European Master in Law and Economics
Erasmus University Rotterdam

Consequences-based Judgements of the Court of Justice of the
European Union: Economic Analysis of Law

17 of August 2012

Donatas Murauskas
EMLE student of the year 2011/2012

Supervisor: Prof. Dr. Roger Van den Bergh
Declaration of Authorship

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I acknowledge the supervision and guidance I have received from Prof. Dr. Roger Van den Bergh. This thesis is not used as part of any other examination and has not yet been published.

Donatas Murauskas

17 of August 2012
Abstract

Temporal limitation of a judgement is the doctrine which was created by the Court of Justice of the European Union (hereinafter CJ) despite the lack of a background in any procedural legislative rule. The primary goal of it was to avoid complex consequences in cases determined by a default retroactive application of a judgement. However, the introduction of the new doctrine created its own costs related to reduced certainty of the existing procedural framework in a course of a preliminary ruling. Thus, CJ tries to find the balance between benefits and costs of the new procedural rule by creating particular restraints regarding its application. The aim of the thesis is to reveal the framework of CJ of limitation of temporal effect of a judgement while dealing with consequences of judgements in the procedure of a preliminary ruling and analyse weaknesses of the framework.

The thesis consists of three parts. Firstly, the general idea of temporality and efficiency arguments of retroactivity of judgements is presented. Secondly, the doctrine of limitation of temporal effects of a judgement of CJ is analysed and the framework of CJ reasoning based on its case law is introduced. Finally, insights on particular weaknesses of the framework with some normative propositions are specified.
# Table of contents

1. **Introduction** ................................................................................................................. 6

2. **Temporal perspective of law** ...................................................................................... 8
   2.1. General insights........................................................................................................... 8
   2.2. Efficiency and temporality of judgements ........................................................... 10

3. **Legal reasoning of the Court** .................................................................................... 18
   3.1. Preliminary ruling and retroactivity ........................................................................ 18
      3.1.1. Preliminary ruling: the social cost................................................................. 19
      3.1.2. Preliminary ruling: costs and benefits of temporal limitation ....................... 22
   3.2. Factors determining temporal limitation .................................................................. 27
   3.3. The framework ....................................................................................................... 35

4. **Weaknesses of the framework** ................................................................................. 39
   4.1. Agency ................................................................................................................. 40
   4.2. Uncertainty ........................................................................................................... 43
   4.3. Information asymmetry ........................................................................................ 46

5. **Conclusion** .................................................................................................................. 51

Appendix ........................................................................................................................ 53

References ...................................................................................................................... 56
List of boxes, tables and figures

Box 1. Intentional redistribution ........................................................................................................11
Box 2. Incidental side-effect ................................................................................................................11
Box 3. Clarification of law and a welfare enhancing rule .................................................................13
Box 4. Efficiency of retroactivity ........................................................................................................14
Box 5. Costs and wasteful incentives ...............................................................................................16
Table 1. Temporal effects of judgements of the Court of Justice .....................................................19
Box 6. Risks, uncertainty and Court of Justice ..................................................................................25
Box 7. Circumventing inefficient investment decisions ...................................................................26
Box 8. The Commissions contribution to uncertainty ....................................................................28
Box 9. The notion of a good faith .......................................................................................................29
Box 10. Expanding the notion of economic repercussions .............................................................31
Table 2. Factual application of the doctrine of temporal limitation ..................................................33
Figure 1. Factual application of the doctrine of temporal limitation by the Court of Justice .........34
Table 3. Evaluation of behavioural consequences of a judgement ..................................................36
Table 4. The concise framework of legal argument regarding the doctrine of temporal limitation by the Court of Justice ..............................................................38
Box 11. The balance between general welfare and personal losses ...............................................44
1. Introduction

The question of consequences of a court judgement has always been relevant in the context of reliability of a judiciary. Consequentialism as a philosophical concept is still an alive and essential feature of law. One of fundamental facets of consequences of courts’ judgements is the extent of their temporal effects. Nowadays the Court of Justice as a sub-court of the Court of Justice of the European Union (hereinafter CJ or the Court) is the object of discussions throughout Europe on such important questions as judicial activism, political autonomy and influential authority. Moreover, these debates usually include not just a matter of a substantive reasoning of CJ but consequences of it’s judgement as well.

CJ was created after the French Conseil d’Etat – the institution which controls governmental abuses of authority. The temporal effect of judgements of the Conseil d’Etat as one of the prototypes of administrative courts has been traditionally retroactive. However, retroactivity has always been disputed as it was understood that it could determine devastating consequences. The relatively new practice of the Conseil d’Etat was inspired by the approach of CJ in its application of the doctrine of limitation of temporal effects of a judgement (hereinafter the Doctrine or the doctrine of temporal limitation) as well as by similar approaches in Germany, Austria and Italy. What is the background of CJ changes which have even influenced alteration of reasoning of it’s precursor? Is it possible to identify the trade-off which has forced to

---

3 Until the Treaty of Lisbon in 2009 it was a separate court known as the European Court of Justice.
4 Alter (2009, pp. 112).
5 For this reason hereinafter the rule under which the temporal effect of a judgement is retroactive is mainly called the default rule.
6 From 2004, see Association AC t et autres (2004).
7 To be precise, the doctrine of limitation of temporal effects of a judgement in the procedure of a preliminary ruling.
8 Massot (2010, pp. 424).
implement the new exception from the default rule? What are efficiency concerns which have lead to this exceptional framework? These are questions to be analysed in order to understand the Doctrine.

The paper deals with a particular case of consequences of a judgement arising due to the alteration of temporal effects. **The aim of the paper is to reveal the framework of the Court of Justice of the European Union of limitation of temporal effect of a judgement while dealing with consequences of judgements in the procedure of a preliminary ruling and analyse weaknesses of the framework.** The paper is structured in a way to reflect the most important facets of the Doctrine. Firstly, the idea of temporality in law, emphasizing the economic rationale of the retroactivity of a judgement, is presented. Secondly, the doctrine of limitation of temporal effects of a judgement is analysed. Finally, insights on particular weaknesses of CJ framework with some normative propositions are specified.

The paper is focused particularly on temporal effects of a judgement in case of the preliminary ruling procedure according to Article 267 of the Treaty on the Functioning of the European Union⁹ (hereinafter **TFEU**). However, it excludes cases where CJ deals with temporal effects of EU legislations which are declared void during the procedure of a preliminary ruling as it seems to be a specific topic. Those are cases when a national court refers for a preliminary ruling to CJ on possible consequences (inter alia temporal) of a regulation or other law which was declared void by CJ¹⁰. In addition, the question of how does the retroactivity affect the notion of legal change¹¹ is also excluded. The paper is based on the assumption that legal argumentation by taking into account consequences of a judgement represents particular policies of a judge and it is

---

¹⁰ E.g. cases such as **Lomas and Others** (1992) or **Roquette Frères v Hauptzollamt Geldern** (1994). Such cases should be analysed applying the legal framework of Action for annulment (Article 263 of TFEU).  
not based on a pure principle or *per se* value. The discussion regarding the distinction between those two approaches is important\(^\text{12}\) but not exposed in this paper. The paper has an interdisciplinary character as it focuses on economic effects in the interaction of mainly three distinct fields: legal reasoning (or legal argumentation\(^\text{13}\)), law and economics and EU law.

### 2. Temporal perspective of law

#### 2.1. General insights

To begin with, interpretation of time in social institutions is not an easy goal to perceive. Traditionally, time in West has not been considered in the linearity – that is an understanding which became dominant from the religiously motivated transformations in Europe in the late twelfth century\(^\text{14}\). Law has never been a social dimension with a single interpretation of time. For instance, the doctrine of precedents could be interpreted as a tool used by courts not in linear but in timelessness form of time\(^\text{15}\). Accordingly, a court judgement could not be directly linked with one exceptional concept of time.

The question of temporal effects presupposes the explanation of how do sources of law vary regarding temporal effects. The most general distinction is among statutory law and case law\(^\text{16}\). In case of statutory law traditionally there is not so much controversy: in

---

\(^{12}\) E.g. Dworkin (1978, pp. 294-330); Greenawalt (1977) and others.

\(^{13}\) Both terms *legal reasoning* and *legal argumentation* are used as synonyms in the paper unless they are used to prescribe different type of conscious legal activity of the justification of a decision by a court.


\(^{15}\) Greenhouse (1989, pp. 1642).

\(^{16}\) Due to clearness statutory law by its function in temporal perspective is more or less analogous to other sources of law such as customary practice.
general, statutory rule has a prospective effect except certain particular situations\(^{17}\). Notwithstanding, judgements of courts are following different approach. Historically, the default rule was opposite to statutory law, i.e. a judgement used to consider as an explanation of existed law \textit{a priori}\(^{18}\). Thus, the retroactive effect used to be a good and justifiable option at least in common law countries\(^{19}\). However, concerns over harsh consequences of such retroactive effects arose as it became obvious that the default rule is not the most efficient solution in all situations\(^{20}\). For the sake of clarity, the mixture between possible temporal effects of a judgement should be analysed taking into account functional features of not only common law but continental courts as well. The specific function of judicial review regarding statutory law of continental courts is known in Europe from the beginning of the twentieth century\(^{21}\). The specificity of judicial review of separate constitutional courts (or administrative courts regarding substatutory law) in comparison to judicial review of ordinary courts in other countries\(^{22}\) provides ideas of different temporal regimes between legal systems in general.

