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Peer review article

Olli Norros, Associate Professor, University of Helsinki

May the Ten-year Limitation Period in the Finnish Limitation Act Contradict the Principle of Effectiveness in EU Law?

1 Introduction

Like most of the central legal questions in the field of civil law, the question of when a debt becomes time-barred is not harmonised within the EU, apart from certain specific situations where EU law contains substantive provisions on the basis of liability as well as the limitation period for such liability. As examples of the latter type of norms, one may note Article 10 of the Directive 2014/104/EU, regarding liability for damages in a case of an infringement of EU competition law, and Articles 10–11 of the Directive 85/374/EEC, regarding product liability. Apart from such specifically regulated situations, the question of limitation of actions – or, as *Reinhard Zimmermann* recommends it to be called, *liberative prescription*[1] – is governed by rules at national level. This applies even in situations where the grounds of the claim itself are based on EU legislation. In other words, unless otherwise provided in EU law, the enforcement of rights based on EU law takes place under the existing national remedies and procedural rules.[2] This principle is often referred to as the principle of *national procedural autonomy*. Likewise, the question of when a monetary

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[1] Reinhard Zimmermann, Comparative Foundations of a European Law of Set-Off and Prescription. Cambridge University Press 2002, p. 69–75.

[2] See, e.g., Michael Dougan, The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts, p. 407–438 in Paul Craig – Gráinne de Búrca (eds), The Evolution of EU Law. Second Edition. Oxford University Press 2011, p. 411; Renato Nazzini, Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law, p. 401–436 in Catherine Barnard – Okeoghene Odudu (eds), The Outer Limits of European Union law, Bloomsbury Publishing Plc 2009, p. 406; Leif Sevón, Kansallinen tuomari yhteisön tuomarina: prosessiautonomian periaate ja sen rajat. Defensor Legis 1/2003, p. 3–12, 3–4; Paul Craig – Gráinne de Búrca, EU Law. Text, Cases, and Materials. Sixth Edition. Oxford University Press 2015, p. 226–227; Katri Havu, Private Enforcement of EU (Competition) Law – Remarks and Outlooks Regarding

claim becomes time-barred falls under the scope of the said principle, regardless of whether the norms regarding limitation of actions are understood as procedural or material by their nature.[3]

There are two well-established exceptions to the principle of national procedural autonomy. First, the *principle of equivalence* requires that the remedies and forms of actions available to ensure the observance of national law must be available in the same way to ensure the observance of EU law. Secondly, national procedural rules must not render virtually impossible or excessively difficult the exercise of rights conferred by EU law. This is the so-called *principle of effectiveness*.[4]

The scope of this article is to analyse, whether, and if so, under which circumstances the ten-year limitation period enacted in Section 7(2) of the Finnish Limitation Act[5] (15.8.2003/728; in Swedish *Lag om preskription av skulder*; in Finnish *Laki velan vanhentumisesta*) may become inconsistent with the principle of effectiveness.[6]

The Limitation Act regulates as a general statute the question of when a debt becomes time-barred, meaning that it cannot be collected anymore. As regards the length and point of commencement of the limitation period, the Limitation Act is structured so that there are different provisions for different types of debts. Section 7 of the Act regulates the limitation of liability for damages and corresponding debts. The structure of the provision reflects a typical modern two-tier prescription norm: in generic terms, Section 7(1) provides that the so-called general limitation period of three years enacted in Section 4 starts to run from the moment the grounds for the claim became observable, as specified more in detail in Section 7(1) for different types of damage claims.

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the Intertwinement of EU and National Law. Tidskrift utgiven av Juridiska Föreningen i Finland (JFT) 1–2/2014, p. 55–72, 56–57.

[3] See, e.g., Case C-188/95 *Fantask A/S e.a. v Industriministeriet (Erhvervministeriet)* [1997] ECR I-06783, paras 42–52.

[4] See, e.g., Case 33-76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989, para 5; Case 45/76 *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 02043, paras 12–16; Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 03595, paras 12, 14; Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-04599, para. 12; Case C 246/09 *Susanne Bulicke v Deutsche Büro Service GmbH* [2010] ECR I-07003, para. 25.

[5] The Limitation Act does not, despite of its importance, belong to those 1040 Finnish statutes of which there is an unofficial English translation published in the free online service Finlex <www.finlex.fi>, upheld by the Finnish Ministry of Justice. Therefore, in this article all translations from the original Finnish legal text, as regards the Limitation Act, are made by the author.

[6] This article is partly based on an expert legal opinion issued by the author in a certain foreign litigation.

Section 7(2) provides that prescription of a claim must anyhow be interrupted before ten years have passed from the breach of contract or the event that led to the damage. In other words, Section 7(2) enacts a so-called secondary limitation period of ten years, which starts to run from the breach of contract or the event that led to the damage. However, personal injuries and environmental damages are specifically excluded from the scope of the ten-year limitation period (second sentence of Section 7(2)). Therefore, liability for such types of loss is excluded also from the scope of this section.

A central feature in the limitation period enacted in Section 7(2) is that commencement of it does not require that the creditor, i.e. the injured party, is aware or that he[7] even could be aware of existence of his right to performance. In this sense, the limitation period of Section 7(2) may be described as *knowledge-insensitive* in contrast to such *knowledge-sensitive* limitation periods, where commencement requires that the creditor has or ought to have become aware of his right. An example of the latter type of limitation period is the one enacted in Section 7(1).

The knowledge-insensitive nature of the limitation period of Section 7(2) is crucial also as regards its relation to the principle of effectiveness, because this feature makes it possible that a debt belonging to the scope of Section 7(2) may expire so that the creditor was never aware of it. If the debt in question has its grounds in EU law – for example, if the debt is compensation for loss incurred by infringement of EU law – one may ask, if the said limitation period has rendered 'virtually impossible or excessively difficult' to enforce a right conferred by EU law.

Anyhow, it must be stressed that according to the Court of Justice of the European Union (CJEU), the principle of effectiveness must be assessed '*on a case by case basis, taking account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made*'.[8] In other words, the compliance of a provision of national law, such as a certain limitation period, with the principle of effectiveness is not a question whether such limitation period *in abstracto* contradicts the principle of effectiveness. Instead, it is always a question of a party's possibility to enforce his right in this very case.[9]

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[7] In this article, such legal positions as debtor, creditor etc. are, for the sake of simplicity, referred to with the pronoun 'he', covering also female subjects as well as inanimate legal subjects such as companies or associations.

[8] Case C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875, para. 37.

[9] Takis Tridimas, The General Principles of EU Law. Second Edition. Oxford University Press 2006, p. 432; Craig – de Búrca 2015, p. 240.

Thus, also the analysis in this article cannot aim to a categorical conclusion, such as finding the limitation period of Section 7(2) either accordant or inconsistent with the principle of effectiveness. Consequently, we must content ourselves with 1) analysing the relation between Section 7(2) and the principle of effectiveness on a general level, and 2) recognising certain factual circumstances that could in an individual case affect the outcome of such analysis. However, before addressing those questions, we will start with a brief review of the substance and objectives of both the principle of effectiveness and Section 7(2) of the Limitation Act.

2 Generally on the Principle of Effectiveness

The background of the principle of effectiveness is the decentralisation of the judicial system of EU law: national courts are the primary venue for the assertion of rights based on EU law.[10] Because the EU legislation does not contain generally applicable rules on legal remedies for different kinds of rights based on EU law or procedural rules for litigation concerning such rights, such legal questions are normally determined by the applicable national jurisdiction. This starting point is, as mentioned below, often referred to as the principle of procedural autonomy. However, it has been noted that talking about procedural autonomy has nowadays become misleading. That is because certain generally applicable principles have emerged within EU law, which delimits the possibilities of a national judge to assess questions of remedies and procedural issues merely from the viewpoint of national jurisdiction.[11]

There does not seem to be any predominant method for categorising and systematising such principles, but different authors may discern the principles somewhat differently. The two most clearly defined of those principles are the aforementioned principles of equivalence and effectiveness, but also the *principle of sincere cooperation*,[12] manifested in Article 4(3) of the Treaty on European Union, the

[10] Tridimas 2006, p. 419; Tuomas Ojanen, EU-oikeuden perusteita. 3., uudistettu laitos. Edita 2016, p. 98–99.

[11] Ojanen 2016, p. 99; accordingly Havu 2014, p. 56–57. See also Nazzini 2009, p. 405–410, who criticises the concept of procedural autonomy from the viewpoint that the concept of 'right' to something on grounds of EU law is too ambiguous, making it meaningless to assess the adequacy of judicial protection of such 'right'.

[12] Juha Raitio, Euroopan unionin oikeus. Talentum Pro 2016, p. 207.

requirement of *proportionality*,[13] the *principle of access to justice,*[14] the *principle of full effectiveness of EU law*[15] and the requirement of *adequate judicial protection*[16] have been raised as independent restrictions to the procedural autonomy.

The requirement of adequate judicial protection is of particular interest here, because it may go even beyond the principle of effectiveness and require that of the possible ways of handling an EU law based claim, the way which most contributes to achieving the goals of the EU should be selected.[17] However, the case-law of the CJEU indicates that the requirement of adequate judicial protection rises mostly in certain other kinds of cases, such as cases concerning sufficiency of remedies and compensation, rather than cases focusing on admissibility of certain detailed procedural rules, such as rules of limitation periods.[18] For example, in the case *Von Colson*, which is understood as manifesting the requirement of adequate judicial protection,[19] the core question was whether national rules determining compensable heads of loss led to sufficient compensation in case of infringement of EU law.[20] As regards the question of admissibility of a national limitation period, the CJEU seems to base its assessment mainly – or even merely – on the conventional principles of equivalence and effectiveness.[21]

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[13] Craig – de Búrca 2015, p. 229.

