap) by a Swedish CoP.

It is difficult to capture causation but if the CJEU decisions cited by the CFI have never appeared in the CoP jurisprudence, the choice cannot have been a direct result of CoP influence and, conversely, it demonstrates that the CFI is able to identify and apply CJEU case law independently.[29] Is it possible that CoP have influenced the CFI to cite CJEU decisions that they themselves have never mentioned in their decisions? If so, we are talking about a very subtle form of influence that by discussing, for example, EU law more generally and/or citing other CJEU decisions, the CoP have inspired the CFI to explore and cite other elements of EU law.

[29] Of course, this would not necessarily mean that the reference was the result of the participating CFI judges' individual research. It is likely that in many cases it is the parties that make the court aware of the existence of relevant EU case law.

If a substantial overlap is discovered you might be tempted to conclude that the CoP have a considerable, positive influence on CFI citation choices, but this is not necessarily true. The fact that a lower court cites a CJEU decision that has appeared in CoP jurisprudence does not necessarily mean that it did so *because* a CoP had previously done so. A plausible, alternative explanation would be that both CFI and CoP cite particular CJEU case law because of a certain quality, such as it being an important precedent on a particular point of law.[30] All we know in such a situation is that it is possible that the lower court was influenced by the choices of the higher court.[31]

In the overwhelming majority of the cases, the CJEU decisions cited by the CFI have never been cited by the Swedish CoP. About two out of three CFI judgments[32] that contain references to CJEU case law have a 0 per cent overlap with the CJEU case law cited by CoP (i.e. they exclusively cite CJEU case law that has never been cited by the Swedish courts of precedent).[33] In only about one in six cases[34] all of the CJEU cases cited by the CFI have appeared in CoP case law.

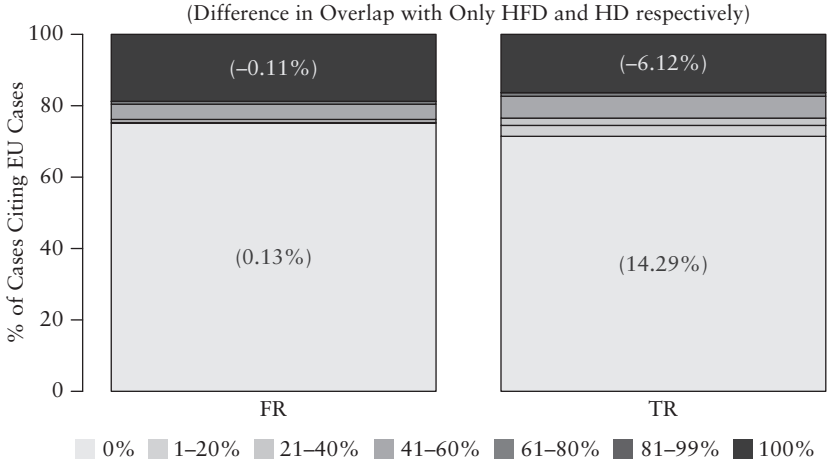

Figure 5.2: CFI/CoP EU Court Decision Reference Overlap

[30] If we consider CFI decisions further back in time, we might also make the mistake of confusing a correlation that is impossible due to differences in time (e.g. a CFI citing a CJEU decision that was cited by the CoP at a later point in time). This has a minimal impact on this study because the CFI data only consists of more recent cases.

[31] We study influence in these second types of situations in more detail below using different approaches.

[32] 71% for general courts and 75% of administrative courts.

[33] See Figure 5.2 above. As shown, there is 0 per cent overlap between EU case law cited in general CFI and in general CoP decisions in 85 per cent of the cases, but this increases to levels on a par with the administrative CFI when you expand the comparison with all CoP references.

[34] 15% and 19% respectively.

The result is quite strongly divided between no reference overlap (0%) and complete reference overlap (100%), with very little in between. The reason for this clear division is that the overwhelming majority of all CFI decisions citing CJEU case law cite one single decision.[35] The nature of the underlying data thus dictates that most CFI decisions can only be sorted into one of the two categories: 0 per cent or 100 per cent reference overlap.

