
KARIN LEIJON
Department of Government, Uppsala University, Uppsala

Abstract
This article explores how national judges’ reasoning in the preliminary ruling procedure varies depending on the prescriptive clarity of European Union (EU) legal frameworks. Drawing on the logic of appropriateness and the logic of expected consequences, this article formulates hypotheses regarding judges’ motivational patterns. Interviews with Swedish judges generate findings that partly corroborate these hypotheses. The findings show that when EU legal frameworks are clear, judges express a mix of considerations, including references to EU rules, expected politico-strategic outcomes and professional norms. When the clarity of the frameworks is low, judges mainly motivate their decisions by invoking professional norms. In light of these findings, the article proposes a revision of the compliance pull explanation that takes into account how not only formal EU rules but also informal norms of appropriate professional conduct may influence the actions of national judges.

Keywords: CJEU; logic of appropriateness; logic of consequentialism; national judges; preliminary ruling procedure

Introduction
Research has shown that national judges express a wide variety of reasons when explaining their decisions to either engage in the preliminary ruling procedure [Article 267 Treaty on the Functioning of the European Union (TFEU)] or remain passive (e.g., Glavina, 2019; Jaremba, 2013; Krommendijk, 2021; Leijon and Glavina, 2022; Mayoral and Pérez, 2018; Pavone, 2018). Some motives identified in this context support the assumption in legalist theory that judges are guided by the ‘compliance pull’ of European Union (EU) law (Hübner, 2018, p. 1818; Weiler, 1994); other reasons, however, support the proposition that judges participate in the procedure to become judicially empowered (Alter, 2001; Burley and Mattli, 1993; Nyikos, 2006) or the expectation that judges avoid the procedure to shield the national legal order from EU law intrusions (Golub, 1996; Wind, 2010). Time is therefore ripe to explore the circumstances under which national judges can be expected to rely on different considerations in their decision-making. This article aims to contribute to our understanding of why judges’ motives vary by exploring one type of situational factor that is believed to influence actors’ reasoning, namely, the ‘prescriptive clarity’ (March and Olsen, 2008, p. 703) of legal frameworks (Dörrenbächer, 2017; Egeberg, 2007; March and Olsen, 1998).

To answer the question of whether and how national judges’ reasoning varies depending on the prescriptive clarity of legal frameworks, this article first develops hypotheses by combining insights drawn from theories on the logic of appropriateness and the logic
of consequentiality (March and Olsen, 1989) and the literature on national courts in EU legal integration. What is proposed is that judges are likely to be guided by the compliance pull of EU law if the rules that regulate a specific decision-making procedure have a high degree of prescriptive clarity; that is, they provide judges with clear behavioural guidelines. Conversely, if the rules are less precise, then other motives, such as personal and politico-strategic preferences or, alternatively, informal rules of appropriateness and professional conduct, are expected to inform judges’ decision-making.

Second, this article conducts a plausibility probe (Levy, 2008) to determine whether any of the hypotheses receive broad support, in which case more systematic testing of the expectations is warranted. Empirically, the article investigates Swedish judges’ motives for action with respect to two central decisions in the preliminary ruling procedure that differ with regard to the prescriptive clarity of the formal legal frameworks: (1) whether to refer cases to the Court of Justice of the European Union (CJEU) and (2) whether to include opinions in requests for preliminary rulings. Interviews with Swedish judges generated findings that partly corroborated the theoretical expectations, suggesting that further tests of the hypotheses are warranted. The results show that when the prescriptive clarity of EU legal frameworks is high, judges express a mix of considerations, including references to EU rules, expected politico-strategic outcomes and professional norms. When the clarity of EU rules is low, judges mainly motivate their decisions by invoking informal rules of appropriate professional conduct. This article theorises about how the results can be understood in relation to the logic of prescriptive clarity and proposes a revision of the compliance pull explanation in legalist theory that accounts for not only the ways in which formal EU rules may influence the actions of national judges but also the ways in which informal rules of appropriate conduct do so.

This article proceeds as follows. The first section presents the literature on the behaviour of national judges in the preliminary ruling procedure. The second section develops theoretical expectations regarding the circumstances in which compliance pull motives or politico-strategic considerations inform national judges’ decision-making. The third section describes the study’s design. The fourth section presents the results of the empirical analysis. The final section discusses the implications of the empirical findings.

I. The Driving Forces Behind National Judges’ Action in the Preliminary Ruling Procedure

Theories on European integration mainly characterise national judges as strategic actors (Conant, 2007; Dyevre, 2010; Nyikos, 2006) who, at least in part, are driven by a wish to promote their own interests, which are referred to as politico-strategic motives for action (Krommendijk, 2021). The judicial empowerment thesis provides a prime example of what such strategic considerations entail by proposing that the motive that informs judges’ decisions to request preliminary rulings is their wish to increase their own influence vis-à-vis other branches of government. National judges are thus expected to participate in the preliminary ruling procedure because the EU legal system provides them with strong judicial tools for monitoring political actors, namely, the power to review whether a national provision is compatible with EU law (Alter, 2001; Burley and Mattli, 1993; Weiler, 1991). Although the empirical support for these assumptions is mixed, studies have shown that Dutch and Spanish judges have requested preliminary rulings from the
CJEU to force the domestic legislator to change policies that the national judges had considered to be in violation of EU law (Krommendijk, 2021; Mayoral and Pérez, 2018).

