

EQUINET CONFERENCE WARSAW 22 and 23.09.2014
**Cooperation between the Defender of Rights/
European Association against Violence against Women at Work (AVFT)**

1. History of Definition of Sexual Harassment in French law

1992: The first law on sexual harassment is adopted: ("*About sexual abuse in working relationships*"). It includes a penal offense of SH and clauses in the labour code and in the law that rules civil servants' rights.

SH is defined as "*the fact to harass, using orders, threat or forces, in order to get sexual favours, by someone who abuses his authority*". The harasser is under penalty of a one year prison term and a fine of 15000€. (For comparison: The punishment is 3 years prison term and a fine of 75000€ for a simple burglary).

1998: first modification of the law: the notion of serious pressures used by the harasser is added.

2001: the European Directive about the organisation of proof for discriminations is implemented in the French law. Although the directive says that the claimer has to "*establish facts from which SH may be presumed*", the French law is more favourable for claimers and says: the claimer has to "*present elements of facts from which SH may be presumed*"...

2002 (January) : 10 years after the sexual harassment law, the "*law for social modernization*" creates the "psychological harassment in the workplace", as well in the penal code, in the labour code as in the law about civil servants' rights. At the same time, the definition of sexual harassment is deeply modified... and stripped. It becomes: "*The fact to harass in order to get sexual favours*". So it is only defined by the harasser's aim.

2002 (September): European Directive *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*.

2003: The parliament amends the burden of proof rule, on the grounds that the French law doesn't respect the European directive (although it was more favourable). It becomes "*the claimer has to establish facts...*" (But only for psychological and sexual harassment The burden of proof for other discriminations remains more favourable).

2005 (October): Deadline for transposing the European directive into the legislation of EU member states.

2008 (may): Vote of a law that adapts the French law to the European law regarding discriminations. The terms "sexual harassment" are missing but the first article states : « *The discrimination includes : Every wrongdoing related to one of a discriminatory motives and every act sexually connoted, suffered by someone and that has for the purpose or as a consequence to affect the dignity or to create an intimidating, hostile, degrading, humiliating or hurtful environment* ». About the sharing of the burden of proof, the 4th clause foresees that: The claimer has to "*present facts...*". This law doesn't replace the former penal and labour laws but is added to them... The sexual harassment's right becomes a « legislative puzzle ».

2008: The French Constitution is modified so that a person subject to trial can directly take the constitutional court so that the compliance of a law to the constitution will be checked. From this year, AVFT continues to alert French authorities on the risk that a man convicted for sexual harassment could take it to the constitutional court repeal the penal offense. No answers.

2008 (September) : The high court hands down four judgements reminding how the burden of proof is arranged as regards to sexual and psychological harassment.

2010: The national assembly votes a modification of the definition of sexual harassment in compliance with the European directive. But the law commission of the senate rejected it.

2011 (December): Gérard Ducray, lawyer, former minister, in charge of the security in the city where he has been elected, is convicted for sexual harassment. He refers his case to the constitutional court.

2012 (may): The constitutional court abrogates the penal offense of sexual harassment, with an immediate effect, because of the lack of precision of the penal offense's definition, which had no « material element ». The consequences are very serious: all the procedures based on the offense of sexual harassment are cancelled because they have no legal grounds anymore. About 1000 (female) claimers are affected. Civil (labour) procedures are obviously not concerned. Aline Rigaud (one of Ducray's victims) and the AVFT have appealed to the European Court of Human Rights. The procedure is still on-going.

2012 (August): Vote of the new law about sexual harassment. It's defined in the criminal Code as: « *the fact to impose to someone repeatedly, words or acts with sexual connotation, that affect the dignity because it's degrading or humiliating, or create against the person a intimidating, hostile or hurtful situation. Is also considered as sexual harassment: each form of serious pressure, even not repeated, in the real or visible aim to get an act of sexual nature, for his own profit or for a third person profit* ».

Contrary to the European Directive, the sexual harassment can be an isolated act but only if it reaches a certain degree of severity.

Punished by a sentence of 2 years of prison and a fine of 30 000 €. Some aggravating factors are added (abuse of authority, known or visible weakness of the victim etc.). A criminal offense of discrimination based on the sexual harassment is also created. In the labour code, it is : « *No employee has to suffer from facts (...)* » and then it's the same as in the criminal code. The verb « *to impose* » doesn't exist in the labour Code.

2014 (August): Vote of the law *about real equality between women and men*. It included two very interesting clauses as regards discriminations, likely to discourage it :

- Obligation for employers convicted for discrimination to pay back unemployment indemnities to the unemployment insurance up to the limit of six months.

