

Court of Justice of the European Union

Commentary on Statute and Rules of Procedure

von
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1. Auflage

Court of Justice of the European Union – Wägenbaur

schnell und portofrei erhältlich bei beck-shop.de DIE FACHBUCHHANDLUNG

Thematische Gliederung:

Europarecht



Verlag C.H. Beck München 2013

Verlag C.H. Beck im Internet:

www.beck.de

ISBN 978 3 406 60325 9

existence of unlawful conduct on the part of the EU-institution(s), the alleged damage concerned, and the existence of a causal link between the alleged unlawful conduct and the loss claimed due to the resulting damage⁷³⁴. The requirement concerning the existence of specific damage is satisfied if the damage is **imminent and foreseeable**, even if said damage cannot yet be precisely assessed⁷³⁵.

b) Not required

Thus, the argument that the limitation period cannot begin until the victim has 5 specific and detailed knowledge of the facts of the case is misconceived, since knowledge of the facts is not one of the conditions which must be met in order for the limitation period to begin⁷³⁶. The act responsible for the damage in question need not be declared invalid in order to oblige an institution to make reparations⁷³⁷.

2. Decisions

In the case of an invitation to tender, the five-year limitation period begins the 6 date upon which the bidder knows the reasons for the negative decision⁷³⁸.

3. Legislative acts

In cases where liability stems from a **legislative** measure, the limitation period 7 cannot begin until all the requirements governing the obligation to make good the damage are satisfied and cannot in any circumstance begin before the injurious effects of the measure have been produced⁷³⁹.

4. Interest

Interest is calculated based upon the value of the damage in question at the date 8 upon which it first occurred. The purpose of calculating interest on damages is merely to ensure updated, fair compensation for the damage suffered. The start date of calculation of interest must not be confused with the date of the damaging event that serves as the start date of the five-year limitation period within the meaning of Art. 46 Statute ECJ⁷⁴⁰.

⁷³⁴ Case T-332/99, *Jestädt v Council and Commission* [2001] ECR II-2561, para. 40 and the case law quoted.

⁷³⁵ Case T-369/03 *Arizona Chemical a.o. v Commission* [2005] ECR II-5839, para. 106 and the case-law quoted.

⁷³⁶ Case T-140/04, *Ehcon v Commission* [2005] ECR II-3287, para. 58.

⁷³⁷ Case T-20/94, *Hartmann v Council and Commission* [1997] ECR II-595, para. 126.

⁷³⁸ Case T-140/04, *Ehcon v Commission* [2005] ECR II-3287, para. 44 et seq.

⁷³⁹ Case T-20/94, *Hartmann v Council and Commission* [1997] ECR II-595, para. 107.

⁷⁴⁰ Case T-106/98, *Fratelli Murri v Commission* [1999] ECR II-2553, para. 28.

III. Interruption of the limitation period (paragraph 1, 2nd and 3rd sentence)

9 **1. Interruption. a) Conditions.** The five-year period is interrupted only if the allegedly aggrieved party institutes proceedings before the EU **judicature** or if, prior to such proceedings, the party submits an application to the relevant EU **institution**. In the case of an application directly submitted to an EU institution, however, interruption of the five-year time-limit only occurs if the request submitted to the institution is followed by an application to the ECJ within the time-limits determined by reference to Art. 263 TFEU or Art. 265 TFEU, depending on the case⁷⁴¹.

b) No interruption

10 Thus, neither the commencement of proceedings before the **national Courts**⁷⁴² nor a request for measures of **inquiry** such as a request to appoint an expert to investigate potential harm to the party in question is enough to interrupt the limitation period⁷⁴³.

c) Recurrent damage

11 If the damage was not caused immediately, but recurred on a daily basis over a particular period as a result of an unlawful measure, with respect to the date of the event which interrupted the limitation period, the time bar under Art. 46 Statute ECJ applies to the period preceding that date by more than five years⁷⁴⁴ and does not affect rights which arose during subsequent periods⁷⁴⁵.

2. Suspension

12 Art. 46 Statute ECJ only mentions interruption of the limitation period; it does not refer to **suspension** of such period. The suspension of the limitation period may result from the defendant's unilateral waiver of the right to plead limitation⁷⁴⁶.

TITLE IV GENERAL COURT

Preliminary

The legislature did not provide the GC with a statute of its own, since it, like the CST, is a subsidiary part of the Court of Justice. Instead, the legislature adopted

⁷⁴¹ Case T-76/94, *Jansma v Council and Commission* [2001] ECR II-243, para. 81.