Alter (2001) nuances the argument of judicial empowerment by suggesting that due to inter-court competition, it is predominantly lower court judges who gain new powers from sending questions to the CJEU. By using the CJEU’s responses, lower courts can deliver rulings that the highest domestic courts must accept. Moreover, national supreme courts, which used to be at the top of the domestic judicial hierarchy, have been demoted in the face of the supremacy of EU law and therefore have fewer incentives to participate in the preliminary ruling procedure. In addition, these courts’ ability to reverse lower court rulings has been circumscribed. However, Pavone and Kelemen (2019) argue that these explanations proved self-eroding over time and that there has been a shift in the structure of incentives in domestic high courts. As the EU legal order has become more entrenched, the incentive for high courts to submit references to the CJEU has increased, as this has helped them to limit lower court challenges and control the dialogue with the CJEU to influence the development of EU law.

The sustained resistance account (Pollack, 2013, p. 1271) provides a strategic explanation for national judges refraining from engaging in the preliminary ruling procedure. The argument is that national judges avoid referring cases to the CJEU to defend national sovereignty (Dehousse, 1998; Wind, 2010) and remain in control of policy outcomes (Golub, 1996, p. 381). By not referring cases, national courts deny the CJEU the opportunity to issue binding responses to questions of EU law that have arisen in domestic legal cases. Research on the behaviour of supreme court judges in the Netherlands and the UK has shown that these judges frequently withhold references from the CJEU to prevent interpretations of EU law that would have a negative effect on the national legal system (Golub, 1996; Krommendijk, 2021, p. 162).

In contrast to these politico-strategic accounts, the compliance pull explanation, which is part of legalist theory, proposes that it is mainly legal factors that influence judges’ decisions in the preliminary ruling procedure (Hübner, 2018, p. 1821; Weiler, 1994, p. 521). The starting point of this explanation is that national judges initially accepted the CJEU’s authority and the preliminary ruling procedure because the supranational court is composed of senior members of the national judiciaries and use a ‘language of reasoned interpretation, logical deduction, systemic and temporal coherence’ when communicating with national courts (Weiler, 1994, p. 521). Expanding on the compliance pull explanation regarding judges’ decisions on whether to request a preliminary ruling from the CJEU, Hübner (2018) proposes that national judges refer cases to the EU court because they are professionally bound to follow the legal procedures laid down in Article 267 TFEU, and it is their responsibility to ensure that EU law is interpreted correctly in the case at hand. According to Hübner (2018), whether national judges decide to refer cases to the CJEU depends on whether they find that they need help with ‘specifying the validity and interpretation of acts’ (p. 1825), as stated in the formal EU rules that regulate the procedure (Article 267 TFEU). Although this explanation has not been able to account for variations in the number of referrals from courts in different member states (Alter, 2001), interviews have revealed that Dutch and Irish judges strictly abide by formal EU rules (Krommendijk, 2021).

Apart from the motives described above, studies have shown that judges also motivate their decisions not to refer cases based on a lack of knowledge about EU law...
(Pavone, 2018) or a lack of time (Glavina, 2019; Krommendijk, 2021). Moreover, judges often have multiple reasons for referring cases to or withholding cases from the CJEU (Jaremba, 2013, p. 313).

II. Logics of Action and Prescriptive Clarity

The concept of prescriptive clarity originates from an attempt to fit the two fundamental logics of human behaviour, that is, the logic of appropriateness and the logic of consequentiality, into a single theoretical framework (March and Olsen, 1998, 2008). The theoretical basis for the logic of appropriateness resembles that of the legalistic compliance pull explanation; both accounts understand human action as being rule-bound and as a process of matching the obligations of one’s identity to a specific situation. In contrast, the logic of consequentiality assumes that individuals act based on their calculations of expected outcomes, such as anticipated personal benefits; this assumption underlines the (politico-strategic) theories of judicial empowerment and sustained resistance.

According to March and Olsen (1998), most human action contains elements of both the logic of appropriateness and the logic of consequences. However, the relative significance of these logics is assumed to vary across different situations and issues (Goldmann, 2005, p. 43; March and Olsen, 1998). The concept of prescriptive clarity proposes that actors are guided by different logics depending on the circumstances and that a clear logic of action will prevail over a logic that is less clear (March and Olsen, 1998, 2008). Consider a situation in which the rules of appropriateness, such as legal frameworks, are precise, consistent and binding. These types of frameworks are assumed to provide actors with clear behavioural guidance. All else being equal, a legal framework that has a high degree of prescriptive clarity makes it more likely for an actor to follow the logic of appropriateness than the logic of expected consequences when making decisions (March and Olsen, 2008, p. 703).

In contrast, when legal frameworks are unclear and provide actors with little behavioural guidance, the first expectation is that actors will make decisions based on the logic of consequences (March and Olsen, 1998). The idea is that formal rules that entail a low degree of prescriptive clarity make space for discretionary action, making it possible for actors to pursue their interests. The second and alternative expectation is that in situations in which legal frameworks have a low degree of prescriptive clarity, actors rely on the behavioural guidance provided by informal norms of appropriateness rather than on strategic calculations. Informal norms of appropriateness are described as shared beliefs about the obligations that are attached to a specific role or an identity (March and Olsen, 1998). In the judicial context, these shared beliefs include principles such as the upholding of the integrity of the judiciary (Clayton and Gillman, 1999, p. 15).

Applied to the EU context, one would expect that when EU legal frameworks have a high degree of prescriptive clarity, compliance pull motives (based on the logic of appropriateness) dominate the substantive reasoning of national judges. If EU rules, on the other hand, have a low degree of clarity, personal interests such as politico-strategic considerations (based on the logic of consequences) or informal norms of appropriate conduct (based on the logic of appropriateness) guide judges in their decision-making.

