BUT THAT’S NOT WHAT I ASKED!
The reformulation of questions asked in preliminary rulings

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1. INTRODUCTION

In their chronicles in ERT last year, Eric Olsson and Martin Bogg discuss national courts’ (un)willingness to refer questions to the Court of Justice of the European Union (“the CJEU” or “the Court”) with a special focus on public procurement cases.¹ This article in turn, aims to investigate another important issue concerning the preliminary ruling procedure, namely the reformulation of questions by the CJEU. Assuming the national judge on a case concerning EU law has thought long and hard about the questions to ask the CJEU, he or she will expect a helpful answer to his or her questions. What if he or she does, after the long wait of about 2 years a preliminary ruling procedure takes in the CJEU, not get back an answer to the questions asked, but rather the answer to other questions? The national judge may indeed proclaim, “…that’s not what I asked!”, but may also wonder why the CJEU reformulated the questions and what the consequences of that reformulation are. The aim of this article is to investigate the (un)willingness of the Court to reformulate the questions asked by the national court when that court finally decides to make a reference to the Court. The questions asked by national courts and in particular their formulation are a vital link between the national court and the CJEU, because they determine to a large degree the type of answer given by the CJEU. Careful drafting of the questions referred is essential, but as all lawyers know, language can

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be deceptive. A number of mistakes can lead to deficient questions. Internal mistakes, such as bad formulations or bad knowledge of the jurisdictional limits of the CJEU, as well as external mistakes such as faulty translation can occur. The aim of this article is to analyse the CJEU’s treatment of questions referred for preliminary rulings, especially related to cases where questions have been reformulated. In the practice of the CJEU, there seems to be a tension between cases where the scope of the preliminary ruling is limited to the questions asked by the national courts on the one hand and cases where the scope is extended on the other hand.2

The structure of this article is as follows. First, a basic recap of the functioning of the preliminary ruling procedure under Article 267 TFEU is provided, followed by an analysis of a number of cases where the Court either decided to reformulate the question posed by the national court for different reasons or denied a reformulation upon request. Then, two questions are analysed: (1) Why does the CJEU reformulate questions asked by national courts? (2) What are the effects of such modifications for the constitutional order concerning the relationship between national courts and the CJEU? The last section concludes.

2. ARTICLE 267 TFEU AND THE FORMULATION OF QUESTIONS

Preliminary ruling procedures under Article 267 TFEU are designed to assist national courts applying EU law. When national courts are faced with a question of interpretation of the Treaties or the validity of a Union act, they may stay proceedings and ask the CJEU for help by submitting one or several questions to that court.3 The CJEU then answers the questions and the national court uses the CJEU’s answers in their adjudication of the case. The procedure under Article 267 TFEU has thus been devised with a clear separation of assignments. The national court identifies the issues of EU law that it needs assistance with, formulates suitable questions and applies the answers from the CJEU to the facts in the case.4 The task for the CJEU is to interpret the Treaty and/or to assess the validity of Union acts.5 The development of EU law is thus partly dependent on the referral of questions by the national courts to the CJEU.6

5 Treaty on the Functioning of the European Union, art 267.

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main mode of operation of the preliminary ruling procedure is by the CJEU itself emphasised as being cooperation between the CJEU and the national courts. Their ultimate goal must be a correct and uniform application of EU law throughout the Union. As regards the referral procedure, the CJEU is placed “above” national courts with regards to the supremacy of EU law, but equally at the same level as the national courts as it aims to assist them in their work.

The question to what extent the CJEU may change the question asked by the national court is highly relevant for the relationship between the national courts and the CJEU. In general a limited procedural scope gives more power to the national courts, hence they have the power to formulate the questions that will be subject to the interpretation by CJEU. A wider scope, logically, gives more power to the CJEU to reformulate a question it considers to be deficiently formulated. The basic problem that occurs in questions for preliminary ruling is the information asymmetry between the two courts involved. The national court, on the one hand, knows the circumstances of the case and the national law applying to the case. The CJEU, on the other hand, has a superior knowledge of EU law and the types of questions it can answer. For that reason, there is a guide for judges at national courts asking questions to the CJEU as regards the formulation of questions and the preliminary procedure as such. However, mistakes can occur in both courts and the purpose of this article is to illustrate the CJEU’s practice when reformulating questions and discuss whether that practice creates any problems for the constitutional relationship between the CJEU and national courts as well as the correct application of EU law in the national courts.

