TEMPORAL LIMITATION BY THE COURT OF JUSTICE OF THE EU: DEALING WITH THE CONSEQUENCES

Donatas Murauskas*

Temporality is one of the tools enabling courts to deal with the consequences of a judgment. The present paper focuses on the special case of temporality in judicial review type judgments, ie the doctrine of temporal limitation of a judgment by the Court of Justice of the EU in the procedure of a preliminary ruling. Although the primary goal of the doctrine was to avoid harsh consequences in cases determined by the conventional retroactive application of a judgment, the doctrine has created its own costs. The paper is an attempt to discuss the arguments of the Court from the perspective of a consequences-based argumentation regarding the temporal effects of a preliminary ruling. The analysis provided is merely the positive type of insights regarding the current argumentation of the Court which aims to extend the view on the social impact driven argumentation of the Court.

TABLE OF CONTENTS

I. INTRODUCTION 101
II. CONSEQUENTIALISM AS A 'METHOD' OF ARGUMENTATION 103
III. JUDGMENTS AND TEMPORALITY 106
1. *The Temporal Effects of Judgments* 107
2. *The Preliminary Ruling Procedure and Temporality* 108
IV. THE CONSEQUENTALISM OF TEMPORAL LIMITATION 110
1. *Legal Insights into the Doctrine* 110
2. *Analysis of Consequences-based Argumentation of the Court* 113
a. Exceptionality 114
b. The Commissions' Contribution 114
c. Good Faith 115
d. Economic Repercussions 116
e. Intricate Legal Relationships 117

* LL.M. (Law & Economics, EMLE), Doctoral Candidate (Vilnius University Faculty of Law), assistant at the Supreme Administrative Court of Lithuania, donatas.asd@gmail.com. I am very grateful for comments of Prof. Dr. Roger Van den Bergh (Rotterdam Erasmus University, Rotterdam Institute of Law and Economics (RILE)), Dr. Peter Cserne (University of Hull, Law School), the participants of thesis meetings at RILE, Prof. Dr. (HP) Egidijus Kūris (Vilnius University Faculty of Law) and anonymous reviewers for critical insights. All mistakes remain my own

f. Actions of Litigants before the Judgment 117
g. Interconnection of Cases 118
h. Existence of the Request 119
V. THE CONCISE FRAMEWORK OF THE APPLICATION OF THE DOCTRINE 119
VI. CONCLUSION 122

I. INTRODUCTION

The Court of Justice of the European Union (referred to below as 'the Court' or 'the Court of Justice') was created to be an enforcer of European law as well as to be the constitutional and administrative authority on European Community legal issues.[1] As every other court it employs various methods of legal reasoning including both rights-based and goal-based types of arguments.[2] Today the Court is the object of discussions throughout Europe on such important questions as judicial activism, political autonomy and influential authority. The debate often includes matters of the reasoning of the Court as well as the consequences of its judgments. The Court of Justice applies rules in particular types of procedures. Most of the procedures end up with judgments having a conventional rule of *ex nunc* (meaning 'from now on') with regards to its temporality. However, three of the procedures[3] have the temporal effects of *ex tunc* (meaning from 'the outset'). Therefore, the specific element of temporality has a potential effect on the social consequences of a judgment, especially if the judgment is to be applied retroactively as in the case of the *ex tunc* effect.

The preliminary ruling is the most frequently used instrument (accounting for over 50 per cent of all cases heard by the Court) and it plays a key role in the development and enforcement of EU law.[4] Although the preliminary ruling is one of three types of procedures with a retroactive temporal effect of judgment, the temporal aspect of the preliminary ruling was

[1] Karen J Alter, *The European Court's Political Power: Selected Essays* (OUP 2009) 288.

[2] The distinctive criteria of a judgment could also be identified as 'absolutistic' and 'relativistic or in other terms, depending on the perspective and the context of the analysis'.

[3] Actions for failure to fulfil an obligation (Article 258 of the Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (referred below as 'TFEU'), Action for annulment (Article 263 of the TFEU and References for a preliminary ruling (Article 267 of the TFEU).

[4] Josephine Steiner, Lorna Woods, Chistian Twigg-Flesner, *EU Law* (9th edn, OUP 2006) 193.

among the areas which were shattered by the need for intervention into the conventional rules of the founding Treaties in 1976.[5] Therefore, it might be useful to analyse the reason the Court has created an exception from the retroactive application of the preliminary ruling in terms of its consequences from the perspective of the consequences for the whole of society.[6]

The present paper aims to analyse the application of the retroactivity principle by the Court in the procedure of a preliminary ruling from the perspective of consequences-based arguments. For this reason, the argumentation of the Court regarding the temporal effect of a preliminary ruling is ascertained in the light of the framework of an analysis of the consequences of a judgment. The background framework is influenced by the analysis of consequence-based arguments proposed by Peter Cserne.[7] The setting consists of a system of an economic analysis hypothetically conducted by a judge. It also reflects the conceptual framework of Jürgen G. Backhaus[8]. The structure of the framework is based on the three-step procedure of the optimisation of a judgment under uncertainty[9]: (i) the identification of the social consequences which matter for a court; (ii) the measuring of the impact of the alternative consequences; and (iii) the evaluating of which type of judgment creates less costs. The analysis of the paper mostly focuses on the third element by assessing the actual arguments of the Court in the light of the costs imposed on various agents and behavioural incentives created. It helps to ascertain the actual arguments of the Court in the light of the social impact they pose.

It is worth noting that the framework operated in the paper does not intend to evaluate arguments of the Court in the light of particular conceptual economic criteria such as their allocative efficiency. It simply

---

[5] From the case *Defrenne v SABENA II* (referred to below as '*Defrenne*') in 1976 when the conventional rule was not applied due to social consequences anticipated by the Court, Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.

[6] More conceptually 'macro-level real consequences' in comparison to 'micro-level real consequences' as the consequences merely for interested parties. See Klaus Mathis, 'Consequentalism in Law' (2010) LawEcon Workshop, University of Bonn, 3-4 <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/paper-mathis> accessed 25 April 2013.

[7] Peter Cserne, 'Consequence-Based Arguments in Legal Reasoning: A Jurisprudential Preface to Law and Economics' in Klaus Mathis (ed), *Efficiency, Sustainability, and Justice to Future Generations* (Springer 2011), 45 <http://ssrn.com/abstract=1684043> accessed 12 March 2013.