- A minimum compensation equivalent to one year of salary for the breach of the employment contract (instead of six months, the minimum set by the court of cassation/supreme court) AND the pay back, to the employee, of the salary he or she had earned from the breach of the contract of employment to the final court decision.

A few days later, the constitutional court abrogated this article, for a technical reason (due to non-respect of the legislative procedure).

2014 (September): The DDD declared that he will remain committed to support the vote of these clauses in another law.

Powers of the Defender of Rights and the AVFT concerning Sexual Harassment

a. Powers of the Defender of Rights:

- **Article 4 of Organic Law No. 2011-333 of 29 March 2011 concerning the Defender of Rights:** The Defender of Rights is tasked with acting to prevent direct and indirect discrimination that is prohibited by law or by an international agreement that has been legally ratified or approved by France, and with promoting equality.
- Sexual harassment constitutes **discrimination on the basis of gender** (Law of May 2008, EUCJ jurisprudence, EU Directives).
- **Article 27** of Law No. 2011-333: the Defender of Rights shall **assist the victim** in the preparation of her case.
- Each year, the Defender of Rights receives around **ten complaints** from women in both public and private sector employment who consider themselves to have been victims of sexual harassment in their place of work. This number is particularly low in the context of the survey (provide details)
- When receiving a complaint, the Defender of Rights may avail itself of a number of **investigatory powers**:
 - Demanding written or oral explanations (hearings) – Article 18 of the aforementioned law;
 - On-site inspections – Article 22
- Once its investigation has been conducted and it finds that sexual harassment has been committed, it may:
 - **Recommend** that the respondent act to redress the harm occasioned to the plaintiff or set in place a number of measures, particularly as regards prevention and training (Art.25);
 - Submit its **observations before the court** if the victim has petitioned a court (Art.33);
 - Try to **resolve the matter amicably** (Art.26);
 - Request that the respondent impose **penalties** upon the perpetrator of the harassment (Art.29).
- The Defender of Rights is also tasked with carrying out **awareness-raising** and **prevention** actions (e.g. sexual harassment surveys, leaflets, etc.).

2. Joint measures implemented by the Defender of Rights and the AVFT on the issue of sexual harassment:

For a number of years, and particularly since revision of the definition of sexual harassment introduced by the law of 6 August 2012, the Defender of Rights and the AVFT have worked

together on two levels: on the handling of individual cases submitted to them and on proposed reform of applicable law pertaining to harassment.

- **Regarding the handling of individual cases:** with the victims' agreement, the AVFT passes on to the Defender of Rights complaints by women who consider themselves to have been victims of sexual harassment in their place of work.

The process of examining complaints differs for the two organisations insofar as AVFT only hears the victim, whereas the DR is required to conduct an adversarial investigation on the respondent.

In the area of sexual harassment, the investigatory powers conferred upon the DR assume their full importance in the acquisition of proof (specifically when hearing the presumed perpetrator) in a context in which proof is difficult to provide.

Once the investigation has been conducted, and where SH has been determined to have occurred, the DR submits its assessment to the petitioned court as an observer or *amicus curiae* where AVFT is an integral party to the proceedings.

- **Regarding proposed reform:** In a number of instances, the DR and the AVFT have reflected jointly on how to improve existing sexual harassment law (Law of 6 August 2012, repayment of unemployment benefits paid by the French Employment Agency on the ground of a dismissal being found to have been invalid). Joint reflection is planned in the future on a number of issues, such as better compensation for victims of sexual harassment and the recognition of the submission of complaints as a valid form of proof in civil law courts.

- **Unresolved questions (questions for the WG):**

- Forms of proof for sexual harassment: can the victim submit an audio or video recording made unbeknownst to the perpetrator (in France this form of proof is deemed unfair by civil courts and may not be produced in legal proceedings);

- Are victims required to prove that they did not provide their consent? (in France the Law does not require the victim to make explicit the fact that she did not provide her consent— body of evidence);

- In France, the issue of whether or not modification of the burden of proof could apply in a case against an employer in which the victim alleges sexual aggression or rape (rather than sexual harassment in the strict sense of the term), has not been ruled upon. What is the situation in this regard in your own countries?

- Have mechanisms been set in place by employers for reporting and dealing with sexual harassment, such as extending the safety obligation in the protection of employee health (in France, the employer is bound, in respect of its employees, by a results-based safety obligation in terms of protecting employee health and safety, specifically as regards psychological and sexual harassment: it must therefore take preventive measures, ensure that the behaviour ceases and instate penalties);

- EU law requires penalties to be effective, proportionate and dissuasive: is this the case?

- Are trade unions involved in the prevention of sexual harassment and, if so, how?