⁷⁴² Case T-246/93 *Bühning v Council and Commission* [1998] ECR II-171, para. 64.

⁷⁴³ Case C-136/01 P, *Autosalone Ispra die Fratelli Rossi v Commission* [2002] ECR I-6565, para. 56.

⁷⁴⁴ Case T-174/00 *Biret International v Council* [2002] ECR II-17, para. 18; Case T-210/00 *Biret & Company v Council* [2002] ECR II-47, para. 41, 44.

⁷⁴⁵ Case T-76/94, *Jansma v Council and Commission* [2001] ECR II-243, para. 79; Case T-369/03, *Arizona Chemical a.o. v Commission* [2005] ECR II-5839, para. 116.

⁷⁴⁶ Case T-246/93, *Bühning v Council and Commission* [1998] ECR II-171, para. 66–70.

Title IV, which includes **Art. 47 to 62 b** of the Statute of the ECJ. These provisions refer, with some exceptions, to those applicable to the ECJ, such as Art. 47 (1), and, more importantly, Art. 53 (1), which refers to the applicability of all of **Title III**, i.e. Art. 19 to 46, the heart of the Statute ECJ, to GC procedure as well.

Article 47 [Applicable rules]

(1) The first paragraph of Art. 9, Article 9 a, Articles 14 and 15, the first, second, fourth and fifth paragraphs of Art. 17 and Art. 18 shall apply to the General Court and its members.

(2) The fourth paragraph of Art. 3 and Articles 10, 11 and 14 shall apply to the Registrar of the General Court *mutatis mutandis*.

I. Applicable provisions (paragraph 1)

The Judges of the GC have the same status as the Judges of the ECJ. The explicit reference to Arts. 2 to 8 of the Statute ECJ has been dropped, since these provisions now explicitly refer also to the GC. A reference to Art. 9 a, which describes the functions of the Vice-President, has been added.

II. Provisions applying to the Registrar of the GC (paragraph 2)

Regarding the Registrar the old Art. 45 has been replaced by Art. 47 paragraph 2.

Article 48 [Number of judges]

The General Court shall consist of 27 Judges.

1. Pending legislative proposal

The proposed increase of the number of Judges from the current number of 27 (i.e., one per Member State) to 39 in order to reduce the case load and shorten trial times for cases before the GC is, by definition, a politically delicate issue. Legally, any increase is possible because the GC is required to have “at least”⁷⁴⁷ one Judge per Member State (but could conceivably have more than one Judge of certain nationalities)⁷⁴⁸, while the ECJ comprises exactly one Judge per Member State⁷⁴⁹. However, implementing an increase, no matter its magnitude, is bound to be politically controversial, which is why the decision on this proposal has been

⁷⁴⁷ Art. 19 (2) TEU.

⁷⁴⁸ In practice, the Judge will most likely have the citizenship of the Member State concerned, but it remains unclear whether this is compulsory in law. Also, there is no rule regarding a Judge holding dual or multiple citizenship.

⁷⁴⁹ Art. 19 (2) TEU.

postponed to 2013. On the one hand, there is an objective, pressing need to reduce the GC's workload, which has substantially increased the average duration of proceedings⁷⁵⁰, in particular in the area of competition law⁷⁵¹. The creation of the CST, which relieved the then Court of First Instance (now the GC) of about one hundred staff cases per year⁷⁵², did not do much to remedy the situation⁷⁵³. Perhaps due in part to the CST's overall ineffectiveness at substantially reducing GC case load, discussions about the creation of further specialised Courts⁷⁵⁴, e.g. in the area of intellectual property rights, seem to have been put on hold. On the other hand, any increase of the number of Judges at the GC, in particular if it is as substantial as the current proposal, which increases the number of Judges by half again, is bound to trigger both a debate on the ensuing costs and a debate on which Member States should be entitled to two Judges.

2. Rotating Judges?

- 2 One way of resolving the more political issue of which Member States would receive multiple Judges would be to create a system of rotation, similar to the one which existed in the early years of the ECJ in which each of the six Member States appoints its own Judge and the seventh seat, required in order to avoid a tie, rotated between the major three Member States. The system of rotation of the 8 Advocates-General is a further precedent upon which one could draw in creating this system. While this might alleviate the political problem, however, the question of costs still remains, as adding twelve new Judges to the Court will prove rather expensive.

