

# Harassment related to Sex and Sexual Harassment Law in 33 European Countries

Discrimination versus Dignity

EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY





## Harassment related to Sex and Sexual Harassment Law in 33 European Countries

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Ann Numhauser-Henning and Sylvaine Laulom

This report was financed by and prepared for the use of the European Commission. It does not necessarily represent the Commission's official position.

This publication was commissioned by the European Commission under the framework programme PROGRESS (Decision 1672/2006/EC of the European Parliament and the Council, OJ L 315/1 of 15.11.2006). For more information on PROGRESS see: <http://ec.europa.eu/social/main.jsp?catId=327&langId=en>

Manuscript completed in November 2011.

The information contained in this report reflects, as far as possible, the state of affairs on 22 August 2011.

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ISBN 978-92-79-22816-2  
DOI 10.2838/54140

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# Part I

## Executive Summary

*Ann Numhauser-Henning*

Following the adoption of Directive 2002/73/EC amending the Equal Treatment Directive, harassment related to sex and sexual harassment are now defined as *discrimination* in EU law and are therefore prohibited in employment, including access to employment, vocational training and promotion. Later, the Recast Directive 2006/54/EC repealed Directive 2002/73/EC, containing the very same definitions of harassment related to sex and sexual harassment. The Directive also bans victimization and encourages Member States to take effective measures to prevent all forms of discrimination on the grounds of sex, in particular harassment and sexual harassment. Similar obligations and definitions apply to the access to and supply of goods and services according to Directive 2004/113/EC. Both Directives were made part of the EEA Agreement.

One important aim of this general report is to investigate *harassment as discrimination and how these EU-law provisions have been transposed into national law*. Another aim is to investigate what – if any – the *added value is of combating harassment related to sex and sexual harassment in the form of a prohibition of discrimination*. This second aim is of special interest in the European setting, given that the legal tradition concerning sexual harassment has been portrayed as a ‘Dignity Harm Approach’ as opposed to the North American ‘Discriminatory Approach’. Despite the fact that EU law now clearly implies a discriminatory approach to harassment related to sex and sexual harassment, what comes to the fore – both where EU law is concerned and when it comes to the results of this report describing national law in 33 European countries – is rather a Double Approach. This Double Approach is reflected in the respective definitions’ inclusion of the words ‘with the purpose or effect of violating *the dignity* of a person’.

All Member States but **Hungary, Poland** and **Latvia** have now implemented the Recast Directive in the sense that harassment related to sex and sexual harassment are two separate concepts characterized as forms of discrimination. The same basically holds true for Directive 2004/113. Also the EEA countries have in principle implemented harassment related to sex and sexual harassment as two separate concepts amounting to discrimination and as regards the candidate countries this is also true for **FYROM** but not so for **Turkey**. Most countries have implemented the rules through specific anti-discrimination legislation, often with a broader scope than the provisions of the Directives. However, to say that the provisions of harassment related to sex and sexual harassment are generally implemented in an anti-discrimination context – especially as regards the area of employment – can be a misconception. Harassment as a form of discrimination is to a greater or lesser extent ‘hidden’ behind more general regulations against victimization or violence at work and thus competes with mobbing or bullying. This is especially true with regard to **Belgium, France, FYROM, Portugal** and **Slovenia**. Also the cases of **Croatia, the Czech Republic, Finland, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Slovakia, Spain, Turkey** and **the UK** can be mentioned in this context.

Despite the fact that the Directives have more or less been correctly implemented, their impact is not necessarily what could have been expected. Discriminatory harassment is far from infrequent in society. It is, however, not easy to get a more exact picture of its frequency. This is partly due to the often sexual nature of such conduct and the relative sensitiveness that still accompanies such issues in society. Many countries also report a very low level of awareness – and even lack of acceptance – of the legal protection against discriminatory harassment related to sex and sexual harassment. In yet other countries, harassment is therefore not really perceived as discrimination, but rather as general

harassment or mobbing. As regards the access to and supply of goods and services, the awareness and presence of the Discriminatory Approach to harassment, although formally implemented, is still hardly distinguishable.

Case law in this field is generally scarce. It is mostly on sexual harassment proper and not harassment related to sex. It is also rather frequent that case law only indirectly reflects the discriminatory harassment ban, being directly related to wrongful dismissal or disguised as general mobbing. Case law in the area of goods and services is practically non-existent. Almost all experts have reported that the rule on the reversed burden of proof has been properly implemented in their national legislation – both with regard to employment and to goods and services. In some countries, however, doubts are raised with regard to the practical application of the reversed burden of proof despite its formal implementation. The role of collective agreements – as reported – in the area of harassment related to sex and sexual harassment is generally speaking minor. Where there are provisions of such harassment in collective agreements these seem to be of a general character, mirroring those in anti-discrimination legislation. In some countries such as **Italy, Romania and Luxembourg** there is a compulsory role for collective agreements to fulfil, however. Moreover, agreements between the social partners do seem to play a relatively significant role in the alleged transformation process towards an even more accentuated Dignity Harm Approach (**FYROM, Luxembourg, Turkey and the UK**).

The characteristic of focusing the dignity harm element on the individual level rather than the systemic discriminatory element – as reflected in many country reports – may have made it difficult for country reporters to follow the design of the questionnaire and to distinguish between harassment related to sex and sexual harassment *within* and *outside* a framework of anti-discrimination law. National legislation is simply too often entwined in this respect. The relation between anti-discrimination law proper in the area of working life and other parts of Labour Law such as Employment Contract Law, Dismissal Law and Health and Safety Law is far from simple. A focus on the ‘employee dignity’ element often goes hand in hand with a broad notion of the addressee scope of the ban on (also discriminatory) harassment (Section 2.1.4). It is considered to cover any employee or person (customer, client etc.). Such an approach is often accompanied by provisions on harassment as a criminal misdemeanour or the subject of civil or administrative penalties (Section 2.1.8). Claims frequently turn out to concern allegations of wrongful harassment on the part of the perpetrator rather than alleged discrimination proper (Section 2.2).

The experts come forward as basically positive regarding the reform making harassment related to sex and sexual harassment a ‘discriminatory wrong’. It is said to draw the attention to the protection of human rights compared to a former health and safety approach and to lighten the burden on women, women’s movements and other stakeholders at national level in countries where the awareness of and attitude towards sexual harassment and harassment relating to sex is still lagging behind. Uniform and compulsory provisions at EU level, which might be broader than national perceptions until now, provide more clarity for victims, lawyers, courts etc, possibly also requesting a preliminary ruling from the ECJ. An anti-discrimination setting is also considered, generally speaking, to provide greater access to justice for individuals including the rules on the reversed burden of proof, no upper limits concerning compensation and the existence of specialized bodies.

Not many ‘pitfalls’ are mentioned by the experts, but the ‘stigma’ still accompanying sexualised conduct is considered to deter victims from coming forward whereas ‘disguising’ sex-related and sexual harassment as general harassment or bullying is a way to make a complaint regarding harassment less stigmatising – it is not a ‘women’s issue’. On the other hand, precisely this may be considered to be the problem: when applying a notorious Dignity Harm Approach, structural (and individual) oppression of women in society, remain invisible!

This general report is basically about the implementation of the Discriminatory Approach. The background and spirit of the Discriminatory Approach is to eliminate structural as well as individual *discrimination*. We know that mainly women are harassed sexually or on the grounds of sex. Such behaviour is not only ‘bad manners’, it reflects and reinforces societal gender hierarchies.

There are deep structural differences between the clear-cut Discriminatory Approach and the Dignity Harm Approach. At the same time we must conclude that the country reports provide us with a picture of not necessarily a Double Approach proper but rather a 'Blurred' Approach. This must be said to be to the detriment of both gender discrimination regulation as such and a satisfying implementation of the Directives' provisions on harassment.

When applying a Double Approach there is reason to keep the respective approaches apart, i.e. regulate discriminatory harassment within the framework of anti-discrimination regulations addressing those 'empowered' to take responsibility for certain activities, and other types of 'dignity harm' in other ways, whether in labour law or in a broader scope.

It is argued that the EU strategy in the years to come should therefore stress the structural and power dimensions of gender discrimination including harassment – i.e. the additional quality of the Discriminatory Approach – in awareness campaigns, including not only the Member States but also the Social Partners. The ECJ can add to this by issuing carefully argued interpretations of the discriminatory aspects of harassment in line with the *Coleman* case.

## 1. Introduction

### 1.1. Legal background

Following the adoption of Directive 2002/73/EC amending the Equal Treatment Directive<sup>1</sup> harassment related to sex and sexual harassment are defined as *discrimination* in EU law and are therefore prohibited in employment, including access to employment, vocational training and promotion. Directive 2002/73/EC had to be transposed into national law by 5 October 2005.

Later, the so-called Recast Directive 2006/54/EC<sup>2</sup> repealed Directive 2002/73/EC. This, too, contained the very same definitions of harassment related to sex and sexual harassment, reading as follows:

'Harassment: where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article 2(1)(c)).

'Sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article 2(1)(d)).

In addition, the Directive stipulates that 'harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct' constitute discrimination related to sex and are therefore prohibited (Article 2(2)(a)). This provision thus categorizes harassment as discrimination and contains the so-called ban on victimization.

The Recast Directive is broader in scope than Directive 2002/73/EC and therefore widens the scope of application of the provisions on harassment related to sex and sexual harassment. The Preamble of the Recast Directive stipulates in Paragraph 6 that 'Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and

<sup>1</sup> OJ L 269, 5.10.2002, p. 15. Already before the adoption of this Directive *harassment* on the grounds of ethnicity as well as on the various grounds covered by the so-called Race Directive 2000/43/EC and Employment Framework Directive 78/2000/EC was classified as discrimination.

<sup>2</sup> Council Directive 2006/54/EC 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), OJ L 204, 26.7.2006, p. 23.

should be subject to effective, proportionate and dissuasive penalties'. Paragraph 7 clarifies that 'In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice'. In addition, Article 26 on the prevention of discrimination stipulates that 'Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion'.

The Recast Directive had to be transposed into national law by 15 August 2008.

Similar obligations and definitions apply to the access to and supply of goods and services according to Directive 2004/113/EC,<sup>3</sup> which should be transposed into national law by 21 December 2007. The preamble of this Directive specifies that 'discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life (Paragraph 9). There is, however, no rule parallel to Article 26 on prevention in the Recast Directive. However, Article 11 states that Member States shall encourage dialogue with relevant stakeholders in order to promote the principle of equal treatment.

Both the Recast Directive and the Goods and Services Directive were made a part of the EEA Agreement.

The European Network of Legal Experts in the Field of Gender Equality sent out a detailed questionnaire to legal experts in 33 European states, including the current 27 EU Member States, the three EEA countries **Iceland, Liechtenstein and Norway** and the additional candidate countries **FYROM, Croatia and Turkey**. The country reports that resulted from this questionnaire round are the basis for the current overview and can be found in the second part of this report.<sup>4</sup>

One important aim of this general report is to investigate *harassment as discrimination and how the provisions just described have been transposed into national law*. In addition, relevant case law of national courts and equality bodies illustrating this implementation is described and analysed.

Another aim is to investigate what, if any, the *added value is of combating harassment related to sex and sexual harassment in the form of a prohibition of discrimination*. This second aim can be said to be of special interest in the European setting, given that the legal tradition concerning sexual harassment has been portrayed as a 'Dignity Harm Approach' as opposed to the North American 'Discriminatory Approach'.<sup>5</sup>

European harassment legislation was and is clearly influenced by North American law. In the U.S., harassment has always been perceived as a form of discrimination. It started with Title VII of the Civil Rights Act 1964 and the discriminatory harassment of racial minorities. The Civil Rights Act, however, covered race, colour, religion, sex and national origin. Nowadays, sexual harassment is the most frequently addressed form of harassment. The term 'sexual harassment' was coined in the 1960s.<sup>6</sup> In her influential book 'Sexual Harassment of Working Women' Catherine MacKinnon argued forcefully that sexual harassment was discrimination under Title VII of the Civil Rights Act perpetuating 'the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labour market'.<sup>7</sup> By 1980, the U.S. Equal Employment Opportunity Commission had issued

<sup>3</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37.

<sup>4</sup> See for publications of the European Network of Legal Experts in the Field of Gender Equality: [http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm), accessed 14 November 2011.

<sup>5</sup> Compare Friedman & Whitman 2003, p. 242, Clarke 2007 and also Saguy 2000.

<sup>6</sup> Jones 1996, pp. 3-90.

<sup>7</sup> MacKinnon 1979.

guidelines on sexual harassment as a breach of section 703(a)(1) of Title VII of the Civil Rights Act 1964 and in 1986 the Supreme Court confirmed that sexual harassment was actionable sex discrimination.<sup>8</sup> In fact, sexual harassment was acknowledged as discrimination by U.S. courts already in the 1970s.<sup>9</sup> First, discrimination implied quid pro quo situations (in exchange for sexual favours the victim gets a better treatment), but in the early eighties also hostile environment cases were regarded to amount to discrimination.<sup>10</sup> In the U.S. sexual harassment litigation has tended to focus on hiring, termination, and advancement, rather than on the terms and conditions of work in continued employment. However, in *Harris v. Forklift Systems*, the Supreme Court's leading 'hostile working environment case',<sup>11</sup> it was stated that a claimant did not necessarily have to show economic or tangible discrimination, it was enough that the working environment was 'abusive'.

European law tradition is said to have never really accepted the doctrinal theory according to which sexual harassment is a form of discrimination. It is said to rather focus on a different formula: 'the dignity of women' or even 'workers'.<sup>12</sup> Despite the fact that EU law, as presented above, clearly implies a Discriminatory Approach to harassment related to sex and sexual harassment it may be fair to say that what comes to the fore – both where EU law is concerned and when it comes to the results of this report describing national law in 33 European countries – is rather a Double Approach.

When it comes to EU law, this Double Approach is reflected in the respective definitions' inclusion of the words 'with the purpose or effect of violating the dignity of a person'.

As early as in 1986, the Member States had requested an analysis of sexual harassment in the terms of 'dignity at work'<sup>13</sup> in connection with the adoption on 11 June 1986 by the European Parliament of a Resolution on violence against women.<sup>14</sup> In the year 1990 the Council adopted a Resolution on the protection of the dignity of women and men at work<sup>15</sup> and in 1991 this was followed by the Commission's Recommendation on the protection of the dignity of women and men at work (92/131)<sup>16</sup> as well as a Code of Practice concerning harassment/sexual harassment.<sup>17</sup> It was already presumed there that sexual harassment sometimes, under certain circumstances, could be contrary to Articles 3, 4 and 5 in the then Equal Treatment Directive. In Rubenstein's 1988 report it was also suggested that harassment should be qualified as sex discrimination according to Article 5 of the Equal Treatment Directive. Now, this step has finally been taken. However, the EU concepts still continue to focus on dignity and hostile environment.

A clear exponent of the Dignity Harm Approach is the 'Framework Agreement on harassment and violence at work' entered into by the social partners ETUC, BusinessEurope, CEEP and UEAPME within the context of the social dialogue on 26 April 2007. In this context, sexual harassment is mentioned along with bullying and physical violence.<sup>18</sup> 'Mutual respect for the dignity of others at all levels within the workplace is one of the key characteristics of a successful organization' says the document and 'harassment and violence can potentially affect any workplace and any worker ... however, certain groups and sectors can be more at risk'. The aim of the Framework Agreement was to increase the awareness and

<sup>8</sup> Clarke 2007, p. 81 and *Meritor Savings Bank v Vinson* 477 US 58 (1986).

<sup>9</sup> *Bundy v Costle*, 561 F.2d 983 (D. C. Cir. 1977). See further Saguy 2000, p. 1104 f.

<sup>10</sup> *Bundy v. Jackson*, 641 F.2d 934(D.C. Cir. 1981. However, also compare *Rogers v EEOC* 454 F2d 234 (5<sup>th</sup> Cir. 1971).

<sup>11</sup> *Harris v Forklift Sys. Inc.*, 510 US 17 (1993), 114 S. Ct. 367 (1993).

<sup>12</sup> Friedman & Whitman 2003, p. 242, and also Clarke 2007. Compare also Holtmaat 2009a.

<sup>13</sup> See Rubenstein 1988.

<sup>14</sup> OJ C 176, 14.7.1986, p. 79.

<sup>15</sup> OJ C 157, 27.6.1990, p. 3.

<sup>16</sup> OJ L 49, 24.2.1992, p. 1

<sup>17</sup> OJ L 49, 24.2.1992, p. 3.

<sup>18</sup> Bullying otherwise is a concept used mostly in the U.S., compare Friedman & Whitman 2003, p. 246. Bullying along with 'mobbing', however, are frequently used concepts in the country reports underlying this overview. These are also the terms I will use alternatively throughout the report when referring to non-discriminatory harassment. In **France** the term 'moral harassment' was introduced by Hirigoyen's influential report in 1998, compare Hirigoyen 1998 and Section 2.1.1 below. This term will only be used here when referring to the French example.

understanding of workplace harassment and violence and to provide employers, workers and their representatives with an action-oriented framework to identify, prevent and manage problems of harassment and violence at work. ‘Harassment occurs when one or more worker or manager are repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work’ and it can be committed by one or more managers or workers. We can immediately discern how this definition – in contrast with the Directives’ definitions – requires intention and repeated conduct and the actions of fellow workers are explicitly included. According to the Agreement, enterprises need to have a clear statement outlining that harassment and violence will not be tolerated and also specifying procedures to be followed where cases arise. The Agreement committed member organisations of the European Partners directly to implement it, whereas member organisations in candidate countries were invited to do so.

It would be too easy to say that whether to apply the Discrimination Approach or the Dignity Harm Approach is just a matter of choice. The applied approach is interrelated with both the historical and the substantive context.<sup>19</sup> It was already mentioned how the Discriminatory Approach in the U.S. related to the race issues and the introduction of the Civil Rights Act in the 1960s. The crucial role to be played by anti-discrimination law there is also related to the lack of employment protection coupled with a lack of strong and publicly monitored health and safety regulations. This is also what makes access to employment, promotion and dismissal the central issues where harassment is concerned. In Europe, on the other hand, characterized by relatively well-developed rights to protection against arbitrary dismissal,<sup>20</sup> it is only natural to concentrate more on fair conditions of work in on-going employment. This also goes hand in hand with well-developed structures concerning employers’ health and safety obligations supervised by public authorities. This does not mean, however, that hiring, termination, and advancement are not central issues from a European perspective, not least for anti-discriminatory regulation. For this reason, Chapter 3 of the Recast Directive has the heading ‘Equal treatment as regards access to employment, vocational training and promotion and working conditions’. Whether the Double Approach may be the right way to go is an issue of continuous debate (Section 4.3).<sup>21</sup>

The country reports underlying this general report to a considerable, though varying, degree can be said to substantially confirm the traditional European Dignity Harm Approach or at least the Double Approach of current EU law. In the early two thousands, Europe has – despite EU law equalling harassment to discrimination being introduced – been said to be in the midst of a transformation, non-discrimination getting weaker and increasingly condemning *employee* harassment.<sup>22</sup> This tendency has reaffirmed the tradition to speak of ‘dignity’ rather than ‘discrimination’. At the same time, bans on harassment discrimination are being kept – or even developed – but discrimination is not ‘the main target’ in practice. Therefore, in some countries the provisions on harassment related to sex and sexual harassment are found in general labour law regulation and even integrated with a ban on general non-discriminatory employee harassment, possibly in parallel with regulation in special anti-discrimination acts (**Belgium, France, FYROM, Portugal, Slovenia and Turkey**). In **Belgium** the application of such a general ban on harassment is given preference before the application of actual anti-discrimination regulation. In **Iceland and the UK** anti-discrimination legislation is complemented with separate regulations protecting from general, not necessarily discriminatory, harassment. Also in **the Czech Republic, Finland, Ireland, Italy, Luxembourg, Poland, Slovakia and Spain** the ‘employee dignity’ element can be said to be especially relevant. A focus on the ‘employee dignity’ element often goes hand in hand with a broad notion of the addressee scope of the ban on (also discriminatory) harassment (Section 2.1.4). Such an approach is often accompanied by provisions on harassment as a criminal misdemeanour or the subject of civil or administrative penalties (Section 2.1.8).

<sup>19</sup> For a comprehensive study on such political, legal and cultural constraints and resources influencing the concept of sexual harassment, see Saguy 2000.

<sup>20</sup> Compare Article 30 of the EU Charter on Fundamental Rights, now part of the Lisbon Treaty.

<sup>21</sup> See e.g. Friedman & Whitman 2003, Clarke 2007 and Holtmaat 2009a.

<sup>22</sup> Friedman & Whitman 2003.

Claims frequently turn out to concern wrongful allegations of harassment on the part of the perpetrator rather than alleged discrimination proper (Section 2.2).

No doubt, this characteristic of focusing the dignity harm element on the individual level rather than the systemic discriminatory element – as reflected in many country reports – may have made it difficult for country reporters to follow the design of the questionnaire and to distinguish between harassment related to sex and sexual harassment *within* and *outside* a framework of anti-discrimination law. National legislation is simply too often entwined in this respect.

The ‘conflict’ between the Dignity Harm Approach and the Discriminatory Approach will be highlighted throughout this general report. Despite the fact that EU law to a certain extent is also characterized by the Double Approach, this report is ultimately about the implementation of the bans on harassment related to sex and sexual harassment as acts of discrimination. Anti-discrimination law may be characterized by the so-called individual complaints-led model,<sup>23</sup> but the background or rather the spirit of such legislation is to come to terms with and eliminate structural discrimination!

### **1.2. General situation**

Despite the fact that harassment related to sex and sexual harassment – not necessarily as separate phenomena – has now for long caught the legislator’s attention, such conduct is far from infrequent in society. It is, however, not easy to obtain a more exact picture of its frequency. This is partly due precisely to the sexual nature of such conduct and the relative sensitiveness that still accompanies these issues in society. It may also be seen as a consequence of a dominating Dignity Harm Approach and a reluctance to acknowledge sexual harassment as sex discrimination in society at large.

Throughout the years, surveys have been carried out in the different Member States and related countries. Many of these refer to harassment in working life more generally. At EU level there are no reliable overall statistics. However, the European Agency for Safety and Health at Work, reporting on regular European surveys on working conditions, in its 2005 (and also 2003) report dealt with sexual harassment.<sup>24</sup> Here (also) discriminatory sex harassment is to a certain extent ‘hidden’ behind workplace violence and mobbing at the workplace in general. However, *sexual* harassment (‘unwanted sexual attention’) was reported to have been experienced in the last 12 months by slightly less than 2 % of the respondents, incidence being rather stable over time. However, it affected three times as many female workers as male workers, and the group most at risk was young women (under 30) where the incidence rose to 6 %. Great differences among countries were reported, with high levels (5-10 %) in countries such as the Czech Republic, Norway, Turkey, Croatia, Denmark and Sweden, whereas in some southern European countries the phenomenon was barely reported at all (Italy, Spain, Malta and Cyprus). In a 2010 report on violence against women<sup>25</sup> it is stated that there are large country differences in work-related violence related to differences in the countries’ social-economic conditions but also due to different levels of awareness and attitude to the problem. The rate of women workers having reported some form of sexual harassment or unwanted sexual behaviour in the workplace throughout working life was as high as 40 to 50 %.<sup>26</sup> The last figure seems to be taken from the European Commission 1999 report on ‘Sexual harassment at the workplace in the European Union’.<sup>27</sup> It also states that women who are between 30 and 40 years of age, single or divorced, with a lower level of education are more likely to experience sexual harassment, whereas perpetrators are mostly colleagues or superiors – far behind are patients or clients and finally subordinates.

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<sup>23</sup> Fredman 2009.

<sup>24</sup> Fourth European Working Conditions Surveys (2005), available on <http://www.eurofound.europa.eu/surveys/ewcs/2005/ewcs2005individualchapters.htm>, accessed 22 September 2011.

<sup>25</sup> European Commission, Unit G1 2010, [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/document/index_en.htm), accessed 2011-12-07.

<sup>26</sup> European Commission, Unit G1 2010, p. 76 with footnote 323.

<sup>27</sup> European Commission 1999.



The picture presented to us by the country reports vary strongly.<sup>28</sup> In some countries there do not seem to be any statistics available at all (**Croatia, Cyprus, Denmark, Hungary** and the **UK**). Where such statistics are presented they often enough are not really suitable for a comparison since the concepts and parameters used are not really compatible and sometimes also difficult to identify in a more precise way (e.g. **Ireland**). In many cases the incidence of sexual harassment in working life proper corresponds fairly well with the European Working Conditions survey, at between 2 and 3 % (**Belgium, Sweden** and **the Netherlands**). In yet other cases the figure, also for sexual harassment proper, is considerably higher (**Czech Republic, Estonia, Liechtenstein, Italy, Romania**), which may well be due to reference periods being different (12 months, 3 years, throughout working life). In the **Czech Republic** in a 2005 survey 28 % of all women knew of sexual harassment in their workplace while 13 % had personal experience (and 4 % of the men).<sup>29</sup> In **Estonia**, according to a 2009 survey, 9 % (10 % among women and 7 % among men) had experienced harassment related to sex and 7-9 % of women and 4 % of men had experienced some sort of sexual harassment.<sup>30</sup> In **Italy** according to a 2009 survey, 8.5 % of all women had experienced sexual harassment during the course of working life, whereas 2.4 % had experienced sexual harassment during the last 3 years.<sup>31</sup> According to the **Liechtenstein** report 28 % of women and 10 % of men had experience of being sexually harassed at their respective workplace. If we are talking about harassment *related to sex*, figures are, where available, generally higher or between 10-30 %.<sup>32</sup> And, finally, in **Slovakia** more than 66 % of the working population is said to have been exposed to some kind of sexual harassment manifestation.<sup>33</sup>

Figures also generally confirm that women are more affected than men. Women are also exposed to sex-related and sexual harassment more than average in sectors that are predominantly male, such as agriculture and manufacturing (**Czech Republic**), the military (**Germany, Sweden**) and police authorities (**Sweden**). According to the **Swedish** report in 2001 12 % of all female policemen had experienced sexual harassment and 33 % of harassment related to sex whereas 36 % of female officers in the military had experienced sex-related harassment.<sup>34</sup> Harassers are mostly colleagues at the same hierarchical level (**Czech Republic**).

As regards the provision of goods and services it is fair to say that we know barely anything on sex-related and sexual harassment and its frequency. General surveys on working life harassment reveal, however, that such harassment is frequently present in areas such as the health and social service sectors, but also within the area of education. We then deal with harassment experienced by workers in those areas *from* clients and pupils (and in principle covered by work-related discriminatory bans), not – as is the focus of Directive 2004/113 – with harassment on the part of goods and service providers (or under their liability) *against* clients and customers.

A number of reports therefore refer to working life (and other) surveys, but describe how sex-related harassment and sexual harassment proper are mainly ‘hidden’ in more general statistics on bullying (**Belgium, Bulgaria, Finland, France, FYROM, Iceland, Ireland, Luxembourg** and **Slovenia**). In **Iceland**, the Administration of Occupational Health and

<sup>28</sup> The following information is based on the respective country reports. Only when the information is more specific is a special reference given.

<sup>29</sup> A summary of the study provided by R. Vasková is available in English on <http://www.eurofound.europa.eu/2006/07/CZ0607019I.htm>, accessed 30 July 2011.

<sup>30</sup> V. Vainu, L. Järviste, H. Biin *Soolise võrdõiguslikkuse monitoring 2009 (Gender Equality monitoring 2009)* Sotsiaalministeeriumi toimetised 1/2010, Tallinn, 2010, p. 146. Available on: [http://www.sm.ee/fileadmin/meedia/Dokumendid/V21jaanded/Toimetised/2010/toimetised\\_20101.pdf](http://www.sm.ee/fileadmin/meedia/Dokumendid/V21jaanded/Toimetised/2010/toimetised_20101.pdf), accessed 22 August 2011.

<sup>31</sup> Le molestie sessuali e i ricatti sessuali sul lavoro 2008-2009 Roma, Istat 2009, <http://www.meltinglab.it/images/violenze/files/testointegrale20100915.pdf>, accessed 12 October 2011.

<sup>32</sup> [http://www.llv.li/pdf-llv-scg-glg\\_flyer\\_6\\_internet.pdf](http://www.llv.li/pdf-llv-scg-glg_flyer_6_internet.pdf), accessed 18 August 2011.

<sup>33</sup> B. Holubová *Sexuálne obťažovanie na pracovisku ako forma diskriminácie a rodovo podmieneného násillia* (Sexual harassment at the workplace as a form of discrimination and gender-based violence) Bratislava, IVPR - Institute for Labour and Family Research, Family and Work No. 4/2007.

<sup>34</sup> *Rapport om förekomst av sexuella trakasserier inom försvaret*, Stockholm 2005.



Safety generally monitors conduct in relation to problems of mobbing, including sexual harassment, and official statistics seem to address such a broader perception of the problem.

Another way to estimate the frequency of harassment is through the number of claims presented before the supervising bodies and/or brought to the courts. Here, too, underreporting is a particularly relevant problem making such statistics a poor substitute for real knowledge.

Case law in the field of sex discrimination harassment is generally scarce. There is yet no ECJ case law within the area and most countries report only a limited number of cases. Existing case law is mostly on sexual harassment proper and not harassment related to sex. It is also rather frequent that case law only indirectly reflects the sex discrimination harassment ban, being directly on wrongful dismissal or disguised as general mobbing cases. If case law regarding sex-related and/or sexual harassment in working life can be said to be generally scarce, in the area of goods and services it is practically non-existent (see further Section 2.2 below).

Despite the fact that the Directives have more or less been correctly implemented in all countries concerned but **Turkey** (see Section 2.1 below) their impact is not necessarily what could have been expected. In some Member States the awareness especially of sexual harassment is fairly high (**Denmark, the Netherlands, Sweden, Ireland, the UK**) but many countries report a very low level of awareness – and even lack of acceptance – of the legal protection against both discriminatory harassment related to sex and sexual harassment. In these Member States – despite formal implementation – there is still no full acceptance of sex-related and sexual harassment as something unacceptable. This is the case in some of the Member States such as **Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania and Poland**. The **Czech** report even states that ‘a certain tolerance of milder forms of sexual harassment is still characteristic of Czech society’ and that ‘trade unions mostly do not pay special attention to harassment or sexual harassment and consider it as a personal issue which is not to be solved by the trade union’. Also Poland is said to have ‘a sexism-tolerant culture in the workplace’. In **Latvia** ‘strong patriarchal attitudes’ are said to prevail. In other countries the awareness of these issues is said to remain quite low (**Estonia, Luxembourg, Lithuania**). In **Lithuania** discrimination related to sex and sexual discrimination is described as ‘one of the current social problems that is ignored and not treated effectively enough’. In **Hungary**, sex-related and sexual harassment is said to be ‘covered in silence, trivialisation or blaming the victim in general. In most of its forms it is considered insignificant, rather a form of “cavalry”, complimenting, perhaps frolics. .... Yet its stronger forms, which may cause serious distress, are simply considered as an individual fault, a form of “improper conduct”, or “bad temper” on the part of the harasser, which comes with the different nature of persons ... and the distress on the part of the victim is often considered as a result of oversensitiveness or a lack of social skills to “handle” the situation. Worse, occasionally the harassment is considered to be the result of a fault (provocative conduct or clothing) of the victim’. Such differences were also reflected in the 2010 Eurobarometer survey<sup>35</sup> where in 11 Member States at least nine out of ten respondents found sexual violence to be very serious (among them **Sweden, the UK, France and the Netherlands**) whereas in 9 at least 20 % of the respondents described sexual violence as being only fairly serious (**Lithuania, Portugal, Latvia, Poland, Slovenia, Romania, Estonia, Hungary and Austria**). In these countries, to accuse somebody of sexual harassment is not yet accepted and the victim may even be found guilty herself of having incited the other person to harassment. In most cases (**Bulgaria, the Czech Republic, Cyprus, Estonia, FYROM, Hungary, Iceland, Liechtenstein, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia**) there was really no regulation against discriminatory harassment before the implementation of the EU Directives we are concerned with and there has been scarce or no case law. Prevention is badly implemented.

Also in **Germany** there is ‘still strong resistance to dealing with the problem of sexual harassment’ and case law is described as hostile. The concept of harassment related to sex is

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<sup>35</sup> European Commission 2010 *Domestic violence against women* Special Eurobarometer 344, WAVE 73.2.

said to be ‘nearly unknown’. Nevertheless, in 1990 almost 75 % of employed women in a survey from Western Germany reported experiences of sexual harassment.

In yet other countries, as indicated above in Section 1.1, harassment is not really perceived as discrimination but rather as general harassment or mobbing. In **Belgium**, as a consequence, case law concerning *discriminatory* harassment is said to be scarce. However, the number of complaints coming forward according to the Welfare at Work Act increased considerably or from 3,200 in 2005 up to 4,800 in 2009. Also in **FYROM** harassment is first and foremost seen as ‘mobbing’, a phenomenon attracting the attention of trade unions and making the sex equality dimension ‘disappear’. This also seems to be true for **France, Poland** and **Portugal**. The trend that sexual harassment is seen as part of the wider problem of harassment or bullying is said also to apply to **the Netherlands, Ireland** and **Finland**.

Finally, little or no debate on these issues is reported in the countries concerned. There is said to be no debate whatsoever in the **Czech Republic, Denmark, FYROM** and **Slovenia**. And this is true even more as regards the access to and supply of goods and services.

However, in **Austria** some level of debate is reported. First regarding the separate harassment concepts and now on bullying, although related to ethnicity, when it comes to access to goods and services. In **Germany**, the debate is mainly on the theme of resistance to EU law on a Discriminatory Approach to sexual harassment. In **Hungary** there is some debate on sex-related harassment in the areas of public communication such as the Internet and regarding commercial advertisements – and then more from a group perspective.

**FYROM** reports that there is a debate on mobbing in working life rather than on discriminatory harassment, whereas in **Portugal** there is said to be some debate precisely on the differences between mobbing and discriminatory harassment.

## **2. Harassment related to sex and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### **2.1.1. On the implementation of EU law generally**

In the early nineties there was no explicit regulation on sexual harassment in the then Member States. Both the UK and Ireland, however, had qualified harassment as unacceptable sex discrimination, in the U.S. tradition.<sup>36</sup> Furthermore, Austria had transposed the Commission’s Recommendation on 92/131 as early as 1992 when preparing its accession to the EC.

All Member States but **Hungary, Poland** and **Latvia** have now implemented the Recast Directive in the sense that harassment related to sex and sexual harassment are two separate concepts characterized as forms of discrimination. The same basically holds true for Directive 2004/113. In **Hungary** there is a kind of blurred definition. Any conduct ‘of a sexual or other nature’ is considered harassment if it is connected to one of the 19 attributes protected in Hungarian law. In **Poland** the rules on discriminatory harassment are included in two parallel regulations: the Labour Code and the 2010 Antidiscrimination Law. In both regulations the simple notion of harassment is used to describe harassment concerning all legally protected groups (a non-exhaustive list covering all grounds protected in EU law and a number of additional grounds). An additional rule states that ‘as discrimination related on the ground of sex is also considered any unwanted conduct of a sexual nature ...’ (Article 18(6) of the Labour Code). Also in **Latvia** the implementation fails to provide for two clearly separate concepts since harassment and ‘actions of a sexual nature’ are entwined into one definition. – With regard to **Germany** there is a question mark concerning the discriminatory character of harassment. The implementing Acts refer to being put at a ‘disadvantage’ (*Benachteiligung*) –

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<sup>36</sup> See further, for instance, Clarke 2006 and McColgan 2007. In the UK, harassment could thus amount to discrimination if it involved less favourable treatment on the grounds of sex. If the harasser plausibly claimed that s/he would have subjected an equally disliked person of the other sex to the same treatment it would not constitute discrimination on the grounds of sex violating the Sex Discrimination Act.

not discrimination. As regards Directive 2004/113 **Germany** has not implemented the ban on *sexual* harassment.

Also the EEA countries have implemented harassment related to sex and sexual harassment as two separate concepts amounting to discrimination. **Iceland**, however, has not yet implemented Directive 2004/113 in this respect. The Gender Equality Act No. 10/2008 prohibits discrimination in the areas of employment, occupation and vocational training and a proper implementation of the Directive 2004/113 would hence supplement the existing legislation significantly if transposed. As regards the candidate countries, **FYROM** has implemented the rules but **Turkey** has not.

Concerning **Turkey** it can be said that while there is some regulation on sexual harassment in relation to working conditions during employment and the termination of employment in the 2003 Labour Code, sexual harassment is not conceptualised as discrimination and the separate concept of harassment related to sex is not recognized. Nor is there any implementation as regards goods and services.

Most countries have implemented the rules through specific anti-discrimination legislation of some kind. In many cases this is done through sex equality acts, covering working life and related areas and/or goods and services (like **Belgium, Denmark, Cyprus, Estonia, Finland, Greece, Iceland, Liechtenstein, Malta, Norway** and **Spain**). Another model is to include the bans on harassment related to sex and sexual harassment in an anti-discrimination act also covering grounds other than sex and also covering various areas of society including working life and goods and services (**Bulgaria, Czech Republic, France, Germany, Poland, Slovakia, Slovenia, Sweden** and **the UK**). In **Lithuania** there is the peculiarity that harassment related to sex and sexual harassment are covered by two parallel anti-discrimination acts, one regarding women and men only and the other also covering a number of other grounds. This is also the case in **Romania**. **Poland** also has double regulation in that bans on discriminatory harassment and sexual harassment are also included in the Labour Code, which has supremacy where working-life discrimination is concerned.

Without going into detail, it can be said that many of the concerned countries' legislation implementing the bans on harassment related to sex and sexual harassment have a broader scope than the provisions of the EU Directives we are concerned with. In some countries this is due to specific sex equality legislation transposing the provisions having a broader coverage (**Belgium, Denmark, Estonia, Finland, FYROM, Greece, Iceland, Italy, Lithuania, the Netherlands, Norway** and **Spain**). Sometimes provisions are incorporated into anti-discrimination acts covering both various grounds and areas in addition to discrimination on the grounds of sex in working life and the access to and supply of goods and services (**Austria, Bulgaria, the Czech Republic, France, FYROM, Germany, Hungary, Ireland, Latvia, the Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden** and **the UK**). In **Hungary** the Equality Act covers employment but also goods and services, social security, social assistance, education, relationships with political and civil organizations and citizen-state administration relations concerning 19 different grounds. In some countries, however, the scope is not broader than that required by the Directives' provisions (**Liechtenstein, Luxembourg, Malta** and **Portugal**)

However, to say that the provisions of harassment related to sex and sexual harassment are implemented in an anti-discrimination context- especially as regards the area of employment –can be a misconception concerning some countries. Harassment as a form of sex (or other ground) discrimination is to a greater or lesser extent 'hidden' behind more general regulations against victimization or violence at work and thus competes with more general forms of mobbing or bullying. This is especially true for **Portugal**, where the bans on discriminatory harassment and sexual harassment in employment are provided in Article 29 of the 2009 Labour Code. This Article covers three forms of harassment: harassment in general, discriminatory harassment based on grounds indicated in law and sexual harassment. Harassment is dealt with 'in addition to' other discrimination rules which are found in another

section of the Labour Code.<sup>37</sup> In **France** there are now two sets of definitions of the concepts of discriminatory harassment (related to sex) and sexual harassment, namely those in the (formally implementing) 2008 Anti-Discrimination Act and those in the Labour Code. (In addition there also is a definition of sexual harassment in the Penal Code!). The 2002 regulation in the Labour Code is a clear exponent of the European Dignity Harm Approach introduced in Section 1.1 above. In 1998 a very influential book on ‘moral harassment’ was published in France,<sup>38</sup> which soon led to the regulation of moral harassment in the Labour Code – and the Penal Code – more as a health and safety and dignity issue than as an issue of discrimination. According to Article L.1152-1 of the Labour Code, employees shall not be subjected to ‘repeated actions constituting moral harassment, the aim or effect of which may result in a deterioration of their working conditions and are likely to violate their rights and dignity’. (It is also characteristic that both sexual harassment and moral harassment are a public offence regulated in the Penal Code.) Both regulations – and both sets of definitions – can now concurrently apply. (In practice, most decisions of the *Cour de cassation* are about moral harassment in general without references to sex discrimination.) Not so different are the regulations of **Slovenia** and **FYROM**. In **Slovenia** the provisions on harassment related to sex are implemented through Article 5 of the 2002 Act Implementing the Principle of Equal Treatment covering harassment ‘based on any kind of personal circumstance’ and Article 6a of the Employment Relationship Act prohibiting (discriminatory) harassment, sexual harassment and ‘bullying’ at the workplace. Recently, the 2009 Regulation on Measures to Protect the Dignity of Employees in Public Administration was adopted, also covering sexual harassment as well as harassment associated with ‘any personal circumstance’. In addition to Article 45 of the Employment Relationship Act and Articles 5 and 11 of the 2009 regulation, an employer is obliged to provide ‘a working environment in which none of the workers is subjected to sexual and other harassment or bullying on the part of the employer, a superior or co-workers’. Also here, provisions on harassment are separated from other rules on discrimination. Here, too, any type of harassment or bullying is seen as a minor offence of ‘unwanted conduct’. In **FYROM** despite two separate anti-discrimination acts implementing both the concept of harassment related to (inter alia) sex and sexual harassment, both concepts are also dealt with in Article 9 of the Labour Law, which in its Article 9(a)(2) also contains a ban on mobbing or psychological harassment. All types of mobbing are sanctioned in the Criminal Code as ‘In-service maltreatment’ or ‘Violation of citizens’ equality’.

**Iceland** and **the UK** have both complemented implementing anti-discrimination acts with additional regulations. In **Iceland** this is Regulation No. 1000/2004 on measures against harassment in the workplace, covering not only discriminatory harassment and sexual harassment but also bullying generally, in **the UK** this is the 1997 Protection from Harassment Act, providing civil remedies and criminal punishments in respect of any type of harassment.

Also the cases of the **Czech Republic, Finland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Slovakia, Spain** and **Turkey** can be mentioned in this context as in different ways ‘adding on’ to the European Dignity Harm Approach and therefore confirming its influential position, despite formal implementation by way of the Discriminatory Approach.

The most remarkable example of the Dignity Harm Approach in this context, however, is **Belgium** with the 1996 Welfare at Work Act covering all types of harassment, sexual harassment and ‘violence at work’ whether or not they include any dimension of discrimination. An employee who falls under this Act must rely exclusively on this provision in the area of employment despite the conduct also being covered by the 2007 Gender Act. (However, sexual harassment was labelled as discrimination in Belgium three years prior to the implementation of EU law!)

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<sup>37</sup> Civil servants and independent workers are covered by special regulations, only including discriminatory harassment and sexual harassment respectively, however, and in the area of goods and services only harassment related to sex and sexual harassment are forbidden.

<sup>38</sup> Hirigoyen 1998.

As regards the express rules in the Recast Directive Articles 2(2)(a) and 24 and the Goods and Services Directive Article 11, respectively, requiring a ban on victimization, these provisions have clearly been implemented in most of the countries concerned. This is not true for **FYROM** and **Hungary**, however. **Belgium** has no explicit rule to implement the ban on victimization in the 2007 Gender Act but in practice these situations are covered according to case law. In **Iceland** the implementation is still based on Directive 2002/73/EC and therefore does not cover the broader coverage of Articles 24 and 2(2)(a) outlawing *any less favourable treatment* based on a person's rejection or submission to harassing conduct (NB: the Goods and Services Directive is not implemented at all).

Against this background, most experts have given a positive answer to the question whether national legislation, in their view, is in compliance with EU law. This is not the case, however, with regard to **Belgium, Finland, Germany, Latvia, Lithuania, Luxembourg, Slovakia** and **Slovenia**. (**Turkey** is disregarded here, having no real obligation to implement the provisions, see further above on Turkey.) Where **Belgium** is concerned, the expert's opinion is based on the Welfare at Work Act and its precedence before anti-discrimination regulation in the area of employment making the anti-discriminatory approach 'redundant' and depriving victims of the 'normal' right to a fixed penalty. (Also as regards **France** and **Portugal**, it is the 'double concept' standard merging harassment related to sex and sexual harassment with moral harassment which has raised some doubts with the experts.) Where **Germany** and **Poland** are concerned, the experts refer to the lack of implementation of sexual harassment as regards goods and services. With regard to the other countries mentioned, doubts are caused by details in the definition of the crucial concepts – see Section 2.1.2 below. Moreover, the experts of **the Czech Republic, Liechtenstein, the Netherlands** and **Malta** have presented some concerns as regard the implementation of the Directives' provisions on prevention, remedies and/or the burden of proof – see further Sections 2.1.5 – 2.1.8 below.

### 2.1.2. Definitions

Many Member States, such as **Belgium, Croatia, Cyprus, Greece, Malta** and **the UK**, have literally implemented the Directives' definitions of the respective concepts of harassment related to sex and sexual harassment. The words 'purpose or effect' are present in the definitions of most Member States, but not in **Austria, Luxembourg, Romania** (as regards sexual harassment), **Slovenia** and **Sweden**. In all cases, it is the word 'purpose' that is missing. As is argued in the **Swedish** and similarly in the **Austrian** report this may seem less important since the aim of the provision – and the definition – is to make clear that the effect 'of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment' is enough, despite the fact that there is no purpose or intention to do so. Having said this, there is some room for doubt whether intention – or at least responsibility in the meaning of awareness or reasonable awareness – is not required in cases of less serious 'harassing' conduct where it is not clearly stated by the victim that this conduct is unwanted. – In relation to criminal penalties the question of purpose/intent may also reoccur – see below Section 2.1.7.

As regards EEA/candidate countries, **Iceland** (as regards sexual harassment) has not incorporated the words 'purpose or effect' in the definition. Attention should also again be drawn to the fact that in **Turkey** there is no explicit definition in the labour and criminal laws, but only in the explanatory note to the article on sexual harassment in the criminal law.

Another apparently crucial element in the respective definitions is the word *unwanted*. It is mostly included in the respective legal definitions but not in **France, Hungary, Luxembourg, the Netherlands, Slovakia, Spain** and **Sweden**. As the **Spanish** and the **Dutch** expert say, these are not necessarily examples of lacking implementation but could rather be considered to be better than the inclusive ones 'since it is not necessary to prove that the behaviour is not wanted by the victim'.<sup>39</sup> (In **Finland**, for example, there seems to be a problem with requirements of strong and clear repulsion on the part of the victim – all in line

<sup>39</sup> Compare also the Hungarian expert labelling 'unwanted' a 'redundant requirement'.

with guidelines by the occupational safety authorities and by the social partners!). Moreover, any conduct with ‘the purpose or effect of violating the dignity of a person ...’ can by nature be said to be unwanted. However, the aim of including the word ‘unwanted’ is generally understood to indicate that it is an essential characteristic of discriminatory harassment that it is the victim’s subjective opinion that matters – it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive.<sup>40</sup> However, it should be added that an objective standard is still somehow introduced by the requirement of the conduct ‘creating an intimidating, hostile, degrading, humiliating or offensive environment’. As a matter of fact, the issue of whether this should be left to a general standard of ‘reasonableness’ or maybe a ‘reasonable woman’ standard has been the concern of both the courts and doctrine. A compromise, suggested by Kathryn Abrams, is that the reasonable person should not be ‘the average person but the person enlightened concerning the barriers to [women] equality in the workplace’.<sup>41</sup>

### 2.1.3. Is sexual harassment related to sex discrimination?

In EU law, sexual harassment is only regulated in the Directives dealing with sex discrimination described in Section 1.1. Does this mean that sexual harassment necessarily relates to discrimination on the ground of sex?

It is true that the concept of sexual harassment originated within the area of sex discrimination and for long it was the only concept of sex-related harassment used. We can also recall the influential writings on sexual harassment by the American feminist Catherine MacKinnon claiming that sexual harassment is *by definition* a form of sex discrimination.<sup>42</sup> In the U.S. the Supreme Court found early on that sexual harassment was actionable sex discrimination.<sup>43</sup> First it was only quid pro quo situations that were treated as discriminatory harassment but in the early eighties it became clear that also so-called hostile environment cases were covered by the sexual harassment concept.<sup>44</sup> Also in the European Commission’s Code of Practice it is clear that the concept of sexual harassment includes what we now call harassment related to sex and that all of it was sex discrimination: ‘sexual harassment means unwanted conduct of a sexual nature, or other conduct *based on sex* ...’.<sup>45</sup> Nevertheless, in the introduction to the very same Code of Practice it is assumed that sexual harassment can also cover same-sex harassment.<sup>46</sup> And this was also confirmed in U.S. case law in the famous case *Oncale v Sundowner Offshore Services*.<sup>47</sup>

Now that we deal with two separate concepts – harassment related to sex and sexual harassment – it is often stressed that sexual harassment is characterized by not having to be related to sex but also implies a prohibition of sexualised behaviour as such, first in working life and then also as regards access to and supply of goods and services. As Clarke says, ‘the Equal Treatment Directive outlaws a specific type of conduct, which need not be related to the sex of the victim in any way at all. Rather, where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, ..., then this too is outlawed conduct’.<sup>48</sup> And therefore the wording of the definition of sexual harassment does not in itself refer to discrimination related to sex – it is the context of the two Directives concerned that relates it to sex discrimination.

One can argue that sexual harassment is by nature related to sex. Despite now being defined separately it is still a specific type of harassment related to sex– conduct of a sexual

<sup>40</sup> Compare the European Commission’s Code of Practice.

<sup>41</sup> Abrams 1995, p. 52. Compare also Clarke 2006, Samuels 2004 p. 195 and Gomes et al. 2004, p. 298.

<sup>42</sup> MacKinnon 1979.

<sup>43</sup> A famous case is the *Meritor Savings Bank v Vinson* 477 US 57 (1986).

<sup>44</sup> See *Bundy v Jackson* 641 F.2d 934 (D.C. Cir. 1981).

<sup>45</sup> Code of Practice, 2. Definition.

<sup>46</sup> Compare, for instance, Katherine Franke arguing that sexual harassment is a technology of sexism, in that it penalizes gender non-conformity by humiliating and/or terrorizing ‘very assertive’ women or ‘effeminate’ men, see Franke, pp. 691-772.

<sup>47</sup> 118 S Ct 998 (1998). For an analysis see e.g. Clarke 2007, p. 83.

<sup>48</sup> See Clarke 2007, p. 98. Compare also e.g. Holtmaat 2009, p. 34.

nature.<sup>49</sup> On the other hand, it can still be argued that sexual harassment for some reason is still not regulated in contexts other than sex discrimination but that this may well be the case in the future. What we can rely on is that any harassing ‘conduct of a sexual nature’ will not be tolerated in relation to ethnicity, disability, etc. It will either be regarded as an integrated part of the broader concept of harassment on the grounds of ethnicity, disability, etc. or it will be dealt with as multiple or complex discrimination.<sup>50</sup>

Sexual harassment is not mentioned in the directives concerning grounds of discrimination other than sex such as Race Directive 2000/43/EC and Framework Directive 2000/78/EC. However, this does not mean that the prohibition of sexual harassment at the national level reflects the same legal structure as EU law in this regard.

As regards the implementing instruments in the countries covered by this report, sexual harassment is most frequently conceptualised as sex discrimination (**Austria, Belgium, Cyprus, Denmark, Estonia, Finland, FYROM, Greece, Iceland, Italy, Liechtenstein, Luxembourg, Malta, Norway, Slovenia and Spain**). This frequently is the direct consequence of sexual harassment being (only) regulated in a specific sex equality act. In quite a large number of countries sexual harassment, however, is not formally conceptualised as part of sex equality, e.g. in the **Czech Republic, Germany, Hungary, Ireland, Latvia, the Netherlands, Poland, Portugal, Romania, Slovakia, Sweden and the UK**. Often enough this broader conceptualisation is due to legal formalities only and no reports actually refer to any concrete practices or even discussion on the application outside the area of sex discrimination.

In the **Swedish** setting, for instance, the 2008 Discrimination Act defines harassment in Chapter 1 Section 4(3) as ‘conduct that violates a person’s dignity and *that is associated with one of the grounds of discrimination...*’. Sexual harassment is defined in Section 4(4) as ‘conduct of a sexual nature that violates someone’s dignity’ and is not literally restricted or related to any certain ground. In the leading Swedish commentary to the Discrimination Act, it is also clearly stated that ‘sexual harassment implies no requirement of being related to a certain ground of discrimination, instead it is the character of the conduct that must have a relation to *sexuality*’.<sup>51</sup> The *travaux préparatoires*, however, are not completely coherent as regards the coverage. Nevertheless, a ‘single’ Anti-Discrimination Act with a horizontal design of the Swedish type promotes that applications are not too particular with regard to the ground of discrimination at hand, as well as it can be said to ‘embrace’ cases of multiple discrimination.

Also in **the Netherlands**, the inclusion of the separate concept of sexual harassment in an Act – the 2004 Amendment of the General Equal Treatment Act, implementing Directive 2004/113 – covering a number of grounds other than sex as well and thus widening its application seems to have been an ‘extension by accident’ according to the expert.

In **Hungary** there is no independent legal concept of sexual harassment and therefore it cannot be established in relation to any ground, really. It is, however, integrated into a general definition of harassment in relation to all grounds covered by the relevant legislation.

#### 2.1.4. The addressees of implementing regulations

The normative logic behind legislated prohibitions against discrimination is that these address those who have the power to institutionalise change – typically speaking employers and providers of goods and services. It is true that harassment is different from many situations of direct and indirect discrimination, as it does not include a comparison of treatment but bans certain conduct as such. This is at least true with regard to sexual harassment proper.<sup>52</sup> However, when making bans on harassment part of discrimination law, it is still ‘empowered’ structures – central to economic or social life – of detrimental treatment facing certain groups of people that is the main target of legislation – not *any* harmful behaviour.

<sup>49</sup> Originally, it was the other way around – sexual harassment included harassment related to sex more generally!

<sup>50</sup> See further, for instance, Holtmaat 2009a.

<sup>51</sup> Fransson & Stüber 2010, p. 89.

<sup>52</sup> Compare Clarke 2006 on the difficulties for courts in the U.K. to deal with harassment ‘on the grounds of sex’.

The general aim of the Recast Directive is to come to terms with harassment related to sex and sexual harassment in the workplace, but also in the context of access to employment, vocational training and promotion. Employers and those responsible for vocational training are addressed as those primarily responsible to take preventive measures against harassment and sexual harassment (preamble Paragraph 7). It may seem only natural to assume that the addressees as regard harassment related to sex and sexual harassment are those who are in charge of decisions concerning work and working conditions, i.e. mainly employers and their representatives. This is especially so when sex-related and/or sexual harassment is ‘costumed’ as a quid pro quo situation. Also as regards hostile environment cases, it is first and foremost the employer who is responsible for a good and friendly working environment and this may also include (possibly implied) contractual obligations. However, addressing the working environment and violations of the dignity of the victim it may also seem rational to widen the scope of application to fellow employees and even third parties such as customers, clients and pupils. Broadening the scope can take on different forms. An important one is a more or less far-reaching liability for the person primary responsible of the workplace, the employer. This aspect is closely related to the duty of the employer to properly investigate and remedy any situation of harassment which comes to his/her knowledge, which should it be neglected can lead to direct or indirect discrimination.<sup>53</sup> Vicarious liability can also be more absolute in character covering any event of banned harassing conduct despite neglect or lack of awareness on the part of the employer. Such far-reaching responsibilities are often accompanied by a Dignity Harm Approach to harassment related to sex (among other grounds) and sexual harassment categorizing them as a misdemeanour, where the addressee can be not only the employer but also any perpetrator or harasser. The law can be said to be equally interested in how employees – or even citizens at large – treat each other! Of course this does not mean that countries more in line with the Discriminatory Approach have no sanctions with regard to the perpetrator when this is not the employer, but only that such responsibility is dealt with outside the context of anti-discrimination provisions e.g. by regulations on disciplinary measures within the employment or dismissal law.

In a number of countries only employers and their representatives can be held responsible under anti-discrimination law proper, be it that the view on the employer’s liability can differ considerably. This seems to be the case in **Bulgaria, Denmark, Finland, Greece, Hungary, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, the Netherlands, Romania and Sweden**. This also seems to be true for the **Czech Republic** where the vicarious liability on the part of the employer is absolute.

In many countries – more or less representative for the Dignity Harm Approach – the ban on harassment is also regarded to cover fellow employees (**Austria, Belgium, Cyprus, France, FYROM, Greece, Ireland, Italy, Luxembourg, Malta, Norway, Poland, Slovakia and Slovenia**), which are then often punishable by a rule implying disciplinary or criminal penalties for harassing conduct. In these cases, the sanction can be provided for within labour law/anti-discrimination law itself or be stipulated in a separate statute – or even the Penal Code – in terms specific to the ban on discriminatory harassment or to a dignity offence in a broader meaning. Especially when the offence rule is part and parcel of the banning provisions or at least formulated in terms of discriminatory or sexual harassment it is difficult to argue that such regulation is ‘outside the scope of anti-discrimination law’. (It is also presumed under the Recast Directive that implementing measures can take the form of criminal procedures (Article 19(5).) As mentioned above, such coverage is often accompanied by an ‘absolute’ vicarious liability on the part of the employer (**the Czech Republic, France, Ireland, Poland, Spain and the UK**). This means that in **Spain** employers are held liable, and subjected to an administrative sanction according to the Act on Infractions and Sanctions in the Social Order, for any sexual harassment situation (which is not conditioned on the

<sup>53</sup> Already back in 1988 the U.S. Supreme Court clarified employers’ liability, holding that employers were strictly liable where sexual harassment had tangible employment consequences such as dismissal whereas in ‘hostile environment’ cases employers would have a defence where they had acted reasonably to prevent harassment, compare Clarke 2007 p. 81 and the cases *Burlington Industries Inc. v Ellerth* 524 U.S. 742 (1998) and *Faragher v City of Boca Raton* 524 U.S. 775 (1998).



employer's full awareness of the conduct) whereas such a sanction in relation to harassment related to sex is only due to a breach of labour relations law (health and safety) or an infraction of prevention rules.

When it comes to the Goods and Services Directive it is more frequent that the addressee is said to be the provider. In **Luxembourg**, however, the legal provisions on discriminatory harassment can be applied to all customers as well.

#### *2.1.5. Prevention*

As can be seen from the preamble of the Recast Directive (Paragraph 7) preventive measures against harassment related to sex and sexual harassment are seen as crucial for coming to terms with such conduct. However, the rules of the Directive do not explicitly oblige employers to take such measures – the Directive merely cautions Member States to encourage employers to ‘take effective measures to prevent all forms of discrimination on the grounds of sex, in particular harassment and sexual harassment ...’ (Article 26). Member States are also assumed to take adequate measures to promote social dialogue between the social partners on these matters, including establishing codes of conduct (Article 21(1)) – this will be left to the section on collective agreements below (Section 3.2), however.

The Goods and Services Directive does not as such include any parallel statements and rules on prevention.

It has already been stated above, however, that proper work with preventive measures is often enough crucial for employers to avoid liability (if possible) for discriminatory harassment of fellow workers or third persons such as clients and customers, in accordance with anti-discriminatory regulation itself. Moreover, according to health and safety regulations and/or contractual terms, employers are normally considered responsible for providing a working environment free from harassment – see Section 3.1 below.

In a number of countries, no express rules on preventive measures in relation to sex discrimination harassment have been introduced. This is the case in **Austria, Belgium, Latvia, the Czech Republic, Denmark, Estonia, FYROM, Hungary, Liechtenstein, Malta** and **Portugal**. This does not mean, however, that there are no indirect requirements for preventive measures in relation to the responsibility for discriminatory harassment and also in relation to general health and safety regulation. Moreover, in **Belgium** we do find requirements in the Welfare at Work Act for employers to have a general policy of prevention in place against ‘psychic and social workload’ covering all types of harassment and violence at work. Also in **France** there are express requirements for preventive measures in relation to moral harassment in general terms and the same is basically true for **Iceland, Luxembourg** and **Turkey**. In **France** the employer must prepare a coherent prevention plan covering many work environment issues and ‘particularly risks relating to moral harassment’. There is also a rule in the Labour Code specifying that employers must take all necessary steps to prevent moral harassment such as training measures specifically addressed to management in order not to harass and to recognize harassment practices. ‘Company regulations’ must also integrate some information on harassment, mainly the prohibition of moral and sexual harassment. In **Iceland**, an ‘Equality Programme’ under the Gender Equality Act should include an action programme for cases of harassment. In **Luxembourg** the law places an obligation on employers to implement preventive measures in order to ‘preserve the dignity of the workers’. In **Turkey** the Obligations Code includes a provision on the ‘protection of the workers’ personality’ coming into effect on 1 July 2012, which imposes on employers the obligation to take all necessary measures to combat sexual harassment and mobbing. There is also a circular of the Prime Ministry on how to monitor this obligation in various ways.

In **Ireland** the Equality Authority published a Code of Practice in 2002 which sets out the procedures that employers should utilize in preventing harassment and sexual harassment and addressing complaints of such harassment. The Code has been given legislative effect but is not mandatory on employers. However, the Code is admissible in any employment dispute in which it is relevant. In **the UK**, too, the Government Equalities Office has published a table of transposition measures in relation to Article 26 of the Recast Directive providing best practice advice and guidance by the Equality and Human Rights Commission.

In **Germany**, prevention in the form of codes of conduct is a question for the works councils – the employer cannot unilaterally regulate this since such regulations can violate the workers' personal rights and privacy.

#### 2.1.6. Procedures

Here our main interest is procedures for dealing with harassment related to sex and sexual harassment *within the context of anti-discrimination law*. Generally speaking this can be discussed in terms of three different, partly parallel, paths: (i) internal procedures followed by (ii) allegations filed with a specialized supervisory equality body of some kind and/or (iii) allegations made within the court system towards the employer/goods and services provider. In addition, administrative and criminal law systems become effective in those cases where sexual harassment and/or dignity harm more generally are categorized as misdemeanours. This is particularly frequent regarding harassment claims against the actual harasser/perpetrator, be it the employer or not. Situations implying other parts of labour law than the ones at stake here, such as health and safety law more generally, employment protection law in relation to wrongful dismissal or the penal system as such regulating, for instance, a number of sexually related crimes, will be dealt with in Section 3 below.

It is, of course, only normal that a situation concerning discriminatory harassment – including sex-related and/or sexual harassment – is first dealt with internally at the workplace before any external action whatsoever is taken. In many countries there are no special procedural rules prescribed for situations of discriminatory harassment but the normal procedural rules in connection to situations of discrimination apply. There can, however, be special rules on this first internal stage, possibly in special 'Company Regulations' (**France**) or Codes of Conduct – compare Sections 2.1.5 and 3.2. This seems to be the case in **Bulgaria, Denmark, France and Germany**. In **Sweden**, for instance, there is a legal obligation on the employer to 'investigate and take measures against harassment' as soon as he becomes aware of a case of alleged harassment. In **Croatia** Article 130 of the Labour Code obliges all employers to define and implement rules and procedures to be followed in cases involving sexual harassment complaints.<sup>54</sup>

Most countries have a special equality body supervising discriminatory practices, including discriminatory harassment and sexual harassment. The competences of such authorities are quite diverse, however. Whereas some have the competence to make compulsory decisions, which may be appealed, others are authorized to bring a claim before court should the victim consent. In **Austria**, for instance, cases of alleged discrimination can be brought before the Equal Treatment Commission, which is divided into several 'Senates' depending on the type of discrimination.

A parallel path is to initiate the claim in the court system. Civil damages often require allegations before a court. For the Recast Directive this would often be special Labour Courts and for the Goods and Services Directive this would be ordinary Civil or Commercial Courts.

In addition, there is the possibility to respond to harassment by initiating administrative or criminal offence proceedings in relation to the employer/goods and services provider or even anybody harassing you. You may also take the harasser to an ordinary court or even claim damages in the course of penal/administrative proceedings.

All in all, there is a very complex 'pattern' of procedures applied in the many countries concerned. I will give but some examples on the procedures in place.

In **Belgium** the Welfare at Work Act provides for a special internal procedure generally applicable for dignity harm offences with specialized 'advisers' who are empowered to conduct investigations and make recommendations which the employer is expected to act upon. You can also take external action, or place a formal complaint with the Labour Inspectorate or the Public Prosecution Office (which may result in penal proceedings, as employers' breaches of the provisions of the said Act are misdemeanours where the victim

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<sup>54</sup> Moreover, when there are more than 20 employees, the employer is obliged to appoint a specific person who is authorized to examine and respond to sexual harassment complaints in addition to the company owner or executive director.

can also claim damages), or initiate a claim before the Labour Court (which may then order that the formal internal procedure is first applied). Strangely enough, the Institute for Equality of Women and Men – the gender equality body – is not competent to receive formal complaints on sex-related or sexual harassment, since the employee where possible must rely on the Welfare at Work Act! In cases under the Goods and Services Directive, allegations must in principle be presented to the Civil and Commercial Courts.

In **Estonia** in discrimination cases there is the possibility to turn to the Gender Equality and Equal Treatment Commissioner to receive an opinion, and there also is the Chancellor of Justice who may carry out voluntary conciliation proceedings. And then there is the possibility to submit a complaint with the Labour Dispute Committees or to turn to a court on general grounds.

In **Iceland**, in accordance with the 2008 Gender Equality Act implementing the Recast Directive (the Goods and Services Directive has not been implemented yet), redress can be sought through the Complaints Committee on Gender Equality, whose decisions are binding on all parties. The parties may refer the Committee's rulings to the Courts. The supervising body, the Centre for Gender Equality, may initiate legal proceedings. Harassment cases before Icelandic courts can be civil or criminal cases whereas the Labour Court would 'not normally deal with such cases' according to the expert.

**Italy** is interesting because of its system with national, regional, provincial and local 'Equality Advisors' which may assist the victims of discrimination. They may also bring claims to courts in cases of 'collective discrimination' when the employees affected are not immediately identifiable, something which should prove especially valuable in cases of harassment related to sex involving a hostile environment. Equality Advisors can also initiate proceedings when delegated by an individual employee.

In **Latvia** the Ombudsman provides one way to tackle discrimination both as regards employment and goods and services. The Ombudsman's Office may initiate an investigation in order to reach a peaceful settlement or, if this is not possible, bring the case before a court representing the victim. There also is the possibility for the victim to go directly to court– in accordance with the Labour Law, Civil Procedure Law or Administrative Procedure Law.

The situation is similar in **Sweden**, where the Equality Ombudsman is the supervising body and the rules on which court to turn to are given in the very 2008 Discrimination Act.

In **Portugal** a employee who has become a victim may take a claim directly to the employer concerning both harassing conduct from a fellow worker or a superior, start a complaints procedure before the Labour Inspection Services (possibly with the help of the union or the works council), start an advisory procedure before the Agency for Equality in Employment (the supervising body) which can later be redirected to the Labour Inspection Services, or, finally, start a judicial procedure for the purposes of compensation of damages.

#### *2.1.7. Burden of proof*

In the *Coleman* case, the ECJ describes the provision of the reversed burden of proof in harassment cases so that 'in the event that (the claimant) establishes facts from which it may be presumed that there has been harassment, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the defendants, who must prove that there has been no harassment in the circumstances of the present case' (p. 62 of the judgment). This rule is contained in Article 19 of the Recast Directive and Article 9 of the Goods and Services Directive, respectively.

Almost all experts have reported that the rule on the reversed burden of proof has been properly implemented in their national legislation – both with regard to employment and goods and services.

In various countries representing the Dignity Harm Approach the reversed burden of proof applies not only to discriminatory harassment but also to harassment in general, i.e. mobbing or bullying. This is the case in **Belgium**, where this is regulated in the Welfare at Work Act, in **France** and in **FYROM**. In **Poland** the burden of proof is even said to formally lie entirely on the employer – in practice it is divided, however. In some countries, however, doubts are raised with regard to the practical application of the reversed burden of proof

despite formal implementation. This is the case in **Austria, Croatia, Germany, Greece, Portugal and Slovakia**. In **Slovakia**, despite being implemented into the Anti-Discrimination Act, the provision on the reversed burden of proof is not regulated in the Code of Civil Proceedings and courts therefore sometimes avoid applying it. The same situation seems to apply in **Greece**.

#### *2.1.8. Remedies and sanctions*

The normative logic of legislated prohibitions against discrimination is that these address those who have the power to institutionalise change – typically speaking employers and providers of goods and services. This is also true with regard to labour legislation in general – to a great extent it provides rules to the protection of the weaker party, i.e. employees or workers on behalf of employers.

Generally speaking, the legislation implementing the EU law bans on harassment related to sex and sexual harassment, whether in special anti-discrimination acts or as parts of labour law, provide for claims within the civil court system against the employer or provider, being the main addressee of legislation – in working life this would often be before the special Labour Courts, and as regards goods and services before the ordinary Civil Courts or Commercial Courts. Damages are a normal remedy here, both economic and in many cases also punitive –. There also is a scope for declaring discriminatory decisions or actions, consequences of harassment, null and void. There may also be the possibility to claim an order on the defendant to cease the discriminatory practice and – sometimes – also to have an apology.<sup>55</sup> In some countries it is also within the competence of supervisory equality bodies to make decisions leading to such consequences but frequently this seems to require a voluntary settlement. So far, the system does not deviate from what is the general rule concerning allegations of discrimination.

However, in a number of countries, discriminatory harassment – and possibly also discriminatory acts in general – is also something which the employer or provider can be made responsible for under criminal or administrative law provisions. This can be combined with a more or less absolute vicarious liability for the acts of fellow employees or third parties. Generally speaking, such penalties do not provide for compensation for the victim, but lead to payment of administrative fines or even to imprisonment. In some cases, however, penal/administrative practices can also be combined with compensation for the victim (**Belgium, Ireland and Spain**).

In **Bulgaria**, there is an administrative penal sanction in the Protection against Discrimination Act. In **Cyprus**, an intentional breach of the 205(I)2002 Equal Treatment of Men and Women in Employment and Vocational Training Act is punishable by fines and/or imprisonment. In **Finland**, discrimination in employment is punishable under the Penal Code Chapter 47 (employer and representative). In **Italy**, minor criminal sanctions are provided for infringement of the prohibition of discrimination in access to work and working conditions. In **Malta**, regulations both in the area of employment and goods and services discrimination provide for penalties in the form of a fine and/or imprisonment. In **Portugal**, the Labour Inspection Services can impose administrative fines according to the Labour Code. In **Spain**, ‘sexual harassment’ is a crime ‘when asking favours of a sexual nature, for oneself or a third party, in the scope of a labour relation, educational relation or of services’ causing ‘an objective and serious intimidating, hostile or humiliating situation’ for the victim (Article 184 of the Penal Code). Administrative sanctions are also established in the Act of Infractions and Sanctions in the Social Order.

Making harassment a public offence can be said to go hand in hand with the Dignity Harm Approach. The broadened scope for harassment, targeting not only discriminatory conduct but any harassing conduct towards or between workers, can be traced also to the sanctioning system making mobbing or bullying generally an offence ‘tacitly’ also covering

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<sup>55</sup> Compare **Croatia** where the law provides four civil-law antidiscrimination lawsuits: a declaration establishing discrimination, prevention of persisting discrimination, compensation of damages and/or demanding a published apology for discrimination.

discriminatory and sexual harassment. In **Belgium**, according to the Welfare at Work Act employers are liable to penal sanctions for general harassment. In **France**, in addition to the Labour Law there is the 2002 Social Modernization Act, which includes specific penal provisions regarding moral harassment. In **Greece**, there are, in addition to the Acts transposing the Directives, Criminal Code provisions which ‘protect the personality and prohibit abuse of the employer’s rights and prejudicial modification of working conditions’. Since 2008, **Hungary** has a misdemeanour called ‘harassment’ in the Criminal Code among ‘crimes against freedom and human dignity’. Harassment is also addressed by civil law as a special form of the misuse of rights together with such misuse aimed at damaging the national economy, violating the rights and interest of others or achieving undeserved rights. In addition, Article 76 of the Civil Code on the ‘rights of persons’ requires civil litigation. In **Slovenia**, an administrative fine can be imposed on employers not having provided protection against sexual or other harassment or bullying. In the **UK**, the 1997 Protection from Harassment Act provides civil remedies *and* criminal punishment also in respect of non-discriminatory harassment. (However, in practice, this regulation is far less important in the employment context than the Equality Act 2010.)

It is interesting to draw attention to the fact that, in contrast with the Recast Directive’s ban on ‘the fixing of a prior upper limit’ in Article 18, a number of countries has what can be called ‘a floor’ of minimum compensation in cases of harassment. This eases the burden on the victim to show concrete harm suffered in individual cases. In **Austria**, the minimum amount of damages for violation of dignity was set at EUR 1 000. In **Belgium**, such fixed damages (EUR 650 or 1 300) exist according to the Gender Act both in cases of employment and as regards goods and services. In **Luxembourg**, in the area of goods and services victims may choose between a fixed allowance of EUR 1 000 or the coverage of the harm actually suffered. In **Poland**, in case of violation of the equal treatment principle there is a right to compensation not lower than one month’s minimum wage.

In many countries the harasser/perpetrator, be it a fellow employee, a customer or a student, can be held responsible under penal/administrative rules making harassment an offence.<sup>56</sup> In **Belgium**, the Penal Code penalizes ‘harassment’ as ‘any behaviour which the perpetrator knows or should have known to be liable to seriously harm another person’s quiet’ whereas in **Cyprus** the perpetrator can also be held responsible by imposing a fine and/or imprisonment under the 205(I) 2002 Equal Treatment of Men and Women in Employment and Vocational Training Act. In **France**, Article 222-33-3 of the Penal Code makes moral harassment punishable by a penalty of one year’s imprisonment and a fine of EUR 15 000. In **Hungary**, Article 76 of the Civil Code on rights of persons can also be used against individual harassers – compare above – and ‘harassment’ is a Criminal Code crime. In **Iceland** ‘sexual harassment’ is a crime under the Penal Code and this is also the case in **Liechtenstein**. In **Portugal**, harassment practices can be a crime of menace ‘against physical integrity, personal freedom or sexual liberty’. In **Romania**, sexual harassment is a criminal offence but requires a relation of subordination between the perpetrator and the victim. This also seems to be the case in **Croatia**. **Slovenia** has both administrative and criminal sanctions against the harasser. In **Spain**, any author of (any type of) harassment can be disciplinarily sanctioned in accordance with Article 54 of the Workers Statute. In these cases, proceedings may also be combined with damages paid to the victim, but typically speaking we are talking about a penalized offence leading to the payment of a fine and not about compensation to the victim.

As regards the individual harasser/perpetrator, in working life labour law also provides for other consequences. It is a common characteristic that the employer in these cases can apply disciplinary measures of different types, starting with a warning and ending with a measure as serious as summary dismissal, depending on the seriousness of the situation. This is clearly reflected in case law on sexual harassment, which frequently takes the expression of

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<sup>56</sup> In all countries, penal law includes crimes on different types of sexual abuse which may be applied in situations of sexual harassment, see further Section 3.

claims on unlawful dismissal on the part the harasser – see also Section 2.2 below.<sup>57</sup> In some countries, legislation makes it more or less compulsory for the employer to react with disciplinary sanctions against the harasser.

A final point of attention under this heading is the consequences for the victims of harassment. Here, obviously, the ban on victimisation comes to the fore. ‘Any less favourable treatment based on a person’s rejection of or submission to’ harassing conduct as well as adverse treatment as a reaction to a complaint is clearly banned by the Directives and is regarded as discrimination per se. Nevertheless, in situations of discriminatory harassment some changes in the workplace are often necessary. Quite often, the victim’s situation at work can be said to require that due to the organisation of the work she (or he) is forced to regularly meet the perpetrator. Therefore a transfer of the perpetrator or the victim can be required. According to the EU Commission’s Code of Practice, it should be the victim’s choice whether she (or he) or the perpetrator is the one to be transferred.

## 2.2. Case law

### 2.2.1. Introduction

Case law in the field of sex harassment is generally scarce. Therefore there is no ECJ case law in this field yet.<sup>58</sup> No cases whatsoever are reported from **Liechtenstein**. In **Romania**, only a few allegations have been presented to the supervising body, the National Council for Combating Discrimination. On the other hand, in other countries such as **Austria, Belgium, Ireland** and **the Netherlands** there is said to be a comprehensive body of case law and other decisions. Where there is case law, this mainly refers to sexual harassment (or it dates from the time where there were no separate concepts for harassment related to sex and sexual harassment), whereas case law on harassment related to sex proper is practically non-existent (however, see **Austria**). Case law regarding the Goods and Services Directive is also practically non-existent.

At the same time, given the rather vague definitions of the respective concepts harassment related to sex and sexual harassment – ‘conduct ... with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment’ – case law is crucial for better understanding. I will therefore look into the cases referred to in the respective country reports and give some examples. It is not unusual that the case referred to is not on the ban of discriminatory harassment proper but instead concerns (alleged unlawful) dismissal as a disciplinary sanction against the harasser or possibly on the part of the victim her/himself. This seems to be especially frequent in **Belgium, Estonia, FYROM, Germany, Italy, Latvia, the Netherlands** and **Poland**. Also, case law may be ‘disguised’ as general mobbing cases and not in the terms of discriminatory harassment. This is currently the case in **Belgium**, where 456 cases under the Welfare at Work Act were reported in the period 2002-2011, of which only 16 concerned sexual harassment, possibly mixed with general harassment. Also in **France** decisions regarding moral harassment are said to outnumber those of sex discriminatory harassment by far. In **Croatia, FYROM, Iceland, Italy, Norway, Poland, Portugal** and **Turkey** sex discrimination also seems to run the risk of being overshadowed by mobbing in general. Relevant assessments do not only come from courts but also from supervisory bodies, such as equality bodies and/or administrative bodies of different types. The latter is, of course, very common where discriminatory sex harassment or harassment is generally seen as an offence to be punished by an administrative fine.

<sup>57</sup> In a recent article Helene Masse-Dessen describes how in France a trend might be discerned how employers tend to ‘use’ the negative connotations related to moral/sexual harassment by using such accusations as ground for dismissal, see Masse-Dessen 2011. See also Clarke 2007 p. 91 on Germany.

<sup>58</sup> A search on the ECJ’s web page only gives four results as regards harassment: Case C-144/04 *Mangold* (age), C-411/05 *Palacios de la Villa* (age), C-303/06 *Coleman* (disability) and C-394/11 *Belov* (ethnicity, pending). None of these cases refer to harassment related to sex or sexual harassment proper and, in fact, among judgments to date only the Coleman case is really about (disability) harassment.

Decisions of supervisory equality bodies play little or no role in many countries (**Austria, Belgium, the Czech Republic, Denmark, FYROM, Germany and the Netherlands**) due to their limited competences or the character of sex-related and/or sexual harassment cases. So, in **Denmark**, the Equality Complaints Board cannot hear oral evidence, which is often crucial to harassment situations. In **Turkey** no supervising equality body has yet been established.

But first, there is a lesson to be learned from the ECJ's judgment in the *Coleman* case C-303/06, so far the only judgment that has explicitly dealt with discriminatory harassment. The case concerned Directive 2000/78/EC and the crucial question was whether this Directive protects employees who, although they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled. The Court deals with harassment on pp. 57-63 and reaches the conclusion that the prohibition of harassment laid down in the Directive is not limited only to people who are themselves disabled – it also covers situations where it is established that the harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee. It is difficult to picture any parallel situation within the area of sex discrimination and from that point of view (only) the judgment appears to be of limited importance.<sup>59</sup> The judgment does provide, however, some statements on the application of the reversed burden of proof rule, also in harassment cases which are of more common interest.

#### 2.2.2. National courts and equality bodies; general features of case law

The question of *what conduct suffices to amount to harassment related to sex or sexual harassment* is, of course, illustrated in many cases and some of them will be referred to here.

In **the Czech Republic**, the City Court of Prague did not find that the strong embrace of a female tram driver by a superior colleague against her will amounted to sexual harassment since 'there was no sexual content in the behaviour of the man' (21 Cdo 2104/2001).

In a notorious case in **Belgium**, the Labour Court of Appeal in Brussels found that salacious talk and unhooking a subordinate's bra through her outer clothing was nothing more than 'delayed boyishness', so that the victim who had waged a denigration campaign against her supervisor had given the employer serious grounds for her dismissal. The Penal Court of Brussels, however, later found the harasser guilty of indecent assault for the same facts.

The **Estonian** report mentions a case on unlawful dismissal of a pilot having allegedly harassed a female security officer (not necessarily a fellow employee) who had stopped him in the security check. He himself grabbed the hands of the security officer and put them on his body. The court found that the dismissal was illegal, annulled the disciplinary sanction and reinstated the pilot. The court noted that the bodies of the pilot and the security officer had not been in contact. Additionally, he had not rubbed her hands on his body but simply put them on his body for a moment, after which she had removed them (Harju County Court 4 March 2010). The Appeal Court also found that the conduct had no sexual nature – and had not even been perceived as such by the victim – nor had it created a hostile work environment (Tallin District Court 15 November 2010).

In **Germany**, the State Labour Court of Schleswig-Holstein found that the display of a pornographic picture to a fellow employee nurse and talk about imaginary sexual intercourse involving this employee and yet another female colleague was enough to immediately dismiss a male nurse after 18 years of employment with the employer. The court took into consideration 'the human dignity of the female fellow nurses, their sexual autonomy, their right to work without sexualised communication structures, the ongoing nature of the sexualised language usage by the claimant and the employer's duty to protect his female employees who, in addition, make up the vast majority of the workforce in a hospital'.

In **Hungary**, the 'cautious' attitude of the Equal Treatment Authority (ETA) catches attention. It is worth mentioning that the ETA did not find harassment to be at hand, where a woman after a divorce was requested to give sexual favours to her superior in exchange for

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<sup>59</sup> A spouse being harassed in relation to his/her transgender spouse or a mother/father being harassed in relation to her/his transgender child may be such examples, however.

meeting her request for a transfer to a better-paid position, with regard to possible “personal conflicts” in the background and also the “moral assessment” (!) of the private life of the complainant’ since ‘this was not related to her female sex and maternity’.

In **Iceland**, a reported case concerns alleged sexual harassment of a female employee by her superior during a work trip with another staff member. She was urged to go into a hot tub where her superior was sitting naked and later on – at night – she was molested by him knocking on her door. The Court found this to be sexual harassment and it made no difference that the defendant had afterwards paid for her visits to a psychologist (Reykjanes District Court judgment 9 February 2011, E-1383/2010).

In **Malta**, verbal harassment suffered by a female employee was considered not to be simply ‘joking around’ but to amount to discriminatory harassment, and the same is true for a case where a female employee was told by a board chairman to take a seat in his lap.

A **Polish** criminal case reveals astonishingly tolerant standards by a lower instance court (when seeking prolongation of their employment contract, female nurses were greeted by their superior pulling at them, kissing them, grabbing them under their skirts, trying to expose their breasts and inducing them to submit to sexual intercourse – conduct regarded to imply an ‘insignificant degree of social harm’!). The Supreme Court, however, found that the fact that there had been ‘no physical exposure of the harmed women before the offender .... and that none of the harmed women had suffered any bodily harm’ constituted no arguments for the assumption that the conduct had an insignificant degree of social harm.

In a recent **Swedish** case (AD 2011 No. 13) an e-mail with potentially offensive sexual content was enough to amount to sexual harassment once the harasser, a superior in a managing position, had been made aware that the women concerned felt offended. Putting up the same picture in the lunch room prior to the e-mail, however, did not amount to harassment in itself. ‘There must be room to put up pictures also of a sexual nature when not directed at anyone special as long as it is not made clear that this is actually causing offence,’ concluded the Court.

Another set of cases deals with *the liability of employers* for harassing conduct at the workplace. The **Irish** report speaks of far-reaching employer’s liability also for harassment by non-employees. See also the **Slovenian** report. The **Swedish** report gives evidence on various cases where the employer has been made responsible for discrimination due to negligence or passivity when learning about sexual harassment in the workplace. In one of these cases, the Swedish Labour Court stated that ‘also events in the employees’ spare time may be covered by the employer’s duty of investigation’ (AD 2005 No. 22).

There are also cases illustrating the ban on *victimization*. Such cases are mentioned in the **Cyprus** report. A reported case from **France** is instructive concerning the concept of discriminatory harassment. A female assistant manager saw her work situation deteriorate shortly after promotion: she was asked to no longer participate in high-level meetings and refrain from behaving ‘seductively’ and her superior sought, by all available means, information about her private life and particularly her love life. There were enough facts to assume that the claimant was dismissed in retaliation for having complained about moral and sexual harassment. The **Icelandic** case referred to above also included a claim on discriminatory victimization. The claimant found her work responsibilities gradually diminished while her superior kept his post as next in line to the CEO. The Court found the employer guilty of discrimination.

Another question is *what standards the requirement of a hostile working environment has to meet*. In a recent case from **the Netherlands** the Dutch Supreme Court found that a specific sensitivity of the victim, because of previous experience of sexual harassment, was not relevant, i.e. it held that an objective standard should be applied (HR 10 July 2009, JAR 2009/202, LJN: B14209). Interesting in this context is also the **Spanish** case 224/1999 from the Constitutional Court, changing the then current interpretation of the need for a victim’s reaction to certain conduct if there is ‘objectively, and not only for the harassed person, a sullen and uncomfortable work atmosphere that does not only depend on the sensitivity of the victim’.



An essential characteristic of harassment related to sex and sexual harassment is that it is *unwanted* by the recipient and that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive. An **Austrian** Labour Court came to the conclusion that since the perception of the victim is decisive it is possible for him/her to pardon the harasser, and in such a case there is no sexual harassment (ASG Wien 5 Cga 16/07z, 3 September 2008). On the other hand, in the **Irish** case *A Worker v A Company* ([1990] E.I. R. 187) the Labour Court held that an employee's consent to a sexual relationship would not provide an unlimited defence to an employer. The Court pointed to the dominant position of the employer, the fact that the employer had taken advantage of work-related arrangements within the hotel, that at the same time there was a lack of social relationship between the employer and the victim outside work and that he was aware of the victim's personal vulnerability.

Therefore, in various countries sex-related and/or sexual harassment is to a varying extent 'disguised' as general bullying. This is misleading, as sex discriminatory harassment then remains even more invisible than it already is. There are other problems as well. Bullying often requires repeated actions, whereas sexual harassment can be at hand also based on one single occasion (**France**).

As regards the Goods and Services Directive so few cases are covered in the reports that they can all be briefly referred to here. In **Bulgaria** one case (still pending) has been brought before the Equality Body by 13 women as a case of harassment related to sex concerning an advertisement of alcoholic beverages and arguably outside the scope of the Directive. Both the Equality Body and the first decision by the Supreme Administrative Court refused to recognize harassment, arguing that the 13 women were not representative enough for the opinion of women in Bulgaria. The final decision by a second panel of five judges of the Supreme Court will follow in the near future (No. 12450/2010, 7<sup>th</sup> division of the SAC). **The Netherlands** reports some cases in the education and healthcare areas. **Italy** also reports two cases concerning the harassment of clients, in the context of dismissal of the harasser. In **Greece** some cases of alleged discriminatory harassment were accounted for in relation to the Ombudsman's activities concerning providers (a doctor and a police officer) harassing women seeking their services; moreover, a private doctor and a police officer were convicted by a penal court and a disciplinary sanction was imposed on a hospital doctor for such conduct. However, the special Consumer Ombudsman, who is the equality body in this respect has not reported any allegations of discriminatory harassment related to sex or sexual harassment whatsoever. In **Latvia** it was the Ombudsman who initiated a case on a harassing commercial depicting women to make the goods being sold more attractive – in accordance with the special Advertisement Law – the outcome being that the commercial was discriminatory related to sex. The decision was not legally binding, however. In **Malta** one complaint was lodged with the supervising body, the national Commission for the Promotion of Equality. In **Norway** a claim was reported to the supervising body regarding the offer of services by a fitness club. A statement by the personal trainer at the gym that he 'preferred women to be a little more curved' was regarded as amounting to sexual harassment of a female (anorectic) client. The case is now pending.

### 2.2.3. Focus on dignity

The EU law setting of the prohibition of discriminatory harassment related to sex and sexual harassment has been labelled as a Double Approach, stressing the effect of 'violating the dignity of a person' and not only creating a hostile working environment.

Any ban on discrimination is linked to equality as one of the fundamental principles of EU law.<sup>60</sup> In the *Coleman* case C-303/06, A.G. Maduro describes the values underlying equality as 'human dignity and personal autonomy' (p. 8 of the Opinion). And, he continues, 'At its bare minimum, human dignity entails the recognition of the equal worth of every individual. One's life is valuable by virtue of the mere fact that one is human, and no life is more or less valuable than another. ... Therefore, individuals and political institutions must

<sup>60</sup> See, for instance, McCrudden 2008.

not act in a way that denies the intrinsic importance of every human life. A relevant, but different, value is that of personal autonomy. It dictates that individuals should be able to design and conduct the course of their lives through a succession of choices among different valuable options. ... When we act as autonomous agents making decisions about the way we want our life to develop our “personal integrity and sense of dignity and self-respect are made concrete”. The aim of Article 13 EC [now Article 19 TFEU, as the article also covers a person’s sex, author’s remark] is to protect the dignity and autonomy of persons belonging to those suspect classifications. ... Treating someone less well on the basis of such reasons undermines this special and unique value that people have by virtue of being human. Similarly, a commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications’ (pp. 9-11).

Since ‘violation of dignity’ is thus made an integrated part of any conduct amounting to harassment related to sex and sexual harassment, the concept of dignity can be said to be necessarily involved in any decision on such conduct. Nevertheless, the concept as such is scarcely referred to in case law and other decisions implying harassment related to sex or sexual harassment as reported by the national experts.

In the **French** report it is said that ‘it seems that the general idea of case law is that harassment itself constitutes a violation of the dignity of workers. It is not necessarily an effect, but rather one of its main characteristics’. In **Lithuania** the honour and dignity of a human being is said to be strongly protected as a human right under constitutional law, and that human dignity is accepted as self-assessment of the person concerned – well in line with the discriminatory harassment concept! In **Italy** sexual harassment is normally qualified as an injury to the moral ‘personality’ of the victim according to the Constitution. In **Latvia** the Constitution provides that the State protects a person’s reputation and honour, equalling dignity. There is not even a direct translation in the Latvian language for ‘dignity’ – it is usually translated with the word for reputation.

With regard to the central feature of the dignity concept in the European continent characterized by the Dignity Harm Approach it is somewhat surprising how few comments the national experts presented in this part of the Questionnaire. The report from the **Czech Republic** does, however, refer to ‘some’ case law from the National Constitutional Court and also the Supreme Court defining the legal character of dignity. Thus, in case IV.US 412/04 the Constitutional Court stated that ‘issues of dignity shall be understood as part of human characteristics, as part of humanity. Guaranteeing the untouchability of human dignity makes it possible to fully enjoy own personality’. Supreme Court decision 20Cdo 2005/2003 further states that ‘degrading the dignity of a natural person, or the respect in society of such a person to a larger extent should be defined as non-proprietary damage in the personal sphere’. Also in **Turkey** as of 1 July 2012 there is a rule obliging employers to take the necessary measures to protect the workers’ ‘personality’ denoting ‘moral integrity’ including ‘dignity’ and covering sexual harassment as well as mobbing in general. The term ‘dignity’ was also used in a circular issued by the Prime Ministry on the deterrence of mobbing.

When only looking at dignity one risks missing out on the discriminatory part of the prohibition against discriminatory harassment, bearing a necessary relationship to a particular ‘suspect classification’, using A.G. Maduro’s words – it is precisely the reliance on certain identified grounds, and among them sex, which EU law considers ‘as an evil which must be eradicated’.<sup>61</sup> Here I can refer to the **German** report, which stresses how there is ‘an agreement’ that ‘dignity’ as used in the non-discrimination legislation is not the same as the term ‘human dignity’ in the German Constitution. In relation to discriminatory harassment ‘dignity’ is understood as basically referring to the seriousness of harassment.<sup>62</sup>

<sup>61</sup> Compare A.G. Maduro in the *Coleman* case 303/06, p. 19.

<sup>62</sup> G. Meinel et al. *Allgemeines Gleichbehandlungsgesetz, Commentary* 2<sup>nd</sup> ed. 2010, § 3 Paragraph 33; U. Rust et al. *Allgemeines Gleichbehandlungsgesetz, Commentary* 2007, § 3 Paragraph 57; A. Schleusener et al., *Allgemeines Gleichbehandlungsgesetz, Commentary* 2<sup>nd</sup> ed. 2008, § 3 Paragraph 79.

The crucial role of dignity also seems to trigger action on the part of the alleged harasser – naturally, his dignity is also at stake with this perception of harassment. Here the reports of **FYROM** (one case of a medical professor), **Greece** (where female claimants and/or their witnesses are often victimized through penal charges brought by the alleged harasser against them), and **Slovakia** are of special interest. In **Turkey**, ‘crimes against sexual inviolability’ is the umbrella term. The Penal Code regulates four types of crimes under this title: Sexual assault, sexual exploitation of children, sexual intercourse with the under-aged, and sexual harassment. These crimes are categorized as a violation of individual rights. Remarkably many cases are reported each year – in 2008 the lawsuits filed against men numbered 18,625 as compared to 1,118 lodged against women. In **Italy**, where dignity is seen as related to the right of privacy, the balancing of the right to privacy of the defendant and that of the victim in one case led to the disclosure of the name of the victim to allow for the proper defence of the harassing employee.

One question in the questionnaire concerned whether there were any clashes reflected in case law between the bans on discriminatory harassment and other human rights/Constitutional rights. Precisely what was discussed in the former paragraph can be said to relate to this – the frequently occurring conflict between alleged discriminatory harassment, on the one hand, and, on the other, the protection of the dignity of the alleged harasser. Few other conflicts of this nature are referred to in the national reports. In **Germany**, however, a Code of Conduct prohibiting any intimate relationship between employees whatsoever in prevention of sexual harassment at the workplace was found to violate the fundamental rights and the rights to privacy of the employees (including the right to choose a partner). In **Latvia**, and also in **Croatia**, there were cases of conflict between the freedom of speech and the provision of the Advertisement Law prohibiting discriminatory commercials.<sup>63</sup>

### **3. Harassment related to sex and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. Legislation**

The relation between anti-discrimination law proper in the area of working life and other parts of Labour Law such as Employment Contracts Law, Dismissal Law and Health and Safety Law is far from simple.

Under Section 2.1.1 on implementation generally, I already pointed to the fact that in some countries anti-discrimination regulations – and in our case especially the regulation on discriminatory harassment – form an integrated part of labour law and are provided for within a Labour Code or similar. This is the case in **France, FYROM, Portugal, Slovenia and Turkey**. Here from a formal perspective it is not necessarily meaningful to talk about regulation within or outside the framework of anti-discrimination legislation. Nevertheless, also in these countries the provisions on discrimination may be more or less clearly distinguishable.

In some countries, however, the provisions of discriminatory harassment are integrated or entwined with general regulations on non-discriminatory harassment such as mobbing or bullying – possibly despite discriminatory harassment also being regulated in separate anti-discrimination legislation. This is the case in **Belgium, the Czech Republic, France, FYROM, Iceland, Ireland, Poland, Portugal, Slovenia** and the **UK**. One example is the **Belgian** Welfare at Work Act from 1996 covering all types of harassment, sexual harassment and ‘violence at work’ whether or not they include any dimension of discrimination. Moreover, an employee who falls under this Act must rely exclusively on this Act, despite the conduct also being covered by the 2007 Gender Act.

This mix is even more compelling – and this applies to many more countries – when we look at rules providing sanctions or penalties concerning harassment. Here we are talking about penalizing provisions within labour law, civil law, administrative law and/or criminal

<sup>63</sup> Freedom of speech in relation to discriminatory harassment is an issue frequently discussed in the doctrine, e.g. see Clarke 2006.

law of quite general application to employers and goods and service providers proper as well as any harasser, be it a fellow employee, a customer or any third party. This concerns **Belgium, Finland, France, FYROM, Hungary, Iceland, Ireland, Italy, Latvia, Portugal Slovakia, Slovenia and Spain**. In **Italy** mobbing violates Article 2087 of the Civil Code, as the victim's 'moral personality has been harmed'. It differs from discriminatory harassment in that intention to marginalize the victim is required, the harmful conduct has to be repeated and the conduct as such is punished, by compensatory damages. In **the Netherlands** the Labour Conditions Act – after introducing the prohibition of harassment on the ground of sex and sexual harassment in equal treatment legislation – now imposes an obligation on employers in general terms to prevent harmful 'psycho-social conditions' (covering situations of sexual harassment, mobbing and discriminatory harassment). The **UK** has a special (1997) Protection from Harassment Act, which provides civil remedies and criminal penalties in respect of harassment, regardless of whether the harassment is related to any protected ground. (However, in practice, harassment in the employment context is far more likely to be dealt with under the Equality Act.) Many countries also have more or less generally stated misdemeanours protecting 'a person's honour' or 'dignity'. In **Spain**, particularly the Public Administration is to integrate the principle of equality in health policies and protection against discriminatory harassment is included in the protection of 'labour health'. Non-compliance/infractions are sanctioned by administrative fines. An article in the Workers' Statute recognizes the right of workers to 'privacy and due respect to dignity' which covers harassment related to sex and sexual harassment as well as other types of harassment/mobbing.

Prior to or in parallel with the Discriminatory Approach harassment, including harassment related to sex and sexual harassment, has basically everywhere been seen as a problem within health and safety regulations. It is part of the employer's responsibility to provide a safe and healthy work environment free from abuse. This is still true in most countries covered by this report. In some countries general mobbing or bullying therefore tends to make discriminatory harassment invisible. In other countries, harassment related to sex and sexual harassment are also covered by health and safety regulations, but in practice they are dealt with under anti-discrimination law as *lex specialis* – we will not deal with such obviously competing schemes. This is the case with regard to **Bulgaria, Cyprus, Denmark, Estonia, Germany, Ireland, Liechtenstein, Malta, the Netherlands, Norway, Romania and Sweden**.

Despite **Sweden** being a country which is frequently mentioned when discussing the origins of the Dignity Harm Approach<sup>64</sup> and although the National Work Environment Authority in its Ordinance AFS 1993:17 already issued provisions on 'Victimization at work' of a general coverage complementary to the Swedish Work Environment Act, Sweden cannot in practice be said to adhere to this tradition.<sup>65</sup> Discriminatory harassment cases are – to the extent that such cases are registered – mainly brought before the Equality Ombudsman or the Labour Court under anti-discrimination legislation. Penalties under the Work Environment Act are not very swift – in this regard they require an investigatory decision against the individual employer at stake by a regional labour inspectorate authority, possibly in combination with an administrative fine – and no compensation for the victim whatsoever is possible under this regulation. Instead, victims have to seek redress through the employment protection legislation – compare below.

<sup>64</sup> See, for instance, Clarke and Friedman & Whitman, respectively, which all refer to how the German psychologist Heinz Leymann back in 1984 wrote a report very influential in Sweden – and elsewhere, also the FYROM expert refers to his influence – to the Swedish National Board of Occupational Safety and Health in Stockholm, coining 'mobbing' as a more general phenomenon in working life.

<sup>65</sup> In Sweden sexual harassment was first mentioned in the (1991:433) Equal Opportunities Act on gender equality. It was then not even accepted as sex discrimination but only as provisions on prevention and non-victimization. Before this, sexual harassment was dealt with as a breach of contractual commitments and indirectly through employment protection regulations. A victim's decision to cease employment could be deemed as provoked dismissal on the part of the employer and dismissal of the harasser could be alleged unlawful dismissal.

The questionnaire includes a question on how and if health and safety problems regarding stress at work may be related to discriminatory harassment in the national context. In their consequences, harassment as well as stress at work are issues of health and safety at the workplace and fall under the employers' obligations to guarantee proper working conditions. In **Sweden**, in its General Recommendations on the implementation of its 1993 Ordinance on Victimization at Work, the National Work Environment Authority describes the underlying causes of destructive behaviour in the form of victimization as – in the first place – shortcomings in the organisation of work such as 'excessive or insufficient workload or levels of demands'. It goes on stating that 'Unsolved, persistent organizational problems cause powerful and negative mental strain in working groups. The group's stress tolerance diminishes and this can cause a "scapegoat mentality" and trigger acts of rejection against individual employees'. The serious consequences for victims mentioned also include 'high stress level, low stress tolerance with over-reactions, sometimes traumatic crisis experience'. From the Swedish point of view it is therefore obvious that there is recognition of the interrelation between stress and (more general but also discriminatory) harassment. Moreover, it is only natural that this should be the case everywhere and that the Dignity Harm Approach generally is the centre of attention. However, as stated by the **Hungarian** expert, there is a risk that this coupling of stress and harassment 'tends to put stress into the limelight and push harassment into the background' implying a double cover-up of discriminatory harassment.

Harassment can also be seen in relation to the employment contract. Here, healthy or decent working conditions are seen as implied terms to the contract, as a *naturale negotii*. Often enough, the remedy for such breaches has to be sought in dismissal law. It should be clear from the above that case law concerning harassment relating to sex and sexual harassment very often comes in the disguise of allegations concerning unlawful dismissal. This can be (and have been in a historical context, where discriminatory allegations were not yet a remedy) the most viable way for a victim to handle a situation of discriminatory harassment: to quit the job and then lodge a complaint against the employer for provoked dismissal relying on employment protection legislation requiring just cause for dismissal. However frequent this reaction to a situation of discrimination may be, this naturally is not a 'reasonable cost' for suffering discriminatory harassment. In **Sweden**, for instance, also without actually quitting the job a victim can claim damages from the employer referring to *the basis of employment protection* regulation requiring just cause. Often enough, however, the claim on unlawful dismissal instead concerns the harasser and therefore only indirectly the conduct of discriminatory harassment. In all countries, dismissal of the harasser/perpetrator can sometimes be considered a reasonable consequence of harassment in working life. However, this naturally depends on the circumstances of the individual case. Interestingly enough, it seems that this type of claims in many countries by far outnumber those concerning alleged discriminatory harassment as such. In **Turkey** the existing ban on sexual harassment is not yet conceptualised as discrimination but sexual harassment and 'similar behaviours' appear in the 2003 Labour Code as reasons for instant termination of the perpetrator.<sup>66</sup>

Finally, in all countries, Penal Law can be said to always include crimes that cover different and more severe forms of sexual harassment, – possibly in addition to misdemeanours regarding sexual harassment proper, harassment more generally, or similar crimes as described above –. These crimes are handled in accordance with general criminal law.

### **3.2. The role of collective agreements**

The role of collective agreements in the area of harassment related to sex and sexual harassment is minor to non-existent in most countries, except for **the Netherlands** and a few other countries. Where there are provisions regarding sex-related and/or sexual harassment in collective agreements, they seem to be of a general character, mirroring those in anti-discrimination legislation, as is the case in **Austria, FYROM, Malta, the Netherlands,**

<sup>66</sup> Compare also Masse-Dessen 2011 on a possible trend to dismiss employees on the grounds of being harassers, see also Clarke 2007, p. 86 on such tendencies in the U.S.

**Norway, Slovenia and Sweden.** In some countries there is a compulsory role for collective agreements to fulfil, however. In **Italy**, prevention is an issue for collective agreements and not for employers! In **Romania**, according to Article 14 of the Equal Opportunities Act, when negotiating the collective labour agreement applicable at company level, the contracting parties ‘will include clauses prohibiting discriminatory acts and, respectively, clauses on the manner of solving the allegations/complaints filed by persons affected by such acts’. Also in **Portugal** collective agreements should deal with equality issues according to the Labour Code. In **Romania** it is compulsory to include clauses on complaints procedures in collective agreements. In **Luxembourg**, according to the Labour Code, collective agreements have to address methods to prevent sexual and other (also non-discriminatory) harassment generally. In **Denmark** many employers are said to implement their duty to have a policy on procedures for harassment cases in place by concluding a local collective agreement.

Employers are therefore often required to elaborate policies of prevention (see Section 2.1.5 above) but Codes of conduct elaborated by the social partners are also quite frequent (**Cyprus, Germany, Italy**).

The 2007 ‘Framework Agreement on harassment and violence at work’ between the European social partners (see Section 1.1 above) has been officially acknowledged throughout the European countries to a varying degree. The Agreement is not referred to anywhere in legislation but the social partners adhere to it and may refer to it on their web pages or similar. This is the case in **Cyprus** (where the social partners and the Minister of Labour and Social Insurance in 2009 signed a corresponding national agreement), **Denmark** (where the social partners have issued a declaration on the implementation, no further implementation measures were considered to be needed), **Finland, France** (where a national agreement was signed in 2010), **Italy, Luxembourg** (where the representative social partners agreed on a convention about harassment and violence in the workplace in 2009), **Norway, Spain and the UK**. Many reports make no reference to the agreement at all, however, or explicitly state that it has not been implemented (**Bulgaria, the Czech Republic, Greece, Hungary, Ireland, Latvia, Lithuania, Poland and Portugal**). To a certain degree, the Agreement also seems to have had the effect that the social partners at national level tend to ‘abandon’ the issues of sexual harassment and other discriminatory harassment. The **Belgian** reporter states that following the Welfare at Work Act, the social partners have given up their previous intentions to work with harassment, sexual harassment and violence at work and nor are they trying to implement the Framework Agreement – legislation as such is assumed to implement it. Also in **Germany** the social partners have found further implementation unnecessary. (Nevertheless, German employers reported several implementation activities in 2010.)

Agreements between the social partners seem to play a relatively significant role, however, in the alleged transformation process towards an even more accentuated Dignity Harm Approach. In **FYROM** the social partners are very active in regulating and monitoring general mobbing and not especially discriminatory harassment, in **Luxembourg** the parties concluded a convention on harassment generally not especially mentioning sexual harassment, in **Turkey** according to the latest developments collective agreements with preventive measures against mobbing shall be especially promoted according to a circular of the Prime Ministry, and in the **UK** there are examples of national collective agreements dealing with the prevention of bullying generally, etc.

#### **4. The Discriminatory Approach versus the Dignity Harm Approach – a final analysis**

The second objective of this general report is to investigate what the added value might be of combating harassment and sexual harassment in the form of a prohibition of discrimination. In many countries, harassment and/or sexual harassment were already prohibited prior to the Directives’ regulation, but without being defined as a form of discrimination, e.g. within the realm of health and safety regulations or other parts of law. As we have seen from the above, also after formal implementation of the Directives, in many of the countries concerned discriminatory harassment in working life ‘competes’ with labour law or even broader civil or public law provisions on mobbing/bullying in general. Against this background it is

interesting to elaborate on what the added value, and possible pitfalls, might be at national level of the Discriminatory Approach.

It should be mentioned again, that in **Belgium** the Discriminatory Approach is not yet really ‘recognized’ in working life – giving preference to the Welfare at Work Act and general bullying – despite formal implementation. In **Turkey**, sexual harassment is still not conceptualised as discrimination but seen as a just cause, among others of ‘similar character’, for summary dismissal of the harasser if the harasser is a co-worker. Where the harasser is the employer, then the harassed worker has the right to quit and is entitled to compensation.

As regards the access to and supply of goods and services the awareness and presence of the Discriminatory Approach to harassment, although formally implemented, is still hardly distinguishable.

#### **4.1. Added value**

The experts come forward as basically positive towards the reform making harassment related to sex and sexual harassment a ‘discriminatory wrong’.

In countries not following the ‘Dignity Harm’ tradition, the Discriminatory Approach is said to help to draw attention to the protection of human rights compared to the former health and safety approach.

Various experts point out that uniform and compulsory EU regulation lightens the burden on women, women’s movements and other stakeholders at national level in countries where the awareness of and attitude towards sexual harassment and harassment related to sex is still lagging behind (**Bulgaria** and **Hungary**). Legislation is now in place also where this would have been not very likely otherwise (the **Czech Republic**). In **Germany**, however, precisely such a development towards a general acceptance of sexual harassment as a discriminatory wrong is said to be still lacking despite implementation.

That the uniform and compulsory provisions at EU level might be broader than previous national perceptions is also referred to as an added value (**France** and **Lithuania**), e.g. as regards the fact that intent is not required (**Germany** and **Greece**). Another added value is that not only sexual harassment but also harassment related to sex is prohibited (**Germany** and **Luxembourg**).

Uniform EU definitions are said to also provide more clarity for victims, lawyers, courts, etc. (**Cyprus**). There is a possibility for national courts to request preliminary rulings from the ECJ and the ECJ can therefore develop case law on the interpretation of crucial concepts and the application of the principle of equal treatment between men and women in relation to harassment (**Malta**). This is something that appears highly desirable since the qualification of sexualised conduct as sexual harassment, occasionally, seems to be lagging behind – compare Section 2.2.2 above.

Generally speaking, an anti-discrimination setting is also considered to provide greater access to justice for individuals including the rules on the reversed burden of proof, no upper limits concerning compensation and the existence of specialized bodies. According to the **Spanish** expert, the added value of the anti-discrimination approach – instead of relying on the general fundamental right of privacy and dignity – is the ‘possibility of applying all instruments of anti-discrimination law’, not least the rule on the reversed burden of proof.

Working environment obligations on an employer may be difficult to claim at the individual level within general labour law.<sup>67</sup> Health and safety regulations can foster prevention and not necessarily individual rights as in **Sweden**, and creates obligations on employers – often enough penalized through administrative sanctions – but not necessarily compensation for individual workers. A victim may have had to react by ending her (or his) employment and pursue a claim for wrongful dismissal on the part of the employer – a burdensome and also risky process! The **Maltese** expert also points out that the Discriminatory Approach pictures the offensive conduct independently of its effects, to a

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<sup>67</sup> This is, however, not always the case. Making the individual situation of dignity harm the object of a misdemeanour penalty does, of course, pertain to the individual case. Not always – but sometimes – compensation at the victim’s level is part of the scheme, however.

greater extent than health and safety regulations. (On the other hand, **the UK** expert points out that the Discriminatory Approach implies ‘shifting the responsibility for harassment away from the employer [as compared to general health and safety regulations, author’s remark] to the victim’, as alleged discrimination is traditionally remedied through the complaints-led-model.<sup>68</sup>

Making harassment a public misdemeanour is still a quite important element especially concerning sexual harassment. In the relevant cases, generally speaking, the rule on the shared burden of proof cannot be applied. Often enough both full proof and intent are required.

It is not only that criminal rules may imply other requirements regarding proof than a discrimination claim. It is obvious that a purely penal-law approach to sexual abuse – only covering its harsher forms – is considerably less convenient than complementary discriminatory regulations. The **Danish** expert points out precisely that anti-discrimination law renders a broader scope of behaviour unlawful than previous criminal law.

The **Irish** report points to the importance of the fact that employers are held vicariously liable under national discrimination law for actions not only of other employees but also of customers, etc.

#### **4.2. Pitfalls**

‘Law in the books’ and ‘law in practice’ are still quite different things. In many of the countries concerned, the awareness of the possibility to come to terms with sex-related and sexual harassment through discrimination claims is said to be too low (**Bulgaria, the Czech Republic, Estonia, Hungary, Luxembourg, Lithuania and Poland**). Lacking awareness of the Discriminatory Approach as compared to the ‘traditional’ health and safety/Dignity Approach also among courts and judges is mentioned in various reports (**the Czech Republic, Italy, Greece**), as are general negative attitudes towards legislative interference with sexuality and sexual harassment and also EU involvement, generally speaking (**Germany**).

The ‘stigma’ still accompanying sexualised conduct is considered to deter victims from coming forward. This is probably true in any context, but even more so in others (**Hungary, Lithuania, Latvia, Poland and Turkey**). It was pointed out that many victims – despite possibly contacting a supervising equality body – in the end do not wish to initiate formal proceedings (**Estonia**). Some country reporters refer to the small size of their country making public allegations even more sensitive. The **Irish** expert suggests that it may also be more difficult to put forward complaints in a small-business setting.

The **Belgian** expert points out that ‘disguising’ sex-related and sexual harassment as general harassment or bullying is a way to make a complaint regarding harassment less stigmatising – it is no longer a ‘women’s issue’ (see also the **FYROM** report). On the other hand, precisely this may be considered to be the problem: when applying a notorious Dignity Harm Approach, structural (and individual) oppression of women in society remain invisible!

The **French** expert refers to the risk that discriminatory harassment – quite opposite to what seems to be the actual situation now – in the future may make allegations concerning general moral harassment more difficult. The **Latvian** expert, on the other hand, refers to the positive effects also on the general harassment prohibition of introducing discriminatory harassment regulations (also see **Lithuania**).

Another problem explaining the scarcity of discriminatory harassment allegations is the fact that it may often – despite the reversed burden of proof – prove difficult to provide the necessary evidence for the alleged discriminatory conduct. This is, of course, especially true with regard to sexual harassment, often taking place in private and without witnesses.

The possibility to address complex cases of harassment (such as a combination of general harassment and sexual harassment) is also mentioned among the pitfalls of the Discriminatory Approach. Less severe sexual harassment often comes in combination with more general mobbing, it is argued. The **Estonian** expert points out that the mandate of equality bodies may prove too narrow for a claim in the area between sexual harassment and general mobbing.

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<sup>68</sup> Fredman 2009 and Holtmaat 2011.



Length and delay in proceedings can be a negative factor (**Ireland**) but this, of course, all depends on how the procedural rules are designed in each country. In **Italy**, the special procedural rules in discrimination cases are seen as an ‘added value’ to the Discriminatory Approach.

#### 4.3. Concluding remarks

Legislated prohibition against discrimination is triggered by detrimental treatment of an identified group and the legislation addresses those who have the power to institutionalise change – in our context employers and providers of goods and services. It is true that harassment is different from many situations of direct or indirect discrimination as it does not necessarily include a comparison of treatment<sup>69</sup> but bans certain degrading conduct as such when relating to a protected ground or implying conduct of a sexual nature.<sup>70</sup> However, when making bans on harassment part of discrimination law it is still ‘empowered’ structures – central to economic or social life – of detrimental treatment facing certain groups of people that is the target of legislation – not *any* harmful behaviour, as was argued by the A.G. in the *Coleman* case C-303/06 (p. 19).

Throughout this general report, we have seen how the Dignity Harm Approach – despite formal implementation of the Discriminatory Approach – may still be said to characterize certain countries and how also EU law can be said to be characterized by a Double Approach. A legitimate question is whether or not the deviating character of harassment – as compared to other discriminatory practices – motivates the Dignity Harm Approach or at least the Double Approach applied by EU law.<sup>71</sup>

There are deep structural differences between the clear-cut Discriminatory Approach and the Dignity Harm Approach. At the same time, we must conclude that the country reports provide us with a picture of not necessarily a Double Approach proper but rather a ‘Blurred’ Approach. This must be said to be to the detriment of both discrimination regulation as such and a satisfying implementation of the Equal Treatment between Men and Women Directives. Moreover, as regards harassment related to the access to and supply of goods and services, formal implementation of the Directive’s provisions has practically left no marks whatsoever in practice.