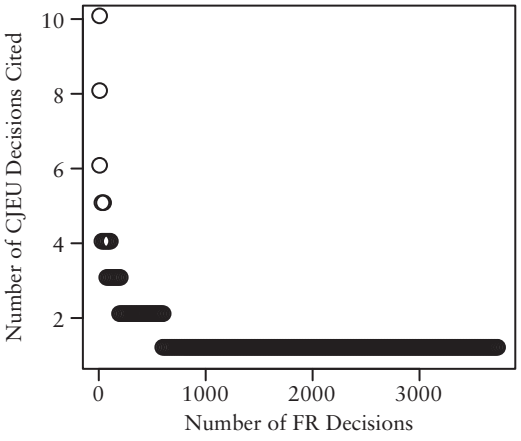

Figure 5.3: Distribution of FR References to CJEU Decisions

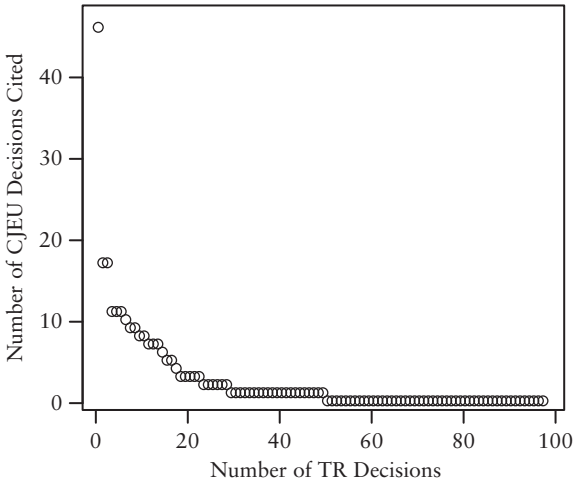

Figure 5.4: Distribution of TR References to CJEU Decisions

[35] See Figures 5.3 and 5.4 above.

This does not affect the observation that Swedish CFI by and large cite CJEU case law that has never been cited by the CoP. As explained above, this finding supports the conclusions that the CFI, to a large extent, consider and apply CJEU case law independently of the higher, national courts. In other words, the CFI do not need the CoP to identify relevant CJEU case law. However, the overlap is so low so as to be somewhat counter-intuitive. Remember, we are not taking into consideration how frequently the higher courts have cited a particular CJEU decision; a single reference in the CoP dataset is sufficient to create an overlap. The fact that the overlap is so low could have a number of explanations. Firstly, it could indicate that the highest courts do not engage with EU law in general and that EU law issues rarely arise before the CoP. However, our previous research indicates that EU law plays an increasingly important role in the highest Swedish courts, demonstrated by the fact that almost 10 per cent of CoP cases had an EU law component in 2014.[36] Secondly, the low overlap could be explained by a tendency of the CoP not to cite CJEU case law, even when engaging with EU law issues. Again, previous research demonstrates that this does not generally hold true. However, higher Swedish courts tend to be rather specific in their use of CJEU case law. More specifically, most CJEU decisions are cited only once and very few decisions accumulate more than a handful of citations.[37] This indicates that the CoP tend to discuss case law that is only relevant in rather specific circumstances. If we assume that the CFI adopt a similar approach, concentrating on CJEU decisions that are specifically relevant to the situation at hand rather than decisions of more general importance, this could contribute to the limited overlap. Finally, and related to the previous discussion, the limited overlap could be an indication of the different legal worlds of the CoP and the CFI. In other words, while both higher and lower courts encounter EU law issues, it might not be the same type of issues.[38]

5. THE MASTER HAS SPOKEN? (POTENTIAL) CoP CITATION INFLUENCE

5.1. What Happens when CoP do Get Involved?

The findings described above show that references to CJEU case law by Swedish courts of first instance cannot, for the most part, be attributed to the very same decisions being cited by Swedish courts of precedent.

[36] M Derlén and J Lindholm, 'Festina Lente—Europarättens genomslag i svensk rättspraxis 1995–2015' (2015) *Europarättslig tidskrift* 151, 157.
[37] Ibid, 170–175.
[38] See further section 5.2 below.

However, that does not exclude the possibility that the CoP can and sometimes do influence the CFI application of CJEU case law. It is possible—and compatible with the findings above—that the CFI are both willing and tend to 'follow the leader' but that the CoP rarely play along.

Considering that the influence of CoP appears limited to the one in four cases that come before the CFI, it may at first glance seem like this is a question of marginal practical importance. That impression is false for two reasons. First, if the CoP exercise a strong influence on the application of CJEU case law of the CFI in one out of four cases, that significantly impacts the uniform and effective enforcement of EU law. Second, even if they in practice use their influence sparsely, it is both principally and practically problematic if higher national courts are able to exert influence over the application of CJEU case law by lower national courts as it effectively places the EU courts at the mercy of the higher national courts. It is, for example, easy to imagine that higher national courts might be tempted to use this influence if a situation where they strongly disagree with CJEU case law were to arise.

