

SEXUAL HARASSMENT IN THE EUROPEAN COMMUNITY*

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Europe outlaws sexual harassment. For the first time it is clearly defined as "sex based discrimination", and a series of norms anti-nuisance are also launched; they are contained in the directive proposal, adopted by the Prodi Committee June 7th 2000, which will be examined by the Euro parliament. The norms must be respected on the job from the same persons responsible of the action.

Sexual harassment is a worrisome phenomenon and over diffused in the European Union: according to investigations conducted in the last decade, over 40% of women declare to have been object of non pleasant attentions. And often, in small firms, to escape from the persecution of colleagues or employers, the molested women come to the point of resigning. Despite this, few Community members (including Italy) have approved new laws, not only for lack of sensibility but also because it is often difficult to trace exactly the characteristics of the phenomenon.

Now, however, a "wider" definition arrives from Bruxelles (from oral aggression to physical) that above all underlines the discriminatory character of vexation: *"Sexual harassment is considered discrimination based upon sex on the job, in presence of an unwanted sexual behavior, which has the purpose or the effect of damaging a person and/or create a threatening, hostile, offensive or vexating environment, particularly when the refusal or the subjugation of a person to such behavior is used as base of a decision that interests this person."*

That is what the new directive prescribes, which replaces and completes a 1976 old text and that, if approved in the foreseen time by the European Council and Parliament, should go into effect in the whole Union within the end of 2001.

First of all Bruxelles aims to realize prevention and information campaigns for victims of sexual harassment (women but also men, even though in smaller proportions).

Furthermore, every country has to find a sort of anti-nuisances "authority", an independent organism that watches over the phenomenon and helps the victims, also financing the legal expenses in case of a court appeal. In this case, it is interesting to notice that "the burden of proof" does not revert on the molested woman, but on the presumed molester. Measures against sexual discrimination pointed out by the directive do not concern only work places, but also professional and trade unions. Moreover, a specific amendment aims to guarantee the right of puerperae to occupy the place of employment - or an equivalent position - that they had before the dismissal of maternity.

Article 3, paragraph 2 of the treaty aims to eliminate inequalities, as well as to promote parity between men and women. The principle of parity between men and women is a fundamental principle of the community legislation as enacted by article 141, particularly in paragraph 3 where it faces sex discrimination in the work environment.

The Council, in the Resolution of May 29th 1990 related to the protection of the dignity of women and men on the job, affirmed that in certain cases sexual harassment on the place of employment may result against the principle of parity of treatment according to the directive 76/207/C.E.E. of the

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Council. In the same directive, the affirmation that sexual harassment jeopardizes the performances of the single workers and/or creates a threatening, hostile or offensive environment must be inserted.

The directive 76/207/C.E.E. does not define the concept of indirect discrimination.

Therefore it is necessary to define a new directive coherent with the 97/80/C.E.E. one of the Council of December 15th 1997 concerning the burden of proof and modified by the directive 98/52/C.E.E.

The number of professional activities that Union members could exclude from the field of enforcement of the directive 76/207/C.E.E. must be narrowed down; it also must be specified in what measure some activities cannot be excluded in conformity with the jurisprudence of the Court of Justice of the European Communities.

The Court of Justice has coherently recognized the legitimacy, as regards the principle of parity of treatment, that of the protection and of the biological condition of a woman during and after maternity; the directive of the Council 92/85/C.E.E. of October 19 1992 concerning the realization of measures aimed to promote the improvement of safety and health of pregnant workers, puerperae or in period of nursing, intends to guarantee the protection of the physical and mental state of pregnant women, puerperae or in period of nursing. Considering such directive, some affirm that the protection of safety and health of pregnant workers, puerperae and in period of nursing should not penalize women on the job market and jeopardize the directives of equal treatment between men and women. The guardianship of labor laws for women, particularly their right to reacquire their job, reenters in the field of application of the directive 76/207/C.E.E.. This right must be expressly guaranteed to the puerperae.

The possibility for Union members to maintain or to adopt positive actions is considered in article 141, paragraph 4 of the treaty; therefore the actual article 2, paragraph 4 of the directive 76/207/C.E.E. is not required.

Periodic publications of the Committee on the realization of the possibility offered from article 141, paragraph 4 will help Union members to compare the formality with which it is applied and will help citizens to have a complete awareness of the existing situation in every member country.

The Court of Justice has established that, considering the fundamental nature of the right to a real legal protection, such protection must be advantageous for the employees even after the end of the job relationship.

In order for the principle of parity of treatment to be effective, the Court of Justice has established that, the indemnification recognized to the discriminated employee must be adequate to the damage suffered if that principle is not respected.

In order to provide a more effective level of protection to workers discriminated for their gender, faculty must be given to the associations or to the corporate bodies to practice the rights of defense on behalf or for protecting every person that is considered injured for the fact that the principle of parity of treatment has not been applied.

EEC members have to promote social dialogue among social parts with the purpose to face and to fight various forms of discrimination founded upon sex on the work place.