3. DENIAL OF REFORMULATING QUESTIONS

Only national courts can refer preliminary ruling questions to the CJEU. Already in a case from 1965, Hessische Knappschaft, the Court concluded that the parties cannot force the Court to change a referred question. In that case,
one of the parties held that the question that was referred for interpretation was not applicable to the facts in the case. The CJEU rejected the request to reformulate the question. The CJEU expressed that the intention of the preliminary ruling procedure was to establish a direct cooperation between the CJEU and the national courts in a “non-contentious procedure excluding any initiative of the parties, who are merely invited to be heard in the course of the procedure”. Later this practice has been confirmed by the CJEU in different contexts. One example among many is the case Danske Svineproducenter where the parties in the national procedure wanted to refer further questions and reformulate the question that the Danish Supreme Court had referred. In answer to that the CJEU held that:

“[…] in the context of the cooperation between the Court of Justice and national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case before it, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties to the main proceedings may not change their tenor”.

The same argument was used in C-138/08 Hochtief AG, where the CJEU also concluded that since the national court did not see,

“[…] neither the need nor the relevance of a question concerning the grounds for, or the circumstances of, the exclusion of the applicants in the main proceedings from the procedure for the award of the public contract in question, the Court cannot carry out an analysis in that regard”.

The conclusion from the above cases appears to be that the CJEU considers the referred questions to form the procedural scope that it must adapt to.

4. REFORMULATION OF QUESTIONS BY THE CJEU

Notwithstanding the above line of case law, there are also a number of cases where the Court has chosen to reformulate the question posed by the national court. In one of the very first references for a preliminary ruling, the famous Costa v E.N.E.L. case, the Court held that it has:

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12 Ibid, p 971.
13 Case C-316/10, Danske Svineproducenter, para 32.
“[the] power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty.” (emphasis added)\textsuperscript{15}

Upon an examination of case law, there appear to be three groups of cases where the Court does not keep itself confined to the question(s) as formulated by the referring national court. These are, firstly, cases where some additional information may be needed to completely address the questions of EU law arising in the case or where some detail is missing in the questions referred. The Court often uses the formula “in order to provide the national court with a useful answer….\textsuperscript{16}” or a similar formulation in the answers to this group of questions. The second group concerns cases where the Court is forced to reformulate questions asked by the national court. National courts sometimes ask questions that the Court may not answer because they fall outside the jurisdiction of the Court.\textsuperscript{17} Furthermore, the Court may receive references with questions which are more or less obviously incorrect as regards the EU law related issues identified in the case. The line between the above-named categories of cases can perhaps not be sharply drawn, but it is nonetheless important to try to differentiate between these two categories, as the first does not necessarily require a reformulation of the questions posed by the national court, while the second group of cases requires a reformulation to ensure that the correct application of EU law carried out by the national court is not endangered. A reformulation can be especially important if the referring court is a court of last instance, since there will be no possibility to appeal a potentially incorrect judgment. Thirdly, the Court may reformulate questions because it appears that the particular question asked by the national court is politically sensitive. All three categories are discussed further below.

5. JUDGMENTS GIVING “A USEFUL ANSWER” TO THE NATIONAL COURT

A typical formulation by the national court when extending the scope of a question can be as follows:

“Although the national court has not asked a question on this point, within the context of the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, and to the extent to which the argument of the appellant in the main proceedings affects the resolution of the dis-
pute in those proceedings, it is for the Court to provide the national court with an answer which will be of use to it and enable it to determine the case before it.\textsuperscript{18} (emphasis added)

There are different circumstances in which the above type of formulation appears in the Court’s case law. Sometimes, the Court, contrary to its own statements, actually takes up an additional issue at the request of the parties to the case.\textsuperscript{19} In the Interportal case, which is cited above, the Court acknowledges an issue that had not been referred to it by the national court. Essentially, the applicant argued that it was the wrong addressee for the claim of the defendant in a previous procedure. However, after acknowledging the relevance of that claim, the Court dismisses the claim of the applicant with very short reasoning in one paragraph.\textsuperscript{20}