To explore this possibility, we will study judgments by Swedish courts of precedent that contain references to EU case law and examine what impact, if any, these judgments have had on the CFI. By studying the CJEU decisions cited by the CoP, we can also deduce in what situations and on what issues they engage with CJEU case law. This can then be compared to the situations and issues where the CFI do so, giving us some insight into the nature of situations where the CoP exert influence and, conversely, those situations where they do not.

5.2. Cite What I Cite: Very Narrow, but Possibly Deep Influence

There are two possible ways engagement of CoP with CJEU case law may influence the use of CJEU case law in the lower courts. The first way is that CFI might be more likely to apply CJEU case law referred to by the higher courts in EU-related precedents. Such a correlation could be caused by the CoP making the CFI aware of the existence of a CJEU judgment by referring to it or increasing the precedential value of the CJEU judgment in the opinion of the lower national courts because the higher national court referred to it, or a combination of these two factors. As discussed below, whether this type of influence is problematic depends on the circumstances.

To study this, we begin by identifying all CJEU decisions ever cited by a Swedish CoP in a published ruling[39] and find that the CoP have all-in-all

[39] The CoP only communicates with the CFI through their published opinions; their ability to influence the CFI towards particular EU judgments without explicitly citing them is limited.

cited 209 unique CJEU decisions.[40] We then examine if and how frequently the Swedish CFI have cited these decisions.[41]

We find that most CJEU decisions cited by the Swedish CoP have never or very rarely been cited by the Swedish CFI[42]—59 per cent of all CJEU decisions cited by Swedish CoP have never been cited by the CFI during the period in question.[43] Among the remaining decisions, 58 per cent have only been cited once or twice by the CFI. Thus, of all the unique CJEU decisions ever cited by Swedish CoP, about 83 per cent[44] have never or so rarely been cited by the CFI that any connection between the two is unlikely. Phrased differently, only 17 per cent of the CJEU case law cited by the CoP has

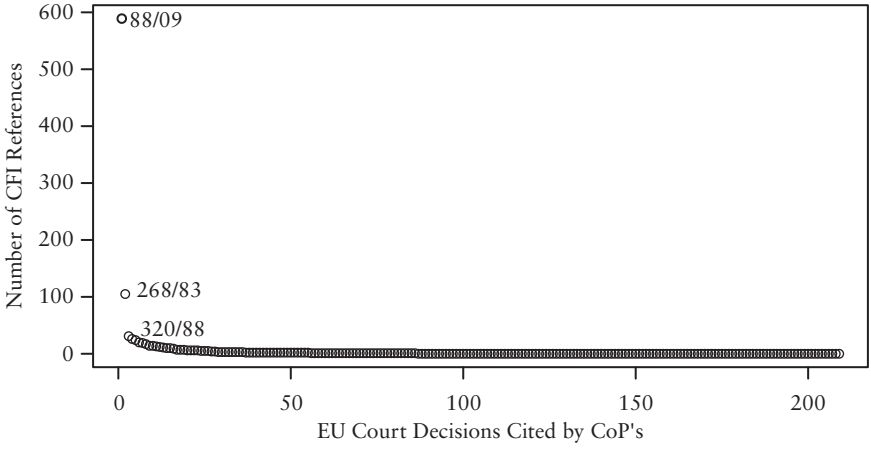

Figure 5.5: CFI References to CoP Cited EU Court Decisions

[40] Many of the decisions cited by the CoP have been cited in several CoP decisions and the total number of references to EU case law is therefore substantially higher. Although it is not directly pertinent to the research question examined in this chapter, we feel that it is worth noting that this must be considered a high number of cases, at least significantly higher than we had expected. The diversity in references supports our previous conclusion that Swedish courts have a rather instrumental approach to EU law and CJEU case law. See Derlén and Lindholm (n 36) 173–174.

[41] Some might argue that the fact that the CFI did not refer to an EU court judgment does not necessarily mean that it did not read, follow, and apply it in the case. It is impossible to empirically prove or disprove the claim that the judges were influenced by something that they intentionally left out of the judgment. It does, however, seem unlikely to us that the lower courts would do this on a larger more systematic scale, particularly under these circumstances where the higher courts through their explicit references have clearly signalled that it is both relevant and appropriate to cite the EU decisions in question.

[42] See Figure 5.5 above.

[43] 123 out of 209 EU court decisions.

[44] 173 out of 209 EU court decisions.

appeared more than twice in CFI judgments and where it is possible that the CFI reference is a sign of CoP influence.