Union members have to foresee effective, proportionate and dissuasive sanctions in case of disobedience to the obligations derived from the directive 76/207/C.E.E..

In conformity to the principle of subsidiarity and proportionality as defined by article 5 of the treaty, the objectives of the present directive cannot be adequately realized from EEC members and are therefore better realizable at a Union level. The dispositions of the present directive are limited to minimum in order to pursue such objectives and they do not go beyond what is necessary to such purpose. The directive 76/207/C.E.E. is modified as follows:

l) The following paragraph I bis is inserted in article I: "1 bis. EEC members introduce the necessary measures that allow them to actively and visibly promote the objectives of parity of treatment between

men and women integrating them, particularly, in all laws, rules, administrative actions, politics and activities in the fields mentioned in the paragraph 1."

2) The following article 1 bis is inserted": Article 1 bis Sexual harassment is considered sex discrimination on the workplace in presence of an unwanted sexual behavior which has the purpose or the effect of damaging the dignity of a person and/or create a threatening, hostile, offensive or troublesome environment, particularly when the refusal or the subjugation of a person to such behavior is used as base of a decision that interests this person."

3) the article 2 is modified as follows: a) the following paragraph is added to paragraph 1 "indirect discrimination to the senses of the first paragraph subsists when a disposition, a criterion or a routine apparently neutral returns to disadvantage of a more elevated proportion of a gender, unless such disposition, criterion or routine is appropriate and necessary and can be justified by objective factors not connected to the gender." b) Paragraph 2 is replaced by the following:

Regarding the access to occupation, Union members can state that a disparity of treatment founded on a characteristic specification of a gender does not constitute discrimination when, for the nature of a particular professional activity or in the context in which it is developed, such characteristic constitutes a precise professional requisite.

The derogations to the principle of parity of treatment have to stay within the limits of appropriateness and necessary to achieve the attended objective." c) A. the following comma has been added to paragraph 3:

"At the end of the period of dismissal for maternity, the puerperae has the right to take back her job or an equivalent place without change of conditions."

d) Paragraph 4 is replaced by the following: "4. based on the information provided from Union members referring to article 9, the Committee will adopt and will publish every three years a relation of comparative evaluation of the positive actions adopted from Union members for the effect of article 141 paragraph 4 of the treaty."

4) The following letter d) is added to article 3, paragraph 2": d) a possible disposition contrary to the principle of parity of treatment is not considered or can be modified if it concerns the affiliation or the appointment to a trade union or of employers or other organizations whose members practice a particular profession, included the advantages foreseen by such organizations."

5) The article 6 is replaced by the following": Article 61. Union members introduce, in their national legal systems, the necessary measures to allow all those people that are injured by the misapplication of the principle of parity of treatment, according to articles 3, 4 and 5, in order to protect their jurisdictional rights, eventually after having made petition to other competent appeals, also after the end of the job relationship.

6) Union members introduce in their national legal systems the necessary measures so that the indemnification for the loss and the damage caused by an injured person following a discrimination, contrary to articles 3, 4 or 5, cannot be limited to a fixed maximum or exclude the recognition of interests to compensate the loss suffered by the beneficiary of the reimbursement due to the delay with which the assigned capital is really given."

7) The followings articles 8 bis, 8 ter and 8 quater are inserted: "Article 8 bis 1. Union members set up an independent organism for the promotion of the principle of parity of treatment between men and women. This organism can be part of the independent preexisting agencies, appointed nationally to the guardianship of individual rights.

Union members behave in a way that these independent bodies mentioned in paragraph 1 have the functions of receiving and sustaining appeals of individuals due to sex discrimination, of activating controls or investigations regarding sex discrimination and that of publishing articles connected with problems concerning sex discrimination.

Union members act so that associations, organizations or other corporate bodies pursue, on behalf and with the approval of the plaintiff, the possible judicial and /or administrative procedures regarding the obligations imposed by the present directive.

Union members adopt suitable measures to promote social dialogue among social parts with the intention of put forward parity of treatment, through the overseeing of the procedures on the work place, collective agreements, ways of behavior, searches or exchanges of experiences and proper routines.

Union members encourage social parts, without prejudice of their respective autonomy, to conclude, to a suitable level, agreements that establish undiscriminating norms in matters of parity of treatment between men and women.

Union members determine sanctions to inflict in case of violation of the national dispositions of realization of the present directive and they make all necessary measures for their application. The sanctions have to be real, proportionate and dissuasive. Union members notify such dispositions to the Committee within December 31 2001, as well as, the modifications concerning them."

Union members enact the necessary legislation, regulation and administrative dispositions to conform themselves to the present directive within December 31 2001 in order that within this date the employers and the workers introduce their dispositions through agreements. Union members adopt all the necessary initiatives to be able to guarantee the results foreseen by the present directive in every moment. They immediately inform the Committee.

When Union members adopt these dispositions, they contain a reference to the present directive or they are equipped by such a reference at the official publication. The formalities of such references are definite from Union members.

