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1 Introduction: CJEU Jurisprudence and Union Courts of Ordinary Jurisdiction

We have come to accept as natural that the judicial enforcement of European Union 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.’

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. 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 authorities of the Member States, who are responsible for ensuring that [Union]
law is applied and respected in the national legal system. 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. National courts are the ‘first-in-line’ courts in the Union judiciary.

There are good reasons for this division of labour between the EU courts and the national courts. Much of it goes 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 Union 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 Union law is effectively enforced on the national level depends on the national courts’ cooperation.

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 the judicial enforcement of EU law consequently and in practice largely occurs on the national level. Even if the EU courts had broader jurisdiction that would allow it to hear more cases, their workloads would not permit it. For this reason, loyal cooperation between EU courts and national courts is essential for full, uniform, and effective application of EU law in every day application. Consistent with this division of labour, national courts have a right and sometimes an obligation to request the CJEU for preliminary rulings on the interpretation and validity of EU law, and, consistent with this division of labour, the majority of the CJEU’s case load consists of such preliminary rulings. It is also the national courts that are capable of providing the remedies and procedures through which the EU law can be realized, and therefore are under an obligation to do so. Another benefit of national courts applying and enforcing EU law against individuals and Member States is that these are assumed to respect the national courts more than the EU courts.

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4 Case C-2/88 Zwartfeld, EU:C:1990:440, paras 16 and 18 respectively.
5 Case T-51/89 Tetra Pak Raising 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, eg Advocate General Bot’s opinion in Case C-555/07 Kucukdeveci 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.
8 See, eg 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.
9 See, eg C-50/00 P Unión de Pequeños Agricultores v Council, EU:C:2002:462, para 41.
This does not mean that the relationship between 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.’ National courts wield considerable power as the effective application and enforcement of Union law depends on their continued and loyal cooperation.

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 to the national political bodies that is responsible for their existence. To use a well-worn expression, Member State courts are servants of two masters: the EU and the Member State.

This contribution will focus on a different aspect, namely the relationship between national and EU courts within the EU judiciary. The relationship between the national and EU courts has also been discussed extensively in the literature, most frequently by focusing on the preliminary rulings institute. That national courts request preliminary rulings and that the CJEU issues them is of important, even necessary, for the division of labour between EU and national courts to function well. 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 centralized 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 contribution: to what extent do lower national courts do their own, independent examination of CJEU case law?

2 Theory: A Three–Tiered EU Judiciary?

The description of the division of labour within the EU judiciary primarily focuses on the difference in function of EU courts on one hand and national courts on the

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11 Tridimas (n 7) 403–404.
12 ibid. See also Lang (n 2) 5.
15 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.
16 The term ‘CJEU case law’ refers herein to the jurisprudence of both the Court of Justice and the General Court.
other. This gives the impression of a two-tiered EU judiciary where, only somewhat simplified, EU courts issue judgments on the interpretation of EU law and 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 that national courts have different roles and functions and thereby over-simplifies the situation. An alternative, more complex but also more correct model acknowledges that the EU judiciary has at least three tiers: EU courts, the highest national courts, and lower national courts.

The fact that European Union law does not provide the highest national courts with any special privileges does not mean that they should be lumped together with all 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 recognized, not least in the legal literature. It has been argued that higher national courts have ‘fought back’ against the erosion of their power that follow from the CJEU.

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 to the idea that all national courts are Union courts of general jurisdiction and steadfastly refused to give the highest national courts and role in between itself and 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 was of Union nature. The reason underlying this holding is made clear: the full, uniform, immediate, and effective application of Union law in all Member

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17 See, eg Barents (n 3) 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.’).

18 Most obviously supreme general and administrative courts and specialized constitutional courts.

19 One could argue for a model with additional tiers, including a distinction between the Court of Justice and the General Court on the EU level and 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 contribution.

20 Article 267 TFEU distinguishes between national courts ‘against whose decisions there is no judicial remedy under national law’ from other national courts, but places them in a weaker position vis-à-vis the CJEU than other national courts, not stronger.


States. 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 includes that lower national courts shall consider and apply CJEU case law independently and without considering higher national courts' opinions.

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 in adjudicating individual disputes. In doing so, the national courts and the Union courts communicate directly with each other and there is no ‘detour’ by way of the higher national courts.