[8] Jürgen G Backhaus, 'Towards an Ideal Economic Analysis of a Legal Problem' in Jürgen G Backhaus (ed), *The Elgar Companion to Law and Economics* (2nd edn, Edward Elgar Publishing 2005) 465-472.

[9] Cserne (n 7) 45.

tries to ascertain a variety of legal arguments in the light of the ratio between benefits and costs created by alternative legal regimes (the retroactivity rule and the doctrine of the temporal limitation of a judgment)[10] as well as incentives provided for particular agents. The analysis is of a positive character, ie it does not identify the way the Court needs to rule in a particular situation. The paper asks the costs and incentives for the particular agents observed by the arguments of the Court of Justice which determine whether the rule of retroactivity is or is not applied. Therefore, the analysis provided is based on the primary systemisation of the actual argumentation of the Court and a derivative evaluation of the argumentation in terms of its direct costs and incentives, not oppositely.

The structure of the paper is determined by the focus of the analysis. First of all, the debate regarding the legitimacy of the consequences-based argumentation is briefly outlined. Secondly, the legal insights and costs related concerns of the temporality of the judicial review type of judgments[11] are presented. Thirdly, the arguments of the Court regarding the application of the doctrine of the temporal limitation of a judgment are provided. Finally, a concise framework of the consequences-based arguments of the Court regarding the temporality of preliminary rulings is highlighted.

II. CONSEQUENTIALISM AS A 'METHOD' OF ARGUMENTATION

There is a continuous debate regarding the content of legitimate arguments in courts. Therefore, one could reasonably ask whether the reasoning of a court based on social consequences is permissible at all. The orthodox view on legal interpretation lies in the idea that it is the text-based and text-bound finding of the correct meaning of a legal norm.[12] Thus, the applicable rule is derived from the internal system of law. The

[10] This would appear to be the criterion of the Kaldor-Hicks efficiency at a first glance. However, the criterion of Kaldor-Hicks tends to narrow the analysis to the homogenious agents which are to be affected by a particular legal change as conceptually a legal change (the change for an alternative legal regime) seems to be Kaldor-Hicks efficient if it maximises net aggregate social welfare, ie the sum of the individuals' welfare regardless of whether each individual is better off (see Richard A Posner, *The Economic Analysis of Law* (3rd edn, Aspen Law & Business 1986) 11-13. Notwithstanding, the analysis of the paper evaluates the argumentation of the Court comprehensively by highlighting the effects on costs or the net benefit of a legal change for all the relevant agents: individuals, Member States, the European Commission.

[11] In particular, the preliminary ruling procedure.

[12] Stefan Mayr, 'Putting a Leash on the Court of Justice? Preconceptions in National Methodology v Effet Utile as a Meta-Rule' (2012/13) 5 EJLS 8, 12.

argument could be derived from the works of Niklas Luhmann, who argued that legal adjudication is conditionally programmed by the legislator. To be precise, if certain conditions are fulfilled then a certain judgment has to be reached.[13] Moreover, the argumentation is a special mode of operation of the system, specialised in the self-observation which is focused on the distinction and denotation of arguments on the basis of texts.[14] The arguments addressed by Luhmann against consequentialism are 'the argument of legal certainty', 'the argument of legal equality', 'the argument of overburdening the courts' and 'the statement that consequentialism jeopardises the independence of the courts'.[15] However, the importance of consequences arises due to the critique regarding the logically-based reasoning of courts as a relatively vulnerable and too pretentious method in the practice of courts. For instance, formal syllogising is a tool pretending to a certainty and regularity which do not exist in fact. The effect of such pretension is increasing uncertainty and social instability. It is for this reason that either logic must be abandoned or it must be relative to consequences rather than antecedents.[16]

The founder of the theory of law as integrity, Ronald Dworkin, has noted the principles as integral elements of the law.[17] He insisted that judges need to restrict arguments based on principles rather than policies, which need to be left to the legislator.[18] However, as Neil MacCormick has argued:

> [T]he spheres of principle and of policy are not distinct and mutually opposed, but irretrievably interlocking [...]. To articulate the desirability of some general policy-goal is to state a principle. To state a principle is to frame a possible policy-goal.[19]

Furthermore, MacCormick has stated the necessity of arguments based on consequences stating that decisions need to be based on various criteria

---

[13] Niklas Luhmann, *Rechtssoziologie 2, Reinbek bei Hamburg* in Klaus Mathis, 'Consequentalism in Law' (2010) LawEcon Workshop, University of Bonn, 3-4 <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/paper-mathis> accessed 25 April 2013.

[14] Niklas Luhmann, 'Legal Argumentation: An Analysis of Its Form' (1995) 58 MLR 285, 287.

[15] Klaus Mathis, 'Consequentalism in Law' (2010), LawEcon Workshop, University of Bonn, 3-4 <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/paper-mathis> accessed 25 April 2013.

[16] John Dewey, 'Logical Method and Law' (1925) 10 Cornell LQ 17, 26.

[17] Nigel E Simmonds, *Central Issues in Jurisprudence* (Sweet & Maxwell 2008) 204-205.

[18] Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co 1977) 85-86.

[19] Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP 1978) 263.

such as justice, common sense, public policy, and legal expediency.[20] Thus, shifting the focus on the consequences of a judgment helps to improve the deficiencies of formal reasoning as consequence-based reasoning can be identified as being instrumental, forward-looking and often policy-oriented.[21]

One of the early proponents of consequentialism in law, Oliver W Holmes, has noted the importance of consequences in the process of adjudication:

> [C]ertainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form [...] [But] [i]t is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.[22]

Holmes' critique of legal formalism and the exclusion from social reality by some opponents of a consequentialist approach in adjudication has been followed by other scholars. The later approaches of the legal realist Karl Llewellyn[23], points made by pragmatists such as John Dewey[24], together with legal scholars such as MacCormick support the statement that consequence is the element which helps to properly frame the decision making process.[25] It could be argued that consequentialism escapes the boundaries created by the internal logic of an artificial system of law as it aims to achieve a factual change by a decision in the real world rather than the formal legitimisation of a decision with no conceptual links to the factual change that it determines.

