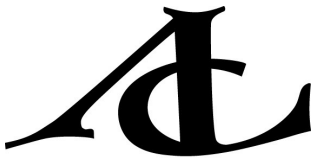

A Comparative Study of European Community Law and the Internal Regulation of the European Institutions in the Spheres of the Physical Working Conditions for Employees, Equality Regarding such Conditions and the Functional Organisation of Work

Authors:

Elaine O'Brien

Michal Kocifaj

Tina Mežnar

Amsterdam International Law Clinic

Table of Contents

Table of Contents.....2

1. INTRODUCTION.....6

1. 1. Purpose of the Report.....6
1. 2. Synopsis.....8
1. 3. Basic Introduction to European Community Legislative Measures.....11

2. PHYSICAL WORKING CONDITIONS.....15

2. 1. Introduction.....15
2. 2. The Physical Conditions Inherent in the Building.....19
2. 2. 1. Room Dimensions and Air Space in Rooms: Freedom of Movement at the Workstation.....19
2. 2. 2. Rest Rooms.....21
2. 2. 3. First Aid Rooms.....24
2. 2. 4. Procedures to be in Place in the Possibility that the Workers are Put in the Serious and Immediate Danger.....27
2. 2. 5. Air Quality.....33
2. 3. The Physical Conditions Inside the Building.....41
2. 3. 1. Room Temperature.....41
2. 3. 2. Quality of the Lighting.....43
2. 3. 3. Computer Display Screens.....47

.....51

3. EQUALITY REGARDING PHYSICAL WORKING CONDITIONS.....52

3. 1. Equal Treatment Regarding Physical Working Conditions.....52
3. 1. 1. The Basis of Equality law in European Community Law and its Application in the Staff Regulations.....52
3. 1. 2. Definition of Direct Discrimination in EC law.....54
3. 1. 3. Definition of Indirect Discrimination in EC law.....55
3. 1. 4. Practical Treatment of Equality Issues in Member States and in the European Institutions.....56
3. 1. 5. Interim Conclusion.....57
3. 2. Equal Treatment Regarding Physical Working Conditions: Disability.....58
3. 2. 1. Background to the Inclusion of Disability in Equality Legislation.....58

3. 2. 2. Definition of the Term "Disability".....60
3. 2. 3. The Duty of the Employer to make "Reasonable Accommodation" for a Person with Disability.....62
3. 2. 4. Interim Conclusion.....65
3. 3. Equal Treatment Regarding Physical Working Conditions: Pregnant Workers and Workers who have Recently Given Birth.....66
3. 3. 1. European Community Law Providing for the Equal Treatment of Pregnant Workers and Workers who have Recently Given Birth with regards to the Working Conditions.....66
3. 3. 2. Provisions Regarding European Civil Servants.....72
3. 3. 3. Interim Conclusions.....73
3. 4. Equal Treatment Regarding Physical Working Conditions: Religion and Place to Worship 73
3. 4. 1. The Duty of the Employer to Give Reasonable Consideration to the Employees' Religious Needs.....74
3. 4. 2. Interim Conclusion.....76

4. FUNCTIONAL ORGANISATION OF WORK 77

4. 1. Introduction.....77
4. 2. Functional Organisation of Work: Working Time and Rest Periods.....77
4. 2. 1. The Scope of Regulation under the European Community Law.....77
4. 2. 2. Maximum Weekly Working Time.....79
4. 2. 3. Breaks, Daily and Weekly Rest Periods.....84
4. 2. 4. Overtime, Shift and Night Work.....84
4. 2. 5. Part Time Work.....88
4. 2. 6. Interim Conclusion.....90
4. 3. Functional Organisation of Work: Maternity and paternity leave 96/34/EC, Special directive for United Kingdom 97/75/EC.....91
4. 3. 1. European Community Law on Parental Leave.....92
4. 3. 2. Staff Regulations' Provisions on Parental Leave.....93
4. 3. 3. Interim Conclusion.....93
4. 4. Functional Organisation of Work: Annual Leave 94
4. 4. 1. European Community Law and its Application in the Staff Regulations.....94
4. 4. 2. Restriction on "Carry-Over Days" as Provided in the Staff Regulations.....95
4. 4. 3. Monetary Payment for Annual Leave not used prior to Termination of Employment.....96
4. 4. 4. Interim Conclusion.....96
4. 5. Sick Leave.....97
4. 5. 1. Introductory remarks.....97
4. 5. 2. Benefits in Cash.....97
4. 5. 3. Sickness Benefits in Kind.....98
4. 5. 4. Interim Conclusion.....98
4. 6. The Renewal of Fixed-Term Contracts in the Functional Organisation of Work.....98
4. 6. 1. European Community Law Governing the Renewal of Contracts.....98

4. 6. 2. Applicable Law to EU Civil Servants on a Fixed-Term Contract.....109
4. 6. 3. Interim Conclusion.....114

5. GENERAL CONCLUSIONS.....116

6. BIBLIOGRAPHY.....119

7. TABLE OF LEGISLATION.....122

8. TABLE OF LEGISLATION.....126

8. 1. European Court of Justice.....126
8. 2. European Court of Human Rights 127
8. 3. Administrative Tribunal of the International Labour Organisation (ILOAT) 127

Annex I: A Brief Analysis of Article 1e (2) of the EU Staff Regulations.....129

1. INTRODUCTION

1. 1. Purpose of the Report

The following report has been prepared by the Amsterdam International Law Clinic upon the request of the Staff Union of the European Patent Office (SUEPO). SUEPO represents the interests of the staff members of the European Patent Office (EPO), which is the executive body of the European Patent Organisation.[1] The EPO has its premises on four locations, namely Berlin, Munich, The Hague and Vienna; and half of their staff is members of SUEPO, which consists of four local sections on the same locations.[2]

The European Patent Organisation was established in 1977 on the basis of the European Patent Convention which was signed four years earlier in Munich.[3] It now has 35 Member States.[4] All of the Member States of the European Union (EU) are also Parties to the European Patent Convention.[5]

As an international organisation, pursuant to the Protocol on Privileges and Immunities,[6] the European Patent Organisation has immunity from jurisdiction and execution within the scope of its official activities.[7] The legal relationships within international organisations are governed by the internal rules of the organisation and they are not automatically subject to the national legislation of the host States. Accordingly, the employees working for the European Patent Organisation are in a different situation to the workers performing a similar function within the scope of national States. As noted by SUEPO,

[1] The European Patent Office: About Us, *available at:* http://www.epo.org/about-us/office.html (last visited 10 April 2009).
[2] SUEPO: About US, *available at:* http://www.suepo.org/public/about (last visited 10 April 2009).
[3] European Patent Organization: Legal Foundations, *available at:* http://www.epo.org/about-us/epo/legal-foundations.html (last visited 10 April 2009). *See also*: European Patent Convention, *available at:* http://www.epo.org/patents/law/legal-texts/html/epc/1973/e/ma1.html (last visited 10 April 2009).
[4] *See* European Patent Organization: Legal Foundations, *supra* note 3.
[5] The European Patent Office: About Us: Member States of the European Patent Organisation, *available at:* http://www.epo.org/about-us/epo/member-states.html (last visited 10 April 2009).
[6] Protocol on Privileges and Immunities of the European Patent Organisation of 5 October 1973, *available at:* http://www.epo.org/patents/law/legal-texts/html/epc/2000/e/ma5.html (last visited 10 April 2009).
[7] *Ibid.*, Article 3.

> "Unlike similar categories of employees in the national public administration or in private industry, the working conditions of the Staff of the European Patent Office are determined by the Administrative Council of the European Patent Organisation. The result is that a wide range of aspects of labour law normally regulated by national parliaments, is determined by an Administrative Council, which has only limited accountability…"[8]

The European Union is also an international organisation, with the Member States corresponding to the majority of the Member States of the European Patent Organisation which has its offices in three EU Member States, namely Austria, Germany, and the Netherlands.[9] The EU civil servants are similarly not directly governed by the labour law of the Member States in which they work,[10] including labour law provisions of the European Community (EC), but by the Staff Regulations of Officials of the European Communities and Conditions of Employment of other servants of the European Communities (Staff Regulations).[11]

The main purpose of the report is to determine how the EU deals with the discrepancies between the position of the workers in its Member States and the staff of the EU with respect to their working conditions. In accordance with Article 137 of the Treaty Establishing the European Community (EC Treaty),[12] the European Community has significant competences in the field of working conditions.[13] The Council of the European

[8] SUEPO: About Us: We Represent Staff Interest, *available at:* http://www.suepo.org/public/about (last visited 10 April 2009).
[9] SUEPO: About Us: A Union in a patent world, *available at:* http://www.suepo.org/public/about (last visited 10 April 2009).
[10] This affirmation has been the subject of debate (*see for example* Constantin, S. & Jørgensen, N. N., Application of European Community Law to (Staff Members of) The European Patent Organisation, Amsterdam International Law Clinic). However, further analysis of this question is outside of the ambit of this paper and for the purposes of this paper, it will be taken that the EU civil servants are governed solely by the internal regulations. *See also* Annex I of this report for a brief analysis of Article 1 (e) (2) of the Staff Regulations.
[11] 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 45, 14.6.1962, p. 1385), last amended by Council Regulation (EC, Euratom) No 420/2008 of 14 May 2008 adjusting with effect from 1 July 2007 the remuneration and pensions of officials and other servants of the European Communities, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1962R0031:20080501:EN:PDF (last visited 10 April 2009).
[12] Consolidated Version of the Treaty Establishing the European Community, *available at:* http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf (last visited 10 April 2009).
[13] *Ibid.,* Article 137, 1 (b).

Union is entrusted with the power to adopt directives which set minimum requirements and which the Member States have to implement in a prescribed period of time.[14] The Member States are therefore obliged to respect the minimum standards regarding the working conditions as laid down by the European Community, and they are only allowed to offer a higher – never a lower – level of protection to their workers. Accordingly, the protection demanded by the European Community legislation represents the level of protection common to all the workers in the territory of the EU.

This Report will compare and contrast the relevant EC laws to the regulation of the position of the EU civil servants within the sphere of working conditions. The research aims at addressing those EU civil servants who work within the EU institutions' offices[15] and will include both permanent and fixed-term contract workers in the analysis. The research for this report includes developments up and until 23 April 2009.

[14] *Ibid.*, Article 137, 2.

[15] Those who fall under Article 1 (2) of Directive 89/654/EEC are not included in this research. Article 1 (2) states: "This Directive shall not apply to: (a) means of transport used outside the undertaking and/or the establishment, or workplaces inside means of transport; (b) temporary or mobile work sites; (c) extractive industries; (d) fishing boats; (e) fields, woods and other land forming part of an agricultural or forestry undertaking but situated away from the undertaking's buildings." *See* Council Directive of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (89/654/EEC), *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0654&model=guichett (last visited 10 April 2009).

1. 2. Synopsis

The report consists of three main parts, each addressing a specific aspect of the regulation of the working conditions as they apply to, on the one hand, the workers in the Member States of the European Union, and on the other hand, to the EU civil servants. Each issue is dealt with in a comparative mode: first, the relevant European Community legislation is presented; and second, if in existence, its equivalent in internal regulations as applied to the EU civil servants.[16] Where possible, reference is also made to the period of time between the release of a particular directive and the incorporation of the same issue in the Staff Regulations. Interim conclusions are given on each issue, establishing the extent to which the regulation regarding EU civil servants corresponds to the EC legislation applicable to the Member States of the EU.

Section 2 looks at the physical working conditions. It is further divided into two sub-sections, namely the physical working conditions inherent in the building and the physical working conditions inside the building. The first category deals with the physical elements which are part of the building's essential structure and the second category deals with the physical elements which are largely independent of the basic building structure. In the first category, aspects of the physical layout generally have to be planned ahead and established already when the building layout is planned, since they can generally not be regulated once the construction of the building is completed and the purpose of its rooms determined. From this group of physical working conditions, the following categories have been chosen for the comparison: room dimensions and air space in rooms (Section 2. 2. 1.), rest rooms (Section 2. 2. 2.), first aid rooms (Section 2. 2. 3.), procedures to be in place in the possibility that the workers are put in serious and immediate danger (Section 2. 2. 4.) and air quality (Section 2. 2. 5.). The physical working conditions inside the building, on the other hand, are those that can be regulated and adjusted regardless of the layout of the building and its architectural aspects. Examples include room temperature (Section 2. 3. 1.), the quality of the lighting (Section 2. 3. 2.) and computer display screens (Section 2. 3. 3.). It must, however, be noted that

[16] Depending on the issue at hand, such regulation can be found either in the Staff Regulations or in some other relevant documents.

the differentiation between the conditions inherent in the building and those inside the building is not always clear-cut and that therefore certain individual conditions may in practice fall under each of the categories.

Section 3 explores the equality regarding physical working conditions. The reasoning behind this Section is based on the fact that certain categories of workers require different levels of health and safety protection in order for the requirement to maintain appropriate working conditions to be satisfied. Due to the special conditions of these categories of workers, adjustments of the work space may be necessary to grant them the working conditions comparable to those of the other workers and to enable them to perform their job equally well. In this Section, first, a general introduction on the equal treatment regarding physical working conditions is given (Section 3. 1.). Following this, three categories of workers who demand special protection with regards to their physical working conditions are presented: disabled workers (Section 3. 2.), pregnant and breastfeeding workers (Section 3. 3.) and those whose religion necessitates a specific place to worship (Section 3. 4.).

Section 4 presents the functional organisation of work. Some of the selected issues are closely connected to the health and safety of workers, such as the regulation of working time. Other topics take into consideration the functional organisation of work from the perspective of the employer, such as the renewal of fixed-term contracts. This Section outlines a general introduction (Section 4. 1.) and then the provisions dealing with working time and rest periods are first set out (Section 4. 2.). This is followed by an analysis of the regulation of maternity and paternity leave (Section 4. 3.), then annual leave is examined (Section 4. 4.) Subsequently, sick leave is addressed (Section 4. 5.) and finally the issue of the renewal of fixed-term contracts in the functional organisation of work is considered (Section 4. 6.).

In the concluding Section 5, a synopsis of our conclusions from each section is provided. The aim of this Section is to give an overview of the similarities and differences which exist between EC law and the Staff Regulations. Regarding the first Section, the

Commission Manual on Standard Building Specifications globally provides greater and more specific health and safety protection than the equivalent EC legislation. With regard to the other sections, in some areas examined, most notably reasonable accommodation for those with disabilities, organisation of working time, sick leave and annual leave and the limit on the number of successive fixed-term contracts, the Staff Regulations give equivalent and sometimes better protection than EC law. However, *lacunae* were discovered in the areas of the accommodation of pregnant workers and the right to breaks. Also, the justification of the use of fixed-term contracts in the EU Institutions has not been specified in the Staff Regulations while justification is necessary by EC standards. Finally, neither the Staff Regulations nor EC law obliges an employer to provide a place of religious worship for his/her employees.

1. 3. Basic Introduction to European Community Legislative Measures[17]

This Section will briefly outline the scope of the EC Treaty[18] and the principal legislative acts used by the EC. The Treaties and secondary legislative acts are the basis of EC law, but their legal standing varies depending on the type of measure. The legislative measures of the EC can be split into measures which are binding on Member States and measures which are not binding on Member States.[19] The legislative acts which have binding force across the Member States (i.e. regulations and directives) do not have binding effect on international organisations within the Community.[20] These legislative acts are only binding on the Member States of the Community and the scope of their application is dependent on whether they are directives or regulations. International organisations which are physically present within the EU are not legally bound by these legislative acts. [21] This includes all of the EU institutions. Any application of EU legislative acts by these bodies is on a voluntary basis and represents an aspiration rather than a legally binding commitment.[22]

[17] This is a basic outline of the different forms of EC legislation and it is not exhaustive.
[18] *See supra,* note 12.
[19] Also known as soft law measures.
[20] *See supra,* note 10.
[21] *Ibid.*
[22] *See* Annex I of this report for a brief analysis of Article 1e (2) of the Staff Regulations.

The EC Treaty governs the first pillar of the European Union and is largely supranational. [23] The Treaty on European Union (EU Treaty)[24] governs the second[25] and third[26] pillars and is based on intergovernmental agreement.

Article 249 EC provides for the secondary legislation which the EC will use in implementing its policies.[27] The articles of the EC Treaty have direct effect if they are sufficiently clear and precise.[28] The concept of direct effect has sparked much debate both in national and European jurisprudence and scholarship. An in-depth analysis of direct effect is outside the ambit of this study. Still, it is important to understand the basic position of the European Courts regarding direct effect. A broad definition of direct effect was held in the European Court of Justice (ECJ) Van Gend en Loos case,[29] where the Court held that Article 12 EC (now Article 25 EC) has direct effect as it does not require any legislative intervention from the Member States and it creates clear rights for the individual which must be protected by the national courts. As pointed out by Craig & De Búrca, "the doctrine of 'direct effect' is applicable at least in principle to all binding Community law including the EC Treaties, secondary legislation..."[30] The meaning of direct effect was further elaborated on:

> "The precise meaning of direct effect remains contested. In a broad sense it means that provisions of binding EC law which are clear, precise, and unconditional enough to be considered justiciable can be invoked and relied on by individuals before national courts.

[23] Craig, P. & De Búrca, G., (2003) *EU Law Texts, Cases and Materials 3rd Edition*, Oxford: Oxford University Press, pages 3–4. Supranational means that the nation states have transferred powers to another bodies in certain areas..
[24] Consolidated Version of the Treaty on European Union, *available at:* http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf (last visited 10 April 2009).
[25] Common Foreign and Security Policy. Further discussion of this is outside the scope of this paper.
[26] Justice and Home Affairs. Further discussion of this is outside the scope of this paper.
[27] EC Treaty, *supra* note 12, Article 249: "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions..."
[28] *See* Case C-26/62, Van Gend en Loos [1963] ECR 13, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:HTML (last visited 10 April 2009), para. ii (b). In this case Article 12 of the Treaty Establishing the European Economic Community (EEC Treaty) was held to have direct effect as it contained a clear and unconditional prohibition.
[29] Case C-26/62, Van Gend & Loos, *supra* note 28.
[30] Craig, P. & De Búrca, G., *supra* note 23, page 178.

> There is also a 'narrower' or classical concept of direct effect which is defined in terms of the capacity of a provision of EC law to *confer rights* on individuals."[31]

Regulations are directly applicable in Member States and have general application.[32] They have to be published in the Official Journal and enter into force on the date published therein and in the absence of this, on the twentieth day following publication.[33]

Directives are the most commonly used form of EC legislation and may have direct effect in Member States once a period of transposition has passed.[34] A notable difference between regulations and directives is that directives are binding as to the objective to be achieved but the choice of national implementation measure is left to the discretion of the Member States. Directives have to be published in the Official Journal.[35] A Member State must, as far as possible, interpret its legislation in correspondence with the relevant EC directive.[36] This is known as the principle of consistent interpretation. However, as held by the ECJ in Adeneler and Others, the obligation of consistent interpretation only exists after the transposition period.[37] Further to previous ECJ case law, directives only have

[31] *Ibid.*
[32] EC Treaty, *supra* note 12, Article 249.
[33] EC Treaty, *supra* note 12, Article 254. As the EC law which is dealt with in this paper consists of directives, a further discussion of regulations is outside of the scope of this paper.
[34] This period is specified upon publication of a directive. *See* Case C-148/78, Ratti [1979] ECR 1629, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61978J0148 (last visited 10 April 2009), para. 24.
[35] EC Treaty, *supra* note 12, Article 254.
[36] Case C-60/02, Rolex [2004] ECR I-00651, *available at:* http://eur-lex.europa.eu/Notice.do?val=287567:cs&lang=en&list=287567:cs,278018:cs,&pos=1&page=1&nbl=2&pgs=10&hwords=&checktexte=checkbox&visu= (last visited 10 April 2009), para. 59; Case C-91/92, Faccini Dori [1994] ECR I-03325, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61992J0091 (last visited 10 April 2009), para. 26; Joined Cases C-397/01 to C-403/01, Pfeiffer [2004] ECR I-08835, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=62001J0397&lg=en (last visited 1o April 2009), para. 113. It must be noted here that a provision cannot be interpreted to mean the opposite of what it says.
[37] Case C-212/04, Adeneler and Others [2006] ECR I-06057, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para 115.

vertical direct effect.[38] They cannot have horizontal direct effect[39] and they cannot have inverse vertical direct effect.[40] In this report, we will mostly deal with directives.

Decisions are binding in their entirety upon those to whom they are addressed.[41] The addressee needs to be notified[42] and those which are taken pursuant to Article 251 EC[43] must be published in the Official Journal. As with regulations, they take effect from the date specified therein or the twentieth day following their publication.[44]

Soft law measures which are provided for in Article 249 EC are recommendations and opinions.[45] These have no binding force but are still used to deliver opinions on Treaty matters.[46] Further to this, other soft law measures which are not provided for in Article 249 EC but are nevertheless used include, *inter alia*, policy guidelines and inter-institutional agreements.[47]

This Section has provided a basic outline of EC law and is not meant to be exhaustive. In consideration of these basic principles, it must be kept in mind that these provisions do not legally bind the EU institutions as regards their own employees. The EU Staff Regulations govern the labour law within the EU institutions and any reference to or application of EC law is on a voluntary basis.[48]

---

[38] Vertical direct effect means direct effect between an individual and the Member State. *See* Case C-148/78, Ratti, *supra* note 34, para. 46.
[39] Horizontal direct effect means direct effect between individuals. *See* Case C-91/92, Facini Dori, *supra* note 36, para. 20.
[40] Vertical direct effect is the direct effect against an individual. *See* Case C-80/86, Kolpinghuis [1987] ECR 03969, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61986J0080:EN:HTML (last visited 10 April 2009), para. 9. *Note:* The direct effect of directives has been the subject of much debate, an elaboration of which is outside the ambit of this report.
[41] EC Treaty, *supra* note 12, Article 249.
[42] EC Treaty, *supra* note 12, Article 254 (3).
[43] This relates to co-decisions taken on the basis of qualified majority voting.
[44] EC Treaty, *supra* note 12, Article 254 (1). *Note:* Further analysis of Decisions is outside the ambit of this report.
[45] Further analysis of this is outside the ambit of this report.
[46] Craig, P. & De Búrca, G., *supra* note 23, p. 116.
[47] *Ibid.*, p. 84. There has been debate on whether inter-institutional agreements form soft law or not but a further analysis of this and other soft law measures is outside the ambit of this report.
[48] As mentioned previously, there has been debate on this issue but an elaboration of this is outside of the ambit of this paper. [HEGE: BUT YOU DO BRIEFLY ADDRESS IT IN ANNEX. REFERENCE TO ANNEX.]

2. PHYSICAL WORKING CONDITIONS

2. 1. INTRODUCTION

This Section will look at the protection of workers in relation to their physical working conditions. The subsections will analyse the specific physical aspects which principally affect office based workers. The EC law governing the specific areas will be outlined in a comparative way to the non-legally binding document on building specifications in the European Commission, Office for Infrastructure and Logistics Brussels, Manual of Standard Building Specifications.[49]

As specified by the Office for Infrastructure and Logistics in Brussels (OIB), this document is the reference for the Commission services and the external intermediaries in the property market.[50] It is interesting to note that in the introduction to the section on building systems, it is explicitly stated that "installations must be fully compliant with the relevant standards and regulations, in particular: the relevant EU directives..."[51] The use of imperative language here leaves no doubt to the fact that Community law governing this area is accepted as the basis within the European Commission. Furthermore, the Commission website, in the section on 'Memo Questions and Answers – Commission buildings policy', declares that the Commission is fully compliant with Belgian legislation and does not enjoy any derogation.[52] However, the Commission Manual on Building Specifications is not a legal document and any statement therein, even if it appears to be a legal assertion, does not have the force of law. This is further evidenced from its explicit description of itself as a reference point.[53]

---

[49] European Commission, Office for Infrastructure and Logistics Brussels, Manual of Standard Building Specifications, *available at:* http://ec.europa.eu/oib/pdf/mit2004_en.pdf (last visited 10 April 2009). *Note:* There is no reference to the specifications for the buildings within the Staff Regulations. It is not certain that further documentation for the other European Institutions exists, but nevertheless if it does, we were not able to obtain it.
[50] *Ibid.*, p. 4.
[51] *Ibid.*, p. 173.
[52] Europa Website, Press Office, Communication from the Press RAPID, Memo Questions and Answers – Commission buildings policy, *available at:* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/341&format=HTML&aged=1&language=EN&guiLanguage=fr (last visited 10 April 2009).
[53] Manual of Standard Building Specifications, *supra* note 49, Section A. General, Preface, p. 4.

Despite the fact that this document is not legally binding, it still has importance in this comparative study. Following from the abovementioned statement from the OIB, this document provides the specifications for the Commission's buildings and their internal physical features.

The EC law in the area of physical working conditions for office based workers is primarily based on the Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.[54] The object of this directive is to introduce measures to encourage improvements in the health and safety of

[54] 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, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0391&model=guichett (last visited 10 April 2009).
There are other EC legislative acts dealing with the protection of employees' health and safety in the workplace. However, these are not as relevant to employees within an office workplace. They include the:
Regulation (EC) No 1338/2008 of the European Parliament and of the Council of 16 December 2008 on Community statistics on public health and health and safety at work (Text with EEA relevance);
Directive 2008/46/EC of the European Parliament and of the Council of 23 April 2008 amending Directive 2004/40/EC on minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);
Directive 2006/25/EC of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);
Directive 2004/40/EC of the European Parliament and of the Council of 29 April 2004 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);
Directive 2003/10/EC of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);
Directive 2002/44/EC of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) (sixteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) - Joint Statement by the European Parliament and the Council;
Commission Directive 2000/39/EC of 8 June 2000 establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work (Text with EEA relevance);
Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC);
Council Directive 90/269/EEC of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC);
Council Directive 89/656/EEC of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

the workers. This directive relies on the broad general principles of prevention, which are defined in the Article 3(d) as "all steps or measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks."[55] The Directive applies to "workers", which within the meaning of this directive, is any person employed by an employer, including trainees and apprentices but excluding domestic servants.[56] Article 5(1) contains the demanding obligation that the employer has the duty "to ensure health and safety of workers in every aspect related to the work."[57] This duty extends to taking responsibility for services provided by third parties[58] and is not diminished by the workers' own obligations for their health and safety.[59]

As EC law does not have legal effect on the European Institutions under the international laws on privileges and immunities,[60] the relevant aspects of the aforementioned Directive 89/654/EEC do not have direct effect on the European Union Institutions.[61] This Directive will be used as part of a comparative study in this Section. Unfortunately, there is no reference to the specifications for the buildings within the Staff Regulations. However, the European Commission Manual of Standard Building Specifications 2004[62] which deals solely with European Commission buildings is available on the European Union's official website.[63] It is not certain that there is documentation for the other European Institutions, but nevertheless if such documents exist, we were not able to obtain them.

[55] Directive 89/391/EEC, *ibid.*, Article 3 (d).
[56] *Ibid.*, Article 3 (a).
[57] *Ibid.*, Preamble, para. 5.
[58] *Ibid.*, Articles 5 (2) and 7 (3).
[59] *Ibid.*, Article 5 (3).
[60] Protocol No. 7 on the privileges and immunities of the European Union, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/07:EN:HTML (last visited 10 April 2009), Preamble: "Considering that, in accordance with Article 343 of the Treaty on the Functioning of the European Union and Article 191 of the Treaty establishing the European Atomic Energy Community ("EAEC"), the European Union and the EAEC shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks, …." *Note:* A further analysis of privileges and immunities of international organisations is outside the scope of this report. As mentioned earlier, this affirmation has been open to much debate which is outside of the ambit of this paper and therefore for the purposes of this study, it is taken that EC law does not have effect on EC civil servants.
[61] *See* Annex I for a brief analysis of the possible direct effect of EC law by virtue of Article 1e (2) of the Staff Regulations.
[62] Manual of Standard Building Specifications, *supra* note 49.
[63] *Ibid., available also at:* Europa website, Office for infrastructure and logistics in Brussels, Reference Documents, http://ec.europa.eu/oib/building_policy_en.htm (last visited 10 April 2009).

The Commission Manual of Standard Building Specifications delves into intricate detail on all aspects of the building specifications which will be dealt with in this Section. A comparative analysis will enable us to derive whether European Commission buildings' specifications follow the same rules as in EC law, despite the fact that EC law is not applicable to them. It is explicitly stated in the preamble of this Manual that it is a point of reference and therefore it does not legally bind the European Commission. As mentioned earlier, the reason for its importance in this comparative study is that it has been attested to be the guidelines for building specifications by the OIB.[64] Furthermore, this Manual acknowledges that: "Any building selected to house Commission departments must conform in every respect to the public-buildings legislation in force in the country where it is located. If such legislation has less binding force than a European directive, then the building must comply with the directive."[65]

What is noteworthy about this acknowledgment is that in principle the European Commission is accepting the obligation to be governed by EC and national law. However, as this is not a legally binding document, such a statement of the binding force of EC and national law is not legally binding upon the European Commission. It is important as it acknowledges that these laws contain the aimed protection but as such an attestation is within a non-legally binding document, it is a political rather than a legal statement.

[64] *Ibid.*
[65] *Ibid.*, Section A, General, A. III Legislation and Standards, p. 9. To note that the reference to less binding force does not imply that national legislation is not in conformity with EC directives. Legislation with less binding force refers to subordinate measures i.e. soft law measures.