Although there are, as made clear in Simmenthal II, good arguments for this model, we do not believe that one 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 in the national legal culture and have both been trained in and are accustomed to paying close attention to the highest national courts’ opinions. 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 are relevant CJEU or General Court 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 on some level be affected thereby. In this manner, and in contrast to the model described above, we imagine and suspect that higher national courts by merit of their position in the national judiciary can impact lower national courts’ application and enforcement of CJEU case law.

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25 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 expertergrupp’ (2007) Svensk Juristtidning 769.
26 See Model A in Figure 1 below.
27 See Model B in Figure 1 below.
3 Method: Measuring Influence

In this study, 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 a study of Swedish courts.

For '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. If we seek to understand how CJEU case law is actually applied and enforced on the national level, as we do here, focus ought to be on national CFI who are responsible for the application and enforcement of Union law in the overwhelming majority of all cases.

For 'higher national courts' we examine 12,179 published decisions by the Swedish Supreme Court (Högsta domstolen) and the Swedish Supreme Administrative Court (Högsta förvaltningsdomstolen) between when Sweden joined 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’ CFI choice of CJEU case law, ie 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.

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 in three different ways 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)

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

29 Previously referred to as Regeringsrätten.
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 study are that, at least in the case of Sweden, higher national courts are capable of and do in practice influence lower national courts’ application of CJEU case law in individual cases, but that in practice this influence is quite limited.

4 We Don’t Need No Education: CFI Citation Independence

The first approach used here to measure to what extent Swedish CoP influence Swedish CFI application of CJEU case law is what we refer to as CFI citation independence. This assesses whether the CJEU court 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 hand, the CJEU case law cited by Swedish CoP.

The underlying thinking is perhaps best explained using an example. If a Swedish CFI issues a judgment where it cites two CJEU court decisions, did it find those decisions and decide to cite them because they had previously been cited by Högsta domstolen or Högsta förvaltningsdomstolen? There are three possible outcomes in this situation: (i) neither of the two decisions have been cited (0 per cent overlap), (ii) one decision has previously been cited (50 per cent overlap), or (iii) both decisions have previously been cited (100 per cent 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, demonstrate that CFI are able to identify and apply CJEU case law independently. Is it possible that CoP have influenced the CFI to cite CJEU and General Court decisions that the CoP themselves have never mentioned in their decisions? If so, we are talking about a very subtle form of influence, for example that by discussing EU law more generally and/or citing other CJEU and General Court decisions the CoP have inspired the CFI to explore and cite other elements of EU law.

If a substantial overlap is discovered one 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 some quality, such as it being an important precedent on a particular point of law. All we know in such

30 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.

31 If we consider CFI decisions further back in time, we might also make the mistake of confusing correlation that is impossible due to differences in time, e.g a CFI citing a CJEU
a situation is that it is possible that the lower court was influenced by the choices of the higher court.\textsuperscript{32}

In the overwhelming majority of all cases the CJEU and General Court decisions that the CFI cite have never been cited by the Swedish CoP. About two out of three CFI judgments\textsuperscript{33} that contains 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.\textsuperscript{34} Only in about one in six cases\textsuperscript{35} have all of the CJEU cases cited by the CFI appeared in CoP case law.

![CFI/CoP EU Court Decision Reference Overlap](image)

The result is quite strongly divided between no reference overlap (0 per cent) and complete reference overlap (100 per cent), with very little in between. The reason for this clear division is that the overwhelming majority of all CFI decisions citing CJEU case law cites a single decision.\textsuperscript{36} The nature of the underlying data thus dictates that most CFI decisions can only sort in one of the two categories: 0 per cent or 100 per cent reference overlap.

\textsuperscript{32} We study influence in these second types of situations in more detail below using different approaches.

\textsuperscript{33} 71\% for general courts and 75\% of administrative courts.

\textsuperscript{34} See Figure 2 below. As shown, there is 0\% overlap between EU case law cited in general CFI and in general CoP decisions in 85\% of the cases, but this increases to levels on par with the administrative CFI when one expands the comparison with all CoP references.

\textsuperscript{35} 15\% and 19\% respectively.

\textsuperscript{36} See Figure 3 below.
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 are, to a large extent, considering and applying CJEU case law independent 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 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 arises before the CoP. However, our previous research indicates that EU law plays an increasingly important role at the highest Swedish courts, demonstrated by the fact that almost 10 per cent of CoP cases had an EU law component in 2014. 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, there is a tendency of higher Swedish courts 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. 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.