[14] Ojanen 2016, p. 100.

[15] Nazzini 2009, p. 414–417.

[16] Nazzini 2009, p. 414–417; Craig – de Búrca 2015, p. 230–231; Havu 2014, p. 59–60.

[17] Havu 2014, p. 59.

[18] Accordingly Craig – de Búrca 2015, p. 238.

[19] Craig – de Búrca 2015, p. 230; Havu 2014, p. 59.

[20] Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891.

[21] However, one may note the Case C-208/90 *Theresa Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-04269. The CJEU held that in a case where transposing of a Directive has been neglected by a Member State, a national limitation period for a damage claim against the Member State could not begin to run before proper transposing of the Directive in question. That was so despite of that the national limitation period, according to the CJEU, 'in principle satisfies' the requirements of equivalence and effectiveness (see paras 16–17). However, the CJEU seems to have taken a step back from the more or less interventionist approach adopted in *Emmott* in more recent cases C-338/91 *H. Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-05475 and C-410/92 *Elsie Rita Johnson v Chief Adjudication Officer* [1994] ECR I-05483. In those cases the facts were quite similar to the ones in *Emmott* and they were decided on grounds of the conventional principles of equivalence and effectiveness. On these cases, see Craig – de Búrca 2015, p. 235–236, stating that '[t]he broader principle articulated in *Emmott* – – – was abandoned in *Steenhorst-Neerings*'.

A similar conclusion has recently been drawn by Advocate General Wahl in his opinion in the case *Skanska*,[22] regarding the question whether in a private law action for damages a company, which has continued the economic activity of a cartel participant, may be held liable to pay compensation for harm caused by a breach of Article 101 TFEU. A crucial preliminary question for this assessment was, whether the determination of which parties are liable for compensation of harm caused by conduct contrary to Article 101 TFEU is to be done by applying that provision directly or on the basis of national provisions. If national norms were applicable, this would potentially rise the question of admissibility of such norms in respect of the principles of equivalence and effectiveness.

Advocate General Wahl approached the question noting that 'the classic test of equivalence and effectiveness is applied only in relation to "detailed rules governing the exercise of the right to claim compensation" before national courts'. Thus, according to Wahl, 'that test is applied with regard to rules that (in one way or another) relate to the *application* of the right to claim compensation before a court of law'. Such rules are to be laid down by the Member States. In contrast, 'where the constitutive conditions of the right to claim compensation are at stake (such as causation), such conditions are examined by reference to Article 101 TFEU'.[23] Wahl regarded the question of determination of the liable parties as belonging to the latter group of questions, and assessed the question directly on the basis of Article 101 TFEU with a conclusion that an economic successor of a cartelist is liable of breach of the said Article. The CJEU came to the same conclusion on mainly similar grounds but without outlining the scope of the principles of equivalence and effectiveness as Wahl did.

In legal literature, three phases have been identified in the development of the principle of effectiveness in the case-law of the CJEU. The first phase was the one of non-intervention. During these years, CJEU's approach was to intervene in questions of remedies and procedural issues as little as possible, and thus secure national procedural autonomy.[24] The case *Rewe* has been raised as a notable example of case-law in the non-interventionist era of the principle of effectiveness.[25] A German importer of French apples had been obliged to pay charges for phytosanitary inspection. Those charges were later regarded as equivalent to customs duties and thus contrary to EU

[22] Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy* [2019].

[23] Case C-724/17 *Skanska*, opinion of Advocate Genaral Wahl, paras 40–41.

[24] Tridimas 2006, p. 420; Juha Raitio, Kommentti Courage ja Crehan -tapauksen tulkintaan tehokkuusperiaatteesta julkisyhteisöjen vahingonkorvausvastuun näkökulmasta. Defensor Legis 4/2014, p. 654–660, 654. Accordingly Craig – de Búrca 2015, p. 226–229.

[25] Case 33-76 *Rewe*.

legislation. However, at that time the importer had already lost his right to claim back the unlawfully collected charges, because a limitation period in national legislation for such refund claim had elapsed. The importer tried to challenge the limitation period, but according to the CJEU, the applicable national time limits could be questioned only 'if the conditions and time limits made it impossible in practice to exercise the rights' conferred by EU law. According to the CJEU, '[t]his is not the case where reasonable periods of limitation of actions are fixed'.[26]

As the case-law developed, the emphasis of the CJEU shifted from the requirements of non-discrimination and minimum protection to the need to provide effective remedies for the breach of rights conferred by EU law. The CJEU was prepared to require the removal of all obstacles posed by national law that prevent the full and effective enforcement of rights based on EU law.[27] As an illustrative example of this interventionist era one may refer to the case *Factortame*.[28] A number of companies, mainly of Spanish origin, had owned 95 fishing vessels altogether which were registered in the register of British vessels. However, the statutory system governing the registration of British fishing vessels was radically altered in order to put a stop to the practice known as 'quota hopping' whereby, according to the United Kingdom, its fishing quotas were 'plundered' by vessels flying the British flag but lacking a genuine link to the United Kingdom. The legislation was altered so that a registration to the British fishing vessels register provided, *inter alia*, that the vessel in question was British-owned and was managed from within the United Kingdom. The new legislation precluded the appellant companies from registering their vessels as British fishing vessels, and thus prevented the companies from continuing their business.

The companies challenged the new regulation's compatibility with EU law and applied for the grant of interim relief until final judgment was given on their application for judicial review. The application for interim relief was dismissed in national courts because according to national law, the courts had no power to grant interim relief in such a case. The grant of such relief was precluded by an old common-law rule saying that an interim injunction may not be granted against the Crown, i.e. against the government, in conjunction with the presumption that an Act of Parliament is in conformity with EU law until a decision on its compatibility with that law

[26] Case 33-76 *Rewe*, para. 5.

[27] Tridimas 2006, p. 420–421; Raitio 2014, p. 654; Craig – de Búrca 2015, p. 231–235.

[28] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433.

has been given. The CJEU, however, quashed this argument stating that the full effectiveness of EU law provides that a rule of national law cannot prevent a court from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law. According to the CJEU, a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.[29]

The interventionist approach was not the end of the story, at least not so far. In the 1990's the line of thinking of the CJEU became yet again more moderate. After that, the chief feature in case-law has been a kind of selective deference to the national rules of procedure. This has taken the form, *inter alia*, of a tendency to leave discretion to national courts in determining whether the national rules of procedure provide a sufficient level of protection for the rights based on EU law in the issue at hand.[30]

The nature of the principle of effectiveness as a legal norm is somewhat ambiguous. If we focus on the wording of the CJEU's description of the said principle, i.e. a prohibition for national procedural rules to 'render virtually impossible or excessively difficult the exercise of rights conferred by EU law', this does not give the picture of a legal principle in the normal sense. According to well-known words of *Robert Alexy*, legal principles may be understood as *optimisation requirements*, i.e. norms which require that something be realised to the greatest extent possible given the legal and factual possibilities.[31] However, the concept of optimisation requirement does not suit the principle of effectiveness too well, because the said principle gains legal effect only in a situation, where the exercise of rights conferred by EU law would become 'virtually impossible or excessively difficult' because of a national procedural norm. In a situation where such discrepancy does not exist, the national norm is applied as it would be applied where the right to be exercised is based on purely national law.[32]

On the other hand, the principle of effectiveness is also described as a 'weighing norm' and its application always requires consideration of other principles of EU law.[33] In addition, the nature of the principle of effectiveness as a legal norm is

[29] Case C-213/89 *Factortame*, para. 21.

[30] Tridimas 2006, p. 421; Craig – de Búrca 2015, p. 235–237, 239; see also Raitio 2014, p. 655.

[31] Robert Alexy, A Theory of Constitutional Rights. Translated by Julian Rivers. Oxford University Press 2002, p. 47–48.

[32] See Katri Havu, Oikeus kilpailuoikeudelliseen vahingonkorvaukseen EU:n ja Suomen oikeudessa. Suomalainen Lakimiesyhdistys 2013, p. 146, 253–254.

[33] Raitio 2014, p. 655.

blurred by ambiguousness in its relationship to the requirement of adequate judicial protection[34] as well as to the principle of full effectiveness of EU law.[35]

However, at least in the context of norms of liberative prescription, the nature of the principle of effectiveness as a legal norm appears as quite straightforward, as shown in the case-law of the CJEU which is analysed in detail in Chapter 4 below. Either a national limitation norm is found contrary to the principle of effectiveness, which leads the said norm to being set aside in that very case, or the national norm is not problematic in this sense, which leaves the case at hand to be decided on the basis of the norm as it is. In other words, at least in context of limitation norms, there does not seem to be an option that a national limitation norm, which would delimit materialisation of a EU law based right to some extent but not rendering it 'virtually impossible or excessively difficult', could be rewritten in a more EU friendly form.[36]

3 Generally on Section 7(2) of the Limitation Act

As mentioned above, Section 7(2) of the Limitation Act provides for a ten-year limitation period commencing from the moment of breach of contract, in case of contractual liability, or from the event that led to the damage, if liability in the case is based on extra-contractual liability norms. In parallel to the ten-year limitation period of Section 7(2), there is a three-year limitation period, which starts to run from the moment the injured party has or ought to have become aware of, in case of contractual liability, the breach of a contract, and in case of extra-contractual liability, the loss and the party liable of it (Section 7(1)). Lapsing of either of these two limitation periods leads to liberative prescription of the debt, regardless how much is left of the other limitation period. It is also worth noting that when the three-year limitation period starts to run, this does not by any means supersede the ten-year limitation

[34] Havu 2014, p. 59–60; Nazzini 2009, p. 403.

