



**RIGA
GRADUATE
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LAW**

MASTER THESIS

Application of the rules on psychological harassment by the European Union institutions, bodies, offices and agencies covered by Regulation No 31 (EEC), 11 (EAEC)¹ and their interpretation by the EU Courts²

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA 2023

¹ Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, OJ L 56, 4.3.1968, p. 1–7. Available on: [http://data.europa.eu/eli/reg/1968/259\(1\)/oj](http://data.europa.eu/eli/reg/1968/259(1)/oj). Accessed February 26, 2023.

² The Court of Justice of the European Union, the EU General Court (previously the Court of First Instance) and the EU Civil Service Tribunal.

Abstract

The purpose of this Master Thesis is to assess whether, under the existing rules, the European Union (hereinafter – “the EU”) institutions, bodies, offices and agencies (hereinafter – “the institutions”) covered by Regulation No 31 (EEC), 11 (EAEC) afford their staff members effective protection against psychological harassment. Accordingly, the research question of the Master Thesis is: How the rules on psychological harassment are applied by the institutions and interpreted by the EU Courts? The Master Thesis finds that the burden of proof is particularly high for an alleged victim as they must prove what they allege while an alleged harasser benefits from the presumption of innocence. The Master Thesis identifies such duties of the institutions as the duty to provide assistance, the duty to open and conduct an administrative inquiry, the duty to separate an (alleged) harasser from an (alleged) victim of psychological harassment, the duty to protect privacy of the involved persons, etc. The author suggests, inter alia, to enhance regulatory acts adopted by each institution to prevent psychological harassment and conduct administrative inquiries and disciplinary procedures, as well as advocates placing the responsibility for preventing psychological harassment in a legislative act, i.e. Regulation No 31 (EEC), 11 (EAEC) rather than a regulatory act, thus giving greater importance to this issue.

Keywords: psychological harassment, EU civil service, Regulation No 31 (EEC), 11 (EAEC), EU Staff Regulations, EU courts, doctrinal legal research

Summary

The overall aim of this Master Thesis (hereinafter – “the MT”) is to assess whether, under the existing rules, those EU institutions, bodies, offices and agencies (hereinafter – “the institutions”³) which are covered by Regulation No 31 (EEC), 11 (EAEC) (hereinafter – “the institutions”⁴) afford effective protection to their staff members against psychological harassment.

When speaking about the staff members covered by Regulation No 31 (EEC), 11 (EAEC) which contains two parts – 1) Staff Regulations of Officials of the European Union (hereinafter – “the Staff Regulations”) this part covering civil service conditions of officials, and 2) Condition of Employment of Other Servants of the European Union (hereinafter – “the CEOS”) this part covering temporary staff, contract staff, accredited parliamentary assistants (hereinafter – “the APAs”), local staff and special advisers (the regulation as a whole is hereinafter referred to as “the Staff Regulations and the CEOS”). However, this MT focuses on temporary staff, contract staff and accredited parliamentary assistants.

The research question of this MT is: How the rules on psychological harassment are applied by the institutions and interpreted by the EU Courts?

In order to answer the research question this MT is divided into three chapters. The first chapter assesses psychological harassment and its consequences from the point of view of psychology. The second chapter assesses the legal framework relevant to this MT with the main focus on the EU primary law, EU secondary law and regulatory acts adopted by each institution.

The third chapter reviews how the rules identified in the second chapter are applied by the institutions and interpreted by the EU Courts, as well as assesses the effectiveness of the available legal remedies. In addition, this chapter discusses such duties of the institutions as the duty to provide assistance to a staff member; the duty to promptly open and conduct an administrative inquiry; duties in view of protection of personal data of involved persons; the duty to separate an

³ The EU institutions are defined in Article 13 of the Treaty on European Union. However, this MT has different/broader notion of 'institutions' and includes the EU institutions, bodies, offices and agencies covered by Regulation No 31 (EEC), 11 (EAEC). The term 'institutions' is chosen due to the fact that such reference is used to refer to the EU institutions, bodies, offices and agencies in Regulation No 31 (EEC), 11 (EAEC).

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(alleged) victim from an (alleged) and the duty to compensate damages (non-material and material) sustained by an (alleged) victim of psychological harassment if they are caused by an unlawful act on the part of the concerned institution.

The MT includes the following suggestions:

- 1) To continue researching certain aspects of psychological harassment by the scholars specialising in psychology;
- 2) To include obligations in view of the prevention of psychological harassment, similar to those included in Directive 89/391/EEC⁵, in the Staff Regulations and the CEOS;
- 3) To align the psychological harassment definition include in the Staff Regulations with definitions included in the EU directives assessed in this MT;
- 4) To monitor the ratification process of ILO Convention No 190 in view of possible reflecting the psychological harassment as a result of a singular occurrence of reprehensible conduct in the EU law including the Staff Regulations and the CEOS.
- 5) To enhance the internal rules of the institutions in view of preventing psychological harassment and conducting administrative inquiries and disciplinary procedures including via the follow up of the suggestions included in the European Ombudsman's Inquiry Report of 2018
- 6) To raise awareness within the institutions of what conduct constitutes psychological harassment and how to effectively stop it, thus boosting an overall culture of non-tolerance of psychological harassment at the institutions.

⁵ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1. Available on: <http://data.europa.eu/eli/dir/1989/391/2008-12-11>. Accessed February 26, 2023.

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Introduction

Researching the topic of psychological harassment is particularly important as the study by the European Union Agency for Fundamental Rights from 2021 shows that in the EU the most common form of harassment involves offensive or threatening comments made in person experienced by 32 % of people in the EU, followed by gestures made in person experienced by 29 % of people in the five years before the survey.⁶ Moreover, of the harassment incidents of non-sexual nature, 16 % were conducted by a work colleague, a customer or a client⁷ which shows the necessity of further researching the phenomenon of psychological harassment at work including from the perspective of the application of the rules designed to handle psychological harassment cases by the institutions.

Furthermore, psychological harassment has serious repercussions on the victim. Therefore, the correct application of the rules and procedures for dealing with psychological harassment is crucial as any member of society must be afforded the possibility to integrate into a society where the workplace plays a very important role. Moreover, the institutions shape popular views about the EU as a union of states and values. Thus, they should set a clear example for resolute efficient policies for dealing with psychological harassment.

In addition, overall in the EU, many victims of violence and harassment do not take court action because of the limited prospects of success⁸, hence the importance of this MT as a contribution to the research of the effectiveness of the available legal remedies and to foster the awareness about them.

The research question of this MT is: How the rules on psychological harassment are applied by the institutions and interpreted by the EU Courts?

In view of the above, the overall aim of this MT is to assess whether under the existing rules the staff members of the institutions are afforded effective protection by the institutions when facing psychological harassment at the workplace.

⁶ See European Union Agency for Fundamental Rights. *Crime, Safety and Victims' Rights: Fundamental Rights Survey* (Luxembourg: Publications Office of the European Union, 2021), p. 49. Available on: <https://fra.europa.eu/en/publication/2021/fundamental-rights-survey-crime>, Accessed April 8, 2023.

⁷ *Ibid.*, p. 59.

⁸ See European Foundation for the Improvement of Living and Working Conditions, *Violence and harassment in European workplaces: Extent, impacts and policies* (Dublin, 2015), p. 56. Available on: <https://www.eurofound.europa.eu/publications/report/2015/violence-and-harassment-in-european-workplaces-extent-impacts-and-policies>. Accessed April 15, 2023.

To achieve the overall aim of this MT, it is divided into three chapters each corresponding to a specific objective. The objective of the first chapter is to assess psychological harassment and its consequences from the point of view of psychology thus setting the scene for the subject matter of this MT. Given the intangible nature of psychological harassment it is much more difficult to regulate it than many tangible work-related matters. The second chapter focuses on the applicable legal provisions, and the third chapter assessing how the rules identified in the second chapter are applied by the institutions and interpreted by the EU Courts, as well as assessing the effectiveness of the available legal remedies in the third chapter.

As to the limitations of this MT, due to the fact that the Staff Regulations and the CEOS do not apply to all EU institutions and bodies, e.g. the European Central Bank⁹, the European Investment Bank¹⁰, the European Defence Agency¹¹; such entities are excluded from the scope of this MT. In addition, given that the provisions of the Staff Regulations that apply to officials regarding non-discrimination, working conditions, psychological harassment, requests for assistance, disciplinary measures and procedures, and appeals mostly apply by analogy via the CEOS to such main staff groups in the institutions as temporary staff, contract staff and APAs (see more in the second chapter of this MT); only these categories of staff of the institutions are covered by the research in this MT. Due to the limited application of the CEOS to local staff and special advisers, these categories of staff are excluded from the scope of this MT. Another limitation of this MT is that it analyses psychological harassment broadly without diving into details of psychological harassment as a form of discrimination based on the prohibition of discrimination on any particular grounds, e.g. grounds included in Article 1d(1) of the Staff Regulations¹².

As to the methodology, doctrinal legal research is the main method used in this Master Thesis to identify and analyse the applicable rules and to illustrate the views of legal scholars pertaining to the subject matter of this MT. The historical approach comes into play to demonstrate the evolution of legislative acts as well as jurisprudence by the EU Courts. Comparative legal

⁹ See Article 36 of Protocol No 4 on the statute of the European System of Central Banks and of the European Central Bank annexed to the Treaty on the Functioning of the European Union.

¹⁰ See Article 11(7) of Protocol No 5 on the statute of the European Investment Bank annexed to the Treaty on the Functioning of the European Union.

¹¹ See Article 11(3)(a) of Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency, *OJ L* 266, 13.10.2015, pp. 55–74. Available on: <http://data.europa.eu/eli/dec/2015/1835/oj>. Accessed April 15, 2023.

¹² Article 1d(1) of the Staff Regulations provides that “In the application of these Staff Regulations, any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation shall be prohibited.”

research contributes to comparing the definition of psychological harassment contained in the Staff Regulations with that included in the EU directives and an international convention. The MT is inter-disciplinary in that that the main source of information for its first chapter is empirical research by scholars specialising in psychology.

1. PSYCHOLOGICAL HARASSMENT AND ITS CONSEQUENCES FROM THE POINT OF VIEW OF PSYCHOLOGY

A study commissioned by the European Parliament in 2018¹³ identifies that:

Interest in workplace bullying started in Sweden in the 1980s, where Heinz Leymann pioneered research by systematically exploring the phenomenon empirically and through his writings and media appearances aroused considerable public debate in the early 1990s. Inspired by Leymann's work and studies on school bullying, the first arena to apply the term, research and public interest in workplace bullying quickly expanded, first to the other Scandinavian countries, and soon thereafter to other European countries.

Ståle Einarsen, a Professor in work and organisational psychology at the University of Bergen, Norway¹⁴ refers to psychological harassment, the term used overall in this MT and in the Staff Regulations and the CEOS, as follows:

The issue of bullying in the workplace, also called “mobbing” in many countries is a complex one. It may come in many shapes and shades with multiple causes on many levels, and with diverging views on its very nature (...). Yet, at a basic level it is about the systematic mistreatment of a subordinate, a colleague, or a superior, which, if continued and long-lasting, may cause severe social, psychological, and psychosomatic problems in the target.¹⁵

As to the different terms used to refer to psychological harassment, the choice of the term used is nation-specific and can be referred to as “workplace bullying”, “harassment”, “mobbing”, etc.¹⁶

Psychological harassment at work is characterised by its repetitive nature towards at least one worker, it is unwanted by the victim, it can be either intentional or unconscious from the perspective of the harasser¹⁷, and it can lead to stigmatisation and victimisation of the targeted person(-s)¹⁸.

¹³ European Parliament. Study for the FEMM Committee. Bullying and sexual harassment at the workplace, in public spaces, and in political life of EU, p. 11. (2018). Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)604949](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)604949). Accessed May 1, 2023.

¹⁴ “A Professor in Work and Organisational Psychology at the University of Bergen, Norway and Head of the Bergen Bullying Research Group. Einarsen has published extensively on issues related workplace bullying (...) during the last 20 years. He was one of the founding members of the International Association on Workplace Bullying and Harassment acting as a member for the first interim board. Einarsen acted as advisor to the Norwegian Government regarding workplace bullying and has co-edited two international volumes on bullying and harassment in the workplace. His work has appeared in journals such as Journal of Occupational and Organisational Psychology, (...) Work and Stress”. See International Association on Workplace Bullying and Harassment. Available on: https://iawbh.org/Stale_Einarsen/. Accessed April 15, 2023.

¹⁵ Ståle Einarsen, Helge Hoel, Dieter Zapf, and Cary L. Cooper. *The concept of bullying and harassment at work: The European tradition*, p. 4. (2011). Available on: ResearchGate. Accessed February 16, 2023.

¹⁶ *Ibid.* “Whereas this phenomenon is usually referred to as a workplace bullying in English-speaking countries and as harassment (harcèlement morale) in French speaking world, it has mainly been termed mobbing in most other European countries, although other nation-specific terms continue to live on side by side.”

¹⁷ *Ibid.*, p. 9.

¹⁸ *Ibid.*, p. 10.

Such mistreatment have adverse effects not only on the victim of the psychological harassment, but also on those witnessing it, thus affecting the overall morale and motivation at the workplace which can result, *inter alia*, in an economic losses for the concerned employer.¹⁹

Psychological harassment at work increases the risk of stress-related illnesses among the staff members, a tendency of early retirement of abused employees, higher personnel turnover. This means additional costs for recruiting temporary or new staff, a decrease in productivity and higher production costs.²⁰

Besides the above-mentioned organisational effects, it is also important to assess the potential costs on the victim, *inter alia*, for the following reason:

For the individual, mobbing is highly destructive. A common question is why does the person not leave the organization. However, as a person becomes older, his or her ability to find a new job diminishes. (...) Expulsion from employment may easily turn into a situation in which the individual in question is unable to find any job at all, which means that he or she is essentially expelled from the labour market.²¹

Various study reports show that besides such health-related consequences of the victims of psychological harassment as sick leaves, sleep problems and depressive disorders²², psychological harassment is also associated with suicidal ideation²³. Moreover, a survey across a four-year follow-up period among 20 – 40% of a large sample of Danish employees shows that sick-leave, poor self-related health and depressive disorders persist over several years regardless of whether bullying is discontinued or not.²⁴

A study conducted in France surveying victims of psychological harassment, salaried workers referred to the clinic against a background of presumed workplace bullying and followed-

¹⁹ See Einarsen *et al*, *supra* note 15, p. 7.

²⁰ See Heynz Leymann, *The Content and Development of Mobbing at Work*, pp. 173–174. (1990). Available on: ResearchGate. Accessed February 18, 2023.

²¹ *Ibid.*, p. 174

²² Jens Peter Bonde *et al*, *Health correlates of workplace bullying: a 3-wave prospective follow-up study*, p. 18. Scandinavian Journal of Work, Environment & Health, January 2016, Vol. 42, No. 1 (January 2016). <http://www.jstor.org/stable/43999191>.

²³ Morten Birkeland Nielsen *et al*, *Does exposure to bullying behaviors at the workplace contribute to later suicidal ideation? A three-wave longitudinal study*, p. 246. Scandinavian Journal of Work, Environment & Health, May 2016, Vol. 42, No. 3 (May 2016). <https://jstor.org/stable/43999224>.

²⁴ See Bonde, *supra* note 22, p. 23.

up over 12-month period²⁵, shows that severe psychiatric pathologies are developed by those with no significant psychiatric history²⁶:

At the initial consultation, one in four patients reported suicidal ideation. At 12 months, there was no significant change in the number of patients presenting suicidal ideation.

At 12-month post-consultation, 25 of the 48 patients (52%) reported a deep fear of returning to or approaching their workplace, even though they were no longer at work due to long-term sick leave or termination of their contract on medical grounds.

Many patients reported various persistent somatic symptoms or disorders at 12-month post-consultation: weight gain, appetite disorders, digestive disorders, palpitations, angina, migraines, giddiness and poorly systematized arthralgia or muscular pain.²⁷

As to the personality traits that could have some impact on the gravity of the psychological harassment situation, various studies have touched upon this aspect but concluded that this topic is far too contentious in terms of vulnerability traits and that the seriousness of psychological harassment as a behaviour is sufficient to cause serious health consequences.²⁸

Speaking about the causes of psychological harassment situations at work; it is another contentious subject, and it “does not always appear to be related to an ‘organised’ workplace strategy or a form of staff management, but is rather the result of individual attitudes”²⁹. Therefore, while it is important to focus on the workplace environment and ensure overall high moral standards within a workplace which would in turn contribute to an overall increase in productivity, it is also important that each employee feels encouraged to report psychological harassment and that effective procedures exist to deal with the reported psychological harassment cases.