Moreover, the philosophic, economic and social ideas of the XVIII-XIX centuries have changed a lot in regards to attitudes to legal adjudication. One such change is the shift to consequentialism as a concept which requires applying arguments from a broader context (ie external

[20] Mathis (n 15) 3-4.
[21] Cserne (n 7) 45.
[22] Oliver W Holmes, 'The Path of the Law' (1886/87) 10 HLR 457, 466.
[23] See Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Wolter Kluwer Law & Business 1960).
[24] See John Dewey, 'Logical Method and Law' (1925) 10 Cornell LQ
[25] Mathis (n 15) 17-18.

arguments). Nowadays, it is widely accepted that consequentialism is an essential feature of law.[26] Even more relevant to the practical implementation of the consequentialist approach by the courts is the concept of instrumentalism. The founder of this theory is the pragmatist John Dewey[27]. Instrumentalism is an approach which holds that reflective thought is always involved in transforming a practical situation.[28] It is the theory according to which the aim (*end*) of the decision presupposes the method (*mean*). Therefore, we do not need to think about internal reasons if the purpose of the reasoning is stated as finding the best means to the end. It is worth noting that the framework of Cserne, which is employed in this paper, is based on instrumental theory. It is aimed at the optimisation of a judgment[29] from the perspective of social consequences, thus it aims to achieve a particular end (reduce the costs) by using a particular methodology (ie the means).

The approach of the Court of Justice regarding temporality might be placed into the theory of instrumentalism. The assumption which needs to be established is that the Court struggles to achieve the least costly approach to the question of temporality in the procedure for preliminary rulings. This assumption enables the argumentation of the Court to be analysed in the light of the conceptual frameworks of reasoning which are based on consequentialist (or instrumentalist) theories. Although the terms 'consequentialism' and 'instrumentalism' are not the same, they are both derived from the same theoretical background and share similar qualities. Thus, for the analysis of the argumentation of the Court provided in the paper, the term 'consequentialism' is used and encompasses both the concepts of instrumentalism and consequentialism unless it is stated otherwise.

To sum up, consequentialism provides a proper justification for arguments based on external sources, ie social consequences. This is important as the framework of consequences-based judgments is focused exceptionally on these types of factors. However, before the analysis based on the framework takes place, the temporality effect of judgments and preliminary procedure in particular needs to be discussed briefly.

III. JUDGMENTS AND TEMPORALITY

[26] See Neil MacCormick, 'On Legal Decisions and Their Consequences' (1983) 58 NYULR 241.
[27] See 'John Dewey (1859-1952)', Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/dewey/> accessed 14 December 2013.
[28] Samuel E Stumpf, *Philosophy: History & Problems* (McGraw-Hill 1989) 424.
[29] Cserne (n 7) 45.

1. *The Temporal Effects of Judgments*

To begin with, the question of temporal effects presupposes an explanation of how sources of law vary regarding temporal effects. The most general distinction is among statutory law and case law. Traditionally, there is not so much controversy in the case of statutory law: The statutory rule has a prospective effect except in certain particular situations.[30] Notwithstanding this, the judgments of courts follow a different approach. Historically, the default rule was opposite to statutory law, ie a judgment used to consider an explanation of existing law *a priori*.[31] Thus, the retroactive effect used to be a good and justifiable option at least in common law countries.[32] However, concerns over the harsh consequences of such retroactive effects arose as it became obvious that the conventional rule is not the most reasonable solution in all situations.[33] For the sake of clarity, the mixture between the possible temporal effects of a judgment should be analysed taking into account the functional features of not only common law but continental courts as well.

This paper deals with a specific type of judgments - judicial review. The concept of judicial review type judgments in courts began to develop in Europe after WWII and was influenced by the proposals of the prominent Hans Kelsen.[34] The idea of judicial review type judgments lies in the jurisdiction of the special court (which usually has the term 'Constitutional' in the title) to annul statues enacted by legislators. This analogous approach has been consequently adopted by the administrative courts regarding the sub-statutory law.

The judicial review type judgment deals with statutory law and may annul

[30] The conventional rule of the temporality of statutory law is 'ex nunc'. This is related to the notion that persons should be entitled to know what the law governing their conduct is at the moment of their actions. However, the feature of such predictability could be sometimes reversed and could need a specific justification (see Stephen R Munzer, 'Retroactive Law' (1977) 6 J of L Studies 373).
[31] The idea is that an ordinary court is an institution which deals with a situation which happened in the past at the time the legal regime existed. Thus, a court should understand and deal with a law which existed at the moment legally important facts occurred. Special remarks should be made regarding the exclusion of non-ordinary courts such as constitutional courts which directly deal with statutory law. In addition, the analogous function of specialised courts such as administrative courts regarding statutory law should also be taken into account.
[32] Thomas S Currier, 'Time and Change in Judge-Made Law: Prospective Overruling' (1965) 51 VLR 201.
[33] eg *Harper v Virginia Dept. of Taxation*. U.S. Supreme Court Judgment of 18 June 1993, Case No. 91-794, 509 U.S. 86.
[34] Allan R Brewer-Carias, *Constitutional Courts as Positive Legislators: A Comparative Legal Study* (CUP 2011) 13.

it. Various legal frameworks establish different rules regarding the temporality of a judgment which annuls the statutory rule. In case of constitutional judicial reviews there could be at least three most common approaches: (i) The court determines when an annulled legislation will cease to have effect at some point in the future; (ii) the courts assign the retroactive or non-retroactive effects of a decision, determine the date on which the legislation ceases to have effects; (ii) the court decides to bring back previously repealed legislation when declaring the present one null.[35]

The situation in case of the jurisdiction of administrative courts to exercise a judicial review is not uniform. The temporal effect of the judgments of administrative courts in Europe was traditionally retroactive as it is still the conventional rule.[36] However, retroactivity has always been disputed as a blind application which could determine devastating consequences. Thus, the relatively new practice of the French *Conseil d'Etat*[37], the highest administrative tribunal in France, which was also a precursor of the Court of Justice, was inspired by a similar approach of the Court in its application of the doctrine of the limitation of the temporal effects of a judgment[38] (referred to below as 'the Doctrine' or 'the doctrine of temporal limitation') as well as by comparable approaches in Germany, Austria and Italy.[39]