[35] For an illustrative example, see the reasoning of the CJEU in a recent case C-637/17 *Cogeco Communications Inc v Sport TV Portugal SA and Others* [2019], paras 43–48.

[36] See also Havu 2014, p. 63–64, who warns about possible problems if a court exaggerates safeguarding of full effect of EU law over applicable national norms. Accordingly Juha Raitio, Oikeusvaltioperiaate, oikeusvarmuus ja koherenssi Euroopan unionin kilpailuoikeudessa. Defensor Legis 1/2019, p. 58–68, 66–68.

period regarding the same damage claim, but both limitation periods run independently of each other and, in case of expiry of one of them, lead to prescription of the claim.[37]

The function of the three-year limitation period is to push an injured party to present his claim for damages or otherwise disclose to the liable party his opinion of his right to compensation within a certain limited time, i.e. three years. Thus, the purpose of the three-year limitation period is to prevent unnecessary procrastination on the creditor's part. On the other hand, the rule regarding commencement of the three-year limitation period protects the creditor in a sense that the limitation period does not start to run at all if the creditor is not and even could not reasonably be aware of existence of his right.[38] In other words, Section 7(1) grants the creditor three years of 'efficient playing time' to bring an action against the liable party.

In most cases, the grounds for a damage claim are revealed to the injured party quite soon after the emergence of the claim, and thus the question of liberative prescription is determined merely on the basis of the three-year limitation period. However, this is not always the case. Sometimes it takes a long time before the economic consequences of a certain damaging act appear. For example, in the Finnish Supreme Court case KKO 2013:72 an attorney had made a mistake in 1997 when drafting a statement of claim. The claim was victorious, but because of the mistake, the client received only a small part of the compensation she could have received. This unfortunate outcome was completely confirmed no earlier than in 2007. The client's compensation claim towards the attorney was dismissed as time-barred, because at the time of the claim, just over ten years had lapsed from the time the attorney filed the ill-fated statement of claims.

On the other hand, it may happen that a party has suffered certain loss without knowing it, until the situation is revealed to him years later. Such a situation may occur, for example, in a case where a party has been a customer to a member of a cartel, and because of the cartel, has been forced to pay overprice of the product in question.

The function and significance of Section 7(2) appear in these kinds of situations. The function of the said section is to provide a sort of fixed deadline for the injured party to take action in order to pursue his rights in case the damage remains unobserved for several years. Without the ten-year limitation period, which starts to run irrespective of the injured party's awareness of the damage, there would be no restric-

[37] Olli Norros, Obligationsrätt. Alma Talent 2018, p. 585.

[38] Regeringens proposition till Riksdagen med förslag till en reform av lagstiftningen om preskription av skulder och offentlig stämning 187/2002 rd, p. 17–18.

tion of how far in the future the settling of the claim could be postponed. This possibility would impede risk management, increase uncertainty and compel courts to decide cases on an uncertain basis, as most of the necessary evidence would have been lost or become unreliable. For these reasons, the 'long-stop' prescription period of ten years has been regarded as an inherent part of the Limitation Act[39] like corresponding statutes in many other legal systems.[40]

4 Starting Points for the Assessment of Section 7(2) in the Light of the Principle of Effectiveness

4.1 General Remarks

In theory, if one were to strive for maximum enforcement and effectiveness of EU law, one could argue that national limitation periods are always a threat to the ultimate effectiveness of EU law and should be set aside without further investigation. That is because once a limitation expires and liberative prescription occurs in case of a claim based on EU law, this prevents enforcement of the claim for good. However, this is obviously not the way the CJEU has approached the issue. Quite the contrary, the CJEU has clearly recognised the admissibility and importance of reasonable limitation periods.

In the case *Pohl*, the CJEU held that 'it is compatible with European Union law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty to the extent that such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law'.[41] In *Bulicke*, the CJEU stated that when analysing the admissibility of a national limitation period in the light of the principle of effectiveness 'account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure'.[42] In *Compass* it was first stated that 'it is compatible with EU

[39] See, e.g., RP 187/2002 rd, p. 20, 52 and the Finnish Supreme Court precedent KKO 2016:98, paras 4–7.

[40] See, e.g., Article 11 of the Directive 85/374/EEC, Section 199(3)(1) of the German *Bürgerliches Gesetzbuch* (BGB), Section 3(3)(2)–(3) of the Danish Limitation Act (*Lov om forældelse af fordringer*) and Section 10(4) of the Norwegian Limitation Act (*Lov om foreldelse av fordringer (foreldelsesloven)*).

[41] Case C 429/12 *Siegfried Pohl v ÖBB-Infrastruktur AG* [2014], para. 29.

[42] Case C 246/09 *Bulicke,* para. 35.

law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned'. According to the CJEU, '[s]uch periods are not by their nature liable to make it virtually impossible or excessively difficult to exercise the rights conferred by EU law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought'.[43] In *Asturcom Telecommunicaciones,* it was also noted that 'the principle of effectiveness cannot be stretched so far as to – – – make up fully for the total inertia' of the creditor.[44]

Moreover, one has to keep in mind the wording customarily used by the CJEU when referring to the principle of effectiveness, i.e. that the exercise of rights conferred by EU law must not be rendered 'virtually impossible or excessively difficult' by the national procedural rules. The wording indicates that the threshold for intervening national procedural rules with the principle of effectiveness is intended to be remarkably high.

4.2 Criteria of Manfredi

In the case-law of the CJEU, there are many cases where a certain feature of a national limitation norm is raised as being prone to challenge the admissibility of that norm in respect of the principle of effectiveness.[45] Probably the best known of these cases is *Manfredi*, where problematic features of prescription norms were outlined on a quite general level.[46] In the case, the appellant claimed partial repayment of charges of compulsory civil liability auto insurance, because it had been revealed that the insurance companies providing such insurances had formed a cartel. The companies objected the claim alleging, *inter alia*, that their possible liability had become time-barred by virtue of national rules on liberative prescription. The appellant objected to this allegation claiming that the national prescription rules led to an outcome contrary to the principle of effectiveness.

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[43] Case C-38/16 *Compass Contract Services Limited v Commissioners for Her Majesty's Revenue and Customs* [2017], para. 42.

[44] Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579, para. 47.

[45] For a compact survey, see Craig – de Búrca 2015, p. 242–243.

[46] Joined cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) *and Nicolò Tricarico* (C-297/04) *and Pasqualina Murgolo* (C-298/04) *v Assitalia SpA* [2006] ECR I-06619.

The CJEU left the final decision in this question to the national court, but outlined the criteria for the assessment. According to the CJEU, '[a] national rule under which [1] the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes [2] a short limitation period which [3] is not capable of being suspended' (numbering by the author).[47] It is worth noting that these three features, i.e. the length of a limitation period, the starting point thereof and the possibility for the period to be interrupted or suspended may be generally understood as the 'cornerstones' of prescription norms – the features that mostly determine the level of harshness of such norms.[48]

When the features described by the CJEU in *Manfredi* are contrasted with Section 7(2) of the Limitation Act, this indicates that Section 7(2) is at least in the clear majority of cases admissible with regard to the principle of effectiveness.

Let us first examine the question of point of commencement of the limitation period. According to Italian law, which was the applicable national law in the *Manfredi* case, the prescription period for a cartel damage claim started from the day on which the agreement, decision or concerted practice to form a cartel was adopted.[49] In the abstract, it is easy to agree with the CJEU that this kind of prescription norm is prone to make it practically impossible to exercise the right to seek compensation, even if we assume that the existence of the cartel is revealed some day. If it is not, then it is of course impossible to claim damages, but this has nothing to do with liberative prescription. Anyhow, even if the cartel is revealed in the end, there may easily be several years between the forming of the cartel and the time the cartel is exposed – and exposed in such a way that the injured parties have sufficient information to present their claim for compensation.[50] As the CJEU stated in *Cogeco*,

[47] Joined cases C-295/04 to C-298/04 *Manfredi*, para. 78.

[48] Magnus Matningsdal, Foreldelse av erstatningskrav ved personskade. Tidsskrift for rettsvitenskap 3–4/1980, p. 472–511, 480; Norros 2018, p. 602; see also RP 187/2002 rd, p. 17.

[49] Joined cases C-295/04 to C-298/04 *Manfredi*, para. 75.

[50] In practice, the interval between a) exposure of a cartel in general terms and b) the moment when a party being damaged by the cartel receives sufficient information for a damage claim seems to be often quite long. That is mostly because an injured party cannot normally gather the information needed for his claim by any other means than by waiting for the competition authority's investigation to be finished and published. Moreover, completion of such investigation may take quite long time, because members of a cartel usually try their best to conceal all possible information about the cartel. The said may be illustrated with a Finnish Supreme Court case KKO 2016:11, where the Finnish competition authority published the first public announcement of a cartel in May 2004, but it was not until December 2006 that the results of

especially in the case of competition law infringement, the bringing of actions for damages requires a complex factual and economic analysis.[51]

What is the case as regards Section 7(2) of the Limitation Act? Behind the said section one can recognise a so-called *principle of the first legal fact* (in Swedish *första rättsfaktumets princip*; in Finnish *ensimmäisen tosiseikan periaate*). According to this principle, in a case where a certain debt is a result of several measures on the debtor's part, the limitation period for such debt starts to run from the first measure that is of essence to emergence of the debt.[52] Thus, in some situations Section 7(2) may lead to an outcome that resembles the one described in *Manfredi*, i.e. the limitation period starts to run from the beginning of certain damaging activity of the liable party. However, this is not always the case. In contrast to the *principle of the first legal fact*, there is a quite established view that in a case where incurring of loss is a result from certain *continuous activity or omission*, the ten-year limitation period starts to run, as a main rule, from the date of the ceasing of such activity.[53]

> As regards liability based on upholding a cartel – a basis for liability that was present in the case *Manfredi* – we may note that interpretation of Section 7(2) differs from the one described, and regarded as problematic by the CJEU in *Manfredi*. However, it is important to note that liberative prescription of liability based on competition law infringement has been regulated in Finland by special legislation since 1 October 1998, when an amendment to the Act on Competition Restrictions

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the investigation were published. According to the Finnish Supreme Court, the latter date was the moment when a contracting party to a member of the cartel had received sufficient information of his loss and the party liable of it, thus commencing the three-year limitation period of Section 7(1) of the Limitation Act (KKO 2016:11, paras 30 and 45).