Interestingly that Sweden, in 1994, was the first ever country to introduce legal provisions deploring psychological harassment at the workplace³⁰ which highlighted the issue of preventing such behaviour by requiring that new employees receive an introduction to respective legal norms and that they are informed about what is expected from them at the start of the employment³¹.

²⁵ Georges Brousse *et al*, *Psychopathological features of a patient population of targets of workplace bullying*, p. 123. (2008). Available on ResearchGate. Accessed February 19, 2023.

²⁶ *Ibid.*, p. 125.

²⁷ *Ibid.*, p. 124

²⁸ *E.g.*, Brousse, *supra* note 25, p. 126.

²⁹ *Ibid.*, p. 127.

³⁰ See Helge Hoel *et al*, *The Swedish Ordinance Against Victimization at Work: a Critical Assessment*, p. 229. European Journal of Work & Organisational Psychology, February 2010. Available on: ResearchGate. Accessed February 16, 2023.

³¹ *Ibid.*, p. 232.

As to the matter of dealing with the psychological harassment cases, moving the victim to alternative duties has been suggested as one of the ways to deal with the issue. However,

[U]sing transfers of victims to alternative duties, to prevent further attack or repeat victimization, must be considered a declaration of failure and an abdication of responsibility on the part of managers as well as a breach of their duty of care toward employees.³²

To summarise this chapter, it must be noted that over 40 years of researching the phenomenon of psychological harassment at work initiated in the 1980s shows that there are very important aspects that still require research, such as vulnerability traits that could show that some types of personalities could be more affected by psychological harassment than others. Another contentious subject is the causes of psychological harassment at work being an organised workplace strategy or rather the result of individual attitudes. More research of the causes of psychological harassment would ensure that employers' attention is focused to the right mitigation measures. It can also be concluded that transferring of victims to prevent further attacks is considered a declaration of failure from the point of view of psychology and therefore other more appropriate measures must be assessed, such an assessment is part of the analysis included in Chapters 2 and 3 of this MT.

³² Hoel et al. *Supra* note 30, p. 234.

2. LEGAL FRAMEWORK APPLICABLE TO THE INSTITUTIONS

This chapter identifies applicable EU primary law, EU secondary law and regulatory acts adopted by each institution to give effect to certain provisions of the Staff Regulations and the CEOS as supplemented by other sources to explain the applicable rules, as well as to compare them with relevant EU and international standards. Regulatory acts adopted by each institution in a form of own internal rules are assessed based on the best practices and improvements for preventing and handling psychological harassment cases identified in the Report of the European Ombudsman on dignity at work in the EU institutions and agencies: SI/2/2018/AMF³³ from 17 December 2018 (hereinafter – “the Inspection Report”). The Inspection Report is based on a unique strategic initiative undertaken by the European Ombudsman after assessing respective internal rules of 26 institutions with respect to identifying and sharing best practices across the EU civil service.³⁴

2.1. EU primary and secondary law, and their comparison with the EU standards applicable to the EU member states and international standards

The legal order of the EU as a whole is based on the values among which are such fundamental rights as human dignity and non-discrimination included in Article 2 of the Treaty on European Union³⁵ (hereinafter – “the TEU”).

Furthermore, the Charter of Fundamental Rights of the European Union³⁶ annexed to the Treaties (hereinafter – “the Charter”), which is addressed, *inter alia*, to the institutions³⁷, finally includes civil and political rights from one side and economic and social rights from the other in a single ‘bill of rights’ and places all these rights at the highest hierarchical level of the EU’s legal acts³⁸. Article 1 of the Charter declares that “Human dignity is inviolable. It must be respected and

³³ European Ombudsman. Report of the European Ombudsman on dignity at work in the EU institutions and agencies, SI/2/2018/AMF (17/12/2018). Available on: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/107799>. Accessed May 1, 2023.

³⁴ *Ibid.*, p. 3.

³⁵ Treaty on European Union (Consolidated version 2020), *OJ C* 202 7.6.2016, p. 13. Available on: http://data.europa.eu/eli/treaty/teu_2016/2020-03-01. Accessed February 6, 2023.

³⁶ Charter of Fundamental Rights of the European Union, *OJ C* 202, 7.6.2016, pp. 389–405. Available on: http://data.europa.eu/eli/treaty/char_2016/oj. Accessed February 8, 2023. The Charter is introduced in the Treaties via Article 6 TEU.

³⁷ Article 51(1) of the Charter lays down that “[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”.

³⁸ See Jeff Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Oxford and Portland, Oregon: Hart Publishing, 2003), pp. 511–513.

protected”. The Explanations relating to the Charter of Fundamental Rights³⁹ (hereinafter – “the Explanations”) drawn up to provide guidance in the interpretation of the Charter which must be given due regard by the EU and member state courts⁴⁰ remind of the post-war importance of the respect and protection of human dignity, *inter alia*, as a guarantor of peace in the world:

The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’

In the context of the working conditions of the staff members of the institutions, Article 31(1) of the Charter states that “Every worker has the right to working conditions which respect his or her health, safety and dignity”. In accordance with the Explanations on this article:

Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression ‘working conditions’ is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

Article 3 of the European Social Charter sets forth that “[a]ll workers have the right to safe and healthy working conditions”⁴¹, point 19 of Community Charter of Fundamental Social Rights of Workers lays down, *inter alia*, that “every worker must enjoy satisfactory health and safety conditions in his working environment”⁴², and Article 26 of the European Social Charter states that “[a]ll workers have the right to dignity at work. Moreover, the Explanations also mention Directive 89/391/EEC as a basis of Article 31(1) of the Charter, and the Staff Regulations and the CEOS (legislative act that governs relations between the institutions and their staff members) refers to the obligation by the institutions to provide their staff members working conditions with health and safety standards meeting at least the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties⁴³, e.g. EU directives. Therefore, it is important to

³⁹ Explanations relating to the Charter of Fundamental Rights, *OJ C* 303, 14.12.2007, pp. 17–35. Available on: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32007X1214\(01\)#ntr1-C_2007303EN.01001701-E0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32007X1214(01)#ntr1-C_2007303EN.01001701-E0001). Accessed April 15, 2023.

⁴⁰ *Ibid.*, see Article 52(7) of the Charter.

⁴¹ Council of Europe. *European Social Charter (revised) (ETS No. 163)*, 1996, Date of entry into force: 1 July 1999. Available on: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=163>. Accessed May 1, 2023.

⁴² Community Charter of the Fundamental Social Rights of Workers, 9 December 1989. Available on: <https://op.europa.eu/en/publication-detail/-/publication/51be16f6-e91d-439d-b4d9-6be041c28122/language-en/format-PDF>. Accessed May 1, 2023.

⁴³ Article 1e(2) of the Staff Regulations states that “[o]fficials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties. This article applies to officials and by analogy to temporary agents via Article 10(1) of the CEOS, to contract agents via Article 80(4) of the CEOS and to

assess the scope of the minimum requirements in view of health and safety standards at work included in Directive 89/391 and to verify if these standards may be relied on by the staff members of the institutions.

As a preliminary point, it must be noted that it is a well-established case-law of the EU Courts that the provisions of EU directives cannot be treated as imposing any obligation on the institutions in their relations with their staff; however, there are three situations in which the institutions cannot preclude rules or principles laid down in respective directives from being relied on against the institutions. First, where those rules or principles appear to be merely the specific expression of fundamental Treaty rules and general principles directly applicable to the institutions; second, a directive may be binding on an institution where the latter, within the scope of its organisational autonomy and within the limits of the Staff Regulations and the CEOS, has sought to carry out a specific obligation laid down by a directive or in the specific instance where an internal measure of general application itself expressly refers to measures laid down by the EU legislature pursuant to the Treaties; and third, the institutions must, in their conduct as employer and in accordance with their duty to cooperate in good faith, take account of legislative provisions adopted at EU level.⁴⁴

Given that Directive 89/391/EEC has the aim to improve health and safety at work⁴⁵, if required, staff members of the institutions may rely on this directive based on Article 1e(2) of the Staff Regulations. Directive 89/391/EEC applies to both the public and private sector⁴⁶; and its Article 5(1) lays down that “[t]he employer shall have a duty to ensure the safety and health of workers in every aspect related to the work”. This duty, although not particularly highlighted in the directive, includes the protection of workers from work-related stress including psychological harassment⁴⁷. Furthermore, Article 6 of Directive 89/391/EEC includes the following among the

APAs via Article 126(2) of the CEOS provided that such measures are compatible with particular nature of the tasks and responsibilities taken on by APAs.

⁴⁴ Judgment of the Court (Grand Chamber) of 8 September 2020, *European Commission and Council of the European Union v Francisco Carreras Sequeros and Others*, joined cases C-119/19 P and C-126/19 P, ECLI:EU:C:2020:676, paras. 87–88.

⁴⁵ Article 1(1) of Directive 89/391/EEC states that: “The object of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work.”

⁴⁶ Directive 89/391/EEC, Article 2, *supra* note 5.

⁴⁷ See Catherine Barnard, *EU Employment Law (Fourth Edition)* (Oxford: Oxford University Press, 2012), p. 511. See also European Foundation for the Improvement of Living and Working Conditions and European Agency for Safety and Health at Work, *Psychosocial risks in Europe: Prevalence and strategies for prevention* (Luxembourg: Publications Office of the European Union, 2014), p. 10. Available on: <http://eurofound.europa.eu/publications/report/2014/eu-member-states/working-conditions/psychosocial-risks-in-europe-prevalence-and-strategies-for-prevention>. Accessed April 15, 2023. See also European Agency for Safety and

responsibilities of an employer: prevention of occupational risks and provision of information and training in order to avoid risks, evaluation of the risks which cannot be avoided and combating risks at source. Accordingly, these duties are included in the scope of Article 1e(2) of the Staff Regulations as minimum standards pertaining to health and safety at work.

Switching to the prohibition of psychological harassment at work, it must first be noted that Articles 11 to 26a of the Staff Regulations on rights and obligations of staff members (including the prohibition of psychological harassment and protection of staff members against reprehensible conduct) apply to officials and by analogy via Article 11 of the CEOS – to temporary staff, while Article 11 of the CEOS applies to contract staff via Article 81 of the CEOS and to APAs via Article 127 of the CEOS. While Article 12 of the Staff Regulations provides a prohibition of any acts or behavior which might reflect adversely upon the staff members' position, Article 12a of the Staff Regulations states requires that staff members refrain from any form of psychological or sexual harassment; hence the need to analyse the definition of psychological harassment included Article 12a of the Staff Regulations.

The definition of psychological harassment was introduced in the Staff Regulations in 2004 by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004⁴⁸ which entered into force on 1 May 2004⁴⁹ and has not changed since then. With this regulation, Article 12a was included in the Staff Regulations as a try to have a comprehensive norms dealing with psychological harassment, third paragraph of this new article introduced the following definition which is still kept in the Staff Regulations:

‘Psychological harassment’ means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are *intentional* [emphasis added] and that may undermine the personality, dignity or physical or psychological integrity of any person.

Health at Work. *Calculating the cost of work-related stress and psychosocial risks: European Risk Observatory. Literature Review.* (2014). P. 4. Available on: <https://osha.europa.eu/en/publications/calculating-cost-work-related-stress-and-psychosocial-risks>. Accessed May 1, 2023. See also European Ombudsman. Report of the European Ombudsman on dignity at work in the EU institutions and agencies, SI/2/2018/AMF (17/12/2018), pp. 4–5. Available on: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/107799>. Accessed May 1, 2023. See also European Agency for Safety and Health at Work, *Calculating the cost of work-related stress and psychosocial risks: European Risk Observatory. Literature Review* (2014), p. 4. Available on: <https://osha.europa.eu/en/publications/calculating-cost-work-related-stress-and-psychosocial-risks>. Accessed May 1, 2023.

⁴⁸ Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, *OJ L* 124, 27.4.2004, pp. 1–118. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004R0723>. Accessed March 9, 2023.

⁴⁹ *Ibid.*, Article 2.

An important element stemming from the above definition of psychological harassment is that the reprehensible acts must take place over a period, be repetitive or systematic. Prior to the inclusion of the psychological harassment definition in the Staff Regulations, the repetitive nature of psychological harassment could not be derived from the conduct described in Article 24 of the Staff Regulations which was used to refer to psychological harassment cases until the amendments of the Staff Regulations of 2004 came into force.

It was already concluded in page 13 above that the institutions must, in their conduct as employer and in accordance with their duty to cooperate in good faith, take account of legislative provisions adopted at EU level. Accordingly, definition of psychological harassment included in the Staff Regulations must be considered having in mind psychological harassment definitions included in EU directives. The following EU directives include definition of psychological harassment: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁵⁰ (hereinafter – “Directive 2000/43”) which applies, *inter alia*, with respect to ensuring fair employment and working conditions⁵¹; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁵² (hereinafter – “Directive 2000/78/EC”) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation⁵³ (hereinafter – “Directive 2006/54/EC), (all together hereinafter – “EU Equal Treatment Directives”).

The EU Equal Treatment Directives, although adopted for different purposes⁵⁴, refer to harassment identically. For example, Article 2(3) of Directive 2000/43/EC (the purpose of the

⁵⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0043>. Accessed February 26, 2023.

⁵¹ *Ibid.*, Article 3(1)(c).

⁵² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0078>. Accessed February 26, 2023.

⁵³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, pp. 23–36. Available on: <http://data.europa.eu/eli/dir/2006/54/oj>. Accessed February 26, 2023.

⁵⁴ *Article 1 of Directive 2000/43/EC states that:* The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. *Article 1 of 2000/78/EC states that:* The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. *Article 1 of Directive 2006/54/EC states that:* The purpose of this Directive is to ensure the implementation

directive being to put in place measures to combat discrimination on the grounds of racial or ethnic origin) provides that:

Harassment shall be deemed to be discrimination (...) when an unwanted conduct related to racial or ethnic origin takes place with the purpose or *effect* [emphasis added] of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.⁵⁵

Accordingly, the EU Equal Treatment Directives refer to the effect of unwanted conduct on the targeted person thus being more explicit in view of the effect of psychological harassment on the targeted person than respective definition included in the Staff Regulations.

In addition, as can be seen in the above analysis EU Equal Treatment Directives define harassment as discrimination which is also prohibited in Article 21 of the Charter as well as Article 1d of the Staff Regulations⁵⁶, i.e. in the legislative acts directly applicable to the institutions.

When examining definition of psychological harassment included in international agreements, it must be noted that international agreements can be taken into account within the framework of EU law under the following conditions:

1) If an international agreement is explicitly applied through its endorsement by the EU legislature which is so in the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵⁷ (hereinafter – “the ECHR”) pursuant to Article 6(3) TEU⁵⁸. In addition, Article 52(3) of the Charter highlights that if the rights included therein correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those of the ECHR.

2) If the EU has concluded an international agreement pursuant to Article 216(1) TFEU.

of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

⁵⁵ Article 2(1) of Directive 2000/43/EC states that: For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

⁵⁶ Article 1d of the Staff Regulations on non-discrimination applies to officials and by analogy to temporary agents via Article 10(1) of the CEOS, to contract agents via Article 80(4) of the CEOS and to APAs via Article 128(1) of the CEOS.

⁵⁷ The Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed February 8, 2023.

⁵⁸ Article 6(3) TEU lays down that: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

3) Even if due to the scope of its competences the EU cannot accede to an international agreement the EU Courts may use international agreements as a source of inspiration when interpreting EU law.⁵⁹ Moreover, there are situations where the EU cannot accede to an international agreement due to the fact that only states parties to an international organisation can accede to respective international agreement, the EU Courts may rely on the provisions falling within the scope of the competence of the EU. In such a case when an international agreement or even some articles of it fall within the competences of the EU, a Council decision under Article 218 TFEU is required to authorise its ratification by the EU member states.

With respect to the ECHR, the Explanations in view of Article 52 of the Charter state that the meaning and the scope of the guaranteed rights are determined not only by the text of the ECHR and the Protocols to it, but also by the case-law of the European Court of Human Rights (hereinafter – “the ECtHR”). The ECtHR has established in its case-law that “discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations”⁶⁰; hence another proof that psychological harassment constitutes a form of discrimination.