2. 2. The Physical Conditions Inherent in the Building

2. 2. 1. Room Dimensions and Air Space in Rooms: Freedom of Movement at the Workstation

2. 2. 1. 1. European Community Law Applying to Room Dimensions and Air Space in Rooms

The work place design is one of the explicitly mentioned elements from the principle of adapting the work for the individual.[66] As stated in the framework Directive 89/391/EEC,[67] the latter is one of the general principles for prevention, which forms the basis for an employer's obligation to implement health and safety measures for the protection of workers.[68]

The Directive 89/654/EEC[69] formally distinguishes between the workplace used for the first time after 31 December 1992 and workplaces already in use before 1 January 1993.[70] The main difference between the two groups is the number of criteria that the workplace is subject to under health and safety requirements. The list of criteria for the workplaces used for the first time is more extensive. Accordingly, the criterion of room dimensions and air space in rooms is one that applies only to the workplaces used for the first time. In Annex I, the Directive lays down the condition that "workrooms must have sufficient surface area, height and air space to allow workers to perform their work without risk to their safety, health or well-being".[71] Furthermore, the workers must have adequate freedom of movement at their workstation, or, if this is not possible, near their workstation.[72]

---

[66] Council Directive 89/391/EEC, *supra* note 54, Article 6, para. 2 (d).
[67] Council Directive 89/391/EEC, *supra* note 54.
[68] *Ibid.*, Article 6.
[69] Council Directive 89/654/EEC, *supra* note 15.
[70] According to Article 3 of the Directive 89/654/EEC, "workplaces used for the first time after 31 December 1992 must satisfy the minimum safety and health requirements laid down in Annex I", whereas Article 4 of the same Directive states that "workplaces already in use before 1 January 1993 must satisfy the minimum safety and health requirements laid down in Annex II at the latest three years after that date". An exception is the Portuguese Republic, where the period to satisfy the minimum safety and health requirements appearing in Annex II is four years after 1 January 1993.
[71] Council Directive 89/654/EEC, *supra* note 15, Annex I, Point 15. 1..
[72] Council Directive 89/654/EEC, *supra* note 15, Annex I, Point 15.2., states as follows: "The dimensions of the free unoccupied area at the workstation must be calculated to allow workers sufficient freedom of movement to perform their work. If this is not possible for reasons specific to the workplace, the worker must be provided with sufficient freedom of movement near his workstation."

2. 2. 1. 2. Internal Regulation of the European Commission Regarding Room Dimensions and Air Space in Rooms

According to the Manual of Standard Building Specifications the buildings occupied by the Commission are subject to the European Directives on health and safety and to the national legislation of the member state where the building is situated,[73] therefore it could be concluded that at least the same requirements regarding the room space apply for the buildings housing the European civil servants as do for the workers under the EC law. However, it must be stressed again, what has been established before,[74] namely that the Manual is not a legal document and that therefore such affirmation indicates a factual aspiration rather than a legally binding commitment.

For the purpose of comparison, it must nevertheless be noted that the Manual of Standard Building Specifications[75] gives more precise recommendations on health and safety for offices and in this context also specifies in great detail the required size of offices in buildings, occupied by the European Commission. *Office space* forms an independent section under the *Health and Hygiene Recommendations* in the Manual. It is explicitly stated that the general health and hygiene standards are dependent on the layout of the office space and that the modular nature of office space can affect the quality of the working environment.[76] Accordingly, under the Architectural Aspects section, the Manual notes that "the ideal architectural module of office space is 1.20 meters, but could be between 1.20 and 1.40 meters in width".[77] It also refers to the ISO standard, which sets the width of a module at 1.25 meters.[78] Furthermore, the Manual also sets the minimum ceiling heights within the buildings, depending on the type of area. For office areas, the ideal minimum height of the ceiling is set at 2.6 meters.[79]

[73] Manual of Standard Building Specifications, *supra* note 49, p. 314: "Commission buildings are subject to all the European Directives on health and safety at work, and those located in Belgium are also subject to the provisions of the General Regulation on Labour Protection (RGPT)."
[74] *See* Section 2. 1..
[75] Manual of Standard Building Specifications, *supra* note 49.
[76] *Ibid.*, Section B.III.7., Health and Hygiene Recommendations, p. 315.
[77] *Ibid.*, p. 18.
[78] *Ibid.*, Section B.I.2., Architectural Aspects, p. 18.
[79] *Ibid.*, p. 19.

2. 2. 1. 3. Interim Conclusions

The Manual,[80] although being a legally non-binding document, provides specified requirements for the dimensions of the office spaces and also relies on the international standards for office spaces. From this point of view, on the voluntary basis of the EU Commission, the protection afforded to the European civil servants is in conformity with the requirements of the EC legislation.

2. 2. 2. Rest Rooms

2. 2. 2. 1. European Community Law Applying to Rest Rooms

Annex I of the Directive 89/654/EEC imposes an obligation for an easily accessible rest room[81] to be established where the safety or health of workers so require.[82] Annex II, regarding the workplaces already in use, establishes the same obligation, but with the distinction that it does not necessarily demand a specific rest room, but rather sets a requirement for "an easily accessible rest room or appropriate rest area".[83] The latter can be understood as meaning that within the existent layout of the building, an area within a certain room can also be designated as a rest area to satisfy the Directive's requirement.

The relevance of these provisions for office-based staff is, however, in both cases minimal. The Directive states that if the workers are employed in offices or workrooms providing equivalent relaxation during breaks, the obligation to provide a rest room or area does not apply.[84]

---

[80] Manual of Standard Building Specifications, *supra* note 49.

[81] The meaning of the term 'rest room' as used in the Directive applies to the rooms meant for the relaxation and rest of the workers and is not to be confused with the term 'restroom' which applies to a public toilet.

[82] Council Directive 89/654/EEC, *supra* note 15, Annex I, Point 16. 1.. According to this provision, the reasons because of which a rest room should be provided for are in particular the type of activity carried out or the presence of more than a certain number of employees.

[83] *Ibid.*, Annex II, Point 11. 1..

[84] *Ibid.*, Annex I, Point 16.1. and Annex II, Point 11.1.. Where the rest room is required, it can be noted that the provisions regarding the workplaces already in use are more lenient when it comes to the conditions that the rest room must fulfil; Annex II merely demands that the rest room or area is equipped with tables and seats with back, whereas Annex I additionally requires that the number of tables and seats is adequate for the number of workers and that the rest room is large enough (*See* Council Directive 89/654/EEC, Annex I, Point 16.2. and Annex II, Point 11.2.). Additionally, Point 16.4. of Annex I contains a provision that "if working hours are regularly and frequently interrupted and there is no rest room, other rooms must

2. 2. 2. 2. Internal Regulation of the European Commission Regarding Rest Rooms

According to the Manual of Standard Building Specifications,[85] which is not a legally binding document,[86] buildings occupied by the European Commission are subject to the European Directives and national laws of the host member states[87] and therefore the Directive 89/654/EEC applies to them as well. However, considering that the majority of EU staff work in offices, its provisions regulating the rest rooms and rest areas are hardly relevant, assuming that equivalent relaxation for the civil servants is provided in offices during breaks.[88]

In the Manual of Standard Building Specifications,[89] rest rooms are not mentioned in the same sense as in the Directive. There is however some reference to the rest and leisure areas, but the context suggests a different meaning of the term. In the section on the architecture of premises for social services, it is stated that certain areas within Commission buildings may be assigned for use as social centres and/or leisure centres, which may have a diverse purpose, being used, among other purposes, as recreation rooms.[90] Moreover, the Manual contains a specific section on health and safety recommendations for first-aid posts[91] and rest areas.[92] However, the meaning of the term *rest area* in this context is specific. Under the description of the role of a first-aid post and rest area, the provision first sets a requirement that good conditions must be provided to accommodate a sick or injured person. It further extends the use of this area to the accommodation of pregnant women and breastfeeding mothers[93] who may need to lie

be provided in which workers can stay during such interruptions, wherever this is required for the safety or health of workers". No such condition is put forward in Annex II for the workplaces already in use.

[85] Manual of Standard Building Specifications, *supra* note 49.

[86] As stated in its Preface, the Manual of Standard Building Specification serves as "the reference document on buildings used both internally by the Commission departments and by the Commission's external partners on the property market"(*See* Manual of Standard Building Specifications, *supra* note 49, p. 4). *See also*, Section 2. 1..

[87] *See for example*, Manual of Standard Building Specifications, *supra* note 49, p. 314: "Commission buildings are subject to all the European Directives on health and safety at work, and those located in Belgium are also subject to the provisions of the General Regulation on Labour Protection (RGPT)."

[88] Council Directive 89/654/EEC, *supra* note 15, Annex I, Point 16.1. and Annex II, Point 11.1..

[89] Manual of Standard Building Specifications, *supra* note 49.

[90] *Ibid*, Section B.I.6.13.2., Social and leisure centres, p. 143.

[91] For more details on the first-aid posts, *see infra*, Section 2. 2. 3..

[92] Manual of Standard Building Specifications, *supra* note 49, Section B.III.7.8., Health and hygiene recommendations for first-aid posts and rest areas, p. 332.

[93] *See* to this point also *infra*, Section 3. 3..

down.[94] Taking into consideration the required equipment[95] of the first-aid post,[96] it is evident that the area is meant to accommodate an individual worker as a result of his/her special condition (the need to receive first aid or, in case of pregnant women and breastfeeding mothers, the need to rest), rather than aiming at providing a place to relax during breaks for a greater number of workers.

2. 2. 2. 3. Interim Conclusions

The meaning of the term *rest rooms* differs in the Manual[97] from the Directive 89/654/EEC. According to the Directive, the notion of rest rooms is of little relevance for people working in offices, as long as they get equivalent relaxation during breaks. The Manual on the other hand, uses the term rest rooms in the context a room available for injured workers or pregnant and breastfeeding workers who might need to take a rest during their working time. Rest rooms as required by the Directive are meant to accommodate all the employed workers, whereas the European Commission's requirement for the rest room is to accommodate an individual or at most just a few workers at the same time.

---

[94] Manual of Standard Building Specifications, *supra* note 49, Section B.III.7.8., Health and hygiene recommendations for first-aid posts and rest areas, p. 332.

[95] According to Point 8. 4. of Section B.III.7.8. of the Manual of Standard Building Specifications, the first-aid post must be equipped with the following items:
• a first-aid box,
• means of transporting a sick or injured person, i.e. a wheelchair and/or stretcher,
• one woollen blanket,
• one thermal insulation blanket,
• one long seat or low bed on which a sick or injured person can be laid,
• one cabinet with additional equipment/first-aid box,
• one table and one or two chairs,
• one washbasin with hot and cold water, and
• one telephone and a list of emergency numbers, such as 52222, the number of the Poison Centre, the medical service and the nearest clinic or hospital with which the Commission has concluded an agreement.
Where there are several long seats or low beds, these must be separated by curtains.

[96] Manual of Standard Building Specifications, *supra* note 49, Section B.III.7.8., Health and hygiene recommendations for first-aid posts and rest areas, p. 333.

[97] Manual of Standard Building Specifications, *supra* note 49.

2. 2. 3. First Aid Rooms

2. 2. 3. 1. European Community Law Applying to First Aid Rooms

The topic of first aid rooms in workplaces used for the first time after 31 December 1992 is dealt with in the Article 3 of the Directive 89/654/EEC.[98] They must satisfy the minimum safety and health requirements laid down in Article 19, Annex I of the Directive 89/654/EEC. One or more first aid rooms must be provided where the size of the premises, type of activity being carried out and frequency of accidents so dictate.[99] First aid rooms must be fitted with essential first aid installations and equipment and are to be easily accessible to stretchers. They must be signposted in accordance with the national regulations transposing Directive 77/576/EEC.[100] In addition, first aid equipment must be available in all places where working conditions require it. This equipment must be suitably marked and easily accessible.[101]

Article 4 of the Directive 89/654/EEC[102] deals with workplaces which were already in use before 1 January 1993. They must satisfy the minimum safety and health requirements laid down in Annex II within a maximum period of three years from this date.[103] The obligations laid down in this Annex apply wherever so required by the features of the workplace, the nature of the activities, where the circumstances necessitate it or when there is a hazard.[104] The temperature in rest areas, rooms for duty staff, sanitary facilities, canteens and first aid rooms must be appropriate to the particular purpose of such areas.[105]

---

[98] Council Directive 89/654/EEC, *supra* note 15.

[99] *Ibid.*, Annex I, Article 19 (1).

[100] Council Directive 89/654/EEC, *supra* note 15, Annex I, Article 19 (2), Council Directive 77/576/EEC of 25 July 1977 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the provision of safety signs at places of work, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1977&nu_doc=576 (last visited 10 April 2009).

[101] Council Directive 89/654/EEC, *supra* note 15, Annex I, Article 19 (3).

[102] Council Directive 89/654/EEC, *supra* note 15.

[103] The only exception regards the Portuguese Republic, where workplaces used before 1 January 1993 must satisfy, at the latest four years after that date, the minimum safety and health requirements appearing in Annex II, but this exception has not much relevance since this period has already passed.

[104] *Ibid.*, Annex II.

[105] *Ibid.*, Annex II, Article 7 (2).

Additionally, workplaces must be fitted with first aid equipment. The equipment must be suitably marked and easily accessible.[106]

2. 2. 3. 2. Internal Regulation of the European Commission Regarding First Aid Rooms

Buildings with a large number of occupants must have a first-aid post. First-aid posts must be accessible and easy to find. The door must be at least one metre wide to allow stretchers to pass through comfortably. The floor and wall coverings must be suitable for washing with water and being thoroughly disinfected. First-aid posts must be equipped with a sink which has a hot water supply and medical-type furnishings. The soundproofing in first-aid posts must be superior to that of offices.[107]

The role of a first-aid post must provide good conditions in which a sick or injured person from the building or its immediate vicinity can be accommodated for the purpose of receiving first aid. This area can also accommodate pregnant women and breastfeeding mothers who may need to lie down.[108] The post must be located on the ground floor or one of the lower floors of the building, near a lift for disabled persons or alternatively a goods or passenger lift and near a toilet. It must be easily accessible by lift or stairs from any point in the building. It must also be in a location from which an injured person can easily be taken to an ambulance through a ground-floor exit or via the underground car park, if this is accessible to the ambulance.[109]

The location of the first-aid post must be indicated by the pictograms laid down by health and safety legislation. These signs must be displayed along a route leading from the entrance foyer to the first-aid post in the form of direction indicators, and at the level of the building on which the post is located, particularly from the lift lobbies and stair

[106] *Ibid.*, Annex II, Article 14.
[107] Manual of Standard Building Specifications, *supra* note 49, B.I, Architecture, Section 11, Health and Hygiene Recommendations for First-Aid Posts and Rest Areas, p. 120.
[108] Manual of Standard Building Specifications, *supra* note 49, B.IV, Security and protection of property, Section 8.1., Health and Hygiene Recommendations for First-Aid Posts and Rest Areas, p. 332.
[109] *Ibid.*, Section 8.2, p. 332.

landings. A 'no smoking' sign must be displayed inside the first-aid post.[110] The first-aid post must be equipped with the following: a first-aid box; means of transporting a sick or injured person i.e. a wheelchair and/or stretcher; one woollen blanket; one thermal insulation blanket; one long seat or low bed on which a sick or injured person can be laid; one cabinet with additional equipment/first-aid box; one table and one or two chairs; one washbasin with hot and cold water; and one telephone and a list of emergency numbers, such as 52222, the number of the Poison Centre, the medical service and the nearest clinic or hospital with which the Commission has concluded an agreement. Where there are several long seats or low beds, these must be separated by curtains and finally the door to the first-aid post must be one metre wide.[111]

2. 2. 3. 3. Interim Conclusion

According to Directive 89/654/EEC one or more first aid rooms must be provided where the size of the premises, type of activity being carried out and frequency of accidents so dictate or wherever first aid rooms are required by the features of the workplace, the nature of the activity, the circumstances or where a hazard exists. EC Legislation imposes requirements on the equipment of the first aid rooms and the signs. The Manual requires first aid rooms in buildings with a large number of occupants and addresses the issues of equipment, position within the building and signs into greater detail than the EC legislation. This is, however, caused by the nature of the Directives and their reliance on domestic legislation of the Member States.

[110] *Ibid.*, Health and Hygiene Recommendations for First-Aid Posts and Rest Areas, Section 8.3, p. 333.
[111] *Ibid.*, Section 8.4, p. 333.

2. 2. 4. Procedures to be in Place in the Possibility that the Workers are Put in the Serious and Immediate Danger

2. 2. 4. 1. European Community Law Applying to Procedures to be in Place in the Possibility that the Workers are Put in the Serious and Immediate Danger

Article 6 of the Council Directive 89/391/EEC[112] states that the wide-ranging general obligations on employers must not only take the measures necessary for safety and health protection of workers, but they must also prevent the occurrence of occupational risks, provide information and training and establish the necessary organisation and means.[113] These measures must be further adjusted to take account of changing circumstances.[114] Article 6 (2) lists general principles of prevention[115] designed to guide the employer. These are: avoiding risks;[116] evaluating the risks which cannot be avoided;[117] combating the risks at source;[118] developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors related to the working environment;[119] giving collective protective measures priority over individual protective measures;[120] and giving appropriate instructions to the workers.[121] Under Article 6 (3) (a), the employer has a duty to evaluate risks to the health and safety of workers and assure improvement in the level of protection afforded to workers with regard to health and safety. And under Article 6 (3) (d) the employer has a duty to take appropriate steps to ensure that only workers who have received appropriate instructions may have access to areas where there is a serious and specific danger.

Article 9 (1) (a) gives employer the "duty of awareness and evaluation", which requires the employer to conduct an assessment of health and safety risks and to be aware of the

[112] Council Directive 89/391/EEC, *supra* note 54.
[113] *Ibid.*, Article 6 (1).
[114] *Ibid.*
[115] Defined in Article 3 (d) of the Directive 89/391/EEC as meaning all steps and measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks.
[116] Council Directive 89/391/EEC, *supra* note 54, Article 6 (2) (a).
[117] *Ibid.*, Article 6 (2) (b).
[118] *Ibid.*, Article 6 (2) (c).
[119] *Ibid.*, Article 6 (2) (g).
[120] *Ibid.*, Article 6 (2) (h).
[121] *Ibid.*, Article 6 (2) (i).

situation of groups of workers who are exposed to particular risks. This directive prescribes objectives but allows Member States to decide how these are to be achieved. There is no guidance as to how risk assessment is to be carried out or any indication of the minimum assessment levels which are necessary. Employers must evaluate the risks to the safety and health of workers, *inter alia*, regarding their choice of work equipment, chemical substances or preparations used and also the fitting out of the workplace.[122] They are to decide on the appropriate protective measures and the equipment needed.[123]

Having completed the assessment the employer has a duty to plan and take action, where the employer must, where necessary, introduce preventive measures and possible changes to working conditions and to improve the health and safety of workers. Any steps taken must form part of a coherent prevention policy[124] and be integrated into all activities of the undertaking at all hierarchical levels.[125] In addition, particularly sensitive risk groups must be protected against the dangers which specifically affect them.[126] The framework directive when read in conjunction with various subsequent directives, envisages a hierarchy of control measures which include elimination of risks from the workplace, which might not be feasible in practice. In such a case, employers must consider possible means by which those risks can be reduced.[127]

As far as emergency procedures are mentioned, such as first aid, fire-fighting, and the evacuation of the workers, Article 8 (1) allows the employer to take necessary measures, adapted to the nature of the activities, and the size of the undertaking, while Article 8 (2) provides that the employer can designate workers who are required to implement such measures.[128] However, the most significant feature of Article 8 is the right to stop work.[129] Article 8 (3) provides that the employer must also give instructions to enable workers in the event of serious imminent and unavoidable danger to stop work and/or immediately

[122] *Ibid.*, Article 6 (3) (a).
[123] *Ibid.*, Article 9 (1) (b).
[124] *Ibid.*, Article 6 (2) (g).
[125] *Ibid.*, Article 6 (3) (a), para. 2.
[126] *Ibid.*, Article 15
[127] Barnard, C., (2006) *EC Employment Law*, Third Edition, Oxford University Press, p. 555.
[128] *Ibid.*, p. 557.
[129] *Ibid.*

leave the workplace and proceed to the place of safety. If, in these circumstances workers do leave their workplace under instruction of the employer or at their own initiative because a superior cannot be contacted, they must not be placed at any disadvantage because of their action and must be protected against any harmful unjustified conduct.[130] Therefore they should be protected against dismissal or any lesser disciplinary measure. Furthermore, where workers have acted on their own initiative when a superior could not be contacted and have subsequently taken appropriate steps in the face of serious and imminent danger, a subjective test is applied and account is taken of their knowledge and the technical means at their disposal.[131] The employer must also refrain from asking for workers to resume work where a serious and imminent danger still exists, save in exceptional cases for reasons duly substantiated.[132]

Adding to this topic, the employer has also the "duty to train and direct the workforce"**,** where under Article 6 (2) (i) employer should give "appropriate instructions to the workers" and where there are specific danger areas the employer must ensure that only workers who have received adequate instructions may have access to them.[133]

Additionally, an employer has a "duty to inform workers and workers' representatives, to consult, and to encourage participation of the workforce," which extends to temporary and hired workers currently working in the enterprise or establishment[134] and workers from any outside undertakings working in the employer's establishment.[135] Furthermore, depending on the size of the undertaking, and in accordance with national laws and/or practices, the employer must, according to Article 10, provide all necessary information concerning the safety and health risks and protective and preventive measures and activities in respect of both the undertakings and/or the establishments in general, each

[130] Council Directive 89/391/EEC, *supra* note 54, Article 8 (4) and (5).
[131] Barnard, C., *supra* note 127, p. 557.
[132] Council Directive 89/391/EEC, *supra* note 54, Article 8 (3) (c).
[133] *Ibid.*, Article 6 (3) (d). This provision may be read in conjunction with Article 8 (3) (c).
[134] *Ibid*, Article 10 (2). *See also* Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0383:EN:HTML (last visited 10 April 2009), Articles 3 and 7.
[135] *Ibid.*

type of work station and job[136] and the measures taken to deal with first-aid, fire-fighting and evacuation.[137]

2. 2. 4. 2. Internal Regulation of the European Commission Regarding Procedures to be in Place in the Possibility that the Workers are Put in the Serious and Immediate Danger

Since May 2004, specific health and safety provisions have been included in the new Staff Regulations. In particular, according to Article 1e of the Staff Regulations of Officials of the European Communities and Articles 10 and 80 of the Conditions of Employment of other servants of the European Communities, EU staff "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". Those new Articles therefore constitute both the legal basis and the obligation for the Commission to establish a harmonised health and safety policy for its staff.[138] By adopting the proposal for a Decision, the Commission has made a commitment to produce detailed and internally binding Health and Safety Rules, in order to set up a standard at least equivalent to the minimum requirements of Council Directive 89/391/EEC of 12 June 1989 and other measures adopted in the areas of health and safety at work pursuant to the Treaties, within two years of the date of adoption of this Decision, as well as to undertake, for the first time, an evaluation of the health and safety risk associated with each post in every Commission workplace within three years of the adoption of this Decision.[139]

According to Commission Decision establishing a Harmonised Policy for Health and Safety at Work for all Commission staff, Health and Safety Rules, Article 4 (1),[140] the

[136] *Ibid.*, Article 10 (1) (a).

[137] *Ibid.*, Article 10 (1) (b): "the measures taken pursuant to Article 8 (2)", namely dealing with first aid, fire-fighting and evacuation of workers, serious and imminent danger.

[138] Communication from the Commission, Draft, Commission Decision Establishing a Harmonised Policy for Health and Safety at Work for all Commission Staff, Explanatory Memorandum, The European Commission as a Workplace, p. 2. Document provided by the client.

[139] *Ibid.*, p. 6.

[140] Draft, Commission Decision Establishing a Harmonised Policy for Health and Safety at Work for all Commission Staff, Health and Safety Rules (*see supra*, note 138), Article 5: "The Commission shall

measures to ensure health and safety at work for all Commission staff shall accord a harmonised system of working conditions for all Commission sites, complying with appropriate health and safety standards at least equivalent to the minimum requirements pursuant to Directive 89/391/EEC, individual Directives and other Community measures adopted in the areas of health and safety at work, including the Commission Decision of 10 April 1996 C(1996)0931/1, on the reorganisation of the Joint Research Centre.[141] Without prejudice to the Protocol on the Privileges and Immunities of the European Communities[142] and other relevant international instruments applicable ("*accords de siège*"), for the purpose of this decision, the Health and Safety Rules may refer to host country legislation for a Commission site. The competent local or national bodies may be invited to assist to maintain high level of health and safety standards as well as the well-being at the workplace in the Commission's premises.[143] The rest of the proposal, especially Article 12[144] in relation to first aid, fire-fighting and evacuation of workers and

---

implement the measures referred to in Article 4, paragraph 1, on the basis of the following general principles of prevention:
(a) avoiding risks;
(b) evaluating the risks which cannot be avoided:
(c) combating the risks at source;
(d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
(e) adapting to technical progress;
(f) replacing the dangerous by the non-dangerous or the less dangerous;
(g) developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment;
(h) giving collective protective measures priority over individual protective measures;
(i) giving appropriate instructions to the Staff."

[141] *Ibid.*, Article 4 (1).

[142] Protocol (36) on the Privileges and Immunities of the European Communities (1965), attached to the Treaty establishing the European Community.

[143] Draft, Commission Decision establishing a Harmonised Policy for Health and Safety at Work for all Commission staff, Health and Safety Rules (*see supra* note 138), Article 4 (3).

[144] Draft, Commission Decision Establishing a Harmonised Policy for Health and Safety at Work for all Commission Staff, Health and Safety Rules (*see supra*, note 138), Article 12:
"1. The Health and Safety Managers shall:
a) take the necessary measures for first aid, fire-fighting and evacuation of workers, adapted to the nature of the activities establishment and taking into account other persons present,
b) arrange any necessary contacts with external services, particularly as regards first aid, emergency medical care, rescue work and fire-fighting.
2. Pursuant to paragraph 1, the Health and Safety Managers shall, *inter alia*, for first aid, fire-fighting and the evacuation of Staff, designate the workers required to implement such measures.
The number of such workers, their training and the equipment available to them shall be adequate, taking account of the size and/or specific hazards of the locations."

Article 13[145] in relation to serious and imminent dangers involves exact replicas of corresponding EC legislation in this matter.

2. 2. 4. 3. Interim Conclusion

It is important to mention that the Commission Decision does not have a binding character. This decision has been provided to us by the client himself as a source of information, since the current Staff Regulations do not refer to this issue. Therefore, taking into account the Commission Decision, it is possible that the EC legislation and the Staff Regulations addressing procedures in place for serious and imminent danger could become more similar. This would be upon the Commission's recognition of its legal obligation under Article 1e of the Staff Regulations and Articles 10 and 80 of the Conditions of Employment of other servants of the European Communities. Thus, it would be reasonable to expect that Staff Regulations will eventually evolve to the point that the Civil Servants will be provided at least the same amount of protection under the Staff Regulations that is provided for in the EC legislation.

[145] Draft, Commission Decision Establishing a Harmonised Policy for Health and Safety at Work for all Commission Staff, Health and Safety Rules (*see supra*, note 138), Article 13:
"1. The Health and Safety Managers shall:
(a) as soon as possible, inform all staff who are, or may be, exposed to serious and imminent danger of the risk involved and of the steps taken or to be taken as regards protection;
(b) take action and give instructions to enable staff in the event of serious, imminent and unavoidable danger to stop work and/or immediately to leave the work place and proceed to a place of safety;
(c) save in exceptional cases for reasons duly substantiated, refrain from asking staff to resume work in a working situation where there is still a serious and imminent danger.
2. The Commission staff who, in the event of serious, imminent and unavoidable danger, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences.
3. The Health and Safety Managers shall ensure that all staff are able, in the event of serious and imminent danger to their own safety and/or that of other persons, and where the immediate superior responsible cannot be contacted, to take the appropriate steps in the light of their knowledge and the technical means at their disposal, to avoid the consequences of such danger. Their actions shall not place them at any disadvantage, unless they acted carelessly or there was negligence on their part."

2. 2. 5. Air Quality

This Section will be subdivided into two parts: The first subsection will look at ventilation of enclosed workplaces which will involve an analysis of the EC law which governs air quality and the Commission Manual on Standard Building Specifications. The second subsection will deal with the more specialised subject of the protection of workers from the risks relating to exposure to asbestos at work. Special attention will be given to this as it has its own directive and cases of exposure in the European Institutions have arisen before the European Courts.

2. 2. 5. 1. Ventilation of Enclosed Workplaces

2. 2. 5. 1. 1. European Community Law Applying to Ventilation of Enclosed Workplaces

In EC law, ventilation of enclosed workplaces is governed by Articles 6 of Annexes I and II of Directive 89/654/EEC concerning minimum safety and health requirements for the workplace. Annex I deals with workplaces which are being used for the first time after 31 December 1992[146] and Annex II deals with workplaces which were already in use before 1 January 1993.[147]

Article 6.1 of Annex I and Article 6 of Annex II read as follows: “Steps shall be taken to see to it that there is sufficient fresh air in enclosed workplaces, having regard to the working methods used and the physical demands placed on the workers. If a forced ventilation system is used, it shall be maintained in working order. Any breakdown must be indicated by a control system where this is necessary for workers' health.”[148]

---

[146] Defined in Directive 89/654/EEC, *supra* note 15, Article 3: Workplaces used for the first time: “Workplaces used for the first time after 31 December 1992 must satisfy the minimum safety and health requirements laid down in Annex I.”

[147] Defined in Directive 89/654/EEC, *supra* note 15, Article 4; “Workplaces already in use before 1 January 1993 must satisfy the minimum safety and health requirements laid down in Annex II at the latest three years after that date…”

[148] Directive 89/654/EEC, *supra* note 15, Article 6.1. of Annex I and Article 6 of Annex II.