Whilst the relative prescriptive clarity of legal frameworks is believed to play a central role in understanding the relationship between these different logics of action, human
behaviour involves complex interactions between legal frameworks, norms, expected consequences and other factors, such as the familiarity of a situation or time constraints (March and Olsen, 2008). In the preliminary ruling procedure, factors that influence judges’ decision-making may include the varying factual clarity of the cases that national judges adjudicate (Hübner, 2018). Whilst this article acknowledges the importance of taking into account these types of factors to achieve a complete understanding of the behaviour of national judges, this first attempt to explore variations in judges’ motives focuses on the prescriptive clarity of EU legal frameworks. This delimitation allows for an in-depth investigation of the proposition from legalist theory that judges are primarily guided by the compliance pull of EU law. That is, judges are assumed to follow the logic of appropriateness. In addition, given their professional role in upholding the law, judges are the types of actors for whom the prescriptive clarity of legal frameworks can be considered a very important, if not the most important, factor.

Moreover, the fact that the level of clarity of actors’ (self-) interests is also likely to vary across situations must be emphasised (March and Olsen, 2008). However, based on previous research, this article assumes that the prescriptive clarity of national judges’ interests is high in the context of the preliminary ruling procedure, at least with regard to the two decision-making situations that are the focus of this study. For instance, referring a case is believed to increase judges’ power vis-à-vis the executive and the legislature (Burley and Mattli, 1993), and judges’ expression of opinions has been described as a way to influence the CJEU’s final rulings (Nyikos, 2006). Although the incentive structure may be different for high court judges than for low court judges (Alter, 2001; Pavone and Kelemen, 2019), the interests related to those incentive structures are clear. For this reason, it is more relevant to focus on the relative clarity of EU legal frameworks than on judges’ interests.

The Prescriptive Clarity of the Rules That Regulate the Preliminary Ruling Procedure

National judges are faced with two decisions in preliminary rulings: (1) whether to refer cases to the CJEU and (2) whether to include opinions in requests for preliminary rulings. This article argues that these decision-making situations differ with regard to the prescriptive clarity of EU legal frameworks.

Considering the judges’ first decisions regarding whether to refer a case concerning the interpretation of EU law to the CJEU, the formal EU rule (Article 267 TFEU) reads as follows:

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

On the one hand, according to the above article, lower national courts may refer cases to the CJEU, but they are not required to. However, in cases in which lower national courts have doubts about the validity of EU law, they are obliged to request preliminary rulings because national courts do not have jurisdiction to declare an EU legal provision
invalid. The courts of final instance, on the other hand, are obliged to refer disputes involving EU law to the CJEU, according to the article. Over the years, the CJEU has established a few exceptions to this rule. Based on the CJEU’s case law, courts of final instance can refrain from referring an EU law case if the CJEU’s interpretation will not affect the outcome of the case, if the EU legal provision in question has already been interpreted by the CJEU (acte éclairé) or if the correct application of EU law is so obvious that it leaves no possibility of reasonable doubt (acte clair) (the CILFIT criteria). Although subsequent judgements from the CJEU have led to a discussion of the interpretations of these exceptions, the CJEU has confirmed them (Maher, 2022).

The regulation of national judges’ second decisions regarding whether to express opinions in requests for preliminary rulings is found in the ‘Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings’ [The Official Journal of the European Union (OJ), 2012]. According to the original version of the recommendations, all national courts have discretion regarding whether they want to include opinions in their requests for preliminary rulings:

If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. (OJ, 2012, paragraph 24)

This article argues that when comparing the two decisions national judges make in the preliminary ruling procedure, the formal legal framework that regulates each decision differs in terms of prescriptive clarity. Regarding the second decision, that is, the expression of opinions, the codified rule prescribes no obligatory action, and the behavioural guidance provided is not clear because it is up to each judge or court to decide whether they can or should state their views. In addition, this rule comes in the form of a lower level norm, that is, a recommendation, not a treaty article. Therefore, the prescriptive clarity of this EU rule is low. In comparison, the prescriptive clarity of the rules that regulate the first decision, that is, the referral of cases, is considered to be higher. The conditions under which national courts are required to refer cases are established in EU treaties and in CJEU case law. To be sure, the prescriptive clarity of a treaty article is somewhat higher for courts of final instance than for lower level courts, although lower national courts are also required to refer cases under certain circumstances. Moreover, the extensive debate on how to interpret CJEU case law regarding the CILFIT criteria (Limante, 2016; Maher, 2022) suggests that the rules that regulate the decision to refer cases are considered to be ambiguous by many actors. However, the claim is not that these rules have ‘perfect’ prescriptive clarity. Rather, what is proposed is that the rules that regulate the decision to refer cases have a relatively high degree of clarity than the rules that regulate the decision to express opinions.

1C-314/85. Foto-Frost.
2C-283/81. Srl CILFIT, paragraph 21.
3Two CJEU judgements pointed in different directions with regard to the obligation to refer. One judgement did not require a court of final instance to make a referral simply because a lower court had made a referral on the same issue (joined cases C-72/14 and C-197/14), whilst in the other judgement, the CJEU held that a court of final instance could not ignore conflicting decisions from lower courts (case C-160/14).
4See case C-561/19. Consorzio Italian Management in which the CJEU confirms and complements the CILFIT criteria.
5In the 2019 version of the recommendations (OJ, 2019), the wording of the paragraph has changed slightly. However, as this study is interested in the period before 2019, it relies on the 2012 version of the recommendations.
Accordingly, contrasting the two sets of EU rules that regulate national courts’ engagement in the preliminary ruling procedure shows that the prescriptive clarity of the formal EU rules related to the first decision, regarding whether cases are to be referred to the CJEU, is higher. Based on this interpretation of the relative prescriptive clarity of the different rules and the proposition that a relatively clear logic will dominate over a logic that is less clear, three hypotheses can be formulated.