Given the focus of this MT on psychological harassment, it is necessary to assess the provisions of International Labour Organization’s Convention concerning the elimination of violence and harassment in the world of work⁶¹ (hereinafter – “ILO Convention No 190”). Although the Council has not yet authorised this convention’s ratification by the EU member states⁶², the EU Courts can use it as a source of inspiration when applying EU law. First, it must be noted that Article 2(2) of the ILO Convention No 190 sets forth that it applies to all private and public sectors. Further, it is interesting to compare the repetitive nature of psychological

⁵⁹ See e.g., Judgment of the EU Civil Service Tribunal (Second Chamber) of 30 April 2009, *Laleh Aayhan v Europea Parliament*, F- 65/07, EU:F:2009:43, para. 101.

⁶⁰ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV.

⁶¹ International Labour Organization. *Convention concerning the elimination of violence and harassment in the world of work, 2019 (No. 190)*, Date of entry into force: 25 June 2021. Available on: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190. Accessed May 1, 2023. NB! Council decision to authorise the ratification of this convention by the EU member states has been discussed in the latest EPSCO meeting; however, it is pending adoption by the Council. See more Council of the European Union. Employment, Social Policy, Health and Consumer Affairs Council, 13-14 March 2023. Available on: <https://www.consilium.europa.eu/en/meetings/epsco/2023/03/13/>. Accessed May 20, 2023.

⁶² Council decision to authorise the ratification of this convention by the EU member states has been discussed in the latest EPSCO meeting; however, it is pending adoption by the Council. See more Council of the European Union. Employment, Social Policy, Health and Consumer Affairs Council, 13-14 March 2023. Available on: <https://www.consilium.europa.eu/en/meetings/epsco/2023/03/13/>. Accessed May 20, 2023.

harassment included in Article 12a(3) of the Staff Regulations *versus* singular occurrences mentioned in Article 1(1) of ILO Convention No 190:

For the purpose of this Convention:

(a) the term “violence and harassment” in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.

Finally, the ILO Convention No 190 also speaks about the prevention of psychological harassment since Article 4(2) thereof requires its members to adopt, in accordance with national law and circumstances, an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work, including:

(c) adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment;

(d) establishing or strengthening enforcement and monitoring mechanisms;

(...)

(h) ensuring effective means of inspection and investigation of cases of violence and harassment, including through labour inspectorates or other competent bodies.

In light of the above duties, it must be noted that when ratifying this convention which is part of legislative process and when it enters into force for respective state, these provisions become part of legislative acts of that state; therefore, as in the case of Directive 89/391, the ILO Convention No 190 also requires in accordance with national law to adopt measures to prevent psychological harassment. Moreover, it requires involving labour inspectorates or other competent bodies being involved in inspection and investigation of psychological harassment. Given that the convention is very recent and only a few EU member states have ratified it at the time of the preparation of this MT, i.e. France, Greece, Ireland, Italy and Spain; it is difficult to assess its potential impact on the EU law; nonetheless, the standards included in this convention once more brings to fore the discussion on seriousness of psychological harassment and importance to enhance the ways it can be tackled.

The consequences of not complying with the prohibition of psychological harassment – the requirement contained in Article 12a of the Staff Regulations – are laid down in Article 22 of the Staff Regulations which provides 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.

As to the duty to report psychological harassment to the management of the institutions, this duty is included in Article 22a(1) of the Staff Regulations for any staff member, not only the (alleged)

victim of psychological harassment and it includes reporting such a behaviour on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.⁶³ Although such persons are not covered by the obligations included in the Staff Regulations and the CEOS, the institutions are under the obligation to ensure the right to working conditions which respect health, safety and dignity of their staff members as provided for in Article 31(1) of the Charter and to accord working conditions with appropriate health and safety standards as provided for in Article 1e(2) of the Staff Regulations.

Besides the reporting obligation included in Article 22a(1) of the Staff Regulations, staff members of the institutions are encouraged to request protection against psychological harassment based on Article 24 of the Staff Regulations which requires that:

The Union shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.

It shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not either intentionally or through grave negligence cause damage and has been unable to obtain compensation from the person who did cause it.

The duty to provide assistance identified in Article 24 of the Staff Regulations is analysed in detail in Chapter 3 of this MT since many of related aspects derive from the interpretation of this article by the EU Courts.

Having received information about psychological harassment based on Article 22a(1) or 24 of the Staff Regulations, the institutions may proceed with an administrative investigation which can result in disciplinary measures. Title VI and Annex IX of the Staff Regulations on administrative investigations and disciplinary measures and procedures apply to officials and by analogy to temporary staff via Article 50a of the CEOS, which applies to contract staff via Article 119 of the CEOS, while for APAs in accordance with Article 139(3) of the CEOS specific provisions in view of disciplinary procedures are to be laid down. It is important to note that Article 2(3) of Annex IX of the Staff Regulations requires that each institutions adopts in accordance with

⁶³ Article 22a(1) of the Staff Regulations instructs that: “Any official who, in the course of or in connection with the performance of his duties, becomes aware of facts which give rise to a presumption of the existence of conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union, shall without delay inform either his immediate superior or his Director-General or, if he considers it useful, the Secretary-General, or the persons in equivalent positions, or the European Anti-Fraud Office (OLAF) direct. (...) This paragraph shall also apply in the event of serious failure to comply with a similar obligation on the part of a Member of an institution or any other person in the service of or carrying out work for an institution.”

Article 110 of the Staff Regulations implementing arrangements with respect to conducting administrative inquiries. Such implementing provisions will be given consideration in the next sub-chapter.

Given the seriousness of psychological harassment, disciplinary penalty may also be severe. Article 9 of Annex IX of the Staff Regulations provides a range of disciplinary penalties from a written warning to removal from post and, where appropriate, reduction *pro tempore* of a pension or withholding, for a fixed period, of an amount from an invalidity allowance. Moreover, Article 23 of Annex IX of the Staff Regulations allows the institutions to immediately suspend the staff member it accuses of serious misconduct for a specified or indefinite period. However, if no case has been made against an alleged harasser they may request the restitution for the reputational damages as provided for in Article 29 of Annex IX of the Staff Regulations by requesting that the damage suffered should be made good through suitable publicity for the decision that psychological harassment is not confirmed. When imposing disciplinary penalties the institutions must not only consider aggravating or extenuating circumstances listed in Article 10 of Annex IX of the Staff Regulations but also have due regard to the principle of proportionality, which is spelt out in Annex IX of the Staff Regulations “Disciplinary procedures”⁶⁴.

When dealing with psychological harassment cases it is also crucial note the most relevant general principles of EU Law, particularly: 1) the “duty of care” or the “duty to have regard for the welfare of a staff member”; 2) the “reasonable time” principle; 3) the principle of protection of privacy; 4) the “right to be heard”; 5) the “presumption of innocence” and 6) the principle of proportionality.

The “duty of care” or the “duty to have regard for the welfare of a staff member”. The EU Courts have recognised that, even though this concept is not mentioned in the Staff Regulations and the CEOS, it reflects the balance of the reciprocal rights and obligations between the institutions and their staff members. Together with the principle of sound administration, it implies that when the institutions take decisions vis-à-vis their staff members, they must take into

⁶⁴ Article 14 of Annex IX of Staff Regulations states that: If, in the presence of the Chairman of the Board, the official concerned acknowledges misconduct on his part and accepts unreservedly the report referred to in Article 12 of this Annex, the Appointing Authority may, in accordance with the principle of proportionality between the nature of the misconduct and the penalty being considered, withdraw the case from the Board. Where a case is withdrawn from the Board the Chairman shall deliver an opinion on the penalty considered.

consideration all the factors which may affect their decision and that when doing so they should take into account not only the interests of the service but also those of the individual concerned.⁶⁵

Not least important is the “reasonable time” principle which applies, in particular, for the submission of a request for assistance under Article 90(1) in view of behaviour listed in Article 24 of the Staff Regulations. Since Article 90(1) does not determine a period of time during which the request for assistance must be submitted, the EU Courts have developed the “reasonable time” principle given that, in the absence of a time limit, the principles of legal certainty or the protection of legitimate expectations require acting within certain time limit thus fixing legal positions already acquired.⁶⁶ The “reasonable time” principle is moreover spelt out in Article 41(1) of the Charter.

The principle of “protection of privacy” is enshrined in Article 7 of the Charter which states that “[e]veryone has the right to respect for his or her private and family life” which corresponds to the same right included in Article 8 of the ECHR⁶⁷. Protection of privacy as a principle is important not only for the protection of an (alleged) victim or witness, but also to ensure the presumption of innocence. This right is also closely linked to the protection of personal data included in Article 8(1) of the Charter and the right to have access to his or her file provided for in Article 41(2)(b) of the Charter⁶⁸.

If an institution takes a decision that there is no psychological harassment and accordingly rejects a request of assistance, or if it decides that psychological harassment is proved and therefore disciplinary penalty is imposed on a harasser, both acts having adverse effects to either an (alleged) victim or a harasser; the principle of “good administration” reflected in Article 41 of the Charter⁶⁹ includes the “right to be heard”⁷⁰ establishing that “the right of every person to be heard, before any individual measure which would affect him or her adversely is taken”. This right is very closely linked to an obligation also included in Article 41 of the Charter – “the obligation of the

⁶⁵ See e.g., Judgment of the Court (First Chamber) of 10 June 2021, *European Commission v Fernando De Esteban Alonso*, C-591/19 P, EU:C:2021:468, para. 61.

⁶⁶ See e.g., Order of the EU Civil Service Tribunal (First Chamber) of 25 November 2009, *Ayo Soerensen Ferraresi v Commission of the European Communities*, F-5/09, EU:F:2009:156, paras. 36–38.

⁶⁷ See the Explanations in view of Article 7 of the Charter.

⁶⁸ See e.g., Judgment of the Court of First Instance (First Chamber) of 6 December 1994, *Lisrestal - Organização Gestão de Restaurantes Colectivos Lda and others v Commission of the European Communities*, EU:T:1994:290, point 50.

⁶⁹ The “reasonable time” principle was acknowledged by the EU Courts before the entry into force of the Charter. See e.g., Judgment of the Court (Second Chamber) of 11 July 1974, *Pierre Guillot v Commission of the European Communities*, 53-72, EU:C:1974:80, point 3 (Law).

⁷⁰ The “right to be heard” was acknowledged by the EU Courts before the entry into force of the Charter. See e.g., Judgment of the Court of First Instance (Second Chamber) of 6 May 1997, *Agustin Quijano v Commission of the European Communities*, T-169/95, EU:T:1997:65, point 44.

administration to give reasons for its decision” aligned with the second paragraph of Article 296 TFEU⁷¹ cannot sufficiently be achieved if all information is not obtained in respective case hence the crucial importance of the “right to be heard”.

In view of the (alleged) harasser’s rights, it is important to note another general principle of EU law – the “presumption of innocence” spelt out in Article 38(1) of the Charter which states that Everyone who has been charged shall be presumed innocent until proved guilty according to law. This principle is also established in Article 6(2) of the ECHR requiring that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. While these provisions are pertinent to the criminal law, it must be noted that “presumption of innocence” is also applicable with respect to conducting administrative inquiries and disciplinary procedures as confirmed by the well-established case law of the EU Courts which is given more attention in Chapter 3 of this MT. The “presumption of innocence” is very closely linked to the “right of defence” which derives from Article 48(2) of the Charter, and was recognised even before the entry into force of the Charter by the EU Courts⁷².

Speaking of available legal remedies, it must be highlighted that an affected staff member (an alleged victim of psychological harassment or an alleged harasser) must exhaust the pre-contentious procedure established in Articles 90 and 91 of the Staff Regulations before submitting an application to the EU Courts pursuant to Article 270 TFEU which sets forth that:

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Title VII ‘Appeals’ of the Staff Regulations (Articles 90 to 91a) applies to officials and by analogy to temporary staff via Article 46 of the CEOS, to contract staff via Article 117 of the CEOS and to APAs via Article 138 of the CEOS.

Article 90 of the Staff Regulation prescribes the pre-contentions procedure that must be followed before challenging an act adversely affecting a staff member before the EU Courts:

1. Any person to whom these Staff Regulations apply may submit to the appointing authority, a request that it take a decision relating to him. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this

⁷¹ *Second paragraph of Article 296 TFEU states that: Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.*

⁷² *See e.g., Judgment of the Court of First Instance (Second Chamber) of 6 May 1997, Agustin Quijano v Commission of the European Communities, T-169/95, EU:T:1997:65, point 44.*

shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged in accordance with the following paragraph.

2. Any person to whom these Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations. The complaint must be lodged within three months. (...)

The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged under Article 91.

As to the origin of Article 90 of the Staff Regulations, the provisions of this article included in the initial Staff Regulations of 1962⁷³ were very concise providing that “tout fonctionnaire peut saisir l’AIPN de son institution d’une demande ou d’une réclamation”⁷⁴. The current text comes from the amendment of the Staff Regulations pursuant to Council Regulation (Euratom, ECSC, EEC) No 1473/72 of 30 June 1972⁷⁵, which introduces the implied decision rejecting a request of a staff member against which a complaint might be submitted. While initially a complaint was optional, and it was possible to submit an application to the EU Courts without having recourse to the complaint; the pre-contentious procedure was established via the amendments of the Staff Regulations of 30 June 1972, and the remarkable stability of these provisions is worth to be highlighted as the then introduced pre-contentious procedure is still retained in the Staff Regulations.⁷⁶

When requesting assistance from an institution by an (alleged) victim of psychological as provided for in Article 24 of the Staff Regulations, such a request is part of above-mentioned pre-contentious procedure initially under Article 90(1) of the Staff Regulations. If it is decided that psychological harassment is not constituted and respective request for assistance is rejected, an (alleged) victim may submit a complaint against this decision affecting them adversely in accordance with Article 90(2) of the Staff Regulations.

⁷³ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, *OJ P* 045 14.6.1962, p. 1385. Available on: [http://data.europa.eu/eli/reg/1962/31\(1\)/2023-01-01](http://data.europa.eu/eli/reg/1962/31(1)/2023-01-01). Accessed April 15, 2023.

⁷⁴ *Translation by the author of the MT*: “any official may submit a request or complaint to the appointing authority of his institution”.

⁷⁵ Regulation (Euratom, ECSC, EEC) No 1473/72 of the Council of 30 June 1972 amending Regulation (EEC, Euratom, ECSC) No 259/68 laying down the Staff Regulations of officials and the Conditions of Employment of other servants of the European Communities, *OJ L* 160, 16.7.1972, p. 1–16. Available on <http://data.europa.eu/eli/reg/1972/1473/oj>. Accessed May 20, 2023.

⁷⁶ *See Statut de la Fonction Publique de l’Union Européenne : Commentaire Article Par Article*, edited by Valérie Giacobbo Peyronnel, and Ezio Perillo (Bruxelles : Bruylant, 2017), p. 493. Available on: ProQuest Ebook Central. Accessed May 1, 2023.

After the above-mentioned pre-contentious procedure has been exhausted, an aggravated staff member may turn to the court proceedings afforded under Article 91 of the Staff Regulations:

1. The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and any person to whom these Staff Regulations apply regarding the legality of an act affecting such person adversely within the meaning of Article 90(2). In disputes of a financial character the Court of Justice shall have unlimited jurisdiction.
2. An appeal to the Court of Justice of the European Union shall lie only if:
 - the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) within the period prescribed therein, and
 - the complaint has been rejected by express decision or by implied decision.
3. Appeals under paragraph 2 shall be filed within three months.

In essence, the pre-contentious procedure can be characterised as follows:

The application of the time-limits established in the Staff Regulations, the nature and operation of the precontentious procedure and the question of what constitutes an act adversely affecting the complainant are the subject of a dense and complex case law. In essence, an appeal to the Court shall lie only if the appointing authority has previously had a complaint submitted to it in accordance with the relevant provisions of the Staff Regulations, the time-limits have been respected and the complaint has been rejected by an express or implied decision. In this context, EU staff cases have provided fertile ground for the development of several well-established principles of EU administrative law such as the duty to state reasons or the requirement of respect for legitimate expectations.⁷⁷

In view of court proceedings, Article 256(1) TFEU sets forth that applications submitted pursuant to Article 270 TFEU are reviewed by the EU General Court and may be challenged before the Court of Justice of the European Union on points of law only.

Besides applying for legal remedies to the EU Courts, psychological harassment cases may come under the scrutiny by the European Ombudsman pursuant to Article 24 TFEU⁷⁸ and Article 43 of the Charter⁷⁹ establishing the right to apply to the European Ombudsman, and pursuant to Article 228(1) TFEU⁸⁰ which also provides details on the procedure before the European Ombudsman stipulating, *inter alia*, that:

⁷⁷ Siofra O'Leary, *Applying principles of EU social and employment law in EU staff cases*, p. 3. (2011). Available on: Westlaw Edge UK. Accessed February 20, 2023.