As the paper deals with CJ judgements under the framework of a preliminary ruling, judicial review type judgements should be addressed. Thus, there are particular types of a judicial review of statutes in terms of temporal effects. In some countries such

\(^{17}\) The default rule of the temporality of statutory law is \textit{ex nunc}. This is related to the notion that persons should be entitled to know what is the law governing their conduct at the moment of their actions. However, the feature of such predictability could be sometimes reversed and it could need a specific justification (see Munzer (1977)).

\(^{18}\) The idea is that an ordinary court is an institution which deals with the situation which happened in the past at the time of the legal regime existed. Thus, a court should understand and deal with a law existed at that time, not now. Special remarks should be made regarding exclusion of non-ordinary courts such as constitutional courts which directly deal with statutory law. In addition, analogous function of specialised courts such as administrative courts regarding statutory law should also be taken into account.

\(^{19}\) Currier (1965). The focus is on common law courts due to the specificity of some aforementioned traditional continental or civil law courts such as constitutional courts or administrative courts which are dealing with statutory law.


\(^{21}\) Austria was the first country to enact such system in 1920 under the guidelines proposed by prominent Austrian legal scholar H. Kelsen.

\(^{22}\) I.e. the Supreme Court of the United States. In the European Union only two countries have system with no specific judicial review function by courts. These are the United Kingdom and the Netherlands.
judgements have retroactive effect as of the moment of coming into force of the statute concerned (effect *ex tunc*). In other countries such judgements take effect only as of the date of their publication (effect *ex nunc*). In other cases the effects of such judgements even come into force only at a future moment (effect *pro futuro*).

The importance of differences between jurisdictions in Europe could be emphasised by the fact that both of the most prominent and influential international courts in Europe\(^2\) has applied prospective rulings regarding cases which could have been directly or indirectly relevant to the United Kingdom where retroactive effect is a default rule with occasional derogations: for example, European Court of Human Rights in the case of *Marckx v. Belgium*\(^2\) and CJ in the *Barber* case\(^2\). Thus, the question of temporality is becoming more and more complex.

### 2.2. Efficiency and temporality of judgements

The temporality is one of the dimensions which prescribe consequences of a judgement. If we consider the moment from which a judgement should be applied, the feature of judgement’s efficiency under the framework of consequences-based decisions in courts is directly touched\(^2\). The economic rationale regarding the subject-matter lies within the analysis of different outcomes (effects) of a judgement under diverse temporal modes: *ex tunc, ex nunc* or *pro futuro*. The essence of underlying issue should be described from the perspective of natural persons and legal entities which could be

\(^2\) Exercising powers under legal frameworks of the Council of Europe and the European Union.

\(^2\) *Marckx v. Belgium* (1979). However, the temporal effect of a judgement of the European Court of Human Rights is always prospective. Thus, it has even more stringent effect for countries with the retroactive default rule.


\(^2\) Cserne (2011, pp. 9).
affected by different types of policies. To make things simpler, particular examples should be depicted.

**Case 1:** Person A knows all statutory rules and case law of courts which prescribe her behaviour. All investment decisions depend on the rule which will be present at the time of investment. All other activities are determined by rules applied at the time of accomplishing. Suddenly, A finds out that the government decided to change the income tax and she is one of the persons for whom the tax will be increased. At the same time the tax will be decreased for some persons (e.g. earning less than a particular minimum). A asks the government to compensate the loss.

**Box 1.** Intentional redistribution.

**Case 2:** Person B lives in a nice area of the City. The City is in an important junction of international highways. It struggles of traffic congestion as many trucks crossing the City impede normal traffic. In addition to this, the mayor of the City provides the survey according to which the mortality of people residing in the centre of the City is much higher than the standard of the country. Thus, the government finances a bypass. However, particular land parcels (including the land of B) should be taken under the eminent domain institution. B asks the government for compensation.

**Box 2.** Incidental side-effect.

Both situations reflect the notion that persons argue their loss on expectations which were not fulfilled as the government in both situations departed from what could have been expected *ex ante*. The difference between situations is the distinction between intentional redistribution as it was done in the case 1 and the imposition of gains and
losses as an incidental side-effect by the government as it happened in the case 227. Thus, completely different patterns of actions could create similar reduction of welfare of persons affecting their investment decisions. The policy question is how to provide proper incentives which lead to efficient level of investment by persons.

Traditional way of evaluating such situations used to be looking at the situation from the perspective of legal certainty. If people made particular decisions based on the previous old rule, they should be grandfathered for a protracted period28 or get a compensation equalling the net present value of the difference between old and new rule29. However, this approach has many deficiencies such as moral hazard as people will tend to over-invest when they know about compensation30 and it is usually not clear who are persons to be compensated31. In addition, persons are able to deal with their own risks and there are tools to cope with them (such as insurance, diversifying risks or adoption of risk-minimising behaviour) which are more efficient than compensation mechanisms provided by the government itself32. However, the situation of windfall losses makes analysis more complex as up to the particular extent risks should be mitigated by the government due to a clear factual inability to assess them in advance. Furthermore, what should be kept in mind is that incentives analysis fully applies to both gains and losses as providing proper incentives for both prospective winners and losers33.

Thus, if in the case 1 the government have provided clear notice regarding the prospective changes of tax policy it would not be efficient to mitigate the loss of the person A as it is not something what was completely unexpected. In addition, the

27 Kaplow (1986, pp. 519).
28 A grandfather rule would exempt from the change in law certain transactions entered into prior to the date of enactment. Graetz (1977, pp. 60).
29 The framework of dealing with tax rules is applied: Vording; Lubbers (2005, pp. 4).
30 Kaplow (1986, pp. 608).
31 The framework of dealing with tax rules is applied: Vording; Lubbers (2005, pp. 4–5).
33 Kaplow (1986, pp. 553).
argument of general increase of welfare could be applied as well. The welfare increase in case of changes of tax policies (could be possibly applied analogically to other policy changes) is a strong assumption. In the case 2 the person B had less possibility to evaluate the risk and her relationship with a property could have an element of subjective value. Thus, in many occasions it could be efficient to mitigate losses of persons like B. However, it always creates risks of possible over-investment in a property and a fact of increased general welfare could be again used against such compensation of unexpected loss or at least to argue for a reduced compensation.

Furthermore, similar effects on investment decisions could be determined by judgements of court which clarify existing law. For this reason a situation could help to emphasize arising issues in a different context of case law.

Case 3: Person A is a non-resident of Belgium. She would like to apply for medical studies in Belgium. However, according to the national law, a number of students who are not residents in Belgium is limited to criteria which cannot be fulfilled by A. She submits a claim in a national court which refers to CJ for a preliminary ruling. CJ declares that Articles 18 and 21 TFEU preclude national legislation which limits the number of students not considered residents in Belgium who may enrol for the first time in medical and paramedical courses at higher education establishments. The government asks to limit temporal effects of the judgement as a large number of legal relationships have been established in good faith, a large number of non-resident students have filed documents with a view to enrolment for the academic year 2006/07, there could therefore be serious economic repercussions tending to destabilise the Community’s education budget.

Box 3. Clarification of law and a welfare enhancing rule.

34 Graetz (1977).
36 Simplified factual situation is based on the case Bressol and Others (2010).
First of all, question whether the new rule is a rule which enhances general welfare (i.e. is progressive) arises. As the new rule precludes discrimination regarding education according to nationalities, it could hardly be argued that the rule which enables more persons to compete for education reduces quality of it. Thus, the new rule could be identified as progressive. Secondly, it is clear that in general there are three groups of interests which are affected by the introduction of the new rule: the member state, residents of the member state and non-residents. Apparently, first two lose and the last one wins. However, expectations (hence, reliance investments) of residents cannot be reduced to the uncertainty as at the time of introduction of later announced as illegal national rule the preclusion of discrimination was present. The same applies to the member state. Thus, the member state and residents were able to adjust their expectation and include prospective risks. In addition, non-residents cannot be identified as solely winners due to the fact that they insisted on the more progressive (i.e. welfare enhancing) notion which should have been understood by national authorities and residents *ex ante*. Hence, no windfall losses could be prescribed and a judgement should be applied retroactively.

The question of efficiency of the new rule against the old one is not a trivial matter and it should be always important to distinguish between efficient and inefficient changes of rules. In general, retroactivity of a judgement has particular efficiency concerns in a sense of increasing net gain in social welfare\(^37\). If a court interprets a situation in a way which is better for society, this results in increased efficiency gains in general despite concerns of distributional character\(^38\).

---

\(^{37}\) Fisch (1977, pp. 1088).

\(^{38}\) However, it is complicated to argue that a change is always positive. Thus, if a change tends to be negative in terms of general welfare, there may be a scope for the rule that an inferior change should be always compensated. The framework of dealing with tax rules is applied: Vording; Lubbers (2005, pp. 7).
Case 4: Legislation A was in effect during the period N, and resulted with overall of 50 units of utility increase in a society. However, a court interpretation of legislation A results with 60 units of utility increase. 50 percent of society members are made better off, accordingly, other 50 percent – worse off. Members of both groups relied on the old rule. Should the decision of court be applied retroactively despite the fact that part of the society relied on previous illegal interpretation? It should, as if the new interpretation (the new rule) does not affect legal relations retroactively, persons are still left with no efficiency gains, contrary to what would happen if the new interpretation is applied retroactively. To make things even simpler, it is better to have more welfare enhancing interpretation for longer period than just from the moment of the new interpretation as it poses more benefits in general than losses for members of the society who relied on the previous interpretation of law (although it is complex to measure).

Box 4. Efficiency of retroactivity.