2. *The Preliminary Ruling Procedure and Temporality*

The jurisdiction of the Court of Justice under the procedure for a preliminary ruling looks towards two fundamental goals: The interpretation and the validity of EU law[40]. The validity of its jurisdiction is confined to the acts of institutions. It is worth noting that the grounds for the invalidity of acts are the same as in actions for annulment procedures under Article 263 of the TFEU[41]. The interpretative function of the Court is wide and it encompasses the jurisdiction to interpret the

---

[35] ibid 94.
[36] See the website of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union <http://www.aca-europe.eu/index.php/en/tour-d-europe-en> accessed 7 March 2013.
[37] From 2004, see Judgment of Conseil d'État, Case 114: 865 *Association AC et autres* [2004].
[38] To be precise, 'the doctrine of limitation of temporal effects of a judgment in the preliminary ruling procedure'; Consolidated Version of the Treaty on the Functioning of the EU (TFEU) [2010] OJ L83/47.
[39] Jean Massot, 'The Powers and Duties of the French Administrative Judge' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar Publishing 2010) 424.
[40] Steiner, Woods and Twigg-Flesner (n 4) 193.
[41] TFEU (n 38).

founding Treaties of the EU, acts of institutions (even including non-binding acts) and statutes of bodies established by an act of the European Council.[42]

Although the Court is prohibited from the interference in matters regarding the reference source (ie the national law in particular)[43] it provides an interpretation of EU law in the context of the points of law stated by the referring institution.[44] Thus, the framework of the preliminary ruling procedure might be seen as a clarification of EU law in the light of a national law by *de facto* establishing whether the national rule conforms to EU law. In cases where a national rule does not satisfy the EU law, the clarification of the Court of EU law might look like a shaping of the proper national rule without even interfering in national jurisdictions. The reason the clarification of the Court shapes national rule is the obligation of Member States to take any appropriate measure, either general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.[45]

Therefore, if the Court rules that a national rule does not correspond with EU law, it is for the national rule to be interpreted retroactively for the time the particular EU rule has been operating. This means that domestic courts are obliged to deal with a 'new' national rule after the preliminary ruling has been published. It also means that the various agents of national law (natural, legal persons, institutions etc.) might have a right to claim for damages against Member States[46] or individuals who relied on the 'old' national rule. In terms of the costs of the issue, which is determined by the retroactive temporal effect, although Member States are monitored by the European Commission (referred to below as 'the Commission') regarding the application of EU law and interested parties, the creative approach of the Court[47] might be underestimated by persons and Member States. Such underestimation might be influenced by the following factors: the political power of the Court, its creativity and the specific situations in which the boundary of whether a national rule conforms to EU law is not yet clear until the Court states so.

As a reliance on a national rule might be risky for some agents, there seems

[42] Steiner, Woods, Twigg-Flesner (n 4) 195.
[43] Case 13/61 *De Geus en Uitdenbogerd v. Robert Bosch GmbH* [1962] ECR 00089.
[44] Case 6/64 *Costa v. ENEL* [1964] ECR 01141
[45] TFEU (n 38), Article 4.
[46] Based on the arguments for member state liability in the *Francovich* case. See Case C-479/93 *Andrea Francovich v Italian Republic* [1995] ECR I-03843.
[47] The political impact of the Court is widely recognised and discussed, eg Alter (n 1).

to be space for the exceptional framework which enables the Court to escape the harsh consequences of the retroactive temporal regime of a preliminary ruling. This framework has been adopted in the aforementioned *Defrenne* case in 1976 and has been applied several times. Exceptions to the conventional rule have an impact on the content of the legal certainty by weakening the reliance on the conventional rule – retroactivity. Hence, there seems to be a trade-off regarding the costs of two alternative rules: the cost of the reliance on a conventional rule by some agents, and the cost of retroactivity for some agents, which will need to compensate for the defection of a national rule (primarily, the Member States). Furthermore, it seems that the reasoning of the Court regarding the doctrine of temporal limitation deals with particular factors and it might be useful to depict those.

The rationale of the positive analysis of the reasoning lies in the idea of the feasible consequences-based argumentation of courts. Although the temporality regime of the preliminary ruling procedure is not clear enough[48] the Court has depicted particular elements of the argumentation which might be evaluated from the perspective of the social consequences. Therefore, the costs determined by those arguments need to be revealed as well as the legal background of the doctrine of temporal limitation.

IV. THE CONSEQUENTALISM OF TEMPORAL LIMITATION

1. *Legal Insights into the Doctrine*

As has already been stated, the doctrine of the temporal limitation of a preliminary ruling has been introduced by the Court of Justice in the *Defrenne* case in 1976[49]. The purpose of this move by the Court was the circumvention of serious economic repercussions on those parties (ie employers) who would otherwise have had to pay compensation due to a breach of the equal pay principle.[50] The problem arose due to the fact that national courts must apply the conventional rule of retroactivity to situations which occurred before the Court of Justice provided a preliminary ruling.[51] In general, the question of temporal limitation needs to be considered by the Court in cases in which a retroactive application may give rise to serious repercussions as regards the past.[52] The doctrine of temporal limitation which is a focus of the paper is actual in interpretative judgments of the preliminary ruling procedure. The preliminary rulings on

[48] Steiner, Woods and Twigg-Flesner (n 4) 217.
[49] Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.
[50] Steiner, Woods, Twigg-Flesner (n 4) 217.
[51] Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 707.
[52] Steiner, Woods and Twigg-Flesner (n 4) 218.

validity are assimilated to those of a successful annulment action regarding the temporal effect of a judgment.[53] In this type of procedure the Court of Justice has limited the temporal effects in number of cases such as the *Roquette Frères.*[54]

For a more rigorous view over the factual application of the doctrine of temporal limitation and tendencies, particular empirical data is provided in Table 1. Apparently, during the period from 1 April 1976 to 1 May 2012 there were 35 requests to apply the Doctrine. The Court only applied the Doctrine in seven cases. The results provided are based on an analysis in the online search tool of the judgments of EU courts.[55] The search was carried out by analysing the preliminary rulings with the key phrases 'temporal limitations', 'doctrine of temporal limitation', 'temporal effect' and 'ratione temporis' explicitly mentioned.