Thus, much like the absence of a CoP reference to a CJEU decision does not seriously impact its chances of being cited by CFI, four times out of five a CoP referring to a CJEU decision has no discernible effect on the lower court's tendency to cite the same case. This suggests, quite strongly, that the Swedish CoP cannot easily and effectively steer the Swedish CFI towards CJEU case law simply by citing it.

It is more difficult to explain this pattern. It seems extremely unlikely that the CFI would refrain from citing relevant CJEU case law because it has already been cited by the CoP. One possible explanation is that Swedish CFI in general pay limited attention to CoP decisions. However, it seems unlikely considering that even though precedence is not *de jure* binding in the Swedish legal system, it plays an important role and is *de facto* followed.[45] In our opinion, the most likely explanation for the observations is that Swedish CFI and CoP deal with different types of EU-related disputes and issues and that much of the CJEU case law cited by the CoP is therefore of limited relevance to the lower courts.[46]

Two CJEU judgments deviate quite sharply from the general trend. The first is the CJEU's judgment in *Graphic Procédé* regarding the classification of transactions for VAT purposes. More specifically, the case concerned the classification of printing services for assigning VAT.[47] In the wake of *Graphic Procédé*, Swedish courts, including general and administrative courts at all levels, have received and decided many cases dealing with the VAT-classification of printing services,[48] including many complex cases regarding the legal consequences of classification and reclassification of print-related services.[49] Thus, the CJEU's interpretation of EU law in *Graphic Procédé* gave rise to extensive practical and complex legal consequences in Sweden, most of which were not governed by EU law, and the resolution of which required the involvement of both Swedish CFI and CoP. It seems quite clear that, in this case, the involvement of CoP was necessary to ensure the uniform and effective enforcement of EU law in Sweden, and did not constitute improper or problematic influence of the lower courts.

The second exceptional case, *Rompelman*, also concerns VAT. The case concerned two Dutch nationals' right to repayment of VAT on payments

[45] See, e.g., G Bergholtz and A Peczenik, 'Precedent in Sweden' in DN MacCormick et al (eds), *Interpreting Precedents* (Farnham, Ashgate, 1997).

[46] See also section 5.3.

[47] Case C-88/09 *Graphic Procédé v Ministère du Budget, des Comptes publics et de la Fonction publique*, EU:C:2010:76 (regarding the classification of reprographic activities).

[48] *Graphic Procédé* is generally relied upon by Swedish courts for the legal rule that printed products shall be assigned 6% VAT-rate instead of the standard 25%.

[49] See, e.g., HFD 2011 not 66; HFD 2014 not 15; HFD 2014 ref 14; HFD 2015 ref 69; NJA 2015 s 1072; NJA 2016 s 799.

on a not-yet-constructed property that they were eventually going to let.[50] Although there are examples of Swedish courts citing *Rompelman* for the CJEU's conclusion that such pre-payments can entitle a VAT-repayment,[51] it is more commonly cited for the general rule that 'it is for the person applying to deduct VAT to show that the conditions for deduction are met'.[52] This explains why references to *Rompelman* appear in a large number of CFI and CoP decisions: there are numerous VAT-repayment-related disputes each year in Sweden and CJEU case law, regarding the placement of the burden of proof, will be relevant in many of those disputes.

In conclusion, our analysis reveals that Swedish CFI are unlikely to cite specific CJEU decisions because the CoP have cited them—in the overwhelming majority of cases a CoP reference has no measurable impact on the lower courts—and when there is a significant overlap it seems attributable to the fact that the type of dispute or the legal questions concerned is a common one, like VAT.[53]

5.3. Cite the Citation: Influence by Replacement

The findings above support the conclusion that CJEU case law citation overlap between Swedish CFI and CoP is quite limited. The most likely explanation for our findings is that while both CFI and CoP encounter EU law issues and cite CJEU case law, they engage with EU law on quite different matters.

If there is no national precedent on how to resolve an EU-related legal matter, a lower-court judge has no other option than to engage directly with original EU sources, including CJEU case law. However, if the national courts of precedent have delivered an opinion on the matter at hand, we expect that the lower-court judge would be inclined to at least consider the higher court's interpretation and arguments since the judge (i) is both accustomed and expected to follow the higher court's decision on non-EU-law-related matters, (ii) wishes to avoid having his or her decision overturned on appeal, and (iii) can save time (which is in short supply in the lower courts) researching EU law independently and *de novo*.

For example, imagine a Swedish court of first instance faced with a dispute where there is relevant CJEU case law and that this case law has been discussed in the published decisions of one of the Swedish courts of precedent. As concluded above, it is rare that the lower court judge reads the

[50] Case 268/83 *Rompelman and Rompelman-Van Deelen v Minister van Financiën*, EU:C:1985:74.