5 The Master Has Spoken? (Potential) CoP Citation Influence

5.1 What Happens When CoP Do Get Involved?

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

Considering that CoP influence appears limited to 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 CFI application of CJEU case law 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 can influence the lower national courts’ application of CJEU case law as it effectively places the EU courts at the mercy of the higher national courts. It is for example easy to imagine

38 ibid, 170-175.
39 See further section 5.2 below.
that higher national courts might be tempted to use this influence if a situation where they strongly disagree with CJEU case law arises.

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 has had on the CFI. By studying which CJEU decisions the CoP cite, 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 is two possible ways by which CoP engagement 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 CJEU judgment’s existence by referring to it, the CJEU judgment’s precedential value increasing 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 and General Court decisions ever cited by a Swedish CoP in a published ruling and find that the CoP have all-in-all cited 209 unique CJEU decisions. We then examine if and how frequently the Swedish CFI have cited these decisions.

We find that most CJEU decisions cited by the Swedish CoP have never or very rarely been cited by the Swedish CFI. 59 per cent of all CJEU decisions cited by Swedish CoP have never been cited by the CFI during the studied period.

Among the remaining decisions, 58 per cent have only been cited once or twice by

\[40\] The CoP only communicate with the CFI through their published opinions and their ability to influence CFI towards particular EU judgments without explicitly citing them is limited.

\[41\] 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 contribution, 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 found 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 37) 173–174.

\[42\] Some might argue that the fact that the CFI did not refer to a 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.

\[43\] See Figure 4 below.

\[44\] 123 out of 209 EU court decisions.
the CFI. Thus, of all the unique CJEU and General Court decisions ever cited by Swedish CoP, about 83 per cent\textsuperscript{45} have never by the CFI or so rarely been cited that any connection between the two is highly uncertain. Differently phrased, only 17 per cent of the CJEU case law cited by the CoP have appeared more than twice in CFI judgments and where it is possible that the CFI reference is a sign of CoP influence.

**CFI References to CoP Cited EU Court Decisions**

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 court 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 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 precedent is not de jure binding in the Swedish legal system, it plays an important role and is de facto followed.\textsuperscript{46} 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 that the CoP cite is therefore of limited relevance to the lower courts.\textsuperscript{37}

There are two CJEU judgments that deviate quite sharply from the general trend. The first of these is the CJEU’s judgment in *Graphic Procédé* regarding the

\footnotesize{\textsuperscript{4} 173 out of 209 EU court decisions.  
\textsuperscript{46} See also section 5.3 below.}
classification of transactions for VAT purposes. More specifically, the case concerned the classification of printing services for assigning VAT. In the wake of Graphic Procédé, Swedish courts, including general and administrative courts on all levels, have received and decided many cases dealing with the VAT-classification of printing services, including many complex cases regarding the legal consequences of classification and reclassification of print-related services. 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 CoP involvement 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 on a not yet constructed property that they eventually would let. Although there are examples of Swedish courts citing Rompelman for the CJEU’s conclusion that such pre-payments can entitle a VAT-repayment, it is much 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.’ This explains why references to Rompelman appear in a large number of CFI and CoP decisions: there is a large number of 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.

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48 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).
49 Graphic Procédé is generally relied upon by Swedish courts for the legal rule that printed products shall be assessed 6% VAT instead of the standard 25%.
50 See, eg HFD 2011 not 66; HFD 2014 not 15; HFD 2014 ref 14; HFD 2015 ref 69; NJA 2015 s 1072; NJA 2016 s 799.
51 Case 268/83 Rompelman and Rompelman-Van Deelen v Minister van Financiën, EU:C:1985:74.
52 See, eg RÅ 2002 not 26.
53 Rompelman, para 24. See, eg RÅ 2004 ref 112; RÅ 2010 ref 98; HFD 2013 ref 12. There are also a very large number of examples from the lower Swedish courts.
54 Besides Graphic Procédé and Rompelman, this is also the case with eg Case C-320/88 Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV, EU:C:1990:61 (third most frequently cited by CFI).
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 a EU-related legal matter, a lower-court judge has no other option than engaging 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) wants 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 having a dispute where there is relevant CJEU case law and that this case law has been discussed by in one of the Swedish courts of precedent’s published decision. As concluded above, it is rare that the lower court judge reads the higher court’s decision and cite 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 sympathize with a lower court judge that chooses the latter approach, it is 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 exist new primary sources not considered in the secondary sources.