Number of Court cases from April, 1976 to May, 2012 (only preliminary rulings[56])	Number of cases in which a Member state or a national court requested / asked for a temporal limitation	Number of cases in which the Court applied the doctrine of temporal limitation
4 486	35	7[57]

Table 1 Factual application of the doctrine of temporal limitation

According to the data provided in Table 1, the Doctrine is not a widespread phenomenon. Therefore, the Doctrine cannot be identified as the new conventional rule regarding the temporal effects of a judgment.

[53] ibid 220.
[54] Case 145/79 *SA Roquette Frères v French State* [1980] ECR 02917.
[55] InfoCuria (Case law of the Court of Justice) <http://curia.europa.eu/juris/recherche.jsf?language=en&jur=C,T,F&td=ALL> accessed 9 December 2012.
[56] 'Reference for a preliminary ruling' and relatively recently adopted 'Preliminary reference - urgent procedure'.
[57] Those seven are Case 43/75 *Defrenne v SABENA II* [1976] ECR 455; Case 24/86 *Blaizot v Université de Liège and Others* [1988] ECR 00379; Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-01889; Case C-163/90 *Administration des douanes and droits indirects v Legros and Others* [1992] ECR I-04625; Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921; Case C-308/93 *Bestuur van de Sociale Verzekeringsbank v Cabanis-Issarte* [1996] ECR I-02097; Case C-437/97 *EKW and Wein & Co* [2000] ECR I-01157.

The question which arises is whether the importance attributed to the Doctrine is not an error in personal judgment? To be precise, the error in personal judgment could occur if persons with limited information exaggerate an issue with a higher than factual probability just because the level of reliance increases inadequately after a prominent case involving the Court.[58] The reliance costs could be various here. They can mostly be related to the decreasing belief in the legal certainty (ie the conventional retroactive rule) by interested persons who become too cautious in regard of national laws implementing EU law. This shift might lead to a situation in which interested persons contest national law in cases where it is not really sufficient, ie by investing more than is reasonably needed in their assets under the present legal regime just because of the lack of certainty. It may lead to needless private litigation costs. Therefore, there needs to be some clear explanations related to the exceptionality of the doctrine of temporal limitation and the specificity of the Doctrine. Some observations might be highlighted.

Firstly, the Doctrine is applied in very different cases. Thus, the probability of its application cannot be based merely on the existing experience as it is not clear what the next field of EU law in which the Doctrine will be applied will be. Secondly, the essence of the Doctrine precludes all preliminary rulings to be included in the estimation as the Doctrine is applied only in exceptional circumstances in important cases[59] when the retroactive effects can be sufficiently detrimental, as usually this is not an issue. Lastly, although the Doctrine was introduced in 1976, its application has not been equally distributed in time. As can be seen in Figure 1, the Doctrine has not been intensively applied throughout all the period from 1976. It is noteworthy that during some periods the Doctrine was not even considered (ie it was not requested by Member States). Thus, this creates even more uncertainty as it is not clear what could contribute to a new wave of application of the Doctrine. This factual situation raises the reliance costs as the uncertainty induces risk-reducing investments in private assets by owners in order to prevent an uncertain outcome.

[58] Christine Jolls, Cass R Sunstein and Richard H Thaler, 'A Behavioral Approach to Law and Economics' in Cass R Sunstein et al. (eds.) *Behavioral Law and Economics* (CUP 2000) 37.

[59] eg Case 43/75 *Defrenne v SABENA II* [1976] ECR 455, Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others*, [1995] ECR I-04921 and others.

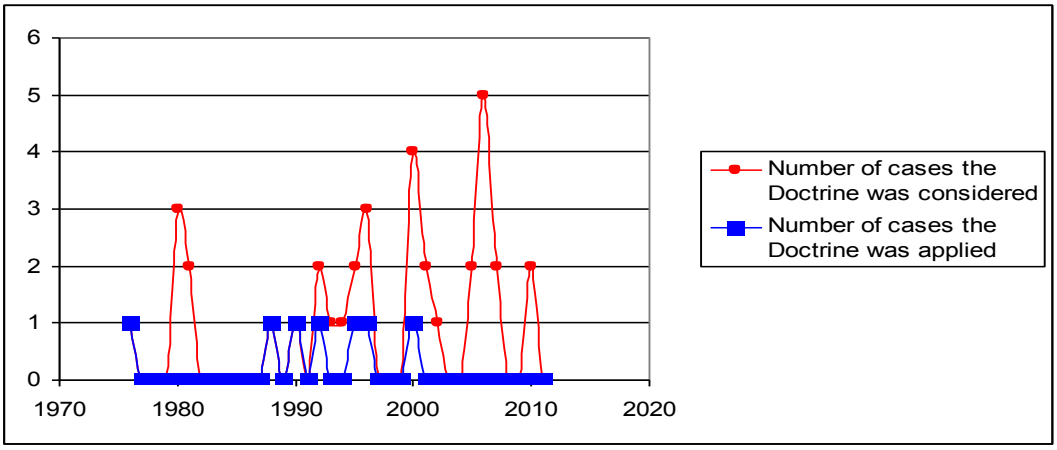

Figure 1 Factual application of the doctrine of temporal limitation by the Court of Justice.

2. *Analysis of Consequences-based Argumentation of the Court*

The positive analysis of the actual consequences-based reasoning of the Court consists of the representation and identification of relevant arguments employed by the Court to justify one of two following alternative rules: (i) the conventional retroactive effect rule or (ii) the doctrine of temporal limitation. The process of tackling cases is identified assuming the framework of Cserne[60] is applied. Therefore, first of all, the Court starts to deal with a case without having any knowledge of the relevant facts. It analyses each case and identifies the factual elements which matter. Subsequently, the Court analyses the impact of possible decisions and, finally, evaluates which of the alternatives poses the least costs to the macro-lever real consequences.

The Court does not explicitly depict the dimension of costs while reasoning. However, the legal arguments which are employed by the Court might be ascertained. The judgments of the Court have a normative character due to their power. Therefore, they create various costs and have a particular impact on the behaviour of different agents by creating incentives. The doctrine of temporal limitation was introduced mainly due to the prospective costs for the agents of the member state (ie the employers in the *Defrenne* case[61]). This means that the basic rationale of the Doctrine is based on particular consequences-based evaluations. Accordingly, a more comprehensive costs-focused approach of the main important factors determining the application of the Doctrine may be depicted.

