

SUMMARY

2012/21: Sexual harassment no longer a criminal offence (FR)

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Facts

Article L.222-33 of the French Criminal Code outlaws sexual harassment (*harcèlement sexuel*), which it defines as “harassing someone with a view to obtaining sexual favours”. On 15 March, Gérard X was convicted of having sexually harassed someone. He was sentenced to three months in prison (suspended) and a fine of € 15,000. He appealed to the Supreme Court, arguing that Article L.222-33 is unconstitutional. He asked the Supreme Court to apply a recently introduced procedure, known as QPC (*question prioritaire de constitutionnalité*), by asking the Constitutional Court (*Conseil constitutionnel*) to pronounce on the constitutionality of Article L.222-33. The Supreme Court, in a judgment delivered on 29 February 2012, complied and asked the Constitutional Court for guidance.

Judgment

On 4 May 2012 the Constitutional Court declared Article L.222-33 of the Criminal Code to be unconstitutional, reasoning that its definition of sexual harassment breaches the fundamental

principle that, in order to be punishable, an offence must be clearly defined (*nulla poena sine lege*). This means that as of 5 May 2012, and as long as the Criminal Code has not been amended, sexual harassment is no longer a criminal offence in France and that all prosecutions based on Article L.222-33 are invalid.

Commentary

The judgment reported above does not invalidate Article L.1153 of the French Labour Code, which deals with sexual harassment in the workplace. However, it is likely that sooner or later the Constitutional Court will be asked to rule on its constitutionality. Section 1 of this Article prohibits sexual harassment. Section 5 enjoins employers to take all necessary precautions to prevent sexual harassment.

A draft Bill of Parliament repairing the legislative gap caused by the Constitutional Court's judgment has been provided to the cabinet and will shortly be presented to Parliament. It is anticipated that this will lead to amendment of Article L.222-33 by the end of the summer. The repair job should not be excessively difficult, given that the Constitutional Court held that the new definition of sexual harassment need not be highly detailed, as long as it is more specific.

Comments from other jurisdictions

Germany (Markus Weber): A similar situation in Germany would be quite unlikely as there is a precise definition of sexual harassment in the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the "AGG"). This has certain implications for German labour law, which enjoins employers to take all necessary precautions to prevent discrimination among staff.

According to Article 3 of the AGG sexual harassment is a form of discrimination and is defined as unwanted, sexually-intended behaviour, including unwanted sexual acts and demands for such acts, sexually intended physical contact, remarks with sexual content, as well as unwanted visual presentation of pornographic images, which intend or cause the dignity of the person concerned to be harmed, in particular if it creates an environment of intimidation, hostility, humiliation, debasement or indignity. This definition predominantly adopts the definition of sexual harassment in Directive 2006/54 on equal treatment of men and women in matters of employment and occupation.

Since this definition is clear - particularly in comparison to the definition in Article L.222-33 of the French Criminal Code - there is no real risk that a German court - notably the German Constitutional Court - would declare the German clause unconstitutional or void. In any event, the German Criminal Code (*Strafgesetzbuch*, the "StGB") is unlikely to be the starting

point for any controversy about the definition of sexual harassment as no such definition is contained in it – and therefore, there can be no penalty for it (*nulla poena sine lege*). Instead, Article 177 of the StGB outlaws “sexual assault” - but again, offers a clear definition.

The Netherlands (Peter Vas Nunes): EU law has a definition of sexual harassment. Directive 2006/54 on the equal treatment of men and women in employment provides the following definition: “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”. Is this definition sufficiently precise to be considered constitutional by the French courts? If so, perhaps Article L.1153 can be interpreted accordingly. If not, what then? An unconstitutional EU Directive?

Subject: General discrimination, sexual harassment

Parties: none

Court: Conseil constitutionnel (Constitutional Court)

Date: 4 May 2012

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