The question arises: does the pure increase of efficiency due to the new interpretation of a rule with retroactive effect of a judgement affect persons properly, induce efficient behaviour in the future and manage their reliance in a reasonable way? An absence of a rule which enables CJ to deviate from the default retroactive effect exposes the importance of legal reasoning of the Court as it obliges to have in mind the analysis of not merely economic effects of two opposite rules (retroactive default rule and the rule of deviation from the default rule) but the analysis of different argumentation regarding consequences (costs) and it’s validity in terms of incentives. Both costs of a judgement and incentives provided in it are interdependent as costs include wasteful incentives for parties.

---

39 It is important to notice that an unclear (for this situation in the broad meaning) legal text (legal rule) enables to highlight the importance of legal reasoning to the purely technical application of the rule. Luhmann (1995, pp. 290).
In the case 5 the government provided detailed estimation of losses which would occur if CJ decides that the national rule contradicts EU law. That is a clear indication of costs. However, the national rule breaches one of the core principles of EU – freedom of movement of goods. The economic value of unrestricted movement of goods within the internal market could be identified as welfare enhancing (promoting competition by reducing regulation regarding cross-border activities). Hence, on the other side of costs there are losses due to taxes of all persons like B (supposedly, the same 116 million euros). If the new rule is applied retroactively, persons have incentives to seek more welfare enhancing interpretation of EU law and it could be described as additional gain to the position of the retroactivity. In addition, the difference between the old rule and

---

**Box 5. Costs and wasteful incentives.**

In the case 5 the government provided detailed estimation of losses which would occur if CJ decides that the national rule contradicts EU law. That is a clear indication of costs. However, the national rule breaches one of the core principles of EU – freedom of movement of goods. The economic value of unrestricted movement of goods within the internal market could be identified as welfare enhancing (promoting competition by reducing regulation regarding cross-border activities). Hence, on the other side of costs there are losses due to taxes of all persons like B (supposedly, the same 116 million euros). If the new rule is applied retroactively, persons have incentives to seek more welfare enhancing interpretation of EU law and it could be described as additional gain to the position of the retroactivity. In addition, the difference between the old rule and

---

\(^{40}\) Simplified factual situation is based on the case Nádasdi (2006).
the new rule cannot be evaluated as precluding reliance on expectations of the member state (surely no windfall losses) due to the fact that there were possibilities to get more information on it for the government of Hungary (e.g. by consulting with the European Commission (hereinafter the Commission)) and the discriminatory character of the rule was quite apparent and straightforward. Thus, retroactive application creates incentives to member states to seek information more actively and precludes over-investment (too much reliance) in dubious tools of taxation.

The question of consequences and proper incentives in the light of a temporality of a judgement is the core of the paper. A case law could be seen both as clarifying existing law or creating it – in all cases if a judgement changes the content of a rule, it has direct influence on behaviour of persons. A tool which helps to cope with different outcomes is temporality. However, it is not easy to describe what an efficient mode of temporality is. A variety of factors should be taken into account: firstly, whether a shift between the old rule and the new rule is welfare enhancing. Secondly, what are direct costs of the application of different temporality rules? Thirdly, was it possible to parties to internalise risks of rules change? Finally, whether the application of a particular mode of temporality induces efficient behaviour of parties in the future?

To sum up, the temporality of judgements raises many important questions which should be answered in order to understand what the proper temporal application is in a specific case. The paper deals with the specific case of CJ regarding temporality of its judgements under the procedure of preliminary ruling. For this reason, relevant facets of the procedure of CJ and the reasoning regarding the Doctrine should be emphasised.
3. Legal reasoning of the Court

The course of a preliminary ruling is a specific procedure which should be addressed in order to conclude effects of its retroactivity and prescribe factors which determine the outcome of a case if the question of retroactivity is included. Thus, the essence of the preliminary ruling and its place in the procedural tools of CJ should be indicated.

3.1. Preliminary ruling and retroactivity

First of all, CJ has various jurisdictions which determine a variety of effects of its judgement. In general, jurisdictions of CJ consist of different adjudication procedures. A variety of procedures is accompanied by a variety of their different temporal effects.

<table>
<thead>
<tr>
<th>Procedure (article of TFEU)</th>
<th>Default temporal effect of a judgement</th>
<th>Possible derogations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals on points of law (Article 256)</td>
<td><em>Ex nunc</em></td>
<td>No clear guidelines</td>
</tr>
<tr>
<td>Actions for failure to fulfill obligations (Article 258)</td>
<td><em>Ex nunc</em></td>
<td>CJ may impose a pecuniary penalty on a member state concerned from the date of the first judgement on the failure to fulfil an obligation.</td>
</tr>
<tr>
<td>Action for annulment (Article 263)</td>
<td><em>Ex tunc</em> (Retroactive effect, act declared void <em>ab</em>)</td>
<td>CJ may state if necessary which effects of the act</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Table 1.</strong> Temporal effects of judgements of the Court of Justice.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| **3.1.1. Preliminary ruling: the social cost** |  

The preliminary ruling is a system of direct cooperation between the Court and national courts by way of a non-contentious procedure which is completely independent of any initiative by parties, who are merely invited to state their case within legal limits laid down by a national court\(^{42}\). Hence, substantially preliminary ruling is a procedure to establish the coherence of the legal order of EU and the uniform application of EU law\(^{43}\). The comprehensive picture of economic rationale of the procedure enables to understand economic logic of its usage in particular situations. The preliminary ruling can be identified as a tool which determines at least two beneficial interrelated outcomes: **increase of legal certainty** and **reduction of information costs**.

\(^{41}\) Freestone (1988, pp. 161).

\(^{42}\) *Palmisani v INPS* (1997).

\(^{43}\) European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system (2007/2027(INI)).
To begin with, in case of legal certainty uniform application of EU law means that existence of the preliminary ruling procedure helps to assure persons with the way EU law is going to be applied. Diverse substantive and procedural law, variance of customs and institutional arrangements, lack of unified interpretation of law in different member states could be detrimental both within borders of a member state or in the internal market as member states may seek diversity not because it is efficient, but because it maximizes the welfare of the selected groups within their domestic constituencies. For example, a person observes different ways of EU law application in different member states and she is not sure whether rely on a particular interpretation or not. If she addresses a national court which refers to CJ for a preliminary ruling, only one existing interpretation remains. In addition, existing case law of CJ can be also explored to find out the right interpretation. Furthermore, the mere existence of the Court as the only official source of interpretation of EU law increases certainty regarding the future application of EU law due to the fact that CJ follows only its own framework of interpretation and unexpected derogations could rarely happen.

On the other hand, the reduction of information costs is due to the decrease of transaction costs for parties regarding the observation of possible application of EU law. For instance, a person is trying to understand what interpretation of EU law she should rely on. The existence of the preliminary ruling procedure enables her to focus only on interpretations of CJ as the only reliable source.

At the same time particular costs of a preliminary ruling procedure exists as well. The length of the procedure is an element which is worth mentioning as the average number of months to solve a reference for a preliminary ruling in 2010 was 16.1. Although the decrease of the length during the last years is noticeable, it is still an important factor to be considered. The Commission as well as other EU institutions try to deal on

44 Linarelli (2003, pp. 1394).
improvements of the procedure of CJ\textsuperscript{46} and it seems that those efforts are productive as the length of the procedure decreases while the amount of cases on references for a preliminary ruling has sufficiently increased\textsuperscript{47}.

Moreover, the cost arises due to the need to maintain a separate court for the matters which can theoretically be solved by national courts. National courts are assigned the role of gatekeepers under the course of the preliminary ruling\textsuperscript{48}. Thus, public choice theory predicts reasons unrelated to justice and rule of law for national courts to refer for a preliminary ruling. Firstly, it is the increased possibility to influence policy or judicial empowerment in other words\textsuperscript{49}. Secondly, it is the warranty that a judgement which is based on a preliminary ruling enjoys against possible reversal in national jurisdiction. Finally, national courts tend to free-ride while addressing CJ on a question of EU law which could be successfully solved by national courts due to abovementioned benefits and the fact that the procedure is not constrained by any price\textsuperscript{50}.

These problems are tried to be solved by inducing national courts to apply EU law when the interpretation sought is clear, i.e. the application of the acte clair doctrine\textsuperscript{51}. However, this doctrine is not unquestionable subject itself as the Court, advocates general, legal scholars and EU officials continue to work on the clear and precise distinction between situations when the doctrine of acte clair should be applied and when it would be abusive\textsuperscript{52}.

\begin{flushright}
\textsuperscript{47} Annual Report (2011, pp. 88, 95).
\textsuperscript{48} Tridimas; Tridimas (2004, pp. 134).
\textsuperscript{49} Weiler (1991).
\textsuperscript{50} Tridimas; Tridimas (2004, pp. 135–136).
\textsuperscript{51} Groussot (2008, pp. 6).
\textsuperscript{52} For example, Opinion of Advocate General (1997).
\end{flushright}
Thus, the disclosure of different costs and benefits creates a background for the analysis of particular effects on costs of relevant persons and member states in a specific situation when the Court deals with consequences-based arguments by evaluating costs of optional temporal outcomes of a case.

3.1.2. Preliminary ruling: costs and benefits of temporal limitation

Before proceeding to the framework of reasoning of the Court, particular costs and benefits of the Doctrine should be distinguished. This could help to understand economic facets of the doctrine of temporal limitation in general and separate it from particular reasoning of CJ. In addition, it could help to compare insights in general to factual legal reasoning of the Court.

To begin with, temporality is one of the tools which enable courts to deal with consequences of their decisions. CJ in the case of preliminary ruling deals with a specific legal concept of judicial review. The reference for a preliminary ruling is the procedure of retroactive effect of a judgement which is unusual among the judicial review type of decisions. The Court has itself concluded while analysing its competence under the Article 234 of TFEU that in the exercise of the jurisdiction conferred upon CJ, it gives to a rule of EU law the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted must be applied by courts even to legal relationships arising and established before a judgement ruling on the request for interpretation.