[60] Cserne (n 7) 45.
[61] *Defrenne v SABENA II* Case 43/75 [1976] ECR 455.

a. Exceptionality

Probably the most pervasive notion regarding the Doctrine is its **exceptionality**. The Court has stated that in determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that although the practical consequences of any judicial decision must be weighed carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the grounds of the possible repercussions which might result.[62]

The notion of the objectivity of the law reflects the value of the legal certainty regarding the conventional procedural rules. It is necessary to reiterate that in case of the temporal limitation, the Doctrine is not prescribed in statutory law. Hence, it arises from the consequentialist idea that there might be exceptional situations when the net benefit of the stable regime under the conventional rule is less than the net benefit after the saved costs which might appear due to, for instance, harsh financial obligations. Thus, the conventional retroactive rule creates legal certainty. The Court indirectly acknowledges that the general trade-off is between the costs of the legal certainty of the conventional rule and the direct costs of the judgment due to retroactivity. According to the Court, legal certainty should, in general, prevail as the feature which ensures the expectations of individuals.

b. The Commissions' Contribution

Furthermore, the arguments of the Court touch upon the notion of windfall losses for those Member States and individuals who relied on the 'old' national rule. These windfall losses lie in an idea directly related to legal certainty and reliance investments of relevant agents. The possibility of windfall losses means that the current situation of agents is such so that there might be a surprising and unexpected loss which was not predicted in advance. This effect is created by the Doctrine and the Court tries to mitigate this. The context of the argument might be seen in the light of the factual situation of the following *Defrenne*[63] case. The applicant was working as a cabin steward for an airline. Her employment contract prescribed her and other female cabin stewards a different salary in comparison to what was paid to male cabin stewards. She brought a claim to a national court, which referred to the Court for a preliminary ruling. The Court declared that the national rule contradicted the principle of equality entrenched in EU law. The government raised the question of

[62] Case 24/86 *Blaizot v Université de Liège and Others* [1988] ECR 00379.
[63] Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.

retroactivity. In addition, the Commission has never initiated proceedings against a member state due to the improper application of EU law.

It is worth noting that one of the core arguments used by the Court in the *Defrenne* case was the fact that the **Commission had not initiated proceedings** against Member States concerned on the grounds of a failure to fulfil an obligation. This argument could be identified as a tool which helps to prevent windfall losses for persons who were following the 'old' national rule. According to the Court, the contribution of the Commission, which was in a position to notice the situation but did not act in order to change it, should be such so as to reasonably lead the authority of a member state to uncertainty. [64] The criterion of 'reasonableness' is not clear in itself, but it does give at least a general idea of the boundaries of a reasonable person. In addition, the argument provides incentives for the Commission to monitor the compliance of national law to EU law more actively.

c. Good Faith

Furthermore, the Court has adapted the notion of **good faith**, which is probably a way to fill in the gap of vagueness of the concept of reasonableness. Accordingly, only a member state which behaves in good faith may successfully request to apply the Doctrine. The following situation in the *Stradasfalti*[65] case highlights the rationale of this argument. The authorities of Italy knew that the tax measure they apply did not comply with EU law. However, the measure was justified by the wording of 'cyclical economic reasons' embedded in an EU directive, which provided a possibility to derogate from the existing regulation. Even though it was supposed to be temporary at the time of the adopting of the measure, the Italian government continued to apply it 20 years later.

Therefore, a member state should be an active and positive participant in the EU institutional framework, trying to comply with EU law in good faith according to the reasoning of the Court of Justice. Such an implication by the Court serves as a constraint on Member States which try to exploit features of the Doctrine. In terms of consequences-based arguments, the Court creates particular restraint for the possible opportunism of Member States. For instance, a member state might be interested in the application of the Doctrine as it finds that all relevant criteria are met. Therefore, the criterion of the good faith enables the Court to test the factual behaviour of the institutions of a member state and reject the request even if other criteria are met.

[64] Case C-437/97 *EKW and Wein & Co* [2000] ECR I-01157.
[65] Case C-228/05 *Stradasfalti* [2006] ECR I-08391.

d. Economic Repercussions

The first application of the Doctrine was related to the general trade-off between the net loss created by the exception from the conventional rule and the net loss consisting of the financial burden for relevant agents (ie employers). Thus, the existence of possible **economic repercussions** was the criterion applied from the first application of the Doctrine.[66] In the *Defrenne* case the Court explicitly concluded that given the large number of persons concerned claims might seriously affect the financial situation of respective undertakings and even drive some of them to the bankruptcy.[67] In its later judgments the Court extended the application of the economic repercussions criterion from private employers to branches of governments or municipalities of Member States[68] and the financial stability of Member States in a more general sense.[69] However, at the same time the Court created a clear boundary to Member States which perceive a possibility to justify the application of the Doctrine due to the presumable financial repercussions. In the *Société Bautiaa*[70] case the Court stated that the financial consequences which might ensue for a government owing to the unlawfulness of a tax or its imposition never in themselves justify limiting the effects of a judgment of the Court. Such an argument explicitly shows the rigorous position of the Court towards an exclusive proposition of financial difficulties. Therefore, it might be an argument which impedes the opportunism of Member States as restricting them to abuse the current financial situation by worsening it even more in order to escape the retroactive application of the preliminary ruling.

It is worth noting that the Court does not rely on the accurate estimations of losses provided by a Member State while dealing with the question of the temporal limitation of retroactivity rule. The *Nádasdi*[71] case is one of the rare examples in which the exact amount of the loss in the case of the retroactive rule is presented. In this case the government has provided a detailed estimation of the losses (116 million Euros) which would occur if

[66] Michael Lang, 'Limitation of the temporal effect of a judgment of the Court' (2007), 35 Intertax 230, 233 <http://www.eatlp.org/uploads/public/Lang%20%20Temporal%20effects%20of%20ECJ.pdf> accessed 19 February 2013.
[67] Case 43/75 *Defrenne v SABENA II* [1976] ECR 455.
[68] Case C-163/90 *Administration des douanes and droits indirects v Legros and Others* [1992] ECR I-04625, Case C-437/97 *EKW and Wein & Co* [2000] ECR I-01157.
[69] Through the possible influence on the financing mechanism of social insurance. See Case C-262/96 *Sürül* [1999] ECR I-02685.
[70] Case C-197/94 *Bautiaa and Société française maritime v Directeurs des services fiscaux des Landes and du Finistère* [1996] ECR I-00505.
[71] Case C-290/05 *Nádasdi* [2006] ECR I-10115.