When applying a Double Approach, there might be reason to keep the respective approaches apart, i.e. regulate discriminatory harassment within the framework of anti-discrimination regulations addressing those ‘empowered’ to take responsibility for certain activities, and regulate other types of ‘dignity harm’ in other ways, whether in labour law or in a broader scope.

This would be an argument to dispose of the word *dignity* as part of the very definition of harassment within EU anti-discrimination law. (As it is now, the word dignity seems to trigger certain elements of an ‘honour’s culture’ rather to the detriment of substantive sex discrimination as we know it. At the same time, it is doubtful whether the word dignity really adds anything to the ban on sex (or other) discriminatory harassment as such.) However, amending the definition does not necessarily appear to be the most efficient way forward.

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<sup>69</sup> Concerning the difficulties experienced in UK law requiring harassment to be *on the grounds of* sex, compare Clarke 2006 and the cases *Porcelli v Strathclyde Regional Council* [1986] ICR 564 and *Pearce v Governing Body of Mayfield Secondary School* [2003] U.K.H.L. 34. See also Holtmaat 2009a, p. 30 f. and McColgan 2007. The requirement of pointing to a difference in treatment as compared to the other sex (‘the difference approach’) has led to the coining of expressions such as the ‘bastard defence’ and the ‘equal opportunity harasser’.

<sup>70</sup> Compare the discussion on the ban on sexual harassment as an expression of ‘puritanism’ banning any sexualised conduct in working life and certain other areas of social life – see, for instance, Friedman & Whitman, pp. 270, Holtmaat 2009 and also Saguy. This view can be said to be quite in line with the Dignity Harm Approach, and, moreover, falls neatly within the neo-Taylorist project of advancing efficiency within the workplace by excluding irrational and emotional behaviour, compare Clarke 2006, p. 88. But is such ‘puritanism’ good for women? There is debate on whether this approach threatens to perpetuate stereotypical attitudes towards women and sexuality – e.g. see Clarke 2006, Schultz 1998 and Schultz 2001 and Baer 2004.

<sup>71</sup> This is in fact the issue of a rather heated debate among scholars, compare Clarke 2006, Samuels 2004, Holtmaat 2009a and b.

So, what should the EU do?

This general report is basically about the implementation of the Discriminatory Approach. It is true that in EU law there is certain ambivalence, here labelled the Double Approach and reflected by the word dignity as included in the respective definitions. However, the background and spirit of the Discriminatory Approach is to eliminate structural as well as individual *discrimination*! We know that mainly women are harassed sexually or on the grounds of sex. Such behaviour is not only 'bad manners', it reflects and reinforces societal gender hierarchies. An approach that concentrates on individual dignity – and therefore also triggers the dignity of harassers allegedly wrongfully accused – risks missing this goal, making such discrimination invisible. Moreover, the tradition of stable employment in Europe as compared to the U.S. may have made way for a focus on the quality of life in the workplace. In the 'Flexicurity Era' the Discriminatory Approach – to another extent also focusing on access to employment, vocational training and promotion – becomes increasingly relevant. The EU strategy in the years to come should therefore be to stress the structural and power dimensions of sex discrimination including harassment – i.e. the additional quality of the Discriminatory Approach – in awareness campaigns, including not only the Member States but also the Social Partners. The ECJ can add to this by issuing carefully argued interpretations of the discriminatory aspects of harassment in line with the *Coleman* case. It is of the utmost importance – the difficulties for the Discriminatory Approach concerning harassment making its way into legal application may well be interpreted as a reflection of still prevailing sexist and discriminatory perceptions of 'women and sexuality' as not really belonging to central dimensions of economic and social life.

## Part II

### National Law: Reports from the Experts of the Member States, EEA Countries, Croatia, FYR of Macedonia and Turkey

AUSTRIA – Neda Bei

#### 1. General situation

1.1. Since Austrian legislation on sexual harassment goes back rather a long way, a short chronological overview of the legislative developments might be useful.

Sexual harassment was introduced into legislation by an amendment to the Equal Treatment Act for the private sector in 1992, which then applied to discrimination on the grounds of sex/gender only.<sup>1</sup> Firstly and in principle, sexual harassment was thus defined as (sex) discrimination; secondly and in detail, the definition more or less literally corresponded to the recommendation of the European Commission on the protection of the dignity of women and men at work 92/131/EEC.<sup>2</sup> The definition covered unwanted heterosexual as well as homosexual conduct by employers, colleagues and, in principle, third persons such as clients, the harasser(s) being liable for material consequences as well as for damaging dignity. Damages for the latter amounted to a minimum of – then - approximately EUR 324.

In 1998 legislation clarified that third persons could harass; employers failing to provide an adequate remedy in such cases were included within the definition of sexual harassment,<sup>3</sup> Furthermore, in cases of a failed remedy against sexual harassment by a third party, the employer was to be considered *ex lege* responsible for sexual harassment himself/herself, albeit his/her responsibility required an element of guilt (slight negligence being sufficient). In other words, an employer who fails to provide an adequate remedy is to be considered as a harasser by legal definition.

In 2004 the Equal Treatment Act was amended and recast.<sup>4</sup> One of the objectives was the implementation of Directive 2002/73/EC.<sup>5</sup> A new Section I was introduced, providing for the principle of equal treatment for women and men in the working environment and thus expanding the scope horizontally beyond the employment relationship to access to vocational

<sup>1</sup> Equal Treatment Act OJ No. 108/1979 as amended by Article V of Federal Act OJ No. 833/1992, entry into force 1 January 1993.

<sup>2</sup> Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, OJ L 049, 24/02/1992 P. 0001 – 0008. The definition was based on three elements: conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, is unacceptable if (a) such conduct is unwanted, unreasonable and offensive to the recipient; (b) a person's rejection of, or submission to, such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or (c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient.

<sup>3</sup> OJ No. I 44/1998.

<sup>4</sup> OJ No. I 66/2004. The provisions on procedure were recast separately as the Act on the Equal Treatment Commission and the Equal Treatment Ombud, also OJ No. I 66/2004.

<sup>5</sup> Another major objective was the transposition of Directives 2000/78/EC and 2000/43/EC. As to the transposition of Directive 2000/78, a new Section II was introduced, covering discrimination in the working environment on the grounds of age, ethnic origin, religion or belief and sexual orientation including harassment, but without an explicit reference to elements of sexual or sex-related harassment. The newly introduced Section III covered discrimination on grounds of ethnic origin at access to and the supply of goods and services including provisions on harassment, again without an explicit reference to elements of sexual or sex-related harassment. Corresponding to the new systematic structure, the Equal Treatment Commission was split into three 'senates', the competence of Senate I comprising discrimination on grounds of sex and multiple discrimination.

training without an employment relationship, to membership of professional organisations and to access to self-employment. Furthermore, the personal scope of the principle of equal treatment, including the prohibition of discrimination on grounds of sex, was expanded to all types of atypical employment relationships, mainly to economically dependent, but formally self-employed persons. Two new elements were added to the definition of sexual harassment, namely sexual harassment by instruction and sexual harassment by third persons without an employment relationship; that is in the expanded material scope as described.<sup>6</sup> Adequate compensation for material damage was provided for at a minimum of EUR 720 for non-material damage in cases of sexual harassment.<sup>7</sup> A new provision on sex-related harassment was introduced and compensation for non-material damage amounted to a minimum of EUR 400.<sup>8</sup> Furthermore, legislation clarified that the rules on alleviated proof which were applicable within the scope of the Equal Treatment Act also applied to sexual and sex-related harassment.<sup>9</sup>

In 2008 the recast Equal Treatment Act was amended, inter alia by prescribing minimum compensation of EUR 720 for non-material damage in cases of sex-related harassment as well and by introducing a new Section IIIa transposing Directive 2004/113/EC. Thus a prohibition on discrimination on grounds on sex in access to and the supply of goods and services was introduced. In this context, sexual harassment and sex-related harassment have been covered by one new provision.<sup>10</sup>

In 2011 the amendment to the Equal Treatment Act OJ No. I 7/2011 finally added a new element to the provisions on sexual harassment and sex-related harassment by explicitly mentioning (sexual) harassment by association. Furthermore, the minimum compensation for non-material damage in all cases of harassment was raised to EUR 1 000. As the text of the Equal Treatment Act was restructured, Section IIIa concerning gender discrimination in the access to and supply of goods and services became Section IV. The provisions of the Federal Treatment Act applying to the public sector have essentially the same structure and have been amended accordingly.<sup>11</sup> However, the procedural and institutional framework is different, but will not be dealt with in detail here. This report focuses on the private sector.

1.2. There are no overall statistical data on sexual or sex-related harassment. However, reports to Parliament on the implementation of the Equal Treatment Act have been mandatory since 1990, when an Equal Treatment Ombud was installed. The presently biannual reports include summaries of relevant judicial decisions (courts) and of the opinions of the Equal Treatment Commission. A special section of these reports is dedicated to the practice of the Equal Treatment Ombud, including statistics covering their experiences in counselling and reports on the cases that the Ombud has brought before the Equal Treatment Commission. Since the entry into force of the provisions on sexual harassment on 1 January 1993, the Ombud has reported a relatively considerable number of cases of sexual harassment. As to the practice from 1993 until 2002, the Ombud brought twelve cases before the Equal Treatment Commission in 1993 and 29 cases in 2002.<sup>12</sup>

In 2006 and 2007, for instance, 49 legal questions connected to sexual harassment were raised before the Commission's Senate I (world of work) in one or more cases, and 9 legal questions concerned sex-related harassment. In 2006 and 2007, the Equal Treatment Ombud counselled about 3,000 persons a year, 14 % of them regarding sexual or sex-related

<sup>6</sup> §6 (1) – (3) Equal Treatment Act as recast in 2004, OJ. No. I 66/2004; new §6 (3) – sexual harassment by instruction.

<sup>7</sup> §11 Equal Treatment Act OJ. No. I 66/2004.

<sup>8</sup> §§7 (1) – (3) and 11 Equal Treatment Act as recast in 2004, OJ. No. I 66/2004.

<sup>9</sup> §12 (12) Equal Treatment Act as recast in 2004 and as amended in 2005, OJ No. I 82/2005.

<sup>10</sup> §40f OJ No. I 98/2008.

<sup>11</sup> Federal Treatment Act OJ No. 100/1933, as amended inter alia by OJ No. I 65/2004, OJ No. I 97/2008 and OJ No. I 6/2011.

<sup>12</sup> I. Nikolay-Leitner 'Zwei Ziele – ein Weg' in: Institut für Gewerkschafts- und AK-Geschichte (ed.) *Man ist ja schon zufrieden, wenn man arbeiten kann. Käthe Leichter und ihre politische Aktualität* pp. 119 – 136 Wien, Mandelbaum 2003.

harassment.<sup>13</sup> In 2009 about 2,000 persons sought counsel with the Ombud, 25 % of them regarding sexual or sex-related harassment.<sup>14</sup>

1.3. Public debate in the media and political polemics about amending the Equal Treatment Act have cooled down since the first introduction of sexual harassment into legislation in 1992. In the years after 1992, the media focussed on more ‘spectacular’ or sensational cases including issues such as the amount of damages. More recently, cases of harassment on ethnic grounds have become a certain focus of the media, especially when access to discotheques, pubs, restaurants or public transport is denied. Furthermore, in a broader context, the media have reported on spectacular cases of sexual violence against minors and children in the church, in the family (*Fritzl*) and by abduction (*Kampusch*). Among legal experts, the burden of proof and damages have been a topic of debate since 1992.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The basis of legislation on sexual harassment in the employment relationship are the provisions of the Equal Treatment Act 1992 and 1998 mentioned which implemented Recommendation 92/131/EEC.<sup>15</sup> Later, national legislation on sexual harassment, and, since 2004 on sex-related harassment, built on the basic structure by clarifying definitions and by gradually adding new elements corresponding to the gradual development of European legislation, as described in 1.1 above. As Directive 2002/73/EC had been transposed in 2004, national legislation supposedly did not consider a special transposition of Directive 2006/54/EC to be necessary.. In 2011, provisions on discrimination by association were added to the general definition of discrimination as well as explicitly to both provisions on sexual and sex-related harassment according to the findings in the *Coleman* case.<sup>16</sup>

The relevant provisions of Directive 2004/113/EC were not transposed until 2008.<sup>17</sup>

#### *2.1.2. Definitions*

2.1.2.1. According to §6 (1) Equal Treatment Act, as amended in 2011, discrimination on the ground of sex furthermore takes place if a person

1. is sexually harassed by the employer himself/herself;
2. is discriminated against by the employer who, in the case of sexual harassment by a third party, is guilty of failing to provide an adequate remedy in accordance with legal provisions, provisions in collective agreements or the employment contract;
3. is harassed by a third party in connection with her/his employment relationship;
4. is harassed by a third party outside an employment relationship, that is within the scope of §4 Equal Treatment Act (vocational training without an employment relationship, membership of a professional organisation, access to self-employment).

According to § 6(2) Equal Treatment Act, as amended in 2011, sexual harassment takes place when there is, linked to the sexual sphere, conduct which affects the dignity of a person or which has the purpose of affecting the dignity of a person, and which is unwanted by, or inappropriate or offensive to the person concerned, and

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<sup>13</sup> III-36 der Beilagen XXIV. GP - Bericht - Hauptdokument Teil 2, pp. 14-22.

<sup>14</sup> III-193 der Beilagen XXIV. GP - Bericht - Hauptdokument Teil II, p. 15.

<sup>15</sup> §2 (1a) and (1b) Equal Treatment Act OJ No. 833/1992 as amended by OJ No. I 44/1998; cf. for the public sector the identical wording of §7 Federal Equal Treatment Act OJ No. 100/1993.

<sup>16</sup> §5 (4), §6 (4) and §7 (4) Equal Treatment Act as amended by OJ. No. I 7/2011; Case C-303/06 *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-5603; RV 918 BlgNR 24. GP p 15.

<sup>17</sup> §40f Equal Treatment Act as amended 2008, OJ. No. I 98/2008 = §35 Equal Treatment Act as amended in 2011 by a new Paragraph 4 on discrimination by association, OJ. No. I 7/2011.

1. which furthermore creates an intimidating, hostile or humiliating working environment for the person concerned or has the same purpose, or,
2. if the person's rejection of, or submission to, such conduct on the part of employers or workers, including superiors or colleagues, is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions.

According to §6(3) Equal Treatment Act, as amended in 2011, discrimination furthermore takes place in the case of an instruction to sexually harass a person.

According to §6(4) Equal Treatment Act, as amended in 2011, discrimination also takes place when a person is sexually harassed on grounds of association with a person because of this person's sex.

Thus, the basic definition of sexual harassment in connection with the employment relationship comprises firstly a general behavioural component linked to the sexual sphere and apt to affect a person's dignity. Secondly, once this component is a given, two aspects must be examined, sexual harassment in the working environment and/or by any detrimental decision taken as a consequence of rejecting such conduct or of submitting to such conduct of an employer, superior, colleague or third person (e.g. a client). Thirdly it is considered sexual harassment if the employer is guilty of failing to provide adequate relief against harassment by third persons, slight negligence being sufficient (the Equal Treatment Act explicitly refers to guilt only in this case, in principle defining the harassers' liability independently from guilt).<sup>18</sup> In order to assess whether there has been sexual harassment in an individual case on the basis of the Equal Treatment Act, the perception of the victim and the effects of the harassing conduct are decisive in practice. Many practitioners have considered the component of purpose referred to in Directives 2002/73/EC, 2006/54/EC and 2004/113, and introduced into national legislation verbatim not before 2008, as narrowing the approach in the Commission's Recommendation ex 1991, because the subjective element on the harasser's side put an additional burden of proof on the victim.<sup>19</sup>

2.1.2.2. According to §7 (1) Equal Treatment Act, as amended in 2011, discrimination on the ground of sex takes place if, by sex-related conduct, a person

1. is harassed by the employer himself/herself;
2. is discriminated against by the employer who, in the case of harassment by a third party, is guilty of failing to provide an adequate remedy in accordance with legal provisions, provisions in collective agreements or the employment contract;
3. is harassed by a third party in connection with her/his employment relationship;
4. is harassed by a third party outside an employment relationship, that is within the scope of §4 Equal Treatment Act (vocational training without an employment relationship, membership of a professional organisation, access to self-employment).

According to § 7(2) Equal Treatment Act, sexual harassment takes place when there is sex-related conduct which affects the dignity of a person or which has the purpose of affecting the dignity of a person, and which is unwanted by that person concerned, and

1. which furthermore creates an intimidating, hostile or humiliating working environment for the person concerned or has the same purpose, or,

<sup>18</sup> From a systematic point of view, the provisions on sexual harassment are seen as substantiating two general principles provided for in the [Austrian] Civil Code (*Allgemeines Bürgerliches Gesetzbuch 1811, ABGB*) as amended. §1157 *ABGB* stipulates the employer's general obligation to care for the life and health of the employees (*Fürsorgepflicht*). Added to the *ABGB* in the late 19<sup>th</sup> century, this provision seems to be paternalistic and vague at the same time. Nevertheless, courts and labour law doctrine developed a casuistic approach which makes the provision a practically most important guiding principle of labour law. The reference to dignity goes back to the original §16 *ABGB*, from 1811, stipulating the prohibition of slavery and, based on reason, a universal human right to be a person. See furthermore §18 Employee Act 1921, OJ No. 292/1921 as amended, H. Hopf et al. *GIBG* pp 326 s. Vienna, Manz 2009.

<sup>19</sup> When the Equal Treatment Act was amended in 2004, the definitions of sexual harassment and sex-related harassment in the working environment referred only to the intimidating etc. effect of a conduct; its purpose was not mentioned.

2. if the person's rejection of, or submission to, such conduct on the part of employers or workers, including superiors or colleagues, is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions.

According to §7(3) Equal Treatment Act, discrimination furthermore takes place in the case of an instruction to harass a person.

According to §7(4) Equal Treatment Act, as amended in 2011, discrimination also takes place when a person is harassed on grounds of association with a person because of this person's sex.

2.1.2.3. According to §35(1) Equal Treatment Act, as amended in 2011, in the context of access to and the supply of goods and services, unwanted, inappropriate or offensive conduct related to sex or ethnic origin or the sexual sphere, and having the purpose or effect

1. of violating the dignity of the person concerned and
  2. creating an intimidating, hostile, degrading, abusive or humiliating environment for the person concerned,
- is to be considered as discrimination.

According to § 35(2) Equal Treatment Act, as amended in 2011, discrimination takes place in the case of an instruction to harass a person or sexually harass a person or if the rejection of, or submission to harassment or sexual harassment is used as a basis for a decision concerning this person. Finally, according to § 35(3) Equal Treatment Act, as amended in 2011, discrimination by association on grounds of ethnic origin or sex has been included.

#### 2.1.3. Sexual harassment

In practice, sexual harassment also covering other grounds of discrimination is only discussed in the context of multiple discrimination or connected with other areas of discrimination in the employment relationship. Furthermore, in practice sexual harassment quite often occurs simultaneously with discrimination upon the termination of an employment relationship.

#### 2.1.4. Scope

National legislation covers sexual harassment and sex-related harassment in (access to) employment, vocational training and promotion without an employment relationship, access to self-employment, membership of professional organisations and access to their services, and, finally, access to and the supply of goods and services; see above 1.1 as to the personal scope.

#### 2.1.5. Addressee

- a) In employment – actually broader: the world of work (any work-related area) – the addressee is the employer, someone in a responsible managing position acting on his/her behalf, colleagues (fellow workers), and 'third persons' such as clients.
- b) In goods and services, the addressee is the person or legal entity providing the service, and agents acting on their behalf or on their instructions.

#### 2.1.6. Preventive measures

The question of whether Article 26 of Directive 2006/54/EC has been implemented is difficult to answer *prima facie*. There is no explicit provision on prevention in the Equal Treatment Act. However, when assessing an employer's responsibility for failure to assist a victim of harassment according to the Equal Treatment Act, the Equal Treatment Commission or the court may take into account whether there is a preventive culture in the enterprise concerned.<sup>20</sup> Article 26 of the Directive nonetheless seems to be somewhat vague or very flexible, about how far encouragement should go, referring to national law and practice.

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<sup>20</sup> N. Bei & R. Novak 'Das Gleichbehandlungsgesetz' in: U. Aichhorn (ed.) *Frauen & Recht* p. 129 Wien - New York, Springer 1997.

Therefore, an appropriate approach might be found by looking more closely at the national law and practice. The State as employer made an unequivocal self-committing statement about (sexual) harassment in the Federal Treatment Act and created a well-construed institutional framework which represents the firm intention to discourage and prevent harassment in the organisational culture of the federal public administration.<sup>21</sup> In the private sector, (sexual) harassment is a continuous focus of the activities of the Equal Treatment Ombud. The Ombud regularly advises employers as well as works councils on measures related to harassment and sexual harassment, and furthermore presents legal information on their website.<sup>22</sup> Employers' organisations are represented in the Equal Treatment Commission for the private sector and, to a certain extent, have raised the awareness of their members by refusing to defend abusive practices in the Commission in some individual cases. As to the few collective agreements dealing with the prevention of harassment, see below in 3.2. Article 4 of the Framework Agreement on harassment and violence at work 2007 has been transposed by a joint declaration of the social partners followed by a code of practice in 2009.<sup>23</sup>

### 2.1.7. Procedures

The dual or parallel structure of enforcement procedures has remained essentially unchanged since 1992, comprising complaints before the Equal Treatment Commission (ETC), an administrative soft law mechanism, and action brought before the labour courts, which can be considered as law enforcement in the strict sense. The expert opinions (*Gutachten*) on general legal questions as well as the decisions of the ETC in individual cases are non-binding, especially as they cannot, as acts by the administration, bind the courts. However, when a court deals with an individual case on which the ETC has given an opinion, the court has to give due consideration to this opinion in its proceedings and, if its findings differ, it has to give the reasons for this in its judgment.<sup>24</sup> The Constitutional Court has repeatedly confirmed the non-binding nature of these opinions as well as of the joined recommendations of the ETC, thus maintaining the dual structure of enforcement procedures provided for by the Equal Treatment Act and their compliance with the Constitution.<sup>25</sup>

Administrative procedure before the ETC is not public.<sup>26</sup> In more recent practice, Senate I of the ETC deals with cases of sexual harassment in subcommittees, not in the plenary.<sup>27</sup>

2.1.7.1. Employment/world of work: In the private sector, the harassed person may complain before the ETC Senate I, with or without the support of the Equal Treatment Ombud, or take action before a labour court, or do so simultaneously. In the public sector, harassment cases

<sup>21</sup> Equal Treatment Ombuds, Equal Treatment officers on all levels of the hierarchy, Federal Equal Treatment Commission, inter- as well as intraministerial working groups.

<sup>22</sup> See the website of the Equal Treatment Ombud, [http://www.gleichbehandlungsanwaltschaft.at/site/cob\\_44261/6880/default.aspx](http://www.gleichbehandlungsanwaltschaft.at/site/cob_44261/6880/default.aspx), accessed 2 October 2011.

<sup>23</sup> *Erklärung von Bundesarbeitskammer, Industriellenvereinigung, Österreichischem Gewerkschaftsbund, Verband der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs und Wirtschaftskammer Österreich zur Umsetzung der europäischen Sozialpartnervereinbarung Belästigung und Gewalt am Arbeitsplatz*, see for instance [http://m.arbeiterkammer.at/bilder/d138/Bro\\_Gewalt\\_am\\_Arbeitsplatz.pdf](http://m.arbeiterkammer.at/bilder/d138/Bro_Gewalt_am_Arbeitsplatz.pdf), accessed 1 November 2011.

<sup>24</sup> 'Befassungs- und Begründungspflicht' according to §61 Equal Treatment Act as amended by OJ No. I 66/2004.

<sup>25</sup> Constitutional Court 28 February 2011, B 1689/10, confirming previous decisions on the status of the Equal Treatment Commission.

<sup>26</sup> Under a new procedural regime which entered into force in March 2011, the complainant and the alleged perpetrator of a discrimination are allowed to be present together during proceedings in order to be able to pose questions ('*Parteienöffentlichkeit*'). However, cases of (sexual) harassment are exempted from this new procedural regime, separate questioning being mandatory with the exception that the person concerned agrees to the presence of the alleged harasser. §14(3) Federal Act on the Equal Treatment Commission and the Equal Treatment Ombud, OJ No. I 66/2004 as amended by OJ No. I 7/2011; see H. Hopf et al. *GIBG. Novelle 2011. Ergänzungsband* pp.262-267 Vienna, Manz 2011.

<sup>27</sup> §16 Equal Treatment Standing Orders OJ No. II 396/2004 as amended by OJ No. II 102/2011.



can be brought before the Federal Equal Treatment Commission. The limitation period for actions before court is one year.<sup>28</sup>

2.1.7.2. Goods and services: ETC Senate III; civil courts.<sup>29</sup>

#### 2.1.8. *Burden of proof*

The Equal Treatment Act provides for an alleviated proof by allowing substantiation of a certain probability. The burden of proof shifts to the discriminator who has to substantiate that other reasons than the alleged discriminatory ones were decisive for his/her decision or behaviour. In cases of (sexual) harassment, the defendant has to prove that, all circumstances taken into account, the facts established by him/her are more probable to be true. In practice, the proof by probability is a thorny area. The relevant provision was amended several times, and the conformity to Community, respectively EU law was controversial as to the degree of the defendant's burden of proof. The Supreme Court has argued for the conformity of the currently effective provision in an extensive decision, thus mitigating the impact of the controversy.<sup>30</sup>

#### 2.1.9. *Remedies and sanctions*

The Equal Treatment Act provides for compensation of material and immaterial damage. Traditionally, the Austrian legal system does not acknowledge too many cases of immaterial damage, so the introduction of an explicit provision into the Equal Treatment Act was a certain challenge. In 2011, the minimum compensation for non-material damages in all cases of harassment, thus including sexual and sex-related harassment, was increased to EUR 1 000 without prejudice to compensation for any other, especially financial damage. In the private sector, employers are entitled to take disciplinary measures against harassing employees, including dismissal as *ultima ratio*. In the public sector, the harasser may be liable to (formalised) disciplinary sanctions. In 2008 the Penal Code was amended by a provision on sexual harassment.<sup>31</sup>

#### 2.1.10. *Compliance with EU law*

Overall Austrian legislation seems to comply with EU law. However, in practice the amount of damages might not be sufficient to deter harassers. The Supreme Court's decision on the burden of proof notwithstanding (mentioned above in 2.1.8), one may furthermore state that in practice it is easier for harassed persons to establish their case before the ETC than before the courts. As a matter of fact, these questions relating to effectiveness would require documentation and an in-depth evaluation.

### 2.2. *Case law*

#### 2.2.1. *National courts and equality bodies*

Dating back to 1993, there is a comprehensive body of decisions by the Supreme Court, labour courts (first and second instance) and of the Equal Treatment Commissions for the private as well as for the public sector. Furthermore, there are decisions of the Constitutional Court concerning the procedures before and the legal status of the Equal Treatment Commission for the private sector as well as of the High Administrative Court, the latter concerning the public sector.<sup>32</sup>

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<sup>28</sup> §15(1) Equal Treatment Act OJ No. I 2008/98; a complaint before the Equal Treatment Commission stays the limitation period.

<sup>29</sup> The limitation period for actions before court is three years, §1489 ABGB.

<sup>30</sup> §12(12) Equal Treatment Act OJ No. I 2008/98; H. Hopf et al. *GIBG* pp 446-456 Vienna, Manz 2009; OGH 9 July 2008, 9 ObA 177/07.

<sup>31</sup> §218 Penal Code, OJ. No. 60/1974 as amended by OJ. No. I 93/2007, entry into force 1 January 2008, without prejudice to the still effective criminal sanctions for severe forms of sexual violence and constraint.

<sup>32</sup> See the reports on the implementation of the Equal Treatment Act on <http://www.frauen.bka.gv.at/site/5555/default.aspx>, accessed 2 October 2011.

### 2.2.2. Main features of case law

#### 2.2.2.1. Sexual harassment

High Administrative Court: An employee of the municipality of Vienna was found guilty by a penal court of sexual duress, perpetrated while drunk, against two waitresses of a café run by his wife. In consequence, his (public) employer had launched disciplinary proceedings, and he was eventually dismissed. The Court confirmed the dismissal.<sup>33</sup>

Supreme Court:<sup>34</sup> The protection from sexual harassment actually begins with the application procedure. The Court found a private limited liability company liable for a manager acting on its behalf and ordered compensation of damages to an amount of EUR 1 500.<sup>35</sup>

The minimum damages of EUR 720 are justifiable in a case of sexual harassment continued for a year.<sup>36</sup>

Upper Provincial Court Vienna: It is irrelevant whether a fellow worker says to a female colleague at a Christmas Party ‘honestly, I don’t want to f\*\*\* you’, or ‘do you want to f\*\*\* me’ or ‘let’s f\*\*\*’. All those statements overheard by colleagues constitute verbal sexual harassment and are objectively apt to violate the credit of and the respect for a person. The Court ordered compensation of damages in the amount of EUR 500. The harasser refused to apologize.<sup>37</sup> In a second case, the Court confirmed as valid the dismissal of an employee who repeatedly harassed female subordinates despite their protests. Unwanted physical contact had created a degrading working environment which entitled the employer to dismissal without prior warning.<sup>38</sup>

Labour Court Vienna: The perception of the harassed person is decisive. It is possible to excuse/forgive the harasser. In such a case there is no sexual harassment. This decision, however, is not part of the judicial mainstream.<sup>39</sup>

#### 2.2.2.2. Harassment

Supreme Court: Sex-related harassment is degrading behaviour which harasses and/or discriminates against the person concerned on the grounds of her sex and creates a hostile working environment. If there had been an additional sexual element, the case would have been treated as sexual harassment. As opposed to ‘mobbing’ which regularly requires continued actions, a singular grave behaviour may constitute harassment, for instance by giving instructions in an inadequate way and referring to blonde jokes. The Court ordered compensation of damages in the amount of EUR 2 500.<sup>40</sup>

### 2.2.3. Dignity

See the case law described above.

### 2.2.4. Restrictions

On a constitutional level, data protection might be invoked in practice. At the level of civil and criminal law, libel actions by harassers may occur.

### 2.2.5. Role of equality bodies

The Equal Treatment Commissions give non-binding opinions; their interaction with court proceedings is not without problems. There is no official evaluation of the Commissions’

<sup>33</sup> High Administrative Court 27 January 2011, 2010/09/0146, cf. EGELR 2011-1, 49.

<sup>34</sup> *Bericht des Bundesministeriums für Arbeit, Soziales und Konsumentenschutz, Vollziehung des GIBG durch die Gerichte. Gleichbehandlungsbericht 2008 und 2009, Teil I*, pp. 264 ss., III-193 BlgNR 24. GP, [http://www.parlament.gv.at/PAKT/VHG/XXIV/III/III\\_00193/imfname\\_202256.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/III/III_00193/imfname_202256.pdf), accessed 20 September 2011.

<sup>35</sup> OGH 9 ObA 18/08z, 5 June 2008.

<sup>36</sup> OGH 8 ObA 35/09v, 30 July 2009.

<sup>37</sup> OLG Wien 9 Ra 158/07g, 28 April 2008.

<sup>38</sup> §105 Abs. 3 Z 2 lit.a Labour Constitution Act; OLG Wien 10 Ra 130/08y, 2 November 2008.

<sup>39</sup> ASG Wien 5 Cga 167/07z, 3 September 2008.

<sup>40</sup> OGH 8 ObA 59/08x, 2 September 2008, the first decision based on §7 Equal Treatment Act.

practice, neither for the private nor for the public sector. As to the private sector, opinions have been issued on sexual harassment<sup>41</sup> as well as on harassment<sup>42</sup> in employment. Until now, there has been only one case of sexual harassment in the access to goods and services.<sup>43</sup>

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

3.1.1. Health and safety law includes a general obligation for employers to provide for the protection of life, health and morality (*Sittlichkeit*) in the workplace, according to Federal Act OJ. No. 450/1994. This lost practical relevance after the Equal Treatment Act entered into force. However, a similar provision is still relevant in the legislation on the protection of under-age employees.

3.1.2. Other labour law: The Employee Act provides for the right of employees to give the employer lawful immediate extraordinary notice without prejudice to severance pay (*Austrittsrecht*) in broadly defined cases of grave verbal or bodily abuse; individual cases of sexual and sex-related harassment can anyway be subsumed.

3.1.3. Criminal law: The provision mentioned above in 2.1.9 and introduced in 2007 penalises 'sexual harassment and public sexual activities'. §218(1) Penal Code refers to harassment by sexual actions including exhibitionist acts; persecution requires an authorisation by the person being harassed. The sanction amounts to a maximum of six months imprisonment or a fine of 360 daily rates (§19 Penal Code), that is, depending on the pecuniary circumstances, EUR 1 440 at a minimum up to EUR 1 800 000 at a maximum.

#### **3.2. Collective agreements**

Two collective agreements for employees in the non-profit sector (social work) could be found which comprise a general commitment to gender mainstreaming and anti-discrimination as well as a general condemnation of (sexual) harassment, also appointing responsible persons and specifying principles of good conduct. In the collective agreement for the privatised federal railway OBB, the structures of the formerly applicable Federal Treatment Act are still recognisable, such as anti-discrimination officers and contact persons supposed to be acting as mediators.<sup>44</sup>

#### **3.4. Stress at work**

As to the difference between mobbing and harassment, see the Supreme Court's decision in 2.2.2.2.

### **4. Added value and pitfalls of anti-discrimination approach**

Before the provisions on sexual harassment in the Equal Treatment Act entered into force, it was as good as impossible to rely on auxiliary legal constructions, such as in the Health and

<sup>41</sup> Private sector: see for instance GBK I/88/07, I/118/07, I/152/08, I/143/08, I/159/08 and others, see <http://www.frauen.bka.gv.at/site/6611/default.aspx>, accessed 10 October 2011.

<sup>42</sup> Public sector: B-GBK I / 84. opinion, March 2010 – age, possibly also gender; <http://www.frauen.bka.gv.at/DocView.axd?CobId=39335>; 80. opinion, November 2009 – mobbing, but not gender-related, <http://www.frauen.bka.gv.at/DocView.axd?CobId=37797>; private sector: GBK I/145/08, <http://www.frauen.bka.gv.at/DocView.axd?CobId=38816>, all accessed 10 October 2011.

<sup>43</sup> GBK III/71/10, 7 April 2011 – driving school, <http://www.frauen.bka.gv.at/DocView.axd?CobId=44271>, accessed 10 October 2011.

<sup>44</sup> Framework collective agreement *Fonds Soziales Wien* (employees), 1 July 2007, Chapters 22, 24, 25; Amendment to the collective agreement for employees of the *Verein Neustart* (former *Verein für Bewährungshilfe und Soziale Arbeit*), 1 December 2007; similarly the framework collective agreement for employees of associations (*Vereine*) with guidelines concerning mobbing and (sexual) harassment. Framework collective agreement Österreichische Bundesbahnen (employees/workers), §4 – Equal Treatment / Guidelines.

Safety Law. Austrian legislation is, as mentioned above, based on a recommendation of the European Commission, which combined the anti-discrimination approach with the dignity-harm approach. This combined or integrated approach has stood the test of time and practice.

## **BELGIUM – Jean Jacqumain**

### **1. General situation**

It should first be stressed that harassment (*‘harcèlement moral/pesterijen’* in Belgian legal terminology) and sexual harassment are hardly ever perceived or analysed as forms of gender discrimination. The reason for this is that while Belgium was a pioneer in the EU when its second Act on gender equality in employment (Act of 7 May 1999) envisaged sexual harassment as gender discrimination, and while the present Gender Act of 10 May 2007 correctly transposed Directives 2006/54/EC and 2004/113/EC in respect of harassment on the ground of sex and sexual harassment, since 2002 Belgium has also developed, in the Welfare at Work (i.e. Health and Safety) Act of 4 August 1996, extensive machinery aimed at preventing and suppressing harassment, sexual harassment and ‘violence at work’ as such, i.e. regardless of whether it includes any dimension of discrimination. Moreover, in a particularly ill-advised attempt at legal simplification, the Gender Act provided that when an employee who falls within the scope of the Welfare at Work Act complains of harassment or sexual harassment, he/she must rely exclusively on the latter Act.

Consequently, there is some collective awareness and extensive case law concerning harassment and violence at work, while sexual harassment is now very rarely mentioned. Gender discrimination (or, indeed, discrimination based on any other ‘Article 19 TFEU’ criterion) is hardly mentioned at all.

There are no recent exhaustive statistics available, mainly because public authorities seem to have lost interest in commissioning surveys of the issue. However, some organisations keep conducting surveys. For instance, the Stichting Innovatie en Arbeid (*‘Foundation for Innovation and Work’*), a subsidiary of the Social and Economic Council of Flanders, communicated in February 2011 that between 2004 and 2010 figures had remained stable (14 %) as to (Flemish) employees who had been confronted with harassment, while the situation had worsened concerning physical violence (from 5.4 % to 7.5 %) and sexual harassment (from 2.1 % to 3 %).<sup>45</sup> The above figures for 2004 corresponded with those of the Dublin Foundation's European Working Conditions Survey 2005.

On the other hand, the federal authorities’ attention has been focussed on another type of statistics: those that can be useful to evaluate the effectiveness of the legal machinery mentioned above (i.e. the Welfare at Work Act). On 28 April 2011 (World Health and Safety at Work Day), the federal Minister of Employment announced the results of an evaluation which had been conducted by research units of the Katholieke Universiteit Leuven and the Université catholique de Louvain-la-Neuve and completed by the federal Department of Employment.<sup>46</sup> According to these results, the number of files (concerning harassment, sexual harassment and violence at work) which had been dealt with by the External Services for Prevention and Protection at Work (see below) had increased from 3.200 in 2005 up to 4.800 in 2009. Meanwhile, the number of cases pending in Labour Courts had remained more or less constant (about 500 per year).

Essentially, the current debates concern the effectiveness of the relevant provisions of the Welfare at Work Act.

<sup>45</sup> Werkbaarheidsmonitor SERV/Stichting Innovatie & Arbeid on <http://www.werkbaarwerk.be>, accessed 11 November 2011.

<sup>46</sup> Quotation of a press release of the federal Minister of Employment, Joëlle Milquet (<http://www.milquet.belgium.be>, accessed 11 November 2011), which referred to that survey, conducted by A. Eertmans and S. Mertens of ISW-Limits (KUL), with the collaboration of A. García and F.J. Sion of Cap-Sciences humaines (UCL).

The expert must make it clear from the beginning of this report that there is no debate whatsoever concerning harassment and sexual harassment as gender discrimination. Further, all documented instances concern situations of existing employment and none of them concern access to employment or self-employment. Finally, although the Gender Act of 10 May 2007 was devised to cover such events as well, harassment and sexual harassment in access to and supply of goods and services have never been mentioned in any way.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The definitions of harassment on the ground of sex and sexual harassment are found in Article 5(9) and (10) of the Gender Act of 10 May 2007, and the prohibition of both types of behaviour as gender discrimination in Article 19. Both provisions are transverse, so that they apply to employment issues as well as to access to and supply of goods and services.

Article 19 does not mention less favourable treatment resulting from the victim's submission or refusal to submit to sex-related or sexual harassment; however, case law does not reveal any particular difficulties in assimilating such events.

It should be recalled that the federal Gender Act is not the sole instrument of transposition of Directives 2006/54/EC and 2004/113/EC, the material scope of which includes various issues (e.g. vocational training and orientation, employment relations in the public services, subsidized accommodation) that fall totally or partially within the respective jurisdiction of the federate authorities (Communities and Regions). Consequently, the latter have adopted various pieces of legislation (*décrets/decreten/Dekreten* and *ordonnances/ordonnances*) which are aimed at combating discrimination and at the same time to transpose EU directives (2006/54/EC and 2004/113/EC, but 2000/43/EC and 2000/78/EC as well). They all include provisions similar to those of the federal Act concerning sexual harassment; the same applies to harassment, except that the federate texts envisage it as based on various criteria of discrimination, including sex.

#### *2.1.2. Definitions*

The definitions of sex-related harassment and sexual harassment are copied from Directives 2006/54/EC and 2004/113/EC. They include the nuance concerning 'purpose or effect', which is accepted in civil and labour law. Given that very few breaches of the provisions of the Gender Act are liable to penal sanctions, no great attention has been paid so far to the acceptability of the nuance in penal law. However, Article 28 of the Act makes civil servants liable to a penalty of imprisonment (from two months up to two years) in case of gender discrimination while performing their duties. Should the discrimination consist in sex-related or sexual harassment, the nuance 'purpose or effect' might be difficult to reconcile with the necessary demonstration of criminal intent; given the complete absence of case law on this issue, the expert cannot do more than raise the point.

The difference between sexual harassment and sex-related harassment is known at a hypothetical level; it was explained in the Statement of purpose of the bill for the Gender Act, by way of a practical example. There is no case law to indicate how well it is understood.

While the Welfare at Work Act of 4 August 1996 uses the same definition of sexual harassment as the Gender Act, its definition of harassment differs: in the Welfare at Work Act, several facts are necessary for the notion 'harassment' to apply, a requirement which appears neither in Directive 2006/54/EC nor in the Gender Act. Given that an employee who claims to be the victim of harassment as a form of gender discrimination must rely on the Welfare at Work Act to the exclusion of the Gender Act, obviously the burden of *prima facie* demonstration of the harassment is made more onerous. Possibly the harmful occurrence might come under the notion 'violence at work' envisaged by the Welfare at Work Act (i.e. any situation of psychological or physical threat or aggression during the performance of

work), which does not demand that there be several facts; still, this would be a roundabout way to meet the definition of Article 2(1)(c) of Directive 2006/54/EC.

The analysis above also applies to harassment as a form of discrimination under Directives 2000/43/EC and 2000/78/EC, given that the definition of harassment in the Welfare at Work Act mentions that it also covers occurrences of discrimination based on sex as well as the other criteria envisaged by the anti-discrimination legislation.

#### *2.1.3. Sexual harassment*

As mentioned above, the concept of sexual harassment as gender discrimination was introduced in Belgian law three years before Directive 2002/73/EC. In the present legislation, sexual harassment remains specific to the Gender Act and is not mentioned in the other two anti-discrimination Acts of 10 May 2007 (on 'Race' and 'Discrimination in General'), for no other obvious reason than its absence from Directives 2000/43/EC and 2000/78/EC. There has been no discussion on this subject.

#### *2.1.4. Scope*

As mentioned above, the notions of sex-related and sexual harassment as gender discrimination are transverse in the Gender Act, the material scope of which is broader than those of Directives 2006/54/EC and 2004/113/EC as it includes statutory social security schemes, 'social advantages' as meant by Article 7(2) of Regulation 1612/68/EEC on the freedom of movement of workers, and 'access to and participation in any economic, social, cultural or political activity open to the public'.

#### *2.1.5. Addressee*

The Gender Act does not define its personal scope. Thus the addressees must be identified according to the situations included in the material scope; theoretically any person so involved is an addressee.

#### *Employment*

As mentioned above, it is pointless to speculate on the application of the provisions of the Gender Act to an employee who is the victim of harassment and sexual harassment as gender discrimination, given that she/he is compelled to rely exclusively on the provisions of the Welfare at Work Act. The latter is applicable to situations of harassment, sexual harassment and violence at work involving employers and any person in a subordinate position (i.e. not only employees engaged in employment contracts, but also civil servants, apprentices, trainees, etc.), plus any third parties with whom employers are in contact while performing their duties (i.e. customers in a shop, contractors delivering goods to a factory, pupils and students in a school, etc). Any occurrences of harassment, sexual harassment or violence at work involving any of those persons (i.e. including employee vs. employee) are included in the scope of the Welfare at Work Act.

#### *Goods and services*

Apparently, the wording 'access to and supply of' suggests that the owner or manager of the business is the addressee, but there is nothing in the Gender Act to exclude the event of harassment or sexual harassment of a shopkeeper by a customer. Again, this is pure speculation in the absence of any case law.

#### *2.1.6. Preventive measures*

The Welfare at Work Act and its ancillary Royal Decree of 27 March 1998 make it compulsory for all employers to develop a policy of prevention against 'psychological and social workload' (the general notion which covers stress, harassment, sexual harassment and violence at work). This policy must take the form of various organisational and material measures, first discussed with the workforce's representatives in the Committee for Prevention and Protection at Work (i.e. in enterprises employing at least 50 persons) and then integrated in the work rules. No examples are provided by the legislation, but such measures are known

to range from elementary material steps such as eliminating ill-lit spots up to more abstract initiatives concerning precise job descriptions and satisfaction at work.

Given the extensive legal provisions, which focus on each enterprise or institution separately, the social partners have given up their previous intention of dealing with harassment, sexual harassment and violence at work by way of collective agreements, either at national or sector level. For the same reason, they seem to rely on legislation as a sufficient instrument to implement the European Framework Agreements on Stress at Work (2004) and Harassment and Violence at Work (2007), while in 1999 the National Labour Council adopted its collective agreement n°72 on the prevention of work-related stress.

Considering that the Gender Act cannot be used to fight sex-related and sexual harassment at work (see above), it goes without saying that Article 26 of Directive 2006/54/EC is not implemented as such.

#### *2.1.7. Procedures*

##### *Employment*

The Welfare at Work Act includes a double set of provisions on which an alleged victim of harassment, sexual harassment or violence at work may rely: one internal to the enterprise or institution, the other external. The internal procedure involves a specialised adviser, member of the Prevention and Protection Service which every employer must establish (Internal Service) or adhere to (External Service); this adviser may be assisted by confidential counsellors. Primarily, the internal procedure aims at identifying conflict situations and seeking informal remedies; however, the victim may lodge a formal complaint with the specialized adviser, who is empowered to conduct investigations and make recommendations which the employer is expected to act upon. The external procedure includes several channels open to the victim: a formal complaint lodged with the Labour Inspectorate or the auditorat du travail/arbeidsauditoraat (i.e. the public prosecution office specialised in social law), which may result in penal proceedings (as breaches of the provisions of the Welfare at Work Act by employers are misdemeanours) in which the victim may intervene in order to claim damages; or an action of the victim in a Labour Court. However, the Labour Court may order that the formal internal procedure first be applied before the case can be decided.

One bizarre aspect is that the Institute for Equality of Women and Men (the gender equality body) is not competent to receive and register formal complaints when the victim of sex-related or sexual harassment as discrimination is an employee who must rely on the Welfare at Work Act (see above), but under the same Act the Institute itself has locus standi to take action in order to challenge such a situation. The trade unions also have locus standi, as well as associations whose charters consider such situations as intolerable.

##### *Goods and services*

In this respect, the alleged victim may only rely on the Gender Act, which only provides for an action in Civil and Commercial Courts, taken by the victim, the Institute or an association with locus standi (see above). The victim should also be allowed to file a complaint with the Economic Inspectorate of the federal Department of Economy, but so far there is no ancillary Royal Decree to make this inspectorate competent.

#### *2.1.8. Burden of proof*

Both the Welfare at Work Act and the Gender Act include identical provisions on the burden of proof, which are copied from Article 19 of Directive 2006/54 (and similar provisions in Directive 2000/43 and 2000/78), although obviously the Welfare at Work Act only refers to situations of harassment, sexual harassment or violence at work and only mentions discrimination as one possible cause for such behaviours.

Case law (see below) has revealed that building a prima facie case of harassment can be extremely difficult for the alleged victim. This is why the Welfare at Work Act heavily relies on the internal procedure, including the specialised adviser's report to establish whether or not there is a case (see above).



Surprisingly enough, the possibility to sue the harasser (i.e. employee vs. employee), probably combined with the protection against victimization (see below), has induced a wave of such claims, to which most Labour Courts reacted negatively, considering that labour disputes should only happen between employees and employers and not between employees. Indeed, an employee who specifically wishes his/her harasser to be punished only tends to rely on yet another legal provision, Article 442bis of the Penal Code aimed at punishing harassment as ‘any behaviour which the perpetrator knows or should have known to be liable to seriously harm another person's quiet’.

#### *2.1.9. Remedies and sanctions*

It seems necessary to first explain that both the Welfare at Work Act and the Gender Act make two types of civil action available to the victim (who may use both):

- an application for a court order to put an end to the challenged situation, and/or
- a claim for damages.

#### *Employment*

As mentioned above, the addressee in the Welfare at Work Act may be the employer, a representative of the employer, a fellow worker or any other person with whom the employee is in contact when performing his/her duties. Any of those may be the addressee of a court order to cease and desist, or the defendant in a claim for damages. Moreover, the employer or his representatives are liable to penal sanctions for breaching the provisions of the Welfare at Work Act.

Whether or not the victim is suing the perpetrator directly, if the latter is a fellow worker the employer may take steps to put an end to the situation (either as a follow-up of the specialised adviser's report or to comply with a court order) which may entail a transfer, disciplinary sanctions or dismissal of the perpetrator. The Welfare at Work Act does not indicate which steps the employer should take, and the usual rules governing such measures must be respected. For instance, in several cases, the Conseil d'Etat/Raad van State (administrative court) annulled sanctions against perpetrators of harassment in public services because of violations of procedural rules.

A victim is supposed to benefit from the enforcement of a court order: given that, from the moment that he/she files a formal complaint or takes legal action, the employer is forbidden to take unfavourable steps against him/her, a transfer of the victim to other tasks can hardly be decided without his/her consent or wish. The victim can also obtain damages, but see below on the necessity of demonstrating their extent according to tort law.

As mentioned above, the Welfare at Work Act makes no reference to the victim's submission or refusal to submit, but there are no conceptual obstacles to the inclusion of such elements (although they may hinder the construction of a *prima facie* case, e.g. when a sentimental or sexual relationship degenerates into conflict because one member of the couple decides to end it and the other one refuses to accept that decision).

#### *Goods and services*

Obviously, the Welfare at Work Act is not applicable to issues of discrimination in access to or supply of goods and services: the victim must rely on the Gender Act. However, what has been described above under *Employment* also applies here because the provisions of both Acts are broadly similar, with one important difference.

When the victim of discrimination related to goods and services claims for damages, he/she must demonstrate the extent of the material and moral harm which he/she has endured; alternatively, he/she may opt for the fixed damages provided by the Gender Act, i.e. EUR 650, or EUR 1 300 when the perpetrator is unable to prove that the same unfavourable treatment would have been applied in the absence of discrimination (a hypothesis particularly abstract in the case of sex-related or sexual harassment).

Again, there is no case law whatsoever to test how effective those provisions may be.



#### *2.1.10. Compliance with EU law*

As far as 'goods and services' is concerned, Directive 2004/113/EC seems to have been implemented satisfactorily, although no deep thought was dedicated to how sex-related and sexual harassment might occur within such a material scope.

As to employment matters, the situation is quite paradoxical. On the one hand, a good deal of effort went into developing a coherent and comprehensive legal system aimed at the prevention and compensation of harassment, sexual harassment and violence at work. On the other hand, providing that when the victim is an employee he/she must rely on the Welfare at Work Act to the exclusion of the Gender Act certainly makes for faulty compliance with Directive 2006/54/EC, for various reasons. First, even if the definition of harassment in the Welfare at Work Act complies with EU anti-discrimination law by stating that a situation of harassment may be conducive to any 'Article 19 TFEU' discriminations, such an element is at best marginal in the treatment of the issue. Second and consequently, there is hardly any chance that the notion of 'harassment on the ground of sex' as introduced by Directive 2002/73/EC will ever be understood, because the Welfare at Work Act pays much more attention to consequences than to causes. Third, it seems absurd that a woman who is the victim of sexual harassment at work be forbidden to complain about gender discrimination. Fourth, the definition of harassment is more demanding in the Welfare at Work Act than in EU law (see above). And finally, one important innovation of the Gender Act as compared to the previous sex equality legislation is the possibility for the victim to claim fixed damages instead of trying to demonstrate the extent of the harm he/she has suffered; when the challenged situation happens within an employment relationship the fixed damages are equal to six months' pay. Obviously, by forcing the victim to rely on the Welfare at Work Act which does not provide for fixed damages, Belgium has made the transposition of Directive 2006/54 less effective than it could have been.

#### *2.1.11. Additional information*

More on the same aspect. The unavailability of the provisions of the Gender Act was motivated by purely political considerations. Within the ruling federal coalition at the time, certain parties successfully relayed the associations of the employers' viewpoint. The latter were anxious to avoid that employees who were complaining about harassment or sexual harassment should be able to rely both on the Gender Act and on the Welfare at Work Act, and even more that the fixed damages provided by the first Act should finally be introduced in the second as an inescapable alignment.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

The equality body (Institute for Equality of Women and Men) has no power of decision. The development of case law is quite revealing. Sexual harassment at work was recognised as an issue by the end of the nineteen eighties; over a period of some 12 years there were there a number of cases (perhaps 50) in which occurrences of sexual harassment were challenged, using any provision in labour law which could be relevant. When the Act of 11 June 2002 inserted the anti-harassment/sexual harassment/violence at work provisions in the Welfare at Work Act, it also made it compulsory for court registrars to communicate any court decisions based on those provisions to the federal Department of Employment, for the purpose of evaluating the effectiveness of the new legal machinery. Over the period 2002-2011, the list of reported decisions has now (June 2011) reached 456 entries (including multiple entries concerning the same case, e.g. when there was an appeal); of those, 5 concerned sexual harassment; 11 both harassment and sexual harassment; and the crushing majority of the remainder harassment (gender discrimination being mentioned in none).

#### *2.2.2. Main features of case law*

Again, there are no known cases relating to goods and services, and none of harassment on the ground of sex either. Nearly all cases in which sexual harassment was mentioned were

disputes arising from dismissal: either of the victim (usually after she had complained) or of the perpetrator (as there is no known case in which the perpetrator was the employer). The first gender equality legislation (the Act of 4 August 1978) was only used in four cases. In three of those, the courts accepted that complaining about sexual harassment could be construed as complaining about sex discrimination, so that the protection against victimisation was applicable and the victims (one of them a man) were allowed fixed damages. In the fourth case, two women successfully applied for a court order imposing on the employer (the Post Office) that their alleged sexual harasser be removed to another position involving no contact with them, but after the latter appealed the case dragged on until he reached his retirement age so that the case was discontinued without any final decision being issued.

#### *2.2.3. Dignity*

The expert has no knowledge of any particular effort to define the concept of 'dignity', either in legislation or in case law. The term is obviously supposed to be taken at face value, which may give much room for subjective interpretation as to whether such-and-such behaviour is harmful to dignity. In a notorious case, the Labour Court of Appeal in Brussels found that salacious talk and unhooking a subordinate's bra through her outer clothing was nothing more than delayed boyishness, so that the victim who had waged a denigration campaign against her supervisor within the enterprise had given the employer serious grounds for her dismissal. Three years later, however, the Penal Court of Brussels found the perpetrator guilty of indecent assault for the same facts.

#### *2.2.4. Restrictions*

The expert has no knowledge of such an issue.

#### *2.2.5. Role of equality bodies*

As mentioned above, the equality body is in an absurd situation, as under the Welfare at Work Act it has locus standi to take action in order to challenge occurrences of sex-related or sexual harassment, but not to register a victim's formal complaint; moreover, the Gender Act cannot be applied in such occurrences. Consequently, the Institute for Equality of Women and Men can hardly do more than re-direct complaints to the Labour Inspectorate.

#### *2.2.6. Additional information*

Nothing to add.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### *3.1. National provisions*

The Welfare at Work Act has already been described, as well as Article 442bis of the Penal Code on the offence of harassment. Before any specific legislation was developed, Article 16 of the Employment Contracts Act of 3 July 1978 (on the mutual obligation of employer and employee to show respect and abstain from immoral behaviour) was relied upon occasionally in litigation, but it is now very seldom quoted.

#### *3.2. Collective agreements*

Similarly, it has been mentioned that after specific legislation had been adopted, the social partners abandoned their intention to conclude a national collective agreement.

#### *3.3. Additional measures*

For Belgium, this question is obviously irrelevant.

#### *3.4. Harassment and stress at work*

As mentioned above, under the Welfare at Work Act, harassment and stress at work both come under the heading of 'psychological and social workload'. Indeed, in quite a number of decisions the labour courts came to the conclusion that victims were mistaking stress for

harassment and dismissed the case; hence the growing insistence on the use of the ‘internal procedure’ (see above) to defuse wrongly perceived situations.

### **3.5. Additional information**

Nothing to add.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

The expert hopes to have shown that Belgium is a case of subtracted value. Having decided that a resolute effort had to be made in order to combat persecution at work (in its three forms of harassment, sexual harassment and violence), the federal Government had Parliament pass coherent and extensive legal machinery which was inserted in the appropriate receptacle, the Welfare at Work Act. At the same time, Belgium (before the EU and most other Member States) already had legal provisions (in the Act of 7 May 1999) which defined sexual harassment as gender discrimination. When the latter provisions had to be included (and extended to harassment on the ground of sex) in the new Gender Act, it should have been possible to devise an articulation so that the victim could rely on both Acts (Gender Act and Welfare at Work Act) when the situation occurred in an employment context. To the contrary, the solution which was chosen results in a weakened protection, a faulty implementation of EU law and a rare piece of intellectual nonsense.

As to the discrepancy between civil law and labour law on the one hand and penal law on the other regarding the burden of proof, it has been acknowledged by EU law as from Article 4(5) of Directive 97/80/EC (now Article 16 (5) of Directive 2006/54/EC). Given that the provisions on the burden of proof are the same in the Welfare at Work Act and the Gender Act, while the former contains penal sanctions and the latter hardly any, the discrimination dimension cannot be regarded as complicating the discrepancy.

### **4.2. Pitfalls**

Again, it is impossible to point out any pitfalls in a non-existent situation.

Finally, the expert would like to venture the following interpretation of the near-extinction of sexual harassment claims. Between the end of the nineteen eighties and 2002 sexual harassment was known (not surprisingly) as a ‘women's problem’, entailing a further painful psychological ordeal for any victim who wished to complain. Harassment was not acknowledged until 1999 (in Article 442bis of the Penal Code), but then it became immediately obvious that as many men as women found cause to complain about it. The Act of 11 June 2002, amending the Welfare at Work Act, gave legal consecration to harassment at work. Thus it comes to mind that complaining about harassment is perceived as less stigmatising (and, to dot the i's and cross the t's, more gender neutral) than confessing that one has been the victim of sexual harassment, or harassment based on sex.

## **BULGARIA – Genoveva Tisheva**

### **1. General situation**

Harassment and sexual harassment are issues that started being debated in Bulgaria after its full accession to the EU. The influence of the European standards is obvious. Despite this, the deeply-rooted gender stereotypes are slow to remove and they strongly influence every debate. This is the reason why sexist portraying and stereotyping of women in public is still allowed, and why accusing anybody of sexual harassment is not yet accepted by some people arguing that this is an American and, more generally, a Western fashion of exaggeration forbidding any freedom of sexual conduct. There are even jokes about what is forbidden in the workplace. And there are studies of some private agencies about how pleasant and healthy sex at the workplace can be, without even touching upon the issue of unwanted sexual

relationships, which are common enough. The latest cases reported to the Equality Body and the courts have provoked more debate, but zero tolerance of any harassment and sexual harassment in society stills needs much clarification.

We can quote two recent research reports: one about sexual violence against women and one about harassment in the health sector.

The first one was produced in 2011 by the Alpha Research Agency and is about sexual violence against women in general, without specifying violence at the workplace.<sup>47</sup> The simple example of one question in this representative research shows the attitudes of the respondents towards sexual harassment: the workplace is indicated as the third place where women are subjected to sexual violence. In 56.6 %, public places are experienced as most risky for them, in 54.9 % of the cases this is home and in 47.9 % of the cases the workplace is risky for women. The other study, also from 2011, is about harassment in general in the healthcare system: physical and verbal sexual harassment is found most often, as well as general psychological, verbal and even physical harassment in the sector.

Unfortunately, I do not have a precise reference to the research in the health sector. It can be left as a trend identified.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

Bulgarian legislation explicitly includes both harassment on all protected grounds, including sex, and sexual harassment, by listing them among the prohibited forms of discrimination in Article 5 of the Protection against Discrimination Act (PADA). The victimisation/less favourable treatment because the person has refused to discriminate or has taken or is supposed to have taken, or will take action in defence against discrimination, is also a form of prohibited discrimination explicitly regulated in the law (Article 5 of the PADA). The latter is regulated in general terms relating to all forms of discrimination and not only to harassment and sexual harassment. Article 17 of this law provides for the obligations of the employer in cases of complaints of sexual harassment. Article 18 envisages the adoption by the employer jointly with the trade unions of effective measures against discrimination in the workplace. According to Article 31 of the PADA, the head of an institution for education and training has symmetrical obligations with the employer in reported cases of harassment: to investigate the case and to take measures to stop the harassment, including imposing disciplinary sanctions. The general provisions prohibiting harassment and sexual harassment also apply to the area of access to and supply of goods and services. Moreover, the protection against harassment as a form of discrimination in all these areas is extended to all protected grounds, including, for example, race and ethnicity, thus going beyond the current scope of protection against harassment in EU law.

The supplementary provisions of the PADA provide for the definitions of the concepts of harassment, sexual harassment and victimisation (Paragraph 1, p. 1, p. 2 and p. 3 respectively).

Generally, it may be concluded that Bulgarian law has transposed the European legislation in the area of harassment and sexual harassment. Although the main principles of protection have been laid down since the adoption and entry into force of the PADA in January 2004, the supplementary provisions of the law explicitly indicate that the PADA transposes the provisions of Directive 2006/54/EC.

#### *2.1.2. Definitions*

As mentioned above, in Bulgarian legislation the concepts of harassment and sexual harassment are defined in broader terms than the requirements of the Directives. They include

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<sup>47</sup> Alpha Research Agency *Sexual violence against women in Bulgaria* January 2011, [www.aresearch.org](http://www.aresearch.org), accessed 24 August, 2011

all relevant elements of the definitions contained in the Directives, including the purpose or effect condition. Both in the law ('...any unwanted conduct...') and in judicial practice it is clear that harassment does not need to be intentional and that intent is not a necessary element of the concept. The relevant definitions are stipulated in Paragraph 1 of the supplementary provisions of the law, and read as follows:

(1) 'Harassment' shall be any unwanted conduct on the grounds referred to in Article 4, Paragraph 1 [any of the grounds listed in the law on the basis of which a forbidden discrimination, including sex, occurs] expressed in a physical, verbal or any other manner, which has the purpose or effect of violating the person's dignity or creating a hostile, degrading, humiliating or intimidating environment, attitude or practice.

(2) 'Sexual harassment' shall be any unwanted conduct of a sexual character expressed physically, verbally or in any other manner, which violates the dignity or honour or creates a hostile, degrading, humiliating or intimidating environment and, in particular when the refusal to accept such conduct or the compulsion thereto could influence the taking of decisions, affecting the person.'

This is the text in the two paragraphs and presents the exact definition; we cannot make any additions. I think that the initial indication is that the law bans 'any unwanted conduct'.

The legislator included in the definition of sexual harassment a particular example of such harassment in order to provide a specific illustration, with the purpose to clarify the law to the enforcement bodies and the affected persons.

As pointed out above, harassment and sexual harassment are explicitly declared to constitute forms of discrimination. The difference between the definitions of harassment and sexual harassment, on the one hand, and the prohibition of (sex) discrimination, on the other, is that in the case of harassment and sexual harassment the law does not require the existence of a less favourable treatment and a comparator, whereas an element of (sex) discrimination is the less favourable treatment in comparison to that of other person(s) in a similar situation. All this has the potential to make claiming harassment and sexual harassment easier for the victims of this form of discrimination.

#### *2.1.3. Sexual harassment*

Sexual harassment is conceptualized as sex discrimination, the central element of which is unwanted sexual behaviour. Under Bulgarian law, the wider notion is harassment which includes all grounds of discrimination.

Paragraph 1 of the additional provisions was quoted above:

(1) 'Harassment' shall be any unwanted conduct on the grounds referred to in Article 4, Paragraph 1 [*any of the grounds listed in the law* on the basis of which a forbidden discrimination, including sex, occurs], expressed in a physical, verbal or any other manner, which has the purpose or effect of violating the person's dignity or creating a hostile, degrading, humiliating or intimidating environment, attitude or practice.

#### *2.1.4. Scope*

In addition to measures in respect of fighting harassment and sexual harassment in the area of access to all areas of employment and the supply of goods and services, Bulgarian law also provides explicitly for similar measures in providing education and training. As harassment and sexual harassment are broadly defined as a form of discrimination, the concept covers all possible areas where such discrimination may occur. As a matter of principle, according to Article 6 of the PADA : 'The prohibition of discrimination shall be binding upon all, in exercising and protecting the rights and freedoms laid down by the Constitution and the laws of the Republic of Bulgaria.

#### *2.1.5. Addressee*

The prohibition of harassment in employment applies equally to everyone at the workplace. The employer has a specific obligation, when receiving a complaint from an employee

considering him/herself a victim of harassment, including sexual harassment, to immediately start an investigation, take measures to stop the harassment, as well as impose a disciplinary sanction in case the harassment has been committed by another worker or employee. In case the employer fails to fulfil this obligation, s/he will be liable under the law for an act of discrimination committed at the workplace by a worker or an employee, employed by him/her. Moreover, the employer, in cooperation with the trade unions, must take efficient measures to prevent any form of discrimination at the workplace.

A similar obligation exists for the heads of training institutions who have received a complaint from a student considering him/herself a victim of harassment committed by pedagogical or non-pedagogical staff or another student. The head must immediately start an investigation and take measures to stop the harassment, as well as impose a disciplinary sanction. Moreover, the law envisages that persons providing training or education are obliged to apply methods of training and education in a way focused on overcoming the stereotyped roles of women and men in all spheres of public and family life.

In fact, Article 31 of PADA states: 'The Head of an educational institution having received a complaint from a student considering oneself a victim of harassment committed by a member of pedagogical or non-pedagogical staff or another student, shall immediately conduct an enquiry and take action to terminate the harassment, as well as impose disciplinary measures.'

As regards the provision of goods and services, the law only explicitly provides that the refusal to provide goods and services as well as providing goods and services of a lower quality or under less favourable conditions on any discrimination ground is prohibited. Apparently, the responsible person will be the provider of the goods and services, including when the discrimination is committed by an employee working for him/her. Apart from the hypotheses mentioned, there is no specific indication of the obligations of the addressee in other cases of harassment in the access to and supply of goods and services. Based on the fact that there is a general ban on harassment and sexual harassment in the law, it can be assumed that the provider has symmetrical obligations to those provided for the field of employment and education. There has been no relevant case law so far.

#### *2.1.6. Preventive measures*

To our knowledge, there have been several studies on harassment at the workplace, mainly on the initiative of trade unions. Some of them are mentioned in the introductory part above. We are not aware of any particular measures of employers' or employees' organisations taken in that area on a national level. However, isolated practices of collective agreements in some branches might exist, also tackling the issues of harassment at the workplace in general.

Because of a lack of sensitivity, the employers in Bulgaria do not take measures in order to prevent sexual harassment and harassment. Usually they cannot identify the problem, so they do not see any need to use their capacity in advance. However, when sexual harassment occurs and complaints against them are lodged, e.g. post factum, they start to think how to deal with it. There is no information available about special procedures established by the employers according to Article 4 of the Framework Agreement on harassment and violence at work, 2007.

Nevertheless, a recent example can be given of the measures taken by the head of a very large Bulgarian company where several women faced sexual harassment at the workplace, after the women lodged their complaints before the employer as well as before the Anti-Discrimination Commission. The employer installed an in-house commission with representatives of trade unions. In order to prevent sexual harassment the employer organized an anti-discrimination training for his employees.

#### *2.1.7. Procedures*

A specific complaints procedure is followed for cases of harassment at the workplace (Article 17 PADA) and in the field of education and training (Article 31 PADA). The specific complaints procedure at the workplace obliges the employer, when receiving a complaint from an employee for harassment or sexual harassment, to immediately investigate, take

measures to stop the harassment and sanction the prohibited behaviour. The obligations of the head of an education and training institution are similar. For more detail, see the information in 2.1.5 above.

The general procedure of the PADA is in force for discrimination claims. They can be brought before the Equality Body – the Commission for Protection against Discrimination – or alternatively, before a court.

It must be noted that the law provides for the establishment of a special panel that hears cases related to sex discrimination, within the national Equality Body.

#### *2.1.8. Burden of proof*

Article 9 of the PADA, in cases of discrimination, including cases of harassment and sexual harassment, provides for the shifting of the burden of proof. This rule is an exception to the main rule of burden of proof in civil cases under the Bulgarian judicial procedure, whereby everybody is supposed to bear the burden to prove of what s/he claims. In proceedings for protection against discrimination, after the party claiming to be a victim of discrimination proves facts sustaining the assumption of discrimination having occurred, i.e. prima facie facts, the defendant must prove that the right to equal treatment has not been infringed, by presenting objective reasons for the difference in treatment unrelated to the ground of discrimination. If the defendant fails to prove with sufficient certainty that there was no discrimination, the discrimination is considered as having been established.

Apart from fear of victimization, other deterring factors for filing a discrimination complaint could be the financial burden, lengthy proceedings, impossibility to hire a lawyer and ensure evidence, etc. Some of these factors were tackled by the law: the proceedings before the Commission for Protection against Discrimination are less lengthy and less formal; the Commission has comprehensive powers to collect evidence and initiate proceedings on its own motion; no court fees are collected both before the Commission and the courts; legal aid lawyers could be assigned in the case of lack of financial resources and when justice so requires; apart from the victim, NGOs and trade unions can also bring discrimination actions before the court both on behalf of the victim with her consent or on their own behalf in *actio popularis* cases with or without identifying particular victims; the limitation period for filing a discrimination claim is relatively long allowing the victims to pursue a claim long after the discriminatory treatment: 3 years for complaints before the Commission and 5 years for claims before court.

#### *2.1.9. Remedies and sanctions*

The remedies and sanctions in cases of discriminatory harassment vary depending on the forum selected by the victim of discrimination: the Anti-Discrimination Commission or the court.

The Commission for Protection against Discrimination can declare the existence of discriminatory harassment and identify the perpetrator, determine the type and the amount of the sanction imposed, apply coercive administrative measures and give mandatory instructions to the defendant. According to Article 76 of the PADA, the Commission may, on its own initiative or at the suggestion of trade unions, individuals or entities apply the following compulsory administrative measures: 1. issuing mandatory instructions to employers and officials, in order to eliminate violations of the laws concerning the prevention of discrimination; 2. suspending the execution of unlawful decisions or orders of employers leading to or capable of leading to discrimination. The administrative penal sanction for those who commit discrimination is a fine of EUR 125 to 1 000 (BGN 250 to 2 000), if not subject to a more severe penalty (Article 78). If violations are repeated, the fine shall be doubled compared to the initially imposed one. The coercive administrative measures and the administrative penal sanctions can be perceived as a guarantee against further victimisation of the persons who were subjected to harassment.

The courts can declare the existence of harassment or sexual harassment, order the defendant to cease the discriminatory action or practice and to refrain from similar future behaviour, and can order *restitutio in integrum*. The court, contrary to the Commission, can

also order compensation to the victim. No possibility for applying interim measures is envisaged by the law.

Individual perpetrators can also be held criminally liable, when the committed act constitutes a crime, e.g. in cases of rape under Article 152 of the Penal Code (PC) and sexual intercourse with another person by using his/her employment or material dependence, under Article 153 PC.

In the field of employment, disciplinary sanctions can be imposed on the perpetrator, including dismissal. In addition, as described above, if the employer fails to act in instances of harassment reported to him, he will be also liable under the law for an act of discrimination committed at the workplace. If the victim is dismissed because of victimisation s/he can seek reinstatement in her/his position from the court.

Similar obligations apply for the head of a training institution and disciplinary sanctions could be imposed on pedagogical or non-pedagogical staff (see above, in 2.1.5). The law does not provide for specific procedures and sanctions in relation to the supply of goods and services, and therefore the general provisions apply here.

#### *2.1.10. Compliance with EU law*

Bulgarian legislation could be considered to be in compliance with EU law. It is advisable, however, to further develop some more detailed regulation of harassment and sexual harassment in various areas such as education and training, supply of goods and services and the like. Another area that may need future improvement is the endorsement of the protection against harassment and sexual harassment by trade unions, and more specifically in the mechanisms of the collective agreements.

Although the Framework Agreement on harassment and violence at work 2007 is not, strictly speaking, an EU standard, the adoption by employers of special procedures in cases of harassment at work can be recommended as well.

Such changes would enhance the legal protection against discriminatory harassment in Bulgaria.

#### *2.1.11. Additional information*

Development of provisions in the Anti-Discrimination Law to allow imposing interim measures for serious instances of harassment and sexual harassment might be considered. Such provisions exist in the area of domestic violence and a similar mechanism for more effective protection in the area of discrimination may also be considered.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

Cases of harassment and sexual harassment have been brought before the national courts and before the Equality Body. Despite the fact that such cases are both from Sofia and from other towns, there are not many and they do not reveal any clear trends or contribute to real case law on these issues. We are convinced that there is a wide discrepancy between the number of cases brought to justice and the incidence of harassment in employment and in the area of goods and services.

#### *2.2.2. Main features of case law*

Most of the cases we know and which were discussed in society represent cases of harassment at work: unwanted conduct of a sexual nature, expressed physically and verbally, some of them pure quid pro quo cases, with only isolated cases of humiliating and offensive environment.

Some cases were decided by the Equality Body that related to creating such an environment by co-workers, where discriminatory harassment was found and administrative measures were imposed on the employer. Currently, there are cases pending before the Commission for Protection against Discrimination regarding severe sexual violence at work in a feminised unit of a large public company. Apparently, the manager of the women



working there harassed several of them by touching them, holding them, and insisting on travelling together with them. The victims also lodged complaints with trade unions and with the Mayor of Sofia, and one of the cases was referred to the public prosecutor. All of these cases are still pending.

In April 2010, the District Court in Sofia issued a decision against a victim of serious sexual harassment at the workplace. The victim was a teacher and suffered sexual harassment by the director of the school for a long time. As she refused to have sexual intercourse with him, she was fired. The act of dismissal was declared unlawful by the Court. The judge on the case for quid pro quo sexual harassment did not find such indications, using arguments that only foster gender stereotyping: ‘...for a woman over 42 the sexual hints can be regarded as a compliment (...)’. Despite this, the Court ordered the defendant to refrain from further acts of sexual harassment in front of the claimant. The court decision was appealed and the higher court (the Sofia City Court) again refused to recognize the fact of discrimination and sexual harassment. Sustaining the arguments of the first instance court, the appellate court also added that the claimant had not proved that the dismissal was due exactly to the fact of sexual harassment. Again, the Court showed a lack of understanding of the substance of harassment and of the procedure in discrimination cases, i.e. the burden of proof rule. The case was referred to the Supreme Court of Cassation, although there are scarce chances for a different final decision to be reached.

The references for this case are: Sofia District Court - 28<sup>th</sup> unit, civil file 6950/ 2004 (note the initial date of the file, the victim has been waiting for justice for more than 7 years now). The appellate court was the Sofia City Court - unit II-b, civil case 9171/ 2010. The case is still pending before the Supreme Court of Cassation of Bulgaria.

The dismissal was declared unlawful in a separate procedure, because the formal justification declaring a lack of skills to perform the job was found invalid.

Although formally outside the scope of protection by Directive 2004/113, we can mention here a case brought before the Equality Body by 13 women in 2008 as a case of sex discrimination and harassment in goods and services. It was brought against a sexist advertisement of an alcoholic beverage. The area of media and advertisement is covered by the PADA in Bulgaria. The Commission found a lack of prima facie discrimination based on sex. The decision was appealed before the Supreme Administrative Court as first judicial instance and a recent decision of this Court sustains the refusal of the Equality Body to recognize discrimination and harassment in this case. Moreover the Supreme Court, although finding that the complainants were obviously offended, insists on the fact that the 13 women were not representative enough of the opinion of women in Bulgaria on this issue and that research data were needed about the attitudes generally accepted in sexist advertisements in Bulgaria. The decision was appealed before the second instance – a panel of 5 members of the Supreme Court – and a final decision will follow in the near future. The case before the Commission for Protection against Discrimination was No. 217/2008. The Supreme Administrative Court (SAC) confirmed the decision of the Commission, in administrative file No. 12450/ 2010, 7<sup>th</sup> division of the SAC.

Case law so far illustrates the attitude of the CPAD and the courts towards sexual harassment and gender stereotyping and gender discrimination in media and advertising. The practice of the courts and the jurisdiction of the Equality Body, although scarce and inconsistent in the field of gender equality, is very discouraging for women who would like to take legal steps to protect their rights in Bulgaria. This is also due to the insensitive attitude of these institutions themselves to the discrimination and harm suffered by women.

As main shortcomings we can also mention the lengthy and dissuasive procedures, the insufficient knowledge of the notions of prima facie and burden of proof in discrimination cases, and the effect of re-victimisation of women by the Equality Body and the courts.

### *2.2.3. Dignity*

There is no consistent case law defining dignity in these cases.

#### *2.2.4. Restrictions*

There is no such case law.

#### *2.2.5. Role of equality bodies*

The Equality Body has not taken any steps in this area.

#### *2.2.6. Additional information*

There is no additional information.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### ***3.1. National provisions***

The Labour Code (LC) contains a general obligation for the employer to protect the dignity of the worker or employee during the implementation of his/ her obligations under the labour contract. This obligation is stipulated in Article 127 Paragraph 2 of the LC and is not further developed in the LC.

Criminal law includes penalties for committing sexual acts without the consent of the other person and for coercion into such acts. Sexual harassment can cover different crimes against sexual integrity. Sexual intercourse with another person by using his/her employment or material dependence (Article 153 PC) is a crime as well and is punishable by imprisonment of up to three years. There is no legal practice related to sexual harassment at work under this criminal provision.

Elaborate civil legislation also exists in the area of domestic violence. The Law on Protection against Domestic Violence from 2005, last amended in 2009, envisages the issuing of court orders with various measures for the protection of victims of such violence.

#### ***3.2. Collective agreements***

To our knowledge, specific instruments such as collective agreements in this area do not exist on a national level. More information can be found in 2.1.6. above.

#### ***3.3. Additional measures***

There is nothing to report on this issue.

#### ***3.4. Harassment and stress at work***

It appears that more emphasis is placed on stress at work nowadays and efforts are made to improve awareness of these issues. However, the issue of stress at work and its relation to harassment is currently too marginal in Bulgarian business culture and is only addressed at seminars and in some foreign private companies in the Bulgarian market. In legislation, no relation is made between the issues of harassment and stress at work.

#### ***3.5. Additional information***

There is no additional information.

### **4. Added value of anti-discrimination approach**

#### ***4.1. Added value***

We are in favour of a broader approach and definition as described in the examples, and would like to see stronger protection at EU level. The fight on the national level is very important, but the procedure is painful and re-traumatizing for women, as far as it is applied at all in our country.

We would specifically recommend that the area of media and advertising is covered by EU provisions in the near future. The situation now, where the Goods and Services Directive is not applicable to these areas, is discriminatory in itself on the part of the EU.

#### 4.2. Pitfalls

We are in favour of the anti-discrimination approach and believe that it should be strengthened. It has to be enhanced by measures at the level of labour relations and other administrative measures.

We would only like to point out the relevance of the issue of gender stereotyping in this field, which goes beyond the strict anti-discrimination approach. This has to be developed further on a national level and at EU level. And it has to be reflected in the practice of the Equality Bodies and in judicial practice.

### CROATIA – Goran Selanec

#### 1. General situation

It is not clear what the general situation is as regards harassment on the ground of sex and sexual harassment in Croatia. There are no thematic reports dealing with the subject nor are there any relevant statistics. At the same time, however, personal stories that can be heard in everyday life suggest that sexual harassment is not infrequent. This assumption also finds some support in the fact that harassment claims constitute a significant, if not the most important, part of discrimination proceedings before Croatian courts and equality bodies. For example, out of 86 complaints concerning sex discrimination in employment filed with the Ombudsperson for Sex Equality, 31 complaints involved sexual harassment (11) or harassment on the grounds of sex (21).<sup>48</sup> Facts such as these suggest that sexual harassment is a serious problem in Croatian society (particularly in employment). However, there hardly is any debate about this form of sex discrimination. The situation is even more worrying regarding sexual harassment in the context of access to and supply of goods and services. Although stories such as quid-pro-quo offers during university education are not rare, it appears that the Croatian general public is almost completely unaware of the fact that anti-discrimination guarantees prohibiting harassment protect individuals in this area as well.

#### 2. Harassment and sexual harassment in the context of anti-discrimination law

##### 2.1. Legislation

###### 2.1.1. Transposition

The provisions on harassment on the ground of sex and sexual harassment in Directives 2006/54 and 2004/113/EC have been transposed primarily through Article 8 of the 2003 Sex Equality Act (SEA; amended in 2008).<sup>49</sup> The same provisions have also been included in the 2008 Suppression of Discrimination Act (SDA). However, Article 2(2)(a) of Directive 2006/54 has only partially been transposed in an explicit manner. Article 8 of the Sex Equality Act defines sexual harassment and harassment on the grounds of sex as a form of sex discrimination. It does not, however, explicitly provide that less favourable treatment based on the person's rejection of such conduct or submission to such conduct constitutes sex discrimination as well. Similarly, Article 3(3) SDA provides that all of the provisions concerning discrimination stipulated in that Act must be appropriately applied to instances of harassment and sexual harassment. Consequently, the fact that any less favourable treatment based on a person's rejection of or submission to such conduct constitutes sex discrimination needs to be implied from the purpose of the anti-discrimination guarantees or Article 4 SEA that explicitly provides that none of the provisions provided by the SEA can be interpreted contrary to the EU sex equality *acquis*.

<sup>48</sup> 2010 Report to Parliament available on [www.prs.hr](http://www.prs.hr), accessed 19 December 2011.

<sup>49</sup> Sex Equality Act, Official Gazette 82/08 (*Zakon o ravnopravnostipolova*, *Narodne Novine* 82/08).

### 2.1.2. Definitions

The SEA definitions of harassment and sexual harassment are literal translations of the definitions provided by Directive 2006/54 in Article 2(1)(c) and (d) and Directive 2004/113/EC in Article 2(c) and (d). Accordingly, they both refer to the *purpose or effect* of violating the dignity of a person. This means that harassment can be unintentional. The implications of the fact that the definitions of sex harassment (meaning both sexual harassment and harassment on the grounds of sex) explicitly define harassment as both intentional and unintentional conduct for the sex equality doctrine in the Croatian legal order are not clear. Relevant actors in the Croatian legal order, particularly the courts, tend to perceive discrimination in a formalistic manner, narrowing it to intentional unfavourable treatment. Consequently, the fact that sex harassment definitions explicitly stress the effect *in addition* to the purpose (intent) may strengthen the conventional understanding that intent is the constitutive feature of 'regular' forms of sex discrimination (if it was not the constitutive feature, the legislative definition of discrimination would explicitly provide otherwise, as is the case with sex harassment).

Unfortunately, the SDA has been less successful in terms of the transpositions of harassment guarantees. Article 3(1) SDA correctly copied the Directive 2006/54 definition of harassment on grounds of sex. However, Article 3(2) SDA defined sexual harassment as intentional or de facto violation of dignity causing fear or intimidating, hostile, degrading or offensive environment (demeaning working environment). In other words, Article 3(2) turned the demeaning working environment from a specific illustration of behaviour that is likely to lead to the violation of dignity into a cumulative precondition of sexual harassment. Since Article 8(1) SEA defined sexual harassment merely as a dignity violation through sexual conduct, citing the demeaning working environment merely as an illustration of dignity violation, there is a clear conflict between two equally valid legal definitions of sexual harassment. Fortunately, as noted above, Article 4 SEA prohibits any interpretation of sex equality guarantees that is not in accordance with the EU sex equality *acquis*. This provides strong support for the argument that Article 8(1) SEA trumps the imperfectly transposed Article 3(2) SDA.

The current Criminal Act does not include a definition of sex harassment.<sup>50</sup> Nevertheless, the Act contains a rather wide ban of unequal treatment prohibiting any intentional limitation of freedoms or rights guaranteed by law on the grounds of sex (Article 106(1)). The wording of Article 106(1) certainly allows the interpretation that intentional sex harassment constitutes a criminal act of unequal treatment. More importantly, however, the recently adopted Criminal Act (taking effect on 1 January 2013) contains a specific provision prohibiting sexual harassment.<sup>51</sup> Article 157(2) of the new Criminal Act defines sexual harassment as verbal or non-verbal treatment of a sexual nature with the purpose or effect of violating the dignity of another person that occurred more than once and caused feelings of fear or increased anxiety in that person. However, at the same time, Article 157(1) provides that sexual harassment constitutes a criminal act only when the victim refuses to submit to the request of a person in a superior position that is accompanied by a promise (threat) of some benefit or unfavourable treatment. Moreover, the provision insists on the explicit quid-pro-quo character of the threat. However, at the same time it defines sexual harassment not merely as verbal conduct. This is a rather cumbersome and confusing definition of sexual harassment if only for the fact that it is somewhat difficult to see how an explicit threat can be communicated through non-verbal conduct. The described inconsistency suggests that the drafters of the Proposal did not fully comprehend different forms of possible sexual harassment. Consequently, Article 157(1) merely prohibits quid-pro-quo sexual harassment, while sexual harassment through a demeaning working environment remains without a similar protection of criminal law.

<sup>50</sup> Criminal Act, Official Gazette 110/97., 27/98., 50/00., 129/00., 51/01., 111/03., 190/03., 105/04., 84/05., 71/06., 110/07., 152/08., 57/11. (*Kaznenizakon, Narodne Novine* 110/97., 27/98., 50/00., 129/00., 51/01., 111/03., 190/03., 105/04., 84/05., 71/06., 110/07., 152/08., 57/11).

<sup>51</sup> 2011 Criminal Act, adopted by the Croatian Parliament on 21 October 2011. Not yet published in the Official Gazette.

### *2.1.3 Sexual harassment*

Both the SEA and the SDA conceptualize sexual harassment as *sex* discrimination. More precisely, they provide that sexual harassment consists of any unwanted verbal, nonverbal or physical conduct of a sexual nature. Although there has been no discussion about the precise scope of the sexual harassment provisions there is nothing in the wording of the current definitions that would prevent the interpretation arguing that the prohibition of sexual harassment also extends to unfavourable conduct of a sexual nature related to the victim's sexual orientation or gender identity.

### *2.1.4. Scope*

The provisions prohibiting sexual harassment and harassment on the grounds of sex are wider in scope than their sister provisions in Directives 2006/54/EC and 2004/113/EC. The prohibition of both forms of sex harassment covers all areas of life.

### *2.1.5. Addressee*

The SEA and SDA do not explicitly define the addressee of the provisions prohibiting sex harassment. Since the provisions merely define the act of harassment itself, technically, any person that commits the act can be found responsible for sex discrimination. In that respect, it is not entirely clear whether employers or service providers can be held responsible for sexual harassment committed by their employees or agents. On the other hand, the Labour Code (LC) suggests that employers could be held responsible for sexual harassment committed by their employees in at least one particular type of case. Article 130 LC obliges employers to define and implement internal rules, procedures and protection measures related to sexual harassment claims. Since all employers have this duty it could be argued that those who did not establish a system of protection from sexual harassment or who failed to respond appropriately to complaints related to sexual harassment committed by their employees are directly responsible for sexual harassment. Furthermore, the Civil Obligations Act provides the obligation of employers to compensate damages caused to third parties by their employees (Article 1061).

### *2.1.6. Preventive measures*

As noted above, the Croatian Labour Code (Article 130) obliges all employers to define and implement rules and procedures to be followed in cases involving sexual harassment complaints. Employers employing more than 20 employees are obliged to appoint a specific person who is authorized to examine and respond to sexual harassment complaints in addition to the company owner or executive director. The employer needs to examine and respond to any sexual harassment complaint within 8 days. The response must include all appropriate measures preventing the persistence of sexual harassment. If the employer fails to take appropriate preventive measures or takes evidently ineffective measures, the harassed employee has the right to withdraw from work until she is provided with the appropriate protection. If she uses that right she is obliged to file the harassment lawsuit within 8 days from her decision to withdraw. During the period of withdrawal the employee is entitled to all employment benefits including her full salary.

Article 130 LC seems to be the only provision dealing with the protection against sexual harassment within the working environment. There is no evidence whatsoever that the issue of protective measures and procedures in cases involving sexual harassment complaints to employers has ever been the subject of collective bargaining and self-regulation.

### *2.1.7. Procedures*

The Article 130 LC procedure is the only specific complaints procedure available for persons in case of alleged sex harassment. The law did not provide for anything similar in the area of goods and services. However, the victims of sex harassment have at their disposal four different types of legal complaints available to victims of discrimination (provided by Article 17 SDA; see below).

#### *2.1.8. Burden of proof*

Croatian law has formally transposed the burden of proof guarantee given by Directive 2006/54 in Article 19. The guarantee was transposed through Article 30 SEA and Article 20 SDA. These provisions apply to all judicial proceedings regardless of the area (employment, access to goods and services, political participation, etc.) in which the alleged discrimination took place. Consequently, the burden of proof in judicial proceedings involving sex harassment claims formally lies on the defendant if the claimant provides facts justifying a suspicion that harassment might have occurred. In reality, however, the effectiveness of the burden of proof guarantee has been significantly circumscribed by the doctrine favoured by Croatian courts. The majority of Croatian courts still insist on the view that their decision must result from a careful and objective evaluation of *all* facts of the case. In other words, the court cannot find discrimination if that finding does not have convincing support in the established facts of the case. Since this doctrine makes the burden of proof guarantee rather ineffective it can deter people from filing a complaint.

#### *2.1.9. Remedies and sanctions*

The Croatian legal order provides several types of sanctions for sex harassment. First, all victims of sex harassment have at their disposal one out of four civil-law anti-discrimination lawsuits (declarative lawsuit for establishing discrimination, lawsuit for prevention of persistence of discrimination, damages compensation lawsuit and lawsuit demanding a publicly published apology for discrimination) provided by Article 17 SDA. The anti-discrimination lawsuits provide victims with a choice regarding possible remedies. A victim can thus choose a declaratory judgment that discrimination occurred, compensation of damages caused or a public apology for discrimination as an appropriate remedy. The victim can also combine several anti-discrimination lawsuits and thus require several remedies.

The harasser can also be sanctioned through criminal law. The SEA defined sex harassment as a misdemeanour and charged it with a financial penalty (EUR 700 – 4000). Furthermore, as noted above, the Criminal Act (Article 106) makes it possible to construe sex harassment as a crime of equal treatment violation. Consequently, a harasser who intentionally engaged in harassment or should have been aware that he engaged in harassment can be sentenced from 6 months' up to 5 years' imprisonment.

As noted above, at least two of these anti-discrimination lawsuits – the lawsuit for prevention of persistence of discrimination and the damages compensation lawsuit – can be directed against the employer in cases where his employees committed harassment. However, in addition to the compensation of damages caused by his employees, it is not clear whether an employer who did not commit harassment personally can be sanctioned in any other way. Yet, Article 293(8) LC imposes a financial (misdemeanour) penalty (EUR 4500 – 8000) on employers who failed to designate a specific person responsible for addressing and dealing with harassment claims. The LC defines harassment as a violation of contractual obligation. Consequently, an employer can sanction her employees engaging in harassment not only through disciplinary measures such as a fine or transfer to other work. She is also allowed to dismiss them.

Croatian law does not prescribe special remedies or sanctions for harassment in the context of the access to and supply of goods and services besides the remedies attached to the four general anti-discrimination lawsuits.

#### *2.1.10. Compliance with EU law*

Croatian legislation concerning sex harassment is formally in compliance with the EU sex equality *acquis*. The same cannot be said about the actual enforcement of legislative provisions. As noted, the burden of proof doctrine favoured by Croatian courts is a deterrent for victims hoping to effectively protect their rights and acquire compensation for the harm caused. As is elaborated below, this is not the only barrier to effective enforcement of anti-harassment legislation.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

Although Croatian courts have delivered very few sex discrimination decisions, there are several important sex harassment decisions that attract attention. A main feature of existing sex harassment case law is a lack of clarity regarding the meaning, scope and character of sex harassment. The majority of Croatian courts involved in sex harassment cases failed to recognize this type of treatment as a form of sex discrimination. The burden of proof requirement clearly played no role whatsoever in these proceedings. Interestingly, most of the courts recognized the behaviour of the defendants as problematic and found for the claimants. However, they either construed it as a violation of some labour right other than sex harassment or discrimination or they failed to convincingly explain why certain behaviour constituted harassment. There is a clear tendency on the part of Croatian courts to include sex harassment claims into a more general class of ‘violation of (workers’) dignity’ cases and deal with them accordingly. Although Croatian law does not recognize this term, the violation of dignity claims are popularly called ‘mobbing’ cases. Sex harassment cases decided so far involved rather conventional examples of sex harassment in employment such as inappropriate physical contact and sexual comments or misuse of authority by men in superior positions towards women.

The Office of the Sex Equality Ombudsperson, on the other hand, developed a practice of recognizing and distinguishing individual claims involving sexual harassment and harassment on the grounds of sex. This is not surprising since the Office of the Ombudsperson employs legal experts trained specifically for sex discrimination complaints. The Office received 31 sex harassment complaints during 2010 (11 sexual harassment claims and 20 harassment on grounds of sex claims).

### *2.2.2. Main features of case law*

As noted above, the main feature of sex harassment case law in the Croatian judicial system is a clear tendency of Croatian courts to treat these claims not as sex discrimination claims but rather as a general violation of dignity (so-called mobbing) claims. Since only discrimination proceedings involve benefits related to the principle of effective judicial remedy, this practice has clear negative implications for sex harassment victims wanting to effectively protect their right not to be discriminated against. Moreover, this practice has significant doctrinal implications. Constructing sex harassment as a mere violation of dignity disguises the fact that sex harassment constitutes sex discrimination that happens primarily, if not almost exclusively, to persons of the female sex. Consequently, it not only conceals the fact that this type of sex discrimination occurs in everyday life, but it also conceals the hierarchical structure of sex discrimination in which women are, in principle, found on the receiving end.

There are several key features of the most relevant sex harassment situations found before Croatian courts or the Sex Equality Ombudsperson. Almost all cases are employment cases. There has not been a single sex harassment case in the area of goods and services. In principle, sex harassment cases involve harassment of a subordinate employee. Most of them are based on a hostile environment argument. Sexual quid-pro-quo cases are rare. This does not mean that this type of sexual harassment does not happen as often as hostile environment situations. It could simply mean that victims are more reluctant to bring these cases before court due to fear of humiliation and shame. The hostile environment harassment cases include both situations involving conduct of a sexual nature (mostly unwanted touching or sexual offers) as well as situations involving unwanted conduct related to the victim’s sex (mostly sexist comments, insults and jokes or a demonstration of superior employment-related competences over female employees).

One case deserves particular attention here.<sup>52</sup> *Udjbinac v HP* involved a claimant who did not agree with the reorganisation of tasks within the legal department where she was employed. More precisely, she did not agree with the fact that she was removed from the property cases for which she had been responsible for many years. She considered that she was removed without good cause and consequently filed a complaint with her employer. The complaint caused tension between her and members of the executive board. As a result, Mr. Mijalić, one of the members of the executive board, invited her to a meeting that escalated into verbal abuse of the claimant. The Court found that the case fell within the scope of the Labour Act provision prohibiting ‘violation of a worker’s dignity and sexual harassment’.<sup>53</sup> The Court did not explicitly state, however, that the employer’s conduct constituted sexual harassment. This can be implicitly concluded from the fact that the Court pointed out that some of the ironic statements made by Mr. Mijalić targeted the claimant as a woman. The Court, for example, pointed out that ‘*Mijalić clearly implied that the claimant faints, bangs her head against the wall and cuts her wrists because she is a woman and, moreover, he was all in her face when stating this.*’ In addition, the Court insisted that the Article 130 prohibition of violation of the worker’s dignity and sexual harassment must be interpreted in light of the prohibition of direct and indirect discrimination. This suggested that unwanted conduct constituted unfavourable treatment on some prohibited ground. At the same time, sex was the only prohibited ground mentioned in the reasoning. Due to this ‘indirect’ manner of reasoning the *Udjbinac v HP* decision failed to elaborate the precise scope of sexual harassment. Once it established the facts of the case, the Court simply found, without any particular reasoning, that the employer’s conduct fell within the scope of the Article 130 prohibition of ‘violation of a worker’s dignity and sexual harassment’. *Udjbinac v HP* is significant for two further reasons. First, the Court explicitly held that the burden of proof was on the employer. However, it is not clear at all how this guarantee played any role whatsoever, either in the procedural sense of discovering evidence or in the Court’s examination and evaluation of discovered evidence. Second, the Court found that the compensation of damages had to be so high to produce a ‘deterrent effect’ not only for this particular employer but other employers as well. Accordingly, the Court granted the claimant damages in the amount of approximately EUR 65,000.

### 2.2.3. Dignity

Croatian courts have shied away from defining the meaning of the term ‘dignity’ in their decisions even though they tend to treat sex harassment cases as a more general class of ‘violation of dignity’ claims. They tend to take for granted that certain conduct did or did not violate a person’s dignity, which suggests that they perceive dignity as something ‘objective’ shared and unrelated to character traits characteristic to a particular individual. At the same time, the Sex Equality Ombudsperson seems to have favoured an approach similar to the one dominant in the United States. In that respect, the Ombudsperson is primarily focused on finding either hostile environment caused by conduct related to sex or quid-pro-quo conduct. Once it is established that such conduct was unwanted at the moment that it occurred it is assumed that it violated the person’s dignity. This suggests that dignity is perceived more in ‘subjective’, contextual terms.

### 2.2.4. Restrictions

There have been no cases involving a clash between the anti-discrimination guarantee of sex harassment claims and fundamental or other constitutional rights before Croatian courts so far. However, the Ombudsperson for Sex Equality received a few individual complaints arguing that commercial speech involving sexist expressions constituted harassment and ought to be prosecuted as a misdemeanour. The Ombudsperson has been very careful in

<sup>52</sup> Judgment of the Zagreb Civil County Court No. LXXI-Pr-4266/05 in the case *Udjbinac v HP*, dated 3 March 2010 (*Presudaopćinskoggrađanskogsuda u Zagrebu, Poslovnibroj No.LXXI-Pr-4266/05 u predmetu Udjbinac v HP* od 3. ožujka 2010). Not published. The text of the judgment is with the expert.

<sup>53</sup> Article 130 of the Labour Act, Official Gazette 149/09 (*Zakon o radu, Narodne Novine* 149/09).



dealing with such claims due to the potential clash with the guarantee of fundamental freedom of expression. Since these complaints usually insist on criminal prosecution, the Ombudsperson found it wisest to consult the State Attorney's Office to see whether it was willing to start criminal proceedings. The State Attorney's Office refused such possibility arguing that the freedom of expression protects this type of speech in public space.

#### *2.2.5. Role of equality bodies*

The Ombudsperson for Sex Equality regularly receives individual complaints involving claims of sex harassment. These complaints consist both of hostile environment claims and of sexual quid-pro-quo claims. A typical hostile environment claim involves an employer harassing his female employees by sexist insults, shouting and threats after they refused to do some work which they did not find appropriate for some reason. A typical quid-pro-quo case involves an employer who more or less explicitly requires sexual favours in return for offered employment or promotion.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### *3.1. National provisions*

Except for the criminal-law provisions described above there are no other provisions related to harassment/sexual harassment in domestic law.

#### *3.2. Collective agreements*

There are no specific national collective agreements aimed at combating harassment in employment.

#### *3.3. Additional measures*

There are no other measures that you would consider relevant taken outside the framework of anti-discrimination law.

#### *3.4. Harassment and stress at work*

As noted above, the Croatian courts tend to include sex harassment in a more general class of claims called 'violation of a worker's dignity'. At the same time, many of these claims concerning the violation of dignity at work involve the question of stress at work. It seems that many people tend to perceive a working environment producing stress as hostile and therefore disrespectful of their personal dignity.

### **4. Added value of anti-discrimination approach**

#### *4.1. Added value*

The anti-discrimination approach not only clearly identifies sex harassment as a form of unfavourable treatment related to the fact that the relevant person belongs to a particular sex, it also tends to suggest that sex harassment is a form of discrimination with a strong group-based dimension. More precisely, by emphasizing that sex harassment is a form of power abuse related to sex membership, the approach strongly implies that this type of discrimination tends to be directed towards members of one particular sex –women. Furthermore, the anti-discrimination approach to sex harassment has some practical advantages. Since it defines sex harassment as discrimination on the grounds of sex, the approach allows the victims of sex harassment to use the burden of proof and the deterrent remedy doctrines to their advantage in court proceedings.

#### *4.2. Pitfalls*

The most significant pitfall of the current anti-discrimination approach to sex harassment is its dignitarian dimension. Dignity is a rather complex notion entailing a whole set of difficult questions. For example, it is not at all clear whether dignity in the sex harassment definitions in Article 2 of the Recast Directive ought to be treated as an 'objective' or 'subjective' notion.

In other words, it is far from clear whether dignity ought to be treated as some standard that can be applied equally to all individuals regardless of their numerous personal differences or as a standard that ought to reflect the victim's personal perspective and as such be defined on a case-by-case basis? Furthermore, if dignity is an objective notion, precisely who is the reference point for defining this universal standard? In case dignity is a subjective notion, what are we supposed to do with individuals who might be oversensitive and consider any conduct they find unwanted as a case of harassment. Difficult questions such as these move the central focus away from the key feature of sex harassment. The anti-discrimination concept of sex harassment is primarily built around the assumption that men tend to abuse their dominant social position in order to satisfy their sexual wants (quid-pro-quo harassment) or express their demeaning views of women as sexual objects (hostile environment harassment). The dignitarian approach is more individualistic and it tends to imply that we can all equally be victims of sex harassment regardless of any group membership. Consequently, it tends to undermine the group-based premise that was originally in the foundations of the anti-discriminatory approach to sex harassment. This may even be the reason why courts tend to avoid sex harassment claims and treat them as more general 'mobbing' or 'violation of a worker's dignity' cases. From their perspective, if the violation of dignity is the core of the notion of sex harassment, then this indeed is merely another version of a more general class of dignity violation claims.

## **CYPRUS – Lia Efstratiou-Georgiades**

### **1. General situation**

1.1. The introduction of harassment and sexual harassment into Cyprus' legislation in 2002<sup>54</sup> as a form of discrimination on the grounds of sex in the workplace and since 2008 in the access to and provision of goods and services has been an important innovation in the legislation and has contributed to the promotion of the principle of equal treatment. It has also contributed to the creation and application of policies and practices for prevention of such conducts, which violate the dignity of working persons, men and women, and create an intimidating, hostile, degrading, humiliating or offensive environment.

1.2. The Equality Inspectors of the Department of Labour received 175 complaints concerning sex discrimination during the period July 2008 to December 2010. Of these complaints 102 related to sexual harassment, 67 were complaints for pregnancy reasons and only 6 related to discrimination based on the person's gender.

The number of sexual harassment complaints is unusually high. However, this is not without reason. Of the 102 complaints relating to sexual harassment, 100 were submitted by third-country nationals working as housekeepers (all women), as part of the complaints process to allow them to change employer. After careful investigation the greatest majority of these complaints were found inadmissible or were withdrawn or the complainant did not show up for the scheduled meeting for the investigation of the claim. Only two of the 100 complaints were found to be admissible. These two complaints (of the total of 102) were submitted by a European citizen and a Cypriot national. One was found to be admissible and the other was not examined, because the complainant did not respond to the written correspondence requesting for more details about the complaint.

In 2009, 103 complaints regarding unlawful discrimination were submitted to the Equality Authority (which has been operating under the Ombudsman since 2004). A further 58 complaints which had been submitted in the previous years and whose examination had not been completed, were also transferred for investigation. The Equality Authority mentioned in the 2009 Annual Report that it had examined 5 % complaints on sexual

<sup>54</sup> The Equal Treatment of Men and Women in Employment and Vocational Training Law No. 205(I)/2002 as amended by Laws 40(I)/2006, 39(I)/2009.

harassment. Furthermore it examined 19 complaints for discrimination on the grounds of sex in the field of Goods and Services but these cases were not linked to any form of harassment.

1.3. In its effort to help combat any form of discrimination in the workplace, the Equality Authority published the 'Code on Sexual Harassment' in 2007. The Code gives general principles, examples, directions and advice, which aim to combat sexual harassment or harassment in the access to employment and self-employment. This Code is used by women's organizations, trade unions and employers' associations to inform their members. No debate has taken place in the field of access to and supply of goods and services.

In 2004 the Cyprus Employers and Industrialists Federation (OEB) published the 'Code of Practice for Dealing with Sexual Harassment in the Workplace'. This Code points out the legal and social aspects of the problem, explains the main provisions of Law No. 205(I)/2002, the meaning of sexual harassment by describing examples, acts and omissions and sets out the prohibitions, the procedure for submission and examination of complaints and the measures that employers must take as stipulated by the Law. All the members of OEB, as well as Bank of Cyprus, have endorsed the Code.

In 2007 the Democratic Labour Federation of Cyprus (*DEOK*) published a guidebook for officials of enterprises, trade unions and government departments, entitled 'Sexual Harassment, a hidden nightmare in the workplace'. The guidebook mentions the legal framework in Law No. 205(I)/2002, as amended, and in particular it explains sexual harassment and its consequences, the employer's responsibilities and the machinery to handle it. It also presents some relevant statistical data.

Furthermore, the Gender Equality Committee in Employment and Vocational Training is in the process of preparing a Code for Preventing and Facing Violence to be used by the Cyprus Tourism Organization and the Electricity Authority of Cyprus and is also debating the issue with other bodies, such as the Public Administration and Personnel Department and the Cyprus Police.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The Equal Treatment of Men and Women in Employment and Vocational Training Law No. 205(I)/2002 was passed for the purpose of harmonization with Directives 76/207/EEC and 97/80/EC and refers to the application of the principle of equal treatment of men and women as regards access to vocational guidance, vocational education and training as well as access to employment and to the terms and conditions of work including promotion and the terms and conditions of dismissal.

The Law included in its provisions, among other issues, sexual harassment. Law No. 40(I)/2006 amended Law No. 205(I)/2002 for the purpose of harmonization with Directive 2002/73/EC, which repealed Directive 76/207/EEC.

Law No. 40(I)/2006 complemented, amended and redrafted the definitions 'harassment', 'sexual harassment' and 'discrimination on the ground of sex' by adopting the definitions given in Directive 2002/73/EC.

Finally, Law No. 39(I)/2009 amended the above Laws for the purpose of harmonization with Recast Directive 2006/54/EC which repealed Directive 2002/73/EC.

Law No. 39(I)/2009 complemented, amended and redrafted definitions including the contents of Article 2(2)(a) of Directive 2006/54/EC. Through the aforesaid amendments of basic Law No. 205(I)/2002, the provisions on harassment on the ground of sex and sexual harassment in Article 2(2)(a) of Directive 2006/54/EC have been specifically transposed into national legislation.

The Equal Treatment of Men and Women as regards Access to and Supply of Goods and Services Law No. 18(I)/2008 (harmonization with Directive 2004/113/EC) applies to all persons who provide goods and services to the public, both in the public and private sectors

(excluding private and family life) and to the transactions which take place within its framework, and includes harassment and sexual harassment. The definitions of harassment and sexual harassment were transposed into the Law as they appear in the Directive.

In 2009, in accordance with the provisions of the Regulatory Administrative Act on Independent Assistance to Victims of Discrimination,<sup>55</sup> the Commission on Gender Equality in Employment and Professional Training was granted the authority to provide advice on subjects relating to sex discrimination in employment, as well as legal aid, including legal advice and representation to victims of discrimination in legal proceedings, as well as proceedings of an administrative nature. The above regulation aimed to harmonise the Republic of Cyprus with 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.

### *2.1.2. Definitions*

Laws No. 40(I)/2006 and No. 39(I)/2009, which amended basic Law No. 205(I)/2002, give the definitions of ‘direct discrimination on the ground of sex’ and ‘discrimination on the ground of sex’, which is direct or indirect discrimination and includes sexual harassment or harassment and any less favourable treatment based on a person’s rejection of or submission to such conduct. It follows from the above that the concepts of harassment and sexual harassment have been embodied in the legislation as the definitions correspond to the definitions given in Article 2(1)(c) and (d) of Directive 2006/54/EC and to Article 2(c) and (d) of Directive 2004/113/EC and in particular they both refer to the purpose or effect of violating the dignity of a person.

The definition of harassment and sexual harassment also includes unwanted harassment and sexual harassment when the conduct towards a person which is expressed by words or acts results in the violation of the dignity of the person, in particular when it creates an intimidating, hostile, degrading, humiliating or offensive environment in employment or vocational training.

In the definitions of harassment and sexual harassment given in Article 2 of Law No. 205(I)/2002 as amended, there is no description of the (potential) differences between both forms of discrimination.

The definitions of harassment and sexual harassment are included in the definition of discrimination on the ground of sex. Thus, in Article 2 of Law No. 205(I)/2002 as amended ‘discrimination on the ground of sex’ means ‘any direct or indirect discrimination and any less favourable treatment including sexual harassment and harassment’. Article 12 of Law No. 205(I)/2002 as amended prohibits harassment and sexual harassment as defined in this Law. The definitions in different Acts are similar. Law No. 2005(I)/2002 provides that harassment and sexual harassment are discrimination on the ground of sex and it prohibits any action which constitutes direct or indirect discrimination of an employee. The consequences of harassment and sexual harassment (sanctions and remedies) are the same.

### *2.1.3. Sexual harassment*

From the wording of Article 2 of Law No. 205(I)/2002, as amended, it is obvious that sexual harassment is conceptualized as sex discrimination. The Law on Equal Treatment in Employment and Work No. 58(I)/2004 (harmonization with Directive 2000/43/EC), as amended by Laws 50(I)/2007 and 86(I)/2009, covers racial and ethnic origin, religion, age and sexual orientation. The Law prohibits direct and indirect discrimination, harassment and any instruction for discrimination on the grounds of racial and ethnic origin, religion, age and sexual orientation.

### *2.1.4. Scope*

The scope of the prohibition of harassment and sexual harassment is the same as the scope of Directives 2006/54/EC and 2004/113/EC.

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<sup>55</sup> R.A.A 176/2009

Law No. 205(I)/2002, as amended, and Law No. 18(I)/2008 cover access to employment, including promotion and vocational training and also working conditions and access to and supply of goods and services.

#### *2.1.5. Addressee*

- a) Employment: According to Law No. 205(I)/2002, as amended, the addressee of the harassment and sexual harassment prohibition is the employer, the manager, colleague of the same grade or any other fellow worker, as well as a person responsible for vocational orientation or training or for access to employment.
- b) Goods and Services: According to Law No. 18(I)/2008 the addressee of the harassment and sexual harassment prohibition is any person who provides goods and services.

#### *2.1.6. Preventive measures*

Article 26 of Directive 2006/54/EC has been implemented in Cyprus through the relevant provisions of Law No. 205(I)/2002 as amended. The Law imposes on employers the obligation to protect their workers against any discrimination and especially sexual harassment, to take any necessary measure in order to stop harassment or sexual harassment to which a person has been subjected and any necessary measure so that this does not occur again in the future, otherwise the employers are considered co-responsible with the offender. Also, the Law calls upon employers to draw up codes of practice giving information, advice and measures in order to prevent acts of harassment or sexual harassment and to take practical measures for the implementation of the code.

As mentioned in 1.3 above, measures have been taken to prevent harassment and sexual harassment by the drawing up of codes and directives. Such codes or directives have been prepared by employers' associations, by trade unions and by the Equality Authority. Also, social partners and women's organizations organize seminars and lectures on this subject. National collective agreements do not deal with the issue of preventing harassment.

In September 2009 the social partners signed the 'Framework Agreement on harassment and violence at work', but no steps have yet been taken to implement this Agreement.

#### *2.1.7. Procedures*

There are no specific complaints procedures available for persons in case of alleged harassment or sexual harassment. The relevant Laws give the procedure for complaints in case of discrimination on the grounds of sex, which includes complaints for harassment or sexual harassment. Law No. 205(I)/2002, as amended, provides for an out-of-court procedure by applying to the Chief Inspector of the Ministry of Labour and Social Insurance, who informs the Gender Equality Committee in Employment and Vocational Training, and to the Ombudsman as Equality Authority, which also has power to deal with complaints under Laws No. 18(I)/2008 and 58(I)/2004.

In the case of employment the complainant submits the complaint to the Ombudsman as Equality Authority, which investigates it and based on its findings makes the necessary recommendation. In case of non-compliance with the recommendation it may impose a fine.

An alternative procedure is that the complainant submits a complaint to the Gender Equality Committee in Employment and Vocational Training which has competence to deal with matters falling under Law No. 205(I)/2002 as amended. This Committee can either forward the complaint to the Chief Inspector for investigation and suitable handling, or gives independent advice to the victim.

In the case of goods and services the Ombudsman as Equality Authority has competence to deal with complaints for breaking Law No. 18(I)/2008 including harassment and sexual harassment.

Apart from the out-of-court procedures as described above, the court procedure is also available. The criminal procedure can be followed in case there is evidence that a criminal offence may have been committed and the civil procedure for compensation and/or recovery of the damage caused by the harassment or sexual harassment.

In case of court procedures under Law No. 205(I)/2002 the competent court is the Labour Disputes Tribunal, whereas under Law No. 18(I)/2008 the competent court is the District Court.

#### *2.1.8. Burden of proof*

Directive No. 97/80/EC relating to the burden of proof has been transposed into Law No. 205(I)/2002 as amended and, except in criminal procedure, the burden of proof lies on the defendant, in order to prove that there has been no violation of the Law (reversal of the burden of proof).

The above Law protects the employee or the trainee or the candidate for employment from vindictive acts against him when filing a complaint, including a complaint for harassment or sexual harassment. The Law also protects any person who has helped the complainant.

The reversal of the burden of proof, except in criminal procedure, also applies under Law No. 18(I)/2006. No problems have been reported here.

#### *2.1.9. Remedies and sanctions*

##### *a) Employment*

Consequences for the addressee. The addressee can be: a) the employer, b) the supervisor, c) a colleague of the same grade as the victim or any other employee, d) any person responsible for vocational orientation or training.