[51] Case C-637/17 *Cogeco,* para. 46.

[52] For the part of the old Limitation Decree, see Aarne Rekola, Saamisoikeuden vanhentuminen Suomen lain mukaan I–II. Helsinki 1938, p. 103, 107–108; for the part of the current Limitation Act, see Norros 2018, p. 585; for the part of similar provisions of Swedish law, see Stefan Lindskog, Preskription. Om civilrättsliga förpliktelsers upphörande efter viss tid. Fjärde upplagan. Wolters Kluwer 2017, p. 412–418. The principle may be illustrated with the Finnish Supreme Court case KKO 2016:98. A housing company claimed compensation from the neighboring housing company on grounds that the latter had constructed a parking space on its courtyard in a manner that caused rainwater to soak into the structure of the claimant company, and the effect thereof was even intensified by defective maintenance of the parking space. The defendant company objected the claim alleging that its possible liability had become time-barred. The Supreme Court dismissed the claim as being time-barred by virtue of Section 7(2) of the Limitation Act stating that the ten-year limitation period had commenced already on the date on which the parking space had been constructed. Thus, the possibility that the maintenance of the parking space had been neglected was irrelevant as regards the date of commencement of the limitation period.

[53] Norros 2018 p. 587, 589; in more detail Olli Norros, Vahingonkorvausvelan vanhentuminen. Talentum 2015, p. 138–147, 166 with references.

(25.5.1992/480; in Swedish *lag om konkurrensbegränsningar*; in Finnish *laki kilpailunrajoituksista*) came into force. Thus, the question of liberative prescription of such liability by virtue of Limitation Act is relevant only as regards competition law infringements prior to 1 October 1998.[54]

Anyhow, if we analyse liability of a member of a cartel towards a customer within the framework of the Limitation Act, we first note that such liability may be based, at least in principle, on either contractual or extra-contractual liability norms as well as the doctrine of restitution.[55] However, the differences between these grounds for liability most probably do not affect the assessment under Section 7(2).

If we assess such liability as extra-contractual, which in my opinion should be the primary way of thinking,[56] we must ask, what is the moment of 'the event that lead to the damage' in such context? This question has not been addressed directly in the legislative materials or in the case-law of the Finnish Supreme Court. The Helsinki District Court and the Helsinki Court of Appeals have adopted different approaches in different cases, calculating the limitation period, for example, from the end of the cartel, from the conclusion of each individual sales contract or from the moment when the contract price was paid. Consequently, the legal state of the issue may be understood to be more or less unclear. Personally, I am inclined to take the view that the starting point of the ten-year limitation period in a cartel damages case should be the time of each individual sales contract concluded under the alleged effect of the cartel. In other words, in a case where a customer of a business taking part in a cartel has concluded several sales contracts with members of the cartel, and thus suffered from the price distortions during the cartel, the ten-

[54] It is worth noting that the Limitation Act is, according to the first sentence of Section 21(3), applicable even to obligations the legal basis of which has arisen before the entry into force of the Limitation Act on 1st January 2004. However, after the said date there was a transition period of three years during which an 'old' obligation could not become time-barred by virtue of the Limitation Act, unless it would have become time-barred also by virtue of the previous limitation statute. Retroactive application of limitation norms combined with insufficient transition arrangements has led to a collision with the principle of effectiveness in certain cases. See, e.g., Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2002] ECR I-06325 and Case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze* [2002] ECR I-08003.

[55] See the Finnish Supreme Court case KKO 2016:11, paras 17 and 19.

[56] As regards the choice between contractual and extra-contractual liability, liability of a member of a cartel must be understood primarily as extra-contractual by its nature. Understanding such liability as contractual is problematic, because the loss of the customer is not occurred by the fact that a contractual obligation would not be fulfilled as agreed – which is the scope of application of contractual liability – but quite the contrary, by the fact that the customer indeed paid what was agreed. The loss occurs because of undertakings of the same branch have restricted their competition and thus distorted the price level on the market – an act which is as such external to fulfilment of obligations of a separate customer contract.

year limitation period for the damages claim is determined independently for each transaction.

According to the case *Manfredi*, shortness of the limitation period is one of the two features of a limitation norm, which are, if combined with a rule locating the point of commencement of the limitation period in the beginning of the damaging activity, prone to lead to contradiction with the principle of effectiveness.[57] However, this is clearly not the case as regards Section 7(2) of the Limitation Act. The limitation period enacted in the said provision is ten years long, which can hardly be described as *short* in the sense of the *Manfredi* case. According to an established view of the CJEU, a national limitation period of three years appears to be reasonable with regard to the principle of effectiveness – in general terms.[58] I will address the significance of the length of a limitation period in more detail in the next Chapter.

According to the reasoning in *Manfredi*, also the possibility of suspension or interruption of the limitation period is relevant when assessing its admissibility with regard to the principle of effectiveness.[59] In this sense, the Limitation Act is remarkably creditor-friendly in an international comparison. Like in most other jurisdictions, an acknowledgement of the debt by the debtor interrupts the limitation period under the Limitation Act (see Section 10(1)(2)). In addition, the Limitation Act allows even the creditor to interrupt a limitation period by informal measures, for example, by informally reminding the debtor of the debt. In other words, unlike in many other jurisdictions, under the Limitation Act a creditor does not have to sue the debtor or take some other legal action in order to interrupt a limitation period.[60] There is no restriction on how often and how many times an interruption may be carried out. As regards the content of the interruptive measure, the only requirement is that the debt in question must be individualised. When it is a question of liability for damages, the grounds for the debt and the amount thereof must be indicated in the interruptive measure in a reasonable manner, unless the debtor is already aware of these facts (see Section 10(2)).

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[57] Accordingly Case C-637/17 *Cogeco*, para. 49.

[58] Case C-542/08 *Friedrich G. Barth v Bundesministerium für Wissenschaft und Forschung* [2010] ECR I-03189, para. 28; Case C-38/16 *Compass,* para. 42 and the cases referred therein.

[59] Accordingly Case C-637/17 *Cogeco*, paras 51–53.

[60] See RP 187/2002 rd, p. 11–15 on Norwegian, Danish, German, Swiss, French and English law. See also Christian von Bar – Eric Clive (eds), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition. Volume 2. Sellier 2009, p. 1192–1196 for further international comparison.

The criteria for a valid interruptive measure are not interpreted and are not even intended to be interpreted in a strict and absolute form. According to the wording of Section 10(2), in case of liability for damages, the grounds for the debt and the amount thereof must be indicated in the interruptive measure in a *reasonable manner*, unless the debtor is *already aware of these facts*. Speaking of *reasonable manner* means, according to the legislative materials, that the creditor's expertise and his possibilities to gain information regarding the grounds for his debt may be taken into account.[61]

> The criteria of Section 10(2) of the Limitation Act have been the core question in two Finnish Supreme Court cases, KKO 2012:75 and KKO 2013:63, of which the previous one is more illustrative.[62] In KKO 2012:75, a buyer of a real estate was given defective information by the seller and the real estate agent regarding the legal restrictions on the use of the estate. It took nearly nine years before the buyer realised the defectiveness of the received information. At this point he notified both the seller and the estate agent, declaring that he would present a claim for price reduction and compensation of damages for the amount which corresponded to the difference of a) the sale price and the b) hypothetical sale price assuming that the restrictions on the use had been duly disclosed. However, it took over a year until the buyer finally presented an exact monetary claim to the seller and the agent, and at this point nearly over ten years had elapsed from the date of the sales contract. This raised the question whether the tentative notification of the buyer's claim could be regarded as an interruptive measure in the sense of Section 10 of the Limitation Act.
>
> The Supreme Court regarded the tentative notification of the buyer's claim as sufficient. The Court noted that at the point when the tentative notification was sent, the buyer did not have accurate information about how the restrictions on the use would affect the market value of real estates in the district, and that this kind of knowledge could not even be required from him, especially not as he was at the time still trying to apply to authorities for relief from the said restrictions. The buyer had no better possibilities to gain knowledge of this kind of issues than the seller. The estate agent, however, could have estimated what effect the restrictions might have on the estate's market value quite easily. For this reason and as the buyer anyhow had described the method for calculation of the monetary amount of his forthcoming claim, the Supreme Court held that the grounds and the amount

[61] RP 187/2002 rd, p. 59.

[62] The circumstances of the case KKO 2013:63 were quite specific as the question was whether an insurance company that had paid compensation to a victim of a traffic accident on account of different insurances had interrupted the limitation period regarding its right to redress, not only regarding damage to property, but also personal injuries. Further analysis of the case is not necessary here.

> of the claim had been indicated in the tentative notification in a reasonable manner as required in Section 10(2) of the Limitation Act.

The case KKO 2012:75 clearly illustrates that the circumstances of each case can and should be taken into account when applying the Section 10(2) of the Limitation Act, and in a case where it would be unreasonable to require very detailed information from the creditor, the required level of detail may, in the end, be quite modest. The wide possibilities for interrupting a limitation period raises the threshold to regard the limitation period enacted in Section 7(2) as inadmissible in respect of the principle of effectiveness.