Notwithstanding, particular negative consequences of the default temporal rule have induced CJ to create the Doctrine. Thus, the benefits of the Doctrine should be

53 *Amministrazione delle finanze dello Stato v Denkavit italiana* (1980).
emphasised. First of all, the Doctrine could help to escape potentially huge direct costs of retroactivity. As in the Blaizot case\textsuperscript{54}, the Court prescribed that pressing considerations of legal certainty preclude any reopening of the question of past legal relationships where that would retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper functioning of universities. In other words, the Court finds out that reliance of persons on the old rule and the extent the legal relationships are embedded and the stability of university system in Belgium reflects higher value than legal certainty regarding the procedural default rule, possible welfare enhancing application of the new rule within the time and positive incentives for persons and member states.

Another benefit of the Doctrine is the possibility to prevent windfall losses from happening. For example, there could be situations when some persons even acting in good faith were not able to internalise any risk only due to the fact that it was extremely costly to reveal existing risks. That could happen due to information asymmetry as persons sometimes cannot easily get information regarding the conformity of national law from the government or other institutions. Another situation could be when a member state always communicates with EU institutions but even that does not help to understand how to apply EU law correctly. Thus, the Doctrine could help to prevent objectively unexpected loss from happening.

However, the legal framework of preliminary ruling procedure determines the specificity of possible negative consequences of the existence of the Doctrine. First of all, the scope of the procedure decides a large variety of consequences and incentives which should be taken into account by judges of CJ. The questions referred to the Court could deal with all possible features directly or indirectly embedded in EU Treaties.

\textsuperscript{54} Blaizot v Université de Liège and Others (1988).
That increases costs of operating the Court. Even so, it does not directly determine costs of parties including member states.

At the same time judges of the Court face the question on the procedural facet of the default rule of retroactivity: whether the change from the default rule to the rule under the Doctrine is worthy taking in mind the reliance of persons on the default rule of retroactivity. Thus, introducing possible cases of derogation reduces procedural certainty. For instance, if a person is sure that the default procedural rule will be applied, he will adjust his behaviour as to maximise the utility. One of the outcomes could be that a person who benefits from the application of the old rule will over-invest to the preservation of the old rule. The same could be applied to member states which will over-invest into the situation which enables them to ask for the Doctrine.

Risks, uncertainty and the Court: Risk is a probability of event, with something like gravity designating it’s possible adverse consequences.\(^{55}\) Previously risk has been referred to probabilities that can be estimated and all other instances being identified as uncertainty as an immeasurable phenomenon.\(^{56}\) The problem of uncertainty can be expressed as a discussion between supporters of formal decision theories such as expected utility models and critics who argue that uncertainty is fundamentally irreducible.\(^{57}\) However, the problem of uncertainty cannot be expanded to immense. Under the classical view probability defines probability of an event occurring in a particular trial as the frequency with which it occurs in a long sequence of similar trials.\(^{58}\) Subjectivist or Bayesian interpretations of probabilities identified them as degrees of belief or credence of rational persons.\(^{59}\) Although elusiveness of rationality

\(^{55}\) Gillette; Krier (1990, pp. 1028).
\(^{56}\) Knight (1921, pp. 19-20, 197–232).
\(^{57}\) Quiggin (2009, pp. 201).
\(^{58}\) Morgen et al. (1990, pp. 48).
\(^{59}\) Hajek (2009, pp. 97).
and lack of ability to state an objective probability of an event prompt to search for more behaviouristic approach in case of uncertainty. Such pursuit of clarification of uncertainty effects on behaviour of subjects which are affected leads to the question of framing of possible outcomes. In other words, what are those framing structures and how do they work? For instance, a person could associate the mere fact that CJ has derogated from an existing case law by evaluating it in the context of minimal account which includes only the direct consequences of the act.\(^{60}\) Such model of framing decisions is plausible because it simplifies evaluation and reduces cognitive strain, reflects the intuition that consequences should be causally linked to acts and matches the properties of hedonic experience, which is more sensitive to desirable and undesirable changes than to steady states.\(^{61}\) Thus, it leads to the cost-benefit of a particular case question and prompts to think that it is a proper way which should be employed by the Court as well.

**Box 6. Risks, uncertainty and Court of Justice.**

Noteworthy, the uncertainty could be both under-estimated and over-estimated.\(^{62}\) The fact that the Doctrine is applied only in exceptional and important cases\(^{63}\) can suggest that uncertainty is over-estimated as a risk is highly visible or salient.\(^{64}\) Such assumption is strong but realistic. The fact that empirically derogations from retroactive effects of a judgement take place only in a minority of cases\(^{65}\) is also relevant. Hence, an increase in precaution measures could be socially detrimental as over-investment

---

\(^{60}\) Tversky; Kahneman (1981, pp. 456).
\(^{61}\) Tversky; Kahneman (1981, pp. 457).
\(^{62}\) Camerer; Kunreuther (1989).
\(^{63}\) First time of application in one of the foundational EU cases Defrenne v SABENA (1976). The other prominent example of application is a widely known Union royale belge des sociétés de football association and Others v Bosman and Others (1995) case which was one of the most influential cases regarding professional sports in Europe ever.
\(^{64}\) Jolls (2000, pp. 290).
\(^{65}\) Referring to the information provided in the Table 12. Factual application of the doctrine of temporal limitation.
because of *de facto* unknown temporal consequences of a judgement of the Court and mismatches of an existing estimation to the factual application of the Doctrine. Moreover, the possibility of derogation from the default retroactive rule adversely affects incentives (both of persons and member states) to invest and rely on the **substantive law**. This side of costs of the Doctrine is interrelated to procedural uncertainty although creates particular incentives as well.

**Case 6**

Person A is a man who retires at the age which entitles him only to a deferred pension payable at the normal pensionable age. He knows that a woman at the same age would be entitled to the full pension. A argues that the rule contradicts EU rules regarding equal treatment of workers. A national court refers for a preliminary ruling and CJ declares that the national rule enables discrimination based on sex and contradicts the Treaty of EU. The government of the United Kingdom asks to limit temporal effects of a judgement because of possibly complex financial consequences.

*Box 7.* Circumventing inefficient investment decisions.

The case 6 helps to emphasise how different outcomes regarding temporality affect incentives of parties. If CJ applies the Doctrine and limits temporal effects, the costs of prospective losses for the member state will be circumvented. However, at the same time persons such as A will be induced to over-invest on monitoring and addressing national courts as precaution measures in case of possible improper application of EU law as it will become the only way to prevent an unfair outcome for a particular person and recoup for unfair treatment. In addition, persons who are risk averse will not try to address national courts at all as they understand that the only possibility to recoup losses is addressing a national court with an issue which will be declared as contradicting to

---

EU law. That is a relatively complex outcome to achieve from their risk averse perspective. At the same time the Doctrine will induce member states not to pay too much attention on the national rules which could be declared as contradicting EU law due to the possibility to escape consequences.

In addition, the Doctrine could determine benefits if the new rule of CJ is welfare reducing. Although it is not easy to find out possible sources of EU law which could act as not only market facilitating and pro-competitive, such opportunity cannot be denied. On the other hand, if the new rule is welfare enhancing, then the Doctrine limits potential increase in general welfare as it does not affect past relationships which remain with inefficient old rule.

Apparently, a variety of different effects on consequences and incentives due to the Doctrine could be revealed. However, it is sufficient to analyse the factual reasoning of the Court and distinguish factors which are relevant to CJ in a real world.

### 3.2. Factors determining temporal limitation

To begin with, the analysis of consequences-based reasoning of CJ consists of representation and identification of relevant arguments used by the Court to justify one or the other option (i.e. default retroactive rule or the Doctrine) chosen in a judgement. The process of tackling cases could be identified as a change in knowledge which enables the Court to find out situations when the default procedural rule cannot be prescribed as efficient\(^\text{67}\). Thus, the analysis of CJ factors helps to collect and present a summarised framework of consequences-based reasoning of CJ regarding the temporality of a judgement.

---

\(^{67}\) Zerbe (2001, pp. 66).
First of all, probably the most pervasive notion regarding the Doctrine is the **exceptionality** of it. CJ has stated that in determining whether or not to limit the temporal effect of a judgement 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 ground of the possible repercussions which might result. The notion of objectivity of the law reflects the value of legal certainty of the procedural rules applied. Thus, the default rule creates legal certainty. CJ acknowledges that the general trade-off is between legal certainty of the default procedural rule and direct costs of a judgement due to retroactivity. According to the Court, certainty should in general prevail as a feature which ensures expectations.

Furthermore, the Court includes the notion close to windfall losses for a member state and persons who relied on the *old* rule.

**Case 7**

Person B was working as a cabin steward in airlines. The contract of employment prescribed her and other female cabin stewards different salary in comparison to what was paid to male cabin stewards. She brought the claim to a national court which referred to CJ for a preliminary ruling. CJ declared that the national rule contradicts principle of equality entrenched in EU law. The government raised the question of retroactivity. The Commission has never initiated proceedings against the member state due to improper application of EU law.

**Box 8.** The Commission’s contribution to uncertainty.

As it is emphasized in the case 7, one of the core arguments used by the Court in the case *Defrenne* was the fact that the **Commission has not initiated proceedings** against member states concerned on grounds of failure to fulfil an obligation. This argument

---

^68 [Blaizot v Université de Liège and Others](1988).