In case any of the above-mentioned persons intentionally violates Law No. 205(I)/2002, he/she commits a criminal offence and if found guilty he/she may be punished with a fine of up to EUR 6 834.40 or with imprisonment up to six months or with both sentences.

If the offence is committed by a legal person, responsibility lies on the managing director, chairman, director, secretary or any official provided it is proved that the offence was committed with his consent, co-operation or tolerance and is punished with a fine or imprisonment or with both sentences as mentioned above and the legal person is punished with a fine of up to EUR 11 960.20 provided no other law provides more severe punishment for such an offence.

Furthermore, the Law provides that any person who intentionally obstructs the Chief Inspector or Inspector from exercising his power of investigating a complaint against such person, is guilty of an offence and punished with imprisonment of up to three months or with a fine of up to EUR 5 125.80 or with both sentences.

Consequences for the harasser/fellow worker. Sexual harassment and harassment constitute punishable acts as mentioned above and there is no excuse that the offender is subject to disciplinary measures. Depending on the severity of the act (harassment or sexual harassment) the consequences include apology to the victim, transfer of the harasser to another office or to other work, demotion or dismissal.

Consequences for the victim. The victim of harassment and sexual harassment who has filed a complaint is protected against suffering vindictive actions against him/her and any detrimental change of his/her working conditions or his vocational orientation or training or his dismissal is null and void, and he/she is protected either through an out-of-court or a judicial procedure. In some cases, the victim may be transferred to another post or dismissed, but can file a complaint to the Industrial Disputes Tribunal requesting damages or reinstatement if she/he wishes. Some of these consequences may be considered as victimization. The victim has the right to claim damages.

##### *b) Supply of goods and services*

Law No. 18(I)/2008 applies to all persons who provide goods and services offered to the public, both in the public and in the private sector, including legal bodies of public law and local authorities (excluding private and family life, education and mass media) and any transactions which take place within this framework.

Consequences for the addressee. The addressee can be any physical or legal person who provides goods and services.

Consequences for the harasser. If the offender is a public servant he/she is subject to general disciplinary measures and the appropriate body to impose disciplinary sentence is the Public Service Commission (the Public Service Law No. 1(I)/1990 as amended). In the private sector the complaint is examined by the Ombudsman, who may give recommendations for the measure to be taken.

Consequences for the victim. Any discrimination on the ground of sex is prohibited and no rejection or tolerance of harassment or sexual harassment can affect the victim and no discrimination or consequence against the person who filed a complaint can be accepted. The victim may apply to the District Court for damages.

#### *2.1.10. Compliance with EU law*

Domestic law is in compliance with EU law and specifically embodies the definitions and the provisions of Directives 2006/54/EC and 2004/113/EC.

#### *2.1.11. Additional information*

There is no more additional information on national legislation.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

There are a few cases before the Equality Authority (Ombudsman) and before Criminal Courts relating to employment. One case is pending before the Criminal Court (Limassol).

#### *2.2.2. Main features of case law*

File No. AKI 44/2008 (Equality Authority)

This case concerns a complaint by Mrs B.P. against her employer for unlawful dismissal after submission of a complaint for sexual harassment by an official of her employer on the basis of the provisions of the Equal Treatment between Men and Women in Employment and Vocational Training Laws of 2002-2007.

Mrs B.P. was employed as secretary at the Union of Scientific Staff of the Electricity Authority of Cyprus (SEPAHK) and filed a complaint for sexual harassment against an official of the Union (Assistant Secretary of the Union), who was a member of the Executive Committee. The complainant mentioned in her complaint that she had submitted her complaint in person to the President of SEPAHK on 6 June 2008 and that she was asked to submit it in writing. She submitted her complaint in writing on 19 June 2008. The Union SEPAHK, as her employer, asked her on 23 June 2008 to hand in the keys to the Union building, to take all her personal belongings from the office and to take obligatory holiday leave paid by the Union.

Conclusions of the Equality Authority: (a) the dismissal of B.P. is null and void, since it was connected with the accusation she had made for sexual harassment, unless the employer can prove that the dismissal was due to any other reason not connected with the accusation, and (b) the Union SEPAHK, as employer, failed to act in accordance with the provisions of the Equal Treatment between Men and Women in Employment and Vocational Training Laws of 2002-2007 and it did not examine the complaint of B.P. in substance.

File No. AKI 42/2008 dated 29 April 2010 (Equality Authority)

On 28 May 2008, Mrs AP submitted to the Ombudsman a complaint against her employer (a Bank) relating to her lack of promotion for several years, which she considered was due to the fact that she had, in the past, accused the Assistant General Manager of the Bank, Mr XX, of sexual harassment before the Board of Directors and the Trade Union of Bank Employees (ETYK).

After examining the case, the Ombudsman reached the conclusion that the reason for the professional stagnation of Mrs AP was the complaint she had made for sexual harassment at the workplace, and that Article 17 of the Equal Treatment of Men and Women in Employment and Vocational Training Laws of 2002 to 2009 was violated. Article 17 provides, inter alia, that the dismissal of a worker or any other harmful change to the conditions of employment by an employer as a reaction to a complaint, including a complaint for sexual harassment, shall be null and void, unless the employer proves that the dismissal or harmful change was due to a reason irrelevant to the complaint. The Ombudsman concluded that discrimination on the ground of gender, contrary to these Laws, may have taken place and advised that Mrs AP should be considered for promotion in future promotion rounds.

Court cases: Criminal Court No. 25191/2005

The defendant in this case was charged with the following offences:

- (a) indecent assault against a woman (maximum sentence provided by legislation: two years' imprisonment);
- (b) sexual harassment of a female subordinate in the workplace, in violation of the provisions of the Equal Treatment in Employment and Vocational Training Law of 2002 (maximum sentence provided by legislation EUR 6 720 or six months' imprisonment, or both).

According to the facts of the case, the defendant, aged 50 and a member of the Diplomatic Service, was positioned as the Ambassador of the Cyprus Republic in Sweden. The defendant allegedly committed the above offences between 2002 and 2005.

The Court accepted the evidence brought by the Counsel for the Republic, which was based on the testimony given by the two complainants, and found the accused guilty on all charges.

Having noted the seriousness of the charges and that the maximum penalty imposable by law was that of imprisonment, the Court imposed the penalty of imprisonment for each charge. Concurrent sentences ranging from one to seven months' imprisonment were imposed.

It should be noted that the Court took the opportunity to suggest that the six months' imprisonment – which is the maximum sentence provided by the Equal Treatment in Employment and Vocational Training Law of 2002 – did in fact not adequately reflect the seriousness of the offence and did not satisfactorily contribute to the safeguarding of the rights of employees.

It is important to note that on 24 May 2007 the High Court, acting as Appeal Court, dismissed the judgment against the defendant on the grounds of unreliability of the witnesses.

There are no cases related to goods and services.

### *2.2.3. Dignity*

There is no case law defining 'dignity' or how 'dignity' should be interpreted.

### *2.2.4. Restrictions*

There is no case law which shows clashes between the prohibition of harassment/sexual harassment and human rights and constitutional rights.

### *2.2.5. Role of equality bodies*

In 2007, the Ombudsman, as Equality Authority, prepared a Code of Practice relating to sexual harassment and harassment in the workplace, which has been distributed in workplaces. Also the Gender Equality Committee in Employment and Vocational Training published a leaflet which was also distributed in workplaces and produced a short informative film.

### *2.2.6. Additional information*

As the number of cases is limited there is no additional information.



### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

- a) The Criminal Code, under the Chapter covering criminal offences against morals, clearly states that the sexual intercourse with a woman without her consent or with her consent when given after exerting against her violence or fear of bodily injury, constitutes a criminal offence and any person found guilty can be sentenced to life imprisonment. A person found guilty of an attempt to rape may be sentenced to 10 years' imprisonment. A person found guilty of indecent assault against a woman or a man may be sentenced to 5 years' imprisonment.
- b) The Law of Safety and Health at Work No. 89(I)/1996 as amended by Laws No. 158(I)/2001, 25(I)/2002, 42(I)/2003, 99(I)/2003 and 33(I)/2011 does not make any special reference to harassment or sexual harassment. The Law defines 'health' in relation to work such that it means not only absence of illness, but also includes the physical, spiritual and psychological factors which affect health and are directly related to safety and health at work. On the basis of these provisions, harassment and sexual harassment may cause physical, spiritual or psychological problems that may affect health and safety at work.
- c) The Law on Equal Treatment in Employment and Work No. 58(I)/2004 as amended by Laws No. 50(I)/2007 and 86(I)/2009 provides the framework for combating discrimination on the ground of racial or ethnic origin, religion or beliefs, age or sexual orientation in the field of employment and work, for the purpose of achieving the principle of equal treatment. The Law defines 'harassment' as unwanted conduct expressed with words or acts with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Furthermore, the Law expressly prohibits discrimination in employment, either direct or indirect, harassment and the instruction for any discriminatory treatment based on, among other grounds, sexual orientation, racial or ethnic origin. It also provides for out-of-court protection, court protection and criminal sanctions against the violator of the Law.

#### **3.2. Collective agreements**

There are no specific national collective agreements aimed at combating harassment in employment.

#### **3.3. Additional measures**

On 14 September 2009, the Employers' Associations (OEB, KEBE) the Trade Unions (SEK, PEO, DEOK, PASYDY) and the Minister of Labour and Social Insurance signed a Framework Agreement on Harassment and Violence at Work, by which they invited their members: a) to start a dialogue at sectoral or business level for adjusting the Agreement to the specific characteristics of the work environment, b) to complete the dialogue by the time of the next renewal of the collective agreements, b) to follow the procedure and give technical support. The Framework Agreement aims at improving the work environment and relations between employers and workers through combating harassment and violence at work, promoting respect and dignity between them, promoting productivity and competition and increasing work satisfaction of workers.

#### **3.4. Harassment and stress at work**

Harassment directly affects and increases the victim's stress at work, thereby causing problems in health, competence and productivity at work.

#### **3.5. Additional information**

In 2009, the Employers Association OEB carried out a survey on sexual harassment at the workplace (banks and semi-government bodies) which showed that at the banks 10 % of the persons asked, mainly highly educated divorced women, and in the semi-government bodies

16 % of the persons asked, mainly divorced women with a low educational level, had experienced immoral or indecent proposals. None of the above incidents was referred to any appropriate body for examination.

#### **4. Added value of anti-discrimination approach**

##### **4.1. Added value**

Law No. 205(I)/2002, as amended, and Law No. 18(I)/2008 gave specific definitions of harassment on the ground of sex and of sexual harassment, and created a new criminal offence with specified sanctions and remedies, beyond what was provided in the Criminal Code.

The transposition of all the above-mentioned Directives into national law helps the victims by providing greater access to justice and other procedures for examining complaints and also provides more clarity not only for victims but also for lawyers, courts, equality authorities etc.

The laying down in Law No. 205(I)/2002 of the employers' obligations as mentioned above as well as the reversal of the burden of proof so that the employer must prove that he did not violate the Law offer additional protection to the worker who files a complaint and to the witnesses of vindictive acts by the employer.

The specific legislation on harassment and sexual harassment helps to apply the principles and to achieve the purpose of combating harassment and sexual harassment.

In criminal procedures the burden of proof lies on the public prosecutor who must prove the commitment of the offence of harassment or sexual harassment beyond reasonable doubt, a process which has many difficulties (see the criminal case mentioned in 2.2.2. above).

##### **4.2. Pitfalls**

Apart from the specified definition given to it by law, harassment is part of the general concept of 'discrimination on the ground of sex' and the same general provisions of the law are applied in all cases. Therefore the handling and outcome of every case depend on the facts of the case and the evidence produced. It is possible that claims on the employer's conduct of alleged discriminatory harassment may come into conflict with his/her managerial prerogative, but managers must realise and accept that it is in their firm's interests to maintain a good and friendly work environment, good relations with their workers, dignity and mutual respect, factors which create work satisfaction and increase productivity, thus serving the purposes of the law.

### **CZECH REPUBLIC – Kristina Koldinská**

#### **1. General situation**

Harassment and sexual harassment are relatively new terms (legal and social) for Czech society, which does not mean, however, that this phenomenon does not exist. In fact, even during communism, tolerance towards softer forms of sexual harassment was quite high. It was quite normal to use ambiguous language and display ambiguous behaviour in the workplace, and often images or photos with sexual content were present in the workplace.

As shown by older and current sociology research, a certain tolerance of milder forms of sexual harassment is still characteristic of Czech society. Examples include colleagues' kisses at parties, vulgar jokes, or comments about the appearance or clothing of female colleagues. Many employees do not consider this type of behaviour to be discriminatory or degrading. Research from 1997 indicated that only one sixth of respondents considered telling rude jokes, kissing colleagues or comments about the clothing of colleagues to be a form of sexual harassment.<sup>56</sup>

<sup>56</sup> J. Vlácil et al. Organisational culture in Czech industry Prague, Codex Bohemia 1997.

This high tolerance level is underlined in the discrepancy between the records of occurrences of the abovementioned types of behaviour and a high percentage of the population reporting experience of sexual harassment. For example, about two thirds of the population have experienced jokes with sexual connotations or comments about their private lives during their careers in the workplace, and more than half of the working population have heard talk involving sexual innuendo.<sup>57</sup>

This phenomenon was examined in an extensive study by the Sociological Institute of the Czech Academy of Sciences, commissioned by the Ministry of Labour and Social Affairs<sup>58</sup> and published in 2005. This study, however, is the only relatively recent study currently available on this topic. The study focused on harassment especially from a sociological point of view, but at the same time focused especially on the labour market and workplace, and is therefore of interest to this national report, which will draw some information from it.<sup>59</sup> As will be explained below, the study focused on sexual harassment, not on harassment on the ground of sex.

The study reveals that one quarter of the population has either experienced sexual harassment personally or is aware of its existence in their workplace. Women reported experiences of sexual harassment more often than men, at a rate of 28 % of all cases. Within this proportion, 13 % of women stated that they had personal experience and 15 % reported that the cases involved someone else. Some 4 % of men reported personal experience of sexual harassment in the workplace.

*Experience of sexual harassment (%) Experience of sexual harassment (%)*

Sex	Experience of sexual harassment			Total
	Yes, personally	Yes, it involved someone else	No, never	
Men (absolute no.)	14	64	284	362
Men (%)	3.9	17.7	78.5	100
Women (absolute no.)	54	59	295	408
Women (%)	13.2	14.5	72.3	100
Total (absolute no.)	68	123	579	770
Total (%)	8.8	16	75.2	100

Source: Křížková et al, 2005

According to the abovementioned study, 57.8 % of female workers and 56.5 % of male workers experienced gossiping in the workplace which they perceived as hostile. As much as 25 % respondents reported experiencing sexual harassment at their workplace (28 % of women and 22 % of men). Some 20 % of the Czech population had experienced sexual harassment in more serious forms, like physical contact or repeated requests for a date which were unwelcome.

Women are exposed to sexual harassment to a more than average degree in sectors that are predominantly male, such as agriculture and manufacturing. In agriculture, 42 % of female respondents stated that they had either personal or indirect experience of sexual harassment, while in manufacturing, the proportion of women affected in this manner was

<sup>57</sup> A. Křížková et al. *Obtěžování žena mužů a sexuální obtěžování v českém systému pracovních vztahů* Prague, Sociological Institute of the Czech Academy of Sciences 2005. Available on <http://www.mpsv.cz/files/clanky/1699/obtezovani.pdf>, accessed 30 July 2011.

<sup>58</sup> A. Křížková et al. *Obtěžování žena mužů a sexuální obtěžování v českém systému pracovních vztahů* Prague, Sociological Institute of the Czech Academy of Sciences 2005. Available on <http://www.mpsv.cz/files/clanky/1699/obtezovani.pdf>, accessed 30 July 2011.

<sup>59</sup> A summary of the study provided by R. Vašková is available in English on <http://www.eurofound.europa.eu/ewco/2006/07/CZ06070191.htm>, accessed 30 July 2011.

30 %. The percentage of women reporting such an experience was lower in the services sector, at 27 %.

In most cases, the persons engaging in acts of sexual harassment are colleagues at the same hierarchical level. However, in 25 %–30 % of the cases surveyed, the victims' supervisors were responsible for the harassment, which is of some concern due to the vulnerability of the victim in such a situation. In such a scenario, the victims' chances of defending themselves can be significantly reduced.

In general, harassment and sexual harassment is quite widely felt in the workplace. The most important factor which determines the level of sexual harassment at the workplace is the general climate in the company. Most victims of sexual harassment at the workplace are women and the harassers their male colleagues. In 15–23 % of cases, harassment was engaged in by male bosses.

Today, behaviour with a sexual content can still quite often be observed in many companies. This behaviour, however, is often not interpreted as sexual harassment (for example, images with erotic or sexual themes).

As part of their support for an appropriate corporate culture, a number of companies had already implemented codes of ethics or standards governing mutual relations between employees and relations between employers and employees. The 2005 study examined the ways in which organisations attempt to avoid degrading types of behaviour in the workplace or the possibilities for resolving such behaviour.

In some companies, jokes and conversations with a sexual or ambiguous content are not only the norm, but also form part of marketing, in order to encourage a relationship with clients. At the same time, in Czech society, it is not common to hire experts on personal relationships who would be able to solve problems within a company, including problems connected to sexual harassment or harassment based on sex. Only a fifth of Czech trade unions also focus on problems of personal relationships, and only one of every eight organisations have a person specially employed for this task. Moreover, trade unions mostly do not pay special attention to harassment or sexual harassment and consider it as a personal issue which is not to be solved by the trade union. Half of Czech companies address problems of personal relationships among their employees in written organisational rules, not by concrete reactions to concrete episodes.

Many personnel managers consider sexual harassment as something which has been imported from Western European countries and which has nothing to do with the Czech style of conversation and behaviour, which often has a sexual content which is perceived as a normal thing.

In general, sexual harassment or harassment based on sex is not perceived at a high enough level in Czech society as forming a problem which should be solved by employers or trade unions; softer forms of this behaviour are usually totally neglected and ignored by the competent managers. For this reason, employees are often unable to find an effective way to tackle the harassment and to eradicate it from the workplace. If the sexual harassment is perceived by the employee as a problem, the only solution they usually find is to change jobs and leave the workplace where they experienced sexual harassment.

There is currently no real debate on these issues.

If a case in which suspected sexual harassment played a role is made public, the general reaction of society is that the woman who claims she was harassed was too touchy or that it was her fault, e.g. because she would wear provocative clothing, or something similar.<sup>60</sup>

The situation is similar at Czech universities. In 2009 two surveys were made – one by the Faculty of Human Studies of the Charles University<sup>61</sup> and the other by the Sociological

<sup>60</sup> See e.g. findings in the already cited study A. Křížková et al. *Obtěžování žena mužů a sexuální obtěžování v českém systému pracovních vztahů* Prague, Sociological Institute of the Czech Academy of Sciences 2005. Available on <http://www.mpsv.cz/files/clanky/1699/obtezovani.pdf>, accessed 30 July 2011.

<sup>61</sup> I. Smetáčková & P. Pavlík 'Výzkum sexuálního a genderově motivovaného obtěžování na VŠ: výsledky dotazníkového šetření' in: B. Knotková (ed.) *Ročenka Katedry genderových studií* [str. 82–102] Praha, Katedra genderových studií 2010. Outcomes of the study published also as a paper P. Pavlík et al (2010). 'Sexual and

Institute of the Czech Academy of Sciences.<sup>62</sup> Both studies came up with some rather alarming findings: over three quarters of Czech university students had at some point been the victims of sexual harassment. Unlike most academic institutions in Western Europe and the United States, Czech universities do not have explicitly stated anti-sexual harassment policies, and the issue is largely neglected. The extreme power imbalance between the parties, reinforced by the gender structure of the university and age differences between students and teachers, make students vulnerable to sexual harassment. Many researchers indicate that this form of harassment has harmful effects on students' psychological wellbeing, success at school and career, as well as study ambitions. As universities do not have any anti-harassment policies in place, students are forced to cope with harassment on their own. Strategies they adopt can be divided into three types: participatory tolerance, passive tolerance, and active resistance. Regardless of the strategy they use, students often meet serious problems when dealing with this conduct (such as fears and scruples when trying to defend themselves against harassment).

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The provisions on harassment on the ground of sex and sexual harassment in Directives 2006/54 and 2004/113/EC have been transposed into national legislation through the Antidiscrimination Act – Act No. 198/2009, and also the Employment Act – Act No. 245/2004 Coll.

#### *2.1.2. Definitions*

The legal definition of harassment and sexual harassment is provided by Article 4, Paragraphs 1 and 2 of the Antidiscrimination Act. The Act defines harassment as unwanted conduct related to any ground listed in Article 2 Paragraph 3 of this Act (race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion or opinion) with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment, or which could legitimately be perceived as a precondition for a decision affecting the exercise of rights and obligations following from legal relationships.

Sexual harassment is defined as any conduct of a sexual nature which has the same characteristics as harassment.

The Employment Act provides slightly different definitions. In Article 4 Paragraphs 8-10 it defines harassment as 'behaviour which a second person is entitled to perceive as unwelcome, inappropriate or insulting and the aim or consequence of which leads to that person's dignity being compromised or to the creation of an unfriendly, degrading or uncomfortable environment. Sexual harassment is understood to be any form of undesirable verbal or other behaviour of a sexual character, the aim or consequence of which is a disturbance of a person's dignity, especially if an intimidating, hostile, degrading, humiliating or insulting environment is created. Harassment on ground of gender, sexual orientation, racial or ethnic origin, physical handicap, age, religion or faith and sexual harassment are regarded as forms of discrimination.'

Article 2(2)(a) of Directive 2006/54/EC has not been specifically transposed. The Antidiscrimination Act, however, separately forbids victimisation as any adverse treatment, sanction or disadvantage that has occurred as a result of the exercise of rights (Article 4 Paragraph 3).

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Gender Motivated Harassment at Czech Universities: Incidence, Perception and Implications for Sexual Ethics' in: H. Gavin & J. Bent (eds.) *Sex, Drugs and Rock & Roll* (str. 77-86) Oxford, Inter-Disciplinary Press.

<sup>62</sup> M. Vohlídalová (ed.), K. Šaldová & B. Tupá *Sexuální obtěžování ve vysokoškolském prostředí: analýza, souvislosti, řešení* Praha, Sociologický ústav AV ČR 2010.

The concepts of harassment and sexual harassment, as defined in national legislation, actually correspond to the definitions given by the Directives. They do refer in particular to the purpose or effect of violating the dignity of a person, as they have almost the same wording as the one of the Directives.

According to the definition provided by the Antidiscrimination Act, harassment can be unintentional, in a situation where conduct occurs with the effect of violating the dignity of the person. As there is no case law on these issues, it is difficult to estimate in which situation such unintentional behaviour would be regarded as sexual harassment.

The difference between harassment and sexual harassment is described in national legislation to the extent that sexual harassment is defined as harassment with a sexual character. There is no further legal distinction.

#### *2.1.3. Sexual harassment*

Sexual harassment is not expressly conceptualized as sex discrimination. Harassment as such, however, can cover other grounds of discrimination and sexual harassment is defined as harassment with a sexual character. It could therefore be derived from the Antidiscrimination Act that sexual harassment also covers other grounds of discrimination.

There has not been any discussion on sexual harassment covering other grounds of discrimination, especially because this topic is quite new and not very well accepted by Czech society.

#### *2.1.4. Scope*

Czech legislation, e.g. the Antidiscrimination Act, is conceptualized in quite a generous way as regards the prohibition of discrimination. Any person has the right to equal treatment and to not be discriminated against, and the Act puts a ban on discrimination in the following areas (Article 1 Paragraph 1):

- a) the right to employment and access to employment;
- b) access to an occupation, business or other self-employment;
- c) employment contract, service and other paid employment, including remuneration;
- d) membership of, and involvement in, trade unions, works' councils or employers' associations, including the benefits such associations provide to their members;
- e) membership of, and involvement in, professional associations, including the benefits such legal persons governed by public law provide to their members;
- f) social security;
- g) the granting and provision of social advantages;
- h) access to and provision of healthcare;
- i) access to and provision of education; and
- j) access to goods and services, including housing, to the extent that they are offered to the public, or in their supply.

These areas therefore include also employment and access to goods and services, and the scope is even broader. Harassment and sexual harassment are defined as discrimination (Article 2 Paragraph 2), so the whole scope of the Antidiscrimination Act also applies to harassment and sexual harassment.

#### *2.1.5. Addressee*

In the area of employment, the addressee of the harassment and sexual harassment prohibition is the employer or somebody in a managing position acting on his/her behalf. If harassment or sexual harassment is engaged in by a fellow worker, it is still the employer who is responsible for such behaviour, as the employer has the responsibility towards his or her employees to guarantee adequate working conditions without any discrimination. This can be deduced not only from the character of labour relations in Czech legislation, but also from Article 5 Paragraph 3 of the Antidiscrimination Act, which states that: 'In matters of the right and access to employment and access to an occupation, business or other self-employment,

working activities and other paid employment, including remuneration, employers shall be obliged to provide for equal treatment.’

In the goods and services field, the addressee of the norm is the provider of goods and services.

#### *2.1.6. Preventive measures*

This article has not been implemented. As explained above, Czech employers hardly take any measures to prevent harassment and sexual harassment and often leave it as it is, so that harassed persons often leave their job simply because they cannot stand such behaviour anymore.

It is not very easy to find the wording of collective agreements, therefore no concrete information can be given with regard to harassment and its prevention. In general it can be said, however, that collective agreements do not deal with the issue of harassment at all, as there is no interest in this regard – neither from employers, nor from trade unions.

Article 4 of the Framework Agreement on Harassment and Violence at Work, 2007, has not been implemented in the Czech Republic – see part 1 of this report.

#### *2.1.7. Procedures*

There are no specific procedures available to victims in the case of alleged harassment or sexual harassment, only general procedures are available. The Antidiscrimination Act provides the possibility for the victim of discrimination to defend their own rights before the court, with a shifted burden of proof. If sexual harassment has the character of a crime, the procedures include all legal instruments provided to the victims of crimes under the code of criminal procedure.

#### *2.1.8. Burden of proof*

As there are no specific procedures regarding harassment, there are not even any specific rules to shift the burden of proof. This is shifted by general procedural conditions – the victim of discrimination has to prove that discrimination occurred (facts that led to discrimination are proved) and then it is up to the discriminator – usually the employer – to prove that he or she has not discriminated against the victim (Article 133a of the Civil Procedural Act No. 99/1963 Coll.). As harassment is interpreted as discrimination, the burden of proof also shifts when a person claims that s/he has been harassed.

National legislation addresses possible deterring factors, such as fear of victimization and other factors, in a provision which stipulates that legal persons may be established for the protection of the rights of victims of discrimination. These persons may provide information on the possibilities of legal assistance and cooperation in the drafting or supplementing of proposals and applications to persons claiming protection against discrimination (Article 11 Paragraph 1 (b) of the Antidiscrimination Act).

#### *2.1.9. Remedies and sanctions*

As a consequence of discrimination, including harassment, it is possible to ask for civil remedies before the court, according to Article 10 Paragraph 2. Usually, the compensation asked for by victims of discrimination is quite low – only a few hundred or a few thousand Euros. It is always up to the court to decide whether the proposed remedy is adequate or not.

The Employment Act also provides rules in this context, providing in Article 4 Paragraphs 10 and 11 that ‘if the dignity or self-respect of the natural person was considerably reduced and sufficient compensation was not provided, they have the right to compensation for the detriment in money. The amount of compensation shall be decided by the court at the request of the natural person, taking account of the seriousness of the detriment and of the circumstances under which the breach of rights and duties occurred.’

Universities should have internal rules, which should establish a complaints procedure for students who are harassed by their teachers. Currently, none of the Czech universities has such a mechanism in place. The only document currently available is a guide for the

management of universities and university teachers and students on how to effectively tackle sexual harassment.<sup>63</sup>

In the area of employment, an employer who hears or discovers that one of his employees has harassed a fellow worker may dismiss that employee on the ground of Article 52 Paragraph 1(g). According to this provision, it is possible to dismiss an employee who has seriously breached a duty arising from statutory provisions and relating to the work performed by him. The labour code envisages that the employer could transfer an employee to another workplace, due to harassment, if such worker has been dismissed because of harassment – see above. In general, it could also be possible to take some disciplinary measures; however, these are currently not used.

The Antidiscrimination Act prohibits victimisation, as it is defined as discrimination (Article 2 Paragraph 2).

#### *2.1.10. Compliance with EU law*

In general, domestic law is in compliance with EU law, especially as regards the scope of the ban on harassment and sexual harassment. What might be problematic are the insufficient preventive measures, the lack of repressive measures against harassers, the total lack of specific measures to tackle harassment, and the disregard of harassment in the specific area of goods and services, where almost nothing can be said about tackling harassment or preventing it.

#### *2.1.11. Additional information*

As stated above, Czech society seems to be quite reluctant to deal with harassment and especially sexual harassment, even though according to studies, softer forms of harassment occur on a daily basis. People have got used to this and do not consider it to be a particular problem.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

There is almost no case law of courts (which would be published), except for one case concerning a tram driver in Prague (decided in 2003).<sup>64</sup>

#### *2.2.2. Main features of case law*

In the abovementioned case, the tram driver claimed that she had been harassed by her superior colleague. Against her will he strongly embraced her, which she felt deprived her of her dignity. She did not ask for any remedy, but asked that he would apologize to her in front of five other colleagues. The city court in Prague did not find any breach of the labour code,<sup>65</sup> and only declared that the behaviour of the colleague was inappropriate, but that there was no sexual content in the man's behaviour. Therefore, sexual harassment was not found and the man did not have to apologize.

#### *2.2.3. Dignity*

There is some case law from the Constitutional Court and also the Supreme Court which defines the legal character of dignity.

In Case IV.ÚS 412/04 the Constitutional Court stated that 'issues of human dignity shall be understood as a part of human characteristics, as part of humanity. Guaranteeing the untouchability of human dignity makes it possible to fully enjoy one's own personality.'

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<sup>63</sup> I. Smetáčková et al. *Sexuální obtěžování na vysokých školách: proč vzniká, jak se projevuje, co lze proti němu dělat. Příručka pro vedení vysokých škol a vyučující* Fakulta humanitních studií UK. Available on [http://www.fhs.cuni.cz/gender/pdf/metodika\\_pro\\_vyucujici\\_FINAL.pdf](http://www.fhs.cuni.cz/gender/pdf/metodika_pro_vyucujici_FINAL.pdf), accessed 30 July 2011.

<sup>64</sup> 21 Cdo 2104/2001 *Terezie Štorkánová vs. Dopravní podnik hl. města Prahy*.

<sup>65</sup> The Antidiscrimination Act did not exist at the time.



Another decision of the Supreme Court, 30Cdo 2005/2003, states that ‘degrading the dignity of a natural person, or the respect in society of such person to a larger extent should be defined as non-proprietary damage in the personal sphere.’

#### *2.2.4. Restrictions*

There is no such case law.

#### *2.2.5. Role of equality bodies*

The Czech defender of rights, who fulfils the tasks of an equality body, has not taken any action or initiated any cases regarding harassment on the ground of sex yet.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### *3.1. National provisions*

Some provisions which could be connected with harassment may be found in penal law. The following criminal acts are defined: rape (Article 185 of the Penal code),<sup>66</sup> defamation of nation, ethnic group, race or opinion (Article 355 of the Penal Code), and dangerous persecution (Article 354 of the Penal Code).

#### *3.2. Collective agreements*

There are no specific national collective agreements which aim at combating harassment in employment.

#### *3.3. Additional measures*

There are no other measures which could be considered relevant to the issues of harassment and sexual harassment.

#### *3.4. Harassment and stress at work*

There are no relationships between the issues of harassment and stress at work in Czech legislation or practice.

### **4. Added value of anti-discrimination approach**

#### *4.1. Added value*

From the Czech perspective, the added value in defining harassment on the ground of sex and sexual harassment as discrimination is that, thanks to the obligation of the Czech Republic to implement the relevant directives and their provisions, sexual harassment and harassment on the ground of sex have been included in Czech legislation and all victims of harassment now have access to justice (in the Czech case not only as regards sex, but also and especially as regards ethnic origin). Clarity for victims, lawyers and courts should be increased as well. It will, however, take some more time to raise the awareness of victims that they can challenge unwanted behaviour like harassment.

As there were no rules before, the antidiscrimination directives had to be implemented and previously only criminal law could be used in order to tackle sexual harassment (in more serious forms, however). The fact that there are currently concrete provisions of the Antidiscrimination Act placing a ban on harassment and ensuring that this ban has quite a broad scope, might also be described as an added value of the anti-discrimination approach in relation to harassment and sexual harassment. Criminal rules still include different requirements regarding proof than a discrimination claim. Also under previous labour legislation, there were no provisions regarding harassment and sexual harassment and in general labour law it was difficult to enforce from an individual's point of view that the employer should respect the ban on harassment and sexual harassment.

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<sup>66</sup> Act No. 40/2009 Coll.

#### 4.2. Pitfalls

It is rather difficult to describe the pitfalls of following a non-discrimination approach to combat harassment and sexual harassment. This is too new in Czech legislation and practice and there is no case law.

In general, to address any behaviour in an anti-discrimination setting might be more difficult than to address it in a working environment setting, as the latter is traditional and courts are able to decide labour cases much better than anti-discrimination cases, where for example EU case law and EU legislation might also be taken into consideration.

### DENMARK – Ruth Nielsen

#### 1. General situation

In Denmark, harassment on the ground of sex and sexual harassment are primarily dealt with at a non-legal level, e.g. as part of human resource management. There are no reports or statistics on the subject as a legal matter and not much debate on legal aspects. The law is relatively clear.

In Danish case law, Danish Equal Treatment Act Section 4, which prohibits sex discrimination in employment conditions, has been interpreted as prohibiting sexual harassment since the 1990's,<sup>67</sup> i.e. before the EU defined it as unlawful sex discrimination. Similarly, sexual harassment during a recruitment interview constituted violation of Section 2 of the Danish Equal Treatment Act which prohibits sex discrimination in the access to employment even before the transposition of the EU provisions on harassment on the ground of sex and sexual harassment after 2002.

#### 2. Harassment and sexual harassment in the context of anti-discrimination law

##### 2.1. Legislation

###### 2.1.1. Transposition

The EU provisions on harassment on the ground of sex and sexual harassment which are now found in Directives 2006/54 and 2004/113/EC have been transposed into Danish legislation mainly by being literally repeated in the definitions of discrimination in Section 1 of the Danish Equal Treatment Act (consolidated Act no. 734 of 28 June 2006), Section 1(a) of the Danish Equal Pay Act (consolidated Act no. 899 of 5 September 2008), Section 3(a) of the Act on equal treatment of men and women in insurance, pensions and similar financial services<sup>68</sup> and in Section 2a of the Danish Gender Equality Act (consolidated Act no. 1095 of 19 September 2007).

Article 2(2)(a) of Directive 2006/54/EC and Article 4(3) of Directive 2004/113 have been specifically transposed in Section 1(4) of the Equal Treatment Act and Section 2a(1) of the Gender Equality Act respectively. The wording of the Danish implementing provisions slightly differ from the underlying Directives but the meaning can be argued to be the same.

Equal Treatment Act Section 1(4) reads (in Danish):

*‘Chikane, som defineret i stk. 5, og sexchikane, som defineret i stk.6, betragtes som forskelsbehandling på grund af køn og er derfor forbudt. En persons afvisning af eller*

<sup>67</sup> U 1999.1744/2 Ø.

<sup>68</sup> The amendment took effect on 17 June 2008. At the time, the title of the Act was ‘Act on equal treatment of men and women in occupational social security schemes’ (consolidated Act no. 775 of 29 August 2001 as amended by Act no. 517 of 17 June 2008). In 2009 by Act no 133 of 24 February 2009, the title of that Act was changed into the current title: Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits in connection with implementation of Article 5 in Directive 2004/113/EC. The amendment came into force on 21 December 2009.

*indvilligelse i en sådan adfærd må ikke anvendes som begrundelse for en beslutning, der vedrører den pågældende’.*

In English this would be:

Harassment, as defined in Paragraph 5, and sexual harassment as defined in Paragraph 6, are to be considered as discrimination based on sex and are therefore prohibited. A person's rejection of or submission to such conduct may not be used as justification for a decision affecting that person.

The wording of the Directive is:

‘For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct;’

An employer who commits sexual harassment and rewards the victim who submits to it with promotion or pay increases can be said to treat the colleagues of the victim unfavourably by forcing them to accept unreasonable competition, but I think the Danish wording makes it clearer that it is unlawful for an employer to reward a worker/employee for submitting to sexual harassment.

#### *2.1.2. Definitions*

The definitions in the Danish implementing legislation follow the definitions in the Danish versions of the Directives literally. They thus refer both to the purpose or effect of violating the dignity of a person and accept that harassment can be unintentional. There is no description or explanation of anything in the Danish legislative texts, just a repetition of the wording of the definitions in the underlying Directives.

The definitions of direct and indirect discrimination and harassment are the same in gender equality legislation as in other legislation implementing the other Article 19 TFEU Directives, i.e. the Ethnic<sup>69</sup> Discrimination Directive (2000/43/EC) and the Framework Employment Directive (2000/78/EC).

#### *2.1.3. Sexual harassment*

Sexual harassment is not mentioned in parts of discrimination law other than gender equality law. As far as I know it is not discussed in other areas of Danish law.

#### *2.1.4. Scope*

The scope of the Danish prohibition of harassment and sexual harassment is broader than the scope of Directives 2006/54/EC and 2004/113/EC. The prohibition against discrimination in the Gender Equality Act which also covers harassment and sexual harassment applies, according to Section 1a of the Act, to

- 1) every employer, authority and organization in public administration and public enterprise and
- 2) authorities and organizations and all persons who supply goods and services that are available to the public in both the public and private sectors, including public bodies, which are offered outside the private and family life and the transactions in this regard.

The above is interpreted as meaning that the Danish Gender Equality Act applies to all sectors of society, e.g. including media, education and social security, i.e. also to areas that fall outside the field of application of Directive 2004/113.

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<sup>69</sup> In English often called the Race Directive. In Danish legal language the word ‘race’ is avoided. What many in English would call race discrimination is usually called ethnic discrimination (*etnisk discrimination*) in Denmark.

Under Section 1a(3) of the Gender Equality Act, the Equal Treatment Act, the Act on pregnancy and childbirth, the Act on equal pay for men and women and the Act on equal treatment of men and women in connection with insurance, pensions and similar financial benefits are used in the areas covered by these laws. This provision is interpreted as a *lex specialis* rule. In areas falling under the specifically mentioned Acts, these laws and not the Gender Equality Act apply.

#### *2.1.5. Addressee*

The employer is the addressee of the harassment and sexual harassment prohibition in employment discrimination law. The person who actually engages in harassment can be either the employer personally, somebody in a managing position acting on his/her behalf or a fellow worker. The employer is responsible for harassment and sexual harassment by managers and fellow workers if the employer has not taken reasonable steps to avoid or stop the harassment. There are no explicit provisions in legislation and no case law on whether the employer could be held responsible for harassment by customers. In my view, that question must be answered by reference to the working environment provisions. An employer has a general duty to provide a safe working environment. If the occurrence of harassment by customers indicates that the employer has not fulfilled that duty, the aggrieved worker can invoke working environment rules, but probably not equality legislation.

The fellow worker himself/herself who engages in harassment is not responsible as an addressee under Danish discrimination law, only under criminal law. As set out below, the most serious forms of sexual harassment amount to criminal offences (rape, etc.). The fellow worker himself/herself can be punished in accordance with the Criminal Code if that law is violated.

With regard to goods and services it is the seller/service provider who is the addressee. Harassment committed by recipients of goods and services (customers, clients, patients, etc.) is not covered by Danish sex discrimination law.

#### *2.1.6. Preventive measures*

Article 26 of Directive 2006/54/EC on preventive measures which places a duty on Member States to encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on the grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion, has not been implemented by any specific provision in Danish law.

As set out above, employers are held responsible for harassment committed by their staff if they ought to have prevented it e.g. by taking preventive measures. This in my view is sufficient to consider Article 26 of the Directive as correctly implemented.

Most large employers include sexual harassment and measures to prevent it in their personnel and human resource management policy. I am not an expert in HRM and do not know any concrete examples.

The main labour market organisations (the Danish Confederation of Employers (DA) and the Confederation of Trade Unions (LO)) have issued a declaration on implementation in Denmark of the EU Framework Agreement on harassment and violence at work.<sup>70</sup> In their view there is no need for any specific implementing measures in Danish law, which is considered sufficient.

#### *2.1.7. Procedures*

There are no specific procedures (to file a complaint) available in the legal system for persons in case of alleged harassment or sexual harassment, neither in employment nor with regard to goods and services. For harassment cases, the access to courts/equality bodies is governed by the same conditions as all other discrimination cases.

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<sup>70</sup> Available in Danish on <http://www.lo.dk/Nyheder/Nyhedsarkiv/2010/12/~media/LO/Aktuelt/nyheder2010/2010/erklaringOmVoldOgChikane.ashx>, accessed 20 October 2011.

Many employers use workplace-specific internal complaints procedures to combat harassment.

#### *2.1.8. Burden of proof*

There are no specific rules for harassment cases. The burden of proof rules for harassment and sexual harassment are the same as for other discrimination cases, i.e. when persons who consider themselves wronged because the principle of equal treatment has not been applied to them, before a court or other competent authority, establish facts from which it may be presumed that there has been direct or indirect discrimination, it is up to the defendant to prove that there has been no breach of the principle of equal treatment.

#### *2.1.9. Remedies and sanctions*

The consequences (remedies and sanctions, civil and/or criminal) in a case of discriminatory harassment are the same as for other discrimination cases.

In case law in employment cases, the typical remedy against the employer who is the addressee is monetary compensation. For the harasser/fellow worker who is not an addressee there is no remedy under discrimination law.

It is a breach of the duties under the employment contract to commit unlawful harassment. Depending on the concrete circumstances it may give the employer the right under employment law to take disciplinary measures, transfer the worker to other work and in serious cases dismiss him/her.

It would be unlawful victimization if the victim is transferred to other work against his/her will.

There is no Danish case law on harassment in the supply of goods and services. In principle the remedies would be the same as in other discrimination cases, for example employment cases (see above).

#### *2.1.10. Compliance with EU law*

In my view, Danish law is in compliance with EU law.

#### *2.1.11. Additional information*

There is no additional information.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

As mentioned above, sexual harassment was regarded as unlawful sex discrimination by Danish courts also before this was stated explicitly in legislation.

Alleged victims of harassment can file complaints with the Equality Complaints Board (*Ligebehandlingsnævnet*<sup>71</sup>) but that body does not allow oral evidence, only written evidence. In many harassment cases, however, it is necessary to hear the parties and witnesses to decide the case because the factual situation is contested and unclear. Such cases cannot be heard by the Equality Complaints Board but must be brought before the ordinary courts, which can hear all kinds of evidence.

#### *2.2.2. Main features of case law*

All published cases on the application of discrimination law to harassment are employment cases. The law is usually clear but the facts are contested. From a legal point of view these cases are, in my view, not very interesting. The difficult part is the factual assessment of the evidence. Most Danish judgments are not published. Consequently, no one knows how many harassment cases there are in total and there are no exhaustive studies of published harassment cases. To my knowledge, all published harassment cases concerning sex are about sexual harassment. The following are examples of sexual harassment cases:

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<sup>71</sup> See <http://www.ligebehandlingsnaevnet.dk/artikler/default.aspx?page=1175>, accessed 15 December 2011.

Sexual harassment was considered to have been proved against an employer.<sup>72</sup> This employer had employed a female employee, A, for about two years. She became sick after an episode of heated exchanges of words during which the male employer had complained about A's work performance. She then handed in her notice and sought support from her union. Simultaneously, she sought psychological and specialist help and claimed that she had been sexually harassed by the employer both verbally and physically.

An employee was awarded compensation for sexual harassment.<sup>73</sup> The 18-year-old A began training at farming at farm B, a partnership owned by C and his son D. A claimed that she was sexually harassed by 68-year-old C, both physically and verbally.

An employer's remarks on sexual topics in front of two young female students were found to constitute sexual harassment in regard to one of the women, in violation of the Equal Treatment Act Section 4.<sup>74</sup> The employer had to pay the aggrieved woman compensation.

### *2.2.3. Dignity*

There is no Danish case law defining or discussing 'dignity' or how 'dignity' should be interpreted.

### *2.2.4. Restrictions*

There is no Danish case law which shows clashes between the prohibition of harassment/sexual harassment and human rights and constitutional rights.

### *2.2.5. Role of equality bodies*

As set out above in Sections 2.1.7 and 2.2.1, persons who consider themselves victims of harassment can either take their case to the ordinary civil courts or file complaints with the Equality Complaints Board (*Ligebehandlingsnævnet*), which has the competence to make decisions on individual complaints. All decisions from the Equality Complaints Board (*Ligebehandlingsnævnet*) are published in full text in Danish on the Board's website: [www.ligebehandlingsnaevnet.dk](http://www.ligebehandlingsnaevnet.dk).

There is no difference between the rules on gender equality bodies that apply in harassment cases and in all other kinds of discrimination cases. The Institute of Human Rights is a general monitoring and advisory body which (since 15 March 2011) has the competences required in Article 12 of Directive 2004/113. The Institute of Human Rights can advise individual victims on how they can get a decision, but it cannot itself decide individual complaints. That competence lies with the Equality Complaints Board (*Ligebehandlingsnævnet*) or the ordinary courts.

### *2.2.6. Additional information*

There is no additional information.

## **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

### ***3.1. National provisions***

Provisions in the Criminal Code cover the most serious forms of sexual harassment, e.g. rape. As described above, fellow workers who sexually harass their colleagues are not liable under discrimination law but they can be punished if the Criminal Code is violated.

For an employee it is incorrect fulfilment of an employment relationship to engage in harassment and the employer can take disciplinary measures in accordance with employment law.

Both under EU and Danish discrimination law and working environment law, the employer has a duty to ensure a working environment free of harassment.

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<sup>72</sup> V1995.B-1569-93. FED1995.142.

<sup>73</sup> OE2006.B-400-05. FED2006.38.

<sup>74</sup> V1995.B-1331-93. FED1995.1276.

### **3.2. Collective agreements**

In the Collaboration Agreement between LO and DA there is a provision recommending that the individual employer make sure that there is no harassment in the workplace. Some businesses in Denmark base their personnel policy on local collective agreements. Most employers with a written personnel policy mention harassment and sexual harassment as something to be prevented.

### **3.3. Additional measures**

I am not aware of any other relevant measures.

### **3.4. Harassment and stress at work**

There are no specific rules on the relationship between stress and harassment but in soft law on stress, harassment is often mentioned as well.

### **3.5. Additional information**

There is no additional information.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

Compared to criminal law, discrimination law renders a broader scope of behaviour unlawful. Compared to working environment law, the remedies and the burden of proof rules are more favourable for the victim of harassment.

### **4.2. Pitfalls**

I am not aware of any pitfalls.

## **ESTONIA – Anneli Albi**

### **1. General situation**

Questions concerning harassment on the grounds of sex and sexual harassment were included in the gender equality survey that was carried out in Estonia in 2009. It was concluded that these concepts were rather unknown and difficult to differentiate for the respondents; overall, the general awareness of these issues remains quite low.<sup>75</sup>

The survey revealed with regard to harassment on the ground of sex that during the preceding 12 months, 9 % of the respondents had received comments, hints or proposals that uncomfortably and in an unwanted way related to the sex of the respondent from a person of the opposite sex (10 % of women and 7 % of men). Persons below 25 years of age received most of such comments: 20 % of women and 16 % of men in the age of 15-24 had experienced verbal harassment on the ground of sex. Mostly the person making such comments was a person whom the victim knew (27 %), often also a member of the family (16 %) or a friend (24 %), but also colleagues (14 %), clients (8 %), superiors (8 %) and strangers (21 %).<sup>76</sup>

Concerning sexual harassment, 15 % of men and 20 % of women had heard a representative of the opposite sex telling inappropriate jokes or expressing bawdry, which was disturbing for the respondents; 6 % of men and 11 % of women had received disturbing remarks about their figure or sexuality; 7 % of men and 9 % of women had received

<sup>75</sup> V. Vainu, L. Järviste, H. Biin *Soolise võrdõiguslikkuse monitoring 2009 (Gender Equality monitoring 2009)* Sotsiaalministeeriumi toimetised 1/2010, Tallinn, 2010, p. 145. Available on: [http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised\\_20101.pdf](http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised_20101.pdf), accessed 22 August 2011.

<sup>76</sup> V. Vainu, L. Järviste, H. Biin *Soolise võrdõiguslikkuse monitoring 2009 (Gender Equality monitoring 2009)* Sotsiaalministeeriumi toimetised 1/2010, Tallinn, 2010, p. 146. Available on: [http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised\\_20101.pdf](http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised_20101.pdf), accessed 22 August 2011.



unwanted proposals or hints for sexual intercourse; 4 % of men and 7 % of women had experienced unwanted attempts of physical closeness; 4 % of men and 9 % of women had received disturbing sexist messages, e-mails, comments etc.<sup>77</sup>

Other studies have revealed that in an employment environment, 5 % of the respondents had experienced unwanted attention of a sexual nature – 45 % from clients (including patients) and 22 % from colleagues.<sup>78</sup>

The Ministry of Justice noted in its annual review of criminality of 2010 that on the basis of victim surveys, 4.4 % of the population had experienced harassment (3.6 % non-physical and 2 % physical harassment). Women and younger persons had experienced more harassment. However, it was noted in the report that it is necessary to keep in mind when interpreting this data that different persons interpret this concept differently and that it can include very different acts.<sup>79</sup>

In conclusion, it can be stated that there is no particular debate about the issue of harassment in Estonian society, although the above-mentioned studies reveal that many people have personally experienced some form of harassment. This issue is considered to be a delicate matter, and as noted below, victims often do not dare to seek legal remedies concerning such issues.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The concepts of harassment on the ground of sex and sexual harassment have been regulated in the Gender Equality Act (GEA, in force since 2004). The definition of sexual harassment was revised and the concept of harassment on the ground of sex was included in the text of the GEA by the Act to amend the Gender Equality Act, the Civil Service Act and the Labour Contracts Act (317 UA I).<sup>80</sup> These amendments took effect on 23 October 2009.

The concept of sexual harassment is defined in Article 3(1)(5) of the GEA and the concept of harassment on the ground of sex in Article 3(1)(6) of the GEA.

#### *2.1.2. Definitions*

The Act to amend the Gender Equality Act, the Civil Service Act and the Labour Contracts Act brought the content of the respective concepts in line with the requirements of the EU directives.

According to Article 3(1)(5) of the GEA, ‘sexual harassment’ occurs where any form of unwanted verbal, non-verbal or physical conduct or activity of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment.<sup>81</sup>

Article 3(1)(6) provides that ‘harassment related to the sex of a person’ occurs where unwanted conduct or activity related to the sex of a person occurs with the purpose or effect

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<sup>77</sup> V. Vainu, L. Järviste, H. Biin *Soolise võrdõiguslikkuse monitoring 2009 (Gender Equality monitoring 2009)* Sotsiaalministeeriumi toimetised 1/2010, Tallinn, 2010, pp. 147-148. Available on: [http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised\\_20101.pdf](http://www.sm.ee/fileadmin/meedia/Dokumendid/V2ljaanded/Toimetised/2010/toimetised_20101.pdf), accessed 22 August 2011.

<sup>78</sup> I. Seppo et al. *Psühhosotsiaalsete riskide levik Eestis (The spread of psychosociological risks in Estonia)* CENTAR, Eesti Rakendusuuringute Keskus 2, 62. Available on: [http://www.ti.ee/public/files/pdf\\_files/CENTAR\\_l6pparuanne.pdf](http://www.ti.ee/public/files/pdf_files/CENTAR_l6pparuanne.pdf), accessed 22 August 2011.

<sup>79</sup> *Kuritegevus Eestis 2010 (Criminality in Estonia in 2010)*, Justiitsministeerium, Tallinn, 2011, p 62. Available on: [http://www.just.ee/orb.aw/class=file/action=preview/id=54700/KuritegevusEestis2010\\_web.pdf](http://www.just.ee/orb.aw/class=file/action=preview/id=54700/KuritegevusEestis2010_web.pdf), accessed 22 August 2011.

<sup>80</sup> The text of the Draft Act with explanatory memorandum is available on the Parliament’s web page [www.riigikogu.ee](http://www.riigikogu.ee) (in Estonian), accessed 10 October 2011.

<sup>81</sup> By way of comparison: earlier it provided that such behaviour had to take place in a relationship of subordination or dependence and that the person had to reject or tolerate such behaviour because it was directly or indirectly a precondition to be hired or employed in the service, or for the existence of the labour relationship, admission to training, receiving payments or other benefits.



of violating the dignity of a person and of creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment.

It appears that both these concepts refer both to the purpose or effect of violating the dignity of a person. Accordingly, any behaviour that has the effect of violating the dignity of a person is also regarded as harassment.

The differences between these concepts are not explained in national legislation any further. However, it is noted in the explanatory memorandum of the Draft Act that harassment on the ground of sex occurs where a person is subjected to disturbance, threats or offensive behaviour in the form of a verbal, visual or other act only because of being a man or a woman and if such behaviour creates such an atmosphere. This relates above all to biased generalisations related to gender, which often also have a degrading undertone. It is pointed out that harassment on the ground of sex includes such situations which do not relate to the sexuality of the person.

According to the second sentence of Article 3(1)(3) of the GEA, harassment related to the sex of a person and sexual harassment and less favourable treatment of a person caused by rejection or submission to harassment are considered as direct discrimination based on sex.

Article 3(3) of the Equal Treatment Act stipulates that harassment is deemed to be a form of direct discrimination when unwanted conduct related to any of the attributes specified in subsection 1(1) of this Act (i.e. ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

#### *2.1.3. Sexual harassment*

According to Article 3(1)(3) sexual harassment is considered to be a form of direct discrimination based on sex.

There have been no discussions on sexual harassment covering other grounds of discrimination.

#### *2.1.4. Scope*

The scope of the GEA is wider than the scope of the respective directives. According to Article 2(1) of the GEA, the Act applies to all areas of social life. Article 2(2) lists two exceptions, stating that the provisions of the GEA do not apply to: 1) professing and practising faith or working as a minister of a religion in a registered religious association; 2) relations in family or private life.

Thus the national legislation covers areas beyond employment and the supply of goods and services.

#### *2.1.5. Addressee*

The addressees of the respective provisions are not stipulated clearly.

Article 6(2)(5) of the GEA stipulates that the activities of an employer shall also be deemed to be discriminatory if the employer harasses a person sexually or in relation to the sex of a person or fails to perform the obligation provided for in Article 11(1)(4) of the GEA. An employer is responsible for failure to perform the duty of care if the employer is aware or should reasonably be aware that harassment related to the sex of a person or sexual harassment has occurred and fails to take the necessary measures to terminate such harassment.

Article 11(1)(4) of the GEA provides that as part of the promotion of equal treatment for men and women, an employer shall ensure that employees are protected from harassment related to the sex of a person and sexual harassment in the working environment.

Accordingly, it can be concluded that in an employment relationship both the employer and the person who has engaged in harassment can be responsible for the harassment, if the conditions of Article 6(2)(5) are fulfilled; in other situations the main defendant should be the person who has exhibited the respective behaviour.

#### *2.1.6. Preventive measures*

There is no information available on preventive measures that employers have taken in order to prevent harassment and sexual harassment.

No information is available on respective provisions in collective agreements.

#### *2.1.7. Procedures*

There are no specific complaints procedures available for persons in case of alleged harassment or sexual harassment. However, the general remedies apply to such cases. Victims can turn to the Gender Equality and Equal Treatment Commissioner to receive an opinion as to whether discrimination has occurred. It is also possible to turn to the Chancellor of Justice (an institution similar to the ombudsman), who has the power to carry out conciliation proceedings in discrimination disputes. However, these are voluntary proceedings and the defendant may refuse to participate in such proceedings. In employment relationships it is possible to submit a complaint to the Labour Dispute Committees. It is also possible to turn to a court on general grounds.

#### *2.1.8. Burden of proof*

The general rules on the burden of proof also apply to cases of harassment.

Article 4(1) of the GEA stipulates that an application of a person addressing a court, a labour dispute committee or the Gender Equality and Equal Treatment Commissioner shall set out the facts on the basis of which it can be presumed that discrimination based on sex has occurred. According to Article 4(2), in the course of proceedings it falls on the defendant to prove that there has been no breach of the principle of equal treatment. If the person refuses to provide proof, such refusal shall be deemed to be equal to acknowledgement of discrimination by that person. The shared burden of proof does not apply in administrative or criminal proceedings (Article 4(3) of the GEA).

The GEA provides general protection against victimization. Article 5(1<sup>1</sup>) of the GEA stipulates that adverse treatment of a person, as well as causing negative consequences for that person due to the fact that that person has relied on the rights and obligations provided for in this Act or has supported another person in the protection of his or her rights provided for in this Act shall also be deemed to be discrimination.

The GEA does not stipulate any specific regulation concerning victimization, burden of proof or otherwise filing a complaint in matters concerning harassment.

#### *2.1.9. Remedies and sanctions*

Article 13 of the GEA regulates the issues of compensation for damage.

Article 13(1) stipulates that if the rights of a person are violated due to discrimination, he or she may demand from the person who violates the rights the termination of the harmful activity and compensation for the damage on the basis of and pursuant to the procedure provided by law. Article 13(2) provides that an injured party may demand that, in addition to the provisions of subsection (1) of this section, a reasonable amount of money be paid to the party as compensation for non-patrimonial damage caused by the violation. According to Article 13(3), upon determination of the amount of compensation, a court or a labour dispute committee shall take into account, *inter alia*, the scope, duration and nature of the discrimination.

In employment relationships, the general principles of responsibility of the employer and employees are stipulated in the Employment Contracts Act; additionally the remedies of the general law of obligations can be applied if the employee is guilty of violation (Article 72 of the Employment Contracts Act). No special measures are provided in relation to the harasser in the relevant equal treatment legislation. However, the general principles of responsibility include the possibility of taking disciplinary measures. Additionally, in the civil service the sanctions can be applied in accordance with the Employees Disciplinary Punishments Act (this Act does not apply to employment contracts in other respects).

#### *2.1.10. Compliance with EU law*

The content of the respective definitions has been brought into line with the definitions of the directives. However, due to the lack of court practice, the impact of these provisions is yet to be seen.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

Only a very limited number of cases have been submitted to courts and equality bodies in relation to harassment.

#### *2.2.2. Main features of case law*

An Estonian court of first instance addressed the issue of sexual harassment and sanctions applicable to a person in Case 2-09-27445 in 2010. The case concerned a situation where a pilot was passing through the airport security check and the security gates started to signal. The female security person gave the pilot instruction to undergo an additional check. Then the male pilot himself put the female security officer's hands on his body. This behaviour was uncomfortable for the security officer; she removed her hands and communicated the incident to the security company which contacted the airline company. The airline company terminated the employment contract with the pilot. The pilot submitted an action to the court to declare the dismissal invalid.

The court found that the dismissal was illegal, annulled the disciplinary sanction and reinstated the pilot.<sup>82</sup> The court noted that the bodies of the pilot and the security officer had not been in contact. Additionally, he had not rubbed her hands on his body but simply put them on his body for a moment, after which the security officer removed them. The court found that this incident did not constitute sexual harassment according to Article 3(1)(5) of the GEA. According to the wording of the GEA which was in force until 23 October 2009, in order to constitute sexual harassment, an act had to take place in a relationship of subordination and the sexual harassment had to constitute a precondition to receive professional prerogatives or benefits.

On appeal, the District Court<sup>83</sup> found that the County Court had given a proper assessment of the behaviour of the complainant, and therefore the arguments of the airline about the supremacy of Article 2(2) of Directive 2002/73/EC were irrelevant. The District Court concluded that the dismissal was unlawful. The District Court further noted that the County Court had not established that the purpose or the effect of the behaviour of the pilot would have been to violate the dignity of the person, in particular creating a disturbing, intimidating, hostile, degrading, humiliating or offensive environment. The Court noted that it is not possible to find that this behaviour had a sexual nature. In addition, from the report of the security officer it had emerged that this incident had been unexpected to her, but it had not been perceived as sexual harassment.

#### *2.2.3. Dignity*

The concept of 'dignity' has been addressed by the courts mainly in relation to the complaints of detainees, who found that the conditions of detention were degrading or in breach of human dignity. The Supreme Court has declared that human dignity is the basis for all fundamental rights and the purpose for protecting fundamental rights and freedoms,<sup>84</sup> but it appears that the Court has not given a definition of this term. The Court has taken into account the practice of the European Court of Human Rights under Article 3 of the European Convention of Human Rights and Fundamental Freedoms. Accordingly, the Court noted that a treatment constitutes a violation of human dignity if the suffering experienced by the detainee is greater than that inevitably entailed by detention. The cumulative impact and the

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<sup>82</sup> Decision of Harju County Court of 4 March 2010.

<sup>83</sup> Decision of Tallinn District Court of 15 November 2010.

<sup>84</sup> E.g. decision of the Administrative Chamber of the Supreme Court, 22 March 2006, no. 3-3-1-2-06, p. 10.

length of time during which the detainee is subjected to the respective conditions have to be taken into account.<sup>85</sup>

#### 2.2.4. Restrictions

There is no case law available that would expressly address clashes between the prohibition of harassment and human rights and constitutional rights.

#### 2.2.5. Role of equality bodies

The Gender Equality and Equal Treatment Commissioner received three complaints concerning sexual harassment in 2010. The same number of complaints concerning sexual harassment was received in 2009. All the complainants (victims) were women. In 2010, two complaints concerned harassment in a work environment. In the third case, the situation in which the harassment occurred was unknown. The Commissioner initiated proceedings only in one case. In 2011 she has given one opinion about a harassment case. The text of the opinion is not currently available.<sup>86</sup>

#### 2.2.6. Additional information

The case law of the Court cited above demonstrates that the regulation of the concept of sexual harassment that was in force until 23 October 2009 was not in conformity with the European directives. However, the Court did not provide any substantive arguments concerning the relationship between national law and European law. Another aspect is the proportionality of sanctions in cases of harassment (dismissal in that particular case) to achieve a proper balance between the rights of the employee, employer and a victim, who may belong to another organisation.

### 3. Harassment and sexual harassment outside the framework of anti-discrimination law

#### 3.1. National provisions

Article 3(2) of the Occupational Health and Safety Law (OHSL) stipulates that *inter alia* psychological factors present in the working environment shall not endanger the life or health of workers or that of other persons in the working environment. Article 4(2) OHSL provides that an employer shall design and furnish workplaces in such a way that it is possible to prevent occupational accidents and damage to health, and to maintain the workers' capacity for work and their well-being.

The Penal Code does not contain provisions which would expressly deal with sexual harassment. If the harassment includes violence against a person, the respective provisions of the Penal Code shall be applied. A further question is whether Article 152 of the Penal Code regarding infringement of equality is applicable to harassment. Article 152(1) of the Penal Code stipulates that unlawful restriction of the rights of a person or granting of unlawful preferences to a person on the basis of his or her nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, financial or social status is punishable by a fine of up to 300 fine units or by detention. However, this provision has not been implemented in practice. One author of the legal commentary to the Gender Equality Act believes that as sexual harassment violates human dignity, the right to sexual self-determination and personal freedom and the right to self-determination, sexual harassment should be punishable under Article 152 of the Penal Code.<sup>87</sup> Further, as sexual harassment constitutes direct discrimination based on sex, Article 152 of the Penal Code should be applied, as the meaning of this provision should be interpreted in line with the prohibition of discrimination as regulated by the GEA and Equal Treatment Act.<sup>88</sup>

<sup>85</sup> E.g. decision of the Administrative Chamber of the Supreme Court, 15 March 2010, no. 3-3-1-93-09, p. 11.

<sup>86</sup> Email communication by the Gender Equality and Equal Treatment Commissioner, 10 August 2011.

<sup>87</sup> M.-L. Sepper *Comments to Article 3(5) of the Gender Equality Act*. K. Albi, J. Laidvee, Ü.-M. Papp, M.-L. Sepper *Gender Equality Act. A Legal Commentary*, Juura, Tallinn, 2010, p 38.

<sup>88</sup> M.-L. Sepper *Comments to Article 3(5) of the Gender Equality Act*. K. Albi, J. Laidvee, Ü.-M. Papp, M.-L. Sepper *Gender Equality Act. A Legal Commentary*, Juura, Tallinn, 2010, p 38.

### **3.2. Collective agreements**

No information is available on specific national collective agreements aimed at combating harassment in employment.

### **3.3. Additional measures**

No further measures are known to the expert.

### **3.4. Harassment and stress at work**

Harassment and stress at work could overlap (see the provisions of the OHSL above) and should be assessed in individual cases.

### **3.5. Additional information**

There is no additional information.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

The obligation to regulate the concepts of sexual harassment and harassment on the ground of sex to transpose the respective European directives has had a positive impact on Estonian national legislation, in that these concepts are now expressly regulated. As these are formulated as a form of discrimination, other guarantees, such as the regulation of the burden of proof and of grounds for requesting compensation in cases of discrimination also apply to cases of harassment.

### **4.2. Pitfalls**

The Gender Equality and Equal Treatment Commissioner has pointed out that victims mainly contact her for consultation, but that they do not wish to initiate formal proceedings. She has observed that instead, victims contact her if the employment contract has been terminated. She has also pointed out that on the basis of initial evidence (including the statement of the victim), it is very difficult to prove harassment, because often only one incident in a sequence of acts has a sexual nature (e.g. a female employee rejects a male superior, which is followed by him harassing her, which does not have sexual characteristics but includes different ways of negative attention, such as excessive demands, control and degrading treatment).<sup>89</sup> Thus it may be difficult to pursue cases of harassment under the gender equality and equal treatment law alone, but general principles of employment law might also be relevant. This, however, may raise questions concerning the mandate of the equality bodies, so that in mixed cases it might not be effective to submit complaints to the equality bodies.

## **FINLAND – Kevät Nousiainen**

### **1. General situation**

1.1 Sexual harassment and harassment on the grounds of sex are prohibited under the Act on Equality between Women and Men (609/1986), and, since a recent amendment of the Act, defined by the Act. In spite of the amendment, individuals may still remain unaware of the exact nature of harassment as a prohibited form of sex discrimination. There are several reasons for assuming so. Firstly, Finnish culture in general tends to be sexually outspoken, and employees are expected to be able to face overtly sexual remarks and jokes. Although harassment has been prohibited for a long time, the requirement that the harassed person must him/herself clearly express that the conduct of the harasser is unwanted is quite strong. Thus, the victim has been largely responsible for stopping the harassment, even in gross cases where

<sup>89</sup> Email communication by the Gender Equality and Equal Treatment Commissioner, 10 August 2011.

the discriminatory nature of the conduct is objectively evident. In a culture where everyone is expected to be 'a good guy' and not be easily offended, it is not always easy to object to harassment. Secondly, harassment has been dealt with mainly as an issue of occupational health, which on the one hand has helped the recognition of harm caused by harassment, but which on the other hand has also steered attention away from the gender discrimination dimension of such harm.

1.2 Statistics may either relate to cases handled by authorities including courts, or be based on information concerning prevalence of harassment among the population. Statistics Finland publishes various statistics under the heading of Justice. Court statistics record statistics on court cases, but the cases are categorised too generally to be helpful in this context. Statistics Finland may make special studies on demand, but none on harassment seems to be available.

Due to problems of clarity in definition, it is difficult to assess the occurrence of sexual harassment and harassment on the grounds of sex accurately, even in studies of the barometer type. A good example of the lack of clarity in the area is shown by the barometer studies on the quality of working life from the perspective of the employees, carried out by the Ministry of Employment and Economy, which since 2004 have contained questions on 'bullying and mental violence'. Bullying and mental violence are defined in the questionnaire as 'isolating, obliterating, threatening, speaking behind the back or otherwise putting pressure on an employee'. It is obvious that the definition partly coincides with that of harassment, and persons reporting 'bullying and mental violence' often refer to harassment. Only the barometer for 2008 contained gender-segregated information. In the 2008 barometer, 7 % of the female respondents and just 1 % of the male respondents had then noticed such behaviour. The outcome points to highly gendered experiences of 'bullying and discrimination',<sup>90</sup> and strengthens the assumption that the figures also reflect harassment. The figures on gendered experiences have not been followed up by later barometer studies, however.

There are a number of social-science studies on sexual harassment in working life in general,<sup>91</sup> or in different fields such as higher education.<sup>92</sup> The latter studies were often carried out in the context of equality planning of the Finnish universities. Equality planning materials made at workplaces or by authorities and educational institutions (which are all required to establish equality planning programmes) often produce information on sexual harassment or harassment on the grounds of sex. The earlier studies usually concentrated on sexual harassment, and even today harassment on the grounds of sex is commonly understood as bullying rather than gender discrimination. Harassment of students in educational institutions has also been discussed to some extent because of the positive duty to establish equality planning programmes. At the moment, all other educational institutions save those offering basic education have a positive duty to promote gender equality, and the need to tackle harassment often arises in these circumstances. When the Government Report on Gender Equality, presented to the Parliament in October 2010,<sup>93</sup> was discussed in Parliament, the Employment and Equality Committee of Parliament in its opinion in February 2011<sup>94</sup> stated that even schools offering basic education should be obliged to establish equality planning programmes.

Equality planning also brought media attention to harassment in Parliament. In recent years, the prevalence of sexual harassment in Parliament has occasionally been hinted at in the media. The public discussion climaxed in 2008. The Parliamentary Office (the administrative body of Parliament) made a study of how its personnel experienced equality at

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<sup>90</sup> *Työolobarometri 2008*. Ministry of Employment and Economy Publications; Employment and Entrepreneurship 33/2009.

<sup>91</sup> For example Varsa 1993 (see Bibliography) contains figures of and descriptions on the prevalence of sexual harassment in working life.

<sup>92</sup> Mankinen 1995 is a study of sexual harassment at the University of Helsinki; and Heikkinen 2003 concentrates on the University of Oulu (see Bibliography).

<sup>93</sup> Government Report on Gender Equality to the Parliament, Government Report to Parliament 7/2010 (*Valtioneuvoston selonteko naisten ja miesten välisestä tasa-arvosta*, VNS 7/2010 vp).

<sup>94</sup> Report of the Parliamentary Employment and Equality Committee 18, 2010 vp. dated 25 February 2011.

work in 2007. The study, carried out by researcher Hertta Niemi, showed that women employed in the Office were clearly less satisfied with the state of gender equality in their workplace than men. Many of the women reported verbal harassment.<sup>95</sup> The media started to cover the issue, and in January 2008 the largest daily newspaper named seven male MPs, who had been pointed out as harassers by women working in Parliament. There was further follow-up of the issue in other newspapers and TV channels. Five of the MPs brought a case before the Council of Mass Media in Finland (a self-regulative body for the media), which found no fault in the manner in which the media had presented the issue. One of the MPs further claimed defamation in a TV interview he gave on the issue, and a case of aggravated defamation was brought before the Helsinki District Court in 2010. Under Finnish law, defamation in mass media aggravates the offence. On the other hand, criticism directed at a person's activities in politics or in some other public activity that does not obviously overstep the limits of propriety does not constitute defamation (Penal Code Chapter 24, Sections 9 and 10). The Turku Appellate Court decided in 2011 that the reporter had sufficient grounds for the allegations on sexual harassment, especially taking into account the significance of freedom of speech.

The alleged harassment in Parliament has attracted much attention to the problem, but the media attention has concentrated more on the freedom of speech angle than on the problem of harassment as such. The public discussion has concentrated on the alleged harassment of parliamentary employees, especially young female assistants to some male MPs. Harassment by MPs is problematic especially because the provisions on compensation for discrimination under the Act on Equality do not apply to parliamentary activities that are related to the functions of Members of Parliament. It thus grants MPs impunity, or at least imposes lower sanctions on MPs than on other persons. No questions have been raised as to whether this exception is acceptable from the point of view of EU law.

1.3 The debate caused by the harassment cases in Parliament has somewhat overshadowed other aspects of employment and self-employment related harassment. Harassment in the access to and supply of goods and services has been very little debated. Altogether, the transposition of Directive 2006/54/EC caused rather negative debates in Parliament, where many MPs considered sanctioned prohibition of discrimination in these areas unnecessary and harmful to small entrepreneurs. The fact that persons working in social and health services often experience bullying and violence by customers or patients is well-known, but in spite of the personnel being largely female, the problem has not been considered in terms of gender discrimination, but as an occupational health risk.

Sexual harassment at schools and other educational institutions has been a topic of debate to some extent, and the positive duty to establish equality planning programmes tends to keep the debate going.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### **2.1.1. Transposition**

Sexual harassment and harassment on the grounds of sex have been prohibited as discrimination by the Act on Equality between Women and Men (609/1986) since 2005. The Act was amended in 2009 so as to include a definition of sexual harassment and harassment on the grounds of sex. The amendment was made after the Commission had sent a reasoned opinion to Finland concerning the lack of definition of harassment in Finnish legislation. Since an amendment of the Act on Equality in 2005, sexual harassment and harassment on the grounds of gender had been prohibited forms of discrimination, but not defined in the Act,

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<sup>95</sup> Hertta Niemi later published a study of the Parliament's equality planning exercise and the media follow-up on harassment by MPs in her doctoral study, Niemi 2010 (see Bibliography).

merely in the preparatory works.<sup>96</sup> The preparatory works, as well as former Finnish doctrine and guidelines, also required that an employee was to clearly indicate that s/he considered an act as unwanted in order for it to be considered harassment. Directive 2002/73/EC provides, however, that ‘a person’s rejection of, or submission to, harassment or sexual harassment may not be used as a basis for a decision affecting that person’. The preparatory works for the 2009 amendment<sup>97</sup> raised the question of how the provision relates to this strict Finnish requirement that the victim clearly rejects the conduct of the harasser. No answer is provided in the preparatory works, however.

The Commission’s reasoned opinion required that, in order to fulfil the requirement of legal certainty, the definitions of harassment and sexual harassment should be inserted into the Act. The Commission pointed out that a definition of harassment based on the grounds of sex as ‘unwanted behaviour based on sex, but not sexual in character’ (the wording of the Act as it was before the amendment) did not contain the detailed contents of the definition in Directive 2002/73/EC (and thus the Recast Directive). Even the preparatory works did not differentiate clearly between the two forms prohibited under EU law, although some examples of harassment on the grounds of sex were given, such as disparaging speech and other degrading activities or bullying at work, and an abstract legal definition was lacking. Such a definition is required in order for individuals to fully understand their rights. Finland promised to include such a definition in the Act on Equality, and the Act was amended accordingly in 2009.

### 2.1.2. Definitions

In its present form, Section 7 of the Act on Equality contains a prohibition of discrimination on the grounds of sex, and a definition of direct and indirect discrimination. Subsection 7(5) prohibits sexual harassment and harassment on the grounds of sex as discrimination, and Subsections 6 and 7 define harassment as prohibited discrimination as follows:

‘Sexual harassment under this Act refers to verbal, non-verbal or physical unwanted conduct of a sexual nature, which on purpose or de facto violates the mental or physical integrity of a person, in particular by creating an intimidating (or threatening, *uhkaava* in Finnish), hostile, degrading, humiliating or offensive environment (or atmosphere, *ilmapiiri* in Finnish).

Harassment on the grounds of sex under this Act refers to unwanted conduct related to the sex of a person, which is not of a sexual nature, and which on purpose or de facto violates the mental or physical integrity of the person, in particular by creating an intimidating, hostile, degrading, humiliating or offensive environment’.

The definitions follow the wording of Directives 2006/54 and 2004/113/EC, with minor differences.

The words ‘on purpose or de facto’ (*tarkoituksellisesti tai tosiasiallisesti*) seem to cover both purpose and effect of violating the dignity of a person. It is clear that the conduct does not need to be intentional in order to be discriminatory. Problems may arise with the ‘unwanted’ character of the conduct, as it is not clear how this is to be established. The Finnish general understanding underlines the idea that a person must clearly indicate that the other person’s conduct is unwanted.

The guidelines provided on the website of the Equality Ombud against harassment and sexual harassment note that if the employer him/herself, or a person in a responsible position, harasses an employee, the harassed person does not need to inform the representative of the employer. The harassed person, however, has *prima facie* responsibility to clearly indicate to the harasser that his/her conduct is repulsive, unless there are particular grounds for not doing so. For example, if the harasser threatens the harassed person that his/her position will be weakened at work unless s/he submits to harassment, the expression of rejection shall not be regarded, or where a person should have, by common consideration, understood that his/her

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<sup>96</sup> Government Bill HE 195/2004 vp.

<sup>97</sup> Government Bill HE 44/2009 vp.



conduct is harassing or unwanted, the harassed person cannot be considered responsible for showing how s/he experiences the conduct.’<sup>98</sup>

The guidelines by occupational safety authorities are somewhat different. The harassed person at the workplace shall ‘at once – effectively and directly – express to the harasser that s/he does not accept the other’s conduct. If this does not help, or if the harassed person does not dare to do so, s/he must ask the help of a colleague or the representative of the employees and together ask the harasser to change his/her conduct. If the harassed person does not react, it is a message to the harasser that the other person accepts to be a victim (...) If the harassed person has effectively expressed to the harasser that s/he does not accept his/her conduct, the harasser may be considered to be aware of the negative effect of his/her conduct and to continue harassment intentionally after that point (...)’.<sup>99</sup>

Also the major national social partners have produced, in mutual consultation, guidelines against sexual harassment at work. The guidelines describe sexual harassment as follows: ‘Sexual harassment is unwanted and one-sided (...) [conduct is] harassment at least when the person who is the object of the conduct has expressed that s/he considers it degrading or repulsive. The subjective experience is the starting point. What is experienced as harassment depends on the person, situation, relation and interaction between persons and earlier experience.’ The booklet lists different examples of conduct that may be experienced as degrading, and adds that the gravest cases may be crimes, such as rape or attempted rape. The guidelines seem to require a clear expression of rejection by the victim in order for conduct to be considered harassment.<sup>100</sup>

The Ombudsman’s guidelines refer to situations where objective grounds for understanding that a person’s conduct is harassment apply, where the victim does not need to express rejection. Other guidelines available through the Internet require effective and direct rejection by the harasser, and the requirement of rejecting harassment seems to add an element of intentionality to the definition even in the civil-law based Act on Equality.

Harassment is not prohibited under the Finnish Penal Code, but there are several provisions that may be relevant, either where harassment consists of taking advantage of a person who is dependent on the harasser, or where harassment may be considered as work discrimination or occupational safety offence, see 3.1 below.

The definitions of harassment and sexual harassment are inserted in the same section of the Act on Equality as the prohibition of discrimination, so that Subsection 7(5) provides that sexual harassment and harassment on the grounds of sex are to be considered discrimination, and the definitions of the two types of harassment follow as Subsections 7(6) and 7(7).

### *2.1.3. Sexual harassment*

Sexual harassment is conceptualised as sex discrimination, and prohibited under Act on Equality which only covers discrimination on the grounds of sex. So far, not even sexual harassment of transsexual persons has not been under discussion, although it is generally accepted that the Act on Equality covers discrimination against this group.

### *2.1.4. Scope*

The scope of the prohibition of harassment (on the grounds of sex) and sexual harassment covers employment, although under Section 2(2), provisions on compensation for discrimination do not apply to parliamentary activities that are related to the functions of Members of Parliament or acts of the President. Ensuing problems are discussed under 1.2. Section 8d of the Act on Equality specifies that the conduct of an employer is to be considered prohibited discrimination, when the employer, after having been informed that an employee has been the victim of sexual or other harassment based on sex, has neglected to take action to stop the harassment.

<sup>98</sup> <http://www.tasa-arvo.fi/syrjinta/hairsta/tyopaikoilla>, accessed 19 August 2011.

<sup>99</sup> <http://www.tyosuojelu.fi/fi/kohtelu>, accessed 19 August 2011.

<sup>100</sup> *Hyvä käytös sallittu - häirintä kielletty! Ohjeita työpaikoille sukupuolisen häirinnän ja ahdistelun varalta.* Booklet available in PDF form on the websites of major social partners.

Section 8e of the Act, which transposed Directive 2004/113/EC, does not explicitly prohibit harassment but more generally discrimination in the supply of goods and services. That harassment is also prohibited in this context is to be understood from Section 7, which defines discrimination and also defines sexual harassment and harassment as discrimination. The responsibility of the provider of goods or services first begins when the provider has been informed of harassment.

Similarly, the Act prohibits discrimination in educational institutions, save those offering basic education (8b), and in labour market organisations (8c). The responsibility of the educational institution first begins when discrimination has been brought to the knowledge of a person responsible for the institution, but they do not take measures to stop the harassment. Similarly, the labour market organisation becomes responsible when it has been informed of harassment.

#### *2.1.5. Addressee*

- a) Section 8d on harassment in the workplace is addressed at the employer. The harasser does not need to be the employer or somebody in a managing position, but when these persons harass an employee, there is no need to inform the employer about harassment. Where a fellow employee is the harasser, it is necessary to inform the employer or employer representative, after which point the employer has the responsibility to stop the harassment.
- b) Section 8e on discrimination in the supply of goods and services is addressed at the provider of such services. The provision is understood to cover harassment by the provider of services and his/her representative.

#### *2.1.6. Preventive measures*

Employers (Section 6) and educational institutions (Section 6b) have a positive duty to promote equality, also by preventing discrimination. Section 6, which obligates employers, merely refers to preventing discrimination in general. The provision must, however, be understood as also including prevention of harassment. Section 6b, which obligates educational institutions, expressly requires that, in equality planning, special attention is to be paid to preventing and removing sexual harassment and harassment on the grounds of sex. The said provisions were enacted already in 2005, and not in order to transpose Directives 2006/54/EC and 2004/113/EC. For example, the equality plan of Helsinki University contains guidelines on harassment, addressed to the heads of units, personnel and students.<sup>101</sup> The guidelines refer both to harassment as an occupational safety hazard and as a form of prohibited discrimination. The preventive aspects of the guidelines involve courses for the persons in charge, aiming at better recognition of harassment and adequate handling of the problem.

As discussed under 2.1.2, the social partners have, in mutual consultation, produced materials against harassment. These materials are somewhat outdated. They concentrate on sexual harassment, and harassment on the grounds of sex has received little or no attention. I have not found collective agreements which would deal with the issue.

The Framework Agreement on harassment and violence at work (2007) is mentioned on the websites of several social partners.<sup>102</sup> I have found no explicit measures of implementation of Article 4 of the Agreement, however.

#### *2.1.7. Procedures*

The guidelines by the Equality Ombudsman, occupational safety authorities and social partners all advise the victim on how to proceed in a case of harassment. The victim is to

<sup>101</sup> [http://www.helsinki.fi/henkos/tasa-arvo/sukup\\_hairinnan\\_ehkaisy.htm](http://www.helsinki.fi/henkos/tasa-arvo/sukup_hairinnan_ehkaisy.htm), accessed 14.8.2011.

<sup>102</sup> For example, the municipal employers refer to the agreement, see <http://www.kuntatyonantajat.fi/tyoelaman-kehittaminen/tyohyvinvointi/Sivut/tyossa-tapahtuvaa-hairintaa-ja-vakivaltaa-koskeva-itsenainen-puitesopimus.aspx>. Similarly, the Finnish Confederation of Professionals, STTK, see <http://www.sttk.fi/fi/tyohyvinvointi/tyoterveys-ja-turvallisuus-eurooppalainen-puitesopimus-vakivallasta-ja-hairinnasta/>, accessed 14 august 2011.

reject conduct felt by the victim to be harassment, and if it does not stop, to inform the employer, his/her representative or a representative of the employees. In an early case, the victim had informed healthcare personnel, which was not considered sufficient, although the harasser was the head of the office and the only representative of the employer.

Many employers, such as universities, have established guidelines on the procedure to be followed in cases of harassment, specifying more in detail the party or parties to be informed, and how the employer then proceeds to handle the case, how the person accused of harassment is to be heard, etc. In public employment, measures and procedures follow the general provisions for sanctions against an official who has failed to perform his/her duties (warning or dismissal, Sections 24 and 33 of Act on State Officials, 750/1994, and Sections 35, 47 and of Act on Municipal Office Holders 3004/2003).

#### *2.1.8. Burden of proof*

The provision on burden of proof does not mention harassment cases. The general rule under Section 9a of the Act on Equality is that the person who claims that s/he has been discriminated against shall present facts on the basis of which it may be assumed that discrimination on the grounds of sex is at hand. The defendant shall then show that equality of the sexes has not been violated, but that other, acceptable reasons underlie his or her conduct. No comparator is required in harassment cases.

#### *2.1.9. Remedies and sanctions*

The victim of harassment may demand compensation, when harassment has taken place in employment, in an educational institution, in a labour market organisation, or in the access to or the supply of goods and provisions (Section 11 of the Act on Equality). There are other remedies, provided for in occupational safety and employment contract legislation, as well as in the Penal Code. Under the Employment Contract Act (55/2001), the employer is liable for a loss to the employee caused through fault or negligence by the employer's representative (Section 1:9 of the Act). Serious breach or neglect of employment contract based obligations may constitute a reason for dismissal of an employee, but, unless such breach is grave, the employee must first be warned. A harasser is more likely to be warned than dismissed, unless a very grave case of harassment is in question – especially bearing in mind the requirement that the victim shall clearly indicate to the harasser that the latter's behaviour is unwelcome.

#### *2.1.10. Compliance with EU law*

The exemption for MPs in the scope of the Act on Equality Section 2(2), discussed in 1.2, especially if taken to mean that an MP's discriminatory conduct, even against an employee of Parliament working for him/her cannot lead to compensation for the victim is, in my mind, not in line with EU law. The interpretation requiring that the victim in practice must always reject discriminatory conduct in order for it to constitute harassment, discussed in 2.1.2, is problematic considering the fact that even unintentional discrimination is prohibited under EU law. The question is whether 'unwanted' conduct may consist of conduct which would be commonly or objectively considered so, or only conduct rejected by the victim.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

A case decided by the Supreme Court in 2010<sup>103</sup> concerned sexual harassment of several young women by their superior. The women in question were working at night in an ambulance service, and the harassment took place in their rest room. The Supreme Court noted that the Act on Equality, as well as the Employment Contracts Act (55/2001), Chapter 2 Section 2, which contains a prohibition of discrimination, and the Occupational Safety Act (738/2002), Section 28, all aim at equal treatment of the sexes in working life. The failure of the employer to fulfil the duty to remove sexual harassment in itself was discrimination under

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<sup>103</sup> KKO:2010:1.

the Act on Equality, and the Act on Equality as well as the other relevant provisions, do not require any comparison with other employees in the context of harassment. Any conduct of the employer and his/her representative at work containing harassment is discrimination in employment, and punishable under the Penal Code Chapter 47.<sup>104</sup> The harasser was also accused of sexual abuse, Chapter 20 Section 5 Subsection 4 of the Penal Code. The Supreme Court upheld the decision of the appellate court, which found the defendant guilty of both sexual abuse and employment discrimination. The decision links sexual harassment in employment with employment discrimination under the Penal Code and thus offers criminal law protection for victims.

### *2.2.2. Main features of case law*

- a) Early case law on harassment based on the provision in force before 2005 can no longer be considered relevant, but it may be said that it was difficult to bring a successful case of harassment to court. In some cases, harassment was dealt with by other means than bringing the case to court. For example, in a notorious case in 2001, the head of the Finnish company which holds the state monopoly for money games (Veikkaus Oy) was dismissed for having harassed his employees. The legal base in dealing with harassment at the time was limited. Prof. Emeritus Pirkko K. Koskinen was appointed to assess the alleged harassment, and the head of the company was dismissed on the basis of her report. The recent Supreme Court decision (see 2.2.1) is important, as it concerns the complicated relation between non-discrimination, occupational safety and criminal-law provisions.
- b) Case law on harassment related to goods and services seems to be lacking. The cause for the lack of cases may reflect the fact that harassment related to employment is often treated as an occupational safety issue. The mechanism for addressing harassment related to goods and services is much weaker.

## **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

### *3.1. National provisions*

The Occupational Safety and Health Act (738/2002) contains provisions on harassment. Section 28 reads as follows: 'If harassment or other inappropriate treatment of an employee occurs at work and causes hazards or risks to the employee's health, the employer, after becoming aware of the matter, shall by available means take measures for remedying this situation.' The preparatory works for the Act state that the harassment under the relevant Section also covers sexual harassment. As harassment is defined in relation to the health risk, rather than violation of human dignity, the manner in which harassment is perceived is not suited to emphasizing the discriminatory nature of harassment. Because occupational health authorities have a much stronger presence at the workplace than equality authorities, the provision of the Occupational Safety and Health Act may have had more practical importance than the Equality Act provisions.

The criminal offence of sexual abuse, Chapter 20 Section 5 Subsection 4 of the Penal Code, has been applied to harassment. The provision concerns cases where the offender 'blatantly takes advantage' of someone who is 'especially dependent on the offender'. Work safety offences under Chapter 47 of the Penal Code may also cover cases of harassment. Section 1 sanctions intentional or negligent violation of work safety regulations by an employer or his/her representative. As harassment is a work safety offence (see in 3), the provision brings harassment of a certain type under criminal law. Further, Section 3 of Chapter 47 on work discrimination covers employers placing an applicant for a job or an employee in an inferior position based on, among other grounds, sex, and Section 3a contains an aggravated form of the offence, in cases where the applicant's or employee's economic or other type of dependent position or distress is used in placing him/her in an inferior position. All these provisions have been applied in case law, see in 2.2.1.

<sup>104</sup> KKO:2010:1: 23 and 24 of the decision.

### **3.2. Collective agreements**

Rather than collective agreements, guidelines by social partners have been used. As pointed out above, the guidelines date from a time before the latest amendments of the Act on Equality, and also reflect the strong emphasis on occupational safety measures in addressing harassment.

### **3.3. Additional measures**

In notorious harassment cases in Parliament and in the money games company (see above), media attention has been important.

### **3.4. Harassment and stress at work**

Because harassment has been treated as an occupational health hazard, discussion on harassment in Finland has been much intertwined with all indications of work environment hazards.

### **3.5. Additional information**

The relationship between violence, sexual offences and harassment is important, especially because criminal law and non-discrimination law provisions and measures often coincide, as may be seen in the case described in 2.2.1.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

The added value of considering harassment as discrimination (rather than an occupational health risk) is in drawing attention to the protection of human dignity, and unequal relations in society. Merely concentrating on health risks tends to deflate that aspect. In Finnish law, addressing harassment in the workplace and receiving compensation are not primarily effected through non-discrimination law.

## **FRANCE – Sylvaine Laulom**

### **1. General situation**

In France, the first piece of legislation on sexual harassment was enacted in 1992, mainly at the request of the women's movement. The relevant Bill introduced sexual harassment as an offence within a section of the Penal Code dedicated to sex-related offences. At the time, sexual harassment was narrowly defined as the fact of harassing anyone using orders, threats or constraint, in order to obtain favours of a sexual nature, by a person abusing the authority conferred on him by his position. The definition was extended afterwards.

In 1998, a book on moral harassment was published in France, which contributed to the development of a public debate on this phenomenon in France.<sup>105</sup> Following this debate, a law was adopted in 2002<sup>106</sup> (the Social Modernization Act) to define and prohibit moral harassment, which was mainly addressed as a specific health and safety issue and was not linked to the issue of discrimination. Harassment and sexual harassment were not defined in relation to discrimination. In addition to labour-law provisions, the Social Modernization Act also introduces specific penal provisions regarding moral harassment. Indeed, Article 222-33-3 of the Penal Code integrates the French Labour Code definition of moral harassment, making it punishable by a penalty of one year's imprisonment and a fine of EUR 15 000. A

<sup>105</sup> M.-F. Hirigoyen *Le harcèlement moral, la violence perverse au quotidien* Syros, 1998.

<sup>106</sup> *Loi n° 2002-73 du 17 janvier 2002 de modernisation sociale.*

new Act came into effect in 2008 (the Anti-Discrimination Act)<sup>107</sup> to achieve the implementation of Directive 2002/73/EC, Directive 2004/113/EC and Directive 2006/54/EC. The Act introduced into French law the definition of moral harassment and sexual harassment in accordance with the definition provided by the Directives.

Since the adoption of these regulations on harassment, there has been a significant development of case law on this issue. The HALDE (the French High Authority for Equal Opportunities and Anti-Discrimination) has also contributed to the definition of the legal regime of harassment.

In May 2008, a report was published not on harassment as such but on hostile behaviour at work.<sup>108</sup> According to the report, 17 % of the workers said that they were confronted with hostile behaviour from co-workers and that this situation prejudiced their health. One out of four workers stated that they had been confronted with such behaviour at least once. Women are slightly more frequently affected by these situations. It also seems that there are many judicial cases on moral harassment, and that very often tribunals do not recognize the existence of harassment.<sup>109</sup>

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The provisions concerning harassment on the ground of sex and sexual harassment were transposed by the Anti-Discrimination Act of 27 May 2008. Article 2(2)(a) of Directive 2006/54/EC has been transposed in Article 1 of the Anti-Discrimination Act, which states that discrimination includes ‘any action relating to one of the reasons mentioned in the first paragraph and any action with a sexual connotation, to which a person is subjected, with the purpose or effect of violating their dignity or creating a hostile, degrading, humiliating or offensive environment’

#### *2.1.2. Definitions*

According to Article L.1152-1 of the Labour Code, employees shall not be subjected to repeated actions constituting moral harassment the aim or effect of which may result in a deterioration of their working conditions and which are likely to violate their rights and dignity, impair their physical or mental health, or jeopardize their professional future. This definition refers, as the Directive does, to the purpose or effect of violating the dignity of a person. This definition of the Labour Code has been completed by another definition in the 2008 Anti-Discrimination Act (see above) which now defines harassment as a form of discrimination on the grounds of sex, and also on other grounds (religion, belief, disability, age, sexual orientation, racial or ethnic origin). It also includes unintentional harassment. However, the 2008 Act has not repealed the existing definition. As a result, there are now two different definitions of moral harassment under French law, applicable in different circumstances. The existence of two definitions (in addition to the one in the Penal Code which is similar to the one in the Labour Code) creates a new complexity in the application of the law. This could create some problems of coordination, as two different definitions of harassment could now concurrently apply. As harassment has been defined as a form of discrimination in the 2008 Anti-Discrimination Act, the entire discrimination regime applies to harassment.

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<sup>107</sup> *Loi n°2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations.*

<sup>108</sup> ‘Un salarié sur six estime être l’objet de comportements hostiles dans le cadre de son travail’ Dares Premières Synthèses Informations, Mai 2008, n°22.2.

<sup>109</sup> P. Adam ‘Petite balade dans le contentieux prud’homal du harcèlement moral’ SSL 2007, n°1315.

### 2.1.3. Sexual harassment

Here, again, there are now two definitions of sexual harassment. Article L.1153-1 of the Labour Code and Article 222-33 of the Penal Code prohibit sexual harassment defined as any action of a person for the purpose of obtaining favours of a sexual nature. However, Article 1 of the 2008 Anti-Discrimination Act defines sexual harassment more extensively as ‘any action with a sexual connotation to which a person is subjected, with the purpose or effect of violating their dignity or creating a hostile, degrading, humiliating or offensive environment’. Thus, creating an offensive environment is now prohibited whereas before 2008, only actions for the purpose of obtaining favours of a sexual nature were condemned.

Although sexual harassment is not explicitly conceptualized as a form of sex discrimination, it is very often analysed as such.

### 2.1.4. Scope

French legislation has the same scope as Directives 2006/54/EC and 2004/113/EC. It covers working conditions (including access to employment, vocational training and promotion), the private and the public sector, and it now also covers access to and supply of goods and services. The 2008 Act does not exclude, as the 2004/113 Directive does, the non-discrimination principle for the content of media or advertising. Concerning public or private education, the Act merely states that the non-discrimination principle does not prohibit the organisation of non-mixed schools but it leaves open the application of the principle of non-discrimination and harassment to education.

### 2.1.5. Addressee

In employment, the definition of harassment includes harassment between workers of the same rank or even between workers of different ranks. Harassment can also be engaged in by a person who does not belong to the company, e.g. a customer. There is no need for the harasser to have a management position or to have authority over the harassed worker. It does not mean that the employer is not responsible for the harassment situation. According to Article L.4121-1 of the Labour Code, the employer has a general obligation of prevention and since 2002 employers are obliged to prevent impairment to workers’ mental health and risks linked to moral harassment.

In the field of goods and services, it is difficult to identify the addressee but it should be the person that offers the goods and services.

### 2.1.6. Preventive measures

According to Article 4121-2 of the Labour Code (which includes obligations of employers on health and safety issues), the employer must prepare a coherent prevention plan, integrating technical aspects, work organisation, working conditions, social relations, and environmental factors, particularly risks relating to moral harassment. This obligation is completed by Article L.1152-4 of the French Labour Code, specifying that employers must take all necessary steps to prevent moral harassment. The prevention of sexual harassment is not so explicitly provided but it should be taken into account by the employer. Training measures specifically addressing management in order to prevent and recognize harassment practices are the most frequently used of the prevention measures. Workers’ representatives and specifically the Committee on Health, Safety and Working Conditions are informed and consulted on the adoption of preventive measures and they can contribute to their definition.

The ‘company regulations’ (*règlement intérieur*), which are the internal policy directives applicable in the workplace, must include some information on harassment, mainly the prohibition of moral and sexual harassment, and the prohibition of discrimination for the victim and witnesses.

Social Partners transposed the Framework Agreement on harassment and violence at work by signing a national intersectoral agreement on 26 March 2010.<sup>110</sup> Article 4 of the

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<sup>110</sup> P. Adam ‘Une lecture de l’accord du 26 mars 2010 sur le harcèlement et la violence au travail’ RDT 2010, p. 428.

Framework Agreement has been implemented in very similar terms. However, the French agreement is also a framework agreement and it is up to the social partners at sectoral levels to negotiate more specific procedures at these levels.

#### *2.1.7. Procedures*

Since 2002, Article L.1152-6 of the Labour Code has provided for a mediation procedure which can be initiated by any person in an enterprise who feels that they have been a victim of moral harassment or by the person accused of that action (this procedure does not apply for sexual harassment). The mediator, chosen by agreement between the claimant and the employer, attempts to reconcile their differences and submits written proposals to stop the harassment. If mediation fails, the mediator informs the parties of any applicable penalties and the protection granted to the victim under the complaints procedure. However, this mediation procedure is not mandatory, and it does not seem to be used very often as it does not really seem to be suitable to harassment issues.

Before the transposition of the Framework Agreement on harassment and violence at work, employers did not have any legal obligation to establish a complaints procedure or committee. In practice, many companies have their own complaints procedure for alleged victims of harassment. With the conclusion of the national agreement, employers have to establish such a procedure. The national agreement also refers to a right of the workers which could also apply in cases of harassment: the right of alert. This right can be used by staff delegates in the event of breach of rights of the person or of individual freedoms within the company, and staff delegates can require the employer to investigate and put an end to the situation. If the employer remains silent, an action can be brought before a court by the employee or the staff delegate.

All these procedures apply to employment relationships, there is no specific procedure for good and services

#### *2.1.8. Burden of proof*

The general burden of proof rules regarding discrimination are applicable in cases of harassment on the grounds of sex, sexual harassment and moral harassment (Article L.1154-1 of the Labour Code). These rules also apply for civil servants but they do not apply in criminal proceedings. The provision of victimisation is also transposed and Article L.1152-2 of the Labour Code stipulates that employees must not be penalised, dismissed or subjected to discriminatory measures for being or refusing to be subjected to repeated instances of moral harassment or for bearing witness to or reporting such actions. In a recent decision, the *Cour de cassation* laid down that an employee who reported moral harassment must not be dismissed for that reason, except in cases where bad faith is shown, which may not result from the sole circumstance that allegations are not substantiated.<sup>111</sup>

#### *2.1.9. Remedies and sanctions*

In employment, different judicial actions are possible in cases of harassment with different remedies and sanctions.

If the employer is not the perpetrator of the harassment, he is still responsible for health and security matters. The employer has the obligation to ensure the worker's safety and it is, for the *Cour de cassation*, an obligation of result. As a consequence, failure to fulfil this obligation constitutes an inexcusable fault, when the employer was or should have been aware of the danger to which the worker was exposed and did not take the necessary steps to protect him/her. Even without any fault, the employer is still responsible if harassment occurs.<sup>112</sup> This responsibility, linked to the employer's obligation on health and safety, incites employers to take harassment seriously and to adopt preventive measures and internal complaints procedures.

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<sup>111</sup> Soc. 10 mars 2009, n°07-44.092.

<sup>112</sup> See Soc. 21 juin 2006, n°05-43914.



Penal sanctions are also possible against the harasser. Strangely enough, until 2010, the Labour Code and the Penal Code did not provide for the same sanctions for harassment. An Act, requested by the *Cour de cassation* in its annual report, was adopted in 2010<sup>113</sup> to harmonise the sanctions. Moral and sexual harassment are now punishable by a penalty of one year's imprisonment and a fine of EUR 15 000 (Articles 222-33 and 222-33-3 of the Penal Code and Article L. 1155-2 of the Labour Code).

Employees responsible for actions constituting moral or sexual harassment are also liable to disciplinary action, and dismissal for gross misconduct is possible. Disciplinary measures are expressly provided in cases of harassment (Articles L.1153-6 and L.1152-5). However, the *Cour de cassation* states that in application of Article L.1152-4 of the Labour Code, employers must take all necessary steps to prevent moral harassment, but the courts do not have the power to order the modification or termination of an employment contract. Consequently, the courts cannot order an employer to impose disciplinary measures on employees responsible for harassment. It is up to the employer to decide whether disciplinary measures are required.<sup>114</sup>

The victim has a right to full compensation of the harm caused by the harassment. If a dismissal has occurred, as a consequence of harassment, it will be null and void, and the employee will have the right to be reinstated (which is normally not the sanction for unfair dismissal). If he/she does not want to be reinstated, he/she will have the right to a compensation that is higher than in cases of 'normal' dismissal). More generally, all measures related to the relevant situation of harassment are null and void. The victim also has the possibility to have the consequences of the harassment for his/her health recognized as a work-related accident or an occupational disease. In this case, he/she has specific rights.

Regarding the access to and supply of goods and services, there are no specific sanctions defined. The same penal sanctions apply. According to civil-law rules, the victim will also have the right to full compensation of the harm caused by harassment. Article 4(3) of Directive 2004/113/EC has been transposed. A person's rejection of or submission to discrimination (which includes sexual harassment and harassment on the grounds of sex) must not be used as a basis for a decision affecting that person.<sup>115</sup>

#### *2.1.10. Compliance with EU law*

Since the adoption of the 2008 Anti-Discrimination Act, French law seems to be in conformity with EU Law. However, the existence of two different definitions of harassment, one related to sex discrimination and one without any link to discrimination, does not contribute to the clarity of the legal regulation of harassment.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

There are many decisions in France of national courts and the HALDE regarding moral harassment, and much fewer regarding sexual harassment. Most of the decisions are about harassment in employment and not in goods and services. Most of the decisions are also about moral harassment as it was defined before the 2008 Anti-Discrimination Act. Therefore, most of the decisions are about moral harassment in general, without any references to sex discrimination.

### *2.2.2. Main features of case law*

The definition of harassment is not so easy to apply in practice, which is why case law has been essential in order to more clearly define the notion of harassment.

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<sup>113</sup> Loi n° 2010-769, 9 juillet 2010, art. 35.

<sup>114</sup> Soc. 1 Juillet 2009, n° 07-44.482.

<sup>115</sup> Article 3, Loi n°2008-496, 27 mai 2008.

For the *Cour de cassation*, first the alleged facts must have a repetitive character. One single fact is not enough to characterise a situation of moral harassment,<sup>116</sup> but the *Cour de cassation* states that harassment could take place in a short period.<sup>117</sup> With the new definition of harassment on the ground of sex introduced in 2008, one single fact is now enough to identify such harassment. It has always been possible for only one fact to constitute sexual harassment. Situations of harassment vary widely from one case to another: it could be the fact of no longer being invited to meetings, a change in the conditions of employment (change of office, etc), a repetition of humiliating attitudes or words, excessive checks on the work done by the victim, giving an employee too much work or not giving him/her enough work or work which does not suit his/her qualifications, or useless work, etc.

Second, these practices must result in a deterioration in working conditions. However, this deterioration of working conditions is very often inherent to the situation itself and courts have an extensive interpretation of the concept of working conditions. Thirdly, these practices must have the purpose or effect of violating the victim's rights and dignity. Finally, these practices may affect (but this is not mandatory) the victim's health or his/her career. In two very important cases, the *Cour de cassation* states that moral harassment could occur even without malicious intent on the part of the perpetrator and considered that certain management methods constituted moral harassment when they consisted of repeated actions against an employee. In the first case,<sup>118</sup> the Court of Appeal considered that there was no harassment as the employee could not prove that the practices she criticised were intentional (humiliation and vexation by her superiors; her office was moved in her absence and her staff placed in one room etc). In contrast, the *Cour de cassation* decided that harassment could occur independently from the will of the perpetrator. This position had been discussed before, as in 2006, the *Cour de cassation* stated that harassment was necessarily intentional.<sup>119</sup> It is now clear that what is important is the effect of the practices of harassment and not the purpose. In the second case,<sup>120</sup> the *Cour de cassation* acknowledged that personal management methods can constitute moral harassment.

### 2.2.3. Dignity

Dignity is not really defined in case law and courts do not systematically consider this issue.<sup>121</sup>

It seems that the general idea in case law is that harassment itself constitutes a violation of the dignity of workers. It is not necessarily an effect, but rather one of its main characteristics.<sup>122</sup>

### 2.2.4. Restrictions

I am not aware of any case law showing conflict between the prohibition of harassment/sexual harassment and human rights and constitutional rights.

### 2.2.5. Role of equality bodies

The HALDE also plays a role in fighting harassment. Its decisions deal with harassment based on various grounds including gender and sexual harassment. For example, in one deliberation (deliberation n° 2008-72 of 14 April 2008), the HALDE states that sexual harassment is in itself discriminatory. The case was about an assistant manager, Mrs Christine H. Shortly after having been promoted to assistant manager, the claimant's work situation deteriorated. She was asked to stop participating in high-level meetings and refrain from behaving 'seductively'. Witness statements confirm her isolated situation. This harassment did not appear to arise from any professional problem. However, her superior sought, by all available means, information about her private life and particularly her love life. She was

<sup>116</sup> See for example, Soc. 15 avril 2008, n°07-40.290.

<sup>117</sup> Soc. 26 mai 2010, n°08-45.521.

<sup>118</sup> Soc. 10 nov. 2009, n°08-41.497.

<sup>119</sup> Soc. 21 juin 2006, n°Bull. civ. V, n°223.

<sup>120</sup> Soc. 10 nov. 2009, n°07-45.321.

<sup>121</sup> H. Gosselin 'Harcèlement moral: la nouvelle donne' *Semaine Sociale Lamy* 2010, n°1439.

<sup>122</sup> P. Adam 'Le harcèlement moral' *Répertoire du droit du travail* Dalloz, n° 108.

criticised for a lack of adaptability, humility and flexibility. A dismissal procedure was initiated. Several witnesses confirmed that her superior harassed the claimant on a sexist basis. She was given tasks requiring less and less skills and pushed aside, her employer did not start any serious investigations and ultimately dismissed her. There were enough factors to assume that the claimant was dismissed in retaliation for having complained of moral and sexual harassment. The HALDE presented its observations before the court.

The HALDE also states that employers are required to protect their employees, pursuant to their responsibility to ensure health and safety within the work environment. They must also prevent any type of retaliatory measures. Employers must inquire into allegations of harassment in a serious, in-depth and impartial manner. Transferring the victim to another position is an ill-suited response. The HALDE has recommended implementing a whistle-blowing procedure in which employees' complaints can be lodged and addressed. Training for management staff and human resources management departments to prevent and fight discriminatory harassment is a necessity.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

Health and safety provisions play an important role in regulating harassment and sexual harassment. The employer has the obligation to secure a safe environment at work (without harassment), which implies specific obligations, like the elaboration of a coherent prevention plan and a risk assessment report, and specific responsibilities if harassment has occurred in an enterprise.

#### **3.2. Collective agreements**

Social Partners transposed the Framework Agreement on harassment and violence at work by signing a national intersectoral agreement on 26 March 2010.<sup>123</sup> One of the results of this agreement should be the development of negotiations on these issues at sectoral and enterprise levels. However, at the moment it is too early to have any information on these negotiations.

#### **3.3. Additional measures**

There is no relevant information on this topic.

#### **3.4. Harassment and stress at work**

Stress and harassment are sometimes difficult to distinguish, especially since the *Cour de cassation* has acknowledged that personal management methods can constitute moral harassment. It is also difficult to distinguish between these two issues because they are both health and safety issues and the employer has the duty to create a work environment without harassment. When stress is linked to the organisation of work, it can also produce harassment

### **4. Added value of anti-discrimination approach**

#### **4.1. Added value**

Before the implementation of Recast Directive 2006/54/EC, moral harassment and sexual harassment were prohibited but they were not linked to discrimination (especially moral harassment). Without doubt, the transposition of the European definitions has widened the scope of the prohibition of harassment. For an act to constitute harassment on the grounds of sex it no longer needs to be repetitive, as was previously the case (although this repetition is still necessary to establish moral harassment). Another result is that victims of harassment will now more often link harassment to discrimination. Regarding sexual harassment, it was also more strictly defined before, as the definition did not include creating an intimidating,

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<sup>123</sup> P. Adam 'Une lecture de l'accord du 26 mars 2010 sur le harcèlement et la violence au travail' RDT 2010, p. 428.

hostile or offensive environment. The new definition and the consequences of the now famous Dominique Strauss-Kahn case could lead to less tolerance as regards a certain type of harassment often described as ‘flirtation’ or ‘seduction’ and improved understanding of this type of harassment. Recently, a lawyer still approved of a decision of a Court of Appeal which refused to acknowledge the existence of sexual harassment in a case where the superior of a woman offered her flowers, earrings, a ring and candles and expressed his love for her several times. The commentator of the decision approved of it, as it is necessary to distinguish between ‘seduction’, which is permitted, and harassment!<sup>124</sup>

#### 4.2. Pitfalls

One of the consequences of following a non-discrimination approach to combat harassment on the grounds of sex and sexual harassment could be a limited view of what constitutes a more general problem. If harassment could often be linked to discrimination, it is also possible to have harassment without discrimination. Would it therefore be necessary to distinguish between various types of harassment? Another consequence is that it stresses the prohibition of these practices and not the adoption of prevention measures, which are essential in fighting harassment. It seems to me that a health-and-safety approach could also lead to larger responsibility for employers.

### GERMANY – Ulrike Lembke

#### 1. General situation

Although feminist scholars have continuously been dealing with the topic, although the number of women entering the workforce has been increasing and will further increase, and although the implementation of the European anti-discrimination directives was subject to contentious public debates, there is still strong resistance to dealing with the problem of sexual harassment in Germany. Moreover, the concept of harassment on the ground of sex is nearly unknown. In 1990, almost three quarters of employed women in a nation-wide study in Western Germany reported experiences of sexual harassment.<sup>125</sup> The Employees Protection Act, enacted in 1994 to combat sexual harassment at the workplace, was implemented inadequately: A high number of unrecorded cases had to be assumed, most actors in the companies and in the courts had little knowledge regarding the law (or none at all) and the law was very seldom applied to harassment cases.<sup>126</sup> According to the 2004 representative study of violence against women in Germany, various forms of sexual harassment have been experienced by 58 % of the women interviewed; 42 % of these harassments took place in working life, vocational training or education.<sup>127</sup> A recent study shows that sexual harassment is still a serious problem for female soldiers.<sup>128</sup>

Public and even legal debates are generally restricted to sexual harassment at the workplace and mainly characterized by resistance, prejudices and lack of conceptualization. For many authors, the prohibitions of discriminatory harassment in the General Equal Treatment Act are the incarnation of all evil connected with European anti-discrimination law: American conditions, ‘political correctness terror’ and ‘conceptual colonisation’ of German civil law. Discriminatory harassment at the workplace forms a major obstacle to

<sup>124</sup> B. Py ‘De la prohibition de l’abus de pouvoir à la répression d’une ambiance?’ *Revue de droit du travail*, juin 2011, p. 348 contra M. Baldeck ‘Une définition rénovée pour un droit plus effectif’ *Revue de droit du travail*, juin 2011, p. 351.

<sup>125</sup> Monika Holzbecher et al. *Sexuelle Belästigung am Arbeitsplatz* 1990.

<sup>126</sup> Almut Pflüger et al. *Beschäftigtenschutzgesetz in der Praxis* 2002.

<sup>127</sup> Ursula Müller & Monika Schrötte *Lebenssituation, Sicherheit und Gesundheit von Frauen in Deutschland* 2005.

<sup>128</sup> According to Gerhard Kümmel *Truppenbild mit Dame. Eine sozialwissenschaftliche Begleituntersuchung zur Integration von Frauen in die Bundeswehr* 2008, sexist remarks are reported by 58 %, sexually motivated physical contacts by 19 % and sexual offences by 4.6 % of the female soldiers interviewed.

female access to paid work, appropriate working conditions, and promotion. Thus it has always been an important topic in feminist jurisprudence as well as in concepts of anti-discrimination law. Considerable challenges result from the distances between modern legislation, unsettled case law and hostile jurisprudence on discriminatory harassment.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

Section 3(3) and (4) of the General Equal Treatment Act,<sup>129</sup> which implements the European anti-discrimination directives, and Section 3(3) and (4) of the Law on Equal Treatment of Soldiers<sup>130</sup> contain definitions of harassment (on the ground of sex) and of sexual harassment. These definitions are identical to the definitions given by Directive 2006/54 in Article 2(1)(c) and (d) and Directive 2004/113/EC in Article 2(c). Article 2(2)(a) of Directive 2006/54/EC and Article 2(d) of Directive 2004/113/EC have not been (specifically) transposed. Harassment, sexual harassment and instruction to harass are violations of the official duties of soldiers under Section 7(2) of the Law on Equal Treatment of Soldiers.

#### *2.1.2. Definitions*

The definitions of harassment and sexual harassment in Section 3 of the General Equal Treatment Act and the Law on Equal Treatment of Soldiers are literally the same as in Article 2(c) of Directive 2004/113/EC and in Article 2(1)(c) and (d) of Directive 2006/54. According to the Directives, harassment and sexual harassment are defined as discrimination, whereas the General Equal Treatment Act and the Law on Equal Treatment of Soldiers do not employ the term discrimination anywhere, but *Benachteiligung* (putting at a disadvantage). This legal term is not intended to weaken the protection as compared to the Directives, but can be explained by the conflicts in connection with the adoption of equal treatment law in Germany.