⁷⁸ *Article 24 (third paragraph) states that:* "Every citizen of the Union may apply to the Ombudsman established in accordance with Article 228.

⁷⁹ *Article 43 of the Charter states that* Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

⁸⁰ *Article 228(1) TFEU states that* A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them.

Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution, body, office or agency concerned, which shall have a period of three months in which to inform him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution, body, office or agency concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.

In addition, Article 2(3) of Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom⁸¹ (hereinafter – “the Statute of the European Ombudsman”) prescribes a time limit of two years for the submission of complaint of maladministration by an institution. Article 6 of the Statute of the European Ombudsman requires that complaints related to employment relations between the institutions and their staff members are admissible only if the pre-contentious procedure of Article 90 of the Staff Regulations has been exhausted, and it also specifically asserts that the European Ombudsman is mandated to verify the measures taken by the institutions to ensure the protection of alleged victims of psychological harassment and to restore a healthy and safe working environment respecting the dignity of the persons concerned while an administrative inquiry is ongoing. It must be noted that in accordance with Article 10 of the Statute of the European Ombudsman, the European Ombudsman shall seek a solution with the concerned institution to eliminate the maladministration complained about; however, it must be noted that under Article 8 of the Statute of the European Ombudsman complaints lodged with the European Ombudsman shall not affect time limits for appeals in administrative or judicial proceedings.

2.2. Regulatory acts adopted by the institutions as their internal rules

While the central legal act covering the most important provisions for dealing with psychological harassment cases by the institutions are the Staff Regulations and the CEOS; the rules contained therein “are not exhaustive, as they expressly empower [the institutions] to adopt further implementing rules on a number of issues”⁸². Such rules giving effect to the Staff Regulations and the CEOS adopted by the institutions related to handling psychological harassment cases are:

⁸¹ Regulation (EU, Euratom) 2021/1163 of the European Parliament of 24 June 2021 laying down the regulations and general conditions governing the performance of the Ombudsman's duties (Statute of the European Ombudsman) and repealing Decision 94/262/ECSC, EC, Euratom, *OJ L* 253, 16.7.2021, pp. 1–10. Available on: <http://data.europa.eu/eli/reg/2021/1163/oj>. Accessed April 23, 2023.

⁸² Report from the Commission to the European Parliament and the Council on the rules adopted by the appointing authority of each institution to give effect to the Staff Regulations, COM(2021) 258 final, Brussels, 28.5.2021, Section 1, paragraph 2 ‘Legal base and objective of the report’. Available on: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52021DC0258>. Accessed March 4, 2023.

1) General implementing provisions on the conduct of administrative inquiries adopted pursuant to Article 2(3) of Annex IX of the Staff Regulations following the procedure established in article 110(1) of the Staff Regulations and as provided for in Article 142 of the CEOS⁸³;

2) Other implementing rules without specifying the procedure for adoption such as rules on disciplinary proceedings adopted pursuant to Article 30 of Annex IX of the Staff Regulations⁸⁴;

3) Implementing rules not expressly provided for in the Staff Regulations and the CEOS adopted upon a need to implement statutory provisions by means of more specific rules⁸⁵, such as rules on protecting the dignity of the person and preventing psychological harassment.

In this chapter best practices as well as areas for improvement for preventing and handling psychological harassment cases are identified based on the European Ombudsman's report of 17 December 2018 adopted pursuant to Article 3(1) of the Statute of the European Ombudsman⁸⁶, i.e. the Report of the European Ombudsman on dignity at work in the EU institutions and agencies: SI/2/2018/AMF⁸⁷ (hereinafter – “the Inspection Report”) and by illustrating the findings of the European Ombudsman by examples of regulatory acts made available via the register administered by the Court of Justice of the European Union as per Article 110(6) of the Staff Regulations⁸⁸ (hereinafter – “the register”).

As a result of exchanges with 26 institutions, the Inspection Report identifies best practices established by the institutions with respect to preventing psychological harassment and dealing with it when it occurs.⁸⁹ In view of preventing psychological harassment the Inspection Report notes the following examples of best practices:

⁸³ Report from the Commission to the European Parliament and the Council on the rules adopted by the appointing authority of each institution to give effect to the Staff Regulations, *supra* note 82, Title I, point (b).

⁸⁴ *Ibid.*, Title I, point (c).

⁸⁵ *Ibid.*

⁸⁶ Article 3(1) of the Statute of the European Ombudsman lays down that “the Ombudsman shall conduct inquiries for which he or she finds grounds, on his or her own initiative or following a complaint”.

⁸⁷ European Ombudsman. Report of the European Ombudsman on dignity at work in the EU institutions and agencies, SI/2/2018/AMF (17/12/2018), pp. 1–2. Available on: <https://www.ombudsman.europa.eu/en/doc/inspection-report/en/107799>. Accessed May 1, 2023.

⁸⁸ Article 110(6) of the Staff Regulations lays down that: The Court of Justice of the European Union shall administer a register of the rules adopted by the appointing authority of each institution to give effect to these Staff Regulations, and those rules adopted by the agencies to the extent that they derogate from the rules adopted by the Commission, in accordance with the procedure provided in paragraph 2, including any amendments thereto. Institutions and agencies shall have direct access to that register and the full right to amend their own rules. Member States shall have direct access to it.

⁸⁹ *See* Report of the European Ombudsman on dignity at work in the EU institutions and agencies, *supra* note 87, p. 1.

- 1) As part of awareness raising, displaying posters and organizing information sessions with staff members;
- 2) Organising compulsory and regular anti-harassment training including as part of the induction of staff members, as well as providing specialised training to managers;
- 3) Mitigating working conditions that can increase the risk of harassment, such as stress, heavy workload, workplace conflict, a lack of clear roles and poor managerial practices. Assessing psychosocial risks on a regular basis is considered a key measure to mitigate the risk of psychological harassment;
- 4) Addressing online harassment / cyberbullying by providing guidelines on how to interact on social media and what to do if things start to go wrong;
- 5) Ensuring gender balance in management positions with a view to cultivating a culture of mutual respect;
- 6) Including in harassment policies a commitment that harassment is not tolerated, explanations on what constitutes harassment and making available formal and informal procedures for dealing with harassment. Monitoring and improving harassment policies to have clear and precise rules on the available procedures.⁹⁰

After the entry into force of the amendments of the Staff Regulations of 2004 the European Commission adopted new policy on preventing harassment – the Commission Decision of 26 April 2006⁹¹ (hereinafter – “Commission Decision on Preventing Harassment”) which is still in force and lists examples of behaviour that constitutes psychological harassment. Point 2.1 of the Commission Decision on Preventing Harassment includes such forms of psychological harassment that might not be easily derived from the definition of psychological harassment included in the Staff Regulations, but can seriously harm a person if faced regularly, such as:

- 1) Antagonism;
- 2) Pressure;
- 3) Refusal to communicate;
- 4) Belittling someone’s contributions and achievements;

⁹⁰ See Report of the European Ombudsman on dignity at work in the EU institutions and agencies, *supra* note 87, pp. 1–2.

⁹¹ European Commission. Commission Decision of 26th April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment, C(2006) 1624/3. Available on: <https://circabc.europa.eu/ui/group/47001db4-d61c-4677-af45-0b5ce0d388fc/library/8bbd464a-f1ea-4652-ab53-b143237c700e/details>. Accessed May 1, 2023.

- 5) Being isolated, set apart, excluded, rejected, ignored;
- 6) Impairing their social relations;
- 7) Setting unrealistic working objectives;
- 8) Contrary to their job description, not giving someone any work, or systematically giving them work which does not meet their profile.⁹²

The European Court of Auditors in their policy on preventing harassment, i.e. Decision No 50-2022 on the European Court of Auditors' policy for ensuring a respectful and harassment-free workplace⁹³ (hereinafter – “the European Court of Auditors policy”), adds in Point 12 the following not less important examples of psychological harassment:

- 1) Spreading false rumours;
- 2) Over-monitoring.

Regarding the mitigation of the risks of psychological harassment, European Ombudsman draws attention to the fact that an identified best practice in this area comes from national legislation, which recognises harassment as a risk to employees' health and requires every organisation with more than 50 employees to carry out an analysis of psychosocial risks.⁹⁴ However, in terms of the psychosocial risks stemming from high workload, a study commissioned by the European Parliament establishes that:

[D]emands in terms of workload is another factor influencing the presence of bullying, and where workload is unreasonably high this could be considered a form of bullying in its own right.⁹⁵

Therefore, while it is understandable that smaller institutions such as the European Institute for Gender Equality with 38 temporary and contract agents by the end of 2021⁹⁶ or and the Agency for

⁹² NB! Commission Decision of 20.10.2016 on giving the Commission's ex ante agreement to the adoption by decentralised agencies and joint undertakings of the policy on protecting the dignity of the person and preventing psychological and sexual harassment. Available on: <https://circabc.europa.eu/ui/group/47001db4-d61c-4677-af45-0b5ce0d388fc/library/1bb8d2e4-150a-4d24-ba36-adc84c03ce76/details>. Accessed May 5, 2023. This decision, adopted based on Article 110(2) of the Staff Regulations, incorporates a model decision proposed to be adopted by decentralised agencies and joint undertakings, and it lists the same examples of psychological harassment cases as the ones included in the Commission Decision on Preventing Harassment.

⁹³ European Court of Auditors. Decision No 50-2022 on the European Court of Auditors' policy for ensuring a respectful and harassment-free workplace of 16 December 2022. Available on: <https://circabc.europa.eu/ui/group/47001db4-d61c-4677-af45-0b5ce0d388fc/library/a180d28d-d7d5-43ee-bb00-2d3200c5d3bc/details>. Accessed May 1, 2023.

⁹⁴ See Report of the European Ombudsman on dignity at work in the EU institutions and agencies, *supra* note 87, p. 5.

⁹⁵ European Parliament. Study for the FEMM Committee. Bullying and sexual harassment at the workplace, in public spaces, and in political life of EU, *supra* note 13, p. 23.

⁹⁶ See European Institute for Gender Equality. *Consolidated Annual Activity Report (CAAR) 2021*, p. 103. Available on: <https://eige.europa.eu/about/documents-registry/consolidated-annual-activity-report-eige-2021>. Accessed May 1, 2023.

Support for BEREC also with 38 temporary and contract agents by the end of 2021⁹⁷ might not have sufficient resources to conduct an analysis of psychosocial risks; at the same time the smaller institutions might be the ones where the workload is the highest, and therefore they should also consider conducting regular psychosocial risk assessment.

In view of procedures established by the institutions for dealing with psychological harassment cases, the European Ombudsman highlights that all institutions should have both formal and informal procedures for dealing with psychological harassment and notes that informal procedures usually involve confidential counsellors or external mediators.⁹⁸ The European Ombudsman underlines that the “inter-agency network of confidential counsellors”, set up by a group of EU agencies, is particularly important as interpersonal relations in these smaller bodies may be a deterrent for staff wishing to contact a confidential counsellor, and it may prove challenging to achieve the balance of gender, grades and languages in the composition of the group of counsellors.⁹⁹ European Ombudsman notes that all the assessed institutions have opened the informal procedure to every person working in the institutions concerned including staff members covered by the Staff Regulations and the CEOS, seconded national experts, trainees and external contractors.¹⁰⁰

Importantly that in view of formal complaints having legal basis in the Staff Regulations European Ombudsman suggests that institutions adapt their internal policies so as to allow all personnel working on-site at the institutions to make a formal complaint similarly as is the case for informal procedures (see above) and that acts committed by individuals from all categories of personnel, including members of institutions, seconded national experts, trainees and external contractors are covered.¹⁰¹ In this context, attention should be paid to the European Commission which employs the highest number of staff among the institutions with more than 30 000 staff

⁹⁷ See Agency for Support for BEREC Office. *Consolidated Annual Activity Report of the Agency for Support for BEREC (BEREC Office) Year 2021*, p. 53. Available on: <https://www.berec.europa.eu/en/document-categories/berec-office/berec-office-activity-reports/2021-consolidated-annual-activity-report-of-the-berec-office>. Accessed May 1, 2023.

⁹⁸ See Report of the European Ombudsman on dignity at work in the EU institutions and agencies, *supra* note 87, p. 2.

⁹⁹ *Ibid.*, p. 7.

¹⁰⁰ *Ibid.*, p. 6.

¹⁰¹ *Ibid.*, p. 7.

members¹⁰² while the total number of staff members in all institutions is around 60 000¹⁰³, in particular, point 4.6 of the Commission Decision on Preventing Harassment of 2006 allows any person working at the European Commission to benefit from informal procedures, but it excludes persons not covered by the Staff Regulations and the CEOS and those that are not seconded national experts from making a formal complaint while allowing to bring the events to the attention of DG ADMIN and to open an administrative inquiry in case of sufficiently serious information.

In addition, the European Ombudsman reiterates that formal investigations should be thorough and swift.¹⁰⁴ It also points out that for investigations to be effective, investigators not only need to be impartial and fair, but also perceived as such by all parties concerned. Furthermore, external investigators should be used if an institution does not have the resources to assign a specialised team to investigate harassment.¹⁰⁵ The pool of independent investigators is suggested to be set up in the context of the EU Agencies Network.¹⁰⁶ In view of rapidity of the formal investigations, European Commission's undertaking is to carry out an administrative inquiry within a timeframe of 12 months¹⁰⁷, the same timeframe for an administrative inquiries has been proposed in the European Commission's model decision to be adopted by decentralised agencies and joint undertakings¹⁰⁸.

European Ombudsman also stresses that individuals are particularly vulnerable to harassment where there is a power imbalance between the parties involved, therefore more demanding rules for high-ranking personnel, who are not covered by the Staff Regulations, such as commissioners, judges, members of the Court of Auditors, members of the Economic and Social

¹⁰² See European Commission. *European Commission HR key figures 2022*, dated 21 March 2022. Available on: https://commission.europa.eu/about-european-commission/organisational-structure/commission-staff_en. Accessed April 13, 2023.

¹⁰³ See European Union. *Types of institutions and bodies*. Available on: https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/types-institutions-and-bodies_en#:~:text=Around%2060%2C000%20EU%20civil%20servants,population%20of%20only%2067%20millio. Accessed May 5, 2023.

¹⁰⁴ See Report of the European Ombudsman on dignity at work in the EU institutions and agencies, *supra* note 87, p. 2.

¹⁰⁵ *Ibid.*, pp. 7–8.

¹⁰⁶ *Ibid.*, p. 2.

¹⁰⁷ See European Commission. Commission Decision of 12.6.2019 laying down general implementing provisions on the conduct of administrative inquiries and disciplinary proceedings, C(2019) 4231 final, Article 15(3). Available on: <https://circabc.europa.eu/ui/group/47001db4-d61c-4677-af45-0b5ce0d388fc/library/155f8247-ae51-4493-a673-688ade45c7af/details>. Accessed May 5, 2023.

¹⁰⁸ See European Commission. Commission Decision of 25.1.2022 on giving the Commission's ex ante agreement to adoption by decentralised agencies and joint undertakings of implementing provisions on the conduct of administrative inquiries and disciplinary proceedings, C(2022) 497 final, Article 15(3) of the model decision included in Annex I of this decision. Available on: <https://circabc.europa.eu/ui/group/47001db4-d61c-4677-af45-0b5ce0d388fc/library/26b85cd0-850c-4b8c-9ffc-d0bca34f71bd/details>. Accessed May 5, 2023.

Committee and so on, must be adopted, e.g. compulsory retirement or removal of pension rights.¹⁰⁹ European Parliament has reacted to psychological harassment occurrences involving Members of the European Parliament and adopted specific rules in this regard, i.e. Decision on the Functioning of the Advisory Committee Dealing with Harassment Complaints Concerning Members of the European Parliament and its Procedures for Dealing with Complaints¹¹⁰. Article 5(1) of this decision gives an example of a provisional measure afforded to the complainant – to perform work at home or in the European Parliament, but not in the office of the Member concerned, or to grant the complainant a leave of absence ex officio. As to the sanctions towards Members of the European Parliament, Article 11(3) of the above-mentioned decision states that the President may decide to impose financial measures on the Member of the European Parliament in the form of assuming responsibility for the professional loss suffered by the complainant. However, such a penalty cannot be compared with that suggested by the European Ombudsman, i.e. compulsory retirement or removal of pension rights.

