To Ask, or Not to Ask

- On the Role of National Courts in the European Union Legal System
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1. Introduction

Once a country becomes a member of the European Union (EU), new obligations and responsibilities await, especially for national courts which shoulder a new kind of responsibility. This responsibility amounts to bringing EU law into all national courts as well as to sustain a cooperation with the supranational Court of Justice of the European Union (hereafter the CJEU or the Court). In this thesis, the role of national courts in the European legal system will be analysed. More precisely, this thesis examines how national courts act in the collaboration expected of them with the CJEU. The collaboration between national courts and the CJEU is set within the context of a procedure called the preliminary reference procedure. The core of this procedure is that national courts can, and in some cases, must ask the CJEU for guidance on interpretation of EU law in national rulings (Bernitz 2016:20).

Given EU law precedence to national law, it is the supranational CJEU’s responsibility to ensure correct interpretation and application of EU law (Cramér et al. 2016:9). However, the preliminary reference procedure is the only way the Court can be informed on the use of EU law in the Member States (Wind 2010:1040). As a result, national courts hold a gate-keeping position as determinants of what cases reach the CJEU (Tridimas, Tridimas 2004:134). The decision to ask or not to ask the CJEU for guidance is an important choice for the development of European legal integration. When national courts refer national cases to the CJEU, the Court gains primary authority to interpret EU law and expand its jurisdictional reach and width (Alter 2009:94). If necessary as a means to reach European legal unity, the CJEU might deem national legislation incompatible with EU law, which means national law will need to be changed (Bernitz 2016:19). When instead national courts refrain from referring cases to the CJEU, the Court is, ipso facto, blocked from penetrating EU law into national law (Leijon unpublished:10).

National courts use EU law on a day to day basis and are, every time, faced with the choice to inform and ask the CJEU for help to interpret EU law or to do an independent assessment and application (Åhman 2011:16). National courts are forced to make a decision to cooperate with the CJEU, potentially putting national legislation at risk. Alternatively, national courts can act protectively of national legislation and make a decision to refrain from cooperation with the CJEU. What is evident however, is that national courts enjoy discretion before this choice.
Empirical studies of how national courts balance and position themselves before this choice is scarce. Previous research shares a common problem having exclusively studied how national courts position themselves before this choice by examining the national cases actually referred to the CJEU (Leijon Karlsson 2013, Wind et al. 2009, 2010, Bernitz 2016). Without analysis of cases not referred to the CJEU, it is impossible to draw any conclusions and thus we lack complete information on how national courts uphold their role within the European legal system and how they position themselves in the expected collaboration with the CJEU. In order to get an overall picture, national cases that are not referred to the CJEU must also be examined. By doing this it is hoped this study will provide new insight into national court behaviour and EU legal integration.

The role of national courts is an important question to address in recognition of the trend of courts increasingly acting as political arbitrators. For over half a century, there has been an on-going process of power shifting from political actors and institutions towards courts. Today, significant political matters are to a greater extent resolved by courts rather than political institutions (Hirschl 2008:94-95). Prime evidence of this is the increasing coverage in the daily press given to judicial rulings, prompting both legal and political debate.

One such case is the Laval ruling. Latvian building workers located in Sweden signed with the Latvian trade union instead of the Swedish union, resulted in a case being brought before the Swedish national court, which was subsequently referred to the CJEU. The issue of law concerned the Latvian company not adhering to the more favourable Swedish collective agreement in terms of minimum pay. As a result, the Swedish trade union imposed a blockade against the Latvian building site, making it impossible for the Latvian company to finish its job. Having asked the CJEU for guidance the Court ruled in favour of European workers’ ability to move across borders. Swedish regulations were disregarded and enforced to be changed. Following the Courts ruling, the Swedish national court’s choice to refer the Laval case proved to end up having political consequences for the Swedish labour-market employment policy (CVRIA 2007). ¹ If the national court in question had decided not to refer this case to the CJEU for guidance, the outcome could have been different for the Swedish labour-market employment policy. It is evident that the decision made by national courts to

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¹ Laval un Partneri Ltd v Svenska Byggnadsarbetarförbundet, Case C-342/05.
refer or to withhold national cases, has wide ranging consequences. Both for the outcome in
the individual case as well as for European legal integration. The transformation of courts into
political actors is referred to as “judicial politics” and constitutes a core concept for this
thesis.

This thesis proceeds from theoretical expectations of national court behaviour towards the
CJEU, which has predominantly been discussed within the research field of European
integration theory. Two dominant perspectives exist: the judicial empowerment view assumes
national courts reach out and act in compliance with the CJEU. The sustained resistance view
assumes national courts act in a more restrained way in being protective of national interest.
With this empirical study, I seek to set out whether the role of national courts in the European
legal system can be aligned with either of these theoretical perspectives.

1.1. Aim and Research questions

Proceeding from the two perspectives within European integration theory, the purpose of this
thesis is to examine what role national courts play in the European legal system by examining
their behaviour in cases chosen not to be referred to the CJEU.

Three aspects of national court behaviour stand in the foreground of previous research on
national courts within the context of the European legal system. Firstly, what kind of cases
national courts decide to refer to the Court of Justice of the European Union for a preliminary
ruling (Leijon and Karlsson 2013, Wind et al. 2009, 2010); secondly, how national courts
apply and embrace EU law in national rulings (Åhman 2011), and thirdly, how well national
courts provide reasons why they have not requested a preliminary ruling (Bernitz 2016).
These three aspects lead me into three investigative questions in order to fulfil the purpose:

1. What kind of cases do national courts withhold from a preliminary ruling by the
   CJEU?
2. How is EU law referred to in national rulings never sent to the CJEU for a preliminary
   ruling?
3. How do national courts provide reasons for not requesting a preliminary ruling?
Having designed an examination of national court rulings connected to EU law, but never referred to the CJEU, this thesis examines aspects of national court behaviour not previously considered. As a result, this thesis breaks new ground providing new empirical knowledge not only to previous research on national courts in the European legal system, but also to the theoretical debate on national courts expected behaviour towards the CJEU.

1.2. Disposition of the thesis

The remainder of this thesis is organized into three main sections and a conclusion. In the following section, theory and previous literature will be outlined focusing on the concept of judicial politics and the theoretical perspectives within European integration theory. Also previous research on national courts and the preliminary reference procedure will be presented.

In the next section, the methodology of this thesis is outlined. However desirable, it has not been possible within the scope of this thesis to study all Member States in the European Union. Therefore, a decision has been made to limit the investigation, into the national courts of Sweden. In this section the design of this thesis will be outlined and the empirical material as well as the analytical framework will be presented. Additionally, the theoretical assumptions valid for this study will be derived.

In the third section, the findings from the empirical study of the three aspects will be analysed and compared. How the empirical findings can be informed by the theoretical perspectives of European integration theory will also be considered. This is followed by a concluding section in which the main results from the empirical study will be discussed. Finally, suggestions for further research will be given.
2. Previous Research and Theory

The following section outlines previous research and theory relevant for this study. Being of central importance to this thesis, the preliminary reference procedure will also be explained.

2.1. Judicial politics

The term judicial politics refers to those decisions of courts which are often political in their results and therefore, courts have within the recent decades become more and more significant political actors (Volcansek 1986:1, Dahl 1957:565, Åhman 2011:211). The increased reliance on courts and the shift in power from political institutions towards the judiciary is commonly referred to as the judicialization of politics (Hirschl 2008:94). Already in 1957 Robert Dahl expressed concern over the American Supreme Court’s significant role in policy making and the position of courts within the political system is still highly debated (Leijon, Karlsson 2013:5-6). This concept of judicial politics expanded to embrace the actions of European courts (Hirschl 2008:94). The generous room for interpretation in EU legislation leaves national courts and the CJEU a high degree of discretion, making the EU legal system of particular interest in terms of judicial politics (Hix 2005:111).

Studies of judicial politics has predominantly focused on the judicial empowerment of the CJEU, commonly described as the most powerful court in the world (Alter 1998a:227, Alter 2009:94). Given its decisions have significant economic and social impact on EU Member States the Court’s rulings are often regarded as political, balancing the core meaning of judicial politics on a knife’s edge (Cramér et al. 2016:6). As the motor of legal integration within the European Union the Court has received much attention for its “constitutionalization” of the treaties often referred to as the quiet revolution (Conant 2001:97, Hix 2005:134, Burley, Walter 1993: 60, Weiler 1994:517). The Court is commonly described as constantly promoting and favouring further economic and political integration within the Union (Pollack 2013:5, Hix 2005:123). The establishment of the doctrines of direct effect and supremacy constitutes a prime example of the Courts powerful position and strong legal authority (Alter 2009:93-94, Hix 2005:123). They were originally requests for preliminary rulings subsequently interpreted by the Court to erase the line between national and EU law. As a result, all EU norms ranging from treaty articles to general principles are ensured direct supremacy over all national law (Hix 2005:121-123).
The transfer of power to a supranational judiciary as pronounced as in the European Union is unique in its kind (Wind 2010:1043). There is no mistake, European judicialization has not only turned the CJEU into an important political actor, but also national courts hold a key position (Vallinder 1994:91, Alter 2009:95-96). It is a well-established fact that the development of the European legal system and the Court’s gradual empowerment was only possible due interaction of national courts (Alter 2009:94, Alter 1998a:227-228). The concept of judicial politics as well as the interplay between the Court and Member State national courts has occupied scholars for decades and remains highly debated. This debate is found within the broader research field of European integration theory, which will now be outlined.

2.2. European integration theory: The CJEU and the Member States

There is a clear division amongst scholars in the study of the CJEU and national courts within theory of European integration. Two main theoretical approaches are easily distinguished, the view of intergovernmentalism and that of neofunctionalism. These two approaches differ strongly in their views on the proceedings of European integration and it is of great importance to understand the core elements in these two theories when studying the interchange between the CJEU and national courts. According to the intergovernmentalist approach, the CJEU is strongly constrained by pressure from the Member States and lacks the autonomy to go against the Member States (Pollack 2013:7, Alter 1998b:121). Opposed to this, the neofunctionalist approach views the CJEU as independent and unconstrained by the Member States (Pollack 2013:7-8). Furthermore, the CJEU has autonomy to rule against the interest of the Member States thus also leeway to push for a deeper legal integration (Alter 1998b:121, Hix 2005:136).