The definitions of harassment and sexual harassment both refer to the purpose or effect of violating the dignity of a person. In these definitions, harassment and sexual harassment can be unintentional. But most of the sanctions against harassers at the workplace under the General Equal Treatment Act are labour law sanctions. Especially the dismissal on grounds of conduct under the Protection Against Dismissal Act requires fault (intent or negligence) on the part of the employee. In principle, the same applies to sanctions against harassers in the army under civil service law or public labour law. Therefore most of the commentaries on anti-discrimination law do not address the issue of unintentional sexual harassment. In criminal law, the prosecution of sexual harassment under sexual offences law as well as under libel law requires intent of the offender.

#### *2.1.3. Sexual harassment*

Under the General Equal Treatment Act, sexual harassment is not explicitly conceptualized as sex discrimination but as a *Benachteiligung* covering all grounds of discrimination listed in Section 1 of the Act. Because sexual harassment is not considered to be discrimination in the majority of academic publications, there has been no discussion on sexual harassment covering other grounds of discrimination. Under Section 1(2) of the Law on Equal Treatment of Soldiers, harassment and sexual harassment are forms of *Benachteiligungen* based on sex.

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<sup>129</sup> Allgemeines Gleichbehandlungsgesetz of 14 August 2006, Official Journal (Bundesgesetzblatt BGBI), part I p. 1897.

<sup>130</sup> Gesetz über die Gleichbehandlung Soldatinnen und Soldaten of 14 August 2006, Official Journal (Bundesgesetzblatt BGBI), part I p. 1897, 1904.

#### *2.1.4. Scope*

Concerning the prohibition of harassment, the General Equal Treatment Act covers all areas of employment, such as access to work, working conditions, and promotion, both in individual and collective agreements, vocational training and membership of, involvement in, and the benefits of employers' and employees' organisations, as well as social security, social benefits, education and the access to and supply of goods and services. So the scope of the prohibition of harassment goes beyond the requirements of the Directives covering the areas of social protection and education. With respect to the provision of goods and services, the General Equal Treatment Act might be difficult to justify under Directive 2004/113/EC by containing several exceptions.<sup>131</sup> Moreover, the prohibition of sexual harassment under Section 3(4) of the General Equal Treatment Act is restricted to the area of employment. According to the prevailing opinion of legal commentaries, this restriction is not applicable in the civil service and has to be eliminated for the private sector, education and the provision of goods and services by Directive-consistent interpretation. However, the clear transposition of Articles 2(d) of Directive 2004/113 and 2(b) of Directive 2006/54 appears to be preferable in the present author's view.

#### *2.1.5. Addressee*

In the area of employment the primary addressee of the harassment and sexual harassment prohibition is the employer (or somebody in a managing position acting on her/his behalf or the official supervisor), because she/he has to take effective measures against these Benachteiligungen under Section 12 of the General Equal Treatment Act and Section 10 of the Law on Equal Treatment of Soldiers. Because harassment and sexual harassment are prohibited for superiors as well as fellow workers, for third persons related to the workplace (e.g. customers, suppliers, patients etc.) and for fellow soldiers, all of them are addressees too. Concerning the provision of goods and services (restricted to so-called mass contracts and the provision of services under civil law), the addressee of the harassment and sexual harassment prohibition is the other contracting party.

#### *2.1.6. Preventive measures*

Under Section 12(1) and (2) of the General Equal Treatment Act employers have to take preventive measures against harassment and sexual harassment such as the provision of information about the topic, the offering of appropriate training courses or the adoption of codes of conduct. The law considers preventive measures to be especially important within the context of vocational training and further education. The sufficient offer of appropriate training courses under Section 12(2) shall imply the proper fulfilment of the obligation to take preventive measures under Section 12(1) which means that the employer is not liable for the first offence committed by one of her/his employees (so-called 'training defence').

Codes of conduct, agreements and guidelines tackling sex discrimination and prohibiting sexual harassment have been widespread in the civil service for a long time. For example, almost every university, higher education institution and local government has its own guidelines on sexual harassment. Equal Opportunity Commissioners play an important role in implementing and controlling measures for preventing harassment on the ground of sex and sexual harassment.

In the private sector, several works council agreements on non-discrimination and partnership at the workplace as well as codes of conduct include combating harassment and sexual harassment. With respect to these agreements and the scope of the newly enacted General Equal Treatment Act, the social partners BDA (Federal Association of German Employers) and DGB (Federation of German Trade Unions) decided in June 2008 that it was not necessary to take further action to implement the Framework agreement on harassment

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<sup>131</sup> The application is restricted to so-called mass contracts which are typically concluded irrespective of the identity of the other contracting party or where the identity is of small importance. Moreover, a landlord who rents out up to 50 apartments does not fall under the provision and nor do contracts which will bring the parties into close spatial contact or into relationships of trust or both parties being housed on the same piece of land.

and violence at work.<sup>132</sup> In 2010, German employers reported several implementation activities such as information, regular training courses, complaint procedures, general and group agreements with works councils, guidelines and integrity charters, regular meetings and exchange of views on the topic.<sup>133</sup> The majority of the employers adopted an anti-discrimination approach which is mostly due to the consideration of a close relationship between the Framework agreement, European anti-discrimination law and the General Equal Treatment Act.

Codes of conduct in larger companies are subject to the works council's right of co-determination under Section 87(1) of the Industrial Relations Act as long as no concluding regulation applies. The Federal Labour Court defined the extent of the General Equal Treatment Act's final settlement regarding sexual harassment in a recent decision.<sup>134</sup> Accordingly, the prohibition of unwanted physical contact or intrusiveness, gestures or comments of a sexual nature are covered by the provision in Section 3(4) of the General Equal Treatment Act, which is why the prohibition of these actions in a code of conduct cannot be co-determined, qualified or weakened by the works council. In contrast, the showing or distributing of pictures, cartoons or jokes with a sexual content cannot be prohibited without the works council's co-determination because these actions are considered not to be definitely regulated by Section 3(4) of the General Equal Treatment Act.<sup>135</sup> This decision (which covered more areas than the prohibition of sexual harassment) initiated a broader discussion about the question to which extent the employer is entitled to regulate the behaviour of her/his employees before violating their fundamental rights, esp. their personal rights and privacy.

#### *2.1.7. Procedures*

Harassed employees can file a complaint under Section 13 of the General Equal Treatment Act. The employer has to establish a specialised committee or to designate a concrete person, body or authority (ombudsman) to deal with these complaints. The complaint authority has to investigate the claim and inform the complainant of the outcome in due time. The harassed employee is not obliged to file an internal complaint before taking legal action but it might be advisable due to the regulations on legal costs in civil and labour law cases. It is very important to know that the statutory period for the assertion of damages etc. cannot be extended by filing an internal complaint. Criminal prosecution does not require a preceding internal complaint procedure.

There are no specific complaint procedures available for persons in case of alleged (sexual) harassment in connection with the provision of goods and services.

#### *2.1.8. Burden of proof*

Generally, there is a shift in the burden of proof in civil and labour law cases under Section 22 of the General Equal Treatment Act: If the claimants offer evidence allowing the conclusion that there was discrimination, the defendant has to show its absence. But this statutory easing of the burden of proof does not work in sexual harassment cases in practice. With respect to the severe sanctions for the alleged harasser, the claimant has to prove the sexual harassment and the violation of her/his dignity – whether there was discrimination or not, is of no greater importance to the courts. Many sexual harassment cases failed under former legislation due to lack of evidence, because harassment mostly takes place without witnesses. Moreover, a representative study commissioned by the Federal Ministry for Family, Senior Citizens,

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<sup>132</sup> Annual joint table on the implementation of the Framework agreement on harassment and violence at work (2008), available on: [http://ec.europa.eu/employment\\_social/dsw/public/dojsessionid=1LGTTTgS45XTLz21jFxN6npLVFhclFT6PgWq1QG860y3PyZK1186!977792517?id=8713](http://ec.europa.eu/employment_social/dsw/public/dojsessionid=1LGTTTgS45XTLz21jFxN6npLVFhclFT6PgWq1QG860y3PyZK1186!977792517?id=8713), accessed 19 August 2011.

<sup>133</sup> Annual joint table on the implementation of the Framework agreement on harassment and violence at work (2010), available on: [http://www.ueapme.com/IMG/pdf/FINAL\\_3rd\\_joint\\_table\\_harassment\\_pdf](http://www.ueapme.com/IMG/pdf/FINAL_3rd_joint_table_harassment_pdf), accessed 19 August 2011.

<sup>134</sup> BAG, judgment of 22 July 2008, 1 ABR 40/07.

<sup>135</sup> The Federal Labour Court placed emphasis on the missing term 'unwanted' and referred to the discussions about the definition and concept of pornography.

Women and Youth revealed discriminatory judgment of the (female) complainants' credibility in sexual harassment cases.<sup>136</sup> The future will tell whether the statutory shift may be effective at least in other harassment cases.

#### *2.1.9. Remedies and sanctions*

There are several consequences in case of discriminatory harassment at the workplace. The employer has to take appropriate measures to put a stop to the discriminatory harassment by fellow workers or third persons under Section 12(3) and (4) of the General Equal Treatment Act. These measures may include disciplinary actions such as suspension of work, transfer, reduction in salary, demotion or discharge as consequences for employees in the civil service and warning, transfer or dismissal of employees in private enterprises. Sanctions against third parties can cover the prevention of contact between harasser and victim by an amended distribution of responsibilities or a ban on entering the premises or, as a last option, the termination of business relations. The same applies in the field of higher education: harassing students can be banned from entering the university buildings or the dormitories or, in serious cases, exmatriculated.<sup>137</sup> If the employer does not take appropriate and effective measures, the harassed employee has a right to pecuniary compensation under Section 15(2) of the General Equal Treatment Act. Employers and harassers can exonerate themselves by showing that they did not act intentionally or negligently.

The primary objective of the provisions against discriminatory harassment is the protection of the victim. Under Section 16 of the General Equal Treatment Act, an employee's rejection of or submission to discriminatory harassment must not be used as a basis for a decision affecting that employee. Moreover, if the employer takes inappropriate or ineffective measures against discriminatory harassment or none at all, the harassed employee is entitled to stop working under Section 14 of the General Equal Treatment Act. The refusal of work must be necessary for the victim's protection (for example, in many cases the victim is not entitled to refuse any work, but to refuse work at a certain workplace).<sup>138</sup> If the conditions are met, the employer is legally obliged to continue payment of wages to the victim. The main problem for the effectiveness of this provision is that any misjudgement of the situation and the legal requirements is to the detriment of the employee who might suffer labour law sanctions as a result.

If discriminatory harassment takes place in connection with the provision of goods and services, the victim can claim immediate cessation of the harassment and recovery of as well as compensation for the damages suffered under Section 21 of the General Equal Treatment Act. The claim has to be brought within two months. Section 16 of the General Equal Treatment Act, which implements the Directives' ban on victimization, is restricted to the field of employment.

#### *2.1.10. Compliance with EU law*

The implementation of the European Directives is not completely satisfactory. The scope of the General Equal Treatment Act covering the prohibition of harassment is not compliant with the European Directives: In violation of the Directives, the prohibition of sexual harassment is restricted to the area of employment. And with respect to the provision of goods and services, the General Equal Treatment Act remains below the requirements of Directive 2004/113/EC by containing several exceptions. Although the definitions of discriminatory harassment both refer to the purpose or effect of violating the dignity of a person, current German law requires fault. Overall, the General Equal Treatment Act is a considerable improvement compared to the former legislation, but it has its pitfalls and limits.

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<sup>136</sup> Almut Pflüger et al. *Beschäftigtenschutzgesetz in der Praxis* 2002.

<sup>137</sup> Students harassing other students have to suffer these consequences under higher education law and basic rules enacted by the universities as part of their self-administration.

<sup>138</sup> The victim's transfer to another job or workplace must not be discriminatory in itself.



## 2.2. Case law

### 2.2.1. National courts and equality bodies

There are only very few judgments available which deal with the prohibition of sexual harassment at the workplace.<sup>139</sup> Judgments concerning other forms of harassment do not cover harassment on the ground of sex. No (sexual) harassment decision has referred to the provision of goods and services so far. The German Anti-Discrimination Body does not have the power to deal with individual cases, so there is no case law.

### 2.2.2. Main features of case law

The majority of cases where sexual harassment at the workplace is an issue are applications for protection against dismissal by (alleged) harassers. Discriminatory harassment can be used to justify dismissal both by summary termination and by ordinary termination with notice. In both cases the main legal question is whether the employer's interest in cancelling the employment relationship outweighs the employee's interest in continuing it. Consideration must be given by the labour court to several criteria such as the fault on the part of the employee, the extent of any damage caused and other negative consequences, the danger of its recurrence, the possibility of transferring the employee, and also the employee's age and continuous length of service within the company. Therefore the main feature of harassment case law seems to be the protection against dismissal, not the harassment.

The State Labour Court of Schleswig-Holstein recently delivered a much-noticed decision on the justification of a termination without notice because of sexual harassment.<sup>140</sup> The claimant, a male nurse working in a hospital for 18 years, was dismissed without notice after having displayed a pornographic picture to a female fellow nurse and talked about imaginary sexual intercourse involving her to another female colleague.<sup>141</sup> The State Labour Court of Schleswig-Holstein decided that these forms of sexual harassment can justify an ordinary termination without notice.<sup>142</sup> The decision generated a contentious debate in labour courts and academic writing, because the claimant was not a superior of the harassed women and he did not touch them in any way. For example, the State Labour Court of Lower Saxony decided with reference to the Federal Labour Court that a termination without notice can only be justified by a more serious sexual harassment in words and in deeds or by the enforcement of sexual favours by a superior.<sup>143</sup> The State Labour Court of Schleswig-Holstein took this into consideration, but put more emphasis on the human dignity of the female fellow nurses, their sexual autonomy, their right to work without sexualized communication structures, the ongoing nature of the sexualized language usage by the claimant and the employer's duty to protect her/his female employees who, in addition, make up the vast majority of the workforce in a hospital.

Labour courts agree on the definition of unwanted conduct as not requiring 'recognisable rejection' by the victim, thus drawing a distinction compared to the requirements of former legislation (Employees Protection Act). It is sufficient when the behaviour is considered to be unwanted or unwelcome from a neutral or objective point of view.

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<sup>139</sup> There is little previous case law based on the Employees Protection Act as well, because the law was broadly unknown to complainants, courts and companies.

<sup>140</sup> LAG Schleswig-Holstein, judgment of 4 March 2009, 3 Sa 410/08.

<sup>141</sup> The picture in question showed the unclothed abdomen of a female person with her legs spread widely apart. On another occasion, the claimant phoned one of his female colleagues at the hospital around midnight and unexpectedly said during the conversation: 'And then I'll take my dick and put it in your hole and shoot.' The claimant was well known for his sexualized language usage.

<sup>142</sup> The State Labour Court of Rhineland-Palatinate decided that repeated verbal sexual harassment of a female fellow worker and a 21-year-old apprentice can justify the ordinary dismissal of the harasser when he had already been warned because of verbal sexual harassment three years before; LAG Rheinland-Pfalz, judgment of 11 March 2009, 7 Sa 235/08.

<sup>143</sup> LAG Niedersachsen, judgment of 29 November 2008, 1 Sa 547/08, with reference to BAG, judgment of 25 March 2004, 2 AZR 341/03. Therefore the State Labour Court of Lower Saxony decided that the claimant's behaviour towards a female temporary worker culminating in the sentence 'I would like to fuck you from behind' could not justify any kind of termination but only a warning or a transfer.

### 2.2.3. Dignity

The courts keep their remarks on the topic of dignity very short. There is general agreement that the term ‘dignity’ as used in the General Equal Treatment Act is not the same as the term ‘human dignity’ in the German Constitution. Legal commentaries conceptualize the required violation of dignity as the requirement of seriousness of the harassment. The connection made between the violation of dignity and an anti-discrimination approach causes some irritation because they are considered to be different (and incompatible) concepts of preventing and combating harassment in Germany.

### 2.2.4. Restrictions

The Federal Administrative Court ruled that the freedom of speech is limited by the basic personal rights and the right to privacy in case of the disclosure of the (assumed) sexual orientation of a soldier at her/his workplace.<sup>144</sup> According to the decision, the disclosure of the (assumed) sexual orientation of an employee at her/his workplace without her/his consent constitutes sexual harassment. The Federal Labour Court decided that a code of conduct prohibiting any intimate relationship between employees (to prevent corruption and sexual harassment) violates the fundamental rights of the employees because the free choice of an intimate partner is an essential part of the basic personal rights and the right to privacy, thus predefined sexual morals or the discouragement of sexual contact cannot be included in a code of conduct.<sup>145</sup>

### 2.2.5. Role of equality bodies

The German Anti-Discrimination Body provides information about anti-discrimination law illustrated by examples from its actual practice. The publication ‘Advice and support’ covers no cases of harassment on the ground of sex and only one case dealing with sexual harassment, whose outcome is not encouraging.<sup>146</sup>

## 3. Harassment and sexual harassment outside the framework of anti-discrimination law

### 3.1. National provisions

As part of the civil service law, every German state has its own Equality Statute and most of them contain provisions on preventing and combating sexual harassment. According to some of these provisions, the Equal Opportunity Commissioner is entitled to receive complaints, to participate in the complaints procedure, to report on the problem of sexual harassment and to initiate appropriate measures against it.<sup>147</sup> There are some civil-law obligations of certain employers to protect their employees against violation of morals, manners or honour<sup>148</sup> which are broadly unknown but considered to cover the duty to combat sexual harassment. Under the Vocational Training Act and the Young Persons’ Employment Protection Act, the competent authority is obliged to examine and control the personal aptitude of training

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<sup>144</sup> BVerwG, judgment of 24 April 2007, 2 WD 9/06. His superior officer ‘congratulated’ him on his birthday in the presence of fellow soldiers with the words: ‘All the best, my gay friend!’

<sup>145</sup> BAG, judgment of 22 July 2008, 1 ABR 40/07; State Labour Court of North Rhine-Westphalia, judgment of 14 November 2005, 10 TaBV 46/05.

<sup>146</sup> Available on:

[http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/\\_rat\\_tat\\_faelle\\_aus\\_der\\_ads.pdf?\\_\\_blob=publicationFile](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/_rat_tat_faelle_aus_der_ads.pdf?__blob=publicationFile), accessed 19 August 2011. The employer delayed the investigation of the claim and took measures which were not sufficient in the opinion of the claimant.

<sup>147</sup> For example, Sections 12 and 17(6) of the Berlin Equality Statute; Section 16(1) of the State Law on Gender Equality and on the Reduction of Discrimination against Women in the Public Service of Hesse; Section 18(4) of the Equality Statute of Rhineland-Palatinate; Section 20 of the Saarland Statute on the Realization of Gender Equality; Section 16(2) of the Thuringian Equality Statute.

<sup>148</sup> Section 618(2) of the Civil Code; Section 62(1) of the Commercial Code. The same applies to Section 75(2) of the Industrial Relations Act.

supervisors.<sup>149</sup> Although these provisions do not employ the term sexual harassment but refer to morals and violations of vocational training law, they are considered applicable.

The concepts of harassment and sexual harassment are not defined in criminal law. Criminal law regarding sexual offences only covers sexual acts of some significance under Section 184g of the Penal Code. It is suggested to prosecute minor forms of sexual harassment under the law of libel, but most of the courts and commentaries have a narrow understanding of punishable sexual behaviour.

### **3.2. Collective agreements**

Combating harassment is not a subject of collective agreements, but works council agreements on non-discrimination and partnership at the workplace as well as codes of conduct, agreements and guidelines tackling sex discrimination and prohibiting sexual harassment are widespread in the civil service as well as in the private sector nowadays.

### **3.3. Additional measures**

The majority of additional measures can be qualified as preventive measures: university guidelines, special training courses e.g. in schools, the suitable offer of information etc. What is lacking is an appropriate public debate which goes beyond the question of bullying at the workplace.

### **3.4. Harassment and stress at work**

Stress at work can cause serious mental and physical health problems, and so can harassment. In their consequences, harassment as well as stress at work are an issue of health and safety at the workplace and of the responsibility for proper working conditions. The employer has to organise the work process and to design the workplace in such a way that risks for her/his employees' life or health are avoided or minimized under the Employees Protection Act. However, discriminatory harassment is not explicitly covered by the Employees Protection Act and there is no link between questions of harassment on the one hand and stress at work on the other in legal practice or academic writing.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

The added value of an anti-discrimination approach encompasses various facets. Defining some forms of harassment as sex discrimination means that not only sexual harassment, but also harassment on the ground of sex is prohibited.<sup>150</sup> In contrast to the former Employees Protection Act, the General Equal Treatment Act which implements the European anti-discrimination directives is well known to employers and courts. The anti-discrimination directives clearly postulate that intention is not required and discriminatory harassment is not limited to intentional behaviour. Furthermore, they state that no upper limits can be set concerning compensation. If the national courts asked preliminary questions, the ECJ could develop case law on discriminatory harassment and thus improve the protection.

The anti-discrimination approach might even lead to the conclusion that combating sexual harassment is not a question of sexual morals or individual sensitivity but of access to paid work and appropriate working conditions for both sexes and thus a question of gender justice.

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<sup>149</sup> Sections 29, 32, 33 of the Berufsbildungsgesetz of 23 March 2006, Official Journal (Bundesgesetzblatt BGBI), part I p. 931, and Sections 25, 27 of the Jugendarbeitsschutzgesetz of 12 April 1976, Official Journal (Bundesgesetzblatt BGBI), part I p. 965.

<sup>150</sup> Although most of the legal commentaries offer no examples of harassment on the ground of sex; welcome exceptions: Sabine Eggert-Weyand, in: Ursula Rust & Josef Falke (ed.) *Allgemeines Gleichbehandlungsgesetz* 2007, § 3, Rn. 45; Dagmar Schiek *Allgemeines Gleichbehandlungsgesetz* 2007, § 3, Rn. 69.

#### 4.2. Pitfalls

The anti-discrimination approach is not accepted by the prevailing opinion in legal commentaries and academic writing in Germany, although harassment and sexual harassment are legally defined as discrimination (*Benachteiligung*). Most authors reduce discrimination to unjustified different treatment and argue that the essence of wrongdoing by harassing is not unequal treatment but the hostile and humiliating behaviour itself. That is even more surprising in the light of previous academic writing on the concept of sexual harassment as sex discrimination and as a question of equality rather than dignity.<sup>151</sup> But the publications of feminist academics are traditionally ignored in German jurisprudence.

Furthermore, even if harassment and sexual harassment would be conceptualized as discrimination, this might not lead to any improvements in preventing and combating them. From a widespread jurisprudential perspective in Germany, sex discrimination is something which happens to women only and anti-discrimination law is an invention of revengeful feminists ready to report any 'political or sexual incorrectness'.<sup>152</sup> Thus, men are not encouraged to be allies in creating workplace environments free of sex discrimination. The problem is intensified by a fundamental lack of understanding of the concepts of discrimination as it is manifested, for example, in the strong reluctance to recognise discrimination based on effects, rather than intent. The all-consuming question of fault is one of the major obstacles for the effectiveness of the General Equal Treatment Act, especially where sex discrimination is concerned.

Not accepted nor understood by major parts of German jurisprudence, an anti-discrimination approach faces failure.

### GREECE – Sophia Koukoulis-Spiliotopoulos

#### 1. General situation

1.1. Until some years ago, sexual harassment was a taboo. It was not prohibited, there was hardly any relevant debate, the rare cases filed mostly failed for lack of evidence and non-awareness of the problem. Although it is now gradually surfacing, it is still a 'hidden problem' which mostly affects women and is intensified due to the economic crisis and the deregulation of employment relationships. Indirect mention of harassment in connection with gender equality was first made in the 1993 national general collective agreement (n.g.c.a.): the social partners acknowledged the principle of gender equality at work and agreed to promote it, 'particularly in matters of employment, pay, training and decent behaviour at work'. This was one of the rare n.g.c.a.s to be co-signed on behalf of the General Confederation of Labour (GSEE) by a woman (then GSEE deputy secretary general). A woman also acted behind the scenes for the Union of Greek Industries (SEB). This clause and a pamphlet by the GSEE Women's Secretariat encouraged complaints and support by unions. In the 2000-2001 n.g.c.a., the employers' organisations stressed their members' legal obligation to protect the workers' personality, which is wider than 'dignity' and means, according to case law of the Supreme Civil and Penal Court (SCPC), 'a complex of components of a person's being, such as his/her honour (i.e. moral value and reputation), mental health and emotional realm'.<sup>153</sup> In the 2004-2005 n.g.c.a., the social partners agreed to study the implementation of EC sexual harassment law.<sup>154</sup> The notions of harassment and sexual harassment were introduced into Greek law by Act 3488/2006 transposing Directive 2002/73 (OJ A 191/11.09.2006), which, however, does not seem to have been applied, while case law based on other provisions is scarce.

<sup>151</sup> Susanne Baer *Würde oder Gleichheit* 1995. According to her concept, anti-discrimination law is about hierarchical structures and not the justification of different treatment or the question of 'differences' at all.

<sup>152</sup> Prime example: Klaus Adomeit & Jochen Mohr, 'Einleitung' in: *Kommentar zum Allgemeinen Gleichbehandlungsgesetz* 2007, p. 4–95.

<sup>153</sup> SCPC (Civil Section) 418/2010 (harassment outside the scope of the Directives)

<sup>154</sup> See all n.g.c.a.s on the GSEE website: <http://www.gsee.gr>, accessed 20 August 2011.

1.2. There are no official or other statistics on any kind of harassment.

*1.2.1. Reports by competent authorities and public bodies*

1.2.1.1. *The Ombudsman*, an independent administrative authority<sup>155</sup> whose independence is guaranteed by the Constitution (Articles 101A, 103(9)), is the equality body in the area governed by Directive 2006/54 (in the private and public sector) and Directive 2004/113 (in the public sector) by virtue of the Acts transposing these Directives. These tasks are fulfilled by a deputy Ombudsman who, upon complaint or *proprio motu*, mediates between the parties and makes (non-binding) proposals for the violation of rights to end.

The Ombudsman has published a Report on sexual harassment<sup>156</sup> (not harassment on the ground of sex). The Report notes that the Ombudsman deals with sexual harassment *inter alia* regarding access of citizens to goods and services. The reference to ‘citizens’ is confusing, since the Directives also cover EU citizens and third-country nationals regarding gender and multiple discrimination, provided that third-country nationality is not among the grounds.<sup>157</sup> In fact, the Ombudsman also deals with multiple discrimination.<sup>158</sup>

The Report covers sexual harassment complaints (all by women; none by an organisation) in 2009 and 2010: the total is seventeen, six in the *public sector* and eleven in the *private sector*. The Report notes that they were too few (8 % of gender discrimination cases), while sexual harassment is common in small firms. There are some errors in this classification: a university and a municipal undertaking are wrongly listed in the private sector.<sup>159</sup> The correct classification would be: eight in the *public sector* and nine in the *private sector*. In the *public sector*, the complaints were against a superior (four) and a colleague (one) for conduct *at work*; a vocational training teacher for harassing a student (one); *service providers* for harassing women seeking their services: a doctor and a police officer. There were no cases in the area of access to employment or training. The *private sector* complaints were against the employer (eight) and a superior (one).

In the *private sector*, seven out of nine complaints were made after the complainant was dismissed or forced to quit. This occurred in none of the *public sector* employment cases, obviously due to constitutional guarantees of permanence and personal and functional independence of civil servants (Constitution, Article 103)<sup>160</sup> and similar legislative guarantees for employees on a private-law contract in the public sector.<sup>161</sup> One private sector employment case was withdrawn; this occurred in none of the public sector cases, obviously due to the above guarantees. However, public sector services cases against persons of authority were problematic: the cases against the teacher and the police officer were anonymous and the former was withdrawn.

The *main problems* noted in the Report were the following: lack of *evidence* and difficulty to apply the *burden of proof* rule, which even lawyers and courts ignore (see below in 2.1.8). Where the complaint was not manifestly ill-founded, but the complainant provided insufficient evidence, the alleged harasser was warned that a new similar complaint would entail the transfer of the burden of proof to him. It is, however, unclear what the Ombudsman

<sup>155</sup> Act 3094/2003, OJ A 10/22.01.2003; Council of State (Supreme Administrative Court) No. 1041/2004.

<sup>156</sup> Ombudsman *The Ombudsman's experience in the matter of sexual harassment (2006-2010)* December 2010: <http://www.synigoros.gr/diakriseis/index.htm>, accessed 20 August 2011.

<sup>157</sup> See Directive 2000/43/EC, Recitals 13-14.

<sup>158</sup> Ombudsman *Equal treatment of men and women in employment and labour relationships, Special Report*, 2009, pp. 21, 33, 83; *Second Special Report on the implementation of the principle of equal opportunities and equal treatment of men and women in employment and occupation*, 2010, p. 15 (0.93 % and 1.14 % of complaints, grounds not mentioned): <http://www.synigoros.gr/diakriseis>, accessed 20 August 2011.

<sup>159</sup> Public sector: State, legal persons of public law (e.g. universities), local authorities and their undertakings, state-controlled legal persons of private law, public corporations (Act 3871/2010, OJ A 141/17.08/2010).

<sup>160</sup> ‘Civil servants in posts provided by law shall be permanent as long as the posts exist [...]; except those retiring upon attainment of the age limit or dismissed by court judgment, they may not be transferred without an opinion or lowered in rank or dismissed without a decision of a service council consisting by at least two-thirds of permanent civil servants.’ <http://www.parliament.gr>, accessed 20 August 2011.

<sup>161</sup> Decree 410/1988, OJ A 191/30.08.1988.

considers insufficient evidence and whether the alleged harasser was invited to explain before receiving the warning. A standard expression is ‘the complainant was asked to provide evidence; this request was not fulfilled and the case was rejected’.

At a panel organised by the General Secretariat for Gender Equality (GSGE)<sup>162</sup> the deputy Ombudsman noted an increase of complaints in the first semester of 2011, which she attributed to the deterioration of employment relationships due to the economic crisis.

1.2.1.2. *The Consumer’s Ombudsman*, an independent authority,<sup>163</sup> monitors, by virtue of Act 3769/2009 transposing Directive 2004/113, its implementation in the private sector. His first Annual Report thereafter (2010) mentions no gender discrimination.<sup>164</sup>

1.2.1.3. The *Labour Inspectorate (L.I.)*, a government service, monitors labour-law implementation in public and private workplaces. They have highly comprehensive powers: to visit and check workplaces at any time, by day or night, impose fines and lodge penal complaints,<sup>165</sup> but cannot be effective due to understaffing and lack of material means, as deplored in L.I. annual reports.<sup>166</sup> Gender discrimination cases must be referred to the Ombudsman, who may request the L.I. to impose fines or lodge penal complaints.<sup>167</sup>

Since 2009, L.I. annual reports contain tables of discrimination against women: 21 cases in 2009 (sexual harassment: 1), 43 cases in 2010 (sexual harassment: 6), with no further information.<sup>168</sup> The 2009 and 2010 tables also list cases that may constitute sexual harassment or harassment on the ground of sex (the L.I. ignores the latter): i) ‘offence to the personality’, ii) ‘indecent behaviour’, iii) ‘mobbing and coercion to resign’ (one case each); iv) ‘insulting behaviour leading to resignation’ (three cases).

1.2.1.4. The *Center for Research in Equality Matters (KETHI)*, a legal person governed by private law, state funded and supervised,<sup>169</sup> made a study on *sexual harassment in the workplace* (2003)<sup>170</sup> on a sample of 1200 female workers across the country. The main findings were the following: 10 % had been harassed; 30 % knew a female colleague who had been harassed, usually by the same person; 15 % had heard of harassed women (low percentages as compared to other studies, probably due to fear to speak up); most harassers were married male superiors, average age 45, educated; no witness in most cases; management was mostly unaware or took no effective measures or even victimized victims; colleagues mostly did not react; the great majority of victims did not complain, mainly for fear of dismissal, as they needed the job; they rather prayed the harasser to stop and confided to relatives/friends; 78 % left work (86.2 % of them quit, 8.5 % were dismissed). The tendency to quit, as compared to the fear of dismissal, seems strange; however, unlike other reports (above 1.2.1.1, below 1.2.2.1, 1.2.2.2), this study predates the worsening of the economic crisis.

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<sup>162</sup> A government service which plans and monitors the implementation of gender equality policies: Decree 5/2008, OJ A 17/08.02.2008; press release 2 June 2011: <http://www.isotita.gr>, accessed 10 August 2011.

<sup>163</sup> Act 3297/2004, OJ A 259/23.12.2004.

<sup>164</sup> Consumer’s Ombudsman’s website: <http://www.synigoroskatanaloti.gr>, accessed 18 August 2011.

<sup>165</sup> Article 13 of Act 2639/1998, OJ A 205/1998 and Act 3996/2011, OJ A 170/5.8.2011.

<sup>166</sup> See <http://www.vpakp.gr>, accessed 20 August 2011.

<sup>167</sup> Article 25 of Act 3896/2010, OJ A 207/08.12.2010, transposing Directive 2006/54, which repeats provisions of Act 3488/2006 transposing Directive 2002/73 (above 1.1).

<sup>168</sup> <http://www.vpakp.gr>, accessed 20 August 2011.

<sup>169</sup> Article 15 of Act 2266/1994, OJ A 218/13.12.1994.

<sup>170</sup> KETHI *Sexual harassment in the workplace*, 2004: <http://www.kethi.gr/index..>, accessed 18 August 2011. The persons scientifically responsible for this study included it in their book: V. Artinopoulou & Th. Papatheodorou *Sexual harassment at work* Athens, Nomiki Bibliothiki 2006.



### 1.2.2. Reports by independent researchers

1.2.2.1. ‘*Mental Health Europe*’ (MHE), a European NGO, published a Guide for employers and female workers on *sexual and moral harassment at work* (2010).<sup>171</sup> The *main findings* of its Greek partner, the NGO ‘Society of Social Psychiatry and Mental Health’ (SSPMH) are the following: no exact data; extensive underreporting; wide gap between official and unofficial data; unawareness by employers and workers; too few complaints; no mechanisms for preventing or combating the phenomenon; vagueness and gaps in the law. The overwhelming majority of victims were women and most did not dare tell their story even under guarantees of confidentiality.

The phenomenon is widespread in small/medium undertakings (which are 90 % of all Greek undertakings) in commerce and tourism, and worst of all in the cleaning sector. Detrimental factors are women’s concentration in ‘high risk’ professions (teaching, social work, healthcare), low pay/low prestige jobs; hard working conditions (heavy workload, intense rhythm, pay reductions, no support by employers, management methods favouring workers’ antagonism; the economic crisis, deregulation of employment relationships and soaring unemployment: women are the first victims and the easiest targets. Violence and harassment at work have serious and long-lasting effects on victims’ mental health, but also affect employers, undertakings and society in general.<sup>172</sup>

1.2.2.2. A report of the *Labour Institute of the General Confederation of Labour and the Civil Servants’ Federation* (INE GSEE/ADEDY) on the (overwhelmingly female) *cleaning sector* (2009) shows widespread sexual harassment, in particular against foreign women (mostly illegal immigrants) hired by ‘temporary employment companies’ (TECs) and ‘lent’ to other (indirect) private and public employers. Although these relationships are strictly regulated by law,<sup>173</sup> control is inadequate, working conditions very bad and social security coverage inadequate or lacking. The women suffer serious, psychological problems, but do not dare react for fear of victimisation and/or expulsion.<sup>174</sup>

1.2.2.3. Earlier reports: A study of the *Greek League for Women’s Rights*<sup>175</sup> in the Athens area on a sample of 1056 female and 462 male workers in the public and private sector (1988-1991) and a study by the *Patras University*<sup>176</sup> in five cities on a sample of 126 female and 76 male workers, in the public and private sector (2002). Common findings are the following: harassers were mostly superiors; some were (same grade or lower) colleagues or clients. The great majority of victims were women, who usually did not dare complain.

1.3. A *debate* on sexual harassment started in the late nineties with articles in law reviews and studies, mostly inspired by the Commission’s Recommendation and Code of Practice. It spread to the media, particularly after the first judicial decisions upholding claims of harassed

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<sup>171</sup> MHE *Violence against women at work, let’s talk about it! Mental health effects of violence & harassment against women at work*, 2010: <http://www.mhe-sme.org>; <http://www.ekpse.gr>, accessed 10 August 2011.

<sup>172</sup> See A. Tsakiri ‘Violence against women at work’, in Greek Society for the Medicine of Work and the Environment, *Work Health* No. 15, 4 September 2010: <http://www.iatrikiergasias.gr>; P. Fitsiou, ‘Impact of violence and harassment at work on women’s mental health’, 13<sup>th</sup> Panhellenic Congress of Social Research of the Greek Society for Psychology *From individual differences to diversity*, 25-29 May 2011: <http://www.elpsecongress2011.gr> (papers not yet published), both accessed 10 August 2011.

<sup>173</sup> Articles 20-26 of Act 2956/2001, OJ A 258/06.11.2001.

<sup>174</sup> INE GSEE/ADEDY, *Labour relationships in the cleaning sector; results of an empirical research*, Athens 2009, pp. 41, 44-45, 47-49: <http://www.inegsee.gr>, accessed 18 August 2011.

<sup>175</sup> I. Manganara ‘Sexual harassment at work: the case of Greece’ in I. Manganara (ed.) *Work, trade unionism and gender equality* pp. 231-278 Athens, Odysseus 1998.

<sup>176</sup> V. Stafida et al. ‘Sexual harassment of female and male workers in the workplace’, Hellenic Institute for Occupational Health and Safety (EL.IN.YAE) *Health and Security at Work* No. 11/2002), pp. 3-5, and No. 12/2002) pp. 4-5: <http://www.elinyae.gr> accessed 20 August 2011.

women. It gradually intensified,<sup>177</sup> in particular when Directives 2002/73 and 2006/54 were transposed and on the occasion of internationally famous incidents (e.g. the recent GSIG panel (above 2.1.1.1) which attracted wide coverage).

## 2. Harassment and sexual harassment in the context of anti-discrimination law

### 2.1. Legislation

#### 2.1.1. Transposition

Act 3896/2010 transposing Directive 2006/54 (OJ A 207/08.12.2010) mostly repeats provisions of Act 3488/2006 transposing Directive 2002/73 on harassment (above 1.1). Article 3(2)(a) of Act 3896/2010 reads: 'Harassment and sexual harassment and any less favourable treatment due to submission or rejection of this conduct constitute gender discrimination *and are prohibited*'. Although this Act (Articles 3(1), 4, 6 and 11) prohibits discrimination within its scope, the reiteration of the prohibition may promote awareness.

Directive 2004/113 was transposed by Act 3769/2009 whose Article 4(1)(b) copies Article 4(3) of the Directive. The latter goes beyond Article 2(2)(a) of Directive 2006/54 in that it reiterates the prohibition regarding harassment/sexual harassment.

#### 2.1.2. Definitions

*Civil liability:* Article 2(c) and (d) of Act 3896/2010 copy the definitions from Article 2(1)(c) and (d) of Directive 2006/54. Article 2(c) and (d) of Act 3769/2009 copy the definitions from Article 2(c) and (d) of Directive 2004/113. Thus, all definitions refer to the *purpose or effect* of violating a person's dignity as well as to the conduct being unwanted in exactly the same wording as the Directives. Thus, *fault* (intent or negligence) is not required for liability to civil or administrative sanctions. The legislation includes no difference between its definitions of harassment on the ground of sex and sexual harassment and those of the Directives.

2.1.2.1. *General penal offences:* 'Harassment' is not a specific offence under the Penal Code (PC); other relevant PC provisions only concern serious cases. The gravest offence is '*rape*', a *felony* consisting in forcing a person 'by physical violence or threat of serious and immediate danger into *intercourse or other lewd act* or tolerance thereof' (Article 336(1) PC). A '*lewd act*' is an act not reaching intercourse, which offends common decency and morals and aims at satisfying or exciting sexual desire.<sup>178</sup> Prosecution is *ex officio*, but at the victim's request it may not start or be dropped.

Harassment may constitute a *misdemeanour*, e.g. '*bodily harm*' (bodily injury or harm to the health: Articles 308-315 PC); an '*offence to a person's honour*', by verbal or physical conduct or any other way (Article 361 PC) ('honour' is a person's moral or social value,<sup>179</sup> which is narrower than dignity) or an '*offence to sexual dignity*' (Article 337(1) PC) consisting in 'lewd gestures or proposals concerning lewd acts' 'offending crudely a person's dignity in the area of his/her sexual life'; '*lewd gestures*' imply bodily contact (caresses etc); '*lewd proposals*' may be oral or in writing or by gestures without bodily contact.<sup>180</sup> All these offences presuppose *intent* and are prosecuted upon *complaint*.

2.1.2.2. *Offences related to employment:* Article 16(4) of Act 3488/2006 transposing Directive 2002/73 increased the sanction for the above '*offence to sexual dignity*' 'when the perpetrator exploits the situation of a person at work or seeking work' (*aggravating circumstances*). This provision (repeated in Article 23(4) of Act 3896/2010 transposing Directive 2006/54) only covers grave sexual harassment ('*crude*' conduct) and omits: i) the

<sup>177</sup> E.g. AFEM & Ligue Hellénique pour les Droits des Femmes *Égalité des genres et combat contre le harcèlement sexuel: les politiques de l'Union européenne* Athens/Brussels, A. N. Sakkoulas/Bruylant 2009 (papers from a European conference in Athens).

<sup>178</sup> Supreme Civil and Penal Court (SCPC) (Penal Section) 1783/2008, 1546/2008.

<sup>179</sup> SCPC (Penal Section) No. 148/2010.

<sup>180</sup> SCPC (Penal Section) Nos. 2590/2008, 1998/2006.



conduct of non-superiors or persons having no authority over the victim; ii) vocational training; iii) harassment on the ground of sex. Prosecution *ex officio* with the exception regarding rape (above 2.1.2.1) might be preferable. We have not found any case law.

*Intentional* harassment by a civil servant may constitute a '*lewd act through abuse of authority*' (Article 343(a) PC), a misdemeanour prosecuted *ex officio*. The victim may be a subordinate or other person; in the latter case the offence may be related to services.

2.1.2.3. *Offences related to services*: Article 10(4) of Act 3769/2009 transposing Directive 2004/113 reads: 'Sexual harassment within the scope of this Act, as defined in Article 2(d), is prosecuted upon complaint in accordance with Article 337(1) PC' ('*offence to sexual dignity*', above 2.1.2.1); no aggravating circumstances are provided. Article 2(c) of the Act (harassment on the ground of sex) is not referred to. This provision (not incorporated in the PC), does not seem to have been applied. Prosecution *ex officio* with the exception regarding rape (above 2.1.2.1) might be preferable.

*Intentional* harassment may constitute: i) a '*lewd act through abuse of authority*', if committed by a person employed in a prison, detention centre, educational establishment, hospital or other care providing establishment against a person in the establishment (a misdemeanour prosecuted *ex officio*: Article 343(b) PC) or ii) an offence not incorporated in the PC<sup>181</sup> ('*offence to sexual dignity*': 'particularly humiliating words or acts related to the sexual life of a person receiving the services of a social care establishment, by a person employed in this establishment'). There may be confusion between the latter and the offences in PC Articles 337(1) ('*offence to sexual dignity*') and 343(b) ('*lewd act through abuse of authority*'), above 2.1.2.1, 2.1.2.3. There is hardly any case law on the offence under (i) and none on the offence under (ii).

2.1.2.4. *Disciplinary offences* are indicatively provided in the Code of Civil Servants and Employees of Legal Persons Governed by Public Law (CCS) and the Code of Employees of Communes (CEC); and exhaustively in Act 3852/2010 (decentralised and local government – Kallikrates),<sup>182</sup> as well as in internal rules of private undertakings.

Article 23(3) of Act 3896/2010 transposing Directive 2006/54 added to Article 107(1) CCS a disciplinary offence (copied from the Act transposing Directive 2002/73): 'The violation of the principle of equal opportunities and equal treatment of men and women in matters of employment and work [hence also harassment] provided by the law which transposes Directive 2006/54'. This also covers employees of regions, as they fall under Article 107 CCS, but not employees of communes, as they fall under the CEC, nor local authorities' officials (heads of region, mayors etc) as they fall under Kallikrates.

Article 10(3) of Act 3769/2009 transposing Directive 2004/113 (not incorporated in the CSC) reads: 'The violation of the prohibition of discrimination on the ground of sex [hence also harassment] is a disciplinary offence in the sense of Article 107(1)(c) [CSC]' ('violation of the duty of impartiality'). This concerns the same employees as above.

Harassment may constitute a more general disciplinary offence, e.g. '*improper conduct towards citizens, superiors or other employees*' or '*indecent conduct in or outside the service*' under the CSC and the CCE, or a '*serious violation of duties*' for officials of local authorities. All disciplinary offences presuppose *fault* (intent or negligence) and are prosecuted *upon complaint* or *ex officio*.

2.1.2.5. The Acts transposing Directives 2006/54 and 2004/113 copy the definitions of *direct* and *indirect* gender discrimination from the Directives. Act 3896/2010 transposing Directive 2006/54 (Article 3(2)(b)) also stipulates that 'any less favourable treatment of a person related to the change of sex also constitutes discrimination on the ground of sex'. Consequently, unwanted conduct towards a *transsexual*, when it is related to transsexuality or to the previous

<sup>181</sup> Article 9(2) of Act 3500/2006 on domestic violence, OJ A 232/24.10.2006.

<sup>182</sup> CSC Articles 107 et seq. (Act 3528/2007, OJ A 26/09.02.2007); CEC Articles 110 et s. (Act 3584/2007, OJ A 143/28.06.2007); Kallikrates Articles 233 et seq. and 252 (Act 3852/2010, OJ A 87/07.06.2010).

or new sex of this person (e.g. teasing, offensive jokes), constitutes harassment on the ground of sex. When it is of a sexual nature (e.g. sexual advances on account of the person's previous or new sex), then it constitutes sexual harassment.

### 2.1.3 Sexual harassment

Harassment is gender specific in the Acts transposing Directives 2006/54 and 2000/43/113. Moreover, in the Act transposing Directives 2000/43 and 2000/78, it covers the grounds covered by these Directives. Harassment may also constitute *multiple discrimination*,<sup>183</sup> a violation of the principle of non-discrimination<sup>183</sup> not prohibited by Greek legislation, but applying to (widespread) harassment against foreign female workers (above 1.2.1.1., 1.2.2.1., 1.2.2.2). We would also consider that harassment of a woman who is pregnant or has recently given birth (which is frequent and aims at forcing her to quit, so that the employer is dispensed of his obligations towards her) should be considered harassment on the ground of sex, irrespective of whether it leads to resignation or dismissal or non-promotion or to any other unfavourable modification of her working conditions. This may be termed 'harassment on grounds of pregnancy and maternity'.

### 2.1.4. Scope

The prohibition of harassment and sexual harassment covers the Directives' scope.

### 2.1.5. Addressee

- a) *Employment*: Article 23(2) of Act 3896/2010 transposing Directive 2006/54 makes the employer, managers and their representatives or agents addressees of the prohibition of gender discrimination in access to and conditions of employment. This also implies liability for harassment by or against fellow workers and third persons (e.g. clients). Civil liability is thus non-fault (Article 2(c) and (d) of the Act, above 2.1.2). The employer has a wide '*duty of care*' for the protection of the material and moral interests and the personality of the workers and third persons in the workplace, deduced from Article 662 CC. This implies the employer's liability for his/her own conduct and the conduct of his/her agents (above). Under the CC, the employer's liability for conduct of his/her agents is non-fault. However, liability for the employer's own conduct and personal liability of his/her agents presuppose their fault;<sup>184</sup> this conflicts with EU law and the above provisions of Act 3896/2010 which prevail, but do not seem to be applied yet.
- b) Providers of *vocational training* are not expressly mentioned in Article 23(2) of Act 3896/2010, but as the prohibition of discrimination (including harassment) covers the whole scope of Directive 2006/54, they and their agents are also addressees, as above (a).
- c) *Goods and services*: Act 3769/2009 transposing Directive 2004/113 is silent about addressees, but all providers and their agents (cf. above (a)) must be held to be addressees. The '*duty of care*' (above (a)) also applies to private providers and their agents.<sup>185</sup>

The State or other public authority is liable for unlawful conduct of its agents in the exercise of their competences, irrespective of a fault of the agent (*non-fault liability*) (Articles 105-106 Introductory Law to the CC).<sup>186</sup>

### 2.1.6. Preventive measures

Article 26(3) of Act 3896/2010 transposes Article 26 of Directive 2006/54/EC, but no specific preventive measures seem to have been taken. Anyway, this duty is also part of the '*duty of*

<sup>183</sup> See also Directive 2000/43, Recital 14, Article 17(2), Directive 2000/78, Recital 3, Article 19(2).

<sup>184</sup> Articles 662, 57, 59, 914, 922, 932 CC and Article 71 CC for moral persons (companies). SCPC (Civil Section) 1839/2008, 995/2008, 786/2008 (none concerns harassment). Athens Court of Appeal (CA) 4937/2001 (employer must protect workers from sexual harassment by colleagues).

<sup>185</sup> SCPC (Civil Section) 995/2008.

<sup>186</sup> Council of State (CS) 1215/2010 (offence to the personality of a prisoner).

*care*' (above (a)). On collective agreements see above 1.1. The Framework Agreement on harassment and violence at work 2007 has not been implemented.

#### 2.1.7. Procedures

*Procedures* available to persons alleging harassment:

- a) *Employment*: Workers or candidates for employment in the private or public sector, in any employment relationship, may lodge an action seeking compensation for offence to their personality and cessation of the offence, before civil courts (Articles 57, 59 CC). Furthermore, workers or candidates for employment on a private-law contract may seek before civil courts: i) a declaration of the nullity of a dismissal, non-promotion or non-hiring and compensation; ii) compensation for being forced to quit due to the conduct of the employer or his agents. Those in a public-law relationship: civil servants of the State and other public authorities (local authorities and other legal persons governed by public law) may lodge a recourse for the annulment of a dismissal, non-promotion or non-hiring, and an action for compensation, before administrative courts.
- b) *Vocational training*: Compensation for offence to the personality and measures for the cessation of the offence may be sought against training staff or trainees, and/or the training establishment. A public establishment (e.g. university) is liable without fault for the conduct of its personnel (cf. above (a) and 2.1.5 i.f.).
- c) *Goods and services*: Compensation for offence to the personality and measures for the cessation of the offence can be sought against the provider and/or his/her agents. A public provider is liable without fault for its agents' conduct (cf. above (a) and 2.1.5 i.f.).

*Interim measures* may be sought in all cases.

- d) *Penal procedure*: A complaint (above 2.1.2.1-2.1.2.3) and/or a civil action against any accused for material and moral damages may be lodged with the penal court, even in the event of *ex officio* prosecution (Articles 63-69 Code of Penal Procedure).<sup>187</sup>
- e) *Disciplinary procedures*: Complaints can be filed by anyone allegedly affected by the conduct of an employee of the State or other public authority, in all cases, to the latter's 'disciplinary' superior or other authority dealing with disciplinary offences, e.g. council of administration of the moral person-employer, Controller of Legality (CL) for disciplinary offences of local authority officials.<sup>188</sup> The General Inspector of Public Administration (GIPA), an administrative authority enjoying guarantees of personal and functional independence, receives complaints for disciplinary offences.<sup>189</sup>

The defendant in the disciplinary procedure and the GIPA can seek the annulment of a final disciplinary decision before the administrative court of appeal or the Council of State (Supreme Administrative Court), which rule on points of law and fact. The complainant testifies in the administrative disciplinary procedure and in court. He/she may not intervene in that procedure or in the trial,<sup>190</sup> but may claim compensation from the State or other public authority for a disciplinary offence of its agents (above 2.1.5 i.f.).

#### 2.1.8. Burden of proof

As the EU rules are only in the Acts transposing the Directives, not in the procedural codes,<sup>191</sup> they are hardly known and not applied (see Ombudsman's Report, above 1.2.1.1). The general rule laying the burden of proof on the claimant deters people from filing a complaint, combined with other factors such as fear of victimization or a 'bad name' in the labour market. These fears, which potential witnesses share, are increasing with the deregulation of employment relationships and unemployment. They could be alleviated if organisations took cases to courts and other authorities, which they hardly do, due to lack of awareness of this

<sup>187</sup> SCPC (Penal Section) 2590/2008.

<sup>188</sup> An administrative authority established by Act 3852/2010 (Articles 216, 233-234).

<sup>189</sup> Act 3074/2002, OJ A 296/04.12.2002, in particular Article 1.

<sup>190</sup> CS 734/2008.

<sup>191</sup> Contrary to CS Opinion 348/2003 on the Decree transposing Directive 97/80.

possibility and/or lack of resources and legal aid. Moreover, in the middle of the economic crisis, gender equality does not seem to be a union priority. However, let us note that, yet without modifying their approach to the burden of proof, courts tend to rely on evidence given by persons in whom the claimant confided and in a few cases on circumstantial evidence (see below 2.2.2.2).

#### 2.1.9. Remedies and sanctions

The procedures under 2.1.7(a) lead to the following traditional sanctions, which are also applied in gender discrimination cases:

- a) *Employment*: When *civil courts* declare a dismissal or non-promotion null and void, it is as if it never occurred: the claimant is deemed to have been promoted retroactively or not to have interrupted work; when they declare the unlawfulness of a refusal to hire, the claimant is deemed to have been hired retroactively. In all cases the claimant is entitled to full compensation, which includes (without ceiling) backpay, material damages (loss and reasonably expected gain) and moral damages plus legal interest, however, liability under the CC presupposes fault<sup>192</sup> (cf. above 2.1.5(a)). When *administrative courts* annul a dismissal, non-promotion or non-hiring by the State or other public authority, it is as if the dismissal never occurred, the act of promotion or hiring is issued with retroactive effect and the employer is liable to full compensation, as above.<sup>193</sup>

*Disciplinary sanctions* for civil servants of the State or other public authorities: written reprimand, a fine of up to three months' wages, no promotion for one to five years, demotion, suspension for three to six months and dismissal. Among the disciplinary offences punishable by *dismissal* are those which may amount to harassment. Those provided by the Acts transposing Directives 2006/54 and 2004/113 are punishable by lighter sanctions. The sanctions are imposed on any offender (superior or colleague). No other disciplinary sanctions, such as transfer to other work, are explicitly listed in the CCS or CEC (above 2.1.2.4), but may be imposed, as the list is *indicative*. The only sanctions for officials of local authorities are suspension for six months and removal from office.

Sanctions for *penal offences* are imprisonment and/or a pecuniary sanction – five to twenty years incarceration for rape<sup>194</sup> – and damages (above 2.1.2.1.-2.1.2.3, 2.1.7(d)).

According to Article 23(2) of Act 3896/2010 transposing Directive 2006/54, 'the violation of the prohibition of gender equality by an employer or his/her agent also constitutes a violation of labour legislation in the sense of Article 16 of Act 2639/1998 (OJ A 205/1998) which is punishable by the *administrative sanctions* provided by this Article', i.e. a *fine* imposed by the L.I., subject to recourse to the administrative first instance court. The latter provision includes among the factors which condition the amount of the fine 'the degree of fault'. This conflicts with the provisions of Article 2(c) and (d) of Act 3896/2010 (above 2.1.2), which prevail since they reflect the definitions of the Directive.

– The victim is entitled to damages and an injunction for the cessation of the offensive conduct, as well as to interim measures (above 2.1.7, 2.1.9). An injunction is coupled with a threat of detention of up to one year and a pecuniary sanction to be paid to the claimant for every act contravening the injunction<sup>195</sup>

– Article 2(2)(a) of Directive 2006/54 has been implemented by Article 3(2)(a) of Act 3896/ 2010 (above 2.1.1). A woman who rejects or complains of harassment is often victimized in connection with employment. The alleged harasser often also brings criminal charges against her and/or her witnesses for defamation, insult or blackmail (below 2.2.2.2).

<sup>192</sup> SCPC (Civil Section) 84/2011 (dismissal for rejection of sexual harassment); 1360/1992, 85/1995 (gender discriminatory non-hiring and dismissal), 48/2011 (unlawful non-promotion).

<sup>193</sup> CS 1848/2007 (annulment of non-hiring).

<sup>194</sup> Article 336(1) in conjunction with Article 52 PC.

<sup>195</sup> Article 947 CivProcedC, SCPC 1664/2008 (sexual harassment outside the scope of the Directives).

- b) *Vocational training*: the above applies *mutatis mutandis*.
- c) *Access to and supply of goods and services*: the above applies *mutatis mutandis*.

#### 2.1.10. Compliance with EU law

Civil sanctions meet EU law requirements (adequacy in relation to harm, deterrent effect), but litigation levels are very low, as victims are reluctant to complain.

### 2.2. Case law

#### 2.2.1. National courts and equality bodies

On cases dealt with by the Ombudsman and the L.I. see above in 1.2.1.1, 1.2.1.2. The GIPA annual reports (above 2.1.7(e)) do not refer to any gender discrimination cases.

#### 2.2.2. Main features of case law

There are no judgments on harassment/sexual harassment based on the Acts transposing the Directives, but there are several private sector employment cases on sexual harassment. They rely on CC provisions which protect the personality and prohibit abuse of employers' rights and prejudicial modification of working conditions. Some invoke the Commission's Recommendation (due to legal theory referring to it), but not the Act transposing Directive 2002/73, even in cases postdating it<sup>196</sup> (below 2.2.3). There are also a few public sector disciplinary cases predating the above Acts and relying on domestic law.

2.2.2.1. Acts considered to constitute sexual harassment are the following: proposals for a sexual relationship,<sup>197</sup> invitations to go out,<sup>198</sup> sexual attacks,<sup>199</sup> embracing, caressing, kissing,<sup>200</sup> intervention in private life,<sup>201</sup> showing and explaining sketches of male underwear,<sup>202</sup> excessive familiarity turning to hostility when rejected.<sup>203</sup> All employment cases we found, but one, are against superiors.

#### 2.2.2.2.

- a) *Employment*: The FIC, relying on the CC and invoking the Commission's Recommendation, declared a dismissal of a woman due to rejection of sexual harassment by her superior null and void, as an abuse of right. It awarded her backpay and moral damages for offence to the personality. GSEE (above 1.1) intervened in the claimant's favour. The claimant's witness was sued by the harasser for defamation and was found guilty in first instance. The CA set aside the FIC decision for inadequate evidence, also taking into account that the witness was found guilty of defamation. The SCPC confirmed the CA judgment.<sup>204</sup>

The Athens FIC (743/1999), relying on the CC, declared the dismissal of a woman null and void on the same ground as above and awarded her backpay and moral damages. It relied on *circumstantial evidence* by female colleagues. It also took into account the pressure by the harasser in order to force the claimant to quit, and noted that he had also sued her for defamation, slander and blackmail. A union intervened in the claimant's favour.

A female cleaner, hired by a TEC (above 1.2.2.2) lodged an action against the TEC and its agent, her superior, who had harassed her at work, after complaining to a higher superior who first transferred her to another building and then dismissed her. The Athens

<sup>196</sup> Thessaloniki FIC 27623/2008 (case postdating Act 3488/2006).

<sup>197</sup> Athens CA 1139/2011; Athens FIC 743/1999, 3623/1997, Corfu FIC 500/1997.

<sup>198</sup> Thessaloniki FIC 27623/2008.

<sup>199</sup> Thessaloniki FIC 27623/2008.

<sup>200</sup> CS 505/2010, Athens FIC 1962/2003.

<sup>201</sup> Thessaloniki FIC 1936/2005, Samos FIC 195/2005.

<sup>202</sup> Thessaloniki FIC 1936/2005.

<sup>203</sup> SCPC (Civil Section) 84/2011.

<sup>204</sup> Athens FIC 3623/1997, Athens CA 5789/1998, SCPC (Civil Section) 1655/1999.

FIC (1962/2003) held that although the agent misused his position, his conduct was unrelated to his duties and was due to personal fault. It thus dismissed the action regarding the TEC and condemned the agent to moral damages. We found no appeal.

The Athens FIC declared the nullity of a dismissal which was due to hostility of the firm's manager against the claimant, because she rejected his harassing conduct. The CA set aside the decision, considering the action ill-founded due to lack of explicit mention of sexual harassment. The SCPC (84/2011) considered such a mention unnecessary.

- b) *Vocational training*: harassment by a teacher (Ombudsman, above 1.2.1.1).
- c) *Goods and services*: A gynaecologist was found guilty of an 'offence to the sexual dignity' of a patient during medical examination.<sup>205</sup> He should have been convicted for rape, as acts falling within the definition of rape (above 2.1.2.1) were proven. The CS confirmed a disciplinary sanction of dismissal of a public hospital doctor for 'indecent conduct' (above 2.1.2.4): harassment of a woman seeking information about a hospitalized relative. The disciplinary decision and the CS judgment relied on circumstantial evidence by other patients' relatives.<sup>206</sup> A conviction of a police officer for 'lewd acts through abuse of authority' (above 2.1.2.2) against a female asylum seeker<sup>207</sup> may be considered to be related to services to asylum seekers. See also the Ombudsman's cases against a doctor and a police officer who harassed women seeking their services (above 1.2.1.1).

### 2.2.3. Dignity

Most civil judgments regarding harassment consider it as an offence to '*personality*', which is wider than dignity and consists in 'a complex of components of a person's being, such as his/her honour, i.e. moral value and reputation, mental health and emotional realm'.<sup>208</sup> Some add '*dignity*', mostly when they invoke the Commission's Recommendation, without defining it.<sup>209</sup>

### 2.2.4. Restrictions

There is no clash between the prohibition of harassment and human/constitutional rights. On the contrary, the victims of harassment are protected by the constitutional norm requiring the protection of the personality (Article 5(1)).

## 3. Harassment and sexual harassment outside the framework of anti-discrimination law

### 3.1. National provisions

There are only penal and disciplinary law provisions in the Acts transposing Directives 2006/54 and 2004/113 (above 2.1.2).

### 3.2. Collective agreements

There are no specific national collective agreements aimed at combating harassment. As far as we know, in the past there have only been some n.g.c.a. clauses referring to sexual harassment (above 1.1), which, although non-binding, seem to have had an awareness-raising effect. However, the (non-binding) agreement of the social partners in the 2004-2005 n.g.c.a. to study the implementation of EC sexual harassment law does not seem to have materialized.

### 3.3. Additional measures

There are no other measures outside the framework of anti-discrimination law.

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<sup>205</sup> SCPC (Penal Section) 2590/2008.

<sup>206</sup> C State 505/2010: dismissal of the harasser's claim for annulment of the sanction.

<sup>207</sup> SCPC (Penal Section) 1770/2010.

<sup>208</sup> SCPC (Civil Section) 418/2010 (harassment outside the scope of the Directives)

<sup>209</sup> Thessaloniki CA 957/2001, Thessaloniki FIC 27623/2008, Athens FIC 3623/1997, Samos FIC 195/2005.

### **3.4. Harassment and stress at work**

Most judgments dealing with harassment refer to the stress it caused. See also above in 1.2.2.1 for stressful conditions of work in relation to harassment.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

Although no judgments have yet relied on the Acts transposing the Directives, it is hoped that EU law will gradually change stereotyped approaches regarding e.g. the prerequisites of liability, in particular fault (above 2.1.2.). Moreover, while until now the focus was on the workplace, EU law explicitly goes beyond it. This would mean greater access to justice for individuals, which, however, is prevented by non-application of the rules on the burden of proof and standing of organisations (above 2.1.8). More clarity for victims, lawyers, courts would be promoted by national case law, in particular through preliminary references. Criminal rules are stricter regarding proof and they will remain so, but the main problem is the limited scope of substantive PC provisions (above 2.1.2.1-2.1.2.3) and the scarcity of penal complaints. The latter can be remedied by L.I. lodging complaints, which they rarely do, in particular in gender discrimination cases, due the inadequacy of their services (above 1.2.1.3). This inadequacy also prevents them from imposing fines. In conclusion, good substantive and procedural rules do not suffice, when victims are reluctant to complain and perpetrators expect to remain unpunished.

### **4.2. Pitfalls**

Regarding the questions in this paragraph, the above applies *mutatis mutandis*. A general comment is that the individual's protection by the courts and other competent authorities has become more difficult in the current crucial socio-economic situation, due not only to the above factors, but also to the growing avalanche of legislative and other measures aimed at coping with this situation. These measures may include or result in direct or indirect violations of fundamental rights, which people and competent authorities cannot easily follow, as they are too complex and frequently modified.

## **HUNGARY – Csilla Kollonay Lehoczky**

### **1. General situation**

Hungary is a patriarchal country. Correspondingly, harassment on the ground of sex and sexual harassment is covered in silence, trivialisation or blaming the victim in general. In most of its forms it is considered insignificant, rather a form of 'cavalry', complimenting, perhaps frolics. Something that is natural when women and men work together and even appreciated by many women. Yet its stronger forms, which may cause serious distress, are simply considered as an individual fault, a form of 'improper conduct', or 'bad temper' on the part of the harasser, which comes with the different nature of persons (i.e. a fact of life) and the distress on the part of the victim is often considered as a result of over-sensitiveness or a lack of social skills to 'handle' the situation. Worse, occasionally the harassment is considered to be the result of a fault (provocative conduct or clothing) of the victim.

Reactions at the institutional level (by employers or authorities) are weak and scattered. Feminist voices calling for deterrent measures are often received with irony and criticism.

Government and employers occasionally try to step up, by way of regulation and penalties. However, this seems too little to change the overall attitude.

No systematic research or statistical surveys on the subject have been carried out so far. Anecdotal reports and case descriptions are available in feminist publications.

According to a report by the legal council of the Equal Treatment Authority, estimates are that 40 % of women and 10 % of men has already experienced harassment, which is not different from the European rate.

As to access to employment, there is no debate on issues of harassment. There is overall silence: while no one would approve workplace harassment, and all agree on the prohibition in general, existing practices of harassment in employment are tolerated. Social expectations put the burden on women, requiring them to prevent and avoid harassment, especially in the hiring process, by 'decent' clothing, 'modest' conduct, 'intelligent' skills in rejecting and discouraging possible harassment, or, even by rejecting a job that clearly involves the risk of being harassed. Or, otherwise, by not being 'sensitive' of the tone and conduct at the workplace. Social opinion holds that these attributes are the ingredients of a capable woman in the labour market, disregarding the implied reduction of career opportunities, i.e. discrimination, in such hidden requirements. The requirements are considered by many to be an evident and proportionate price for working without being harassed.

As to training and education (as part of the access to employment) harassment by teachers is more openly condemned and sanctioned, when revealed – corresponding with the conservative patriarchal approach to harassment. In the few cases that have become public, teachers were removed from the relevant school (although frequently justified by a different reason). Nevertheless, harassment – also in higher education – is still latent, and victims prefer to hide such insults, in part due to fear for their diploma, in part due to fear of the shame and to avoid public discussion of their pain.

Regarding services, harassment and particularly sexual harassment have not emerged as an issue (contrary to discrimination on the ground of race, age or disability). There are three areas where sex-related harassment – more exactly: sexism and sexist communication – has been an issue: Internet services, public media and advertisement. These do not regard forms of individual harassment, but rather a violation of equal treatment of women as a group, a collective form of harassment by creating a degrading and humiliating environment for women (although not each individual woman might regard it as offensive).

1. In the area of Internet services, all service providers issue rules of conduct for the service users (web marketers, web shop keepers, bloggers etc.) and these rules prohibit harassment in general and sexual harassment of minors. Accompanying this prohibition, some companies include the threat of initiating criminal procedures in case of serious violation. There is no debate on these issues.

2. The second area, public media communication, only has regulation with respect to minors. The Act on Radio and Television Communication prohibits, among other things, any visual or audio communication of explicit sexuality outside night hours (between 11 p.m. and 5 a.m.). Before the broadcast of such scenes a warning must be shown. Although some legal cases have been brought before court (mostly by communication companies that had been fined), so far no significant dispute on this issue has emerged.

3. The third group, commercial advertisements, seems to raise the largest problems, or at least to cause public debate. Public attention directed at these issues seems to have an impact on the policies of advertising companies, which in itself is a good result. The law on public advertisement requires ads to comply with good morals, not to violate human dignity and not to be discriminatory with regard to (among other things) sex. The law on radio and television advertisements similarly declares that those ads must not violate human rights, the principle of dignity and equality, and discrimination with respect to (among other things) sex is prohibited. Erotic advertisements are permitted only between 10 p.m. and 6 a.m. Nonetheless, the concept of 'discrimination' and 'violation of dignity' is quite diverse, and the competent board of the Hungarian Advertisement Association of Advertisement companies has a fairly lenient interpretation. Nevertheless, when in 2007 (after some previous incidents) feminist organizations and human rights advocates loudly protested against a series of food advertisements in the newspapers and on giant posters on public billboards, using a female body to show the 'appetizing' parts of the advertised chicken (labelled as 'bomber chick') and aubergine (showing a female body and labelled as 'greens'), the association itself found the ads distasteful and harassing. The customer whose products were advertised claimed that it



was ‘humorous and charming’ and they did not remove the pictures, in spite of the decision of the ethical board of the Association. Later, reluctantly and with delay, they were removed.

In recent years, there have not been any similar cases involving scandalous business commercials. Recently, a YouTube video<sup>210</sup> released by the Central Statistical Office, a government agency, in preparation of the 2011 national census to encourage people to fill in and return the census questionnaires by Internet generated strong protest. The video, apparently featuring a prostitute, aroused strong criticism among feminists. Officials of the Statistical Office do not find it sexist, but rather a cost-saving and efficient way to reach the ‘target group’.

## 2. Harassment and sexual harassment in the context of anti-discrimination law

### 2.1. Legislation

The Constitution, the Law on Healthcare, the Civil Code, the Criminal Code and the Labour Code contain provisions prohibiting discrimination, in addition to the overall and detailed prohibition enacted by the Equality Act (Act of CXXV of 2003 on the Law of Equal Treatment and Equal Opportunities). The Equality Act defines ‘harassment’ as a form of violation of equal treatment and the Criminal Code – by a 2007 amendment – establishes ‘harassment’ as a new crime. However, none of these legislative Acts regulate or just mention sexual harassment.

#### 2.1.1. Transposition

The Equality Act – adopted in order to transpose the *acquis communautaire* on equality and non-discrimination has extended the prohibition of discrimination, in addition to employment, to services, social security and education as well. Since the novel areas covered by Directives 2006/54 and 2004/113/EC were already basically covered, the adoption of these legal instruments was not followed by any specific transposing legislation. This is, of course, a supposed reason, and no explanation for the lack of explicit implementation was given (no correlation table of national law was published). Also, Article 2(2)(a) of Directive 2006/54/EC has not been specifically transposed. The reason, again presumably, might be that it was thought to be covered by Article 10§3 prohibiting ‘retaliation’. In this case the reluctance to address sexual harassment directly might have played a role as well.

#### 2.1.2. Definitions

The Equality Act defines harassment somewhat narrower than Directive 2002/73 insofar as according to its Article 10(1), the ‘violation of dignity’ has to occur as a fact (a result), and this has to be connected with the intention or result of creating an intimidating, hostile, humiliating, degrading or offensive environment against a person (whereas under the Directives, the intention might be enough with regard to both elements). The violation of dignity has to be the result of conduct ‘of a sexual or other nature’ and must be in connection with one of the protected attributes (among others sex) enumerated in Article 8 of the Equality Act. The redundant requirement of the conduct being ‘unwanted’ is not included in the text.

Since Directives 2004/113/EC and 2006/54/EC define sexual harassment with a broader scope than harassment (here the sole violation of dignity – as an intention or a result – is enough and the further elements regarding the environment are not required), the Hungarian definition, which merges harassment and sexual harassment, further narrows the concept of the latter in comparison to the EU definition (that of 2(1)(d) in both Directives.) In the final analysis, in spite of the narrowed concept, the definition permits finding harassment even when there is no intention.

<sup>210</sup> [http://www.youtube.com/watch?v=71d7gzymPA0&oref=http%3A%2F%2Fwww.youtube.com%3Fsearch\\_query%3DKSH%2Bpromo%2Bn%25C3%25A9psz%25C3%25A1ml%25C3%25A1l%25C3%25B6it%25C3%25A9s%26aq%3Df&has\\_verified=1](http://www.youtube.com/watch?v=71d7gzymPA0&oref=http%3A%2F%2Fwww.youtube.com%3Fsearch_query%3DKSH%2Bpromo%2Bn%25C3%25A9psz%25C3%25A1ml%25C3%25A1l%25C3%25B6it%25C3%25A9s%26aq%3Df&has_verified=1) (The text of the dialogue between the census taker and the girl: ‘CT: Hello, coming at the wrong time? G: Guess!? CT: Eeeh, just because... as you know, it is census time.... Anyway, it is possible to fill it in on the Internet... G: Fine, I would like to use the Net.... CT: That’s fine, I’ll be off then, G: OK, Ciao’.)

An amendment of the Criminal Code, in force from 1 January 2008, in Article 176/A§, established a misdemeanour called ‘harassment’, inserted in the Title ‘Crimes against freedom and human dignity’ in the Chapter on ‘Crimes against persons’. According to the definition, harassment is intended to intimidate another person, to disturb the privacy of or to upset, or cause emotional distress to another person. Engaging in the pestering of another person on a regular basis also constitutes harassment. Sexual harassment is not included and – apart from rape, which is another crime – has not been covered by case law.

Civil law addresses harassment as a special, exceptional form of the misuse of rights, together with such misuse aimed at damaging the national economy, violating the rights and interests of others, or achieving undeserved gains. (Article 5§2 of the Civil Code among the ‘Introductory provisions’ on the rules of the exercise of rights.)

These definitions of ‘harassment’ are not only independent from and unconnected with ‘sexual harassment’ as defined in the Recast Directive, but are also independent from each other as legal terms. None of these provisions outside the Equal Treatment Act treat harassment as a form of discrimination.

This lack of connection between discrimination and these forms of ‘harassment’ is underlined by Article 76 of the Civil Code on the ‘Rights of Persons’ which, among other things, declares discrimination to be a violation of the inherent rights of the person together with the violation of the freedom of conscience, the unlawful deprivation of personal freedom; injury to body or health; contempt of or insult to the honour, integrity, or human dignity of private persons. While the word ‘harassment’ is not used, these violations are much closer to the definition of harassment under the EU equality directives.

*2.1.3. Sexual harassment* As mentioned above, the Equality Act does not include a separate concept of sexual harassment. Any conduct ‘of a sexual or other nature’ constitutes harassment if it is connected to one of the 19 protected attributes. Thus, theoretically, ‘sexual conduct’ can result in harassment with respect to any attribute (race, religion, trade union membership etc.) other than sex. However, since under Hungarian law there is no independent legal concept of sexual harassment, it cannot be established with respect to other grounds, either.

A case that may be referred to under the category of sex-based and race-based harassment is a case initiated against the Mayor of a small settlement with a considerable Roma population. He publicly claimed that numerous Roma women, when pregnant, intentionally beat their abdomen in order to harm their foetus because they wish to receive the higher amount of family allowance paid to parents of seriously disabled children. For this case, the Equal Treatment Authority (for the first time) used its right to initiate a procedure itself. It was explained in the decision that the reason to initiate the procedure was that the statement of the Mayor became widely known in Hungary and resulted in a strong feeling of humiliation within the Roma society, primarily its female members. In the procedure it was established that the statements of the Mayor, by his clear-cut statements and reference to actual personal knowledge, had generated a hostile, offensive and humiliating atmosphere for the affected persons. For this reason, it found violation on the ground of sex, race and maternity of Article 10§1 prohibiting harassment.

#### *2.1.4. Scope*

The Equality Act defines its material scope by its personal scope, i.e. it enumerates the addressees and prohibits discrimination in all their legal relationships. Thus, harassment has a broad material scope, significantly broader than that covered by Directives 2004/113/EC and 2006/54/EC. In addition to employment (including vocational training and promotion) and access to and supply of goods and services, it covers social security, social assistance, education, relationships within political and civil organizations, and the citizen-state administration relationship.

#### *2.1.5. Addressee*

Since harassment is stipulated as one type of violation of equal treatment, addressees of the prohibition of harassment are identical to the actors covered by the personal scope of the

Equality Act. This means that in the field of employment it is the employer and in the field of goods and services it is the service provider who is the addressee of the duty of equal treatment, including the prohibition of harassment. Emphasizing this interpretation is important to avoid incorrect interpretation.

This is because (regrettably) it was none other than the ‘Advisory Body to the Equal Treatment Authority’, established by the Equal Treatment Act, that has issued an opinion declaring that if someone is harassed by another employee who is not their superior, the only way to obtain remedy is civil-law litigation against the harasser.<sup>211</sup> This opinion (which, even if it has no legal force, might deter victims of harassment from enforcing their rights) fails to take into consideration the responsibility of employers for the working conditions (including material and human factors) that are provided and controlled by the employer.

Promisingly, there seems to be a shift developing in the case law of the ETA. Two recently published decisions contained an almost identical sentence, both declaring: the authority initiated the procedure against the employer who is obliged to guarantee the observation of equal treatment and *is accountable for its each employee*.<sup>212</sup> This wording seems to indicate that the ETA is turning against the interpretation of the Advisory Board. (The interpretation by the Advisory Board is not legally binding for the ETA.)

#### 2.1.6. Preventive measures

Article 26 of the Recast Directive on preventive measures *has not* been specifically implemented. Public employers and employers with a state share of at least fifty percent are obliged to adopt an ‘Equality plan’. Such a plan in principle might include provisions on preventing harassment. However, this is not likely, primarily because the goal of such a plan is to promote the ‘equal opportunities’ of specified vulnerable groups. Such practice, however, is not known. Rather, some foreign companies have brought a somewhat different organizational culture by adopting internal rules – a type of code of conduct, or code of ethics – prohibiting harassment and prescribing procedures whereby those who feel aggrieved may lodge a complaint.

There are no national collective agreements in Hungary. The few sectoral agreements focus on basic terms and conditions of employment in a narrow sense (primarily stipulating minimal wages and wage categories, regulations on working hours and overtime). Similarly to most post-socialist countries, collective agreements are generally concluded at company level. These agreements also do not deal with issues of harassment. (A few years ago, a systematic research surveying the content of collective agreements revealed that equality, particularly gender equality, was not addressed in collective agreements. Although no such surveys have been carried out recently, it is unlikely that the situation has changed.

No implementation of the Framework Agreement on harassment and violence at work has been enacted either in the law or in collective agreements or other agreements between the social partners or tripartite partners. The Agreement has been presented as a result of EU-level social dialogue and as an important document. However, no proposals or initiatives on its implementation are available.

#### 2.1.7. Procedures

At the level of legal regulations no specific (complaints) procedures are available for persons in cases of alleged harassment or sexual harassment. In employment, procedures for legal disputes are available (including a reconciliation process before turning to court with a legal claim), which include the opportunity of a reconciliation procedure.

Similarly, in the access to and supply of goods and services the regular consumer-protection regulations and complaints procedures prevail. There are no specific provisions

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<sup>211</sup> [http://www.egyenlobanasmod.hu/tt/TTaf\\_200812](http://www.egyenlobanasmod.hu/tt/TTaf_200812), accessed 12 October 2011.

<sup>212</sup> Cases 365/2011 and 831/211. In the latter case, a fine of about EUR 3 700 was imposed on the employer, while in the former case apologies and promises by the employer to avoid such situation in the future was accepted and the case was closed by an agreement.

regarding harassment. Against such conduct, the available procedure is a complaint submitted to the Equal Treatment Authority, as for any other discrimination issue.

#### *2.1.8. Burden of proof*

According to the rules of the division of the burden of proof,<sup>213</sup> the person who feels treated unequally has to prove the disadvantage (or threat of disadvantage) affecting her, as well as the possession of one of the prohibited grounds of discrimination. This rule cannot properly work in harassment cases where the disadvantage is frequently unclear in an employer's action, and mostly it is not public, or manifests itself in the hostile environment. Furthermore, the public opinion that frequently blames the victim for the harassment as well as the overall belief that if complaints procedures are permitted due to harassment it would be abused by alleged victims are also a strong deterrent. Victims frequently give up trying to enforce their right due to the fear of being exposed to shame, embarrassment or to a unsympathetic work-environment, and perhaps to open or hidden retaliation.

#### *2.1.9. Remedies and sanctions*

In employment and goods and services, no special remedies or sanctions are established for harassment cases. The remedies and sanctions are the same as those used for the violation of rights (personality rights) in general. There are no special sanctions or remedies in the Equality Act for harassment either. Victims may initiate court procedures either within the framework of civil litigation for the violation of personality rights under Article 76 of the Civil Code, or within the framework of labour litigation if the violation occurred in the field of employment.

Remedies for violations of personality rights protected under Article 76 of the Civil Code are the following: a declaration by the court finding the violation, a prohibition of the continuation of the situation/action, restoration of the previous situation at the costs of the perpetrator, and possible harm should be compensated.

Sanctions against the perpetrator – in addition to providing the remedies – might be supplemented by the court: if the amount of the damages are insufficient in comparison to the gravity of the actionable conduct, the civil court may order the perpetrator to pay a fine to be used for public purposes (Article 74 of the Civil Code).

In a labour dispute if unlawful violation of equal treatment is found, the regular remedies are available for the victim in a court procedure: reinstatement of the previous job if terminated, and payment of damages. So-called non-material damages can also be awarded if serious violation has occurred. However, courts are treating such claims quite strictly, i.e. they require strong evidence for the actual long-term harm underlying the claim.

Aggrieved persons frequently opt for turning to the Equal Treatment Authority instead of either the civil or the labour court. The ETA may find violation and order its discontinuation, but it cannot order the payment of damages. Instead, it may mediate an agreement between the employer and the victim of the harassment and within the framework of such an agreement the harm and damages deriving from the harassment might be settled.

The sanction against the perpetrator imposed by the ETA might be a fine of almost EUR 200 up to approximately EUR 22 000 (HUF 50 000 to 6 million). The right of the ETA to impose a fine on the perpetrator (either private or legal person) may give an incentive to the perpetrators to come to some consensual settlement with the victim. A further deterrent might be the publication of the decision for two years on the homepage of the ETA.<sup>214</sup> For a while, a serious sanction of being excluded from applying for state subsidies was connected to such publication. In the course of the time the preconditions of the exclusion have tightened, i.e. employers can more easily avoid this manifestly painful sanction.

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<sup>213</sup> Article 19§1 of the Equality Act.

<sup>214</sup> Currently, a total of four decisions are published on the homepage. None of them is about sex or gender discrimination, and one of them is a harassment case, due to political opinion (EBH/427/2011 (2011.09.14-2011.12.14)).

The law includes no provisions on the arrangements either for the victim or for the perpetrator. In practice, it is frequently the victim who has to change either his/her post or job, not because of any legal aspects, but rather due to social pressure. On the other hand, in the infrequent cases where the perpetrator is, indeed, found liable, the case ends with dismissal or punishment by the employer.

Under the Criminal Code one year, and, in case of serious harm, a maximum of two years', imprisonment can be imposed for harassment. It is worth mentioning that the upper limits are two and three years if the harassment took place against present or past spouses or partners or persons under the harasser's custody.

#### *2.1.10. Compliance with EU law*

I do not think that Hungarian law is in compliance with EU law. The legislator has tried to find solutions to meet formal requirements, however, sexual harassment is not further explicitly referred to and prohibited. Furthermore, the unequal status of the two sexes continues, including all its consequences, in particular leaving unchanged (or even confirming) the outdated social attitude that weakens existing efforts to eliminate harassment.

#### *2.1.11. Additional information: Opinion on anti-discrimination*

As stated several times before (and I apologise for repeating it) I think we can only treat the symptoms of gender inequality if the roots (primarily the unequal family roles and stereotypes, as well as the unequal treatment of female and non-female jobs, occupations and industries) are not properly addressed in a long-term strategic way.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

There are only a few harassment cases, in the case law of the courts or in the case law of the ETA. The cases in themselves indicate a slight change, but no 'breakthrough' can be detected: victims remain reluctant to raise their problem at the workplace, to go to the ETA or to the courts – and with good reason. The procedures are frequently much more 'costly' for them (in stress, humiliation) than for the perpetrators and the available remedies are frequently disappointing.

### *2.2.2. Main features of case law*

A few examples from the ETA's case law might demonstrate the lenient approach to harassment.

In one manifest case there was clear evidence for harassment against a woman who was approached by a colleague: when the woman married another man, the male colleague became aggressive and harshly harassing. Even if the offender was known as a bad-tempered harasser, both their superior and the staff blamed the woman to some extent (if others could leave without complaining why could not she?). After one discussion with the two parties – which was unsuccessful due to the manner of the perpetrator – the boss 'closed the matter' and did not want to hear more about it. The woman turned to the ETA, which found harassment. It ordered the harasser to discontinue such conduct, obliging the employer to introduce anti-harassment rules in the Equality Plan and imposed a fine of less than EUR 400.<sup>215</sup>

In another case where the harassment consisted of non-stop text messages and e-mails, although not offensive, the woman who asked for the help of the trade union to turn to the superior was requested to delete the messages and criticized by the superiors for involving the trade union. In this case the ETA approved an agreement that the two parties would work in alternate shifts in the future, and the superior promised to act and apply further measures if necessary.<sup>216</sup>

<sup>215</sup> ETA 1/2010 <http://www.egyenlobanasmod.hu/jogesetek/hu/1-2010.pdf>, accessed 12 October 2011.

<sup>216</sup> ETA 38/2010 <http://www.egyenlobanasmod.hu/jogesetek/hu/38-2010.pdf>, accessed 12 October 2011.

A woman complained of being harassed after her divorce in the form of requests for sexual favours by her superior in exchange for meeting her request to change her post (since she had to raise her child alone). While it is commonly known that divorced, especially recently divorced, women are more often exposed to sexual harassment, the Equal Treatment Authority has not investigated the details of the case. It accepted that there might have been 'personal conflict' in the background, and also accepted the 'moral assessment' (!) of the private life of the complainant, since 'this was not related to her female sex and maternity'. Thus, no harassment was found.<sup>217</sup>

In court case law it was even harder to find cases where harassment (sexual harassment) was found and remedied (explaining to some extent why victims turn to the ETA in spite of its soft and lenient attitude towards employers).

In obvious cases, harassment is found and sanctioned (having reached the court): in a case where a healthcare worker harassed a patient who had just been operated on in the surgery ward, he was dismissed by disciplinary dismissal.<sup>218</sup> In more complex cases, however, the harassment claim fails in the majority of cases, frequently due to lack of evidence. Therefore, these cases mostly reach the court as dismissal cases or claims for compensation of lost wages due to leaving the job.

There was one remarkable case in which the claim was retaliatory dismissal with a background combining deficiencies in the organizational operation and rejected sexual advances. The court rejected the claim for lack of evidence for motive and offensive conduct of the employer. It added: if the sexual advances had been proven, it could have caused violation of personal rights(!), but could not entail liability of the employer for non-pecuniary damages.<sup>219</sup>

### *2.2.3. Dignity*

While violation of dignity has been found several times, the concept of dignity has not been defined. It was defined by the Constitutional Court as a 'general personality right' (the source and mother of all personality rights). However, this would not take us any closer to dignity in harassment cases.

### *2.2.4. Restrictions*

There are no explicit restrictions, similar to those based on the freedom of speech in the US, but the generally lenient approach suggests a perception of some type of freedom that would be limited or threatened by a more consistent prevention and sanction of harassment.

### *2.2.5. Role of equality bodies*

The role of the ETA is hesitant and cautious in general (especially recently). This deficiency is stronger when it comes to harassment, where its hesitation is increased by the general social attitude.

### *2.2.6. Additional information*

There is no additional information.

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<sup>217</sup> ETA 91/2010 <http://www.egyenlobanasmod.hu/jogesetek/hu/91-2010.pdf>, accessed 12 October 2011.

<sup>218</sup> Supreme Court, M. törv. II. 10 378/1989. sz (BH - Bulletin of Court Decisions 1991/88).

<sup>219</sup> Supreme Court, Mfv.I.11.054/2008/3.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### ***3.1. National provisions***

Within health and safety law there are no provisions – harassment is usually considered to be an individual problem rather than a structural one belonging to the system of organized workplaces. There are no special provisions in labour regulation, and the Equality Act is supposed to provide a comprehensive regulation on discrimination and also on harassment.

The provisions of civil and criminal law have been described under 2.1.2 and 2.1.9.

It might be added here that the Criminal Code, Chapter XX punishing military crimes, among the crimes committed by superiors, includes ‘violation of a subordinate’ (Article 358), punishable by a maximum of one year’s imprisonment. This provision has been applied in a number of cases, when sexual harassment claims were found proved. At the same time, suspended prison sentences or only pecuniary penalties are normally imposed.

#### ***3.2. Collective agreements***

There are no national collective agreements in Hungary, and there are no collective agreements aimed at combating harassment in employment. Lower-level agreements typically do not contain any provisions against harassment.

#### ***3.3. Additional measures***

No additional measures combating harassment can be mentioned.

#### ***3.4. Harassment and stress at work***

The two phenomena have recently attracted attention, particularly because the two relevant EU directives are frequently discussed in combination. This coupling, in most cases, tends to put stress into the limelight and push harassment into the background.

#### ***3.5. Additional information***

There is no additional information.

### **4. Added value of anti-discrimination approach**

#### ***4.1. Added value***

The discrimination approach might produce a more objective and institutional, less ‘sensitive’ or ‘taboo’-like approach with respect to harassment (and perhaps one day with respect to sexual harassment as well, openly using this term). The need for this ‘demystification’ is clearly shown by the approach of the Equality Body to the ETA, causing victims of harassment to turn to the civil courts for personal-rights litigation, while no one would think of such an interpretation in case of ‘simple’ discrimination by a non-superior colleague. In the latter case, the liability of the employer is undisputed.

This would shed more light on and bring clarity to the pure discriminatory nature of sexual harassment (depriving it from all ‘romanticism’) and would promote the enforcement of equal treatment.

#### ***4.2. Pitfalls***

Hungary has too little experience to see any pitfalls. So far, all steps approaching the European concept and handling of harassment only seem to constitute advantages. No cases are available to compare the different settings and they would be difficult to assess under Hungarian law.



## 1. General situation

The concept of sexual harassment is rather recent in the Icelandic debate on gender equality matters. The concept of harassment was first recognized as part of the problem of gender-based discrimination in the Act on the Equal Status and Equal Rights of Women and Men No. 96/2000, which was replaced by the Act on the Equal Status and Equal Rights of Women and Men No. 10/2008. These Acts will be referred to as Gender Equality Acts or GEA Nos. 96/2000 and No. 10/2008 respectively. Sexual harassment, however, has been recognized for some time as a problem at the workplace, in schools and in social life.

The Administration of Occupational Health and Safety in Iceland (hereinafter the AOSH) is an independent institution under the Ministry of Social Affairs. It is responsible for the enforcement of legislation applying to the situation and conditions of the workplace. The current legislation is the Act on Working Conditions, Health and Safety in the Workplace No. 46/1980, and a number of regulations ratified by the Minister of Social Affairs cover workplaces on land with a staff of one or more persons.<sup>220</sup>

The AOSH has conducted research in relation to problems related to social risk factors, including mental and physical violence, mobbing, sexual harassment, extensive work load, incorrect organization of work and monotonous work. In 2004, the AOSH published a roadmap to a healthy and safe working environment.<sup>221</sup> The roadmap presents a number of criteria: working hours, lack of time, monotonous work, the scope of workers to have an impact on working conditions, isolation at the workplace, communication, information flow, combination of working groups and requirements made of staff. This road map provides examples and paradigms for all criteria and measures to assess whether the conditions are satisfactory and in accordance with the paradigms.

According to information from the AOSH, women are the majority of the victims of sexual harassment at the workplace.<sup>222</sup> These are mainly divorced women, young women and newcomers to the workplace and women of other nationalities.<sup>223</sup> It has proven more difficult to solve the problem if the harasser has a high position. The AOSH does not interfere in harassment problems at a workplace unless it receives a written complaint. It then sends someone in to inspect the situation and to conduct a meeting with the parties to the case within the workplace. The company/institution gets three months to solve the problem and report on its solution.

A report on mobbing and sexual harassment at the workplace was published by the AOSH in 2008.<sup>224</sup> The report defines what constitutes mobbing and sexual harassment, its reasons and its consequences, and preventive measures and remedies. The report makes a distinction between mobbing as defined in Regulation no. 1000/2004 (see below under national provisions)<sup>225</sup> and sexual harassment as a form of bullying at the workplace. It traces the most likely reasons for mobbing/harassment and the impact of such behaviour on the victim. Finally, it lists preventive measures and remedies and the duties of employers to secure a safe working environment. The remedies can be informal and hence solved within the workplace or according to a formal procedure where the harasser is either moved to another department or dismissed after an objective and thorough investigation into the matter.

<sup>220</sup> <http://vinnueftirlit.is/vinnueftirlit.is/english/>, accessed 20 August 2011.

<sup>221</sup> [http://www.vinnueftirlit.is/vinnueftirlit/upload/files/vinnuumhverfisvisar\\_og\\_gatlistar/visafe01\\_felagsl\\_andl\\_adbun.pdf](http://www.vinnueftirlit.is/vinnueftirlit/upload/files/vinnuumhverfisvisar_og_gatlistar/visafe01_felagsl_andl_adbun.pdf), accessed 20 August 2011.

<sup>222</sup> [http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/namskeid/8\\_einelti\\_a\\_vinnustad.pdf](http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/namskeid/8_einelti_a_vinnustad.pdf), accessed 20 August 2011.

<sup>223</sup> [http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/namskeid/8\\_einelti\\_a\\_vinnustad.pdf](http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/namskeid/8_einelti_a_vinnustad.pdf), accessed 20 August 2011.

<sup>224</sup> [http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/baeklingar/einelti\\_og\\_kynferdisleg\\_vef.pdf](http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/baeklingar/einelti_og_kynferdisleg_vef.pdf), accessed 20 August 2011.

<sup>225</sup> <http://www.ealcj.org/documents/Final%20Report.pdf>, accessed 20 August 2011.



The AOSH report refers to research showing that victims are often incapable of seeking help themselves when confronted with bullying/sexual harassment.<sup>226</sup> Such situations require that employers becoming aware of such behaviour initiate an investigation into the matter.

Statistics from 2002 reveal that among the staff of financial institutions around 8 % complained of being bullied.<sup>227</sup> A study among employees in the public sector in 2006 reveals that around 17 % complained of harassment and 10 % of frequent occurrences of such unwelcome behaviour.<sup>228</sup>

The Centre for Gender Equality has the task of monitoring and applying the Gender Equality Act No. 10/2008 and supervise educational and informative activities. It has not produced any study on the topic of gender-based or sexual harassment. There is a short overview on its website of what constitutes gender-based and sexual harassment in the meaning of the GEA No. 10/2008.<sup>229</sup>

There is not much general debate on the issue of sexual harassment or mobbing/bullying at the workplace. There is growing awareness of what constitutes sexual harassment. Recent case law has also shed light on such issues. There is, however, little if any general awareness or debate regarding gender-based harassment or bullying at the workplace, where women tend to be the victims.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

*The Constitution of the Republic of Iceland no. 33/1944*  
Article 65 states:

‘Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.  
Men and women shall enjoy equal rights in all respects.’

*Gender Equality Act No.10/2008*

Article 22 deals with gender-based harassment and sexual harassment stating:

‘Employers and the directors of institutions and non-governmental organisations shall take special measures to protect employees, students and clients from gender-based sexual harassment at the workplace, in institutions, in their work for, or the functions of, their societies, or in schools. If a superior is charged with alleged gender-based or sexual harassment, he or she shall be deemed incompetent to take decisions regarding the working conditions of the claimant during examination of the case, and the next superior shall take such decisions.’

#### **2.1.1. Transposition**

The EEA Joint Committee made Directive 2006/54/EC (hereinafter Recast Directive) part of the EEA Agreement by its decision of 14 March 2008. The Recast Directive, however, has not been transposed into Icelandic law. The reason provided by authorities is that such transposition is not necessary as the Act on Equal Status and Equal Rights of Women and Men No. 10/2008 – the Gender Equality Act (hereinafter GEA No. 10/2008) is regarded as covering the provisions of the Recast Directive in substantive law.

Article 2(2)a of the Recast Directive 2006/54 has not been specifically transposed. The Goods and Services Directive 2004/113 has not yet been implemented into Icelandic law. The

<sup>226</sup> [http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/baeklingar/einelti\\_og\\_kynferdisleg\\_vef.pdf](http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/baeklingar/einelti_og_kynferdisleg_vef.pdf), accessed 22 August 2011.

<sup>227</sup> <http://www.fjarmalaraduneyti.is/starfsmenn-rikisins/starfsaevin/einelti/>, accessed 21 August 2011.

<sup>228</sup> <http://www.fjarmalaraduneyti.is/frettir/frettir-stjornenda/frettir-stjornenda/nr/9143>, accessed 21 August 2011.

<sup>229</sup> <http://www.jafnretti.is/jafnretti/?D10cID=Page&ID=87>; <http://www.jafnretti.is/jafnretti/?D10cID=Page&ID=73>, both links accessed 19 Dec 2011.

GEA prohibits discrimination in the areas of employment, occupation and vocational training while Directive 2004/113/EC covers other areas outside employment and professional life and would hence supplement the existing legislation if transposed.

The protection against harassment and sexual harassment according to GEA No. 10/2008 mostly complies with Paragraph 7 of the Preamble to the Recast Directive. It is prohibited to discriminate at work and on recruitment in employment but the access to employment, vocational training (cf. Paragraph 7 of the Preamble to the Recast Directive) is missing from the provision covering gender-based harassment and sexual harassment in the GEA's Article 22, although it is prohibited in general to discriminate at work and on recruitment in employment (Article 26 GEA); regarding terms of employment (Article 25 GEA); in connection with a complaint or a demand for redress (Article 27 GEA); in schools and educational institutions (Article 28 GEA) and in advertisements as well as waiving the rights set forth in the GEA (Article 30).

Article 26 of the Recast Directive is also much more to the point regarding sexual harassment than the relevant provision (Article 22) in GEA No. 10/2008.<sup>230</sup>

### *2.1.2. Definitions*

Article 2 of GEA No. 10/2008 stipulates the purposes of this Act. The following terms are defined below:

1. Direct discrimination: When one individual receives less favourable treatment than another of the opposite sex in comparable circumstances.
2. Indirect discrimination: When an impartial requirement, standard of reference or measure affects either sex more heavily than the other, unless this is appropriate, necessary or justifiable in terms of impartial considerations independent of gender.
3. Gender-based harassment: Any type of unfair and/or insulting behaviour which is connected with the gender of the person affected by it, is unwelcome and impairs the self-respect of the person affected by it, and which is continued in spite of a clear indication that it is unwelcome. This harassment may be physical, verbal or symbolic. A single instance may be considered as gender-based harassment if it is serious.
4. Sexual harassment: Any type of unfair and/or insulting sexual behaviour which is unwelcome and impairs the self-respect of the person affected by it, and which is continued in spite of a clear indication that it is unwelcome. This harassment may be physical, verbal or symbolic. A single instance may be considered sexual harassment if it is serious.

The definitions of gender-based harassment and sexual harassment are based on the text in Directive 2002/73/EC 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. The text corresponds more or less with the definition in the Recast Directive No. 2006/54 as it takes into account the purpose, insulting behaviour connected with the gender of the person and impairing the self-respect of that person. In the definition of Article 2 of the GEA there is no mention of harassment which can be 'unintentional' yet the context is clear that if the person is affected it then constitutes harassment.

The new Article 2(3) of the Recast Directive has not been literally transposed. Although Article 27 of the GEA prohibits dismissal in connection with a complaint or a demand for redress, the content of Article 2(3) of the Recast Directive i.e. the prohibition against using it as a basis for a decision affecting the person if she/he rejects or submits to such conduct is much more elaborate.

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<sup>230</sup> Article 26 of Directive 2006/54/EC: 'Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.'

### 2.1.3. Sexual harassment

Sexual harassment is conceptualized as sex discrimination.<sup>231</sup> The provision in Article 22 of the GEA does not list other grounds of discrimination but that does not mean that the prohibition would not apply in relation to other grounds than sex. Sexual harassment is a type of unfair and/or insulting sexual behaviour which impairs the self-respect of the person affected by it and is continued in spite of a clear indication that this behaviour is unwelcome. Sexual harassment can be physical, verbal or symbolic. One event may be considered sexual harassment if it is serious (see case law below). If a superior is charged with sexual harassment, he/she shall be deemed incompetent to take decisions on the working conditions of the claimant during the investigation of the case and a higher superior shall take decisions regarding the claimant (cf. Article 27 of GEA No. 10/2008).

The AOSH report from 2008 interprets sexual harassment under the GEA No. 10/2008 as including the following examples although each victim of such behaviour must assess herself/himself where the line is drawn: Dirty jokes and sexual remarks, pornographic posters on the walls at the workplace, improper questions on sexual matters, unwelcome touching, repeated requests/offers of a sexual relationship which have previously been rejected or turned down.

Sexual harassment is characterised by the abuse of a superior of his/her position by psychological domination impairing the self-respect of the subordinate employee/student/other person, by behaviour intended to coerce an individual to become submissive or to belittle another, by downgrading the person with harmful consequences to her/his mental and/or physical health.<sup>232</sup>

What distinguishes sexual harassment from flirting in the workplace or showing sexual interest is that it is perceived as unwelcome by the person at whom such behaviour is directed and that it is not on equal basis.<sup>233</sup>

The provision in the GEA adopted in 2008 is based on Directive 2002/73/EC and not the Recast Directive and hence does not provide the broader protection against victimisation which according to Article 2(2)(a) includes in addition to gender-based harassment and sexual harassment 'any less favourable treatment based on a person's rejection of or submission to such conduct'.

### 2.1.4. Scope

The protection of the law/regulations against harassment applies to all employees, students and clients. The definition is objective. The legislation covers more areas than the workplace, i.e. institutions, societies and schools, although the scope does not go beyond the realm of the aforementioned workplaces. Discrimination is prohibited in advertisements (Article 29), yet does not include belittling or disrespectful gender-based portrayal in the media.<sup>234</sup>

### 2.1.5. Addressee

The addressee is the employer or director in case of institutions and non-governmental organisations that is obliged to take special measures to protect employees, students and clients from gender-based or sexual harassment. It is clear from the text supported by the case law that the employer must protect his/her employees from the harassment of co-workers (see below, Supreme Court judgment no.430/2007). The employee/student or a third person temporarily present in the business or vocational training is also protected.

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<sup>231</sup> Explanatory report with Act No. 10/2008.

<sup>232</sup> [http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/baeklingar/einelti\\_og\\_kynferdisleg\\_vef.pdf](http://www.vinnueftirlit.is/vinnueftirlit/upload/files/fraedsluefni/baeklingar/einelti_og_kynferdisleg_vef.pdf) p. 8; see also [http://www.jafnretti.is/D10/\\_Files/areitni.pdf](http://www.jafnretti.is/D10/_Files/areitni.pdf), both accessed 20 August 2011.

<sup>233</sup> [http://www.jafnretti.is/D10/\\_Files/areitni.pdf](http://www.jafnretti.is/D10/_Files/areitni.pdf), accessed 20 August 2011.

<sup>234</sup> For further reading of interest in this respect: <http://www.springerlink.com/content/f6l06k33433000q7/>, accessed 22 August 2011.

#### 2.1.6. Preventive measures

When the present Gender Equality Act was adopted in 2008 the paradigm used was Directive No. 2002/73/EC. No relevant article like Article 26 of Recast Directive No. 2006/54 is to be found in the GEA No. 10/2008.

The main trade unions emphasize that employers must guarantee their employees a good working environment both with regard to technical facilities as well as social surroundings. If the employer does not prevent harassment against an employee he/she may become liable to pay compensation. The websites of the main trade unions submit guiding principles on what constitutes harassment, on how to prevent it, on the rights of employees etc. At the same time, there have recently been reports on the news of harassment against employees of one of the largest trade unions caused by the behaviour of the chairman.<sup>235</sup>

One of the stated aims of GEA No. 10/2008 is to work against gender-based violence and harassment and subsequently to change traditional gender images and work against negative stereotypes regarding the role of women and men.<sup>236</sup> Employers and trade unions have special obligations on the labour market, i.e. to purposefully bring women and men on equal footing within enterprises and institutions. In cases where there are more than 25 employees on average over the year, enterprises and institutions are obliged to set up gender equality programmes and make it clear to all their staff that harassment will not be tolerated within their organisation.<sup>237</sup> An equality programme should furthermore include an action programme in cases of harassment. The victim must be informed on how to react to such unwelcome behaviour.<sup>238</sup> In the event of a harassment case, employers may not dismiss employees for demanding redress on the basis of the GEA (cf. Article 27). They must furthermore ensure that the employee is not subjected to further injustice regarding terms of employment and other terms listed in Article 27, on the grounds of having submitted a complaint.

As far as we know, there are no measures where employers have emphasized the need to explicitly address the problem of gender-based and sexual harassment. Indeed, there are reports of bullying and mobbing at workplaces where women (according to the few statistics available) are the majority of those victimised: divorced women, younger women and women of other national origin. The need to raise awareness and for appropriate training of managers and workers to reduce the likelihood of harassment at work<sup>239</sup> has not been met with any other paradigm than the present GEA No. 10/2008. As case law reveals, there may be an increased understanding of sexual harassment but not of gender-based harassment which is no less insidious.

#### 2.1.7. Procedures

Article 6 of GEA No. 10/2008 provides that individuals and non-governmental organizations in their own name or on behalf of their members who consider that they have been subjected to violations of the Gender Equality Act may seek redress with the Complaints Committee on gender equality. The opinions of the Committee are binding on all parties and subject to appeals to a higher authority. The Centre for Gender Equality, which has a surveillance role under the Gender Equality Act, may initiate legal proceedings and impose a daily fine in order to monitor the implementation of the Act.

Harassment cases before Icelandic courts can be civil or criminal cases. The Labour Court would not normally deal with such cases.

<sup>235</sup> [http://www.mbl.is/frettir/innlent/2011/03/13/einelti\\_a\\_skrifstofu\\_vr/](http://www.mbl.is/frettir/innlent/2011/03/13/einelti_a_skrifstofu_vr/), accessed 20 August 2011.

<sup>236</sup> Cf. Article 1 of the Act on Equal Status and Equal Rights of Women and Men No. 10/2008.

<sup>237</sup> Cf., Article 18 of the Act on Equal Status and Equal Rights of Women and Men No. 10/2008.

<sup>238</sup> As pointed out on the website of the Centre for Gender Equality <http://www.vinnueftirlit.is/is/gagnabrunnur/einelti/>, accessed 19 December 2011.

<sup>239</sup> Framework agreement on harassment and violence at work (European Social Dialogue), <http://www.tradeunionpress.eu/Agreement%20violence/Framework%20Agreement%20Harassment%20and%20Violence%20at%20Work2.pdf>, accessed 21 August 2011.

#### *2.1.8. Burden of proof*

In civil cases, the main rule is that the claimant has the burden of proof. In cases based on discrimination on grounds of gender, the employer/or person in charge of an institution or vocational training has the burden of proof if it is sufficiently plausible that in matters of recruitment, assignment to a post, promotion, change of position, retraining, continuing education, (lifelong learning) vocational training, study leave, notice of termination, the working environment or employees' working conditions, individuals have been discriminated against on grounds of their gender, then the employer must demonstrate that his or her decision was based on grounds other than the individual's gender (cf. Article 27 of the GEA No. 10/2008).

#### *2.1.9. Remedies and sanctions*

Employers who deliberately or through negligence violate the law shall be liable to pay compensation for non-financial loss, in addition to any financial loss, to the person suffering damage. Perpetrators may also be liable to fines, to be paid to the State Treasury, which is unusual in Icelandic law given the often private-law nature of the relations at issue.<sup>240</sup> Furthermore, under the Penal Code, anyone who is found guilty of serious sexual harassment may be subject to imprisonment for up to two and sometimes even four years.

#### *2.1.10. Compliance with EU law*

The ban on victimization in Article 2(2)(a) of Directive 2006/54/EC has not been transposed to the extent therein required.

#### *2.1.11. Additional information*

Although Article 27 of the GEA No. 10/2008 prohibits dismissal etc. in connection with a complaint or a demand for redress there are strong reasons to believe that individuals are deterred from filing a complaint against their employer, not least in cases of mobbing. In such circumstances, where the bullying continues and is not solved within the workplace it is evident that the employer is not performing his/her duty of protecting his/her employee. There is an Icelandic phrase that says that the head dictates how the limbs move.

### **2.2 Case law**

#### *2.2.1. National courts and equality bodies*

##### *Supreme Court judgment no.430/2007*

The employer must be objective when solving an issue of harassment at the workplace. A male nurse complained that a female nurse had sexually harassed him (when he had gone home with her after a staff party). Subsequently, the female nurse was moved to another department within the hospital. The female nurse denied allegations of sexual harassment (she was not in a superior position at the hospital). She held that her employers at the hospital had harassed her by their handling of the matter which was humiliating for her. The Supreme Court confirmed her claim for pecuniary damages.

##### *Supreme Court judgment no. 555/2007*

Employee O was dismissed without notice by K Inc. because of comments allegedly published by O on a website inciting others to bully his boss. The Court held that the company in question had not proven that O had written these comments or was responsible for their publication and that K Inc. had not investigated the matter thoroughly and objectively. The Court decided that K Inc. must pay the notice period.

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<sup>240</sup> The draft law with the provision stipulating that violations of the Act may be liable to fines to be paid to the State Treasury met a great deal of resistance from the Employer's Association.

*Reykjanes District Court judgment 9 February 2011(case no. E-1383/2010)*

Female employee A complained of sexual harassment which occurred when she went on a work trip to the countryside with her superior B and another staff member of company Z to elaborate on her promotion and increased responsibilities within the firm. During their stay in a summer house her superior B was naked in a hot tub urging A to get in. When A had gone to bed he kept bothering her by knocking on her door. A had not been able to leave the summer house as she had arrived with him and the other employee in his car.

After the trip, head of staff E was notified about the incident. The reaction was to move A to work for another boss, on the premise that her assignments would not be changed. A complained to E, however, that B kept bothering her and that her assignments were cut. E did not react, so A complained to the CEO of Z about the changes to her work assignments. B had received a warning from his superiors a month after the trip because of the incident. B kept bothering her and A contacted her trade union and presented an opinion of her lawyer stating that this was clearly a case of sexual harassment in the meaning of the Gender Equality Act. As A did not believe that her superiors were taking her case seriously, she decided to take her case to court and press charges against company Z for the reduced payments due to reduced assignments, compensation for costs seeking psychological help and pecuniary damages for sexual harassment.

The District Court found this to be a case of sexual harassment as defined in Article 2 of GEA No. 10/2008, although the claimant had not reported the incident to the police as the defendant claimed she should have done and also despite the fact that the defendant had supported the claimant in seeing a psychologist afterwards and paid for her visits. The defendant's employee B had also seen a psychologist.

The Court subsequently went on to evaluate whether the aftermath of this incident and the behaviour in the claimant's workplace was to be considered to be gender-based harassment in the meaning of Article 22 of the GEA No. 10/2008 (see above under 2.1.1). The Court also referred to Article 27 of the GEA which prohibits dismissal in connection with a complaint or a demand for redress.

The claimant complained that her role and responsibilities had gradually been diminished and that the defendant's employee B continued approaching her at the workplace despite the warning he had received. The Court held that her company Z had not reacted in accordance with the GEA. Company Z had not actively ensured that the injustice ceased, with the consequence that the claimant's position at the workplace had changed, thus contravening her contract. The Court ruled in the claimant's favour that she should be paid compensation for her reduced payments and subsequent costs in seeking help. Furthermore the Court ruled that she should receive compensation for non-financial loss as her employer, who was also the employer of her superior/harasser, had not taken measures to ensure her safety and job security in accordance with Article 27 of the GEA No. 10/2008 and was hence liable to pay compensation according to ordinary rules in accordance with Article 31 of the GEA.

### *2.2.2. Main features of case law*

There has been little case law so far, but the last judgment described above is highly relevant to this discussion.

### *2.2.3. Dignity*

Dignity is not expressly protected in Constitution No. 33/1944 but certainly relevant in the definition of sexual harassment under Article 2 of GEA No. 10/2008 (cf. 2.1.2).

### *2.2.4. Restrictions*

See 2.1.1. above.

### *2.2.5. Role of equality bodies*

See 2.1.7 above.

#### 2.2.6. Additional information

There is no additional information.

### 3. Harassment and sexual harassment outside the framework of anti-discrimination law

#### 3.1. National provisions

*Act on Working Environment, Health and Safety in the Workplace No. 46/1980*

Article 38 submits that the Minister of Social Affairs (after receiving the comments of the Board of Administration of Occupational Safety and Health) shall issue further regulations, whose provisions shall be complied with concerning the organisation, arrangement and execution of jobs, such as: 'e. on measures against bullying in workplaces' (amended by Act No. 68/2003).

The Ministry has done this by implementing Regulation No. 1000/2004 on measures against harassment in the workplace.

*Regulation No. 1000/2004 on measures against harassment in the workplace (took effect on 2 December 2004)*

Article 3 states: Harassment: Amendable or repetitive unacceptable conduct, i.e. conduct or behaviour that may lead to humiliation, demeanour, insult, hurtfulness, discrimination or intimidation and cause bad feelings in the person in question. Sexual harassment and other psychological and physical violence applies here. Here, a difference of opinion or conflict of interest that may arise between employer/manager and employee or two or more employees does not apply, as such a difference of opinion or conflict does not lead to the behaviour described above. The protection from harassment applies regardless of the reason for the harassment.

*Icelandic Penal Code No. 19/1940*

Article 198 states: Any person who has sexual intercourse, or other sexual relations, with a person outside the bond of marriage or a cohabitational union by grossly abusing the fact that the person is financially dependent on him or her, is in his or her employment, or is under his or her protection in a relation of trust, shall be imprisoned for up to 3 years, and up to 6 years if the person is under the age of 18. Other forms of sexual harassment shall be punishable by imprisonment of up to 2 years.

