

February 2024

NEWSLETTER  
N° 29

Case T-529/22, QT / EIB of  
11 October 2023

Recovery of sums paid but not due –  
lack of competence to act – limitation  
period

**EIB recovery decision annulled -  
Can OLAF investigations suspend  
the limitation period for recovery?**



# Staff Matters

Legal News from Union Syndicale

This newsletter presents a recent case on two subjects of high practical relevance: (1) the lack of competence of an author to decide on an act adversely affecting staff and (2) the recovery of sums unduly paid to an official. The General Court annulled a recovery decision, because its author did not act on the basis of a correct sub-delegation. On the second point, the court decided that, for reasons of legal certainty, the limitation period of five years for the recovery was neither interrupted nor suspended by the opening of an OLAF investigation on the facts giving rise to the recovery. As a result of this, staff have to be aware that recovery decisions may be issued before investigations of OLAF (or audits etc.) are completed.

You can continue to send us your suggestions for new subjects or your questions and comments :  
[StaffMatters@unionsyndicale.eu](mailto:StaffMatters@unionsyndicale.eu)

## Waiver

Although this newsletter is accurately prepared, it cannot replace individual legal advice. Legal situations are manifold and require both complex analysis and strategic action. You should therefore not rely on general presentations or former case-law alone to draw conclusions for your concrete situation. Please turn to us timely, should you require individual legal advice and/or representation.

## Legal Background

Art. 85 Staff Regulations (SR) provides that “any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.

The request for recovery must be made no later than five years from the date on which the sum was paid. Where the Appointing Authority is able to establish that the recipient deliberately misled the administration with a view to obtaining the sum concerned, the request for recovery shall not be invalidated even if this period has elapsed.”

Art. 16.3 of the EIB Staff Regulations provides similar rules for recovery and equally a five years limitation period for the EIB, which applied in the present court case.



## Facts of the Case

The applicant, an employee of the EIB, had received education allowances, dependent child allowances and related benefits between July 2014 and June 2017. OLAF conducted an investigation concerning 70 EIB employees from 2018 onwards concerning possible irregularities in the grant of education allowances and recommended to open disciplinary proceedings and the recovery of allowances, also against the applicant. The EIB heard the applicant and, in September 2021, adopted a recovery decision for an amount of ca. 61.000 Euro against her. The recovery was signed by the head of unit of the “individual rights and payment” unit at EIB.

## Decision of the General Court

The General Court (GC) annulled the recovery decision of the EIB (in its entirety) for two reasons: firstly, for lack of competence of the author of the recovery decision; secondly, for infringement of the five-year limitation period as regards the amount paid to the applicant up to September 2016.

### Lack of competence to act

On the first point, the GC found that the recovery decision should have been signed by the Director-General of Personnel and that the signature by the head of unit took place without proper sub-delegation. Sub-delegation cannot be presumed, the delegating authority must take an

express decision transferring powers and the delegation can relate only to clearly defined executive powers. In the present case, the sub-delegation was unwritten. Neither a letter by the Director-General informing the applicant about the OLAF recommendations and announcing the recovery, nor a reference contained in the recovery decision to the Director-General's agreement counted as valid sub-delegation. Finally, also a note of the Director-General confirming a sub-delegation was not accepted by the GC, because it came into being only after the recovery decision. The decision was therefore taken by an author without competence to do so.