Interportal nevertheless seems to be the exception to the rule. More often, reformulations pertain to the provisions of EU law which are relevant to the case at issue. In some cases, the national court has chosen an incorrect EU law basis to the dispute at issue. In Weigel, the national court had referred a question pertaining to the free movement rules contained in the Treaty. The applicants and the Commission, intervening, pointed out that there was a Directive which was potentially applicable to the situation at hand. The Court decided to examine said Directive, since it would not be necessary to apply primary law to a situation where secondary law exists.\textsuperscript{21}

In Worten, the referring court had asked a question regarding a specific provision in Directive 95/46. The Court examined that provision as regards the circumstances in the case and came to the conclusion that the provision pointed out by the national court was not relevant. The Court then reiterated its usual phrase that it needed to provide the national court with a useful answer and proceeded to examine the other, relevant, provisions of Directive 95/46 which the national court had referred to.\textsuperscript{22}

In other cases, such as Dyson, it was necessary to examine an additional provision except that at issue in the question of the national court. In that case, the Commission, intervening in the proceedings, pointed out that to answer the question posed by the national court, it was first necessary to examine a certain other provision of the Directive at issue. Both the applicant and the defendant in the case before the national court argued against the intervention of the

\textsuperscript{18} Case C-569/08 \textit{Internetportal und Marketing GmbH} [2010] ECLI:EU:C:2008:569, para 28.
\textsuperscript{19} Case C-316/10, \textit{Danske Seineproducenter}, para 32.
\textsuperscript{20} Ibid, paras 27–30.
\textsuperscript{21} Case C-387/07 \textit{Harald Weigel and Ingrid Weigel v Finanzlandesdirektion für Vorarlberg} [2004] ECR I-4981, paras 42–45.
\textsuperscript{22} Case C-342/12 \textit{Worten – Equipamentos para o Lar SA v Autoridade para as Condições de Trabalho (ACT)} [2013] ECLI:EU:C:2013:355, paras 18–32.
Commission, but the Court nonetheless considered that it was relevant to examine the provision pointed out by the Commission and proceeded to do so to provide the national court with “all those elements […] which may be of assistance”. 23

While national courts more often seem to refer to EU provisions with too wide a scope, national courts may also make the opposite mistake, that is to say refer with too narrow a scope. In Hay, the national court had referred to a specific part of a provision in the relevant Directive. While the Court regarded that the national court had identified the correct provision, it took a larger part of that provision into consideration in its answer to ensure that a complete answer to the question at hand could be given. 24

If the CJEU is not sure exactly which provision is relevant to the dispute at issue with the national court, it may also resort to alternative answers. In Winner Wetten, the national court had referred a question regarding what are now Articles 49 and 56 TFEU. However, the Commission maintained that only Article 49 TFEU could be applied to the situation at hand. The Court held in that case that it was for the national court to identify the relevant EU law issues arising in the case and proceeded to give the national court an answer with regard to both Article 49 and Article 56 TFEU. 25

Lastly, it may be so that a question asked by a national court is entirely irrelevant to the dispute. In such a case, the Court may confine itself to answering just the relevant question. In Ritter, the national court referred two questions to the Court. However, upon examination of one of the questions, the Court held that only one of the two questions was relevant to the dispute before the national court and hence proceeded to only answer the (according to the Court) relevant question. 26

To alter the relevant provisions pointed out in the question by the national court thus appears to be a common practice by the Court. However, there are examples where this practice has led to disagreements either between the Court and the Advocate General (“AG”) on the case or the referring national court and the CJEU. In Engelbrecht, AG Léger held the view that the referring Court had incorrectly concluded that a certain provision of Regulation 1408/71 was not applicable to the dispute before it. However, the Court disagreed and proceeded to only apply the provisions that the national court had referred to with

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the motivation that the national court had explicitly stated that it did not consider that provision of Regulation 1408/71 to be relevant.27