**Decision 1: High Degree of Prescriptive Clarity in Formal Rules**

*H1* When deciding whether to request preliminary rulings from the CJEU, national judges are expected to mainly consider the compliance pull of EU law (i.e., base their decisions on Article 267 and the CILFIT criteria).

**Decision 2: Low Degree of Prescriptive Clarity in Formal Rules**

*H2a* When deciding whether to express opinions in requests for preliminary rulings, national judges are expected to mainly consider personal or politico-strategic outcomes.

*H2b* When deciding whether to express opinions in requests for preliminary rulings, national judges are expected to mainly consider the compliance pull of informal rules of appropriateness, such as norms regarding professional judicial conduct.

### III. Materials and Methods

This study builds on semistructured face-to-face interviews with 20 Swedish judges. As the aim is to understand how judges think about the decisions they make, the use of such open-ended interview questions is appropriate because they allow the respondents to reflect upon their actions (Marsh and Stoker, 2010, p. 199). The respondents were randomly selected from amongst a list of all judges who had requested at least one preliminary ruling; this selection was done to ensure that respondents had all actually considered whether to request preliminary rulings and whether to express opinions. Moreover, for the compliance pull of EU law to take effect and for the prediction of prescriptive clarity to work as expected, judges are assumed to have sufficient knowledge of the preliminary ruling procedure. Swedish judges with prior experience of referring cases to the CJEU are therefore a suitable choice because they are arguably likely to be familiar with the EU rules regulating the procedure.

The aim of the empirical analysis is to conduct a plausibility probe, that is, to make an empirically informed judgement about whether more systematic testing of the theoretical expectations is warranted (Eckstein, 1975; Levy, 2008). Thus, whilst the number of respondents is too limited as a basis for thoroughly testing the validity of the three hypotheses, the analysis seeks to establish whether any of the expectations receive broad

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6 Approximately 120 Swedish judges had requested at least one preliminary ruling at the time in which the respondents were selected (2016 to 2017). All respondents in the sample had also decided against referring EU law cases to the CJEU. The respondents’ court placement can be found in the Appendix (Table A1).
support, suggesting that the hypotheses would be worthy of further exploration in a larger study. An important limitation of the study design is that it only allows for an investigation of how judges’ motives differ depending on one factor, namely, the prescriptive clarity of EU rules. One should therefore keep in mind that other circumstances, such as the complexity of the legal case at hand (Hübner, 2018), may influence judges’ motivational patterns.

To investigate whether H1 is supported, the respondents were asked about the considerations that led them to request preliminary rulings from the CJEU in some cases and the considerations that resulted in no referral being made in other cases. If the majority of the respondents stated that they considered EU rules (i.e., Article 267 and the CILFIT criteria), then this behaviour was interpreted as being in line with H1. For example, if a lower court judge explained that a referral was made because the validity of EU law was at stake or because the interpretation of EU law was unclear, then H1 was considered to be supported. Similarly, if respondents from lower courts justified their decisions not to request a preliminary ruling by referencing the fact that they had no obligation to refer, then this justification was interpreted as support for H1. Finally, H1 was also supported if a respondent from a court of final instance explained that a referral was made because the interpretation of EU law was unclear or that a referral was not made because the interpretation of the EU legal provision was considered ‘obvious’ (the CILFIT criteria). In contrast, H1 was not supported if the respondents mainly justified their referral decisions with reference to any motives other than the formal EU rules, for example, if the respondents indicated that their decisions not to refer a case were part of a strategy to avoid further integration. As requests for preliminary rulings must concern the interpretation or validity of EU law for those requests to be considered by the CJEU (OJ, 2012, 2019), it can be expected that all judges will mention how referrals made relate to these points of EU law when explaining their decisions to refer. In the empirical analysis, it will thus be important to determine whether the judges also mention other motives for referring cases to the CJEU.

To determine whether either H2a or H2b was supported, the respondents were asked about their decisions regarding whether to include how the case should be resolved in the request opinions. H2a was supported (and H2b rejected) if most respondents justified their decisions with reference to politico-strategic motives or personal preferences, for example, if respondents described the decision to express an opinion as a way to influence the interpretation of EU law. Conversely, H2b was supported (and H2a rejected) if the interviewees mainly referred to rules of appropriate behaviour, such as shared professional norms. In addition, H2a and H2b were rejected if the judges mainly referred to formal EU recommendations, that is, if respondents said that an opinion was included because the court found itself able to formulate it and that including the opinion would facilitate the handling of the request for a preliminary ruling. The coding procedure used for the responses is described in the Appendix (Table A2).

To ensure that the respondents felt they could talk freely, they were granted anonymity. However, the respondents’ answers should be treated as a mix of internal motivations and external justifications for action. A fruitful way forwards is to discuss what types of justifications are considered socially desirable in the context of the study. Regarding national judges, it is reasonable to assume that as they are supposed to follow the law, we can expect that these respondents mainly emphasise EU rules in their answers. The questions of
whether this claim holds and how such answers potentially affect the interpretation of the results are discussed in the following section.

IV. Empirical Analysis

In the following two subsections, the findings from the interviews with Swedish judges are presented. Each respondent was assigned a number between 1 and 20, which is referred to in connection with the quotes.