Article 199 states: Any person found guilty of sexual harassment shall be imprisoned for up to 2 years. 'Sexual harassment' here refers, amongst other things, to stroking, groping or probing the genitals or breasts of another person, whether under or through clothing, and also to suggestive behaviour or language which is extremely offensive, repeated or of such a nature as to cause fear.<sup>241</sup>

Article 200 states: Any person who has sexual intercourse or other sexual relations with his or her own child or other descendant shall be imprisoned for up to [8 years']<sup>242</sup> or up to [12 years']<sup>243</sup> if the child is under the age of 16.

Sexual harassment of a type other than that specified in the first paragraph of this article and directed at the perpetrator's own child or other descendant shall be punishable by up to [4 years']<sup>244</sup> imprisonment, and up to [6 years']<sup>245</sup> imprisonment if the child is under the age of 16.

Sexual intercourse or other sexual relations between siblings shall be punishable by up to 4 years' imprisonment. If one or both of the siblings was under the age of 18 at the time of the offence, it may be decided to waive punishment applying to them.<sup>246</sup>

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<sup>241</sup> Act No. 61/2007, Article 8.

<sup>242</sup> Act No. 40/2003, Article 2.

<sup>243</sup> Act No. 61/2007, Article 9.

<sup>244</sup> Act No. 40/1992, Article 8.

<sup>245</sup> Act No. 61/2007, Article 9.

<sup>246</sup> Act No. 40/1992, Article 8.

Article 201 states that any person who has sexual intercourse or other sexual relations with a child or young person under the age of 18 who is his or her adopted child, stepchild, foster child, the child of his or her cohabitational partner or a young person who has been entrusted to him or her for education or upbringing, shall be imprisoned for up to 6 years, and up to 10 years if the child is under the age of 16.<sup>247</sup>

Sexual harassment of a type other than specified in the first paragraph of this article shall be punishable by to 4 years' imprisonment,<sup>248</sup> and up to 6 years' imprisonment if the child is under the age of 16.

### **3.2. Collective agreements**

All collective agreements must be in accordance with the Gender Equality Act (cf. Act on the Terms of Employees No. 55/1980).

### **3.3. Additional measures**

The Administration of Occupational Health and Safety in Iceland (the AOSH) has the task of surveillance and guidance in matters of workplace harassment.

### **3.4. Harassment and stress at work**

Very little research, if any, has been done to assess the current situation. Case law is limited and concerns individual sexual harassment. Stress at work is not dealt with in this respect.

### **3.5. Additional information**

There is no additional information.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

The limited research that exists in the area of harassment at work has made it clear that women are the majority of victims, not merely of sexual harassment but also of bullying or mobbing, which would consequently fall under the category of gender-based harassment.

It is necessary to raise awareness regarding gender-based harassment as a form of mobbing. Fear of victimization prevails among women, not least because we are in an era of growing job insecurity and unemployment. Taking a case to court is a major step for most women as the issue of gender-based harassment is even harder to prove than sexual harassment. What might help is to enable harassed individuals to present complaints to *f. Ex.*, the Centre for Gender Equality, before taking further steps. There are guidelines on what constitutes sexual harassment but no actual guidelines on what constitutes gender-based harassment.

### **4.2. Pitfalls**

Although it may be complex to address mixed/complex harassment or sexual harassment in an anti-discrimination setting rather than 'merely' in a working environment (which is not easy either) it is imperative to consider that possibility. The main reason is that women have fewer chances of promotion and are more subject to bullying and victimization than men.

Regulation No. 1000/2004 on measures against harassment in the workplace states that the definition of harassment does not include a difference of opinion or conflict of interest between employees or an employer, or between two or more employees. The fundamental right of freedom of expression applies to the workplace in principle. This is, however, a sensitive issue and it is very hard to verify how employees are protected in this respect as part of retaining one's job is not to go against one's employers/directors in respect of controversial opinions – not least regarding access to employment. There are numerous incidents of

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<sup>247</sup> Act No. 61/2007, Article 10.

<sup>248</sup> Act No. 61/2007, Article 10.

<sup>249</sup> Act No. 61/2007, Article 10.



bullying of employees by other employees (often with the tacit consent of the superiors) where there are no apparent remedies.

It is also common knowledge in an era of increased unemployment that the first victim is the freedom of expression.

## **IRELAND – Frances Meenan**

### **1. General situation**

Harassment and sexual harassment are prohibited under Irish law in the Employment Equality Acts 1998 - 2011 and the Equal Status Acts 2000 - 2011. There are few reports or statistics on the matter. The Equality Tribunal states in its Legal Review of 2007<sup>250</sup> that in that year the Tribunal decided three cases of sexual harassment. There is little debate on issues surrounding the current legal position on sexual harassment. While there has been some debate in Ireland on the issue of harassment in recent years this has generally been in the context of occupational health and safety in respect of bullying in the workplace rather than equality law. Both the Employment Equality Acts and the Equal Status Acts prohibit discrimination on the grounds of gender, civil status, family status, age, race, religion, disability, sexual orientation and being a member of the traveller community grounds.

### **2. Harassment and sexual harassment in the context of anti-discrimination law**

#### **2.1. Legislation**

##### *2.1.1. Transposition*

Harassment and sexual harassment are prohibited in relation to employment by Section 14A of the Employment Equality Act 1998.<sup>251</sup> This Section states that any harassment or sexual harassment as defined in that Section shall constitute discrimination by the victim's employer in relation to the victim's conditions of employment. The definition provided under Article 2(2)(a) of Directive 2006/54/EC is specifically provided under Irish law. Harassment or sexual harassment in relation to access to goods and services is prohibited under Section 11 of the Equal Status Act 2000.<sup>252</sup> The Equality Act 2004 amended both the Employment Equality Act 1998 and the Equal Status Act 2000.

##### *2.1.2. Definitions*

Harassment and sexual harassment are defined in Section 14A(7) of the Employment Equality Act 1998. Harassment is described as any form of unwanted conduct related to any of the discriminatory grounds set out in the Act. Sexual harassment is defined as any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, having the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. The Subsection further states that any such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material. The alleged harasser may be another employee in the victim's employment or the victim's employer or a client, customer or other business contact of the victim's employer. Section 11(5) of the Equal Status Act 2000 defines harassment and sexual harassment in relation to the access to goods and services in identical terms. These definitions correspond with the definitions set out in the relevant Directives and encompass both intentional and unintentional harassment. The

<sup>250</sup> On p. 15, [http://www.equalitytribunal.ie/EqualityT\\_LegalRev16July.pdf#search="harassment"](http://www.equalitytribunal.ie/EqualityT_LegalRev16July.pdf#search=), accessed 18 July 2011.

<sup>251</sup> As inserted by Section 8 of the Equality Act 2004.

<sup>252</sup> As amended by Section 51 of the Equality Act 2004.

definitions of harassment in both Acts refer to harassment relating to any of the discriminatory grounds.

#### *2.1.3. Sexual harassment*

Sexual harassment is not specifically defined as discrimination under any of the discriminatory grounds and the 1998 Act merely states that sexual harassment shall constitute discrimination. Accordingly, it would appear that sexual harassment can be seen as encompassing any of the discriminatory grounds.

#### *2.1.4. Scope*

The scope of the prohibition of harassment and sexual harassment in relation to employment law encompasses harassment or sexual harassment at a place where the person works or otherwise in the course of employment and extends to acts suffered by a person using or seeking to use any service provided by an employment agency or a person participating in a vocational training course. Harassment and sexual harassment is also prohibited in relation to a person's access to and supply of goods and services. The scope of this prohibition is further extended to any act where the victim is a proposed or actual recipient from the person of any premises (that is immovable property (real property/estate)) or of any accommodation or services or amenities related to accommodation or where the victim is a student at, has applied for admission to or avails or seeks to avail himself of any service offered by, any educational establishment at which the person is in a position of authority.

#### *2.1.5. Addressee*

The addressee, i.e. the defendant/respondent for harassment and sexual harassment under Section 14A of the Employment Equality Act 1998 can include the victim's employer, someone who works for the same employer or in the same place of work or a client, customer or other business contact of the victim's employer where the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it. This may also include an employment agency or the person offering a vocational education course. Section 15 of the 1998 Act also places vicarious liability on an employer for any acts done by an employee for the purposes of any proceedings under the Act.<sup>253</sup> An agent with authority (either express or implied and whether precedent or subsequent) may be treated as a defendant/ respondent under the Act. Section 11(2) of the Equal Status Act 2000 extends the responsibility of a person who is responsible for the operation of any place that is an educational establishment or at which goods, services or accommodation facilities are offered to the public beyond acts of harassment or sexual harassment by himself and requires that he shall not permit another person who has a right to be present in or to avail himself of any facilities, goods or services provided at that place, to suffer sexual harassment or harassment at that place.

#### *2.1.6. Preventive measures*

Social partnership agreements in Ireland have not tended to address the issue of harassment or sexual harassment. The Equality Authority, however, published a Code of Practice in 2002 on procedures for preventing harassment and sexual harassment in the workplace. This Code of Practice has been given legislative effect<sup>254</sup> and sets out the procedures which employers should utilise in preventing harassment and sexual harassment and addressing complaints of such harassment. While the provisions of the Code are not mandatory on employers, the Code is admissible in any employment dispute in which it appears relevant to the determination of any question therein. The Code first provides for an informal process where a competent named person is available to assist in the resolution of the problem. In some cases, it may be possible and sufficient for the employee to explain clearly to the person engaging in the unwanted conduct that the behaviour is not welcome, that it offends them or makes them

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<sup>253</sup> *Health Board v BC* [1994] ELR 27.

<sup>254</sup> Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2002, S.I. No. 78 of 2002.

uncomfortable and that it interferes with their work. Where this may be too difficult for the employee on their own, an alternative approach would be to seek support from, or for an initial approach to be made by, a sympathetic friend or a designated person or trade union representative. The informal process could also provide for mediation. There should also be a formal complaints procedure to provide for independent investigation. Such procedure should provide that the complaint shall be in writing, both complainant and alleged harasser are entitled to representation, the alleged harasser be given time to respond to the allegation, a written record be kept of all meetings and confidentiality be assured. A written report will be issued and if the allegation is upheld there should be application of the employer's disciplinary procedure. If the complaint is against a non-employee then that person should be excluded from the premises and the provision of services should be ceased. There may also be a provision for a right of appeal. Accordingly, the Code plays an important role in regulating the approach of employers to preventing harassment and sexual harassment and gives effect to the principles set down in Article 4 of the Framework Agreement. The Code predates the amendments subsequent to Directive 2002/73/EC, Directive 2000/43/EC and Directive 2000/43/EC, however, it is still a very useful document.

There does not appear to be any reference whatsoever to the Framework Agreement on Harassment and Violence at Work of the European Social Partners of 26 April 2007.

#### 2.1.7. Procedures

The procedures for pursuing a complaint against an employer or service provider for harassment or sexual harassment are the same as those for pursuing any other type of discrimination claim under the Employment Equality Acts or the Equal Status Acts. Unlike most other discrimination claims, however, the anonymity of parties in sexual harassment cases is protected.

#### 2.1.8. Burden of proof

The burden of proof under Irish law is on the employer or the responsible service provider to show that the alleged harassment or sexual harassment did not take place once facts are established from which it may be presumed that there has been such discrimination.<sup>255</sup> First, one must consider the allocation of the burden of proof. The Equality Tribunal or the Labour Court does not seek *prima facie* evidence that the discriminatory ground relied upon was the only or dominant reason for the impugned treatment.<sup>256</sup> Further, the evidence can point to either conscious or subconscious discrimination.<sup>257</sup> The Labour Court has stated that where the primary facts point to the possibility that an employer consciously or unconsciously treated a woman as he did because she did not fit in or that she was unsuited to the job because she is a woman, then in such cases, an inference of discrimination arises and it is for the defendant/respondent to prove the contrary.<sup>258</sup> Where the employer or service provider argues that he took reasonable steps to prevent the harassment or sexual harassment, the burden of proof is again on him to prove that such reasonable measures were taken. As such there would appear to be no barriers to filing a complaint in this respect. Considerable attention is also given to ensuring that fears of victimisation do not provide any barriers to the making of a complaint. Compensation for victimisation is provided under Section 77(1)(d) of the Employment Equality Act 1998. Section 98 of that Act further states that where an employer dismisses an employee in circumstances amounting to victimisation under the Act, he shall be guilty of an offence. The Code of Conduct further states that employers' policies on harassment and sexual harassment should explicitly state that an employee will not be victimised for making a complaint in good faith, or for giving evidence in proceedings, or by

<sup>255</sup> Section 85A of the Employment Equality Act and Section 38A of the Equal Status Act 2000 as inserted by Section 38 and 64 of the Equality Act 2004.

<sup>256</sup> Applying *Wong v. Igen Limited* [2005] IRLR 258.

<sup>257</sup> Applying *King v. Great Britain China Centre* [1992] I.C.R. 516 and *Nagarajan v. London Regional Transport* [1999] I.C.R. 877 (even though they were both racial discrimination cases).

<sup>258</sup> E.g. *Ely Property Group Limited v. Boyle* EDA0920.

giving notice of intention to do so. Victimisation is also addressed in the Equal Status Act 2000 with victimisation being included as a distinct ground of discrimination.<sup>259</sup>

#### *2.1.9. Remedies and sanctions*

Redress for acts of discrimination is set down in Section 82 of the Employment Equality Act 1998 and Section 27 of the Equal Status Act 2000. Examples of redress which may be ordered against an employer under Section 82 of the 1998 Act include compensation, an order for equal treatment or an order to take a specified course of action. Where the complainant has been dismissed, the Tribunal or Court also has the power to order reinstatement or reengagement. In the case of compensation, Section 82 limits the redress which the Equality Tribunal can award to an amount of up to 104 weeks' remuneration<sup>260</sup> or EUR 13 000 where the complainant is not in receipt of remuneration. Where the discrimination alleged is on the gender ground, however, a complainant may bring a claim to the Circuit Court whose jurisdiction to award compensation is unlimited. Section 98 of the 1998 Act, as amended by Section 6 of the Fines Act 2010 also confers criminal liability on an employer for dismissals amounting to victimisation. On summary conviction an employer is liable to a fine not exceeding EUR 2 500 or to imprisonment of up to a year or both. On indictment, the employer is liable to a fine of up to EUR 31 743.45 or two years' imprisonment or both.<sup>261</sup> The 1998 Act does not address the consequences for the harasser. The Code of Conduct on harassment, however, does address approaches that employers should take to sanctions stating '(e)mmployees should be informed that in the event of the complaint being upheld the disciplinary process will be invoked which may lead to disciplinary sanctions up to and including dismissal. Non-employees should be informed that in the event of the complaint being upheld appropriate sanctions ... could in particular circumstances include termination of contract, suspension of service, exclusion from premises etc. as appropriate'. The 1998 Act does not make provision for the victim being transferred to other work and there would not appear to be any conflict with the ban on victimisation. In practical terms, the victim initiates a further claim for discrimination in the event of victimisation... In relation to goods and services, the orders which the Equality Tribunal can make against the supplier of the good or service includes compensation of up to EUR 6 348.69 and an order that a person or persons take a specified course of action.<sup>262</sup> If the claim is on the gender ground, the claim may be brought to the Circuit Court which has unlimited jurisdiction in relation to damages. The Equal Status Act 2000 does not provide for any consequences for the harasser or the victim and there would not appear to be any conflict with the ban on victimisation contained within the Act.

#### *2.1.10. Compliance with EU law*

Irish legislation would appear to be in compliance with EU law.

#### *2.1.11. Additional information*

There is no additional information.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

All decisions of the Equality Tribunal, before which such claims are heard in the first instance, are published as are the decisions of any appeals before the Labour Court. Decisions on a point of law by the High Court are also made available.

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<sup>259</sup> Section 3(2)(j).

<sup>260</sup> 104 weeks' remuneration or EUR 40,000, whichever is the greater (Civil Law (Miscellaneous Provisions) Act 2011.

<sup>261</sup> Section 100.

<sup>262</sup> Section 27, Equal Status Act 2000.

### 2.2.2. Main features of case law

One of the main features of recent case law in this area has been the extent of the scope of the employer's liability for acts of harassment or sexual harassment. In respect of harassment on the gender ground, the Labour Court has stated 'The essential characteristics of harassment within this statutory meaning is that the conduct is (a) unwanted and (b) that it has either the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. This suggests a subjective test and if the impugned conduct had the effect referred to at paragraph (b) of the subsection, whether or not the effect was intended, and whether or not the conduct would have produced the same result in a person of greater fortitude than the complainant, it [that is, the impugned conduct]<sup>263</sup> constitutes harassment for the Acts'.<sup>264</sup> Examples of cases where there has been harassment on the gender ground include the use of foul and abusive language which satisfied the Court that it was offensive, humiliating, intimidating and degrading on the basis of gender; along with the use of graffiti.<sup>265</sup> In the case *A Worker v. A Company*<sup>266</sup> the Labour Court held that an employee's consent to a sexual relationship would not provide an unlimited defence to an employer. In doing so the Court pointed to the dominant position of the employer, the fact that he had taken advantage of work-related arrangements within the hotel, the lack of a social relationship with the victim outside of work and that he was aware of the personal vulnerability of the worker.

The question of harassment by non-employees has also arisen in a number of cases. In *Two Female Teachers v. Board of Management and Principal of a Secondary Boys School*<sup>267</sup> a school was held liable for acts of sexual harassment carried out by students finding that the school failed to exercise its control over the students. In *A Worker v. A Company*<sup>268</sup> the Labour Court found the company liable for sexual harassment notwithstanding the fact that the harasser concerned was not an employee of the company. It was held in this case that as the perpetrator was on the premises with the company's consent and it was in a position to protect the worker liability should be imposed. Similarly in *Atkinson v. Carty*<sup>269</sup> a defendant was found liable for sexual harassment perpetrated by an independent accountancy service provider. In *Ms. A v. A Contract Cleaning Company*<sup>270</sup> the respondent was held liable for sexual harassment committed by a security guard in a shopping centre in which the claimant was working.

Another question which has arisen in this area is the liability of an employer where the harassment or sexual harassment occurs outside the workplace. In *A Limited Company v. One Female Employee*<sup>271</sup> the company was held liable for harassment where the harassment alleged occurred during a residential training programme that took place in a hotel away from the workplace. In *A Female Employee v. A Recruitment Company*<sup>272</sup> the employer was held liable where the complainant's manager sent a number of sexually offensive text messages to the complainant during a night out with a number of colleagues. Acts of harassment at a Christmas party was also found to have a sufficient connection to the complainant's work for a finding of harassment in the course of employment<sup>273</sup> By contrast, in the case of *O'N v. An Insurance Company*<sup>274</sup> the employer sponsored an employees' Sports and Social Club. A question arose as to whether an act of sexual harassment committed on a night out with the club came within the provisions of the Employment Equality Act 1998. It was held, however,

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<sup>263</sup> Author's text.

<sup>264</sup> *Nail Zone Limited v. A Worker* EDA1023 and followed in *McDermott v. Connacht Gold Cooperative Society Limited* DEC-E2011-147.

<sup>265</sup> *Ely Property Group Limited v. Boyle* EDA0920.

<sup>266</sup> [1990] E.L.R. 187.

<sup>267</sup> DEE021.

<sup>268</sup> [1992] E.L.R. 40.

<sup>269</sup> [2005] E.L.R. 1.

<sup>270</sup> DEC-E2004-068.

<sup>271</sup> EE10/1998.

<sup>272</sup> DEC-E2008-015.

<sup>273</sup> *Maguire v. North Eastern Health Board* DEC-E2002-014.

<sup>274</sup> DEC-E2004-052.

that mere financial sponsorship of an event was not enough in itself to bring the act of sexual harassment within the course of employment. There has also been some recent consideration as to what might be considered reasonable steps by an employer to prevent acts of harassment or sexual harassment. In *A Hotel v. A Worker*<sup>275</sup> the Labour Court considered that as the obligation is preventative, measures taken to prevent recurrence of the harassment after it had taken place would not suffice. The Court further stated that as a minimum the employer would be required to show that a clear anti-harassment policy was in place prior to the harassment and that this policy had been effectively communicated to staff and that members of management were sufficiently trained to deal with incidents of harassment.

### 2.2.3. Dignity

There does not appear to be any case law providing any analysis on the interpretation of 'dignity'.

### 2.2.4. Restrictions

There is little case law addressing the conflict between the prohibition on harassment and sexual harassment and human or constitutional rights. In *County Louth Vocational Education Committee v. The Equality Tribunal*,<sup>276</sup> which concerned procedural issues only, the applicant applied to the High Court for a judicial review of the Equality Tribunal hearing. The Court held that the Equality Officer was entitled to run the hearing as she saw fit so long as natural and constitutional justice was complied with. The Equality Officer had ordered that a number of members of staff against whom allegations of harassment were made should not all be present at the same time during the hearing so that 'fairness and privacy is observed in the hearing process'. The Court pointed out that the presence of a large number of co-workers throughout the hearing might present an intimidating atmosphere for a complainant. In this case, the complainant had brought a claim of harassment. The High Court considered, however, that it is essential that the employees complained against know the case being made against them and that they are represented at the hearing so that they can confront the accuser and cross – examine him. The right to know the case being made against an accused and the right of representation and cross – examine are fundamentals of fair procedure which is a constitutional right.

### 2.2.5. Role of equality bodies

The Equality Authority has brought cases with regard to harassment or sexual harassment. In one such case the Authority brought a claim in conjunction with two other claimants against the board of management of a school in relation to acts of sexual harassment committed by pupils at the school.<sup>277</sup> The Equality Authority may act on behalf of a victim claimant and provide legal assistance.

### 2.2.6. Additional information

It is important to note that a person can bring a statutory claim and also a claim at common law for damages for breach of contract and negligence on the part of the employer (see below), i.e. two separate cases.

## 3. Harassment and sexual harassment outside the framework of anti-discrimination law

### 3.1. National provisions

There is no specific prohibition of harassment or sexual harassment under health and safety legislation. The Safety, Health and Welfare at Work Act 2005 does, however, lay down general duties of the employer for the protection of the employee's safety, health and welfare at work which can be relied upon for personal injury claims owing to stress suffered due to

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<sup>275</sup> [2010] E.L.R. 72.

<sup>276</sup> [2009] IEHC 370.

<sup>277</sup> *Two Female Teachers v. Board of Management and Principal of a Secondary Boy's School* DEE021.

harassment inflicted upon the employee. Additionally, Section 10 of the Non-Fatal Offences Against the Person Act 1997 makes harassment a criminal offence. A person is guilty of harassment where he either intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other person and where a reasonable person would realise that those acts would have such an effect. There are provisions for fines and imprisonment and also protection for the person who was harassed. Breach of such an order is also a criminal offence and on conviction a person would again be liable to the same sanctions available on conviction for harassment. The Prohibition of Incitement Act 1989 prohibits incitement to hatred on account of race, religion, nationality or sexual orientation in relation to the publication or distribution of written material. There are other offences in relation to harassment or stalking in relation to telecommunications.

### **3.2. Collective agreements**

There are no national collective agreements aimed specifically at harassment or sexual harassment.

### **3.3. Additional measures**

In addition to the courts finding that the failure of an employer to provide a harassment-free working environment contravenes health and safety legislation, such failure has also been held to violate an implied term of mutual trust and confidence of the employee's contract of employment.

### **3.4. Harassment and stress at work**

As stated above, an employee may bring a claim for personal injury and breach of contract in relation to harassment, sexual harassment or bullying in the workplace. In the recent case of *Sweeney v The Board of Management of Ballinteer Community School*<sup>278</sup> the claimant was a teacher who complained of psychiatric injury following being bullied and harassed by the principal of the school. The principal also engaged the services of a private investigator and the court considered that this amounted to serious harassment of the claimant. The court described that the principal 'arranged for this single lady to be stalked by a private investigator.' The court held that the board of management of the school was vicariously liable for the acts of the principal as such acts were committed by him within the scope of his employment. The court found, on the balance of probabilities, that the claimant had discharged the onus on her of establishing that she suffered from psychiatric illness and that a direct causative connection existed between that injury and continuous bullying and harassment of her by the principal. The claimant was awarded substantial damages.

In addition to or as an alternative to a personal injury claim, a victim may bring a claim for breach of the contract of employment on the basis that a person is entitled to a harassment-free workplace.<sup>279</sup>

### **3.5. Additional information**

In addition to the code of practice prepared by the Equality Authority, a code of practice prepared by the Labour Relations Commission and entitled the Industrial Relations Act 1990 (Code of Practice Detailing Procedures For Addressing Bullying in The Workplace) (Declaration) Order 2002<sup>280</sup> has also been given legal effect in order to lay down procedures for employers to address workplace bullying more generally. The Health and Safety Authority has also published guidelines in relation to work-related stress in the workplace.<sup>281</sup>

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<sup>278</sup> [2011] IEHC 131.

<sup>279</sup> E.g. *Butler v Four Star Pizza* unreported Irish Times, 3 March 1995.

<sup>280</sup> S.I. No. 17 of 2002.

<sup>281</sup> See [www.hsa.ie](http://www.hsa.ie), accessed 7 November 2011.

## 4. Added value of anti-discrimination approach

### 4.1. Added value

Once the claimant can present a *prima facie* case, the burden of proof is on the employer which assists the claimant considerably. In addition the wording of the legislation is broad and it is the perception of the recipient which is important. In addition, there is the provision that the employer is vicariously liable for the actions not only of other employees but also of customers etc.

### 4.2. Pitfalls

The major pitfall is that in many cases the victim is afraid to bring a claim, more particularly in an employment where there are few employees and there is always the fear of reprisal in certain cases in a small community. The protection of victimisation still would not provide sufficient protection because, even if successful, the victim may not succeed in obtaining alternative employment. There is also the fact that a victim has to wait up to eighteen months for a hearing before the Equality Tribunal, hence there must be a better way of the victim obtaining redress. Mediation is available but only if both parties agree.

## ITALY – Simonetta Renga

### 1. General situation

At present, the main source of information on the Italian situation is the 2009 Istat<sup>282</sup> Survey on harassment on the ground of sex and sexual harassment at the workplace.<sup>283</sup> The Survey addressed 60,000 families and 24,388 women aged 14 to 65. About half of these women had experienced, in the course of their life, harassment on the ground of sex/sexual harassment. Most of this behaviour took place in the north of Italy. During the years 2007/2009, 3,864,000 women were victims of harassment, most of whom aged 14-34; in these three years, the phenomenon was stronger in the south than in the north of Italy. This may be due both to the increase in women's participation in the labour market in the south and to greater homogeneity in women's lifestyle. The more frequent types of harassment were verbal ones (26.6 %), followed by episodes of stalking (21.6 %), by acts of exhibitionism (20.4 %), physical harassment (19 %) and obscene phone calls (18.2 %). In particular, the large majority of cases of physical sexual harassment were by strangers (59.4 %); in 7.1 % of the cases the offenders were friends, in 5.1 % colleagues and in 4.7 % employers. Harassment took place mainly in public transportation and in the street (47.6 %), but also at the workplace (12.6 %) and in pubs/restaurants/discos (10.5 %).

In particular, a 2009 report by Istat states that at the workplace, 1,224,000 women have been victims of sexual harassment during their life, which is 8.5 % of working women (here including those who were looking for work). During the last three years before the interview, 347,000 women had been harassed (2.4 %). Most of them were aged 14-34 and worked in the south of Italy. The number of women who had experienced, in the course of their professional life, harassment as regards access to employment was about 500,000, which is 3.4 % of the women of working age. 81.7 % of the women who had been harassed kept the experience to themselves and almost none of the victims denounced the employer at the public authority. These facts show that the attitude of women is to suffer this wrong without reacting, their belief being that there is no choice or no way out, a sort of 'gender disenchantment'<sup>284</sup> that deeply influences women's choices.

<sup>282</sup> Istat: National Institute for Statistics.

<sup>283</sup> Istat Le molestie sessuali e i ricatti sessuali sul lavoro 2008-2009 Roma, Istat 2009, <http://www.meltinglab.it/images/violenze/files/testointegrale20100915.pdf>, accessed 12 October 2011.

<sup>284</sup> C. Ventimiglia Verifica sullo stato della parità tra uomini e donne sul lavoro. Molestie sessuali mobbing e dintorni Parma, Università degli Studi di Parma-regione Emilia Romagna 2003, <http://www.allapari>.



According to Istat, the number of victims of physical sexual harassment has strongly decreased in the last decade. One of the reasons is the introduction of the Act on rape in 1996, which no longer classifies rape as a crime against public morality, but as a crime against the person. This change in legal culture brought about a new awareness in lawyers and judges as regards the nature of this crime and the necessity to firmly condemn and tackle this phenomenon. Sexual harassment at the workplace has also decreased in the last decade. This may be due to the increase of women's occupation and, paradoxically, to the increase of precarious working patterns, which has reduced the possibility to offer long-term employment as a term of exchange, which used to make women more liable to being blackmailed.

The debate on harassment followed a piecemeal approach in Italy, meaning that it tackles either particular clamorous cases that rouse the interest of the media or, by contrast, it triggers the technical debate at the legal level on issues such as the definition of sexual harassment/harassment on grounds of sex. It has to be emphasized that for a long time, judges and collective bargaining attempted to substitute the legislator, which failed to respond to the strong EU dynamics on this issue, often however with little result: judges, in particular, never used the anti-discrimination legislation. Even after the equalization of sexual harassment to discrimination, which took place with Decree No. 145/2005, the judiciary did not make any use of the relevant provisions (see under 2.2 of this report). As regards collective bargaining, prevention of harassment at the workplace has also been carried out through codes of conduct promoted by workers' representatives, trade unions or specific bodies provided at a local level, such as the committees for equal opportunities. Important in this respect have also been the activities of the Equal Opportunities Advisors at the local level. However, the debate has always interested isolated areas of society, such as the trade unions or the feminist movement, and only rarely did it reach either the scholars of the disciplines involved, the labour market or political/civil society as a whole. In the labour-law field, in particular, only few scholars studied this phenomenon. Directive 2004/113/EC did not have much impact in the debate either.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

Directives 2006/54/EC and 2004/113/EC have been transposed as regards harassment in Articles 26, 50 bis, 55 bis, 55 ter, Paragraph 6 of the Code of Equal Opportunities (Decree 11-04-2006, no. 198, as modified by Decree 6-11-2007, no.196 and by Decree 25-1-2010, no. 5).

In particular, harassment on the ground of sex and sexual harassment have been equalized to discrimination on the ground of gender. The relevant legislation basically repeats the wording of the Directives. Article 2(2)(a) of Directive 2006/54/EC has been specifically transposed.

#### *2.1.2. Definitions*

Article 26 of the Code of Equal Opportunity between men and women states: 'Harassment, that is unwanted conduct related to the sex of a worker with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment, is regarded as discrimination on the ground of gender'. It also states that 'Sexual harassment, that is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a worker, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is also regarded as discrimination on the ground of gender'. Article 26 also provides that any less favourable treatment based on a worker's rejection of or submission to harassment on ground of sex or sexual harassment are regarded as discrimination. Moreover it states that:

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[regione.emilia-romagna.it/temi/menu\\_formazione\\_lavoro/allegati-lavoro/verifica\\_ventimiglia\\_03](http://regione.emilia-romagna.it/temi/menu_formazione_lavoro/allegati-lavoro/verifica_ventimiglia_03), accessed 12 October 2011.

‘Acts, pacts or provisions taken in relation to the employment relationship towards workers who are victims of harassment are null and void if adopted as a consequence of the worker’s rejection of or submission to harassment on ground of sex or sexual harassment’ and that ‘Any adverse treatment by the employer as a reaction to a complaint within the organisation or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment is regarded as discrimination on the ground of gender’.

Article 55 bis of the Code gives, in relation to goods and services, basically the same definition of harassment on the ground of sex/sexual harassment quoted above. Article 55 ter, Paragraph 6 provides that ‘The refusal of harassment or sexual harassment by a person cannot be the reason for a decision that is relevant for that person’.

The two definitions basically repeat the wording given by Directive 2006/54 in Article 2(1)(c) and (d) and Directive 2004/113/EC in Article 2(c) and (d).

They both refer to the purpose and the effect of violating the dignity of workers (Article 26) or of persons (Article 55 bis): the use of the word worker/person is actually the only difference between the two definitions of harassment. The conduct can therefore be unintentional as well. Definitions that contain the concept of harassment on the ground of gender/sexual harassment can be found in labour/civil law in the concept of mobbing and in penal law in the crimes of rape (Article 609 bis Penal Code), stalking (Act no. 38 of 23 April 2009), harassment or disturbance to persons (Article 660 Penal Code) and insults (Article 594 Penal Code) (for more on these issues see 3 of this report). In all these cases, however, the behaviour must be intentional.

### *2.1.3. Sexual harassment*

Sexual harassment and harassment on the ground of sex are both conceptualized as gender discrimination. Other grounds of discrimination include the concept of harassment but not those of sexual harassment/harassment on the ground of sex: Decrees no. 215 and 216 of 2003 and Act no. 67/2006, in particular, equalized to discrimination harassment on the ground of race/ethnic origin (Directive 2000/43/EC), religion, belief, disability, age or sexual orientation as regards employment and occupation (Directive 2000/78/EC) and finally, disability.

### *2.1.4. Scope*

The scope of the domestic prohibitions is basically the same as that of the two Directives. The only significant difference is that Directive 2006/54/EC refers to ‘persons’ as the victims of harassment, while Article 26 of the Code refers to ‘workers’, thus excluding third parties present in the organisation.

### *2.1.5. Addressee*

The addressees of the prohibition in relation to gender equality are both employers and/or those acting on his behalf, as well as fellow workers.

The addressee in relation to goods and services are all persons, as regards both the public and private sectors, who provide goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context.

### *2.1.6. Preventive measures*

Article 26 of Directive 2006/54/EC has been transposed in Article 50 bis of the Code for Equal Opportunities, which states: ‘Collective agreements can provide for specific measures, such as codes of conduct, guidelines and good practices, in order to prevent all forms of discrimination on the grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion’. In national implementation, the emphasis of the rule moved from the employers’ responsibility, foreseen by the Directive, to that of collective bargaining. And in fact in Italy it is not the employer that takes measures to prevent harassment: these actions have always been left to collective bargaining. In some agreements, the attention for harassment and prevention is very limited; in other agreements, prevention is entrusted to National/Local Observatories or to Joint Equal

Opportunities Commissions at national or local level. Other agreements provide for specific articles on harassment, where the phenomenon is defined and qualified as an offence to personal dignity and where prevention is again entrusted to National or Local Joint Equal Opportunities Commissions. Often, these agreements also include the employers' commitment to adopt all necessary measures in order to avoid harassment. The employers' responsibility in actual cases of harassment within the organisation, however, is seldom provided for. In other agreements, rules on harassment are provided in the section on disciplinary sanctions. Here, the punitive perspective prevails over the preventive one.

The most important attempt to prevent harassment carried out by collective agreements, however, is that of specific Codes of Conduct attached to the agreements, introduced following the Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work (92/131/EEC). These Codes normally contain a definition of sexual harassment as an offence to the dignity of the person. They develop clear and precise procedures to deal with sexual harassment once it has occurred. The procedure provides, as a first step, for an informal solution of any problems. If the conduct continues or if it is not appropriate to solve the problem informally, it provides for recourse to the formal complaints procedure. Then, the Codes provide for confidential counsellors for advice and assistance to employees subjected to sexual harassment, with the responsibility to assist in the solution of any problems, whether through informal or formal means. Finally, the Codes provide for prevention of harassment through information and professional training.

The Framework Agreement on harassment and violence at work, 2007, received attention from trade unions, which published the agreement on their websites, but so far it has not been specifically implemented.

#### *2.1.7. Procedures*

As harassment on the ground of sex and sexual harassment have been equalized to gender discrimination, the available procedures are those provided for cases on equality rights: they are assessed following procedures for labour disputes. Ordinary or special urgent legal proceedings can be brought to court, depending on the circumstances. Italian legislation empowers Equality Advisers to assist victims of discrimination. National and Regional Equality Advisers can act directly in their name in cases of collective discrimination, even if the employees affected by the discrimination are not immediately identifiable. Regional and Provincial Advisers can also initiate proceedings when delegated by an individual employee or can intervene in the process initiated by the latter. Recently, associations and organizations promoting respect for equal treatment between male and female workers have also been entitled to act on workers' behalf.

As regards goods and services, similarly to what applies to gender discrimination at work, ordinary or special legal proceedings can be brought to court, depending on the circumstances. Associations and organizations promoting respect for equal treatment have been entitled to act on the victim's behalf. They can act directly in their name in cases of collective discrimination, if the victims of the discrimination are not immediately identifiable.

#### *2.1.8. Burden of proof*

We have a partial reversal of the burden of the proof with respect to both gender discrimination at work and goods and services: when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court, facts from which it may be presumed that there has been direct or indirect discrimination, it is up to the defendant to prove that there has been no breach of the principle of equal treatment. This can be deemed to be important, considering that discrimination seems difficult to detect. The Code of Equal Opportunities also provides for protection against victimisation for employees and all other persons who are the victim of detrimental treatment by their employer in response to them obtaining compliance with the principle of equal treatment between men and women. The same is granted as regards discrimination on goods and services.

### 2.1.9. Remedies and sanctions

Remedies and sanctions for harassment, again, are the same as for gender discrimination. In particular, minor criminal sanctions are provided for infringement of the prohibition of discrimination in access to work and working conditions. Positive actions are also provided as remedies against collective discrimination found by a court. Revocation of public benefits, or even exclusion, for a certain period, from any further financial or credit incentives or from any public tender is also provided as a sanction for any direct or indirect discrimination found. The general remedy of nullity is enforceable for all discriminatory acts. Compensation for economic harm can be awarded following the general principles on contractual and extra-contractual liability. The compensation of non-economic harm, which in the Italian system is limited to cases expressly stipulated by the law, is also provided by the Code on Equal Opportunities, but only for special and urgent proceedings. Transfer to other work for the victim is not specifically provided and it could clash with the ban on victimization. The harassing fellow worker will undergo a disciplinary procedure and a proportionate sanction will be imposed, here including that of dismissal if applicable.

As regards goods and services, remedies follow the model of interventions for gender discrimination provided in the employment field: the court can order payment of both patrimonial and non-patrimonial damages. In the event of discrimination by public or private subjects which have contracts for public works, or services or supplies, the Public Administration can revoke financial or credit benefits allowed to them. For the harasser, if applicable according to labour law, disciplinary measures might be taken.

### 2.1.10. Compliance with EU law

These provisions of national legislation can reasonably be considered to be in line with the Directives.

### 2.1.11. Additional information

There is no additional information.

## 2.2. Case law

### 2.2.1. National courts and equality bodies

As regards national courts, there have been about 50 published cases since 1990. However, only three of these cases found discrimination on the ground of gender and only two of them were handled using anti-discrimination legislation. In the two cases where the anti-discrimination provisions were used, the Local Equality Advisors were involved.<sup>285</sup> The equalization of sexual harassment to discrimination, which took place with Decree No. 145/2005, did not change the situation. Usually, the legislation used in order to ban sexual harassment includes Article 32 of the Constitution, i.e. the right to health, Article 2 on human rights, and Article 2087 of the Civil Code, which provides for an obligation of the employer to take all technically possible measures necessary to protect the health and moral personality of workers. Often, the Penal Code is used, i.e. Article 660, 'Harassment or disturbance to persons', and where the harassment amounted to physical violence, Article 609 bis on 'Rape'.

Provisions on discrimination in goods and services have never been used so far to handle cases on sexual harassment. In published case law, there are only two cases that address sexual harassment of the client of a business by an employee. In both cases, the employee was

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<sup>285</sup> Pretura Roma 20 December 1996, published in *Giurisprudenza Lavoro Lazio* (1997) p.92, where the sexual harassment is defined as discrimination, but then civil code legislation (Article 2043) is used to assess the compensation of damages; *Cassazione Penale* 5 February 2009, no. 16031, published on [http://consigliernazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna\\_details.aspx?id\\_documento=129](http://consigliernazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna_details.aspx?id_documento=129) and *Tribunale Taranto Decreto* 22 February 2006, published on [http://consigliernazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna\\_details.aspx?id\\_documento=42](http://consigliernazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna_details.aspx?id_documento=42), which were handled using anti-discrimination legislation (both accessed 12 October 2011).

dismissed for just cause using the legislation on justified dismissal for breach of the employment contract.<sup>286</sup>

### 2.2.2. Main features of case law

As stated, the case law on sexual harassment was based on anti-discrimination legislation in two cases. The *Corte di Cassazione Penale* used the anti-discrimination provisions to admit the Equality Advisor of Piemonte as a civil party to penal proceedings for sexual harassment at work in order to allow it compensation of damages as a public institution who carries out the public interest of promoting equal opportunities between men and women.<sup>287</sup> The other decision is that of the *Tribunal* of Taranto<sup>288</sup>: here, the Local Equality Advisor intervened in a labour-law dispute on sexual harassment at work. The special procedures of the Code of Equal Opportunities and the partial reversal of the burden of proof were used by the judges (see above in 2.1.7 and 2.1.8), but the claimant lost the case because she failed to establish the facts from which it may be presumed that there had been direct or indirect discrimination.

In the case law on sexual harassment, the courts state that sexual harassment at work is a just cause for dismissing the harasser, even if this is not provided by the compulsory disciplinary code. Sexual harassment at work is also regarded as a just cause for resignation of the victim. Moreover, victimization through dismissal of the victim who denounces the harassment is regarded as unlawful. Here, again, this is stated on the basis of the labour-law provisions on dismissal, rather than on those of the Code for Equal Opportunities. Article 2087 of the Civil Code, which provides for an obligation of the employer to take all technically possible measures necessary to protect the health and moral personality of workers, is often used to confirm the responsibility for damages of the employer who knew about the harassment and failed to respond.

Case law, however, always fails to define sexual harassment. Another problem is that of the remedies: often, compensation of damages is quite poor and case law lacks a clear vision on the criteria for quantification of harm.

### 2.2.3. Dignity

Case law almost always qualifies sexual harassment as an injury to the moral personality of the victim according to Articles 32 and 2 of the Constitution. The concept of moral personality also includes that of human dignity. However, the courts fail to define how dignity or moral personality should be interpreted.

### 2.2.4. Restrictions

We have not had any cases of clashes between the prohibition of sexual harassment and human/constitutional rights.

The only published case where a clash between different constitutional rights was decided in this field was that where the *Corte di Cassazione* stated that an equilibrated comparison shall be made between the right to privacy of the victim and the right of the harasser to be defended in court, both granted at Constitutional level, taking into account the specific situation brought to court, in order to decide which one should prevail.<sup>289</sup> In this decision, the name of the victim of sexual harassment had been disclosed. The case was between the employer, who had dismissed the harasser, and the harasser/employee, who denied the circumstances of fact alleged by the employer to justify the dismissal. The Court in the end decided that the disclosure of the name of the victim was important to allow the

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<sup>286</sup> *Tribunal Milano* 17 October 2000, published in *Orientamenti giurisprudenza Lavoro* I (2000) p. 1093 and *Cassazione sez. lavoro* 28 April 1995, no. 4735, published in *Repertorio Foro Italiano* (1995), column no. 852.

<sup>287</sup> *Cassazione Penale* 5 February 2009, no. 16031, published on [http://consiglieranazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna\\_details.aspx?id\\_documentazione=129](http://consiglieranazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna_details.aspx?id_documentazione=129), accessed 12 October 2011.

<sup>288</sup> *Tribunale Taranto Decreto* 22 February 2006, published on [http://consiglieranazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna\\_details.aspx?id\\_documentazione=42](http://consiglieranazionale.lavoro.gov.it/pubblico/Discriminazioni/Rassegna/rassegna_details.aspx?id_documentazione=42), accessed 12 October 2011.

<sup>289</sup> *Corte di Cassazione, sezione lavoro*, 5 August 2010, no. 18279, published in *Orientamenti Giurisprudenza del Lavoro* I (2010) p. 338.

dismissed employee a fair defence; in this case, therefore, the right to privacy was sacrificed to allow the defence of the employee.

#### *2.2.5. Role of equality bodies*

As regards equality bodies, there are only two published cases where the Regional Equality Advisor of Piemonte and the Local Equality Advisor of Taranto were involved.<sup>290</sup> As stated, these are the only two cases handled using anti-discrimination legislation (see above in 2.2.2).

It has to be stressed that local equality bodies take important action at the level of prevention of harassment and at the level of counselling and assistance of the victims, and they also intervene in organisations following informal procedures. Data on these activities, however, are not immediately available to the public.

#### *2.2.6. Additional information*

There is no additional information.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

There are other provisions related to harassment/sexual harassment in criminal law and labour law (see under 3.4).

In criminal law, in particular, Act no. 38 of 23 April 2009 introduced the new crime of ‘persecutory acts’ (better known as stalking). The Act provides a penalty of six months up to four years for the person who, with repeated behaviour, threatens or torments another person, forcing him/her to change his/her habits or causing him/her one or more of the following conditions: a deep and persistent fear or anxiety; a well-founded fear for his/her safety or for the safety of his/her relatives or persons linked by a sentimental relationship. The penalty is higher if the victim is a former partner, a minor, a pregnant woman or a disabled person, or if it is committed with weapons or in disguise. The crime is prosecuted only in case of a victim’s report. Criminal proceedings are, however, compulsory if the victim is a minor or a disabled person or if the fact is linked to another crime for which criminal proceedings start *ex officio*. Under Article 8, before any action is taken, the victim can ask the police-superintendent to verbally warn the perpetrator. The authority can proceed immediately or after a summary inquiry, where the latter is necessary. If previous warning has been given, this constitutes an aggravating circumstance of the crime of persecutory acts and makes it prosecutable *ex officio*. Protection orders and restraining orders are also provided for in the new Act: the court can issue a restraining order, which is legally binding for the perpetrator and can be made effective using police force. The Act also created a free telephone number (so-called ‘green number’) to give victims immediate help 24 hours a day, to offer initial psychological and judicial assistance and to report to the police urgent cases at the victim’s request.

Another provision which is related to physical harassment is the crime of rape (Article 609 bis Penal Code). The crime of rape is punishable by 5 to 10 years’ imprisonment.

In criminal legislation there are also other crimes of which harassment can be a component, e.g. in Article 660 of the Penal Code ‘Harassment or disturbance to persons’ and Article 594 of the Penal Code ‘Insults’.

However, apart from the crime of stalking, the regulation of which is more complex, the provisions covering crimes constitute punitive rather than preventive measures. Moreover, harassment must always be intentional here.

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<sup>290</sup> These cases are published on [http://consigliernazionale.lavoro.gov.it/publico/Discriminazioni/Rassegna/rassegna\\_view.aspx](http://consigliernazionale.lavoro.gov.it/publico/Discriminazioni/Rassegna/rassegna_view.aspx), accessed 12 October 2011.

### ***3.2. Collective agreements***

As regards collective agreements, as stated in 2.1.6, the most relevant provisions concerning sexual harassment are those of specific Codes of Conduct attached to the agreements, introduced following the Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work (92/131/EEC). These Codes normally contain a definition of sexual harassment as an offence to the dignity of the person. They develop clear and precise procedures to deal with sexual harassment once it has occurred. The procedure provides, as a first step, for an informal solution of any problems. If the conduct continues or if it is not appropriate to solve the problem informally, it provides for recourse to the formal complaints procedure. Then, the Codes provide for confidential counsellors for advice and assistance to employees subjected to sexual harassment, with the responsibility to assist in the solution of any problems, whether through informal or formal means. Finally, the Codes provide for prevention of harassment through information and professional training.

### ***3.3. Additional measures***

There is nothing to report on this issue.

### ***3.4. Harassment and stress at work***

In labour law, a situation also related to harassment is that of mobbing at work. Mobbing consists of persecutory treatment of an employee repeated over time, with the intention of inducing her/him to leave. This may include mobbing by the employer against the employee, by employees against a subordinate, by employees against a colleague and by employees against a superior. This behaviour, which infringes Article 2087 of the Civil Code, gives rise to compensation of damages in favour of the victim, whose moral personality has been harmed. The differences with the treatment of sexual harassment are the following: in the first place, mobbing requires the intention of marginalizing the worker; second, the harmful conduct has to be repeated during a period of time; and third, the persecutory acts are punishable in themselves without any link to a factor of discrimination, such as gender.

### ***3.5. Additional information***

There is no additional information.

## **4. Added value of anti-discrimination approach**

### ***4.1. Added value***

The added value of treating sexual harassment as discrimination is in the special judiciary procedures made available by the Code of Equal Opportunities: the special urgent legal proceedings; the possibility for Equality Advisers to assist victims of discrimination; the possibility of Equality Advisers to act directly in their name in cases of collective discrimination; the fact that Regional and Provincial Advisers can also proceed when delegated by an individual employee or can intervene in the process initiated by the latter; and the fact that associations and organizations promoting respect for equal treatment between male and female workers are entitled to act on the workers' behalf. The partial reversal of the burden of proof provided by the Code is another great advantage, as proof in cases of harassment may not be easy. Moreover, the definition of sexual harassment as discrimination refers to the purpose or effect of violating the dignity of a person and can thus be unintentional; this is not possible in penal legislation and under the other provisions related to harassment. Remedies and sanctions provided by the Code also strengthen the position of the victims of harassment.

### ***4.2. Pitfalls***

The non-discrimination approach, mainly followed in our case law, has shown its limits: it did not produce a definition of sexual harassment; it awarded poor compensation of damages; it did not allow any special proceedings; it did not allow applying the partial reversal of the burden of proof or the remedies and sanctions which are provided by non-discrimination



legislation, and it kept equality advisors outside proceedings. Moreover, only in the definition of harassment given by non discrimination legislation is unintentional behaviour sanctioned.

The main problems, however, with anti-discrimination legislation in Italy are the lack of awareness of it among the judiciary and lawyers, and the diffuse feeling of distrust regarding its efficacy, which is totally unjustified. Indeed, the entry into force of Decree no. 145/2005, introducing the equalization of sexual harassment to discrimination, has not yet brought any changes to the extreme reluctance to handle cases of harassment using anti-discrimination legislation.

## **LATVIA – Kristine Dupate**

### **1. General situation**

In general, the level of awareness is very low regarding protection against harassment and in particular harassment on the grounds of sex and sexual harassment. Several reasons may be identified. First, issues have not been discussed publicly and therefore society has insufficient knowledge to identify harassment on the grounds of sex and sexual harassment. Second, there is a strong patriarchal attitude in Latvia, and everyone claiming to have been harassed is seen as a loser or, in other words, it is typical to believe that the victim is guilty him/herself because he/she has incited another person to engage in harassment or sexual harassment. One positive exception is the long-lasting attempts of a women's NGO to amend legislation for the proper protection of women against domestic violence. However, the response of politicians remains the same: it is a family matter and most obviously women who are victims of domestic violence deal with relationships in the family inadequately, and have most probably incited the violence themselves. Third, social relationships among members of society are highly power-oriented, and an offensive attitude in everyday life among individuals is seen as a norm, but persons who are not able to bear this are considered to be too sensitive and are therefore exceptional. Fourth, Latvia has the highest disproportion between the number of male and female persons of the EU Member States.<sup>291</sup> This situation has existed since the First World War, and any attention (sexual) from a male person towards a female person is seen as an honour, while rejection is regarded as an insult towards the male person.

To the author's knowledge, there have been no discussions, publications or awareness-raising campaigns in Latvia regarding harassment and sexual harassment. In general, the respective provisions in national law are seen as a result of the EU dictate, which is not topical in Latvia.

### **2. Harassment and sexual harassment in the context of anti-discrimination law**

#### **2.1. Legislation**

##### **2.1.1. Transposition**

The provisions of Directives 2006/54 and 2004/113 have been transposed by several national laws.

Protection against harassment and sexual harassment in the field of employment has been implemented by Article 29(7) Labour Law.<sup>292</sup> Respective protection applies to all persons who have the status of employee and to civil servants and officials via special laws<sup>293</sup>

<sup>291</sup> 46 % male and 54 % female persons according to the Population Census of 2000, Central Statistic Bureau of Latvia, on <http://data.csb.gov.lv/Dialog/Saveshow.asp>, accessed 18 August 2011.

<sup>292</sup> OG No.105, 6 July 2001, respective amendments OG No.72, 7 May 2004.

<sup>293</sup> In particular, Article 2(4) Law on Civil Service, OG No.22 September 2000; Article 3(2) Law on Service of Persons with Special Service Ranks at System of Interior Affairs and Imprisonment Office, OG No.101, 30 June 2006; Article 3(2) Law on Custody Courts, OG No.107, 7 July 2006; Article 6(8) of Law on the National Guard of the Republic of Latvia, OG No.82, 26 May 2010; Article 12(2) of Law on Military Service,



referring to the applicability of Labour Law norms on the prohibition of differential treatment (prohibition against discrimination).

Further, the protection against harassment and sexual harassment regarding the access to employment is provided by Article 2<sup>1</sup> of the Law on Support of the Unemployed and Jobseekers<sup>294</sup> covering employment and training (re-training) services provided by the State Employment Agency and by Article 3<sup>1</sup> of the Education Law<sup>295</sup> covering the entire education system in Latvia. The Education Law does not itself provide definitions of discrimination, but it refers to the definitions provided by the Law on the Protection of Consumer Rights,<sup>296</sup> at the same time the explanatory memorandum does not contain a reference to Directive 2004/113, but to Directives 2002/73 and 2006/54. Protection against harassment and sexual harassment with regard to access to employment from the perspective of private providers of recruitment services is provided by the Cabinet of Ministers' Regulation No. 458<sup>297</sup> which refers to norms of the Labour Law stipulating the principle of non-discrimination on the grounds of sex.

The Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities<sup>298</sup> implements protection against harassment and sexual harassment from both perspectives – the employment and the goods and services perspective. It protects the self-employed against harassment and sexual harassment with regard to access to self-employment and with regard to the right to work in self-employment without discrimination and at the same time it precludes discrimination against the self-employed by providers of goods and services which the self-employed uses for the performance of his/her economic activities. The explanatory memorandum of the said law also refers to Directives 2002/73, 2006/54 and 2004/113. The Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities does not itself provide definitions of discrimination but via Article 4(2) refers to definitions provided by the Law on the Protection of Consumer Rights.

The main law implementing protection against harassment and sexual harassment in the field of access to and supply of goods and services is the Law on the Protection of Consumer Rights. Article 3<sup>1</sup> of the said law provides definitions of the concepts.

One more law containing protection against harassment is the Law on Social Security.<sup>299</sup> Article 2<sup>1</sup> prohibits discrimination on various grounds, including sex, and provides a definition of harassment. It is not clear, however, which perspective it is intended to cover (employment or goods and services) because the explanatory memorandum only mentions Directives 2000/43 and 97/80. From the Latvian perspective, the social security system concerns all fields of the EU gender equality law, because it embraces education (Directive 2006/54), health and social services (Directive 2004/113) and statutory social insurance (Directive 79/7, 2010/41).

Article 2(2)(a) of Directive 2006/54 and Article 4(3) of Directive 2004/113 have been specifically transposed. Article 29(4) of the Labour Law, Article 3<sup>1</sup>(7) of the Law on the Protection of Consumer Rights, Article 2<sup>1</sup>(5) of the Law on Support of the Unemployed and Jobseekers, Article 2<sup>1</sup>(2) of the Law on Social Security provide that harassment is to be considered as discrimination. Article 4(2) of the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities and Article 3<sup>1</sup>(7) of the Education Law refer to concepts of discrimination provided by the Law on the Protection of Consumer Rights.

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OG No.91, 18 June 2002. Employment conditions of judges are still not covered by provisions of non-discrimination.

<sup>294</sup> OG No.80, 29 May 2002, respective amendments OG No.51/52, 31 March 2010.

<sup>295</sup> OG No.343/344, 17 November 1998, respective amendments OG No.47, 24 March 2010.

<sup>296</sup> OG No.104/105, 1 April 1999, respective amendments OG No.104, 9 July 2008

<sup>297</sup> The Regulation of the Cabinet of Ministers No. 458 'The procedure on licensing and supervision of merchants – providers of recruitment services' (Ministru Kabineta 2007.gada 3.jūlija noteikumi Nr.458 'Komersantu – darbiekārtošanas pakalpojumu sniedzēju – licencēšanas un uzraudzības kārtība'), OG No. 108, 6 July 2007.

<sup>298</sup> OG No.89, 9 June 2009.

<sup>299</sup> OG No.144, 21 September 1995, respective amendments OG No.205, 22 December 2005.

### 2.1.2. Definitions

Definition of harassment is provided by Article 29(7) of the Labour Law, Article 2<sup>1</sup> of the Law on Support of the Unemployed and Jobseekers, Article 3<sup>1</sup> of the Law on the Protection of Consumer Rights and Article 2<sup>1</sup> of the Law on Social Security.

The definition of harassment implements Article 2(1)(c) of Directive 2006/54 and Article 2(c) of Directive 2004/113 word for word. The Latvian definition is as follows:

‘Harassment of a person is the subjection of a person to such actions which are unwanted from the point of view of the person, which are associated with his or her belonging to a specific gender, including actions of a sexual nature if the purpose or result of such actions is the violation of the person’s dignity and the creation of an intimidating, hostile, humiliating, degrading or offensive environment’.<sup>300</sup>

All laws provide for more or less the same definition with a slightly different word order, which does not substantially change the definition in the Latvian language. The definition provided by Article 2<sup>1</sup> of the Law on Social Security does not include the words ‘including actions of a sexual nature’ and therefore only protects against harassment.

The definition of sexual harassment is not implemented separately. The definition of harassment includes protection against sexual harassment, because it not only includes ‘actions [...] which are associated with his or her belonging to a specific gender’, but also ‘actions of a sexual nature’. It follows that Latvian law has implemented the prohibition against sexual harassment incorrectly due to the following reasons. First, the Latvian definition does not provide forms of expression of sexual harassment as provided by the definition, i.e. ‘verbal, non-verbal or physical conduct’. Second, according to the Latvian definition sexual harassment is seen as a form of harassment, although according to Directives 2006/54 and 2004/113 these are two separate concepts – one is ‘unwanted conduct related to the sex of a person’ the other – ‘unwanted [...] conduct of a sexual nature’.<sup>301</sup>

The Latvian definition explicitly refers to both ‘purpose’ and ‘effect’ requiring only one of them to establish the breach of the principle of non-discrimination.

### 2.1.3. Sexual harassment

There is no legal doctrine in Latvian law regarding the conceptualization of sexual harassment. Provisions of the Labour Law allow other grounds of discrimination to be covered by the prohibition of sexual harassment. If Article 29(7) of the Labour Law prohibits harassment on the grounds of sex including actions of a sexual nature, then Article 29(9) of the said law provides for application of the norms of Article 29 (including 29(7)) also with regard to other grounds (‘race, skin colour, age, disability, religious, political or other conviction, national or social origin, property or marital status, sexual orientation or other circumstances’) as far as ‘they are not in conflict with the essence of the relevant right’.

There is a slightly different situation with regard to the definition provided by Article 3<sup>1</sup> of the Law on the Protection of Consumer Rights. The definition of harassment itself, unlike the definition of the Labour Law, lists as prohibited grounds not only sex but also race and ethnic origin:

‘Offence shall be the exposure of a person on the basis of his or her sex, race or ethnic belonging to such action that is unfavourable from the point of view of this person (including action of sexual nature), the purpose or the result of which is the violation of the person’s honour and the creation of an intimidating, hostile, derogatory or degrading environment’.<sup>302</sup>

<sup>300</sup> English translation provided by the State Language Centre, [www.vvc.gov.lv](http://www.vvc.gov.lv), accessed 16 August 2011.

<sup>301</sup> See also M. Driessen-Reilly and B. Driessen *Don’t shoot the messenger: a look at Community law relating to harassment in the workplace* (2003) 28 E.L.Rev. Aug., Maxwell and Contributors.

<sup>302</sup> English translation provided by the State Language Centre, [www.vvc.gov.lv](http://www.vvc.gov.lv), accessed 16 August 2011.

Consequently, the definition under the Law on the Protection of Consumer Rights protects against actions of a sexual nature based on race and ethnic origin. The same is true for the definition provided by Article 2<sup>1</sup> of the Law on Support of the Unemployed and Jobseekers.

However, it is unlikely that in practice discrimination grounds other than sex are to be considered as covered by the prohibition of sexual harassment, because in Latvian society it is seen as an issue exclusively related to relationships between persons of opposite sex.

#### *2.1.4. Scope*

The scope of the prohibition of harassment and sexual harassment under Latvian law is not the same as under EU law. It is the same as the scope of Directive 2006/54, which means that Latvian law covers all aspects of employment: access to employment and self-employment, vocational training, working conditions, promotion and dismissal.<sup>303</sup>

However, Latvian law does not correctly reflect the scope of Directive 2004/113. In particular, Directive 2004/113 is implemented by the Law on the Protection of Consumer Rights. The basic reason for adoption of the said law was and is implementation of the EU consumer rights and therefore the Law on the Protection of Consumer Rights is limited in its personal scope: the provider of goods or services only is the person who acts within the limits of his/her professional or business activities.<sup>304</sup> Consequently, it does not cover situations where natural persons provide goods or services publicly but outside the scope of their professional activities, e.g. a lawyer who sells his/her family house in a public advertisement. The same applies to the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities: the non-discrimination obligation only concerns those suppliers who provide their services and goods to the self-employed within the scope of their professional activities. One more point is that the Law on Social Security does not provide protection against sexual harassment and therefore persons are not protected against such form of discrimination in the field of social security which covers education, health services, social assistance and services and statutory social insurance.

At the same time, one could argue that Latvian law provides protection against harassment and sexual harassment in fields falling outside EU law. In particular, it concerns education. The Education Law, providing for prohibition of harassment and sexual harassment, covers the entire system of education in Latvia, from kindergarten to doctoral studies, which means that such protection goes far beyond vocational training and in substance it extends the scope of protection against discrimination regarding the access to and supply services of education.

#### *2.1.5. Addressee*

According to the Labour Law the addressee is the employer (protected person – employee). According to Article 28 of the said law an employer has the obligation to provide just, safe and healthy employment conditions. It follows that an employer is also responsible for the employment environment, including the behaviour of fellow workers. Grammatically speaking, the provision of a just, safe and healthy working environment may also include protection against third parties present at the workplace, but it is unlikely that currently such reading is enforceable in practice due to the low awareness of the concepts of harassment and sexual harassment, and even more if the third party is a customer (because ‘the customer is always right’).

The obligation to provide education without discrimination according to the Education Law is addressed to educational establishments (protected persons – recipients of educational services) although it is not provided expressly. The same applies to the Law on Support of the Unemployed and Jobseekers: it follows from the context of the law that the addressee is the State Employment Agency and its subcontractors (protected persons – recipients of vocational training or related services).

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<sup>303</sup> The principle of gender equality and non-discrimination still does not cover all fields of employment in the public sector, in particular judges.

<sup>304</sup> Article 1(4).

The addressees under the Law on Social Security are the providers of social services, i.e. State Social Insurance Agency, administrative authorities and their subcontractors which provide any kind of state or municipal social and health services (protected persons – recipients of services under the statutory social security system).

Under the Law on the Protection of Consumer Rights the addressee is the provider of goods and services (protected person – natural person – customer recipient of such goods or services which are intended for personal use, i.e. which is not used for the purposes of professional or business activities).

The addressees under the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities are providers of goods and services and persons concerned with access to self-employment (protected persons – the self-employed).

#### *2.1.6. Preventive measures*

Neither Article 26 of Directive 2006/54 nor Article 4 of the Framework Agreement on harassment and violence at work have been implemented in Latvia. The only implementing measures regarding protection against harassment and sexual harassment are provisions covering respective concepts under the principle of non-discrimination by national laws.

Collective agreements found by the author of this report do not deal with issues related to the prevention of harassment.

#### *2.1.7. Procedures*

There are no special procedures apart from those generally applicable in cases of breach of the principle of non-discrimination. It follows that in cases of harassment or sexual harassment the same procedures are available as in cases of breach of the principle of non-discrimination in any other form.

The Ombudsman provides alternative procedures to tackle discrimination cases.<sup>305</sup> The Ombudsman office may initiate an investigation, during which peaceful settlement may be reached, and if that is impossible the Ombudsman may bring a case before a national court as representative of the victim. The final decision of the Ombudsman in an investigation is not legally binding. The competence of the Ombudsman regarding discrimination cases covers all fields of life, as provided by the Constitution of Latvia, legally binding international agreements and national law.

Article 6 of the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities, Article 3<sup>1</sup>(4) of the Law on the Protection of Consumer Rights and Article 3<sup>1</sup>(6) of the Education Law provides that everyone has the right to complain to the Ombudsman or bring a claim before court.

The Law on Social Security does not explicitly provide complaints procedures. However, the same right applies: the right to complain to the Ombudsman derives from Ombudsman law and the right to bring a claim before a court from procedural laws (Civil Procedure Law<sup>306</sup> and Administrative Procedure Law).<sup>307</sup> The same applies to the Labour Law and the Law on Support of the Unemployed and Jobseekers or the field of employment.

#### *2.1.8. Burden of proof*

The principle of the reversed burden of proof in a definition is provided by the Labour Law, the Law on Support of the Unemployed and Jobseekers, the Law on the Protection of Consumer Rights, the Education Law and the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities. The definition provided by the said laws is substantially the same. It provides that if a person presents circumstances or factors which may be the basis for direct or indirect discrimination, it is up to the respondent/defendant to prove that the principle of differential treatment applied.<sup>308</sup>

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<sup>305</sup> Ombudsman Law, OG No.65, 25 April 2006.

<sup>306</sup> OG No.326/330, 3 November 1998.

<sup>307</sup> OG No.164, 14 November 2011.

<sup>308</sup> This is the concept used in Latvian law to provide the principle of non-discrimination.

From a legal point of view, however, it is unclear in what form harassment or sexual harassment may occur. Latvian law is formally in line with Article 19(1) of Directive 2006/54 and Article 9(1) of Directive 2004/113 by also providing for an obligation of a victim to establish before a court facts from which it may be presumed that there has been direct or indirect discrimination.

The Law on Social Security does not provide for the right to a reversed burden of proof. If an allowance or service is provided by a public authority this might not be a major problem, because such claims would fall under the competence of administrative courts where the principle of objective investigation is applicable. At the same time, not all discrimination cases under the said law fall within the competence of administrative courts, in particular, in cases where social services are provided by a private person, although as a subcontractor to the State or a municipality who is in charge of the provision of respective services under the law.

Usually there are problems in filing complaints in the event of sexual harassment, because such litigation may involve disclosure of very private aspects (although court proceedings in such a case would be closed to the public). Another factor generally is the feeling of shame of a victim regarding the sexual harassment as such (e.g. in cases of rape) and doubts about what is considered as harassment or sexual harassment in Latvia. A very problematic issue is the collection of evidence, unless harassment occurred in the form of e-mails or text messages. Finally, one should take into account that Latvia is a small country and that even though court proceedings regarding sexual harassment would be confidential, this would still not ensure the prevention of an information leak. In such a situation, if the complaint fails before the court it is most probable that the harasser will lodge a claim for defamation of honour and reputation.

#### *2.1.9. Remedies and sanctions*

In the field of employment, the remedies and sanctions are the same as for forms of discrimination other than harassment and sexual harassment. The employer's obligation is to provide just, healthy and safe working conditions, and the employer has the obligation to pay compensation for moral harm, the amount of which, in case of dispute, is to be determined by a court. This follows from Article 28 and Article 29(8) of the Labour Law.

If discrimination occurs in connection with the provision of educational services, Article 3<sup>1</sup>(3) of the Education Law provides for the right to claim loss and damages, the amount of which, in case of dispute, is to be determined by a court.

According to Article 5 of the Law on Prohibition of Discrimination against Natural Persons – Performers of Economic Activities, a self-employed person who has been discriminated against has a right to claim the provision of non-discriminatory access to performance of his/her economic activities and a right to claim loss and damages, the amount of which again, in case of dispute, is to be determined by a court.

Article 3<sup>1</sup>(11) of the Law on the Protection of Consumer Rights provides for the right to claim execution of contract and reparation of loss and harm, the amount of which, in case of dispute, is to be determined by a court. Grammatically speaking this provision seems to be incomplete, because it does not cover situations where the customer does not have a contract to be executed because he/she was denied such a contract due to discrimination.

All laws mentioned and the Law on Support of the Unemployed and Jobseekers explicitly provide for the protection against victimisation. Although not provided explicitly by all relevant laws, according to court practice, a victim of victimisation has the same remedies as a victim of discrimination. The Law on Social Security, however, does not provide for protection against victimisation.

The Law on Support of the Unemployed and Jobseekers and the Law on Social Security do not provide for remedies. They do not provide for the obligation to provide a victim with services without discrimination and do not provide for a right to compensation for moral harm. It might therefore be problematic to enjoy such remedies.

Formally an employee who has become a victim may also complain to the State Labour Inspectorate, which may issue a decision with an obligation to introduce employment

conditions that are in line with the law and/or it may impose an administrative fine to the person responsible for harassment, i.e. the employer.<sup>309</sup> However, this seems virtually impossible in practice, since cases of harassment or sexual harassment usually require detailed investigation on facts which may be interpreted or perceived in many different ways. Usually the State Labour Inspectorate imposes administrative penalties in cases of alleged breach of employment rights.

Formally there is one more option – to bring a case before a court of first instance<sup>310</sup> in a procedure of administrative penalties.<sup>311</sup> In such a case, the victim could claim that an administrative penalty be imposed on the harasser under Article 204<sup>17</sup> of the Law on Administrative Penalties, but the victim will have to provide evidence him/herself. This is a very formal provision, because there are no data on whether it has ever been applied since the entry into force on 21 June 2007. In addition, it may be relevant only in cases of harassment in the access to and supply of goods and services, but the Law on the Protection of Consumer Rights provides that in the event of discrimination customers may sue providers only in a civil procedure.

Latvian law does not provide for any other remedies and sanctions. Harassers do not have responsibility before the law, if they are fellow workers, workers or providers of goods and services. It is up to the employer or the provider of the goods and services to take internal disciplinary measures.

#### *2.1.10. Compliance with EU law*

In general, Latvian law complies with EU law. It almost completely covers the personal and material scope of Directives 2006/54 and 2004/113. The problems regarding coverage of the scope concern the complete body of EU gender equality law, not only specifically harassment and sexual harassment. In particular, some groups of persons employed in the public sector are not covered by the non-discrimination provisions, e.g. judges. There is a gap in the implementation of Directive 2004/113. In particular, the implementation measures do not cover any goods and services provided by persons outside their professional activities. The protection against sexual harassment is not implemented with regard to the state social security system. At the same time, non-discrimination provisions cover the entire system of education, exceeding the scope of Directive 2004/113, which explicitly excludes education from its scope.

The problems related to the implementation of the concepts of harassment and sexual harassment are the following: there are no implementation measures for the definition of sexual harassment. The concept of sexual harassment in Latvian law is implemented as a form of harassment. Furthermore, there are problems regarding the implementation of the right to special remedies. The Law on Support of the Unemployed and Jobseekers does not provide for the obligation to provide a victim with services without discrimination or for the right to compensation for moral harm. It might therefore be problematic to enjoy such remedies. The Law on Social Security does not provide for the right to a reversed burden of proof. If an allowance or service is provided by a public authority, this might not be a major problem because such claims would fall under the competence of administrative courts where the principle of objective investigation applies. At the same time, not all discrimination cases fall within the competence of the administrative courts, in particular cases where the social service is provided by a private person, as a subcontractor to the state or the municipality that is in charge of the provision of the respective services under the law. The said law also does not provide for the protection against victimization.

Furthermore, regarding difficulties in practical application, there might be problems related to the interpretation of the concepts contained in the definition of harassment and sexual harassment, in particular, what is to be considered as and what evidence proves ‘unwanted conduct’, actions ‘related to the sex of a person’ and ‘of a sexual nature’, and ‘an

<sup>309</sup> Article 204<sup>17</sup> and 215<sup>3</sup> of the Law on Administrative Penalties, OG No.51, 20 December 1984.

<sup>310</sup> Ordinary court dealing with civil and criminal matters and also in certain cases administrative penalties.

<sup>311</sup> 213 of the Law on Administrative Penalties, OG No.51, 20 December 1984.

intimidating, hostile, degrading, humiliating or offensive environment'. The author of the present report believes, and national case law demonstrates, that Latvian society, which has a very strong patriarchal attitude, requires a very high threshold to prove the aforementioned circumstances.

#### *2.1.11. Additional information*

There is no additional information relevant to the protection against harassment or sexual harassment.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

National case law is poor with regard to decisions in cases of harassment. There is only one case on harassment based on sex. The claimant was a customer of a private employment company offering recruitment services. She participated in the application procedure for the recruitment of a sales manager. After the first round in the procedure for the selection of candidates she received an e-mail stating that she was excluded from the second round in the selection procedure because 'for the second round the employer has selected only male candidates because the employer considers a male candidate to be more appropriate for the post in question'. The court of appeal decided that there had been harassment based on sex, because the recruitment company had not submitted any evidence which would logically explain why in the final round only male candidates were included and why a male candidate would be more suitable for the post in question. Such decision was not contested before the court of cassation and has thus become final.<sup>312</sup>

There have been no cases on sexual harassment.<sup>313</sup>

According to information provided by the national equality body, the Ombudsman office, there have been two complaints on sexual harassment at the workplace, which were quite easy to prove because of respective text messages sent to the victims. In these cases, the Ombudsman office reached a peaceful settlement between the parties, mostly because none of the parties wanted to bring their case before court for fear of disclosure of intimate information to a wider circle. No documents are available on these cases.

### *2.2.2. Main features of case law*

Because of the lack of case law in harassment and sexual harassment cases, it is worthwhile to refer to some cases of mobbing and bossing around or psychological terror at the workplace. Such case law highlights the difficulties regarding the identification of particular concepts. National courts have particular difficulty in identifying psychological terror at the workplace because the approach regarding the assessment of evidence is too formal. The fact is that most frequently expressions of psychological terror, which taken separately, as is true for many acts (or failure to act), do not seem harassing or conducive to stress or feelings of terror, but taken together and during a longer period of time they create a stressful and degrading environment at work. In some cases, the court refused to assess the whole situation taken together and preferred to concentrate on the evidence supplied by the employer, justifying each particular episode. Second, not all judges have a uniform understanding of what creates a stressful, humiliating and degrading environment. In some cases, judges have emphasised that the claimant simply was too sensitive.<sup>314</sup> This demonstrates that the threshold to prove moral suffering in Latvia is high, especially taking into account the fact that in one particular case the claimant submitted three medical certificates attesting to health problems characteristic of long-lasting stress, including one month spent at a neurosis clinic on account of depression.

<sup>312</sup> Decision of the Regional Court of Riga in case No.C31276209, CA-4034/18 2010, 11 October 2010, not published.

<sup>313</sup> The first reason is restricted access to court decisions in civil cases and the second reason is restricted availability of court decisions containing intimate personal information.

<sup>314</sup> Decision of the Supreme Court of Latvia in case No.SKC-730/2010, 13 October 2010, not published; Decision of Riga Regional Court in case No.C31264206, CA-1626/17 2010, 18 January 2010, not published.

The second issue concerns procedural aspects. In some cases where stress at the workplace was caused by a fellow worker, the national court decided that such situation falls outside the employment relationship, and that therefore the victim had to bring a claim against the relevant natural person on the basis of Civil Law<sup>315</sup> provisions protecting honour and reputation between private persons.<sup>316</sup>

### 2.2.3. Dignity

Article 95 of the Latvian Constitution provides that the State protects a person's reputation and honour. Article 2352a of the Civil Law<sup>317</sup> provides for protection against unlawful injury of one's reputation and honour (dignity) orally, in writing or by acts. So far, injury of reputation and honour have only been interpreted in the context of freedom of expression (press) which is not so relevant in the context of discrimination. In addition, in Latvian there is no direct translation for the concept of 'dignity'. In Latvia there only is the concept of '*cieņa*', which so far has been interpreted as 'reputation', i.e. social status or how a person is evaluated by others and society. The concept of 'dignity' is broader, because it not only involves relations between individuals but also personal integrity<sup>318</sup> including self-esteem. At the same time, on the basis of Article 2352a Latvian courts in a couple of cases have accepted claims in discrimination cases concerning human dignity. One case was about a political commercial of a nationalistic party which depicted black persons in a way that constituted harassment<sup>319</sup> and the other one was about the unfounded rejection of services on the grounds of disability.<sup>320</sup> In both cases, national courts did not elaborate on the concept of dignity but referred to relevant international-law documents and stated that such behaviour injures a person's reputation and honour (dignity) on the grounds of race and disability, respectively.

### 2.2.4. Restrictions

There has been public debate on the issue of possible conflict between the freedom of expression and provisions of the Advertisement Law<sup>321</sup> prohibiting discriminatory commercials. In particular, it regarded commercial depictions of women to make the goods being sold more attractive and commercial depictions of construction workers (with other types of faces than those characteristic in Latvia) in a way constituting harassment (speaking broken Latvian) as an advertisement for a store selling construction materials. In the latter case, the Centre for the Protection of Consumer Rights imposed an administrative penalty on the enterprise in the amount of EUR 7 114 (LVL 5000),<sup>322</sup> which is quite a considerable sum of money in the Latvian context. However, there has been no further legal debate on the issue.

### 2.2.5. Role of equality bodies

The national equality body, the Ombudsman office, initiated a case on a commercial that constituted harassment: women as an addition to the goods being sold. The outcome of this case was a public announcement that such commercials were discriminatory on the grounds of sex. No further activities followed, because decisions of the Ombudsman are not legally binding. Two other cases on sexual harassment were closed after the parties reached a peaceful settlement.

### 2.2.6. Additional information

There is no relevant additional information.

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<sup>315</sup> Adopted on 28 January 1937, re-enforced on 1 March 1993.

<sup>316</sup> Decision of Kurzemes District Court in case No.T28348410, 18 March 2011, not published.

<sup>317</sup> Adopted on 28 January 1937, re-enforced on 1 March 1993.

<sup>318</sup> According to the ECtHR.

<sup>319</sup> Summary of court practice on civil protection of reputation and honour, the Supreme Court of Latvia, 2004, available in Latvian on <http://www.at.gov.lv/lv/info/summary/2004/>, accessed 18 August 2011.

<sup>320</sup> Decision of Riga Regional Court in case No.c04386004, C2020/3, 11 July 2005, not published.

<sup>321</sup> OG No.7, 10 February 2000.

<sup>322</sup> News portal [www.delfi.lv](http://www.delfi.lv), 19 April 2007, on <http://www.apollo.lv/portal/news/articles/98042/0>, accessed 19 August 2011.



### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

There are no other national provisions related to harassment and sexual harassment, except under criminal law – provisions prohibiting rape and violent satisfaction of sex drive<sup>323</sup> – and under the Advertisement Law<sup>324</sup> – prohibiting commercials presenting any discrimination based on sex.<sup>325</sup>

#### **3.2. Collective agreements**

The author of this report has not found any collective agreements that deal with the issues of harassment and sexual harassment.

#### **3.3. Additional measures**

There are no other relevant measures taken outside the framework of anti-discrimination law.

#### **3.4. Harassment and stress at work**

It is indeed difficult to distinguish between harassment and stress at work. There was one particular case that included psychological terror against an employee on account of the fact that her post was already ‘filled’ before her return from maternity and childcare leave, and in substance the only reason for this psychological terror against her was to get rid of an ‘unnecessary’ employee. The question remains whether this should simply be considered as stress at work or as harassment based on sex, because in substance it occurred due to the use of the right to maternity and childcare leave and the obligation to provide the same or an equivalent workplace, all the more because the claim was rejected in all court instances.<sup>326</sup>

#### **3.5. Additional information**

There is no relevant additional information.

### **4. Added value of anti-discrimination approach**

#### **4.1. Added value**

From the Latvian perspective, the anti-discrimination approach to harassment based on EU law gave rise to claims regarding psychological terror at work (stress at work). Although claims regarding psychological terror are based on provisions requiring just, healthy and safe working conditions,<sup>327</sup> the anti-discrimination definition of harassment serves as a good point of departure to establish the necessary elements for identification of psychological terror. Moreover, the provision implementing the anti-discrimination approach to the prohibition of victimisation is used by national courts in a broader scope, i.e. in all cases where it is established that a person has been subjected to psychological terror on account of using his/her labour rights.<sup>328</sup>

#### **4.2. Pitfalls**

No pitfalls have been identified in the Latvian context.

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<sup>323</sup> OG No.199/200, 8 July 1998, Articles 159 and 160.

<sup>324</sup> OG No.7, 10 February 2000.

<sup>325</sup> Article 4(2)(1).

<sup>326</sup> Decision of the Supreme Court of Latvia in case No.SKC-730/2010, 13 October 2010, not published; Decision of Riga Regional Court in case No.C31264206, CA-1626/17 2010, 18 January 2010, not published.

<sup>327</sup> Article 28 of the Labour Law.

<sup>328</sup> See for example, decision of the Supreme Court of Latvia in case No.SKC-67, 14 February 2007.

## 1. General situation

In Liechtenstein, the Office for Equal Opportunities published a report<sup>329</sup> on sexual harassment at the workplace in 2008. In this report it only refers to figures from neighbouring country Switzerland, which are also more or less representative and at least informative regarding the situation in Liechtenstein. It reveals that 28 % of women and 10 % of men have been sexually harassed at their respective workplace. Women indicate that three quarters of harassers are men, the rest are mixed groups and very rarely women. Concerning men half of the harassers are men, one quarter are mixed groups and one quarter women.

There is another publication<sup>330</sup> from the Office for Equal Opportunities dealing with the subject as well. It was compiled in 2006 and addresses employees and employers. It describes in more detail what the term sexual harassment means and how to act and react in concrete situations at the workplace.

It can be stated that the above-mentioned publications have sparked a debate. All concerned stakeholders will now most likely be aware of the fact that sexual harassment is clearly not allowed at the workplace and everybody should work together in order to reduce such situations as much as possible. At any rate, sexual harassment and harassment on the ground of sex were both subject of the latest amendment<sup>331</sup> of the Gender Equality Act, which entered into force on 8 June 2011, concerning the access to employment and the access to and supply of goods and services.

## 2. Harassment and sexual harassment in the context of anti-discrimination law

### 2.1. Legislation

#### 2.1.1. Transposition

The provisions on harassment on the ground of sex and sexual harassment in Directives 2006/54/EC and 2004/113/EC were transposed into national legislation by the amendment of the Gender Equality Act (GLG) that entered into force on 8 June 2011.<sup>332</sup> Relevant national provisions are especially Article 1a(c) and (d), Article 4 and Article 4b GLG.

But this was not the first regulation on these issues, since sexual harassment and harassment on the ground of sex were already prohibited before<sup>333</sup> The GLG was primarily restructured, so that definitions can now be found in its general part at the beginning.

Article 2(2)(a) of Directive 2006/54/EC was specifically transposed by Article 4 GLG, which has copied the wording of the Directive.

#### 2.1.2. Definitions

The concepts of harassment and sexual harassment defined in national legislation correspond to the definitions given by Directive 2006/54/EC in Article 2(1)(c) and (d) and by Directive 2004/113/EC in Article 2 (c) and (d). In particular, they both refer to the purpose or effect of violating the dignity of a person. Article 1a (c) GLG describes harassment as ‘unwelcome conduct related to the sex of a person with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment’. Article 1a (d) GLG describes sexual harassment as ‘any form of unwelcome verbal, non-verbal or physical conduct of a sexual nature, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment’. As the definition given by the Directive has

<sup>329</sup> [http://www.llv.li/pdf-llv-scg-glg\\_flyer\\_6\\_internet.pdf](http://www.llv.li/pdf-llv-scg-glg_flyer_6_internet.pdf), accessed 18 August 2011.

<sup>330</sup> [http://www.llv.li/pdf-llv-scg-glg\\_flyer\\_6\\_internet.pdf](http://www.llv.li/pdf-llv-scg-glg_flyer_6_internet.pdf), accessed 18 August 2011.

<sup>331</sup> LGBl. 2011/212; see <http://www.gesetze.li/Seite1.jsp?clearsvs=true&clearlrs=true>, accessed 18 August 2011.

<sup>332</sup> LGBl. 2011/212, <http://www.gesetze.li/Seite1.jsp?LGBl=1999096.xml&Searchstring=glg&showLGBl=true>, accessed 18 August 2011.

<sup>333</sup> LGBl. 2006/152.

been copied into national law, harassment can also be unintentional. But it cannot be stated with certainty if a situation where conduct occurs with the effect (and not the purpose) of violating the dignity of the person can be defined as harassment. National legislation with regard to this subject is brand new and no case law can be referred to. Even the comments on the proposal to the amendment of the Gender Equality Act do not explore that situation and do not give any interpretation of the text. At least according to criminal-law concepts, criminal acts shall be based on certain kinds of intention in order to fulfil the elements of a crime (Article 203 Criminal Code regulates sexual harassment).<sup>334</sup>

Potential differences between the two forms of discrimination are not described in national legislation. Harassment and sexual harassment as defined in Article 1a GLG are explicitly considered to be sex discrimination according to Article 4 and 4b GLG.

### *2.1.3. Sexual harassment*

Sexual harassment is conceptualized as sex discrimination according to Article 4 and 4b GLG. To my knowledge there has been no significant discussion on sexual harassment also covering other grounds of discrimination.

### *2.1.4. Scope*

The scope of the prohibition of harassment and sexual harassment is the same as the scope of Directives 2006/54/EC and 2004/113/EC. National legislation does not cover more than the access to employment including vocational training and promotion and the access to and supply of goods and services.

### *2.1.5. Addressee*

The addressees of the harassment and sexual harassment prohibition are the employer or somebody in a managing position acting on his or her behalf, because it must be guaranteed that the working environment is free from any forms of harassment. Harassment and sexual harassment by fellow workers has to be handled by employers by taking adequate measures in order to guarantee a working environment free from any form of harassment (Article 7c (2) GLG). Such measures are meant to be those regulated in the framework of general labour law when employees do not fulfil their work with due diligence (e.g. disciplinary measures).

Pursuant to Article 4a(2) and Article 4b GLG, the addressee in the field of goods and services is every person who offers goods and services which are accessible to the public in both the private and the public sector, including public institutions.

### *2.1.6. Preventive measures*

Article 26 of Directive 2006/54/EC on preventive measures has not been specifically implemented in Liechtenstein.

### *2.1.7. Procedures*

There are specific complaints procedures available for persons in the event of alleged harassment or sexual harassment. According to Article 5 GLG<sup>335</sup> the following rights can be claimed: One can demand before a court or before the administration authority that an existing discrimination has to be eliminated and/or the discrimination has to be declared by judgment if it is no longer disturbing. Furthermore, the employer can be sued for pecuniary compensation if he or she has not taken adequate measures to prevent the harassment or sexual harassment. Pursuant to Article 7c(2) and (3) GLG such a compensation amounts to at least EUR 4 166 (CHF 5 000) for employment cases. Concerning cases of goods and services the minimum amount of such a pecuniary compensation is only EUR 833 (CHF 1 000) pursuant to Article 15a(2) GLG.

<sup>334</sup> Article 203 StGB, LGBI. 1988/37, <http://www.gesetze.li/Seite1.jsp?LGBI=1988037.xml&Searchstring=STGB&showLGBI=true>, accessed 18 August 2011.

<sup>335</sup> Article 5 GLG is a general norm which governs cases concerning employment and goods and services.

Article 7 GLG<sup>336</sup> also includes the possibility of a group action for specialised organisations. In Liechtenstein there are in fact two such organisations, namely the *LANV* (employee association) and *infra* (information and contact point for women) which can bring group actions.

Article 7a GLG<sup>337</sup> includes the prohibition of revenge measures and protection of witnesses. In reaction to a claim due to the violation of the prohibition of discrimination neither the concerned person nor witnesses or persons giving information to the procedure may suffer any disadvantages. Such revenge measures entail the same consequences as discrimination itself.

Regarding private employment contracts appealing to an arbitration board is obligatory (Article 11 GLG) before bringing the claim to court. The same applies to cases in the area of goods and services.

Finally, employees working under a private employment contract are protected against revenge dismissals after having initiated a procedure following a discrimination, up to six months after the end of such procedure (Article 10 GLG).

#### 2.1.8. *Burden of proof*

According to Article 6 GLG, discrimination constituting harassment or sexual harassment is assumed if the concerned person is able to furnish *prima facie* evidence. In Liechtenstein there is practically no case law concerning anti-discrimination law and it is not clear or easy to identify the reasons for this. Combined with other factors such as fear of victimization it is imaginable that people are deterred from filing a complaint by the specific situation in Liechtenstein. It is nevertheless a very small country where everybody knows everyone else, and anti-discrimination lawsuits are still considered to be very delicate issues in spite of all the useful awareness-raising campaigns initiated especially by the Office of Equal Opportunities.

#### 2.1.9. *Remedies and sanctions*

See Point 2.1.7. concerning civil remedies and sanctions.

With regard to criminal remedies and sanctions Article 203 Criminal Code<sup>338</sup> governs sexual harassment. Pursuant to this norm, sexual harassment is a criminal offence prosecuted only upon application by the victim and is punishable by imprisonment of up to six months or by a fine of up to 360 daily rates.

#### 2.1.10. *Compliance with EU law*

In my opinion, domestic law is in compliance with EU law in general. Nevertheless, implementation concerning preventive measures is lacking. Furthermore, no case law is available, thus one can hardly describe how the new legal amendments will be applied and interpreted in concrete cases.

#### 2.1.11. *Additional information*

A new Article 6a GLG was introduced by the amendment<sup>339</sup> to the Gender Equality Act. Pursuant to this norm contractual regulations, company codes, statutes of associations, collective agreements and all other agreements and regulations which violate the prohibition of discrimination of the GLG are null and void.

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<sup>336</sup> Article 7 GLG is a general norm which governs cases concerning employment and goods and services.

<sup>337</sup> Article 7a GLG is a general norm which governs cases concerning employment and goods and services.

<sup>338</sup> Article 203 StGB, LGBl. 1988/37, <http://www.gesetze.li/Seite1.jsp?LGBl=1988037.xml&Searchstring=STGB&showLGBl=true>, accessed 18 August 2011.

<sup>339</sup> LGBl. 2011/212, <http://www.gesetze.li/Seite1.jsp?LGBl=1999096.xml&Searchstring=glg&showLGBl=true>, accessed 18 August 2011.

## **2.2. Case law**

As mentioned above, case law concerning anti-discrimination is lacking in Liechtenstein and therefore not available. Thus the following questions cannot be answered in detail.

### *2.2.1. National courts and equality bodies*

### *2.2.2. Main features of case law*

### *2.2.3. Dignity*

### *2.2.4. Restrictions*

### *2.2.5. Role of equality bodies*

### *2.2.6. Additional information*

## **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

### **3.1. National provisions**

The Labour Law<sup>340</sup> (Article 6) and the Labour Contract Law<sup>341</sup> (Paragraph 1173a Article 27 Civil Code, ABGB) oblige employers to take measures in order to protect the health and personal integrity of employees. These measures include the protection against harassment and sexual harassment at the workplace. Employers have to ensure that employees are not harassed or sexually harassed and that for victims of harassment and sexual harassment no further disadvantages occur.

Regarding criminal law, relevant information is in 2.1.9. above.

### **3.2. Collective agreements**

To my knowledge there are no specific regulations aimed at combating harassment in employment.

### **3.3. Additional measures**

No specific information is available.

### **3.4. Harassment and stress at work**

No specific information is available.

### **3.5. Additional information**

No specific information is available.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

Given the situation in Liechtenstein that both forms of harassment are regulated in the context of anti-discrimination law of the GLG and in the context of the non-discrimination law of general labour-law norms, with the consequence that no case law is available at the moment, it is really not clear what the advantages or pitfalls will be. Thus, neither concept can be argued to be better than the other because case law in Liechtenstein is lacking anyway.

Nevertheless it has to be considered that the amendments concerning the GLG are brand new and case law based on this will normally take a while to come up. So nothing is final at the moment.

My personal opinion tends to assess the definition of both forms of harassment as discrimination as positive, because uniform EU definitions apply which might be broader than national ones. And in fact every aspect which opens people's minds can help to improve the

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<sup>340</sup> LGBl. 1997/212, <http://www.gesetze.li/Seite1.jsp?LGBl=1967006.xml&Searchstring=Arbeitsgesetz&showLGBl=true>, accessed 23 August 2011.

<sup>341</sup> LGBl. 2006/153, <http://www.gesetze.li/Seite1.jsp?LGBl=1003001.xml&Searchstring=ABGB&showLGBl=true>, accessed 23 August 2011.

situation in Liechtenstein and to also take the next step: after implementing legislation also applying it in case law!

#### **4.2. Pitfalls**

Please see point 4.1. above.

### **5. Literature**

To my knowledge there is no further specific literature concerning Liechtenstein in addition to the reports already referred to above under 1.

## **LITHUANIA – Tomas Davulis**

### **1. General situation**

The legal assessment of sexual harassment and harassment on the ground of sex is one of the current social problems that is ignored and not treated effectively enough. Public opinion is driven by the stereotype that sexual harassment cannot exist because the relationship between a woman and a man is always based on mutual recognition and respect. Unwanted intimacies and physical contacts are regarded either as innocent jokes or provoked by the victim her/himself.

However, studies show that the problem is widespread, especially in the workplace. There are not many surveys, but one of the surveys<sup>342</sup> presented by the Equal Opportunities Ombudsperson indicates that sexual harassment is experienced at least once in their lifetime by 21 % of women and 15 % of men in Lithuania. 30 % of all harassment was engaged in by employers and 70 % by colleagues at work. The survey indicates that half of the respondents could not even recognise actions of the harasser as sexual harassment. Occasional and intentional physical actions were reported by 70.5 % of these respondents, offensive verbal remarks by 18 %, pornographic pictures by 8 %, and psychological pressure and sexual suggestions by 17 % of the respondents. Most of the harassers were men (80 %).

The survey has shown that the majority of all respondents (55 %) believe that it may generally be the victim's fault in the event of sexual harassment and 5 % hold that the victim is always to blame for the action of harassment.

There is not much debate on the issue in public. Society is generally keen to ignore the problem, leaving the victims to fight this battle on their own. Victims are reluctant to go public with their cases not only because the harassers in most cases are their employers, but also because society lacks any supportive attitude. Legal remedies are not sufficient.

### **2. Harassment and sexual harassment in the context of anti-discrimination law**

#### **2.1. Legislation**

##### **2.1.1. Transposition**

The national law transposing relevant EU legislation is the Equal Opportunities Act for Women and Men (EOAWM).<sup>343</sup>

The first Equal Opportunities Act for Women and Men, of 1998, only defined sexual harassment. It was perceived as insulting, verbal or physical conduct of a sexual nature toward a person who is bound by employment, statutory or other dependent relationship. The

<sup>342</sup> This is not a representative survey, and was made by a student of the Faculty of Communications based on information available in Lithuanian libraries. Paper in author's possession.

<sup>343</sup> State Gazette, 1998, no. 112-3100. A translation into English is available on the Internet site of the Lithuanian Parliament on [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=381468](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=381468), accessed 1 September 2011.



current definition of sexual harassment and the new definition of harassment were introduced by the Amendments of the EOAWM of 5 July 2005.<sup>344</sup>

One of the Lithuanian particularities is a double coverage of discrimination on the ground of sex by two different laws: the EOAWM and the Equal Opportunities Act as amended on 16 December 2008,<sup>345</sup> which deals with discrimination on grounds provided by the EU equality directives of 2000 and a number of other ‘domestic’ grounds such as language and social origin.

The double coverage of the ground of sex creates a lot of problems with respect to clarity and legal certainty, as the two laws regulate the issue to a different extent and in different ways. The EOAWM is a *lex specialis* but the later Equal Opportunities Act is more advanced. The Equal Opportunities Act is more precise as far as the obligations of persons are concerned, but the competences of the Equal Opportunities Ombudsperson are regulated by the EOAWM more narrowly.

### 2.1.2. Definitions

Section 2(6) of the EOAWM defines sexual harassment as any form of unwanted and insulting verbal, written or physical conduct of a sexual nature toward a person with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, humiliating or offensive environment. The Lithuanian definition contains an additional condition which cannot be found in the Directive. It requires that the conduct shall also be unwanted and ‘insulting’ (in Lithuanian – *užgaulus*). Until now there have been no cases or practice where this additional condition of ‘insulting conduct’ could be interpreted as additional criterion for the definition of sexual harassment.

In a literal translation, Section 2(7) of the EOAWM defines harassment on the ground of sex as any unwanted conduct when because of the sex of a person this person is subjected to an attempt to violate the dignity of the person or the dignity of the person has been violated and there is an attempt at creating an intimidating, hostile, humiliating or offensive environment or this type environment has been created.<sup>346</sup> The slight difference of the Lithuanian definition<sup>347</sup> compared to the definition provided by Directive 2006/54/EC is the criterion in the definition of sexual harassment that the conduct shall be of a sexual nature not connected with the conduct itself but with the purpose of the conduct.<sup>348</sup> In other words, Lithuanian law requires proving the sexual nature of the purpose but not the sexual nature of the conduct. However, due to the lack of practice it cannot be established whether this deviation has any decisive impact on the practice of application of the definition.

Article 2(2)(a) of Directive 2006/54/EC has been specifically transposed in Section 2(2) of the EOAWM, which states that discrimination means any direct or indirect discrimination, sexual harassment, harassment or an instruction to directly or indirectly discriminate against persons on the grounds of sex. However, this provision provides for little help in establishing a clear legal framework for prohibiting both forms of discrimination (see below for further comments).

In both Lithuanian definitions, the purpose or effect of violating a person’s dignity are well reflected. The Lithuanian definitions also suggest that harassment can be unintentional, but, as explained above, the conduct should relate to the sex of the victim. Differences between sexual harassment and harassment are not further developed in the law.

The Equal Opportunities Act also includes a definition of harassment. Harassment is perceived as any unwanted conduct on the ground of *inter alia* sex when there is an attempt to violate or a violation of the dignity of the person, and an intimidating, hostile, humiliating or

<sup>344</sup> State Gazette, 2005, no. 88-3281.

<sup>345</sup> State Gazette, 2008, no. 76-2988. A translation into English is available on the Internet site of the Lithuanian Parliament on [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=389500](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=389500), accessed 1 September 2011.

<sup>346</sup> This is a literal translation.

<sup>347</sup> The difference is not noticeable in the official translation of the EOAWM, which can be found on the Internet: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=381468](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=381468), accessed 1 September 2011.

<sup>348</sup> ‘When this type of conduct is caused with the purpose or effect of violating the dignity of a person’ (Section 2 (6) of the EOAWM).

offensive environment has been created or there has been an attempt to do so. The Equal Opportunities Act does not include a definition of sexual harassment, only a definition of harassment.

### *2.1.3. Sexual harassment*

Sexual harassment is clearly considered as one of the forms of discrimination on the grounds of sex (Section 2(2) of the EOAWM).

However, it is important to note that Lithuanian equality legislation lacks clear and constant prohibition of sexual harassment and harassment throughout the text of the EOAWM.

In other words, the law defines both forms of this misconduct (Sections 2(6) and 2(7) of the EOAWM), places it under sex discrimination (Section 2(2) of the EOAWM), but does not (!) prohibit it directly.

This strange legal construction looks like a chain of complicated references:

1. Section 2(3) of the EOAWM consolidates the definition of the 'Violation of equal rights for women and men' and defines it as discrimination on the grounds of sex.
2. Section 2(3) of the EOAWM defines 'Discrimination' as any direct or indirect discrimination, sexual harassment, harassment or an instruction to directly or indirectly discriminate against persons on the grounds of sex.

At this stage, we can state that both sexual harassment and harassment fall under the notion of violation of equal rights for women and men. It is interesting to note that the legislator does not simply prohibit the violation of equal rights for women and men (and sexual harassment and harassment), but introduces two sets of provisions. One of them stipulates concrete obligations of different actors in this area (Chapter II of the EOAWM), and the second one defines what actions constitute formal violation of equal rights (Chapter III of the EOAWM). This raises the question whether the explicit enumeration of the obligations and duties without any reference to sexual harassment or harassment is sufficient to ban those two forms of discrimination.

In Chapter II of the EOAWM, 'Implementation of Equal Rights for Women and Men', we can find a set of obligations for employers, including the duty to take appropriate measures to prevent sexual harassment or harassment of employees (Section 5 p. 5 of the EOAWM).

In Chapter III of the EOAWM, 'Violation of Equal Rights for Women and Men', including obligations for employers, the violation of which can be sanctioned by an administrative fine, there is no reference to harassment or sexual harassment.

A similar inconsistency can be found in the area of access to an supply of goods and services. In Section 5 p. 2 in Chapter II of the EOAWM, 'Implementation of Equal Rights for Women and Men', we read that a seller or producer of goods or a service provider in providing consumers with information about products, goods and services or advertising them, must ensure that it will not express humiliation, scorn or restriction of rights, will not extend privileges on the grounds of a person's sex and will not display any public attitude that one sex is superior to another.

Section 7-1 p. 2 in Chapter III of the EOAWM, 'Violation of Equal Rights for Women and Men', states that actions of a seller or producer of goods or a provider of services shall be treated as violating equal rights for women and men, if, on the grounds of a person's sex, in offering information about products, goods and services or advertising them, public opinion is formed that one sex is superior to another, and consumers are also being discriminated against on grounds of sex.

However, the legal construction remains obscure. For instance, sexual harassment is not mentioned in Chapter III, 'Violation of Equal Rights for Women and Men', which makes it formally impossible for the Equal Opportunities Ombudsperson to punish the harasser with an



administrative fine.<sup>349</sup> Only civil-law and criminal-law remedies remain at the disposal of the victim.

Another piece of legislation, the Equal Opportunities Act, follows a different pattern. Harassment related to sex is already considered a 'Violation of Equal Opportunities'.<sup>350</sup> But no administrative sanctions can be imposed, because the Act refers to the EOAWM as far as competences of the Equal Opportunities Ombudsperson are concerned. This explains why the Lithuanian Equal Opportunities Ombudsperson has only issued warnings after investigating complaints on sexual harassment.

#### *2.1.4. Scope*

The scope of application of the EOAWM is broader than required by Directives 2006/54/EC and 2004/113/EC. It covers the actions of state and municipal institutions and agencies (Section 3 of the EOAWM), educational establishments and institutions of science and studies (Sections 4 and 7 of the EOAWM) and both private and state social security systems (Sections 5-3 and 7-3 of the EOAWM). However, the explicitly regulated duties and enumerations of punishable violations of equal rights include no special provisions on harassment and sexual harassment.

The Equal Opportunities Act, which deals with the majority of the prohibited grounds of discrimination, is more comprehensive in this regard. It also contains the rule that educational establishments, other education providers as well as research and education establishments must preclude any harassment or instruction to harass on the grounds of gender (Section 6(1) of the Act).

The Military Discipline Statute<sup>351</sup> has a Section 87 called 'Sexual Harassment' which stipulates various disciplinary measures for verbal or written sexual harassment.

#### *2.1.5. Addressee*

The problematic distinctions between the definitions of sexual harassment and particular sets of different duties and different sets of violations of equal rights does not allow a clear indication of who the addressees are.

Since Sections 5, 5-1 and 7 and 7-1 of the EOAWM refer to the employer and the seller or the producer of goods or the provider of services, only those persons can be considered as possible addressees. However, as mentioned before, these Sections of the EOAWM do not entail a clear prohibition of sexual harassment and harassment.

Only Section 7 p. 6-7 of the Equal Opportunities Act consolidates clear duties for an employer to take measures to prevent harassment or instructions to discriminate against any employee or civil servant at the workplace and to take measures to prevent sexual harassment against any employee or civil servant. The breach of these duties can be considered as a violation of the right to equal opportunities and may be sanctioned.

The Equal Opportunities Ombudsperson has often proposed to clearly stipulate in the EOAWM that not only the employer but also his representative as well as other employees may be recognised as the addressees.

#### *2.1.6. Preventive measures*

The social dialogue in Lithuania is usually restricted to the discussion on wages and social benefits. Policy measures, such as, for instance, preventive measures against discrimination, are not a subject of debate of social partners or a subject of any collective agreements. There are national collective agreements in Lithuania and only very few sectoral agreements. They definitely include no provisions on sexual harassment or harassment in the workplace. Not even informal discussions on the implementation of the Framework Agreement on harassment

<sup>349</sup> This may explain why the Lithuanian Equal Opportunities Ombudsperson has only issued warnings after investigating complaints on sexual harassment.

<sup>350</sup> Under the duties of employers we also find the obligation to take measures to prevent harassment or instruction to discriminate against any employee or civil servant at the workplace and to take measures to prevent sexual harassment against any employee or civil servant.

<sup>351</sup> State Gazette, 2006, No. 17-603.

and violence at work 2007 have taken place in Lithuania, since the majority of leaders does not consider this a priority.

#### *2.1.7. Procedures*

No specific complaints procedures are available for individuals in the event of alleged harassment or sexual harassment. They may lodge their complaint with the Equal Opportunities Ombudsperson, initiate a civil case or lodge their complaint with the state prosecutor asking for a criminal investigation (see 2.1.9.).

#### *2.1.8. Burden of proof*

The situation is quite ambiguous. The burden of proof is definitely not shifted to the person or institution against which a complaint was filed under the EOAWM. Section 2-1 of the EOAWM states that the burden of proof shall be reversed in cases of direct or indirect discrimination. However, the new version of the Equal Opportunities Act, which also covers the ground of sex, in its Section 4 explicitly consolidates that the reversal of proof rule shall also be applied to cases of sexual harassment.

This may be true for cases before the civil courts. The existing administrative court practice rejects the reversal of the burden of proof in investigations by the Equal Opportunities Ombudsperson of sexual harassment complaints (see below in 2.2.1).

#### *2.1.9. Remedies and sanctions*

With some exceptions, the remedies are the same for both the area of employment and the access to and supply of goods and services.

Pursuant to Section 9(1) of the EOAWM, a person who believes that he has become the subject of sexual or any other harassment shall have the right to appeal to the Equal Opportunities Ombudsperson for objective and unbiased help. In the opinion of the author of this report and the Equal Opportunities Ombudsperson, the latter is not competent to impose administrative sanctions on the harasser, despite its existing competence to investigate sexual harassment complaints. The problem simply lies in the lack of reference to harassment and sexual harassment in Chapter III of the EOAWM, which defines the 'Violations of Equal Opportunities for Women and Men'. The problem was highlighted in the 2009 Annual Report of the Equal Opportunities Ombudsperson<sup>352</sup> but no further steps have been taken so far.

Under Section 24-1 of the EOAWM, a person who has suffered discrimination on the grounds of sex, sexual harassment or harassment shall have the right to demand before a court that the guilty persons reimburse the pecuniary and non-pecuniary harm in the manner prescribed by the Civil Code of the Republic of Lithuania. The courts of general jurisdiction are competent in those matters.

There are no specific labour-law remedies or sanctions provided in national labour law. Sexual harassers may be dismissed from work without notice (Section 235 Labour Code). Section 235 of the Labour Law states that sexual harassment is among many other examples of gross breach of employees' discipline.

In addition, Section 5 p. 5 of the EOAWM requires employers to take measures to ensure that an employee, a representative of an employee or an employee who testifies or provides explanation will be protected from hostile behaviour, negative consequences and any other type of persecution as a reaction to the complaint or any other legal procedure concerning discrimination.

An administrative fine may be imposed on employers who persecute an employee, a representative of an employee or an employee who testifies or provides explanation about the complaint or any other legal procedure concerning discrimination on the grounds of sex.

Victims of sexual harassment may lodge a complaint before a court or state prosecutor, because sexual harassment in some cases is considered as a criminal act (Section 152 of the Criminal Code). The following acts would be considered as a criminal misdemeanour:

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<sup>352</sup> Annual Report 2009 of Equal Opportunities Ombudsperson, p. 125.

- a) seeking sexual contact or satisfaction;
- b) by harassing a person;
- c) who is subordinate to him in office or otherwise;
- d) by vulgar or comparable acts or by making offers or hints.

Section 7-1 p. 3 of the EOAWM defines persecution of the person who has filed a complaint concerning discrimination as a violation of the principle of equal rights for women and men.

#### *2.1.10. Compliance with EU law*

Lithuanian legislation has not correctly transposed the definition of harassment on the ground of sex and lacks effectiveness in providing a legal framework to ban sexual harassment and harassment on the ground of sex. The EOAWM does not clearly prohibit sexual harassment and harassment on the ground of sex because they are not mentioned among the 'Violations of Equal Opportunities of Women and Men'. For this reason, the Ombudsperson lacks the authority to impose administrative sanctions on sexual harassers.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

#### *2.2.2. Main features of case law*

Only few cases have been handled by the Lithuanian courts and they all concern sexual harassment. Most of the cases are solved in the first instance and do not reach the higher courts, which makes them difficult to trace. Victims are also reluctant to make their case publicly known.

In one of the proceedings concerning the legitimacy of a dismissal without notice of an employee who sent numerous text messages with a sexual content to his colleague was upheld by the Vilnius Regional Court (second instance).<sup>353</sup> The Court conducted a thorough investigation of the content of the text messages but rejected the argument of the harasser that he did not intend to create a hostile environment. In the Court's opinion, the harasser could not indicate any other purpose in the sending of text messages to the colleague. Surprisingly, the Court, while examining the case between employer and employee, accepted the duty to shift the burden of proof, but the text of the ruling indicates that this was only a formal statement.

In its ruling of 20 May 2008<sup>354</sup> the Highest Administrative Court of the Republic of Lithuania rejected the arguments of the Equal Opportunities Ombudsperson that the burden of proof shall be shifted to the possible harasser in the administrative investigation of a complaint by the Ombudsperson. The Court pointed out that the Equal Opportunities Ombudsperson shall investigate cases of sexual harassment in accordance with the principle of the presumption of innocence. The Equal Opportunities Ombudsperson has criticised this attitude in Parliament but the EOAWM was not amended.

The case of Lithuanian national Ms. Cudak, which relates to possible sexual harassment at the Embassy of Poland, has returned from its examination before the ECHR (Application no. 15869/02) and is still pending in Lithuanian courts. In 2010, the Supreme Court of Lithuania sent the case back to the first instance for re-examination.

There are no cases from the area of the access to and supply of goods and services.

There are no cases related to harassment. In one of the investigations of the Equal Opportunities Ombudsperson, the charges of sexual harassment were dropped but the harasser received an official warning by the Ombudsperson. In this case, the harasser even initiated proceedings against the victim, accusing her of slander.

<sup>353</sup> Vilnius Regional Court ruling of 9 December 2008 in Case no. 2A-1027-340/08.

<sup>354</sup> Ruling of 20 May 2008 by the Highest Administrative Court of the Republic of Lithuania in Case No. A<sup>325</sup> – 825-08.

### 2.2.3. *Dignity*

There are only general observations of the courts regarding the notion of dignity in civil life.

The Constitutional Court clearly considers honour and dignity of the person as a constitutional human right. Under Articles 21 and 22 of the Constitution, the honour and dignity of the person are protected by the law and the court. In the doctrine of the Constitutional Court of the Republic of Lithuania it is widely accepted that human dignity is an integral characteristic of the human being as the greatest social value. Each member of society enjoys innate dignity.<sup>355</sup> In its 9 December 1998 ruling, the Constitutional Court held that innate human rights are innate opportunities of the individual, which ensure human dignity in all areas of social life. It is to be noted that dignity is a characteristic of every human being, irrespective of how he himself or other persons assess him.

Lithuanian law differentiates between human dignity and human honour. Human dignity is perceived as self-assessment of the person, whilst honour is understood as assessment of the person made by others. In practice no significant difference exists between those two notions and the practice used to employ them as synonyms.

Under the Constitution it is prohibited to degrade the dignity of the human being. Thus, the Constitution establishes the duty of the State to ensure the protection and defence of human dignity. The fact that the legislator, while regulating the implementation of human rights and freedoms, must guarantee their proper protection constitutes one of the conditions of ensuring human dignity as a constitutional value. In its 19 August 2006 ruling, the Constitutional Court stated that the Constitution imperatively requires establishment by law of such legal regulations as to ensure that a person who suffers harm by unlawful actions, especially related to the violation of dignity, is able in all cases to claim just compensation for that harm and to receive that compensation.

Case law of the civil courts indicates that the assessment of the emotional status of the victim does not require special medical knowledge or skills. Human dignity is perceived as self-assessment of the person, and therefore to investigate whether there has been violation of dignity no special knowledge is required. Common sense and perception of moral norms as accepted by society are sufficient. Any unwanted, repeated proposal to satisfy a sexual desire is recognized as a violation of pride and human dignity.<sup>356</sup>

### 2.2.4. *Restrictions*

There is no case law examining possible conflict with the freedom of speech or other similar constitutional values, including the right to privacy. However, the EOAWM keeps this possibility open, since it strictly limits the scope of application and scope of competences of the Equal Opportunities Ombudsperson by excluding private life and family life.

### 2.2.5. *Role of equality bodies*

The Equal Opportunity Ombudsperson is a very important institution providing counselling and legal aid for victims of harassment and sexual harassment. It also investigates complaints lodged by victims or may initiate investigations on its own initiative. However, the absolute numbers of complaints are very low: 2 in 2010, 1 in 2009, 2 in 2008, 1 in 2007, 2 in 2006 and 3 in 2005. No complaints related to harassment have been lodged so far.

In its Annual Reports to Parliament, the Equal Opportunity Ombudsperson points out the following difficulties in investigating such complaints:

- a negative attitude in society towards victims of sexual harassment;
- no reversal of the burden of proof in this type of investigation and cases;
- no special rules on the collection and assessment of evidence;
- difficult definition of harassment and sexual harassment, which requires evidence for the violation of dignity or creation of an intimidating, hostile, degrading, humiliating or offensive environment;

<sup>355</sup> Ruling of 20 December 2004 of the Constitutional Court of the Republic of Lithuania.

<sup>356</sup> Vilnius Regional Court ruling of 9 December 2008 in Case no. 2A-1027-340/08.

- refusal of victims or witnesses to provide useful information;
- no witnesses of the event.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

##### *Labour Law*

Section 235 of the Labour Code mentions sexual harassment as an example of gross breach of work duties of an employee and allows employers to terminate the contract of employment without notice. The limited application of this norm indicates that the definition of sexual harassment under the EOAWM is generally applied.

##### *Criminal Law*

Article 152 of the Criminal Code of the Republic of Lithuania<sup>357</sup> defines sexual harassment as a misdemeanour<sup>358</sup>: a person who, in seeking sexual contact or satisfaction, harasses a person subordinate to him in the office or otherwise by vulgar or comparable actions or by making offers or hints shall be considered to have committed a misdemeanour and shall be punished by a fine or by restriction of liberty or by arrest. A person shall be held liable for this act only subject to a complaint filed by the victim or a statement by the victim's authorised representative or at the prosecutor's request. This is a clearly intentional criminal act<sup>359</sup> and requires intention of sexual contact or sexual satisfaction.