As Sharpston and Barnard point out in an early article on the (then) Article 177 procedure, it is possible that the Court misunderstands the situation at issue before the national court which then leads to an answer which is not useful to the national court. In Jenkins for example, the Court merged three separate questions into one. The national court referring the case, the Employment Appeal Tribunal in the United Kingdom found the answer given by the Court of Justice to be too unclear to apply and chose to apply national law instead.28

6. THE NATIONAL COURT HAS (MIS)UNDERSTOOD EU LAW

There seem to be two categories of questions which require a full reformulation by the CJEU. Firstly, questions which are obviously incorrect as to the relation between the question and the case before the national court. A good example of that is Ioan Tatu, where AG Sharpston gave the Court a thorough explanation of why the national court’s question needed to be changed:

“[…] it is apparent from the order for reference that the national legislation that is relevant to the case in the main proceedings is OUG No 50/2008 in its original form, and not in its amended version. It follows that, in considering the issues raised by the order for reference, it is the unamended version of the legislation that the Court should have regard to, and not subsequent versions of it. It follows that the words ‘as subsequently amended’ in the question referred for a preliminary ruling should be disregarded.

Although the question referred for a preliminary ruling uses the expression ‘manifestly discriminatory’, in none of its case-law relating to Article 110 TFEU has the Court held that it is necessary that discrimination be ‘manifest’ in order for that article to be contravened. The test is simply whether discrimination exists. The word ‘manifestly’ should accordingly also be disregarded in answering the question referred.

I would add that there is nothing in the order for reference which indicates that taxation of second-hand motor cars acquired in a Member State other than Romania affords indirect protection to products other than motor vehicles. It is only where there is internal taxation which affords that type of protection that the second

paragraph of Article 110 TFEU will apply. That being so, it is clear that it is the first paragraph of that article which is relevant to the case before the referring court.\textsuperscript{29}

The Court went on agreeing with AG Sharpston’s amendments to the question asked by the national court, though in a less explicit manner.\textsuperscript{30}

The second category consists of questions which are formulated in such a way that they fall outside the jurisdictional scope of the CJEU. Usually this is where the national court asks the CJEU to assess whether a national provision is compatible with EU law. While the Court is not empowered to assess national law, it may give the national court the necessary interpretation of the relevant provisions of EU law to make that assessment itself.\textsuperscript{31} The distinction between these two assessments may be marginal in practice, but is important to delineate the jurisdiction of the Court vis-à-vis national courts. An example of this type of case is Placanica, where the Court was asked whether the national criminal rules regarding a game of chance applied in Italy were compatible with the rules on the freedom of establishment and the freedom to provide services.\textsuperscript{32}

The Court held that:

“Admittedly, as regards the division of responsibilities under the cooperative arrangements established by Article 234 EC, the interpretation of provisions of national law is a matter for the national courts, not for the Court of Justice, and the Court has no jurisdiction, in proceedings brought on the basis of that article, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law […].

In that regard, the Advocate General pointed out, quite correctly, at point 70 of his Opinion that, on a literal reading of the question referred for a preliminary ruling by the Tribunale di Larino […] the Court is being asked to rule on the compatibility with Community law of a provision of national law. Nevertheless, although the Court cannot answer that question in the terms in which it is framed, there is nothing to prevent it from giving an answer of use to the national court by providing the latter with the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law.”\textsuperscript{33}

\textsuperscript{29} Opinion of Advocate General Sharpston in Case C-402/09 Ioan Tatu v Statul român prin Ministerul Finan\c{t}elor \c{s}i Economiei and Others [2011] ECR I-2711, paras 25–27.
\textsuperscript{30} Case C-402/09 Ioan Tatu v Statul român prin Ministerul Finan\c{t}elor \c{s}i Economiei and Others [2011] ECR I-2711, paras 27–38.
\textsuperscript{31} Morten P. Broberg & Niels Fenger, Preliminary references to the European Court of Justice (Oxford University Press 2010) 403.
\textsuperscript{32} Joined cases C-338/04, C-359/04 and C-360/04 Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04) [2007] ECR I-1891, para 31.
\textsuperscript{33} Ibid, paras 36–37.
As in the Placanica case, the Court often simply rephrases questions which could be deemed inadmissible on grounds of lack of jurisdiction, in order to provide the national court with an answer if it appears that there is an issue of EU law relevant for the dispute to be solved before the national court.34

However, it seems that the CJEU does have a limit as to when it is able to reformulate questions. In AC-ATEL, the Court found that it was not necessary to answer questions that the national court implicitly refused to refer to the CJEU, despite the applicants’ claims to the contrary.35 It held that

“It is, moreover, solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court […].