Building on neofunctionalism and intergovernmentalism two sub-categories have emerged, the “judicial empowerment view” and the “sustained resistance view”, seeking to explain national court behaviour and competence. In line with neofunctionalism, the “judicial empowerment view” hypothesise national courts’ support of the CJEU in their drive towards further integration (Pollack 2013:12, Golub 1996:8). National courts support for the CJEU rest upon self-interest and search for empowerment, which also explains acceptance of EU law and legal integration. National judges’ and legal actors’ self-interest is explained as a driving force. By referring legal cases to the CJEU, national judges and legal actors are given
an opportunity to empower themselves. Ruling on the compatibility between national legislation and EU legislation also enables them to practice a form of judicial review (Leijon unpublished:6). By referring cases to the CJEU, national judges and legal actors are also given the opportunity to gain further jurisdiction in decision making institutions as well as entering a dialogue with the CJEU (Golub 1996:7). Opposed to this and in line with the intergovernmentalism approach, the “sustained resistance view”, hypothesise national courts resistant position towards cooperation with the CJEU in order to protect domestic interests. Within this view, the assumption that national courts have an interest in supporting the CJEU is rejected. National judges face a strong incentive not to cooperate with the CJEU because of the high political stakes involved in EU law supremacy and direct effect (Leijon unpublished:6, Pollack 2013:12). Being strategic actors, national courts act in accordance with domestic long term economic and political interests (Hix 2011:97-98).

### 2.3. The preliminary reference procedure

As the ultimate arbiter, the CJEU shall guarantee legal certainty by uniform application and interpretation of EU law in all Member States, irrespective of previous national legislation (Cramér et al. 2016:9, Bernitz 2016:19). National courts function as an extended arm applying and interpreting EU law into national law and the Court is dependent on national courts willingness to refer cases for the Court to rule on in order for the EU legal system to function (Wind 2010:1040). As regulated in Article 267 Treaty on the Functioning of the European Union (TFEU), national courts must refer national legal cases for a preliminary ruling from the CJEU to resolve questions on EU law interpretation and validity when applying EU law. Any national court has the right to refer cases to the CJEU as soon as EU law is involved. National courts are however obliged to refer national cases when “there is no judicial remedy under national law” or when uncertainties concerning EU law application arise (Bernitz 2016:20, Crámer et al. 2016:14). Due to the principle of direct effect, rulings from the CJEU are binding not only for the national court referring the case but for all national courts ruling on the particular EU law (Crámer et al. 2016:13-14).

Being the key mechanism connecting national courts and the CJEU the preliminary reference procedure has received considerable attention within studies of European integration. As the only channel of communication between the two levels of actors the preliminary reference system is of central importance when explaining national court behaviour and the paradoxical relationship between them and the CJEU. The judicial empowerment view assumes national
courts support for the CJEU and compliance with the preliminary reference system (Leijon unpublished:12-13). National judges are assumed to use the preliminary reference system strategically as “a sword to force change” reinforcing their own position and personal views (Golub 1996:8). The preliminary reference system can be a means to challenge and improve their own status, break free from the hierarchy amongst domestic courts, as well as to challenge the national government (Alter 2003:49, Alter 2009:99-100, Golub 1996:8). The sustained resistance view assumes national courts use of the preliminary reference system to defend national policy (Leijon unpublished:13). By withholding preliminary references national judges can shield national policy from unfavourable CJEU rulings (Golub 1996:9).

Also relevant to the discussion is the inter-court competition argument (Alter 1998a:241). EU supremacy is argued to be considered a threat to higher national courts as they no longer hold the superior position. Contrary, lower national courts see few costs and numerous benefits in referring cases to the CJEU as national judges are given the opportunity to empower themselves against judges at higher instances (Alter 2009:99, Davies 2012:87). A salient argument within the discussion is that of national courts usage of the preliminary reference procedure as a means to circumvent higher courts. By strategically referring cases to the CJEU when it is expected for the Court to interpret in a favourable manner, lower national courts improve their own status thus break free from the hierarchy amongst national courts (Alter 2003:49, Alter 2009:100).

In sum, despite existing formal obligations for national courts to refer cases when in doubt about national law compliance to EU law, it is still up to national courts “to decide whether such doubt exists or not” (Wind 2010:1042). This choice enables discretion to use the preliminary reference procedure strategically. Withholding cases eliminates the risk of having the CJEU rule unfavourable to national policy and interests. On the other hand, a referral to the CJEU can be a strategic advantage (Golub 1996: 8-9).

2.4. National courts and the preliminary reference procedure

The preliminary references system is according to the Court “an index both of judicial cooperation between the CJEU and the national courts of the Member States and of the integration of Community law into national law” (Golub 1996:2). Also a majority of scholars agree to this as it is the varying degree of the aggregated number of preliminary references sent from Member States to the CJEU that has been focus of the most research and debate.
(Stone Sweet & Brunell 1998, Tridimas & Tridimas 2004, Alter 2009, Wind et al. 2009, Bernitz 2016). Comparative studies explaining the varying degrees of preliminary references sent from Member States have found support both in favour of the judicial empowerment view (Stone Sweet, Brunell 1998) as well as the sustained resistance view (Wind et al. 2009, 2010, Golub 1996). These ambiguous results continue to generate debate on Member States varying degrees of preliminary references as no general conclusions can be drawn due to the varying methods and materials used.

Sweden is statistically among the Member States that have made the lowest number of request for preliminary rulings (Bernitz 2016:67, 118). Hence, Swedish national courts are found to be too restrictive in their use of the preliminary reference procedure, consequently there is room for an increase in the number of requests from national courts in Sweden (Bernitz 2016:118-120). National courts hesitant approach to the preliminary ruling system has been explained as a lack of tradition of judicial review (Wind et al. 2009:72-73). Constitutional democracies familiar with strong courts and judicial review is on the other hand more prone to draw on the preliminary reference system (Wind 2010:1041). Judicial review is considered good “democratic governance” by constitutional democracies whilst assisting to EU law supremacy over national law is a radical move for national judges in countries such as Sweden and Denmark due to a strong dualist and majoritarian tradition where national judges identify themselves to loyal civil servants (Wind et al. 2010:1057-1058, 2009:71-72).

Using the preliminary reference system as a measurement tool for Member State compliance to EU law and national court behaviour has however been criticised (Alter 2009:99, Wind 2010:1052). The great variation in Member States willingness to refer cases to the CJEU is not a measurement of Member States compliance to legal integration, but rather a visible sign of national courts considerable discretion in the choice to refer or withhold national cases before the CJEU (Alter 2003:34). Withholding questions on national law compatibility on EU law has been used strategically to limit the CJEU from expanding its jurisdiction (Alter 2009:100-101). In practice, national courts have been found to frequently withhold national cases, despite existing doubt on EU law interpretation and application (Alter 2003:34). Subsequently, national courts have a tendency to refer narrow and technical questions as a means to obstruct the CJEU to expand its jurisdictional scope and reach or challenge national legislation (Alter 2009:99). In his research on British judges Golub found references to the
CJEU to be withheld as EU law was independently interpreted in order to protect national environmental policies from unfavourable EU law (Golub 1996:9).

Examining the aggregated number of requested preliminary rulings does not inform us of national court behaviour. Rather, investigating what kind of cases that are referred does (Wind 2010:1052-1053). However, there are currently only a few studies on what kind of cases national courts refer to the CJEU available. Subsequently, we know surprisingly little about national court preference and behaviour when interacting with EU law (Leijon, Karlsson 2013:6-7) and national courts choice to refer or to withhold national legal cases opens up to a yet undiscovered research area (Conant 2007:221-222).

One of the few studies investigating the characteristics of national cases referred to the CJEU is Wind. Having found an overrepresentation of technical cases referred by national courts to the CJEU Wind suggests national courts to be more likely to refer technical cases rather than politically sensitive ones. The results from her in depth case study on Danish and Swedish Courts suggests national courts to act in line with the sustained resistance view as she finds characteristics of a national case to be decisive for national courts in their choice to refer or withhold national cases. Wind draws a distinction between private and public cases. National cases involving only private parties are, according to Wind, less controversial than a case in which a public prosecutor, national authorities or government are party to that case (Wind 2010:1052). As the only multidimensional analysis of national courts case referrals to the CJEU Leijon and Karlsson (2013) further explain national courts’ behaviour based on case characteristics. Swedish national cases referred to the Court for a preliminary ruling were identified as non-politically sensitive technical cases, somewhat politically sensitive cases, politically sensitive cases or highly politically sensitive cases in order to determine whether Swedish national courts mainly refer technical or political sensitive cases to the CJEU. The results were as followed: 26.9 % of the legal cases studied were non-politically sensitive technical cases, 22.4 % somewhat politically sensitive cases, 37.3 % politically sensitive and 13.4 % being highly politically sensitive. As a result, Swedish national courts were found to mainly refer politically sensitive or highly politically sensitive cases (Leijon, Karlsson 2013:22). The results suggest for Swedish national courts to act in line with the judicial empowerment view. However, without information on the proportion of cases not referred to the CJEU, it is difficult to draw any final conclusions as to whether the judicial empowerment view better reflects national court behaviour (Leijon unpublished:26-27).
2.5. The CILFIT criteria and EU law in national rulings

European national courts’ propensity to refrain from sending cases to the CJEU has been further documented by a growing number of scholars. In fact, the majority of national cases connected to EU law are decided by national courts without preliminary references. As a result, the practical enforcement of EU law is in reality based on the interpretation of national courts (Conant 2002:81,90).

As mentioned, national courts have an obligation to request a preliminary ruling from the CJEU when ruling on EU law. There are however some exceptions. These exceptions are regulated in the CILFIT criteria developed by the CJEU in the CILFIT ruling 1982.\(^2\) The criteria were developed in order to provide national courts with guidelines for when courts are not obliged to request a preliminary ruling (Bernitz 2016:30-31).\(^3\) The CILFIT criteria comprise of the doctrines of *Acte Èclairé* and *Acte Clair*. According to the *Acte Èclairé* doctrine, national courts do not have to request a preliminary ruling if another court within the Union has already consulted the CJEU on the matter in question. The question does not have to be identical as long as the Court’s previous answer or practice explains EU law clear enough so a uniform application of EU law is not put at risk (Broberg 2014:233.) If the correct application of EU law is so obvious that it does not leave “scope for any reasonable doubt”, a case is considered *Acte Clair*. Another accepted exception is if the matter in question is not relevant for the final outcome of the case (Bernitz 2016:37).

National courts’ avoidance for requesting preliminary rulings has been recognized primarily in the *Acte Clair* doctrine (Pollack 2013:30). It has also been suggested for national courts to make decisions in accordance with the CILFIT criteria, despite existing doubt on national law compliance to EU law (Arnull 2002:187). A desire to avoid unwelcome decisions by the CJEU has been a suggested source to the misapplication of the CILFIT criteria (Pollack 2013:14) and the expansion of the misuse of the CILFIT criteria has even been acknowledged as “a growing abuse of the *Acte Clair* doctrine” (Wind 2010:1055-1056). Establishing the extent of such a misuse, has however, proven difficult as a systematic analysis of each individual legal case involving EU law is required (Wind 2010:1056). No previous systematic

\(^2\) Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, Case 283/81.