^69 Simplified factual situation is based on the case *Defrenne v SABENA* (1976).
could be identified as a tool which helps to prevent windfall losses of persons who were following the *old* rule. According to the Court, the contribution of the Commission which was capable to notice the situation but did not act in order to change it should be such as reasonably leading the authority of a member state to uncertainty. The criterion of reasonableness is not itself clear but it gives at least general guidelines with boundaries of a reasonable person.

Furthermore, CJ adapted the notion of *good faith* which is probably a way to fill in the gap of vagueness of the concept of reasonableness. Only a member state which behaves in good faith may request to apply the Doctrine.

![Case 8](https://example.com/case8)

**Box 9.** The notion of a good faith.

Thus, a member state should be active and positive participant in EU institutional framework, trying to comply with EU law in good faith. Such implication of the Court serves as a constraint on member states which try to exploit other features of the Doctrine.

When the Court started to deal with the Doctrine it focused on direct and usually financial consequences. The existence of possible *economic repercussions* was the criterion applied from the first time of application of the Doctrine. In *Defrenne* case

---

70 *EKW and Wein & Co* (2000).
71 Simplified factual situation is based on the case *Stradasfalti* (2006).
CJ explicitly concluded that given a large number of people concerned claims might seriously affect the financial situation of respective undertakings and even drive some of them to bankruptcy\(^\text{73}\). In its later judgements the Court extended application of economic repercussions criterion to branches of governments or municipalities of member states\(^\text{74}\) and financial stability of member states in a more general sense (e.g. through the possible influence on the financing mechanism of social insurance\(^\text{75}\)). However, at the same time CJ 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 case *Société Bautiaa*\(^\text{76}\) CJ stated that financial consequences which might ensue for a government owing to the unlawfulness of a tax or imposition never in themselves justifie limiting the effects of a judgement of the Court. Such argument explicitly shows a rigorous position of CJ towards an exclusive proposition of financial difficulties.

Noteworthy, a variety of cases enabled to expand the concept of direct losses from pure economic repercussions to other concepts as well.

**Case 9\(^\text{77}\):** Person A was a football player in a football club X. After the termination of a contract A decided to sign a contract with a football club Y from another member state than his former club X. However, according to the rules of sporting association (governing body of football clubs of a member state where the club X is based) a professional footballer who is a national of one member state may not, on the expiry of his contract with a club, be employed by a club of another member state unless the latter

---

\(^{73}\) *Defrenne v SABENA* (1976).


\(^{75}\) *Sürül* (1999).


\(^{77}\) Simplified factual situation is based on the case *Union royale belge des sociétés de football association and Others v Bosman and Others* (1995).
club has paid to the former club a transfer, training or development fee. Legal
governed by a very complex system of rules of national associations
relationships between football players and clubs as well as among clubs regarding
UEFA (at the European level) as well as FIFA (at the international level). The
football players are governed by a very complex system of rules of national associations
player appealed to a national court which referred to CJ for a preliminary ruling.

Box 10. Expanding the notion of economic repercussions.

Hence, in a well-known Bosman case CJ provided different test of direct costs
indicating that specific features of rules laid down by sporting associations for transfers
of players between clubs of different member states, together with the fact that the same
or similar rules applied to transfers both between clubs belonging to the same national
association and between clubs 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 potential financial loss as direct
costs to the more sophisticated concept of uncertainty of a situation in the context of
intricate legal relationships.

Furthermore, the Doctrine is an instrument which not only helps to evade harsh direct
losses but creates negative effects as well. One of these negative consequences are
incentives for persons to address national courts and seek damages due to improper
application of EU law despite possible derogation from the retroactive effect. In other
words, in the light of temporal limitation, persons understand that a new rule will not be
applied to them retroactively. Thus, persons are hindered from addressing improper
application of EU law. However, the actual application of the Doctrine takes into
account such incentives. In Legros case78 CJ concluded that neither provisions of EEC
Treaty relating to charges with effect of customs duties on imports nor Article 6 of the

Agreement between the Community and Sweden may be relied upon in support of claims for refund of charges such as dock dues paid before the date of this judgement, except by claimants who have, before that date, initiated legal proceedings or raised an equivalent claim. Thus, while applying the Doctrine the Court excludes persons who addressed an old rule of national law actively before a judgement of CJ. Such exclusion induces persons to monitor and appeal possible improper application of EU law.

Furthermore, application of the Doctrine creates dubious effects on negatively affected persons if they (including member states) are able to assess risks in advance and internalise them. Thus, there should be a tool to prevent compensating persons who were able to minimise their risks in advance. Noteworthy, the Court has distinguished such argument by stating that the limitation of temporal effects of a judgement could be carried out only if an actual judgement upon the interpretation sought. It means that persons cannot circumvent a retroactive application of changed interpretation of EU law if there already is another judgement which is similar to the present case. This criterion of interconnection can be illustrated in the field of tax law as it is the field where this factor was mostly applied. To be precise, the criterion is supposed to help to avoid the situation when tax payers in one member state are still able to exercise their rights whereas tax payers in another member state cannot do it due to a non-retroactive judgement, even though the same fiscal periods are concerned.

Another more technical factor regarding the Doctrine should be also mentioned. That is an existing request of a member state or a national court by an inclusion of this question in a reference for a preliminary ruling as an obligatory condition to apply it.

---

79 Sürül (1999).
81 In a majority of CJ cases where the question on the application of the doctrine was analysed.
CJ has never limited temporal effect of a judgement *ex officio*. This factor within the reasoning of the Court could be even called the first precondition for the Doctrine.

For a more rigorous view over the factual application of the Doctrine and tendencies, particular empirical data is provided in the table 2. Apparently, during the period from April, 1976 to May, 2012 there have been 35 requests to apply the Doctrine. In 7 cases CJ has applied the Doctrine. In addition, more detailed information on all cases is provided in the appendix\(^{83}\).

<table>
<thead>
<tr>
<th>Number of CJ cases from April, 1976 to May, 2012 (only preliminary rulings(^{84}))</th>
<th>Number of cases when a Member state or a national court requested / referred for a temporal limitation</th>
<th>Number of cases when CJ applied the doctrine of temporal limitation</th>
<th>Number of cases when CJ applied the doctrine of temporal limitation without any request</th>
</tr>
</thead>
<tbody>
<tr>
<td>4,486</td>
<td>35</td>
<td>7</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 2. Factual application of the doctrine of temporal limitation.

Hence, according to the data provided in the Table 12 and the appendix, the Doctrine is not a widespread phenomenon. Therefore, the Doctrine cannot be identified as a new default rule regarding temporal effects of a judgement. The question which still arises is whether the importance which is attributed to the Doctrine is not a personal judgement error? To be precise, the personal judgement error could occur if people with limited information exaggerate an issue with higher than factual probability just because after a prominent case of CJ the level of reliance increases inadequately\(^{85}\). However, the issue cannot be overcome easily due to the specificity of the Doctrine.

\(^{83}\) See Appendix. List of judgements of Court of Justice with the doctrine of temporal limitation considered.

\(^{84}\) Reference for a preliminary ruling and relatively recently adopted Preliminary reference - urgent procedure.

\(^{85}\) Jolls; Sunstein; Thaler (2000, pp. 37).
Firstly, the Doctrine is applied in very different cases. Thus, the probability of the application of it cannot be merely based on the existing experience as it is not clear what will be the next field of EU law with the Doctrine applied. 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\textsuperscript{86} when the retroactive effects can be sufficiently detrimental as usually it is not an issue. Lastly, although the Doctrine was introduced in 1976, the application of it was not equally distributed in time. As it can be spotted in the figure 1, the Doctrine was not intensively applied during all period from the first time it was applied in 1976. Noteworthy, during some periods of years the Doctrine was not even considered (i.e. not requested by member states). Thus, it creates even more uncertainty as it is not clear what could contribute to the new wave of application of the Doctrine.

![Figure 1. Factual application of the doctrine of temporal limitation by the Court of Justice.](image)

To sum up, the difficulties to conclude about the real importance and risks related to the Doctrine precludes the possibility to identify an entirely elaborated structure of argumentation of the Court. For this reason insights on factors of the Court reasoning are put in the proposed framework of the consequences-based reasoning.

\textsuperscript{86} E.g. Defrenne v SABENA (1976), Union royale belge des sociétés de football association and Others v Bosman and Others (1995) and others.
3.3. The framework

To begin with, 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 every court’s practice. 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. This is why either that logic must be abandoned or it must be relative to consequences rather than antecedents. Thus, shifting of focus on consequences of a judgement helps to improve deficiencies of formal reasoning as consequence-based reasoning can be identified being instrumental, forward-looking and often policy-oriented.

The reasoning of CJ in the matter of application of the Doctrine could be analysed using a slightly modified abstract framework of steps regarding consequences of a judgement proposed by P. Cserne. He provides a normative type of economic analysis as part of the system of economic analysis of legal problem consisting of three levels (evaluative, positive and normative) which also reflects a conceptual framework of economic analysis by J. G. Backhaus.

Noteworthy, the type of framework focuses on so-called behavioural consequences as incentives provided by court considering criterion of the least cost in a particular case. That is quite distinct from the perspective of judicial consequences which involves analysis of direct incentives determined by a judgement as a bundle of consequences-as-
implications as general rules for future cases. In other words, behavioural consequences refer to *what human behaviour the rule will induce or discourage* while judicial consequences refer to *what sorts of conduct the rule would authorize or proscribe*. The doctrine of temporal limitation is not merely a way to reason unacceptable consequences regarding the situation after a judgement (*direct costs*) but it also affects the behaviour of parties in other cases since it signals the expected way of behaviour (*providing incentives*).