Union members communicate to the Committee within three years from the beginning of the present directive all the necessary information to allow the Committee to compile a report to the European Parliament and Council on the application of the present directive.

Except for paragraph 2 of the present article, Union members communicate every three years to the Committee the text of the legislation, regulation and administrative dispositions concerning positive measures adopted based on article 141, paragraph 4 of the treaty.

With particular reference to small and medium firms (PMI) the directive of the Council has been modified 76/207/C.E.E. of February 9th 1976 related to the realization of the principle of parity of treatment between men and women as it regards the access to employment, to the formation and the professional promotion and conditions of job

Considering the principle of subsidiarity and because Union legislation is necessary in this concern, the European Union is founded upon the fundamental principles of parity between women and men.

The application of a Union legislation tool has to be consistent with the principle of subsidiarity. A change of the directive 76/207/C.E.E. is only the way of guaranteeing that the abundant jurisprudence of the Court of Justice is uniformly and effectively applied to a national level. It is also necessary to guarantee to a Community level the coherence of the legislation that affects the principle of parity. Concerning sex discrimination, this can only happen through the change of the directive 76/207/C.E.E.. Furthermore the content of the proposed tool is conforming to the principle of proportionality for which it establishes minimum requirements, for example regarding sexual harassment, leaving Union members the most decisional space possible to decide in order that the principle of parity of treatment can be applied in an effective way.

The Union legislation will not have direct impact on the operation of the firms and will not impose susceptible administrative or juridical ties to hinder the creation or the development of PMI.

The firms have to operate in order that the decisions concerning employment, access to occupation, promotion, access to the formation and the terms and the conditions of occupation, including excess workers and salaries, are coherent with the principle of parity of treatment between men and women.

By and large, this is the situation in Union members. The directive intends therefore to strengthen the actual prescriptions rather than to introduce entirely new dispositions, and it will contribute to certainty and juridical clarity incorporating the jurisprudence of the Court.

For example regarding the right of the puerperae to return to their preceding job duties, or to analogous employments, at the same conditions of those applied during maternity dismissal, see the cause 184/83 Hofmann against Barmer Ersatzkasse 1984. RGC 3047, paragraph 25, the trial C-421 / 92 Habermanns Beltermann 1994. RGC 1-1657, paragraph 21 and the trial C-32/93 Webb against EMO Air Freighter 1994. RGC 1-3567, paragraph 20.

Regarding sex discrimination, the proposal will intensify participation to economic and social life and it will reduce the inequalities between men and women. The effects will be of direct benefit for economic growth through government cuts in assistance and welfare, through the expansion of purchasing power of families and the promotion of the competitiveness of firms, which will enable to make an optimal use of all the available resources on the job market.

The directive will contribute to create a job market open to everybody, as foreseen by the European Strategy for occupation. It will improve therefore the quality of employment and in medium-term it will conduct to consequential more elevated levels of employment thanks to greater competitiveness among European firms.

The directive will introduce more flexible conditions of access to employment, self-employment and free profession.

Regarding competitiveness, the directive will develop an important role in order to guarantee the same possibilities to all operators. As said before, the directive will strengthen the competitiveness of European companies giving them a greater availability of specializations and resources greater than now and doing so that such specializations will be used without discrimination.

The actual community juridical frame related to parity of treatment between men and women already requires that companies justify decisions regarding assumptions, promotions, access to formation and other terms and conditions of employment, in order to avoid any discriminatory actions. This is already the situation in most Union members.

There are no additional costs. Firms already know the Community context related to equal opportunities between women and men, which has been the same for over 20 years.

The directive reflects above all the developments of community legislation and contributes to the juridical certainty incorporating the jurisprudence of the Court of justice.

In the medium-term, firms will benefit of a greater diligence from workers and of a greater resulting competitiveness from a better use of resources.

The directive establishes a flexible general frame for the realization of the principle of parity of treatment, and it will be up to Union members and to social parts the assignment to define precise ways of practical achievement. However, costs will be limited.

The directive does not require the firms to guard and to evaluate their compliance to the directive. However, it will be in their interest to hold a register of their decisions in matters such as those of employments, promotions, access to training and other terms and conditions of employment, to prove that such decisions have been adopted without discrimination. Firms of greater dimension could extend a more structured supervision so that the principle of parity of treatment is applied at all levels.

The proposal does not make any difference regarding the dimensions of the firm because sex discrimination is found in all companies, leaving aside the number of employees. The directive establishes only minimum requirements on the base of a flexible context of principles. Union members and social parts are therefore free to vary the requirements of the directive.

Consultation

The Committee has consulted the representative bodies of the social parts at a European level and has held a seminar on the matter in May 2000. All the consulted organizations have recognized the importance of the problem and the necessity of a legislative approach. However, they have expressed various positions regarding some aspects of the proposal. The ETUC 3. would like a new proposal (a second detailed proposal) concerning sex discrimination on the provisions of the treaty in matters of health and safety on job (article 137.1).

The UNICE believes that this aspect is already considered in the directive on health and safety on job (directive 89/391/C.E.E.).