In conclusion, an analysis of the Limitation Act within the framework of *Manfredi* indicates that Section 7(2) is, at least in most cases, fully compatible with the principle of effectiveness. Two of the three critical features mentioned in *Manfredi* are clearly not present when it comes to Section 7(2), and even the third criteria, early point of commencement of limitation period, is not fulfilled in circumstances comparable to the ones in *Manfredi*. However, there is one essential feature in Section 7(2) and some other limitation norms that is not directly touched upon in the Manfredi criteria: knowledge-insensitivity, i.e. the feature that a limitation may commence and even expire without the creditor's knowledge. The significance of this feature will be analysed next.

4.3 The Significance of Knowledge-insensitivity

As mentioned earlier, Section 7(2) is knowledge-insensitive in the sense that commencement thereof does not require that the injured party is, or by any means even could be, aware of his loss and right to compensation. Thus, the said provision may lead to a situation where the damage claim becomes time-barred even before the injured party has or ought to have become aware of the damage. Is such feature of a national limitation norm admissible in respect of the principle of effectiveness?

It is evident that knowledge-insensitivity is essential as regards the principle of effectiveness. This has been expressed in the case *Bulicke*, where the CJEU found a fairly short limitation period of two months admissible in respect of the principle of effectiveness, but merely because the provision had been interpreted by the national courts so that the limitation period would not start to run – regardless of the wording of the provision – before the injured party has gained knowledge of his loss.[63] In certain other cases knowledge-insensitive and relatively short limitation periods have

[63] Case C-246/09 *Bulicke,* paras 39–41.

been held inadmissible on account of the principle of effectiveness. For example, in *Levez*, a knowledge-insensitive limitation period of two years[64] and in *MedEval*, a similar limitation period of six months was set aside by virtue of the principle of effectiveness.[65] Is it possible to conclude from the cases *Bulicke*, *Levez* and *MedEval* that all knowledge-insensitive limitation periods are contradictory to the principle of effectiveness? My answer is clearly negative for the following reasons.

When a knowledge-insensitive limitation period forms a part of a two-tier limitation norm, such as Section 7 of the Limitation Act, the purpose of such a limitation period is normally to supplement a short knowledge-sensitive limitation period, such as Section 7(1) of the Limitation Act, in a situation where the occurrence of the damages remains unrevealed to the creditor for several years and, thus, the short limitation period does not start to run at all. As was mentioned in Chapter 3 above, an important objective behind the short knowledge-sensitive limitation period is to push the creditor to take action within a reasonable time. In a situation where a creditor is not aware of his claim, one cannot blame the creditor for unnecessary procrastination. However, even in such a situation, there are important objectives which justify the possibility of the prescription of a claim, and their importance is increased as the years pass by and the factual grounds of the claim are left further in the past. Those include, *inter alia*, the objectives the CJEU has noted in its reasoning: protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.

First, if we take a look at the protection of the rights of the defence, we may note that the law of liberative prescription protects the debtor – or the one alleged to be the debtor – from claims for which the legal grounds dates so far back that it would be difficult or impossible to gather necessary evidence for proper defence.[66] In this sense, the law of prescription has an important function to prevent unjustified claims which could otherwise be successful because of the respondent's difficulties to defend himself.[67] This objective is significant especially in the context of damage claims, because in such cases the need for evidence is usually much greater than in a

[64] Case C-326/96 *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-07835, paras 28, 32–34.

[65] Case C-166/14 *MedEval-, Qualitäts-, Leistungs- und Struktur-Evaluierung im Gesundheitswesen GmbH* [2015], paras 41–42, 46.

[66] Zimmermann 2002, p. 63–64.

[67] von Bar – Clive 2009, p. 1187.

case of a debt based on, for example, a promissory note.[68] From the perspective of the described objective, it is mostly irrelevant if the creditor has had the knowledge of his claim or not – the debtor would face more or less the same difficulties in building his defence in both cases. That is why the passing of time itself justifies the debt becoming time-barred at some point, irrespective of the creditor's knowledge of his right.

However, here one must emphasise the significance of the length of the applicable limitation period. When the limitation period is short, the objective of protection of the rights of the defence does not play a very central role in justifying the prescription, because it does not make great difference if one must be able to gather evidence of certain events that occurred four months ago or two years ago. Thus, in the above mentioned cases *Bulicke*, *Levez* and *MedEval*, the application of knowledge-insensitive limitation period could not have been justified by the objective of protection of the rights of the defence. The situation is totally different when the applicable limitation period is ten years long as in Section 7(2) of the Limitation Act.

Secondly, the reasoning above holds true also with regard to the second admissible objective raised by the CJEU, namely the objective of a proper conduct of procedure. If a court is compelled to base its decision on insufficient and unreliable evidence of very old incidents, this increases the risk of a false outcome and may even erode the confidence in the court system generally.[69] Moreover, this objective justifies the legal effect of prescription regardless of whether the creditor was aware of his right or not, provided that the applicable limitation period is sufficiently long.

Thirdly, the principle of legal certainty prerequisites that when time passes but a certain debt remains unclaimed, as years go by the debtor will increasingly expect that the debt will not be claimed at all.[70] If the debtor knows or assumes that the creditor is not aware of his claim, this obviously weakens the reason to assume that the creditor, who remains passive, is not interested in charging his claim. But even in this scenario the longer the time period, the stronger the reason to assume that the debt will not be claimed.

In addition, the principle of legal certainty may be understood to protect also the trust of third parties in the stability of the economic conditions of others. Even from this viewpoint, it would be problematic if one's economic situation could be ruined

[68] Norros 2018, p. 529; Rekola 1938, p. 39–40; Per Augdahl, Den norske obligasjonsretts almindelige del. Femte utgave. Aschehoug/Tano 1978, p. 102.

[69] Lindskog 2017, p. 57–58.

[70] As regards this objective, see, e.g., Zimmermann 2002, p. 63–64.

anytime because a creditor of an old forgotten claim has finally taken action.[71] Also this objective of prescription favours the admissibility of knowledge-insensitive limitation periods.

In light of the objectives of prescription, as described above, a knowledge-insensitive but sufficiently long limitation period is thus well justified.

Another issue which is of utmost importance when evaluating the compatibility of Section 7(2) of the Limitation Act with the EU law principle of effectiveness is that similar limitation periods have been enacted in many other legal systems in Europe[72] – and even within EU law itself. An important example is Directive 85/374/EEC regarding product liability, i.e. a directive that is part of EU legislation which is currently in force. Articles 10–11 of the said Directive contain a set of two-tier prescription norms quite similar to Sections 7(1) and 7(2) of the Limitation Act. Article 10(1) of the Directive provides that there is a three year knowledge-sensitive prescription period. According to Article 11, the 'rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer'.

Furthermore, this knowledge-insensitive ten-year limitation period even applies to personal injuries, even though these are typically excluded from the scope of a knowledge-insensitive limitation period – or an extra-long limitation period is applied to them – in many legal systems.[73] It is widely established that the type of the damage quite strongly affects the admissibility of a knowledge-insensitive limitation period. Typically, the outcome that a claim based on property damage or economic loss becomes time-barred before the injured party becomes aware of his right is much easier to tolerate than a claim concerning damage to someone's life or health or even environmental damage.[74] The existence of Article 11 of the Directive 85/374/EEC as

[71] Rekola 1938, p. 42; Erkki Aurejärvi – Mika Hemmo, Velvoiteoikeuden oppikirja. 3. painos. Edita 2007, p. 115 fn 228; Norros 2018, p. 530.

[72] See Case C-30/02 *Recheio – Cash & Carry SA v Fazenda Pública/Registo Nacional de Pessoas Colectivas* [2004] ECR I-06051, para. 22, where it was noted that when assessing the reasonability of a limitation period, one may compare it to similar limitation periods in other Member States.

[73] See von Bar – Clive 2009, p. 1190–1191; Norros 2015, p. 178–179 with references. As mentioned above in Chapter 1, personal injuries as well as environmental damages are excluded from the scope of Section 7(2) of the Limitation Act, see the second sentence of the provision.

[74] Zimmermann 2002, p. 101–102.

a part of EU legislation in force is in itself a strong argument for the admissibility of Section 7(2) of the Limitation Act with regard to the principle of effectiveness.

Apart from Article 11 of the Directive 85/374/EEC, other important points of comparison are the international model laws, or sets of legal principles, the *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (DCFR) and the *UNIDROIT Principles of International Commercial Contracts 2016* (UNIDROIT PICC). Both are intended to reflect the 'big picture' of internationally established legal principles and they represent balanced solutions to the legal questions covered therein. In light of the theme of this article, it is notable that the DCFR was intended to work as the basis of harmonisation of private law within the EU, and its drafting was also funded partly by the EU. The prescription rules of both DCFR and UNIDROIT PICC are based on a set of two-tier limitation periods quite similar to Section 7 of the Finnish Limitation Act, the second tier being a ten-year, knowledge-insensitive limitation period (DCFR Art. III. – 7:307 and UNIDROIT PICC Art. 10.2(2)).[75]

Knowledge-insensitive but fairly long limitation periods similar to Section 7(2) of the Limitation Act are common in many other national legal systems as well. A claim of damages is, with certain exceptions, subject to ten-year long, knowledge insensitive limitation period, *inter alia*, under Section 199(3)(1) of the German BGB, Section 2(1) of the Swedish Limitation Act (*preskriptionslag*)[76] and Section 3(3)(2)–(3) of the Danish Limitation Act as well as Section 10(4) of the Norwegian Limitation Act, which covers only contractual liability, though.[77] In comparative legal literature it has been considered that as regards damage to property and economic harm, a knowledge-insensitive limitation period of ten years is widely accepted.[78]

[75] It is also worth noting that the prescription norms of DCFR and UNIDROIT PICC are not as creditor-friendly as the Limitation Act regarding the important question of how the running of a limitation period may be interrupted. As regards interruptive measures on the creditor's part, both DCFR and UNIDROIT PICC require taking legal action or another formal measures aiming at execution (see DCFR Art. III. – 7:402 and UNIDROIT PICC Art. 10.5–7), whereas under the Limitation Act the creditor may, as stated above, interrupt the limitation period and thus make it restart by simply notifying the debtor of his debt. As the CJEU noted in *Manfredi*, the possibilities to interrupt or suspend the running of a limitation period are one of the key factors when evaluating the admissibility of national prescription norms in the light of the principle of effectiveness.