[51] See, e.g., RÅ 2002 note 26.

[52] *Rompelman*, para 24. See, e.g., RÅ 2004 ref 112; RÅ 2010 ref 98; HFD 2013 ref 12. There are also many examples from the lower Swedish courts.

[53] Besides *Graphic Procédé* and *Rompelman*, this is also the case with, e.g., Case C-320/88 *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV*, EU:C:1990:61 (third most frequently cited by CFI).

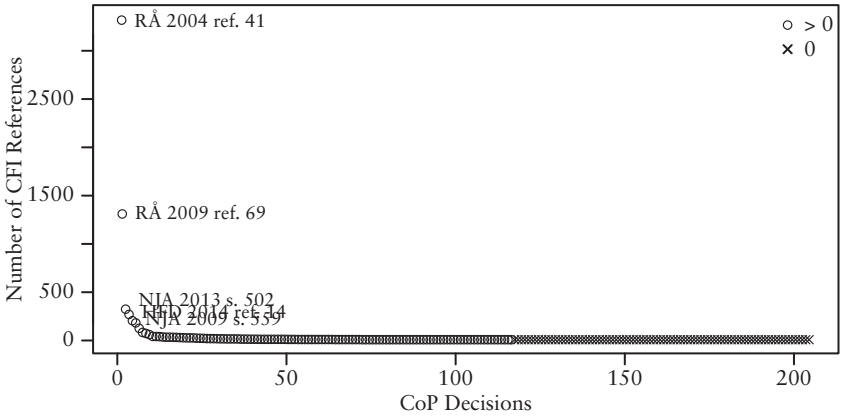

Figure 5.6: CFI References to CoP Decisions Citing EU Court Decisions

higher court's decision and cites the same or similar CJEU court decisions. However, it is possible that the lower court judge regards the higher court's decision as such a strong source of law on the issue and relies on the higher decision, by itself or along with relevant CJEU case law.

While we can understand and sympathise with a lower court judge who chooses the latter approach, it is still problematic. The approach is not entirely dissimilar to a researcher using secondary sources and carries the same potential problems; the secondary sources may have misinterpreted the primary sources and there may be new primary sources that have not been considered in the secondary sources.

We use a multi-step approach to examine whether Swedish CFI have such tendencies. We begin by identifying all Swedish CoP decisions that contain references to CJEU case law.[54] We then identify and isolate CFI decisions that cite those EU-related CoP decisions.[55] This information is interesting in itself as it shows us which EU-related CoP decisions may have had the greatest impact on the interpretation of EU law by the CFI.[56]

Figure 5.6 demonstrates that most EU-related CoP decisions are of very limited use in lower courts: 43 per cent of them have never been cited by the CFI in the period studied,[57] and most others were only cited rarely. However, a handful of CoP decisions have been cited very frequently. The clear leader is RÅ 2004 ref 41, concerning patient mobility and free movement, with 3,339 references in the CFI dataset. The runner-up is RÅ 2009 ref 69, with 1,303 references, concerning public procurement. These two judgments

[54] The data considered contains 205 such CoP decisions.
[55] The data considered contains 6,235 such CFI decisions.
[56] See Figure 5.6 above.
[57] 88 decisions.

are in a league of their own, with the third most cited case far behind with 317 references. This is NJA 2013 s 502, where the Swedish Supreme Court reversed its position on *ne bis in idem* and tax surcharges following the *Åkerberg Fransson* case from the CJEU.[58] The list of frequently cited judgments also include HFD 2014 ref 14, concerning tax assessment and value added tax,[59] and NJA 2009 s 559, concerning the expulsion of EU citizens due to criminal activity, with 263 and 198 references respectively.

The fact that EU-related CoP judgments follow a power law distribution in the CFI dataset, where a few judgments are cited extensively and most judgments are practically never used, is not surprising in itself, since practically all citation networks display this tendency.[60] However, it is interesting from the perspective of CoP as gatekeepers. The fact that some CoP judgments are cited extensively indicates that the highest courts indeed have a significant potential as gatekeepers for lower courts in EU-related matters. However, this influence is limited to a handful of cases, whereas most CoP judgments are never or very rarely cited by the CFI. It is reasonable to assume that the leading cases, discussed above, deal with EU issues that frequently arise in lower courts, while many of the other judgments deal with more specific issues. Examples of this include RÅ 2001 ref 69, concerning VAT and breakfast served at hotels, and NJA 2004 s 662, concerning the EEA agreement and state liability.