[…] It is therefore necessary to answer only the Finanzgericht’s question, which concerns […].”36 (emphasis added)

The word “necessary” in AC-ATEL indicates that the CJEU considers that questions explicitly or implicitly not asked by the national court are unnecessary to consider, whatever is said by the parties or interveners, because it is up to the national court to give final judgment in the case. Even if the CJEU were to answer a question not asked by the national court, it is not certain that the national court would apply that answer since it has already decided that the answer to that question is not necessary to adjudicate the case. A problem in the relationship between the national courts and the CJEU may also appear if the CJEU were to adopt a practice of “double-checking” the national courts assessment of the relevant questions with regard to the interpretation of EU law. National courts are bound by the answers given by the CJEU and answers going beyond the questions asked by the national courts may cause irritation and a less partner-oriented relationship than the one that the CJEU has tried to establish. The same approach was used by the Court in other cases. In Alsatel the CJEU found that it could not interpret an article in the EEC Treaty that the national court had refrained from referring to the CJEU. The CJEU could therefore only interpret the issue that was referred. The applicant in the main proceeding as well as the Commission asked for a wider scope of the preliminary ruling in the specific case.37 Furthermore, in DHL the CJEU refused to

36 Ibid, paras 18 and 20.
widen the scope of the preliminary ruling when the national court had not referred a specific question of which it was aware.\footnote{Case C-148/10 \textit{DHL International NV, formerly Express Line NV v Belgisch Instituut voor Postdiensten en Telecommunicatie} [2011] ECR I-9543, para 30.}

7. THE CJEU DOES NOT WANT TO ANSWER THE QUESTION ASKED

The CJEU is sometimes accused of “judicial activism” for going too far in its interpretations of EU law.\footnote{Paul Craig & Gráinne De Búrca (2011) 64–65.} However, an opposing stream of case law can also be observed, where the Court takes high regard of national issues of distinctive character or politically sensitive issues. This sometimes results in the reformulation of questions posed by national courts.\footnote{See also Morten P. Broberg & Niels Fenger (2010) 406.} The CJEU does of course not say outright that it is not prepared to answer a question posed by a national court. However, in the circumstances of some cases, it is obvious that the Court has reformulated questions slightly to avoid having to answer politically sensitive questions. Two examples are discussed in more detail below. First, an older case, Grogan, which dealt with information material regarding abortions carried out in the United Kingdom (UK) distributed to Irish women.\footnote{Case C-159/90 \textit{The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others} [1991] ECR I-4685.} Second, a more recent case, Dano, concerning social assistance to a Union citizen residing in Germany is discussed below.\footnote{Case C-333/13 \textit{Elisabeta Dano and Florin Dano v Jobcenter Leipzig} [2014] ECLI:EU:C:2014:2358.}

According to the facts of Grogan, a number of student associations had distributed information about clinics legally providing abortions in the UK, inter alia about the location of the clinics, how to contact them, etc. The student associations had no relation with the promoted clinics. Abortion was, save for certain extraordinary cases, prohibited by the Irish constitution. The question was whether it was possible to prohibit the spreading of information on legal abortions available in other Member States.\footnote{Case C-159/90, Grogan, paras 2–8.} The questions posed by the national court were the following:

\begin{enumerate}
\item Does the organized activity or process of carrying out an abortion or the medical termination of pregnancy come within the definition of ‘services’ provided for in Article 60 of the Treaty establishing the European Economic Community?
\item In the absence of any measures providing for the approximation of the laws of Member States concerning the organized activity or process of carrying out an abortion or the medical termination of pregnancy, can a Member State prohibit the dis-
tribution of specific information about the identity, location and means of commu-
nication with a specified clinic or clinics in another Member State where abortions
are performed?
3. Is there a right at Community law in a person in Member State A to distribute
specific information about the identity, location and means of communication with
a specified clinic or clinics in Member State B where abortions are performed, where
the provision of abortion is prohibited under both the Constitution and the crimi-
nal law of Member State A but is lawful under certain conditions in Member State
B? 44