[76] On interpretation of Section 2(1) of the Swedish Limitation Act as regards liability for damages, see, e.g., Lindskog 2017, p. 432.

[77] According to the comparative survey in the commentary of DCFR, a ten-year long knowledge-insensitive limitation period for liability for damages is also in force in Poland and in Estonia, but I was not able to verify this information myself. von Bar – Clive 2009, p. 1190.

[78] Zimmermann 2002, p. 101–102.

A possible argument in the context of damage claims based on infringement of EU competition law could be that because Article 10(2) of the Directive 2014/104/EU on antitrust damages explicitly prohibits knowledge-insensitive limitation periods in the scope of the said Directive, such a limitation period would be also contradictory to the principle of effectiveness in this same factual context.[79] Thus, according to this view, the Article 10 of the Directive would be understood as illustrating what requirements the principle of effectiveness imposes on the commencement of a limitation period.

However, I find this point of comparison irrelevant. From a formal point of view one may note that the scope of application of Article 10 of the Directive 2014/104/EU belongs no longer to the sphere of procedural autonomy and the principle of effectiveness, because the Article contains explicit norms on questions of procedural nature.[80] Thus, after expiry of the transposition period of the Directive, it is contrary to the Directive itself to sustain a knowledge-insensitive limitation period in national legal order in the scope of the Directive, but on the other hand, the content of the Article tells nothing about the interpretation of the principle of effectiveness.[81] Even if we ignored this more or less legalistic argument, we cannot deny the clear difference between questions a) how does the EU legislator formulate prescription norms in a situation where it has a full freedom to formulate them as it finds best and b) what kind of national prescription norms the CJEU is willing to tolerate because they cannot be deemed to render virtually impossible or excessively difficult the exercise of rights conferred by EU law.

Another issue is that it may well be so that the background and the context of a case, for example infringement of EU competition law, may have certain effect, when assessing admissibility of a national limitation norm in respect of the principle of

[79] Article 10(2) of the Directive 2014/104/EU: 'Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer.'

[80] As Nazzini 2009, p. 406 puts it, 'if the Community has legislated to harmonise the law on the matter in question, procedural autonomy has no role to play'.

[81] This was expressed implicitly yet clearly in the Case C-637/17 *Cogeco*, where the CJEU first assessed whether the Directive 2014/104/EU was temporally applicable to the case (paras 24–34). The answer was negative, which lead the CJEU to assess whether the applicable national limitation norms were admissible in the light of the principle of effectiveness. It is worth noting that in this analysis, the CJEU did not refer by any means to the said Directive, for example, as an implication of features of an admissible limitation norm.

effectiveness.[82] In *Cogeco* the CJEU noted that when assessing the admissibility of national norms of liberative prescription with regard to the principle of effectiveness, prescription norms 'must be adapted to the specificities of competition law and the objectives of the implementation of the rules of that right by the persons concerned, so as not to undermine completely the full effectiveness of Article 102 TFEU'.[83]

However, I do not see how merely the fact that the background of the case concerns competition law could render a knowledge-insensitive limitation inadmissible. What is in my opinion illustrative in this context is that even the competence of the European Commission to penalise competition law infringements is restricted by fairly short knowledge-insensitive limitation periods. This is the case regardless of the fact that it is the public enforcement that is, or at least has been, the spearhead of enforcement of competition law, not the private enforcement. According to Article 25 of the Council Regulation No 1/2003, the limitation periods for the imposition of penalties are, depending on the type of the infringement, three or five years from the day on which the infringement is committed, or, in the case of continuing or repeated infringements, from the day on which the infringement ceases. In other words, the issue of when the Commission or anyone else became aware of the infringement is irrelevant for the running of the limitation period and the Commission's competence to penalise the infringement. This fact undermines the possible counterargument that passing of time itself could not lead to exclusion of legal consequences of a competition law infringement.

4.4 Finnish Precedents Regarding the Relation between Section 7(1) and the Principle of Effectiveness

Even though the scope of this article is the relationship between Section 7(2) and the principle of effectiveness, and nothing else, it is worth noting that the admissibility of Section 7(1) in the light of the principle of effectiveness has been evaluated twice in the Finnish Supreme Court. It is clear that one cannot attach great importance to the outcomes of those evaluations as regards the admissibility of Section 7(2), because the objectives, length of limitation period and point of commencement thereof are different in those two cases. However, one can at least say that the precedents do not speak against the major conclusions of this article as regards Section 7(2).

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[82] Craig – de Búrca 2015, p. 238–239.

[83] Case C-637/17 *Cogeco*, para. 47.

The first of the cases where admissibility of Section 7(1) in the light of the principle of effectiveness was evaluated was the case KKO 2016:11 regarding liability for cartel damage and prescription of this liability. In the said case, the Supreme Court stated briefly that the principle of effectiveness does not require deviance from the applicable national prescription norms, which were in that case Section 18a(3) of the Act on Competition Restrictions and Section 7(1) of the Limitation Act.[84]

A more thorough analysis of the relation between Section 7(1) of the Limitation Act and the principle of effectiveness was pursued in KKO 2017:84. Finnish legislation on shipping route fees had been regarded as discriminating with regard to the EU law principles of free movement. The legislation was later modified, but certain Estonian shipping companies sued the Finnish State and claimed compensation for the loss caused to them due to being charged excessive shipping route fees during the time the previous legislation was in force. The Supreme Court held that because the discrepancy between the national legislation and the principles of free movement had been quite easy to discover, the loss caused to the shipping companies had become observable in the sense of Section 7(1) of the Limitation Act on the date of service of each decision regarding shipping route fees. Thus, the loss was held to have become observable even before the authorities had admitted the discrepancy between national legislation and the principles of free movement and before the legislation had been modified. This interpretation would have rendered the claims of the companies time-barred.

The Supreme Court then raised the question whether Section 7(1) should be set aside by virtue of the principle of effectiveness. The Court went on analysing the case-law of the CJEU and concluded that neither the length of the applicable limitation period (three years), nor the interpretation that the limitation period may start running before there is an authoritative confirmation of the infringement of EU law, may be regarded as contrary to the principle of effectiveness.[85] My conclusion based on the grounds of these two precedents has been – and still is – that the principle of

[84] KKO 2016:11, para. 18.

[85] KKO 2017:84, paras 57–62. The case KKO 2017:84 spawned a sequel litigation, where the shipping companies who had lost their case sought annulment of the judgment KKO 2017:84, alleging that the Finnish Supreme Court had committed a procedural fault when it had not made a request for a preliminary ruling from the CJEU on the interpretation of the principle of effectiveness. The Finnish Supreme Court dismissed the application in a new precedent KKO 2019:70. The Supreme Court reasoned thoroughly why the prior case-law of the CJEU could be regarded as giving a sufficiently clear picture of the interpretation of the principle of effectiveness in the context of the case at hand, hence it was not necessary to make a request for a new preliminary ruling.

effectiveness can hardly ever affect the application of Section 7(1) of the Limitation Act.[86]

> The relation between the Limitation Act and the principle of effectiveness has been assessed for the third time by the Supreme Court in a recent case KKO 2019:58, regarding liberative prescription of liability of cartelists. The injured party, a municipality, had initially had claims against three cartelists, who had been jointly and severally liable. However, the municipality had failed to keep its right towards two of the cartelists in effect through timely interruption of the applicable limitation period, i.e. the three-year limitation period of Section 7(1) of the Limitation Act. This caused, by virtue of Section 19(2) of the said Act, the joint and several liability of the cartelist to cease, and the municipality's claim against the third remaining party to be restricted to the sum corresponding his proportion of the whole loss. The Supreme Court held that keeping the claims against the two liable parties in effect could not be considered in the facts of the case as virtually impossible or excessively difficult. Thus, the application of Section 19(2) in this case was held compatible with the principle of effectiveness.[87] Any other outcome was hardly imaginable.[88]

4.5 Concluding Remarks

The analysis in the present Chapter shows clearly that the basic structure and central features of Section 7(2) are admissible in respect of the principle of effectiveness. The provision does not appear problematic contrasted with the framework outlined by the CJEU in the *Manfredi* case. One may ask if the feature of knowledge-insensitivity in Section 7(2) could cause problems in relation to the principle of effectiveness, but there are strong reasons speaking against this: First, a knowledge-insensitive but sufficiently long limitation period may be justified by objectives accepted by the CJEU. Secondly, ten-year long knowledge-insensitive limitation periods are from

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[86] Olli Norros, KKO 2017:84 – Valtion korvausvastuun vanhentuminen, p. 316–320 in Pekka Timonen (toim.), KKO:n ratkaisut kommentein II:2017, Alma Talent 2018, p. 320; Norros 2018, p. 132, fn 159. Accordingly, from a more general viewpoint Erkki Havansi, Määräajat ja oikeudenkäynti. Tutkimus prosessiliitännäisistä määräajoista. WSOY Lakitieto 2004, p. 259–263. Cf Katri Havu, Kilpailunrajoitus, hyvitysvelan vanhentuminen ja EU-oikeus – huomioita ratkaisusta KKO 2016:11. Lakimies 5/2016, p. 810–822, 819–821; Katri Havu, KKO 2016:28 – Vahingonkärsijän tietoisuus ja vanhentumisajan alkaminen, p. 262–266 in Pekka Timonen (toim.), KKO:n ratkaisut kommentein I:2016. Alma Talent 2016, p. 265–266, emphasising more the significance of the principle of effectiveness.