As a next step, we examine whether CFI judgments citing a particular EU-related CoP decision also include references to CJEU case law. We refer to this as the CoP decision's co-reference rate. If every CFI decision that contains a reference to the CoP decision also contains references to CJEU case law, the co-reference rate is 100 per cent. Conversely, if none of the CFI decisions citing the CoP decision cite any CJEU case law, the co-reference rate is 0 per cent. The examination of the co-reference rate includes all CJEU case law, not just the judgment or judgments cited by the CoP, as it is possible that the CFI might find other CJEU cases relevant.

We would expect most CoP decisions to have quite a high co-reference rate. Since the CFI decisions cite CoP decisions citing CJEU case law, it is reasonable to assume that there is relevant CJEU case law that the CFI could cite in its judgment[61] and as Union courts of ordinary jurisdiction we expect

[58] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.

[59] This forms part of the extensive litigation concerning VAT on printing services, in the wake of the above-mentioned *Graphic Procédé* case from the CJEU. For a comment see, e.g., U Hedström, 'HFD:s beslut om att efterbeskatta kunder i de s.k. tryckerimomsmålen—ändring av praxis?' (2014) *Skattenytt* 245.

[60] In fact, this holds true for most complex networks, R Albert and AL Barabási, 'Statistical Mechanics of Complex Networks' (2004) 74 *Review of Modern Physics* 47, 49, and the European Court of Justice, M Derlén and J Lindholm, 'Peek-a-boo, It's a Case-Law System! Comparing the European Court of Justice and the United States Supreme Court from a Network Perspective' (2017) 18 *German Law Journal* 647.

[61] This is not necessarily true in every individual case. The CoP decision may contain statements of law that are entirely unrelated to EU law and it is possible that the CFI is citing that part. It is, therefore, important to manually confirm what is being cited.

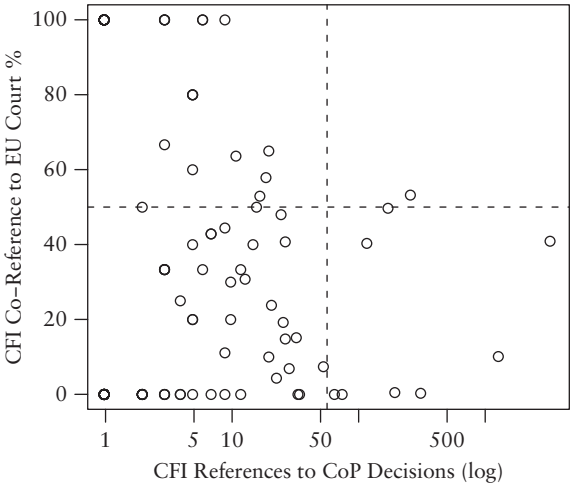

Figure 5.7: CFI References to EU-Related CoP Decisions

the CFI to cite such case law independently and faithfully. However, as illustrated by Figure 5.7, this hypothesis does not hold true.

In fact, nearly half of the relevant CFI judgments[62] only cite the Swedish CoP decisions and no CJEU judgments. This is a surprisingly high number. However, we again see significant differences between individual CoP decisions. For some CoP judgments, the co-reference rate is high, even as high as 100 per cent. To find examples of the latter, we have to go to judgments with relatively few CFI citations. This includes HFD 2011 ref 28, concerning value added tax on sailboats, RÅ 2006 ref 38, concerning investment funds and HFD 2012 ref 29, concerning public service contracts, all with between 6 and 9 references. Among CoP judgments with a higher number of citations from CFI, we find a co-reference rate of about 50 per cent or higher. This includes RÅ 2009 ref 43 (co-reference rate 51 per cent) and RÅ 2008 ref 35 (co-reference rate 43 per cent), both concerning public procurement and the right to withdraw an invitation to tender. When it comes to the top five judgments mentioned above, HFD 2014 ref 14 has a co-reference rate of 53 per cent and RÅ 2004 ref 41 scores very high, with 79 per cent.

However, the vast majority of judgments have a very low co-reference rate. This includes two of the judgments mentioned above, NJA 2013 s 502 and NJA 2009 s 559, where the co-reference rate is close to zero.[63] RÅ 2009 ref 69, the second most cited EU-related CoP decision, also scores low on the co-reference scale, with about 11 per cent.

[62] 3,031 of 6,236 CFI decisions.
[63] 1/317 (or 0.3%) and 1/198 (or 0.5%) respectively.