Motives for (Not) Requesting Preliminary Rulings

A clear majority (18 out of 20 respondents) described their decisions to refer cases to the CJEU as a simple matter of fact given the wording of Article 267 and the CJEU’s case law. For example, a judge who worked in a court of final instance stated, ‘If the legal case is about the interpretation of an EU legal rule and the interpretation is unclear, then you just have to ask’ (19). These respondents’ references to the compliance pull of EU rules were expected because judges are required to explain why a referral is necessary when sending a case to the CJEU. However, two lower court judges also mentioned other types of motives that were unrelated to formal EU rules when describing their decisions to refer specific cases. These interviewees noted that they decided to refer cases to the CJEU to avoid being blamed for setting aside national legislation. Both judges noted that the situation is sensitive when domestic policies conflict with the supreme EU law. As one of them stated,

> It’s later, when you get into more sensitive situations, where you maybe need that … that someone else says it. In our case, for example, it was a scapegoat function really, very clear, one could say. (Q: How do you mean?) It’s not we who are setting aside Swedish law, but it’s actually the European Court of Justice that says that we have to do it — “Look, our hands are tied” — it’s a pretty good feature [of the EU legal system]. (9)

This blame avoidance motive (Novak, 2013, p. 1101) for requesting preliminary rulings from the CJEU matches the assumption of the judicial empowerment thesis, which suggests that judges use the preliminary ruling procedure to safeguard and strengthen their own position vis-à-vis the political branches of government (Alter, 2001, p. 50, note 21; Maher, 1994, p. 229).

In regard to the motives behind not requesting preliminary rulings, seven of the respondents described that the EU law cases in which they decided against referral were clear with regard to the interpretation of EU provisions; these statements are in line with the compliance pull explanation. However, the majority of the judges mentioned other motives. One respondent who worked in a court of final instance stated that he or she sometimes refrained from requesting preliminary rulings to prevent the expansion of EU law, which is a reasoning that corresponds to the expectations of the sustained resistance account (Golub, 1996) and the attitudes of Dutch and British high court judges (Krommendijk, 2021). It should be noted that as all respondents have referred questions

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7 Respondents 5 and 9.
8 Respondents 3, 7 and 8 (lower court judges) and 11, 12 and 17 (high court judges).
9 Respondent 16.
to the CJEU, they are more likely to be positive about EU law and its potential expansion than the average Swedish judge. This situation suggests that the share of judges who decide against referring cases to the CJEU to prevent further expansion of EU law is smaller in this sample than in the population.\footnote{In particular, lower court judges who want to limit the expansion of EU law are unlikely to be included in the sample because it only includes judges that have referred at least one case and these judges are less likely to have referred cases because they are not obliged to do so.}

Moreover, four respondents at different levels of the judicial hierarchy\footnote{Respondents 1, 2 and 9 (lower court judges) and 13 (high court judge).} stated that they avoided the procedure because they were afraid of making mistakes. One of them stated,

It’s embarrassing! It is an embarrassment for the court to ask a question and then get a response that lets you know that you have completely misunderstood [EU law]. (13)

The claim in the judicial politics literature is that judges fear that such critical remarks from higher courts will have a negative effect on their career prospects (Heumann, 1978; Tridimas and Tridimas, 2004, p. 135). Similar motives have been expressed by, for instance, Dutch (Krommendijk, 2021), Italian (Pavone, 2018), and Croatian and Slovenian judges (Glavina, 2019).

Finally, 10 judges from both lower and higher courts\footnote{Respondents 1, 2, 4, 5 and 6 (lower court judges) and 10, 14, 15, 18 and 19 (high court judges).} described how they did not always act in accordance with EU rules. The reason for this ‘rule-breaking’ behaviour was, according to the respondents, an effort to protect the functioning of the preliminary ruling procedure. These judges had all decided against referrals because they worried that the CJEU is overburdened with cases and unable to deliver judgements within a reasonable time. Previous research has suggested that the CJEU harbours similar concerns about the long processing time in the preliminary ruling procedure (Brekke et al., 2022). One of the interviewees stated,

If all courts of final instance were to ask questions, which they are obliged to do as soon as doubts arise, then the European Court of Justice would be drowning in requests for preliminary rulings. (2)

Moreover, and partly in line with previous studies (Krommendijk, 2021), these respondents feared that the lengthy procedure before the CJEU may harm the parties to the case. One of them stated,

It is not so often you want to refer a case because you know that it takes almost two years before you get an answer, and it is not so fun for the parties that it takes such an awful long time. (1)

These quotes show that the respondents found it inappropriate to refer all cases in which the interpretation of EU law is unclear to the CJEU due to the expected delay in the procedure. In contrast to the claims made in previous research about how the compliance pull of EU law and considerations of judicial empowerment affect judges’ level of engagement in EU legal integration, this finding shows that judges may also consider what type of decision is suitable given the (perceived) need to protect the functioning of the preliminary ruling procedure.

As Table 1 shows, whilst most respondents referred to formal EU rules when asked to describe their reasons for requesting preliminary rulings, most respondents expressed...
motives unrelated to those rules when explaining why they did not refer cases to the CJEU. These findings thus support the theoretical expectation (H1) only with regard to the decision to request a preliminary ruling. We cannot know for sure whether judges omit their reasons for (not) referring cases. However, the motives stated are varied, ranging from blame avoidance to respect for the limited capacity of the CJEU, and are somewhat surprising because the respondents could simply have referred to the formal rules when explaining their decisions. This finding indicates that the study did not primarily capture socially desirable justifications for action, in which case the respondents would solely have emphasised formal EU rules in their answers. Moreover, although the design of the study does not allow for comparisons across court levels, the findings show that there is no difference in the stated motives between respondents from the highest courts and those from lower courts.