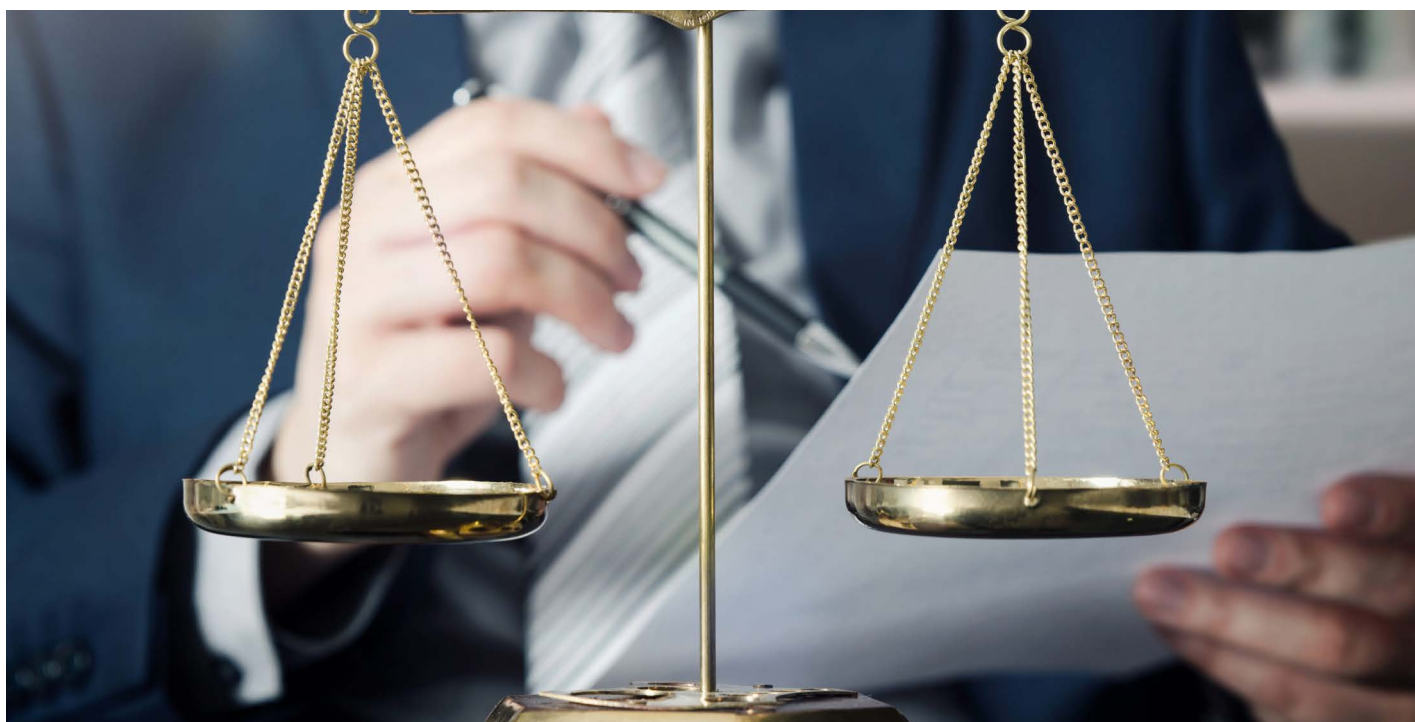
This infringement of the rules for allocation of the powers leads to annulment only if either it adversely affects one of the guarantees given to officials by the Staff Regulations or if it adversely affects the principles of good administration in matters of staff administration. In the present case, the GC annulled the recovery decision in its entirety, because it found that the alleged competence of the author of the recovery decision was neither clearly defined nor published, so that it undermined the principles of good (sound) administration.

### Limitation period for recovery

On the second plea in law, the infringement of the limitation period, the GC decided that the amounts paid before September 2016 (i.e. paid to the applicant more than five years before the recovery decision was taken in September 2021) fell under the limitation period and therefore could not be recovered. The GC ruled that the limitation period was neither suspended nor interrupted by the opening of OLAF investigations.

On this point, the EIB had argued that - under the OLAF Regulation - the bodies, offices or agencies cannot conduct parallel investigations while OLAF conducts its internal investigations and therefore the EIB was unable to take any action in regard to the recovery. OLAF had even explicitly instructed the EIB not to carry out parallel investigations. However, the GC refuses this argument by differentiating between the adoption of a recovery decision of sums wrongly paid to a staff member on one side and an investigation on the other side: In the opinion of the GC, there was nothing to prevent the EIB from recovering the amounts it considered wrongly paid. The function of a limitation period is to ensure legal certainty - which prevents the administration from "indefinitely delaying the exercise of its powers". The limitation period must be defined in advance and depends on „the historical and social circumstances prevailing in a society at a given time". Where the legislature of Art. 16.3 EIB Staff Regulations does not foresee interruption or suspension of the limitation period for recovery in the event of the opening of an investigation by OLAF, legal certainty precludes the EIB from being able to rely on any such interruption or suspension based on the opening of investigations by OLAF.