[87] KKO 2019:58, paras 25–31.

[88] See also my case note in Olli Norros, KKO 2019:58 – Yhteisvastuullisen vahingonkorvausvelan vanhentuminen ja vahingon suuruus, p. 515–518 in Pekka Timonen (toim.), KKO:n ratkaisut kommentein I:2019. Alma Talent 2019, p. 518.

an international perspective quite common, and which is of utmost importance, such a limitation period is even included in the EU legislation currently in force, i.e. Article 11 of the Product Liability Directive – and also applicable to personal injuries. Thus, successful challenging of Section 7(2) by virtue of the principle of effectiveness is, in most cases, difficult.

However, as stated in Chapter 1 above, the question of admissibility of a national procedural norm with regard to the principle of effectiveness cannot be decided *in abstracto*, but must always be evaluated on a case by case basis. Thus, even though Section 7(2) appears compatible with the principle of effectiveness on a general level, we must still go a little deeper and try to identify certain circumstances, in which Section 7(2) could – notwithstanding what was just said – still become contradictory to the principle of effectiveness.

5 The Significance of Some Special Circumstances

5.1 Introduction

As concluded in the previous Chapter, the clear starting point is that Section 7(2) of the Limitation Act is fully compatible with the principle of effectiveness. However, because the question of this compatibility cannot be decided *in abstracto*, we must also analyse certain special circumstances, which could be of significance when assessing an individual case. Three possible circumstances may be raised:

a) the question whether the injured party has become aware or ought to have become aware of his claim before the expiry of the limitation period
b) the question whether the damage claim has been mature and enforceable before the expiry of the limitation period
c) the question whether there is some kind of factual hindrance for presenting a damage claim, for example, the injured party being a subsidiary to the liable party or otherwise in a subordinate position in relation to the liable party.

5.2 Discoverability of the Right to Compensation

As shown above, Section 7(2) of the Limitation Act is as such fully knowledge-insensitive, thus the question whether the injured party has had a possibility to discover his right to compensation is irrelevant when applying the said provision. But is it also

irrelevant as regards the relationship between Section 7(2) and the principle of effectiveness?

In the case-law of the CJEU one can find cases where even a remarkably short limitation period has been held admissible in the light of the principle of effectiveness, providing that the limitation period is knowledge-sensitive. In a fairly recent case, *Bulicke*, a limitation period of two months was found admissible, taking into account that the provision had been interpreted by the national courts in such a way that the limitation period would not start to run before the injured party has knowledge of his loss.[89] In older cases like *Rewe* and *Comet* even a limitation period of one month or 30 days was held admissible.[90] In *Cogeco* the CJEU held that it was not sufficient that the commencement of a three-year limitation period was postponed until the injured party became aware of his right to compensation, if the commencement is not postponed also by the fact that the injured party cannot identify the liable party. However, the outcome of the assessment was also affected by the fact that the national limitation period could not be interrupted or suspended in the course of proceedings before the national competition authority.[91]

On the grounds of these cases we can conclude that if the injured party has had a real possibility and time – even a relatively short time – to present his claim or otherwise interrupt the limitation period before the expiry of the limitation period, this is a strong counterargument for intervening in the normal application of the limitation period on grounds of the principle of effectiveness. In other words, such intervention may – if ever – be possible only in situations where the right to damages has become discoverable after the expiry of the limitation period.

Another issue is that the criterion of discoverability of right to compensation is not necessarily the same when the principle of effectiveness is applied compared to the application of Section 7(1) of the Limitation Act, for instance. Actually, the activity requirements imposed on the injured party by the CJEU when applying the principle of effectiveness appear to be somewhat strict. An illustrative example is the above mentioned case *Pohl*, where the circumstances were, according to the national court, such that it would have been practically impossible for the injured party to bring a claim until the delivery of certain judgments by the CJEU which clarified the

[89] Case C-246/09 *Bulicke*, paras 39–41.

[90] Case 33-76 *Rewe* and Case 45/76 *Comet.* The length of the national limitation periods is not expressed in the judgment of the CJEU but in the opinion of Advocate General Warner (p. 1, 3), which concerns both cases.

[91] Case C-637/17 *Cogeco*, paras 49–53.

legal state in the relevant questions.[92] The CJEU found that a preliminary ruling of the CJEU does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect already from the date on which the rule interpreted entered into force. For this reason, the delivery of the referred clarifying judgments was not considered to affect the starting point of the limitation period at issue, and was thus held as irrelevant for the purposes of determining whether the principle of effectiveness had been respected.[93]

5.3 Is the Right to Compensation Mature?

A circumstance one could find relevant when assessing the relationship between Section 7(2) of the Limitation Act and the principle of effectiveness in an individual case, is the question whether the damage claim in question is mature on the date of expiry of the limitation period. In many cases, the question when a right to compensation becomes mature does not become a hindrance to the injured party at all, because such a right is normally mature as soon as all the conditions for emergence of such a right are met – in other words, a right to damages emerges in an already mature form.[94]

However, in some cases a certain condition for a right to damages may stay unfulfilled for a long time after fulfilment of the others, thus essentially postponing becoming due of the right to compensation. There are two typical examples: First, an act or omission that leads to liability does not always cause loss immediately but only after a delay, meaning that prior to materialisation of the loss the right to compensation is premature. Secondly, in some cases there are two or more parties, all of whom being somehow involved in causing of the loss and thus liable of it, but there is a legal norm that renders liability of one party secondary to liability of another party.[95]

According to Section 7(2) of the Limitation Act, the ten-year limitation period starts to run from the date of breach of contract or the event that led to the damage.

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[92] Case C 429/12 *Pohl*, para. 17(3).

[93] Case C 429/12 *Pohl*, paras 30–32.

[94] See, for example, Norros 2018, p. 251; Zimmermann 2002, p. 109; on a more general level, Knut Rodhe, Obligationsrätt. P. A. Norstedt & Söners Förlag 1956, p. 115.

[95] Norros 2018, p. 257. For example, according to the Finnish Tort Liability Act (31.5.1974/412; in Swedish *Skadeståndslag*; in Finnish *Vahingonkorvauslaki*), if an employee causes loss to a third party, his liability is, as a main rule, secondary to liability of the employer, who is liable of the loss on grounds of vicarious liability (see Chapter 6, Section 2).

Thus, commencement of the ten-year limitation period does not prerequisite that a right to damages would be mature at that point, and so even expiry of the limitation period is possible prior to becoming due of the right to compensation, albeit this is very extraordinary. If one brings an action claiming compensation for yet unmaterialised loss, it is dismissed as premature.[96] That kind of judgment does not prevent the claimant from bringing a new action later regarding the same loss if it has been subsequently actualised,[97] but prior to that, the claim is not enforceable. If there is a right to compensation based on EU law, but this right becomes time-barred by virtue of Section 7(2) before it has become mature, has 'the exercise of rights conferred by EU law' become 'virtually impossible or excessively difficult' in the sense of the principle of effectiveness?

Such situations where a claim becomes time-barred before it has become mature and enforceable, have been encountered by the CJEU in cases considering unnecessarily collected value added tax (VAT) and a business's right to claim back disbursements from a tax authority after the business has been obliged to return corresponding sums to his customers. The CJEU has considered it to be an infringement of the principle of effectiveness if the applicable national rules both 1) preclude the business from claiming back unnecessarily disbursed VAT before his customers had claimed corresponding sums from him, and 2) render the right to reimbursement time-barred if such claim is presented after paying the corresponding sums to the customers.[98]

Does it follow that the application of Section 7(2) of the Finnish Limitation Act may be regarded as an infringement of the principle of effectiveness in a case where a right to compensation becomes time-barred before it has materialised in an

[96] The main rule has been expressed clearly in the Finnish Supreme Court cases KKO 1997:105, KKO 1997:196 and KKO 1999:31.

[97] See, e.g., Jarkko Männistö, Lainvoimaisesti tuomitun vahingonkorvauksen muuttaminen. Lakimies 3/2008, p. 410–432, 411; Juha Lappalainen, Siviiliprosessioikeus II. Kauppakaari 2001, p. 457–458, 461.

[98] Joined cases C-89/10 and C-96/10 *Q-Beef NV* (C-89/10) *v Belgische Staat and Frans Bosschaert* (C-96/10) *v Belgische Staat, Vleesgroothandel Georges Goossens en Zonen NV and Slachthuizen Goossens* NV [2011] ECR I-07819, para. 43; Case C-427/10 *Banca Antoniana Popolare Veneta SpA v Ministero dell'Economia e delle Finanze and Agenzia delle Entrate* [2011], para. 30. In the latter case, a bank had collected VAT when providing a certain service, and disbursed the sums to a tax authority. Later, the tax authority had changed its interpretation of the relevant legislation so that the service in question was regarded as exempted from VAT retrospectively. For this reason, the bank had to refund the sums it has collected from its customers as VAT. The bank tried to claim back its payments to the tax authority, but at that time, the right for reimbursement had become time-barred. The CJEU held that such an outcome was inadmissible with regard to the principle of effectiveness.

enforceable form?[99] We must separate situations a) where the grounds for the claim have become observable to the injured party at least at some time before expiry of the limitation period and b) where they have not. In the former case, the injured party has had the possibility to interrupt the running of the limitation period through an informal reminder to the liable party (see Chapter 4.2 above), unless there are some special circumstances preventing this (see Chapter 5.4 below). The efficiency of an interruptive measure does not prerequisite that the claim in question would be materialised in an enforceable form. It is difficult to see why the injured party should not take that measure in this situation. Thus, it is also difficult to see how the possible liberative prescription of the claim in such a situation where the injured party could have prevented occurrence of prescription quite easily, could render exercise of the right 'virtually impossible or excessively difficult' in the sense of the principle of effectiveness.