the Court decided that the national rule contradicts EU law. However, the Court has not been convinced by the proposition of the Member State. It again puts forward the restriction on the opportunism of Member States, meaning that despite the accurateness of the estimated costs, there still needs to be other important elements to grant a relief from the retroactive effect of the preliminary ruling procedure.

e. Intricate Legal Relationships

A variety of cases have enabled the expansion of the concept of direct losses from pure economic repercussions to other comparable concepts as well. The seminal case was the *Bosman*[72] case in 1995. The situation was as follows. The applicant was a football player playing for *RFC Liège* in the Belgian First Division in Belgium. After the termination of his contract, he decided to sign a contract and moved to *Dunkerque*, a French team. However, according to the rules of the Royal Belgian Football Association at the time a professional footballer who is a national of one Member State could not be employed by a team of another Member State upon the expiry of his contract with a team unless the latter team had paid a transfer fee or a training and development fee to his former team. The legal relationships between football players and teams, as well as among teams, regarding football players are governed by a very complex system of rules of their respective national associations and by UEFA (at the European level) as well as FIFA (at the international level). The player appealed to a national court which then referred to the Court for a preliminary ruling.

The Court provided a different test of direct costs indicating that the specific features of the rules laid down by sporting associations for the transfers of players between teams of different Member States, together with the fact that the same or similar rules applied to transfers between teams belonging to the same national association and between teams belonging to different national associations within the same member state, may have caused uncertainty as to whether those rules were compatible with EU law. Thus, the Court extended the potential financial loss as direct costs to the more sophisticated concept of the **uncertainty of a situation in the context of intricate legal relationships**.

f. Actions of Litigants before the Judgment

The Doctrine is an instrument that does not only help to evade harsh direct losses as it creates costs as well. Among these are incentives for

[72] Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921.

individuals to address national courts and seek damages due to the improper application of EU law. The loss in this situation is that in the light of a temporal limitation, persons understand that a 'new' national rule might be applied to them retroactively. Thus, they might be hindered from addressing the improper application of EU law if an 'old' rule is beneficial to them. Such a situation creates costs as it deters persons from a reasonable investment in their assets in those fields which are debatable as regards their compatibility with EU law if we assume that EU law promotes efficiency by reducing entry barriers to markets or stimulating the capabilities of the EU single market.

However, the actual application of the Doctrine takes into account such incentives. In the *Legros* case[73] the Court concluded that neither the provisions of EEC Treaty in relation to charges related to customs duties on imports nor Article 6 of the Agreement between the Community and Sweden may be relied upon in support of claims for the refunding of charges such as dock dues paid before the date of this judgment, except by claimants who had initiated legal proceedings before that date or who had raised an equivalent claim. Thus, while applying the Doctrine the Court **excludes those persons who did not address the 'old' rule of national law actively before a judgment by the Court**. In addition to the proposition of the Court to overcome fear to invest in some 'risky' assets, it also induces individuals to monitor and appeal possible improper applications of EU law in national courts.

g. Interconnection of Cases

The application of the Doctrine creates dubious effects on negatively affected persons if they (including Member States) were able to assess the risks in advance and internalise them. Thus, there might be a tool that would prevent those persons from compensating their losses if they were able to assess that a rule does not correspond EU law. It is worth noting that the Court had distinguished this argument by stating that **the limitation of the temporal effects of a judgment could be carried out only if an actual judgment upon the interpretation was sought.**[74] This means that it is not possible to circumvent a retroactive application of the changed interpretation of EU law if there is another judgment similar to the present case. This criterion of 'interconnection' can be illustrated in the field of tax law, as it is this field that the factor has been mostly applied. The criterion is supposed to help to avoid a situation

[73] Case C-163/90 *Administration des douanes and droits indirects v Legros and Others* [1992] ECR I-04625.
[74] Case C-415/93 *Union royale belge des sociétés de football association and Others v Bosman and Others* [1995] ECR I-04921.

in which taxpayers in one member state are still able to exercise their rights, whereas the taxpayers in another member state cannot do so due to a non-retroactive judgment, even though the same fiscal periods are concerned.[75]

h. Existence of the Request

The procedural element that is considered by the Court is the existence of a **request of a Member State** or a national court[76]. It is an obligatory condition to apply the Doctrine in the majority of the Court cases in which the question regarding the Doctrine was analysed. The Court has never limited the temporal effect of a judgment *ex officio*. This factor could be even called the first precondition for the Doctrine within the reasoning of the Court. It seems that this precondition of the Doctrine does not have any explicit effect on social consequences merely being a formal requirement.

To sum up, the factors that are highlighted by the Court of Justice regarding the effect of the Doctrine on various agents in terms of costs and incentives, it is difficult to summarise the structure of the argumentation of the Court and the effect this has on costs and incentives. For this reason insights into the relevant factors of the Courts' reasoning are put into the proposed framework of the consequences-based reasoning.

V. THE CONCISE FRAMEWORK OF THE APPLICATION OF THE DOCTRINE

Cserne[77] focuses on so-called 'behavioural consequences' framework as the criterion with which to consider the least achievable costs and the effects on incentives of various agents in a particular case. This is quite distinct from the perspective of 'judicial consequences' which involves the analysis of a judgment as a bundle of consequences-as-implications as general rules for future cases.[78] Behavioural consequences refer to 'what human

[75] Ariane Wiedmann, 'Non-Retroactive or Prospective Ruling by the Court of Justice of the European Communities in Preliminary Rulings According to Article 234 EC' (2006), (E) 5/6-2006 The European Legal Forum 197, 199 < http://www.simons-law.com/library/pdf/e/682.pdf> accessed 12 February 2013.

[76] Case C-423/04 *Richards* [2006] ECR I-03585, Case C-57/93 *Vroege v NCIV* [1994] ECR I-04541, Case C-367/93 *Roders and Others v Inspecteur der Invoerrechten en Accijnzen* [1995] ECR I-02229.

[77] See Table 2. Evaluation of behavioural consequences of a judgment. More: Cserne (n 7) 45.