\(^3\) Due to lack of practice it is uncertain whether this only applies to national courts of highest instance only or all national courts (Bernitz 2016: 37).
examination of national courts compliance with the CILFIT criteria exist but substantial shortcomings has been faintly outlined (Bernitz 2016:97).

However, declaring a case to be Acte Clair or Acte Èclairé according to the CILFIT criteria is not enough. National courts must also provide the reasons for not finding a preliminary ruling relevant. If a proceeding involving EU law is considered possible to rule on without the CJEU, national courts must explain why according to both CJEU case law and also national legislation (Bernitz 2016:34-37). In Sweden, the obligation to provide reasons why a preliminary reference is not requested is even regulated in national law. Having been criticised by the Commission in 2004, Sweden established a law\(^4\) regulating all Swedish courts with an obligation to provide a motivation why a request for submitting a preliminary reference from another part has been rejected or when a judgement cannot be appealed against (Broberg 2014: 271).

In a survey of a small selection of published national rulings connected to EU law, not referred to the CJEU, Bernitz empirically study reasons why a preliminary reference was not submitted. In many national cases, Swedish national courts do not address why a preliminary ruling has not been requested. Swedish national courts are found to independently decide on proceedings when interpreting and applying EU law (Bernitz 2016:47,50). This is problematic as drawing on the preliminary reference procedure help maintain legal certainty and uniformity in EU as cases involving EU law are difficult to foresee (Bernitz 2016:120). When Swedish national courts give reasons why requests for preliminary rulings are not made, scantly worded standardized phrases without substantial meaning is commonly used (Bernitz 2016:43) As a result, it is argued that national courts do not comply with their obligation to request a preliminary ruling nor to provide reasons why they have not requested a preliminary ruling, as regulated in the CILFIT criteria and in national legislation (Bernitz 2016:50).

The CILFIT criteria has been subject of much debate and critique. Bernitz assumes no Member State to have a perfect record in terms of providing reasons for not requesting a preliminary ruling from the CJEU. Judges working within the context of EU law have claimed for the obligation to request preliminary rulings to have softened with time (Bernitz

\(^4\) Law 2006:502. In Swedish, “Lag (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol”. In English, the” Law on certain provisions on preliminary rulings from the Court of Justice”.
2016:31). It has also been argued that the system would have collapsed a long time ago if everyone who had doubts about the interpretation and application of EU law would refer a question. Additionally, it has been argued that the CILFIT criteria have to be applied with common sense thus the reality of CILFIT is different to theory (ACA-Europe 2004:17). In practise however, judging by recent rulings by the CJEU, the Court maintain its previous attitude towards national courts obligation to provide reasons why preliminary rulings are not requested (Bernitz 2016:31).

Turning now to the literature of law, a study on standards review by Åhman (2011) proves to be of interest to this study. Standards review is the judicial practice of trying conflicts of norms in order to uphold systematic uniformity within the legal system (Åhman 2011:23). Doing this, Åhman examines Swedish national courts adjudication on the Instrument of Government (Regeringsformen), EU law and the European Convention on Human Rights and Fundamental Freedoms (Åhman 2011:16). Of particular interest for this thesis is the examination of national cases connected to EU law and how national courts try national law compatibility to EU law. The cases studied are around 600 Swedish legal cases from the Swedish Supreme Court, Court of Appeal, District Court, Supreme Administrative Court, Administrative Court of Appeal and the Administrative Court between 2000-2011. Åhman analyses if national courts’ reasoning has become any clearer since the Swedish accession to the European Union, if national courts are more inclined to perform standards review since EU law supremacy to national law, how national courts express conflicts between norms as well as how common it is for national courts to interpret law conformist. Åhman presents a qualitative analysis of Swedish practice and national courts’ tendencies within standards review (Åhman 2011:193). In the national cases studied, standards review was practised to try national law applicability and compatibility to EU law, this was however done in a similar conduct, in terms of extent or reasoning, since before EU law precedence to national law (Åhman 2011:193). Doing so, national courts were found to demonstrate adherence towards the CJEU as well as tendency to uphold the use of an EU law reasoning (Åhman 2011:194, 197). EU law was in many cases used as a compliment for applying national law and previous EU practise was considered (Åhman 2011:139). As a result, Åhman found Swedish national courts to embrace an EU law perspective in their rulings. When conflict of norms existed,

5 A similar concept is judicial review. The purpose of judicial review is to test a law’s compatibility with the constitution (or law and regulation) perhaps most commonly done by a constitutional court (Åhman 2011:19).
national courts were found to disregard national law in favour of EU law or reinterpret national law in favour of precedent EU law (Åhman 2011:164). Consequently, national courts were found to have a tendency not to emphasise potential conflicts between national law and EU law, hence Swedish national courts were found to exercise a so called EU conformist interpretation in order to keep the two judicial systems consistent (Åhman 2011:209). National courts tendency to put national law who is in conflict with EU law aside, or to interpret national law EU conformist, is something also Bernitz has found having studied national cases connected to EU law (Bernitz 2016:50).

To conclude, previous research dominantly focused on national courts’ aggregated use of the preliminary reference procedure and national rulings actually referred to the CJEU for a preliminary ruling. Also a minority of previous research has empirically examined characteristics of national cases sent for a preliminary ruling by the CJEU (Leijon, Karlsson 2013, Leijon unpublished, Wind et al. 2009, 2010). In contrast, national rulings withheld from a preliminary ruling by the CJEU have never before been studied. The lack of research into those cases that are not forwarded is an area that this thesis will seek to correct.

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6 Practising EU conformist interpretation refers to the practise of interpreting national legislation in light of EU legislation in order to comply with EU legislation to the furthest extent possible.
3. Research Methodology

In this section I will explain the methodology of this study. I will address the selection of Sweden as well as outline what can be expected in terms of theoretical assumptions. The empirical material, as well as the analytical framework, will also be explained. Lastly, the limitations of this study will be discussed.

3.1. Design and case selection

The aim of this thesis is to gain knowledge on how national courts act before the choice to refer or withhold national cases in the preliminary reference procedure through examining national cases that has been withheld from the CJEU. This is, more easily examined through the study of national court rulings connected to EU law never referred to the CJEU for a preliminary ruling. For this, I have designed an examination of national court decisions connected to EU law, but never referred to the Court. An analytical framework was created to perform a systematic study and qualitative coding of empirical material. The analytical framework was created in order to systematically capture relevant national court behaviour and comprise three different analytical aspects. As indicated previously, three aspects of national court behaviour stand in the foreground of previous research and the analytical framework is based on theoretical reasoning and empirical conclusions within the three aspects. Having been previously discussed, a systematic study of all three analytical aspects in national cases withheld from a preliminary reference before the CJEU has never before been conducted. Once the study is conducted I will analyse how the findings can be related to theory and the two dominating perspectives previously presented; the judicial empowerment view and the sustained resistance view.

Being the first study in its kind, discussing how the existing theoretical assumptions can be understood in the context for this study becomes essential. Consequently, it is necessary to ask how the judicial empowerment view and the sustained resistance view expect national courts to act when deciding whether to refer or withhold national cases before the CJEU. Assuming national courts compliance to the CJEU and the EU legal system; the judicial empowerment view assumes national courts commitment and compliance to EU law and the preliminary reference procedure. A propensity for engaging EU law and devolving cases to the CJEU is true for all kinds of cases, even politically sensitive ones. Opposing this, assuming national courts resistance towards the CJEU and the EU legal system; the sustained
resistance view assumes national courts to distance themselves from the EU legal system and, as far as possible, withhold national cases from the CJEU to defend national policy and national interests. This is especially true for the most politically sensitive cases.

Turning now to the case selection. As it was not possible within the scope of this thesis to study all Member States within the European Union the choice to study Sweden was made, for several reasons. Firstly, the demand to read and understand national court rulings limited potential Member States substantially due to language barriers. Having researched the possibility to obtain original rulings, free of charge, from national courts of both lower and higher instances in Sweden, Denmark and United Kingdom the choice to study Sweden was made. The possibility to access national rulings free of charge was proved to be easiest in Sweden. Secondly, Swedish national characteristics made Sweden a suitable choice in terms of previous theoretical assumptions. Studying Sweden can help establish which perspective, the judicial empowerment view, or the sustained resistance view, reflect national court behaviour. Sweden has a strong popular sovereignty and for Sweden, as well as other majoritarian democracies, constitutional courts and judicial review is not traditionally practised and argued incompatible with “government by the people” (Wind 2010:1045-1046). As a result, judicial review, as practised by the CJEU, becomes an unknown element for Sweden. Sweden has a history of a public general distrust towards the European Union and has kept a restrictive attitude towards the preliminary reference procedure (Bernitz 2016:38-39). Consequently, Swedish national characteristics as such comprise a disadvantageous point of departure for the judicial empowerment view. As a result, Sweden is a least likely case for the theoretical perspective of the judicial empowerment view. Sweden has previously been accused by the Commission to refer too few cases to the CJEU (Broberg 2014:270-271). This further indicates Sweden to act in line with the sustained resistance view rather than the judicial empowerment view. It could therefore be expected of Swedish national courts to act as protectors of national interests, ruling independently without asking the CJEU for a preliminary ruling as assumed by the sustained resistance view. If, however the empirical findings prove the opposite, support for the judicial empowerment view is found.
3.2. Data

The empirical material studied is original Swedish national court rulings in full. The empirical material was first identified through the National Decisions’ database (hereafter Dec. Nat) (ACA-Europe 2006). Dec. Nat is a large-scale database of national court rulings relating to EU law from 1959 until today. It aims to monitor the evolution of national jurisprudence within the EU and collects national court rulings which have been relevant for the development of EU law. The database is administrated by the Association of Councils of States and Supreme Administrative Jurisdiction of the European Union (ACA), and updated by the Research and Documentation Directorate at the Court of Justice of the European Union (Hubner 2015:2-5).