Motives for (Not) Expressing Opinions

With regard to the judges’ motives for expressing opinions, the findings show that three respondents who worked in lower courts believed that they were required to include opinions in the requests; however, the recommendations do not make opinions mandatory. One respondent stated,

Well, you should express your views, and you should provide the EU court with information about the member state’s law and its purpose. (1)

It appears as if these judges motivate their decisions to include opinions by referring to the compliance pull based on what they perceive are the formal EU rules. In addition, four judges from both lower and higher courts stated that they were unaware that they could

<table>
<thead>
<tr>
<th>Motives for referring</th>
<th>Number of answers/respondents</th>
</tr>
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<tbody>
<tr>
<td>Required by EU law: Article 267 and the CILFIT criteria (compliance pull of formal EU rules)</td>
<td>18</td>
</tr>
<tr>
<td>Blame avoidance (politico-strategic)</td>
<td>2</td>
</tr>
<tr>
<td>Total number of answers and respondents</td>
<td>20/20</td>
</tr>
</tbody>
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<tr>
<th>Motives for not referring</th>
<th>Number of answers/respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not required by EU law: Article 267 and the CILFIT criteria (compliance pull of formal EU rules)</td>
<td>7</td>
</tr>
<tr>
<td>Limit EU law expansion (politico-strategic)</td>
<td>1</td>
</tr>
<tr>
<td>Fear of making mistakes (personal-strategic)</td>
<td>4</td>
</tr>
<tr>
<td>Protect the functioning of the preliminary ruling procedure (compliance pull of informal norms of appropriateness)</td>
<td>10</td>
</tr>
<tr>
<td>Total number of answers and respondents</td>
<td>22/20*</td>
</tr>
</tbody>
</table>

Abbreviations: CJEU, Court of Justice of the European Union; EU, European Union.
*Respondents 1 and 2 expressed motives related to the fear of making mistakes and protecting the functioning of the preliminary ruling procedure. Both of their answers are included in the numbers reported in this table, which means that the total number of answers is 22.

13 Respondents 1, 2 and 9 (lower court judges).
14 Respondents 7 and 8 (lower court judges) and 11 and 12 (high court judges).
express opinions. These responses are surprising and suggest that some of the Swedish judges are not that familiar with EU rules. As previous research has shown, a lack of knowledge is one reason for which national judges do not engage in the preliminary ruling procedure (e.g., Glavina, 2019; Jaremba, 2013; Krommendijk, 2021; Pavone, 2018; Wallis, 2008).

Three respondents expressed motives that could be considered politico-strategic or personal in nature. One of these judges, who worked in a court of final instance, believed that national courts should use their opinions to influence EU legal integration by ‘steering the work of the EU court’ (18). This type of motive is interpreted as being in line with the assumptions underlying the judicial empowerment thesis and the sustained resistance view. Two other respondents from lower courts stated that they did not include opinions in their requests because they were afraid of making mistakes.

Finally, 10 respondents, most of them from the highest courts, said that they did not state their views in the requests because they found such opinions to be incompatible with the court’s role within the EU legal system. The respondents perceived that the expression of opinions undermined their impartiality, as illustrated by the following quotation:

The [national] court should not state its position on the matter because the legal process continues. You have to be impartial until the final decision is made; it’s a basic judicial norm. (20)

Similarly, opinions were considered by the respondents to be incompatible with the division of competencies between the CJEU and the national courts. As one respondent stated,

If the national court would write “so we think that this matter should be interpreted in this way”, then the national court would be placing itself above the CJEU. (17)

It is clear that these motives for not expressing opinions do not follow the EU recommendations, which allow for opinions to be expressed. Instead, the respondents’ reasoning appears to be related to their understanding of what constitutes appropriate professional behaviour for a national judge.

Summarising the results in relation to the theoretical expectations, Table 2 shows that although a few judges referred to personal and politico-strategic reasons when describing their rationales for not expressing their opinions, for instance, the fear of making mistakes, these reasons do not constitute the dominant motives, which means that H2a is not supported. Instead, the majority of the respondents believe that opinions should not be expressed because they undermine the judges’ role as impartial actors and interfere with the division of labour between the national courts and the CJEU.

Put in general terms, most of the respondents thought that the expression of opinions was irreconcilable with their professional responsibilities as national judges. These results corroborate the alternative hypothesis (H2b): When formal EU rules have a low degree of prescriptive clarity, judges consider the compliance pull of informal rules such as norms regarding professional judicial conduct. The implication of this finding is discussed in the next and final section.

15Respondents 3 and 4 (lower court judges).
16Respondents 5 and 6 (lower court judges) and 10, 13, 14, 15, 16, 17, 19 and 20 (high court judges).
Conclusions

Does national judges’ reasoning vary depending on the prescriptive clarity of EU legal frameworks and, if so, how? The theoretical expectations stated that if the formal legal framework has a high degree of prescriptive clarity, that is, it provides judges with clear behavioural guidelines, then the dominant motive is the compliance pull of EU law (H1). Conversely, if the prescriptive clarity of the legal framework is low, then other motives, such as politico-strategic preferences (H2a) or, alternatively, informal rules of appropriateness (H2b), inform judges’ decision-making. The results show that Swedish judges’ motives for action partly support the hypotheses.

With regard to the first decision-making situation in which the prescriptive clarity of the legal framework is high, the findings support the expectation (H1) by showing that the majority of the respondents referred to formal EU rules when asked to describe their reasons for requesting preliminary rulings. However, and contrary to the hypothesis, most respondents expressed motives unrelated to EU rules when explaining why they did not refer cases to the CJEU. Instead, they mentioned various considerations, including informal rules of appropriateness (i.e., professional norms) and strategic motives such as limiting the expansion of EU law. With regard to the second decision-making situation in which the prescriptive clarity of the legal framework is low, the results do not support the expectation (H2a) that judges mainly justify their decisions with reference to politico-strategic or personal preferences when the prescriptive clarity of formal EU rules is low. Instead, H2b is supported as the majority of the judges decided against expressing their opinions because they found those opinions to be incompatible with professional judicial norms.