Article 49 [Advocate General]

(1) The members of the General Court may be called upon to perform the task of an Advocate General.

(2) It shall be the duty of the Advocate General, acting with complete impartiality and independence, to make, in open Court, reasoned submissions on certain cases brought before the General Court in order to assist the General Court in the performance of its task.

(3) The criteria for selecting such cases, as well as the procedures for designating the Advocates General, shall be laid down in the Rules of Procedure of the General Court.

(4) A member called upon to perform the task of Advocate General in a case may not take part in the judgment of the case.

⁷⁵⁰ The number of new cases before the GC rose from 469 in 2005 (when the CST was first referred cases in an attempt to relieve the overworked GC) to 722 in 2011; while the GC completed 104 more cases in 2011 (714 completed) than in 2005 (610 completed), it nevertheless had 275 more cases pending (1308 cases pending in 2011 versus 1033 in 2005). See *Annual Report of the European Court of Justice: Statistics of the General Court 2011*, p 19.

⁷⁵¹ c.f. "Draft Amendments to the Statute of the Court of Justice of the European Union and to Annex I Thereto", Introductory Note, p 3-4, www.curia.europa.eu; Case C-385/07 P *Der Grüne Punkt* [2009] ECR I-6155.

⁷⁵² Whilst this effect was somewhat mitigated by an increased number of appeals lodged at the GC.

⁷⁵³ See note 684, *supra*..

⁷⁵⁴ Which replaces the somewhat unfortunate term of "judicial panels".

This Art. implements Art. 254 (1) TFEU, which states that the Statute may 1 contain provisions allowing the GC to be supported by Advocates-Generals. So far, the legislature has not created the function of an Advocate General at the GC. It is unlikely that the creation of Advocates General for the GC would become an alternative to the proposed increase of the number of Judges at the GC.

Instead, Art. 49 Statute provides the possibility to designate a Judge to exercise 2 the tasks of an Advocate-General in a given case. Nevertheless, with the exception of some major competition cases during its initial years, the GC has never made use of this provision. This might have to do with the circumstance that the bulk of cases dealt with by the GC are factual, similarly to the cases for which the CST has jurisdiction, by contrast to proceedings at the ECJ, which are predominantly and often exclusively about legal questions.

Article 50 [Chambers, full Court, single Judge and Grand Chamber]

(1) The General Court shall sit in chambers of three or five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

(2) The composition of the chambers and the assignment of cases to them shall be governed by the Rules of Procedure. In certain cases governed by the Rules of Procedure, the General Court may sit as a full Court or be constituted by a single Judge.

(3) The Rules of Procedure may also provide that the General Court may sit in a Grand Chamber in cases and under the conditions specified therein.

I. General

This provision is similar to Art. 16 Statute ECJ. Creating chambers of different 1 sizes comprised of an uneven number of Judges in order to avoid a tie, reflects the collegial judgments seen in the judiciaries of most Member States as well as most international Courts. However, in contrast to the ECJ, where chambers of 5 Judges are assigned more than half of all cases, most cases before the GC (approximately 85 % in 2011⁷⁵⁵) are heard by a chamber comprised of three Judges.

II. Duration of the mandate

Only the mandate of the President of the Chamber of Five Judges is defined in 2 Art. 50(1); this three-year mandate is equivalent to that of his counterparts at the ECJ, as compared to the mandate of the President of chamber with three Judges. However, while the ECJ “Grand Chamber” is comprised of 15 Judges⁷⁵⁶, no

⁷⁵⁵ “Statistics of Judicial Activity of the General Court,” *Annual Report of the European Courts of Justice 2011*, www.curia.europa.eu.

⁷⁵⁶ Art. 16 (2) Statute ECJ.

provision in the Statute ECJ defines the number of Judges in the equivalent formation at the GC. Instead, Art. 10 (1) RP GC regulates this “grand chamber” within the GC.

Article 51 [Jurisdictions]

(1) By way of derogation from the rule laid down in Art. 256 (1) of the Treaty on the Functioning of the European Union jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against:

(a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:

- decisions taken by the Council under the third subparagraph of Art. 108 (2) of the Treaty on the Functioning of the European Union;
- acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Art. 207 of the Treaty on the Functioning of the European Union;
- acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Art. 291 of the Treaty on the Functioning of the European Union;

(b) against an act of or failure to act by the Commission under the first paragraph of Art. 331 of the Treaty on the Functioning of the European Union.