Dec. Nat database is a reference database and does not provide any actual rulings, only the national reference number, the date of the decision and names of the parties to the case. Having only been publicly available since 2012, Dec.Nat is still unknown to many and is insufficiently cited. By contact with the Research and Documentation Directorate at the CJEU the credibility of the database was confirmed and it was assumed reliable to use the database as a means to identify national rulings. Also, essential information on the process of case selection for the database was provided through this contact. The decisions featured in Dec.Nat database are collected and analysed by the Research and Documentation Directorate of the CJEU. Two categories of national rulings are included: the first category is first and foremost national decisions from Member States’ national courts presenting a direct link with preliminary reference procedures, including both preliminary reference decisions themselves and follow-up decisions adopted by national courts after a preliminary ruling. The second category is other decisions of Member States’ national courts, which present a particular interest for the CJEU judicial activity. National decisions are searched for and collected manually by a lawyer at the Research and Documentation Directorate. The lawyer is an expert in their national law and collects the rulings from national legal periodicals and national legal websites. Several elements are taken into consideration when determining which national decisions present a particular interest to the Courts judicial activity. This can for example be

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7 The national legal periodicals are available at the CJEU library online catalogue at the Courts website under Library and Documentation / Library.
reference to the Court’s case-law, decisions presenting a strong political interest with regard to EU law and decisions touching upon particularly sensitive issues (Cabral 2006).8

Before coding and analysing the empirical material, I identified national rulings involving EU law never referred to the CJEU in the Dec.Nat database. When conducting a search in the database, 323 hits were generated for Sweden dated 1993 to 2014.9 Sweden has since 1995 requested 102 preliminary rulings from the CJEU (Bernitz 2016:9, Bernitz 2010:16), once these were identified, 121 national rulings connected to EU law not referred to the CJEU remained. Since the preliminary references also included several follow up decisions; 190 hits in total were connected to the 102 preliminary references; leaving 121 hits national decisions connected to EU law, not referred to the CJEU for a preliminary ruling.

Dec.Nat database is retrospectively updated and the most recent decision included is dated 2014. In order to also include more recent cases in this study, 26 national rulings were identified though a recent study by Bernitz (2016).10 Adding together the national rulings identified through Dec.Nat database and Bernitz a pool of 147 national rulings connected to EU law not referred to the CJEU for a preliminary ruling was identified. A random sample of 60 national rulings were then selected from the population of 147 national rulings. As always with qualitative research, determining sample size is difficult as no definite answers exist (Bryman 2008:436, 190). The length of each national ruling varied between two to approximately 30 pages thus a sample of 60 out of 147 was, considering the time at hand, considered reasonable for this study.

Having first identified the empirical material in the database, the original national rulings were obtained, either through online databases or contact with national courts. The databases used were Karnov juridik, Zeteo or InfoTorg Juridik – Rättsbanken.11 When a national ruling

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8 Cabral, Pedro, Head of Unit 3 at Research and Documentation Directorate of the CJEU. E-mail September 2016.
9 12 cases dated between 1993 up until 1995 were excluded from the search as they are dated prior to Sweden’s EU membership.
10 Ulf Bernitz has in his survey identified 27 recent national rulings connected to EU law not referred to the CJEU. These are rulings from the Supreme Court and the Supreme Administrative court between 2010-2015 published in national legal periodicals.
11 These databases include original Swedish national decisions in full and can be accessed free of charge through Uppsala University library website.
was not accessible online, each individual court was contacted in order to request access to the original judgement.

3.3. Analytical framework

When studying and coding the material, three analytical aspects were looked for in every case. The first aspect was political sensitivity of a case building on previous research by Leijon and Karlsson (2013) and Leijon (unpublished). Based on work undertaken by Åhman (2011), the second aspect looked for in every case was reference and usage of EU law. The final aspect looked for was national courts reasons why requests for preliminary rulings are not made, building on Bernitz’s (2016) previous discussion. The analytical framework for the three aspects is inductively and deductively created in order to unfold how Swedish national courts behave in national rulings not referred to the CJEU for a preliminary ruling. Prior to proceeding with the study of the random sample, a pilot study was conducted comprised of a sample of ten random rulings in order to establish the applicability of the analytical framework.

3.3.1. Political sensitivity of a case

The political sensitivity of a case was assessed through a national ruling’s political and economic cost for the Member State government. The assessment is based on the potential political and economic costs for the Member State government if the CJEU would rule contrary to the preference of the Member State (Leijon unpublished:18-19). As the rulings examined in this thesis have not been referred to the CJEU, national courts have completed an independent interpretation and application of EU law. Due to EU law supremacy, a reference to the CJEU will always imply a risk for Member States having to change existing national legislation. This will imply both political and economic conversion costs (Leijon unpublished: 18-19). Consistent with previous research, the political sensitivity of a case was categorised as either non-politically sensitive, somewhat politically sensitive, politically sensitive or highly politically sensitive.

In a non-politically sensitive case, there is no conflict between EU law and national law (Leijon, Karlsson 2013:16). The typical case concern interpretation and application of EU treaties, directives and previous practice without challenging national legislation and the parties involved are private parties. The political and economic costs due to a ruling by the CJEU contrary to the preference of the Member State are negligible (Leijon unpublished: 21).
An example of a non-politically sensitive case from this study is a Supreme Court ruling on species protection. A private party was convicted for selling a stuffed endangered bird online. The court referred to EU regulation No 338/97 on the protection of species of wild fauna and flora as well as the national environmental code MB 29:2 b. The two sections of law being identical, no conflict exist between EU law and national law.\textsuperscript{12}

In a \textit{somewhat politically sensitive case}, national law compliance to EU law is scrutinized. However, core national policies are not challenged and in the case of a ruling by the CJEU contrary to the preference of the Member State, the political and economic costs are limited (Leijon, Karlsson 2013:16-17, Leijon unpublished:22). The case typically involves some branch of the Member State such as a public agency or a municipality and is commonly an appeal to a decision. As a result, national legislation does not run the risk of being ruled against but rather the decision made by a public agency (Leijon unpublished: 22). An example of a somewhat politically sensitive case is Supreme Administrative Court ruling on the right to appeal a decision made by the National Food Agency. Having informed on recent measurements of high levels of carcinogen in olive oil, retailers withdrew the product in question leaving the distributing company with financial damages. The agency was accused of breach of EU directive 98/34/EU on the procedure for the provision of information in the field of technical standards and the plaintiff claimed a right to appeal in accordance with EU law. The Agency having only informed and not officially decided, the matter was ruled not to involve EU law.\textsuperscript{13}

In a \textit{politically sensitive case}, national legislations potential incompatibility to EU law is scrutinized. National characteristics are challenged and a ruling by the CJEU contrary to Member State preference risk cause noticeable political and economic costs as the Member State may be required to initiate legislative reforms. Some branch of the Member State is involved as a party to the case (Leijon unpublished:22-23, Leijon, Karlsson 2013:17). An example of a politically sensitive case is an Administrative Court ruling connected to the Swedish alcohol monopoly. A wholesale trade company claimed to be repaid previously paid fees for purchasing permission from the Alcohol Inspection Agency. The CJEU had recently ruled on a Swedish case, dispossessing the Swedish alcohol retailer Systembolaget its

\textsuperscript{12} Högsta domstolen, B 3227-10
\textsuperscript{13} Regeringsrätten, 2693-2003.
monopoly in wholesale trade. As a result, national law was changed invalidating previous regulations imposing any other actor but Systembolaget fees for wholesale trade. Having claimed retrospectively reimbursement to be invalid, the court ruled the Alcohol Inspection Agency to repay the company with reference to the previous ruling by the CJEU and changes to national law.\textsuperscript{14}

In a highly politically sensitive case, national legislations potential incompatibility to EU law is scrutinized and core national characteristics and values are challenged (Leijon, Karlsson 2013:17). A ruling by the CJEU contrary to Member State preference risk cause substantial political and economic costs as well as the need for legislative reforms in one of the state’s core national policy fields. Some branch of the Member State are involved as a party to the case (Leijon unpublished:23). An example of a highly politically sensitive case is a Supreme Administrative Court ruling on an imposition of a fine related to the Swedish gambling monopoly. A restaurant was found possessing a gambling terminal owned by a foreign company, in breach of the Swedish gambling monopoly. The Swedish monopoly was however accused of being in breach with EU law on freedom of movement. Having discussed relevant EU law and its compliance to the Swedish governments monopoly rights, the court found Swedish law to not be in breach of EU law.\textsuperscript{15}

Returning briefly to the issue of theoretical assumptions within the context of political sensitivity of national cases not referred to the CJEU; the sustained resistance view would predict national courts to, as far as possible, withhold national cases, especially more politically sensitive and highly politically sensitive cases as a means to protect national interests. The judicial empowerment view would on the other hand predict national courts to refer all kinds of cases, even the more politically sensitive and highly politically sensitive ones. If empirically found in this study that national courts withhold an equal or fewer number of politically sensitive and highly politically sensitive cases than those referred, previous results indicating national courts to act in line with the judicial empowerment view is substantiated.

\textsuperscript{14} Länsrätten, Ö 4805-98.
\textsuperscript{15} Regeringsrätten, 5819-2001.
3.3.2. Reference and use of EU law

National courts’ reference and usage of EU law in national rulings was also looked for in the empirical material. In terms of this second aspect of the analytical framework four categories was used in order to identify a system of classification. Reference and usage of EU law is categorised in order of precedence, from least reference and use of EU law, to most and the primary focus for studying the extent of reference and use of EU law lies within the courts findings and conclusions. National cases in which EU law was not mentioned at all were categorised as one (1). This is either because it is considered not relevant to the case or due to lack of awareness of EU law relevance to the case. National cases where EU law was quoted on a mechanic and superficial basis was categorised as two (2). In these rulings, sections of EU articles, directives and previously established practice was mentioned in passing. Non-existent or limited use and reference to EU law indicate national courts to dissociate themselves from EU law, the CJEU and the European legal system. This is a behaviour the sustained resistance view would predict national courts to uphold. National cases where relevant EU law and national law was mentioned and discussed was categorised as three (3). In these ruling, national law and EU law was mentioned separately, vis a vis their mutual relationship, compliance or incompatibility was not discussed. Lastly, national cases where the applicable section of EU law, national law and their mutual relationship was discussed extensively was categorised as four (4). Allowing for EU law to penetrate into national court rulings embracing an EU law perspective indicate national court compliance to EU law and the CJEU. This is a behaviour the judicial empowerment view would predict national courts to uphold.

3.3.3. Reasons why a preliminary ruling is not requested

The final aspect that was looked for in all national cases were reasons for not requesting a preliminary ruling. The number of national decisions providing reasons for not requesting a preliminary reference was noted (1). When national courts provided reasons, how the reason was formulated was searched for and categorised into explicit or implicit (2). An explicit reason is easy to find as it is expressly stated that a reference for a preliminary ruling will not be obtained, perhaps even in an assigned section in the judgement. An implicit reason is implied throughout the written judgement without expressly stating that a reference for a preliminary ruling will not be obtained. For example, an implicit reason can be the use of the phrase “clear enough”. The extent of the reason given was also examined, categorising them as either formal or substantial (3). In a formal reason, the national court uses standard phrases
such as “not relevant”. In a substantial reason, the national court account for their reasoning in a detailed manner. Returning again to the issue of theoretical assumptions; the logic of the sustained resistance view would predict national courts resistance towards participating in CJEU regulations thus disclaim from the obligation to provide reasons for not requesting a preliminary ruling as regulated in the CILFIT criteria. On the other hand, the judicial empowerment view would predict national courts to approach and commit to the will of the CJEU hence provide reasons for not requesting preliminary rulings.