Whilst this study covers Swedish judicial behaviour, it is worth reflecting upon whether one should expect that judges who are experienced in requesting preliminary rulings in other member states express similar motives. On the one hand, research has suggested that the particular political and legal traditions in the Nordic states have made Swedish judges reluctant to engage in the preliminary ruling procedure (Wind, 2010). We may thus expect that the considerations expressed by Swedish judges differ from those expressed by judges in other member states. On the other hand, the motives uncovered in this study show that Swedish judges’ considerations frequently coincide with
those expressed by British, Croatian, Dutch, Italian and Slovenian judges, suggesting that similarities in motivational patterns across member states cannot be ruled out. In sum, the result of this plausibility probe suggests that more rigorous testing of the theoretical expectations is warranted. In particular, the broad support for the hypothesis that when the prescriptive clarity of the formal rules is low, national judges mainly consider the compliance pull emanating from informal rules of appropriateness (professional norms) (H2b) suggests that this hypothesis is worthy of further exploration in a larger comparative study.

Moreover, whilst the analysis is based on answers by a limited number of respondents, the fact that the majority of the respondents considered the inclusion of opinions in their request for preliminary rulings to be incompatible with their professional responsibilities has potentially two important implications for research on national judges in EU legal integration. First, this finding is likely to have implications for the compliance pull explanation. Whilst the claim in previous research has been that judges generally find themselves to be professionally bound to follow the compliance pull of formal EU law (Hübner, 2018; Weiler, 1991), this article suggests that it is also necessary to account for the informal rules of appropriateness. As the results of this study indicate, judges experience a ‘compliance pull’ emanating from professional norms. In light of this finding, the article proposes a partly redefined understanding of how ‘the compliance pull of law’ (legal formalism) matters for national judges: What national judges perceive themselves as professionally bound to do may depend not only on the compliance pull of formal EU rules but also on the pull of informal rules of appropriateness such as norms regarding appropriate judicial conduct.

Second, the findings potentially have implications for the literature on the forces driving human behaviour and the proposition that the logic of consequences is likely to dominate actors’ reasoning in situations where formal rules have a low degree of prescriptive clarity (March and Olsen, 1998, 2008). Contrary to this expectation, the results show that when formal EU rules were unclear, most of the respondents explained their decision to refrain from expressing opinions by invoking professional norms rather than consequentialist considerations such as politico-strategic motives. To make sense of this finding, it can be theorised that when there are no clear, codified rules that prescribe legally binding action, the uncertainty of the situation leads judges to ask themselves ‘What is the basis of my professional identity?’ rather than ‘What is the best decision given my preferences?’ That is, the lack of clear and legally binding regulations makes judges unsure about the discretion they have in a given situation. Instead of consequentialist considerations, judges rely on norms related to their professional role. As discussed above, the study shows that even when EU rules did provide behavioural guidance, most of the respondents did not motivate their decisions to withhold cases from the CJEU based on these formal rules. A possible explanation for this finding is that national judges consider factors other than EU rules precisely because that legal framework is clear. If the rules are fairly precise, then national judges are able to determine which aspects of the procedure, if any, are not regulated. Based on this information, judges can identify the level of discretion they have. That is, judges are aware of what parts of the decision-making process are not guided by formal rules, and in these instances, they may base their decisions on any type of consideration, including politico-strategic interests.
The findings also speak to previous research that has shown that Croatian and Slovenian judges (Glavina, 2019; Leijon and Glavina, 2022) as well as Italian judges (Pavone, 2018) refrain from participating in the preliminary ruling procedure due to insufficient knowledge about EU law. The judges included in this study were considered likely to be familiar with EU law due to their prior experience in the preliminary ruling procedure. However, several judges were unaware of the possibility of expressing opinions or had misinterpreted the rules. This result suggests that a lack of familiarity with some aspects of EU law, such as the CJEU’s recommendations to national courts, is also a factor that affects the dialogue between more knowledgeable judges and the CJEU. Moreover, the respondents differentiated between national law and EU law to some degree in their answers, suggesting that EU law is not fully embedded in the day-to-day work of the judges. This fact is most evident with regard to the judges who noted that they wished to prevent the expansion of EU law and those who referred to the conflicts between national provisions and the supreme EU law as sensitive matters.

This article has investigated how Swedish judges’ motives for action in the preliminary ruling procedure vary depending on one factor, the prescriptive clarity of EU legal frameworks; the article has further suggested that future research should investigate whether and how this clarity matters in shaping the motives used by judges in their actions across different member states. To further our understanding of national court behaviour in the context of European integration, other factors worth exploring in future studies pertain to whether judges’ considerations vary depending on their positions in the judicial hierarchy (Alter, 2001; Pavone and Kelemen, 2019) and whether the clarity of the factual circumstances of legal cases and the complexity of legal provisions (Hübner, 2018) result in different motivational patterns.

Acknowledgements

The author is grateful to Thomas Persson, August Danielson, Kajsa Edholm and the participants at the Law and Courts section, ECPR General Conference 2021, for their constructive feedback on earlier drafts of this article. The author would also like to thank the three anonymous reviewers for their helpful comments.

Correspondence:
Karin Leijon, Department of Government, Uppsala University, Box 514, 751 20 Uppsala, Sweden.
email: karin.leijon@statsvet.uu.se

References


Appendix

Coding of Interview Responses

The respondents were first asked about how many times they had requested preliminary rulings from the CJEU. Then, they were asked to describe the circumstances of one of these cases in more detail and what the main reasons for referral were. If they had referred more than one case, they were invited to describe those cases as well. Second, the judges...
were also asked if they, in that case or in any other cases they had referred (if they had referred more than one case), had included opinions and, if so, their motivation for including/not including opinions in the request.

The recorded interview responses were transcribed by the author.