There is no explicit link between the definition of sexual harassment in the EOAWM and the definition of sexual harassment as a criminal act.

#### **3.2. Collective agreements**

There are no relevant collective agreements.

#### **3.3. Additional measures**

There are no additional measures.

#### **3.4. Harassment and stress at work**

There is no relevant information on the relationship between harassment and stress at work.

### **4. Added value of anti-discrimination approach**

#### **4.1. Added value**

There is no implementation at national level of the differences between harassment on the ground of sex and sexual harassment, including their different applications. Only sexual harassment is publicly known, but its precise definition has not been analysed so far. The European definitions are beneficial because their formulation is broader than the national ones (e.g. the first national definition of sexual harassment required a vertical relationship between the harasser and the victim). However, at the national level they are not supported by additional instruments such as clear obligations for employers, rules on the collection of evidence, administrative sanctions etc.

Adding sexual harassment and harassment to the field of discrimination extends the scope of possible options for defence of the victim, including active participation of the Equal Opportunities Ombudsperson. In Lithuania, this institution has won certain trust among the victims of harassment and is often regarded as the primary institution for the defence of infringed rights.

<sup>357</sup> State Gazette, 2000, no. 89-2741. A translation into English is available on the Internet site of the Lithuanian Parliament on [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=366707](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=366707), accessed 1 September 2011.

<sup>358</sup> All criminal acts in Lithuania are divided into crimes and misdemeanours.

<sup>359</sup> *Dvilaitis V. Seksualinis priekabiavimas ir teisinė atsakomybė už jį*. 2004, t. 60(52). p. 111.

#### 4.2. Pitfalls

Against the Lithuanian background, where the fight against harassment and sexual harassment is underdeveloped, it is difficult to point out any possible pitfalls. However, the problem of harassment currently receives more attention when it is combined with discrimination. Equality legislation at least provides for a certain legal framework for the courts to take decisions.

Solving the problem of sexual harassment and harassment in the working environment using the tools of traditional labour law (health and safety, breach of contract, tort) has been found ineffective.

### LUXEMBOURG – Anik Raskin

#### 1. General situation

In Luxembourg, harassment is mainly a subject regarding employment and career advancement. In 2001, two trade unions established a specific association called *Mobbing asbl* that assists and counsels victims of harassment in the workplace.

*Mobbing asbl* publishes figures on an annual basis. In 2010, it registered 114 claims for harassment on different grounds. 85 % of these claims were analysed by *Mobbing asbl* itself. 76 % of the claimers were women. 88 % were employees of the private sector. Of these 114 claims, three were on the ground of sexual harassment. There is no data available regarding harassment on the ground of sex.

The ‘*Centre pour l’égalité de traitement*’ (Centre for Equal Treatment) was created by law in 2006.<sup>360</sup> Its members having being nominated by Parliament in late 2008, it started its work in early 2009. Like *Mobbing asbl*, the Centre for Equal Treatment publishes annual figures about its work.

Since 2009 not a single claim concerning harassment on the ground of sex or sexual harassment has been submitted to it.

In 2000, when the law on sexual harassment in the workplace was about to be adopted, there was great concern among different parties about the effect of this law. People were afraid that its result would be a huge number of unfounded claims. This did not occur and the adoption of provisions on harassment on the ground of sex did not raise any more discussion.

Neither sexual harassment nor harassment on the ground of sex are discussed in the area outside the workplace. Nor is there any discussion about these matters in the areas of access to employment and vocational training

#### 2. Harassment and sexual harassment in the context of anti-discrimination law

##### 2.1. Legislation

###### 2.1.1. Transposition

In May 2000<sup>361</sup> the Luxembourg Parliament adopted a law on sexual harassment in the workplace. Thus, protection regarding sexual harassment in the workplace already existed in Luxembourg before the transposition of Directive 2002/73/EC.

<sup>360</sup> Loi modifiée du 28 novembre 2006 portant 1. transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l’égalité de traitement entre les personnes sans distinction de race ou d’origine ethnique; 2. transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d’un cadre général en faveur de l’égalité de traitement en matière d’emploi et de travail; 3. modification du Code du travail et portant introduction dans le Livre II d’un nouveau titre V relatif à l’égalité de traitement en matière d’emploi et de travail; 4. modification des articles 454 et 455 du Code pénal; 5. modification de la loi du 12 septembre 2003 relative aux personnes handicapées

<sup>361</sup> Loi du 26 mai 2000 concernant la protection contre le harcèlement sexuel à l’occasion des relations de travail et portant modification de différentes autres lois abrogée par la Loi modifiée du 31 juillet 2006 portant introduction d’un Code du Travail

Regarding harassment on the ground of sex in the workplace, Directive 2002/73/EC was transposed by the adoption of a law in 2008.<sup>362</sup>

Directive 2004/113/EC was transposed by a law in 2007.<sup>363</sup>

Luxembourg has taken no specific measures in order to transpose Directive 2006/54/EC until now.

### *2.1.2. Definitions*

In Luxembourg, the legal definition of harassment on the ground of sex is the same as the one given by Directive 2006/54/EC. Thus it refers to purpose or effect of violating the dignity of a worker. Harassment on the ground of sex can be unintentional and is defined as discrimination on the ground of sex.

Regarding sexual harassment, the law defines it as conduct of a sexual nature or based on sex which the person who displays it knows or should know that it affects the dignity of a person. The concepts of 'sexual nature' and 'based on sex' are not clearly defined by the law. Nor is there any case law addressing them. The intentional element is assumed to exist.

Harassment on the ground of sex as well as sexual harassment are regulated by Title IV of the Labour Code. They are explicitly defined as discrimination on the ground of sex.

Regarding access to and supply of goods and services, Directive 2004/113/CE has been transposed by reproducing the exact terms of the Directive. Thus, harassment on the ground of sex and sexual harassment can be unintentional and are considered as discrimination on the ground of sex.

There is no description of differences between the two types of harassment in national law.

Harassment on the ground of sex and sexual harassment are regulated by the same Acts as discrimination on the ground of sex. One Act concerns discrimination in the workplace. A second one regulates access to and supply of goods and services.

### *2.1.3. Sexual harassment*

As mentioned in 2.1.2., sexual harassment is defined as conduct of a sexual nature or based on sex. There has never been any discussion on it covering other grounds of discrimination.

### *2.1.4. Scope*

The scope of the prohibition of harassment on the ground of sex and sexual harassment is the same as the scope of Directives 2006/54/EC and 2004/113/EC. However, a Bill meant to extend the scope in the area of access to and supply of goods and services to the areas of education, media and advertising has been presented to Parliament recently.

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<sup>362</sup> Loi du 13 mai 2008 portant 1. transposition de la directive 76/207/CEE du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre hommes et femmes en ce qui concerne l'accès à l'emploi, à la formation et à la promotion professionnelles, et les conditions de travail telle que modifiée par la directive 2002/73/CE du Parlement Européen et du Conseil du 23 septembre 2002; 2. modification du Code du travail; 3. modification de l'alinéa 1 de l'article 2 de la loi du 14 mars 1988 relative au congé d'accueil; 4. modification de la loi modifiée du 16 avril 1979 fixant le statut général des fonctionnaires de l'Etat; 5. modification de la loi modifiée du 24 décembre 1985 fixant le statut général des fonctionnaires communaux; 6. modification de la loi du 28 novembre 2006 portant 1. transposition de la directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique; 2. transposition de la directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail; 3. modification du Code du travail et portant introduction dans le Livre II d'un nouveau titre V relatif à l'égalité de traitement en matière d'emploi et de travail; 4. modification des articles 454 et 455 du Code pénal; 5. modification de la loi du 12 septembre 2003 relative aux personnes handicapées

<sup>363</sup> Loi du 21 décembre 2007 portant 1. transposition de la directive 2004/113/CE du Conseil du 13 décembre 2004 mettant en œuvre le principe de l'égalité de traitement entre les femmes et les hommes dans l'accès à des biens et services et la fourniture de biens et services; 2. modification du Code pénal; 3. modification de la loi modifiée du 27 juillet 1997 sur le contrat d'assurance.

#### *2.1.5. Addressee*

At the workplace, the regulation shows some differences. Regarding harassment on the ground of sex, according to the law, each worker is addressed as well as the employer or its representatives.

The article on sexual harassment is more precise, as it mentions workers, trainees and students. Furthermore, according to Article L.245-4.(1), clients and providers of the employer are addressed as well. The employer has to prevent sexual harassment by providing information on the law and by taking measures in order to stop sexual harassment acts of her/his employees. These measures can vary, such as assigning the harasser to another job or suspending his/her work, for example.

In the field of access to and supply of goods and services no addressee is mentioned in the law. In the Explanatory Memorandum to the Bill, it is mentioned that anyone (client, employee, provider,...) is addressed.

#### *2.1.6. Preventive measures*

As the Government considers that national legislation is in compliance with Directive 2006/54/EC, no specific legal act has been adopted in order to transpose it.

Currently, Article 26 of Directive 2006/54/EC can be considered as having been transposed regarding sexual harassment in the workplace, as the law places an obligation on the employer to implement preventive measures in order to preserve the dignity of the workers. These measures have to include information measures.

There is no similar legal provision regarding harassment on the ground of sex.

On 25 June 2009, representative social partners agreed on a Convention<sup>364</sup> about harassment and violence in the workplace. Although the document refers to the European Framework Agreement on harassment and violence at work of 2007, it does not mention sexual harassment or harassment on the ground of sex at all. The main aim of the Convention is to take action regarding psychological harassment and regarding violence. Article 4 of the European Framework Agreement was implemented in the Convention.

This Framework has no influence on the legal provisions regarding sexual harassment and harassment on the ground of sex.

#### *2.1.7. Procedures*

There are no legal provisions regarding procedures. However, the above-mentioned Convention, as it reproduces Article 4 of the European Framework Agreement, does create a procedure for harassment in general.

Social partners are allowed to adopt collective agreements which can be declared to be generally binding. In that case, the sectors concerned must obey the rules laid down by the agreement. Any provision which is contrary to the principle of equality between women and men is formally prohibited. Collective agreements must include the principle of equal pay and methods to prevent sexual and moral harassment. Most of the agreements contain general declarations or simply refer to the legal regulation on harassment.

#### *2.1.8. Burden of proof*

According to the law, defendants have to prove that there has been no violation of the principle of equal treatment between women and men if claimants establish, before a court or another competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. This applies to the area of the workplace as well as to the area of access to and supply of goods and services.

Complaints about discrimination are more than rare in Luxembourg. This also applies to harassment on the ground of sex and sexual harassment. It is difficult to guess the reasons of this. Luxembourg is a small country and people may fear to be 'labelled' as unwanted in the workplace in the event of a complaint.

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<sup>364</sup> Convention du 25 juin 2009 relative au harcèlement et à la violence au travail (OGB-L, LCGB, UEL).



Regarding victimization, national law guarantees protection from adverse treatment for complainers as well as for witnesses.

Non-profit associations and trade unions can, under certain conditions, engage in proceedings on behalf or in support of any victim. Associations can do so in the area of work and employment as well as in the area of access to and supply of goods and services. Trade unions can only do so in the field of work and employment. The Centre for Equal Treatment has no competence of that kind.

There is no specific provision in Article L.245-1. on sexual harassment in the workplace. However, as Article L.241-1.(3) specifies that sexual harassment is to be considered as discrimination on the ground of sex, this leads to the conclusion that the same rules apply regarding the burden of proof.

In Luxembourg, there is very little case law regarding discrimination in general. No detailed analysis has been performed about the reason for this. According to a survey<sup>365</sup> conducted by the national equality body, people who feel discriminated against do not want to bring a claim to court. They usually prefer to change jobs or they avoid the places where the discrimination took place without claiming for any right to be protected against discriminatory acts.

#### *2.1.9. Remedies and sanctions*

In the area of access to and supply of goods and services, victims may choose between a fixed allowance of EUR 1 000 or coverage of the damage actually suffered as regards moral harm. The second option implies that the claimant has to present evidence of the harm suffered because of the discrimination. As there is no case law yet, one can assume that the victim would have to provide precise data on the amount.

In the area of work and employment, in the event of a dismissal, the worker can call for the dismissal to be nullified in order to retain his/her job, or, if necessary, to be reinstated. The victim can sue the perpetrator for damages.

The employer can be summoned by the president of the tribunal to take measures, 1, in order to make sexual harassment acts stop. These measures may be disciplinary measures like an advertisement or even dismissal of the harasser.

Penal law covers obsessive harassment. The sanction for this is 15 days to 2 years' imprisonment and/or a fine of EUR 251 to EUR 3 000.

#### *2.1.10. Compliance with EU law*

Luxembourg domestic law is in compliance with EU law regarding harassment on the ground of sex and sexual harassment. As the law on sexual harassment was passed before Directive 2002/73/EC had to be implemented, the definition given by European law and Luxembourg law do differ textually. Nevertheless, the substance can be identified as the same. The addition in Luxembourg law that the intentional element is assumed to exist is clearer than the expression 'with the purpose or effect' used by European law.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

The national equality body has not registered any claims regarding harassment on the ground of sex or sexual harassment.

Nor is there any case law accessible on harassment on the ground of sex. Regarding sexual harassment, three cases have been published. All of them are in the area of work and employment.

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<sup>365</sup> [http://cet.lu/wp-content/uploads/2011/07/Sondage-Obs.discr.\\_20111.pdf](http://cet.lu/wp-content/uploads/2011/07/Sondage-Obs.discr._20111.pdf), accessed 18 August 2011.

### 2.2.2. Main features of case law

In *L'Estrade c/Barthelemy c/Etat*,<sup>366</sup> the *Cour Supérieure de Justice* (Supreme Court of Justice) recognized the employer's responsibility for acts of sexual harassment by a manager, arguing that the manager was the physical representative of the employer.

In *Rausch c/Luxair*,<sup>367</sup> of the Supreme Court of Justice, the Court maintained that the employer was not obliged to start a formal investigation before suspending a worker who was suspected of having engaged in sexual harassment.

In *COMET S.A. c/Pereira*<sup>368</sup> the Supreme Court of Justice confirmed that a worker who experiences working conditions as unbearable because of perceived sexual harassment acts is entitled to cease his/her work contract without delay. The worker is entitled to claim for indemnities at the cost of the employer.

### 2.2.3. Dignity

The Court in *COMET S.A. c/Pereira* refers to the concept of dignity by mentioning the provisions of the law on sexual harassment. It does not define or describe the concept.

### 2.2.4. Restrictions

There is no case law which refers to the possible conflicts between harassment and human rights or constitutional rights.

### 2.2.5. Role of equality bodies

The Equality Body has not received any claims about harassment on the ground of sex or about sexual harassment.

## 3. Harassment and sexual harassment outside the framework of anti-discrimination law

### 3.1. National provisions

There are no further provisions on harassment on the ground of sex or sexual harassment in domestic law.

### 3.2. Collective agreements

As mentioned above, according to the Labour Code, collective agreements have to address equal pay for workers of both sexes as well as methods to prevent sexual and moral harassment. These aspects are probably not the biggest concern during negotiations on the agreements and the provisions are rather vague or only refer to the law.

### 3.3. Additional measures

There is no information about any other specific measures.

### 3.4. Harassment and stress at work

The possible relationship between stress at work and harassment has not been the subject of any known publication. However, the association *Mobbing asbl* deals with the subject. Generally speaking, it seems that people themselves often confuse stress at work and harassment, knowing that harassment in general terms may result from stress at work.

## 4. Added value of anti-discrimination approach

### 4.1. Added value

The concept of sexual harassment is well known among the general public. People seem to have a very clear idea of what it is about. The same does not apply to harassment on the ground of sex. This concept seems to remain rather vague.

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<sup>366</sup> C.S.J. 30 01 2003 N° 26327.

<sup>367</sup> C.S.J. 29 06 2006 N° 30051.

<sup>368</sup> C.S.J. 09 03 2006 N° 28379.

As there are only very few cases regarding discrimination and harassment, it seems more than difficult to identify any added value in defining harassment on the ground of sex and sexual harassment as discrimination in relation to other provisions related to harassment.

#### 4.2. Pitfalls

As already stated regarding its possible added value, it is very difficult to evaluate the possible pitfalls of the anti-discrimination approach. This is also because Luxembourg has seen only few cases about discrimination in general.

### FYR of MACEDONIA – Mirjana Najcevska

#### 1. General situation

The concept of harassment is relatively new in Macedonia. It was introduced about five years ago. The term harassment is used in legislation, in laws, bylaws and collective agreements. However, the discussion and introduction of the notion of mobbing provoked much greater interest. Generally, the term mobbing is used to mean psychological harassment (as repeated, non-physical acts of harassment at the workplace, occurring over a significant period of time, which have a humiliating effect on the victim). Different laws and bylaws include slightly different definitions of mobbing. However, contextually speaking, mobbing is accepted as part of harassment, which from a legal point of view is seen as a type of discrimination.

While harassment is formally included in antidiscrimination legislation and in the labour law and it is directly related to discrimination, mobbing is of greater interest for the trade union associations. In the last few years, trade unions have been directly involved in the legislative amendments and the establishment of a network for reports of cases of mobbing and protection of the victims of mobbing. Harassment is not mentioned in the practical work of the trade unions. Furthermore, trade unions are initiating legislative drafts and promoting the adoption of specific legislation related to mobbing.<sup>369</sup> The website of the Association of trade unions gives a definition of mobbing.<sup>370</sup> For something to be identified as mobbing it should take place at least once a week during six months. It seems that the trade unions are trying to further specify the legal condition (repetitive for at least six months period) by establishing the minimum frequency.

In the general definition and explanation of mobbing in the trade union documents there is no mention of gender and there is no link with discrimination. Thus, the perspective of the trade unions is possibly in contradiction with the legal perspective described above.

The main concern in such situations is that mobbing could 'surpass' harassment as a discriminatory practice. This is indicated also by the fact that all reports and statistics in the Republic of Macedonia are related to mobbing, whereas harassment is not a subject of interest. This way, the gender dimension is somewhat disappearing in research and proposed practice.

There are no reports or statistics on harassment. There are several studies on mobbing and statistics related to these studies.

According to comparative research on mobbing,<sup>371</sup> the present Labour Law lacks mechanisms for identification and prevention of mobbing. According to this research, the law's definition of mobbing is too extensive, which hinders the application of the law in practice. The law does not enable the identification of the responsibility of the perpetrator of

<sup>369</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=431&Itemid=148&lang=en](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=431&Itemid=148&lang=en), accessed 18 August 2011.

<sup>370</sup> By definition, mobbing is pressure on staff, or psychological terror in the workplace. It consists in hostile and unethical communication, often directed at an individual who is in a position of helplessness, unable to defend himself. The condition can be specified as a systematic and organized campaign, in order to force a person away from work.

<sup>371</sup> B. Davitkovski et al. *Comparative legal analysis of anti-mobbing legislation Country Studies: Croatia, Macedonia, Montenegro, Serbia* Zagreb, Association for help and education of the victims of mobbing 2010.

mobbing. Also, there is no clear understanding of the role of trade unions in the cases of mobbing.

The pilot research done in 2009 by the Association of trade unions<sup>372</sup> reports that: 41 % of interviewed workers had been the victim of mobbing. Only 5 % linked mobbing with sex. 24 % had discussed the problem with their family and 22 % with colleagues. Even the questionnaire for this report has no questions about mobbing related to gender. Only 12 % of workers think that there is a protective mechanism in the company. 40 % believe that such protection could be found with the trade union.

There is no debate on harassment. However, there is much debate on the theme of mobbing on a local level, in discussion rounds organised by NGOs, trade unions and the Ministry of Labour and Social Politics.<sup>373</sup>

Mainly, this debate focuses on awareness raising and has an informative rather than an analytical approach.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The provisions on harassment, in accordance with Article 25 of the Macedonian Constitution that guarantees the dignity of every citizen, are transposed in several national laws. Yet, none of them deals with the issue of the victims' rejection or submission to such conduct.

In the *Antidiscrimination Law*<sup>374</sup> the definitions of both harassment (Article 7(1)) and sexual harassment (Article 7(2)) are transposed fully in line with the EU Directives. After a period of trying to avoid adopting this law that was part of the group of laws connected with the process of integration of the Republic of Macedonia, and after much discussion mostly connected with the protection of citizens with different sexual preferences, it was adopted only in 2010. As a new law, particularly these two definitions were integrally transposed from the EU Directives, and were basically undisputed.

In its first version (2006), the *Gender Equality Law*<sup>375</sup> did include these definitions (Article 4(1)(6) & (7)), but in a rather vague formulation. However, with the amendments of 2008, the wording concerning harassment and sexual harassment was actually copied from the Directives' definitions.

The same goes for their definitions in Article 9 of the *Labour Law*<sup>376</sup> which deals with harassment and sexual harassment. The last and specific formulation of these two definitions was introduced in 2008 as well, thus aligning them with the EU Directives.

However, further on, there is a stipulation (Article 9(a)(2)) on so-called 'mobbing' or psychological harassment, apparently inspired by the Swedish experiences.<sup>377</sup> 'Psychological harassment' (Article 9(a)(2)) '...is every negative and repetitive (for at least a six months' period) conduct with the purpose or effect of violating the dignity of the applicant for employment or the worker and of creating an intimidating, hostile, humiliating or offensive environment and whose final objective is ending the working relationship or the worker leaving that position.' Since the EU Directives do not include the distinction between harassment and mobbing, in this context suffice it to say that it is not a way of transposing the solutions of the EU Directives into national law. This is because the trade unions emphasise

<sup>372</sup> *Mobbing – psychological pressure in the workplace* Skopje, SSM 2009.

<sup>373</sup> [http://www.antiko.org.mk/novosti\\_detail.asp?ID=167](http://www.antiko.org.mk/novosti_detail.asp?ID=167),  
<http://www.vest.com.mk/?ItemID=C502DAB0E4F8F140BC5B8713549F7624&arc=1>,  
accessed 18 August 2011.

<sup>374</sup> The Law on Prevention and Protection against Discrimination, adopted in April 2010; Official Gazette of the Republic of Macedonia No. 50/2010.

<sup>375</sup> Law on Equal Opportunities for Women and Men, 'Official Gazette 66/2006 & 117/2008.'

<sup>376</sup> Labour Law (revised), Official Gazette, No. 146/2010.

<sup>377</sup> H. Leymann 'The Content and Development of Mobbing at Work', 5 Eur. J. Work & Organizational Psychology 1996.

the issue of mobbing while neglecting all other forms of harassment, which might result in confusion regarding possible cases of sexual harassment.

The *Law on the Protection of Consumers* develops a rather different approach. Harassment is interpreted<sup>378</sup> in only one direction – pushing the consumer into agreeing to trade that in other circumstances he or she would not agree to.

The Macedonian Criminal Code<sup>379</sup> has not followed these changes in the equality laws. The only detectable possibility to address harassment in criminal procedure is Article 143 ‘In-service maltreatment’, which is a sort of residual article in the chapter concerning protection of human rights and fundamental freedoms, in addition to the general provision on discrimination in Article 137 ‘Violation of Citizens' Equality’.

### 2.1.2. Definitions

The definitions in the three laws (Antidiscrimination Law, Gender Equality Law, and Labour Law) are in line with the Directives, including the reference to both the purpose or effect of violating the dignity of a person. Thus, harassment ‘(...) is unwanted conduct (...) with the purpose or effect of violating the dignity of the (...) and of creating an intimidating, hostile, humiliating or offensive environment.’ Sexual harassment ‘(...) is every unwanted<sup>380</sup> verbal, nonverbal or physical conduct of a sexual character with the purpose or effect of violating the dignity of the (...) and of creating an intimidating, hostile, humiliating or offensive environment.’

While both the Antidiscrimination Law and the Labour Law define harassment in relation to any ground of discrimination, sex included, the definition in the Gender Equality Law relates harassment exclusively to the sex of the person.

The Criminal Code does not require purpose for an act to constitute in-service maltreatment or a violation of citizens' equality. The effect should suffice for a criminal procedure to be initiated.

Since the definitions were transposed rather quickly into the Macedonian legal system, their distinctions are clear: they are in the context of discrimination. It is to be seen whether they would be properly implemented in the court practice.

### 2.1.3. Sexual harassment

Both the concept and the definition of sexual harassment are the same in all these three laws. It is envisaged as sex discrimination and it does not cover any ground of discrimination. There has not been any apparent dispute about it or discussion on covering other grounds of discrimination.

### 2.1.4. Scope

The Labour Law covers all aspects of employment, including selection criteria, recruitment conditions, treatment at work, promotion, professional training and other benefits, as well as termination of employment.

The Gender Equality Law and the Antidiscrimination Law try to cover all areas of social life. The Gender Equality Law specifically mentions the private sector of employment, education, social security etc. The scope of the Antidiscrimination Law is wider, including access to goods and services and a final clause referring to any other area stipulated by law.

### 2.1.5. Addressee

Neither the Antidiscrimination Law nor the Gender Equality Law specifies the addressee, either in the substantial or in the procedural provisions. However, the wording refers to every person possible. Hence they cannot be interpreted as targeting only the employer, meaning that petitions both in administrative and in court procedures can target as perpetrators of

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<sup>378</sup> Article 31-d of the Amendments of the Law on the Protection of Consumers, Official Gazette 24/2011.

<sup>379</sup> Criminal Code, Official Gazette 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 105/04, 84/05, 71/06, 110/07, 152/08.

<sup>380</sup> Only the Labour Law does not use the word 'unwanted'.

harassment any other physical (co-workers included) or legal person (e.g. separate unit of a chain of enterprises).

The Labour Law includes a somewhat different approach. In relation to the ban on discrimination, the employer is specifically mentioned as addressee (Article 6). Concerning harassment and sexual harassment the *erga omnes* wording is used, as in the other two laws (Article 9). Concerning mobbing (Article 9-a) it specifically mentions not only that it can be committed by an individual or a group (Paragraph 3), but also that the perpetrator could be either the employer or any other responsible person (somebody in a managing position) or any other employee (fellow worker(s)).

#### *2.1.6. Preventive measures*

There are no specific provisions on the prevention of harassment and sexual harassment in the Antidiscrimination Law. In fact, there is no provision on prevention at all, including on discrimination in general, except in the name of the Law.

The Gender Equality Law's main aim is not defined as achieving equality but as ensuring equal opportunities for both sexes in the political, economic, social, educational, and any other social sphere – Article 2(1). The way to achieve this is by 'lifting the objective barriers' by, *inter alia*, preventing unequal treatment – Article 2(2). The means to achieve this aim is adopting so-called programme measures – Article 6(3)(3) – as part of the special measures, meaning raising awareness and adopting action plans.

The Labour Law has no provisions on prevention. A type of preventive mechanism is envisaged in collective agreements. For instance, the one concerning the Ministry of the Interior (14 September 2010), in which general definitions on protection from discrimination, harassment and sexual harassment, and mobbing (Articles 76-78) are included, envisages that upon request – Article 162(2) – the Ministry is obliged to furnish the Trade Union with data about the current condition and the exercise of the rights of the workers. Furthermore, the Minister is obliged to meet with the representative(s) of the Trade Union on a bi-monthly basis to discuss the 'socio-economic and professional condition of the workers' – Article 162(7).

#### *2.1.7. Procedures*

The *Anti-Discrimination Law* envisages two levels of defence in cases of discrimination: a) an administrative procedure before the Commission for Protection against Discrimination (Articles 25-29); and b) litigation before a regular court (Articles 34 & 35) based on the provisions of this Law including specific requests that should be contained in the lawsuit (Article 36).

The *Gender Equality Law* envisages a detailed administrative procedure, including inspection and supervision of the implementation of the adopted decisions (Articles 23-40).

The *Labour Law* contains one Article (181) on administrative procedure if a worker believes that his/her right(s) have been violated, and two Articles (182 & 183) on the options for peaceful settlement of disputes (mediation and arbitration) if agreed in the relevant collective agreement.

There are no mechanisms to identify and manage problems with harassment in collective agreements. For instance, the collective agreement of the Ministry of the Interior mentioned above (14 September 2010) includes a well-developed chapter on the procedure regarding disciplinary violations of the worker on the one hand. On the other hand, it includes a very short chapter, not really on procedure but on the right of a worker to complain about violations of his/her rights – Articles 260 & 261 – together with an Article declaring that the worker, if unsatisfied, can proceed by initiating a court procedure (Article 262).

The *Law on the Protection of Consumers* does not in fact include any possibilities for individual complaints in an administrative procedure regarding harassment and sexual harassment. The consumer can initiate a court procedure in accordance with Article 31-n of this Law ('any other procedure').

#### *2.1.8. Burden of proof*

The shift of the burden of proof is regulated by Article 38 of the *Anti-Discrimination Law*, and by Article 39 of the *Gender Equality Law*. There is no specific mention of harassment and sexual harassment.

The *Labour Law* regulates the shift of the burden of proof in Article 11, relating it to discrimination, harassment and sexual harassment (by mentioning the respective articles of the Law), whereas it specifically mentions mobbing – Article 11(2).

There are no legal impediments in this direction. However, in addition to the general anti-victimization provision in the Constitution, Article 24(2), the Labour Law only envisages a ban on victimization in relation to mobbing, Article 11(3), but not in relation to harassment and sexual harassment, or any other form of discrimination for that matter.

#### *2.1.9. Remedies and sanctions*

The *Antidiscrimination Law* stipulates two levels of court protection. On the misdemeanour level (Article 42-45) there is a possibility of fines ranging EUR 400-1 000. Article 43 deals with harassment specifically, and includes the following fines: EUR 400-600 for the perpetrator, EUR 600-800 for the responsible person, and EUR 800-1 000 for the legal entity where the harassment took place. The same scheme is envisaged (Article 44) in case of victimization. The litigation procedure is regulated in Articles 34-41. The general character of these norms allows individual and group lawsuits in all areas of social life, including employment, access to goods and services, also including requests for compensation of the harm suffered.

The *Gender Equality Law* has no provisions on penalties. However, it refers to other laws reaffirming the right of the individual to initiate an administrative or regular law procedure in case of violation of his/her rights (Article 37) and compensation (Article 38) in accordance with the Law on Obligations.

The *Labour Law*, in addition to a regular court procedure, envisages two possibilities. The worker can report the violation to the State Inspection Body, which in a misdemeanour procedure can impose a fine of EUR 7 000 on the employer in cases of harassment – Article 264(1)(3). The other possibility for the worker is to quit his/her job acquiring certain financial privileges – Article 100(1)(6-8). In these provisions, mobbing is not mentioned, but harassment is. There is no mention of any disciplinary measures against the harasser.

#### *2.1.10. Compliance with EU law*

From a legal perspective, national legislation on antidiscrimination, harassment and sexual harassment included, is in compliance with EU law. However, it seems that this law has not been implemented in practice. It is certain that there are no mechanisms assisting workers in preventing, identifying and managing problems of harassment. There are no statements outlining that harassment and violence will not be tolerated, or public information on the procedures to be followed where cases arise.

#### *2.1.11. Additional information*

There is one specific legal uncertainty: in cases of misdemeanour, the Macedonian Constitution reverses the presumption of innocence – Article 13(2) – into the possibility of the penalized person to sue before a court of law. Thus, automatically, the claimant must prove his/her allegations. Therefore, if harassment is the subject of proceedings for misdemeanour, the Court would have to choose between a shifted burden of proof (as envisaged by the antidiscrimination laws) and the legal procedure of proving innocence.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

There are no known decisions of either of the equality bodies – the one established in accordance with the Antidiscrimination Law (Commission for Protection against Discrimination) and the one established in accordance with the Gender Equality Law.

There are two final verdicts of the Shtip Basic and Appellate Court on mobbing, which are both negative for the alleged victims of psychological harassment, i.e. in favour of the defendants.

There is one final verdict of the Skopje Basic and Appellate Court, which is negative for the alleged victims of sexual harassment.

#### *2.2.2. Main features of case law*

The Skopje case (verdict of the Skopje Appellate Court of 29 April 2010 No. Гж.бр.-5301/09) revealed the problems faced in the classical approach of the Macedonian Criminal Code. A Professor in medical school was reported for sexual harassment of a number of his students. However, the indictment was filed against him for Forceful Sexual Act Based on Abuse of Position (Article 189 of the Criminal Code) against one of the students. The school fired him based on strong indications that he had engaged in sexual harassment. However, when the indictment in the Criminal Court failed, and the allegations of sexual harassment were not even considered, the Professor requested and was granted by a civil court compensation for being dismissed from the school and for harm suffered by the public exposure of the allegations of sexual harassment.

#### *2.2.3. Dignity*

There is no relevant information on this topic.

#### *2.2.4. Restrictions*

There is no relevant information on this topic.

#### *2.2.5. Role of equality bodies*

There is no relevant information on this topic.

#### *2.2.6. Additional information*

There is no additional information.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

In addition to the main antidiscrimination laws and articles in the Labour Law, there are several additional laws dealing with harassment.

The Law on Safety and Health During Work<sup>381</sup> provides for a statement on safety, which in a more general interpretation also covers harassment and mobbing. It is a document which should be signed by employers and which provides information on risks during the work process and on the assessment of risks as well as protection measures.

In the Law on Army Service,<sup>382</sup> harassment and sexual harassment are recognized as a 'serious violation of discipline'.<sup>383</sup> In the same Article of this law the same stipulation is made for mobbing, which is defined as 'mental harassment'.

#### **3.2 Collective agreements**

There are no specific national collective agreements aimed at combating harassment in employment. In the general collective agreements in the trade and industry, and in the public sector, there are no articles on harassment and mobbing.

However, several specific collective agreements include articles related to harassment and mobbing. For example, the Collective Agreement of the Ministry of the Interior<sup>384</sup>

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<sup>381</sup> Official Gazette of RM No 92/07.

<sup>382</sup> Official Gazette of RM No 36/10.

<sup>383</sup> Article 131, Law on Army Service.

<sup>384</sup> [http://www.mps.mk/Nov\\_KD.pdf](http://www.mps.mk/Nov_KD.pdf), accessed 18 August 2011.



includes a ban on discrimination, harassment, sexual harassment and psychological harassment (mobbing).<sup>385</sup>

According to the Collective Agreement of the Real Estate Sector, the worker is allowed to terminate the employment agreement in case of harassment.<sup>386</sup>

There are few institutions providing protection against harassment in their internal rules and regulations.<sup>387</sup>

#### **4. Added value of anti-discrimination approach**

Any added value in defining harassment on the ground of sex and sexual harassment as discrimination in relation to other provisions related to harassment could include the following:

- Better understanding of harassment and easier identification of situations of harassment as situations of discrimination;
- Assistance to judges in the application of the law (more clarity for victims, lawyers, courts etc.);
- Easier involvement of mediators and correctly defining the problem as harassment;
- In cases of mobbing and harassment the burden of proof is shifted, which could encourage victims to exercise their rights;
- The trade unions, Ombudsman and NGOs are already aware of violations related to harassment and mobbing and they are much more closely involved in concrete cases.

The introduction of mobbing on the one hand has complicated the situation in the framework of the non-discrimination approach (people do not know on the basis of which ground they should claim protection of their rights). On the other hand, mobbing is becoming an easily understandable concept and more acceptable for the Government. The Government is less hesitant in addressing discriminatory behaviour in cases of mobbing.

The huge support that anti-mobbing activities are receiving from trade unions<sup>388</sup> is encouraging victims of various cases of harassment to initiate procedures before the relevant institutions or at least to start to talk about these situations.

The Association of trade unions is promoting the idea of adopting a special law on mobbing which should specifically regulate the following issues:

- Measures that the employer should introduce to prevent mobbing;
- Protection of employees, the procedure of judicial protection;
- Protection of the victim of mobbing if court proceedings are initiated;
- Identification of the perpetrator of mobbing;
- Training of employees to recognize mobbing;
- The role of the trade union;
- Penalties for perpetrators of mobbing and other issues.

In addition to the legal advantages, the situation on the ground is in favour of addressing mobbing in legal provisions. In these cases, the trade union is prepared to assist the victim. In contrast, in cases of harassment and sexual harassment, the victim stands alone when trying to pursue justice. Such a lonely effort faces various basic problems: a lack of internal policies related to harassment and a lack of suitable and easily accessible procedures. Sometimes the victim even faces some misguidance, as in the case of the Ministry of the Interior (where harassment and mobbing are mentioned in the collective agreement): every employee, in the case of harassment, has the right to approach the Sector for Internal Control and Professional Standards, which, however, has no capacity to initiate such procedures.

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<sup>385</sup> Articles 77 and 78.

<sup>386</sup> [http://www.katastar.gov.mk/userfiles/file/drugi\\_akti1.pdf](http://www.katastar.gov.mk/userfiles/file/drugi_akti1.pdf), accessed 18 August 2011.

<sup>387</sup> <http://www.gradinka.com.mk/ins/za/pro.pdf>, accessed 18 August 2011.

<sup>388</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=435&Itemid=151&lang=en](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=435&Itemid=151&lang=en), accessed 18 August 2011.

### ***Local specifics***

In Macedonia, the very specific situation related to harassment is that predominant interest is given to mobbing and the issue of harassment is managed badly.

The second specific thing is the ground of harassment/mobbing. It is not related so much to sex, but rather to politics/belonging to a party. According to research done by trade unions, mobbing is worse in public administration than in the private sector.<sup>389</sup> According to this research 'The private sector is not lagging behind in the handling of mental harassment, although there is a different type of mobbing. In most areas, the owners are literally the rulers of their companies and employees do not dare speak a word about the daily abuse. There have been cases of sexual harassment, physical attacks, threats, restrictions (going to the toilet more than once), but the general public knows little of these conditions'.

In the last two years, an entire network of anti-mobbing consultants has been established,<sup>390</sup> and an office for assistance to victims of mobbing has been established in the Association of trade unions of Macedonia.<sup>391</sup> Also, there is a special website to help interpret and initiate proceedings in cases of mobbing.<sup>392</sup>

## **MALTA – Peter G. Xuereb**

### **1. General situation**

Harassment and sexual harassment came to be regulated in Malta as a result of efforts to transpose the relevant Directives through the Employment and Industrial Relations Act of 2002<sup>393</sup> and the Equality for Men and Women Act of 2003.<sup>394</sup> The general situation is that while the number of actual cases coming before the courts or tribunals remains very low, the various efforts on the part of the NCPE (National Commission for the Promotion of Equality), the NCW (National Council of Women), the ETC (Employment and Training Corporation) and various NGOs has surely led to greater awareness. A high-profile case hit the headlines when the Industrial Tribunal decided on awarding damages to the victim. Statistics are available in the form of numbers of enquiries or reports made to the NCPE. For the year 2010, the NCPE reported 10 complaints of gender discrimination in employment, stated to include complaints about harassment, but did not include a breakdown to show how many, if any, of these complaints concerned harassment or sexual harassment.<sup>395</sup> There is no major ongoing debate, but the NCPE reports that it has on several occasions pressed employers to adopt a model Code of Practice as a means of addressing the causes of complaints made against them or their employees. The NCPE and other bodies have organised public awareness campaigns over the last few years.

<sup>389</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=433&Itemid=149&lang=en](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=433&Itemid=149&lang=en), accessed 18 August 2011.

<sup>390</sup> <http://www.dnevnik.com.mk/default.asp?ItemID=7B1945E5648BBE4FA0904811E16D4836>, accessed 18 August 2011; [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=648&dodeleni-uverenija-za-antimobing-sovetnici&catid=49:health&Itemid=146&lang=en](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=648&dodeleni-uverenija-za-antimobing-sovetnici&catid=49:health&Itemid=146&lang=en), accessed 18 August 2011.

<sup>391</sup> [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=575&Itemid=158&lang=en](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=575&Itemid=158&lang=en); [http://www.ssm.org.mk/index.php?option=com\\_content&view=article&id=575&Itemid=158&lang=en](http://www.ssm.org.mk/index.php?option=com_content&view=article&id=575&Itemid=158&lang=en), accessed 18 August 2011.

<sup>392</sup> <http://www.mobbing.mk>, accessed 18 August 2011.

<sup>393</sup> Chapter 452 of the Laws of Malta.

<sup>394</sup> Chapter 456 of the Laws of Malta.

<sup>395</sup> National Commission for the Promotion of Equality, Annual Report for 2010, available on [https://secure2.gov.mt/socialpolicy/SocProt/equal\\_opp/equality/resources/annual\\_reports.aspx](https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/annual_reports.aspx), accessed 27 October 2011.

## 2. Harassment and sexual harassment in the context of anti-discrimination law

### 2.1. Legislation

The relevant legislation was amended in order to bring it into line with Recast Directive 2006/54 and Directive 2204/113. The relevant pieces of legislation, and main provisions, are:

- Article 9 of the Equality for Men and Women Act (Cap. 456 Laws of Malta,<sup>396</sup> henceforth EMWA);
- Articles 28 and 29 of the Employment and Industrial Relations Act (Cap. 452 Laws of Malta, henceforth EIRA);
- Regulations 2 and 3 of the Equal Treatment in Employment Regulations (henceforth ‘ETE Regulations’) of 2004 as amended,<sup>397</sup> made under EIRA;
- Regulations 2, 3 and 4 of the Access to Goods and Services and their Supply (Equal Treatment) Regulations of 2008, as amended (henceforth the Access Regulations), made under EMWA.

#### 2.1.1. Transposition

I would say that Article 2(2)(a) of Directive 2006/54/EC was most ‘specifically’ (though not directly and explicitly) transposed by Article 9 of EMWA and by Regulations 2 and 3 of the Equal Treatment in Employment Regulations.

#### 2.1.2 Definitions

The definitions of harassment and sexual harassment are in essence a reproduction of those given in Article 2(1)(c) and (d) of Directive 2006/54, and in Article 2(c) and (d) of Directive 2004/113/EC. The definitions in Maltese law (both for harassment and for sexual harassment) therefore refer in the alternative to the purpose or the effect of violating the dignity of the person, as well as other elements.

As to the relationship between sex discrimination and harassment and sexual harassment, it is clear from the layout of the law that harassment and sexual harassment are closely linked to, and form part of, the concept of sex discrimination, and of discriminatory treatment and the breach of the principle of equality more widely. The main context of the provisions tends to be that of sex discrimination or implementation of the principle of equality as between the sexes. In the context of goods and services, this is clear from the relevant regulations, namely Regulations 3 and 4 of the Access Regulations.

In the employment context, the EIRA provides as follows regarding harassment: According to Article 29(1) of the Act, it is unlawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures, or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person. Article 29(2) then provides that it is unlawful for an employer or an employee to sexually harass another employee or the employer by (a) subjecting the victim to any act of physical intimacy; or (b) requesting sexual favours from the victim; or (c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where (i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim; (ii) the victim is treated differently or it could reasonably be anticipated that the victim could be so treated, by reason of the victim’s rejection of or submission to the act, request or conduct.

These provisions are further developed in the relevant subsidiary legislation, the Equal Treatment in Employment Regulations<sup>398</sup> made under the Act, and as a further example of the

<sup>396</sup> The Laws of Malta are available on <http://www.mjha.gov.mt/LOM.aspx?pageid=27&mode=chrono>, accessed 19 August 2011.

<sup>397</sup> The subsidiary legislation in the form of Legal Notices is available on <http://www.doi.gov.mt/EN/legalnotices/2011/default3.asp>, accessed 22 August 2011.

<sup>398</sup> Subsidiary Legislation 452.95.

link between harassment and sex discrimination and discrimination (discriminatory treatment) which exists in Maltese law, it can be pointed out that Regulation 2, the definition section, of this subsidiary legislation provides:

‘2. (1) For the purposes of these regulations – ‘discriminatory treatment’ means any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on any of the grounds mentioned in Regulation 1(3)<sup>399</sup> which is not justifiable in a democratic society and includes (a) harassment and sexual harassment, as well as any less favourable treatment based on a person’s rejection of or submission to such conduct.’ Regulation 3 of the same regulations, applying in the broad employment context, then provides that: (3) No person shall harass another person by subjecting him to unwanted conduct or requests relating to any of the grounds referred to in sub-regulation (1), when such conduct or request takes place with the purpose, or which has the effect of (a) violating the dignity of the person who is so subjected, and (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected; (4) For the purposes of these regulations, employers or any persons or organisation to whom these regulations apply shall also be deemed to have discriminated against a person if they (a) instruct any person to discriminate against another person; (b) neglect their obligation to suppress any form of harassment at their workplace or within their organisation, as the case may be; (5) No person shall sexually harass another person by subjecting him to any form of unwanted verbal, non-verbal or physical conduct or request of a sexual nature, when such conduct or request takes place with the purpose, or which has the effect, of violating the dignity of the person who is so subjected, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected.

From a combination of these provisions in the main Act (EIRA) and the ETE Regulations it emerges clearly that it is the dignity of the person that is being protected. Of course, the provisions are gender neutral.

#### *2.1.3 Sexual harassment*

It follows from the above that sexual harassment is conceptualised as sex discrimination. There has been no discussion of other grounds in connection with sexual harassment. Of course the criminal law creates ‘sexual offences’ such as rape, sexual assault, defilement, and so on, but these are conceptualised as such rather than as sexual harassment or as sex discrimination. Of course, there can be overlap in terms of conduct. The Commission on Domestic Violence is currently exploring any possible links and developing procedures that could well be applied in a sex discrimination context.<sup>400</sup>

#### *2.1.4. Scope*

The scope of the prohibition of harassment and sexual harassment is limited to the scopes of Directive 2006/54/EC and 2004/113/EC.

#### *2.1.5. Addressee*

The addressees of the prohibitions are:

- (a) In the context of employment ‘any person’, including the employer, organisation or fellow workers. The law does not as such require an employer to have a sexual harassment prevention policy in place but it makes the employer responsible for ensuring that harassment of any kind does not occur. This can lead to penalties being imposed on the employer if there be sexual harassment of an employee by another employee. The clearest cases of this type occur where the harassment is verbal and with other employees present, indeed on the work floor itself, as is common.

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<sup>399</sup> Including sex discrimination.

<sup>400</sup> See Commission on Domestic Violence, Annual Report March 2009 – February 2010, and especially Appendix G, on the setting up of a sexual assault response team. The Report is available on the Commission’s website on [https://secure2.gov.mt/socialpolicy/SocProt/family/domestic\\_violence/dom\\_violence\\_annual\\_reports.aspx](https://secure2.gov.mt/socialpolicy/SocProt/family/domestic_violence/dom_violence_annual_reports.aspx), accessed 18 August 2011.

- (b) In the context of the access to and supply of goods and services, the addressee is ‘a/any person or organisation to which the regulations apply’, therefore any person providing goods and services made available to the public, including public bodies (Regulation 1(3) of the Access Regulations).

#### 2.1.6 Preventive measures

Article 26 of Directive 2006/54 has not as such been transposed into legislation in terms of any legally binding obligation on the State to encourage various groups to work against discrimination. However, it is implicit in the general Constitutional obligation on the State to protect against discrimination. The technique adopted appears to have been for the State to fulfil this obligation by imposing an obligation on persons, private and public, covered by the relevant legislation to prevent any form of harassment or sexual harassment within their organisation, and subjecting them to penalties if they fail – on the basis that they are themselves guilty of discrimination in such an event.<sup>401</sup> Moreover, the Government regularly issues statements exhorting Unions and others to fight discrimination and advance equality.

Examples of measures taken by employers include the adoption of codes of practice, pursuit of the Equality Mark awarded by the NCPE, and various information practices (for example regarding sexual harassment at the place of work). However, there has not been a comprehensive survey of such practices. Sexual Harassment: A Code of Practice (NCPE, 2005)<sup>402</sup> aimed at raising awareness and providing a template for employers. The Code of Practice was issued in response to the EU Recommendation on the Dignity and Protection of Men and Women at Work<sup>403</sup> (1992).

National collective agreements in general do not deal with the issue of the prevention of harassment. However, the Public Service Collective Agreement and the Public Service Management Code do include relevant provisions.<sup>404</sup>

There is little evidence of specific implementation by the social partners of Article 4 of the Framework Agreement on Harassment and Violence at Work, although employers’ and employees’ organisations all refer to the issues and proclaim a zero tolerance approach to them.<sup>405</sup>

#### 2.1.7. Procedures

- (a) Employment: The complaints procedure is not specific to harassment, but is the one set out in general terms under the EMWA (Equality for Men and Women Act), which set up the equality body (the NCPE), and the EIRA (Employment and Industrial Relations Act), which provides for access to justice via the Industrial Tribunal, while saving the right of recourse to the civil courts. Provision is made for criminal proceedings.<sup>406</sup>
- (b) The same applies in the area of access to goods and services.

#### 2.1.8. Burden of proof

In the employment context, the burden of proof is shifted to the defendant to show that he did not commit the unlawful ‘act’<sup>407</sup> once the complainant shows facts from which it can be presumed that there has been direct or indirect discrimination. Regulation 10(3) of the ETE regulations is typical. In the context of access to and supply of goods and services, the language used is in the first place that of ‘it shall be for the defendant to prove that there has

<sup>401</sup> See, for example, Regulations 5 and 10 of the Access Regulations.

<sup>402</sup> Available on <http://webapps01.un.org/vawdatabase/uploads/Malta%20-%20Sexual%20Harassment%20Code%20of%20Practice%20%282005%29.pdf>, accessed 19 August 2011.

<sup>403</sup> 1992/131/EC.

<sup>404</sup> For the Public Service Management Code, Section 7, and further references (including Guidelines issued) see <http://www.mpo.gov.mt/downloads/psmcrevised.pdf>, accessed 17 August 2011.

<sup>405</sup> See for example the Malta Report presented as part of the Final Report at the Conference of European Association of Labour Court Judges, Vienna 2008, p. 110; available on <http://www.ealcj.org/documents/Final%20Report.pdf>, accessed 19 August 2011.

<sup>406</sup> For example, Articles 44 et seq. of the EIRA.

<sup>407</sup> Presumably this covers ‘omission’, such as where the employer is in neglect of duty to prevent a breach.

been no breach of the principle of equal treatment<sup>408</sup> once facts have been shown from which it can be presumed that there has been direct or indirect discrimination. However, the provision goes on to provide that the court or tribunal shall uphold the complaint if the defendant does not prove that he did not commit ‘that unlawful act’, in similar terms to the employment context.<sup>409</sup> One assumes that in either case, the court or tribunal will adopt a broad purposive interpretation of the law.

The relevant law prohibits victimisation of any complainant, for example Article 28 of the EIRA, and Regulation 4(7) of the Access Regulations.

#### *2.1.9. Remedies and sanctions*

- (a) Employment. The ETE Regulations (Regulation 14) make all breaches of the regulations (therefore including harassment of all kinds and the neglect of one’s responsibility to prevent such) an offence and provide for a penalty of a fine (maximum EUR 2 329.37) or imprisonment for up to six months, or for both such fine and imprisonment. Therefore both a harassing or neglectful employer, and a harassing fellow worker are caught. In addition, the harassing fellow worker may indeed find himself liable to disciplinary procedures including possible dismissal, which would no doubt be deemed fair by the Industrial Tribunal in a serious case. The victim would be entitled to the payment of damages as compensation, which the court is bound to award in such cases. Recent changes to the civil law to provide for the award of moral damages may well lead to higher awards of compensation than has been the case in the past. It is not clear how transfer to other work would feature in terms of the ban on victimisation. It is thought that the court would take the wishes of the victim into account and make any appropriate order in the particular case.
- (b) Access to and supply of goods and services. The same penalties and consequences would apply in this field, *mutatis mutandis*.<sup>410</sup> Further, provision is made for the award of compensation which is dissuasive and proportionate to the damage suffered, in addition to the damages and costs as may have actually been suffered and as may be due according to law.<sup>411</sup> Victimisation is regarded as discrimination in itself and is subject to the appropriate penalties.<sup>412</sup>

#### *2.1.10. Compliance with EU law*

In my opinion, Maltese law is in essential compliance with EU law, save that it remains my view that the possibility of imposing a maximum fine of around EUR 2 300 is not a sufficient deterrent when considering the responsibility of an employer to suppress any form of harassment at the workplace and the potential avoidance of much harassment if employers were made to take this legal obligation more seriously. On the other hand, the imprisonment of the employer is likely to be as harmful to employees as it is to an employer himself and to my knowledge this penalty has not yet been imposed in such cases.

#### *2.1.11. Additional information*

It is still true that the clearest exposition of the relevant rules is to be found in the subsidiary legislation rather than in the principal Acts of Parliament. This includes some core definitions. In my view, it would be better for the principal Acts to more fully reflect the essential provisions of the Directives.

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<sup>408</sup> Rather broader language than in the employment context.

<sup>409</sup> Regulation 7 of the Access Regulations.

<sup>410</sup> Regulation 11 of the Access Regulations.

<sup>411</sup> Regulation 7(4) of the Access Regulations.

<sup>412</sup> Regulation 4(7) of the Access Regulations.



## 2.2. Case law

### 2.2.1. National courts and equality bodies

Although some media sources have claimed<sup>413</sup> that a few hundred complaints of harassment are lodged every year with the Industrial Tribunal and the NCPE, this seems grossly exaggerated, and certainly such complaints are made far less frequently with the NCPE. Indeed, in the latest NCPE Annual Report (for the year 2010)<sup>414</sup> the NCPE reports only some ten complaints made in the area of employment as a whole, and only one in the area of access to and supply of goods and services.<sup>415</sup> These figures are not broken down to show how many were cases of harassment or sexual harassment, and we must conclude that there cannot have been more than can be counted on the fingers of one hand. This paucity of complaints in general is of itself extremely worrying. The paucity of actions and of decided cases makes it impossible to ascertain any trend in case law, other than a willingness on the part of the Industrial Tribunal to apply Union law faithfully in such cases as are brought and reported. In August 2010 the Criminal Court imposed a EUR 2 000 fine on an employer for verbal harassment suffered by a female employee. As is common in such cases the defence argued that the employees were simply ‘joking around’; the Court decided that the limits of humour had been exceeded.<sup>416</sup> In a recent case of note,<sup>417</sup> the Industrial Tribunal found harassment and awarded damages when a female employee was asked by a board chairman to take a seat in his lap. Perhaps the case cannot be said to be typical of cases of harassment in as much as the incident occurred in a relatively public forum, a company board meeting. Several people were present, the forum being a full company board meeting. On the other hand, almost all those present were men. While the secrecy or surreptitious element was lacking, the demeaning effect was clear and direct.

### 2.2.2. Main features of case law

In a recent much-reported case, mentioned above, a female employee who entered a board meeting after it had begun, to find that all seating was taken, was asked by the chairman of the board to sit in his lap in the absence of an empty chair. The employee was awarded damages on the ground that she had been the victim of sexual harassment. The case is interesting as it can be assumed that most incidents happen in private (where the element of secrecy presents added menace but makes for difficulty of proof and a vast number probably go unreported), but in this case, the ‘public’ nature of the harassment meant that there could be little question of the facts and their interpretation even possibly heightened the feeling of indignity and embarrassment to its extreme in what was a quasi all-male environment. There is little purpose in securing greater female presence in board rooms (or elsewhere) if women are not made to feel fully equal and protected by the law.

### 2.2.3. Dignity

The above case highlighted the issue of dignity very clearly. However, the decision of the Industrial Tribunal did not go into broad questions of definition of the concept of ‘dignity’.

### 2.2.4. Restrictions

No such case law has been reported.

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<sup>413</sup> See Yasmina Soriano ‘Just Making Doris Happier’ *Independent* 17 April 2011, <http://www.independent.com.mt/news2.asp?artid=123706>, accessed 15 August 2011.

<sup>414</sup> [https://secure2.gov.mt/socialpolicy/SocProt/equal\\_opp/equality/resources/annual\\_reports.aspx](https://secure2.gov.mt/socialpolicy/SocProt/equal_opp/equality/resources/annual_reports.aspx), accessed 16 August 2011.

<sup>415</sup> Details are not given.

<sup>416</sup> <http://www.maltatoday.com.mt/news/national/local-sexual-harassment-case-reported-and-taken-seriously>; *maltatoday*, 10 August 2010, accessed 15 August 2011. Case not yet reported.

<sup>417</sup> Not yet reported.

#### *2.2.5. Role of equality bodies*

It does not seem that any cases have actually been initiated by the national equality body. Unfortunately, the annual reports of the NCPE are not clear as to how many cases there have been, although some refer to 'several' or even 'numerous' cases.<sup>418</sup> Yet, tables show only a small number of cases of complaints brought, and this relatively small number is presented in aggregated form, so it seems that the number must be very small.

#### *2.2.6. Additional information*

My main comment relates to the lack of reports of actual cases. It is only recently that the Industrial Tribunal has started to make its reports available, and this is done commercially and at quite a high cost and on a selective basis. On the other hand, the NCPE Reports are rather telegraphic, but in any event show (at least in published tabular format) a marked paucity of complaints referred to it (averaging two or so per year, according to the tables produced) despite it being a matter of public knowledge that many incidents of harassment occur. The NCPE Reports often state that the NCPE is dealing with 'numerous' cases, yet for 2009 and 2010 the number of gender cases shown in table form was very small (around 20).

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### *3.1. National provisions*

There are no specific relevant provisions in other laws. However, there is the clear possibility of other laws, including labour law and criminal law, applying to cases of bullying or other forms of victimisation where the element of sex is not as overt as is required in a sex discrimination context. The same idea applies to health and safety legislation, which may become relevant on its own terms at some point.

#### *3.2. Collective agreements*

There are no 'specific' national collective agreements on the issue.

#### *3.3. Additional measures*

In my view, an important related context is that of violence against women, especially domestic violence, which breeds a certain 'expectation' among women and is, as we now know, far more common in Malta than was previously acknowledged. The relevant context for the Domestic Violence Act would be specific to the 'family' context, which, however, can be found in many cases to overlap with an employment context, and there can therefore be some overlap with 'domestic violence'. In any case, domestic violence may well 'socialise' many women into accepting degrading treatment.

#### *3.4. Harassment and stress at work*

Clearly harassment generally, and sexual harassment in particular, have a direct impact on the victim and will be a major cause of stress at work. There is no doubt that it can affect performance at work and that lack of performance might then be used to 'justify' the taking of disciplinary measures, or to loss of job satisfaction and what then appears to be 'voluntary' resignation. One question is the fine line between putting unfair or excessive pressure to perform on an employee and harassment of that employee, whether or not this is linked to any element of sex. With the element of sex (in the biological sense of sexuality) present, there can also be the element of victimisation for failure to submit to the sexual harassment. In such a case sexual harassment can be followed by harassment even if the perpetrator has 'given up' on the employee as a potential victim of the direct sexual harassment. On the other hand, a work-stressed (or otherwise stressed) employee may perceive any form of criticism of

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<sup>418</sup> See Annual report 2009, National Commission for the Promotion of Equality, pp. 82 and 83. This Report gave an example of a sexual harassment complaint made and considered (page 85), but this turned out to be a case where no finding of sexual harassment was in fact made by the NCPE. The tendency is for the NCPE to simply provide 'examples' in sketch form of cases considered. NCPE Reports can be accessed [www.equality.gov.mt](http://www.equality.gov.mt), accessed 18 August 2011.



performance as harassment. It seems to me that it is ultimately for the adjudicator to get to the bottom of the facts on objective terms. However, the law should be clear about its distinctions as well as about the overlaps between the various forms of harassment. However, there can be repercussions in terms of health and safety at work, for example where employees are distracted in precision work, resulting in liability for the employer also on this front.

### ***3.5. Additional information***

There is a dearth of studies on the above issues.

## **4. Added value of anti-discrimination approach**

### ***4.1. Added value***

In my view, the clear added value is that otherwise a phenomenon that largely affects women, even in places of work where they are in the majority, but most insidiously where they are in the minority (and including at the higher levels of employment) would be simply ‘absorbed’ into possibly related but phenomenologically distinct and neutral issues. While health and safety law might come into play, for example, it will do so only when a clear health risk emerges. An anti-discrimination approach addresses the actual conduct as it occurs independently of its effects, even where there are no ill effects, e.g. because the complainant is a strong person and finds in her employer a responsive manager who will deal swiftly and effectively with the problem. In my view, this is the kind of good practice that we wish the law to engender. An approach and definitions based on this concept at EU level must surely mean greater access to justice for individuals, as well as providing clearer focus for lawyers and adjudicators whose sole focus is whether or not there was a breach of clear rules prohibiting closely-defined conduct both in terms of its purpose and, alternatively, its effect. It is in this perspective that the lack of reported cases is so perplexing.

The development Europe-wide of a preventive approach as inherent in EU law as it stands is clearly open to the Court of Justice, at the instance of national courts via the preliminary ruling procedure. Although cases in Malta are currently rather scarce, the impact of the case law of the Court of Justice is undeniable, as witnesses the alacrity with which Court of Justice judgments are reported in the press.

There is no doubt that we have seen (although few) cases where a positive judgment, both in terms of finding and of compensation would have been at least unlikely before the EU-based legislation. It is a key consideration (despite the lack of take-up in practice) that the law is framed in terms of a principle of equality and in terms of individual access to justice and remedies. A general labour law or industrial relations approach would not, in my view, suffice in this regard.

### ***4.2. Pitfalls***

I agree with the points made in the questionnaire. I feel that while it is possible to address the specific problems or symptoms of harassment on grounds of sex from other angles and at various stages of harm, it remains vitally important to regard harassment on grounds of sex as a pernicious act or practice that needs to be rooted out irrespective of other considerations, in the same way as harassment or discriminatory treatment of any kind on any of the grounds of discrimination or particular treatment. Only this can properly target the source of the harm and the manifold later problems with full effect. It is for the adjudicator to assess the facts, and rightly for the alleged harasser to prove that other (legitimate) reasons lay behind the act or conduct complained of. This does not exclude developments in the law such as to fully protect (all) employees from all types of abuse, verbal and non-verbal, or threats or intimidation or overbearing behaviour, but in my view the law should be clear that if there is any sexual, racial, age, disability etc. (the prohibited grounds) connotation, the case should be treated and heard according to the specific rules that have evolved in the context of non-discrimination law.

## 1. General situation

Since the mid-1970s<sup>419</sup> awareness of sexual harassment at work has been raised by the women's movement. It is now acknowledged that sexual harassment does not only occur in the workplace, but that it is also a persistent phenomenon in schools, in hospitals, in youth care centres etc., and that it not only affects girls and women, but also boys and men, and especially homosexuals. Sexual harassment is more and more seen as part of a wider problem of harassment, violence, discrimination, bullying and more generally 'unwanted or undesirable conduct' that creates an undignified and unsafe environment. The gender aspect of it now stands less in the foreground. At first (since 1984), it was mainly *conceptualised* as a health and safety issue and was regulated in that context. The Government refused to see it as something that needed to be regulated under equal treatment legislation, because it was deemed to be a 'different issue'. When the EU directives needed to be implemented (2006/2007), this view was no longer defended. Instead, in the parliamentary *debate* there was considerable resistance against including sexual harassment in equal treatment legislation because of the fact that this would mean that the (shifted) burden of proof rules in this legislation would also become applicable to these situations. This was considered undesirable, because people were afraid of false accusations which would become hard to deny for the alleged perpetrator because many instances of sexual harassment take place 'behind closed doors'.<sup>420</sup>

No *research* is known on the prevalence of harassment on the ground of sex. There are many studies on the prevalence of sexual harassment in different sectors. For example, the bi-annual 'National Enquiry Labour Conditions' (*Nationale Enquête Arbeidsomstandigheden*, NEA) of 2010, shows that 1.8 % of all workers had experienced 'unwanted sexual attention' from a superior or a colleague. For men, this figure was 0.9 %, for women 2.7 %.<sup>421</sup> In the same study, it was found that 5 % of all workers experienced 'unwanted sexual attention' from clients, or patients, students, passengers, etc. For men, this figure was 1.8 %, for women 5.7 %. There are some older studies into the causes and consequences of sexual harassment in the workplace, including 'victim profiles'; i.e. a description of categories of workers that are most vulnerable to sexual harassment.<sup>422</sup> In the education sector there are various studies by the Ministry of Education and independent researchers, showing a considerable number of victims, both teachers (victimized by other personnel or by pupils) and pupils (victimized by personnel and fellow pupils). For example: in 2008, 4 % of all teachers and pupils in secondary schools had experienced some form of sexual harassment.<sup>423</sup> In 2007/2008, 7 % of all schools reported 'incidents' in this area to the inspectorate. For the health sector there are no general studies and reports; studies concentrate on particular subsectors, e.g. hospital care, physiotherapy, nursing, or mental care institutions. Most vulnerable, apparently, are women who are mentally disabled or have psychiatric problems and experience sexual harassment either by personnel of the institution where they stay or by fellow patients. Workers in the health sector are also very vulnerable. In the NEA 2008, it was published that 14.6 % of these workers complained about 'unwanted sexual attention' by their patients or clients.<sup>424</sup> The position of the self-employed in relation to (sexual) harassment has not been a topic of research or of any specific regulations.

<sup>419</sup> NB: In this country report, I will write '(sexual) harassment' when discussing the issues of 'harassment on the ground of sex' and 'sexual harassment' together.

<sup>420</sup> See e.g. H. van den Berg 'Omkering bewijslast beroerd idee', *De Volkskrant* 19 April 2005, and P.A. Charbon 'Verschuiving bewijslast bij seksuele intimidatie', *ArbeidsRecht* 2007-2, pp. 8-12.

<sup>421</sup> The NEA study was done by TNO and is published on the Internet. See [http://www.tno.nl/content.cfm?=&content=inno\\_publicatie&laag1=891&laag2=904&laag3=1&item\\_id=824](http://www.tno.nl/content.cfm?=&content=inno_publicatie&laag1=891&laag2=904&laag3=1&item_id=824), accessed 6 July 2011.

<sup>422</sup> E.g. the study of the Projectgroep Vrouwenarbeid, Universiteit van Groningen. Published by the Ministry of Social Affairs, The Hague 1986.

<sup>423</sup> See Mooij et al. *Sociale veiligheid in het voortgezet onderwijs* Nijmegen, ITS 2008.

<sup>424</sup> NEA 2008, published on [http://www.tno.nl/content.cfm?context=thema&content=inno\\_publicatie&laag1=&=904&laag3=1&item\\_id=824](http://www.tno.nl/content.cfm?context=thema&content=inno_publicatie&laag1=&=904&laag3=1&item_id=824), accessed 6 July 2011.

## 2. Harassment and sexual harassment in the context of anti-discrimination law

### 2.1. Legislation

#### 2.1.1. Transposition

The provisions concerning harassment (on the ground of...) were included in the General Equal Treatment Act (GETA) in 2004 (on the basis of Directives 2000/43/EC and 2000/78/EC).<sup>425</sup> Since the GETA also includes the ground of sex, harassment on the ground of sex was prohibited from that point in time. This issue was included in the Equal Treatment Act (for men and women in employment; ETA) in 2006.<sup>426</sup> The provisions concerning sexual harassment in the Amended Sex Equality Directive/Recast Directive were transposed into the ETA in 2006<sup>427</sup> and into the GETA in 2007 (implementation of the Goods & Services Directive).<sup>428</sup>

#### 2.1.2. Definitions

There is only one small difference compared to wording of the definitions in the relevant Directives: in the definition of sexual harassment the word 'unwanted' is left out. The Dutch Government believed that including this word would put a heavy burden of proof on the victim to show that the sexual harassment was indeed (subjectively) unwanted. Instead, the Government wanted to emphasize that sexual harassment, objectively speaking, is always an offence. Leaving out 'unwanted' therefore offers more protection to victims of sexual harassment. The elements 'purpose or effect' are included in both definitions, meaning that intent is not required/does not need to be proven.

#### 2.1.3 Sexual harassment

In Article 1a(1) of the GETA and ETA it is provided that the concept of discrimination, as prohibited in these laws, includes harassment and sexual harassment. In this way, the connection is made to the prohibition of discrimination. Sexual harassment is not explicitly conceptualised as a form of sex discrimination. Since the ETA only covers sex discrimination, it seemed obvious that this is what the legislator meant to do. However, the GETA (in which sexual harassment was also included in order to implement the Goods & Services Directive) also covers a wide range of other grounds.<sup>429</sup> Therefore, according to the text of this law, the provision about sexual harassment is also applicable with respect to these other grounds.<sup>430</sup> It looks like this 'extension' happened by accident since this was not acknowledged by the Government in the Bill in which it proposed this amendment of the GETA to Parliament, nor in the parliamentary (written and oral) discussions about the Bill.

#### 2.1.4. Scope

The scope of the prohibition of (sexual) harassment is the same as the scope of Directives 2006/54/EC and 2004/113/EC. The GETA also covers goods and services. Apart from vocational training, also primary and secondary education are covered. Also, healthcare and housing are included in the concept of 'goods and services'.

#### 2.1.5. Addressee

In the field of *employment*, the addressee of the prohibition to discriminate (including (sexual) harassment) is the owner/employer or the board of the company. The Equal Treatment

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<sup>425</sup> Article 1a of the EG Implementation Act GETA, Stb. 2004, 119.

<sup>426</sup> Article 1a of the Law of 5 October 2006, Stb. 2006, 469 amending the ETA. At the same time, similar provisions were included in the Civil Code (Article 7:646 BW).

<sup>427</sup> Law of 5 October 2006, Stb. 2006, 469 amending the ETA.

<sup>428</sup> Article 1a of the Law of 21 July 2007, Stb. 2007, 321, amending the GETA.

<sup>429</sup> The grounds covered by the GETA, in addition to sex, are nationality, race/ethnicity, sexual orientation, civil status, religion and political opinion.

<sup>430</sup> It does not apply, however, to disability and age, because these grounds are regulated in separate laws in which harassment is prohibited, but not sexual harassment.

Commission (ETC) has a broad interpretation of this: also persons in the employment organisation and in management positions who are ‘in charge’ or who may ‘act on behalf’ of the employer are seen as addressees. Other employees cannot be seen as addressees. The situation for *vocational training* is the same as for employment relations. However, in addition to employees, also ‘students’ or ‘trainees’ may be involved. They are considered to be ‘stakeholders’ in the same way as employees and their position is the same (i.e. they are protected, but they are not addressees). In the area of *goods and services*, the addressee is the owner of the company or firm or of the board of an institution (e.g. a hospital or school) that offers the goods and services. Again, this has a broad interpretation: also persons ‘in charge’ or ‘acting on behalf’ are included.

#### 2.1.6. Preventive measures

##### *Employment*

Since 1994, employment health and safety law includes the obligation to prevent sexual harassment at work (including vocational training; the Labour Conditions Act, *Arbeidsomstandighedenwet*, see below in 3.1.). Therefore, it was not considered necessary to implement Article 26 of Directive 2006/54/EC. On this basis, employers are obliged to draft annual risk assessment reports and develop measures to prevent risks. Sexual harassment is considered to be a health and safety risk and therefore this topic needs to be addressed in these reports. Regular evaluations of the risks and of the effectiveness of the measures need to take place. The labour inspectorate (at least in theory) supervises this process. Many employers take such measures, for example by means of issuing and publishing a code of conduct, by appointing a counsellor (who can be asked for advice and support) and by installing a complaints committee. Employers who fail to take measures may not only be fined under the Labour Conditions Act (which hardly ever occurs, since the Labour Inspectorate is not very active in this respect), but may also be held liable by their employees who have suffered from sexual harassment (see 2.1.9.). Since courts have indeed granted considerable damages to victims under general civil-law procedures (since 1998), employers are more and more inclined to take such measures. As far as preventive measures in collective agreements are concerned, see under 3.2.. There is no general legal obligation for employers to establish solid mechanisms (including complaints procedures) to protect victims (in line with Article 4 of the Framework Agreement.) For some sectors (esp. education, healthcare, youth care) this obligation does exist, but is mainly meant to protect pupils and clients.

##### *Goods and services*

In the areas of healthcare, youth care and education, the legislator has issued some general legal measures which might have a preventive and protective effect. These are obligations to install complaints procedures and to report any case of sexual harassment to the Inspectorate, and even to the police (in case of education).<sup>431</sup>

#### 2.1.7. Procedures

Although several proposals to this end have been made in Parliament, until now there is no legal obligation for all *employers* to install a complaints committee. In practice, many (large) employers or organisations have their own complaints procedure for victims of (sexual) harassment or other ‘misconduct’. Smaller organisations are often linked to a ‘national complaints committee’ for a certain sector (e.g. the national complaints committee for the primary education sector, where individual primary schools can ‘buy’ the assistance of an independent committee in case a complaint is made in a particular school). In general, for companies and institutions delivering/offering *goods and services*, no such obligation exists either. There are obligations to do so for educational institutes in primary and secondary education (but they often sign up to a regional or national agency to perform this task for

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<sup>431</sup> This legislation is described in R. Holtmaat *Seksuele Intimidatie: een juridische gids* Nijmegen, Ars Aequi Libri 2009, Sections 4.5 and 4.6.

them) and for the healthcare sector (*idem*). Also, some Ministries have issued guidelines for organisations working for or under them (e.g. the police force, the army or the prison sector) to enact codes of conducts and complaints procedures and to install complaints committees.

#### *2.1.8. Burden of proof*

The general burden of proof rules of the ETA and GETA are applicable to cases of (sexual) harassment. In practice, these rules are applied when a case has to be decided solely on the basis of these laws. This is mainly true when the ETC investigates a case. When a legal procedure is started under general civil law, e.g. tort law or a labour law, the situation is more complicated. Civil-law procedures have not been amended on the basis of the burden of proof provisions in the EU equal treatment directives. This means that most courts will simply apply the ‘normal’ burden of proof rules in these cases. Only in some provisions in labour law (especially with respect to the employer’s duty of care), the burden of proof rules are also (more) favourable for employees. Especially if a victim wants to claim damages from a perpetrator on the basis of general civil tort law, he/she will have the full burden of proof.

#### *2.1.9. Remedies and sanctions*

##### *General*

Criminal-law procedures are similar for all cases where there is a form of sexual harassment which amounts to rape or sexual assault. (NB: sexual harassment as such is not a criminal law offence.) The ETA and GETA do not contain any effective remedies and sanctions. A victim, who wants to receive some kind of compensation or wants the sexual harassment to stop, needs to use general civil and administrative law procedures.<sup>432</sup> In practice, many different legal procedures are possible. Sometimes, in these procedures the victim may rely on the prohibition of (sexual) harassment as such (in the ETA and GETA). Sometimes relying on these norms in combination with other legal norms (e.g. the norm to act as a good employer, or the norms from the Labour Conditions Act to provide safe working conditions) is a better strategy. In practice, for victims – and even for lawyers – this ‘system’ of various possible legal actions is very complicated. Victims will hardly know what the possibilities are and often do not receive adequate legal advice in this respect.

##### *Employment*

###### *– Liabilities of the employer*

The addressee of the ETA and GETA is the employer (broadly defined). In case of (sexual) harassment, the ‘employer’ can only be held accountable when he himself is the perpetrator.<sup>433</sup> If this is the case, the employee/victim may choose between several legal procedures. The three principle ones are: (1) to ask the ETC to declare that this was indeed a case of prohibited (sexual) harassment, whereupon the ETC can not impose any real sanctions; (2) to file a case with the civil or administrative labour court, stating that the employer has not acted as a good employer and requiring damages on that ground; (3) to ask the court to terminate the employment contract and grant a (high) amount of compensation for this termination to the victim.

Even if the employer is not himself the perpetrator, the victim still has possibilities to claim damages from him. The employer is also the addressee of the (instruction) norm to ensure that working conditions are safe and to prevent/protect against (sexual) harassment, and may be held liable under that norm. Two such norms exist: (1) the ETA and GETA both prohibit discrimination in the area of ‘working conditions’ as well. In 1993, the ETC held that this implies that an employer also violates the equal treatment laws when working conditions are discriminatory or when working conditions are

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<sup>432</sup> Administrative law is applicable if the employee is a civil servant.

<sup>433</sup> This is often the case, especially in small firms with only a few employees!

negatively affected because of (sexual) harassment at the workplace,<sup>434</sup> and (2) employers are obliged on the basis of health and safety legislation to guarantee safe working conditions, including the obligation to prevent that employees are exposed to discrimination and (sexual) harassment and to protect them from any harm as a consequence of such conduct by colleagues or clients. The employer may also be liable (under contract law or tort law) if a third person (e.g. client or student) is the victim of sexual harassment by an employee. Under general civil law, employers are to a certain extent liable for acts of their employees, if these employees violate the rights of others (e.g. clients) 'in the course of their work'. E.g. if the employer knew about the danger and has not taken preventive measures (e.g. failed to terminate a contract with an employee after a first serious offence), this may lead to liability when the same employee harasses another client.

– *Sanctions against the perpetrator*

The employer may sanction the harasser/employee on a number of conditions, the most important ones (according to case law) being that the perpetrator knew in advance about the anti-harassment policies of the employer and about possible sanctions, and that the sanction is proportionate to the seriousness of the harassment. Fines, warnings, transfer to another department, demotion and dismissal are all possible. If a perpetrator/employee is lawfully dismissed for this reason, the court will most likely deny this person all claims to a compensation for the dismissal.

– *Remedies for the victim*

Sometimes the victim is asked to cooperate in finding a solution, e.g. by means of transfer to another department or by agreeing to a mediation procedure. This may not amount to victimisation. Often, in practice, the victim is dismissed because of 'failure to perform' (victims often become ill or are seen as a nuisance because of their complaints). The victim may contest this dismissal in court and ask for a high amount of damages to be paid because of unlawful dismissal.

In addition to the remedies mentioned above (against the employer), the victim also has the possibility to take action against the perpetrator, if they are a colleague or a client. These persons are not addressees of the ETA or GETA, and therefore no action may be taken against them (directly) on the basis of this legislation (e.g. in a procedure before the ETC). Legal action against clients/colleagues is also possible on the basis of general civil tort law. On that basis, the victim may claim damages or an injunction to stop the (sexual) harassment.

*Goods and services*

– *Liability of the directors/owners*

Under the GETA, directors/owners of companies and institutions (broadly defined) are the addressees. They can only be held accountable for (sexual) harassment under this law when they themselves are the perpetrator. For the situation where a third person (e.g. client, student) is the victim of (sexual) harassment by an employee of a particular owner/board: see above under liability of the employer.

In a situation where clients (sexually) harass other clients, the owner/board in most cases cannot be held accountable at all, unless the victim proves that the owner/board should have taken preventive measures and has seriously neglected this duty. For example: the owner of a pub can hardly be held accountable when some clients sexually harass other clients. (When employees of the owner/board are the victims of clients, the above is applicable!).

– *Sanctions against the perpetrator*

The owner/board may sometimes have an action against a 'client' who harasses his personnel or other clients. This depends on the nature of the legal relationship between

<sup>434</sup> ETC Opinion 1993-53. Safe working conditions also includes having in place (and applying correctly) a complaints procedure which safeguards the rights of both victims and alleged perpetrators in a procedurally correct manner. See ETC Opinion 2010-12.

them (i.e. is there a contract and does it include anything about ‘misbehaviour’?). For example, in education, it is more and more common to have pupils and/or their parents sign a code of conduct which also includes sanctions for misbehaviour. When such a contractual basis is lacking, the owner/board must rely on tort law.

– *Remedies for the victim*

If the owner/board himself is the perpetrator, the victim may rely on equal treatment legislation. However, the GETA does not include a remedy or sanction. For that, the victim will have to rely on tort law, either against the owner/board or against the perpetrator, unless the victim may rely on his/her contract with the owner/board and may demand compensation for damages on the basis of that contract. Sanctions against victims are possible (at least in theory), e.g. if a contract between the owner/board and the victim is terminated before the termination date of the contract. The victim may contest any such decision on the basis of the anti-victimisation clauses in the ETA and GETA.

#### 2.1.10. Compliance with EU Law

The definition of harassment is fully in compliance with the Directives. However, it may be argued that the accumulative conditions in this definition (which has the purpose or effect of violating the dignity of a person and creating an intimidating, hostile, degrading, humiliating or offensive environment) are in breach of the Directives’ non-regression clauses. The same can be said of the definition of sexual harassment, which lacks the ‘quid pro quo’ type of sexual harassment.<sup>435</sup> A broader definition (i.e. without the accumulation and with the ‘quid pro quo’ element) was included in the Labour Conditions Act (*Arbeidsomstandighedenwet*) of 1994; this definition was abolished after amendment of the ETA and GETA in 2006/2007.<sup>436</sup>

It is an omission in Dutch legislation that the shifting of the burden of proof is not explicitly regulated in the Code of Civil Procedure as well. It is a major problem that the ETA and GETA do not contain any remedies and sanctions, and that the Dutch ‘system’ of other (civil and administrative) remedies and sanctions is very complicated and obscure and deprives victims of effective access to justice. This is not only a problem with (sexual) harassment, but with all kinds of discrimination.

## 2.2. Case law

### 2.2.1. National courts and equality bodies

There is no case law from the courts on the issue of harassment on the ground of sex. There is one Opinion of the ETC in which the ETC concluded that an employer (m) had harassed an employee on the ground of her sex (f) because he had dealt with her (unsubstantiated) complaints about sexual harassment by a colleague (m) in an intimidating way.<sup>437</sup> The connection between the sex of the victim and this intimidation or harassment by the employer, however, was very weak.<sup>438</sup> Since 1984 there have been many cases on the issue of sexual harassment.<sup>439</sup> All different types of legal actions described in 2.1.9 are represented in this

<sup>435</sup> ‘Quid quo pro’ means that the sexual harassment is presented as a condition to obtain ‘favours’ from the person who is exercising some kind of power over the victim (as a boss, teacher, or doctor). This element is included in the Directives in the form of a prohibition of victimisation, instead of as an element of the definition of what sexual harassment may entail.

<sup>436</sup> This broader definition of sexual harassment was first included in the Law of 29 June 1994, Stb 1994, 536, amended in the Law of 18 March 1998, Stb. 1999, 184. This definition was abolished in 2008 (Law of 2006, entered into effect on 1 January 2008, Stb 2006, 673), in order to avoid discrepancies between the different parts of the Law. For the full text in Dutch, see R. Holtmaat *Seksuele Intimidatie: een juridische gids* Nijmegen, Ars Aequi Libri 2009, p. 73.

<sup>437</sup> ETC Opinion 2010-12. See also *European Gender Equality Law Review* 2010-1, p. 109.

<sup>438</sup> See also the critical review of E. Cemers & M. Vegter in: C.J. Forder *Oordelenbundel* 2010 Nijmegen, Wolff Legal Publishers 2011, p. 106.

<sup>439</sup> I have described this case law in great detail in two books: R. Holtmaat *Seksuele Intimidatie op de werkplek: een juridische gids* Nijmegen, Ars Aequi Libri 1999 and R. Holtmaat *Seksuele Intimidatie: een juridische gids* Nijmegen, Ars Aequi Libri 2009. For the research for my latest book, I have analysed approximately 275 cases that were brought before the civil courts and approximately 34 cases before the ETC between 1984 and 2009.

case law. However, except for one case,<sup>440</sup> none of these cases was (partly) decided on the basis of equal treatment legislation, which only included a prohibition of sexual harassment since 2006/2007. The ETC has rendered decisions on the issue of sexual harassment since 1993. However, except for a few recent cases, this was not on the basis of the explicit prohibition of sexual harassment in the ETA and GETA, but on the basis of the prohibition to discriminate with respect to working conditions. Also see 2.1.9 of this report.

### *2.2.2. Main features of case law*

There is only one court case that is explicitly based on the (new) prohibition of sexual harassment in the ETA and GETA, which was decided in the end by the Dutch Supreme Court (SC; Hoge Raad).<sup>441</sup> This case was about alleged sexual harassment between a manager (m) and a member of his staff (m), in which damage claims against both the employer and the manager were partly dismissed and partly upheld by the SC. The fact that the case was between two men (one of whom (the victim) was a homosexual), did not play a role in the decision to use the prohibition in the GETA as a framework to decide this tort and labour law case. The crucial legal question was how the court should apply the definition of sexual harassment, which is identical to the definition in the Directives apart from the word ‘unwanted’ (also see 2.1.2 above). The SC confirmed that a specific sensitivity of the victim, because he had had former experiences of sexual harassment, was not relevant, i.e. it held that an objective standard should be applied. However, contrary to the wording of the definition (which refers to purpose or effect), the SC concluded that the intentions of the perpetrator were indeed relevant. The judgment was strongly criticised.

Although in the 1980s the courts were reluctant to recognise sexual harassment as an offence, they have considered a great variety of situations to be ‘sexual harassment’ since it was defined in the Labour Conditions Act of 1994 (see 3.1. below). The context in which the sexual harassment takes place is relevant for something to qualify as such: gestures or words which are allowed between adult colleagues may not be allowed in the relationship between a teacher and a pupil. Courts take into account whether there is a (strong) hierarchy between the perpetrator and the victim and hold managers and employers more readily accountable (and liable) than ‘just colleagues’. In the field of goods and services, there are only cases of sexual harassment in the context of education and healthcare. From case law it appears that in a large number of legal procedures the employer/board did not properly investigate the complaint and did not follow basic procedural rules (e.g. the right to be heard or the right to privacy) and on that ground is ordered to pay large amounts in damages to the victim or the perpetrator who suffered from this.

### *2.2.3. Dignity*

Dignity played a role in a case that was finally decided by the SC in 2009. Previously, in 2007, in the same case the Court of Appeal of Amsterdam<sup>442</sup> applied this element from the new definition in the ETA, although the facts of the case had taken place before 2006 and the old definition in the Labour Conditions Act did not contain this element. The Court of Appeal decided that the conduct of the manager (m) towards his employee (m) was a ‘sick joke’ and that he had trespassed what counts as ‘decent behaviour’. But this did not amount to violating the latter person’s dignity; especially because the incident did not take place in a hostile, intimidating and unsafe environment (it took place at a party where lots of other people were present). This interpretation is very doubtful. Regretfully this point was not an issue in the judgment of the SC.

### *2.2.4. Restrictions*

No restrictions are officially included in the law. However, in theory there may be a clash between e.g. the right to freedom of expression and the right to be free from (sexual)

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<sup>440</sup> HR 10 July 2009; JAR 2009/202, LJN: BI4209.

<sup>441</sup> HR 10 July 2009; JAR 2009/202, LJN: BI4209.

<sup>442</sup> Hof Amsterdam 5 July 2007, LJN: BD4010.



harassment. To my knowledge, this argument has never been made in a case about (sexual) harassment.

#### *2.2.5. Role of equality bodies*

The ETC has not initiated any cases (which is only possible when they see a structural problem in a certain sector of industry). In 2006, it published a brochure summarizing the conditions for careful complaints procedures in cases of discrimination, including (sexual) harassment.<sup>443</sup>

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### *3.1. National provisions*

In the Labour Conditions Act, *Arbeidsomstandighedenwet* of 1994, sexual harassment was (well) defined in Dutch law for the first time. This law did not contain a prohibition of sexual harassment, but an instruction for employers to prevent sexual harassment and to protect victims and draft/evaluate the risk assessment reports (also see 2.1.6.). In 2007, after the inclusion of the prohibition of sexual harassment in the ETA and GETA, the Labour Conditions Act was amended. Sexual harassment is not defined in this Act any longer. The Act now imposes an obligation on employers in quite general terms to prevent any ‘psycho-social conditions’ that might cause physical or mental stress for employees. As examples of such situations, inter alia discrimination and (sexual) harassment are mentioned.<sup>444</sup> The obligation to draft/evaluate the risk assessment report still exists. Important other rules concerning sexual harassment may be found in education laws and health laws, mainly establishing the obligation to have adequate complaints procedures in place (also see 2.1.6.).

#### *3.2. Collective agreements*

Since the mid-1990s, many collective agreements contain provisions in this area, e.g. obliging employers to prohibit sexual harassment and/or to set up a complaints procedure or provide for counselling.<sup>445</sup> In 2004, 44 % of workers in the Netherlands fell under a collective agreement that contained provisions concerning (sexual) harassment at work.<sup>446</sup> The impression is that collective agreements have become a less important instrument in this respect since more and more employers have drafted codes of conduct and have set up their own complaints procedures.

#### *3.3. Additional measures*

Many employers and institutions in different sectors (large employers in industry and retail, healthcare, education, sports, etc.) have adopted their own codes of conduct or internal regulations prohibiting inter alia sexual harassment, also including sanctions and a complaints procedure. Many of these ‘internal rules’ contain definitions of sexual harassment that are different from the legal definitions, which may be a problem. For a court, it may be complicated to decide which definition should be applied, e.g. in a case where an employer has taken sanctions against a perpetrator/employee: the one in the relevant legislation or the more lenient or more severe one in the internal rules (on the basis of which the sanction was taken!)?<sup>447</sup>

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<sup>443</sup> CGB *Zorgvuldig omgaan met klachten bij discriminatie*; see [http://www.cgb.nl/\\_discriminatieklachten](http://www.cgb.nl/_discriminatieklachten), accessed 14 July 2011.

<sup>444</sup> Article 3(2) of the Labour Conditions Law of 2008.

<sup>445</sup> R. Holtmaat 2009, *Seksuele Intimidatie: een juridische gids* Nijmegen, Ars Aequi Libri 2009, Section 4.2.5 on the role of social partners in combating sexual harassment at work.

<sup>446</sup> Van Dam & Van Engelen *Evaluatie van de Arboret inzake omgangsvormen, eindrapport* Leiden/The Hague 2004. The report does not clarify the content of these provisions.

<sup>447</sup> Case law described in R. Holtmaat *Seksuele Intimidatie: een juridische gids* Nijmegen, Ars Aequi Libri 2009, Section 3.8.1.

### 3.4. Harassment and stress at work

In the amended Dutch Labour Conditions Act of 2008, it was acknowledged that it is difficult to distinguish between (sexual) harassment and stress at work. Instead of instructions to prevent and protect against (sexual) harassment, the employer is now instructed more generally to prevent all ‘psycho-social conditions’ at work that may cause stress (also see 3.1.) The fact that sexual harassment causes stress and that therefore not only physical but also mental harm should be compensated has been acknowledged in Dutch case law since 1999.<sup>448</sup>

## 4. Added value of anti-discrimination approach

### 4.1. Added value

As for harassment on the ground of sex (or on any other non-discrimination ground), I think this is a good addition to equal treatment legislation, which until now only prohibited unequal treatment, and not bad treatment (which needs no comparison). In my view, there hardly is any added value in defining and prohibiting sexual harassment in equal treatment law, compared to previously existing law (especially the Labour Conditions Act). It has not provided greater access to justice for victims because the addressees are limited (employers/owners/boards) and equal treatment legislation as such does not contain any sanctions or remedies. Although I welcome uniform EU definitions, I am critical of the fact that these definitions contain two ‘mistakes’ (the cumulative requirements in the definition of harassment and the omission of the ‘quid pro quo’ type of sexual harassment; see 2.1.10).

### 4.2. Pitfalls

I consider it a major problem that equal treatment legislation emphasises the prohibition of (sexual) harassment, granting individual victims (in theory) a legal remedy against a limited number of addressees. Proactive legal (instruction) norms that impose a positive obligation on employers and owners/boards of important institutions to prevent and to protect against (sexual) harassment are more effective, since individual victims are in a very vulnerable position making it difficult to stand up against a perpetrator. A second argument in favour of instruction norms is that employers/boards have the power to ‘change the culture of an organisation’. Therefore, I think the EU should continue to take legislative measures, e.g. in the context of its health and safety at work policies.<sup>449</sup>

## NORWAY – Helga Aune

### 1. General situation

Norwegian legislation has transposed EU law on harassment on the ground of sex and sexual harassment through Section 8a in the Gender Equality Act (GEA).<sup>450</sup> Harassment on the ground of sex was not included in the GEA before the transposition of the Directives.<sup>451</sup> A prohibition against harassment on all types of grounds including gender was part of the Working Environment Act (1977) Section 12.<sup>452</sup> In 2004 a new chapter X A on equal

<sup>448</sup> Ibid.

<sup>449</sup> E.g. in the framework of Council Directive 89/391/EC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work; OJ 1989 L 183/1, as amended by Regulation 2003/1882, OJ 2003, L284/1.

<sup>450</sup> See the Gender Equality Act of 9 June 1978 no. 45 (English translation) on <http://www.regjeringen.no/en/doc/laws/Acts/the-act-relating-to-gender-equality-the-.html?id=454568> and in Norwegian <http://www.lovdata.no/all/nl-19780609-045.html>, accessed 18 August 2011.

<sup>451</sup> See preparatory work: <http://websir.lovdata.no/cgi-lex/wiftsok?button=%A0+S%D8K+%A0&emne1=likestilling&emne2=kj%F8nn&emne3=&depa=&kort=&dato=&para=&ikra=&endret=&endrer=&publ=&kunn=&trunker=on>, accessed 10 September 2011.

<sup>452</sup> See the wording of the former WEA (1977) Section 12 on: <http://www.lovdata.no/oll/tl-19770204-004-002.html#12>, accessed 10 September 2011.

treatment in employment was added to the WEA (1977), see Paragraph 54 A – K, in order to fulfil the requirements of Directive 2000/78, in particular the requirement on the shared burden of proof.<sup>453</sup>

At present, the issue is not very topical in political debates or in the media. The number of cases is fairly low both in the courts and before the Anti-Discrimination Ombud.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The provisions on harassment on the ground of sex and sexual harassment in Directives 2006/54 and 2004/113/EC have been transposed into national legislation through sections in discrimination legislation as well as in labour law.

Article 2(2)(a) of Directive 2006/54/EC is transposed in the Gender Equality Act Section 8a and Section 3.

The Gender Equality Act (GEA) Section 8a regulates the prohibition against harassment because of gender and sexual harassment and has the following wording:

#### Section 8a. (Gender-based harassment and sexual harassment)

Gender-based harassment and sexual harassment are not permitted. Such harassment is considered to be differential treatment in contravention of Section 3. (the prohibition against direct and indirect discrimination).

The term ‘gender-based harassment’ shall mean unwelcome conduct that is related to a person’s gender and that has the effect or purpose of offending another person’s dignity. The term ‘sexual harassment’ shall mean unwelcome sexual attention that is offensive to the object of such attention.

The employer and management of organizations or educational institutions shall be responsible for preventing and seeking to preclude the occurrence of harassment in contravention of provisions of this Act within their sphere of responsibility.

The provisions of the Anti-Discrimination Ombud Act shall apply in connection with the enforcement of the prohibition against gender-based harassment in the first paragraph and the provision in the third paragraph.

The prohibition against sexual harassment shall be enforced by the courts of law.

Section 8a was included in the GEA by a legislative act of 14 June 2002 no. 21 and has been in force since 1 July 2002. As the last two paragraphs prescribe, the Ombud has competence to encourage and follow up on work performed at workplaces and at educational institutions in order to prevent harassment, but the courts have the sole competence to enforce the prohibition against discrimination. Section 3 of the GEA prohibits direct and indirect discrimination.

The prohibition against harassment and discrimination is also included in Chapter 13 of the Working Environment Act<sup>454</sup> (WEA) and has the following wording:

#### Section 13-1. Prohibition against discrimination

(1) Direct and indirect discrimination on the basis of political views, membership of a trade union, sexual orientation, disability or age is prohibited.

(2) Harassment and instruction to discriminate persons for reasons referred to in the first paragraph are regarded as discrimination.

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<sup>453</sup> See WEA (1977) Chapter XA: <http://www.lovdata.no/oll/tl-19770204-004-011.html>, accessed 10 September 2011.

<sup>454</sup> See the Working Environment Act of 17 June 2005 no. 62: <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>, accessed 18 August 2011.

(4) In the case of discrimination on the basis of gender, the Gender Equality Act shall apply.

The prohibition against harassment and discrimination is also included in the WEA sections regarding working environment, see Sections 2-3 d) regarding an employee's duty to report any instance of harassment or discrimination at the workplace to the employer or the working environment committee and Section 4-3 (3) regarding an employee's right not to be exposed to harassment or other unacceptable conduct. The working environment committee is also obliged to focus on gender/sexual harassment as part of their work according to the aforementioned sections and will have to include the requirements according to the GEA into their work tasks as described in the WEA.

There also is a prohibition against harassment in the Disability Act<sup>455</sup> Section 6 as well as in the Anti-Discrimination Act<sup>456</sup> which may be of relevance in cases of multiple/intersectional discrimination cases. The Tribunal has in some cases addressed the serious double burden for victims in cases of multiple discrimination, but so far this has not resulted in double compensation.

### *2.1.2. Definitions*

The concepts of harassment and sexual harassment are defined in legislation as described above. Purpose and effect are both referred to in GEA Section 8a second paragraph. Both forms of discrimination are equally covered in legislation.

Criminal Code Section 193 imposes a punishment of up to 6 years' imprisonment on any person who engages in or aids and abets another person to engage in sexual activity by misusing a position or a relationship of dependence or trust.<sup>457</sup>

### *2.1.3. Sexual harassment*

Sexual harassment is conceptualized as sex discrimination through GEA Section 8a.

### *2.1.4. Scope*

The WEA is limited to the area of employment, whereas the GEA covers all fields of society including employment, see Section 2, first paragraph.

### *2.1.5. Addressee*

- a) Employment
  - People who can be held responsible for discriminatory harassment are the offender personally, which may be the employer or fellow employees, see sections in the GEA as well as the WEA. In addition, the employer may be responsible for neglecting the responsibility to ensure a safe and sound working environment.
- b) Goods and Services
  - All persons are covered by the GEA, not only limited to the employment market. Whoever offends someone through harassment may be liable to pay compensation.

### *2.1.6. Preventive measures*

- Employers are obliged to provide annual reports on the status of gender equality at the enterprise and to provide information on plans and measures initiated in order to improve

<sup>455</sup> The Disability Act (*Diskriminerings- og tilgjengelighetsloven*) of 20 June 2008 no. 42 (in Norwegian): [http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-20080620-042.html&emne=diskriminerings%20%2b%20og%20%2b%20tilgjengelighetslov\\*&&](http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/nl-20080620-042.html&emne=diskriminerings%20%2b%20og%20%2b%20tilgjengelighetslov*&&), accessed 18 August 2011.

<sup>456</sup> The Anti-Discrimination Act (*Diskrimineringsloven*) of 3 June 2005 no. 33: <http://www.regjeringen.no/en/doc/laws/Acts/the-act-on-prohibition-of-discrimination.html?id=449184>, accessed 18 August 2011.

<sup>457</sup> See the General Criminal Code (*Straffelov*) of 22 May 1902 no. 10, Section 193: [http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/tl-19020522-010-023.html&emne=\(\(%20LOV-1902-05-22-10%20I%20\(TITT.DATE\)\)%20%2b%20\(%20193%20I%20\(PARA%20\)\),%20\(%20LOV-1902-05-22-10-%20a7193\)&,\(English\)http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf](http://www.lovdata.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/all/tl-19020522-010-023.html&emne=((%20LOV-1902-05-22-10%20I%20(TITT.DATE))%20%2b%20(%20193%20I%20(PARA%20)),%20(%20LOV-1902-05-22-10-%20a7193)&,(English)http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf), accessed 18 August 2011.

the equality situation, see GEA Section 1a. The content and elements of the report may vary from enterprise to enterprise. However, if harassment has been an issue it should be reported.

- Regarding collective agreements, examples of approaches, see GEA Section 1a. Many organizations also have action plans against harassment and violence at work.<sup>458</sup>
- The major unions/organizations have signed the Framework Agreement on harassment and violence at work 2007.

#### *2.1.7. Procedures*

There are no specific procedures in addition to the regular procedures in discrimination cases.

#### *2.1.8. Burden of proof*

The regular rule on burden of proof (split/shared) applies; see GEA Section 16 and WEA Section 13-8. The latter has the following wording:

If the employee or job applicant submits information that gives reason to believe that discrimination has taken place in contravention of the provisions of this chapter, the employer must substantiate that such discrimination or retaliation has not occurred.

Other issues that would deter people from filing a complaint are the fear of being considered the difficult one and in cases of harassment not because of sex that the freedom of speech is far reaching. Lastly, a court case is a costly affair unless there is a labour union supporting the claim. The lack of funding may deter some victims from filing a complaint. In order to improve the situation regarding harassment cases, it might be a good idea to evaluate if financial support from the State may be an option.

#### *2.1.9. Remedies and sanctions*

The consequences in cases of discriminatory harassment may be as follows:

##### *a) Employment*

- For the addressee: The employer is under the obligation to provide annual information about the gender equality status in the enterprise as well as planned and ongoing measures according to GEA Section 1a. Breach of these obligations has no consequences apart from a statement in writing from the Ombud perhaps. The employer may also be liable to pay compensation for economic or non-economic damages, see WEA Section 13-9 and GEA Section 17. Criminal charges may also apply depending on the situation, see Criminal Code Section 193.
- For the harasser/fellow worker: The harasser may receive a warning, notice of termination or a summary dismissal depending on the gravity of the incident, following various sections in the WEA. The employer may also be liable to pay compensation for economic or non-economic damages, see WEA Section 13-9 and GEA Section 17. The harasser may also be subject to criminal charges, see Criminal Code Section 193.
- For the victim: The victim may be entitled to compensation for economic or non-economic damages, see the GEA with the following wording: Section 17. (Liability for damages) Any job seeker or employee who has been subjected to treatment in contravention of provisions of this Act by an employer or a person acting on the latter's behalf may demand compensation and redress regardless of the fault of the employer. Compensation shall be fixed at the amount that is reasonable, having regard to the financial loss, the situation of the employer and the employee or job seeker and all other circumstances. Redress shall be fixed at the amount that the court finds reasonable, having regard to the relationship of the parties and all other circumstances. In all other respects, the general rules regarding liability for damages in the event of wilful or negligent contravention of the provisions of this Act shall apply.

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<sup>458</sup> See for example: <http://www.ks.no/PageFiles/7229/TruslerVoldArbeidsbok2009.pdf>, accessed 18 August 2011.

See also WEA Section 13-9 with the following wording:

The effects of breach of the discrimination prohibition (1) Anyone who has been discriminated against this chapter may claim compensation without regard to the fault of the employer. The compensation shall be fixed at the amount the court deems reasonable in view of the circumstances of the parties and other facts of the case. (2) Compensation for financial loss as a result of discrimination in contravention of this chapter may be claimed pursuant to the normal rules. (3) Provisions laid down in collective pay agreements, contracts of employment, regulations, bylaws, etc., that are in contravention of the provisions of this chapter shall not be valid.

b) Supply of goods and services

- For the addressee: The rules of the WEA and the GEA may apply, see above.
- For the harasser: The rules in the WEA may apply, criminal charges may follow under the Criminal Code, see above.
- For the victim: The victim may be entitled to compensation for economic or non-economic damages, see GEA Section 17.

*2.1.10. Compliance with EU law*

Domestic law is in compliance with EU law.

*2.1.11. Additional information*

The UN Convention against Discrimination against Women (CEDAW) is part of Norwegian law through enactment in the Human Rights Act.<sup>459</sup> Absence of violence and harassment is a precondition for the enjoyment of these rights. CEDAW is part of the argumentation in favour of maintaining shelters for battered women reserved for women only. The public debate regarding the services offered to asylum seekers also mentions the need to secure housing free of harassment and sexual harassment for female asylum seekers when awaiting the decision on their application.<sup>460</sup> Both examples regard fundamental rights as well as the minimum standard of services offered to certain groups of society.

**2.2. Case law**

*2.2.1. National courts and equality bodies*

There are only four cases on harassment from the Appeal Court and two complaint cases from the Ombud.

*2.2.2. Main features of case law*

There are only four cases on harassment from the Appeal Court, three regarding disputed termination and one regarding compensation for non-economic damages only. In all three cases regarding termination, the legal frame is the evaluation following the WEA. Sexual harassment is only one of several factors evaluated and the violation of provisions in the GEA is only a supporting argument.

Case LA-2009-202366 – The employer had issued an unlawful notice of termination according to the WEA and engaged in unlawful harassment according to the GEA. The employer showed porn on the TV in his office wanting the employee to watch it together with

<sup>459</sup> See the Human Rights Act of 21 May 1999 no. 30, Section 2 no. 5: [http://www.lovdata.no/cgi-wift/wiftldes?doc=/app/gratis/www/docroot/all/nl-19990521-030.html&emne=menneskerettslov\\*&](http://www.lovdata.no/cgi-wift/wiftldes?doc=/app/gratis/www/docroot/all/nl-19990521-030.html&emne=menneskerettslov*&), accessed 18 August 2011.

<sup>460</sup> See reports regarding shelters for battered women: <http://www.regjeringen.no/nb/dep/bld/Dokument/proposisjonar-og-meldingar/Odelstingsproposisjonar/2008-2009/otprp-nr-96-2008-2009-.html?id=561009>, accessed 18 August 2011, and asylum seekers' living conditions report Chapter 19.5.1.3. <http://www.regjeringen.no/nb/dep/jd/dok/nouer/2011/nou-2011-10/20.html?id=645498>, accessed 18 August 2011.



him in addition to kissing her without her consent. The employee was awarded a total compensation for non-economic damages of approximately EUR 9 500 (NOK 80 000). The appeal court referred to and supported the judgment of the court of first instance, which had made an overall assessment of the damages based on violation of two pieces of legislation (WEA and GEA), in addition to the fact that the employee was in a weak position not speaking Norwegian and in need of work to maintain her work permit in the country. Also, the court made clear reference to EU court statements that the awarding of damages should be sufficiently severe in order to send out a preventive message.

LA-2009-189015-2 – An employer had issued a legal notice of termination according to the WEA based on the valid reason/just cause evaluation. Part of the reasons for termination was based on sexual harassment of two young colleagues at a Christmas party.

LG-2006-95785 – An employer had issued an unlawful notice of termination according to the WEA. The employer issued the notice of termination after an employee reacted by threatening the employer upon being faced with complaints of sexual harassment by two female colleagues. The court considered it proved that the women had received unwanted attention, but not to such a degree as to define it as sexual harassment. One of the women had been called ‘kitten’, also after she had asked him to stop using that word. The other woman reported she had been asked what she preferred for supper, but that he was not thinking about food. Both women found these statements offensive and as having a sexual undertone. Also, the court found the alleged threats not to be sufficiently clear as to constitute threats.

LB-2006-124840 – A former employee’s claim for compensation of non-economic damages was rejected. The court found insufficient evidence of harassment and sexual harassment.

### *2.2.3. Dignity*

The term ‘dignity’ is not defined in legislation and is not elaborated in preparatory works to legislation.

### *2.2.4. Restrictions*

There are no cases regarding clashes between harassment/human rights/constitutional law.

### *2.2.5. Role of equality bodies*

The Equality and Anti-Discrimination Ombud does not have the legislative competence to initiate cases regarding harassment. The Ombud’s function is to act as first instance for complaints, with the Tribunal being the appeal instance. The Ombud provides some information about harassment on its website and presents reports on two individual complaint cases there. One case regards the offer of services of a fitness club, the other is about the working conditions of an employee.

Case 09/2374 – A female member of a sports club was asked to present a medical statement that she was fit to exercise health-wise. The gym suspected she was anorectic. In addition the woman was asked to accept four sessions with a personal trainer, an offer the woman declined. The woman filed a complaint with the Ombud saying that she was discriminated against because of her sex and that she had been the victim of sexual harassment. The latter was based on a remark from one of the personal trainers at the gym who had said that ‘he preferred women to be a little more curved’. The Ombud decided that the case raised issues of intersectional discrimination, i.e. a question of discrimination because of gender (GEA Section 3 and Section 8a) as well as a question of discrimination because of the woman’s assumed reduced health ability (Anti-Discrimination Act Section 4 (5)). As regards the statement about the personal trainer who ‘preferred women with more curves’, the Ombud concluded that this was a statement from a person with ‘authority’ within the gym and thus represents the strong party compared to lay people exercising at the gym. The power imbalance is part of the picture when evaluating whether or not a statement is harassment,

according to the preparatory works.<sup>461</sup> The Ombud concluded on 8 July 2011 that the statement was in violation of GEA Section 8a. The fitness centre has filed a complaint with the Tribunal and a decision may be expected at the earliest in 6 months.

Case 10/1741 – A woman had undergone gender-corrective treatment and was not allowed to carry out a specific task as interviewer for a group of children. The employer claimed that it had nothing to do with the woman's sex change but it was merely a question of not distracting the children doing the interview in their homes. The distraction was the physical appearance of the woman. The employer said he understood that this was painful to hear for the woman, but that she had had other job tasks during the entire period and had suffered no loss. The Ombud concluded that the employer had acted in violation of GEA Section 3 (Section 8a was not used) when he excluded the woman from the position as interviewer based on a general assumption of what is a neutral appearance. The purpose of the prohibition against discrimination is to prevent stereotypical ideas (assumptions) from being the reason for differential treatment.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### ***3.1. National provisions***

Please see the information provided in section 2.

#### ***3.2. Collective agreements***

Many collective agreements will have provisions addressing this issue, if not explicit then at least implicit as part of gender equality issues, see for example the main agreement between LO and NHO (2010-2013) Section 10-1 regarding an employee's right to refuse to work with a person because of that person's indecent conduct. In the commentary it says that this includes cases of sexual harassment. It is further stated that the section is reserved for the very severe cases.<sup>462</sup> All the major unions signed the European Framework Agreement on Harassment and Violence at Work in 2006/2007.<sup>463</sup>

#### ***3.3. Additional measures***

Many institutions will have guidelines on how to report unwanted sexual attention/sexual harassment, see for instance the University of Oslo web page on 'uønsket seksuell oppmerksomhet/seksuell trakassering'.<sup>464</sup> This page provides examples of unwanted attention as well as addresses of various people that can be contacted should the problem arise. Another example of measures is surveys that are carried out anonymously where students or employees are asked to report on incidents of unwanted attention/harassment. This will offer information about incidents as well as useful information about where extra attention is needed.

#### ***3.4. Harassment and stress at work***

This may be addressed by the working environment committee at the enterprise, see WEA Chapter 7 and/or the safety representatives at the enterprise, see WEA Section 6-2.

#### ***3.5. Additional information***

There is no additional information.

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<sup>461</sup> See Ot. Prp. Nr. 35 2004-2005 s. 38.

<sup>462</sup> <http://www.handboka.no/Sak/Avtaler/Lo/ha10.htm>, accessed 19 August 2011.

<sup>463</sup> [http://www.ks.no/PageFiles/1750/harassment\\_violence\\_at\\_work\\_en.pdf](http://www.ks.no/PageFiles/1750/harassment_violence_at_work_en.pdf), and <http://www.ks.no/PageFiles/1750/avtale%20traka%20og%20vold.pdf>, accessed 19 August 2011.

<sup>464</sup> <http://www.uio.no/for-ansatte/ansatt/arbeidsmiljo/trakassering/>, accessed 19 August 2011.



## 4. Added value of anti-discrimination approach

### 4.1. Added value

The added value is the increased attention for the issue, as it is mentioned in a large number of legal acts. As the topic is visible in a number of legal acts, more lawyers will presumably be trained in that area of law. In addition, the shared burden of proof provides a sensible tool in these kinds of cases. Lastly, I assume that the term ‘discrimination’ means that this kind of conduct is unfair and not acceptable.

### 4.2. Pitfalls

The Ombud is badly equipped as to measures to provide assistance in these kinds of cases. In practice, the Ombud is limited to offering guidance and mild supervision on how the issue is addressed in the annual reports from enterprises obliged to report according to Section 1a in the GEA. This leaves the harassed person – if the employer is not able to solve the problem alone or together with the local working environment committee – with the regular civil court system and the need for a well-trained lawyer in this area of law. In addition, some solid private funding is needed for a court case. The other possibility is if the person is a union member and the union is willing to support the case. It may be worth investigating if these types of cases should be eligible for some hours of free legal aid.

## POLAND – Eleonora Zielińska

### 1. General situation

Sexual harassment in Poland was and still is very common, facilitated by a sexism-tolerant culture in the workplace, a lack of decisive response from public authorities and the media, public opinion’s general attitude, tending to sympathize with the harasser rather than with the victim, and a relatively lenient policy of the courts.

Only few cases of sexual harassment are brought before labour courts. Their number in the last decade has not exceeded 18 cases annually, and in some years more than half were filed by men.<sup>465</sup>

There still are no reliable official statistics and studies on the actual extent and dynamics of sexual harassment. Estimates may only be made based on public opinion surveys, showing that in 2007 one fifth of the working or studying population (22 %) declared that in their workplace or educational institution they had experienced unwanted behaviour of a sexual nature of their colleagues, which violated their personal dignity.<sup>466</sup> In comparison with previous surveys this number is higher. It is noted, however, that the data collected do not reflect the true extent of the phenomenon, which is believed to be much larger, the

<sup>465</sup> In 2005 there was a total of 10 cases pending before regional and district courts, regarding Section 18<sup>3a</sup> (6) LC (5 of them lodged by women). In 2006 there were 12 cases (7 lodged by women); in 2007, 12 cases (7 lodged by women); in 2008, 18 cases (7 lodged by women); and in 2009, 14 (8 lodged by women). In the first six months of 2010 there were 17 cases pending before regional and district courts (10 lodged by women). It is important to point out that at the same time the annual number of claims on mobbing exceeded 400 cases. The statistical data cited are based on information provided for by the Department of Statistics of the Ministry of Justice available on the website of the Ministry: <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010/>, accessed 15 August 2011.

<sup>466</sup> 7 % of the respondents declared the existence of physical sexual harassment and 4 % of sexual blackmail by employers or other superiors. 2 % of the respondents were aware of the fact that another person got the job or was promoted because of having sexual intercourse with a superior or a teacher. More or less every 10<sup>th</sup> employed woman under 34 admits to having been the object of such behaviour from a superior person. Compare: Public Opinion Research Centre CEBOS *Molestowanie seksualne. Komunikat z badań* (Sexual harassment. Research Report), Warszawa 2007, pp.2-5, [http://www.cbos.pl/EN/publications/public\\_opinion\\_2011.php](http://www.cbos.pl/EN/publications/public_opinion_2011.php), accessed 18 August 2011.

respondents (especially women) as a rule are not willing to disclose facts related to sexual aspects of their lives, even in anonymous surveys.<sup>467</sup>

From time to time, there is stronger concern about sexual harassment due to incidents shocking public opinion, e.g. at the Polish branch of an international corporation (Pepsi Co),<sup>468</sup> or in the political and public sphere (like the so-called ‘work for sex’ affair in one of the political parties,<sup>469</sup> in which two leaders, including a former deputy Prime Minister, were involved,<sup>470</sup> or allegations of rape and sexual harassment against the former Mayor of the city of Olsztyn by his subordinate female civil servants<sup>471</sup>). Incidents of this nature also occurred in the National Museum of Musical Instruments<sup>472</sup> and in one of the Divisions of the Border Guard.<sup>473</sup>

However, if such cases ever reach the courts, proceedings take very long (especially criminal proceedings are very long).<sup>474</sup> And worse, appeals for such cases often result in the case being referred back to the court of previous instance for further examination,<sup>475</sup> which sometimes leads to the court then declaring the accused not guilty.<sup>476</sup> If the accused are

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<sup>467</sup> 7 % of the respondents declared the existence of physical sexual harassment and 4 % of sexual blackmail by employers or other superiors. 2 % of the respondents were aware of the fact that another person got the job or was promoted because of having sexual intercourse with a superior or a teacher. More or less every 10<sup>th</sup> employed woman under 34 admits to having been the object of such behaviour from a superior person. Compare: Public Opinion Research Centre CEBOS *Molestowanie seksualne. Komunikat z badań* (Sexual harassment. Research Report), Warszawa 2007, p. 9, [http://www.cbos.pl/EN/publications/public\\_opinion\\_2011.php](http://www.cbos.pl/EN/publications/public_opinion_2011.php), accessed 18 August 2011.