Additionally, buildings which are being used for the first time have a further obligation regarding maintenance of air-conditioning systems: "If air-conditioning or mechanical ventilation installations are used, they must operate in such a way that workers are not exposed to draughts which cause discomfort. Any deposit or dirt likely to create an immediate danger to the health of workers by polluting the atmosphere must be removed without delay."[149]

2. 2. 5. 1. 2. Internal Regulation of the European Commission

The European Institutions are not under a legal obligation to adhere to the aforementioned legislation.[150] As in the previous sections, the Commission Manual of Standard Building Specifications which "...has served since 1992 as the reference document on buildings used ... internally by the Commission departments..."[151] will be addressed. The Commission is not legally bound to follow these specifications,[152] but they provide an extensive practical infrastructural grounding which is nevertheless of importance in this comparative study. As regards air quality, the Commission Manual includes the general statement that "...air quality is a key element in the health standard of work stations. The greatest care must be taken, in both the design and the everyday operation of the air-conditioning system, to guarantee excellent air quality."[153]

In the building systems section of the Commission Manual, in a subsection called 'Description of Equipment', this is supplemented by technical characteristics for the

[149] *Ibid.*, Annex I, Article 6. 2..
[150] *See* Section 1. 1. for a further discussion of the relationship between EC law and EU Institutions.
[151] Manual of standard building specifications, *supra* note 49, Preface, p. 4.
[152] *See* Section 2. 1. for an analysis of the legal nature of the Commission Manual on building specifications.
[153] Manual of Standard Building Specifications, *supra* note 49, Section B.IV, Security and the Protection of Property, Health and Hygiene recommended for offices, Section 2.4 ventilation and air-conditioning, p. 315.

ventilation devices. The specifications are given for air-conditioning units,[154] fans,[155] humidifier casing,[156] humidifier,[157] dehumidifier,[158] air filtration for supply units[159] and heat recovery.[160] Further to this, detailed specifics are provided regarding the ventilation of the following: interpreters' booths,[161] workplaces for catering services,[162] print-shops using offset presses[163] and car parks.[164]

2. 2. 5. 1. 3. Interim Conclusions

[154] *Ibid*, Section B.II Building Systems, Section 4 (Description of Equipment), Section 4.13.1 – Ventilation Air-conditioning unit: "The air-conditioning units must be modular, with standard components and must be delivered in one piece or in several modules for assembly on site. The casing must be double-walled panels at least 50 mm thick. The panels must be assembled using an interlocking system and be completely sealed, with fireproof internal insulation (DIN 4102/Class A1). They must be silenced to a minimum value of RW = 44 dB."

[155] *Ibid*, Section 4.13.2 – Ventilation Fans: "The fans must operate silently. They must be centrifugal fans in volute-shaped casing, statically and dynamically balanced according to DIN ISO 1940. They must have backward-curved vanes. Preference must be given to a direct drive rather than a belt drive. The fan and its casing must be assembled so as to produce as little vibration or noise as possible. A report from an official body, certifying the acoustic power spectrum of each fan, must be provided to the Commission before an order is placed with the constructor. Each unit must be equipped with a safety switch. The bottom of the drive unit must be constructed so as to prevent the water from stagnating. Lighting must be provided inside the casing. The internal walls of the air ducts must be smooth (no internal insulation)."

[156] *Ibid*, Section 4.13.3 – Ventilation, Humidifier casing: "The humidifier casing must be designed to ensure the greatest possible ease of regular maintenance and minimise the concentration of bacteria and pollutants in the water. The tray must be designed to prevent water stagnation and consequent bacteria development (Legionella, etc.). It must be equipped with a tap so it can be completely drained. The design of the condensate outlets must ensure that contamination of the air conditioned in the units is impossible. The spray pump (where installed) must be controlled by a humidity sensor in the recovery inlet."

[157] *Ibid.*, Section 4.13.4 – Ventilation, humidifier: "The function of a humidifier is to raise the absolute humidity of the air in the building by increasing its water-vapour content.
The humidification system must be one of the following:
• Types preferred:
- Individual steam humidifiers (direct injection of steam produced by boiling water in the unit) (power less than 180 kg/h of steam).
- Central steam humidification (direct injection of steam produced centrally for the whole building).
• Types accepted:
- Air-washer humidifiers (only for units with air flows over 10 000m³/h; such systems must always include a droplet separator and ultraviolet capacity for treating the humidifier water).
- Fixed-nozzle compressed-air cool mist spray humidifiers (only for units with large air flows).
- Ultrasonic mist spray humidifiers (not advised).
- Evaporation/mist spray humidifiers (not advised).
• Types not accepted:
- Rotating nozzle mist spray humidifiers (not accepted).
- Centrifugal mist spray humidifiers (not accepted).
- Steam-injection humidifier using steam produced by an evaporation humidifier
(e.g. "*Amazone*" humidifiers) (not accepted).
- Mist injector humidifiers (not accepted).
The humidifiers must be corrosion-proof and as resistant to clogging as possible. Minimum useful life of ten years."

The detailed specifications regarding air quality in the Commission Manual of Standard Building Specifications are in conformity with the minimum EC law standards. However, it must be borne in mind that this Manual does not legally bind the European Commission.[165]

---

[158] *Ibid.*, Section 4.13.5, Ventilation, dehumidifier: "Dehumidifiers are not accepted, except in the following cases:
• to regulate relative humidity in the area housing the historical archives. Such systems must be adsorption dehumidifiers with an electrically heated air outflow. Refrigerant or absorption dehumidifier systems are not accepted.
• to regulate relative humidity in specialised rooms, using cabinet air conditioning (see Section B.II.7).
• to regulate relative humidity in specific areas genuinely in need of such conditioning."

[159] *Ibid.*, Section 4.13.6, Ventilation, air filtration for supply units: "F7 synthetic filter compliant with EN779; 80-90% opacimetric effectiveness; measurement of dirt accumulation by means of pressure difference."

[160] *Ibid.*, Section 4.13.7, Ventilation – heat recovery: "A system of heat recovery must be installed on the units' outbound airflow. It must be one of the following systems: run-around heat-recovery coils; heat-recovery wheels; mixture of vitiated and fresh air as a function of the enthalpy, but always in compliance with the prescribed minimum intake of fresh air (this method is not permissible for interpreting booths). However, preference should be given to a method of energy recovery other than recycling air; transfer of office air to the indoor car park after heat recovery by one of the abovementioned systems.

[161] Manual of Standard Building Specifications, *supra* note 49, Section B.I Architecture, Special facilities for DG SCIC (Directorate General for Interpretation): "As booths are occupied throughout the day, adequate ventilation is required. The air supply should be 100% fresh (i.e. not recycled). The air-conditioning system must be independent from that of the rest of the building and of the conference chamber. This is the crucial point for the air-conditioning system. Air renewal must be seven times per hour or 75m³/h per person and the carbon dioxide concentration must not exceed 0.1%. The temperature must be controllable between 19°C and 23°C by means of an individual regulator in each booth. Relative humidity must be between 45% and 65%. Air velocity must not exceed 0.2 m/s. Air inlets and outlets must be placed in such a way that interpreters are not exposed to draughts. Good results can be obtained by introducing the air through a perforated ceiling and extracting it through vents at the rear of the booth, in the floor or the rear wall."

[162] *Ibid.*, Section B.I Architecture, 12 (Premises designated for use by catering services), Section 12.1.4.8 Ventilation: "The work areas must be adequately ventilated in order to avoid excess heat, steam, condensation and dust, and to clear polluted air. The air flow must never be directed from a dirty area towards a clean area.
The artificial ventilation system must meet the following conditions:
• the aerator must be fitted with a grill or some other form of protection in a corrosion-resistant material,
• the filters and other parts of the installation must be easily accessible for maintenance and cleaning purposes.
An extractor fan above the cooking appliances must effectively remove steam and greasy vapours. No condensation or fat must fall back onto the hob."

[163] *Ibid.*, Section B.IV Security and Protection of Property, 3.2.6 Printshops using offset presses: "Solvent vapours must be extracted via a ventilation system that is separate from the circuit used for extracting air from the building. The circulation of fresh air must be guaranteed. The extraction system for solvent vapours and other pollutants must fulfil the criteria listed in point 2.2."

2. 2. 5. 2. Protection of Workers from the Risks Related to Exposure to Asbestos at Work

2. 2. 5. 2. 1. European Community Law Governing the Exposure of Workers to Asbestos

Prior to 2003, the protection of workers from the exposure to asbestos was governed at an EC level by Directive 83/477/EEC. Following a session initiated by the Senior Labour Inspectors Committee (SLIC)[166] in 2000 on the hazards of the handling of asbestos, the Asbestos Conference of 2003 was organised. This led to the Dresden declaration on the Protection of Workers against Asbestos which came out the same year as this amended directive[167] and drew attention to the dangers of exposure to asbestos.[168] While this directive deals largely with the protection of those who work in the construction industry and in close contact with asbestos, it also has some relevant provisions for those who work in offices which are insulated with asbestos. Article 7 of this directive provides for the regular testing of the air in a workplace for asbestos fibres.[169] Furthermore, an

[164] *Ibid*, Section B.IV Security and protection of property, 4 (Health and Safety in Underground car parks), Section 4.1.2, Car park ventilation: "The car-park ventilation system must be designed to extract vehicle exhaust fumes efficiently under normal conditions and to be capable of evacuating smoke in the event of a vehicle fire. A manual control switch for this extraction system must be provided for the use of the fire brigade."

[165] *See* Section 2. 1. for an analysis of the legal stature of the Commission Manual on Building specifications.

[166] The Senior Labour Inspectors Committee (SLIC) was officially started in July 1995 by Commission decision 95/319/EC. It consists of two representatives from each member state who are from the labour inspection service of their national state. The Committee gives its opinion to the Commission regarding health and safety at work. The Commission decision (95/319/EC) which enacted the SLIC was published in the Official Journal L 188 of 09.08.95

[167] Directive 2003/18/EC of the European Parliament and of the Council of 27 March 2003 amending Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003L0018&model=guichett (last visited 13 April 2009).

[168] Senior Labour Inspectors Committee, Dresden Declaration on the Protection of Workers against Asbestos, Doc. 2317/03.

[169] Directive 2003/18/EC, *supra* note 167, Article 7:

"1. Depending on the results of the initial risk assessment, and in order to ensure compliance with the limit value laid down in Article 8, measurement of asbestos fibres in the air at the workplace shall be carried out regularly.

2. Sampling must be representative of the personal exposure of the worker to dust arising from asbestos or materials containing asbestos.

3. Sampling shall be carried out after consultation of the workers and/or their representatives in undertakings.

4. Sampling shall be carried out by suitably qualified personnel. The samples taken shall be subsequently analysed, in accordance with paragraph 6, in laboratories equipped for fibre counting.

5. The duration of sampling must be such that representative exposure can be established for an eight-hour reference period (one shift) by means of measurements or time-weighted calculations.

employer is obliged to ensure that "no worker is exposed to an airborne concentration of asbestos in excess of 0, 1 fibres per cm³ as an eight-hour time-weighted average (TWA)." [170] In doing this, they must inform any person who may have been exposed to asbestos in excess of the limit in article 8, as soon as possible.[171] Following this, an exposed person is to be given: "...advice regarding the assessment of their health which they may undergo following the end of exposure..." and "the doctor or authority responsible for the medical surveillance of workers may indicate that medical surveillance must continue after the end of exposure for as long as they consider it necessary to safeguard the health of the person concerned." [172]

In accordance with the practices and principles of occupational medicine, specific recommendations are given for the subsequent medical care of those who have been exposed.[173] Additionally all Member States are under the obligation to implement sanctions for the infringement of the national legislation which transposes this directive. These sanctions must be "...effective, proportionate and dissuasive."[174]

2. 2. 5. 2. 2. Regulation of Exposure to Asbestos in the European Commission[175]

---

6. Fibre counting shall be carried out wherever possible by PCM (phase-contrast microscope) in accordance with the 1997 WHO (World Health Organisation) recommended method(16) or any other method giving equivalent results.
For the purpose of measuring asbestos in the air, as referred to in the first subparagraph, only fibres with a length of more than five micrometres, a breadth of less than three micrometres and a length/breadth ratio greater than 3:1 shall be taken into consideration."

[170] *Ibid.*, Article 8.

[171] *Ibid.*, Article 15 which replaces Article 14 (2) (b).

[172] *Ibid.*, Article 16 which replaces Article 15 (3).

[173] *Ibid.*, Article 21, replacement of Annex II, Point 3: "Health examination of workers should be carried out in accordance with the principles and practices of occupational medicine. It should include at least the following measures:
- keeping records of a worker's medical and occupational history,
- a personal interview,
- a general clinical examination, with particular reference to the chest,
- lung function tests (respiratory flow volumes and rates).
The doctor and/or authority responsible for the health surveillance should decide on further examinations, such as sputum cytology tests or a chest X-ray or a tomodensitometry, in the light of the latest occupational health knowledge available."

[174] *Ibid.*, Article 19 which adds an Article 16 (a) to Directive 83/477/EEC.

[175] *See* Section 2. 1. for analysis of the legal nature of the Commission Manual of Standard Building Specifications.

The European Institutions are neither subject to these directives nor the sanctions of the Member States on infringement of such legislation.[176] As previously mentioned, the Commission Manual of Standard Building Specifications underlines the necessity to adhere to the minimum requirements of EU law but it must be kept in mind that this is not a legally binding document.[177] However, the Office for Infrastructure and Logistics (OIB) has attested that this is the working document in the European Commission regarding building specification[178] and therefore it is still important in this comparative study.

According to the Commission Manual of Standard Building Specifications, one of the administrative legal documents which each Commission building needs to possess is "a certificate attesting that the building is asbestos free or that all the elements listed in the building's asbestos inventory have been removed"[179] and asbestos is listed as one of the prohibited materials.[180] In the event that the building is already in existence, an asbestos inventory and management plan needs to be drawn up in accordance with the national law (in this case Belgian Royal Decree of 22 July 1991 and Ministerial Decree of 22 December 1993).[181]

The Commission has voluntarily attested here that their buildings are to be completed in accordance with external laws. However, this declaration is not in a legally binding document and therefore this statement does not have the force of law.[182] Cases have arisen before the European Courts regarding EU Institutions employees' illness from alleged exposure to asbestos. In Angeletti v Commission,[183] the applicant called, *inter*

[176] *See* Section 1. 1. for a further analysis of the relationship between the EU Institutions and EC law.
[177] *See* Section 2.1 for a further analysis of the legal nature of the Commission Manual of Standard Building Specifications.
[178] Manual of Standard Building Specifications, *supra* note 49.
[179] *Ibid*, Section A.IV.1 Administrative documentation, p. 11 *and also* Section BI, Architecture, BI3 Structural aspects, Subsection 1, General: "The materials used to construct buildings may not contain asbestos. The owner of the building must confirm this by providing the Commission with an "asbestos-free" certificate issued by an appropriate approved inspection body."
[180] *Ibid*, Annex 1, p. 395.
[181] *Ibid* Section B.I Architecture, BI3 Structural aspects, Subsection 1.
[182] *See* section 2.1 for a further analysis of the legal nature of the Commission Manual of Standard Building Specifications.
[183] Case T-394/03, Angeletti v. Commission [2006] ECR Staff Cases I-A-2-00095, II-A-2-00441, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0394:FR:HTML (last visited

alia, for the annulment of a report from the medical committee of the Commission which did not recognise the occupational origins of her illness which was due to exposure to asbestos. The applicant based her argument on the irregularity of the opinion of the medical committee[184] and the decisions and acts relating to a breach of the duty to have regard for the welfare of officials regarding the time that it took to make the decision.[185] Also, a breach of the principle of sound administration was inferred.[186] The Court subsequently ordered the Commission to pay €12,000 in compensation and ordered them to pay half of the applicant's costs incurred. The Commission's contested decision and the medical committee's report were not annulled. Other cases regarding appeals of medical reports relating to exposure to asbestos have relied on Article 73[187] and Article 78[188] of the Staff Regulations.

2. 2. 5. 2. 3. Interim Conclusions

Under the European Commission's Manual, asbestos is a prohibited substance and therefore the building specifications are in line with EC law. It is noteworthy that cases which have arisen in this area have relied upon the Staff Regulations as a basis for cases as they have related to a contested medical report from the Commission appointed medical experts. The appeals procedure regarding medical reports is outside the ambit of this study and will not be discussed further. However, the use of these articles as the legal basis for appeals underlines that it is the Staff Regulations that are binding upon the European Commission and not the Commission Manual of Standard Building Specifications or the EC directives.[189]

13 April 2009).
[184] *Ibid.*, para. 37.
[185] *Ibid.*, para. 149.
[186] *Ibid.*, paras. 148–161.
[187] Case C-180/03 P, Latino v Commission, Order of the Court [2004] ECR I-01587, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 24.
[188] Case C-181/03 P, Nardone v Commission [2005] ECR I-00199, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 20099), paras. 28 and 32.
[189] *See* Section 2. 1. for further analysis of the legal nature of the Commission Manual of Standard Building Specifications.

2. 3. The Physical Conditions Inside the Building

2. 3. 1. Room Temperature

2. 3. 1. 1. European Community Law Applying to Room Temperature

The EC law governing the regulation of room temperature is specified in Council Directive 89/654/EEC Annex I and II. Parallel to the previous sections, Annex I deals with workplaces which are being used for the first time after 31 December 1992[190] and Annex II deals with workplaces which were already in use before 1 January 1993.[191] For both building types, "during working hours, the temperature in rooms containing workplaces must be adequate for human beings, having regard to the working methods being used and the physical demands placed on the workers".[192]

Furthermore, the moderation of temperature outside of the principle areas of work is dealt with in both Annexes by Article 7.2 which states that "the temperature in rest areas, rooms for duty staff, sanitary facilities, canteens and first aid rooms must be appropriate to the particular purpose of such areas."[193]

In order to regulate the room temperature by the building structure of new buildings, Annex I includes rules on the control of sunlight in a workplace. Article 7.3 states that "windows, skylights and glass partitions should allow excessive effects of sunlight in workplaces to be avoided, having regard to the nature of the work and of the workplace."[194]

---

[190] Defined in Directive 89/654/EEC, *supra* note 15, Article 3: Workplaces used for the first time: "Workplaces used for the first time after 31 December 1992 must satisfy the minimum safety and health requirements laid down in Annex I."

[191] Defined in Directive 89/654/EEC, *supra* note 15, Article 4: "Workplaces already in use before 1 January 1993 must satisfy the minimum safety and health requirements laid down in Annex II at the latest three years after that date…"

[192] Directive 89/654/EEC, *supra* note 15, Article 7.1 of Annexes I and II.

[193] *Ibid.*, Article 7.2 of Annexes I and II.

[194] *Ibid.*, Annex I, Article 7.3.

2. 3. 1. 2. Internal Regulation of the European Commission Regarding Room Temperature

The aforementioned EC law is not applicable to the internal regulation of the European Institutions.[195] As room temperature is not regulated within the Staff Regulations, this comparative study will look at the European Commission's Manual of Standard Building Specifications.[196]

The specifications regarding the room temperature of various rooms such as the kitchen, dishwashing area and dining room are outlined in section 12 of this Manual.[197] In the section on Building Management Systems, the specifications of temperature sensors are provided.[198] In addition, the specifications of the preferred temperature in all different types of rooms are given in the section on Heating Ventilation and air conditioning.[199]

An overlap between the regulation of air quality and the regulation of room temperature occurs with regard to the interpreters' booths.[200] The Commission Manual of Standard Building Specifications states that "the air-conditioning must be fully adjustable for each booth from a central control unit. In addition, the temperature must be adjustable from within each booth."[201] Additionally, the heights of the interpreters' booths are addressed for the control of draughts and therefore the control of temperature.[202] The specific temperature at which the interpreters' booths should be controlled is specified at between 19 ºC and 23 ºC.[203]

---

[195] *See* Section 1. 1. for a further analysis of the relationship between EC law and the EU Institutions.
[196] Manual of standard building specifications, *supra* note 49. *See* Section 2. 1. for an analysis of the legal nature of the Commission Manual of Standard Building Specifications.
[197] *Ibid.*, Section 12, Premises designated for use by catering staff, pp. 121-144.
[198] *Ibid.*, Section 3. 2. 1, Temperature sensors, p. 148, *and* Section 3.4, Safety thermostats, p. 149.
[199] *Ibid.*, Section 2. 2, Interior conditions, p. 174.
[200] *See* Section 2. 2. 5. of this report for a further analysis of air quality.
[201] Manual of Standard Building Specifications, *supra* note 49, Section B.I.6, Point 1.2, Interpreting booths, p. 51.
[202] *Ibid.*, Section B.I.6, Point 4.3.6, Minimum dimensions of booths, p. 63: "Where feasible, additional height can be an advantage for draught and temperature control."
[203] *Ibid.*, Section B.I.6, Point 4.3.10, Air conditioning, p. 66: "The temperature must be controllable between 19°C and 23°C by means of an individual regulator in each booth. Relative humidity must be between 45% and 65%."

2. 3. 1. 3. Interim Conclusions

The Commission Manual of Standard Building Specifications delves into more detail than the EC law regarding the specifications needed to maintain the room temperature for European Commission employees.[204] The EC law in this area is broader and the specifics which would be needed to obtain their objectives are left to the discretion of the Member States. The implementation of the specifications as outlined in the Commission Manual of Standard Building Specifications would accord the European Commission employees with adequate room temperature regulation in comparison to the EC law despite the fact they are regulated by their internal regulations and not EC law.[205]

2. 3. 2. Quality of the Lighting

2. 3. 2. 1. European Community Law Applying to the Quality of Lighting

The EC law on the quality of lighting in the workplace is to be found in Council Directive 89/654/EEC.[206] As with other subject matters referred to above, the requirements are divided into new buildings[207] and buildings which are already in use.[208] In both annexes the article which deals with natural and artificial room lighting is Article 8. Article 8.1 of both Annexes states that "workplaces must as far as possible receive sufficient natural light and be equipped with artificial lighting adequate for the protection of workers' safety and health".

Article 8.3 of Annex I and Article 8.2 of Annex II state that "workplaces in which workers are especially exposed to risks in the event of failure of artificial lighting must be provided with emergency lighting of adequate intensity". A further obligation on

[204] It must be noted that EC law is not applicable to the EU Institutions. *See* Section 1 for a further analysis.
[205] *Ibid*
[206] Council Directive 89/654/EEC, *supra* note 15.
[207] Defined in Directive 89/654/EEC, *supra* note 15, Article 3: Workplaces used for the first time: "Workplaces used for the first time after 31 December 1992 must satisfy the minimum safety and health requirements laid down in Annex I."
[208] Defined in Directive 89/654/EEC, *supra* note 15, Article 4; "Workplaces already in use before 1 January 1993 must satisfy the minimum safety and health requirements laid down in Annex II at the latest three years after that date…"

employers who operate in buildings which are in use for the first time is that "…lighting installations in rooms containing workplaces and in passageways must be placed in such a way that there is no risk of accident to workers as a result of the type of lighting fitted". No such obligation is put on an employer where the building is already in use.

2. 3. 2. 2. Internal Regulation of the European Commission regarding the Quality of Lighting

The aforementioned EC Directive does not legally bind the European Institutions[209] and as in the previous sections, this Section will compare the EC legislation to the Commission Manual of Standard Building Specifications.[210] Despite the fact that the Commission is not legally bound by the health and safety Directive,[211] it has very extensive lighting requirements which coincide with Article 8 of the annexes to Directive 89/654/EEC. Another interesting point is that the minimum lighting level which is followed in the building standards document is that of the Belgian Royal Decree of 19 December 1997 which governs fireproofing standards.[212] In Section 2.1. it was pointed out that this Manual is not a legal document and therefore any statement therein does not have the force of law. However, its citation of Belgian law is still important from a theoretical perspective.[213]

Firstly, in the section on building systems, the Manual explicitly states that lighting must be sufficient to avoid staff eye fatigue.[214] Furthermore, in the section on architecture, the

[209] *See* Section 1. 1. for a further discussion of the legal relationship between EC law and the EU Institutions.
[210] There is no reference to the specifications for the buildings within the Staff Regulations. It is not certain that further documentation for the other European Institutions, but nevertheless if such documents exist, we were not able to obtain them.
[211] *See* Section 1. 1. for further analysis of the relationship between EC law and the EU Institutions.
[212] Manual of Standard Building Specifications, *supra* note 49, Section BII Building Systems, 3.12, Emergency lighting for escape routes, corridors and stairways, p. 200: "These appliances will not be taken into account when calculating the minimum lighting level stipulated by the Royal Decree of 19 December 1997."
[213] *See* Section 2.1. for a further analysis of this point.
[214] Manual of Standard Building Specifications, *supra* note 49, Section BII, Building systems, 1.8, Lighting, p. 255: "The lighting must be sufficient to avoid staff eye fatigue (for lighting level, *see* Section B.II.3.1.2.). It must be connected to an emergency power supply."

building standards document provides that "the building as a whole and each of its parts should be as harmonious and cohesive as possible in terms of the various elements used in its construction, which should make use of the play of volume and natural light to create an impression of spacious harmony".[215]

It is expressly stated that natural lighting is not necessary in meeting rooms and the specifications for artificial lighting are given with regard to staff health.[216] Regulation of artificial lighting can be controlled by the people within the room but there is also a requirement to install sensors which adjust light to a pre-determined level.[217]

Subsequent to these blanket buildings specifications for lighting, the Commission Manual details the lighting requirements of various different workplaces within the Commission,

[215] *Ibid*., Section BI 7.1, General appearance of the buildings, p. 20.

[216] *Ibid.*, Section B.IV, Security and protection of property, 3.2, Health and Hygiene, Visual comfort – lighting, p. 322: "Avoid powerful lighting units which create an uneven light flux in the body of the conference room. Preference should be given to lighting systems which provide a good even spread of light, such as luminaries with fluorescent tubes or bulbs. It is recommended that dimmer switches be provided to adjust the intensity of the lighting, if possible by distinct areas: wall lighting, ceiling lighting, etc. The lighting level must conform to the specifications that are customary for such premises. Natural lighting (windows, cupolas) is not required for meeting rooms and conference chambers."

[217] *Ibid.*, BII, Building systems, Section 3.10.3, Light sensors, p. 199; The sensors are to function either in on-off mode (with an upper threshold and a lower threshold), or in continuous-adjustment mode (automatically adjusting the lighting to a pre-set level of brightness).

including the interpreters' booths,[218] the mail sorting office,[219] areas in which foodstuffs are prepared and stored,[220] exhibition rooms[221] and flat roofs in the event of maintenance work.[222] In addition to the specifications on the level and maintenance of lighting, the Commission Manual includes specifications on emergency lighting in the event that power is cut.[223]

[218] *Ibid.*, Section 4.3.12.2., The lighting in the booths must be independent of that in the hall, as the latter may have to be darkened for the projection of films or slides. The booths must be provided with two different lighting systems: one for work and the other for general purposes. Both systems must have an on/off dimmer switch. The general lighting will be on the ceiling in the rear third of the booth. The lighting for the working surface will be on the ceiling in the front part of the booth.
The working surface must be lit by non-fluorescent lighting, for which a switch should be available by the booth door. The dimmer switches should be within reach. The light source must not cause reflections on booth windows. The lighting systems, including dimmers and transformers, must not cause magnetic interference or audible noise.
The working surface available to each interpreter must have an individual adjustable compact table lamp of a least 300 lux, connected to a low voltage circuit.
Its switch, within easy reach of the interpreter, should give continuous intensity control over a minimum range from 100 lux to 500 lux (all values to be achieved at working surface level).
Table lamps and the range of tilt of their reflectors must be so designed as to avoid glare in adjacent working positions or into the hall and to allow them to be handled without the risk of burns. The combined work-lighting must provide coverage of the required intensity over the whole working surface of the booth, taking account, in particular, of the increasing use of grey, recycled paper.
All light sources must generate as little heat as possible and be of a suitable colour.
Lighting systems, including dimmers, must cause no inductive electrical interference in neighbouring microphone circuits. Switches should be mechanically silent.
The overhead work-lighting must be so positioned as to avoid shadows being cast by the working interpreter on the working surface, documents, equipment, fixtures, etc.
The lights on both circuits must be switched off automatically after a freely programmable period.
[219] *Ibid.*, B I, Architecture, Section 10.4, p. 119; Special care must be paid to the quality of the lighting, both natural and artificial, in these rooms and at work stations.
[220] *Ibid.*, BI, Architecture, Section 12.1.4.9, Lighting, p. 127; Good lighting throughout the working area is extremely important. Lighting must meet the following requirements: Direct natural or artificial lighting which does not throw shadows on the worktops. See the requirements set out in B.II.3, point 2.2. All light fittings must be protected to avoid any contamination of foodstuff in the event of the glass breaking.
[221] *Ibid.*, BI, Architecture, Section 14.2, Exhibition Rooms, p. 144; The electrical lighting in these rooms must be flexible and powerful enough to do justice to the exhibited works. Lamps within reach of visitors must be of low voltage.
[222] *Ibid.*, Section B.I, Security and Protection of Property, 10, Safety of Terraces and Roofs, p. 355: "Flat roofs which are accessible by maintenance staff must be equipped with lighting points designed to make their work safe."
[223] *Ibid*, Section BII, Building Systems, 3.12, Emergency lighting for escape routes, corridors and stairways: "In Commission buildings, emergency lighting must operate in the event of a power cut. When the normal power supply is working, it also supplies the emergency lighting. If that power is cut, the emergency lighting must come on again within a few seconds by switching automatically to current from an emergency generator while autonomous emergency units are turned off in order to maintain their autonomy.

2. 3. 2. 3. Interim Conclusions

Also for this subject-matter relating to lighting, the EC law gives the Member States the choice of methods to obtain the Directive's objective. The Manual affords the Commission employees with the same standards of protection which are in place in EC law.[224]

2. 3. 3. Computer Display Screens

2. 3. 3. 1. European Community Law Applicable to Computer Display Screens

Article 6 (3) of Council Directive 89/391/EEC[225] continues the obligation that the employer shall, taking into account the nature of the activities of the enterprise and/or establishment, evaluate the risks to the safety and health of workers, *inter alia*[226] in the choice of work equipment and the fitting out of work places. Furthermore the employer has a duty to assure improvement in the level of protection afforded to workers with regard to health and safety.[227] Furthermore, under the Article 6 (3) (c)[228] the employer has a duty to ensure that the planning and introduction of new technologies is the subject of consultation with the workers and/or their representatives as regards the consequences of the choice of the equipment, the working conditions and the working environment for the safety and health of the workers.

One appliance (fluorescent tube) in four is to be connected to this network. If the emergency network is down, the emergency autonomous units are put back into operation." *Note*: This also has relevance to the section on Procedures to be in Place in the Possibility that the Workers are put in Serious or Immediate Danger. *See* to this point also Section 2.2.4..

[224] It must be kept in mind that EC law does not apply to the EC Institutions. *See* Section 1.3. for further analysis of the relationship between EC law and EU Institutions.

[225] Directive 89/391/EEC, *supra* note 54.

[226] This is a non-exhaustive list: *See* Case C-49/00 Commission v Italy [2001], ECR I-08575, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 12.