Figure 1. Summary of derived theoretical assumptions for this study.

<table>
<thead>
<tr>
<th></th>
<th>Sustained resistance view</th>
<th>Judicial empowerment view</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Aspect: Political sensitivity</td>
<td>National courts are resistant to cooperate with the CJEU and try to withhold national cases, especially politically sensitive and highly politically sensitive cases due to the high political stakes involved in terms of national interests.</td>
<td>National courts support the CJEU and cooperate by referring all kinds of cases, even politically sensitive and highly politically sensitive cases.</td>
</tr>
<tr>
<td>Second Aspect: Reference and use of EU law</td>
<td>National courts dissociate from EU law and only limited presence of EU law is allowed.</td>
<td>National courts embrace EU law which is referred to and used to a greater extent hence allow for EU law to penetrate into national law.</td>
</tr>
<tr>
<td>Third Aspect: Reasons for not requesting preliminary rulings</td>
<td>National courts disclaim from providing reasons for not requesting a preliminary ruling to demonstrate resistance towards regulations by the CJEU.</td>
<td>National courts provide reasons for not requesting a preliminary ruling to approach and demonstrate commitment to the CJEU.</td>
</tr>
</tbody>
</table>

3.4. Limitations

A limitation for this study is that only one Member State is studied. This reduces the ability to generalise results. It was however, due to language barriers, not possible to include any more Member States within the scope of a Master’s thesis. Also, the Dec.Nat database has diverted
its focus to only include rulings from national courts of highest instance since 2003. This creates a bias and a potential overrepresentation of rulings from the Supreme and the Supreme Administrative Court. However, as national court instance is not studied in particular this does not affect the findings of this study materially.

Another issue to address is the analytical coding scheme. This study builds upon previous research. However, as this is the first systematic study of national court rulings not referred to the CJEU some adjustments from previous research have had to be made when designing the analytical framework in order to fit the empirical material. Building on the study published in 2013 by Karlsson and Leijon, Leijon (unpublished) is currently extending the study. Also Leijon (unpublished) categorizes national legal cases in the four categories of political sensitivity, however more Member States and more requests for preliminary rulings are intended to be included. The category scheme is further elaborated providing a more detailed description of the classification of national cases. Categorizing national legal cases for this study, an analytical framework was created based on both the study by Karlsson and Leijon in 2013 and Leijon (unpublished). The empirical findings of this study will however be compared to the results presented in Karlsson and Leijon 2013 as these are results for Sweden. The results of a study are always dependent on how a study was conducted and the adjustments made to fit this empirical material are a potential source of error when comparing these results to the results presented by Leijon and Karlsson (2013). This was however necessary and the potential errors are limited as the proceedings of this examination is also based upon the work of Leijon (unpublished), in which the system of classification is further elaborated. The results of a study are also dependent on the researchers interpretation and judgement of the empirical material, hence this can also be a source of error.

It should also be mentioned that previous research by Åhman (2011) and Bernitz (2016) are literature of law, hence it has unfortunately not been possible to conduct a similar and as extended comparison to previous research for aspect two and three as for the first aspect. On the issue of law, it should also be declared this is not a judicial review. A legal analysis on the accuracy of national courts’ reasoning in terms of EU and national law has not been undertaken due to lack of access to legal expertise. Consequently, it cannot be excluded that other relevant behavioural patterns might have been revealed if this study was conducted also from a judicial perspective.
4. Findings

The results from the empirical study on Swedish national courts will now be presented. As mentioned, the research questions focused upon the political sensitivity of cases; reference to EU law and reasons for not requesting a preliminary ruling in national decisions.

4.1. Political sensitivity of a case

Having coded 60 national cases, 26.7 % of the cases were found to be non-politically sensitive cases. In a non-politically sensitive case, EU treaties and directives are interpreted and applied without challenging national law and parties to the case are private. Out of the 16 non-politically sensitive cases, nine were rulings from the Supreme Court and the remaining seven were rulings from Courts of Appeal.

Typical cases in this first category are those concerning whether the court in question has a right to rule on a dispute amongst two private parties, or if the plaintiff has a right to bring an action before a Swedish court. Queries on where prosecutions should be commenced commonly arise in disputes between two parties domiciled in different Member States, forcing national courts to judge if authorised to judge on the specific case. Common matters of dispute are reimbursements and indemnifications. An example of one such case is an action brought before Göta Court of Appeal on matters of compensation for breach of an agreement. The court was first to decide whether the plaintiff, a shipping company domiciled in another Member State had the right to bring an action before the Swedish court. Another illustrative example is the Supreme Court ruling on a child custody battle between two parents. The court was faced to decide whether it was authorised to judge on the matter as the parent with sole custody had moved to Indonesia. Also worth mentioning as a common matter within the category of non-politically sensitive cases are requests for a national court to amend a previous judgement from a national court in another Member State. An example of one such case is a ruling from Svea Court of Appeal on a previous judgement from France. A Swedish couple married in France applied for a divorce in France. The French court ruled the couple to live apart, imposing the man to pay alimony. Having moved to Sweden, the man brought an

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16 Göta Hovrätt, 1843-09.
17 Högsta Domstolen, Ö5155-10.
action before the Swedish court claiming full dissolution of the marriage. The Swedish court was faced to rule on whether the French ruling imposing alimony was still valid or not.\(^\text{18}\)

In this first category, the majority of cases concerned international civil law on matters of jurisdiction, recognition and enforcement of judgements in civil and commercial matters, including family law. This is regulated in the Brussels I and II regulations as well as the Lugano Convention (Eur-lex 2014, 2015, 2007). International civil law is to a large extent a policy area already harmonized within the European Union (Bernitz 2016:71). As a result, Member States’ courts interpretation and application of EU law does not raise much question or doubt nor is national law challenged. In the non-politically sensitive cases, national law and EU law are often referred to as a means to confirm each other’s mutual meaning. The parties to the case being private actors, matters handled in these cases never touch upon policy areas or matters that could be considered politically or economically sensitive for the Swedish government. Disputes between private actors and rulings on national courts authority to rule on a specific case will never bring any political or economic costs from the Swedish government, even if the CJEU were to rule contrary to a decision already made by a Swedish national court.

25% of the 60 cases studied were coded to belong in the second category of *somewhat politically sensitive cases*. Out of the 15 cases in total in this category, six were rulings from the Supreme Court and six were rulings from the Supreme Administrative Court. The remaining three cases were rulings from the Administrative Court, the Court of Appeal and the Court of Patent Appeals.

In a somewhat politically sensitive case, national law compliance to EU law is scrutinized. Parties to the case are commonly a private party and some branch of the Member State, such as a public agency or a municipality. Examples of public agencies from the empirical material are the National Board of Health and Welfare, the Tax Agency, the National Food Agency and the Environment and City planning of a municipality. Examples of matters discussed in somewhat politically sensitive rulings are appeal against previous decisions by national agencies concerning for example patent protection and the European Convention on Human Rights and Fundamental Freedoms. These matters do not involve core national policies hence

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\(^{18}\) Svea Hovrätt, 6034-03.
national legislation does not run risk of being ruled against. Instead it is common for a
decision made by a public agency to be overruled by the court. As examples of somewhat
politically sensitive cases, two Supreme Court rulings on EU Directive 2005/36/EC on the
recognition of professional qualifications can be cited. In these cases, the plaintiff to the
case appealed against the National Board of Health and Welfare’s decision on qualification
criteria for being issued specialist competence within dentistry and medicine. Contrary to
decided previous decision made by the agency, the national court ruled in favour of the
plaintiffs allowing them to include previous experience from other Member States enabling
them to be issued with specialist competence documentation in Sweden.

In this second category, questions concerning the European Convention on Human Rights and
Fundamental Freedoms were also raised. For example, these cases concerned remittance of
convicts to Member States of citizenship and as illustrated in the following example on
double criminality. In a legal case between the Environment and City planning in Nacka
municipality and a private party, Svea Court of Appeal judged on the potential breach of
article 4, protocol 7 in the European Convention on Human Rights and Fundamental
 Freedoms. The article forbids an accused person of being punished twice for the same
crime. The national court was to decide whether an already debited construction charge
prevented the Environment and City planning to impose an additional fine against a private
actor. In its reasoning, the national court discussed definitions according to national law and
EU law thus concluded the outcome according to EU law to be identical to national law. In
sum, in somewhat politically sensitive cases, EU law is applied and interpreted independently
by national courts. However, in the case of a CJEU ruling contrary to that which has already
been decided by a national court, the political and economic costs are limited.

Turning now to the third category of cases in which 45％ of the cases studied were found.
Out of the 25 cases in total in this category, the majority were rulings by the Supreme
Administrative Court. Five cases were rulings from the Supreme Court and the remaining
were rulings from Courts of Appeal and Administrative Courts.

In politically sensitive cases, national law potential incompatibility to EU law is scrutinized.
National characteristics are challenged and some branch of the Member State is involved as a

19 Högsta Förvaltningsdomstolen, 2428-13, Högsta Förvaltningsdomstolen, 2923-14.
party to the case. Examples of matters ruled upon are social benefits, taxes and reimbursement of fees or charges previously paid to some branch of the Member State. Examples of involved State actors are, the Prosecutor General, Office of the Chancellor of Justice, the Social Insurance Agency, Ministry of Environment and the Tax Agency.

There are two typical cases in this third category. The first one is rulings connected to social benefits such as child and housing benefits as well as remuneration for expenditure on health care abroad. In these cases, a party to the case has lodged an appeal against a previous decision or ruling. Private parties commonly appeal against decisions made by, for example, the Social Insurance Agency or the Tax Agency. It is also common for the agency in question to appeal against a ruling from a court of lower instance. An illustrative example is a case brought before the Supreme Administrative Court on child benefits. Having moved to Sweden from Latvia during her maternity leave a Latvian woman claimed child benefits from Sweden. This was rejected by the Swedish Insurance Agency but later approved by the Supreme Administrative Court after having reviewed previous practice within the Union. Another example of a politically sensitive case is a ruling by the Supreme Court on the Swedish custom on sanctions for accounting fraud being incompatible with article 4, protocol 7 in the European Convention on Human Rights and Fundamental Freedoms. As previously mentioned, the article forbids an accused person of being punished twice for the same crime.

In this third category of cases, national characteristics are challenged and national law potential incompatibility to EU law is scrutinized. As a result, national law risk being ruled against due to EU law precedence. A ruling by the CJEU contrary to a ruling already laid down by a national court or Member State preference risk cause noticeable political and economic costs both in terms of unwanted attention as well as legislative reforms may be required. As some branch of the State is involved as a party to the case, public attention will always be drawn if the CJEU were to find national rulings invalid. Member States also risk noticeable economic costs in cases such as the above presented example on child benefits. If publicly known that private parties’ unfavourable decisions on benefits and taxes by national agencies were later overruled in court, this might bring an increase in appeal of decisions by national agencies.