<sup>468</sup> FritoLay; see articles in ‘Gazeta Wyborcza’ of 27 December 2005 and of 9 December 2006, accessed 18 August 2011.

<sup>469</sup> This was the case of for the Samoobrona (Self-defence) party, which did get any representation win any seats in the 2007 parliamentary elections.

<sup>470</sup> [http://wiadomosci.gazeta.pl/Wiadomosci/1.80708.7550248.Wyroki\\_ws\\_seksafery\\_Lepper\\_i\\_Lyzwinski.html](http://wiadomosci.gazeta.pl/Wiadomosci/1.80708.7550248.Wyroki_ws_seksafery_Lepper_i_Lyzwinski.html), accessed 18 August 2011.

<sup>471</sup> *Rzeczpospolita*, 28 January 2008, p. A8; <http://www.rp.pl/artykul/85648.html> and <http://www.rp.pl/artykul/>, accessed 20 August 2011.

<sup>472</sup> This information is available on the website of the Government Plenipotentiary for Equal Treatment; [http://www.rownetraktowanie.gov.pl/wystapienia\\_interwencje/mobbing\\_i\\_molestowanie](http://www.rownetraktowanie.gov.pl/wystapienia_interwencje/mobbing_i_molestowanie), accessed 17 August 2011.

<sup>473</sup> The case involves a captain of the guard, presently in retirement, charged with triple sexual harassment of the female workers; [http://lublin.gazeta.pl/lublin/1.48724.9783129.Znecanie\\_ponizanie\\_molestowanie\\_strazy.html#ixzz1Vkj8zaFl](http://lublin.gazeta.pl/lublin/1.48724.9783129.Znecanie_ponizanie_molestowanie_strazy.html#ixzz1Vkj8zaFl), accessed 17 August 2011.

<sup>474</sup> E.g. the case of the Samoobrona party related to the period 2001-2002, the ruling of the court of first instance was issued in 2008 and became binding in 2011 only.

<sup>475</sup> The proceeding in the case of the President of Olsztyn related to the period 2001-2007 and ended with referring the case back to the court of previous instance for further examination. The case is still pending and the first hearing of the court is scheduled for October 2011. During this time the accused has permanently been performing public functions (recently as a city councillor) [http://www.ro.com.pl/aktualnosci/tresc/14783/pazdzierniku\\_moze\\_ruszyc\\_owskiego/](http://www.ro.com.pl/aktualnosci/tresc/14783/pazdzierniku_moze_ruszyc_owskiego/), accessed 17 August 2011. In the Frito Lay case, the alleged sexual harassment took place in 2005. The criminal court of first instance declared the accused not guilty. This ruling was appealed and eventually the case was referred back to the court of first instance for further examination. The case has been pending for almost five years now before the same regional court, that originally issued the not-guilty ruling. According to information obtained by the Human Rights NGO Helsinki Foundation (Fundacja Helsińska), which is monitoring the case, the case is to be conducted again from the very beginning because the judge fell ill and had to be replaced.

<sup>476</sup> Such was the case for a female worker from the Bielbaw factory. In 2004 the Regional Court in Dzierżoniów found ten men employed in the Bielbaw factory guilty of forcing her to submit to sexual contacts in the period from January 2001 until April 2002. They were sentenced to imprisonment for 6 months up to 3 years. One year later, the court of second instance upheld the ruling and referred the case back to the court of previous instance for further examination. Hearing the case again, the regional court eventually found the accused not guilty. See the article by Violetta Waluk ‘Kto kogo skrzywdził’ (Who wronged whom) *Przegląd* No. 22/2007; <http://www.przegląd-tygodnik.pl/pl/artykul/kto-tu-kogo-skrzywdzil>, accessed 17 August 2011.

eventually found guilty, the punishment tends to be rather lenient<sup>477</sup> and is not always fully executed.<sup>478</sup>

It is equally rare for claims for damages to be accepted in proceedings before labour courts. For example, in the first six months of 2010 only three such cases were adjudicated, in two of which the full claim was awarded. The statistics from previous years were not any better in this respect. In 2005 one claim was adjudicated in total, in 2006 none, again one in 2007 and in 2008, and none in 2009.<sup>479</sup>

This situation results in significant limitation of the deterrent effect on potential harassers. At the same time, experiences with court proceedings, especially the high risk of secondary victimization, discourage victims from lodging complaints before the court, thereby causing a so-called 'chilling effect'.

The media play an important role in such attitudes. In the hunt for sensation, while reporting on sexual harassment cases, they often violate the right to privacy of the victims, sometimes also placing them in an unfavourable light and at the same time justifying the perpetrator.<sup>480</sup>

It is, however, worth mentioning that occasionally cases do occur where the perpetrators are found guilty and the victims even succeed in obtaining substantial damages in court (approximately EUR 12 500).<sup>481</sup>

However, these are still swallows, that don't make a summer.

## 2. Harassment and sexual harassment in the context of anti-discrimination law

### 2.1. Legislation

#### 2.1.1. Transposition

The notion of harassment in the context of discrimination was introduced into the Labour Code<sup>482</sup> for the first time in 2003.<sup>483</sup> In 2008<sup>484</sup> this definition was extended and significantly

<sup>477</sup> In approximately 80 % of the convictions based on Section 199 PC, the sentence is imprisonment with suspension of execution of the penalty. Source: <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010/>, accessed 20 August 2011.

<sup>478</sup> E.g. in March 2001 the Court of Appeals in Radom lowered the sentence of 5 years of imprisonment for one of the Samoobrona party officials (who was found guilty of 7 charges of sexual harassment) to 3.5 years. After this ruling his counsel filed a motion for conditional release from serving the full sentence, arguing that he had already served more than half of it (considering the 2.5 years he served in preliminary detention) and that his health condition was deteriorating. The court accepted the motion so that the former deputy will not go to jail to serve the rest of his sentence; <http://wiadomosci.onet.pl/kraj/mimo-wyroku-byly-posel-nie-pojdzie-do-wiezienia,1,4804909,wiadomosc.html>, accessed 17 August 2011

<sup>479</sup> The statistical data are based on the information provided for by the Department of Statistics of the Ministry of Justice, available on the website of the Ministry: <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010/>, accessed 15 August 2011.

<sup>480</sup> This was very obvious in the so-called sex affair, where a regular system of party concubines was created who, in exchange for employment, performed sexual services to party officials. The case was referred to as Lewinski Gate, thus diluting the difference between voluntary sex and exploitation of the relation of subsidiarity or critical situation. The case also included political provocation, implying that the alleged victims had supporters, which reversed the relations (alleged victims – perpetrators) and an aberrant claim of a perverted woman. Ref. A. Mroziak, *Dziewczynki mówią dość* (*Girls say enough*) Zadra 20/31/2007. Also available in 'Molestowanie seksualne' ('Sexual harassment') edited by Gender Index [http://www.feminoteka.pl/downloads/molestowanie\\_broszura\\_internet.pdf](http://www.feminoteka.pl/downloads/molestowanie_broszura_internet.pdf), accessed 15 August 2011.

<sup>481</sup> *Gazeta Wyborcza Opole* [http://wyborcza.pl/1,75248,9174920,50\\_tys\\_zl\\_zadoscuczynienia\\_za\\_molestowanie.html#FIvgPZX2](http://wyborcza.pl/1,75248,9174920,50_tys_zl_zadoscuczynienia_za_molestowanie.html#FIvgPZX2), accessed 17 August 2011.

<sup>482</sup> Labour Code Act of 26 June 1974. Journal of Laws of the Republic of Poland of 1994 No. 11 item 38. (hereafter: Dz.U.). Unified text: Dz.U. 1998 No. 21 item 94 with further amendments. <http://isap.sejm.gov.pl/VolumeServlet?type=wdu&rok=1998&numer=021>, accessed 8 August 2011

<sup>483</sup> Law of 14 November 2003, Dz.U. 2003 No. 213, item 2081. The 2001 amendment of the Labour Code introduced only a general provisions which obliged the employer to respect the dignity and other personal goods of the employees (Section 9<sup>1</sup> LC) which cannot serve as a separate legal basis for complaints. Law of 24 August 2001, Dz.U. 2001 No. 99, item 1075.

<sup>484</sup> Act of 21 November 2008 on amendment of the Act; Labour Code published in Dz.U. 2008 No. 223, item 1460, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20102541700>, accessed 8 August 2011.

improved. The Recast and Service Directives were transposed by the Law of 3 December 2010 implementing the five equality directives.<sup>485</sup> This law complements the Labour Code, since it states that it does not apply to employees in matters regulated by the Labour Code's equal treatment provisions (Chapter IIa).

### 2.1.2. Definitions

Polish law distinguishes between the notion of harassment and sexual harassment.

However, the notion of sexual harassment is interpreted as covering any unlawful conduct, both of a sexual nature and related to the sex of the victim. In this respect it does not correspond with EU regulations dealing with sexual discrimination. Such classification may derive from the fact that, in addition to sexual harassment in this meaning, the Labour Code and the Antidiscrimination Law use the simple notion of 'harassment' to describe harassment based on other grounds than sex.

The definition of harassment provided for in Section 18<sup>3a</sup>(5.2.)LC reads as follows: 'As a form of discrimination in the meaning of Paragraph 2 should be perceived any unwanted conduct, the purpose or effect of which is violation of the dignity of a person, in particular by the creation of an intimidating, hostile, degrading, humiliating or offensive atmosphere'. Paragraph 2 of Section 18<sup>3a</sup> refers to the principle of equal treatment which means non-discrimination, direct or indirect, in any form, on the ground described in Paragraph 1 of this provision. The list of grounds of discrimination provided for in Section 18<sup>3a</sup>(1) is not exhaustive and contains: sex, age, disability, race, religion, nationality, political conviction, membership of trade unions, ethnic origin, belief (religion), sexual orientation or type of employment (fixed period or part time).

Pursuant to Section 18<sup>3a</sup>(6) LC as discrimination on the ground of sex is also considered any unwanted conduct of a sexual nature or related to the sex of an employee, the purpose or effect of which is violation of dignity of a person, in particular by the creation of an intimidating, hostile, degrading, humiliating or offensive atmosphere. This conduct may consist of verbal, non-verbal and physical elements (sexual harassment).

Section 18<sup>3a</sup> (7) LC transposes Section 2(2)a of the Recast Directive in the following way: 'Submission of the employee on a person's rejection of the harassment or sexual harassment must not result in any adverse consequences for an employee'.

In addition, definitions of harassment and sexual harassment are provided for in the Antidiscrimination Law (Section 3(3 and 4)). Both definitions contain descriptive elements similar to those provided in the Labour Code. However, contrary to the Labour Code, in the definition contained in the Antidiscrimination Law there is no direct reference to sex discrimination in case of sexual harassment or to discrimination in case of harassment.

The Antidiscrimination Law, however, (in Section 3(5)) also stipulates that the notion of unequal treatment should be understood as treatment of a physical person constituting one or more of the following behaviours: direct or indirect discrimination, harassment and sexual harassment, less favourable treatment of a person because of her/his submission or rejection to harassment or sexual harassment, as well as behaviour consisting of encouraging (instigating) or ordering another person to pursue such conduct.

These definitions indicate that only in the Labour Code sexual harassment is explicitly conceptualized as sex discrimination. In the Antidiscrimination Law it is treated as a form of unequal treatment. This difference in formulation does not, however, seem to have any practical significance since the right to compensation as well as all procedural rights and safeguards are enjoyed by everybody, regarding whom the principle of equal treatment has been violated (Section 13).

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<sup>485</sup> The Law of 3 December 2010 was published in Dz.U.2010 No. 254, item 1700, <http://isap.sejm.gov.pl/DetailsServlet?id=...>, accessed 8 August 2011. Hereafter: Antidiscrimination Law. It refers to the following Directives: 86/613/EEC, 2000/43/EC, 2000/78/EC, 2004/113/EC, 2006/54/EC. The law entered into force on 1 January 2011.

### 2.1.3. Sexual harassment

Regardless of the fact that in practice sexual harassment regularly occurs between men and women, the latter being victims, Polish regulations provide for special legal measures also in situations when harassment takes place between person of the same sex. A constitutive element of liability for sexual harassment is the fact that the behaviour has to be unwanted. For this reason, it is noted in the commentary to the Labour Code that the person covered by the provision should, in a more or less persistent manner, manifest his or her disapproval of a particular behaviour.<sup>486</sup>

The behaviour that which may be perceived as sexual harassment, according to these provisions, equivalent to the forms provided for in the directives, have been described widely. They may consist of physical, verbal and non-verbal behaviour.<sup>487</sup>

The definition of sexual harassment contained both in the Labour Code and in the Antidiscrimination Law refer to the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. Thus, any conduct with the effect (and without the purpose or intention) of violating dignity of a person can be defined as harassment according to labour regulations as well as civil-law regulations.

Such unintentional conduct cannot, however, be punishable under criminal law. The Penal Code (PC) does not contain regulations of a separate type of offence, corresponding with the definition of harassment provided for in the directives. Nevertheless, it includes some crimes covered by the concept of harassment. Exercising or toleration of sexual harassment at the workplace, if conducted maliciously or persistently, may be qualified as a criminal offence constituting infringement of the rights of the employee resulting from a work-contract relationship, and is subject to imprisonment for up to 2 years (Action 218. § 1).

Blackmailing with a sexual context may be punished under the provision of Section 199 PC.

In 2011, stalking was criminalised as well (Section 190a PC).

Some types of verbal harassment may be qualified as insult (Section 216 PC) or violation of personal integrity (Section 217 PC).

These offences, however, are only punishable if committed intentionally. In order to become criminally liable, intent must be proved.

The definition of sexual harassment contained in Polish law covers both forms: sexual blackmail and creating a hostile working environment.

Some experts claim, however, that the employee may only benefit from the procedure provided for in the event of discrimination, as well as from special compensation, if sexual harassment takes the form of sexual blackmail (*quid pro quo*). If the sexual harassment appears in the form of creating a hostile working , the basis of the employer's responsibility may only be the provisions sanctioning the violation of employee's dignity or other personal goods such as e.g. integrity, health as well as violations of the employer's duty to provide a safe working environment.

It is rightly pointed out, however, that this opinion does not seem to be justified, given the fact that both forms of sexual harassment are regulated in Chapter IIa of the Labour Code, dealing with discrimination, and that the lack of the employer's response to hostile working conditions for an employee may be also perceived as unjustified unequal treatment.<sup>488</sup> Therefore there are is no reason why e.g. special compensation for moral harm might be excluded in the event of harassment in the form of the creation of a hostile working environment, but accepted only in the event of sexual blackmail.

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<sup>486</sup> M. Gersdorf et al. *Kodeks pracy. Komentarz (Labour Code. Commentary)* Warsaw 2004, p 67.

<sup>486</sup> K. Kędziora & K. Śmiszek *Dyskryminacja i mobbing w zatrudnieniu (Discrimination and mobbing in employment)* 2nd ed., CH Beck, Warszawa 2010, p. 57.

<sup>487</sup> The commentary to the Labour Code gives examples for actions in the physical sphere (touching of the harassed person), verbal sphere (telling of sexist jokes in the context of the harassed person) and non-verbal sphere (ambiguous gestures and looks); M. Gersdorf et al. *Kodeks pracy. Komentarz ( Code. Commentary)* Warsaw 2004, p. 68.

<sup>488</sup> K. Kędziora & K. Śmiszek *Dyskryminacja i mobbing w zatrudnieniu (Discrimination and mobbing in employment)* 2nd ed., CH Beck, Warszawa 2010 , p.133 and the literature indicated therein.

It should be noted, however, that harassment at the workplace may also constitute infringement of personal goods (e.g. health). In such a case, in addition to the protective measures provided for in the Labour Code or Antidiscrimination Law, also the protective measures as stipulated in the Civil Code may also be applied.

It may also occur, in particular in case of violation of the employee's dignity by another employee or by a person not connected with the victim's place of employment, in addition to the claim against the employer on the basis of the Labour Law, that the employee whose dignity was violated will choose to sue the fellow employee or e.g. a customer of the enterprise before a civil court.

The issue as to whether the prohibition of sexual harassment would apply in relation to discrimination grounds other than sex has not been the subject of special debate in Poland. It seems that the answer to this question should be negative in relation to the Labour Code, where, as it already pointed out, sexual harassment is conceptualized as sex discrimination. However, this is not the case in antidiscrimination law, where sexual harassment is not associated with sex discrimination, nor with any other ground of discrimination. Therefore it seems that it might be claimed that pursuant to this law sexual harassment also covers other grounds of discrimination.<sup>489</sup>

#### *2.1.4. Scope*

The Labour Code provisions dealing with harassment and sexual harassment may in practice be applied in the field of access to employment, vocational training, promotion and working conditions, including remuneration and other benefits connected with work (Section 18<sup>3b</sup>(1)).

The Antidiscrimination Law in Section 8 specifies that in relation to work the prohibition of unequal treatment *inter alia* on the ground of sex shall apply to: 1) access to and performance of professional training (including additional education, proficiency courses and requalification training (vocational orientation and reorientation) as well as professional apprentices (practical training)); 2) conditions of performing and exercising economic or professional activities, in particular in the form of labour relationships or work on the basis of civil-law contracts; 3) access to activities in trade unions, employers' organisations and professional corporations; and 4) access to and conditions for the enjoyment of publicly available instruments and services of the labour market.

In addition, this Law provides for the prohibition of unequal treatment on the ground of sex in the access to and conditions of social security, services, including housing, in the access to goods and the provision of rights and energy, if publicly offered (Section 6).

The Antidiscrimination Law does not cover areas other than the access to employment (including vocational training and promotion) and the access to and supply of goods and services provided in EU directives.

#### *2.1.5. Addressee*

The addressees of Labour Code provisions are employees and employers. This means that LC provisions apply to the formal employer as well as to any other persons exercising management positions, acting on behalf of the employer or having superior competences, as well as any fellow workers.

The Antidiscrimination Law applies to all physical and legal persons, as well to other organisational units having legal capacity. It does not apply to employers and employees as far as the Labour Code applies (Section 2).

#### *2.1.6. Preventive measures*

The Labour Code provides for the employer's obligation to counteract discrimination in employment, e.g. on the ground of sex (Section 94(2b)). This means that the employer is

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<sup>489</sup> However, it may also be argued that in the access to goods and services any unwanted conduct of a sexual nature, whose purpose or effect is the violation of dignity of a person, may be qualified as sexual harassment without the necessity to prove that such conduct has been committed on one or more grounds indicated in Section 1 of the Antidiscrimination Law.



responsible for any incidents of unequal treatment. It therefore is in the employer's interests to elaborate internal policies that may prevent discrimination.

Pursuant to Section 94(4) LC the employer is additionally obliged to provide safe and hygienic working conditions. This provision is of particular importance for counteracting harassment, sexual harassment and mobbing, since situations in which the employee is exposed to a hostile working environment, resulting from the abovementioned behaviour, may be perceived as a violation of this obligation.

The employer also has the duty to make the provisions on equal treatment available to the employees in the form of written information disseminated at the location of employment or to provide the employee with access to the said provisions in another form adopted by the relevant employer (Section 94<sup>1</sup> LC). This employer's duty concerns employees only. The employer has no legal duty to provide such information e.g. to candidates for work. Section 4 of the 2007 Framework Agreement on harassment and violence at work has not been formally implemented. However, some enterprises have a clear mission statement outlining that harassment will not be tolerated and specifying the procedure to be followed should a particular case arise. An example of such a policy statement is Ordinance *no. 101/2008 issued by the Rector of Warsaw Medical University* on 23 October 2008 regarding the introduction of a 'procedure for counteracting mobbing, discrimination and sexual exploitation'.<sup>490</sup>

There is no information that national collective agreements specifically deal with the issue of preventing sexual harassment.

#### 2.1.7. Procedures

The Labour Code, as well as the Antidiscrimination Law, contains no specific complaints procedure for persons in of alleged harassment or sexual harassment. Therefore, the general provisions provided for in the event of a violation of the principle of equal treatment at work or in the access to goods and services shall apply. This means that in the event of harassment at the workplace the injured party may initiate legal proceedings before special labour courts.<sup>491</sup> If harassment occurs outside the employment relation, pursuant to Section 13(2) of the Antidiscrimination Law, in matters connected with violation of the equal treatment clause, the provisions of this law apply, together with provisions of the Civil Code<sup>492</sup> dealing with the protection of personal goods.

Both in cases regulated by the Labour Code and by the Antidiscrimination Law, disputes are considered on the basis of the Code of Civil Procedure.<sup>493</sup>

It may be added that if the alleged sex discrimination concerns access to employment, the individual may lodge a claim before the municipal court, which handles misdemeanours (contraventions). The Act on the Promotion of Employment and the Institute of the Labour Market provides sanctions for the violation of anti-discriminatory provisions in two situations.<sup>494</sup> First, anyone running an employment agency who does not comply with the prohibition of discrimination based e.g. on sex may be subject to a fine of at least approximately EUR 689 (PLN 3 000; Section 121(3)). Secondly, the same fine applies to anyone, who – on the same ground – refuses to employ a candidate in a vacant post, or refuses to accept an individual for vocational training (Section 123). Such punishments may be applied e.g. if the person running an employment agency refuses to provide the abovementioned services because a candidate refuses to submit to sexual harassment. In addition, the victim may claim compensation from the person running the employment agency on the basis of Section 13 of the Antidiscrimination Law.

<sup>490</sup> <http://www.wum.edu.pl>, accessed 17 August 2011.

<sup>491</sup> Sections 242-264 of the Labour Code (Act of 26 June 1974, unified text in Dz.U. 1998 No. 21 item 94, with further amendments); [http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630\\_-u.htm](http://orka.sejm.gov.pl/proc.6.nsf/ustawy/630_-u.htm), accessed 27 August 2009. There is no specific out-of-court alternative for settling disputes related to violation of the principle of equal treatment, but more general conciliation procedures may be applied in those cases as well.

<sup>492</sup> The Law of 23 April 1964, Dz.U. 1964, No. 16, item 93 with further amendments.

<sup>493</sup> The Law of 17 November 1964, Dz.U. 1964, No. 43, item 296 with further amendments.

<sup>494</sup> Act of 20 April 2004 Dz.U. 2004, No. 99 item 1001, Section 121.3 and Section 123.

In terms of non-judicial measures, a discrimination complaint may also be lodged with the labour inspector who supervises and monitors the observance of labour law (including antidiscrimination provisions).<sup>495</sup> The inspector, in particular cases, is also entitled to file claims with the labour court.<sup>496</sup>

As regards sexual harassment at the workplace, some enterprises have special procedures for cases of sexual harassment on the basis of internal regulations (e.g. at Warsaw Medical University, mentioned above).

The alleged victim of discrimination may in addition file a complaint with the Commissioner for Civil Rights Protection.<sup>497</sup>

#### 2.1.8. *Burden of proof*

The general rule of civil proceedings that the obligation to prove the facts falls on the person who derives legal effects from such facts (Section 6 of Civil Code) does not apply to discrimination cases.

However, the specific regulations governing the burden of proof in the Labour Code and Antidiscrimination Law differ in this respect.

The reversed burden of proof in sex discrimination cases (Section 18<sup>3b</sup>(1) *in fine*), introduced into the Labour Code in 2001, may also be applied in sexual harassment cases since 2003. Pursuant to this provision, the employer is obliged to prove that he/she was guided by objective reasons e.g. in his/her refusal to appoint a candidate or any other decision adversely affecting working conditions, access to vocational training or promotion.<sup>498</sup>

Section 18<sup>3b</sup>(1) LC does not explicitly charge the employee with the duty to indicate the facts on the basis of which discrimination may be presumed, but rather establishes an unconditional shift of burden of proof onto the employer. In this respect, the implementation of the directive's provision into the Labour Code is not fully correct and should be evaluated negatively.<sup>499, 500</sup> It is not compatible with the purpose of the directive, which is not only the effective protection of employees from sex discrimination, but also the prevention of excessive accusations of employers of discrimination.<sup>501</sup> Therefore, in Polish legal literature as well as in case law, the opinion prevails that in discrimination cases regulated by the Labour Code the burden of proof is *de facto* divided.<sup>502</sup>

According to some authors, the context in which the reversed burden of proof has been placed in Section 18<sup>3b</sup>(1) LC (referring to any decisions adversely affecting the employee's situation) gives ground for the assumption that this rule is only applicable to cases of sexual harassment in the form of sexual blackmail. While agreeing that the practical significance of this shift of the burden of proof is greater in blackmail cases, the possibility of application of the reversed burden of proof also in cases of sexual harassment creating a hostile environment

<sup>495</sup> The law of 6 March 1981 on the National Labour Inspectorate (unified text: Dz.U. 2001, No. 124, item 1362. Section 8 (1) point 11a.)

<sup>496</sup> The Labour Inspector mainly applies other specific remedies such as: orders, protests or submissions.

<sup>497</sup> Compare: The law on the Commissioner for Civil Rights Protection of 15 July 1987, unified text: Dz.U. 2001 No. 14 item 147 with further amendments.

<sup>498</sup> M. Gersdorf et al. *Kodeks pracy. Komentarz (Labour Code. Commentary)* Warsaw 2004, p. 70.

<sup>499</sup> A different opinion has been expressed by P. Czarnecki 'Rozkład ciężaru dowodu w sprawach na tle dyskryminacji' ('Burden of proof in discrimination cases') In: *Praca i Zabezpieczenie Społeczne* 2006, No. 3, p.14.

<sup>500</sup> A different opinion has been expressed by P. Czarnecki 'Rozkład ciężaru dowodu w sprawach na tle dyskryminacji' ('Burden of proof in discrimination cases') In: *Praca i Zabezpieczenie Społeczne* 2006, No. 3, p.14.

<sup>501</sup> K. Kędziora & K. Śmiszek *Dyskryminacja i mobbing w zatrudnieniu (Discrimination and mobbing in employment)* 2nd ed., CH Beck, Warszawa 2010, p. 57.

<sup>502</sup> The Supreme Court in the decision of 9 June 2006 (III PK 30/06, OSNP 2007, Nos 11-12, item 160, p. 476) invoking Section 10 of 2000/78/EC Directive, as well as the European Court of Justice's judgment in case C-196/02 *Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados AE*, issued on the basis of Directive 97/80/EC, decided that the employee should indicate the facts from which it may be presumed that discrimination occurred and only then it shall be up to the defendant to prove that there has been no breach of the principle of equal treatment. A similar opinion was expressed by the Supreme Court in the judgment of 23 May 2005 (II PK 33/05) and in the Commentary to the Labour Code. Compare: L. Florek ed. *Kodeks Pracy. Komentarz (Labour Code. Commentary)* Warszawa 2005, Lex 2011, remarks to Section 18<sup>3b</sup>, item 2.



should not be rejected. In the latter situation, the person alleging discrimination has to prove that her/his personal goods (e.g. dignity) has been affected by the described behaviour of the defendant and the defendant is obliged to prove that his/her conduct was not unlawful. The Supreme Court in its judgment of 8 December 2005 stressed that, as a rule, giving by the employer giving the employee lawful orders related to work does not constitute violation of the employee's dignity, violation of the principle of equal treatment, discrimination or mobbing.<sup>503</sup>

The Antidiscrimination Law contains regulations which reflect the directives' intention in respect of the burden of proof more clearly and better than the Labour Code. It stipulates that the person 'who alleges violation of the principle of equal treatment shall make the facts of the violation plausible (Section 14(2)). It shall be for the person against whom violation has been alleged to prove that there has been no breach of the principle of equal treatment (Section 14(3))'.

It is not clear whether this obligation to make the facts of the violation plausible in the Polish Antidiscrimination Law has the same meaning as the obligation 'to establish facts from which it may be presumed that there has been discrimination' stipulated in Section 9 of Directive 2004/113/EC and Section 19 of Directive 2006/54/EC. Undoubtedly, in both cases, the goal is to accept a certain fact although not all premises have been proven and to allow that conclusions drawn based on existing premises are possible, but not necessary.

It seems, however, that the threshold provided for in Polish law is higher than the one provided in EU law. to indicate facts according to which it may be assumed that discrimination is possible (meaning 'not excluded'). In contrast, in Poland it also has to be made plausible that the conclusion drawn based on according to those facts (that the principle of equal treatment has been violated) is real (plausible) and not just possible to imagine. If the burden of proof provision in the Antidiscrimination Law were interpreted in this way, it should be evaluated as not entirely conforming with EU law. Considering the possibility to apply an EU-friendly interpretation of this provision, it has to be noted that this would result in extending the scope of application of a regulation, which provides for an exception to a general rule regarding the burden of proof (Section 6 of the Civil Code). This raises doubt as to the possibility to widen the interpretation of such an exception, with regard to the legal rights of the harasser.

#### 2.1.9. Remedies and sanctions

The Labour Code stipulates that an employee initiating a claim related to discrimination as well as any other person supporting him or her are entitled to special protection against victimisation, e.g. against dismissal (Section 18<sup>3e</sup>).<sup>504</sup> Pursuant to Section 18<sup>3d</sup> Labour Code in every case of violation of the principle of equal treatment the employee is entitled to request special compensation. The compensation must not be less than the minimum wage (approximately EUR 349 in 2011 (PLN 1 386)).

In legal literature it has been noted that this compensation should be proportionate to the harm suffered. It is, however, not a typical civil-law compensation, and therefore the legislator decided to introduce a mechanism providing the victim with a minimum guaranteed amount of compensation, applicable in every case of violation of the principle of equal treatment in employment, even if the employee did not suffer any harm in connection with the employer's unlawful conduct. This means that indication of the harm suffered is not necessary in order to obtain the minimum amount of compensation.<sup>505</sup> It should be noted that the above minimum amount of compensation is always binding. The compensation cannot be lower even if the parties reach an agreement, otherwise the agreement will be unlawful.<sup>506</sup> Special compensation in the event of discrimination is also provided in the Antidiscrimination Law

<sup>503</sup> I PK 103/05 OSNP 2006/21-22/321.

<sup>504</sup> Section 18<sup>3e</sup> of the Labour Code, in the interpretation of the text after the amendments of 2008 (in force since January 2009).

<sup>505</sup> M. Matey-Tyrowicz & T. Zielinski (ed.) *Prawo pracy RP w obliczu przemian (Labour Law in the Republic of Poland in the face of change)*, Warszawa 2006, p.340.

<sup>506</sup> M.T. Romer *Prawo Pracy Komentarz (Labour Law. Commentary)* Warszawa 2005, p.181.

(Section 13). However, in this case there is no minimum amount of compensation. Instead, the law stipulates that general principles of civil law apply.

The labour law includes no specific disciplinary sanctions to be applied regarding an employee in the event of sexual harassment. General rules of disciplinary responsibility may be applied in such cases. In respect of the professions of public trust (lawyers, physicians, academics etc.) the rules of professional responsibility may apply regardless of the question whether the perpetrator has penal or civil liability for the same deed. Such rules provide the following sanctions: reprimand, fine, suspension of duties for a limited period of time or total expulsion from profession).

#### *2.1.10. Compliance with EU law*

The implementation of EU provisions with regard to harassment is in many aspects correct. There are, however, some objections to be made. Most of all, different from Community law, Polish law applies the notion of sexual harassment to any unlawful conduct, both of a sexual nature and related to the sex of the victim. This may cause doubts as to the correctness of the definition of the burden of proof, both in the Labour Law and in the Antidiscrimination Law. A shortcoming in the regulations of the Labour Law is that Section 18<sup>3b</sup>(1) LC does not explicitly charge the employee, acting as claimant, with the duty to indicate the facts on the basis of which discrimination may be presumed, but rather establishes an unconditional shift of the burden of proof to the employer. With regard to the Antidiscrimination Law the problem may also raise concern, although there is more room for debate, especially as to whether the provision 'make plausible the facts of the violation' results in setting a higher standard of proof for the claimant than the one provided for in EU law.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

As already indicated, few cases of sexual harassment are lodged before labour courts. The same may be said concerning penal courts.<sup>507</sup> Even worse, it is difficult and sometimes impossible to make a detailed analysis. Usually in such cases only the sentence of the ruling is available and the underlying reasoning remains closed to the public. The problem of sexual harassment also seldom occurs in the practice of equality bodies, which to a certain extent can be explained by their short their existence. The Government Plenipotentiary for Equal Treatment (in office since 2008) intervened in one such case. Also one case, involving alleged sexual harassment in a homosexual relationship, has been found in the records of the Commissioner for Civil Rights Protection, to whom the Antidiscrimination Law of 2010 conferred the function of equality body.

#### *2.2.2. Main features of case law*

In the sexual harassment cases available for examination for which court proceedings were initiated, most frequently reference was made to Section 199 PC. In one of these cases, the commanding officer of a military hospital was charged with committing multiple molestation of various nurses. In most cases, the scenario was similar: nurses were called in to discuss the prolongation of their employment contract. During the meeting, the man attempted to induce the women to submit to sexual intercourse or another sexual act. In this attempt he pulled the women towards himself, tried to kiss them and used violence by tearing off clothes, grabbing them by the hips, holding their arms, spreading their legs, grabbing them under their skirts, touching their crotch through their underwear, pulling up their blouse and touching their breasts. Sometimes he unzipped his trousers and exposed himself. With regard to most of the charges (which were not qualified as attempted or committed rape) the court of first instance discontinued the proceedings given the insignificant degree of social harm of the offence (which then did not constitute a crime under Polish law).

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<sup>507</sup> In 2009, 30 persons were convicted on the basis of these provisions; in 2008, 27 and in 2007, 23; <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010/>, accessed 15 August 2011.

The Supreme Court, hearing the case as court of second instance, contested this evaluation noting that the accused's conduct was cynical: knowing that he was actually the only employer that could offer these women employment, he took advantage of their critical situation forcing them to submit to sexual acts. Neither were these occurrences incidental, as the court of first instance found, since several women became victims. According to the Supreme Court, the conclusions of the court of first instance, that the offender's conduct did not become seriously harmful and that it did not cause quite negative consequences (both physically and mentally) for the injured women, as well as that 'no physical exposure of the injured women before the offender took place' and that 'none of the women suffered any bodily injury', constituted no arguments for the assumption that the offender's conduct towards the harassed women had an insignificant degree of social harm.<sup>508</sup>

In another case the Supreme Court, while examining a cassation claim of the accused, decided that 'grabbing, grappling or touching of intimate body parts of the injured persons may by no means be considered as 'crude behaviour' and even less as jokes. The Court noted that the conduct of the accused was doubtlessly crude, but at the same time fulfilled the criteria provided in Article 199 PC. Attempts in the cassation proceedings to question the sexual basis of this touching was entirely detached from the reality of the case. As a consequence, the argumentation of the cassation was found to be manifestly unjustified.<sup>509</sup>

### 2.2.3. *Dignity*

I did not find any case law that defined the notion of 'dignity' or explained how 'dignity' should be interpreted.

### 2.2.4. *Restrictions*

There is no case law which shows clashes between the prohibition of harassment/sexual harassment and human rights or constitutional rights.

### 2.2.5. *Role of equality bodies*

In 2008, the Government Plenipotentiary for Equal Treatment intervened in the case of mobbing and sexual harassment of female employees of the National Museum of Musical Instruments in Szydłowiec by directing a letter to the Marshal of the Mazowsze Voivodship, as a result of which the Marshal initiated mediation. The Plenipotentiary also addressed the National Labour Inspectorate with a proposal to organize an inspection of the Museum and the State Prosecutor with a proposal to examine the case again (initially it was dismissed). She also met with the injured women and directed them to anti-mobbing organizations. With new aspects of the case coming to light, the Plenipotentiary again addressed the State Prosecutor with the proposal to re-examine the case and to change the prosecutor's office handling it. As a result of these actions, the prosecutor's office handling the case has been changed.<sup>510</sup>

In the office of the Commissioner for Civil Rights Protection a case is currently pending<sup>511</sup> regarding discrimination in education (refusal to prolong PhD studies at Cardinal Stefan Wyszyński University in Warsaw) on the ground of sexual orientation and non-submission to sexual harassment. In this case the District Court of Warsaw (civil division) rejected a claim,<sup>512</sup> because it did not believe the statements of the claimant, claiming that the promoter offered the claimant sexual intercourse in exchange for the promise to promote his interests at the university.

<sup>508</sup> Ruling of the Supreme Court – Military Division of 18 July 2007, WA 28/2007.

<sup>509</sup> Ruling of the Supreme Court of 31 May 2007, III KK 392 /06.

<sup>510</sup> [http://www.rownetraktowanie.gov.pl/wystapienia\\_interwencje/mobbing\\_i\\_molestowanie](http://www.rownetraktowanie.gov.pl/wystapienia_interwencje/mobbing_i_molestowanie), accessed 10 August 2011.

<sup>511</sup> The Commissioner may e.g. file a cassation case on behalf of the claimant.

<sup>512</sup> Ruling of 6 July 2011, ref. no. XXV C 391/09.

### 3. Harassment and sexual harassment outside the framework of antidiscrimination law

#### 3.1. National provisions

The most relevant provision is Section 199 of the Penal Code which reads as follows: 'Whoever, abusing a relationship of dependence or by taking advantage of a critical situation, subjects a person to sexual intercourse or makes him/her submit to another sexual act or to perform such an act, shall be subject to the penalty of imprisonment for up to 3 years.'

#### 3.2. Collective agreements

There is no information indicating that matters of sexual harassment are of special interest with respect to collective agreements. Nevertheless, given the fact that many collective agreements repeat the wording of the entire chapter of the Labour Code on equal treatment, provisions on sexual harassment also apply here.

#### 3.3. Additional measures

In certain schools of higher education, special antidiscrimination commissions have been installed, with the goal to collect claims regarding sexual harassment. Such a commission has been installed by an Ordinance of the *Rector of Warsaw Medical University, dated 23 October 2008*<sup>513</sup> and by the *Ordinance of the Rector of Warsaw University dated 8 March 2010*.<sup>514</sup>

#### 3.4. Harassment and stress at work

Since 2003<sup>515</sup> the Polish Labour Code includes special provisions on mobbing.

Pursuant to Section 94<sup>3</sup>(1) the employer has an obligation to prevent mobbing, which is defined as: 'Every action or behaviour related to an employee or directed against an employee consisting of persistent and lengthy harassment or intimidation resulting in a decrease of his/her self-esteem (evaluation of professional capacities), as well as resulting in or aimed at humiliating or ridiculing an employee or isolating him/her from his/her work team (94<sup>3</sup>(2). An employee who suffers health problems as a result of mobbing may claim a relevant sum from the employer as cash compensation for the harm suffered (94<sup>3</sup>(3). An employee who terminates the employment contract as a result of mobbing shall have the right to claim compensation from the employer in the amount of at least the minimum remuneration for work. To this compensation the employee is entitled also when he has not incurred material damage'.<sup>516</sup>

Mobbing and discrimination, in particular in the form of ordinary harassment, seem to be similar. Both are humiliating for the employee, but in the event of mobbing all detrimental behaviour is unlawful, while in case the event of discrimination only the behaviour motivated by one or more legally protected grounds is unlawful. In addition, according to the Labour Code, mobbing consists of persistent and lengthy intimidation, while there is no such restriction in the event of harassment. In the event of mobbing, as opposed to discrimination, the burden of proof as to whether psychological violence has been used, is on the employee (according to the general rule), even if the employer claims that the employee's conduct is the source of conflict.

In this situation, it would seem that in cases where the conduct of the employer or another worker meets the criteria of both sexual harassment and mobbing, it would be more preferable to the employee to claim sexual harassment. Practice, however, proves otherwise: court cases involving mobbing are much more frequent than cases involving sexual harassment. They amount to several hundreds every year, although courts accept claims just as rarely as for cases of sexual harassment (only a few per cent).<sup>517</sup> The only explanation for the popularity of

<sup>513</sup> [www.wum.edu.pl/files/.../zarzadzenie\\_101-2008\\_zalacznik1.rtf](http://www.wum.edu.pl/files/.../zarzadzenie_101-2008_zalacznik1.rtf), accessed 20 August 2011.

<sup>514</sup> [www.uw.edu.pl](http://www.uw.edu.pl), accessed 20 August 2011.

<sup>515</sup> The amendments to the Labour Code were introduced by the Law of 14 November 2003 (Dz.U.2003, No. 213, item 2081).

<sup>516</sup> M. Gersdorf et al. *Kodeks pracy. Komentarz (Labour Code. Commentary)* Warsaw 2004, p. 70, p. 417.

<sup>517</sup> E.g. in 2009 there were over 500 such cases, in 34 cases of which the claim was entirely accepted. The statistical data are based on the information provided for by the Department of Statistics of the Ministry of

claims alleging mobbing seems to be that employees try to avoid involvement in court proceedings which may expose their sexual preferences, out of fear of secondary victimisation and reaction of their surroundings.

#### **4. Added value of antidiscrimination approach**

##### **4.1. Added value**

A consequence of the adoption of the EU definitions of sexual harassment and qualification of such behaviour as a form of sex discrimination, Poland has seen a significant extension of the scope of protection from such conduct and facilitation of pursuing claims. Before 2003, sexual harassment in Poland was treated as a violation by the employer of the obligation to respect the dignity and other personal goods of the employee. The respective provision was treated as a general rule of labour law and as such could not constitute an independent legal source (basis) for claims to be pursued by the employee (the employee only had the possibility to bring a civil-law case alleging violation of his personal goods, according to general provisions of civil law). For this reason, adding the regulations on sexual harassment to the chapter of the Labour Law on equal treatment has had a revolutionary effect on the facilitation of claims. Since then, all procedures and special measures provided for pursuing claims in discrimination cases can also be applied to cases of sexual harassment. The same can be said with regard to special measures provided for in the Antidiscrimination Law.

The most important ones are the possibility to obtain a minimum compensation for the harm suffered, without the need to prove the existence of the harm, as well as the reversed burden of proof, which has significant practical meaning in cases of unequal treatment due to a refusal to submit to sexual harassment. Important is also the new possibility for national courts to refer preliminary questions to the Court of Justice of the EU. The detailed definitions of sexual harassment have contributed to greater clarity for victims, lawyers and courts, resulting in improved understanding and easier detection of the phenomenon by the general public.

The introduction of provisions on sexual harassment into the Antidiscrimination Law has also resulted in distinguishing harassment with regard to sex as a specific type of harassment. Unfortunately, in Poland the other form of harassment is also treated as sexual harassment, which, in public opinion, has eliminated any differences between harassment of a sexual nature and harassment related to the sex of the victim.

##### **4.2. Pitfalls**

I see advantages rather than pitfalls to the non-discrimination approach to the combat of sexual harassment.

### **PORTUGAL – Maria do Rosário Palma Ramalho**

#### **1. General situation**

1.1. Portugal has transposed EU legislation on harassment on the ground of sex and sexual harassment both in the field of employment and in relation to equality in the access to and supply of goods and services. In both these areas, harassment and sexual harassment were not regulated at national level prior to the transposition of EU legislation.

1.2. In the field of employment, the issues of harassment and sexual harassment are the subject of academic reports,<sup>518</sup> conferences and other initiatives, also at academic level.<sup>519</sup>

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Justice, available on the website of the Ministry; <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010/>, accessed 15 August 2011.

<sup>518</sup> Please see the literature list in section 5 below.

<sup>519</sup> For instance, at the Faculty of Law of the University of Lisbon, under the academic supervision of Professor Doctor Maria do Rosário Palma Ramalho, a large seminar on the subject was organised in November 2004.

There are some statistics on the subject, but the results of these data are often contradictory and therefore uncertain.

1.3. There is some debate on these issues mainly in the employment area, and not only among the usual partners (employees, unions and employers) but also involving other partners, like medical doctors, psychiatrists and psychologists, due to the health implications that these subjects often involve. The media are also frequently interested in the topic and promote the debate.

The questions that seem to be more frequently discussed relate to the difference between sexual harassment and 'moral' harassment (mobbing), to the identification and proof of harassment, to the effects of those practices and to the possible reactions and means of defence of the worker against the harasser.

In contrast, to our knowledge the topic is rarely addressed in the area of goods and services.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### **2.1.1. Transposition**

The transposition of EU provisions on harassment into national legislation has been effected separately in the areas of employment, employment of civil servants, self-employment and access to and supply of goods and services.

In the employment area, EU provisions were initially transposed into the Labour Code of 2003, but the issue is now addressed in the new Labour Code, since 2009 (approved by Law No. 7/2009 of 12 February 2009 (Article 29).

In what regards civil servants, the transposition was effected into their specific legislation (*Lei do Contrato de Trabalho em Funções Públicas* – Law No. 59/2008 of 11 September 2008), in Article 15 of Part One.<sup>520</sup> Despite the fact that this legislation is not applicable in general to all civil servants, because not all of them have a labour contract, this specific provision as well as other provisions concerning equality apply to all civil servants, throughout Article 8(b) of the preliminary rules of Law No. 59/2008.

The issue of discriminatory harassment and sexual harassment is also addressed in the legislation concerning independent work, which transposed Directives 2000/43, 2000/78 and 2006/54 in this particular area: Law No. 3/2011 of 15 February 2011, Article 5 No. 5 and No. 6.

Finally, in the area of goods and services, the transposition of Directive 2004/113 into national legislation was effected by Law No. 14/2008 of 12 March 2008. The issue of harassment is addressed in Article 3(c) and (d) and in Article 4 No. 4.

The transposition of the provisions on harassment on the ground of sex and sexual harassment is, in general, in line with Directives 2006/54 and 2004/113/EC. There are some differences between the various national Acts, justified by the different scope of the provisions.

Regarding the specific transposition of Article 2(2)(a) of Directive 2006/54/EC, the Labour Code has a provision along the same lines: Article 25 No. 7 declares 'null and void any action that causes damage to an employee, in response to his/her rejection or submission to a discriminatory practice'. This provision has a broader scope than Article 2(2)(a) of the Directive but its relation to harassment is unclear due to the fact that the new Labour Code addresses harassment in a specific section of the provisions regarding equality and non-discrimination, and this provision is integrated in another section. In fact, this 'separate' approach to harassment issues in the new Labour Code creates several problems regarding the

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<sup>520</sup> This piece of legislation is divided into two parts. This specific issue is addressed in Part One.

extension of other provisions on equality and non-discrimination to discriminatory and sexual harassment.<sup>521</sup>

Where goods and services are concerned, Article 4 No. 3 of Directive 2004/113 has been specifically transposed into national legislation by Article 4 No. 4 (final part) of Law No. 14/2008.

### *2.1.2. Definitions*

The concepts of harassment and sexual harassment are defined in national legislation in line with the definitions given by Directive 2006/54 in Article 2(1)(c) and (d) and Directive 2004/113/EC in Article 2(c) and (d), with some small differences between them, and in some cases with a scope wider than the notions of the Directives.

In the employment area, these notions are addressed in Article 29 No. 1 and No. 2 of the Labour Code, and have a wider scope than the notion of Directive 2006/54, since this provision includes three forms of harassment: harassment in general (e.g. moral harassment or mobbing), harassment based on a discriminatory factor (including sex but also other discriminatory factors indicated in the law, such as age, race, disability, place of birth, religious or political convictions, etc.) and sexual harassment. In this context, the national definition is therefore not only in compliance with the Directive but even exceeds it.

In civil servant legislation, the definition of harassment is also wide, but not as wide as the one in the Labour Code, since it only includes two forms of harassment: harassment based on a discriminatory factor (including sex but also other discriminatory factors) and sexual harassment (Article 15 of Part One of Law No. 59/2008 of 11 September 2008).

In the area of goods and services, Law No. 14/2008 of 12 March 2008 deals with these notions in Article 3(c) and (d), but only considers harassment on the grounds of sex and sexual harassment, directly in line with Directive 2004/113.

Finally, where independent work is concerned, the law defines discriminatory harassment in general (on the ground of sex or on the ground of other discriminatory factors) and sexual harassment (Law No. 3/2011 of 15 February 2011, Article 5 No. 5 and No. 6, respectively).

With the exception of the last definition, all these notions refer both to the purpose and to the effect of violating the dignity of a person (although the potential differences between both forms of discrimination are not described in the law), so harassment can be unintentional under national legislation. Only in the context of independent work, the legal notions expressly mention that harassment must have the purpose of violating the dignity of the person, thus excluding unintentional harassment. Also, all definitions refer to the *unwelcome* nature of the harasser's behaviour.

Finally, all these definitions relate the notions of harassment and sexual harassment to the prohibition of sex discrimination, but in some of them this relation is more explicit (e.g. in the legislation regarding goods and services, where sex is the only discriminatory factor considered), while in other definitions this relation is less strong since harassment is also linked to other discriminatory factors or is even allowed in addition to discrimination (this is the case in the Labour Code).

### *2.1.3. Sexual harassment*

In national legislation sexual harassment is conceptualized as discrimination and not explicitly as sex discrimination (Law No. 3/2011 of 15 February 2011, Article 5 No. 5 and No. 6, for independent work; Law No. 14/2008 of 12 March 2008, Article 4 No. 4, for goods and services; Article 15 of the Part One of Law No. 59/2008 of 11 September 2008, for civil servants). Only in the Labour Code, the relation of sexual harassment with discrimination is not established clearly, due to the fact, indicated above, that the Labour Code deals with harassment in a different section of non-discrimination provisions.

Also, as indicated under 2.1.2., harassment based on sources of discrimination other than sex is also prohibited in employment, both in the private and in the public sector, and in independent work.

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<sup>521</sup> We will deal with these problems below.



#### *2.1.4. Scope*

The prohibition of harassment and sexual harassment at national level has the same scope as Directive 2006/54/EC in the sense that national legislation covers the areas of employment, access to employment, vocational training and promotion. However, this wide scope is clearer in civil servant legislation (Article 13 No. 1 and No. 2 of Part One of Law No. 59/2008 of 11 September 2008) than it is in the Labour Code, due to the systematic option of treating harassment separately from other discriminatory practices.

Where Directive 2004/113 is concerned, the scope of national legislation is also the same, e.g. granting protection against gender and sexual discrimination in access to and supply of goods and services.

On the other hand, if you take into consideration the several definitions of harassment in national law, as indicated under 2.1.2., the scope of the legal protection against harassment is wider at national level, since in some cases these definitions include not only harassment on the ground of sex and sexual harassment, but also harassment on the ground of other discriminatory factors and harassment in addition to discrimination.

#### *2.1.5. Addressee*

The addressee of the harassment and sexual harassment prohibition depends on context.

In the field of employment, the natural addressee of the norm is the employer, since the prohibition of discriminatory behaviour refers to him (Article 25 No. 1 of the Labour Code). This general prohibition imposed on the employer naturally extends to persons in managing positions or acting on the employer's behalf, since they represent the employer (vertical harassment).

However, since harassment is referred to in a general way by the Code (Article 29), harassment and sexual harassment by fellow workers cannot be excluded from the prohibition (horizontal harassment). The problem in the latter case would be to define to what extent the employer is obliged to protect a harassed employee from another employee (the harasser), but in our view this obligation can be sustained under the general duty of the employer to ensure good working conditions, both from a physical and from a moral point of view (Article 59 No. 1 b), as provided by the Portuguese Constitution and Article 127 No. 1 (c) of the Labour Code).<sup>522</sup>

In the area of self-employment the addressee is the creditor of the work (Article 5 No. 5 of Law No. 3/2011 of 15 February 2011).

In relation to goods and services, the prohibition of harassment is also stipulated in a general way, where the addressee is the person who provides the services/goods (Article 3 (c) and (d) and Article 4 No. 4 of Law No. 14/2008 of 12 March 2008).

#### *2.1.6. Preventive measures*

Article 26 of Directive 2006/54/EC on preventive measures has not been explicitly transposed into national legislation. Nevertheless, the Labour Code has rules that intend to prevent discriminatory practices in general, and these rules should be interpreted as including harassment (e.g. Article 492 No. 2, stating that collective agreements should deal with equality issues).

I have no knowledge of examples of measures taken by employers in order to prevent harassment and sexual harassment and this topic is also not common in collective agreements (nation-wide or other).

Article 4 of the Framework Agreement on harassment and violence at work (2007), has not been specifically implemented in my country, but, as indicated under 2.1.5., the employer has a general duty to ensure good working conditions for the employees, both from a physical and from a moral point of view (Article 59 No. 1 b), as provided by the Portuguese Constitution and Article 127 No. 1 (c) of the Labour Code). Therefore, the employer is obliged to prevent violent behaviour and to ensure a peaceful environment at the workplace.

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<sup>522</sup> These considerations also apply to civil servants, since their specific legislation includes the same rules.



### 2.1.7. Procedures

In case of alleged harassment or sexual harassment in employment, the victim can follow several procedures: present a claim directly to the employer in case of harassment perpetrated by a fellow worker (horizontal harassment) or harassment perpetrated by a superior worker; start a complaints procedure before the Labour Inspection Services<sup>523</sup> (administrative services under the responsibility of the Employment Minister), directly or with the help of the union or the works council; start an advisory procedure before the Agency for Equality in Employment,<sup>524</sup> which can subsequently be redirected to the Labour Inspection Services; start a judicial procedure for the purposes of damage compensation (Article 28 and Article 29 No. 3 of the Labour Code).

Where self-employment is concerned, harassment or sexual harassment give a right to damage compensation. The law also considers any discriminatory action attached to this behaviour as null and void (Article 6 No. 1 and No. 2 of Law No. 3/2011 of 15 February 2011).

In the area of goods and services, harassment and sexual harassment give a right to damage compensation and to a change of contract, in order to restore equality (Article 10 No. 1 and 3 and Article 11 No. 2 of Law No. 14/2008 of 12 March 2008). This procedure is judicial or arbitral, depending on the choice of the parties (Article 8 of Law No. 14/2008 of 12 March 2008).

### 2.1.8. Burden of proof

The question of the burden of proof in case of harassment or sexual harassment must be addressed separately for employment, self-employment and the area of goods and services.

In the area of self-employment and in the area of goods and services, the law explicitly establishes the reversal of the burden of proof, stating that the victim of a discriminatory practice only needs to indicate the factual elements that support the alleged discrimination and the other party must prove the absence of discrimination (Article 7 of Law No. 3/2011 of 15 February 2011, regarding non-discrimination in self-employment, and Article 9 of Law No. 14/2008 of 12 March 2008, regarding non-discrimination in access to and supply of goods and services). Since, in these two areas, harassment and sexual harassment are explicitly identified as discriminatory practices, this special burden of proof rule applies directly to harassment.

The same goes for harassment in employment of civil servants, since the legislation in this area is exactly the same (Article 14 No. 3 of Part One of Law No. 59/2008 of 11 September 2008).

In contrast, in relation to employment in the private sector (regulated by the Labour Code), this question is not so simple, due to the option in the Labour Code, described above, to deal with harassment outside discrimination rules and in a separate section. Therefore, since the special rule regarding the reversal of the burden of proof is integrated in the section of the Code that is dedicated to discriminatory practices (Article 25 No. 5), it can be argued that this rule does not apply to harassment, which is treated elsewhere. This interpretation, which can easily be sustained using the argument that exceptional rules (and, of course, a rule establishing the reversal of the burden of proof is exceptional) cannot extend beyond their original scope, is, in our view, contrary to EU legislation, at least in the case of harassment based on gender and sexual harassment. In this context, the least we can say is that the option of the Labour Code to treat harassment in a separate section gives ground for doubt and may result in incorrect interpretation of national legislation.

The described situation, in addition to the natural fear of victimization, would certainly deter people from filing a complaint, because harassment is very hard to prove. National legislation does not address these specific problems.

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<sup>523</sup> *Autoridade para as Condições de Trabalho.*

<sup>524</sup> *Comissão para a Igualdade no Trabalho e no Emprego.*

### *2.1.9. Remedies and sanctions*

#### *a) Employment*

The remedies and sanctions for the addressee in the event of discriminatory and sexual harassment may be of a civil, administrative or criminal nature, depending on the nature of the harassment.

The harasser/employer has civil responsibility, and can be ordered by a court to pay damage compensation (Article 28 and Article 29 No. 3 of the Labour Code), but he can also receive a fine, imposed by the Labour Inspection Services (Article 29 No. 3 of the Labour Code).

Horizontal harassment (where the harasser is a fellow worker), is a disciplinary fault in the sense that all employees have the legal duty to respect their fellow employees (Article 128 No. 1 a) of the Labour Code). Therefore, disciplinary measures against the harasser worker may be taken by the employer. Among these disciplinary sanctions, transfer to other work is not allowed, since transfer cannot be used as a disciplinary tool under national legislation; on the contrary, disciplinary dismissal can only take place if the employer proves that the conduct of the worker was a serious offence.

As far as the victim is concerned, payment of damage compensation is provided for (Article 28 and Article 29 No. 3 of the Labour Code), but not the transfer of the worker (at least not without the employer's agreement). In case the victim prefers to leave, the termination of the labour contract on this ground also gives a right to damage compensation (Article 394 No. 2 (b) and (f) and Article 396<sup>o</sup> No. 1 of the Labour Code).

The solutions are the same for employment in the public sector.

Where independent employment is concerned, harassment or sexual harassment give a right to damage compensation and any discriminatory action attached to this behaviour is considered null and void (Article 6 No. 1 and No. 2 of Law No. 3/2011 of 15 February 2011).

Harassment on the ground of sex and sexual harassment are not a criminal offence as such. However, some forms of related behaviour can be a criminal offence that falls under the Criminal Code. For instance, harassment can also constitute a crime of menace against physical integrity, personal freedom or sexual liberty (Article 153 of the Criminal Code), a crime of compulsion of a person into performing an unwanted action or to submit that person to an unwanted activity (Article 154), a crime of sexual compulsion (Article 163 of the Criminal Code) or a crime of rape (Article 164). In these cases, criminal procedure is independent from other procedures.

#### *b) Supply of goods and services*

In this area, harassment or sexual harassment gives a right to damage compensation and to a change of contract, in order to restore equality (Article 10 No. 1 and 3 and Article 11 No. 2 of Law No. 14/2008 of 12 March 2008).

A fine can also be imposed on the perpetrator of discriminatory harassment in this area (Article 12 of Law No. 14/2008 of 12 March 2008).

### *2.1.10. Compliance with EU law*

In my view, national legislation is generally in compliance with EU law.

Nevertheless, two negative remarks are in order regarding harassment in private employment, due to the systematic option of the new Labour Code to consider this topic separately from the other provisions regarding discrimination.

The first remark concerns the prohibition of harassment, which is far from clear in the law. In fact, this prohibition only appears in the title of Article 29 of the Code and does not become clear from its text, therefore it is not adequately established. Of course, correct interpretation of this provision will overcome this lack of clarity, but this point should be clearer.

The second remark is to underline that the option of considering harassment separately from the provisions regarding discrimination raises serious doubts about the possible application to harassment of some provisions on discrimination, although we think that this option of the Code does not prevent the extension of these rules, since it is possible to

overcome it by an integrated interpretation of the rules. In short, the legal system should be clearer on this point.

#### *2.1.11. Additional information*

We have no additional information.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

There is some case law and also some equality bodies' decisions regarding harassment and/or sexual harassment.

In relation to equality bodies, we underline the role of the public Agency for Equality in Employment, which receives complaints and makes recommendations on these issues. These recommendations are public.<sup>525</sup> Some examples of the last two years are a recommendation regarding harassment of a breastfeeding worker (in 2011) and another one regarding moral harassment of a worker after a court decision annulling a dismissal and ordering the employer to reemploy the worker (in 2010).<sup>526</sup>

#### *2.2.2. Main features of case law*

There is some case law on harassment in the area of employment, which mostly deals with questions related to moral harassment (mobbing), with or without discriminatory grounds, and more rarely with sexual harassment.

The questions most frequently discussed are the following: the notions of harassment and mobbing<sup>527</sup>; the system of proof and the extension of the specific rule of the reversal of the burden of proof to non-discriminatory harassment, which is denied by the courts<sup>528</sup>; the qualification of harassment perpetrated by a fellow worker or by a superior worker against another worker as a serious offence and proper cause for dismissal<sup>529</sup>; the difference between mobbing and accident at work or professional illness, where the courts emphasize the intent or the effect of affecting the dignity of the worker or creating a hostile environment for him/her as a requirement of moral harassment.<sup>530</sup>

As concrete examples of harassment and sexual harassment, we can find various practices – for instance, sexual verbal or physical approaches of women at work (qualified by the courts as sexual harassment), or the withdrawal of a worker from his/her post to a lonely workplace together with the abrupt and unjustified withdrawal of tasks or the attribution of new but less dignified tasks (qualified by the courts as moral harassment or mobbing, with or without discriminatory ground).

#### **b) Goods and services**

In this area, we found no case law.

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<sup>525</sup> [www.cite.gov.pt](http://www.cite.gov.pt), accessed 1 September 2011.

<sup>526</sup> Recommendation No. 47/CITE 2011, Proc. No. 970-QX/2010; Advice No. 17/CITE/2010, Proc. No. 701-QX/2009, on [www.cite.gov.pt/pt/pareceres2011.html](http://www.cite.gov.pt/pt/pareceres2011.html) and [www.cite.gov.pt/pt/pareceres2010.html](http://www.cite.gov.pt/pt/pareceres2010.html), accessed 1 September 2011.

<sup>527</sup> E.g. Decision of the Court of Appeal of Porto of 7 July 2008 (Proc. No. 08122166), and Decision of the Court of Appeal of Lisbon of 9 May 2007 (Proc. No. 1254/2007-4), both on [www.dgsi.pt](http://www.dgsi.pt), accessed 1 September 2011.

<sup>528</sup> E.g. Supreme Court of Law of 21 April 2010 (Proc. No. 1030/04.4.TTPRT.S1), on [www.dgsi.pt](http://www.dgsi.pt), accessed 1 September 2011.

<sup>529</sup> E.g. Supreme Court of Law of 3 December 2003 (Proc. No. 03S2944), and of 7 July 1993 (Proc. No. 003709), as well as the Decision of the Court of Appeal of Lisbon of 8 January 1977 (Proc. No. 0001854), all on [www.dgsi.pt](http://www.dgsi.pt), accessed 1 September 2011.

<sup>530</sup> E.g. Supreme Court of Law of 13 January 2010 (Proc. No. 1466/03.2.TTPRT.A1), and Decision of the Court of Appeal of Porto of 10 March 2008 (Proc. No. 0716615), both on [www.dgsi.pt](http://www.dgsi.pt), accessed 1 September 2011.

### *2.2.3. Dignity*

In case law we found no references to the definition of ‘dignity’ or to how ‘dignity’ should be interpreted for the purposes of harassment and sexual harassment questions

### *2.2.4. Restrictions*

We are not aware of case law showing clashes between the prohibition of harassment/sexual harassment and human rights and constitutional rights. In fact, the Portuguese Constitution considers the right to privacy as a fundamental right (Article 26 No. 26), but this right must be compatible with other fundamental rights in the Constitution that can be called upon and that have implications for harassment (e.g. the right to dignity, the right to equality and non-discrimination, the right to physical and moral integrity and the right to adequate and safe working conditions – Article 13, No. 1 and 2, Article 25 No. 1, Article 26 No. 2, and Article 59 No. 1 (b) and (c) of the Constitution).

### *2.2.5. Role of equality bodies*

Equality bodies can take initiatives and initiate cases regarding harassment.

In the area of employment, the Commission for Equality in Employment<sup>531</sup> publishes regular surveys and published a Code of Practice on Harassment at the Workplace a long time ago.

Also, in the area of goods and services, NGOs related to non-discrimination, women’s rights or relevant collective interests have the legal right to initiate cases to defend their interests in this area (Article 11 of L. No. 14/2008 of 12 March 2008).

### *2.2.6. Additional information*

We have no additional information on this topic.

## **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

### *3.1. National provisions*

As indicated under 2.1.2. with respect to the field of employment, the legal provision regarding harassment (Article 29 No. 1 and No. 2 of the Labour Code) is not limited to discriminatory and sexual harassment but also includes harassment in general, which is usually identified with moral harassment or mobbing, regardless of the cause. This form of harassment is, in practice, much more frequent than discriminatory harassment.

### *3.2. Collective agreements*

We have no knowledge of national (or sectoral) collective agreements aimed at combating harassment in employment.

### *3.3. Additional measures*

We have no knowledge of any other relevant measures taken outside the framework of anti-discrimination law with relation to harassment.

### *3.4. Harassment and stress at work*

It is, in fact, difficult to distinguish harassment from stress at work in some instances and in certain working environments, not so much in the case of sexual harassment, which is more visible, but in the case of moral harassment or mobbing (on grounds of a discrimination factor or in addition to discrimination), because this kind of behaviour is continuous, insidious and can be developed in many different ways.

Our experience in this area is that whenever an allegation of moral harassment in employment is made by the worker, the usual response of the employer is that it is only stress, and, quite often, in the initial stage of these practices the victim himself/herself tends to

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<sup>531</sup> *Comissão para a Igualdade no Trabalho e no Emprego.*

identify the situation as stress and goes to see the doctor before the lawyer. This is the reason why the issue of harassment is also a medical concern.

### **3.5. Additional information**

We have no additional information on this topic.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

In my view, the added value of defining harassment on the ground of sex and sexual harassment as discrimination in relation to other provisions related to harassment is twofold.

On the one hand, this approach contributes to making harassment more visible than it was before, because of the obligation to transpose discrimination directives in this area as well. Portugal is a good example of this result, since we have some tradition concerning gender equality legislation (our first legislation in this area is from 1979, before becoming a member of the EU), but only after Directive 2002/73 harassment was taken seriously and the prohibition of such practices was established in the law. In this sense, I also agree with the idea that the definition of sex and sexual harassment as discrimination contributes to providing greater access to justice for individuals and more clarity on the subject for victims, lawyers and courts.

On the other hand, defining harassment on the ground of sex and sexual harassment as discrimination has made it possible to extend to this context all the legal rules that were already in place for other discriminatory practices, such as prevention rules, damage compensation rules and, above all, the rule on the reversal of the burden of proof, which is of the utmost importance, due to the difficulties in demonstrating harassment.

Of course, in cases of harassment in addition to discrimination, these advantages do not stand, since these rules are not applicable, so there is a strong advantage here.

### **4.2. Pitfalls**

In my view, following a non-discrimination approach to combat harassment on the ground of sex and sexual harassment would not be advantageous due to the more favourable rules applicable in the discrimination approach, as indicated above under 4.1.

## **ROMANIA – Roxana Teșiu**

### **1. General situation**

Sexual harassment in Romania is not a topic of public debate or a topic considered to be a subject of specific action or public policy measures. Research on the topic is rather isolated. When analysed, sexual harassment tends to appear as a topic within more extensive research dedicated to gender equality and/or equal opportunities fields, but it is relatively rarely approached as a topic itself.

There are no recent reports or statistics on the subject. Most initiatives of non-governmental organisations implemented using structural funds<sup>532</sup> to a large extent address the broader areas of gender equality, equal opportunities or gender discrimination. Following these broad areas, specific small projects may be identified, oriented towards offering data on sexual harassment. One of the largest initiatives that could be considered as following a consistent approach on sexual harassment as a distinct research topic, which was largely promoted in Romanian mass media, was implemented by the Centre for Partnership and

<sup>532</sup> <http://www.altfem.ro/>, accessed 6 September 2011.

Equality in 2007.<sup>533</sup> This study was conducted at a national urban level and targeted the extent to which participants were able to identify various types of behaviour as representing situations of sexual harassment and the extent to which they had been involved in a situation of sexual harassment at the workplace. According to the survey findings, 12.3 % of the participants responded that they had experienced a form of sexual harassment. Based on the age group, persons belonging to the age group of 18 to 29 reported the highest incidence of sexual harassment at the workplace (one fifth of the participants in the respective age group). The most frequent form of sexual harassment indicated by the survey respondents was the one based on behaviour with a sexual connotation. One year later, the initial research initiative was continued and developed into a new approach designed to take the sexual harassment topic to a more practical level.<sup>534</sup> Thus, the Centre produced a number of materials intended to improve the management of dysfunctional relations at the workplace. These materials are aimed at helping specialists in human resources who are running Human Resources Departments to assess whether their organisation is healthy<sup>535</sup> and to calculate the costs to the company of dysfunctional relationships such as sexual harassment. The initiative itself was run in 2007 and represented a benchmark in Romania, in the sense that it moved the emphasis from sexual harassment being studied as a legal reality towards linking it to concrete aspects of organisational behaviour.

All the above initiatives cover the topic of sexual harassment present in the field of employment. However, no information could be found with regard to sexual harassment with regard to the areas of self-employment, and access to and supply of goods and services.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The legal provisions on harassment on the ground of sex and sexual harassment in Directives 2006/54 and 2004/113/EC have been adequately transposed into Romanian national legislation. The transposition is realized through two main laws: the Anti-Discrimination Law<sup>536</sup> and the 202 of 2002 Equal Opportunities Law.<sup>537</sup> Article 2(2)(a) of Directive 2006/54/EC has been specifically transposed.

#### *2.1.2. Definitions*

Article 2(5) of the Anti-Discrimination Law defines harassment as ‘any behaviour on grounds of race, nationality, ethnic origin, language, religion, social status, beliefs, gender, sexual orientation, belonging to a disadvantaged group, age, disability, refugee or asylum seeker status or any other criteria, which leads to establishing an intimidating, hostile, degrading or offensive environment’. The definition as provided does not particularly refer both to the purpose or effect of violating the dignity of a person.

The concept of harassment is also provided for in the Equal Opportunities Law. Article 4(c) stipulates that harassment represents ‘any undesirable gender-based behaviour, with the purpose or effect of negatively affecting the dignity of a person and to create a degrading, intimidating, hostile, humiliating or offensive environment’.

Furthermore, a specific definition of sexual harassment is provided by the Equal Opportunities Law in Article 4(d) as ‘any undesirable sex-related behaviour expressed in a

<sup>533</sup> Centre for Partnership and Equality, Sexual Harassment at the Workplace. research report, Bucharest 2007, [http://www.cpe.ro/romana/index.php?option=com\\_content&task=view&id=27&Itemid=48](http://www.cpe.ro/romana/index.php?option=com_content&task=view&id=27&Itemid=48), accessed 5 September 2011.

<sup>534</sup> [www.hartuiresexuala.ro](http://www.hartuiresexuala.ro), accessed 6 September 2011.

<sup>535</sup> <http://www.hartuiresexuala.ro/companii.html>, accessed 6 September 2011.

<sup>536</sup> Governmental Ordinance No. 137 of 31 August 2000 on preventing and combating all forms of discrimination, republished in the Official Gazette No. 99 of 8 February 2007.

<sup>537</sup> Law No. 202 of 2002 on equal opportunities and equal treatment between men and women, republished in the Official Gazette No. 150 of 1 March 2007.

verbal, nonverbal or physical manner with the purpose or effect of negatively affecting the dignity of a person and to create a degrading, intimidating, hostile, humiliating or offensive environment'. Broadly, these definitions as provided for by the Equal Opportunities Law correspond with the definitions given by Directive 2006/54 in Article 2(1)(c) and (d), and Directive 2004/113/EC in Article 2(c) and 2(d). The element of 'unintentional' behaviour, however, is not specifically included in Romanian legislation, but only the element of 'unwanted' behaviour. The 'unintentional' behaviour can only be detected indirectly, as the definitions make reference to the 'purpose or effect'.

The national legal provisions defining the concepts of 'harassment' and 'sexual harassment' contain the distinctions regarding the reference to gender-based behaviour in the case of harassment and sex-related behaviour in the case of sexual harassment.

The Equal Opportunities Law in Article 4(g) provides that 'sex-based discrimination shall be understood as direct and indirect discrimination, harassment and sexual harassment of a person by another person, at the workplace or in any other place where that person performs activities'.

#### *2.1.3. Sexual harassment*

As provided by Article 4(d) of the Equal Opportunities Law, sexual harassment is defined as sex-related behaviour. Consequently, sex-related behaviour can cover other grounds of discrimination such as age and race, although these are not specifically governed by the same legal provision. So far, such an interpretation has not been specifically mentioned or discussed.

#### *2.1.4. Scope*

According to Article 2 of the Equal Opportunities Law, its provisions are applicable to the fields of labour, education, health, culture and public information, politics, decision making, access to and supply of goods and services, as well as to any other field regulated by special laws. Furthermore, as per the provisions of Article 3, the Law is not applicable to religious cults. Hence, the scope of Romanian national legislation is broader than the one provided for by Directives 2006/54/EC and 2004/113/EC.

Article 3 of the Anti-Discrimination Law stipulates that 'The provisions of the ordinance herein shall be applicable to all public and private, natural or legal entities, as well as to public institutions with competencies in the following fields:

- a) employment conditions, conditions and criteria for recruitment and selection, criteria for promotion, access to all forms and levels of professional orientation and professional training;
- b) social protection and social security;
- c) public services or other services, access to goods and facilities;
- d) the education system;
- e) freedom of movement;
- f) enforcement of public peace and public order;
- g) any other fields of social life.'

#### *2.1.5. Addressee*

The national legal framework as provided for by the Anti-Discrimination Law or the Equal Opportunities Law does not specify the addressees of the harassment and sexual harassment prohibition. Definitions of the concepts of 'harassment' and 'sexual harassment' only cover 'a person' acting against another person. Article 39(1) of the Equal Opportunities Law, however, mentions that 'Employees are entitled, whenever they consider themselves to be discriminated against based on gender, to file notifications or complaints to the employer or against it, if the latter is directly involved, and to request the support of the trade union or the employees' representatives in the company to settle their situation at the workplace.'

### 2.1.6. Preventive measures

According to the provisions of Article 8(1) of the Equal Opportunities Law, ‘Employers have the obligation to ensure equal opportunities and treatment of employees, women and men, within labour relations of any kind, including by introducing provisions in the in-service rules and regulations of companies, that forbid discrimination.’ Furthermore, Article 8(2) stipulates that ‘Employers have the obligation to regularly inform employees, including by posters in visible places, on their rights with respect to the observance of equal opportunities and equal treatment between women and men in employment relations.’

In addition, provisions of Article 242(b) of the Labour Code<sup>538</sup> provide that there has to be a minimum structure of ‘in-service rules and regulations’,<sup>539</sup> which is a mandatory document at the employer’s level. The minimum structure has to contain provisions with at least the rules on enforcing the non-discrimination principle. The existence and enforcement of the in-service rules and regulations at the employer’s level are mandatory items during the checks performed by the labour inspectorates. Hence, it could be construed that by law all employers are obliged to structure and enforce the in-service rules and regulations and to promote the principle of equal opportunities and non-discrimination among employees as one of the fundamental principles for organising internal social relations in the organisation.

### 2.1.7. Procedures

The specific complaints procedures available to persons in the event of alleged harassment or sexual harassment cases are provided for by the Anti-Discrimination Law. These are applicable to the employment field, as well as to access to good and supply of services areas.

In the event of an alleged act of discrimination, the victim of discrimination or any person interested can choose between filing a complaint with the National Council for Combating Discrimination (NCCD), and/or filing a civil complaint for civil damages with a court of law, unless the act is criminal and in such a case the Criminal Code provisions apply.

According to Article 20(1) of the Anti-Discrimination Law, ‘The person, who under the terms of this law considers himself/herself discriminated against, may file a complaint at the National Council for Combating Discrimination not later than one year from the date when such act was committed or from the date on which the victim could have acknowledged that such act was committed’. Furthermore, Article 20(2) provides that the NCCD should handle this petition through a the Steering Board Decision. Based on the complaint submitted under the circumstances of Paragraph (1), the person who considers that he/she has been discriminated against has the right to claim the removal of the consequences of discrimination and the reinstatement into the situation existing before the discriminatory act happened.

The Equal Opportunities Law also provides for a specific complaints procedure applicable to sex-based discrimination. According to the provisions of Article 39(1) employees are entitled, whenever they consider themselves to be discriminated against based on gender, to file notifications or complaints with the employer or against it, if the latter is directly involved, and to request the support of the trade union or the employees’ representatives in the company to settle their situation at the workplace. If such notification/complaint is not settled at company level through mediation, the employee who submits factual elements that lead to the assumption of direct or indirect gender-based discrimination in the field of labour is entitled, under this law, to send the notification/complaint to the competent authority or to file a complaint with the qualified court of law. The qualified court of law addresses such complaints through the departments specialized in labour conflicts and litigation located in the area in which the employer or the perpetrator carry out their activity, but not later than a year from the date when the discriminatory act has been committed.

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<sup>538</sup> Labour Code Law No. 53 of 24 January 2011, republished in the Official Gazette No. 345 of 18 May 2011.

<sup>539</sup> ‘In-service rules and regulations’ represent the fundamental mandatory document required under the Labour Code aimed to establish the rules of organization and functioning of all employers in Romania. By law, such a document has to have a minimum required structure. In-service rules and regulations are structured and adopted at the employer’s level based on the consultation of the union or the employees’ representatives appointed following the legal provisions that regulate the area of social dialogue.



#### *2.1.8. Burden of proof*

The amendments to the Romanian Anti-Discrimination Law introduced the concept of 'sharing the burden of proof.' According to the provisions of Article 20 (6) and Article 27(4) 'the interested person has the obligation of proving the existence of facts which allow to presume the existence of direct or indirect discrimination and the person against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination.' These legal provisions regarding the burden of proof refer to cases of direct and indirect discrimination. Although not completely in compliance with the provisions of Article 8 Directive 2000/43 and Article 10 Directive 2000/78, the provisions on the burden of proof represent a significant step forward in the context of the extremely conservative Romanian civil procedure under which the general rule is that the burden of proof is on the applicant.

#### *2.1.9. Remedies and sanctions*

Article 42(1) of the Equal Opportunities Law provides that the court of law can order the guilty party to pay damages to the person who considers him/herself to be discriminated against based on gender, to an amount reflecting the suffered prejudice. The amount of damages will be set by the court according to applicable law.

The employer reintegrating in the company or at the workplace a person on the basis of a definitive court decision, is obliged to pay any remuneration lost due the unilateral modification of the labour conditions or labour relations, as well as all contributions to the state budget and to the state social insurance budget due by both employer and employee. If the reintegration in the company or at the workplace is not possible for the person regarding whom the court decided that the labour conditions or labour relations were unilaterally modified, the employer shall pay to the employee damages equal to the real prejudice suffered by the employee. The amount of damages will be determined by the court according to applicable law.

#### *2.1.10. Compliance with EU law*

The currently enforced national legislation with regard to harassment and sexual harassment is compliant with EU law.

#### *2.1.11. Additional information*

While national legislation is compliant with EU law, there is a lack of understanding on the part of the recipients of the law with regard to the set of rights under the law, as well as with regard to corrective measures. The abolishment of the National Agency on Equal Opportunities (NAEO) as the main body implementing equal opportunities legislation is little known in public sources of information. While many of the websites of the non-governmental organisations that offer information and aim to educate the public on the legal aspects of equal opportunities and gender equality, as well as about the enforcement mechanisms, still include references to the NAEO, which information is no longer accurate.

There seems to be a gap between the currently enforced legal framework and implementation bodies with regard to equal opportunities and anti-discrimination on the one hand, and the existence of a certain type of public information on such aspects on the other hand. Even the website of the Minister of Labour, Family and Social Protection still includes references to the NAEO<sup>540</sup> as an implementation body for equal opportunities legislation, thus offering misleading information to those interested in reading and finding more information on legal remedies in cases of gender-based discrimination. Systematic public information and campaigns on offering clear information on the anti-discrimination bodies, their role, mandate, and structure, as well as the legal remedies available, are absolutely essential initiatives for a proper implementation of the law.

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<sup>540</sup> <http://www.mmuncii.ro/ro/601-view.html>, accessed 1 September 2011.

## 2.2 Case law

### 2.2.1. National courts and equality bodies

For courts, no case law could be found on harassment or sexual harassment, despite the fact that the mass media have recently made public some information with regard to such cases. With regard to decisions issued by the NCCD on gender criteria, we found two such decisions under the respective website section<sup>541</sup> dating back to 2008. Furthermore, for the year 2010, the NCCD has available on its portal a number of decisions related to discrimination cases on various grounds, including one decision on sexual harassment based on Article 2(5) of the Anti-Discrimination Law. The perpetrator received a fine amounting to EUR 465 for violating the relevant provisions.

In the first six months of 2011, according to the information posted on the website of the NCCD, there have been no relevant decisions on cases of discrimination related to sexual harassment.<sup>542</sup>

### 2.2.2. Main features of case law

In Romania, case law on harassment and sexual harassment is hardly available, which makes it impossible to describe the main features of national case law on harassment on the ground of sex and sexual harassment. Also, there are no details to be provided on the most relevant situations that are considered to constitute harassment and sexual harassment.

### 2.2.3. Dignity

The definitions of harassment and sexual harassment are related to ‘dignity’. However, there is no case law defining ‘dignity’ or how ‘dignity’ should be interpreted in this context.

### 2.2.4. Restrictions

There is no case law which shows clashes between the prohibition of harassment/sexual harassment on the one hand, and human rights and constitutional rights on the other hand.

### 2.2.5. Role of equality bodies

The NCCD has not taken any action or initiated any cases regarding harassment based on sex or sexual harassment.

### 2.2.6. Additional information

While Romanian legislation has adequately transposed the EU directives with regard to harassment based on sex and sexual harassment and, in some areas, provides for broader coverage than the EU directives,<sup>543</sup> the level of enforcement through specific case law is extremely low, or almost non-existent.

## 3. Harassment and sexual harassment outside the framework of anti-discrimination law

### 3.1. National provisions

The Romanian Criminal Code<sup>544</sup> includes sexual harassment as a criminal offence. Article 203<sup>1</sup> defines sexual harassment only with regard to the existence of a relation of subordination between the perpetrator and the victim in the area of employment. The action of harassing a person using threats, with the purpose of obtaining sexual advantages, by a person that abuses his/her authority or influence at the workplace shall be punished by imprisonment of 3 months to 2 years, or a fine.

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<sup>541</sup> <http://www.cncd.org.ro/hotarari/Criterii-3/Gen-9/>, accessed 2 September 2011.

<sup>542</sup> <http://www.cncd.org.ro/noutati/Buletin-de-jurisprudenta/Hotarari-de-constatare-a-cazurilor-de-discriminare-adoptate-in-prima-jumatate-a-anului-118/>, accessed 2 September 2011.

<sup>543</sup> E.g. the scope.

<sup>544</sup> The Criminal Code has been significantly modified by Law No. 202 of 2010, published in the Official Gazette No. 714 of 26 October 2010.

### **3.2. Collective agreements**

Recently, Romania has adopted the Law on Social Dialogue<sup>545</sup> that introduced significant changes to the social dialogue framework. Among the novelties introduced by the Law on Social Dialogue, the most significant ones refer to the changes to the criteria for the trade unions to be represented at employer's level, thus enabling them to negotiate collective bargaining agreements. Another change refers to the abolition of the concept of 'collective bargaining agreement applicable at national level'. As per the provisions of the Law on Social Dialogue, there are no references to principles of equal opportunities and equal treatment being included in the negotiation of collective agreements applicable at employer level or branch level.

With regard to collective agreements, provisions of Article 14 of the Equal Opportunities Law stipulate that 'In order to prevent gender-based discrimination, actions in the field of employment (...) when negotiating the collective labour agreement applicable at company level, the contracting parties will include clauses prohibiting discriminatory acts and, respectively, clauses on the manner of solving the allegations/complaints filed by persons affected by such acts.'

### **3.3. Additional measures**

There are no other relevant measures taken outside the framework of anti-discrimination law in Romania.

## **4. Added value of anti-discrimination approach**

### **4.1. Added value**

Romania certainly has a strong and complex national legal framework on anti-discrimination and equal opportunities. Unfortunately, this strong legal framework is not aligned with the main objective of addressing cases of sexual harassment, thus failing to lead to appropriate implementation and real effectiveness.

## **SLOVAKIA – Zuzana Magurová**

### **1. General situation**

Part of the European antidiscrimination legislation was gradually transposed into labour legislation. An important milestone was the adoption of the so-called 'Harmonization Amendment'<sup>546</sup> to the Labour Code in 2003, which for the first time introduced definitions of direct discrimination, indirect discrimination and harassment.

The transposition process should have been completed by the adoption of the Antidiscrimination Act<sup>547</sup> in the year 2004. The process of adoption of this comprehensive Act was very complicated and lengthy, accompanied by unwillingness of the political parties and Government to approve it. The greatest dispute about whether to include sexual harassment or not was conducted during the adoption of the Act.

Following the adoption of the Antidiscrimination Act the terminology in the Labour Code was changed: the 'prohibition of discrimination' was replaced by the 'principle of equal treatment'. The legal definitions of direct and indirect discrimination and harassment were removed from the Labour Code, because they are now contained in the provisions of the Antidiscrimination Act.

The Antidiscrimination Act provides the general framework for the application of the principle of equal treatment in public and private relationships and it stipulates the legal

<sup>545</sup> Law No. 62 of 10 May 2011 on social dialogue, published in the Official Gazette No. 322 of 10 May 2011.

<sup>546</sup> Act No. 210/2003 Coll. amending Act No. 311/2001 Coll. Labour Code.

<sup>547</sup> Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on the amendment of certain acts (Antidiscrimination Act).

remedies in the event of violation of this principle. The Antidiscrimination Act regulates direct discrimination, indirect discrimination, harassment, instruction to discriminate, incitement to discriminate and victimisation and, following the second amendment, in effect since April 2008, also sexual harassment. The adoption of the legislation relating to sexual harassment was rather regarded as a necessary evil, required by the harmonization process, or as something redundant.

In 2006, the first (and only known) representative study in the area of harassment and sexual harassment in the workplace was conducted. It was ordered by the Department of Family and Gender Policy of the Ministry of Labour, Social Affairs and Family and was carried out by Institute for Labour and Family Research on a sample of 1,041 respondents. The study showed that more than 66 % of the working population in Slovakia had been exposed to some type of sexual harassment. Women are exposed to sexual harassment much more often than men. The most frequently indicated initiators of sexual harassment were men – colleagues working in the same work position, sexual harassment by a supervisor occurred in approximately 17 % of the cases. The three most common forms of sexual harassment are sexual jokes, comments of a sexual nature and inappropriate addressing; however, physical contacts (intimate touching and unwelcome familiarities) also occur quite often.

The research report<sup>548</sup> is focused on findings regarding the most frequently experienced forms of sexual harassment, working position of harassers and reactions of victims. Attitudes to sexual harassment of the working population, its reasons and types of prevention are complementing parts of findings about the phenomenon of sexual harassment in Slovakia. The study is concluded by presenting examples of good practices of prevention and elimination of sexual harassment in the workplace.

The next research report<sup>549</sup> related to this representative study deals with interference of mobbing and sexual harassment of women and with tolerance of this phenomenon in society. The analysis of cases is the focus of the procedure and solution of the cases, its type and manifestation and on the type of workplace. Cases published in the media are examples of how sexual harassment is covered in the media. The closing part of the report consists of measures for prevention and elimination at political, institutional and individual levels.

The most recent is the study on good practices in non-discrimination, presenting examples of sexual harassment and published in 2010 by the Slovak National Centre for Human Rights.<sup>550</sup>

In the years 2005-2007, the non-governmental organisation Women's Association of Slovakia in cooperation with the Commission for Gender Equality in the Confederation of Trade Unions implemented a project entitled Sexual Harassment in the Workplace.

The prohibition of sexual harassment and harassment at work is contained in the National Action Plan for prevention and elimination of violence against women (2009–12), which pays special attention to violence in the workplace. Measures planned include awareness-raising and educational activities on violence in the workplace and monitoring of complaints about sexual harassment.

The issue of harassment, in particular sexual harassment, is not a very much-discussed subject. Few articles devoted to this special issue have been published to date. Theoretical articles have always analysed this issue only marginally, especially in the period of adoption of the Antidiscrimination Act and its amendments. The author of a report on equal treatment,<sup>551</sup> for example, referred to the absence of regulation of sexual harassment in 2005.

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<sup>548</sup> B. Holubová *Sexuálne obťažovanie na pracovisku ako forma diskriminácie a rodovo podmieneného násillia* (Sexual harassment at the workplace as a form of discrimination and gender-based violence) Bratislava, IVPR - Institute for Labour and Family Research, Family and Work No. 4/2007.

<sup>549</sup> B. Holubová *Sexuálne a šikanózne obťažovanie žien na pracovisku* (Sexual and bullying harassment of women at the workplace) Bratislava, IVPR - Institute for Labour and Family Research 2007.

<sup>550</sup> B. Holubová 'Good practices in non-discrimination – example of sexual harassment' in: *Good Practices in Non-Discrimination and in Enforcement of Diversity in Employment Relations (A Comparative study)* Slovak National Centre for Human Rights 2010.

<sup>551</sup> Z. Magurová 'The Principle of equal treatment of men and women (Selected aspects)' in: *Proceedings of the international conference (In)equality*, held on 13 -15 October 2005 in Tatranská Štrba, p.241.

According to labour law professor Barancová,<sup>552</sup> the Antidiscrimination Act should contain, in addition to the generally defined term ‘harassment’, the narrower term ‘sexual harassment’. From the practical perspective, in decisions on legal disputes it would be simpler for a judge examining a particular case of sexual harassment in labour relations to use the term sexual harassment, as defined by Directive 2002/73/EC. The lawyer Davala,<sup>553</sup> for example, also disagreed with those claiming that the definition of sexual harassment in the Antidiscrimination Act was not necessary. He stressed that not choosing an explicit legal definition as the correct form of transposition of the Directive would be possible in a legal system where justice applies a progressive approach in this area. In his opinion, the ‘sexual character’ of sexual harassment is such a determining element that it must be unambiguously regulated by law, instead of waiting for court interpretation of whether acts of a sexual nature should or should not be subsumed under the term ‘harassment’.

There are no studies on harassment and sexual harassment in the area of the access to and supply of goods and services.

## **2. Harassment and sexual harassment in the context of antidiscrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The definition of harassment was first introduced by a so-called harmonization amendment of the Labour Code in 2003<sup>554</sup> as one of the forms of discrimination in labour relations, for the purpose of transposition, especially of Directives 2000/43/EC and 2000/78/EC.

Under Section 13 Paragraph 4 ‘As a form of discrimination is also considered harassment where unwanted conduct occurs with the purpose or effect of violating human dignity and creates for the employee a hostile, intimidating, degrading, humiliating or offensive environment.’

As the Labour Code contained a general prohibition of discrimination on the grounds of sex, the prohibition of harassment also automatically applied to harassment on the grounds of sex.

After the adoption of the comprehensive Antidiscrimination Act<sup>555</sup> the regulation of harassment was transferred from the Labour Code to the Antidiscrimination Act.

However, the definition of harassment differed from the definition contained in the Labour Code as well as from definitions contained in the Directives. Under Section 2 Paragraph 5 of the Antidiscrimination Act ‘Harassment shall mean such treatment of a person which that person can justifiably perceive as unpleasant, inappropriate or offensive and a) the purpose or effect of which is or could be violating the dignity of a person and of creating a hostile, degrading or offensive environment, or b) the suffering of which a person may consider to constitute a precondition for a decision or for the exercise of rights and obligations resulting from legal relationships.

In particular, the term ‘unwanted conduct’ was replaced by the term ‘treatment’, whereby the attribute ‘unwanted’ was fully omitted from the definition.

The Antidiscrimination Act, effective since 1 September 2004, transposed three Directives –(2000/43/EC, 2000/78/EC and 96/97/EC), but failed to implement Directive 2002/73/EC. Consequently, the Act did not contain the regulation of sexual harassment. One of the reasons that Directive 2002/73/EC was not transposed by the Antidiscrimination Act

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<sup>552</sup> H. Barancová *The Antidiscrimination Act and principle of equal treatment in labour relations* Právny obzor 88, 2005 No. 4, p. 342.

<sup>553</sup> M. Davala ‘Present development of transposition of European antidiscrimination legislation in Slovak law’ in: *Proceedings of the international conference ‘Days of Public Law’* Masaryk University, Faculty of Law 2007, p. 960.

<sup>554</sup> Act No. 210/2003 Coll. amending Act No. 311/2001 Coll. Labour Code.

<sup>555</sup> Act No 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other acts (Antidiscrimination Act), effective as from 1 July 2004.

was the unwillingness to accept the problem of discrimination on the grounds of sex and opinions interpreting sexual harassment as a private affair of the directly involved parties.

In late 2005, the Government refused to recognise the non-implementation of Directive 2002/73/EC, arguing that 'sexual harassment' could be included under the term 'harassment', which was regulated in the Antidiscrimination Act. The Government also pointed out that they had not received a notice from the European Commission that sexual harassment should be specified in our country.

As some provisions taken from the Directives were implemented by the Antidiscrimination Act incorrectly or incompletely, in the years 2006-2007 the Commission sent the Slovak Republic three formal notices<sup>556</sup> and initiated proceedings for the breach of the Treaty Establishing the EC.

One of the incorrectly defined terms was 'harassment'. While the Directives refer to harassment as to 'conduct', the Antidiscrimination Act regulated harassment as 'treatment of a person'. Moreover, the Directives do not contain a reference to 'justifiably perceived'. According to the Commission, such definition of harassment could have affected the protection against harassment, required by the Directives, in Slovak law. As a result of these formal notices, two amendments to the Antidiscrimination Act were passed with a view to eliminating the imperfections objected to by the Commission.

### *2.1.2. Definitions*

The purpose of the amendment of the Antidiscrimination Act<sup>557</sup> of 2007 was to promptly rectify the weaknesses that the Slovak Republic had been reproached for in the formal notices mentioned above and thus to finalize the transposition of both Directives 2000/43/EC and 2000/78/EC in line with the comments and observations of the Commission. The amendment also revised the definition of harassment. It returned to the term 'conduct' (instead of 'treatment'), but without the attribute 'unwanted'. Under Section 2 Paragraph 7 'Harassment shall mean such conduct which results or can result in intimidation, shame, humiliation, degradation or offence of a person and the purpose or effect of which is or may be violation of freedom or human dignity'.

The main objective of the second major amendment to the Antidiscrimination Act<sup>558</sup> was the transposition of Directive 2004/113/EC. It introduced the currently valid definition of 'harassment'. Under Section 2a Paragraph 4 'Harassment shall mean such conduct which creates or may create an intimidating, hostile, shameful, humiliating, degrading, disrespectful or offensive environment and the purpose or effect of which is or may be the violation of freedom or human dignity.'

### *2.1.3. Sexual harassment*

The second amendment to the Antidiscrimination Act of 2008 also increased the protection of persons against harassment by introducing the explicit prohibition of sexual harassment that was not previously contained elsewhere in our national legislation. According to Section 2a Paragraph 5 'Sexual harassment shall mean verbal, non-verbal or physical conduct of a sexual nature, the purpose or effect of which is or may be the violation of human dignity and which creates an intimidating, humiliating, dishonouring, hostile or offensive environment.'

The Antidiscrimination Act defining harassment and sexual harassment does not contain any direct reference to grounds of sex regarding which harassment and sexual harassment are prohibited. But logic interpretation of the full Act indicates that they are prohibited on the grounds of sex as well as on other grounds.<sup>559</sup> Sexual harassment is not conceptualized

<sup>556</sup> In the first proceedings (No. 2006/2260 of 28 June 2006) the EC objected to the incomplete or incorrect transposition of Directive 2000/43/EC, in the second proceedings (No. 2006/2447 of 20 December 2006) Directive 2000/78/EC and in the third proceedings Directive 2002/73/EC, amending Directive 76/207/EEC.

<sup>557</sup> Act No 326/2007 Coll. amending Antidiscrimination Act effective from 1 September 2007.

<sup>558</sup> Act No 85/2008 Coll. amending Antidiscrimination Act effective from 1 April 2008.

<sup>559</sup> Under the Antidiscrimination Act the principle of equal treatment shall lay in the prohibition of discrimination on grounds of sex, religion or belief, race, nationality or ethnic origin, disability, age, sexual orientation,

strictly as sex discrimination. There has been no discussion on sexual harassment based on sex nor on sexual harassment based on other grounds of discrimination.

#### *2.1.4. Scope*

The provisions of Article 2(2)a of Directive 2006/54<sup>560</sup> were not specifically transposed only in relation to harassment and sexual harassment, but are defined in general terms and apply to all types of discrimination. Under Section 2a Paragraph 10, rejection of or submission to discrimination by a person may not in any way affect the subsequent treatment of this person or conduct towards this person or constitute the basis for any decision related to this person.

The scope of the prohibition of harassment and sexual harassment is wider than in the Directives because it applies to all areas.<sup>561</sup> Both definitions correspond with the terms in the Directives and thus provide protection against conduct, the intention or effect of which is or can be a violation of human dignity. Harassment also includes unintentional conduct.

In spite of certain improvements, the definitions of harassment and sexual harassment are not fully compatible with the definitions contained in the Directives. This is because both definitions leave out the adjective ‘unwanted’, although the preamble to the amended Antidiscrimination Act contains this attribute.

Moreover, the definition of sexual harassment requires a cumulative fulfilment of actual or potential violation of human dignity and the creation of an intimidating, humiliating, dishonouring, hostile or offensive environment, and from the wording it is not clear how these requirements interrelate. The definition of sexual harassment in the Antidiscrimination Act contains the conjunction ‘and’ unlike the Directive, which contains the term ‘in particular’.

#### *2.1.5. Addressee*

Under the Antidiscrimination Act everyone is obliged to adhere to the principle of equal treatment in the field of employment and similar legal relations, social security, and healthcare, the access to and supply of goods and services, and education. The addressee of the prohibition of harassment and sexual harassment is the concrete person and also the institution (employer, entity providing goods and services).

#### *2.1.6. Preventive measures*

There is no information available about concrete preventive measures adopted by employers or contained in collective agreements. (See 3.2 and 3.3 for more.)

#### *2.1.7. Procedures*

There are no specific complaints procedures available for persons in the event of alleged harassment or sexual harassment. Disputes concerning the breach of the principle of equal treatment, including sex discrimination, are covered primarily by the Antidiscrimination Act (as a special regulation) and subsidiarily by the Code of Civil Procedure<sup>562</sup> (as a general regulation on civil proceedings). The Antidiscrimination Act contains two differences with the Code of Civil Procedure: it institutes a shift of the burden of proof and the option for the parties to be represented by a legal person<sup>563</sup> (in classic litigation proceedings, a party may be represented by a physical person only).

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marital or family status, colour, language, political affiliation or other conviction, national or social origin, property, lineage or any other status.

<sup>560</sup> According to Act No. 48/2011 Coll. amending the Labour Code and Antidiscrimination Act, since 1 April 2011 Directive 2006/54/EC is included in the list of adopted acts of EC and EU, which is an annex to the Antidiscrimination Act.

<sup>561</sup> The Antidiscrimination Act regulates the principle of equal treatment in the field of employment and similar legal relations, social security, and healthcare, the access to and supply of goods and services, and education.

<sup>562</sup> Act No 99/1963 Coll. on Civil Procedure Code.

<sup>563</sup> A legal entity with such authorisation under a special law – the Slovak National Centre for Human Rights (Centre) – the equality body which also annually publishes the Report on the observance of human rights (including the observance of the equal treatment principle), or legal entity whose aim or scope of activity is protection against discrimination (e.g. non-governmental organisation).

Section 13 of the Labour Code stipulates the right of employees to submit a complaint with his/her employer about the infringement of the principle of equal treatment. The employer is obliged to respond to such a complaint without undue delay, examine it, refrain from such conduct in the future and eliminate the consequences thereof. The possibility for an employee to lodge a complaint with the employer was retained in the Labour Code after the adoption of Antidiscrimination Act, as an extrajudicial remedy. However, the effect of such a remedy is doubtful.<sup>564</sup> Any employee who considers that his/her legally protected rights or interests are affected by the failure to apply principles of equal treatment may submit their case to a civil court (there are no special labour courts for discrimination cases in the area of employment) and seek legal protection as provided under the separate Antidiscrimination Act.

#### *2.1.8. Burden of proof*

The possibility of shifting the burden of proof to the defendant was first introduced into the Labour Code in 2003. After the adoption of the Antidiscrimination Act, the procedural guarantees in the event of violation of the principle of equal treatment, contained in the Labour Code, were reduced. The regulation of procedural guarantees, including the ‘shifted burden of proof’, was transferred to the Antidiscrimination Act. It states that if the evidence submitted to court by the claimant gives rise to the reasonable assumption that such violation indeed occurred, the defendant is obliged to rebut such statement and to prove that this principle was not violated. A drawback to this regulation is the fact that it does not directly amend the Code of Civil Procedure. The possibility to shift the burden of proof to the defendant is only stipulated in the Antidiscrimination Act, which has the same legal authority as the Code of Civil Procedure. The courts can, therefore, ‘only’ follow the procedural regulation and avoid applying the provision included in the Antidiscrimination Act. Failing to implement the principle of shifting the burden of proof on the part of some courts is most frequently justified by the fact that this procedural principle is not defined in the Code of Civil Procedure, as opposed to, for example, in the Czech Republic. As a result, women who are discriminated against often do not succeed in court proceedings due to lack of evidence.

#### *2.1.9. Remedies and sanctions*

Persons who consider themselves wronged in their rights, legally protected interests and/or freedoms by a violation of the principle of equal treatment may, in particular, seek that the person violating the principle of equal treatment be made to refrain from such conduct (e.g. stop the harassment, and stop sexual harassment) and, where possible, rectify the unlawful situation (e.g. pay the difference in salary that was paid in an inadequate amount due to unequal treatment) or provide adequate satisfaction (e.g. an apology). Should failure to observe the principle of equal treatment result in substantial reduction of dignity, social respect, or social position of the person and adequate satisfaction prove to be insufficient, this person may also claim non-pecuniary damages in money (the amount will be set by the court with due regard for the extent of non-pecuniary harm and to all circumstances under which it occurred).

The existing application of the Antidiscrimination Act in practice shows that the possibility of judicial protection in proceedings concerning harassment on the ground of sex and sexual harassment is very limited.

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<sup>564</sup> According to the Centre’s annual report, a new phenomenon in the year 2009 was the way in which some employers investigated the complaints of male and female employees who objected to the violation of the principle of equal treatment by their bosses or male or female colleagues. Instead of meeting their obligation to respond to a complaint objecting to discrimination and fulfilling the obligation to prevent the phenomenon and to adopt measures to protect the victims from discrimination, the employers would often evade the issue and shift the responsibility to the victims of discrimination, applying the provisions of the Act on Complaints, despite the fact that the complaint on the violation of the equal treatment principle and discrimination is not assessed according to the Act on Complaints. Such behaviour was identified by the Centre in state administration authorities, in territorial self-government, but also in some manufacturing companies; p. 122.



## 2.2. Case law

In the last two years, the Centre investigated a few cases of harassment and sexual harassment. Despite this, not many cases of harassment on the ground of sex or sexual harassment were recorded and handled by the courts or authorities addressed by the Centre. In 2009, judicial proceedings were ongoing in a claim relating to the protection of personal dignity, filed by a senior employee against his female colleague, who accused him of sexual harassment. This fact was also proven in an independent investigation carried out by the Centre. After the claim was filed, all hearings were postponed due to the absence of the complainant and their legal representative, which, however, intentionally subjects the victim of discrimination to increased stress and longer victimisation.

In 2010, the Centre dealt with two cases. At the request of one client, the Centre produced an expert opinion on sexual harassment in the workplace. In 2011, the Centre has provided advice to two women. They were interested in the regulation of sexual harassment and the possibility of legal protection. The Centre did not make any applications to court on behalf of their clients in the years 2009-2011. The annual reports of the Centre include no sexual harassment cases pending before court.

## 3. Harassment and sexual harassment outside the framework of antidiscrimination law

### 3.1. National provisions

Human dignity is protected under the Constitution<sup>565</sup> and other laws. Article 16 of the Constitution protects privacy in general and Article 19 states that ‘every person shall have the right to maintain and protect his or her dignity, honour, reputation and good name. Everyone shall have the right to be free from unjustified interference in their privacy and family life. Anyone has the right to be protected against unwarranted collection, disclosure, and other misuse of personal information.’

Unwanted conduct related to the ground of sex which takes place with the purpose or effect of violating human dignity and of creating an intimidating, unfriendly, shameful, humiliating, insulting, degrading or offensive environment, can be considered as unlawful acts not only according to the Antidiscrimination Act but, in special circumstances, also under civil law, and under misdemeanour and criminal law.

The dignity of a person, without expressly stipulating discrimination or sex discrimination, is protected under civil-law provisions. Section 11 of the Civil Code<sup>566</sup> states that ‘natural persons have the right to protection of personhood, in particular life and health, civil honour and human dignity, as well as privacy, reputation and manifestations of a personal nature.’<sup>567</sup> Section 13 of the Civil Code provides a remedy in the event of breach of Section 11 and states that ‘natural persons have, in particular, the right to request that any unlawful interference with the right to the protection of their personhood be discontinued, that the consequences of such interference be eliminated, and they also have the right to adequate satisfaction.’ In serious cases, non-pecuniary damages can be sought also in the form of pecuniary satisfaction.

‘Unwanted conduct’, taking the form of unlawful harassment, corresponds to minor offences referred to in the Minor Offence Act.<sup>568</sup> Under Section 49 of the Act ‘any person who defames another person by insulting or ridiculing him or her is liable to a pecuniary fine of up to EUR 33.’

Some provisions of the Criminal Code,<sup>569</sup> (Section 189 – Blackmail, Section 190 – Serious Coercion, and Section 360 – Dangerous Threat) could also, to some extent, be considered to cover harassment.

<sup>565</sup> The Constitution of the Slovak Republic No. 460/1992 Coll. (as amended).

<sup>566</sup> Act No. 40/1964 Coll. Civil Code as amended.

<sup>567</sup> E.g. pictures, drawings, literary output etc.

<sup>568</sup> Act No. 372/1990 Coll. on Minor Offences (as amended).

<sup>569</sup> Act No. 300/2005 Coll. Criminal Code.

### 3.2. Collective agreements

There are no analyses of collective agreements available. These agreements are not systematically monitored, so there is a lack of information concerning their concrete provisions. Trade unions primarily try to negotiate the highest possible increase in wages and the greatest degree of job security for employees. Equal opportunity issues which have been included in collective agreements have mostly concerned the working conditions of pregnant women and employees taking care of young children.

### 3.3. Additional measures

Since 2008, the Centre has recorded codes of ethics developed in nearly all areas of the labour market. The code of ethics usually governs the principles of the company in relation to partners and clients and governs the relations with the employees. Codes of ethics for employees, occupational groups, associations, self-governments, state administration authorities, trade unions etc. oblige the entities to observe human rights, the principle of equal treatment and the prohibition of discrimination, to create conditions for harmonising family and work life and to adhere to general principles of morality. Most of such adopted codes are associated with a policy against harassment and discrimination on other grounds than sex, anti-corruption policy and business ethics. Some companies have established internal guidelines and policies against sexual harassment rather than a code of ethics.<sup>570</sup> These codes are not legally binding. The failure to adhere to them, however, may lead to measures and sanctions being imposed (e.g. by decreasing the personal remuneration of the employee, negative publicity of the company, or exclusion from associations). Unfortunately, experience of the Centre has shown that having a code of ethics does not necessarily mean that the company observes the principle of equal treatment. Often it only meets the formal criteria and is not efficiently used in practice.

## 4. Added value of antidiscrimination approach

The regulations regarding harassment and sexual harassment were introduced into national legislation due to the harmonisation process. Not only sexual harassment but also harassment on the ground of sex is now prohibited.

The English text of the Constitution can be found on [www.concourt.sk](http://www.concourt.sk), accessed 13 December 2011. All other laws published in the Collection of Laws from 1998 onwards can be found in the Slovak language on [www.zbierka.sk](http://www.zbierka.sk), accessed 13 December 2011.

## SLOVENIA – Tanja Koderman Sever

### 1. General situation

1.1. Slovene legislation as regards prohibition of harassment on the ground of sex and sexual harassment was adopted in 2002 with the Act Implementing the Principle of Equal Treatment<sup>571</sup> (hereinafter the AIPET) and in 2004 with the Employment Relationship Act<sup>572</sup>

<sup>570</sup> An example would be the Code of Conduct of the Bratislava Water Company, which defines sexual harassment as follows: *‘Sexual harassment is any form of behaviour with a sexual content or undertone that the other party does not want. The Code of Conduct of BWC, Inc. includes into sexual harassment direct sexual advances, allusions to the sex life of another employee, jokes with erotic themes, any touching of another person, if the person does not want it, if it offends him/her or is for him/her mentally and physically uncomfortable’*. Another good example is the Code of Conduct of the Slovak Electricity Company, which defines sexual harassment as follows: *‘Sexual harassment is not allowed nor tolerated and no forms of behaviour or verbal expression are allowed, which might unsettle the feelings of the individual (such as displaying images with a clear sexual reference or insistent and incessant sexual innuendo)’*. In: B. Holubová *‘Good practices in non-discrimination – examples of sexual harassment’* in: *Good Practices in Non-Discrimination and in Enforcement of Diversity in Employment Relations (A Comparative study)* Slovak National Centre for Human Rights 2010, p.52.

<sup>571</sup> Act Implementing the Principle of Equal Treatment, Official Gazette of the Republic of Slovenia, No. 61/2007.

(hereinafter the ERA). Both laws were amended in 2007. In addition, the Regulation on Measures to Protect the Dignity of Employees in Public Administration<sup>573</sup> (hereinafter the RMPDEPA) was adopted in 2009. It deals specifically with sexual harassment in the workplace. Harassment based on any kind of personal circumstance is defined in the AIPET, whereas sexual harassment is only defined in the ERA and the RMPDEPA.

1.2. In Slovenia, there are not many reports and surveys conducted in regard of harassment on the grounds of sex and sexual harassment. The only survey on sexual harassment conducted on a representative sample is the study of M. Jogan from 1999,<sup>574</sup> describing forms of sexual harassment, the frequency of their occurrence, sex and position of harassers in the workplace, and reactions to sexual harassment in the workplace. According to this study, sexual harassment in the workplace is experienced by every eighth woman and every fourteenth man. Another survey was conducted by the Office for Equal Opportunities and participating trade unions in 2007 on sexual and other harassment at the workplace.<sup>575</sup> They tried to find out the occurrence of sexual and other forms of harassment at the workplace in Slovenia. The results showed that every third woman is a victim of verbal sexual harassment and every sixth woman a victim of physical sexual harassment. The most common harassers are fellow colleagues, then superior persons and persons in managing positions. The latest survey on this subject was conducted in 2009 by the Office for Equal Opportunities and participating trade unions. According to the analysis of the measures taken to prevent sexual and other harassment and bullying at the workplace<sup>576</sup> most employers, despite the legal obligation arising from Article 45 of the ERA, have not yet adopted measures to protect workers' dignity at work and provide a working environment free of sexual and other harassment or bullying.

1.3. There is no special debate on these issues.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

The provisions of Directives 2006/54/EC and 2004/113/EC on harassment on the ground of sex and sexual harassment have been transposed into Slovene legislation by:

- Article 5 of the AIPET which provides the definition of harassment in various areas of social life, including access to employment and self-employment as well as access to and supply of goods and services;
- Article 6a of the ERA which prohibits harassment, sexual harassment and bullying at the workplace;
- Article 45 of the ERA which protects workers' dignity at work;
- Article 15a of the Public Servants Act<sup>577</sup> (hereinafter PSA) which prohibits harassment; and
- the RMPDEPA which gives definitions of harassment and sexual harassment and defines measures to protect the dignity of employees in public administration.

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<sup>572</sup> Employment Relationship Act, Official Gazette of the Republic of Slovenia, Nos 42/02 and 103/07.

<sup>573</sup> Regulation on Measures to Protect the Dignity of Employees in Public Administration, Official Gazette of the Republic of Slovenia No 36/2009.

<sup>574</sup> M. Jogan *Seksizem v vsakdanjem življenju* Ljubljana, FDV 2001.

<sup>575</sup> Analysis on Sexual and Other Harassment at the Workplace, Office for Equal Opportunities and cooperating trade unions 2007; <http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/RaziskavaNadlegovanje.pdf>, accessed 26 August 2011.

<sup>576</sup> Analysis of the Measures Taken to Prevent Sexual and Other Harassment and Bullying at the Workplace, Office for Equal Opportunities and cooperating trade unions 2009; [http://www.uem.gov.si/si/delovna\\_podrocja/trg\\_dela\\_in\\_zaposlovanje/](http://www.uem.gov.si/si/delovna_podrocja/trg_dela_in_zaposlovanje/), accessed 26 August 2011.

<sup>577</sup> Public Servants Act, Official Gazette of the Republic of Slovenia, Nos 56/02, 110/02, 02/04, 23/05, 35/05 - upb1, 62/05, 75/05, 113/05, 32/06 - upb2, 33/07, 63/07-upb3 and 65/08.

Article 2(2)(a) of Directive 2006/54/EC has been specifically transposed by the two abovementioned laws. Any sexual and other harassment is deemed to be discrimination according to Articles 5(2) of the AIPET and 6a(2) of the ERA.

### *2.1.2. Definitions*

According to Article 5(1) of the AIPET and Article 15a of the PSA, harassment is any unwanted conduct, based on any kind of personal circumstance creating an intimidating, hostile, degrading, humiliating or offensive environment for a person or offends his or her dignity. This definition refers to the effect of violating the dignity of a person since only any conduct with the effect (and not the purpose) of violating the dignity of the person is defined as harassment. In contrast, the newly adopted definitions of sexual harassment and harassment from the ERA and the RMPDEPA refer to the purpose or effect of violating the dignity of a person. According to Article 6a(1) of the ERA and Article 2 of the RMPDEPA, sexual harassment is any form of undesired verbal, non-verbal or physical action or behaviour of a sexual nature with the effect or purpose of adversely affecting the dignity of a person, especially where this involves the creation of an intimidating, hostile, degrading, humiliating or offensive environment. And harassment is defined as any unwanted conduct associated with any personal circumstance with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment. Workers' dignity at work is furthermore protected with Article 45 of the ERA and Articles 5 to 11 of the RMPDEPA. According to these Articles, the employer must provide a working environment in which none of the workers is subjected to sexual and other harassment or bullying on the part of the employer, a superior or co-workers. Therefore the employer must take appropriate steps to protect workers from sexual and other harassment or from bullying at the workplace.