European Ombudsman also notes in its Inspection Report that some of the anti-harassment policies of the institutions and agencies were written over a decade ago and suggests to review them, taking account of the findings of this strategic initiative if not reviewed in the past 5 years.¹¹¹ The European Court of Auditors policy adopted in 2022¹¹² is a good example of such a review of an anti-harassment policy. Its Point 22 includes an undertaking to organise a yearly event with the participation of confidential counsellors, mediators, legal service, human resources department, occupational psychologist, medical service, etc. in order to increase its staff's awareness of the services provided by them. In addition, Point 7 of the above-mentioned policy pays particular attention to avoiding secondary victimisation which may be caused by repeated exposure of the victim to the perpetrator, repeated questioning about the same facts and the use of inappropriate language or insensitive comments made by those who come into contact with the victim. Such undertakings are not present in respective policies of the large institutions such as the European

¹⁰⁹ See Report of the European Ombudsman on dignity at work in the EU institutions and agencies, *supra* note 87, pp. 2–3.

¹¹⁰ European Parliament. Decision on the Functioning of the Advisory Committee Dealing with Harassment Complaints Concerning Members of the European Parliament and its Procedures for dealing with complaints, Bureau Decision of 2 July 2018. Available on: <https://circabc.europa.eu/ui/group/47001db4-d61c-4677-af45-0b5ce0d388fc/library/ed3cba26-5fef-4d0f-b6fb-af7dabe98a74/details>. Accessed May 1, 2023.

¹¹¹ See Report of the European Ombudsman on dignity at work in the EU institutions and agencies, *supra* note 87, p. 5.

¹¹² See European Court of Auditors. Decision No 50-2022 on the European Court of Auditors' policy for ensuring a respectful and harassment-free workplace, *supra* note 93.

Commission¹¹³ or the Council of the European Union¹¹⁴ (no regularity envisaged for training and awareness raising activities for whole staff and no specific precautions identified to avoid secondary victimisation).

In summary and as an initial assessment of this chapter, it can be concluded that the legal framework pertaining to institutions, when compared to the provisions applicable to EU member states, adequately addresses the issue of psychological harassment at work. However, the Staff Regulations and the CEOS require that the working conditions afforded to the staff members comply with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties. Furthermore, nothing in the Staff Regulations and the CEOS expressly requires the institutions to adopt internal rules on preventing psychological harassment. Currently an obligation for the institutions to prevent psychological harassment stems from Directive 89/391/EEC. To place greater importance and clarity on the institutions' duties with respect to preventing psychological harassment, one possible approach could be the inclusion of obligations in view of the prevention of psychological harassment, similar to those included in Directive 89/391/EEC, in the Staff Regulations and the CEOS.

Switching to psychological harassment definition included in the Staff Regulations compared with respective definitions in the EU Equal Treatment Directives, these three directives contain identic definitions of psychological harassment all of them referring to the purpose or *effect* of violating the dignity of a person thus being absolutely clear that it is not required that the reprehensible conduct must be *intentional* while the Staff Regulations define psychological harassment as improper conduct that is *intentional* and that may undermine the dignity of a person. Although the EU Courts have acknowledged that the word *intentional* in this context means that the reprehensible conduct is not accidental, for the sake of clarity, it would be desirable to amend the definition of psychological harassment included in the Staff Regulations to make it clear that psychological harassment is also a conduct that has an *effect* of violating the dignity of a person.

¹¹³ See Commission Decision of 26th April 2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment, *supra* note 91.

¹¹⁴ See Council of the European Union. Decision No 23/2021 of the Secretary-General of the Council of the European Union concerning psychological and sexual harassment at work within the General Secretariat of the Council of 29 June 2021. Available on: <https://circabc.europa.eu/ui/group/47001db4-d61c-4677-af45-0b5ce0d388fc/library/0706a874-ce7a-4d24-9fd2-6ad727212188/details>. Accessed May 1, 2023.

In view of the repetitive nature of psychological harassment as provided for in the definition of psychological harassment included in the Staff Regulations, it is necessary to closely monitor the ratification process of ILO Convention No 190 which determines that psychological harassment may be constituted even as a result of a single occurrence of reprehensible conduct. If this international standard becomes widely accepted among the EU member states, it should be considered whether the EU law including the Staff Regulations and the CEOS should reflect this change in the definition of psychological harassment.

It is advisable that all institutions, including the small ones, conduct analyses of psychosocial risks, particularly due to the fact that the smaller institutions might be the ones where the workload is the highest, and as assessed in a study commissioned by the European Parliament concludes that where the workload is unreasonably high this could be considered a form of psychological harassment in its own right.

The duty to report psychological harassment includes reporting psychological harassment even if it such a behaviour on the part of a Member of an institution or any other person in the service of or carrying out work for an institution even if such persons are not covered by the obligations included in the Staff Regulations. This is in line with the European Ombudsman's finding that individuals are particularly vulnerable to harassment where there is a power imbalance and respective requirement for more demanding rules for high-ranking personnel, who are not covered by the Staff Regulations and the CEOS, such as commissioners, judges, members of the Court of Auditors, members of the Economic and Social Committee must be adopted, e.g. compulsory retirement or removal of pension rights. It must be noted that the European Parliament has adopted rules that include sanctions towards Members of the European Parliament; however, the envisaged penalty envisaging financial measures on the Member of the European Parliament in the form of assuming responsibility for the professional loss suffered by the victim cannot be compared with that suggested by the European Ombudsman, i.e. compulsory retirement or removal of pension rights.

Another very important suggestion by the European Ombudsman is that formal complaints having legal basis in the Staff Regulations are afforded to all personnel working at the institutions to cover acts committed by seconded national experts, trainees and external contractors. This is crucial to ensure working conditions which respect dignity at the institutions in general, especially given that psychological harassment affects not only the victims but also individuals witnessing it.

Given the unique inquiry undertaken by the European Ombudsman, it is important that a follow up to the suggestion included therein is conducted in view of further enhancing internal rules of the institutions if an as required especially given that it has been noted that some of the anti-harassment policies of the institutions and agencies were written over a decade ago and therefore the European Ombudsman suggests to review them taking account of the findings of this strategic initiative of the European Ombudsman.

3. APPLICATION OF THE RULES BY THE INSTITUTIONS AND THEIR INTERPRETATION BY THE EU COURTS

This chapter assesses how the rules examined in the second chapter of this Master Thesis are applied by the institutions and interpreted by the EU Courts in their judicial capacity.

3.1. Interpretation of psychological harassment

The very first version of the Staff Regulations in force as of 1 January 1962¹¹⁵ provided some information on what could be understood as psychological harassment in Article 24 dealing with the assistance to staff:

Each Community shall assist any official in its service, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.

Given that there was no definition of psychological harassment in the first forty years of the application of the Staff Regulations, the judiciary dealing with psychological harassment cases referred to the conduct included in Article 24 of the Staff Regulations to ascertain what conduct constituted psychological harassment.¹¹⁶ Moreover, the Court of First Instance required that notwithstanding the subjective perception of the alleged facts, it was necessary that the behaviour complained of had the intention to affect the claimant. For example, the Court of First Instance judged in Case T-136/03 *Schochaert v Council* [2004] as follows:

[L]e requérant n’a pas avancé un ensemble d’éléments permettant d’établir qu’il a subi un comportement qui a visé, objectivement, à le discréditer ou à dégrader délibérément ses conditions de travail (...).¹¹⁷

Similarly, in Case T-144/03 *Schmit v Commission of the European Communities* [2005], the Court of First Instance was strict in that “pour que l’on soit en présence d’un harcèlement moral, le comportement en cause doit présenter objectivement un caractère intentionnel”¹¹⁸.

¹¹⁵ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, *OJ* 145, 14.6.1962, pp. 1385–1386. Available on: [https://eur-lex.europa.eu/eli/reg/1962/31\(1\)/oj](https://eur-lex.europa.eu/eli/reg/1962/31(1)/oj). Accessed March 10, 2023.

¹¹⁶ See Judgment of the Court of First Instance (single Judge) of 8 July 2004, *Robert Charles Schochaert v Council of the European Union*, T-136/03, EU:T:2004:229, paras. 50–51.

¹¹⁷ *Ibid.*, para. 41. Translation by the author of the MT: [T]he applicant has not put forward a set of elements making it possible to establish that he was subjected to conduct which was aimed, objectively, at discrediting him or deliberately worsening his working conditions.

¹¹⁸ Judgment of the Court of First Instance (Third Chamber) of 4 May 2005, *Nadine Schmit v Commission of the European Communities*, T-144/03, EU:T:2005:158, para 65. Translation by the author of the MT: for there to be moral harassment, the behaviour in question must objectively be intentional.

The definition of psychological harassment introduced in the Staff Regulations in 2004 by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004¹¹⁹, which entered into force on 1 May 2004¹²⁰ and has not changed since then, has been a turning point as it was no longer necessary to prove that reprehensible conduct had an aim at discrediting the alleged victim or deliberately worsening his working conditions. Previously established case-law concerned only conduct that occurred before the entry into force of the new Article 12a(3) of the Staff Regulations.¹²¹

In Case F-52/05 *Q v Commission of the European Communities* [2008] the EU Civil Service Tribunal confirmed that as of the entry into force of Article 12a(3) of the Staff Regulations the previous case-law cannot be effectively relied on as it concerned conduct prior to introducing this article. Furthermore, the EU Civil Service Tribunal explained that, even if the Court of First Instance in Case T- 154/05 *Lo Giudice v Commission* [2007] applied the previous case- law despite the fact that some conduct of the alleged harasser post- dated the entry into force of Article 12a(3) of the Staff Regulations, nothing in the judgement expressly implied the interpretation of Article 12a(3) of the Staff Regulations as making the malicious intent of the alleged harasser a condition for the existence of psychological harassment.¹²²

In the definition of psychological harassment included in Article 12a(3) of the Staff Regulations, the confusing element is the requirement that an act negatively affecting an individual must be intentional to qualify as psychological harassment; however, the EU Courts have interpreted this qualifying word as something that is not accidental. For example, in Case F-52/05 *Q v Commission of the European Communities* [2007], few years after the introduction of the psychological harassment definition in the Staff Regulations, the EU Civil Service Tribunal provided the following explanation:

By virtue of the fact that the adjective ‘intentional’ applies to the first condition, and not to the second, it is possible to draw a twofold conclusion. Firstly, the physical behaviour, spoken or written language, gestures or other acts referred to by Article 12a(3) of the Staff Regulations must be intentional in character, which excludes from the scope of that provision reprehensible conduct which arises accidentally. Secondly, it is not, on the other

¹¹⁹ Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, *OJ L* 124, 27.4.2004, pp. 1–118. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004R0723>. Accessed March 9, 2023.

¹²⁰ *Ibid.*, Article 2.

¹²¹ See also Sean Van Raepenbusch, *Le juge face au harcèlement moral dans le cadre du contentieux de la fonction publique européenne*, pp. 127–128. Available on: Strada Lex Europe electronic database. Accessed March 24, 2023.

¹²² Judgment of the EU Civil Service Tribunal (First Chamber) of 9 December 2008, *Q v Commission of the European Communities*, F-52/05, EU:F:2008:161, para. 140.

hand, a requirement that such physical behaviour, spoken or written language, gestures or other acts were committed with the intention of undermining the personality, dignity or physical or psychological integrity of a person. In other words, there can be psychological harassment within the meaning of Article 12a(3) of the Staff Regulations without the harasser's having intended, by his reprehensible conduct, to discredit the victim or deliberately impair the latter's working conditions. It is sufficient that such reprehensible conduct, provided that it was committed intentionally, led objectively to such consequences.¹²³

As to the perception of the improper conduct referred to in Article 12a(3) of the Staff Regulations by an alleged victim, it is a well-established case-law of the EU Courts that, to be classified as psychological harassment, such conduct must be objectively sufficiently real, meaning that “an impartial and reasonable observer, of normal sensitivity and in the same situation, would consider it to be excessive and open to criticism”¹²⁴.

In view of the use of vulgar or even insulting language, the EU General Court in Case T-275/17 *Michela Curto v European Parliament* [2018] rejected the justification of the European Parliament that the use of harsh language and raised voices could be normalised in stressful situations associated with the work of the members of the European Parliament and that the use of vulgar or even insulting language with the applicant could, even though those instances constituted singular cases, be justified for urgent work-related matters and by the fact that the harasser was not satisfied by the applicant's performance at work. The EU General Court ruled that such a behaviour belittled the applicant's work at her workplace or even insulted her and that such an improper conduct could in no way be regarded as an attitude befitting a member of an EU institution. Furthermore, the EU General Court dismissed the European Parliament's argument that the behaviour at issue could be tempered by the closeness of the relations between the harasser and the applicant or by the allegedly tense atmosphere within the harasser's team of APAs.¹²⁵

However, in case F-12/13 *CQ v European Parliament* [2014] the EU Civil Service Tribunal highlighted with respect to managerial weaknesses resulting in *accidental* words or gestures that such a conduct does not constitute psychological harassment:

It is possible that, given her managerial weaknesses, identified in the Committee's opinion, the Head of Unit may have accidentally adopted an inappropriate tone at the meeting of 23

¹²³ *Q v Commission of the European Communities*, para. 135.

¹²⁴ Judgment of the EU Civil Service Tribunal (Third Chamber) of 8 February 2011, *Carina Skareby v European Commission*, F-95/09, EU:F:2011:9, para. 65. *More recently see also* Judgment of the EU General Court (Fourth Chamber) of 23 March 2022, *NV v European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA)*, T-661/20, EU:T:2022:154, para. 103.

¹²⁵ Judgment of the EU General Court (First Chamber) of 13 July 2018, *Michela Curto v European Parliament*, T-275/17, EU:T:2018:479, paras. 84–86.

May 2011. However, accidental words or gestures are excluded from the scope of Article 12a(3) of the Staff Regulations.¹²⁶

3.2. What is not psychological harassment and respective implications towards the burden of proof

In psychological harassment cases, the burden of proof is particularly high for the alleged victim. Laure Levi, having represented alleged victims on a number of occasions before the EU Courts, points out that:

La problématique des preuves est, quant à elle, difficile. C'est en effet à la personne qui allègue de démontrer ce qu'elle allègue. Or, en matière de, la victime ne disposera que rarement de preuves (lesquelles sont par ailleurs peu nombreuses puisque l'on se réfère à des comportements et que, par ailleurs, la victime ne s'identifiera comme victime d'un que tardivement).¹²⁷

The former Judge and President of the EU Civil Service Tribunal Sean Van Raepenbusch highlights the need to distinguish psychological harassment from a list of other work-related stresses:

Il est impératif de définir soigneusement le harcèlement moral pour éviter que, sous le couvert de ce concept, ne soient, en réalité, mises en cause de mauvaises conditions de travail, une surcharge de travail, une mauvaise gestion administrative, une querelle entre personnes au travail, ou encore une réorganisation des services, une décision de réaffectation, une évaluation des mérites mal acceptée. (...) Certes, le stress, le surmenage, une mauvaise ambiance de travail peuvent faire le lit du harcèlement, mais, pour que celui-ci existe, les faits ou actes mis en cause doivent tendre spécifiquement à porter atteinte à la dignité d'une personne en créant des conditions de travail humiliantes ou dégradantes, ce qui rend de tels agissements particulièrement graves.¹²⁸

Sean Van Raepenbusch also stresses that some types of isolated one-time acts as such would not constitute psychological harassment as long as they do not repeat or do not become systematic. According to Sean Van Raepenbusch such examples as not saying hello or not looking at a person become destructive only upon their accumulation.¹²⁹

¹²⁶ Judgment of the EU Civil Service Tribunal (Third Chamber) of 17 September 2014, *CQ v European Parliament*, F-12/13, EU:F:2014:214, para. 95.

¹²⁷ Laure Levi, *Le harcèlement en droit de l'Union*. Available on: Strada Lex Europe electronic database. Accessed March 24, 2023. *Translation by the author of the MT*: The problem of proof is, for its part, difficult. It is in fact up to the person who alleges to demonstrate what he alleges. However, in such matters, the victim will only rarely have evidence (which is, moreover, scarce since we are referring to behaviour and, moreover, the victim will only identify himself as a victim at a later stage).

¹²⁸ Van Raepenbusch, *supra* note 121, pp. 123–124. *Translation by the author of the MT*: It is imperative to carefully define psychological harassment to avoid that in reality, under the cover of this concept, are placed poor working conditions, overwork, poor administrative management, a dispute between persons at work, or even reorganisation of services, a reassignment decision, a poorly accepted evaluation of merits. (...) It is true that stress, overwork, a poor working atmosphere can pave the way to harassment, but, for it to exist, the facts or acts in question must specifically aim to undermine the dignity of a person by creating humiliating or degrading working conditions, which makes such conduct particularly serious.