[227] Directive 89/391/EEC, *supra* note 54, Article 6 (3) (a), para. 1.

[228] Directive 89/391/EEC, *supra* note 54.

This topic is dealt with further in Directive 89/655/EEC,[229] concerning the minimum health and safety requirements for the use of work equipment by workers. This obliges the employers to ensure that the work equipment made available to workers is suitable for the work to be carried out, or properly adapted for that purpose and may be used by workers without impairment to their health and safety.[230] Three directives supplement Directive 89/655/EEC including Directive 90/270/EEC[231] which lays down minimum health and safety requirements for work with display screen equipment (VDUs).[232] The directive applies to any worker, as defined in Article 3(a) of Directive 89/391/EEC,[233] "who habitually uses display screen equipment as a significant part of his normal work".[234] However neither the term 'habitual' nor 'significant' is defined. In Criminal Proceedings against X,[235] the Court ruled that Article 3 (a) of Directive 89/391/EEC[236] could not be defined in the abstract and that it was for the Member States who, given the vagueness of the phrase, had a broad discretion to specify its meaning when adopting national implementing measures.[237]

---

[229] Council Directive 89/655/EEC of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31989L0655&model=guichett (last visited 13 April 2009). This has been amended by Council Directive 95/63/EC of 5 December 1995 amending Directive 89/655/EEC concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31995L0063&model=guichett&lg=en (last visited 13 April 2009); *and* by Directive 2001/45/EC of the European Parliament and of the Council of 27 June 2001 amending Council Directive 89/655/EEC concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0045:EN:HTML (last visited 13 April 2009).

[230] *Ibid*, Article 3 (1).

[231] Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31990L0270&model=guichett (last visited 13 April 2009).

[232] *Ibid.*

[233] Directive 89/391/EEC, *supra* note 54, Article 3 (a) defines 'worker' as any person employed by an employer, including trainees and apprentices but excluding domestic servants.

[234] Directive 90/270/EEC, *supra* note 231, Article 2 (c).

[235] Joined Cases C-74/95 and C-129/95, Criminal Proceedings against X [1996] ECR I-06609, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0074 *(last visited 13 April 2009)*, para. 30.

[236] Directive 89/391/EEC, *supra* note 54.

[237] Barnard, C., *supra* note 127, p.568.

The specific obligations imposed on employers are fivefold. First, they must analyse the workstations[238] to evaluate the health and safety conditions affecting their workers, particularly as regards possible risks to eyesight, physical problems, and mental stress, and to take measures to remedy risks found.[239] Secondly, they must ensure that workstations comply with the minimum requirements set out in the Annex of the Directive.[240] Thirdly, the employee must receive training on the use of the workstation before commencing work and further training whenever the organisation of the workstation is substantially modified.[241] Fourthly, employers are obliged to keep themselves informed of the latest advances in technology and scientific findings concerning workstation design so they can make any changes necessary to guarantee better levels of health and safety protection.[242] Fifthly, the employer must plan the workers' activities in such a way that daily work on display screen is periodically interrupted by breaks or changes of activity reducing the workload at the display screen.[243] In addition, workers are entitled to appropriate eyesight tests carried out by a person with necessary skills. This is to take place before commencing work on a display screen and is to continue at regular intervals thereafter, and also whenever they experience visual difficulties which may be due to display screen work.[244] If, as a result of this examination, workers need further assistance they are entitled to an ophthalmological examination and, if need be, they must be provided with "special corrective appliances appropriate for the work concerned' if normal appliances cannot be used."[245] The protection of workers' eyes and eyesight may be provided as part of

[238] Directive 90/270/EEC, *supra* note 231, Article 2 (b) defines 'workstation' as "an assembly comprising display screen equipment, which may be provided wit a keyboard or input device and/or software determining the operator/machine interface, optional accessories, peripherals including the diskette drive, telephone, modem, printer, document holder, work chair and work desk or work surface and the immediate work environment".

[239] Directive 90/270/EEC, *supra* note 231, Article 3.

[240] *Ibid.*, Articles 4 and 5 respectively. These requirements apply to all workstations and not just those used by 'habitual users'. *See* Case Criminal Proceedings against X, *supra* note 235, para. 41.

[241] Directive 90/270/EEC, *supra* note 231, Article 6 (2).

[242] *Ibid.*, Preamble.

[243] *Ibid.*, Article 7.

[244] *Ibid.*, Article 9 (1). According to Case Criminal Proceedings against X, *supra* note 235, para. 36, regular eye tests are carried out on all workers to whom the Directive applies and not just to certain categories of workers.

the national health system[246] but in any case, measures taken pursuant to this article may "in no circumstances involve workers in additional financial costs".[247]

2. 3. 3. 2. Internal Regulation of the European Commission Regarding the Computer Display Screens

According to the Draft Commission Decision Establishing a Harmonised Policy for Health and Safety at Work for all Commission staff, the measures to ensure health and safety at work for all Commission staff shall accord a harmonising system of working conditions for all Commission sites, complying with appropriate health and safety standards at least equivalent to the minimum requirements pursuant to Directive 89/391/EEC, individual Directives and other Community measures adopted in the areas of health and safety at work.[248] Without prejudice to the Protocol on the Privileges and Immunities of the European Communities[249] and other relevant international instruments applicable ("*accords de siège*"), for the purpose of the Commission Decision,[250] the Health and Safety Rules may refer to host country legislation for a Commission site. The competent local or national bodies may be invited to assist to maintain high levels of health and safety standards as well as the protection of the well-being at the workplace in the Commission's premises.[251] The Commission shall implement the measures referred to in Article 4, paragraph 1, on the basis of the general principles of prevention such as adapting the work to the individual (especially as regards the design of work places), the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-

[245] Directive 90/270/EEC, *supra* note 231, Article 9 (3). *See further* Case C-455/00, Commission v Italy [2002] ECR I-9231, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000J0455 (last visited 13 April 2009).
[246] Directive 90/270/EEC, *supra* note 231, Article 9 (5).
[247] *Ibid.*, Article 9 (4).
[248] Draft, Commission Decision establishing a Harmonised Policy for Health and Safety at Work for all Commission Staff, *supra* note 138, Article 4 (1). Document provided by the client.
[249]Protocol (36) on the Privileges and Immunities of the European Communities (1965), attached to the Treaty establishing the European Community.
[250] Draft, Commission Decision establishing a Harmonised Policy for Health and Safety at Work for all Commission staff, *supra* note 138. Document provided by the client.
[251] *Ibid.*, Article 4 (3).

rate and to reducing their effect on health;[252] adapting to technical progress[253] and replacing the dangerous by the non-dangerous or the less dangerous.[254] Furthermore, the Commission shall provide necessary and adequate health and safety information and/or training to every member of Commission staff[255] and all Commission staff under an identified health and safety risk shall receive health surveillance at regular intervals, appropriate to the degree of health and safety risks to which they are exposed to in their workplace.[256] However, there is no existing binding EC legislation, therefore there are no guidelines having mandatory character.

2. 3. 3. 3. Interim conclusion

The Draft of the Commission Decision[257] has been used as a main point of reference. An important issue, however, is that the Decision does not have a binding character and therefore can be used only for the purpose of describing the tendency for the future since the valid Staff Regulations currently do not directly address the issue of health and safety in regards of computer display screens. Thus, it is clear that at this time EC legislation is affording EU workers better protection under the Directive 90/270/EEC than the protection which is afforded to Civil Servants by the Staff Regulations.

[252] *Ibid.*, Article 5 (d).
[253] *Ibid.*, Article 5 (e).
[254] *Ibid.*, Article 5 (f).
[255] *Ibid.*, Article 10.
[256] *Ibid.*, Article 14.
[257] *Ibid.*

3. EQUALITY REGARDING PHYSICAL WORKING CONDITIONS

3. 1. Equal Treatment Regarding Physical Working Conditions

3. 1. 1. The Basis of Equality law in European Community Law and its Application in the Staff Regulations

In the course of this Section, the difference between implementation of equality provisions in the Member States and the EU institutions will be analysed and direct and indirect discrimination will be defined. The importance of this definition is that they can both occur in the workplace and it is only by use of these definitions that a discriminatory act can be identified.

The development of anti-discrimination law in the European Community can be defined by an increased emphasis on equality as a fundamental right.[258] Article 13 (1) EC implemented by the Treaty of Amsterdam and amended by the Treaty of Nice, permits the EU institutions to take action regarding specific discriminatory grounds.[259] Furthermore, Article 141 EC explicitly establishes the principle of equal pay between men and women.[260] Article 1 of Directive 2000/78 EC (the Framework Directive) formally sets out that discrimination on the basis of religion or belief; disability; age or sexual orientation, are prohibited in employment and occupation.[261] Furthermore,

[258] Brun, N., 'The New Legal Framework for Equality in the European Union', *The Changing Face of European Labour Law and Social Policy* (2004), The Hague: Kluwer Law International, p. 90.
[259] EC Treaty, *supra* note 12, Article 13 (1): "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."
[260] EC Treaty, *supra* note 12, Article 141 (1): Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
[261] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=32000L0078&model=guichett&lg=en (last visited 13 April 2009), Article 1: "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".

discrimination on the basis of sex is prohibited by Directive 2006/54 EC,[262] which was the accumulation and recasting of previous legislation.[263]

The Staff Regulations includes these conditions with the supplementary categories of: race; colour; ethnic or social origin; genetic features; language political or other opinion; membership of a national minority; property and birth.[264] Under the aforementioned EC Directives the formulation of the principle of equal treatment prohibits both direct and indirect discrimination.[265] A prohibition on both types of discrimination has been incorporated into the Staff Regulations in Article 1d (5).[266]

[262] 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 (recast), *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:01:EN:HTML (last visited 13 April 2009).

[263] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31976L0207&model=guichett (last visited 13 April 2009); Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31986L0378&model=guichett&lg=en (last visited 13 April 2009); Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31975L0117&model=guichett (last visited 13 April 2009); and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=31997L0080&model=guichett (last visited 13 April 2009).

[264] Staff Regulations, *supra* note 11, Article 1 d (1). This section was incorporated into the staff regulations by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004. Therefore, it was incorporated four years after the EC Directive 2000/78/EC.

[265] Directive 2000/78/EC, *supra* note 261, Article 2 (1): “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.”. Directive 2006/54/EC, *supra* note 262, prohibits direct and indirect discrimination in regard to equal pay (Title II Chapter 1, Article 4), occupational social security schemes (Title II, Chapter 2, Article 5), access to employment, vocational training and working conditions (Title II, Chapter 3, Article 14).

[266] Staff Regulations, *supra* note 11, Article 1 d (5): “Where persons covered by these Staff Regulations, who consider themselves wronged because the principle of equal treatment as set out above has not been applied to them, establish facts from which it may be presumed that there has been direct or indirect discrimination, the onus shall be on the institution to prove that there has been no breach of the principle of equal treatment. This provision shall not apply in disciplinary proceedings.” This article was incorporated into the Staff Regulations by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004.

There is no definition of direct and indirect discrimination in the Staff Regulations, but in Elizabeth Afari v European Central Bank,[267] the Court of First Instance applied the definitions from Article 2 of Directive 2000/43/EC.[268] The definitions of indirect and direct discrimination in EC law will now be outlined.

3. 1. 2. Definition of Direct Discrimination in EC law

The EC Directives regarding equality[269] have defined "direct discrimination" as the situation where, as a result of the prohibited grounds, one person is treated less favourably than another would have been.[270] Normally, the comparator will be an individual who has received better treatment, but the event where a comparator is not available is provided for with the use of the words "... has been or would be treated ..." The European Court of Justice (ECJ) has taken a narrow and literal view of direct discrimination in cases which involved the question of whether an action was directly or indirectly discriminatory. In Vergani v Agenzia delle Entrate,[271] the Court held that a provision which encouraged women to take voluntary redundancy five years earlier than men was held to be directly discriminatory on the grounds of sex. In Schnorbus v Land Hessen,[272] the ECJ held that practical legal training that gave preference to those who had done military service was indirectly discriminatory as opposed to directly discriminatory. Even though only men could do military service, this was not held to be direct discrimination as the preferential treatment was not given specifically on the basis of sex.

---

[267] Case T-11/03, Elizabeth Afari v European Central Bank [2004] ECR - Staff Cases I-A-00065, II-00267, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0011:EN:HTML (last visited 13 April 2009), paras. 159–160.

[268] Further to this the Civil Servant's Tribunal Case F-120/06, Noémi Dálnoky v Commission [2007] ECR 00000, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 28, the applicant argues direct and indirect discrimination within the same definition as is followed in EC law. The court did not subsequently address the issue of discrimination definitions.

[269] The Race and Ethnic Origin Directive 2000/43/EC (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32000L0043&model=guichett (last visited 13 April 2009)), Article 2 (2) (a); The Framework Directive 2000/78/EC, *supra* note 261, Article 2 (2) (a); Equal Treatment of Men and Women Directive 2006/54/EC, *supra* note 260, Article 2 (1) (a).

[270] *Ibid.*

[271] Case C-207/04, Vergani v Agenzia delle Entrate [2005] ECR I-07453, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 35.

[272] Case C-79/99, Schnorbus v Land Hessen [2000] ECR I-10997, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 82.

3. 1. 3. Definition of Indirect Discrimination in EC law

The importance of controlling indirect discrimination stems from the fact that indirect discrimination can exist in covert forms while still causing inequalities within the workplace. "Indirect discrimination" has been defined by the EC Directives on equal treatment as any provision, custom or practice which appears to be neutral but which puts a person or persons under a disadvantage as a result of the grounds laid out in the relevant directives.[273] This is established by comparison with those who do not fall under the same category. However, the measure can be justified if it has a legitimate aim and the means of achieving this are appropriate and necessary.[274] This may involve incentives and affirmative action in favour of disadvantaged groups. The Treaty of Amsterdam involved the insertion of the positive-action provision into Article 141 (4) EC. This states that:

> "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions provides for positive action which would normally be discriminatory when there is an occupational requirement to do so.[275] The

[273] Directive 2000/43/EC, *supra* note 269, Article 2 (2) (b); Directive 2000/78/EC, *supra* note 259, Article 2 (2) (b); Directive 2006/54/EC, *supra* note 262, Article 2 (1) (b).
[274] *Ibid.*
[275] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32002L0073 (last visited 13 April 2009), Article 2 (6): "Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided

ECJ has upheld the importance of this exception in the Lommers case.[276] This involved a scheme which tackled the under-representation of women by subsidising the nursery places for its female staff.[277] However, the 1995 ECJ Kalanke case took the view that a system which gave women unconditional and absolute priority for appointment or promotion went beyond the accepted positive action exception.[278] In the later Marschall case, the ECJ affirmed that 'absolute and unconditional priority' went beyond the limits of positive action, but a quota which considered individual circumstances would be flexible enough to fall within the exception to indirect discrimination.[279] In consideration of the ECJ's rulings, it can be derived that for the positive action principle to be compatible with EC law, the gender of the person who is going to benefit must genuinely be under-represented in the relevant sector, the measure must be designed to *de facto* reduce inequalities and compensate for career disadvantages and the criteria must be transparent and objective.[280] The Treaty provision for positive action only applies to gender equality but it is still important to look at in the realm of the definition of indirect discrimination in order to understand the possible exceptions to its prohibition.

3. 1. 4. Practical Treatment of Equality Issues in Member States and in the European Institutions

The law on equality appears to be applied to EU civil servants in the same way as other workers in the Member States of the EU. However, one important difference which remains to be noted is that under Article 8 of the Framework Directive (Directive 2000/78/EC), Member States are permitted to implement more favourable regulations for the protection of equal treatment and this is in fact encouraged by the EU Lisbon Strategy for Growth and Jobs.[281] While the Institutions are not prohibited from implementing more

---

that the objective is legitimate and the requirement is proportionate."

[276] This was previously provided for in Article 2 (1) and (4) of Directive 76/207/EEC, *supra* note 263.

[277] Case C-476/99, Lommers [2002] ECR I-02891, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009).

[278] Case C-450/93, Kalanke v Freie Hansetadt Bremen [1995] ECR I-03051, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993J0450:EN:HTML (last visited 13 April 2009), paras. 22–23.

[279] Case C-409/95, Hellmut Marschall v Land Nordhein Westfalen [1997] ECR I-06363, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), paras. 32-33.

[280] Craig, P. & De Búrca, G., *supra* note 23, page 894.

favourable conditions, they are not encouraged in the same continuous manner as the Member States.

3. 1. 5. Interim Conclusion

Equality has increasingly been defined as a fundamental right and this is evidenced by the increased volume of equality legislation in the EC and subsequently in the internal organisation of the EU institutions. The Staff Regulations have incorporated at least the minimum EC standards in relation to the control of discrimination, but they are not encouraged to continue development of these regulations in the same manner as the Member States of the EU under the EU Lisbon Strategy for growth and jobs. The importance of understanding direct and indirect discrimination is that both can cause inequality in the workplace. However, indirect discrimination is not always prohibited. For instance, in positive action schemes what would otherwise be discriminatory is permitted in a specified sector to even out inequalities.

The development history of anti-discrimination law and the definitions of direct and indirect effect should be kept in mind when dealing with equality regarding physical working conditions for disabled people, pregnant workers, women who have just given birth and people with a religious need to worship during work hours.

[281] The EU Lisbon Strategy for Growth and Jobs (Communication from the Commission to the European Council Strategic Report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008 – 2010) COM (2007) 803 final) is the product of a consensus between Member States to modernise Europe (*More information available at:* http://ec.europa.eu/growthandjobs/index_en.htm, last visited 13 April 2009). It aims at increasing the inclusion of disabled people in the workforce. In line with this, within the ambit of job protection, the European Employment Strategy (EES) guidelines, *available at:* Europa Website, European Commission; Employment, Social Affairs and Equal Opportunities, European Employment Strategy, http://ec.europa.eu/social/main.jsp?catId=101&langId=en, last visited 13 April 2009) set out the employment policies that are to be implemented by the Member States. This will be discussed in more detail in the section on the equality of working conditions regarding workers with disabilities (*See infra*, Section 3. 2.).

3. 2. Equal Treatment Regarding Physical Working Conditions: Disability

3. 2. 1. Background to the Inclusion of Disability in Equality Legislation

The development of anti-discrimination law on the basis of disability is relatively recent. Prior to the Council Directive 2000/78/EC, the EC legislation regarding the inclusion of disabled people in the workplace was primarily non-binding in nature or took the form of action programmes which provided for the exchange of information in this field.[282] These programmes were developed with a view to developing the Community Disability Policy.[283] The first major step in the legal protection for those with disabilities came in 1999 with the Treaty of Amsterdam, which included a provision for the development of secondary legislation to combat discrimination, *inter alia*, on the grounds of disability.[284] Any doubt regarding the possible effects of such an imprecise provision were quashed by the quick adoption of a non-discrimination package and non-discrimination directives.[285] This marked a major step in the development of anti-discrimination disability law. Following an increase in the number of soft law measures, the equal treatment of persons with disabilities is included in the Framework Directive (Directive 2000/78/EC).[286] The Preamble to this Directive acknowledges the need to "take appropriate action for the social and economic integration of elderly and disabled people".[287] Furthermore, the

[282] Waddington, L., (2006) *From Rome to Nice in a Wheelchair, The Development of a European Disability Policy*, Groningen: Europa Law Publishing, p. 4.
[283] *Ibid.*
[284] EC Treaty, *supra* note 12, Article 13 (1): "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred upon it by the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".
[285] Waddington, L, *supra* note 282, p. 20 – The relevant directives are Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
[286] Council Proposals, Decisions and Recommendations, which do not have the force of law. In relation to the area of disability, the following soft law measures laid the foundations for the Framework Directive: COM(90) 588 (OJ [1992] C15/21) The proposal for a Council Directive on Transport for Workers with Reduced Mobility designed to enhance disabled worker's mobility and to provide them with safe transport to work. This was withdrawn by the Commission COM (2001) 763; Council Recommendation on the Employment of Disabled People in the Community 86/379/EEC of 24 July 1986 (OJ [1986] L225/43; Resolution of the Council and Representatives of the governments meeting within Council of 20 December 1996 on equality of opportunity for people with disabilities (OJ [1997] C12/1); Resolution 99/702 (OJ [1999} C186/3) on Equal Opportunities for people with Disabilities and the Commission Proposal for a Council Directive on Establishing a General Framework for Equal Treatment in Employment and Education COM (99)565,4.
[287] Directive 2000/78/EC, *supra* note 261, Preamble, Recital 6.

importance of physically accommodating disabled people in the workplace is regarded as important in combating discrimination.[288] Disability is included in Article 1 as one of the grounds under which discrimination is prohibited. The Nice Treaty marked another important step towards the protection of disabled people from discrimination with the formulation of the Charter of Fundamental Rights of the European Union. This defined the integration of persons with disabilities as a right.[289] This Charter is not currently legally binding, but if the Lisbon Treaty is ratified, it will have legal standing.[290] According to Blanpain, measures that need to be taken to integrate disabled people into society and the workplace include vocational training, ergonomics and accessibility.[291] Pursuant to the development of law in this area and the Framework Directive (2000/78/EC), discrimination on the basis of disability is contrary to EC law and disabled people are to be reasonably accommodated in the workplace.

Article 1 of the Framework Directive has been incorporated into the Staff Regulations.[292] Disability requires special attention under the heading of Equal Treatment regarding Physical Working Conditions, as it differs from the other grounds for discrimination.[293]

---

[288] *Ibid.*, Recital 16.

[289] Charter of the Fundamental Rights of the European Union, *available at:* http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last visited 13 April 2009), Article 26, Integration of Persons with Disabilities: "The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community."

[290] Europa Website, Treaty of Lisbon, The Treaty at a glance, A Europe of Rights and Values, *available at:* http://europa.eu/lisbon_treaty/glance/rights_values/index_en.htm (last visited 13 April 2009): "...the Treaty of Lisbon guarantees the enforcement of the Charter of Fundamental Rights. The EU therefore acquires for itself a catalogue of civil, political, economic and social rights, which will be legally binding not only on the Union and its institutions, but also on the Member States as regards the implementation of Union law."

[291] Blanpain, R., *European Labour Law*, 10th Edition, 2006, The Hague: Kluwer Law International, p. 239.

[292] Staff Regulations, *supra* note 11, Article 1 (d): "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...4. For the purposes of paragraph 1, a person has a disability if he has a physical or mental impairment that is, or is likely to be, permanent. The impairment shall be determined according to the procedure set out in Article 33... A person with a disability meets the conditions laid down in Article 28 (e) if he can perform the essential functions of the job when reasonable accommodation is made.
'Reasonable accommodation', in relation to the essential functions of the job, shall mean appropriate measures, where needed, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.." This section of the Staff Regulations was incorporated by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004. Therefore four years after the creation of Directive 2000/78/EC.

[293] Barnard, C., *supra* note 127, p. 393.

One such important difference is that it could inhibit an individual's ability to do his/her job. In certain circumstances, a specifiable amount of accommodation in the workplace could help the worker overcome the difficulty.

In this Section, the accommodation of disabled persons in the work place will be specifically considered. Additionally, the definition of disability will be analysed, along with the question of employee competence and the reasonable accommodation which is expected of the employer. As stated by Whittle, these are two of the core aspects of anti-discrimination which need to be understood before further progress can be made.[294] The situation vis-à-vis EU civil servants in the Staff Regulations will be examined in light of the EC law.

3. 2. 2. Definition of the Term "Disability"

The Framework Directive does not define the term "disability", and therefore recourse needs to be had to case law. The ECJ in Chacón Navas v Eurest Colectividades SA[295] favoured the medical definition of disability. This definition was originally adopted in British law under the Disability Discrimination Act 1995 to mean "a physical or mental impairment which has a substantial and long-term adverse effect on [the] ... ability to carry out normal day-to-day activities".[296] Wells explains how this "medical model" sees disability as a functional impairment and the alternative "social model" classifies disability in relation to the relationship between the impaired individual and his/her society.[297] The social model takes the view that the difficulties which disabled people face come from the disabling environment and not the individual's own impairment.[298] The implication that society has the responsibility to accommodate a person with a disability

[294] Whittle, R., 'The Framework Directive for Equal Treatment in Employment and Occupation: an analysis from a disability rights perspective', 2002, *European Law Review*, Volume 27.
[295] Case C-13/05, Chacón Navas v Eurest Colectividades, [2007] SA ECR I-000, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009).
[296] Office of Public Sector Information, Legislation, UK, Acts, Public Acts 1995, Disability Discrimination Act 1995, *available at:* http://www.opsi.gov.uk/acts/acts1995/ukpga_19950050_en_1 (last visited 13 April 2009), Section (1).
[297] Wells, K. 'The impact of the Framework Employment Directive on UK Disability Discrimination Law', 2003, *Industrial Law Journal*, volume 32, p. 253.
[298] Waddinton, L, *supra* note 282, p. 14.

is stronger under the social model than the medical model.[299] In Chacón Navas, the ECJ ruled that a disability is a limitation that results from "physical, mental or psychological impairments" that may hinder a person's ability to partake in professional life for a probable long period of time.[300] The ECJ further defined disability to be independent of sickness, and it held that a person who is dismissed as a result of a sickness is not covered by the Framework Directive.[301] However, the inclusion of a provision for reasonable accommodation in the Framework Directive[302] indicates that EC law has embraced the social model as it acknowledges that the environment of the impaired individual can be changed to accommodate them. Therefore, both definitions have a role to play in the development of anti-discriminatory disability policy within the EC.

The Staff Regulations define disability under the medical definition. Article 1d (4) of the Staff Regulations[303] maintains that a person has a disability if he or she has a potentially permanent physical or mental impairment, which has been determined pursuant to the procedure outlined in Article 33.[304] This Article sets out the requirement for every potential employee to be medically examined by one of the institutions' medical officers. [305] This is with the aim of confirming that the employees meet the requirements of Article 28 (e),[306] which states that an official has to be deemed physically fit to perform his or her duties.[307] In the event of a negative response to Article 28 (e), Article 33 details the procedure for appeal.[308]

---

[299] *Ibid.*
[300] Chacón Navas v Eurest Colectividades Case, *supra* note 295, paras. 43–45.
[301] *Ibid.*, para. 47.
[302] Directive 2000/78/EC, *supra* note 261, Article 5 – Reasonable accommodation for disabled people.
[303] Staff Regulations, *supra* note 11, Article 1d (4). This article was incorporated into the Staff Regulations by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004.
[304] *Ibid.*, Article 33. This article was incorporated into the Staff Regulations by Council Regulation (Euratom, ECSC, EEC) No 912/78 of 2 May 1978.
[305] *Ibid.*
[306] *Ibid.*, Article 28 (e). This was incorporated into the Staff Regulations by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004.
[307] *Ibid.*, Article 28 (e): "An official may be appointed only on condition that: (e) he is physically fit to perform his duties;"
[308] *Ibid.*, Article 33: "…Where a negative medical opinion is given as a result of the medical examination provided for in the first paragraph, the candidate may, within 20 days of being notified of this opinion by the institution, request that his case be submitted for the opinion of a medical committee composed of three doctors chosen by the appointing authority from among the institutions' medical officers. The medical officer responsible for the initial negative opinion shall be heard by the medical committee. The candidate may refer the opinion of a doctor of his choice to the medical committee. Where the opinion of the medical

3. 2. 3. The Duty of the Employer to make "Reasonable Accommodation" for a Person with Disability

The concept of reasonable accommodation comes from the social model definition of a disability.[309] This is an example of positive action which is permitted and encouraged to integrate a marginalised group into employment. The importance of an employer's obligation to accommodate disabled people is evident from the fact that a failure to reasonably accommodate a person with a disability can lead to discrimination. It obliges an employer to acknowledge the impairment and to decide whether changes can be made to the work environment to permit the disabled person to carry out the required standard of work.[310] As a result of the specific characteristics of a disability, EC law has not created a blanket requirement on employers to fully accommodate those with disabilities. The Preamble to the Framework Directive affirms that:

> "This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities."[311]

Article 5 of the Framework Directive outlines "reasonable accommodation" as follows:

> "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer ...."

Therefore, the obligation of reasonable accommodation applies to both direct and indirect discrimination. Article 1d (4) of the Staff Regulations transposes this definition of

committee confirms the conclusions of the medical examination provided for in the first paragraph, the candidate shall pay 50 % of the fees and of the incidental costs."

[309] Waddinton, L., *supra* note 282, p. 22.

[310] *Ibid.*

[311] Directive 2000/78/EC, *supra* note 261, Preamble, Recital 17.

"reasonable accommodation" verbatim.[312] However, a supplementary assessment criterion which applies to Member States is included in Article 5 of the Framework Directive. This is that the burden on the employer shall not be disproportionate where the Member State already sufficiently remedies the inclusion of disabled people by means of a national policy.[313] In other words, the reasonable accommodation test considers national policies. This creates another point of reference for the Member States in the interpretation and implementation of the principle of "reasonable accommodation". The reasoning behind such a provision is that one can expect more protection if there are subsidies from elsewhere. For instance, under public access obligations a building would have to have better accessibility for disabled people. Hence, one can expect a higher level of accommodation in such buildings. If there are more finances available to an undertaking, the level of accommodation which would be reasonably expected would be higher.

The EU institutions have adapted the exact definition of "reasonable accommodation", and are therefore, without being under the obligation to do so, in conformity with EC law. However, the institutions do not undergo the same constant evaluation as the Member States. The EU Disability Action Plan (DAP) 2003 – 2010 aims at mainstreaming the issue of disability and integrating this issue into all EU policy areas.[314] Member States are encouraged to take further measures pursuant to the Council Conclusions on the follow-up to the European Year of People with Disabilities 15512/03.[315] Furthermore, the EU Lisbon Strategy for Growth and Jobs aims at increasing the inclusion of disabled people in the workforce.[316] In line with this, within the ambit of job protection, the European Employment Strategy (EES) guidelines set out the employment policies that are to be

[312] Staff Regulations, *supra* note 11, Article 4.
[313] Directive 2000/78/EC, *supra* note 261, Article 5 - Reasonable accommodation for disabled people: "...This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."
[314] European Commission; Employment, Social Affairs and Equal Opportunities; The EU Disability Action Plan, *available at:* http://ec.europa.eu/social/main.jsp?catId=430&langId=en (last visited 13 April 2009).
[315] Council Conclusions on the follow-up to the European Year of People with Disabilities 15512/03, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0738:EN:NOT (last visited 13 April 2009).
[316] Communication from the Commission to the European Council – Strategic Report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008 – 2010) COM (2007) 803 final, para 4.1, Investing in People and Modernising Labour Markets: "…Support for low-skilled workers, migrants and disabled people needs to be reinforced, notably by fostering skills development".

implemented by the Member States.[317] All Member States have to report back to the Commission annually, outlining their national developments, among others, in the area of employment initiatives for disabled people.[318] Therefore, despite the fact that the Staff Regulations implement the same definition of "reasonable accommodation" as the Framework Directive, they are not subject to the same constant evaluation as the Member States.