<table>
<thead>
<tr>
<th>Step</th>
<th>Question to be answered by CJ</th>
<th>Difficulties</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Identification</td>
<td>Which consequences matter?</td>
<td>Operationalisation</td>
</tr>
<tr>
<td>2. Measurement</td>
<td>What is the impact (costs) of the decision in these dimensions?</td>
<td>Information</td>
</tr>
<tr>
<td>3. Evaluation</td>
<td>Which of possible decisions has the best consequences (the least costs)?</td>
<td>Trade-offs</td>
</tr>
</tbody>
</table>

*Table 3.* Evaluation of behavioural consequences of a judgement.

Following the framework, the *first* step (exposing all important factors which affect consequences according to the Court) is provided in the part 3.2. in which factors of CJ reasoning are introduced. *Second*, it is important to distinguish possible consequences

---

91 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. MacCormick (1983, pp. 251).
92 Cserne (2009, pp. 15).
of a case in the relation to all factors provided by the Court. The judge is obliged to measure prospective costs and benefits of possible different outcomes having in mind different factors of reasoning regarding temporal effect of a judgement and deciding in which case consequences would lead to the least decrease of social welfare. The third step enables to see the particular trade-offs of divergent outcomes which are faced by the judge. The presentation of faced consequences and actual solution consist of provided arguments of CJ (1), costs related to particular arguments depending on whether the Doctrine is applied or not (2) and incentives related to effects which particular argument generates regardless the Doctrine is applied or not (3).

<table>
<thead>
<tr>
<th>Factors (arguments) related to costs if the default rule of retroactivity is applied (conceivable incentives)</th>
<th>Factors (arguments) related to costs if the doctrine of temporal limitation is applied (conceivable incentives)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Argument:</strong> the Commissions contribution to uncertainty. Costs related to windfall losses by persons who were not able to estimate risks objectively (incentives: Commission is induced to actively monitor the compliance of national law to EU law).</td>
<td><strong>Argument:</strong> Exceptionality of the Doctrine. Costs created by uncertainty of the procedural rule (incentives: mitigating improper perception of risks which are either under-investment or over-investment in precaution measures due to uncertainty created by the Doctrine).</td>
</tr>
<tr>
<td><strong>Argument:</strong> Good faith of a member state. Costs related to worthless endeavours of a member state by seeking compliance (incentives: a member state is induced to seek a compliance of national</td>
<td><strong>Argument:</strong> Excluding persons who addressed an old rule before a judgement of CJ. Costs related to investments by persons who argued improper national rule in court (incentives:</td>
</tr>
</tbody>
</table>
law to EU law). persons are induced to address national courts, search for efficient rule other than national).

**Argument: Intricate legal relationships regarding the subject-matter of a case.**

Costs related to revaluation and restructuring of intricate legal relationships, adjudication of costs in complex cases (incentives: creating complex legal relationships in order to escape retroactive application for *losing* persons).

**Argument: Actual judgement upon the interpretation sought.**

Costs related to inefficient internalisation of risks by persons who were able to perceive them (incentives: persons are induced to seek information and internalise their risks).

**Argument: Economic repercussions.**

Costs related to direct financial losses of a member state or other persons (incentives: creating large potential financial losses for *losing* persons (first of all, member states)).

**Table 4.** The concise framework of legal argument regarding the doctrine of temporal limitation by the Court of Justice.

To sum up, the compact framework of CJ regarding the Doctrine provided in the table 4 enables to see different issues touched by the Court in order to prevent inefficient outcomes from happening. In general, two arguments (intricate legal relationships regarding the subject-matter of a case and economic repercussions) create negative incentives for parties and member states. However, other arguments seem to work as a
tool of mitigating such unfavourable outcomes by seeking to get the perception
determined by the introduction of the Doctrine to equilibrium.

4. Weaknesses of the framework

The doctrine of temporal limitation could be seen as a flexible approach of CJ
purporting to adjust its case-law to a wide range of possible social consequences.
However, particular ways of how the Court does it and what are criteria could be
sometimes questioned. Thus, some potential weaknesses of legal reasoning of the Court
should be presented and feasible solutions discussed. One of them could be that the
existing framework does not directly touch the question whether a new rule is welfare
enhancing, though it could be one of disputable issues regarding the Doctrine and its
application. Other deficiencies should also be analysed, although those are not literally
repeated in this section as some issues clearly overlap and even coincide. To be precise,
the Doctrine reveals different types of specific frailties of the reasoning but the main
focus in this paper is on problems of agency, uncertainty and issue of information
asymmetry.

93 See 3.1.2. Preliminary ruling: costs and benefits of temporal limitation.
4.1. Agency

To begin with, member states might be identified as agents who are rationally interested to maximise their utility. Game theory is a framework which enables to foresee the strategic behaviour occurring when individual decision-making turns on what an individual expects that some other individual will choose to do.\textsuperscript{94} The similar outlook could be harnessed to ascertain the prospective behaviour of member states in the light of existing international or supranational duties.

The commonly used solution concept is the Nash equilibrium, which identifies a set of strategies that is the best response for each player, having regard to the strategy chosen by the other player. The simplest strategic form game could be shown in the bimatrix with two players playing and having two possible options to choose.\textsuperscript{95} The key-issues emphasised by the prisoner's dilemma as a classical framework of the game theory is that players are incapable to make a credible commitment to cooperate, either because there is no opportunity to communicate or because a promise is not enforceable.\textsuperscript{96}

The idea of prisoner's dilemma can be used to ascertain the behaviour of a member state regarding EU institutions in the light of existing case law of CJ when there is a possibility to escape harsh consequences even if the member state does not complies (e.g. applies EU legislation improperly). There could be at least two dimensions for such issue to happen: \textit{vertical} (compliance under control of EU institutions) and \textit{horizontal} (getting advantage in respect of other member states). Both dimensions are presented in turn.

Firstly, the mere existence of possibility to escape when non-compliance is confirmed creates incentives to a member state not to comply if the gain when non-complied

\textsuperscript{94} Baird; Gertner; Picker (1994).
\textsuperscript{95} Cooter; Ulen (2000, pp. 34–37).
\textsuperscript{96} Whincop (1999, pp. 4).
exceeds losses when complied. Theoretical possibility to escape issues of the non-cooperative behaviour is a repetition of the prisoner’s dilemma for an indefinite future period of time as it may change the strategic incentive of parties so that they cooperate instead of defecting. However, in the presence of preliminary ruling and the nature of them, there is no scope for repetition as it is usually a matter of specific circumstances regarding a specific EU legislation.

Hence, there is a scope for moral hazard and opportunistic behaviour to occur as a member state could try to let the situation of non-compliance to happen at the same time creating harsh consequences if it gets considerable benefits while non-complying. It should be noted that CJ has an extensive discretion regarding the indeterminacy of EU law as its interpretations are the official source of EU law. It enables to identify the shift of commitment function from member states to the Court as it becomes the principal regarding member states in case of fulfilment of their obligations under EU law. In terms of preliminary ruling the Court has to induce proper behaviour of member states while dealing with situations of negative consequences (e.g. financial) at the same time. The fact that harsh consequences can be assessed as a reason to reject retroactive effects can induce member states to abuse this situation by creating extremely complicated situation themselves while having hope to escape retroactivity.

Secondly, the horizontal aspect of moral hazard and opportunistic behaviour is interrelated with the vertical but has specific facets as well. If EU is interpreted as a federation which seeks to create larger and more open markets, it can be identified as a cartel which suffers from instability explicable in the prisoner’s dilemma: there is a tendency of one member of a cartel (i.e. member state) to get an advantage by ignoring

obligations which are imposed on other members. Thus, it enables the deviating member to get an advantage regarding other members\textsuperscript{98}.

Thus, there is a considerable need for CJ to diminish chances for such strategy to occur by signalling even stricter attitude regarding evidences on intentions of the member state during the period from the start of negotiations of a particular EU legislation to the day when national court referred for a preliminary ruling. The Court could not only state the duty of good faith of the member state, but elaborate this notion by stating what typical actions or inactivity present behaviour which does not comply with the notion of good faith.

Another important and interrelated facet of temporal effects of a preliminary ruling is the period of indetermination in a member state if its national law or measures of enforcement EU law are concluded as inappropriate by the Court regarding the substantive legal provisions until the correct way of application is provided. In other words, there is a problem of non-existence of a proper law from the moment of a judgement of CJ to the moment a new national law is enacted\textsuperscript{99}. That is why there are proposals to apply the alternative model of setting consequences \textit{pro futuro} following the doctrine of the German Constitutional Court\textsuperscript{100}.

The solution of the aforementioned issue could be an imposition of a time-limit of continuation to apply an improperly applied national rule by making a member state able to enact a proper rule during the period. That would prevent issue of increased costs due to legal certainty as persons would be able to justify their claims on previously existing rules in domestic courts regardless interpretation of CJ for a particular period of time. However, lack of tangible criteria to apply such \textit{pro futuro} effect, existence of the

\textsuperscript{98} Sweet (2004, pp. 7–8).
\textsuperscript{99} Wiedmann (2006, pp. 201).
\textsuperscript{100} Opinion of Advocate General (2006).
the doctrine of vigilance of individuals concerned to protect their rights\textsuperscript{101} would annihilate the incentive to have recourse to expensive and time-consuming private enforcement of EU law\textsuperscript{102}. Moreover, there could be a problem determined by the requirement of interconnection between the primary ruling and the dictum temporally limiting effects which has a direct effect on a good faith behaviour of a member state regarding particular interpretation of EU law\textsuperscript{103}. The core issue is that it is extremely complex to distinguish situations when member states acted in good faith and when there was no interconnection criteria fulfilled in a case. The similarity of two cases could sometimes be difficult to assess. Even after providing particular interpretation of EU law in one case there could be arguments by other member states regarding a different approach of related EU law in respect to them, thus enabling them to benefit from the advantage of having superior legal framework in the period from the first judgement to a judgement regarding the deviating member state.