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21 Högsta Förvaltningsdomstolen, 7017-13.
22 Högsta Domstolen, B 4946-12.
Only two cases were considered *highly politically sensitive* (3.3%). In this fourth category of cases, national legislations potential incompatibility to EU law is scrutinized. Some branch of the Member State is involved as a party to the case and core national characteristics and values are challenged. The two highly politically sensitive cases in this study both challenge the Swedish gambling monopoly. As an illustrative example the dispute between Unibet and the Swedish State through the Office of the Chancellor of Justice can be cited. In this case, Unibet brought an action before the court challenging the Swedish gambling monopoly regulated in the Lottery law (lotterilagen) in an attempt to market their gaming services in Sweden. The lottery law prohibits all other gambling operators apart from the Swedish State to organize betting and gambling in Sweden. Unibet argued the law to be in conflict with article 56 TFEU on the free movement of persons, services and capital and accused the Swedish State of sustaining national legislation to strengthen the public treasury. Having discussed relevant EU legislation, as well as national legislation, the District Court found the Swedish law to be compatible with EU law. It was argued that mitigating factors prevail as the national law guarantees the implementation of Swedish hazardous gaming politics, protecting hazard gamblers. A ruling by the CJEU invalidating the Swedish mitigating factors for having a gambling monopoly which is, to a large extent, in breach of EU free movement of persons, services and capital and which would bring substantial and economic costs for Sweden. Not only would legislative reform be required but great economic costs in terms of loss of revenue would also result.

In line with the sustained resistance view, previous findings by Alter (2009) and Wind (2010) indicated national courts to mainly refer technical, less politically sensitive cases as a means to limit the CJEU from expanding its jurisdiction. For national courts to prove a similar resistant behaviour in this context, the number of politically sensitive and highly politically sensitive cases would be higher than the number of technical, less politically sensitive cases. National courts would have a special interest in withholding politically sensitive and highly politically sensitive cases to protect national interests hence rather refer technical, less politically sensitive cases to the CJEU. The empirical findings from this study suggests otherwise. When comparing political sensitivity dichotomously re-categorising non-political sensitive and somewhat politically sensitive cases as “technical, less politically sensitive”

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23 Eskilstuna Tingsrätt, T2417-03, 2418-03. The case was later referred to the CJEU for a preliminary ruling in the Court of Appeal.
cases, and politically sensitive and highly politically sensitive cases as “politically sensitive” the following results are found: 51.7 % of national cases withheld are technical, less politically sensitive cases and 48.3 % of national cases withheld are politically sensitive.

Table 1. Characteristics of national cases withheld from the CJEU for a preliminary ruling. Total number of national cases studied (N=60).

<table>
<thead>
<tr>
<th>Technical, less politically sensitive cases withheld</th>
<th>Politically sensitive case withheld</th>
</tr>
</thead>
<tbody>
<tr>
<td>51.7 % (31)</td>
<td>48.3 (29)</td>
</tr>
</tbody>
</table>

Out of the national cases withheld from the CJEU, the majority are technical, less politically sensitive cases. This behaviour goes against previous findings (Wind) and the expectations of the sustained resistance view hence national courts’ behaviour corresponds more closely with a behaviour predicted by the judicial empowerment view.

As discussed, Leijon and Karlsson (2013) found the majority of cases referred from national courts to be politically sensitive and highly politically sensitive suggesting national courts compliance to the CJEU, and to act in line with the judicial empowerment view. Having analysed the empirical material, it is now for the first time possible to present the results from this study as a compliment to the results from previous research (Leijon, Karlsson 2013). A comparison of politically sensitivity of national cases referred and withheld by Swedish national courts enables us to see the complete picture of national court behaviour in terms of kind of cases referred and withheld. Table 2 (below) shows the results from the previous study by Leijon and Karlsson (2013) and the results presented in this study.
Table 2. Results from previous findings on national cases referred to the CJEU and results from this study on national cases withheld from the CJEU. Number of national cases studied in brackets.

<table>
<thead>
<tr>
<th></th>
<th>Referred national cases (N=67)</th>
<th>Withheld national cases (N=60)</th>
<th>Difference +/- between referred and withheld national cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-politically sensitive cases</td>
<td>26.9 % (18)</td>
<td>26.7 % (16)</td>
<td>-0.2 %</td>
</tr>
<tr>
<td>Somewhat politically sensitive cases</td>
<td>22.4 % (15)</td>
<td>25 % (15)</td>
<td>+2.6 %</td>
</tr>
<tr>
<td>Politically sensitive cases</td>
<td>37.3 % (25)</td>
<td>45 % (27)</td>
<td>+7.7 %</td>
</tr>
<tr>
<td>Highly politically sensitive cases</td>
<td>13.4 % (9)</td>
<td>3.3 % (2)</td>
<td>-10.1 %</td>
</tr>
</tbody>
</table>

Leijon and Karlsson (2013) found national courts to refer 26.9 % non-politically sensitive cases. A similar result was found in this study as 26.7 % of national cases withheld were non-politically sensitive. 22.4 % of national cases referred to the CJEU for a preliminary ruling were somewhat politically sensitive cases. The equivalent number for national cases withheld was 25 %. Previous research found 37.7 % of national cases referred to be politically sensitive cases. It was in this study found that 45% of national cases withheld from the CJEU were politically sensitive. Lastly, Leijon and Karlsson found 13.4 % of national cases referred to be highly politically sensitive. This is to be compared with 3.3% of highly politically sensitive cases withheld from the CJEU.

It was previously assumed for the judicial empowerment view to predict national courts to withhold and equal number or fewer national cases considered politically sensitive than referred for a preliminary ruling. Turning first to a comparison between the results from this study and previous results for the joint category of politically sensitive and highly politically sensitive cases empirical evidence of this assumption is found. When comparing previous findings by Leijon and Karlsson to the results from this study, it is found that Swedish national courts refer more politically sensitive and highly politically sensitive cases to the CJEU than they withhold. The percentage of politically sensitive and highly politically sensitive cases withheld are 48.3%. This is to be compared with the percentage of politically
sensitive and highly political sensitive cases referred which is 50.7%. A summary of the findings are presented in table 3 (below).

Table 3. Results from previous findings on national cases referred to the CJEU and results from this study on national cases withheld from the CJEU, dichotomously categorised.

<table>
<thead>
<tr>
<th></th>
<th>Referred national cases (N=67)</th>
<th>Withheld national cases (N=60)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Technical, less politically sensitive national cases</td>
<td>49.3 %</td>
<td>51.7 %</td>
</tr>
<tr>
<td>Politically sensitive national case</td>
<td>50.7 %</td>
<td>48.3 %</td>
</tr>
</tbody>
</table>

As the share of politically sensitive and highly politically sensitive cases withheld from preliminary rulings is smaller than cases referred to the CJEU, previous indications of national courts to act in line with the judicial empowerment view are confirmed. This is also true for the fourth category of highly politically sensitive cases when considered individually; more cases are referred to the CJEU than withheld (table 2) compared to the other categories, in which the distribution of referred and withheld cases has been even. Within the dataset studied, the number of highly politically sensitive cases referred to the CJEU is significantly higher than highly politically sensitive cases withheld (13.4 % compared to 3.3 %). The results further indicate national courts’ willingness to devolve all kinds of cases to the CJEU, even the highly politically sensitive ones. If national courts were to act in line with the sustained resistance view, highly politically sensitive cases would have been withheld to a greater extent than referred. National courts would try to avoid interference from the CJEU withholding the most important and interesting cases in terms of national preference and interest. The results from this study inform us that this is not the case. Rather, national courts appear to have aligned themselves with the CJEU as highly politically sensitive cases are not withheld.

The empirical findings from the first aspect makes it possible to view the complete picture of national courts’ behaviour in terms of kind of cases referred and withheld before the CJEU. As we now also have information on the proportion of cases not referred to the CJEU, the findings from this study sheds new light on previous findings, substantiating Leijon and Karlsson’s (2013) support for the judicial empowerment view to reflect national court behaviour. In conclusion, support is found for national courts to act in line with the judicial empowerment view in terms of what kind of cases are referred and withheld. It cannot be the
expected of national courts to refer all national cases related to EU law and the difference between national cases referred and withheld is marginal. However, as difference between highly politically sensitive cases referred and withheld are big, this further supports the results. It can never the less not be argued that the findings from this study conclusively substantiate support for the judicial empowerment view to explain national court behaviour. The findings from this study does however suggest national courts to act in line with the judicial empowerment view.

4.2. Reference and use of EU law

As previously mentioned, it was also an intention of this study to examine how, and to what extend EU law was referred to in the national rulings. Having coded the empirical material in accordance with the analytical framework it was found that EU law was not mentioned at all in 6.7% of the cases studied. Sections of EU articles, directives and previous established practice was mechanically and superficially quoted in 15% of the cases studied, hence EU law to be present marginally. EU law is not present or merely mentioned in passing in 21.7% of the national cases, indicating national courts do not allow themselves to be to be informed by EU law and act independently from EU law and the CJEU. As the reader may recall, it was assumed for the sustained resistance view to predict national courts to shield themselves from the CJEU and EU law in order to safeguard national interests and values.

EU law was however in the majority (78.3%) of national cases referred to in a more elaborative manner. EU law and national law was quoted separately in 41.7% of the cases, and EU law concordance or incompatibility in connection to national law was discussed to a larger extent in 36.6% of the cases. When EU law and national law is discussed separately, EU law compliance or incompatibility is not expressly discussed. This suggests national courts to think of EU law as one thing, and national law as another. However, relevant EU law is mentioned and considered, indicating national courts to have assimilated, reasoned and reflect around EU law. It was common for national courts to refer to EU law or previous EU practise as a background to national law or the national court’s reasoning before their ruling. EU law is constantly present and allowed to penetrate into the national legal system, suggesting national courts to embrace an EU law perspective. When EU law concordance or incompatibility in connection to national law was discussed EU law is constantly present and referred to extensively. In general, EU law is embraced as national courts discuss EU law at great length whilst comparing and evaluating national law to EU law, suggesting EU law and
national law to be considered as one legal system. Embracing an EU law perspective indicates national courts compliance to EU law and the CJEU, as predicted by the judicial empowerment view. Table 4 (below) shows number of cases and percentage of the above discussed results.

Table 4. National cases categorised in order of precedence. Number of national cases studied in brackets. Total number of national cases studied (N=60).