The concept of "reasonable accommodation" merits further analysis. Its underlying aim is to remove barriers without creating undue burdens for an employer. "Reasonable accommodation" can be limited in two respects: firstly, it only applies to what is reasonable; and secondly, it is limited if it creates undue hardship.[319] Recital 21 of the Preamble of the Framework Directive states that "to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance."[320]

Therefore, the test of what is reasonable is monetary in nature. The cost which is calculated must only relate to the measures which an employer would have to take for the accommodation of a disabled individual. "Reasonable accommodation" is to be provided if an employee can and should be accommodated to do his function.[321] There is no

[317] Europa Website, European Commission; Employment, Social Affairs and Equal Opportunities, European Employment Strategy, *available at:* http://ec.europa.eu/social/main.jsp?catId=101&langId=en (last visited 13 April 2009).

[318] The European Employment Strategy, guideline 12, the 'developing entrepreneurship' pillar '…provides that Member States will "promote measures to exploit fully the possibilities offered by job creation at local level and in the social economy, especially in new activities linked to needs not yet satisfied by the market, and examine, with the aim of reducing, any obstacles in the way of such measures. In this respect, the special role and responsibility of local and regional authorities, other partners at the regional and local levels, as well as the social partners, needs to be more fully recognised and supported. In addition, the role of the Public Employment Services in identifying local employment opportunities and improving the functioning of local labour markets, should be fully exploited."

[319] Barnard, C., *supra* note 127, p. 401.

[320] Directive 2000/78/EC, *supra* note 261, Preamble, Recital 21.

[321] Whittle, R., *supra* note 294, sets out an example of a 'reasonable accommodation' scenario in page 314: The requirement to have a driving licence for a specific job would constitute indirect discrimination against a blind person but it would have to be permitted as to outlaw it would be unworkable. However, if being able to drive is an advantage for the employer but not an essential element of the job, under the principle of 'reasonable accommodation', the employer is obliged to take reasonable actions for the blind person (such as swapping some of his/her tasks with another work colleague or providing a taxi on the necessary occasions).

obligation to accommodate those who are not qualified for the employment position. An employer has to assess new employees in light of the accommodations that could reasonably be undertaken.[322] The aim of such provisions is that disabled people are not hindered from participation in working life because of stereotypical assumptions.[323] EC law provides for the special provisions for disabled individuals by virtue of Article 5 of the Framework Directive. [324]

The possibility of teleworking as a means of reasonable accommodation has not been addressed by EC law or the EU institution's staff regulations. However, within the European Commission there is a possibility to telework for up 50% of each working week.[325] In the event that a workplace cannot be adjusted to accommodate for a disabled individual, teleworking could provide a financially viable solution. However, to decide whether teleworking was reasonable in a specific case, it would have to be assessed under the same reasonable accommodation test as any other provision.

3. 2. 4. Interim Conclusion

Further to the EU Lisbon Strategy for Growth and Jobs, a policy of increased inclusion of disabled people in the workforce has emerged in the EU. According to this emerging body of law, disabled people have the right to integrate into society and this is to be facilitated by "reasonable accommodation" at work to overcome these barriers. Both EC law and the Staff Regulations aim at striking a balance between the need to integrate disabled people and the creation of excessive burdens for the employer. The Staff Regulations are notably not bound by EC law and therefore the implementation of rules which coincide with EC law is voluntarily. The Staff Regulations follow the minimum standards as set out in EC law and there has not yet been any case before the Civil

[322] Whittle, R. *supra* note 294, p. 317.
[323] Collins, H., 'Discrimination, Equality and Social Inclusion' (2003) *Modern Law Review*, Volume 66, p.16.
[324] Directive 2000/78/EC, *supra* note 261, Article 5.
[325] Commission Of The European Communities Brussels, 21 December 2006 C (2006) 6831 Memorandum To The Commission of 21 December 2006 concerning the use of teleworking the Commission services. Adoption of a new "Guidelines for the implementation of teleworking in the European Commission (Memorandum from Mr Kallas), page 4.

Servants Tribunal questioning "reasonable accommodation" by a person with a disability. However, it is worth noting that the EU institutions are not under the same constant scrutiny as the Member States and therefore they are not under the same pressure to improve physical working conditions for disabled people.

3. 3. Equal Treatment Regarding Physical Working Conditions: Pregnant Workers and Workers who have Recently Given Birth

3. 3. 1. European Community Law Providing for the Equal Treatment of Pregnant Workers and Workers who have Recently Given Birth with regards to the Working Conditions

3. 3. 1. 1. General Overview of the European Community Law Regarding the Equal Treatment and Health and Safety of the Pregnant Workers and Workers who have Recently Given Birth

Within secondary European Community legislation, three Directives need to be mentioned with regards to the pregnant workers and workers who have recently given birth, namely the Directive 89/654/EEC on the minimum safety and health requirements for the workplace,[326] the Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding[327] and the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.[328]

Directive 89/654/EEC[329] has one sole provision on this topic, stating merely that the pregnant women and nursing mothers must be able to lie down to rest in appropriate

[326]Directive 89/654/EEC, *supra* note 15.
[327] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992L0085&model=guichett (last visited 13 April 2009).
[328] Directive 2006/54/EC, *supra* note 262.
[329] Directive 89/654/EEC, *supra* note 15.

conditions.[330] The Directive 92/85/EEC[331] is of greater importance, as it focuses specifically on this category of workers. Both Directives formally fall in the group of directives dealing with health and safety requirements. However, with regards to the pregnant workers and workers that have recently given birth, the provisions also have a strong non-discrimination component.[332] While providing for the protection of the health and safety of this category of workers by imposing the obligation to accommodate the working conditions to their needs, the provisions also strive for assuring that the pregnant workers and workers who have recently given birth can perform their jobs as equally as possible to other workers. For this reason, the topic of pregnant workers and workers who have recently given birth is included in the Section on equality regarding physical working conditions rather than in the previous Section dealing exclusively with physical working conditions.

It is acknowledged in the Preamble of the Directive 92/85/EEC[333] that pregnant workers and workers who have recently given birth or who are breastfeeding are a specific risk group to which certain activities can pose a danger and therefore deserve special attention with regards to their safety and health protection.[334] To achieve this aim, and from the perspective of physical working conditions, the Directive firstly imposes an obligation on the employer to assess the risk of exposure to the certain agents, processes or working conditions; secondly to inform the workers concerned about the outcome of the assessment; and finally to take the necessary measures to ensure that exposure to such risks in avoided.[335] The Directive itself provides a non-exhaustive list of agents (physical, biological and chemical), processes and working conditions that need to be assessed;[336]

[330] *Ibid.*, Annex I, Article 17 and Annex II, Article 12.The provisions are identical, the reason for their being stated twice is that Annex I deals with the workplaces used for the first time, whereas Annex II regulates workplaces already in use before 1 January 1993, imposing an obligation that the workplaces satisfy the minimum safety and health requirements laid down in it at the latest three years after that date.
[331] Directive 92/85/EEC, *supra* note 327.
[332] Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women, Report on Pregnancy, Maternity, Parental and Paternity Rights, *available at*: http://ec.europa.eu/employment_social/gender_equality/legislation/report_pregnancy.pdf (last visited 13 April 2009), p. 4.
[333] Directive 92/85/EEC, *supra* note 327.
[334] *Ibid.*, Preamble.
[335] *Ibid.*, Article 4.
[336] *Ibid.*, Annex I.

and furthermore, it regulates the cases in which the exposure is prohibited.[337] In cases where the risk turns out to be present, the employer has a duty to adjust the working conditions and/or working hours of the worker in question, or when such adjustments are not feasible or cannot be reasonably required, the worker shall be moved to another job or, if even that is not possible, she shall be granted leave for the entire period necessary to protect her safety or health.[338]

Regarding the functional organisation of work, the Directive pays special attention to the regulation of the night work of pregnant workers and workers who have recently given birth. In accordance with the provision of Article 7, such workers are not obliged to perform night work if they submit a medical certificate stating that this is necessary for their safety and health.[339] The possible measures in such cases must entail a possibility for the worker concerned to be transferred to daytime work, or leave from work or extension of maternity leave where such transfer is not feasible or cannot be reasonably required.[340]

Finally, the third directive, Directive 2006/54 imposes on the Member States the obligation of equal treatment of pregnant workers and workers who have recently given birth. In the Preamble it is pointed out that according to the case law of the European Court of Justice, unfavourable treatment of a woman because of pregnancy or maternity constitutes direct discrimination on the grounds of sex.[341] Furthermore, the protection of a woman's biological condition during pregnancy and maternity and the introduction of maternity protection measures as a means to achieve substantive equality are legitimate as regards the principle of equal treatment.[342]

In Article 2,[343] which relates to any less favourable treatment of a woman related to pregnancy or maternity leave in the definition of discrimination, the Directive makes explicit reference to the Directive 92/85/EEC. The latter Directive's definitions of pregnant workers and maternity leave are decisive for the personal scope of the

[337] *Ibid.*, Article 6 and Annex II, listing the prohibited agents and working conditions.
[338] *Ibid.*, Article 5.
[339] *Ibid.*, Article 7.
[340] *Ibid.*, Article 7.
[341] Directive 2006/54, *supra* note 262, Preamble, Recital 23.
[342] *Ibid.*, Preamble, Recital 24.
[343] *Ibid.*, Article 2 (2) (c).

prohibition of discriminatory treatment under the paragraph 2 (c) of Article 2 of the Directive 2006/54. The most important substantive provision explicitly regarding the workers who have recently given birth is Article 15.[344] With respect to the employment rights of women on maternity leave, according to this provision this group of workers are "entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence".[345] Together with the prohibition of dismissal during pregnancy and maternity leave,[346] this right is constitutive for the protection of the employment status, health and safety of the pregnant workers and workers who have recently given birth.

3. 3. 1. 2. The Prohibition of Dismissal as a Measure to Protect the Health and Safety of Pregnant Workers and Workers who have Recently Given Birth

The Member States are under an obligation to take measures that pregnant workers or workers who have recently given birth cannot be dismissed from the beginning of their pregnancy to the end of the maternity leave pregnant workers.[347] The Preamble of the Directive 92/85/EEC justifies such prohibition by the fact that the risk of dismissal for reasons associated with their condition may have harmful effects on their physical and mental state.[348] The same is further reiterated by the case law of the European Court of Justice. In the Brown case,[349] the Court held that

> "It was precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that the Community legislature, pursuant to Article 10 of Council Directive 92/85/EEC …

[344] *Ibid.*, Article 15.
[345] *Ibid.*, Article 15.
[346] *See infra*, Section 3.3.1.2..
[347] Directive 92/85/EEC, *supra* note 327, Article 10.
[348] *Ibid.*, Preamble.
[349] *See also* Case C-109/00, Tele Danmark [2001] ECR I-06993, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 26 *and* Case C-460/06, Paquay [2007] ECR I-08511, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 30.

> provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave."[350]

As stated in Article 10 of the Directive 92/85/EEC,[351] this provision is meant to guarantee the health and safety protection rights of this group of workers. They can only be dismissed "in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent".[352] Apart from that, no exception to or derogation from the prohibition of dismissal is allowed from the start of worker's pregnancy to the end of her maternity leave.[353]

The scope of the protection granted by Article 10 of this Directive is interpreted in a broad manner by the ECJ. In Jiménez Melgar,[354] the Court held that the precise obligation imposed by this Article on the Member States afford them no margin of discretion,[355] especially when they are acting in their capacity as an employer. Furthermore, regarding this prohibition of dismissal,[356] no distinction is made between the employment contracts for an indefinite period and the fixed-term employment contracts.[357] In Paquay,[358] the Court further expanded the scope of the protection by pointing out that, "in the context of the application of Article 10 of the Directive 92/85, the Member States cannot amend the scope of the concept 'dismissal' thereby negating the extent of the protection which that provision offers and compromising its effectiveness".[359] In addition, it was established in

[350] Case C-394/96, Brown [1998] ECR I-04185, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para 18.
[351] Directive 92/85/EEC, *supra* note 327.
[352] *Ibid.*, Article 10, Point 1.
[353] Brown Case, *supra* note 350, para. 18; Tele Danmark Case, *supra* note 349, paras. 26 and 27; Paquay Case, *supra* note 349, para. 31, Case C-506/06, Mayr [2008] ECR I-01017, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 35.
[354] Case C-438/99, Jiménez Melgar [2001] ECR I-06915, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009).
[355] *Ibid.*, para. 33.
[356] *Ibid.*, para. 44. *See also* Tele Danmark Case, *supra* note 349, para. 31.
[357] However, the non-renewal of a fixed-term contract is not contrary to the provision of Article 10 of the Directive 92/85/EEC, *supra* note 327. Nevertheless, it is still prohibited, when such non-renewal is based on the worker's state of pregnancy and therefore constitutes direct discrimination on grounds of sex, contrary to current Article 14(1) of the Directive 2006/54/EC, *supra* note 262, which replaced the Articles 2(1) and 3(1) of the Directive 76/207, *supra* note 261 (*See* Jiménez Melgar Case, *supra* note 354, paras. 45-47). For a general analysis of fixed-term contracts, *see infra*, Section 4. 6..
[358] Paquay Case, *supra* note 349.
[359] *Ibid.*, para. 32.

the same case that not only the notification of dismissal, but also the steps taken in the preparation of the dismissal are prohibited under the provision of Article 10 of the Directive 92/85/EEC.[360] In accordance with the case law, the European Commission's Proposal for the amendment of the Directive 92/85/EEC[361] includes prohibition of all preparations for a possible dismissal not related to exceptional circumstances, during the maternity leave.[362]

In the recent judgement in the Mayr[363] case regarding the *in vitro* fertilisation, the ECJ held that the earliest possible date in the pregnancy must be chosen for the purpose of ensuring the health and safety of pregnant workers.[364] The Court ultimately maintained the limits of the scope of Article 10 of the Directive 92/85/EEC[365] by holding that the prohibition of dismissal under Article 10 does not extend to "a female worker who is undergoing in vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that in vitro fertilised ova exist, but they have not yet been transferred into her uterus".[366]

As has been pointed out, the dismissal of a pregnant worker or worker who has recently given birth is allowed in exceptional cases, where the reason of dismissal is not connected with the worker's condition, provided that, where applicable, the competent authority has given its consent.[367] According to the case law of the ECJ, the Member States are not under the obligation to compose a specific list of reasons for permitted

[360] *Ibid.*, para. 33.
[361] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637 final, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0637:EN:NOT (last visited 13 April 2009).
[362] *Ibid.*, the existing Paragraph 1 of Article 10 is replaced with the following:
"1. The Member States shall take the necessary measures to prohibit the dismissal *and all preparations for a dismissal of workers* within the meaning of Article 2 during the period from the beginning of their pregnancy to the end of the maternity leave provided for in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent." (*Emphasis added*).
[363] Mayr Case, *supra* note 353.
[364] *Ibid.*, para. 40.
[365] Directive 92/85/EEC, *supra* note 327.
[366] Mayr Case, *supra* note 353, para. 53.
[367] Directive 92/85/EEC, *supra* note 327, Article 10.

dismissals.[368] Furthermore, the Court established that the provision of Article 10 of the Directive 92/85/EEC[369] is to be interpreted as meaning that the consent of a competent authority is necessary where such a procedure had already existed in the Member State and independent of any obligation to introduce such national authority.[370] The employer does however have an obligation to substantiate the ground for the dismissal in writing[371] and the workers must be provided with the necessary protection from the consequences of an unlawful dismissal.[372]

Finally, it has to be pointed out that the protection afforded by the Directive 92/85/EEC[373] to the workers who have recently given birth is complemented by the protection of employment rights of women, particularly their right to return to work, under the Directive 2006/54. That right is, as noted in Section 3.3.1.1., explicitly guaranteed to women who have recently given birth.

3. 3. 2. Provisions Regarding European Civil Servants

The Staff Regulations[374] have no specific provision dealing with the protection of the health and safety of pregnant workers and workers who have recently given birth with regards to the physical working conditions. The Manual of Standard Building Specifications[375] mentions that the first-aid post and rest area may be used to accommodate pregnant women and breastfeeding mothers who may need to lie down.[376]

[368] Jiménez Melgar Case, *supra* note 354, para. 37.
[369] Directive 92/85/EEC, *supra* note 327, Article 10.
[370] Jiménez Melgar Case, *supra* note 354, paras. 51 and 52.
[371] The Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637 final, *supra* note 327, extends this obligation to provide a reasoning in writing to the cases when the worker is dismissed within six months from the end of her maternity leave and requests that the employer does so. The new proposed Paragraph 2 of Article 10 goes as follows: "If a worker within the meaning of Article 2 is dismissed during the period referred to in point 1 the employer must cite duly substantiated grounds for her dismissal in writing. *If the dismissal occurs within six months following the end of maternity leave as provided for in Article 8(1), the employer must cite duly substantiated grounds for her dismissal in writing at the request of the worker concerned*." (*Emphasis added*).
[372] Directive 92/85/EEC, *supra* note 327, Article 10.
[373] Directive 2006/54/EC, *supra* note 262.
[374] Staff Regulations, *supra* note 11.
[375] Manual of Standard Building Specifications, *supra* note 49.
[376] *Ibid.*, Section 8.1., p. 332.

It has to be stressed, however, that this is not an obligation imposed on the European Commission acting in its capacity as an employer, but merely a guideline that it might follow when establishing the working conditions for the European civil servants.

3. 3. 3. Interim Conclusions

The EC legislation, supported by the jurisprudence of the European Court of Justice, aims at a high level of protection of pregnant workers and workers who have recently given birth. They are seen as a specific risk group and accordingly, special measures need to be taken by the Member States to provide for adequate protection; the workplace has to be adjusted to afford them the possibility to rest; special risk assessment must be performed by the employer and the pregnant workers and workers who have recently given birth may be excluded from the obligation of night work. Any less favourable treatment of women due to their pregnancy or maternity leave is considered discriminatory and maternity protection measures are viewed as legitimate measures to establish equality.[377] Dismissal of a worker during her pregnancy or maternity leave is prohibited and the worker has the right to return to her job or an equivalent post and the right to all the benefits from any improvement in working conditions to which she would have been entitled during her absence.

Staff Regulations do not provide specifically for any protection of this kind and the regulation of the issue seems to be scarce. It appears that the level of protection afforded by EC legislation to EU citizens is higher and more precise than that which is afforded to the European civil servants.

3. 4. Equal Treatment Regarding Physical Working Conditions: Religion and Place to Worship

As far as the Staff Regulations are concerned, the topics of religion and a place to worship at work are not mentioned. However, Article 13 (1) of the EC Treaty[378] permits

[377] Directive 2006/54/EC, *supra* note 262, Preamble, Recital 24.
[378] EC Treaty, *supra* note 12.

the EU institutions to take action regarding specific discriminatory grounds.[379] Article 1 of Directive 2000/78 EC prohibits, *inter alia*, the discrimination on the basis of religion or belief. [380] The Staff Regulations deal with this matter in Article 1d (5).[381] Therefore, if an EU official is not provided with a place to worship or sufficient time to reach the place for his or her religious needs, it could be inferred that there is potential discrimination. This could occur between religious employees and employees without religious beliefs in the same position.

3. 4. 1. The Duty of the Employer to Give Reasonable Consideration to the Employees' Religious Needs

Currently,
no legislation exists within the EU framework that obliges an employer to provide a place to worship within the premises of the work place. Therefore this topic creates a certain degree of legal uncertainty within Staff Regulations as well as in EC legislation. As a result of the lack of legislation on this subject, recourse will be made to case law.

The leading authority regarding this topic is the European Court of Human Rights case Ahmad v United Kingdom,[382] where the applicant, who was a school teacher employed by a local authority, complained that he was forced to resign from his full-time post because he was refused permission to attend a mosque for the purposes of worship during

[379] *Ibid.*, Article 13 (1): "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."
[380] Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, Chapter 1, Article 1, "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.".
[381] Staff Regulations, *supra* note 11, Article 1d (5): "Where persons covered by these Staff Regulations, who consider themselves wronged because the principle of equal treatment as set out above has not been applied to them, establish facts from which it may be presumed that there has been direct or indirect discrimination, the onus shall be on the institution to prove that there has been no breach of the principle of equal treatment. This provision shall not apply in disciplinary proceedings.".
[382]Ahmad v United Kingdom (1982) 4 EHRR 126.

hours of employment.[383] The Commission of the European Court of Human Rights[384] found that the case was inadmissible on the basis that, according to the Article 9(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR),[385] freedom of religion[386] is not absolute, but subject to the limitations set out by Article 9(2).[387] Furthermore, "it may, as regards the modality of a particular religious manifestation, be influenced by the situation of the person claiming that freedom".[388] The Commission accepts that the school authorities, in their treatment of the applicant's case on the basis of his contract with the employer, had to regard not only his religious position, but also to the requirements of the education system as a whole.[389] In other words, the ECHR is drawn in vague terms presenting high-sounding principles that can be used for all sorts of unreasonable claims and initiate all sorts of litigation.[390] These principles needed to be precisely defined and applied in conformity with existing law and the needs and rights of other parties involved.

Still, the case suggests that employers should give genuine and serious consideration to the ways to accommodate their employees' requests, even if they cannot ultimately do so. The importance of this case is that the conclusion was made by the European Commission of Human Rights established by legally binding European Convention of

[383] European Court of Human Rights, Application 8160/78, Decision of 12 March 1981 on the admissibility of the application, p. 33, para 1.
[384] This case was examined under old Strasbourg Mechanism of the European Court of Human Rights lasting until 1998. Two organs were initially set up under the European Convention of Human Rights: the European Commission of Human Rights and the European Court of Human Rights. Applications were first examined by the Commission, which established the facts of the case and determined the admissibility of the complaint.
[385] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953, *available at:* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (last visited 13 April 2009), Article 9 (1): "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." .
[386] *Ibid.*
[387] *Ibid.*, Article 9 (2): "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."
[388] *Ibid.*, para. 11, p. 35.
[389] European Court of Human Rights, Application 8160/78, Decision of 12 March 1981 on the admissibility of the application, para. 19, p. 37.
[390] Lord Denning MR, Ahmad v United Kingdom [1978] QB 38.

Human Rights.[391] The recognition of the Commission's jurisdiction had been made upon separate recognition of the European Convention of Human Rights by individual states. Once states ratify European Convention of Human Rights they are legally bound under Article 46 (1)[392] of the Convention to follow decisions of organisations set up by this Convention.

3. 4. 2. Interim Conclusion

Following the principle of the conclusion of the Commission in Ahmad v United Kingdom, it appears that workers covered by EU legislation are entitled under Article 9[393] to the freedom of religion as far as it does not significantly interfere with their duties under the employment contract. Nevertheless, it is essential to mention that for the employer, there is no clear obligation under the EU legislation to provide a physical place to worship. The reasoning behind this is that it could create significant hardship for the employer to accommodate such a request due to a lack of facilities or other reasonable matters. The fact that the EU civil servants are employees of EU institutions created by European Countries, which voluntarily ratified the European Convention of Human Rights, might indicate a very vague relationship between the principle established by judgement in Ahmad v United Kingdom and the EU institutions. However, such a statement is a speculation and not a legal conclusion. In addition, the Staff Regulations do not address this point at all. Therefore, pure reliance on the application of European Court of Human Rights judgments on the EU institutions is too remote. As a result, it cannot be asserted that EU institutions are obliged to take requests for a place to worship into consideration.

[391] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 385.
[392] *Ibid.*, Article 46 (1): "Any of the High Contracting Parties may at any time declare that it recognizes as compulsory 'ipso facto' and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention."
[393] *Ibid.*

4. FUNCTIONAL ORGANISATION OF WORK

4. 1. Introduction

Functional organisation of work combines two main elements of work management. On one hand, it forms an important part of the protection of workers' health and safety, but on the other hand it also expresses the employer's need to organise the work process appropriate to the employer's needs.

This Section therefore looks at both aspects of the organisation of work, keeping in line with the comparative approach of this report. Firstly, working time and rest periods are dealt with. Falling within this scope, maximum weekly working time, breaks, daily and weekly rests, overtime, shift and night work and part-time work as regulated in EC legislation and Staff Regulations are compared. Further on, maternity and paternity leave, annual leave and sick leave are all looked at individually. Lastly, the issue of the renewal of fixed-term contracts is explored in more detail, presenting both the EC legislation and case law on this topic as well as the applicable law to the EU civil servants regarding the fixed-term contracts.

Interim conclusions are drawn in each subsection to summarise the essential findings.

4. 2. Functional Organisation of Work: Working Time and Rest Periods

4. 2. 1. The Scope of Regulation under the European Community Law

Working time regulation is an important aspect of the protection of workers' health and safety. The main act regulating the working time as regards the working hours and breaks is the Directive 2003/88/EC of the European Parliament and the Council concerning certain aspects of the organisation of working time.[394] Apart from that, "the provisions of Council Directive of 12 June 1989 on the introduction of measures to encourage

[394] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32003L0088&model=guichett (last visited 13 April 2009).

improvements in the safety and health of workers at work (89/391/EEC) remain fully applicable to the areas covered by the first Directive, without prejudice to more stringent and/or specific provisions contained therein".[395]

Already Article 137 of the Treaty establishing the European Community[396] aims at improving the working conditions as well as the working environment to protect workers' health and safety. The second paragraph of this article provides legal basis for the Directive 2003/88/EC, which has replaced Council Directive 93/104/EC.[397] The Directive 2003/88/EC limits its purpose to lying down the minimum health and safety requirements for the organisation of working time.[398] The principle of "humanisation of work" underlies the aim of the Directive, demanding therefore that its provisions are interpreted in the light of adapting the work to the worker.[399]

In the Preamble, the Directive 2003/88/EC states that all workers are entitled to adequate rest periods[400] and that a maximum limit on weekly working hours[401] must be enforced. "Working time" is defined as "any period during which the worker is working, at the employer's disposal and carrying out his activity of duties, in accordance with national

[395] *Ibid.*, Preamble, Recital 3.
[396] EC Treaty, *supra* note 12, Article 137 goes as follows:
"1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
a) improvement in particular of the working environment to protect workers' health and safety;
b) working conditions;…
2. To this end, the Council:
… may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings…
5. The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."
[397] Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0104&model=guichett (last visited 13 April 2009).
[398] Directive 2003/88/EC, *supra* note 394, Article 1.
[399] Barnard, C., *supra* note 127, p. 579, *see* footnote 51: "Although Art. 13 is located at the end of Section III on night work there is no evidence that it is confined to this section, particularly since the Article makes express reference to breaks during working time which is found in Section II. Indeed, it would appear from the breadth of Art. 13 that all provisions must be interpreted in the light of the principle of humanization of work."
[400] Directive 2003/88/EC, *supra* note 394, Preamble, Recital 5.
[401] *Ibid.*, Preamble, Recital 5.

laws and/or practice";[402] whereas "rest period" means "any period which is not working time".[403] Rest periods, according to the Directive, are therefore divided in four different groups, namely daily rest, breaks, weekly rest period, and annual leave.[404] Additionally, the Directive sets a limit to the maximum allowed weekly working time.[405] In the case law of the European Court of Justice it has, moreover, been established that the "concept [of working time] is placed in opposition to rest periods, the two being mutually exclusive".[406]

As far as the European Union civil servants are concerned, the consolidated version of the Staff Regulations sets forth their working conditions under its Title IV.

In the following paragraphs, different aspects of the working time are presented one by one in a comparative mode. Firstly the relevant EU legislation is described and this is followed by an outline of the provisions regulating the European Union civil servants.

4. 2. 2. Maximum Weekly Working Time

4. 2. 2. 1. European Community Law and Case Law Regarding Maximum Weekly Working Time

The reason behind the maximum working hours that workers can do per week is set forth by the Directive,[407] namely to protect their safety and health. The Member States must take measures to ensure that the maximum limit is set by means of laws or agreements and that "the average working time for each seven-day period, including overtime, does

[402] *Ibid.*, Article 2, Point 1.
[403] *Ibid.*, Article 2, Point 2.
[404] For the purpose of this report, the issue of annual leave will be dealt with separately. *See infra*, Section 4. 4..
[405] Directive 2003/88/EC, *supra* note 394, Article 6, para. 2 (b).
[406] Case C-303/98, Simap [2000] ECR I-07963, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 47; Case C-151/02, Jaeger [2003] ECR I-08389, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 48; Case C-14/04, Dellas and Others [2005] ECR I-10253, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 42 (*see also* other cases cited in the paragraph, and a later Order of the Court C-437/05).
[407] Directive 2003/88/EC, *supra* note 394.

not exceed 48 hours".[408] In Pfeiffer and Others,[409] the European Court of Justice held that this provision is sufficiently precise and unconditional to have direct effect.[410] When applying the laws, which aim at transposing the directive, in the proceedings between private individuals, since no direct effect is possible in such horizontal relationships, the national courts are bound to interpret the whole body of relevant national laws in the light of the wording and purpose of the directive, doing what is possible to ensure that the maximum working time limit of 48 hours is not exceeded.[411]

In Simap[412] and Jaeger[413] and Dellas and Others[414] cases, the European Court of Justice dealt extensively with the content of on-call and stand-by duty. It has been established that the defining factor for determining whether on-call duty or stand-by falls under working time or rest period is whether the worker is under the obligation to stay in the workplace, irrespective of the actual work that he does in that time.[415] Regarding the on call duty of doctors, the ECJ held in Simap that:

> "… even if the activity actually performed varies according to the circumstances, the fact that such [workers] are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance."[416] "[T]he situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. Even if they are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests. In those circumstances, only time linked to the actual provision of primary care services must be regarded as working time within the meaning of Directive 93/104."[417]

[408] *Ibid.*, Article 6.
[409] Joined Cases C-397/01 to C-403/01, Pfeiffer and Others, *supra* note 36.
[410] *Ibid.*, paras. 104-106.
[411] *Ibid.*, para. 120.
[412] Simap Case, *supra* note 406.
[413] Jaeger Case, *supra* note 406.
[414] Dellas and Others Case, *supra* note 406.
[415] *See* Dellas and Others Case, *supra* note 406, para. 43: "The conclusion must be in this context, first, that Directive 93/104 does not provide for any intermediate category between working time and rest periods and, second, that the intensity of the work done by the employee and his output are not among the characteristic elements of the concept of 'working time' within the meaning of that directive."
[416] Simap Case, *supra* note 406, para. 48; Jaeger Case, *supra* note 406, para. 49.
[417] Simap Case, *supra* note 406, para. 50; Jaeger Case, *supra* note 406, para. 51.