After answering the first question in the positive, the Court reformulated the
second and third questions into the following, single question:

“Having regard to the facts of the case, it must be considered that, in its second and
third questions, the national court seeks essentially to establish whether it is contrary
to Community law for a Member State in which medical termination of pregnancy
is forbidden to prohibit students associations from distributing information about
the identity and location of clinics in another Member State where medical termi-
nation of pregnancy is lawfully carried out and the means of communicating with
those clinics, where the clinics in question have no involvement in the distribution
of the said information.” (emphasis added) 45

Essentially, what the Court does in the above reformulation is to narrow down
the very similar content of the second and third questions to the particular cir-
cumstances of the case. In that case, where the students distributing informa-
tion were not associated with the abortion clinics, they could not be seen as car-
rying out a service according to Article 56 TFEU. 46 In this manner, the Court
avoided an intrusion into the constitutional prohibition of abortions in Ireland,
an extremely sensitive issue for that Member State. 47 However, the original
questions by the national court were more generally phrased as regards the pos-
sibility to prohibit the distribution of information about lawful abortions in
other Member States. What if the information had been distributed by the clin-
ics themselves, for example by handing out leaflets at gynecologist’s offices in
Ireland or if agents paid by the abortion clinics had distributed the information?
It is true that the answer of the Court enabled the national court to give judg-
ment in this particular case, but it does not clarify the situation at a more gen-
eral level, basically forcing the Irish national court to ask the same questions
again, should a slightly different matter arise before it.

The second case named above, Dano, is a more recent case, which also treats
a politically sensitive question, namely that of “welfare tourism”. Dano was a

44 Ibid, para 9.
46 Ibid, para 24.
47 JOANNA N. ERDMAN, ‘Procedural abortion rights: Ireland and the European Court of Human
Romanian women residing in Germany. She did not actively seek work and had never been employed, neither in Romania nor in Germany. The case essentially concerned the question whether she could claim social allowance from the German state. Welfare tourism has long been discussed in the EU, especially with regard to the eastern expansion of the EU.\textsuperscript{48} In Sweden, this issue has recently arisen anew in connection with Union citizens who try to make their living by begging.\textsuperscript{49} The German court first asked whether “special non-contributory benefits” such as the social allowance at issue would fall within the scope of Regulation 883/2004 and thereby under the principle of equal treatment set out in that Regulation.\textsuperscript{50} The CJEU answers this question in the positive and then goes on to the second and third questions, which read as follows:

“(2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?

(3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] TFEU in conjunction with the [second subparagraph] of Article 20(2) TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?”\textsuperscript{51}

The CJEU reformulated these two questions as follows:

“By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the Member State concerned who are in the same situation.”\textsuperscript{52}

\textsuperscript{48} Klaus F. Zimmermann, Labor mobility and the integration of European labor markets (2009), at http://www.econstor.eu/bitstream/10419/27385/1/595036619.PDF, 15.


\textsuperscript{50} Case C-333/13, para 45.

\textsuperscript{51} Ibid.

\textsuperscript{52} Ibid, para 56.
In Dano, the Court uses a different technique to avoid answering a question that it apparently does not want to answer. Instead of using a more particular question as in Grogan, the Court avoids answering the second question as regards Regulation 883/2004 by combining the questions as regards that Regulation and Directive 2004/38. In its reasoning, the Court then holds that Germany could withhold social allowance from Dano since she did not fulfill the criteria for residence in Germany according to Directive 2004/38.53 Had the Court answered the original second question posed by the national court, its answer to the first question suggests that Regulation 883/2004 on its own would have had to be interpreted as meaning that Member States cannot discriminate between nationals and Union citizens when granting “special non-contributory benefits”.

While there is no way to prove that the CJEU reformulated questions in cases such as Grogan and Dano to avoid political controversy, the circumstances point to such a conclusion. The larger question is however whether the reformulation of questions causes any problems to the functioning of the preliminary ruling procedure, an issue discussed below.