Scenario b) is different in the sense that the injured party clearly has no possibility to interrupt the limitation period. However, the question whether the right to damages is enforceable or not does not play any role here. As discussed in Chapter 4.3 above, merely the circumstance that a right to damages may become time-barred before the injured party becomes aware of his right, does not as such constitute an infringement of the principle of effectiveness, providing that the limitation period is sufficiently long. It is difficult to see why the assessment should be any different even if the right in question is still premature when the limitation period expires. In other words, the objectives that may justify a claim becoming time-barred after ten years have passed from its occurrence irrespective of the creditor's knowledge of his claim are equally strong in a situation where the claim is still premature.

In conclusion, the question of prematurity of a claim lacks any independent significance when assessing the admissibility of Section 7(2) of the Limitation Act in the light of the principle of effectiveness.

> Another issue is that under Section 7(1)(3) of the Limitation Act there are reasons to consider that in a case where a claim for compensation would be dismissed as premature, the loss and the one liable of it cannot be regarded as being discoverable to the injured party in the sense of the said provision. Thus, the three-year limitation period does not start to run until the right to compensation becomes mature. That is mainly because the point of commencement of the limitation period under

[99] Another question is whether national norms regarding falling due of a right to compensation that are very strict, and thus postpone materialisation of a right conferred by EU law too far in the future, can contradict the principle of effectiveness. This question, however, is not within the scope of this article.

> Section 7(1) is so closely connected to the possibility of the injured party to present his claim, and in a case where a claim would be dismissed as premature, the injured party does not have *de facto* the possibility to enforce his right to compensation.[100] That is the case, however, already on the grounds of the Limitation Act itself; in other words, the principle of effectiveness does not become relevant here.

5.4 A Factual Circumstance Hinders a Damage Claim

One special case where Section 7(2) of the Limitation Act could possibly contradict the principle of effectiveness is a situation where there is some factual circumstance that efficiently hinders a possible damage claim against the liable party. It is worth noting that unlike limitation statutes in many other legal systems, the Limitation Act does not contain provisions on an insurmountable obstacle or other circumstances that prevent interruption of the limitation period in time.[101] In the legislative materials it is noted that there is no need for special provisions for situations where the debtor's domicile is unknown or where the debtor is avoiding a claim. That is because according to Section 11, a limitation period is interrupted – or to be more precise, suspended[102] – already at the moment when the application for a summons is filed in a court.[103] In the legal literature support can be found for the viewpoint that a *force majeure,* which prevents interruption of a limitation period, may lead to suspension

[100] Norros 2015, p. 283–287. See, however, the Finnish Supreme Court case KKO 2017:84, where the three-year limitation period for a damage claim was regarded as having commenced after the service of certain administrative decisions, which were held as infringing rights of the party concerned (see para 56). However, if a party had sued the State for compensation on this date, the suit had been dismissed as premature, because at this point the original decision could still have been appealed against. The question whether this circumstance should have affected the point of commencement of the three-year limitation period, was not raised in the judgment.

[101] See, e.g., Section 10(2) of the Norwegian Limitation Act, Section 14(1) of the Danish Limitation Act, Section 206 of the German BGB as well as examples listed in von Bar – Clive 2009, p. 1176. See also DCFR III. – 7:303 Art. and UNIDROIT PICC 10.8(1) Art.

[102] On anatomy of interrupting a limitation period through taking legal action, see Norros 2018, p. 619–620.

[103] RP 187/2002 rd, p. 62 and accordingly p. 23–24, 65–66; see also Regeringens proposition till riksdagen med förslag till lagar om ändring av utsökningsbalken och av 11 § i lagen om preskription av skulder 137/2015 rd, p. 14–15.

of the limitation period even without explicit provision in the Limitation Act,[104] but the question may be considered highly unclear.[105]

An important example of a situation where the interruption of a limitation period may be *de facto* difficult or even impossible, is a situation where the creditor is for some reason in a subordinate position in relation to the debtor – or, as regards a damage claim, the injured party is subordinate to the liable party. This may be the case, for example, if a parent has caused loss to his child, if a parent company has caused loss to a subsidiary or if an agent has caused loss to his principal.

For a case where a guardian has caused loss to his ward, there are special provisions in the Guardianship Services Act (1.4.1999/442; in Swedish *Lag om förmyndarverksamhet*; in Finnish *Laki holhoustoimesta*), which postpone commencement of a limitation period until the guardianship has ceased (see Sections 60 and 61).[106] In legal literature in Sweden it has been considered that in a case where the debtor is a statutory representative to the creditor or is otherwise obliged to attend to the creditor's interest, and the creditor does not have anyone else looking after him, the limitation period does not run in favour of the debtor as long as the described circumstance is present – even though there is no statutory support for such legal effect.[107]

As far as I am aware, the possibility of application of such a general principle has not been considered in Finland.[108] However, the factual justification for this exception from the normal course of a limitation period may be strong in some situations. For example, in a case where a liable party to whom the injured party is in a subordinate position is aware of his liability, as well as the fact that without his contribution the injured party is unable to claim for compensation, the justification for granting the liable party a relief from his liability through the law of prescription, is quite remote.

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[104] Mika Hemmo, Sopimusoikeus II. Toinen, uudistettu painos. Talentum 2003, p. 448; Ari Saarnilehto, Velkasuhteen päättyminen ilman asianmukaista suoritusta, p. 269–306 in Ari Saarnilehto (toim.), Varallisuusoikeus. Toinen, uudistettu painos. SanomaPro 2012, p. 295.

[105] For a thorough analysis, see Norros 2018, p. 625–629.

[106] There is an unofficial English translation of the original version of the Guardianship Service Act available in Finlex, but one must note that Section 61 was amended in 2003 in connection to the enactment of the Limitation Act, and this amendment is not updated in the English version available at <www.finlex.fi>.

[107] Lindskog 2017, p. 478–480.

[108] I have favoured such an exception in an expert legal opinion in a domestic dispute, mostly on grounds of Swedish law, as a comparable example and the special circumstances of the case.

I also find it possible that if national limitation rules do not allow exceptions in this kind of situations, and the right to compensation in such a case is based on EU law, there may be grounds to consider that enforcement of EU law has become 'virtually impossible or excessively difficult'. In this case there would be no balancing factors that could justify a strict application of prescription norms, such as the need to promote legal certainty. Moreover, as many other jurisdictions allow exceptions from the normal limitation norms in such situations, the lack of such possibility in the Limitation Act could be seen as a kind of 'casting defect in legislation' that could be smoothened through the principle of effectiveness in order to secure full enforcement of rights based on EU law. It also is worth noting that even the European Court of Human Rights (ECHR) has favoured deviation from national prescription rules in such situations on the grounds that the creditor's right to *access to justice* would be otherwise infringed.[109] Of course, the normative basis is different in the cases before ECHR, and thus the conclusions do not have any direct normative significance in the context of the principle of effectiveness, but they are still worth noting.

6 Conclusions

The objective of this article was to assess, whether, and to which extent, the ten-year limitation period enacted in Section 7(2) of the Finnish Limitation Act may become contradictory to the principle of effectiveness in EU law. As stated, this question cannot possibly be answered *in abstracto* either in an affirmative or negative way, because the CJEU has stressed that the admissibility of a certain national norm in the light of the principle of effectiveness must be assessed *in casu*.

Anyhow, my analysis shows that Section 7(2) appears as fairly unproblematic contrasted to the framework of the case *Manfredi* – a decision in which the CJEU has raised certain features of national limitation norms that may lead to a collision with the principle of effectiveness – and to other relevant case-law of the CJEU as well. In addition, it was concluded that the feature of knowledge-insensitivity does not as such cause problems in relation to the principle of effectiveness, providing that the

[109] See the judgment of 7th July 2009 in the case *Maria and Manuela Stagno v State of Belgium*. A widow had embezzled a life insurance compensation that belonged to her underage daughters in circumstances which rendered even the insurance company and the bank, where the money was deposited in, liable of the loss. After coming of age the daughters had claimed compensation from the insurance company and the bank. A Belgian court had dismissed the claim as time-barred regarding that the applicable limitation period had expired already at the time the claimants were underage. The ECHR, however, regarded that such application of the prescription norms had infringed the appellants' right to access to justice. According to the ECHR, the daughters had lacked a real possibility to take legal action before they had come of age, because their only guardian, their mother, had herself taken part in causing of the loss.

applicable limitation period is sufficiently long. As concluded above, a limitation period of ten years may be regarded as generally acceptable, at least when it comes to other types of losses than consequences of a personal injury. The last mentioned restriction is not relevant in the context of Section 7(2) of the Limitation Act, because personal injuries and environmental damages are explicitly excluded from the scope of the said limitation norm.

In addition to the general level analysis, I strove for identifying special conditions that may affect the assessment of the acceptability of Section 7(2) *in casu*, or even change the outcome so that Section 7(2) would turn out as contradictory to the principle of effectiveness. The results were, however, quite meagre. The only special circumstance identified, which may seriously challenge the acceptability of Section 7(2), is a situation where the injured party is, for some reason or another, in a subordinate position in relation to the liable party. In this situation the Finnish Limitation Act, unlike limitation statutes in many other jurisdictions, does not provide any generally applicable exceptions in favour of the injured party that could suspend the running of the limitation period until the injured party is *de facto* capable of attending his interests.