\textbf{4.2. Uncertainty}

As it was mentioned before, one of crucial issues related to the application of the Doctrine is the emerged uncertainty regarding the temporal effect. As uncertainty could be both under-estimated and over-estimated\textsuperscript{104} the question is what the actual effect of the Doctrine is. First of all, uncertainty is created in a way that persons do not know whether to follow the \textit{old} rule of the application of EU law or try to argue the more efficient \textit{new} rule which contradicts the \textit{old} rule but could be in conformity with EU law.

\footnotesize{\textsuperscript{101} Van Gend en Loos v Administratie der Belastingen (1963).} \\
\footnotesize{\textsuperscript{102} Wiedmann (2006, pp. 201).} \\
\footnotesize{\textsuperscript{103} Wiedmann (2006, pp. 202).} \\
\footnotesize{\textsuperscript{104} Camerer; Kunreuther (1989).}
Case 10: Person A is not a citizen of a member state she resides. She is charged in a complicated way by a tax in a member state. After one year she realises that the tax is slightly larger than the same tax to citizens of the member state. Noteworthy, A is the first person who suffered from this tax and was charged by it. She argues the national rule in a domestic court which refers for a preliminary ruling. CJ decides that the national rule contradicts EU law. The government of the member state requests to limit temporal effects of the judgement due to potentially huge fiscal losses. It is clear that the government will charge the same higher tax to citizens of the member state. Thus, losers of a change are both the member state and citizens of it. However, the new tax regime will be sufficiently more welfare enhancing.

Box 11. The balance between general welfare and personal losses.

The situation is focused on the issue of persons (citizens of the member state) who became losers of the shift (even if the shift is welfare enhancing). The problem here is the lack of knowledge of citizens of the member state ex ante since they were unable to evaluate conformity of the national rule. In addition, there is always a risk that a judge may be biased by judging of what should have a person known at the moment of events\textsuperscript{105}. Should those citizens suffer from the situation that was clearly unknown to them before the judgement? Regarding to this, positive effects of learning process should be emphasized\textsuperscript{106}. Diversity of legal modes enables to experiment in their search for efficient and workable rules of law\textsuperscript{107}. In other words, even the inability to internalise risks should not be the only dominant factor for the question whether to apply the Doctrine or not if there is a scope for a new more efficient rule to emerge.

\textsuperscript{105} That is the effect of the hindsight bias. Rachlinsky (2000, pp. 99).
\textsuperscript{106} Hayek (1960, pp. 148–161).
\textsuperscript{107} Van den Bergh (2000, pp. 438).
Thus, learning effects could be among facets of the framework by creating proper incentives for persons to seek a better rule to be applied.

Another aspect emerging from the uncertainty could be the burden of compliance with EU law. According to behavioural insights uncertainty in this case can be over-estimated as a risk is highly visible or salient. In the light of existing information asymmetry between member states and persons regarding evaluation of factual compliance to EU legislation, there could be a distinction drawn by the Court taking more seriously matters when a large amount of persons is included, hence, creating a heavier burden on member states to comply with EU law.

First of all, even if persons in a member state are able to make a decision regarding the way of EU law implementation, an institutional system is not capable to maintain same preferences in both societal and institutional decision making levels. Individuals vote for their representatives and those representatives subsequently make decisive choices regarding public goods. However, a more observant look on feasible voting mechanisms of representatives reveals that they suffer from factual impossibility to channel preferences of individuals which is identified in Arrow’s impossibility theorem. In addition, the vast majority of decisions in modern democracies are taken by representative bodies and direct-democratic elements play only a minor role.

Thus, the mere ability to employ elements of direct democracy in a process of application of EU law makes representatives responsible for wasting such possibilities.

To be precise, representatives are able if not to announce referendum at least to ask members of a society for an opinion by using e-communication tools to obtain the position and have as comprehensive picture of attitudes and opinions as they can. In contrast, if the application of EU law is identified as a technical process, the

---

110 Arrow (1963, pp. 46–60).
111 Voigt (1997, pp. 44).
responsibility should not be shifted on members of the society of the member state as their abilities to determine the outcome are objectively restricted.

However, it could be argued that in terms of social welfare even if the burden to offset losses created by improper application of EU law is shifted to the member state, it will still use existing resources of budget to reimburse it. Although it is partly true, the burden should still be shifted to member states due to a few important reasons. Firstly, if the member state should reimburse the harm caused by its illegal actions, the source is in general the same as in other situations when the state uses its funds. Thus, the burden is dispersed equally on all members of the society in comparison to the burden placed on solely relevant persons. Secondly, if the burden is shifted on the member state it is easier for electing individuals to distinguish the amount of funds wasted due to the mistakes of the government. Thus, if the burden is partly on the side of relevant persons, it is more complicated to expose what part of resources was paid by those persons and what should have been recouped by the government. Such clarity could help to choose between more and less reliable politicians during elections.

4.3. Information asymmetry

The last but not the least bundle of critical insights is exposing quite distinct character. These are issues related to information asymmetry. As it was mentioned previously existing problems to assess effects of the Doctrine create particular behavioural issues as the lack of information is one of the reasons of the personal judgement error\textsuperscript{112}. The case law of the Court upraises issues of information asymmetry as particular elements of the Doctrine create complexity to ascertain specific situations and more information could help to circumvent this problem. There are at least three aspects of legal reasoning

\textsuperscript{112} Jolls; Sunstein; Thaler (2000, pp. 37).
when under the Doctrine member states suffer from information asymmetry: a diversity of the same issue judgements, a period needed to acknowledge the Commission has contributed to uncertainty and a variety of subject-matter of judgements.

First of all, there are many cases when national courts referred for a preliminary ruling from different member states but due to the same or at least similar legal issue. However, the limitation of temporal effect of a judgement could be carried out only if an actual judgement upon the interpretation sought\(^\text{113}\). It means that later reference for a preliminary ruling can be rejected by CJ as it encompasses questions revealed in one of the previous rulings. Anyhow, it can create misunderstanding on whether the question is the same or not and which of the rulings to follow. For example, in the case *Vroege v NCIV*\(^\text{114}\) the Court concluded that the limitation of effects in time in the *Barber*\(^\text{115}\) judgement does not apply to the right to join an occupational pension scheme and in this context there is no scope for any analogous limitation. It could be considered that at the time of the application of the Doctrine CJ can add a few additional statements in the reasoning regarding the subject-matter of a judgement in which the Doctrine is applied regarding fields which are not covered by a particular judgement and the precise temporal and territorial effects of the Doctrine as it might clarify the scope of the Doctrine to member states. In general, the Court should not be distant from the analysis of questions which are not subject-matter of a case as it might help to determine the efficient behaviour of different persons in the future and result in less waste of resources determined by misunderstandings of member states. Thus, more inclusive judgements could help to solve this informational deficiency.

Another important facet of CJ reasoning is one of arguments supporting the application of the Doctrine, i.e. the fact that the Commission contributed to uncertainty regarding a

\(^{113}\) Sürül (1999).

\(^{114}\) *Vroege v NCIV* (1994).

\(^{115}\) *Barber v Guardian Royal Exchange Assurance Group* (1990).
proper application of EU law. In a situation when factually the Commission contributed to uncertainty there is a variety of questions which add to uncertainty of member states at the same time. First of all, it is not clear what is the period of time needed to acknowledge that the Commission has not paid enough attention regarding the improper application of EU law. Thus, it might be useful to establish a period of termination of the possibility for the Commission to take actions upon a member state regarding an improper application of EU law. Secondly, the actual content of communications between a member state and the Commission should be analysed and prescribed in a more detailed and structural manner to make member states able to evaluate themselves whether they have provided enough efforts regarding the application of EU law and relevant information submitted to the Commission. Thus, respective CJ reasoning could be more elaborated and determine fundamental principles of what is the proper (is it feasible to introduce concept of good faith in this dimension as well?) communication flow from a member state to the Commission.

Finally, the analysis of the variety of cases with possible harsh consequences and situations when member states ask to apply the Doctrine might help to distinguish particular trends of what is really important in the light of consequences in particular cases. After all, for persons and member states it is important to know exactly what are the benefits, interests or consequences which are taken into account by CJ when it decides whether to apply the Doctrine. The universal rule regarding the legal reasoning obviously coincides with the economic idea of reduction of vagueness which determines the certainty and clearness for relevant persons: reasons in legal argumentation should be such that anyone would be bound to accept them. In other words, justification of the application of the Doctrine should be seen as an attempt to convince all reasonable

people of the rightness of a result\textsuperscript{118}. Thus, it should be inclusive and based not on merely particular individual cases.

To be more precise, one of the most widespread examples is cases when CJ deals with direct taxation issues\textsuperscript{119}. In these situations arguments for the application of the doctrine of temporal limitation are usually quite specific, related to economic repercussions of a member state (as particular interpretation of EU law might determine an unexpected budget deficit of the member state etc.). However, in other cases\textsuperscript{120} consequences related issues are of different character. For instance, the interrelated legal relationships might be difficult to resettle because of their complexity. Hence, the Court could start to reason by, first of all, focusing on the type of consequences in a particular case and then discussing only issues which are relevant to the particular type of cases. That would create more clearness for member states and courts which intend to ask to apply the Doctrine as they would know what type of arguments they should use due to peculiarities of a case in mind. Furthermore, it would also reduce the extent of CJ tasks as the Court would not need to ascertain irrelevant arguments in every case, i.e. argument from efficiency\textsuperscript{121} regarding of CJ workload could also be considered.