8. WHY DOES THE COURT REFORMULATE QUESTIONS AND WHY SHOULD WE CARE?

A number of questions arise in the context of the above analysis of cases. One question is whether there is an explanation why the Court chooses to reformulate the questions to be answered in some preliminary ruling cases, but not in others? A pattern behind the reformulation of questions could be that the Court assesses questions in preliminary rulings ex officio. Alternatively, the Court could depend on the submissions of the parties to the case and/or interveners in the case. This latter explanation seems to be contradicted by the Court’s own statements assessed above,54 but also confirmed by the above quote from the Interportal case.55 The cases discussed above point to the conclusion that there is no connection between party or intervener submissions and reformulation of questions. Sometimes, it is obvious from judgments that submissions have influenced the reformulation of questions.56 However, the Court also appears to make ex officio assessments of the questions referred by the national court.57

54 See section 3 above.
55 See section 5 above.
56 See cases Case C-569/08 Interportal; Case C-321/03 Dyson; Case C-387/07 Weigel; Case C-409/06 Winner Wetten.
57 See cases Case C-342/12 Worten; Case C-267/12 Hay; Case C-152/03 Ritter; Joined cases C-338/04, C-359/04 and C-360/04 Phucanica.
Nevertheless, it can be useful if party submissions are made to this end, since the parties may have better knowledge of the facts to the case than the Court itself. It thus appears likely that the Court uses both of the above-named sources to ensure that questions asked by national courts are answered as helpfully as possible. If there is no clear pattern indicating a single factor causing the Court to reformulate questions in preliminary rulings, the most likely explanation appears to be that the Court makes a case-by-case assessment, evaluating what type of EU law related problem is at issue in the case before the national court and deciding accordingly if the question posed by the national court is sufficient to cover that problem. For the CJEU at least, the reason d'être for preliminary rulings is after all to help the national court to solve the case before it in a correct manner, rather than relying on formalistic rules that questions could not be reformulated or that the parties to the case could not make submissions as to the questions referred in the case at hand.

If we conclude that there is no pattern or clearly identifiable factors that determine when the Court reformulates questions posed by national courts, but that each case is assessed on a case-by-case basis, the question is whether this practice poses a problem for the EU legal order and the function of the Article 267 procedure? If a case-to-case assessment is made, the function of assisting national courts in their application of EU law is after all fulfilled, is it not? One could argue that there are some dangers to this case-by-case approach. As already exemplified above, the Court may misinterpret the facts of the case before the national court or the questions asked by that court. This in turn may lead to an inconsistent application of EU law by national courts, exactly the opposite of the actual intention of Article 267 TFEU. Furthermore, a badly answered reference may generate more references for preliminary rulings, further increasing the already heavy workload of the CJEU. In practice, many of the rulings of the CJEU in preliminary ruling cases have created doctrines in EU law which enable national courts to rule on cases concerning EU law without the help of the CJEU. Preliminary rulings which are limited to the specific facts of the case are unlikely to create doctrine for national Courts to rely on. As always in human interaction, there is a margin of error causing the CJEU to give an answer to the national court that is not helpful to that court. However, it appears from the case analysis above, that a reformulation of questions due to deficiencies in the referral from the national court will usually be beneficial for the national court referring a question.

What would be a theoretical alternative to the current approach? One could take a more formalistic approach to questions referred to the Court and answer questions as national courts ask them. After all, the CJEU likes to underline that

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58 See section 5 above.
59 Examples of such well-known cases are Dassonville, Costa v E.N.E.L or Van Gend en Loos.
it is for the national courts to identify the EU law issues of the case before them. On the one hand, this more formalistic approach would better respect the division of assignments between courts. On the other hand, that approach would also put much higher demands on national courts as to their knowledge of EU law and their ability to correctly identify and formulate the EU law questions pertaining to disputes before them. In view of the great number of courts able to refer a reference for preliminary ruling and the fact that the EU is an ever-extending Union, this is perhaps an unrealistic demand to make on national courts. Furthermore, it does not necessarily erase the disadvantages of the current approach; it only shifts the risk of incorrect assessments from the CJEU to national courts. Mistakes on the side of national courts may then in turn lead to inconsistent application of EU law as well. Thus, forcing the CJEU to answer the national courts’ questions as posed does not appear to be a superior solution.