¹²⁹ *Ibid.*, p. 125.

While developing an understanding of what can be interpreted as psychological harassment, the EU Courts have been rather explicit in giving examples of situations which although stressful cannot be classified as psychological harassment. For example, in Case T-486/04 *Michail v Commission* [2008] the Court of First Instance ruled that:

Il convient d'observer d'emblée que le fait qu'un fonctionnaire ait des relations difficiles voire conflictuelles avec des collègues ou des supérieurs hiérarchiques, ou qu'il considère que c'est à tort que son point de vue ou ses conseils sont rejetés, ne constitue pas à lui seul la preuve d'un harcèlement moral.¹³⁰

The majority of psychological harassment cases that appear before the EU Courts are those where the alleged psychological harassment is directed to a Staff Member by their hierarchical supervisor, among which are cases where a Staff Member claims that negative remarks that appear in a report on their performance are part of psychological harassment. However, negative remarks in such reports are hard to prove to be part of psychological harassment as the EU Courts had acknowledged already in the first decades of the application of the Staff Regulations that “assessors have the widest discretion when judging the work of persons upon whom they must report”¹³¹. In view of staff reports, the EU Civil Service Tribunal stated in Case F-41/14 *CW v European Parliament* [2015] that:

[I]t is only on a purely exceptional basis that a plea in law based on a supposed case of harassment can be relied on in the context of a review of the legality of an act adversely affecting a person, such as, in the present case, a staff report, and only if it appears (...) that there is a link between the alleged harassment and the negative assessments contained in such a report (...).¹³²

It must be noted that the review of the EU Courts is limited to assessing whether a staff appraisal procedure is conducted in a regular manner, the facts are materially correct, and there is no manifest error of assessment or misuse of powers without having any powers to review the assessment of the professional abilities of a Staff Member where it involves complex value-judgements which by their nature cannot be objectively verified.¹³³ Moreover, a person that has been a victim of

¹³⁰ Judgment of the Court of First Instance (First Chamber) of 16 April 2008, *Michail v Commission*, T-486/04, EU:T:2008:111, para. 61. *Translation by the author of the MT*: It should be noted from the outset that the fact that an official has difficult or even conflictual relations with colleagues or hierarchical superiors, or that he considers that his point of view or advice is wrongly rejected, does not in itself constitute evidence of moral harassment.

¹³¹ Judgement of the Court (Second Chamber) of 1 June 1983, *Pieter Willem Seton v Commission of the European Communities*, joined cases 36/81, 37/81, 218/81, EU:C:1983:152, para. 23.

¹³² Judgment of the EU Civil Service Tribunal (First Chamber) of 26 March 2015, *CW v European Parliament*, F-41/14, EU:F:2015:24, para. 89.

¹³³ See Judgment of the EU Civil Service Tribunal (Second Chamber) of 10 July 2014, *CW v European Parliament*, F-48/13, EU:F:2014:186, para. 70.

psychological harassment can later on be dismissed due to their bad performance without the decision to dismiss being linked to an alleged psychological harassment.¹³⁴

In Case F-61/06 *Sapara v Eurojust* [2008], although the conduct of the head of unit undermined the applicant's personality and such a conduct was effectuated twice, i.e. the head of unit made jokes about the colour of the skin of the applicant on two occasions; the EU Civil Service Tribunal emphasised lack of further instances of such jokes after the applicant had requested that the head of unit discontinues them and more importantly that the applicant did not demonstrate that these instances and other facts she referred to had any effect on the decision to terminate her service.¹³⁵ Moreover, the EU Civil Service Tribunal highlighted that the allegations of psychological harassment had been made in the context that the head of unit had given negative assessments of the applicant's professional abilities and added that "[t]he onus [was] thus on the applicant to demonstrate that she [was] not confusing negative assessments with an attempt to discredit her work"¹³⁶ and that she failed "to establish either that she was subjected to conduct intended to discredit her or that the purpose of the alleged attempt to discredit her work was in fact to justify dismissing her"¹³⁷. Accordingly, the EU Civil Service Tribunal concluded that "[s]he cannot therefore rely on that alleged attempt to discredit her in support of her challenge of the dismissal decision"¹³⁸.

The above case is interesting from the following perspective: the discriminatory jokes of the head of unit were considered reprehensible conduct¹³⁹, and such situations may often lead to loss of motivation (see more about the loss of motivation in the first chapter of this MT) which may result in unsatisfactory performance for which a person may be dismissed on the grounds that they did not demonstrate the necessary abilities to perform the required duties; however, in this case nothing indicated that the applicant had lost motivation or could not perform her duties at a satisfactory level due to the suffering caused as a consequence of the conduct of the head of unit. As can be seen from the analysis of this case, there can be situations which could cause lots of stress; yet such situations would not qualify as psychological harassment even if the cause of the

¹³⁴ See Judgment of the EU Civil Service Tribunal (Third Chamber) of 24 February 2010, *Riccardo Achille Menghi v European Network and Information Security Agency (ENISA)*, F-2/09, EU:F:2010:12, para. 69.

¹³⁵ See Judgment of the EU Civil Service Tribunal (Third Chamber) of 10 July 2008, *Cathy Sapara v Eurojust*, F-61/06, EU:F:2008:98, paras. 106–107.

¹³⁶ *Ibid.*, para. 108.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, para. 107.

stressful situations could be attributed to relations with one specific person often being a hierarchical superior of an alleged victim of psychological harassment.

In psychological harassment cases, an institution's responsibility is usually invoked due to the rejection of a request for assistance in view of Article 24 of the Staff Regulations and related suffering of an alleged victim of psychological harassment. Yet, besides directing a claim for annulment against a decision rejecting a request for assistance it is also possible to rely on psychological harassment to support a claim for annulment directed against other types of decisions. However, the EU Courts have acknowledged that such a claim for annulment could only succeed on a purely exceptional basis, for example, in case of a staff report a link between the alleged harassment and the negative remarks must be apparent. What is required to annul such a staff report on the basis of psychological harassment is an ability to demonstrate a manifest error of assessment vitiating that report as well as to adduce evidence that the earlier conduct of a hierarchical superior, who prepared a staff report, qualifies as psychological harassment.¹⁴⁰

In Case T 179/21 *QN v European Commission* [2022] where the applicant seeks annulment of their appraisal report, the EU General Court ruled as follows:

The only comment containing a request for improvement relating to the applicant's communication and cooperation with his colleagues cannot, even in the context of a tense relationship between the applicant and his head of sector, be regarded, on its own, as resulting from any form of harassment.¹⁴¹

In view of promotion, in Case T 27/18 RENV *FV v Council of the European Union* [2019] the EU General Court ruled that the description of a situation of institutional mistreatment caused by stress, discouragement and demotivation included in the applicant's complaint against their non-promotion is not considered sufficient evidence of psychological harassment on the part of their former head of unit since the complaint came from the applicant herself.¹⁴²

Another aspect that, at first, might suggest the existence of psychological harassment is health condition of an alleged victim, especially if mental health problems are established. Nonetheless, it is not sufficient to rely on medical reports evidencing the mental health issues of the alleged victim of psychological harassment to prove the existence of psychological harassment. The EU Civil Service Tribunal held as follows in Case F-12/13 *CQ v Parliament* [2014]:

¹⁴⁰ See Judgment of the EU General Court (Eighth Chamber) of 19 September 2019, *FV v Council of the European Union*, T-27/18 RENV, EU:T:2019:621, paras. 147-149 and 151.

¹⁴¹ Judgment of the EU General Court (Eighth Chamber) of 14 September 2022, *QN v European Commission*, T-179/21, EU:T:2022:557, para. 106.

¹⁴² *FV v Council of the European Union*, *supra* note 140, para. 154.

The Tribunal notes that, in any event, the medical certificates submitted, if they reveal that the applicant has psychological problems, do not establish, however, that those problems result from psychological harassment, since, to make such a finding of harassment, the authors of the certificates necessarily rely exclusively on the description that the applicant made of her working conditions in the Parliament.¹⁴³

The above assessment illustrates that tense or even conflictual situations may arise between Staff Members and their hierarchical superiors in situations such as, a decision of dismissal or non-renewal of an employment contract, a non-promotion decision and negative comments in an appraisal report. The hierarchical superiors due to their position towards their subordinates have a lot of discretion, in particular, they have the duty to assess the work of their subordinates, recommend any relevant improvements and even suggest the termination of the service of their subordinates. However, there is no psychological harassment unless the situation leads to domination or an evil relationship as suggested by Sean Van Raepenbusch:

La question cruciale sera donc de déterminer à partir de quand on bascule du lien de subordination à la relation de domination d'une personne sur une autre, ou encore d'une querelle entre collègues à une relation malveillante, où l'un chercherait, consciemment ou inconsciemment, à faire perdre à l'autre son identité, à le faire «craquer».¹⁴⁴

In view of the suffering of psychological harassment by the victim, even if they face mental health issues as a consequence of psychological harassment, a medical certificate alone does not prove that an alleged victim has been a target of psychological harassment. However, such medical certificates may be considered by the EU Courts in support of other facts brought to its attention. For example, the EU Court judged in Case T-275/17 Michela Curto v European Parliament [2018] that “the medical certificates produced in the present case confirmed that psychological integrity of the applicant had actually been undermined”¹⁴⁵.

Given the intangible nature of psychological harassment, the burden of proof is very high for the alleged victims of psychological harassment even if medical certificates show that an alleged victim suffers from mental health issues. It also often happens that the alleged victims suffering is in fact not caused by psychological harassment but rather is a consequence of a dispute between colleagues, a reassignment decision, a poorly accepted evaluation of the performance of

¹⁴³ *CQ v European Parliament*, *supra* note 126, para. 127.

¹⁴⁴ Van Raepenbusch, *supra* note 121, p. 125. *Translation by the author of the MT*: The crucial question will therefore be to determine from when the relationship shifts from subordination to domination of one person over another, or even from a quarrel between colleagues to a malicious relationship, where one would seek, consciously or unconsciously, to make the other lose his identity, to make him «crack»”.

¹⁴⁵ See *Michela Curto v European Parliament*, *supra* note 125, para. 92.

a staff member by their supervisor, a decision to not renew the contract of a staff member or even a decision to dismiss a staff member.

3.3. Psychological harassment vs other forms of reprehensible conduct

Referring once again to Case F-61/06 *Sapara v Eurojust* [2008], it is valid to touch upon Article 12 of the Staff Regulations, which requires that “[a]n official shall refrain from any action or behaviour which might reflect adversely upon his position”. This article implies that the Staff Members of the institutions considering their grade and duties must reasonably understand what behaviour is likely to cause confusion as to the interests of the EU and avoid such unloyal conduct.¹⁴⁶ Whatever the grade and duties of a Staff Member, they must understand that jokes about another person’s skin colour are discriminatory and that if such behaviour would come to the attention of the public it would cause an immediate adverse effect on the reputation of an institution they serve or the EU in general.

Given the seriousness of the discriminatory jokes referred to in Case F-1/06 *Sapara v Eurojust* [2008], even if not classified as psychological harassment such conduct may be liable to disciplinary measures for non-compliance with Article 12 of the Staff Regulations by imposing one of the penalties included in Article 9(1) of Annex IX of the Staff Regulations, e.g. a written warning or a reprimand. Given that the agency suffered reputational damages as the case was brought to the EU Civil Service Tribunal and the judgement was made public, besides a disciplinary penalty the agency might have considered reputational damages made good. It must be noted that compensation for the damages caused is not a disciplinary measure, and accordingly the same act may give rise to two separate proceedings – one pursuant to Article 22 of the Staff Regulations and another, of a disciplinary nature, on the basis of Article 86 of the Staff Regulations.¹⁴⁷ However, there is no information in the public domain of any action that Eurojust might have taken in this regard as no further dispute ever reached the EU Courts.

It must also be mentioned in the context of the discriminatory jokes referred to in Case F-1/06 *Sapara v Eurojust* [2008] that such conduct is reprehensible no matter if it is repeated or not.¹⁴⁸ It is also worth noting that if that conduct was not discontinued it could have reached a level

¹⁴⁶ See e.g., Judgment of the EU Civil Service Tribunal (First Chamber) of 23 October 2013, *Joaquim Paulo Gomes Moreira v European Centre for Disease Prevention and Control (ECDC)*, F-80/11, EU:F:2013:159, para. 63.

¹⁴⁷ See also Peyronnel, *supra* note 76, p. 181.

¹⁴⁸ *Cathy Sapara v Eurojust*, *supra* note 135, para. 107.

of seriousness that could qualify as psychological harassment; however, the circumstances of the case prove that an explicit request to discontinue such conduct made by the person suffering from that conduct can be a turning point in dealing with such a situation.

3.4. Duty to provide assistance

The EU Courts acknowledged already in their early judgements with respect to Article 24 of the Staff Regulations that although that provision is primarily established to protect staff members against attacks and maltreatment by third parties, it also entails the duty of the institutions to provide assistance against such acts if the perpetrator is another staff member of an institution.¹⁴⁹

Accordingly, Article 24 of the Staff Regulations applies not only with respect to third parties but also to the alleged psychological harassment cases within the institutions between colleagues.

Furthermore, it is the well-established case-law of the EU Courts that deal with the situations included in Article 24 must be handled with all the necessary vigour:

In the light of that situation and faced with an incident which was incompatible with the good order and tranquillity of the service the Commission was required to intervene with all the necessary vigour so as to ascertain the facts and, having done so, to take the appropriate action in full knowledge of the matter.¹⁵⁰

The EU Courts have recognised that the duty to provide assistance included in Article 24 of the Staff Regulations does not only apply to the current staff members but extends also to the former ones:

Although the wording of Article 24 of the Staff Regulations appears to impose on the Community institutions an obligation to provide assistance only for officials and other servants who are in post, the provision, nevertheless, has a more general scope: its purpose is to provide officials and other servants in active employment with protection both at the present time and in the future in order to enable them to carry out their duties better in the general interest of the service. Consequently, the Community institutions' duty to provide assistance also extends to retired staff.¹⁵¹

Regarding the form of a request submitted pursuant to Article 90(1) of the Staff Regulations, it is not subject to any particular formal requirements, such as using special forms drawn up for this purpose by an institution, expressly referring to Article 90 of the Staff Regulations or using the

¹⁴⁹ See e.g., Judgement of the Court (Second Chamber) of 14 June 1979, *Mrs V. v Commission of the European Communities*, 18/78, EU:C:1979:154, para. 15.

¹⁵⁰ *Ibid.*

¹⁵¹ Judgment of the Court (Third Chamber) of 12 June 1986, *Maria Sommerlatte v Commission of the European Communities*, 229/84, EU:C:1986:241, para. 19.

term ‘request’. However, the substance of the request must be such that it is evident that a request to take a decision is required.¹⁵²

In order to be afforded assistance it is not sufficient that the concerned person brings forward allegations on the conduct referred to in Article 24 of the Staff Regulations. In fact, at least some evidence of the reality of attacks that can be then followed up by an inquiry to determine the facts and act accordingly must be provided. What is even more important is that such evidence cannot be brought up for the first time during the stage of the court proceedings instituted against a decision rejecting a request for assistance.¹⁵³

In view of the period of time during which a request under Article 90(1) must be submitted (with respect to seeking protection against reprehensible acts that include psychological harassment as provided for in Article 24 of the Staff Regulations), while such requests must be submitted within a reasonable time, the reasonableness of that period depends on the circumstances of each case, i.e. the importance of the case for the concerned person, its complexity and the conduct of the parties.

As to the time for providing an answer to a request for assistance, whenever initial evidence is submitted, allegations must be examined seriously, expeditiously and in total confidentiality, and the complainant must be informed of the action to be taken in view of that request.¹⁵⁴ Reasonable time principle is applied by the EU Courts when examining the time taken to open an administrative inquiry and the total length to deal with the request for assistance as no time limit is endorsed by the Staff Regulations on these procedural steps. What is important is that each measure is taken within a reasonable time after the previous measure.¹⁵⁵ It is an established case-law of the EU Courts that, if the ‘reasonable time’ principle is not observed, such a delay, in the absence of special circumstances, constitutes maladministration such as to render the concerned institution liable.¹⁵⁶

According to the well-established case-law regarding the four months period prescribed for a reply to a request under Article 90(1) of the Staff Regulations this provision is exclusively intended to afford the possibility for an affected staff member to submit a complaint under Article

¹⁵² Peyronnel, *supra* note 76, p. 493.

