

Supreme Court

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Obligation of the Supreme Court to request a preliminary ruling from the Court of Justice of the European Union

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Background to the case and the question to be addressed

The applicant companies had sued the state for damages incurred in the payment of fairway dues that they claimed had been levied in breach of European Union law. In its precedent KKO 2017:84, the Supreme Court had dismissed the claims as time-barred.

In their extraordinary appeal on the basis of procedural fault, the companies had requested that the precedent KKO 2017:84 be nullified on the grounds that the case should not have been decided without seeking a preliminary ruling from the Court of Justice of the European Union on the interpretation of the principle of effectiveness in relation to the limitation of claims for damages. According to the companies, it was subject to interpretation how the principle of effectiveness should be applied to the commencement of the limitation period. The companies claimed that the case law of the Court of Justice to which the Supreme Court had referred had not been established and the case law referred to concerned situations different to the present case. In addition, the Supreme Court had failed to refer to case law that was contrary to the case law referred to (judgment of 19 May 2011, *Iaia*, C-452/09, EU:C:2011:323).

The case involved the question of whether a procedural error had occurred in the Supreme Court proceedings, in that the Supreme Court had not requested a preliminary ruling from the Court of Justice on the interpretation of the effectiveness principle, before issuing its judgment in KKO 2017:84.

The obligation to request a preliminary ruling

The Supreme Court explained the provisions contained in Article 267 (1) and (3) of the Treaty on the functioning of the European Union (TFEU) and the consequent obligation of the highest appeal court to request a preliminary ruling from the Court of Justice. The Supreme Court noted that the purpose of the preliminary ruling procedure was to prevent the emergence of national case law that would be in conflict with EU law and to ensure that EU law is applied as uniformly as possible in all Member States.

Under established Court of Justice practice, the obligation to submit a request for a preliminary ruling is determined on the basis of the so-called *Cilfit* criteria. According to these criteria, a preliminary ruling need not be requested where there is no reasonable doubt as to the interpretation of a provision of EU law, if the Court of Justice has already interpreted the provision of EU law in question in a materially identical situation or if the answer can be clearly derived from the established case law of the Court of Justice.

The Court noted that, under national law, a final judgment may be nullified by means of an extraordinary remedy if a procedural error had occurred in the proceedings that was deemed to have or may be presumed to have materially influenced the decision in the case. The Supreme Court confirmed that a breach of a procedural provision in European Union law, such as Article 267 (3) of TFEU, could constitute such a procedural error.

The Supreme Court noted that it had the obligation also on its own initiative to assess whether, in a case before it, there was a need to submit to the Court of Justice a request for the interpretation of a provision of European Union law. However, in general the national courts themselves apply EU law. The purpose of requesting a preliminary ruling is to obtain an interpretation of European Union law, but not to determine how European Union law is to be applied to the facts raised in the main proceedings.

Assessment by the Supreme Court

The Supreme Court noted that what was at issue in the present case was not that the Court of Justice would have subsequently issued a judgment that would have shown that the Supreme Court had incorrectly assessed the requirements of EU law in relation to the national provisions on the application of limitation periods to a debt. However, when assessing whether the Supreme Court should have submitted a request for a preliminary ruling, what was decisive was whether the Court of Justice had issued a preliminary ruling in a materially identical question or whether the case law established through its judgments would have been so established that the answer could clearly be inferred from it.

The Supreme Court noted that the principle of effectiveness had originated and been developed in the case law of the Court of Justice. The principle of effectiveness is generally described as requiring that national procedural rules should not be such as to make it impossible or excessively difficult in practice to exercise rights conferred by EU law. The Supreme Court noted that a question concerning the interpretation of a legal principle such as this can also constitute an obligation to request a preliminary ruling.

The Court of Justice has issued several judgments that deal with the relationship between the limitation period under national law and the principle of effectiveness. For example, the Supreme Court precedent KKO 2017:84 refers, among other judgments, to the judgment of the Grand Chamber in *Danske Slagterier* (24 March 2009, C-445/06, EU:C:2009:178). *Danske Slagterier*, for example, dealt with the relationship between the limitation period under national law and the principle of effectiveness in a case that corresponded to the present one, in which a private entity brings an action against the state for compensation based on alleged infringement of EU law. Having set out these judgments of the Court of Justice, the Supreme Court deemed that the judgment in the *Iaia* case referred to by the applicants was not, in the manner asserted by the applicants, in conflict with earlier or with subsequent case law of the Court of Justice.

In its case law, the Court of Justice has consistently held that the onset of the limitation period may be blocked by the principle of effectiveness only if the actions of a national authority in conjunction with a preclusive limitation period had resulted in a situation where a person has completely lost the opportunity to assert his or her rights before the national authorities or the national courts.

According to the Court of Justice, in itself the maintenance in force of legislation that is in breach of EU law and the application of such legislation in the making of administrative decisions does not constitute conduct by a public authority which would prevent a person from asserting his or her rights. It has also been established that, notwithstanding the principle of effectiveness, the limitation period may start to run even if the state keeps in force legislation that is in breach of EU law (e.g. the judgments in *Danske Slagterier* and in *Iaia*, in which there is a clear distinction to the judgment in *Emmott* 25 July 1991, C-208/90, EU:C:1991:333).

It is also clear from the case law of the Court of Justice that, without prejudice to the principle of effectiveness, the limitation period may also run in the course of an action brought by the Commission against a Member State for failure to uphold its obligations, and thus before the Court of Justice has ruled that EU law has been infringed.

Conclusion

The Supreme Court held that the interpretation provisions that are necessary for the application of the principle of effectiveness are laid out in, and can at least be clearly drawn from, the established case law of the Court of Justice. No new issue regarding the interpretation of the principle of effectiveness has emerged in the present case which would have required a request for a preliminary ruling. The fact that the circumstances in the case differed from the circumstances in cases in which the Court of Justice has issued a judgment has not given rise to a need to request a preliminary ruling. No procedural error had been made in the consideration of the case. The Supreme Court rejected the application.

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