Although any sexual or other harassment is deemed to be discrimination according to the AIPET and the ERA, definitions of sexual and other harassment and its prohibition are provided separately (in separate Articles) from the general prohibition of discrimination.

### *2.1.3. Sexual harassment*

Sexual harassment is conceptualized as sex discrimination. Until now there has not been any discussion on sexual harassment covering other grounds of discrimination.

### *2.1.4. Scope*

The scope of the prohibition of harassment and sexual harassment is broader than the scope of Directives 2006/54/EC and 2004/113/EC. In addition to access to employment and self-employment (including vocational training and promotion) and access to and supply of goods and services, the AIPET covers professional education and training, participation in an organisation of workers or employers or any other organisation and education.

### *2.1.5. Addressee*

The addressee of the harassment and sexual harassment prohibition is the person who harasses (a fellow worker, a superior or a person in a managing position, a client etc.). In the area of employment, the employer is liable for the damages inflicted on a third person, including employees, by his/her employee during work or in connection with work unless the employer can prove that the employee acted as was necessary under the given circumstances.<sup>578</sup>

### *2.1.6. Preventive measures*

Article 26 of Directive 2006/54/EC and Article 4 of the Framework Agreement on harassment and violence at work from 2007 have been implemented in Slovene legislation by Article 45 of the ERA and the RMPDEPA. According to this legislation, the employer must provide a working environment in which no worker is subjected to sexual and other harassment or

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<sup>578</sup> Article 147 of the Obligations Code, Official Gazette of the Republic of Slovenia, No. [97/2007](#).

bullying on the part of the employer, a superior or co-workers. Therefore, the employer must take appropriate measures to protect workers from sexual and other harassment or from bullying in the workplace. In addition, the RMPDEPA defines measures that need to be taken in order to protect workers from harassment and sexual harassment (such as raising awareness and the appointment of confidential advisers) and procedures and measures to be taken in cases of alleged harassment or sexual harassment in public administration (as lodging informal and formal complaints).

According to the analysis of the measures taken to prevent sexual and other harassment and bullying in the workplace conducted in 2009, most employers have not yet adopted measures which are aimed at protecting workers' dignity at work and providing a working environment free of sexual and other harassment or bullying based on Article 45 of the ERA. Nevertheless, there are some companies that have adopted internal acts, rules or codes of conduct prohibiting sexual and other harassment and bullying at work.

In addition to this, there are also some collective agreements dealing with the issue of preventing harassment.

#### *2.1.7. Procedures*

There are no specific complaints procedures available for persons in case of alleged harassment or sexual harassment, neither in the area of employment nor in the area of access to and supply of goods and services. In the event of a violation of the prohibition of discrimination, victims may file a complaint pursuant to the provisions of the ERA and the AIPET.

#### *2.1.8. Burden of proof*

There are no issues in respect of the burden of proof that would deter people from filing a complaint. If during a dispute a person alleges facts from which it may be presumed that there has been discrimination, it is up to the harasser or employer to prove that there has been no discriminatory harassment.

#### *2.1.9. Remedies and sanctions*

In the event of discriminatory harassment in employment:

- An employer is liable for damages caused to his or her worker at work or in relation to work pursuant to the general rules of civil law.<sup>579</sup> Later, the employer has the right to demand the reimbursement of damages paid to the victim from the harasser. Furthermore, an administrative fine of EUR 3 000 to 20 000 can be imposed on the employer if he has not provided protection against sexual and other harassment or bullying<sup>580</sup>;
- A harasser may be disciplinarily responsible. An employer may impose disciplinary sanctions on a worker, such as a fine or deprivation of advantages, if such sanctions are laid down in the branch's collective agreement.<sup>581</sup> If the violation has all the characteristics of a criminal offence, the employer may extraordinarily dismiss a worker if it is not possible to continue the employment relationship until the expiration of the notice of termination or until the expiration of the period for which the employment contract was concluded.<sup>582</sup> The victim has the right to demand the reimbursement of damages directly from the harassing worker if such damage is inflicted intentionally. In addition, some administrative and criminal sanctions may also be imposed according to Article 24 of the AIPET (see above) and the Criminal Code.<sup>583</sup>
- A victim of discrimination may extraordinarily terminate the employment contract if the employer failed to ensure for the worker equal treatment and protection against sexual

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<sup>579</sup> Article 184 of the ERA.

<sup>580</sup> Article 229 of the ERA.

<sup>581</sup> Article 175 of the ERA.

<sup>582</sup> Articles 110 and 111 of the ERA.

<sup>583</sup> Article 174 (Violation of sexual integrity by abuse of position), Article 171 (Sexual violence), Article 170 (Rape), Article 132 (Criminal Coercion) of the Criminal Code, Official Gazette of the Republic of Slovenia, Nos 55/08 and 39/09.

and other harassment or bullying at the workplace. In that case, the worker shall be entitled to severance pay, stipulated for the case of ordinary dismissal due to business reasons, and to the compensation amounting to no less than the loss of salary during the notice period.<sup>584</sup> In addition, a victim may claim damages pursuant to the general rules of civil law.

In the area of the access to and supply of goods and services:

- The addressee may be liable to provide compensation according to the general rules of civil law.<sup>585</sup> Besides, an administrative fine in the amount of EUR 2 500 to 40 000 may be imposed according to the AIPET<sup>586</sup> to a legal person and to an independent business person at whose premises a misdemeanour was committed;
- The harasser may be sanctioned with a fine of EUR 250 to 1 200 in the event of discriminatory harassment. In addition, the harasser may be liable for damages according to the general rules of civil law. If the violation has all characteristics of a criminal offence, he or she may as well be criminally liable for the abovementioned criminal offences;
- The victim has the right to request the hearing of a case of violation in judicial and administrative proceedings as well as before other competent bodies, under the conditions and in a manner determined by law, and shall thereby be entitled to compensation according to the general rules of civil law.

A person's rejection of action and behaviour referred to as harassment or sexual harassment must not be used as a basis for discrimination in employment and access to and supply of goods and services.

#### *2.1.10. Compliance with EU law*

The definitions of harassment and sexual harassment, the ban on victimization, the provisions on burden of proof and on preventive measures in the employment area are in compliance with EU legislation. In contrast, the definition of harassment from the AIPET which covers the area of access to and supply of goods and services does not refer to the purpose or effect of violating the dignity of a person. Therefore, it should be amended. In addition, the provisions on preventive measures in the AIPET are lacking too.

#### *2.1.11. Additional information*

There is no other relevant information.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

There is a small number of cases on harassment on the ground of sex and sexual harassment in Slovene case law in the area of employment. On the other hand, there is no case law available whatsoever in the area of access to and supply of goods and services.

### *2.2.2. Main features of case law*

In Slovenia, labour courts are competent to decide cases against an employer who is liable for the damages inflicted on a third person by an employee during work or in connection with work. There is no case law of civil courts that are competent to deal with cases where compensation is claimed directly from the harasser (fellow worker or a superior person in a managing position). In the majority of cases, the harasser is a superior person or a person in a managing position, and in some cases a fellow worker. In all cases, courts based their decision on Article 6a of the ERA (which defines sexual harassment as any form of undesired verbal,

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<sup>584</sup> Article 112 of the ERA.

<sup>585</sup> Article 22 of the AIPET.

<sup>586</sup> Article 24 of the AIPET.

non-verbal or physical action or behaviour of a sexual nature with the effect or intent of adversely affecting the dignity of a person) and Article 45 of the ERA (which obliges an employer to provide a working environment in which no worker is subjected to sexual and other harassment on the part of the employer, a superior or co-workers). Case law regarding compensation awarded due to harassment on the ground of sex and sexual discrimination has not been formed yet. The amount of compensation amounts up to EUR 5 000 and is compared to damages for the infringement of personal rights and mental distress suffered due to defamation in civil cases. The sexual harassment found was verbal<sup>587</sup> (harassers giving comments about clothing or someone's body, telling sexual or sex-based jokes, requesting sexual favours or repeatedly asking a person out). In a few cases it was caused by physical acts<sup>588</sup> (assault, impeding or blocking movements, inappropriate touching of someone or someone's clothing, kissing, hugging, patting etc.) and in one case visual<sup>589</sup> (e-mails of an inappropriate sexual nature).

Undesired verbal and non-verbal behaviour of a sexual nature was found in a case of the High Labour and Social Court, No. Pdp 499/2009, in March 2010. Two female claimants were victims of sexual harassment at the workplace in the years 2005 and 2006. The employer was the Slovene Army and they were harassed by a superior person. Although they complained to the Slovene Army the employer did not act against the harassers and denied all charges. The complaints even caused further discrimination. That is why the claimants decided to file a lawsuit against the Slovene Army and claim damages for not providing a working environment in which none of the workers is subjected to sexual and other harassment on the part of a superior or co-workers. The Court decided that the Slovene Army was liable for the damages caused by verbal and non-verbal sexual harassment by their employees and awarded the female claimants a compensation in the amount of EUR 5 000.

Another interesting case of the High Labour and Social Court, No. Pdp 631/2009, was decided in April 2010. The Court found that the female claimants had been subjected to unwanted conduct of a sexual nature at work from early 2003 onwards. Their superior had been sending them e-mails with inappropriate content (with attachments of pictures of naked women and men, genital organs, women in degrading poses) and had been verbally harassing them with inappropriate words and remarks during work sessions. Following extensive assessment of the evidence, the Court found that the defendant (the employer) had failed to provide the claimants with a working environment in which none of the workers is subjected to unwanted conduct of a sexual nature by allowing the improper conduct of its employee. However, the Court also decided that the claimants themselves had contributed to the harm for 30 % because they had opened and read e-mails which based on their title were obviously not instructions from their superiors and because they had not informed the management earlier about the unwanted behaviour of their superiors. The four claimants were awarded compensation each in an amount from EUR 2 240 to EUR 2 919.

### 2.2.3. *Dignity*

There is no case law defining 'dignity' or how 'dignity' should be interpreted.

### 2.2.4. *Restrictions*

There is no case law which shows clashes between the prohibition of harassment or sexual harassment and human rights and constitutional rights.

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<sup>587</sup> Judgments of the High Labour and Social Courts No. Pdp 1297/2006, of 6 February 2008.

<sup>588</sup> Judgments of the High Labour and Social Courts No. Pdp 1288/2010 of 24 March 2011, No. Pdp 499/2009 of 3 March 2010.

<sup>589</sup> Judgment of the High Labour and Social Court No. Pdp 631/2009 of 8 April 2010.



#### *2.2.5. Role of equality bodies*

In 2007<sup>590</sup> the Advocate of the Principle of Equality (hereinafter the Advocate) dealt with three cases of sexual harassment. One of them was the case of verbal and non-verbal sexual harassment of two female employees in the Slovene Army by their superior. The Advocate decided that the Slovene Army as an employer failed to provide protection against sexual harassment in the workplace. She recommended the adoption of a special statement to define the forms of sexual and other harassment in the workplace, the procedure in a case of harassment and organization of regular trainings on harassment for its officers. In the second case, the Advocate found sexual harassment by a fellow worker during business trips and recommended the adoption of specific policy statement against sexual harassment. In 2008,<sup>591</sup> the Advocate found sexual harassment in one case. A female worker was harassed by a fellow worker. She recommended the employer to adopt a special policy statement against sexual harassment. In 2009,<sup>592</sup> the Advocate decided in a case of sexual discrimination of a female worker by her superior worker who sent her e-mails with inappropriate content. The Advocate advised the victim to file a complaint with the competent inspectorate and bring the case to court.

Regarding written opinions of the Advocate, it needs to be mentioned that they are informal and not binding.

#### *2.2.6. Additional information*

There is no other relevant information.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### *3.1. National provisions*

Provision 197 of the Penal Code criminalises the violation of sexual integrity by abuse of position. According to this provision, a person who abuses his position, induces his subordinate or dependent person of the same or different sex to have sexual intercourse with him or to perform or submit to any other sexual act shall be punished by imprisonment of up to five years.

#### *3.2. Collective agreements*

There are some collective agreements that deal with the issue of preventing harassment. One example is the collective agreement for the banking sector of Slovenia, which extended the obligations of employers of Article 45 of the ERA with the obligation to prevent harassment, to protect victims of harassment, to raise awareness among employees about harassment and the obligation to respect the dignity of each worker and to give compensation to a victim if the employer does not prevent such conduct.

#### *3.3. Additional measures*

There are no other relevant measures.

#### *3.4. Harassment and stress at work*

It may sometimes be difficult to distinguish between harassment and stress at work. Nevertheless, due to the new definitions of harassment, sexual harassment and bullying in the ERA, which are very clear and precise, harassment is more easily identifiable and it is easier to file a complaint with the competent inspectorate, the Advocate or the court. There is a relationship between harassment and stress at work, since harassment can have a variety of

<sup>590</sup> Annual report of the Advocate for 2007; <http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/PorociloZagovornica2007.pdf>, accessed 26 August 2011.

<sup>591</sup> Annual report of the Advocate for 2008; [http://www.uem.gov.si/si/zagovornik/letna\\_porocila/](http://www.uem.gov.si/si/zagovornik/letna_porocila/), accessed 26 August 2011.

<sup>592</sup> Annual report of the Advocate for 2009; <http://www.uem.gov.si/fileadmin/uem.gov.si/pageuploads/ZagovornistvoPorocilo2009.pdf>, accessed 26 August 2011.



physical and psychological effects on people. One of the most commonly reported effects is stress.

### 3.5. Additional information

There is no other relevant information.

## 4. Added value of anti-discrimination approach

### 4.1. Added value

The added value in defining harassment on the ground of sex and sexual harassment as discrimination is that both, harassment on the ground of sex and sexual harassment, are prohibited. Furthermore, uniform EU definitions provide greater access to justice for individuals and provide greater clarity to victims, lawyers, judges and others applying EU law. The ECJ can develop case law on the interpretation of these uniform concepts.

### 4.2. Pitfalls

I do not see any pitfalls in following a non-discrimination approach to combat harassment on the ground of sex and sexual harassment.

## SPAIN – Berta Valdés de la Vega

### 1. General situation

Harassment and sexual harassment are expressions of gender violence at work that are quite frequent in Spain. The studies conducted until now have mainly analysed sexual harassment, although in recent years, especially since 2007, there has also been some literature about harassment.

According to a report presented by UGT<sup>593</sup> in 2011,<sup>594</sup> between 30 % and 45 % of women declared to have suffered sexual harassment or to have received unwelcome requests of a sexual nature. Nevertheless, only 1 % of the victims decided to denounce it. The report emphasized the need to give information and to run awareness campaigns so that sexual harassment ‘becomes visible’. It was also indicated that the treatment of sexual harassment in collective agreements was insufficient, since only 5 % of the agreements made some reference to sexual harassment and the treatment was mainly disciplinary, typifying it as a misdemeanour. This situation has changed considerably since 2007, after Act 3/2007 for effective equality between women and men was passed.

The following reports are from 2006 and 2009. The 2006 report about sexual harassment was published by the *Instituto de la Mujer*<sup>595</sup> and indicates that the percentage of women affected by situations of sexual harassment varies according to the degree or type of harassment. The results of the study indicate that 14.9 % of working women in Spain had experienced some situation of sexual harassment in the previous year (technical harassment). Nevertheless, among them the number of women who really perceived having suffered sexual harassment (harassment declared) drops to 9.9 %. Transferring these data to the group of actively employed women in Spain in 2005, a total of 8,425,000 workers, it is estimated that 1,310,000 women at work experienced some situation of sexual harassment (technical harassment), although only 835,000 women experienced it as sexual harassment (harassment declared). The degrees of sexual harassment were slight (verbal or gesture pressure) for 790,000 women; 300,000 were serious (psychological pressure), and 180,000 workers suffered very serious harassment (physical pressure).

<sup>593</sup> *Unión General de Trabajadores* (General Union of Workers).

<sup>594</sup> Available on <http://webs.uvigo.es/pmayobre/textos/varios/2acoso.pdf>, accessed 2 August 2011.

<sup>595</sup> Available on [www.democraciapartitaria.com](http://www.democraciapartitaria.com), accessed 21 August 2011.

The third report based on actual cases was published in the magazine of violence studies (*Estudios de la violencia*) in 2009.<sup>596</sup> The study analysed the situation of 32 women who suffered harassment in the independent community of Catalonia. Sexual harassment is an important type of discrimination affecting women, who are the main victims, and their right to equal opportunities. The report indicates that the following groups are particularly vulnerable: divorced or separated women, widows, single mothers, women with precarious or instable employment contracts, women with disabilities, and women from ethnic minorities and immigrant women. The report especially analysed the impact of sexual harassment on the life of a person beyond the labour scope. In this sense, the outcome of the study was the following: a total of 4 cases of separation had occurred during the period of sexual harassment, and 1 case of psychological and physical maltreatment of one of the victims who had denounced her partner. Almost half of all victims of the study needed the 18 months of temporary incapacity and two asked for the highest degree of disability due to their psychological state resulting from the sexual harassment.

Finally, the statistical data about sexual harassment published by the Ministry of Social Policy and Equality are based on the formal complaints brought before the State Police. These data therefore only correspond with reported crimes of sexual harassment. The number of complaints has slightly decreased since 2007. The data for the last six years are the following: 419 in 2004, 402 in 2005, 409 in 2006, 431 in 2007, 390 in 2008 and a total of 330 crimes in 2009.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

Sexual harassment and harassment are mainly regulated by Act 3/2007. Some of the provisions in this Act transpose Directives 2006/54 and 2004/113 regarding these concrete issues. Act 3/2007 modifies several laws that regulated various aspects of sexual harassment and harassment, e.g. the Law of infractions and sanctions in the social order (Articles 8.13, 8.13 bis, 46 bis), the Workers Statute (Articles 4.2 and 17.1), the Penal Code (Article 184) or the Law of Labour Procedure (Article 181).

Act 3/2007 applies to all, individual or legal, entities that are or act in the Spanish territory and in relation to all scopes of life, especially the political, civil, labour, economic, social and cultural fields. The main aim of this law is to achieve equal treatment and equal opportunities between women and men (Article 1.1.). The principle of equal treatment and equal opportunities between women and men means the absence of all discrimination, direct or indirect, because of sex (Article 3). This principle is applied both in the scope of private and public employment, in the access to employment, including self-employment, in vocational training, in professional promotion and in working conditions generally (Article 5). Sexual harassment and harassment are considered as discriminatory (Article 7) and therefore they are prohibited in the access to public or private employment, including self-employment, in vocational training and in professional promotion.

The provisions on sexual harassment and harassment are of general application, including the scopes of Directives 2006/54 and 2004/113. In addition, Act 3/2007 establishes the public authorities' principles that are to apply in all its actions, and these are connected to effective equality between women and men. One of these principles is to adopt all necessary measures to eradicate all kinds of sexual harassment and harassment (Article 14.5). In particular, the public administration should integrate the principle of equality in health politics and for that harassment and sexual harassment should be included under the protection of labour health provisions (Article 27.3 c).

Law 3/2007 establishes several provisions in order to fight against harassment at work both in private companies and in public administration. These provisions try to encourage

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<sup>596</sup> *Revista de Estudios de la Violencia* nº 7, 2009, accessed 18 August 2011.

employers (private or public) to adopt effective measures to prevent sexual harassment and harassment, in compliance with Article 26 of Directive 2006/54. All companies should negotiate with workers' representatives on measure to avoid harassment, such as composing and distributing codes of good practices, information campaigns or training. These measures must achieve working conditions free of sexual harassment and harassment. It is also necessary to establish procedures to prevent harassment and procedures to receive and handle claims brought by victims of harassment.

Workers' representatives also have the task to take action to help prevent harassment and sexual harassment. Some of these actions could be campaigns to raise employees' awareness of harassment and to inform the directors of the company of conduct or behaviour which could cause it (Article 48).

Finally, the measures to prevent sexual harassment and harassment should also be part of the equality plans developed, by obligatory or voluntary means, in companies (Article 46.2).

Law 3/2007 also establishes measures against harassment in public employment. The public administration should establish effective measures against harassment and sexual harassment (51 Article e). The public administration must negotiate with workers' representatives on a protocol in order to prevent harassment and sexual harassment. The protocol must contain at least three aspects: the commitment of the General Administration of the State to prevent and refuse to tolerate harassment and sexual harassment, the instruction to all personnel to respect personal dignity, and the guarantee of confidential treatment of claims regarding harassment and sexual harassment (Article 62). The protocol was finally negotiated with the main unions *CCOO*, *UGT* and *CESIF* in July 2011 (published in the *BOE* on 8 August 2011).

Article 2(2)(a) of Directive 2006/54/EC has been transposed by Articles 7.3 and 4 of Act 3/2007 in the following way:

- 'Harassment and sexual harassment shall be deemed to be discrimination'.
- 'Conditioning a right or a future right to the acceptance of a sexual harassment situation or of a situation of harassment on ground of sex shall also be deemed to be discrimination on the grounds of sex and therefore prohibited'.

The objective of the Spanish law and of the Directive seems quite the same, i.e. to consider as discrimination a situation of sexual blackmail or sexual extortion. The Spanish law focuses on the action of the persecutor (conditioning the right to acceptance) whereas the Directive focuses on the result of the action (less favourable treatment – if the victim does not submit to harassment conduct – or submission to the conduct).

### 2.1.2. Definitions

The definition of harassment and sexual harassment is given in Article 7 of Act 3/2007 in the following way:

- 'Sexual harassment: any form of verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, degrading or offensive environment'.
- 'Harassment: any conduct related to the sex of a person with the purpose or effect of violating his/her dignity and of creating an intimidating, degrading, or offensive environment'.

The two definitions established in Act 3/2007 correctly transpose the definitions of Directives 2006/54 and 2004/113/EC. The transpositions are almost literal and they both refer in particular to the *purpose or effect* of violating the dignity of a person. Harassment and sexual harassment can be unintentional for Spanish law. In the transposition there are some differences. For example, sexual harassment is not defined in Spanish law as 'unwelcome' behaviour, which is better since it does not require proof that the behaviour is unwanted by the victim. In addition, any behaviour that intimidates, degrades or offends is naturally unwelcome. In the two definitions of Spanish law, the adjectives 'hostile and humiliating' are

omitted, but this does not result in deficient transposition since hostile and humiliating are superior degrees of the adjectives intimidating and degrading.

In the Spanish definition there is no further description about differences between both forms of discrimination. Both harassment and sexual harassment shall always be deemed to be discrimination on the grounds of sex and are therefore prohibited in Article 7 of Act 3/2007.

In the Penal Code, sexual harassment is regulated as an independent crime in Article 184 in the following way:

- A person will be punished as guilty of sexual harassment when asking for favours of a sexual nature, for oneself or a third party, in the scope of a labour relation, educational relation or of services, and with such behaviour creating for the victim an objective and serious intimidating, hostile or humiliating situation.
- The punishment will be higher when the person guilty of sexual harassment committed the fact taking advantage of a labour or educational superiority or hierarchic situation, or with the express or tacit announcement to cause the victim any harm related to his or her legitimate expectations in the scope of the indicated relation.

#### *2.1.3. Sexual harassment*

Sexual harassment is conceptualised in Act 3/2007 as sex discrimination and in the scope of this law no other grounds of discrimination are included.

#### *2.1.4. Scope*

For this issue, please see the information above, in 2.1.1.

#### *2.1.5 Addressee*

The prohibition of harassment and sexual harassment applies to all persons and scopes of life, especially in the political, civil, labour, economic, social and cultural fields. Therefore, any harassment or sexual harassment engaged in by the employer, somebody in a managing position or by fellow workers is also included in the prohibition.

#### *2.1.6. Preventive measures*

Private and public employers are encouraged to take effective measures to prevent harassment and sexual harassment in accordance with Article 26 of Directive 2006/54/EC (for more detailed information, see above in 2.1.1). According to Act 3/2007, the employer should take the necessary measures to avoid any harassment and sexual harassment in the workplace. In order to fulfil this target, employers can decide to implement these measures as part of the equality plans of their companies, include them in collective agreements or negotiate specific protocols to prevent harassment with workers' representatives. All companies must establish measures to avoid any type of discrimination between women and men. Specific measures to prevent harassment and sexual harassment should also be negotiated and they should include claims procedures. Those companies obliged to negotiate an equality plan can include these measures in the equality plan.

The measures to prevent harassment have almost always been negotiated with the unions or with workers' representatives either in collective agreements, in equality plans or as specific protocols. In order to help fulfil the obligation of adopting preventive measures against harassment and to develop these protocols, the unions have established some instructions on how to implement a preventive protocol. These instructions mainly incorporate and develop Article 4 of the Framework Agreement on harassment and violence at work of 2007. The protocols following these instructions or the equality plans developed applying the principles of these instructions are quite well done, at least from the point of view of fulfilling the requirements of Article 4 of the Framework.

The collective agreements also deal with both forms of harassment, but in different ways. Some of them just copy the definition of harassment and sexual harassment given by Act 3/2007, and include a mostly disciplinary complaints procedure regulating faults and sanctions. Some other agreements go beyond this and establish measures for preventing

harassment either by including a link to the Framework Agreement on harassment and violence at work of 2007 or by regulating a specific protocol.

#### *2.1.7. Procedures*

The procedures available in the event of alleged harassment or sexual harassment are the same procedures as those that apply to violations of fundamental rights. In employment law or civil law, there are no specific complaints procedures for harassment or gender discrimination. This has been criticised, as the procedure does not offer an effective guarantee and is therefore used in only 10 % of harassment cases.<sup>597</sup>

#### *2.1.8. Burden of proof*

The burden of proof is on the defendant: the defendant must prove that there has been no breach of the principle of equal treatment, in this case that no harassment or sexual harassment has occurred. There is also a general prohibition of victimization in Article 9 of Act 3/2007.

#### *2.1.9. Remedies and sanctions*

There are four types of sanction for harassment and sexual harassment. The first one is the disciplinary sanction (Article 54 of the Workers Statute) that applies to any type of harassment to sanction a worker who is guilty of harassment. Harassment and sexual harassment are considered punishable breaches of contract. The employer is obliged to adopt the necessary measures to avoid that a known situation of harassment continues and one of the possible measures is to sanction the perpetrator.

The second sanction is the nullity of any discriminatory decisions of the employer (or of its representatives). Declaring damaging acts as null and void when due to harassment is often difficult or impossible. Only when harassment has produced a loss of rights will the sanction be the immediate termination of the damaging conduct and the recognition of the violated rights.

The third, administrative sanction is stipulated in Articles 8.13 and 8.13 *bis* of the Act of infractions and sanctions in the social order (*Ley de infracciones y sanciones en el orden social*). Employers will be sanctioned when harassment and sexual harassment takes place in their working organization and scope, whoever the perpetrator is. Nevertheless, the regulation is different because the sanction for sexual harassment is not conditioned on the employer being fully aware of the relevant conduct. In contrast, the sanction for harassment will be applied only when the employer was aware of the conduct and no measures are adopted in order to stop it. The administrative sanction will be more dissuasive when harassment or sexual harassment is not only due to a breach of labour relations law but also to an infraction of prevention rules. In this case, the fine can be very high (more than EUR 800 000).

In relation to payments of damages, the worker who has suffered harassment will receive indemnification (fixed by labour law) in an amount that is compatible with civil compensations. The problems discussed in the labour literature doctrine about sanctions and payment of damages are the issue of whether it is necessary to demonstrate the existence of 'moral' harm to have be entitled to compensation, and the determination of the amount of the indemnification for harassment.

From the point of view of social protection, the effects of harassment and sexual harassment at work will be considered as an industrial accident yielding a right to a temporary benefit. In addition, if the harassment was due to the employer's failure to take the required preventive measures, the employer will have to pay the benefits surcharge. Finally, see above in 2.1.2 for penal or criminal consequences.

#### *2.1.10. Compliance with EU law*

In my opinion, Spanish law is in compliance with EU law.

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<sup>597</sup> T. Perez Del Rio *La violencia de género en el ámbito laboral: el acoso sexual y el acoso sexista* Bomarzo 2009, p.82.

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

Case law is available from the Constitutional Court and from various other courts, but not from equality bodies.

### *2.2.2. Main features of case law*

Most of the cases deal with sexual harassment. The jurisprudential definition and identification of harassment on the ground of sex is quite recent, and the influence of Act 3/2007 is clear in the sentences passed.

An important national case from the Constitutional Court is Case 224/1999 complemented, from the point of view of the possible perpetrator, with Case 250/2007, as follows:

Constitutional Court Case 224/1999 describes the elements of sexual harassment for the first time in constitutional case law. In this case, the employee had a temporary contract of six months to work at a video club. The employer used to direct many sexual remarks at the victim and made continuous physical contact while working at the video club. The psychological report on the victim's health indicated that she experienced anxiety with nervous symptoms, which had caused her to take sick leave with a diagnosis of depression and stress. Until this sentence, very strong rejection on the part of the victim was frequently required. In the absence of such strong rejection, this was interpreted as if the victim tolerated or allowed the conduct of the aggressor and it could therefore not be considered as harassment. The Constitutional Court in Case 224/1999 changed this previous interpretation of the need for a reaction on the part of the victim. The definition given in this sentence of sexual harassment ('environmental' sexual harassment) is a conduct of a sexual nature, physical or verbal, expressed in acts, gestures or words. This behaviour is perceived as undesired by the victim or addressee and can create a radically hateful and ungrateful atmosphere. The conduct generates, objectively, and not only for the harassed person, a work atmosphere that is sullen and uncomfortable and that does not only depend on the sensitivity of the victim. This atmosphere can be detected objectively, derived from the combined circumstances in each case. Some examples of these circumstances would be the intensity of the conduct and its reiteration, if humiliating physical contacts or verbal excesses have taken place. It is also relevant if the behaviour has affected the employee's work performance or if there are effects on the psychological situation of the victim. The Constitutional Court considers that sexual harassment at work affects the right to privacy but that it is also connected to the prohibition of sexual discrimination at work (Article 14 EC). Sexual harassment affects women most frequently and with higher intensity than men due to historical conditions of inferiority at work. The sentence declares that the sexual harassment harmed the worker's right to privacy and personal dignity.

Case 250/2007 of the Constitutional Court deals with sexual harassment among colleagues at work and not by the employer, where the aggressor was hierarchically superior to the victim. In addition, all employees were aware of the situation of sexual harassment, with psychological effects on the victim who had to go on sick leave. The victim was working as a waiter on a ship and from the beginning she suffered fondling and sexual requirements by Mr. Mason, her immediate superior. The sexual aggression and sexual requirements took place during several months and were well known on the ship, because 'due to the obsession of Mr. Mason with the victim, he did not hesitate to show it'. In May 1997, based on a decision of Mr. Mason, the victim's work was changed such that she had to move to the section of 'coffee tasting'. The worker asked for the reason for this change and Mr. Wayne – superior of Mr. Mason – answered that to recover her previous position she needed to 'go through the bed of' Mr. Mason. That same day, the woman had to be taken to the doctor as a result of an attack of depression and later she had to disembark to receive psychological treatment. The sentence acknowledges sexual harassment and infringement of the right to non-discrimination on the ground of sex at work and the right to protection of integrity and personal privacy, recognized in Articles 14, 15 and 18.1 of the Spanish Constitution. The

Constitutional Court considers that fundamental rights protection in labour relationships not only addresses the employer. Sexual harassment between workers also violates this right, particularly when the aggressor uses his superior position as sexual blackmail.

In criminal law, Case 219/2002 of the *Audiencia Provincial* of Castellón (Criminal Jurisdiction) analyses the criminal concept of sexual harassment. In sexual harassment as a crime certain subjective and objective elements must be combined. These elements include, first of all, asking for favours of a sexual nature. This requirement is fulfilled when the request of a sexual nature is serious and unequivocal and when this conduct is unwanted, and offensive for the woman in question. Also, the request should objectively produce a situation that is seriously intimidating, hostile or humiliating for the victim. Another element is that the aggressor takes advantage of his situation of labour or hierarchic superiority and announces to the passive subject, in an express or tacit way, that not accepting his requests can cause her harm related to her legitimate labour expectations. Case 219/2002, nevertheless, argues about the nature of the crime that the mere act of sexual harassment is a crime in itself. The crime is perpetrated with the accomplishment of the typical conduct, i.e. with a request for a sexual favour as described before. It does not require the guilty party to be looking for or pursuing, as a result of his action, an objective situation of serious hostility, humiliation or intimidation, although this situation, as an objective condition, must occur in order for it to be punishable as a crime of sexual harassment. Otherwise, the crime will be considered to constitute another type of crime, such as the crime against moral integrity.

Application of Act 3/2007 regarding harassment on the ground of sex is not as frequently found in case law as sexual harassment. The sentence of the Superior Court of Justice of Murcia of 12 January of 2009 concerns a case of harassment. The worker had a long-term contract and held the position of director of a department with two subordinate workers. She had a degree in Economics. In October 2006 she gave birth to a son and for this reason she went on maternity leave and later took a leave of absence to take care of the child. The employee returned to work in September 2007 and asked for a reduction of her working day to care for her child. She found herself in a new job because her previous one no longer existed because of a reorganization of the company. In her new job, her direct superior was one of her former subordinates, who now gave her tasks that were previously carried out by an assistant.

A quite interesting case applying Act 3/2007 is Case 320/2010 of the Superior Court of Justice of Galicia, which confirms the violation of the worker's dignity by the infringement of the equality principle and the right to privacy. Sexual harassment was considered to be proved. As a reaction against that harassment the employee failed to fulfil her obligations and was dismissed. The breach of contract was considered to be a rejection of the woman of the intimidating, degrading and offensive atmosphere created by her boss at work. For that reason, the Court considers that the dismissal is discrimination on the ground of sex motivated by that rejection. Moreover, the company had no measures in place to prevent situations of harassment or sexual harassment. According to Article 48 of Act 3/2007, the company had the obligation to take preventive measures, but in this case the company had not fulfilled that legal obligation. This violation made the company responsible for the harm, even if the company was not aware of the situation.

### 2.2.3. Dignity

Article 4.2.e) of the Workers' Statute recognizes the right of workers to their privacy and due respect of dignity, which includes the protection against verbal or physical offences of a sexual nature. This Article creates in the labour field the fundamental right of all persons to dignity (Article 10.1 of the Spanish Constitution), and harassment and sexual harassment constitute violations of this right. In Case 224/1999, the Constitutional Court for the first time established a link between sexual harassment and dignity, indicating that the hidden objective of sexual harassment is to treat women as an object, scorning their condition and personal dignity.

#### 2.2.4. Restrictions

The relation between the prohibition of harassment and sexual harassment and constitutional and human rights is one of reinforcement, but not of conflict.

#### 2.2.5. Role of equality bodies

There is no relevant information on this, as far as I know.

### 3. Harassment and sexual harassment outside the framework of anti-discrimination law

#### 3.1. National provisions

See above, in 2.1.1.

#### 3.2. Collective agreements

See above, in 2.1.1 and 2.1.6.

#### 3.3. Additional measures

There is no relevant information.

#### 3.4. Harassment and stress at work

There is some case law dealing with both issues but this does not make a clear distinction or link between the two issues. See above in 2.2.2: the sentence of Constitutional Court in Case 224/1999.

### 4. Added value of anti-discrimination approach

#### 4.1. Added value

Yes, in fact, the added value of the anti-discrimination approach, as opposed to other fundamental rights, such as privacy or dignity, is related to the possibility of applying all instruments of anti-discrimination law.

## SWEDEN – Ann Numhauser-Henning

### 1. General situation

The actual frequency of harassment situations – be it in working life or in relation to the provision of goods and services – is very difficult to interpret. This is also true with regard to harassment on the ground of sex and – not least – sexual harassment. Sexual harassment is known to be more frequent in male-dominated branches, and especially in relation to female ‘breakers’. In Sweden there have been several cases, for instance, in the military.<sup>598</sup> Empirical studies have, ever since 1987,<sup>599</sup> been carried out in an attempt to control the situation.

Every two years, the Swedish Bureau of Statistics (SCB) carries out a work environment survey on behalf of the Work Environment Authority (AMV). According to the 2009 study<sup>600</sup> 18 % of women and 7 % of men had experienced some kind of gender harassment during the previous year (2009). The frequency of *sexual* harassment was significantly lower: 2 % among women (equalling approximately 40,000 cases!) and 1 % among men. Most frequent was harassment on the grounds of sex by managers and/or fellow employees (12 % among women and 5 % among men) but also harassment by third parties such as patients, students or costumers occurred (7 % among women and 2 % among men). Young women in the ‘white collar’ sector are the most vulnerable – 7 % had experienced sexual harassment in the last 12 months! In some male-dominated branches, such as the police and the military, considerably

<sup>598</sup> AD 2005 No. 63 and AD 2006 No. 73.

<sup>599</sup> FRID-A, the Equal Opportunities Ombudsman, Stockholm 1987.

<sup>600</sup> *Arbetsmiljön* 2009, AMV Rapport 2010:3, Stockholm 2010.



higher levels of harassment have been shown to exist. According to a 2001 survey, 12 % of all women policemen had experience of sexual harassment and 33 % of harassment on the grounds of sex,<sup>601</sup> whereas as many as 36 % of women officers had experience of gendered harassment.<sup>602</sup> Until now, it was mainly harassment/sexual harassment in working life that caught attention. To my knowledge, no surveys have been carried out as regards the area of goods and services.

Another way to assess the situation is the number of cases reported to the Equality Ombudsman (EO).<sup>603</sup> Since 2009 there have been 129 allegations concerning sexual harassment – only five were arbitrated and one led to a conviction in the Labour Court.

Generally speaking, however, there is little knowledge or statistics on harassment – for instance within trade unions – and the ‘silent number’ may be quite high. It was recently suggested that the EO’s monitoring of preventive measures concerning sexual harassment and other harassment should be intensified, especially in the higher education sector.

Occasionally, the issue of gender and sexual harassment is highlighted in the press.<sup>604</sup>

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### **2.1. Legislation**

#### *2.1.1. Transposition*

In Sweden, harassment on the ground of sex and sexual harassment – as well as other forms of harassment – have been regulated since 1 January 2009 in the (2008:567) Discrimination Act (DA). This is a ‘Single Non-Discrimination Act’ covering all protected grounds and areas of society. It is really ‘horizontal’ in character. Chapter 1 Section 4 contains the definitions of harassment in general and sexual harassment as a form of discrimination – compare 2.1.2 below in this report.

Instructions to discriminate – i.e. orders or instructions to discriminate given to someone who is in a subordinate or dependent position relative to the person who gives the orders or instructions or to someone who has committed herself or himself to performing an assignment for that person – are equally covered.

Chapter 2 DA contains rules on the obligation to investigate and take measures against harassment separately for working life (Section 3), education (Section 7) and the national military service and civil service (Section 16). It should be noted that there is no such special rule regarding the access to and supply of goods and services regulated in Chapter 2 Section 12.

Chapter 2 Sections 18 and 19 contain the prohibitions of reprisals: An employer or a person who is alleged to have acted contrary to the bans on discrimination must not subject an employee/individual to reprisals because he or she has reported or called attention to such actions, participated in an investigation of discrimination or rejected or given in to harassment or sexual harassment on the part of the employer/person who is alleged to have engaged in discrimination. With regard to working life, this rule applies also to a person who is enquiring about or applying for work, applying for or carrying out a traineeship, or is available to perform or is performing work as temporary or borrowed labour. The ban refers to any type of reprisal, i.e. negative treatment.

Chapter 3 of the DA contains rules on ‘Active Measures’ in working life and education. Section 6 obliges employers ‘to take measures to prevent and hinder any employee from being subjected to harassment or sexual harassment or reprisals associated with such harassment’.<sup>605</sup>

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<sup>601</sup> SCB, Stockholm 2001.

<sup>602</sup> *Rapport om förekomst av sexuella trakasserier inom försvaret*, Stockholm 2005.

<sup>603</sup> *Diskrimineringsombudsmannen*, DO.

<sup>604</sup> See e.g. a series of articles in the daily newspaper *Sydsvenskan* 21 – 22 May 2011 regarding sexual harassment at Tetra Pak AB.

<sup>605</sup> For education such a rule is included in Section 15.

The regulation on harassment thus principally contains three different elements: the ban on discrimination as such, a duty to investigate allegations and an obligation concerning preventive measures.

### 2.1.2. Definitions

Chapter 1 Section 4 of the DA contains the definitions of harassment in general and sexual harassment. They are defined as a form of discrimination and regulated in the same section of the Act as direct and indirect discrimination as well as instructions to discriminate. In Chapter 2 of the DA, harassment of any kind – also direct and indirect discrimination – is covered by a generally formulated ban on ‘discrimination’ as defined in Chapter 1 Section 4. Therefore no distinction is made between the different forms of discrimination.

The legal definition of harassment in general – the paragraph covers all protected grounds – is as follows:

Conduct that violates a person’s dignity and that is associated with one of the grounds of discrimination (sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age).

Sexual harassment is defined as:

Conduct of a sexual nature that violates someone’s dignity.

As can be seen from the above, the respective Swedish definitions do not contain the word ‘unwanted’ in relation to the conduct covered, nor does it explicitly refer to the ‘purpose or effect’ of the conduct covered. Nevertheless, I believe that the implementation is correct. It is inherent that in order to ‘violate a person’s dignity’ the conduct is unwanted by nature.<sup>606</sup> From the definition, it also follows that conduct that actually violates a person’s dignity – i.e. has that effect – is covered whether unintentional or ‘with purpose’. I therefore believe that the regulation meets the requirements of the Directive despite the wording being somewhat different.

However, it should be noted that although no intention/purpose to *harass* is needed, there is a requirement that the offender should be aware of the unwanted – and therefore potentially offensive – character of his/her actions. Some actions are offensive in character, whereas in other less obvious cases it might be necessary for the alleged victim to clearly indicate that the conduct is unwanted (compare 2.2 below).

### 2.1.3. Sexual harassment

The ban on sexual harassment originates from gender discrimination. Along the way the concept of sexual harassment was divided into harassment on the ground of sex on the one hand and sexual harassment proper on the other. Does this mean that sexual harassment is now still conceptualized as a subcategory to sex discrimination? No, in the Swedish setting that does not seem to be the case. The DA defines harassment in Chapter 1 Section 4(3) as conduct that violates a person’s dignity and *that is associated with one of the grounds of discrimination* covered by the DA. Sexual harassment, on the other hand, is defined in Section 4(4) as ‘conduct of a sexual nature that violates someone’s dignity’ and is thus not restricted or related to any certain ground. Interpreted like that, and on a superficial level, the regulation goes beyond the requirements of EU law – the articulate ban on sexual harassment applies not only to sex discrimination but to all types of discrimination. However, the ‘specification’ that we are dealing with ‘conduct of a sexual nature’ does not necessarily prevent that we also, along the same lines, may interpret this conduct as harassment on the grounds of a certain ground of discrimination under 4(3)!). This must, in my opinion, also be the case in EU law. It seems unthinkable that sexual harassment /conduct clearly stated in terms of e.g. ethnicity or sexual orientation should not be covered either as a case of multiple discrimination on the grounds of sex *and* ethnicity/sexual orientation, or by the ban on harassment on the grounds of ethnicity/sexual orientation as such.

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<sup>606</sup> Equally, Fransson and Stuber p. 91.

The interpretation that the ban on sexual harassment applies to all grounds covered by the DA is also the interpretation made in the leading Swedish commentary to the DA.<sup>607</sup> The *travaux préparatoires*, however, are somewhat puzzling as regards the scope. In the governmental Bill preceding the DA it is stated that ‘sexual harassment is different from harassment related to a specific ground. Sexual harassment is characterised by the fact that the conduct is of a sexual nature, which is not the case with other forms of harassment.’<sup>608</sup> This is in line with the interpretation that sexual harassment is not related to any specific ground of discrimination made above. The *travaux préparatoires*, however, also refer to EU law and the importance of close implementation and also states that the meaning of sexual harassment is the same as in the former Swedish Equal Opportunities Act and ‘other laws of discrimination’.<sup>609</sup> When the concept of sexual harassment was originally divided into two concepts in Swedish law, this was done only in the Equal Opportunities Act and a 2003 Act covering discrimination on a number of different grounds in other areas of society than working life including goods and services.<sup>610</sup> The concept of sexual harassment was, however, not introduced into the other acts regulating discrimination in working life on the grounds of ethnicity and disability and it was stated that the amendments did not imply any change in the protection against harassment whatsoever, which may imply that it only referred to gender harassment being divided into two types.<sup>611</sup> Be it as it may, a Single Act of horizontal design such as the Swedish DA promotes that applications are not too particular with regard to the ground of discrimination at hand, and it ‘embraces’ cases of multiple discrimination. It is, however, in my own opinion, also possible to argue that sexual harassment is by nature related to sex discrimination (as is pregnancy) and thus needs no express relation to this (or any other) ground.

#### 2.1.4. Scope

As was already indicated, the DA covers a great number of grounds (sex, transgender identity and expression, ethnicity, religion and other belief, disability, sexual orientation and age) and areas of society. Swedish legislation goes further than the directives related to gender covered by this report and also – as regards gender – covers the areas of education, healthcare and medical care and social services, the social insurance system, unemployment insurance and financial aid for education, national military service and civil service, as well as any situation where a public employee assists the public.

As regards the scope of *sexual* harassment and protected grounds, see 2.1.3 above.

#### 2.1.5. Addressee

The addressee of the bans on discrimination – including harassment and sexual harassment – is specified in each of the bans in Chapter 2 of the DA. So, the addressee of the prohibition of discrimination in working life is ‘an employer’. The provision also expressly states that ‘a person who has the right to make decisions on the employer’s behalf in matters concerning someone referred to in the first paragraph (i.e. employees, someone enquiring for or applying for work, a trainee or temporary employee or borrowed labour, *my remark*) shall be equated with the employer’. Harassment in relation to vocational training may be covered by the ban on discrimination in education. Its addressee is any ‘natural or legal person conducting activities referred to in the Education Act (1985:1100) or other educational activities (an education provider)’. When it comes to goods, services and housing the addressee is stated to be ‘a natural or legal person who supplies goods, services or housing to the general public, outside the private and family sphere, or organises a meeting or event that is open to the public’. Moreover, ‘a person who represents (such) a person ... in relation to the public, shall be equated with that person’.

<sup>607</sup> Fransson and Stuber p. 89: ‘Sexuella trakasserier saknar kravet på orsakssamband med någon diskrimineringsgrund och i stället är det handlingen, uppträdandet etc. som ska ha en *sexuell anknytning*’.

<sup>608</sup> Prop. 2007/2008:95 p. 106.

<sup>609</sup> Prop. 2007/2008:95 p. 494.

<sup>610</sup> Prop 2004/05:147 s 53 f.

<sup>611</sup> Prop 2004/05:147 s 53 f. p. 54.

This means that harassing conduct by another person, such as an ordinary fellow employee or a pupil or a client, does not amount to discrimination. Instead, the legal obligations to prevent and/or investigate alleged situations of harassment apply. The addressees of those obligations are the same as those described above. However, as already indicated elsewhere, in regard to goods, services and housing there are no such legislated obligations concerning prevention and investigation. At workplaces, along the same lines as the obligations to intervene in cases of harassment regulated in the DA, the regulation in the Work Environment Act applies in combination with the rules and recommendations of the Ordinance on Victimization at Work – see further below in 3.

The Swedish approach to the addressee, only including employer representatives proper, has been criticised by Malmberg, who argues that this implies a failure to implement the requirement on effective remedies and sanctions for acts of discrimination.<sup>612</sup>

#### *2.1.6. Preventive measures*

As was described above in 2.1.1, Chapter 3 of the DA on ‘Active Measures’ in working life and education contains in Section 6 a rule that obliges employers ‘to take measures to prevent and hinder any employee from being subjected to harassment or sexual harassment or reprisals associated with such harassment’, thus implementing Article 26 of Directive 2006/54.<sup>613</sup> The issue of prevention is also addressed by the provisions of victimization at work in health and safety legislation – see further in 3. below. In Ordinance AFS 1993:17 the guidelines to Section 2 on the duty of prevention indicate the employer’s obligations in very general terms. The especially mention, however, the duty to ‘give all employees information about and a share in the measures agreed on for the prevention of victimization’. Article 4 of the Framework Agreement can be said to have been implemented by the Work Environment Authority’s Ordinance on Victimization at Work, especially Sections 2 and 3 and the corresponding guidelines – see further in 3. below. There is no special mention of the Framework Agreement, however, in this Ordinance, which dates from 1993.

There has been no time to analyse Swedish collective agreements from this point of view. However, collective agreements are known to include quite general formulations on preventive measures and harassment, much in line with legislation itself.

#### *2.1.7. Procedures*

As there is a Single Non-Discrimination Act in Sweden there is also a Single Supervising Body, the Equality Ombudsman (EO). It is this authority’s task to monitor and supervise compliance with non-discrimination legislation in its entirety, be it by informative and controlling measures or by receiving individual allegations from victims of harassment in any covered area. The EO may bring a court action on behalf of an individual who consents to this but has no obligation to do so.

In the area of working life, the EO’s right to bring a court action is second to that of a trade union to represent its member. In both cases, a claim is brought before the Swedish Labour Court, in these cases acting as the one and only tribunal available.

In other areas of society covered, the EO – as well as an individual – may present a claim to the courts of the general court system (damages) or – in some cases regarding social security, etc. – to the administrative courts. Any claims regarding the sector of goods and services are therefore dealt with by the ordinary court system.

Failure on the part of the employer as regards preventive measures may be acted on by/reported to both the EO and the trade unions concerned which in such cases may turn to the Board against Discrimination – see Chapter 4 Sections 7-17 of the DA.

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<sup>612</sup> Malmberg 2010 p. 411. Compare also Labour Court cases 2007 No.45, where discriminatory conduct by an employee on probationary employment was not the responsibility of the employer, and 2007 No. 16, where the conduct of trade union representatives in a situation of employment was not the responsibility of the employer either.

<sup>613</sup> For education such a rule is included in Section 15.

#### *2.1.8. Burden of proof*

As in any case of alleged discrimination, the reversed burden of proof applies. This is regulated in Chapter 6 Section 3 of the DA. The claimant/victim is thus requested to ‘demonstrate circumstances that give reason to presume that he or she has been discriminated against or subjected to reprisals’. Then ‘the defendant is required to show that discrimination or reprisals have not occurred’.

Whereas harassment on the grounds of gender implying a hostile work environment or comparable circumstances may not be that difficult to demonstrate, the reverse is often the case with sexual harassment. Such offences often take place ‘in private’ without any witnesses. This is reflected in case law such as Labour Court Case 1993 No. 30.

A special case is when sexual harassment also – possibly – amounts to a criminal offence and how the different requirements on the burden of proof in the criminal case relate to those in a civil court claim. As regards the criminal offence, the public prosecutor – as in any criminal offence – bears the full burden of proof. An employer can and should, however, act to investigate and prevent further harassment on fewer indications. When it comes to act against the harasser in terms of dismissal, however, the employer has the obligation to prove ‘just cause’.

#### *2.1.9. Remedies and sanctions*

Generally speaking, the remedies for discrimination are compensatory damages for the offence resulting from violation. Should the offence imply economic loss, in cases in the area of working life, the employer must also pay economic damages.

Apart from this, as will be described further below in 3., there may also be legal consequences based on the Employment Protection Act. Passiveness on the part of the employer may amount to a breach of the victim’s employment protection rights, and with regard to the offender legal actions such as transfer or dismissal may be taken.

#### *2.1.10. Compliance with EU law*

Generally speaking, I believe that Swedish law as regards harassment and sexual harassment is in compliance with EU law.

### **2.2. Case law**

#### *2.2.1. National courts and equality bodies*

To my knowledge, there are no judgments regarding gender or sexual harassment in the general court system at Supreme Court level. Thus, the rather limited number of judgments available were issued by the Swedish Labour Court. Decisions by the EO are not binding, but mainly serve not to take an allegation to court, frequently due to lack of proof or as a result of successful settlement out of court..

#### *2.2.2. Main features of case law*

Relevant case law consists of judgments issued by the Swedish Labour Court.

*AD 2002 No.102* concerned the employer’s duty to investigate and take action on an alleged case of harassment.<sup>614</sup> A woman was sexually harassed by her direct boss. The employer did have a talk with the relevant employee about his ‘management culture’ but not in the terms of sexual harassment, nor was there any real investigation of what had actually happened or was any ‘follow-up’ done. The alleged victim eventually became sick and had to go on sick leave. The employer was found to be in breach with his duties under the former Equal Opportunities Law.

Case *2005 No. 22* also concerned the employer’s obligation to investigate alleged sexual harassment. In this case, a female employee was sexually harassed by a fellow employee. The conduct included an actual rape in a private situation. The employer urged the woman to report the event to the police and offered her some individual support but neglected to

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<sup>614</sup> The case concerned an earlier provision on this duty in Section 22.a of the former Equal Opportunities Act.

investigate the situation any further. This was insufficient according to the Labour Court. It stated that the general idea behind the employer's duty of investigation is that whatever takes place between two employees may be of importance for the situation at the workplace. Therefore also events in the employees' spare time may be covered by the duty of investigation and this was the case here. Not any and all events outside the place of work and within a private relation are, however, necessarily covered. For the duty of investigation not to apply at all, it must be obvious that no harassment has taken place.

The most recent case is *AD 2011 No. 13*. The issue here was whether an employee in a managing position had sexually harassed two female employees. There were also aspects of reprisal as well as ethnic harassment. Two female employees from Eastern Europe working in municipal care asserted harassment by their managing chief. The claim concerning ethnic harassment – but not the one concerning gender harassment – was allowed regarding one of the claimants. The conduct implied that she was called 'East woman' and not by her name, despite her making it clear that she found this offensive. The claim concerning sexual harassment related to the fact that the manager in question at Christmas 2007 had put up a picture with a potentially offensive sexual content in the lunch room. This was not found to amount to sexual harassment per se. ('There must be room to put up pictures also of a sexual nature when not directed at anyone special, as long as it is not made clear that this is actually causing offence', said the Court.) However, after being made aware that the two claimants did find the picture offensive, the following Christmas the manager emailed the picture especially to them. This, according to the Labour Court, did amount to sexual harassment – the manager was now aware that his behaviour was offensive to the claimants and discrimination was at hand. The action – of sending an offensive email – was not considered to constitute a reprisal, however, for the women bringing their complaints regarding the year 2007 to the central administration. The repressive element was missing, according to the Court. Damages were set at approximately EUR 3 500 (SEK 35 000) and approximately EUR 2 500 (SEK 25 000), respectively.

#### *2.2.3. Dignity*

There is no relevant information on this topic.

#### *2.2.4. Restrictions*

There is no relevant information on this topic.

#### *2.2.5. Role of equality bodies*

As has already been described, the EO may bring claims to court on behalf of an individual who consents to this. This was reflected in 2.2.2 above. The EO, however, has no obligation to bring a claim and prior to taking on a case, the EO makes his/her own assessment of the situation at hand. Decisions of the EO proper are not binding in a legal sense (and cannot be appealed), but are of course decisive for the EO's standing on bringing individual claims to court and may also – if made public – deter future victims from bringing their cases to the EO.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### *3.1. National provisions*

There are no other provisions on harassment/sexual harassment proper, i.e. formulated in those terms, other than those in the DA. However, since long, harassment is also a consideration of health and safety at work law. According to the Swedish (1977:1160) Work Environment Act there is a general duty on employers to provide a good working environment (Chapter 2 Section 2a) and to take any action needed to prevent that an employee is exposed to non-health or harm (Chapter 3 Section 2). It is the duty of the Work Environment Authority to monitor the work environment and to issue complementary provisions/regulations. In its Ordinance AFS 1993:17 it deals with 'Victimization at work'. The Ordinance contains provisions on measures against victimization at work, together with

general recommendations on the implementation of the provisions. 'Victimization' is here defined as 'recurrent reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community'. The regulation covers individual harassment as regulated in the DA but also 'bullying' and other behaviour against individuals of non-protected groups. The Ordinance also covers harassment by clients, customers, students and pupils, to mention only a few examples. According to the general provisions there is a duty on employers to 'plan and organise work so as to prevent victimization' (Section 2) and to 'make clear that victimization cannot be accepted in the activities' (Section 3). There must be procedures for early detection and for the rectification of unsatisfactory working conditions. If signs of victimization become apparent counter-measures shall be taken and followed up without delay, and there shall be special procedures on how alleged victims may quickly be given help and support.

Harassment situations are also since long dealt with under the (1982:80) Employment Protection Act (EPA). Generally speaking, an employer can take different types of action *against a harasser*, ranging from an ordinary conversation to disciplinary actions and, eventually, transfer or dismissal. In such a case we are dealing with the EPA. In severe situations, dismissal (even immediate dismissal) can take place without any further ado, whereas in less severe cases other solutions such as a transfer must be considered. *Case 2006 No. 73* deals with sexual harassment in the military sector. The issue was whether there were reasons to dismiss a managing officer who had harassed recruits at a social work event. He was found to have both physically and verbally sexually harassed a number of male and female recruits, behaviour 'unacceptable and victimizing' enough to dismiss him. *Case 2006 No. 54* concerned immediate dismissal of an employee who had repeatedly sexually harassed a young female fellow employee. The harassment regarded physical and verbal abuse on at least fifteen occasions. The dismissal was accepted. Another situation under the EPA is that *a victim* of alleged harassment chooses to leave her employment and then claims that the employer is responsible for the situation due to failure to fulfil his obligations of investigation and prevention – i.e. a case of provoked dismissal. *Case 2005 No. 63* concerned a female officer on duty in Kosovo who chose to leave her temporary position due to sexual harassment by fellow employees. The issue was whether provoked dismissal was at hand, and this was not the case. When it comes to measures *against a harasser* in the state sector, the rules on disciplinary sanctions of the (1994:260) Public Employment Act may also apply. A state employer has a duty to report a case involving a criminal offence to the police.

Sexual harassment may also amount to a criminal offence. Depending on the circumstances, there is a number of different crimes, from sexual offence or abuse to rape (Chapter 6 of the Penal Code). Should the offender be the employer himself or a representative of the employer or – when it comes to goods and services – a provider, these rules apply to the ban on discrimination along the same lines. In such situations, the different burdens of proof that apply in these situations may cause problems.

### **3.2. Collective agreements**

I have no detailed information on the contents of different Swedish collective agreements concerning harassment and sexual harassment. Generally speaking, however, if a collective agreement contains rules on such issues they can be expected to reflect the general wording of legislation.

### **3.3. Additional measures**

There is no relevant information on this topic.

### **3.4. Harassment and stress at work**

In its General Recommendations on the Implementation of its Provisions on Measures against Victimization at Work, the Work Environment Authority describes the underlying causes of destructive behaviour in the form of victimization as – in the first place – shortcomings in the organisation of work such as 'excessive or insufficient workload or levels of demands'. It

goes on stating that ‘Unsolved, persistent organizational problems cause powerful and negative mental strain in working groups. The group’s stress tolerance diminishes and this can cause a “scapegoat mentality” and trigger acts of rejection against individual employees’. The serious consequences of victimisation mentioned also include ‘high stress level, low stress tolerance with over-reactions, sometimes traumatic crisis experience’. From the Swedish point of view it is therefore obvious that there is a recognition of the interrelation between stress and victimization/harassment.

#### **4. Added value of anti-discrimination approach**

##### **4.1. Added value**

It has been said that the fact that EU law defines harassment as a form of discrimination may have forced national legislators to change their regulations. In Sweden, according to the Labour Court in Case **1991 No. 65**, sexual harassment did not amount to discrimination on the ground of sex. It was only qualified using those terms in 2005 through amendments in order to implement EU law.

Moreover, when harassment is dealt with under health and safety law – compare above in 3 – such provisions relate to the employer’s duties and do not, generally speaking, give the employee as an individual the right to make a claim and receive damages. Also, a claim under the EPA concerning provoked dismissal as a consequence of passiveness on the part of the employer is quite demanding on the individual employee, who has to put his/her position at stake. Claims can now be filed in accordance with the DA and possibly with the help of the EO. This is true whether it is a case of discrimination proper by the employer or a failure to investigate and act properly on an allegation of harassment.

##### **4.2. Pitfalls**

When dealt with under non-discrimination law, for harassment to amount to discrimination (under Swedish law) the employer/service provider or a representative must be held responsible. In practice, however, the offender frequently is a fellow employee or – when it comes to the supply of goods and services – even a client. Then the EPA becomes an important tool to deal with the situation, in addition to the rules on possibly neglected duties of investigation/prevention.

### **TURKEY – Nurhan Süral**

#### **1. General situation**

In Turkey, until the adoption of the new Labour (2003) and Penal (2004) Codes, little importance was attached to the issue of sexual harassment and the level of awareness was not very high.

No distinction is made between ‘harassment’ and ‘sexual harassment’. The Labour Code regulates sexual harassment during the course of employment and at its termination but not in the contexts of access to employment, vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, and promotion. Similarly there are no specific legal rules on harassment as regards access to and supply of goods and services.

Results from the Fourth European Working Conditions Survey by EUROFOUND reveal that 2 % of European workers say they have experienced sexual harassment, with three times as many female workers as males reporting such harassment.<sup>615</sup> Women in the Czech Republic (10 %), Norway (7 %), Turkey, Croatia (6 %), Denmark, Sweden, Lithuania and the UK (5 %) are the most affected, while in some southern European countries the phenomenon

<sup>615</sup> [www.eurofound.europa.eu/pubdocs/2006/98/en/2/ef0698en.pdf](http://www.eurofound.europa.eu/pubdocs/2006/98/en/2/ef0698en.pdf), accessed 30 June 2010.



is barely reported at all. Italy, Spain, Malta and Cyprus all have an incidence rate of less than 1 % overall.

A Dutch study based on interviews with migrant women of Turkish and Hindu descent about their perception of sexual harassment suggests that in comparison with other women migrant women more frequently take preventive measures in advance in their contacts with men at the workplace: they keep a certain distance.<sup>616</sup> They would only lodge a complaint if there were no other possibility. They would never tell their families, because in their view the women are responsible for the occurrence and prevention of sexual harassment at work. Talking about sexual the reaction of their environment. For example, the interviews suggest that Turkish and Hindu harassment is very difficult for women in minority groups because of feelings of guilt and fear of women would rather resign than make a complaint.

The total number of lawsuits initiated against 'crimes against sexual inviolability' was 17,151 in 2008, 14,347 in 2007, and 14,311 in 2006. In 2008, such lawsuits targeted 18,625 men and 1,118 women.<sup>617</sup>

There are no official statistics on sexual harassment in the workplace but various academic studies and surveys have been conducted, some of which will be referred to here. A survey to identify the prevalence and sources of sexual harassment against nurses in Turkey, its consequences, and factors affecting harassment experiences showed that 37,1 % of the participants had been harassed sexually.<sup>618</sup> Nursing is proved to be among harassment-prone occupations. Physicians were identified as the primary instigators of sexual harassment. The most common reactions against harassers were anger and fear. Frequently reported negative effects of sexual harassment were disturbed mental health, a decline in job performance, and headaches. 'Did nothing' was the coping method used most commonly by the nurses. About 80 % of sexually harassed nurses did not report the incident of sexual harassment to the hospital administration.

Another study covering 55 physicians of whom 89,1 % were research assistants showed that 37 participants (67.3 %) were harassed, in some way or another, by a patient or their relatives.<sup>619</sup> 'Gazing at physician in a lewd manner' was the most common harassment (52.7 %) reported by the female physicians. In terms of sexual harassment risk, 56.4 % reported that, compared to other female workers, the sexual harassment risk for female physicians was low. It was concluded that, although it was not in a severe form, sexual harassment of female physicians by patients or their relatives was high.

The last study to be mentioned here examined incidents of sexual harassment by trainers, administrators, spectators, etc. directed at elite sportswomen from different branches and found that out of 356 participating sportswomen, 56.2 % declared that they had been exposed to sexual harassment while 43.8 % did not.<sup>620</sup> The most frequent sexual harassment was stated to be 'come-ons' at 26.4 %, followed by 'unwelcome jokes, questions and sexual utterances' at 25.3 %, and 'unwelcome letters and phone calls' at 24.2 %. As regards sources of harassment, 40 % claimed that spectators, 33.1 % teammates, and 24.8 % trainers were guilty of harassment. The rate of sexual harassment varied. Of the participants, 12.4 %, declared it occurred only once, 30.9 % said that it occurred one to three times, 7.3 % said that it occurred

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<sup>616</sup> European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, Sexual Harassment in the workplace in the European Union, 1998, pp. 18-19.

<sup>617</sup> Judicial Statistics, *Star* newspaper, 10 July 2010.

<sup>618</sup> Y. Çelik & S. Çelik 'Sexual Harassment Against Nurses in Turkey', *Journal of Nursing Scholarship*, Vol. 39, Issue 2, pp. 200 – 206, available online on <http://www3.interscience.wiley.com/journal/118508784/abstract>, accessed 15 July 2011.

<sup>619</sup> H. Ulusoy et al., *Bir Üniversite Hastanesinde Çalışan Bayan Hekimlerin Hasta ve Yakınları Tarafından Cinsel Tacize Uğrama Durumlarının Belirlenmesi* (Determination of Incidents of Sexual Harassment of Female Physicians by Their Patients and Patients' Close Relations), unpublished report, 2008, available online on <http://www.ttb.org.tr/siddet/images/stories/file/rapor/hulusoy.doc>, accessed 1 July 2011.

<sup>620</sup> N. Gündüz et al. 'Incidents of Sexual Harassment in Turkey of Elite Sportswomen' *The Sport Journal*, Vol. 10, No. 2, Spring 2007, available online on <http://www.thesportjournal.org/article/incidents-sexual-harassment-turkey-elite-sportswomen>, accessed 10 July 2011. For an examination of perceptions of workplace sexual harassment in the Turkish context see: Y. Toker & H. Sümer 'Workplace Sexual Harassment Perceptions in the Turkish Context and the Role of Individual Differences', *Applied Psychology* 2010, pp. 616-646.

four to six times, 5.1 % said that it occurred five to eight times, and 3.9 % declared continuous harassment.

## **2. Harassment and sexual harassment in the context of anti-discrimination law**

### ***2.1. Legislation***

#### *2.1.1. Transposition*

With the adoption of the Turkish Labour (2003) and Penal (2004) Codes, sexual harassment and workplace sexual harassment were legally recognized and outlawed in Turkey. The term sexual harassment is used and it is prohibited. The term harassment is not used but in accordance with the peculiarities of the case, the judges will consider it as falling under 'sexual harassment', or 'offending honour and dignity'. These Codes are not extensive laws providing full protection against gender discrimination or workplace sexual harassment. Turkey has to further develop its own national framework for interpreting and enforcing harassment laws in such a way as to bring the country's system into line with European legislation. Within this context, Turkey has to

- distinguish between 'direct' and 'indirect' discrimination;
- identify sexual harassment as an illegal form of gender-based discrimination with a formulation mirroring that of the directive to avoid any errors in interpretation;
- introduce the concept of harassment on the grounds of a person's gender;
- encourage employers to take preventive action;
- encourage the social partners to promote equal treatment;
- allow class actions (e.g. introduce procedural provisions to allow associations and organizations to bring legal or administrative cases in the name or in support of a victim of discrimination or harassment with the complainant's approval);
- extend the rules on sexual harassment to the contexts of access to employment, vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, and promotion.

#### *2.1.2. Definitions*

Despite the improvements, the conceptual framework for sexual harassment is quite weak. There is no separate non-discrimination legislation. Article 5 of the Labour Code<sup>621</sup> is the most extensive provision on the prohibition of discrimination. This Article regulates the principle of equal treatment prohibiting discrimination on the basis of race, sex, language, religion and sect, political opinion, philosophical belief, or any such considerations. 'Any such considerations' implies that the listing is non-exhaustive. For example, gender reassignment and sexual orientation have not been specified in the Article but upon a possible validation of a claim of discrimination on such a basis, the judiciary will, most probably, consider the case as falling under 'sex discrimination,' 'any such considerations,' or the 'right to equal treatment.' The concepts of (direct and indirect) discrimination and sexual harassment are used in Labour Code but have not been defined. No distinction has been made between 'harassment' and 'sexual harassment'. Case law does not add anything to legislative provisions. In the National Action Plan – Gender Equality 2008-2013,<sup>622</sup> 'revising the existing Labour Code to incorporate definitions based on gender equality' is specified as one of the strategies for action to combat gender discrimination in the labour market and to decrease the gender pay gap.

<sup>621</sup> *İş Kanunu* Law no. 4857, Official Gazette 10 June 2003, No. 25134.

<sup>622</sup> As part of the 'Promoting Gender Equality Project - Strengthening Institutional Capacity Twinning Project', implemented jointly by the General Directorate on the Status of Women and the Directorate of International Affairs of the Ministry of Social Affairs and Employment of the Netherlands, the National Action Plan - Gender Equality 2008-2013 (*Toplumsal Cinsiyet Eşitliği Ulusal Eylem Planı 2008-2013*) has been prepared in consultation with all parties in order to form a solid basis for public policies. For the full text in English see: [http://www.ksgm.gov.tr/Pdf/NAP\\_GE.pdf](http://www.ksgm.gov.tr/Pdf/NAP_GE.pdf), accessed 1 July 2011.

According to the Code on Establishment and Broadcastings of Radios and Televisions, (Law No. 3984),<sup>623</sup> radio and television programmes should not in any way promote violence and discrimination against women, children, and the disabled (Article 4(2)u).

The Prime Ministry issued a circular on the deterrence of mobbing in public bodies and institutions and in private workplaces.<sup>624</sup> The circular mentions the potential negative impact of mobbing on working life and highlights the importance of occupational health and safety and labour harmony. Mobbing is defined as systematic negative social acts targeting an employee: Mobbing is deliberate and systematic behaviour by which an employee is humiliated, degraded, socially excluded, intimidated, has his or her personality and dignity violated and is subjected to (hostile) ill treatment.

#### *2.1.3. Sexual harassment*

Sexual harassment has not been conceptualized as sex discrimination.

#### *2.1.4. Scope*

This issue is explained under '2.1.1. Transposition.'

#### *2.1.5. Addressee*

In the Labour Code, the employer, employer's representative, managers, and a co-worker may be responsible for sexual harassment.

#### *2.1.6. Preventive measures*

According to Article 417 entitled 'Protection of the worker's personality' of the Obligations Code,<sup>625</sup> to become effective on 1 July 2012, and the circular issued by the Prime Ministry on the deterrence of mobbing, employers are under the obligation to take all necessary measures to combat sexual harassment and mobbing. Currently there is no code of practice.

#### *2.1.7. Procedures*

Judicial procedures are available.

#### *2.1.8. Burden of proof*

The last paragraph of Article 5 of the Turkish Labour Code, stating that once the worker establishes facts that support the presumption that harassment has occurred it is up to the defendant (employer) to prove that there has been no breach of the principle of equal treatment, conforms to Article 19 of the Recast Directive.

#### *2.1.9. Remedies and sanctions*

*Remedies for victims of workplace sexual harassment:* The Labour Code does not make a distinction between harassment and sexual harassment. The only reference is to workplace sexual harassment, which is regulated as a ground for instant contract termination (summary termination; termination for a just cause) (Articles 24, 25). 'Sexual harassment' or 'offensive behaviour' shall be interpreted as to cover 'harassment.' A worker who has been sexually harassed by a fellow worker, or by a third person in the workplace, may instantly quit the employment relationship if the employer does not take necessary measures to prevent such a work environment after being warned of the incident(s) (Article 24(II)b, d). Similarly, an employer may instantly lay off a worker who has sexually harassed him/her, any member of his/her family, or a fellow worker (Article 25(II)b-c). A sexually harassed worker who quits his/her job under Article 24(II) shall be entitled to severance pay, on condition that he/she has served for at least one year, and to discrimination compensation.

According to Article 5 of the Labour Code, in an employment relationship, excluding recruitment and selection, the specified acts of discrimination including sex discrimination are

<sup>623</sup> *Radyo ve Televizyonların Kuruluş ve Yayınları Hakkında Kanun* Official Gazette 20 April 1994, No. 21911.

<sup>624</sup> Official Gazette 19 March 2011, no. 27879.

<sup>625</sup> *Borçlar Kanunu* Law no. 6098, Official Gazette 4 February 2011, No. 27836.

reasons to justifiably claim wrongful treatment or termination. Proof of discrimination shall suffice, and a consequent loss or suffering shall not be required. A worker, who considers himself discriminatorily treated during the course of employment or dismissal may pursue his claims and demand a payment amounting to four months of his basic wages. This is the so-called ‘discrimination pay.’ The ECJ has ruled that fixing a prior upper limit may preclude effective compensation.<sup>626</sup> The case law of the ECJ is upheld by Directive 2002/73/EC<sup>627</sup> and Recast Directive 2006/54. Such compensation or reparation must not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination is the refusal to take his/her job application into consideration (Article 18).

Article 22 of the Labour Code is on substantial changes to employment conditions. A substantial change to employment conditions such as being assigned to an undesirable shift, or moved to a different location or subjected to moral harassment (unfair hostility or degrading working conditions) may amount to constructive dismissal (contrived resignation), a form of wrongful termination. For the purposes of not being sued for termination and to avoid having to pay severance pay, companies may wish for a worker to leave of his own accord by giving his notice and so use forms of manipulation, hoping that he will leave ‘voluntarily.’ Constructive dismissal is not easy to prove. If the worker quits by giving his notice as a result of such manipulation, he is not entitled to compensation including severance pay and there is no legal rule on converting such a resignation into unfair termination by the employer. However, when the reason for termination is unclear, it is up to the court to find out the facts and define the type of termination.

The Prime Ministry circular on the deterrence of mobbing in public bodies and institutions and in private workplaces defines mobbing (see under ‘2.1.2. Definitions’). The measures to be taken to combat mobbing are:

1. Employers shall be under the obligation to provide for all dissuasive measures.
2. Employees shall refrain from acts and behaviour falling under the scope of mobbing.
3. Collective labour agreements laying down preventive measures to deter mobbing shall be promoted.
4. The Labour and Social Security Communication Center shall provide help and support through a psychological support hotline (*ALO 170*) in order to strengthen the fight against mobbing.
5. In the Ministry of Labour and Social Security, a Board to Combat Mobbing shall be established to follow, evaluate and create preventive policies with the participation of the State Personnel Directorate, NGOs and relevant parties.
6. Auditing personnel shall investigate complaints with due care and must finalize them without undue delay.
7. The utmost care shall be taken for the protection of privacy in mobbing cases.
8. The Ministry of Labour and Social Security, the State Personnel Directorate and the social partners shall organize educational and informative meetings and seminars to create a different approach as far as mobbing is concerned.

#### *2.1.10. Compliance with EU law*

Please see ‘2.1.1. Transposition’.

#### *2.1.11. Additional information*

There is no additional information.

<sup>626</sup> Case C-180/95, *Draehmpaehl*, (1997) ECR I-2195, Case C-271/91, *Marshall* (1993) ECR I-4367.

<sup>627</sup> Directive 2002/73/EC of the European Parliament and of the Council amending 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 (OJ L 269, 5 October 2002, p. 15).

## **2.2. Case law**

### *2.2.1. National courts and equality bodies*

There are initiatives to establish an equality body. National court decisions have been given in relation to the relevant articles described under ‘2.1.9. Remedies and sanctions’.

### *2.2.2. Main features of case law*

Case law reflects the relevant provisions but does not add to them. Relevant examples are as follows: Sexual harassment by the employer or employer’s representative shall be deemed to fall under the same provision,<sup>628</sup> in Court of Appeals 14.12.2009, Case no. 2009/10125, Decision no. 2009/10125 (unpublished); Court of Appeals 12.10.2009, Case no. 2009/115, Decision no. 2009/26672 (unpublished). In addition Court of Appeals 13.10.2009, Case no. 2008/6230, Decision no. 2009/26962 (unpublished) are examples of recent decisions of the Appeals Court validating instant dismissals by the employer where the dismissed worker had sexually harassed a co-worker. Also, where a worker employed as a salesperson of pharmaceutical products sexually harasses his customer, the employer shall be entitled to instantly dismiss this worker.<sup>629</sup>

### *2.2.3. Dignity*

There is no legal rule or case law defining dignity. In Article 417 entitled ‘Protection of the worker’s personality’ of the Obligations Code, to become effective on 1 July 2012, the term ‘personality’ has been used to denote ‘moral integrity’ including ‘dignity’: Employers are obliged to take the necessary measures so that the worker is respected, his personality is protected and that he is not subjected to sexual harassment and mobbing. ‘Dignity’ is used in the circular issued by the Prime Ministry on deterrence of mobbing.

### *2.2.4. Restrictions*

There is nothing to report on this issue.

### *2.2.5. Role of equality bodies*

There is nothing to report on this issue.

### *2.2.6. Additional information*

There is no additional information.

## **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

### **3.1. National provisions**

Sexual harassment has been regulated in the Labour and Criminal Codes. There is no separate non-discrimination legislation.

The new Penal Code treats sexual crimes as violations of individuals’ rights and not as crimes against society, the family or public morality, as did the previous code. It criminalizes rape in marriage, eliminates sentence reductions for honour killings, ends legal discrimination against non-virgin and unmarried women, and criminalizes sexual harassment in the workplace. Provisions on the sexual abuse of children have been amended to remove the possibility of under-age consent. The Penal Code regulates four types of crimes under the title ‘Crimes against sexual inviolability’: Sexual assault, sexual exploitation of children, sexual intercourse with the under-aged, and sexual harassment. ‘Crimes against sexual inviolability’ is the umbrella term and sexual harassment is a type of such crimes. Sexual harassment has not been defined in the Article itself (Article 105) but in the reasoning introducing the Article. According to this definition, sexual harassment occurs when acts of a sexual nature cause sexual disturbance to the victim, violating moral decency but not the physical inviolability of

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<sup>628</sup> Court of Appeals 28 January 2010, Case no. 2008/14529, Decision no. 2010/1463 (unpublished).

<sup>629</sup> Court of Appeals 5 October 2009, Case no. 2008/43257, Decision no. 2009/25705 (unpublished).

the victim. In other words, this behaviour may be verbal (remarks about figure/look, sexual jokes, verbal sexual advances/offers, unwanted messages or emails) or non-verbal (staring, whistling, indecent exposure), but not physical. Acts involving physical contact, such as patting, kissing, fondling, hugging, grabbing, and rape constitute types of sexual assault. Upon complaint by the victim, sexual harassment is punishable by three months' to two years' imprisonment or fine. There can be aggravating circumstances (Article 105/2). Abuse of a hierarchical, interfamily, educational, or employment relation or benefiting from being in the same place of work are aggravating circumstances resulting in a 50 % increase in punishment. If the victim is obliged to leave employment, education, or family as a result, the imprisonment period cannot be less than a year (Article 105/2).

A peace criminal court in Kırklareli applied to the Constitutional Court claiming unconstitutionality of Article 105/1 on sexual harassment on the basis that sexual harassment has not been defined therein and therefore remained an ambiguous concept, and that this contradicted the constitutional principle of legality of crimes and penalties. The Constitutional Court rejected the claim stating that on the basis of other crimes specified under the title 'Crimes against sexual inviolability' and the reasoning introducing Article 105, sexual harassment has to be understood as any disturbing behaviour with a sexual aim/undertone that does not amount to sexual assault or sexual exploitation.

Moral harassment (mobbing, bullying, victimization, psychological terror): Moral harassment falls outside the Labour Code but in theory and judicial practice, proponents of action link it to existing legal fields such as the equal treatment of women and men, the employer's duty of care, or the guarantee of workplace health and safety. Moreover, sexual harassment is specified in Articles 24(II) and 25(II) of the Labour Code as a ground for instant termination under the title 'immoral behaviour/conduct by the employer/worker or similar behaviour' where 'similar behaviour' implies that the listing is non-exhaustive and that 'moral harassment' may be interpreted as behaviour similar to 'offensive behaviour' or 'sexual harassment.' If the victim suffers from a physical or psychological illness caused by moral harassment, then instant termination will be allowed under Articles 24(I) and 25(I) for health reasons. Nevertheless, formulating a legally binding framework is likely to be most effective.

### ***3.2. Collective agreements***

There are no national collective agreements aiming at combating harassment in employment. In the circular issued by the Prime Ministry on deterrence of mobbing, it is stated that collective labour agreements laying down preventive measures to deter mobbing shall be promoted. The circular also states that the Ministry of Labour and Social Security, the State Personnel Directorate and the social partners shall organize educational and informative meetings and seminars to establish a different approach as far as mobbing is concerned.

### ***3.3. Additional measures***

There is nothing to report on this issue.

### ***3.4. Harassment and stress at work***

In academic studies, harassment is considered as one of the major causes for stress at work.

### ***3.5. Additional information***

There is no additional information.

## **4. Added value of anti-discrimination approach**

### ***4.1. Added value***

There is no relevant information in this issue..

### ***4.2. Pitfalls***

There is no relevant information in this issue.

## 1. General situation

1.1. It is generally recognised that harassment including sexual harassment is a problem which requires legal remedies.

1.2. I am not aware of any recent national statistics on the prevalence of (sexual) harassment in the workplace or in access to goods and services.

1.3. There is public debate on (sexual) harassment which is, in my view, generally regarded as unacceptable both in relation to employment/self-employment and in access to goods and services.

## 2. Harassment and sexual harassment in the context of anti-discrimination law

### 2.1. Legislation

The provisions on harassment and sexual harassment were transposed in various pieces of legislation which have now been consolidated into the Equality Act 2010, the relevant provisions of which came into force in October 2010. The Act is discussed further below. For the sake of completeness, however, it is also relevant to mention the Protection from Harassment Act 1997, which provides civil remedies and criminal punishments in respect of harassment. The 1997 Act applies regardless of whether the ‘harassment’ in question is related to any protected ground. It was originally intended to deter and punish ‘stalking’ (i.e. repeated and unwanted actions of following, approaching and/or intimidation etc.) and was amended to cover the activities of those such as animal rights activists who pursue and threaten those working, for example, for pharmaceutical companies.

Section 1 of the 1997 Act is set out in Appendix 1 to this country report. ‘Harassment’ is not fully defined by the Act, which provides for the possibility of damages in respect of and injunctions, backed by criminal sanctions, against harassment. Section 7(4) of the Act states, however, that “‘Conduct’ includes speech”; Section 7(2) that ‘[r]eferences to harassing a person include alarming the person or causing the person distress’; and Section 7(3) that ‘[a] ‘course of conduct’ must involve (a) in the case of conduct in relation to a single person ... conduct on at least two occasions in relation to that person, or (b) in the case of conduct in relation to two or more persons ... conduct on at least one occasion in relation to each of those persons’. Criminal sanctions are limited to imprisonment of up to six months and/or a fine of up to EUR 5 705 (£5 000).

It has been confirmed by the highest court in the UK that the Protection of Harassment Act 1997 can apply in the context of employment, and that an employer may be held vicariously liable for the actions in this respect of his or her staff.<sup>630</sup> The Act, however, is not enforceable in the employment tribunals where most employment-related cases (including discrimination cases) are litigated and the majority of harassment claims are brought under the discrimination legislation (now the Equality Act 2010).

#### 2.1.1 Transposition

Article 2(2)(a) of Directive 2006/54/EC has been specifically transposed by the definition of harassment in the Equality Act 2010. The Act regulates discrimination and harassment across a range of contexts including employment and self-employment, housing, access to goods and services and the functions of public authorities.

<sup>630</sup> *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [2006] ICR 1199, [2006] IRLR 695.

### 2.1.2 Definitions

Harassment is defined by Section 26 of the Equality Act 2010, which is set out in Appendix 2 to this country report. The definition corresponds to those given by Directive 2006/54 in Article 2(1)(c) and (d) and Directive 2004/113/EC in Article 2(c) and (d). The inclusion of the objective test for harassment in the Equality Act's predecessor legislation generated criticism as it had the potential to invite conclusions (for example) that it would be unreasonable for a woman working in a male environment to take objection to sexualised comments or behaviour. Such an approach would undermine the very purpose of a prohibition on sexual harassment: in *Richmond Pharmacology v Dhaliwal* the Employment Appeal Tribunal ruled that the purpose of the objective test was (in the context of a racial harassment claim) to avoid a finding of harassment where 'the tribunal believes that the Claimant was unreasonably prone to take offence' and to avoid 'a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'<sup>631</sup>

Despite fears that the inclusion of an express objective test would invite arguments that claimants should 'in Rome, do as the Romans', or at least put up with what Romans do, there is no evidence that the test was used in this way<sup>632</sup> and the inclusion of an objective element in the assessment of harassment is perhaps both necessary and inevitable to avoid a situation in which wholly unreasonable offence is taken.

The definition refers both to the purpose or effect of violating the dignity of a person, covering unintentional as well as intentional harassment. The (potential) differences between both forms of discrimination are described in national legislation, reasonableness being a consideration only in relation to unintentional harassment.

Harassment and sexual harassment are treated by the Equality Act 2010 as if they were forms of discrimination: they are prohibited insofar (a) as they relate to protected grounds and (b) take place in particular contexts. There is now only one Act regulating discrimination and harassment by reference to the protected grounds (the Equality Act 2010), although the Protection from Harassment Act 1997, which was intended to deal with the problem of stalking, also provides remedies in relation to 'harassment' as defined in 2.1.1 above. Harassment and sexual harassment may also amount to direct discrimination contrary to the Equality Act 2010 where they involve less favourable treatment because of a protected ground.

### 2.1.3 Sexual harassment

Sexual harassment (i.e. unwanted conduct of a sexual nature) is prohibited in terms by Section 26 of the Equality Act 2010. Like harassment related to sex, race, disability etc. it is prohibited as a specific wrong, although the approach of the Equality Act 2010 (like the predecessor legislation) is to prohibit it in its own terms rather than categorising it *as such* as a form of discrimination (this generally requiring a comparator, real or hypothetical). Sexual harassment (like other forms of harassment) could *also* amount to direct discrimination related to sex or any other protected ground where it was because of that ground, i.e. where unwanted conduct of a sexual nature was used as a weapon against someone for reasons related to his or her sexual orientation, ethnicity, age, religion etc.

### 2.1.4 Scope

The Equality Act 2010 goes beyond Directives 2006/54/EC and 2004/113/EC, the prohibitions on harassment and sexual harassment extending to cover education and virtually all the activities of public authorities.

### 2.1.5 Addressee

The Equality Act 2010 prohibits (Section 40) harassment by employers (see Appendix 3 to this country report). It imposes vicarious liability on employers for civil wrongs perpetrated by their staff and agents (see Section 109: Appendix 4). The concept of vicarious liability is

<sup>631</sup> [2009] IRLR 336, [2009] ICR 724, [33], [34].

<sup>632</sup> See, for example, the recent decision in *Thomas Sanderson Blinds v English* [2011] UKEAT 0316\_10\_2102.



widely interpreted to cover anything done by staff which has any relationship to their employment, and would include harassment carried out at work-related social functions and by peers and subordinates as well as harassment by managers and similar within the strict confines of the workplace. Also of importance are Section 40, Subsections (2)-(4) (also in Appendix 3), which are intended to capture harassment of staff by customers or clients of employing organisations, and harassment by contractors. These provisions did not appear in most of the predecessor legislation to the Equality Act 2010, although the Sex Discrimination Act 1975 was amended to include a similar provision in the wake of litigation by the then equality body, the EOC, in 2007. The Government announced in March 2011 its intention to consult in the autumn on the removal of this provision. The likely outcome of that consultation is indicated by the Government's description in its 'Plan for Growth' of the third-party harassment provision as an 'unworkable requirement ... for businesses to take reasonable steps to prevent persistent harassment of their staff by third parties as they have no direct control over it'.<sup>633</sup>

Harassment related to sex and sexual harassment are prohibited in the provision of goods and services as they are in employment (see Section 29 in Appendix 5 to this report). Section 109 applies in this context also, with the effect that harassment by an employee or agent of A will amount in law to harassment of A unless A makes out the defence provided by Section 109(4).

#### 2.1.6. Preventive measures

A table of transposition measures published by the Government Equalities Office states, in relation to Great Britain, in relation to Article 26, that<sup>634</sup> '[t]he UK Government encourages employers and those responsible for vocational training to take measures to prevent discrimination by providing in Great Britain an explanation of the law in this area and best practice advice and guidance via the EHRC and the Advisory, Conciliation and Arbitration Service (Acas)', referring in particular to 'funding for training courses aimed specifically at different groups of women: including EUR 23.8 million (£20 million) for a Level 3 training pilot in London to deliver over 7,000 A-Level equivalent qualifications for women returners and those with low skills' and '[s]upporting eight Sector Skills Councils through a £10m Women and Work Sector Pathways initiative to develop projects providing women with the skills and confidence and mentoring support to move up within or move into male-dominated occupations'. A similar transition table for Northern Ireland states that:<sup>635</sup>

The Office of the First Minister and Deputy First Minister encourages employers and those responsible for vocational training to take measures to prevent discrimination by providing an explanation of the law in this area and best practice advice and guidance via the Equality Commission for Northern Ireland.

Many employers have equal opportunities policies including policies specifically addressing sexual and other forms of harassment. Some employers also provide training on equal opportunities including sexual and other forms of harassment. The Equality and Human Rights Commission's Guidance for Employers suggests that the 'reasonable steps' an employer might take to prevent harassment include:<sup>636</sup>

- Putting into place a harassment policy, whether or not as part of a wider equality policy;
- 'Involv[ing] staff in the policy-making process, including agreeing the policy with a trade union and/or other worker representatives if appropriate';
- 'Mak[ing] sure ... workers are aware of the policy's existence and of their responsibilities to make it work, for example, by providing them with training';
- Mak[ing] sure that any visitors, clients, suppliers or customers who come into contact with your workers or job applicants are also aware of the policy and behave in line with it, for example, using signs in your reception area'.

<sup>633</sup> DIS, Plan for Growth, [http://cdn.hm-treasury.gov.uk/2011budget\\_growth.pdf](http://cdn.hm-treasury.gov.uk/2011budget_growth.pdf), accessed 28 October 2011.

<sup>634</sup> [http://sta.geo.useconnect.co.uk/pdf/Transposition\\_Note\\_-\\_Recast\\_Directive.pdf](http://sta.geo.useconnect.co.uk/pdf/Transposition_Note_-_Recast_Directive.pdf), accessed 28 October 2011.

<sup>635</sup> <http://www.ofmdfmi.gov.uk/transposition-table>, accessed 28 October 2011.

<sup>636</sup> <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/managing-workers/avoiding-and-dealing-with-harassment/>, accessed 28 October 2011.

The EHRC further advises that a harassment policy should, inter alia:<sup>637</sup>

- ‘Describe the protected characteristics and clearly state that any harassment of workers or job applicants related to any of these characteristics will not be tolerated’;
- ‘Make it clear that harassment will be treated as a disciplinary offence’;
- ‘Clearly explain how a worker can make a complaint, informally and formally’;
- ‘Make it clear that complaints of harassment will be dealt with within a reasonable time, treated seriously and confidentially, and that someone complaining will be protected from victimisation’;
- ‘Describe what support is available to a worker if they think they are being harassed, for example, counselling or a worker assistance programme’;
- ‘Describe any training/other resources available for workers to help them spot and stop harassment’;
- ‘Describe how your policy will be implemented, reviewed and monitored’;
- ‘Build in a review process; this is particularly important if someone has complained of harassment, as you will need to make sure that your policy was effective in dealing with the incident’.

By way of an example of a national collective agreements dealing with the issue of preventing harassment, there is a ‘Joint Agreement on Guidance for Harassment and Bullying in Employment in Further Education Colleges’ between the Association of Colleges (AoC), the Association for College Management (ACM) and unions: the Association of Teachers & Lecturers (ATL), GMB, Unite, UNISON and the University and College Union (UCU).<sup>638</sup>

That agreement provides ‘Guidelines on a Harassment and Bullying Policy’ which state, inter alia, that any complaints ‘will be investigated promptly and appropriate action will ... taken’, that serious bullying or harassment ‘will be dealt with under the disciplinary procedure and may be viewed as gross misconduct, which could result in summary dismissal’, and that harassment or bullying of employees by students ‘will [be] deal[t] with ... under the student disciplinary procedure, which could result in expulsion’. Harassment is defined in line with the legislation and ‘bullying’ as ‘offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient’. Examples are provided which include:

- ‘Offensive songs, remarks, jokes, emails or gestures
- Display of offensive posters, publications and graffiti
- Unwanted physical contact or advances
- Offensive remarks about a person’s dress or appearance...
- Shouting, abusive or intimidating language
- Spreading malicious rumours, allegations or gossip
- Excluding, marginalising or ignoring someone
- Intrusion by pestering, spying or stalking
- Copying memos that are critical about someone to others who do not need to know
- Deliberately undermining a competent worker by overloading, taking credit for his/her work or constant criticism
- Removing areas of responsibility and imposing menial tasks
- Cyber-bullying: that is, the sending or posting of harmful, cruel or offensive text or images by email, internet, social networking websites or other digital communication devi[c]es’.

The Agreement provides for training, the provision of support for complainants and the maintenance of confidentiality ‘as far as possible’, subject to a college being entitled to investigate complaints even where the complainant does not wish to take any action ‘in

<sup>637</sup> <http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers/managing-workers/avoiding-and-dealing-with-harassment/>, accessed 28 October 2011.

<sup>638</sup> The agreement, of 15 May 2008, is available at <http://www.atl.org.uk/Images/Agreement%20on%20harassment%20&%20bullying%20in%20FE.pdf>, accessed 28 October 2011.

accordance with its duty of care to ensure the safety of all employees who may be affected by the alleged behaviour’.

The Agreement sets out procedural guidelines for dealing with complaints of harassment or bullying which include informal, formal and appeal stages with guidance on malicious and false allegations (which should be ‘investigated and dealt with under the college disciplinary procedure and may be serious enough to constitute gross misconduct, which may result in summary dismissal’ or, where the complainant is a student, expulsion).

According to the Yearly Joint Table summarising ongoing social partners activities 2010,<sup>639</sup> ‘the [Framework agreement on harassment and violence at work, 2007] was implemented in the UK through a guide for both employers and employees entitled Preventing workplace violence and harassment’ which was drafted jointly by the CBI, TUC and PPE, with input from ACAS, Department for Business, Innovation and Skills and the Health and Safety Executive. The guide was launched on 17 November 2009, and is hosted on [www.workplaceharassment.org.uk](http://www.workplaceharassment.org.uk), 500 hard copies of the guide also having been printed.

#### *2.1.7 Procedures*

There are no specific (complaints) procedures available for persons in case of alleged harassment or sexual harassment at a national level although (as is clear from the Collective Agreement discussed above) employers (and service providers) may establish specific procedures, and would be well advised to do so in order to maximise the chances of making out the ‘due diligence’ defence to the vicarious liability which will otherwise apply in relation to the actions of their employees.

#### *2.1.8 Burden of proof*

The burden of proof under the Equality Act 2010 is set out in Section 136, which is in Appendix 6 to this country report. The Act prohibits victimisation, defined by Section 27(1) as occurring where ‘A person (A) .... subjects [another person] B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act’, Section 27(2) defining as ‘protected acts’ ‘(a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act’ and Section 27(3) providing that ‘Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.’ Tribunal and court practice allow for anonymity of claimants and restrictive reporting orders designed to protect claimants from unwanted publicity. Such orders are used particularly in sexual harassment cases but it remains difficult, notwithstanding these and the prohibition of victimisation, for prospective claimants to take action in view of fears of reprisals and limited prospects of success.

#### *2.1.9 Remedies and sanctions*

Damages may be awarded under the Equality Act 2010 to the victim of harassment to cover injury to feelings as well as any losses arising in connection with the discrimination. Such damages may be significant, particularly in cases where (as is not infrequent) psychiatric injuries flow from the harassment, also where harassment results in actual or constructive dismissal and the loss of earnings resulting therefrom. Damages are generally sought against the employer because of the vicarious liability which applies and the fact that the employer is likely to be in a better position to pay damages than the actual harasser. But Section 112 of the Act provides that ‘(1) A person (A) must not knowingly help another (B) to do anything which contravenes’ the Act, Subsection (2) providing a defence where the aider ‘relies on a statement by B that the act for which the help is given does not contravene this Act, and it is reasonable for A to do so’. The effect of this is that the actual perpetrator of harassment can

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<sup>639</sup> [http://www.ueapme.com/IMG/pdf/FINAL\\_3rd\\_joint\\_table\\_2010\\_harassment\\_violence.pdf](http://www.ueapme.com/IMG/pdf/FINAL_3rd_joint_table_2010_harassment_violence.pdf), accessed 28 October 2011.

have damages awarded against him or her personally in addition to those awarded against the employer.

As above, the Equality Act 2010 prohibits victimisation.

Damages may be awarded in respect of harassment in the context of the provision of goods and services as they may be in respect of harassment in the context of employment. Employers are free to discipline those who engage in harassment as in other forms of misconduct, subject to requirements of fairness where dismissal is concerned.

#### *2.1.10 Compliance with EU law*

In my view, domestic law is in compliance with EU law.

#### *2.1.11 Additional information*

There is no additional information.

### **2.2. Case law**

#### *2.2.1 National courts and equality bodies*

The important case law, which arose under the pre-Equality Act 2010 legislation, has been consolidated into the 2010 Act and adds nothing to the law as set out above.

#### *2.2.2 Main features of case law*

The illustrative list of harassing behaviours in 2.1.6 above is based on case law developed under the predecessor legislation to the Equality Act 2010. In addition, *Saini v All Saints Haque Centre* [2009] IRLR 74 established that harassment may be connected to a protected ground if it is motivated by the characteristics of a colleague, rather than those of the victim; *English v Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421, [2009] ICR 543, [2009] IRLR 206 found that harassment may be connected to a protected ground (there sexual orientation) even if its perpetrators knew that the victim did not possess the characteristic (there gayness) in connection with which he was being taunted; and *Aberdeen City Council v McNeill* that a senior employee who had referred at senior management meetings to a junior employee as ‘big boobs’ or ‘big tits’, in her presence, had committed such a fundamental breach of his contract of employment that he could not rely on a subsequent breach of contract by the employer to found a claim of constructive dismissal.

#### *2.2.3 Dignity*

There is no case law defining ‘dignity’ or how ‘dignity’ should be interpreted.

#### *2.2.4 Restrictions*

There is no case law showing clashes between the prohibition of harassment/sexual harassment and human rights and constitutional rights.

#### *2.2.5 Role of equality bodies*

The Equal Opportunities Commission (which, prior to the creation of the Equality and Human Rights Commission, was the equality body with responsibility for gender equality) brought judicial review proceedings against the Government in respect of the transposition of Community law relating to sexual harassment: *EOC v SSTI* [2007] IRLR 327. The amendment of the Sex Discrimination Act 1975 to expressly prohibit third-party harassment was the result of this litigation, but see above for the plans to remove this provision, now of general application, from the Equality Act 2010.

#### *2.2.6 Additional information*

There is no additional information.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

#### **3.1. National provisions**

See the discussion of the Protection from Harassment Act 1997, above. In addition, (sexual) harassment could breach the contract of employment, in particular implied duties relating to mutual trust and confidence and/or employers' duties of care.

#### **3.2. Collective agreements**

I am not aware of specific national collective agreements aimed at combating harassment in employment other than that discussed above.

#### **3.3. Additional measures**

I am not aware of other relevant measures taken outside the framework of anti-discrimination law.

#### **3.4. Harassment and stress at work**

There are relationships between the issues of harassment and stress at work and psychiatric or other personal injuries resulting from harassment could result in the recovery of damages in like fashion to those obtainable for psychiatric or other personal injuries resulting from stress at work.

#### **3.5. Additional information**

There is no additional information.

### **4. Added value of anti-discrimination approach**

#### **4.1. Added value**

I am not sure of the added value in defining harassment on the ground of sex and sexual harassment as discrimination. This is not done in terms in the UK, although harassment and sexual harassment are treated, for the purposes of damages, as a type of discrimination (although without the need for a comparator, which characterises discrimination). To the extent that this treatment means (in UK law) that damages recoverable for injuries and losses flowing therefrom are unlimited, the equation of harassment and discrimination is beneficial. The same is true in respect of the points raised in the questionnaire. This equation, and the singling out of harassment connected with protected grounds, also underlines the fact that harassing behaviour is employed (whether consciously or otherwise) to maintain the homogeneity of male, white, etc. workplaces by making them unwelcoming to 'others'. As such, there is a strongly arguable case for focusing on links between unacceptable behaviour and protected grounds.

#### **4.2. Pitfalls**

On the other hand, the link between harassment and discrimination has the effect of downgrading the seriousness of bullying and other harassing behaviour which is not connected with any protected ground, and also of shifting the responsibility for dealing with harassment away from the employer (as would be the case in a system which regarded harassment as for the most part an environmental/health & safety issue) to the victims.

### **Appendix 1:**

#### **Protection from Harassment Act 1997**

##### **1 Prohibition of harassment**

- (1) A person must not pursue a course of conduct—
  - (a) which amounts to harassment of another, and
  - (b) which he knows or ought to know amounts to harassment of the other.
- (1A) A person must not pursue a course of conduct—

- (a) which involves harassment of two or more persons, and
- (b) which he knows or ought to know involves harassment of those persons, and
- (c) by which he intends to persuade any person (whether or not one of those mentioned above)—
  - (i) not to do something that he is entitled or required to do, or
  - (ii) to do something that he is not under any obligation to do.
- (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.
- (3) Subsection (1) [or (1A)] does not apply to a course of conduct if the person who pursued it shows—
  - (a) that it was pursued for the purpose of preventing or detecting crime,
  - (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

## **Appendix 2:**

### **Equality Act 2010**

#### **26 Harassment**

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
  - (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are (...) sex (...).

## **Appendix 3**

### **Equality Act 2010**

#### **40 Employees and applicants: harassment**

- (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
  - (a) who is an employee of A's;
  - (b) who has applied to A for employment.
- (2) The circumstances in which A [an employer] is to be treated as harassing B under subsection (1) include those where—
  - (a) a third party harasses B in the course of B's employment, and

- (b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.
- (3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.
- (4) A third party is a person other than—
  - (a) A, or
  - (b) an employee of A's.

#### **Appendix 4**

##### **Equality Act 2010**

#### **109 Liability of employers and principals**

- (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
- (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
- (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.
- (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
  - (a) from doing that thing, or
  - (b) from doing anything of that description.

#### **Appendix 5**

##### **Equality Act 2010**

#### **29 Provision of services, etc**

- (1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service (...)
- (3) A service-provider must not, in relation to the provision of the service, harass—
  - (a) a person requiring the service, or
  - (b) a person to whom the service-provider provides the service.
- (6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation (...).

#### **Appendix 6**

##### **Equality Act 2010**

#### **136 Burden of proof**

- (...)
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.





# Annex 1

## Questionnaire

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**Questionnaire for the report *Harassment on the Ground of Sex and Sexual Harassment. How is EU law transposed into national law, in particular Directives 2006/54/EC and 2004/113/EC* (working title)**

### **European Network of Legal Experts in the Field of Gender Equality**

#### **Introduction**

##### *Relevant EU law and definitions*

Since the adoption of Directive 2002/73/EC, harassment on the ground of sex and sexual harassment is defined in EU law as a form of discrimination on the ground of sex and is therefore prohibited in (the access to) employment in Article 2(2) (new). Harassment and sexual harassment are defined in this Directive as follows:

Harassment: ‘where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment’.

Sexual harassment: ‘where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment’.

In addition the Directive stipulates in Article 2(3) (new) that:

Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

These provisions had to be transposed into national law by 5 October 2005 (Article 2(1)). The Recast Directive 2006/54/EC, which repealed Directive 2002/73/EC, contains the same definitions and therefore extends the scope of application of these provisions. The Recast Directive had to be transposed into national law by 15 August 2008. The Preamble of the Recast Directive stipulates in Paragraph 6 that:

Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

Paragraph 7 of the Preamble clarifies that:

In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice.

The protection against victimisation according to Article 2(2)(a) of the Recast Directive is broader than the protection according to Directive 2002/73/EC. This Article states that discrimination includes ‘harassment and sexual harassment, as well as *any less favourable treatment* based on a person's rejection of or submission to such conduct’. In addition, Article 26 on the prevention of discrimination stipulates that:

Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.

Similar obligations and definitions apply to the access to and supply of goods and services according to Directive 2004/113/EC, which had to be transposed into national law by 21 December 2007. The preamble of this Directive specifies in Paragraph 9 that:

Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

In addition to the provisions of the abovementioned directives, the Framework Agreement on Harassment and Violence at Work of the European Social Partners of 26 April 2007 is relevant as well.<sup>1</sup> This Framework Agreement provides an action-oriented framework for social partners to identify, prevent and manage problems of harassment and violence at work.

#### *Preliminary remarks on some specific issues*

Sexual harassment is not mentioned in the directives concerning other grounds of discrimination such as the Race Directive 2000/43/EC and the Framework Directive 2000/78/EC. However, this does not mean that the prohibition of sexual harassment at national level would not apply in relation to other discrimination grounds than sex. In the Swedish setting, for instance, sexual harassment does not seem to be restricted in that way. The 2008 Discrimination Act defines harassment in Chapter 1 Section 4(3) as ‘a conduct that violates a person’s dignity and *that is associated with one of the grounds of discrimination...*’. Sexual harassment is defined in Section 4(4) as a ‘conduct of a sexual nature that violates someone’s dignity’ and is thus not literally restricted or related to any certain ground. If sexual harassment is unrelated to the protected ground, the prohibition comes close to a general requirement on non-sexual behaviour.

Another specific issue is the question of who is the addressee of the harassment and sexual harassment prohibition? Must it be the employer or somebody in a managing position acting on his/her behalf? What about acts of fellow colleagues or third parties such as customers, pupils or patients?

The relation of the prohibition of harassment on the grounds of sex and sexual harassment to other provisions in labour law and elsewhere (e.g. criminal law) merits specific attention as well. What role can employment protection measures play to prevent and to combat harassment and sexual harassment?

Finally, it seems that sometimes, harassment on the ground of sex or harassment in general (not sexual harassment) can be facilitated by a specific task division at the workplace. In these situations, it could sometimes be difficult to distinguish clearly between stress at work and harassment. In some countries, like France, both harassment and stress at work are also a health and security issue and the employer has the duty to create a work environment without harassment. Perhaps these issues are linked in legislation and/or case law.

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<sup>1</sup> Available at: <http://www.tradeunionpress.eu/Agreement%20violence/Framework%20Agreement%%20and%20Violence%20at%20Work2.pdf>, accessed 1 June 2011.

## *Objectives of the report*

The aim of this thematic report is twofold. The first objective is to investigate how the relevant EU provisions have been transposed into national law. In addition, the report should provide information on relevant case law of national courts and equality bodies.

The second objective of this report is to investigate what the added value is of combating harassment and sexual harassment in the form of a prohibition of discrimination. In many countries, harassment on the ground of sex and/or sexual harassment were already prohibited, e.g. in labour law, but without being defined as a form of discrimination. It seems interesting to investigate what the added value and possible pitfalls of an anti-discrimination approach might be at national level.

## **QUESTIONS AND GUIDELINES FOR DRAFTING THE NATIONAL REPORTS:**

### **1. General situation**

1.1. What is the general situation as regards harassment on the ground of sex and sexual harassment in your country?

1.2. Are there any reports or statistics on the subject? If so, briefly describe the main findings and include references to the most important and recent reports.

1.3. Is there any debate on these issues? If so, please briefly describe the main issues debated.

Please provide such information, if possible, at least in respect of two areas:

- The access to employment and self-employment
- The access to and supply of goods and services.

### **2. Harassment and sexual harassment in the context of anti-discrimination law**

#### **2.1 Legislation**

2.1.1. How have the provisions on harassment on the ground of sex and sexual harassment in Directives 2006/54 and 2004/113/EC been transposed into national legislation? Please include references to the relevant national provisions.

- Has Article 2(2)(a) of Directive 2006/54/EC been specifically transposed?

2.1.2. How are the concepts of harassment and sexual harassment defined in national legislation?

- Do these definitions correspond with the definitions given by Directive 2006/54 in Article 2(1)(c) and (d), and Directive 2004/113/EC in Article 2(c) and (d)?
- Do they specifically refer both to the *purpose or effect* of violating the dignity of a person?
- In the definition given by the Directive, harassment can be unintentional. Thus a situation where a conduct occurs with the effect (and not the purpose) of violating the dignity of the person can be defined as harassment. Is this the case in national legislation? Is this reflected in the definitions themselves (civil and/or criminal)? If not, please explain the differences and refer to the relevant national provisions.
- Are the (potential) differences between both forms of discrimination described in national legislation?
- What is the relationship between the national definitions of harassment and sexual harassment and the prohibition of (sex) discrimination? Are the definitions in different Acts (if any) similar? If not, what are the main differences and which consequences follow from such differences?

2.1.3 Is *sexual* harassment conceptualized as *sex* discrimination? Or does it also cover other grounds of discrimination? Has there been any discussion on sexual harassment covering also other grounds of discrimination?

2.1.4. Is the scope of the prohibition of harassment and sexual harassment the same as the scope of Directives 2006/54/EC and 2004/113/EC?

- Does national legislation cover more areas than (access to) employment (including vocational training and promotion) and (access to and) supply of goods and services?

2.1.5. Who is the addressee of the harassment and sexual harassment prohibition?

a) Employment

Must it be the employer or somebody in a managing position acting on his/her behalf?

How about harassment and sexual harassment by fellow workers?

b) Goods and services

2.1.6. Has Article 26 of Directive 2006/54/EC on preventive measures been implemented in your country?

- Could you give examples of measures that employers have taken in order to prevent harassment and sexual harassment?
- Do national collective agreements deal with the issue of preventing harassment? If so, could you give examples of approaches?
- See Article 4 of the Framework agreement on harassment and violence at work 2007. Has this article been implemented in your country? If it has, please provide details.

2.1.7. Are there specific (complaint) procedures available for persons in case of alleged harassment or sexual harassment?

a) Employment?

b) Goods and services?

2.1.8. What about the burden of proof? Are there any issues in this respect that would deter people from filing a complaint, alongside other factors such as fear of victimization? Does national legislation address those specific problems?

2.1.9. What are the consequences (remedies and sanctions, civil and/or criminal, if any) in a case of discriminatory harassment?

a) Employment

– For the addressee?

– For the harasser/fellow worker (are there disciplinary measures, transfer to other work, dismissal)?

– For the victim (transfer to other work, payment of damages)? How does this relate to the ban on victimization (see in particular Article 2(2)(a) of Directive 2006/54/EC)?

b) Supply of goods and services

– For the addressee?

– For the harasser (are there disciplinary measures, transfer to other work, dismissal)?

– For the victim? How does this relate to the ban on victimization (see in particular 4(3) of Directive 2004/113/EC)?

2.1.10. Is domestic law in compliance with EU law in your opinion?

2.1.11. Please feel free to provide any additional information that you would consider important regarding national legislation in the context of anti-discrimination.

## **2.2 Case law**

2.2.1. Is there any case law from courts and/or equality bodies available regarding harassment and/or sexual harassment?

2.2.2. If case law is available, please describe the main features of national case law on harassment on the ground of sex and sexual harassment. Please provide details on the most relevant situations that are considered to be harassment and sexual harassment.

- What concrete examples do you have of harassment and sexual harassment?

- Could you briefly describe the most interesting cases on harassment on the ground of sex and/or sexual harassment?

a) Employment

b) Goods and services

2.2.3. The definitions of harassment and sexual harassment are related to ‘dignity’; is there any case law defining ‘dignity’ or how ‘dignity’ should be interpreted?

2.2.4. Is there any case law which shows clashes between the prohibition of harassment/sexual harassment and human rights and constitutional rights? <sup>2</sup>

2.2.5. Have equality bodies taken action or initiated cases regarding harassment? If so, could you briefly describe some example(s)?

2.2.6. Please feel free to provide any additional information that you would consider important regarding national case law in the context of anti-discrimination.

### **3. Harassment and sexual harassment outside the framework of anti-discrimination law**

3.1. Are there any other provisions related to harassment/sexual harassment in domestic law, e.g. in health and safety law, other labour law, in criminal law etc.? If so, please briefly describe these provisions.

3.2. Are there specific national collective agreements aimed at combating harassment in employment?

3.3. Are there any other measures that you would consider relevant outside the framework of anti-discrimination law?

3.4. It could sometimes be difficult to distinguish between harassment and stress at work. Are there any relationships between the issues of harassment and stress at work?

3.5. Please feel free to provide any additional information that you would consider important regarding harassment and sexual harassment outside the framework of anti-discrimination law.

### **4. Added value of anti-discrimination approach**

4.1. What, in your view, is the added value of defining harassment on the ground of sex and sexual harassment as discrimination in relation to other provisions related to harassment? The following aspects could be relevant in this respect and are meant as examples:

- Not only harassment on the ground of sex, but also sexual harassment is prohibited;
- Uniform EU definitions apply that might be broader than the national definition(s), this might, for example, result in:
  - Greater access to justice for individuals
  - Provide more clarity for victims, lawyers, courts etc.;
- There is a possibility for national courts to ask preliminary questions and the ECJ can develop case law on the interpretation of these concepts and the application of the principle of equal treatment between men and women in this respect;
- Are there greater opportunities to address issues in the workplace that previously were harder to resolve or obtain compensation for? If so, please provide details. For instance, criminal rules may imply other requirements regarding proof than a discrimination claim, and working environment obligations on an employer may be difficult to claim from an individual's point of view within general labour law.

Do not hesitate to include other aspects and details that you consider important in this respect.

4.2. Do you consider that there are pitfalls in following a non-discrimination approach to combat harassment on the ground of sex and sexual harassment? If so, please describe them briefly. The following aspects could be relevant in this respect and are meant as examples:

- Addressing mixed/complex cases of harassment/sexual harassment may be more difficult in an anti-discrimination setting than in a working environment setting;
- Claims regarding alleged discriminatory harassment by the employer may conflict with his/her managerial prerogatives.

Do not hesitate to include other aspects and details that you consider important in this respect.

Please include any further comments which you think may be relevant for this report.

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<sup>2</sup> In some jurisdictions, in particular in the United States, there is case law that restricts harassment on the basis of potential conflict with freedom of speech, privacy etc.



## Annex II

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DOI 10.2838/54140

ISBN 978-92-79-22816-2



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