The Court employs in all instances the concept of 'on-call' duty and not of 'stand-by' duty,[418] but as seen from the judgement, it is the content of the duty that plays the decisive role with regards to the working time and the Court established that on-call duty of a doctor, who is obliged to stay in the hospital, constitutes working time. Following these judgments of the Court, the European Commission issued a proposal for the amendment of the Directive 2003/88/EC,[419] which was later amended.[420] According to the European Commission, one of the aims of the Directive was to "provide legislative definitions relating to 'on-call' time, and to distinguish between different types of on-call time, in response to recent decisions of the Court of Justice (Simap, Jaeger…) which have

[418] 'Stand-by' duty is mentioned in Jaeger Case, *supra* note 406, with respect to German national law, which makes a distinction between 'Bereitschaftsdienst' or 'on-call duty' and 'Rufbereitschaft' or 'stand-by service' (paras. 15 and 16). On-call duty in this context means that the worker is "obliged to be present at a place determined by the employer, on or outside the latter's premises, and to keep himself available to answer his employer's call, but he is authorised to rest or to occupy himself as he sees fit as long as his services are not required" (para. 15), whereas the stand-by service "is characterised by the fact that the employee is not obliged to remain waiting in a place designated by the employer but it is sufficient for him to be reachable at any time so that he may be called upon at short notice to perform his professional tasks" (para. 16).

[419] Proposal for a Directive of the European Parliament and of the Council amending the Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certains aspects of the organisation of working time, *available at:* http://ec.europa.eu/employment_social/news/2004/sep/working_time_directive_proposal_en.pdf (last visited 13 April 2009).

[420] The amended proposal of the Directive 2003/88/EC with regards to the on-call time goes as follows:
"In Article 2, paragraphs 1a, 1aa and 1b shall be added:
"1a. "on-call time": period during which the worker has the obligation to be available at the workplace in order to intervene, at the employer's request, to carry out his activity or duties.
1aa. "workplace": the place or places where the worker normally carries out his activities or duties and which is determined in accordance with the terms laid down in the relationship or employment contract applicable to the worker.
1b. "inactive part of on-call time": period during which the on-call worker is on call within the meaning of Article 1a but is not required by his employer to effectively carry out his activity or duties."
2. The following Article 2a shall be added:
"Article 2a
On-call time
The inactive part of on-call time shall not be regarded as working time unless national law or, in accordance with national law and/or practice, a collective agreement or an agreement between the social partners decides otherwise.
The inactive part of on-call time may be calculated on the basis of an average number of hours or a proportion of on-call time, taking account of experience in the sector concerned, by collective agreement or agreement between the social partners or following consultation of the social partners.
The inactive part of on-call time may not be taken into account in calculating the rest periods laid down in Articles 3 (daily rest period) and 5 (weekly rest period)."
The period during which the worker effectively carries out his activity or duties during on-call time shall always be regarded as working time.«
(Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time COM (2005)246 final of 31.05.2005, last visited 3 April 2009:
http://ec.europa.eu/employment_social/labour_law/docs/w_t_310505_en.pdf).

had a profound effect on the organisation of working time in public services."[421] At the present stage, the Commission, the Council and the European Parliament are divided with regards to the content of 'inactive part of on-call time'. The Commission, as well as the Council[422] defend the position that active periods of on-call time always constitute a part of working time, whereas the inactive periods do not, unless national law or collective agreements provide so, while the European Parliament on the other hand argues that both active and inactive periods should be considered as constituting working time.[423] The issue is therefore still somewhat disputed and at this point, the case law of the European Court of Justice remains the main point of reference with regards to the contents of the on-call duty. Considering this case law, however, the position of the European Parliament seems to be closer to the interpretation of the concept as established by the Court.[424]

4. 2. 2. 2. Staff Regulations' Provisions Regarding Maximum Weekly Working Time

The main provision regarding the EU officials is laid down in Article 55 of the Staff Regulations, and it stresses that the officials shall be at disposal of their institution at all

[421] Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a proposed Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0568:FIN:EN:PDF (last visited 13 April 2009), p. 3.

[422] *See* The Common Position adopted by the Council on 15 September 2008 with a view to the adoption by the European Parliament and the Council of a Directive amending Directive 2003/88/EC concerning certain aspects of the organisation of working time - statement of the Council's reasons and the legislative acts and other instruments, *available at:* http://www.europarl.europa.eu/meetdocs/2004_2009/organes/empl/empl_20081020_2100.htm (last visited 13 April 2009).

[423] Opinion of the Commission pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty on the European Parliament's amendments to the Council's common position regarding the proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time amending the proposal of the Commission pursuant to Article 250 (2) of the EC Treaty (04/02/2009), *available at:* http://ec.europa.eu/employment_social/labour_law/docs/2009/avis_en.pdf (last visited 13 April 2009).

[424] In Dellas and Others Case, *supra* note 406, paras. 46 and 47, the ECJ held that "it is settled case-law that on-call duty performed by a worker where he is required to be physically present on the employer's premises must be regarded in its entirety as working time within the meaning of Directive 93/104, regardless of the work actually done by the person concerned during that on-call duty […]" (para. 46) and that "[t]he fact that on-call duty includes some periods of inactivity is thus completely irrelevant in this connection" (para 47.).

times.[425] The hours of the working day are nevertheless to be determined by the appointing authority, where the normal working week must not exceed 42 hours.[426] However, an official may be required to remain on standby duty at his or her place of work or at home outside normal working hours.[427] In the latter case, the official is entitled to a special allowance.[428]

4. 2. 2. 3. Interim Conclusion

The main difference between the European Community law and the Staff Regulations is in the approach itself. The EU legislation not only sets a maximum weekly working time that the Member States have to transpose to national legislation, but also clearly states that this maximum (calculated as a weekly average): (a) includes overtime, which is not the case for the Staff Regulations, and (b) includes the time when the worker is at the employer's disposal;[429] whereas the Staff Regulations explicitly provide for a possibility of a stand-by duty outside the normal working hours.

4. 2. 3. Breaks, Daily and Weekly Rest Periods

4. 2. 3. 1. European Community Law Regarding Breaks, Daily and Weekly Rest Periods

According to Article 4 of the Directive 2003/88/EC,[430] Member States have the obligation to "take measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break".[431] The details, including duration and the

[425] Staff Regulations, *supra* note 11, Article 55, para. 1. This Article has been amended by Regulation (Euratom, ECSC, EEC) No 1369/72 of the Council of 27 June 1972, Regulation (Euratom, ECSC, EEC) No 1473/72 of the Council of 30 June 1972 and last by Regulation (Euratom, ECSC, EEC) No 1601/75 of the Council of 24 June 1975.
[426] *Ibid.*, Article 55, para. 2.
[427] *Ibid.*,Article 55, para. 3.
[428] *Ibid.*, Article 56 (b), para. 1. In accordance 1 with Article 56b, para 2, the categories of officials entitled to such allowances, the conditions for granting the allowances and also the rates thereof are laid down in a separate document, namely in Council Regulation (EEC, EURATOM, ECSC) No 495/77, *available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1977R0495:20061223:EN:PDF (last visited 13 April 2009).
[429] As laid down in Article 2, Point 1 of the Directive 2003/88/EC, *supra* note 394.
[430] Directive 2003/88/EC, *supra* note 394.
[431] *Ibid.*, Article 4.

terms on which the break is granted, are to be laid down in collective agreements or agreements between the two sides of industry or, if failing that, by national legislation.[432]

Article 3 of the Directive states that the "Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period".[433] Furthermore, regarding the weekly rest, the Member States must "take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3".[434] Moreover, "if the objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied".[435]

4. 2. 3. 2. Staff Regulations' Provisions on Breaks, Daily and Weekly rest Periods

As far as the EU civil servants are concerned, there are no provisions in the Staff Regulations regulating their right to breaks, or daily or weekly rests.

4. 2. 4. Overtime, Shift and Night Work

4. 2. 4. 1. Overtime

4. 2. 4. 1. 1. European Community Law Regarding Overtime

As stated in Article 2, Point 1 of the Directive 2003/88/EC, the allowed amount of overtime depends on the regular working time, since together they must not exceed the prescribed 48 hours' weekly maximum.[436] The Member States do, however, have an option to lay down reference periods, provided that these do not exceed four months, for the application of the maximum weekly working time.[437] Consequently, on a shorter basis

[432] *Ibid.*
[433] *Ibid.*, Article 3.
[434] *Ibid.*, Article 5.
[435] *Ibid.*
[436] *Ibid.*, Article 6, para. 2 (b).
[437] *Ibid.*, Article 16, Point a.

overtime is not prohibited, as long as the reference-period based average satisfies the maximum weekly working time criterion laid down in the Directive.

4. 2. 4. 1. 2. Staff Regulations' Provisions Regarding Overtime

The Staff Regulations state that "an official may not be required to work overtime except in cases of urgency or exceptional pressure of work".[438] The maximum overtime which an official may be asked to work is set at 150 hours in any six months. Whether an official has a right to a compensation or remuneration depends on the administrators' (AD) or assistants' (AST) function group to which they belong; but generally speaking, only lower ranking civil servants are entitled to a compensation or remuneration when obliged to work overtime.[439]

4. 2. 4. 2. Shift Work and Night Work

4. 2. 4. 2. 1. European Community Law on Shift Work and Night Work

[438] Staff Regulations, *supra* note 11, Article 56, Para. 1. This provision of the Staff Regulations was amended by Regulation (Euratom, ECSC, EEC) No 1473/72 (OJ L 160, 16.7.1972, p. 1), which added the 150 hours limit.

[439] Staff Regulations, *supra* note 11, Article 56, Paras. 2 and 3 go as follows: "Overtime worked by officials in function group AD, and in function group AST 5 to 11 shall carry no right to compensation or remuneration. As provided in Annex VI, overtime worked by officials in grade AST 1 to AST 4 shall entitle them either to compensatory leave or to remuneration where requirements of the service do not allow compensatory leave during the month following that in which the overtime was worked." These two paragraphs were last amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, which amended the names of the function groups.
See also Annex VI, Article 1 of the Staff Regulations: "Within the limits laid down in Article 56 of the Staff Regulations, overtime worked by an official in grade AST 1 to AST 4 shall entitle him to compensatory leave or to remuneration as follows:
(a) For each hour of overtime, he shall be entitled to one hour and a half off as compensatory leave; if the hour of overtime is worked between 2200 hours and 0700 hours or on a Sunday or on a public holiday, the entitlement to compensatory leave shall be two hours off; in the granting of compensatory leave, account shall be taken of the requirements of the service and the preference of the official concerned.
(b) Where the requirements of the service do not permit compensatory leave to be taken during the month following that during which the overtime was worked, the appointing authority shall authorise remuneration for uncompensated hours of overtime at the rate of 0·56 % of the monthly basic salary for each hour of overtime on the basis set out in subparagraph (a).
(c) To qualify for compensatory leave or remuneration for one hour's overtime, the extra time worked must have been more than thirty minutes''.

The level of safety and the protection of health of the night and shift workers must be adapted to the nature of their work.[440] Therefore, the Directive 2003/88/EC[441] sets forth a few provisions dealing specifically with shift and night work. It defines shift work as:

> "... any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks".[442]

In this context, "shift worker" means "any worker whose work schedule is part of shift work".[443] The definition of a 'night worker' is, according to the Directive, twofold: on one hand, it refers to "any worker, who, during night time, works at least three hours of his daily working time as a normal course";[444] and on the other hand, the definition includes "any worker who is likely during night time to work a certain proportion of his annual working time".[445] The definition of 'night time' is laid down in the Directive as well; it refers to "any period of not less than seven hours, as defined by national law, and which must include, in any case, the period between midnight and 5.00".[446]

The Directive puts the Member States under the obligation to take the necessary measures with regards to the length of the night work to ensure both that "normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period",[447] and also that "night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work".[448] The reference period for calculation of this average occurs after consultation of the two sides of industry or by collective agreements

[440] *See* Directive 2003/88/EC, *supra* note 394, Preamble, Recital 10.
[441] Directive 2003/88/EC, *supra* note 394.
[442] *Ibid.*, Article 2, Point 5.
[443] *Ibid.*, Article 2, Point 6.
[444] *Ibid.*, Article 2, Point 4.
[445] *Ibid.*, Article 2, Point 4: "As defined at the choice of the Member State concerned: (i) by national legislation, following consultation with the two sides of industry; or (ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level."
[446] *Ibid.*, Article 2, Point 3.
[447] *Ibid.*, Article 8 (a).
[448] *Ibid.*, Article 8 (b).

or agreements concluded between the two sides of industry at national or regional level. [449] It is obligatory for the Member States to ensure that the night workers are provided with regular free health assessments;[450] and they are obliged to take all the necessary measures to ensure that the health and safety protection of the night and shift workers is appropriate to the nature of their work, and that they have at all times at their disposal the relevant appropriate prevention services or facilities, equivalent to those applicable to other workers.[451]

4. 2. 4. 2. 2. Staff Regulations' Provisions on Shift Work and Night Work

Regarding the shift work done by the EU employees, the Staff Regulations state that such civil servants are, when expected to work regularly at night, on Saturdays, Sundays or public holidays, "entitled to special allowances when doing shift work which is required by the institution because of the exigencies of the service or safety rules and which is regarded by it as a regular and permanent feature".[452] An additional requirement set forth by the Staff Regulations is that "the normal working hours of an official on shiftwork must not exceed the annual total of normal working hours [sic]".[453]

4. 2. 4. 2. 3. Interim Conclusion

The night work and shift work are more precisely defined and the matter is regulated in more detail on the European community level. Both bodies of law do however set a maximum amount of night or shift work. The EC law provides for the average of 8 hours in any 24-hour period as a limit which must not be exceeded,[454] therefore leaving the Member States with the discretion to determine the reference period for the calculation at

[449] *Ibid.*, Article 16 (c).
[450] *Ibid.*, Article 9.
[451] *Ibid.*, Article 12.
[452] Staff Regulations, *supra* note 11, Article 56a (1). In para. 2 of the same Article, it is stated that "acting on a proposal from the Commission submitted after consulting the Staff Regulations Committee, the Council shall determine the categories of officials entitled to such allowances, and the rates and conditions thereof".
[453] *Ibid.*, Article 56 a, para. 3.
[454] Directive 2003/88/EC, *supra* note 394, Article 8 (a).

a national level.[455] The Staff Regulations, on the other hand, set the annual total number of normal working hours as the maximum limit for the normal working hours of the official on shift work.[456] The difference in the regulation lies in the additional provisions dedicated specifically to the protection of health and safety of the night and shift workers (such as obligatory free health assessment, necessary measures for protection of health and safety to be taken), which are incorporated in the Directive 2003/88/EC[457] but not in the Staff Regulations.[458]

4. 2. 5. Part Time Work

4. 2. 5. 1. European Community Law on Part Time Work

The provisions regarding the part-time work, applicable to the workers in the European Union, are enacted in a separate Directive, namely Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.[459] The Framework Agreement sets out the general principles and minimum requirements relating to the part-time work[460] and its purpose is the elimination of the discrimination against the part-time workers as well as the promotion of the flexible organisation of working time.[461] It defines the "part-time worker" as "an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker".[462]

---

[455] *Ibid.*, Article 16 (c).
[456] Staff Regulations, *supra* note 11, Article 56a (3).
[457] Directive 2003/88/EC, *supra* note 394.
[458] Staff Regulations, *supra* note 11. It must be noted, however, that under Article 59 of the Staff Regulations, all the officials of the EU (and not specifically those performing night or shift work) are subject to obligatory annual medical check-up by the institution's medical officer or by a medical practitioner chosen by them.
[459] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC with Annex : Framework agreement on part-time work, *available at*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0081:EN:HTML (last visited 13 April 2009).
[460] Framework Agreement, *supra* note 459, Preamble.
[461] *Ibid.*, Clause 1.
[462] *Ibid.*, Clause 2, Pt. 1.

4. 2. 5. 2. Staff Regulations' Provisions on Part Time Work

According to the Staff Regulations, the authorisation to work part time may be granted upon the official's request.[463] The official is entitled to authorisation in certain cases related to family life, further training or gradual adjustment to the retirement.[464] In these circumstances, either the option to refuse the authorisations of request is subject to stricter conditions or the period of the part time work itself is limited by the Staff Regulations.[465]

What is specific for the Staff Regulations is that they make a distinction between the part-time work as described above, and half-time work as regulated in Article 55b.[466] The reason behind the half-time work is to provide the officials with the opportunity of job-sharing.[467] This possibility is limited by the official's post, which must be appropriate for such purpose; but once authorised, the right to work half-time must generally not be limited in time.[468]

4. 2. 5. 3. Interim Conclusion

Both the EC law and the Staff Regulations offer a possibility of part time work. With respect to half time work, however, considering that no such concept is included in the provisions of the Directive 97/81/EC,[469] it can be noted that in this respect, the Staff Regulations even exceed the protection afforded by the European Community legislation.

---

[463] Staff Regulations, *supra* note 11, Article 55a, para. 1. This Article was last amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, therefore shortly after the Directive 2003/88/EC.

[464] *Ibid.*, Article 55a, para. 2.

[465] *See* Staff Regulations, *supra* note 11, Article 55 (a), para. 2: "Where part-time is requested in order to take part in further training, or as of the age of 55, the Appointing Authority may refuse authorisation or postpone its date of effect *only in exceptional circumstances and for overriding service-related reasons*. Where such entitlement to authorisation is exercised to care for a seriously ill or disabled spouse, relative in the ascending line, relative in the descending line, brother or sister, or to take part in further training, *the total of all such periods shall not exceed five years over the official's career*."

[466] *Ibid.*, Article 55b, para. 1. This Article was last amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 .

[467] *Ibid.*

[468] According to Article 55b, the authorisation may be withdrawn by the Appointing Authority in the interests of the service giving the official six months' notice, or on application of the official concerned and giving at least six months' notice.

[469] Directive 97/81/EC, *supra* note 459.

4. 2. 6. Interim Conclusion

The EC legislation and the Staff Regulations deal with certain aspects of the working time with a different approach. The first difference appears already in defining the maximum weekly working time. Contrary to the EC legislation, which limits the maximum working hours and includes in this scope also the overtime[470] to protect the workers in the EU, the Staff regulations put stress on the official's duty to be at the disposal of the organisation at all times,[471] adding only after that that the normal working hours are to be determined by the appointing authority.[472] With regards to the breaks, daily and weekly rests, no such right is explicitly afforded to the EU civil servants.

The regulation of night and shift work in EC law focuses on providing the necessary protection of workers in the Member States; whereas with regards to the civil servants, the approach seems to be more lenient, providing the officials with the right to special allowances and setting the permitted yearly limit of shift work.

On the issue of part time work, which is regulated both under the EC legislation and the Staff Regulations, the latter offers an additional opportunity for the EU civil servants, which is not provided for within the scope of the Directive 2003/88/EC, namely the possibility to work half- time in the form of job sharing.[473]

[470] Directive 2003/88/EC, *supra* note 394, Article 6.
[471] Staff Regulations, *supra* note 11, Article 55, para. 1. It must be noted that this requirement can hardly be regarded as a peculiarity of the Staff Regulations, on the contrary, it is a general characteristic of the system of civil service.
[472] *Ibid.*, Article 55, para. 2.
[473] *Ibid.*, Article 55 (b), para. 1.

4. 3. Functional Organisation of Work: Maternity and paternity leave 96/34/EC, Special directive for United Kingdom 97/75/EC

The entitlement for parental leave is covered by EC Directive 96/34/EC,[474] which has the purpose of putting the annexed Framework Agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations (Unice, CEEP and the ETUC) into effect.[475] This Directive is applicable to all Member States with the exception to United Kingdom of Great Britain and Northern Ireland, where Directive 97/75/EC is applicable[476] without prejudice to Article 2 of the Directive 96/34/EC.[477] The only difference is the date for implementation.

The main section of the consolidated version of the Staff Regulations dealing with the parental leave is Chapter 2, Section 6, Article 42a, and the main body of EU legislation on the same topic is the Council Directive 96/34/EC of 3 June 1996. [478]

The aim of this Section is to compare the Staff Regulations with the Council Directive in order to find out whether EU civil servants are being treated equally under the Staff Regulations as other EU employees under the Council Directive. [479]

---

[474] Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31996L0034&model=guichett (last visited 13 April 2009).

[475] *Ibid.*, Article 1.

[476] Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31997L0075&model=guichett (last visited 13 April 2009).

[477] *Ibid.*, Article 2: 'The following paragraph shall be inserted in Article 2 of Directive 96/34/EC: " As regards the United Kingdom of Great Britain and Northern Ireland, the date of 3 June 1998 in paragraph 1 shall be replaced by 15 December 1999. "

[478] Council Directive 96/34/EC, *supra* note 474.

[479] *Ibid.*, Annex, Clause 1: Purpose and Scope 1: "all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State".

4. 3. 1. European Community Law on Parental Leave

The Council Directive 96/34/EC applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State.[480] As far as parental leave is concerned, under Council Directive 96/34/EC EU workers are granted leave, on non-transferable basis.[481] According to the Council Directive, men and women workers have an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months until the child is eight years old.[482] EU legislation decides whether parental leave is granted on a full-time or part-time basis, in a piecemeal way or in the form of a time-credit system.[483] The remuneration during parental leave is left to be determined by domestic legislation of the Member States.

EU workers keep their rights which they have already acquired up until the start of the period of parental leave. Those rights shall be maintained as they remain until the end of the parental leave period. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply.[484] For EU workers this involves, "all matters relating to social security in relation to this agreement are for consideration and determination by Member States according to national law, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care."[485] At the end of the parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.[486]

[480] *Ibid.*, Annex, Clause 1: Purpose and Scope 1.
[481] *Ibid.*, Annex, Clause 2 (2).
[482] *Ibid.*, Annex, Clause 2 (1).
[483] *Ibid.*, Annex, Clause 2 (3) (a).
[484] *Ibid.*, Annex , Clause 2 (6).
[485] *Ibid.*, Clause 2 (8)
[486] *Ibid.*, Annex, Clause 2. 5.

4. 3. 2. Staff Regulations' Provisions on Parental Leave

In comparison, the Staff Regulations do not address transferability of parental leave. Officials of EU institutions[487] are entitled to a maximum of six months of parental leave which is to be taken during the first twelve years after the birth or adoption of the child.[488] The officials of the EU institutions are entitled to their parental leave without their basic salary; instead they shall receive EUR 822, 06 or 50 % of such sum if on half-time leave but may not engage in any other gainful employment.[489] During parental leave, the official's membership of the social security scheme shall continue; the acquisition of pension rights, dependent child allowance and education allowance shall be maintained. [490] Furthermore, EU civil servants enjoy the full contribution to the social security scheme which shall be borne by the institution and calculated on the basis of the basic salary of the official.[491] An EU civil servant shall retain his or her post, and shall continue to be entitled to advancement or promotion in grade.[492]

4. 3. 3. Interim Conclusion

In general, it is possible to say that the Staff Regulations by their nature are more detailed than EC legislation concerning parental leave. It must be noted that this area is largely left to the Member States to regulate. This means that differing protection exists in different Member States. Nevertheless, as regards the EC provisions outlined above, it appears that EU Civil Servants' entitlements in many cases exceed the requirements imposed by the EC legislation.

---

[487] The Staff Regulations apply to any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Communities by an instrument issued by the Appointing Authority of that institution. (Staff Regulations, *supra* note 11, Article 1a, para. 1) This definition in paragraph 1 shall also apply to persons appointed by Community bodies to whom these Staff Regulations apply under the Community acts establishing them (hereinafter 'agencies'). Any references to 'institutions' in these Staff Regulations shall apply to agencies, save as otherwise provided in these Staff Regulations." (Article 1a, para. 2.)

[488] Staff Regulations, *supra* note 11, Section 6, Article 42a on Parental Leave.

[489] Amended by Council Regulation (EC, Euratom) No 420/2008 of 14 May 2008 at 15.5.2008

[490] *Ibid.*

[491] *Ibid.*

[492] *Ibid.*

4. 4. Functional Organisation of Work: Annual Leave

4. 4. 1. European Community Law and its Application in the Staff Regulations

The general right to take annual leave, which applies to all employees regardless of their contracts, is regulated by Article 7 of the Organisation of Working Time Directive 2003/88/EC.[493] The basis of this legal principle falls within the ambit of "adequate rest periods".[494] Article 7(1)[495] provides that "every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice".[496] Further to this, Article 22 (2) of the same Directive sets out permissible differing treatment towards those who are in the transitional period which cannot exceed three years. This provides that these workers are entitled to three weeks paid annual leave.[497]

The Staff Regulations differentiate between transitional workers[498] and permanent staff[499] in Annex V Article 2.[500] This provides that annual leave can only be permitted in the initial three months of employment if the circumstances are compelling.[501] For all other employees, Article 57 sets out the minimum number of annual leave days to be twenty-four.[502] This same provision is to apply to temporary workers and contract workers by

[493] Directive 2003/88, *supra* note 394.
[494] *Ibid.*, Preamble, Recital 5.
[495] *Ibid.*, Article 7 (1).
[496] *Ibid.*
[497] *Ibid.*, Article 22 (2): "Member States shall have the option, as regards the application of Article 7, of making use of a transitional period of not more than three years from 23 November 1996, provided that during that transitional period: (a) every worker receives three weeks' paid annual leave in accordance with the conditions for the entitlement to, and granting of, such leave laid down by national legislation and/or practice"
[498] Those who are in their first three months of employment.
[499] Those who have a permanent employment contract.
[500] Staff Regulations, *supra* note 11, Annex V, Article 2. This was part of the original Staff Regulations: 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 45, 14.6.1962, p. 1385).
[501] *Ibid.*, Annex V Article 2: "…An official entering the service shall be granted annual leave only after completing three months' duty; leave may be approved earlier than this in exceptional cases for reasons duly substantiated."
[502] *Ibid.*, Article 57: "Officials shall be entitled to annual leave of not less than twenty-four working days nor more than thirty working days per calendar year, in accordance with rules, to be laid down by common accord of the institutions of the Communities after consulting the Staff Regulations Committee." This was

analogy.[503] Article 1 of Annex V states that the leave is to be calculated by two working days per completed month of service in the event that an official does not complete a full year, i.e. the year in which he or she commences or ceases employment.[504] Both of these provisions conform to the standards in the Organisation of Working Time Directive.[505] This is despite the fact that the internal functioning of the EU institutions is governed by the Staff Regulations and not by EC law.[506]

4. 4. 2. Restriction on "Carry-Over Days" as Provided in the Staff Regulations

A point that EC law does not elaborate upon is the possibility to carry over unused annual leave days from one year to the next. This is covered in the Staff Regulations Annex V Article 4, according to which the amount of permitted "carry over days" is a maximum of twelve, unless the reason for the carry over is the requirement of service.[507] The Civil Servants' Tribunal judges have held that sick leave cannot be included with a view to increasing the possible number of "carry-over days".[508] However, the Staff Regulations

---

part of the original Staff Regulations: 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 45, 14.6.1962, p. 1385).

[503] *Ibid.*, Conditions of Employment of other servants of the European Communities; Temporary Workers, Chapter 4, Working Conditions, Article 16: "Articles 55 to 61 of the Staff Regulations, concerning hours of work, overtime, shiftwork, standby duty at place of work or at home, leave and public holidays, shall apply by analogy [sic]."; Contract Workers; Chapter, Working Conditions, Article 91: "Articles 16 to 18 are to apply by analogy".

[504] *Ibid.*, Annex V Article 1: "In the year in which an official enters or leaves the service, he shall be entitled to two working days' leave per complete month of service, to two working days for an incomplete month consisting of more than fifteen days and to one working day for an incomplete month of fifteen days or less." This was part of the original Staff Regulations: 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 45, 14.6.1962, p. 1385).

[505] Directive 2003/88/EC, *supra* note 394.

[506] *See* Section 1. 1. for a further analysis of the relationship between EC law and the EU Institutions.

[507] Staff Regulations, *supra* note 11, Annex V Article 4: "Where an official, for reasons other than the requirement of the service, has not used up all his annual leave before the end of the calendar year, the amount of leave which may be carried over to the following year shall not exceed twelve days…" This was part of the original Staff Regulations: 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 45, 14.6.1962, p. 1385).

[508] Case T-80/04, Castets v Commission [2005] ECR - Staff Cases I-A-00161, II-00729, *available at:* http://eur-lex.europa.eu/SuiteJurisprudence.do?T1=V100&T3=V1&RechType=RECH_jurisprudence&Submit=Search (last visited 13 April 2009); Case T-368/04, Verheyden v Commission [2007] ECR 00000, *available at:* http://eur-lex.europa.eu/SuiteJurisprudence.do?T1=V100&T3=V1&RechType=RECH_jurisprudence&Submit=Search (last visited 13 April 2009). *See*

do provide that if an official contracts an illness during annual leave, his or her annual leave can be extended for the duration of his or her incapacity.[509]

4. 4. 3. Monetary Payment for Annual Leave not used prior to Termination of Employment.