¹⁵³ See Judgment of the Court (Third Chamber) of 26 January 1989, *Jean Koutchoumoff v Commission of the European Communities*, 224/87, EU:C:1989:38, points 15, 20–22.

¹⁵⁴ See Judgment of the EU General Court (Eighth Chamber) of 6 April 2022, *KU v European External Action Service (EEAS)*, T- 425/20, EU:T:2022:224, para. 136.

¹⁵⁵ *Ibid.*, para. 140.

¹⁵⁶ See e.g., Judgment of the EU Civil Service Tribunal (First Chamber) of 11 May 2010, *Fotios Nanopoulos v European Commission*, F-30/08, EU:F:2010:43, para. 141.

90(2) against an implied decision rejecting that request upon expiry of the four months period and accordingly the four months period included in Article 90(1) does not mean that the institutions have, in general, four months to act, regardless of the circumstances of the case. This would be contrary to the ‘reasonable time’ principle that must be assessed on a case-by-case basis. Consequently, a reply to a request for assistance provided within four months does not in itself prove that the institution acted with the required promptness and diligence.¹⁵⁷

Notwithstanding the necessity to examine allegations about the existence of psychological harassment seriously and expeditiously, it is also acknowledged that running an administrative inquiry properly can be a time-consuming process. For example, the period of 16 months for opening and administrative inquiry and adoption of a decision as a response to the request for assistance might not be unreasonable considering the volume of facts and evidence that must be analysed (including new evidence if provided by a claimant), high number of witnesses that must be heard and follow-up with the complainant and the alleged harasser.¹⁵⁸

Similarly, European Ombudsman considered that there was no maladministration by the European Food Safety Authority (EFSA) for taking more than 3 years to conduct administrative inquiry given that internal rules of EFSA did not set a timeframe for the administrative inquiries and given the complexity and circumstances of the case such as high number of witnesses that had to be interviewed as well as the workload of external investigators during the COVID-19 pandemic which was a situation of *force majeure*.¹⁵⁹

Moreover, the EU Courts are of the view that even if the time for examining the allegations was excessive, unless it would have affected the content of a decision it would not trigger an annulment of the decision to reject the request for assistance.¹⁶⁰

The right to be heard included in Article 41 of the Charter is an inalienable right of the alleged victim that must be granted before the request for assistance is rejected, despite the fact that an administrative inquiry proves that the alleged harassment did not take place. The reason behind being that the person concerned, if heard, could provide additional explanations clarifying their

¹⁵⁷ *Fotios Nanopoulos v European Commission*, *supra* note 156, paras. 144 – 145.

¹⁵⁸ *See KU v European External Action Service*, *supra* note 154, para. 145.

¹⁵⁹ *See* European Ombudsman. Decision in case 575/2020/NH on the time it took the European Food Safety Authority (EFSA) to finalise an administrative inquiry into alleged harassment of 20 November 2020, paras. 14–22. Available on: <https://www.ombudsman.europa.eu/en/decision/en/135247>. Accessed May 1, 2023.

¹⁶⁰ *See KU v European External Action Service (EEAS)*, *supra* note 154, para. 142.

initial request for assistance which could allow the administration to base its decision on full knowledge of the facts.

In view of the institutions' duty to ensure appropriate health and safety standards for their staff members as per Article 1e(2) of the Staff Regulations; Laure Levi, lawyer at the Brussels Bar and a scientific collaborator at the Institute for European Studies of the Free University of Brussels¹⁶¹ insists that this duty is without the need to wait for a formal request for assistance, but can be taken care of by drawing on the information available to an institution's medical service:

On peut relever à cet égard les informations parfois essentielles dont dispose le service médical de l'employeur et qui, tout en préservant le secret médical, ne sont pas utilement prises en considération pour conduire à une action d'initiative de l'employeur et de protection d'un ou parfois même de plusieurs agents. L'employeur ne saurait ainsi se « couvrir » devant l'absence d'une demande d'assistance « formelle » alors qu'il est tenu à des obligations de « faire » ne fût-ce qu'au titre de la directive 89/[3]91 et de l'article 1 sexies, § 2, du statut.¹⁶²

3.5. Duty to open and conduct an administrative inquiry, and the burden of proof

The EU Courts has ruled that, where at least some evidence in support of the allegations of psychological harassment has been provided with the request for assistance, it is a duty of the institution concerned to undertake an inquiry, with the cooperation of the complainant, to determine the facts and act accordingly as without an inquiry it cannot adopt a definitive position on how to proceed, i.e. take no action on the complaint or open a disciplinary procedure and, if appropriate, impose disciplinary sanctions.¹⁶³

Moreover, where sufficient *prima facie* evidence has been submitted in support of allegations of psychological harassment; the concerned institution, in fact, does not have broad discretion as to whether it is appropriate to open and conduct an administrative inquiry. On the contrary, the concerned institution must proceed with it as quickly as possible to be able, in due course, to restore working conditions conducive to the interest of the service.¹⁶⁴ Moreover, an

¹⁶¹ Levi, *supra* note 127, 2023.

¹⁶² *Ibid.* Translation by the author of the MT: In this respect, it is worth noting the sometimes essential information available to the employer's medical service which, while preserving medical confidentiality, is not usefully taken into consideration in order to lead to action on the employer's initiative and to protect one or sometimes even several employees. The employer cannot therefore "cover up" for the absence of a "formal" request for assistance when he is bound by obligations to "do", if only under Directive 89/[3]91 and Article 1e(2) of the Staff Regulations.

¹⁶³ See e.g., Judgment of the EU General Court (Appeal Chamber) of 12 July 2011, *European Commission v Q*, T-80/09 P, EU:T:2011:347, para. 84.

¹⁶⁴ See Judgment of the EU General Court (First Chamber) of 3 October 2019, *DQ and Others v European Parliament*, T-730/18, EU:T:2019:725, para. 84.

administrative inquiry is a must 1) to comply with the principle of sound administration and thus prevent such a situation recurring, 2) to acknowledge the existence of psychological harassment which in itself is likely to have a beneficial effect in the therapeutic recovery of the person who has been harassed and to use the results of the inquiry in proceedings before a national court, for which an institution has duty to provide assistance under Article 24 of the Staff Regulations or 3) to disprove the allegations of psychological harassment and thus to repair the damage to an alleged harasser.¹⁶⁵

The timing of a request for assistance may coincide with a time that a staff member ceases to be employed by an institution. It can be that a hierarchical supervisor's conduct towards their subordinate includes elements of psychological harassment which results, *inter alia*, in a decision not to renew an employment contract of the concerned staff member. Therefore, even if the contract has not been renewed and the concerned staff member does not have any link or interaction with the alleged harasser anymore; the sole fact that in such circumstances psychological harassment ceased to exist does not allow that institution to not initiate or stop an investigation even if the harassment does not continue.¹⁶⁶

It is not always necessary to open an administrative inquiry based on the request for assistance submitted by an alleged victim of psychological harassment as discussed in sub-chapter 3.4 above, but an administrative inquiry is also mandated following the receipt of a report of psychological harassment made pursuant to Article 22a(1) of the Staff Regulations.¹⁶⁷

In view of the rapidity of opening an administrative inquiry where *prima facie* evidence of psychological harassment has been submitted, the EU General Court ruled in Case T-730/18 *DQ and Others v European Parliament* [2019] regarding a request for assistance submitted to the European Parliament on 24 January 2014 that:

While, in the present case, the appointing authority did open an administrative inquiry in response to the request for assistance, it did not do so until 19 March 2014, and did not inform the applicants until April 2014, which was almost three months after the request had been made. It must be held that, in proceeding in that way, the appointing authority infringed the principle of sound administration as well as Article 24 of the Staff Regulations, while also leaving the applicants in doubt as to the action taken in response to their request.¹⁶⁸

¹⁶⁵ See *Michela Curto v European Parliament*, *supra* note 125, para. 59.

¹⁶⁶ See Judgment of the EU Civil Service Tribunal (First Chamber) of 6 October 2015, *CH v European Parliament*, F-132/14, EU:F:2015:115, paras. 121-122.

¹⁶⁷ See *DQ and Others v European Parliament*, *supra* note 164, paras. 62-64.

¹⁶⁸ *DQ and Others v European Parliament*, *supra* note 164, para. 85.

Accordingly, in this case, the EU General Court has been very strict about the time frame for opening an administrative inquiry and informing persons submitting a request for assistance about this step. It can be concluded that where *prima facie* evidence of psychological harassment has been provided, opening an administrative inquiry within 2 months and informing the applicant about it within another month is not an expeditious proceeding with an inquiry.

With respect to the confidentiality of administrative inquiries, while it is considered that at least at the initial stages of the administrative inquiries no third parties should be informed of a request for assistance; hierarchical superiors of an alleged harasser and those of an alleged victim might need to be informed with a view to seeking their help in dealing with the request as long as such disclosure does not undermine the effectiveness of an inquiry which must be assessed in each case separately.¹⁶⁹

Moreover, in Case T- 703/19 *DD v European Union Agency for Fundamental Rights (FRA)* [2021] the EU General Court established that the person whose acts are investigated within an administrative inquiry must be informed of the existence of the administrative inquiry as soon as it is initiated in so far as the gathered information is not detrimental to the conduct of the inquiry.

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Besides the difficulty to prove psychological harassment, it is also important to highlight that the presumption of innocence articulated in Article 48(1) of the Charter as well as Article 6(2) of the ECHR is a general principle of EU law, and as such must be respected by the institutions when assessing the conduct of an alleged harasser. Even in the absence of criminal proceedings, the presumption of innocence applies to administrative proceedings having regard to the nature of the infringements in question as well as the nature and degree of severity of the measures relating thereto¹⁷¹. Given that psychological harassment is a very serious infringement which may result in, e.g. dismissal of a harasser¹⁷², the presumption of innocence applies to psychological harassment cases and therefore it is for the alleged victim to adduce *prima facie* evidence of psychological harassment when submitting a request for assistance (see more in sub-chapter 3.4 of this Chapter), and it is for the institutions to gather sufficient proof of psychological harassment within an

¹⁶⁹ *Ibid.*, para. 88.

¹⁷⁰ Judgment of the EU General Court (Fourth Chamber) of 21 December 2021, *DD v European Union Agency for Fundamental Rights*, T- 703/19, EU:T:2021:923, para. 92.

¹⁷¹ Judgment of the EU General Court (First Chamber) of 21 December 2021, *KS v European Border and Coast Guard Agency*, T-409/20, EU:T:2021:914, para. 151–152.

¹⁷² See Article 9 of Annex IX of the Staff Regulations for complete list of disciplinary penalties.

administrative inquiry before making any conclusions within such procedures. This is due to the fact that:

[I]n defining the measures which [the institution] considers appropriate in order to establish the truth and scope of the facts alleged, the administration must also ensure that the rights of persons implicated in a request for assistance which may be the subject of an investigation are protected.¹⁷³

To conclude, sub-chapters 3.4 and 3.5 demonstrate that the burden of proof is particularly high for an (alleged) victim as they must prove what they allege while an alleged harasser benefits from the presumption of innocence, and furthermore due to the fact that the concerned institution must open an administrative inquiry only if the alleged victim adduces *prima facie* evidence of psychological harassment and given that administrative inquiries may be lengthy thus prolonging the anxiety of the victim of psychological harassment. This highlights once more the importance of preventive measures that must be robust enough not to put a staff member in a situation where they must prove the existence of psychological harassment.

3.6. Duties in view of protection of personal data of involved persons

With respect to administrative inquiries, while Article 41(2)(c) of the Charter requires the institutions to give reasons for their decision, e.g. a decision rejecting a request for assistance; the institutions must also have regard to Article 8(1) of the Charter which affords everyone the right to the protection of their personal data, as well as to the provisions of Regulation (EU) 2018/1725.

In the context of protection of personal data, if an administrative inquiry report includes information that identifies the person under investigation, the alleged victim, witnesses and persons merely quoted in the report; the investigators should limit the collection of personal information to what is directly relevant and necessary to the purpose of the inquiry and of the disciplinary proceeding.¹⁷⁴ This stems from Article 4(1)(c) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No

¹⁷³ Judgment of the EU General Court (Seventh Chamber) of 13 July 2022, *AI and Others v European Centre for Disease Prevention and Control*, T-864/19, EU:T:2022:452, para. 150.

¹⁷⁴ See European Data Protection Supervisor. Guidelines on processing personal information in administrative inquiries and disciplinary proceedings, 18 November 2016, p. 7. Available on: https://edps.europa.eu/data-protection/data-protection/reference-library/administrative-inquiries-and-disciplinary_en. Accessed May 1, 2023.

1247/2002/EC¹⁷⁵ (hereinafter – “Regulation 2018/1725”) which lays down the principle of data minimisation. However, the compliance with the principle of data minimisation must not hinder the claimant’s ability to understand the reasons why their request for assistance is rejected.

This notion of data minimisation also stems from established case-law of the EU Courts from which it follows that (alleged) victims of psychological harassment do not have a right to have access to full investigation report since it is, except in special circumstances, necessary to protect witnesses by guaranteeing their anonymity and the confidentiality of any data likely to identify them. This is also required to allow neutral and objective investigations to be carried out with the full cooperation of staff members, to prevent any risk of influence of witnesses by the alleged harasser or even by the complainant, and thus to preserve working relations conducive to the smooth running of the services.¹⁷⁶

Similarly, the European Ombudsman in its inquiry into complaint 63/2013/LP against an EU agency concerning allegations of harassment conducted pursuant to Article 24 TFEU and Article 43 of the Charter decided that since the agency gave the (alleged) victim of psychological harassment a non-confidential version of the report in which the names of the witnesses and their statements were omitted, the only difference between the confidential and non-confidential versions of the administrative inquiry report being the fact that the date when the staff members were heard and their respective declarations were omitted from the latter. However, in this particular case the European Ombudsman criticised the fact that the agency followed the general jurisprudence of the EU Courts that that the surname, first name, post and grade of the persons heard should be omitted since, apart from the (alleged) victim, the only persons heard were the alleged harasser and a witness whose names were already disclosed to the (alleged) victim and were retained in the non-confidential version of the investigation report. Accordingly, the European Ombudsman decided that in such a situation it is difficult to imagine how disclosing their testimonies, as set out in the investigation report, would further undermine their privacy and underlined that withholding this information is also not justified by the need to protect smooth running of the services since the complainant no longer worked for the agency. The European

¹⁷⁵ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, pp. 39–98. Available on: <http://data.europa.eu/eli/reg/2018/1725/oj>. Accessed April 21, 2023.

¹⁷⁶ See Judgment of the EU Civil Service Tribunal (Third Chamber) of 23 October 2013, *BQ v Court of Auditors of the European Union*, F-39/12, EU:F:2013:158, paras. 73–74 and the case-law cited.

Ombudsman suggested that it would be appropriate to make available to the (alleged) victim, if not the full version of the administrative inquiry report, at least one that contained the declarations made by the two persons heard.¹⁷⁷

As determined in sub-chapter 3.5 above an alleged harasser must be informed of the existence of the administrative inquiry as soon as it is initiated in so far as the gathered information is not detrimental to the conduct of the inquiry. However, although Article 17(1) of Regulation 2018/1725 affords data subjects the right to access their personal data in which an alleged harasser has an utmost interest; Article 1 and 2 of Annex IX of the Staff Regulations, in alignment with the provisions of Article 25(1) of Regulation 2018/1725 that includes restrictions of the right of access, provides for an exception to this right allowing the institutions to conduct an investigation in absolute secrecy and giving a chance to the alleged harasser to comment on its outcome after the investigation is concluded subject to the protection of the legitimate interests of third parties.