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

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55 The data considered contains 205 such CoP decisions.
56 The data considered contains 6,235 such CFI decisions.
57 See Figure 5 below.
Figure 5 demonstrates that most EU-related CoP decisions see very limited use in lower courts: 43 per cent of them have never been cited by the CFI in the period studied, and most others cited only 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 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. The list of frequently cited judgments also include HFD 2014 ref 14, concerning tax assessment and value added tax, and NJA 2009 s 559, concerning 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, where a few judgments are cited extensively and most judgments are practically never used, in the CIF dataset is not surprising in itself, since practically all citation networks display this tendency. However, it is interesting from the perspective of text cited...

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58 88 decisions.
59 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105.
60 This forms part of extensive litigation concerning the value-added taxation of printing services, in the wake of the above mentioned *Graphic Procédé* case from the CJEU. For a comment see, eg U Hedström, ‘HFD:s beslut om att efterbeskatta kunder i de s.k. tryckerimomsnälen – ändring av praxis?’ (2014) *Skattenytt* 245.
CoP as gatekeepers. The fact that some CoP judgments are cited extensively indicates that the highest courts indeed have 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 decisions also contain 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 cites 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 a quite 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\textsuperscript{62} and as Union courts of ordinary jurisdiction we expect the CFI to cite such case law independently and faithfully. However, as illustrated by figure 6, this hypothesis does not hold true.

![CFI References to EU-Related CoP Decisions](image)

\textit{Figure 6}

\textsuperscript{62} 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.
In fact, nearly half of the relevant CFI judgments 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, all the way up to 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 can 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. 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.

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. Firstly, 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 the judgment the Supreme Court discussed both the penalty for pick-pocketing and expulsion of EU citizens convicted of crimes. A number of CFI cases cite the judgment on the issue regarding the relevant penalty for pick-pocketing, without any EU law dimension. However, NJA 2009 s 559 is also used by lower courts regarding expulsion of EU citizens and the citizens’ rights directive, with no references to CJEU case law.

Secondly, 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,68 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 his complaint. This conclusion has been cited, practically verbatim, by lower administrative courts in many public procurement cases. Typically, the lower court will – so to say – 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 that judgment.69 Cases such as RÅ 2009 ref 69 contain both EU and national law elements, but unlike in the case of NJA 2009 s 559 these cannot be separated from each other. The EU law issue is foundational and decides the ambit for 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 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, ie 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 assessed 6 per cent VAT 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 for 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

68 Case C-315/01 Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG), EU:C:2003:360.
69 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.
foundational decision in Graphic Procédé. However, other CFI judgments obscure the EU dimension by only referring to Swedish legislation and the CoP judgment, as if no EU dimension existed. This approach is sometimes adopted even if the plaintiff explicitly makes reference to the EU principles of legal certainty and legitimate expectations. 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, ie 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, ie referring only to the CoP judgment even for the EU law dimension, ie scenario 3 above. This is inherently problematic, as it obscures the EU law dimension and make 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 CFI’s application of CJEU case law 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 and General Court case law independent of whether this has been dealt with by Swedish CoP or not. This ‘reference independence’ is true regardless how one measures it: the CFI never or rarely cite 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, 

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70 As noted above, the co-reference rate for HFD 2014 ref 14 is about 53 per cent. For examples of administrative CFI judgments referring to HFD 2014 ref 14 as well as CJEU case law, see, eg 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.

71 See, eg 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.

72 See, eg Förvaltningsrätten i Stockholm’s judgment in case number 2438-15, 12 March 2015.
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.

On the other hand, 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 CoP’s influence on the CFI enforcement of CJEU law can be and is quite high in situations where they 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, like the American. In 1973, the United States Supreme Court famously declared in Roe v. Wade that the U.S. Constitution included a right to have an abortion.73 Soon thereafter and explicitly on the basis of the U.S. Supreme Court’s decision in Roe v. Wade, the state Supreme Court of Minnesota concluded in State v. Hodgson that the state of Minnesota was precluded from interfering with abortions.74 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.

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73 410 US 959, 93 S Ct 1409 (1973).
74 204 NW2d 199 (Minn 1973).