<table>
<thead>
<tr>
<th>EU law is not at all or mechanically mentioned in passing</th>
<th>EU law and national law is referred to separately or EU law concordance or incompatibility in connection to national law is discussed</th>
</tr>
</thead>
<tbody>
<tr>
<td>21.7 % (13)</td>
<td>78.3 % (47)</td>
</tr>
</tbody>
</table>

As the majority of national cases were categorised within category three and four (78.3%) rather than within category one and two (21.7%), national court compliance to EU law is indicated. EU law presence in national rulings suggests national courts acceptance of EU law and uniformity, indicating Swedish national courts to act more in line with the judicial empowerment view than the sustained resistance view. Previous findings indicated for national courts to sustain a EU law perspective in national rulings (Åhman 2011), hence the empirical findings gathered in this study is consistent with previous research. National courts have previously also been found to exercise EU conformist interpretation of EU law in national rulings (Åhman 2011, Bernitz 2016). Further evidence of this was found when analysing the empirical material. Before making a final judgement, national courts were often found to reflect and reason around how EU law should be interpreted. With this, the requirement for Swedish national courts to exercise EU conformist interpretation, or a confirmation of the courts EU conformist interpretation of EU law was cited. An example of an expressly cited use of EU conformist interpretation is a Supreme Administrative Court ruling on value added tax. Having referred to EU law, as the matter in question was not regulated in national law, the court motivated the use of EU law as being an EU conformist interpretation “such a directive conformist interpretation of the regulation guarantees the intended distribution of Member State taxation in cross-border trade in services”.24 As there was no applicable national law, EU law was in this case used to fill the absence of national law. Another illustrative example is a Supreme Administrative Court ruling “in the light of

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24 Regeringsrättens dom, 1326-1328-05, my own translation
Union law demands for national law to as far as possible be interpreted in a EU conformist manner, even this regulation must be considered (…) 25

When studying three aspects of national court behaviour it becomes of interest to also analyse aspects simultaneously.

Table 5. Reference and use of EU law and political sensitivity of national cases. Number of national cases studied in brackets. Total number of national cases studied (N=60).

<table>
<thead>
<tr>
<th>Political Sensitivity</th>
<th>EU Law is not at all or Mechanically Mentioned in Passing (n=13)</th>
<th>EU Law and National Law is Referred to Separately or EU Law Concordance or Incompatibility in Connection to National is Discussed (n=47)</th>
<th>Difference +/-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-politically sensitive and Somewhat politically sensitive cases</td>
<td>84.6% (11)</td>
<td>42.5% (20)</td>
<td>42.1%</td>
</tr>
<tr>
<td>Politically sensitive and Highly politically sensitive cases</td>
<td>15.4% (2)</td>
<td>57.5% (27)</td>
<td>-42.5</td>
</tr>
</tbody>
</table>

The extent of EU law reference and use in relation to the politically sensitivity of a case was also examined. A summary of these findings are presented in table 5 (above). National courts are more inclined to follow a line of reasoning relating EU law to national law in the most politically sensitive cases. When comparing category one and two to category three and four together with dichotomously categorised politically sensitivity it was found that EU law was used and most extensively referred to in politically sensitive and highly politically sensitive cases (57.5%). For the non-politically sensitive cases and somewhat politically sensitive cases EU law was used and extensively referred to in 42.5% of the cases. On the contrary, EU law was less referred to in the less politically sensitive cases (84.6%). The corresponding percentage for politically sensitive and highly politically sensitive cases was 15.4%.

These findings indicate the preference of Swedish national courts to make an effort to quote EU law and relevant national law, as well as discuss EU law concordance or incompatibility

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25 Högsta Förvaltningsdomstolens dom 2924-13, my own translation
in connection to national law to a greater extent in the more politically sensitive cases. One expected explanation for this is that of politically sensitive cases involving more complex sections of EU law and directives. One such example are regulations on freedom of movement which in its character is much more complex than EU law applied in less politically sensitive and technical cases (such as regulations on shape and measurement requirements for food). This behaviour further indicates national court compliance to the CJEU and the judicial empowerment view. For national courts to comply with expectations of the sustained resistance view, limited use of EU law as a means to restrain EU law to penetrate into national law would be true for the more politically sensitive cases. The central assumption within the sustained resistance view is still for national courts to protect national law and interests, which runs the risk of being challenge in politically sensitive and highly politically sensitive cases. The findings from this study suggests otherwise. As a result, national court behaviour in terms of reference and use of EU law also indicate support for the expectations originating from the judicial empowerment view.

4.3. Reasons why a preliminary ruling is not requested

It was also an intension to examine how often national courts addressed whether a preliminary ruling was to be obtained from the CJEU. It was found that in the majority (73.3%) of cases studied, requesting a preliminary ruling was not addressed. In the remaining 26.7 %, requesting a preliminary ruling was addressed. Table 6 (below) demonstrates the numbers of the findings.

Table 6. Number of cases with and without reasons for not requesting a preliminary ruling.
Total number of national cases studied (N=60).

<table>
<thead>
<tr>
<th>Reasons for not requesting a preliminary ruling provided</th>
<th>Reasons for not requesting a preliminary ruling not provided</th>
</tr>
</thead>
<tbody>
<tr>
<td>26.7 % (n=16)</td>
<td>73.3 % (n=44)</td>
</tr>
</tbody>
</table>

Reasons for why a preliminary ruling was not requested were given in 16 national cases. In the remaining 44 cases, no reasons were given.

National court behaviour was further systematically examined in terms of how well national courts follow the obligation to provide reasons why a preliminary ruling has not been requested before ruling in a case. Out of the 16 cases in total where reasons were provided, the reason itself was explicitly addressed in all cases but one. Examples of this are as follows:
“There is no reason to obtain a preliminary ruling”\textsuperscript{26}, “A preliminary ruling will, therefore, not be necessary”\textsuperscript{27}, “The court finds no reason to request a preliminary ruling”\textsuperscript{28}, “The court rejects the request for a preliminary reference”\textsuperscript{29}. It was in one case, only written that “the question concerning EU law had no impact on the outcome of the case”\textsuperscript{30}, hence this was interpreted as an implicitly given reason for not requesting a preliminary ruling.

As explained in the previous research and theory section, national courts should provide reasons why requests for preliminary rulings are not given in accordance with the CILFIT criteria. Having coded the empirical material national courts references to the criteria were identified. Two of the cases studied were found to be Acte Ènclai\`re, hence the court was able to rule on the case thanks to EU practise and previous rulings where the CJEU had been consulted. Four cases were found to be Acte Clair. This was expressly stated in one case; however, it was in the remaining three cases explained that EU law meaning was obvious or clear. Questions concerning EU law interpretation and application was, in three cases, found to be irrelevant as this has nothing to do with the final outcome of the case. It was in the remaining cases not possible to identify any of the CILFIT criteria as the national court only stated that it was not necessary to request a preliminary ruling.

This is the first systematic study of a national courts’ compliance to provide reasons why requests for preliminary rulings are not made. It has however, as noted in the previous research and theory section, previously been discussed, mainly by Bernitz (2016) who criticises national courts for not elaborating the reasons. It was however found in this study that some national courts provided substantially formulated reasons why a preliminary ruling was not requested. When this was the case, the national court explained in detail the underlying reasons as to why a request for a preliminary ruling was not requested. For example, in a Supreme Court ruling the court explained in detail, in a specific subheading, relevant EU law, its relationship to national law, potential questions in terms of EU law compatibility as well as when obligations to provide reasons why a request for a preliminary ruling is not sent is relevant for national courts, citing the CILFIT criteria. Furthermore, it was

\textsuperscript{26} Regeringsrätten, 4451-07, 4454-07.
\textsuperscript{27} Högsta Domstolen, T 5767-13.
\textsuperscript{28} Länsrätten, Ö4805-98.
\textsuperscript{29} Högsta Domstolen, T 2572-11.
stated that it is not certain whether the court had an obligation to request a preliminary ruling in this case, however when considering more aspects, it became evident that a preliminary ruling was not necessary.\textsuperscript{31} When on the other hand, national courts only stated that a preliminary reference will not be requested, this was considered to be a formally provided reason, as quoted above.

\textit{Table 7. Number of national cases where a reason for not requesting a preliminary ruling was given categorised into explicit or implicit and formal or substantial.}

<table>
<thead>
<tr>
<th>Explicit</th>
<th>Implicit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formally</td>
<td>10</td>
</tr>
<tr>
<td>Substantially</td>
<td>5</td>
</tr>
</tbody>
</table>

Turning now to the theoretical assumptions; the logic of the sustained resistance view would, in its ideal form, predict national courts to avoid participating in CJEU regulations. Having found national courts to provide substantially formulated reasons why a preliminary reference was not requested goes against the expectations of the sustained resistance view. As a result, it cannot be suggested for national courts to act in line with the sustained resistance view.

\textsuperscript{31} Högsta Domstolen, T 5767-13.
Of interest is also an analysis of which cases, in terms of political sensitivity, reasons for not requesting a preliminary ruling was given.

Table 8. Reasons for not requesting a preliminary ruling and political sensitivity of national cases. Number of national cases studied in brackets. Total number of national cases studied (N=60).

<table>
<thead>
<tr>
<th></th>
<th>Reasons for not requesting a preliminary ruling provided (n=16)</th>
<th>Reasons for not requesting a preliminary ruling not provided (n=44)</th>
<th>Difference +/-</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-politically sensitive cases</td>
<td>12.5 % (2)</td>
<td>31.8 % (14)</td>
<td>-19.3%</td>
</tr>
<tr>
<td>Somewhat politically sensitive cases</td>
<td>6.25 % (1)</td>
<td>31.8 % (14)</td>
<td>-25.55%</td>
</tr>
<tr>
<td>Politically sensitive cases</td>
<td>75 % (12)</td>
<td>34.1 % (15)</td>
<td>40.9%</td>
</tr>
<tr>
<td>Highly politically sensitive cases</td>
<td>6.25 % (1)</td>
<td>2.3 % (1)</td>
<td>3.95%</td>
</tr>
</tbody>
</table>

It was found that the majority of reasons provided, were given in politically sensitive cases (75%). Two reasons were given in non-politically sensitive cases, one in a somewhat politically sensitive case and one in a highly politically sensitive case. National courts have been more willing to provide reasons why a preliminary reference has not been requested in politically sensitive cases than the less politically sensitive cases. These results are shown in table 8 (above).

As discussed in aspect two, these findings indicate the preference of Swedish national courts to make an effort to explain why a preliminary ruling was not requested in the more politically sensitive cases.