The situation is somewhat different with regard to cases where the Court reformulates the question posed by the national court, because it does not want to answer the national court’s question. Of course such intent cannot be proven, but the circumstances of some cases give reason to suspect that political considerations lie behind the reformulations of questions. The interesting question here is not so much why the Court chooses one action or the other, but rather whether the CJEU should reformulate questions based on political considerations. On the one hand, one could argue that courts generally should not decide cases on the basis of political motivations, but should rather apply the law in a manner as objective as possible. Political questions should be left to the legislator and courts should under normal circumstances not resort to political considerations in their judgment. The risk is that courts become “shadow-legislators” risking misapplication of the law with regards to the legislators’ intention. On the other hand, it can be stated that the CJEU is in a very different situation from national courts when giving judgment in preliminary ruling cases. The CJEU has the difficult task of advising national courts from 28 Member States on the correct application of EU law. These 28 Member States have different cultures, values and constitutional traditions. On the legislative side, Member States often have differing points of view, causing EU legislation to be based on the lowest common denominator between the Member States. Compromises between the Member States can also result in vague or deficiently formulated legislation. One can add to that the limited competences of the Union in certain areas, such as tax law and criminal law. This reality often makes for difficult cases presented to the CJEU. The Court then needs to find

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60 Case C-316/10, Danske Svineproducenter, para 32.
a way to solve these cases. Essentially it has three possibilities: (1) The CJEU can answer the question as posed. This may cause dissatisfaction in the Member State in question, for example because the Member State feels that the CJEU is intruding on national matters. This in turn may cause decreased confidence in the CJEU as a Court or in the EU as a whole. (2) The CJEU can refuse to answer the question, for example by declaring the question inadmissible.63 While the Court sometimes declares cases inadmissible, this does not help the national court seeking assistance at all. (3) The Court can reformulate the question so as to avoid controversy. This appears to be the solution sometimes chosen by the Court.

Looking in particular at the two cases discussed above, one can find different problems. In the Grogan case, the CJEU only reformulated the question slightly so that it fitted the case in question. The obvious advantage is that the national court was able to rule on the case in question. The disadvantage is that important questions of EU law may remain unanswered, potentially causing follow-on questions and an increased workload for the CJEU. Nevertheless, this is a relatively harmless consequence with regard to the correct application of EU law. In Dano, the situation is somewhat different, since the outcome may have an effect on follow-up cases. By choosing to apply primarily Directive 2004/38, the CJEU essentially required that Union citizens fulfil the criteria in the Directive before obtaining access to benefits according to Regulation 883/2004. This way of interpreting the Directive and the Regulation together does not only affect the Dano case, but may also effect follow-on cases if the CJEU does not want to depart from its line of case law. One could argue that the CJEU has thereby created a connection between two legal instruments which were not supposed to be connected by the legislators express will. As a result, a situation is created where the law is applied in a manner which the legislator may not have intended.

9. CONCLUSION

The above discussion essentially distinguishes three situations: Reformulations by the Court where there is some type of “mistake” in the formulation of the question by the national court. Reformulations in these types of cases appear to be relatively uncontroversial and accepted in the face of the superior knowledge of EU law by the CJEU. Reformulations also occur where the national court has not understood EU law or the jurisdiction of the CJEU correctly. The third category are reformulations where the Court does not appear to want to answer the exact question posed, particularly where the question is politically sensitive.

63 See further Paul Craig & Gráinne De Búrca (2011) 467–73.
As the cases discussed above demonstrate, such reformulations might be harmless and simply cause a number of follow-on questions. However, as illustrated by Dano reformulations can have important consequences for the interpretation of EU law and cause repercussions in the long run. The fact that the interpretation of EU law is heavily based on case law by the CJEU bestows a heavy burden upon the Court. Once a politically motivated interpretation is made, it is difficult to reverse. The practice of the Court to reformulate questions in preliminary rulings may not always lead to optimal outcomes, but alternative approaches do not offer superior outcomes if the system of preliminary references is to be upheld.