[78] To lead as a person of prudence and forethought any judge across *the range of possible situations which will have to be covered by this ruling in point of right*. See MacCormick, 'On Legal Decisions and Their Consequences' (n 26) 251.

behaviour the rule will induce or discourage' while judicial consequences refer to 'what sorts of conduct the rule would authorise or proscribe'[79]. It is worth noting that the doctrine of temporal limitation is not merely a way to reason the unacceptable consequences regarding the social situation after the judgment (**direct costs**). The Doctrine also affects the behaviour of parties in other cases since it signals the expected manner of behaviour (**providing incentives**). Therefore, both facets of the consequentialism of the Court need to be addressed.

Step	**Question to be answered by the Court**	**Difficulties**
1. Identification	Which consequences matter?	Operationalisation
2. Measurement	What is the impact (costs and benefits) of the decision in these dimensions?	Information
3. Evaluation	Which of the possible decisions has the best consequences (the least costs)?	Trade-offs

Table 2 Evaluation of the behavioural consequences of a judgment.

Following the framework proposed, the **first** step of the analysis (exposing all the relevant factors which affect consequences according to the Court) is provided in the previous part of the paper in which those factors of the Courts' reasoning regarding the subject-matter are introduced. **Secondly**, it is important to distinguish the possible consequences of a case in the relation to all factors provided by the Court. The judge is obliged to measure the prospective costs and benefits of possible different outcomes having in mind the different factors of reasoning regarding the temporal effect of a judgment and deciding in which case the consequences would lead to the situation with the least overall costs in terms of direct costs and behavioural incentives. The **third** step enables the particular trade-offs of divergent outcomes which are faced by the judge to be seen.

Therefore, the analysis of the actual application of the Doctrine in the

[79] Backhaus (n 8) 15.

practice of the Court might pose various concerns about the way judges approach the different possible outcomes of a case. The issue of the evaluation of every consequence and the comparison of them still need more comprehensive analysis. For the purposes of the positive analysis the identification of the current systemic approach of the Court is the most relevant concern. However, the vagueness of many of elements which are included in the framework of the Court might encourage discussion on their values and possible hierarchy.

The actual presentation of the consequences-based argumentation of the Court consists of: (i) the actual arguments provided by the Court; (ii) costs related to particular arguments depending on whether the Doctrine is applied or not; and (iii) incentives related to the effects which a particular argument generates *regardless* of whether the Doctrine is applied or not. Hence, sections (ii) and (iii) are revealed in the paper after the analysis of the actual argumentation (i) of the Court.

Factors (arguments) related to costs if the conventional rule of retroactivity is applied (conceivable incentives of the argument in general)	**Factors (arguments) related to costs if the doctrine of temporal limitation is applied (conceivable incentives of the argument in general)**
Argument: **the Commissions' contribution to uncertainty**. Costs related to windfall losses by individuals who were not able to estimate risks objectively (incentives: Commission is induced to monitor the compliance of national law to EU law actively).	Argument: **Exceptionality of the Doctrine**. Costs created by the uncertainty of the temporal regime rule (incentives: mitigating the improper perception of risks which are either under-investment or over-investment in precautionary measures (the reliance costs) due to the uncertainty created by the Doctrine).
Argument: **Good faith of a member state**. Costs related to worthless endeavours on the part of the Member State by seeking compliance (incentives: the Member State is induced to seek a compliance of national law to EU law, Member States are discouraged from the opportunistic behaviour).	Argument: **Excluding persons who did not address the 'old' rule before the judgment of the Court**. Costs related to investments by those persons who argued the improper national rule in court (incentives: persons are induced to address national courts

	and to search for more efficient rules other than the 'old' national rule).
Argument: **Intricate legal relationships regarding the subject-matter of a case**. Costs related to the revaluation and restructuring of intricate legal relationships, the adjudication of costs in complex cases (incentives: creating complex legal relationships in order to escape retroactive application for those individuals who benefited from the improper 'old' rule).	Argument: **Actual judgment upon the interpretation sought**. Costs related to the inefficient internalisation of risks by those persons who were able to perceive them (incentives: persons are induced to seek information on existing EU law and appeal improper national rules).
Argument: **Economic repercussions**. Costs related to the direct financial losses of a Member State or other persons (incentives: creating large potential financial losses for agents who will benefit from the Doctrine (mostly Member States)).	

Table 3. The concise framework of the legal arguments regarding the doctrine of temporal limitation by the Court of Justice.

To sum up, the concise framework of the Court regarding the Doctrine provided in Table 3 enables the different issues touched upon by the Court in order to prevent costly outcomes from happening and diverse social impact of the argumentation to be seen. In general, two arguments (the intricate legal relationships regarding the subject-matter of a case and its economic repercussions) seem to create some negative incentives for the parties and Member States. However, other arguments seem to work as a tool for the mitigating of such unfavourable outcomes by seeking to get the perception determined by the introduction of the Doctrine to the equilibrium. Nevertheless, the analysis conducted proposes an outlook on the subject-matter and further deeper research needs to be fulfilled in the future.

VI. CONCLUSION

Dealing with the consequences of judgments is a matter of economic analysis of law which may be harnessed by judges in order to achieve more grounded outcomes of their decisions. One of the dimensions which might determine the social consequences of a judgment is its temporal effect. The doctrine of temporal limitation of a judgment is a tool which enables

the Court of Justice to prevent harsh social consequences of the retroactive effect of a preliminary ruling procedure. However, the introduction of such a doctrine creates particular concerns regarding the costs and behavioural incentives for various agents from individuals to Member States and the European Commission.

The doctrine of temporal limitation of a judgment of the Court of Justice is an attempt to balance the benefits of conventional retroactivity and costs which might be imposed on the parties. In the arguments concerning the doctrine of temporal limitation, the Court includes propositions related to costs if the conventional rule of retroactivity is applied (such as the Commissions' contribution to uncertainty etc.) and propositions related to costs if the doctrine of temporal limitation is applied (such as an actual judgment upon the interpretation sought etc.). While reasoning judgments, the Court creates incentives which offset some of the costly effects of the doctrine of temporal limitation (primarily, the devaluation of legal certainty). Therefore, the Court searches for the proper approach by minimising the costs of the retroactivity of a judgment and for the reasonable behavioural incentives for various agents at the same time.