The Organisation of Working Time Directive provides that "the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated".[510] The Staff Regulations include this provision with specifics as to the money to be given in Annex V Article 4 of the Staff Regulations.[511]

4. 4. 4. Interim Conclusion

In sum, annual leave provisions laid down in the Working Time Directive have been included in the Staff Regulations and they apply to all employees, regardless of their specific employment contracts.[512] A noteworthy difference is that the Staff Regulations include a supplementary regulation that the carrying over of annual leave days from one year to the next is restricted.

Section 4. 5. for further analysis of sick leave.

[509] Staff Regulations, *supra* note 11, Annex V Article 3: "If, during annual leave, an official contracts an illness which would have prevented him from attending for duty if he had not been on leave, his annual leave shall be extended by the duration of his incapacity, subject to production of a medical certificate." This was part of the original Staff Regulations: 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 45, 14.6.1962, p. 1385).

[510] Directive 2003/88, *supra* note 394, Article 7 (2).

[511] Staff Regulations, *supra* note 11, Annex V Article 4: "…Where an official at the time of leaving the service has not used up all his annual leave, he shall be paid compensation equal to one-thirtieth of his monthly remuneration at the time of leaving the service for each day's leave due to him. A sum calculated in the manner provided for in the preceding paragraph shall be deducted from payment due to an official who at the time of leaving the service has drawn annual leave in excess of his entitlement up to that date."

[512] The relevance here is that there is no differentiation between permanent and contract staff.

4. 5. Sick Leave

4. 5. 1. Introductory remarks

At the time of writing this paper there was no EC legislation dealing with this matter. However, sick leave is dealt with in a great detail in Chapter 2 of the Staff Regulations.[513] This Chapter provides precise guidelines from practical arrangements to the entitlements of sickness benefits.[514] Moreover, there are further subsections referring to different aspects of sickness benefits to which an EU worker is entitled, while on sick leave. Those categories include the amount of days off from work, benefits in cash and benefits in kind of which the worker is entitled.

4. 5. 2. Benefits in Cash

Benefits in cash are normally intended to replace income suspended because of illness.[515] The benefits provided in a specific situation (dependence) can be considered as sickness benefits in cash.[516]

As a general rule, they are provided for in the legislation of the country where the EU worker is insured, regardless of the country in which the worker is resident. Domestic legislation also provides for the amount and duration of this cash benefit and, in general, they will be directly provided by the institution with which a worker is insured.[517]

---

[513] Staff Regulations, *supra* note 11, Article 59. The Article was amended last by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004.
[514] *Ibid*.
[515] European Commission, Your Europe, Citizens, Living in Europe: Social security, Sickness and maternity leave, *available at:* http://ec.europa.eu/youreurope/nav/en/citizens/living/social-security/sickness/index_en.html (last visited 13 April 2009).
[516] *Ibid.*
[517] *Ibid.*, Benefits in cash, *available at:* http://ec.europa.eu/youreurope/nav/en/citizens/living/social-security/sickness/index_en.html#26_3 (last visited 13 April 2009).

4. 5. 3. Sickness Benefits in Kind

Sickness benefits in kind include the direct payments to reimburse the cost of medical and dental care, medication and hospital stays.[518] As a general rule, they are provided in application of the legislation from worker's country of residence or temporary stay, if worker was insured in that country. This could give rise to a situation that is more or less favourable than that provided under the legislation where the worker is in fact insured.

Staff regulations deal with this issue extensively in the system of pensions and system of insurances provided by the EU organisations.

4. 5. 4. Interim Conclusion

It is possible to conclude that the vast majority of rules regarding this topic are left upon consideration of Member States. Staff Regulations, on the other hand, provide very detailed and extensive attention to this area. As a result, the apparent lack of EC legislation on this subject matter makes it impossible to undertake a comparative analysis.

4. 6. The Renewal of Fixed-Term Contracts in the Functional Organisation of Work

4. 6. 1. European Community Law Governing the Renewal of Contracts

4. 6. 1. 1. European Community Law Governing Fixed-Term Contract Workers

The EC legislation governing fixed-term contract workers[519] is the Council Directive 1999/70/EC. This Directive sets out the general principles and minimum requirements for fixed-term employment contracts and employment relationships. The Directive applies to

[518]Sickness and maternity leave, *supra* note 515.

[519] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *available at:* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31999L0070&model=guichett (last visited 13 April 2009), Annex, Clause 3: "…a person having an employment contract or a relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event".

"fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practise in each member state."[520] The aim is to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.[521] It binds the Member States as to the result to be achieved, whilst leaving them the choice of form and methods.[522] This directive prescribes measures in accordance with the principles of subsidiarity[523] and proportionality[524] as set out in Article 5 of the EC Treaty.[525] This directive limits itself to the minimum standard required for the attainment of those objectives and does not go beyond what is necessary for that purpose.[526]

There are certain exceptions which this directive does not cover. The Preamble to the directive makes it clear that the "agreement applies to fixed term workers with the exception of those placed by a temporary work agency at the disposition of a user enterprise".[527] Furthermore, Member States, after consultation with the national social partners, can exclude, first, initial vocational training relationships and apprenticeship schemes and, second, employment contracts and relationships which have been concluded within the framework of a specific public or publicly supported training,

[520] *Ibid.*, Annex, Clause 2.
[521] *Ibid.*, Preamble, Recital 14.
[522] *Ibid.*, Preamble, Recital 15.
[523] This principle specifies that in areas that are not within the Community's exclusive powers the Community shall only take action where objectives can best be attained by action at Community rather than at national level. *See* EUROPA, Summaries of Legislation, Treaty of Maastricht on European Union, *available at:* http://europa.eu/scadplus/treaties/maastricht_en.htm#SUBSIDIARITY (last visited 13 April 2009).
[524] Under this rule, the institutions' involvement must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the extent of the action must be in keeping with the aim pursued. This means that when various forms of intervention are available to the Union, it must, where the effect is the same, opt for the approach which leaves the greatest freedom to the Member States and individuals. *See EUROPA*, Glossary, *available at:* http://europa.eu/scadplus/glossary/proportionality_en.htm (last visited 13 April 2009).
[525] EC Treaty, *supra* note 12, Article 5: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."
[526] Directive 1999/70/EC, *supra* note 519, Preamble, Recital 16.
[527] *Ibid.*,, Preamble, para. 4.

integration and vocational retraining programme.[528] Therefore, the State is able to exempt itself and its contractors entirely where projects are linked with the employability and adaptability criteria which underpin the European Employment Strategy.[529]

The directive contains three main rights for fixed term workers. First, and consistent with the principle of non-discrimination, it provides that in respect of employment conditions, fixed term workers are not to be treated in a less favourable manner than comparable permanent workers solely because they have a fixed term contract or relationship unless justified on objective grounds.[530] Where appropriate, the principle of *pro rata temporis* applies.[531] The term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.[532] Where there is no comparable permanent worker in the establishment, the comparison is to be made to the applicable collective agreement, or where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.[533] The arrangements for the application of Clause 4 (1)[534] are to be defined by the Member States after consultation with the Social Partners, and/or the Social Partners, having regard to Community law, national law, collective agreements and practice.[535] Additionally, Clause 4 (4)[536] provides that the: "period of service qualifications relating to particular conditions of employment are to be the same for fixed term workers and for permanent workers except where different length of service qualifications are justified on objective grounds."

Second, another source of protection provided for by the Directive[537] concerns the prevention of abuse of fixed term contracts. The idea is to ban the abuse of number of

[528] *Ibid.*, Annex, Clause 2 (2).
[529] Kenner, J., *EU Employment Law, From Rome to Amsterdam and Beyond*, Hart Publishing, 2003, p. 287
[530] Directive 1999/70/EC, *supra* note 519, Annex, Clause 4 (1).
[531] *Ibid.*, Annex, Clause 4 (2).
[532] *Ibid.*, Annex, Clause 3 (2).
[533] *Ibid.*, Annex, Clause 3 (2), para. 2.
[534] *Ibid.*, Annex, Clause 4 (1): "In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds."
[535] *Ibid.*, Annex, Clause 4 (3).
[536] *Ibid.*, Annex, Clause 4 (4): Principle of non-discrimination.
[537] Directive 1999/70/EC, *supra* note 519.

renewals of fixed term contracts in countries which did not have any limits on the number of occasions on which fixed term contracts could be renewed.[538] Clause 5 (1)[539] provides that:

> "To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
> (a) objective reasons justifying the renewal of such contracts or relationships;
> (b) the maximum total duration of successive fixed-term employment contracts or relationships;[540]
> (c) the number of renewals of such contracts or relationships."

There is no definition of "abuse" in this context, although such workers are often placed in a vulnerable position under national law.[541] Furthermore, courts appear to be reluctant to intervene in matters concerning construction and termination of the contract of employment or employment relationship under national law.[542]

Furthermore, in the Clause 5 (1) it says that *one or more* measures listed in this clause should be introduced. This is very flexible provision. In case only measure 5 (1) (b) would be adopted, fixed-term contracts would be allowed to be renewed for many years without limiting the number of renewals or providing for objective justification.

[538] Barnard, C., *supra* note 126, p. 482.
[539] Directive 1999/70/EC, *supra* note 519, Annex, Clause 5 (1): Measures to prevent abuse.
[540] Member States after consultation with the Social Partners, and/or the Social Partners, shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships: a) shall be regarded as ´successive´; b) shall be deemed to be contracts or relationships of an indefinite duration (Clause 5 (2)). *See* Barnard, C., *supra* note 127, p. 481.
[541] Kenner, J., *supra* note 529, p. 288.
[542] In the Case C-438/99, Jiménez Melgar, *supra* note 354, non-renewal of the contract of a pregnant worker who had been employed under successive fixed-term contracts was deemed not to be a "dismissal" for the purposes of the protective provisions in Article 10(1) of the Directive 92/85/EEC (*see supra* note 327). In this case, however, there still might be a violation of the Equal Treatment Directive, but it is not sure whether such treatment would amount to "abuse" under the Fixed-term Work Directive and what responsibility, if any, would fall on the state to take preventive action. Clause 5 of the Fixed-term directive does little to moderate any doubts that this Directive would be of limited use in such circumstances. *See* Kenner,J., *supra* note 529, p. 288. *See also* Section 3.3.1.2. of this report.

Therefore, the extent to which the abuse is prevented is almost entirely dependent upon the approach taken by Member States.[543] As Kenner makes reference to Murray's note, Clause 5 amounts to little more than a platform for national bargaining around loosely defined terms.[544]

The issue of Clause 5 has been addressed in the Adeneler case,[545] which established that the concept of objective reasons required recourse to fixed-term work agreements to be justified "by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out."[546] The mere fact that the use of fixed contracts was provided for in national law could not be an objective reason. Furthermore, the Court held that a national rule, which did not deem fixed term contracts that were separated from one another by a minimum period of 20 working days to be successive, was not compatible with the Fixed-Term Working Directive.[547]

The third right guaranteed for fixed-term contract workers by the directive[548] is related to information. In Clause 6 (1) it is mentioned that the employer has to inform fixed term workers about "vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers. Such information may be provided by way of a general announcement at a suitable place in the undertaking or establishment."[549] Additionally, Clause 6 (2) says that "as far as possible, employers should facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility."[550] Furthermore, according to Clause 7 (1) "fixed-term workers shall be taken into consideration in calculating the threshold above which workers' representative bodies provided for in national and Community law may be constituted in

[543] Kenner, J., *supra* note 529, p. 289.
[544] *Ibid*, Murray, (1999, *Industrial Law Journal)* n 525 above at 275 (as in Kenner 2003).
[545] Adeneler and Others, s*upra* note 37. For further information on the case law on fixed-term contract *see infra*, Section 4. 6. 1. 2..
[546] *Ibid.*, para. 75.
[547] *Ibid.*, para. 84.
[548] Directive 1999/70/EC, *supra* note 519.
[549] *Ibid.*, Annex, Clause 6 (1).
[550] *Ibid.*, Annex, Clause 6 (2).

the undertaking as required by national provisions."[551] According to Clause 7 (2), "the arrangements for the application of Clause 7 (1) shall be defined by Member States after consultation with the Social Partners in accordance with national law, collective agreements or practice and having regard to clause 4.1."[552] This is concluded by Clause 7 (3) which states that: "as far as possible, employers should give consideration to the provision of appropriate information to existing workers' representative bodies about fixed-term work in the undertaking."[553]

4. 6. 1. 2. European Community Case Law on Fixed-Term Contracts

The European Court of Justice has on several occasions dealt with the question of fixed-term contracts, providing insight into the scope of the Directive 1999/70/EC[554] and explaining the meaning of its individual provisions. In this Section, certain relevant decisions of the ECJ will be presented.

With regard to the renewal of fixed-term contracts, the ECJ's judgment from 2006 in the Adeneler and Others case[555] provides a good starting point. Firstly, the Court reiterated that the scope of the Framework Agreement[556] extends to both the private and public sectors.[557] However, in a subsequent judgement in the Marrosu and Sardino case,[558] the ECJ held that "the Framework agreement does not preclude, as such, a Member State from treating the misuse of successive fixed-term employment contracts or relationships

[551] *Ibid.*, Annex, Clause 7 (1).
[552] *Ibid.*, Annex, Clause 7 (2). Clause 4 (1) goes as follows: "In respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds."
[553] *Ibid.*, Annex, Clause 7 (3).
[554] Directive 1999/70/EC, *supra* note 519.
[555] Adeneler and Others Case, *supra* note 37.
[556] The Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP, as incorporated in the Directive 1999/70/EC, *supra* note 517.
[557] Adeneler and Others Case, *supra* note 37, paras. 54-57. *See also* the subsequent judgments: Case C-53/04, Marrosu and Sardino [2006] ECR I-07213, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), paras. 40-43; Case C-180/04 Vassallo [2006] ECR I-07251, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), paras. 32-35; Case C-307/05, Del Cerro Alonso [2007] ECR I-07109, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009), para. 25.
[558] Marrosu and Sardino Case, *supra* note 557.

differently according to whether those contracts or relationships were entered into with a private-sector or public-sector employer",[559] as long as effective measures are available in each sector to prevent the misuse of the fixed-term employment contracts.[560]

Furthermore, in Adeneler and Others,[561] the Court then proceeded to address in great detail the issues of "objective reasons"[562] and "successive"[563] contracts. The Court held that the purpose of the Framework agreement is to limit the successive use of fixed-term contracts[564] and to that end, the Directive 1999/70/EC imposes on the Member States the obligation to introduce measures to prevent the misuse of this type of employment relationship.[565] In this respect, the requirement of "objective reasons justifying the renewal of such contracts or relationships" represents such measure.[566] It was established in Adeneler and Others that "a national provision which merely authorises recourse to successive fixed-term employment contracts in a general and abstract manner by a rule of statute or secondary legislation"[567] does not satisfy the criterion of "objective reasons". Instead, "precise and concrete circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term employment contracts"[568] must be provided, and furthermore, "[...] those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those

[559] *Ibid.*, para. 48. The same was later reaffirmed in Vassalo Case, *supra* note 557, para. 33.
[560] *Ibid.*, para. 49.
[561] Adeneler and Others Case, *supra* note 37.
[562] Directive 1999/70/EC, *supra* note 519, Annex, Clause 5 (1), which goes as follows:
"To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
(a) *objective reasons* justifying the renewal of such contracts or relationships;
(b) the maximum total duration of successive fixed-term employment contracts or relationships;
(c) the number of renewals of such contracts or relationships." (*Emphasis added*)
[563] *Ibid.*, Annex, Clause 5 (2) (a) which goes as follows:
"Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:
(a) shall be regarded as "*successive*"
(b) shall be deemed to be contracts or relationships of indefinite duration." (*Emphasis added*).
[564] Adeneler and Others Case, *supra* note 37, para. 63.
[565] *Ibid.*, para. 65.
[566] *Ibid.*, para. 66.
[567] *Ibid.*, para. 71.
[568] *Ibid.*, para. 69.

tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State."[569]

The reasoning behind such specified required justification lies in the risk of misusing the concept of fixed-term contracts to the detriment of the workers if an authorisation of fixed-term contracts in a general and abstract manner was to be allowed.[570]

Regarding the meaning of "successive" fixed-term employment contracts, the Court noted that the Member States have a certain margin of appreciation at determining what is considered to be a successive fixed-term employment contract, but that at the same time, this competence is not unlimited, since the sole objective[571] of the Framework Agreement must not be compromised.[572] In the case at hand, the ECJ held that the provisions under which only fixed-term contracts that are separated by 20 days or less fall under the definition of 'successive' contracts, clearly presents a case where "the object, the aim and the practical effect of the Framework Agreement"[573] is compromised. Therefore such successive contracts are precluded by Clause 5 of the Framework Agreement.[574]

Finally, the ECJ also addressed the issue of the conversion of the fixed-term employment contracts into a contract of indefinite duration.[575] It based its decision on the preliminary observation that; "the Framework Agreement neither lays down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration nor prescribes the precise conditions under which fixed-term employment contracts may be used,"[576] But, at the same time, the Member States are still under the obligation to effectively prevent the misuse of successive fixed-term

[569] *Ibid.*, para. 70.
[570] *Ibid.*, paras. 71 and 72.
[571] *Ibid.*, para 68: ECJ held in the same judgement that »while the Member States … have a margin of appreciation in the matter, the fact remains that they are required to guarantee the result imposed by Community law…"
[572] *Ibid.*, paras. 81 and 82.
[573] *Ibid.*, para. 83.
[574] *Ibid.*, para. 89.
[575] *Ibid.*, paras. 90-105.
[576] *Ibid.*, para. 91.

contracts by adopting at least one of the measures listed in Clause 5 (1) of the Framework agreement,[577] if national law does not already include equivalent measures.[578] Apart from the objective reasons justifying the renewal of such contracts or relationships[579] described above, the Member States can opt for two other measures, namely the maximum total duration of successive fixed-term employment contracts or relationships,[580] or the number of renewals of such contracts or relationships.[581] The question presented to the Court in the Adeneler and Others case[582] was whether the national legislation may prohibit absolutely the conversion of the fixed-term contracts into the contracts of indefinite duration in the public sector. In accordance with its findings described above, the ECJ held that such prohibition does constitute an abuse of fixed-term employment contracts as long as and only if the national law of the Member State does not include any other effective measure to prevent and punish the misuse.[583] Similarly, in Marrosu and Sardino,[584] the Court concluded that

> "the framework agreement must be interpreted as not in principle precluding national legislation which, where there is abuse arising from the use of successive fixed-term employment contracts or relationships by a public-sector employer, precludes their being converted into contracts of indeterminate duration, even though such conversion is provided for in respect of employment contracts and relationships with a private-sector employer, where that legislation includes another effective measure to prevent and, where relevant, punish the abuse of successive fixed-term contracts by a public-sector employer."[585]

Generally, the judgments in the cases subsequent to the Adeneler and Others,[586] namely in Marrosu and Sardino,[587] Vassallo[588] and Del Cerro Alonso,[589] were to a great extent based

[577] Directive 1999/70/EC, *supra* note 519, Annex, Clause 5 (1).
[578] Adeneler and Others Case, *supra* note 37, paras. 92 and 101.
[579] Directive 1999/70/EC, *supra* note 519, Annex, Clause 5 (1) (a).
[580] *Ibid*, Annex, Clause 5 (1) (b).
[581] *Ibid*, Annex, Clause 5 (1) (c).
[582] Adeneler and Others Case, *supra* note 37.
[583] *Ibid.*, para. 105.
[584] Marrosu and Sardino Case, *supra* note 557.
[585] *Ibid.*, para. 57.
[586] Adeneler and Others Case, *supra* note 37.
[587] Marrosu and Sardino Case, *supra* note 557.
[588] Vassallo Case, *supra* note 557.
[589] Del Cerro Alonso Case, *supra* note 557.

on the first one. In the latter case,[590] however, the issue presented to the Court was not the misuse of the fixed-term contracts with regards to their renewal, but rather the difference in treatment and the principle of non-discrimination applicable to the fixed-term contract workers. According to the Directive 1999/70/EC,[591] the difference in treatment of fixed-term workers and comparable permanent workers is only permitted when the different treatment is justified on objective grounds.[592] In explaining the concept of "objective grounds", the Court referred to its decision in Adeneler and Others,[593] and held that by analogy with the term of "objective reasons",[594] relying on a general, abstract national norm as a justified basis for the difference in treatment does not satisfy the criterion of the objective grounds.[595] Instead, the existence of precise and concrete factors is needed to justify the unequal treatment, which itself must correspond to a genuine need, must be appropriate for achieving the objective pursued and must be necessary for that purpose.[596]

Some of the issues addressed in Adeneler and Others[597] and the subsequent judgments, especially in the Del Cerro Alonso case,[598] were further explored in the ECJ Impact case[599] of 2008. The ECJ reiterated its findings from the Adeneler and Others case that the Framework Agreement seeks to limit the successive use of the fixed-term employment contracts, which represent a potential source of abuse to the disadvantage of workers and to that end lays down certain protective provisions, preventing the status of employees from being insecure.[600] It then goes further by saying that such protection would be ineffective if the Member States, acting in their capacity as public employers were allowed to renew contracts for unusually long term in the period between the date which the directive entered into force and the deadline for its transposition.[601] Because of this, such measures which are contrary to the objective pursued by that directive and the

[590] *Ibid.*
[591] Directive 1999/70/EC, *supra* note 519.
[592] *Ibid.*, Annex, Clause 4.
[593] Adeneler and Others Case, *supra* note 37.
[594] *See supra*.
[595] Del Cerro Alonso Case, *supra* note 557, para. 57.
[596] *Ibid.*, para. 57.
[597] Adeneler and Others Case, *supra* note 37.
[598] Del Cerro Alonso Case, *supra* note 557.
[599] Case C-268/06, Impact [2008] ECR I-02483, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009).
[600] *Ibid.*, para. 88. *See also* Adeneler and Others Case, *supra* note 37, para. 63.
[601] *Ibid.*, para. 91.

framework agreement in the period between the deadline for transposing Directive 1999/70 and the date on which it entered into force are prohibited.[602]

The Impact case[603] also dealt extensively with the principle of non-discrimination of fixed-term workers as was ruled upon in the Del Cerro Alonso case.[604] With regards to the principle of non-discrimination as applicable to pay, the Court of Justice in both cases noted that indeed, the establishment of the level of the various constituent parts of the pay of a worker is a matter for the Member States and falls outside the competence of the Community legislature.[605] Nevertheless, the Member States must take into consideration the Community law even when dealing with policy areas in which the EC does not have competence. The national authorities must exercise their discretion in such a way that is compatible with the EC law. Consequently, the principle of non-discrimination of fixed-term workers as laid down in Clause 4 of the Framework agreement[606] must be applied by them when establishing the constituent parts of pay and level of these constituent parts.[607]

From the case law of the ECJ on the fixed-term employment contracts, it can be noted that the Court approached the issue in the light of the purpose of the Framework agreement to improve the quality of the fixed-term workers and to prevent the abuse of successive use of this particular type of employment relationship.[608] As held in the cases Mangold,[609] Adeneler and Others[610] and Impact,[611] the benefit of stable employment constitutes a major element in the protection of workers, whereas only in certain circumstances that fixed-term employment contracts are liable to respond to the needs of both employers and workers.[612] When the fixed-term contracts are nevertheless in use, the Court applies the principle of non-discrimination of the fixed-term workers extensively,

[602] *Ibid.*, para. 92.
[603] Impact Case, *supra* note 599.
[604] Del Cerro Alonso Case, *supra* note 557.
[605] Impact Case, *supra* note 599, para. 129; and Del Cerro Alonso Case, *supra* note 557, paras. 40 and 46.
[606] Directive 1999/70/EC, *supra* note 519, Annex, Clause 4.
[607] Impact Case, *supra* note 599, paras. 129 and 130.
[608] Directive 1999/70/EC, *supra* note 519, Annex, Clause 1.
[609] Case C-144/04, Mangold [2005] ECR I-09981, *available at:* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en (last visited 13 April 2009).
[610] Adeneler and Others Case, *supra* note 37.
[611] Impact, *supra* note 599.
[612] Mangold Case, *supra* note 609, para. 64; Adeneler and Others Case, *supra* note 37, para. 62; Impact Case, *supra* note 599, para. 87.

assuring the purpose of the Framework agreement to improve the quality of fixed-term work. Moreover, in cases of renewal of fixed-term employment contracts the Court recognises the obligation of Member States to ensure effective measures that such renewals do not lead to abuse of successive fixed-term contracts.

4. 6. 2. Applicable Law to EU Civil Servants on a Fixed-Term Contract

The renewal of fixed-term contracts within the European Institutions is governed by the Staff Regulations. This Section will look at contract workers within the meaning of Article 3a (1) of the Staff Regulations section on the Conditions of Employment of other Servants in the Community.[613] These employees are different from the body of staff that are hired for temporary periods of time to cover permanent roles.[614] It can be derived from this definition that fixed-term contract employees should not undertake positions of a permanent nature and that fixed-term contracts should only be used to undertake tasks which are temporary

Within the sphere of fixed-term contract workers this Section will restrict itself to an analysis of the termination and renewal of fixed-term contracts within the EU

[613] Staff Regulations, *supra* note 11, Conditions of Employment of other Servants in the Community; Article 3a (1): "For the purposes of these Conditions of Employment, 'contract staff' means staff not assigned to a post included in the list of posts appended to the section of the budget relating to the institution concerned and engaged for the performance of full-time or part-time duties:
(a) in an institution to carry out manual or administrative support service tasks,
(b) in the agencies referred to in Article 1a(2) of the Staff Regulations,
(c) in other entities inside the European Union created, after consultation of the Staff Regulations Committee, by specific legal act issued by one or more institutions allowing for the use of such staff,
(d) in Representations and Delegations of Community institutions,
(e) in other entities situated outside the European Union."

[614] Staff Regulations, *supra* note 11, Conditions of Employment of other Servants in the Community; Article 2: "For the purposes of these Conditions of Employment, 'temporary staff' means:
(a) staff engaged to fill a post which is included in the list of posts appended to the section of the budget relating to each institution and which the budgetary authorities have classified as temporary;
(b) staff engaged to fill temporarily a permanent post included in the list of posts appended to the section of the budget relating to each institution;
(c) staff, other than officials of the Communities, engaged to assist either a person holding an office provided for in the Treaties establishing the Communities or the Treaty establishing a Single Council and a Single Commission of the European Communities or the elected President of one of the institutions or organs of the Communities, or one of the political groups in the European Parliament or the Committee of the Regions, or a group in the European Economic and Social Committee;
(d) Staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned."

Institutions. Both the Staff Regulations and the current and previous case law will be analysed with an aim to outlining the legal basis of the organisation of fixed-term contracts within the EU Institutions.

4. 6. 2. 1. Termination of a Fixed-Term Contract[615]

Previous case law regarding the termination of a fixed-term contract in the EU Institutions has been based on Article 47 of the Staff Regulations section on Conditions of Employment of Other Servants of the Communities.[616] The sub-topics of such cases will be looked at in this Section, but first it is worth noting that there are differences in the termination procedure for fixed-term contract workers and other categories of employees. The main difference between the termination of fixed-term and indefinite term contracts is that the notice period for employees under an indefinite term contract shall be a minimum of one month for every years service with a minimum of one month and a maximum of ten months.[617] The maximum period is limited to three months for

[615] For the purpose of analysis in this section, termination relates to the termination of the contract when the full period of the contract has not been fulfilled. Much of the case law in this section concerns contracts for an indefinite period, but the principles which apply are the same. The situation where a contract has reached its end will be dealt with in the next section on the renewal of fixed term contracts.

[616] Staff Regulations, *supra* note 11; Conditions of Employment of Other Servants of the Communities; Chapter 9 Termination of Employment; Article 47: "Apart from cessation on death, the employment of temporary staff shall cease:

(b) where the contract is for a fixed period:

(i) on the date stated in the contract;

(ii) at the end of the period of notice specified in the contract giving the servant or the institution the option to terminate earlier. The period of notice shall not be less than one month per year of service, subject to a minimum of one month and a maximum of three months. For temporary staff whose contracts have been renewed the maximum shall be six months. The period of notice shall not, however, commence to run during maternity leave or sick leave, provided such sick leave does not exceed three months. It shall, moreover, be suspended during maternity or sick leave subject to the limits aforesaid. If the institution terminates the contract, the servant shall be entitled to compensation equal to one third of his basic salary for the period between the date when his duties end and the date when his contract expires;

(iii) where the servant no longer satisfies the conditions laid down in Article 12(2), point (a), subject to the possibility of authorising an exception under that provision. Should the exception not be authorised, the period of notice referred to in subpoint (ii) of this point (b) shall apply."

[617] Staff Regulations, *supra* note 11, Conditions of Employment of Other Servants of the Communities; Chapter 9 Termination of Employment; Article 47 (c): "where the contract is for an indefinite period:

(i) at the end of the period of notice stipulated in the contract; the length of the period of notice shall not be less than one month for each completed year of service, subject to a minimum of three months and a maximum of 10 months. The period of notice shall not, however, commence to run during maternity leave or sick leave, provided such sick leave does not exceed three months. It shall, moreover, be suspended during maternity or sick leave subject to the limits aforesaid; or

those under a fixed-term contract.[618] Both forms of contract are subject to the conditions of employment which all temporary members of staff are subject to under Article 12 of the aforementioned section of the Staff Regulations.[619] This sets out the qualifications which are necessary for attainment of a temporary post in the European Institutions. Furthermore, both types of contract worker may have their contracts terminated during or at the end of a probation period or if an employee is not able to resume duties after a period of sick leave.[620] The termination on the grounds that these qualities are no longer present is broader for fixed-term contract workers than the termination of permanent positions as there is a wider variety of methods for finishing a fixed-term contract workers employment in the case of such a change in qualities[621] Permanent employees are subject to a more onerous procedure for the dismissal.[622] The Court of First Instance held in Karatzoglou v European Agency for Reconstruction (EAR)[623] that the reason for this

(ii) where the servant no longer satisfies the conditions laid down in Article 12(2), point (a), subject to the possibility of authorising an exception under that provision. Should the exception not be authorised, the period of notice referred to in subpoint (i) of this point (c) shall apply."

[618] Staff Regulations, *supra* note 11, Article 47 (b) (ii).