When coding the interview transcripts, the main code used was ‘manifest coding items’, which consisted of answers to direct questions. For instance, ‘did you include opinions in the request for a preliminary ruling’ yes/no, why not? And why did you decide to refer case X to the CJEU? The other coding item used was ‘latent coding items’, which included responses that were not explicitly related to the questions, for example, reflections on national legal procedures.

Table A1: List of Respondents by Court Level.

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Court</th>
<th>Instance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Administrative Court in Stockholm</td>
<td>1st</td>
</tr>
<tr>
<td>2</td>
<td>Administrative Court (The Higher Education Appeals Board)</td>
<td>1st</td>
</tr>
<tr>
<td>5</td>
<td>Administrative Court of Appeal in Sundsvall</td>
<td>2nd</td>
</tr>
<tr>
<td>6</td>
<td>Administrative Court of Appeal in Sundsvall</td>
<td>2nd</td>
</tr>
<tr>
<td>7</td>
<td>Administrative Court of Appeal in Stockholm</td>
<td>2nd</td>
</tr>
<tr>
<td>11</td>
<td>The Supreme Administrative Court</td>
<td>3rd</td>
</tr>
<tr>
<td>12</td>
<td>The Supreme Administrative Court</td>
<td>3rd</td>
</tr>
<tr>
<td>13</td>
<td>The Supreme Administrative Court</td>
<td>3rd</td>
</tr>
<tr>
<td>14</td>
<td>The Supreme Administrative Court</td>
<td>3rd</td>
</tr>
<tr>
<td>3</td>
<td>General Court (Stockholm District Court)</td>
<td>1st</td>
</tr>
<tr>
<td>4</td>
<td>General Court (Haparanda District Court)</td>
<td>1st</td>
</tr>
<tr>
<td>8</td>
<td>General Court (Court of Appeal for Upper Norrland)</td>
<td>2nd</td>
</tr>
<tr>
<td>9</td>
<td>General Court (Svea Court of Appeal)</td>
<td>2nd</td>
</tr>
<tr>
<td>10</td>
<td>General Court (Court of Appeal for Western Sweden)</td>
<td>2nd</td>
</tr>
<tr>
<td>15</td>
<td>The Supreme Court (General Court)</td>
<td>3rd</td>
</tr>
<tr>
<td>16</td>
<td>The Supreme Court (General Court)</td>
<td>3rd</td>
</tr>
<tr>
<td>17</td>
<td>The Supreme Court (General Court)</td>
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<tr>
<td>19</td>
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<td>3rd</td>
</tr>
<tr>
<td>20</td>
<td>The Supreme Court (General Court)</td>
<td>3rd</td>
</tr>
</tbody>
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Table A2: Coding of Interviews.

<table>
<thead>
<tr>
<th>Theoretical category</th>
<th>Code</th>
<th>Coding example</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Whether to refer cases</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legalist theory</td>
<td>Required by EU law</td>
<td>‘If the legal case is about the interpretation of an EU legal rule and the interpretation is unclear, then you just have to ask’ (19).</td>
</tr>
<tr>
<td>(compliance pull of EU law)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not required by EU law</td>
<td>‘We considered the EU law to be clear’ (12).</td>
<td></td>
</tr>
<tr>
<td>Logic of appropriateness</td>
<td>Protect the functioning of the preliminary ruling procedure</td>
<td>‘If all courts of final instance were to ask questions, which they are obliged to do as soon as doubts arise, then the European Court of Justice would be drowning in requests for preliminary rulings’ (2).</td>
</tr>
<tr>
<td>(compliance pull of informal norms)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Politico-strategic</td>
<td>Blame avoidance (judicial empowerment)</td>
<td>‘It’s later, when you get into more sensitive situations, where you maybe need that … that someone else says it. In our case, for example, it was a scapegoat function really, very clear, one could say’ (9).</td>
</tr>
<tr>
<td>Limit EU law expansion</td>
<td>Limit EU law expansion (sustained resistance)</td>
<td>‘It is important to not request preliminary rulings when you are unsure if it is an EU legal issue. What I think is problematic from a constitutional stand point is if you ask the CJEU a question outside the realm of EU law. If a national court does that it has taken a stand that the issue falls within the scope of EU law’ (16).</td>
</tr>
<tr>
<td>Personal interest</td>
<td>Fear of making mistakes</td>
<td>‘It’s embarrassing! It is an embarrassment for the court to ask a question and then get a response that lets you know that you have completely misunderstood [EU law]’ (13).</td>
</tr>
<tr>
<td><strong>Whether to express opinions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lack of knowledge</td>
<td>Unaware of the possibility to express opinions</td>
<td>‘I am not familiar with the practice of expressing any opinions’ (11).</td>
</tr>
<tr>
<td>Logic of appropriateness</td>
<td>Believed to be formally required (compliance pull of perceived formal rules)</td>
<td>‘Well, you should express your views, and you should provide the European Court of Justice with information about the member state’s law and its purpose and so on’ (1).</td>
</tr>
<tr>
<td>(compliance pull of informal norms)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Politico-strategic</td>
<td>Influence EU law (judicial empowerment)</td>
<td>‘We discussed whether we should provide some suggestion that can steer the work of the EU court and I thought that should be done’ (18).</td>
</tr>
<tr>
<td>Personal interest</td>
<td>Fear of making mistakes</td>
<td>‘It is too risky. An important part is that I was afraid to seem stupid’ (4).</td>
</tr>
<tr>
<td>Logic of appropriateness</td>
<td>Incompatible with one’s professional role and competence</td>
<td>‘No … I think … the question is whether it’s really appropriate to express opinions because we are not a party to the case. We are not supposed to express our own opinion’ (14).</td>
</tr>
</tbody>
</table>

Abbreviation: EU, European Union.