3.7. Duty to separate an alleged harasser from an alleged victim

While at the initial stages of an administrative inquiry, it might be difficult to determine if and what immediate measures must be undertaken; in cases of serious allegations substantiated by sufficient *prima facie* evidence no hesitation in separating an alleged harasser from an alleged victim is permissible. In such cases, the alleged harasser cannot remain in contact with the alleged victim as day-to-day contact could provide the alleged harasser with an opportunity to intimidate or threaten the alleged victim. The duty to separate an (alleged) victim from an (alleged) harasser derives from the duty to provide assistance contained in Article 24 of the Staff Regulations as it is required to restore the working conditions compatible with the dignity of a person, within the meaning of Article 31(1) of the Charter which states that “[e]very worker has the right to working conditions which respect his or her health, safety and dignity”. Furthermore, not taking a rapid decision to separate the two sides cannot be excused if the submitted evidence is credible and even more so if such evidence is submitted by several staff members. Notwithstanding the above-mentioned, the rights of the alleged harasser, in particular the right of defence and the presumption of innocence,

¹⁷⁷ See European Ombudsman. Decision of the European Ombudsman closing her inquiry into complaint 63/2013/LP against [an EU Agency] concerning allegations of harassment of 24 November 2015, paras. 43–46. Available on: https://www.ombudsman.europa.eu/en/decision/en/61434#_ftn2. Accessed May 1, 2023.

must also be observed and therefore definitive measures are adopted at the conclusion of the inquiry.¹⁷⁸

There are situations when moving away an alleged victim is considered an effective way to deal with an alleged psychological harassment situation; however, it can be problematic as the alleged victim can perceive their transfer as a disguised penalty for bringing up an issue. Nonetheless, the EU Courts consider moving away an alleged victim appropriate. For example, in Case T-80/09 P *European Commission v Q*, T-80/09 P [2011], the EU General Court stated that the duty of protection included in Article 24 of the Staff Regulations includes taking “appropriate preventive measures, such as the reassignment or provisional transfer of the victim, in order to protect him against a repetition of the alleged conduct during the period required for the administrative inquiry”¹⁷⁹. Moreover, in the same judgement, the EU General Court acknowledged that:

The administration has a wide discretion, subject to review by the European Union Court, in the choice of the measures, both provisional and definitive, which must be taken pursuant to Article 24 of the Staff Regulations. The review by the European Union Court is limited to the question of whether the institution concerned has acted within reasonable limits and has not exercised its discretion in a manner which is manifestly incorrect (...) ¹⁸⁰

The very necessity to distance the concerned persons from each other means that further cooperation between them is considered impossible as it would most probably cause further adverse effects. However, distancing an (alleged) harasser from an (alleged) victim of psychological harassment might not always be objectively possible; for example, due to the size of the institution and/or the specificity of the work of the concerned staff members. When comparing the size of different institutions, it is evident that institutions such as the European Commission with around 30 000 officials, temporary and contract agents by the end of 2021¹⁸¹ due to their size are much better equipped to comply with the duty to separate an (alleged) harasser from an (alleged) victim than the small institutions such as the European Institute for Gender Equality with 38 temporary and contract agents by the end of 2021¹⁸². Same challenge is faced by the Agency

¹⁷⁸ See *DQ and Others v European Parliament*, *supra* note 164, paras. 89–91.

¹⁷⁹ *European Commission v Q*, *supra* note 163, para. 85.

¹⁸⁰ *Ibid.*, para. 86.

¹⁸¹ See European Commission. *European Commission HR key figures 2022*, dated 21 March 2022. Available on: https://commission.europa.eu/about-european-commission/organisational-structure/commission-staff_en. Accessed April 13, 2023.

¹⁸² See European Institute for Gender Equality. *Consolidated Annual Activity Report (CAAR) 2021*, *supra* note 96.

for Support for BEREC with 38 temporary and contract agents by the end of 2021¹⁸³. Therefore, to restore working conditions which respect staff member's health, safety and dignity as required in Article 31(1) of the Charter the smaller institutions might need to have recourse, with due regard to the assessment of the gravity of each case, to the disciplinary penalty being the removal from post the harasser.

3.8. Damages compensated by the institutions

As to the compensation of the damages suffered by an (alleged) victim of psychological harassment in view of the acts of the institutions, such a liability can occur in some circumstances occur if an institution has unlawfully rejected a request for assistance. It is a settled case-law that a decision of an institution rejecting a request for compensation is an integral part of the preliminary administrative procedure which precedes an action before the EU Courts. The position adopted by that institution during the pre-litigation stage has the sole effect of allowing the party who has suffered damage to apply to the EU Courts for compensation.¹⁸⁴

3.8.1. Non-material damages

The responsibility for non-material harm caused as a direct result of psychological harassment primarily lies with a harasser, and therefore a victim of psychological harassment must first seek compensation for such damages by bringing an action before a national court against the harasser.¹⁸⁵

When it comes to the institutions' liability for damages, the following cumulative conditions must be met: the conduct of an institution of which it is accused must be unlawful, an actual damage must have been suffered, and there must be a causal link between the two. However, legal remedies in view of the institutions' liability involving the civil service afforded under Article 270 TFEU and Articles 90 and 91 of the Staff Regulations are governed by different rules than those arising from the general principles on the non-contractual liability of the EU under Article 268 TFEU and the second paragraph of Article 340 TFEU. A staff member of an institution is connected to an institution by a legal relationship of employment from which stems an employing institution's duty to have regard for the welfare of a staff member. An institution is therefore under

¹⁸³ See *Consolidated Annual Activity Report of the Agency for Support for BEREC (BEREC Office) Year 2021*, *supra* note 97.

¹⁸⁴ See *AI et al, v European Centre for Disease Prevention and Control*, *supra* note 173, para. 102.

¹⁸⁵ See *Michela Curto v European Parliament*, *supra* note 125, para. 112.

a greater liability when it acts as an employer, and accordingly, a mere finding of unlawfulness, whether it relates to an act or to decision-making conduct, is sufficient to satisfy the first condition to incur the liability of an institution towards its staff member. If the administration is required, under the legislation in force, under general principles or fundamental rights, or under rules it has imposed on itself, to conduct in a particular way; a failure to fulfil such an obligation in itself gives rise to liability on its part.¹⁸⁶

If an institutions has unlawfully rejected a request for assistance, even though it is a settled case-law of the EU Courts that an annulment of an unlawful act may constitute, in itself, appropriate and, in principle, sufficient compensation for any non-material harm which that act may have caused¹⁸⁷, the annulment of the unlawful rejection for assistance would not be sufficient to make good the harm caused by such an act “where the applicant shows that he has sustained non-material harm that can be separated from the illegality justifying the annulment and that cannot be compensated for in full by that annulment”¹⁸⁸. This is the case, for example, if an institution fails to bring about an effective separation of an alleged harasser from an alleged victim of psychological harassment following a request for assistance which results in not restoring working conditions compatible with the dignity of an alleged victim within the meaning of Article 31 of the Charter¹⁸⁹.

In addition, liability by an institution can be established for not complying with the reasonable time principle.¹⁹⁰ For example, in Case T-275/17 *Michela Curto v European Parliament* [2018], the EU General Court ruled that the unreasonable period of over two years that the European Parliament took to deal with the request for assistance left the applicant in a state of uncertainty and prevented her from or, at the very least, delayed the opening of legal proceedings against the alleged harasser. Accordingly, the EU General Court ordered the European Parliament to compensate the non-material harm suffered by the applicant in the sum of EUR 10 000.¹⁹¹

Furthermore, the second paragraph of Article 24 of the Staff Regulations provides that the Union shall compensate for the damages caused to the victim by the conduct of a harasser if the victim is unable to obtain compensation from the person who caused the harm. The EU General Court ruled in Case T-730/18, *DQ and Others v European Parliament* [2019] that compensation

¹⁸⁶ See *DQ and Others v European Parliament*, *supra* note 164, paras. 47–51 and the case law cited.

¹⁸⁷ E.g., *Michela Curto v European Parliament*, *supra* note 125, para. 114 and the case-law cited.

¹⁸⁸ *Ibid.*

¹⁸⁹ See *DQ and Others v European Parliament*, *supra* note 164, para. 91.

¹⁹⁰ *Ibid.*, para. 112.

¹⁹¹ See *Michela Curto v European Parliament* *Supra* note 125, paras. 116 and 118.

for such harm can be asked from an institution only if the applicant's claim has been dismissed by a national court:

As regards the claim for compensation in respect of the non-material damage suffered by the applicants as a result of the conduct of the head of unit, this must be rejected at the outset as being premature, as it is not the case that the applicants had first brought an action for compensation before a national court, against the head of unit, which had been dismissed.¹⁹²

Furthermore, another case where a victim might not be able to recover non-material harm from the harasser is when the harasser is a Member of the European Parliament and cannot be prosecuted because of his immunity from jurisdiction: “[c]ette hypothèse est typiquement celle de l'assistant parlementaire par un membre du Parlement et qui ne pourrait être poursuivi en raison de son immunité de juridiction”¹⁹³.

Moreover, as the EU Civil Service Tribunal acknowledged in Case F-132/14 *CH v European Parliament* [2015], the liability of an institution for non-material damages can also be constituted having regard to the following circumstances:

[T]he feeling of injustice and the anxiety caused by the fact that an individual is required to undergo pre-litigation and litigation proceedings in order to secure recognition of his rights may constitute psychological harm that can stem from the mere fact that the administration acted unlawfully, bearing in mind that such harm is reparable where it is not compensated by the satisfaction resulting from the annulment of an act (...). The same applies, inter alia, where, in connection with measures to comply with a judgment annulling an act, the administration repeats irregularities of the same nature as those which justified that annulment.¹⁹⁴

In the above-mentioned case the EU Civil Service Tribunal awarded the applicant damages in the amount of EUR 25 000 as compensation of the psychological harm suffered due to the failure to open an administrative inquiry promptly, the applicant being required to ask for the opening of an inquiry repeatedly, being required to make further approaches to the administration and in the end bring further proceedings for full recognition of her rights under Article 24 of the Staff Regulations.¹⁹⁵ In addition, the EU Civil Service Tribunal ordered the European Parliament to pay interest added on top of that compensation as of the date of the decision that the EU Civil Service Tribunal annulled.¹⁹⁶

¹⁹² *DQ and Others v European Parliament*, *supra* note 164, para. 55.

¹⁹³ Levi, *supra* note 127. Translation by the author of the MT: [t]his hypothesis is typically that of the parliamentary assistant by a Member of Parliament who could not be prosecuted because of his immunity from jurisdiction.

¹⁹⁴ *CH v European Parliament*, *supra* note 166, para. 125.

¹⁹⁵ *Ibid.*, para. 126.

¹⁹⁶ *CH v European Parliament*, *supra* note 166, para. 129.

3.8.2. Material damages

As to the duty to provide assistance by an institution under Article 24 of the Staff Regulations, it is only due in respect of acts which are suspected of being illegal and can be reasonably assessed as prejudicial to the rights of civil servants.¹⁹⁷ If this is the case, a staff member in their request for assistance may request an institution for an assisted legal action with a view to obtaining that actions aimed at them by reason of their duties be recognised as illegal¹⁹⁸ and providing financial assistance to an alleged victim¹⁹⁹.

In view of the financial assistance for the fees related to a request for assistance, given that there is no requirement to be represented by a lawyer in a pre-litigation procedure, such fees are not considered recoverable costs within a claim for damages.²⁰⁰ While such lawyer's fees are to be borne by a concerned staff member, such fees might exceptionally be ordered to be recovered by an employing institution provided existence of such exceptional circumstances can be established by the EU Courts.²⁰¹

As to the litigation costs, while, in general, costs of proceedings before the EU General Court and the Court of Justice of the European Union are free of charge²⁰², the costs of the successful party, as a general rule, are to be borne by the unsuccessful party²⁰³. However, it is not an unusual practice that if unsuccessful party is a staff member of an institution the EU General Court has recourse to Article 135(1) of the Rules of Procedure of the General Court and based on a fair assessment of the circumstances in the interests of equity orders that each party bears its own costs.²⁰⁴

¹⁹⁷ See *European Commission v Fernando De Esteban Alonso*, *supra* note 65, para. 41.

¹⁹⁸ *Ibid.*, para. 42.

¹⁹⁹ See *DQ and Others v European Parliament*, *supra* note 164, para. 59.

²⁰⁰ *Ibid.*, para. 115 and the case-law cited.

²⁰¹ See Judgment of the EU General Court (Fourth Chamber) of 23 February 2022, *OA v European Economic and Social Committee*, T-671/20, EU:T:2022:82, para. 58.

²⁰² See Article 139 of the Rules of Procedure of the General Court and Article 143 of the Rules of Procedure of the Court of Justice.

²⁰³ See Article 134(1) of the Rules of Procedure of the General Court and Article 138(1) of the Rules of Procedure of the Court of Justice.

²⁰⁴ See *AI and others v ECDC*, *supra* note 173, paras. 208–209.

Conclusions

From the point of view of psychology, psychological harassment at work is repeated or systematic mistreatment of a subordinate, a colleague or a superior which may cause severe social, psychological and psychosomatic problems in a targeted person. Furthermore, psychological harassment is unwanted by the victim, and it can be either intentional or unconscious from the perspective of the harasser, and it can lead to stigmatisation and victimisation of the targeted person. Finally, psychological harassment can also have adverse effects on those witnessing it, thus affecting the overall morale and motivation at the workplace which can result, *inter alia*, in economic losses for the concerned employer.

The author of this MT concludes that over 40 years of researching the phenomenon of psychological harassment at work shows that there are very important aspects that still require research, such as vulnerability traits that could show that some types of personalities could be more affected by psychological harassment than others. In addition, more research of the causes of psychological harassment is desired to ensure that employers' attention is focused to the right mitigation measures.

Rules governing the handling of psychological harassment cases, general principles of EU law, as well as the case law of the EU Courts determine a comprehensive set of obligations incumbent on the institutions, such as: the duty to provide assistance to a staff member; the duty to promptly open and conduct an administrative inquiry once *prima facie* evidence of psychological harassment is adduced; duties in view of protection of personal data of involved persons; duty to separate an (alleged) victim from an (alleged) harasser including during the administrative inquiry in cases of serious allegations substituted by sufficient *prima facie* evidence (in case of a smaller institutions such a transfer might not be feasible which might necessitate a decision to remove the harasser from post if psychological harassment is proved); duty to compensate damages (non-material and material) sustained by an (alleged) victim of psychological harassment if they are caused by an unlawful act on the part of the concerned institution.

In view of the legal framework pertaining to institutions, when compared to the provisions applicable to EU member states, it can be concluded that it adequately addresses the phenomenon of psychological harassment at work. However, the Staff Regulations and the CEOS require that the working conditions afforded to the staff members comply with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in

these areas pursuant to the Treaties. Furthermore, nothing in the Staff Regulations and the CEOS expressly requires the institutions to adopt internal rules on preventing psychological harassment. Currently an obligation for the institutions to prevent psychological harassment stems from Directive 89/391/EEC. To place greater importance and clarity on the institutions' duties with respect to preventing psychological harassment, one possible approach could be the inclusion of obligations in view of the prevention of psychological harassment, similar to those included in Directive 89/391/EEC, in the Staff Regulations and the CEOS.

As to the psychological harassment definition included in the Staff Regulations compared with respective definitions in the EU Equal Treatment Directives, these directives contain identic definitions of psychological harassment all of them referring to the purpose or *effect* of violating the dignity of a person thus being absolutely clear that it is not required that the reprehensible conduct must be *intentional* while the Staff Regulations define psychological harassment as improper conduct that is *intentional* and that may undermine the dignity of a person. Although the EU Courts have acknowledged that the word *intentional* in this context means that the reprehensible conduct is not accidental, for the sake of clarity, it would be desirable to amend the definition of psychological harassment included in the Staff Regulations to make it clear that psychological harassment includes a conduct that has an *effect* of violating the dignity of a person.

In view of the repetitive nature of psychological harassment as provided for in the definition of psychological harassment included in the Staff Regulations, it is necessary to closely monitor the ratification process of ILO Convention No 190 as this convention determines that psychological harassment may be constituted even as a result of a single occurrence of reprehensible conduct. If this international standard becomes widely accepted among the EU member states, it should be considered whether the EU law, including the Staff Regulations and the CEOS, should reflect this change in the definition of psychological harassment.

The following suggestions are made considering the internal rules of the institutions: 1) All institutions, including the small ones, should conduct analyses of psychosocial risks, particularly due to the fact that the smaller institutions might be the ones where the workload is the highest which influences the presence of psychological harassment; 2) To introduce more demanding sanctions for psychological harassment for high-ranking personnel, who are not covered by the Staff Regulations and the CEOS, such as commissioners, judges, members of the Court of Auditors, members of the Economic and Social Committee, e.g. compulsory retirement or removal of pension

rights; 3) To open the formal complaints having legal basis in the Staff Regulations to all personnel working at the institutions to cover acts committed by seconded national experts, trainees and external contractors, thus fully ensuring working conditions which respect dignity at the institutions; 4) To follow up the suggestion included in the European Ombudsman's Inquiry Report and accordingly enhance internal rules of the institutions if an as required; 5) To raise awareness within the institutions of what conduct constitutes psychological harassment and how to effectively stop it, thus boosting an overall culture of non-tolerance of psychological harassment at the institutions.

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