In addition, the created clearness of the Doctrine would not only serve as a tool to decrease costs of seeking information, it would also help to achieve higher level of predictability and certainty (apparently, matters of information and certainty are deeply interrelated). Less potential variables regarding the universalised rule would mean more possibilities for persons to conform to the rule entrenched by the Court\textsuperscript{122}. This way the

\textsuperscript{118} Bell (1986, pp. 49).
\textsuperscript{119} E.g. Uudenkaupungin kaupunki (2006).
\textsuperscript{120} E.g. Union royale belge des sociétés de football association and Others v Bosman and Others (1995).
\textsuperscript{121} Schauer (1991, pp. 146).
rule of CJ could enhance reliance on the framework of CJ by providing simplification as fewer possible outcomes would be perceived by persons concerned\textsuperscript{123}.

\textsuperscript{123} Schauer (1991, pp.139).
5. Conclusion

1. Dealing with consequences of judgements is a matter of economic analysis of law which may and should be harnessed by judges in order to achieve efficient outcomes of their decisions. One of dimensions of consequences is the temporality of judgements. The doctrine of temporal limitation of a judgement is a tool which enables the Court of Justice to prevent outcomes of the retroactive effect of a preliminary ruling which tend to be too costly. However, the introduction of such doctrine creates particular concerns regarding efficiency and incentives for interested persons.

2. The temporality is a concept differently applied in various fields of law. In general, there are strong arguments for the efficiency of the retroactivity of judgements if the new interpretation of a rule is welfare enhancing. However, in some occasions retroactivity poses effects which can be hardly overcome by particular persons. For instance, by creating too serious financial burden for persons who were not able to foresee such situation ex ante.

3. The doctrine of temporal limitation of a judgement of the Court of Justice is an attempt to balance the benefits of retroactivity and a possibility of derogations from the retroactivity in specific circumstances. In its framework of the reasoning regarding the doctrine of temporal limitation the Court includes arguments related to costs if the default rule of retroactivity is applied (such as the Commission’s contribution to uncertainty etc.) and arguments related to costs if the doctrine of temporal limitation is applied (such as an actual judgement upon the interpretation sought etc.). While reasoning judgements the Court tries to create positive incentives to persons and member states which offset negative effects of the doctrine of temporal limitation (first of all, uncertainty).
4. The framework of the reasoning of the Court of Justice is relatively vulnerable in the light of some concepts better known as market failures. The reasoning of the Court suffers from agency problems as it creates space for moral hazards and opportunistic behaviour for member states. In addition, the reasoning creates concerns related to uncertainty and information asymmetry. The analysed market failures created by the framework can be solved by some changes in the reasoning of the Court and more elaborate argumentation regarding the doctrine of temporal limitation of a judgement.
Appendix

List of judgements of the Court of Justice with the doctrine of temporal limitation considered

<table>
<thead>
<tr>
<th>Case No.</th>
<th>Date</th>
<th>Title of the case</th>
<th>Result (Was the Doctrine applied?)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>C-2/09</td>
<td>03/06/2010 Kalinchev</td>
<td>No</td>
</tr>
<tr>
<td>2</td>
<td>C-73/08</td>
<td>13/04/2010 Bressol and Others</td>
<td>No</td>
</tr>
<tr>
<td>3</td>
<td>C-292/04</td>
<td>06/03/2007 Meilicke and Others</td>
<td>No</td>
</tr>
<tr>
<td>4</td>
<td>C-313/05</td>
<td>18/01/2007 Brzeziński</td>
<td>No</td>
</tr>
<tr>
<td>5</td>
<td>C-290/05</td>
<td>05/10/2006 Nádasdi</td>
<td>No</td>
</tr>
<tr>
<td>6</td>
<td>C-228/05</td>
<td>14/09/2006 Stradasfalti</td>
<td>No</td>
</tr>
<tr>
<td>7</td>
<td>C-423/04</td>
<td>27/04/2006 Richards</td>
<td>No</td>
</tr>
<tr>
<td>8</td>
<td>C-184/04</td>
<td>30/03/2006 Uudenkaupungin kaupunki</td>
<td>No</td>
</tr>
<tr>
<td>9</td>
<td>C-402/03</td>
<td>10/01/2006 Skov and Bilka</td>
<td>No</td>
</tr>
<tr>
<td>10</td>
<td>C-209/03</td>
<td>15/03/2005 Bidar</td>
<td>No</td>
</tr>
<tr>
<td>No</td>
<td>Case Reference</td>
<td>Date</td>
<td>Party</td>
</tr>
<tr>
<td>----</td>
<td>----------------</td>
<td>------</td>
<td>-------</td>
</tr>
<tr>
<td>11</td>
<td>C-453/02</td>
<td>17/02/2005</td>
<td>Linneweber</td>
</tr>
<tr>
<td>12</td>
<td>C-347/00</td>
<td>03/10/2002</td>
<td>Barreira Pérez</td>
</tr>
<tr>
<td>13</td>
<td>C-366/99</td>
<td>29/11/2001</td>
<td>Griesmar</td>
</tr>
<tr>
<td>14</td>
<td>C-184/99</td>
<td>20/09/2001</td>
<td>Grzelczyk</td>
</tr>
<tr>
<td>15</td>
<td>C-372/98</td>
<td>10/10/2000</td>
<td>Cooke</td>
</tr>
<tr>
<td>16</td>
<td>C-177/99</td>
<td>19/09/2000</td>
<td>Ampafrance</td>
</tr>
<tr>
<td>17</td>
<td>C-104/98</td>
<td>23/05/2000</td>
<td>Buchner and Others</td>
</tr>
<tr>
<td>18</td>
<td>C-437/97</td>
<td>09/03/2000</td>
<td>EKW and Wein &amp; Co.</td>
</tr>
<tr>
<td>19</td>
<td>C-126/95</td>
<td>03/10/1996</td>
<td>Hallouzi-Choho v Bestuur van de Sociale Verzekeringsbank</td>
</tr>
<tr>
<td>20</td>
<td>C-308/93</td>
<td>30/04/1996</td>
<td>Bestuur van de Sociale Verzekeringsbank v Cabanis-Issarte</td>
</tr>
<tr>
<td>21</td>
<td>C-197/94</td>
<td>13/02/1996</td>
<td>Bautiaa and Société française maritime v Directeurs des services fiscaux des Landes and du Finistère</td>
</tr>
<tr>
<td>22</td>
<td>C-137/94</td>
<td>19/10/1995</td>
<td>The Queen v Secretary of State for Health, ex parte Richardson</td>
</tr>
<tr>
<td>23</td>
<td>C-415/93</td>
<td>15/12/1995</td>
<td>Union royale belge des sociétés de football association and Others v Bosman and Others</td>
</tr>
<tr>
<td>24</td>
<td>C-57/93</td>
<td>28/09/1994</td>
<td>Vroege v NCIV</td>
</tr>
<tr>
<td>25</td>
<td>C-377/93</td>
<td>07/07/1993</td>
<td>Roders and Others v Inspecteur der Invoerrechten en Accijnzen</td>
</tr>
<tr>
<td>Case No.</td>
<td>Ref.</td>
<td>Date</td>
<td>Case Title</td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
<td>--------</td>
<td>-----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>26</td>
<td>C-163/90</td>
<td>16/07/1992</td>
<td><em>Administration des douanes and droits indirects v Legros and Others</em></td>
</tr>
<tr>
<td>27</td>
<td>C-200/90</td>
<td>31/03/1992</td>
<td><em>Dansk Denkavit and Poulsen Trading v Skatteministeriet</em></td>
</tr>
<tr>
<td>28</td>
<td>C-262/88</td>
<td>17/05/1990</td>
<td><em>Barber v Guardian Royal Exchange Assurance Group</em></td>
</tr>
<tr>
<td>29</td>
<td>C-24/86</td>
<td>02/02/1988</td>
<td><em>Blaizot v Université de Liège and Others</em></td>
</tr>
<tr>
<td>30</td>
<td>C-142/80</td>
<td>27/05/1981</td>
<td><em>Amministrazione delle finanze dello Stato v Essevi and Salengo</em></td>
</tr>
<tr>
<td>31</td>
<td>C-69/80</td>
<td>11/03/1981</td>
<td><em>Worringham and Humphreys v Lloyds Bank</em></td>
</tr>
<tr>
<td>32</td>
<td>C-826/79</td>
<td>10/07/1980</td>
<td><em>Amministrazione delle finanze dello Stato v MIRECO</em></td>
</tr>
<tr>
<td>33</td>
<td>C-66/79</td>
<td>27/03/1980</td>
<td><em>Amministrazione delle finanze dello Stato v Salumi</em></td>
</tr>
<tr>
<td>34</td>
<td>C-61/79</td>
<td>27/03/1980</td>
<td><em>Amministrazione delle finanze dello Stato v Denkavit italiana</em></td>
</tr>
<tr>
<td>35</td>
<td>C-43/75</td>
<td>08/04/1976</td>
<td><em>Defrenne v SABENA</em></td>
</tr>
</tbody>
</table>
References

Case law


42. *Bressol and Others*. Judgement of the Court of Justice of 13 April 2010, Case No. C-73/08, ECR I-02735.


**Other sources**


95. Wiedmann, A. (2006). Non-retroactive or prospective ruling by the Court of Justice of the European Communities in preliminary rulings according to Article 234 EC, *The European Legal Forum*, (E) 5/6-2006, pp. 199 et seq.