How can the low co-reference rate be explained? We identify three possible explanations for the absence of separate references to CJEU case law by the CFI. First, and most obviously, the CFI could be citing the CoP judgments for reasons entirely unrelated to EU law. This would seem to hold true at least for certain CoP cases. For example, the above-mentioned case NJA 2009 s 559 clearly includes non-EU related issues. As part of its judgment, the Supreme Court discussed both the penalty for pickpocketing and expulsion of EU citizens convicted of crimes. A number of CFI cases cite the judgment on the issue regarding the relevant penalty for pickpocketing, without any EU law dimension.[64] However, NJA 2009 s 559 is also used by lower courts regarding the expulsion of EU citizens and the Citizens' Rights Directive[65] with no references to CJEU case law.[66]

Second, the CFI could be referring to a discussion concerning national law that is fundamentally related to EU law. In such cases an underlying EU law question is resolved by the higher court, based on CJEU case law, and the lower courts see no need to discuss said case law or EU law dimension themselves. For example, in RÅ 2009 ref 69, mentioned above, the Supreme Administrative Court discussed the respective role of the courts and the parties in public procurement proceedings, more specifically whether the court could take into consideration circumstances not discussed by the parties. The court observed that the CJEU had left this issue to be decided by the procedural rules of the Member States,[67] and continued to discuss how the Swedish rules on administrative procedure should be applied regarding public procurement. Based on this discussion, the Supreme Administrative Court concluded that the party claiming that an error had been committed also had the responsibility to clearly explain the circumstances on which he or she based the complaint. This conclusion has been cited, practically verbatim, by lower administrative courts in many public procurement cases. Typically, the lower court will—so to speak—jump straight to the conclusion of the Supreme Administrative Court and not discuss the underlying judgment of the CJEU, thus implicitly accepting the CoP interpretation of

[64] See, e.g., Stockholms tingsrätt's judgment in case number B 8550-13, 1 July 2013; Kalmar tingsrätt's judgment in case number B 4271-12, 17 April 2013; Malmö tingsrätt's judgment in case number B 1688-14, 13 March 2014.

[65] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp 77–123.

[66] See, e.g., Uddevalla tingsrätt's judgment in case number B 865-14, 8 April 2014; Stockholm's tingsrätt's judgment in case number B 2018-15, 2 April 2015; Attunda tingsrätt's judgment in case number B 828-15, 24 March 2015.

[67] Case C-315/01 *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)*, EU:C:2003:360.

that judgment.[68] Cases such as RÅ 2009 ref 69 contain both EU and national law elements, but unlike NJA 2009 s 559, these cannot be separated from each other. The EU law issue is foundational and decides the ambit of the discussion about Swedish administrative procedural law. While it makes sense for lower courts to refer to the conclusion of the Supreme Administrative Court when it comes to the issue of how the Swedish rules on administrative procedure should be applied regarding public procurement, the absence of references to the underlying CJEU judgment could hide the EU law dimension.

Thirdly, and most controversially, the lower court could in fact be citing the citation (i.e. referring only to the CoP judgment even for the EU law issue). An example of this is HFD 2014 ref 14, discussed above, concerning tax assessment and value added tax. Here, the Supreme Administrative Court decided on the consequences of the *Graphic Procédé* judgment of the CJEU, according to which printed products should be assigned a 6 per cent VAT-rate instead of the standard 25 per cent. The Supreme Administrative Court discussed several judgments of the CJEU before concluding that the Swedish Revenue Service had the right to alter previous decisions regarding VAT on printing services, for suppliers and buyers of the services alike. HFD 2014 ref 14 has been cited extensively by lower administrative courts, but they have taken different approaches to the use of CJEU case law. Several of the CFI judgments mention some CJEU case law, at least the foundational decision in *Graphic Procédé*.[69] However, other CFI judgments obscure the EU dimension by only referring to Swedish legislation and the CoP judgment as if no EU dimension existed.[70] This approach is sometimes adopted even if the plaintiff explicitly makes reference to the EU principles of legal

[68] See, among many others, Förvaltningsrätten i Stockholm's judgment in case number 9957-15, 26 August 2015; Förvaltningsrätten i Stockholm's judgment in case number 12213-15, 1 July 2015; Förvaltningsrätten i Stockholm's judgment in case number 26716-13, 4 February 2014; Förvaltningsrätten i Stockholm's judgment in case number 1944-15, 10 April 2015; Förvaltningsrätten i Stockholm's judgment in case number 5747-15, 8 May 2015; Förvaltningsrätten i Uppsala's judgment in case number 3249-13E, 15 August 2013; Förvaltningsrätten i Stockholm's judgment in case number 7796-14, 7 July 2014; Förvaltningsrätten i Härnösand's judgment in case number 1337-14E, 1338-14E and 1339-14E, 11 July 2014; Förvaltningsrätten i Uppsala's judgment in case number 5493-13E, 28 March 2014.