[619] Staff Regulations, *supra* note 11, Conditions of Employment of Other Servants of the Communities; Chapter 3 Conditions of Employment; Article 12 (2): "A member of the temporary staff may be engaged only on condition that:
(a) he is a national of one of the Member States of the Communities, unless an exception is authorised by the authority referred to in the first paragraph of Article 6, and enjoys his full rights as a citizen;
(b) he has fulfilled any obligations imposed on him by the laws concerning military service;
(c) he produces the appropriate character references as to his suitability for the performance of his duties;
(c) he is physically fit to perform his duties; and
(e) he produces evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties."

[620] Staff Regulations, *supra* note 11, Conditions of Employment of Other Servants of the Communities; Chapter 9 Termination of Employment; Article 48: "Employment, whether for a fixed or for an indefinite period, may be terminated by the institution without notice:
(a) during or at the end of the probationary period in accordance with Article 14;
(b) if the servant is unable to resume his duties at the end of a period of paid sick leave as provided for in Article 16. In such case, the servant shall receive an allowance equal to this basic salary, plus family allowances at the rate of two days per month of service completed."

[621] Staff Regulations, *supra* note 11, Chapter 4 Termination of Service; Article 47: "Services shall be terminated by: (a) resignation; (b) compulsory resignation; (c) retirement in the interests of the service; (d) dismissal for incompetence; (e) removal from post; (f) retirement; or (g) death."

[622] Staff Regulations, *supra* note 11, Chapter 4 Termination of Service, Articles 48–53. A further analysis of the different termination procedures applicable for different categories of employees under the Staff Regulations will not be dealt with in any more detail here.

[623] Case T-471/04, Karatzoglou v European Agency for Reconstruction (EAR) [2008] ECR 00000, para 36. *Note* that this case relates to the termination of an indefinite term contract. *Also in* Case C-18/91 P V v Parliament [1992] ECR I-3997, para. 39; Case T-256/01, Pyres v Commission [2005] ECR – Staff Cases I-A-23 and II-99, para. 43; Case T-10/02, Girardot v Commission [2004] ECR – Staff Cases I-A-000 and II-0000, para. 72.

difference is that the nature of the duties is temporary. The different procedures will not be dealt with in further detail here but the different questions under which a termination of a contract have been dealt with by the Court of First Instance and the Civil Servant's Tribunal will be analysed.

Firstly, the termination of contracts has previously been questioned on the basis of a failure to state adequate reasons for the termination. In Karatzoglou[624] the Court held that the competent authorities have a broad discretion which '...is recognised by the member of staff at the time of his recruitment' which therefore means that justification of a decision to dismiss is to be found within the contract of employment and the reasons do not have to be stated.[625] In Landgren v ETF,[626] the Court held that reasons must be given. The difference between this case and that of Karatzoglou is that in Karatzoglou, termination of this kind was inherent in the contract of the employee and therefore there was no need for disclosure.[627]

Secondly, the principle of sound administration has been raised to question decisions to terminate a contract. As outlined in case-law concerning the dismissal of contract workers under the Staff Regulations,[628] the administration must take into account all of the possible consequences of its decision when they take a decision concerning them. This should include the interests of the services and the members of staff. However, it must be noted that the administration of an office or operation retains a large discretion in the organisation of its staff.

[624] Karatzoglou Case, *supra* note 623.
[625] *Ibid*, para 35. This followed the previous rulings of Case 25/68, Schertzer v Parliament [1977] ECR 1729, para 39; Case T-45/90, Speybrouck v Parliament [1992] ECR II-33, para 93; and Case T-51/91, Hoyer v Commission [1994] ECR-SC I-A-103 and II-341, para 27.
[626] Case F-1/05, Landgren v ETF [2001] ECR-SC I-A-000 and II-000, para. 61. *Note* that this case relates to an indefinite term contract.
[627] Karatzoglou, *supra* note 623, paras. 35 and 41.
[628] Case T-11/03, Afari v ECB, *supra* note 267, para. 42; Case F-28/06, Sequeira Wandschneider v Commission [2007] ECR-SC I-A-000 and II-000, para. 150; Karatzoglou Case, *supra* note 623, para. 56.

4. 6. 2. 2. Renewal of Fixed-Term Contracts in the Staff Regulations

To avoid abuse of the fixed term contract by employers, Article 85 of the Staff Regulations section on the Conditions of Service for other Servants of the Community outlines the number of times that a fixed-term contract can be renewed[629] and provides for access to training in a third language for those under a fixed-term contract.[630] The very specific renewal criteria limit the maximum period of a fixed-term contract to 5 years. It must be noted that there is no explicit burden on the employer to renew a fixed-term contract once it has been completed and the contract worker "...must have served a probationary period in accordance with Article 84 before renewal of a contract for an indefinite duration".[631] The employers are limited in the amount of time under which a fixed-term contract can last. Therefore if they want to retain an employee, they are obliged to change the contract to one of indefinite duration or to employ them in a permanent capacity.

Currently there are two cases before the Court of First Instance regarding the renewal of fixed term contracts.[632] The Reiner case concerns the requested annulment of a Commission decision to limit the duration of a contract and the Adjemian case concerns a request for the annulment of a decision to refuse to renew fixed-term contracts. The judgments in these cases will clarify the position of fixed-term contract employees in the EU Institutions.[633]

---

[629] Staff Regulations, *supra* note 11, Conditions of Service for other Servants of the Communities; Chapter 4 Special Provisions of the Contract Staff Referred to in Article 3A; Article 85; (1) The contracts of contract staff referred to in Article 3a may be concluded for a fixed period of at least three months and not more than five years. They may be renewed not more than once for a fixed period of not more than five years. The initial contract and the first renewal must be of a total duration of not less than six months for function group I and not less than nine months for the other function groups. Any further renewal shall be for an indefinite period. Periods covered by a contract as a member of the contract staff referred to in Article 3b shall not be counted for the purposes of the conclusion or renewal of contracts under this Article. (2) By way of derogation from the last sentence of the first subparagraph of paragraph 1, the Appointing Authority may decide that only the fourth renewal of a contract for a member of function group I shall be for an indefinite period, provided that the total duration of his engagement for a fixed period does not exceed ten years...

[630] *Ibid*, Article 85 (3): "Contract staff in function group IV shall before renewal of a contract for an indefinite period be required to demonstrate the ability to work in a third language among those referred to in Article 314 of the EC Treaty.The common rules on access to training and the modalities of the assessment mentioned in Article 45 (2) of the Staff Regulations shall apply by analogy."

[631] *Ibid*, Article 85 (4).

[632] Case F-8/08, Reiner v Commission of the European Communities and Case F-134/07, Adjemian e.a v Commission of the European Communities.

[633] *Note* that at the time of writing this report the judgments in these cases had not yet been handed down.

Employees under a fixed-term contract are not subject to the same protection against dismissal as other categories of workers. However, this is explained by the nature of such contracts and their function within the functional organisation of work. This Section outlined the internal regulations of the termination and renewal of fixed term contracts under the Staff Regulations and the previous case-law regarding these provisions. The extent to which the Court will take into consideration EC law which is applicable to Member States will be addressed in the next Section, which will discuss the similarities and the *lacunae* between the EC law and the internal Staff Regulations of the EC Institutions.[634]

4. 6. 3. Interim Conclusion

While a comparative analysis of the Staff Regulations regarding EU Institution employees and the law applicable at an EC level is useful at this point in time[635] a full comparative study will be largely dependent on the outcomes of the Reiner and Adjemian cases. However, one aspect of the comparison which can currently be fully addressed is the obligation upon Member States by EC law to define the maximum total duration of fixed-term contracts[636] and the limit the number of renewals of such contracts[637] in precise and concrete terms.[638] The Staff Regulations are in conformity with the EC obligations in this sense as there are very specific terms on the maximum duration of contracts and the maximum number of renewals.[639]

Under EC law there is a necessity to provide an objective reason for hiring people under successive fixed-term contracts and the obligation that such renewal is appropriate and necessary for the functioning of the workplace.[640] The specificities of the Staff

[634] It must be kept in mind that EC law is not legally applicable to the EC Institutions and any inference of such laws is on a voluntary basis.
[635] April 2009.
[636] Directive 1999/70/EC, *supra* note 519, Annex, Clause 5 (1) (b).
[637] *Ibid.*, Clause 5 (1) (c).
[638] Adeneler and Others Case, *supra* note 37, para. 71.
[639] Staff Regulations, *supra* note 11, Conditions of Service for other Servants of the Communities; Chapter 4 Special Provisions of the Contract Staff Referred to in Article 3A; Article 85 (1) and (2).
[640] Del Cerro Alonso Case, *supra* note 557, para. 57.

Regulations do not provide the background and the justification of such measures; however the upcoming rulings in Reiner and Adjemian will clarify whether the successive use of fixed-term contracts is appropriate to the functioning of the European Commission.

Finally, previous case law on the termination of contracts of EU civil servants held that the reason for differences in treatment was justified as it was inherent in the contract type. [641] The upcoming rulings on the successive use of contracts will address this issue by defining whether such terminations and the use of successive contracts comply with the principles of non-discrimination and prevention of abuse of fixed term contracts.

[641] Karatzoglou Case, *supra* note 623, para. 35.

5. GENERAL CONCLUSIONS

This report has considered the specificities of health and safety regulations governing the EU civil servants, the question of equality regarding employees who necessitate further assistance to undertake their functions and the functional organisation of work. This has all been done in a comparative manner between the Staff Regulations governing the staff of the EU Institutions and the equivalent EC law.

Section 2 of the report compared the specifications of health and safety measures for European Commission employees under the Manual of Building Specifications with the EC law on health and safety in the workplace as outlined in Directive 89/654/EEC. An interesting point which was established from this Manual is that in the introduction to the section on building systems, it is explicitly stated that "installations must be fully compliant with the relevant standards and regulations, in particular the relevant EU directives..." The use of imperative language here leaves no doubt to the fact that Community law governing this area is accepted as the basis within the European Commission. However, the Commission Manual on Building Specifications is not a legal document and any statement therein, even if it appears to be a legal assertion, does not have the force of law. This is further evidenced from its explicit description of itself as a reference point.[642] This is nevertheless of importance as it is evidence that the Commission accepts that there is a high level of protection offered by EC law. On comparison of these documents, the Manual globally provided more specifics as to how health and safety would be protected than comparable EC law. However, as this is only a manual and cannot be and is not a legally binding document, the extent to which these specifications are followed in reality cannot be affirmed in this report.

In Section 3 the issue of equality regarding physical working conditions was addressed. It was established that on a European level, equality is increasingly being viewed as a right. Accordingly, EC law has increasingly provided for equality in the workplace, but primarily regarding disabled people. There is a requirement on an employer to reasonably

[642] Manual of Standard Building Specifications, *supra* note 49, Section A. General, Preamble, p. 4.

accommodate those with disabilities to join the workforce. The test of reasonableness is in monetary terms. Interestingly, with regard to equality in general and the specific provisions on disability, the Staff Regulations have directly incorporated the measures as outlined in EC law. The only difference regarding disability is that the EU Institutions are not part of the European Employment Strategy (EES) and are therefore not encouraged to the same extent to integrate those with disabilities. In comparison to EC law, the treatment of pregnant women and women who have just given birth is largely neglected in the Staff Regulations in respect to discrimination and dismissal. In the Staff Regulations the issue is not regulated while in EC law there is a high level of protection for this category of worker. Finally in this Section it was discovered that the obligation to provide a place to worship for those with religious needs is not enshrined in EC law or the Staff Regulations. Therefore the generally anti-discriminatory provisions which are part of both EC law and the Staff Regulations are the only point of reference.

In Section 4 the functional organisation of work was the basis of the comparative study between EC law and the Staff Regulations. With regard to the organisation of working time, it was found that there is often a different approach by EC legislation and the Staff Regulations but that the ultimate result is generally the same. This is with the notable exception of the right to breaks which is missing from the Staff Regulations but present in EC legislation. On the other hand, the Staff Regulations provide more leniency than EC legislation regarding shift work and night work and they also provide the supplementary possibility of working half-time. The area of parental leave is notably more extensively addressed in the Staff Regulations than EC legislation. An interesting point is that the Staff Regulations do not provide for the protection of pregnant employees. An area where the Staff Regulations are more extensive than EC legislation is the provision of sick leave. There is no regulation of this at an EC level and it is therefore left to the Member States to govern this by national measures. The Staff Regulations however, specify the amount of days which can be taken for sick leave and the possibility of benefits in cash or benefits in kind is provided. Finally, the Staff Regulations organise annual leave differently to EC legislation but they produce the same result.

The last part of Section 4 addressed the renewal of fixed-term contracts within the frame of the functional organisation of work. This is a developing issue within Institutional law regarding the EU Institutions due to the Reiner and Adjemian cases which are currently before the Court of First Instance. The possible scope to use fixed-term contracts within the EU Institutions will be clarified by the judgment of this case which at the time of writing this paper has not yet been handed down.[643] The EU Institutions have specific guidelines regarding the renewal of fixed-term contracts from the Staff Regulations which specifies the maximum duration of successive fixed-term contracts and therefore in this respect are in conformity with EC legislation in this area. The aforementioned cases will clarify whether the EU Institutions are justified in their use of fixed-term contracts and in clarifying the role which the principle of non-discrimination plays in this field.

The research for this report was concluded on 23 April 2009.

[643] April 2009.

6. BIBLIOGRAPHY

- Barnard, C. (2006) *EC Employment Law* 3rd Edition, Oxford: Oxford University Press.
- Blanpain, R. (2006), *European Labour Law*10th Edition, The Hague: Kluwer Law International.
- Brun, N., (2004), 'The New Legal Framework for Equality in the European Union', *The Changing Face of European Labour Law and Social Policy* The Hague: Kluwer Law International.
- Commission Manual on Building Specifications, available at Europa website, Office for infrastructure and logistics in Brussels, Reference Documents. Last visited 3 April 2009: http://ec.europa.eu/oib/pdf/mit2004_en.pdf.
- Commission of the European Communities Brussels, 21 December 2006 C (2006) 6831 Memorandum to the Commission of 21 December 2006 concerning the use of teleworking the Commission services. Adoption of a new "Guidelines for the implementation of teleworking in the European Commission (Memorandum from Mr Kallas).
- Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a proposed Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time, page 3. Last visited 3 April 2009: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0568:FIN:EN:PDF.
- Constantin, S. and Jørgensen, N, (2007) Application of European Community Law to (Staff Members of) The European Patent Organisation, Amsterdam International Law Clinic: Amsterdam.

- Craig, P. And De Búrca G, (2003) *EU Law Texts, Cases and Materials 3rd Edition,* Oxford: Oxford University Press.

- Craig, P. And De Búrca G, (2007) *EU Law Texts, Cases and Materials 4th Edition,* Oxford: Oxford University Press.

- Europa Website, Eur-lex, Council Conclusions on the follow-up to the European Year of People with Disabilities 15512/03. Last visited 3 April 2009: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0738:EN:NOT.

- Europa Website, European Commission, Employment and Social Affairs, Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women, Report on Pregnancy, Maternity, Parental and Paternity Rights, p. 4. Last visited April 7th 2009; http://ec.europa.eu/employment_social/gender_equality/legislation/report_pregnancy.pdf.

- Europa Website, European Commission; Employment, Social Affairs and Equal Opportunities, European Employment Strategy, last visited 3 April 2009 http://ec.europa.eu/social/main.jsp?catId=101&langId=en.

- Europa Website, European Commission, Employment, Social Affairs and Equal Opportunities; The EU Disability Action Plan. Last visited 3 April 2009: http://ec.europa.eu/social/main.jsp?catId=430&langId=en.

- Europa website, European Commission, Office for Infrastructure and Logistics Brussels, Manual of standard building specifications (2004 Edition) Version of 29 June 2004. Last visited 3 April 2009: http://ec.europa.eu/oib/pdf/mit2004_en.pdf.

- Europa Website, European Commission, Your Europe. Citizens, Living in Europe: Social Security, Sickness and maternity leave, last visited April 7th 2009: http://ec.europa.eu/youreurope/nav/en/citizens/living/social-security/sickness/index_en.html.

- Europa Website, Press Office, Communication from the Press RAPID, Memo Questions and Answers – Commission buildings policy. Last visited 3 April 2009: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/341&format=HTML&aged=1&language=EN&guiLanguage=fr.

- Europa website, Treaty of Lisbon, The Treaty at a glance, A Europe of Rights and Values: Last visited 3 April 2009: http://europa.eu/lisbon_treaty/glance/rights_values/index_en.htm.

- Kenner, J., (2003) *EU Employment Law, from Rome to Amsterdam and Beyond*, Oxford: Hart Publishing.

- The EU Lisbon Strategy for Growth and Jobs (Communication from the Commission to the European Council Strategic Report on the renewed Lisbon strategy for growth and jobs: launching the new cycle (2008 – 2010) COM (2007) 803 final) last visited 3 April 2009: http://ec.europa.eu/growthandjobs/index_en.htm.

- Waddington, L. From Rome to Nice in a Wheelchair, The Development of a European Disability Policy, 2006, Groningen: Europa Law Publishing.

- Wells, K. (2003) 'The impact of the Framework Employment Directive on UK Disability Discrimination Law' *Industrial Law Journal*, volume 32.

- Whittle, R., (2002) 'The Framework Directive for Equal Treatment in Employment and Occupation: an analysis from a disability rights perspective', *European Law Review*.

7. TABLE OF LEGISLATION

- **Charter of the Fundamental Rights of the European Union** (2000/C 364/01) Official Journal of the European Communities C 364/1 18.12.2000.
- **Communication from the Commission, Draft, Commission Decision Establishing a Harmonised Policy for Health and Safety at Work for all Commission Staff**.
- **Consolidated version of the Treaty on European Union** - PROTOCOLS - Protocol (No 7) on the privileges and immunities of the European Union, Official Journal 115, 09/05/2008 P. 0266 – 0272.
- **Council Directive 75/117/EEC** of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.
- **Council Directive 76/207/EEC** of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
- **Council Directive 77/576/EEC** of 25 July 1977 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the provision of safety signs at places of work.
- **Council Directive 86/378/EEC** of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.
- **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.
- **Council Directive 89/655/EEC** of 30 November 1989 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- **Council Directive 89/656/EEC** of 30 November 1989 on the minimum health and safety requirements for the use by workers of personal protective equipment

at the workplace (third individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

- **Council Directive 90/269/EEC** of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).
- **Council Directive 90/270/EEC** of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment.
- **Council Directive 92/85/EEC** of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
- **Council Directive 93/104/EC** of 23 November 1993 concerning certain aspects of the organization of working time.
- **Council Directive 96/34/EC** of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
- **Council Directive 97/75/EC** of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
- **Council Directive 97/80/EC** of 15 December 1997 on the burden of proof in cases of discrimination based on sex.
- **Council Directive 97/81/EC** of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.
- **Council Directive 98/24/EC** of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).
- **Council Directive 1999/70/EC** of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

- **Commission Directive 2000/39/EC** of 8 June 2000 establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work.
- **Council Directive 2000/43/EC** of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
- **Council Directive 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- **Directive 2002/44/EC** of the European Parliament and of the Council of 25 June 2002 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) (sixteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) - Joint Statement by the European Parliament and the Council.
- **Directive 2003/10/EC** of the European Parliament and of the Council of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).
- **Directive 2003/18/EC** of the European Parliament and of the Council of 27 March 2003 amending Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work.
- **Directive 2003/88/EC** of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time.
- **Directive 2004/40/EC** of the European Parliament and of the Council of 29 April 2004 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (18th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).

- **Directive 2006/25/EC** of the European Parliament and of the Council of 5 April 2006 on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).
- **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 (recast).
- **Council Regulation** (EC, Euratom) No 420/2008 of 14 May 2008 adjusting with effect from 1 July 2007 the remuneration and pensions of officials and other servants of the European Communities.
- **European Patent Convention**, Protocol on Privileges and Immunities of the European Patent Organisation of 5 October 1973.
- **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 45, 14.6.1962, p. 1385), last amended by Council Regulation (EC, Euratom) No 420/2008 of 14 May 2008 adjusting with effect from 1 July 2007 the remuneration and pensions of officials and other servants of the European Communities.
- **Treaty Establishing the European Community** (25 March 1957) EU Consolidated Treaties, entered into force 1 January 1958.
- **Treaty Establishing the European Community** (consolidated version) - E. Protocol annexed to the Treaties establishing the European Community and the European Atomic Energy Community - Protocol (No 36) on the privileges and immunities of the European Communities (1965) Official Journal C 321 E , 29/12/2006 P. 0318 – 0324.

8. TABLE OF LEGISLATION

8. 1. European Court of Justice

- Case C-26/62, Van Gend en Loos [1963] ECR 13
- Case C-148/78, Ratti [1979] ECR 1629
- Case C-80/86, Kolpinghuis [1987] ECR 3969
- Case C-18/91 P V v Parliament [1992] ECR I-3997
- Case C-91/92, Facini Dori [1994] ECR I-3325
- Case C-450/93, Kalanke v Freie Hansetadt Bremen, ECR I-3051
- Joined Cases C-74/95 and C-129/95, Criminal Proceedings against X [1996] ECR I-6609
- Case C-409/95, Hellmut Marschall v Land Nordhein Westfalen [1997] ECR I-06363
- Case C-394/96, Brown [1998] ECR I-04185
- Case C-303/98, Simap [2000] ECR I-07963
- Case C-79/99, Schnorbus v Land Hessen [2000] ECR I-10997
- Case C-438/99, Jiménez Melgar [2001] ECR I-06915
- Case C-476/99, Lommers [2002] ECR I-02891
- Case C-49/00 Commission v Italy [2001], ECR I-08575
- Case C-109/00, Tele Danmark [2001] ECR I-06993
- Case C-455/00, Commission v Italy [2002] ECR I-9231
- Joined Cases C-397/01 to C-403/01, Pfeiffer and Others [2004] ECR I-08835
- Case C-60/02, Rolex [2004] ECR I-00651
- Case C-151/02, Jaeger [2003] ECR I-08389
- Case C-180/03 P, Latino v Commission, Order of the Court [2004] ECR I-01587
- Case C-181/03 P, Nardone v Commission [2005] ECR I-00199
- Case C-14/04, Dellas and Others [2005] ECR I-10253
- Case C-53/04, Marrosu and Sardino [2006] ECR I-07213
- Case C-144/04, Mangold [2005] ECR I-09981
- Case C-180/04 Vassallo 2006] ECR I-07251
- Case C-207/04, Vergani v Agenzia delle Entrate [2005] ECR I-07453,
- Case C-212/04, Adeneler and Others [2006] ECR I-06057
- Case C-13/05, Chacón Navas v Eurest Colectividades [2007] SA ECR I-000
- Case C-307/05, Del Cerro Alonso [2007] ECR I-07109
- Case C-268/06, Impact [2008] ECR I-02483
- Case C-460/06, Paquay [2007] ECR I-08511
- Case C-506/06, Mayr [2008] ECR I-01017

- Case F-1/05, Landgren v ETF [2001] ECR-SC I-A-000 and II-000
- Case F-28/06, Sequeira Wandschneider v Commission [2007] ECR-SC I-A-000 and II-000
- Case F-120/06, Noémi Dálnoky v Commission [2007] ECR 00000
- Case F-134/07, Adjemian e.a v Commission of the European Communities
- Case F-8/08, Reiner v Commission of the European Communities

- Case 25/68, Schertzer v Parliament [1977] ECR 1729
- Case T-45/90, Speybrouck v Parliament [1992] ECR II-33
- Case T-51/91, Hoyer v Commission [1994] ECR-SC I-A-103 and II-341
- Case T-256/01, Pyres v Commission, [2005] ECR – Staff Cases I-A-23 and II-99
- Case T-10/02, Girardot v Commission [2004] ECR – Staff Cases I-A-000 and II-0000
- Case T-11/03, Elizabeth Afari v European Central Bank [2004] ECR - Staff Cases I-A-00065, II-00267
- Case T-394/03, Angeletti v. Commission [2006] ECR Staff Cases I-A-2-00095, II-A-2-00441
- Case T-471/04, Karatzoglou v European Agency for Reconstruction (EAR) [2008] ECR 00000
- Case T-80/04, Castets v Commission [2005] ECR - Staff Cases I-A-00161, II-00729
- Case T-368/04, Verheyden v Commission [2007] ECR 00000

8. 2. European Court of Human Rights

- Ahmad v United Kingdom (1982) 4 EHRR 126

8. 3. Administrative Tribunal of the International Labour Organisation (ILOAT)

- Mr. J.M.W. (No 14) v. EPO, ILOAT, Judgment No. 2292
- Mr. J.M.W. v. EPO, ILOAT, Judgment No. 2237
- Miss E.E. H. (No 4) v. EPO, ILOAT, Judgment No. 2236

ANNEX I: A BRIEF ANALYSIS OF ARTICLE 1E (2) OF THE EU STAFF REGULATIONS

The purpose of this Section is to *briefly* address the meaning of Article 1(e) (2) of the EU Staff Regulations and the analysis is by no means exhaustive.[644]

On the face of the wording of this Article, it is unclear whether it is meant to apply to all relevant EC legislation, especially when there is a higher level of protection for officials. Article 1(e), paragraph 2 of the Staff Regulations reads as follows:

> "Officials 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."[645]

The words "at least equivalent" mean that officials should be afforded the same or higher protection than that which is afforded by "minimum requirements *applicable* under measures adopted in health and safety pursuant to Treaties" [emphasis added]. However, it is uncertain what is the meaning of word 'applicable' within the meaning of this sentence. The Article itself does not provide for any further clarification of this matter. In such a case the *travaux préparatoires* of the Staff Regulations need to be explored in order to attain further understanding of what the drafters of the Article intended. However, at the time of writing this report, these documents were not available to the Amsterdam International Law Clinic; therefore this step could not be undertaken.

More specifically, the wording of this Article raises two issues. First, "*the minimum requirements applicable under measures adopted in these areas pursuant to Treaties*" is unclear. Second, it is uncertain when "*the minimum requirements*" should be applicable. Possibly, it is when the Staff Regulations are not in conformity with "*the minimum requirements*" and where minimal requirements offer a better standard of protection. In

[644] This section has been written following the direct request of the SUEPO. The purpose is to summarise points which arose during the conversation which took place during a meeting in the European Patent Office in The Hague concerning Article 1(e) (2).
[645] Staff Regulations, *supra* note 11, Article 1 (e) (2), *emphasis added.*

such a situation, however, "*the minimum requirements applicable under measures adopted in these areas pursuant to Treaties*" could be perceived as a superior source of law to the Staff Regulations. In regard to conflicts concerning human rights norms, the interpretation which more favourably protects interests would normally be held to apply. At least derogation to the detriment of the beneficiaries would appear to be precluded.[646]

The second alternative would be to give the minimum requirements a supplementary position to the Staff Regulations. Therefore "*the minimum requirements*" mentioned by Article 1(e) (2) would act as a gap-filler when the Staff Regulations fail to address a specific issue.

The third way to identify "*applicable minimum standards*", as mentioned by this Article, is to explore the procedure adopted by the EU Civil Servants' Tribunal and its jurisprudence. It is important to establish whether this Court allows for the adoption of elements or judgements of other jurisdictions, in particular, the principles of *jus cogens* and international customary law or judgements of the European Court of Human Rights. Even if the EPO is not a party to human rights treaties,[647] the Organisation is bound to the extent to which such rights constitute customary international law.[648] It is possible to argue that the EC Treaty and the European Convention on Human Rights (ECHR) together constitute customary international law on a regional level in Europe.[649]

---

[646] *See* Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the international Law Commission at its 58th Session (finalized by M. Koskenniemi), para. 108, A/CN.4/L.682, April 13, 2006, *available at:* http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement (last visited 24 March 2009) [footnote omitted]; Constantin, S. & Jørgensen, N. N., *supra* note 10, p. 28.

[647] *See* Mr. J.M.W. (No 14) v. EPO, ILOAT, Judgment No. 2292, *available at:* http://www.ilo.org/public/english/tribunal/fulltext/2292.htm (last visited 10 April 2009): "The EPO notes that it is not a party to the European Convention on Human Rights, so that it is doubtful whether that Convention is directly applicable to it."; Mr. J.M.W. v. EPO, ILOAT, Judgment No. 2237, *available at:* http://www.ilo.org/public/english/tribunal/fulltext/2237.htm (last visited 10 April 2009): in its reply, the EPO "rejects the complainant's arguments resting on the European Convention on Human Rights. The EPO is not bound by the Convention or any protocol thereto."; Miss E.E. H. (No 4) v. EPO, ILOAT, Judgment No. 2236, *available at:* http://www.ilo.org/public/english/tribunal/fulltext/2236.htm (last visited 10 April 2009). *See also* Constantin, S. & Jørgensen, N. N., *supra* note 10.

[648] The applicability of human rights to the EPO is supported by the Organisation itself. In the case of Mr. J.M.W. v. EPO, "it points out that the Administrative Council adopted a declaration in 1994 whereby the Office undertakes to abide by general legal principles, including those concerning human rights." Mr. J.M.W. (No. 14) v. EPO, Constantin, S. & Jørgensen, N. N., *supra* note 10.

[649] *Ibid*, p. 26.

The fourth, and more controversial interpretation, is the possibility of application of EC legislation and the findings of the European Court of Justice and the European Court of Human Rights by the Civil Servants' Tribunal in matters which are not covered by the Staff Regulations. Previous jurisprudence of the Civil Servants' Tribunal would have to be examined in order to establish whether there is such a tendency. The latter could arguably be seen as a logical step since the European Patent Organisation (EPO) is a European institution on the European territory,[650] and therefore, it could be reasoned, subject to regional customary law built up by a combination of EC legislation and the European Court of Human Rights jurisprudence.[651]

The applicability of the domestic law of EC Member States should be examined as well. For this topic, reference may be had to a previous report by the Amsterdam International Law Clinic report concerning the applicability of European Community Law to the European Patent Office.[652]

[650] *Ibid.*, p. 25.
[651] See, e.g., E.T. Swaine, Rational Custom, 52 DUKE L.J. 559, 622 (2002) (defining regional customary international law as "custom forged between a small number of relatively homogenous states, binding among them only"). See also Right of Passage Over Indian Territory, (Portugal v. India) 1960 I.C.J. 39.See also *ibid*., p. 26.
[652] *Ibid*