(2) Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.

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I. Introduction

Art. 51 Statute ECJ describes a seemingly complex system of derogations: It reserves jurisdiction to the ECJ for certain cases, while providing a number of exceptions to these derogations, which thus remain within the jurisdiction of the GC. These numerous exceptions presumably justify placing this provision in Title IV Statute ECJ. It seems thus useful to provide an overview on the jurisdiction of the ECJ and the GC:

II. Exclusive jurisdiction of the ECJ

The ECJ has exclusive jurisdiction over all legal remedies referred to in Art. 251 et seq. TFEU⁷⁵⁷, unless the GC or the CST (to date the only specialised Court), has exclusive jurisdiction within the meaning of Art. 256 TFEU, or unless the ECJ and the GC have “divided jurisdictions”. These various jurisdictions will be described further below.

III. Exclusive jurisdiction of the GC

The GC has exclusive jurisdiction over appeals of CST judgements as well as for applications regarding non contractual liability⁷⁵⁸.

IV. Divided jurisdiction

1. General

Both the ECJ and the GC have jurisdiction over actions for annulment and failure to act, as well as over referrals for preliminary rulings, depending upon the **legal status of the applicant** and the **legal subject** concerned on the basis of rules that are far from being a masterpiece of transparency:

2. Actions for annulment and failure to act. a) GC. The GC has jurisdiction at first instance over the actions for annulment and failure to act mentioned in Art. 256 (1) TFEU, **except** for those actions that are a matter for the ECJ by virtue of Art. 51 Statute ECJ, **unless** the case falls under one of the specific exceptions provided for in this provision, in which case the GC has jurisdiction.

⁷⁵⁷ See e.g. Art. 256 (1), sub-para. 2 TFEU – appeal against decisions of the GC; Art. 258 TFEU – infringement proceedings by the Commission, Art. 259 TFEU) – infringement proceedings by a Member State.

⁷⁵⁸ Art. 256 (1) TFEU and Art. 268 in conjunction with Art. 340 TFEU.

Stat Art. 52

Statute of the Court of Justice of the EU

- 6 b) ECJ. aa) Rule. The ECJ has jurisdiction⁷⁵⁹ for all actions for annulment and failure to act lodged by EU institutions. Furthermore it is, in principle, responsible for hearing actions for annulment and failure to act lodged by Member States (see Art. 51 paragraph 1 a) and b) Statute ECJ), unless one of the exceptions provided for in litera a) applies. Should such an exception apply, the GC has jurisdiction over said case.

bb) Exceptions

- 7 These include unanimous decisions which the Council adopts on the basis of Art. 108 (2), sub-paragraph 3 TFEU with respect to state aid; decisions which implement a regulation based on Art. 207 TFEU; and those cases in which the Council did not delegate the responsibility to create measures which implement a regulation to the Commission, but instead kept this competence for itself (or, alternatively, executes these measures in the context of a “comitology”- procedure (see Art. 290, 291, (2) to (4) TFEU)).

3. Referral for preliminary rulings

- 8 The ECJ has jurisdiction for referrals for preliminary rulings within the meaning of Art. 267 TFEU, insofar as the Statute ECJ does not specifically attribute such jurisdiction to the GC⁷⁶⁰, which is not the case to date.

V. Specialised Courts

- 9 The “specialised Courts” have exclusive jurisdiction over one or several particular subject(s) or sector(s). Currently the CST is the only specialised Court; it has exclusive jurisdiction for staff matters⁷⁶¹ at first instance. In the vast majority of cases, distinguishing between a staff case under the jurisdiction of the CST and other cases that come under the jurisdiction of the GC, such as a pending request lodged by an official for access to documents on the basis of Regulation 1049/2001, is not difficult⁷⁶².

Article 52 [Staff of the GC]

The President of the Court of Justice and the President of the General Court shall determine, by common accord, the conditions under which officials and other servants attached to the Court of Justice shall render their services to the General Court to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the General Court under the authority of the President of the General Court.

⁷⁵⁹ Art. 51 (2) Statute ECJ.

⁷⁶⁰ Art. 256 (3), sub-para. 3 TFEU.

⁷⁶¹ Art. 270 TFEU.

⁷⁶² Case F-121/07, *Strack v Commission* and T-197/11 P, *Commission v Strack*.