[69] As noted above, the co-reference rate for HFD 2014 ref 14 is about 53%. For examples of administrative CFI judgments referring to HFD 2014 ref 14 as well as CJEU case law, see, e.g., Förvaltningsrätten i Malmö's judgment in case number 3403-13, 23 September 2014; Förvaltningsrätten i Malmö's judgment in case number 12786-13, 30 July 2014; Förvaltningsrätten i Malmö's judgment in case number 5243-13, 11 July 2014; Förvaltningsrätten i Linköping's judgment in case number 8211-11, 5 December 2014; Förvaltningsrätten i Linköping's judgment in case number 8617-13, 11 December 2014; Förvaltningsrätten i Karlstad's judgment in case number 1232-14 and 4739-14, 20 May 2015.

[70] See, e.g., Förvaltningsrätten i Luleå's judgment in case number 1885-13, 4 September 2014; Förvaltningsrätten i Falun's judgment in case number 303-15, 18 December 2015; Förvaltningsrätten i Stockholm's judgment in case number 587-13 and 594-13, 11 June 2015.

certainty and legitimate expectations.[71] In these cases the CFI are clearly citing the citation, resolving the issues as if they were solely domestic and obscuring the EU law dimension.

It is not possible to quantify how many of the CFI references concern internal rather than EU dimensions in the underlying CoP judgment (i.e. scenario 1 above). However, it seems unlikely that this could serve as a general explanation for the low co-reference rate. Even if the CoP judgments contain issues unrelated to EU law, we would still expect a significantly higher co-reference rate. It is reasonable to assume that in many situations, the lower court is, in fact, citing the citation—in other words referring only to the CoP judgment even for the EU law dimension (i.e. scenario 3 above). This is inherently problematic, as it obscures the EU law dimension and makes the CFI dependent on the interpretation of CJEU case law performed by the CoP.

6. CONCLUSIONS—IS THERE SOMETHING ROTTEN IN THE STATE OF SWEDEN?

The three tests used in this study suggest that the answer to whether Swedish CoP influence the application of CJEU case law by CFI is complicated, perhaps more so than one might initially imagine.

On the one hand, this study's findings suggest that, generally speaking, Swedish courts of first instance identify and apply relevant CJEU case law independent of whether this has been dealt with by Swedish CoP or not. This 'reference independence' is true regardless of how you measure it: the CFI never or rarely cites most CJEU court decisions cited by the CoP and most CJEU court decisions cited by CFI have never been cited by the CoP. Differently put, when viewed as a whole and when focusing on references to CJEU decisions, the Swedish CoP's influence as gatekeepers or filters appears quite marginal. This would seem to support the idea, championed by the CJEU, that all national courts, regardless of their position in the national legal order, are Union courts. Our findings seem to indicate that the CoP and CFI live in somewhat different worlds: the data shows that both are confronted by EU law-related issues, but differences in citation behaviour could be explained by the fact that they are not confronted by the same issues.

However, our study shows that when Swedish CFI have found and cited a CoP decision concerning an issue relating to EU law, they do not consistently consider relevant CJEU case law. Thus, the influence of the CoP on the CFI enforcement of CJEU law can be and is quite high in situations where they

[71] See, e.g., Förvaltningsrätten i Stockholm's judgment in case number 2438-15, 12 March 2015.

make decisions on matters of EU law that the CFI subsequently cite. This is highly surprising, even controversial, as it suggests that Swedish CFI have on some matters effectively replaced the primary source of law—CJEU case law—with an interpretation in a secondary source of law—a national CoP decision.

To put things in perspective, let us imagine that something similar occurred in a federal legal order, such as in the USA. In 1973, the United States Supreme Court famously declared in *Roe v Wade* that the US Constitution included a right to have an abortion.[72] Soon thereafter and explicitly on the basis of the US Supreme Court's decision in *Roe v Wade*, the Supreme Court of Minnesota concluded in *State v Hodgson* that the state of Minnesota was precluded from interfering with abortions.[73] Imagine if inferior Minnesota courts subsequently exclusively referred to *State v Hodgson* as the source for the right to have an abortion, completely disregarding *Roe v Wade*.

A possible, more nuanced, understanding of these findings is to admit that the interplay between national law and EU law is both important and complicated; that the CoP are the ultimate arbiters of matters of national law and interpreters of national law; and that this—perhaps inevitably and legitimately—gives them some influence over how the CFI apply and enforce case law-based EU law.

[72] 410 US 959, 93 S Ct 1409 (1973).
[73] 204 NW2d 199 (Minn 1973).