In theory, every exception from the obligation to provide reasons why a preliminary ruling was not requested is an infringement. However, as discussed in the previous research and theory section, the reality of CILFIT is argued to be different from theory and the obligation to request preliminary rulings is claimed to have softened with time. It is therefore not possible to assume for national courts to provide reasons for not requesting preliminary rulings in each case. As a result, when considering the national cases where reasons for not requesting a preliminary ruling is provided, the empirical findings from this study illustrates national courts general motivation to approach the CJEU and comply to the Court’s
regulations. The overarching ambition from the CJEU is for national courts to refer all national legal cases, primarily those involving EU law of politically sensitive character. When this is not implemented, the CJEU wants national courts to provide reasons why a preliminary ruling was not requested. The same logic is valid for the Court's primary interest in cases referred through the preliminary reference procedure, as in which cases reasons why a preliminary ruling was not requested is given. As national courts primarily provide reasons for not requesting a preliminary ruling in politically sensitive cases, national courts actions indicate their wish to approach and comply with the CJEU.

Put together, national court behaviour in terms of reasons for not requesting a preliminary ruling comes closest, again, to the behaviour predicted by the judicial empowerment view.

Having now presented the findings from my empirical study and analysis of the results for the three aspects and research questions, I will in the next section give concluding remarks for this thesis as well as suggestions for future research.
5. Conclusion

This thesis has examined the role national courts play in the European legal system. Proceeding from the two perspectives considered within European integration theory, Swedish national courts behaviour in cases chosen not to be referred to the CJEU has been examined, in order to determine whether their behaviour is consistent with the judicial empowerment view or the sustained resistance view. Three aspects standing in the foreground of previous research lead to investigating three questions, which will now be considered in turn.

The first aspect and the first question; “what kind of cases do national courts withhold from a preliminary ruling by the CJEU?” was addressed in section 4.1. National cases withheld from the CJEU were categorised as non-politically sensitive, somewhat politically sensitive, politically sensitive and highly politically sensitive. When comparing the empirical findings from this study to previous findings by Leijon and Karlsson (2013) it was found that Swedish national courts refer more politically sensitive national cases for a preliminary ruling by the CJEU than they withhold. Hence, it was in this study found that Swedish national courts withhold less politically and highly politically sensitive cases than what they refer to the CJEU. The fact that national courts were found to refer significantly more highly politically sensitive cases than they withhold made the findings even clearer.

With this study, it was possible to compare the results from this study with previous research focussed on cases referred to the CJEU, thus allowing a comparison of referred and withheld cases. This made it possible to compare proportions of national cases withheld and referred hence also distinguish a high proportion of referred cases from a low proportion of withheld cases. As a result, the findings from this study substantiate previous indications for Swedish national courts to act in line with the judicial empowerment view.

The second aspect and the second question; “how is EU law referred to in national rulings never sent to the CJEU for a preliminary ruling?” was addressed in section 4.2. Swedish national courts were found to mainly refer to and use EU law in an elaborative manner in their rulings. This was especially true for politically sensitive and highly politically sensitive cases than less politically sensitive cases. As a result, national courts were found to embrace an EU law perspective and exercise EU conformist interpretation in national rulings, as also
previously found by Åhman (2011). Consequently, national courts were again found to mostly act in line with the judicial empowerment view.

The third aspect and the third question; “how do national courts provide reasons for not requesting a preliminary ruling?” was addressed in section 4.3. Swedish national courts were found to provide reasons why a preliminary ruling was not requested in some of the cases studied. Where courts did provide reasons it was evident in more politically sensitive and highly politically sensitive cases than less politically sensitive cases. Also, some reasons for not requesting a preliminary ruling were explained in a substantial manner. As a result, once again, the judicial empowerment view was found to reflect national court behaviour.

Having been systematically studied for the first time, it is now also possible to analyse the three aspects joint result as yet another parameter of national court behaviour. When looking at all three aspects simultaneously, national courts allow for EU law to penetrate into national rulings and engage EU law to a larger extent in politically sensitive cases than less politically sensitive cases. This is also true for when reasons for not requesting a preliminary ruling are provided. National courts provide reasons for not requesting a preliminary ruling to a larger extent in the more politically sensitive cases. Also of interest, when looking at all three aspects together is whether national courts act in a similar manner or not in terms of the theoretical perspectives. Looking at all three aspects together it is found that national courts act in the same manner. Politically sensitive cases are not withheld to a larger extent than referred to the CJEU, indicating national courts’ compliance and acceptance of the CJEU to rule on national politically sensitive cases. An EU law perspective is present in national rulings, suggesting Swedish national courts’ desire to embrace EU law; as this is true also for politically sensitive cases national courts comply with EU law supremacy over national law. Lastly, as national courts provide substantial reasons why a preliminary ruling was not requested, especially in politically sensitive cases, it cannot be suggested that national courts attempt to shield themselves from CJEU regulations, but rather, actively seek the direction of the CJEU. As a result, this suggests that Swedish national courts are committed to the EU legal system and act in compliance to the CJEU, promoting EU legal integration. This behaviour corresponds well with national court behaviour as expected by the judicial empowerment view. In sum, the findings from this empirical study indicate that Swedish national courts act more in line with the judicial empowerment view than the sustained resistance view.
Having only examined Swedish national courts it is not possible to generalize the empirical findings of Swedish national courts to other Member State national courts. Nonetheless, as the reader may recall, Sweden was selected as a least likely case for the judicial empowerment view. Having now empirically found preference for Swedish national courts to act in line with the judicial empowerment view, it could be suggested that national courts act in line with this view in other Member States. It could be assumed that the inclination of national courts in other Member States are cooperative rather than obstructive with legal integration across the EU.

Without further research it is not yet possible comment on any causal mechanisms for Swedish national courts’ compliance towards the CJEU. National courts choice to refer more cases of politically sensitive and highly politically sensitive character than withheld, can on the one side be interpret as Swedish national courts’ obedience towards the CJEU, as all kinds of national cases are referred. On the other hand, referring more national cases of politically sensitive and highly politically sensitive character than withheld, can also be interpreted from a pure professional perspective. If so, Swedish national courts consider it important to be certain of ruling correctly, which is why the CJEU is consulted before a final judgement is made.

With the findings presented in section 4.1, 4.2 and 4.3 in mind, as well as a joint account of the three aspects together, the three research questions have been answered and also fulfilled the purpose of this thesis; to examine what role national courts play in the European legal system. Considering the results from the three questions, which all indicate for national courts to act more in line with the judicial empowerment view than the sustained resistance view, it was found that Swedish national courts to play the role of promoters of European legal integration.

In conclusion, new empirical knowledge on national courts’ behaviour in the European legal system has been presented. As the first study of national cases not referred to the CJEU this study contributes to previous findings as well as the current theoretical debate.
5.1. Future research

Future research could seek to address some of the limitations of this study. Of primary interest would be a systematic comparative case study of more Member States. With the inclusion of more Member States, it would be possible to draw wider conclusions on the role of national courts as arbiters of EU legal integration. If possible to include more analytical aspects and variables, investigating the covariance between specific characteristics of national courts a further clarity on national court behaviour would be obtained. To this, it would also be of interest to expand the initial analytical aspects into a further examination of how national courts act both from a political science perspective as well as a judicial perspective. This would enable a greater analysis of national courts use and reference of EU law. It would be of interest to investigate in what cases national courts set aside national law in favour of EU law, or in what cases EU law has been put aside in favour of national law, especially in national cases not referred to the CJEU. A greater judicial perspective would be beneficial overall, as this would not only enable studying more aspects to greater depth, but also depict underlying, implicit judicial reasoning.

Another topic of interest not discussed in this thesis is the normative questions concerning national court behaviour in the continued development of EU law and an EU legal system. In the wake of national courts having to judge in cases where the line between jurisprudence and politics is blurry, questions arise concerning whether it is desirable for national courts to obey or challenge the supranational CJEU. So far, national courts are expected to be loyal to both national and EU law, which leaves national judges in a difficult situation. It would therefore also be of interest to study national court behaviour in terms of individual judges. So far, national courts and the CJEU are only examined as unified actors, of great interest also would be knowledge on the behaviour of individual judges and their thoughts behind the choice to refer or withhold cases before the CJEU and the changes a European Membership has brought to their professional role.
6. List of References

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**Official documents**


**Online sources**

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B 5191-13       Ö 3417-05
B 4946-12       Ö 3156 – 98
T 2572-11       Ö 2065-05
T 5767-13       Ö 5155-10
B 5202-10       B 3272 – 10
Ö 450/10        Ö 2731-08
Ö 3223-13       Ö 1214/95
Ö 430-07        Ö 210-07
Ö 4502-05       T 2934-03
B 4918-11       Ö 2256-10

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Hovrätten för Övre Norrland, B 1001-13
Svea Hovrätt P 11322-13
Hovrätten för Västra Sverige Ö 3113-08
Göta Hovrätt Ö 1843-09
Svea Hovrätt 6034-03
Svea Hovrätt Ö 3442-07
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Svea Hovrätt Ö 7080 – 07
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Eskilstuna Tingsrätt T 2417, 2418-03

Supreme Administrative Court (Högsta Förvaltningsdomstolen)
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4451-07, 4454-07 5334-13
1201-09         7017-03
631-1999        2905-05
630-1999        7675-2000
312-15          7461-1999
1828-12, 4546-11 3890-03
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**Administrative Court of Appeal (Kammarrätt)**

**Administrative Court (Förvaltningsrätt)**
Länsrätten i Stockholms län 4805-98
Länsrätten i Stockholms län 11896-98
Länsrätten i Uppsala Län 1328-02

**Court of Patent Appeals (Patentbesvärsrätten)**
96-110
Appendix 1 Swedish Quotes (in order of appearance)

Page 31-32
English translation: “such a directive conformist interpretation of the regulation guarantees the intended distribution of Member States taxation in cross-border trade in services”.
Original Swedish: “En sådan direktivkonform tolkning av bestämmelsen säkerställer den avsedda fördelningen av medlemsstaternas beskattningsanspråk vid gränsöverskridande tjänstehandeln”.

English translation: “in the light of Union law demands for national law to as far as possible be interpreted in a EU conformist manner, even this regulation must be considered (…)”. Original Swedish: “Mot bakgrund av det unionsrättsliga kravet på att nationell rätt så långt möjligt ska tolkas till ett EU-konformt resultat, måste även denna bestämmelse beaktas vid en prövning av om AA uppfyller förutsättningarna för specialistkompetens”.

Page 34
English translation: “There is no reason to obtain a preliminary ruling”
Original Swedish: “Det saknas därför anledning att inhämta ett förhandsavgörande”

English translation: “A preliminary ruling will, therefore, not be necessary”
Original Swedish: “Det är därmed inte nödvändigt att inhämta ett förhandsavgörande”

English translation: “The court finds no reason to request a preliminary ruling”
Original Swedish: “Länsrätten finner inte skäl att inhämta förhandsavgörande”

English translation: “the court rejects the request for a preliminary reference”
Original Swedish: “HD avslår yrkandet om att det ska inhämtas ett förhandsavgörande från EU domstolen”

English translation: “the question concerning EU law had no impact on the outcome of the case”
Original Swedish: “saknar frågan om tillämplighet betydelse för utgången”