Finally, the GC rejected the argument of the EIB that the applicant was aware, before the expiry of the five-year limitation period, that her eligibility for the contested allowances had been called into question. The GC decided that, first, Art. 16.3 of the EIB Staff Regulations (Art. 85 SR) does not provide for the interruption or suspension of the limitation period in such a situation, and second, the starting point for the five-year period for the recovery of the undue amounts is the date of payment of those amounts and not the date on which the beneficiary became aware that they were unlawful.



## COMMENTS:

1. There is no discretion on an appointing authority's side whether or not to recover an overpayment (cf. Case T-782/14 P, DF / Commission). Once the conditions for the recovery of undue payments are met, the institution must recover the amounts that the staff member had unduly received. This is what the EIB tried to do in the case.

2. The EIB's decision to recover was taken without proper sub-delegation for the head of unit as the author of the recovery decision. The correct way of sub-delegating powers is described in the so-called "Meroni" case-law (Cases 9/56 and 10/56, Meroni), which is also of great importance in other areas of EU administration apart from EU civil service law:

- (a) A delegating authority cannot confer upon the receiving authority any powers different from those which it has itself received.
- (b) The delegation of discretionary powers is not permitted.
- (c) A delegation of powers can only involve clearly defined executive powers, the use of which must be entirely subject to supervision.
- (d) The transfer of authority by the delegating authority must take place in an express decision. Sub-delegation cannot be presumed.

3. It may happen that an institution decides to take recovery decisions only long time after the amount has been paid out to the staff member. The present judgment clarifies that the five years limitation period of Art. 16.3 EIB Staff Regulations (equivalent in Art. 85 SR) has to be interpreted strictly: the opening of an OLAF investigation does not suspend the period, interrupt or let it start afresh. The limitation period continues to run. This is rightly so, because the institution has to take its own decisions in regard to recoveries.

4. It can be deduced that the same is true for other kinds of procedures that are carried out to check the correctness of expenditures, e.g. an internal or external audit. Also such procedures would not suspend the limitation period provided for in Art. 85 SR.

5. For the recovering institutions this means that they have to take their decisions soon enough, on the basis of the information available to them and without being able to await the result of OLAF investigations, neither their own investigations. In the perspective of the staff

members this could mean that the recovery decision of an institution is issued before investigations are completed.

6. The five years limitation period does not apply where the appointing authority is able to establish that the recipient deliberately misled the administration with a view to obtaining the sum concerned. This was not the case here.

7. De lege ferenda, the Staff Regulations could be changed if the legislature (here EIB) wanted to adopt a different legal framework that allowed for a suspension or interruption of the limitation period. Obviously, such a change would have to redefine the objective of a limitation period vis-à-vis the principle of legal certainty.

8. The legal basis for recovery relates only to the financial relationship between an official who has received overpayments and the employer institution. It does not take into account the possible consequences of the recovery for the staff member with regard to other persons who may have benefited directly or indirectly from the overpayments subject to recovery by the institution, these being matters of private law.

9. The constellation of a recovery of sums unduly paid to the staff member under Art 85 SR is to be differentiated from the financial liability of staff, and is also different from the rules contained in Art. 105 Financial Regulation. Art. 22 SR stipulates that an official "may be required to make good, in whole or in part, any damage suffered by the Union as a result of serious misconduct on his part in the course of or in connection with the performance of his duties". There is no legal limitation period for the adoption of a decision under Art. 22 SR, however the institution is required – again by virtue of legal certainty – to adopt the decision "within a reasonable time" (Case T-693/16 P-RENV-RX, HG / Commission). Art. 105 Financial Regulation allows for interruption of the limitation period.