

*European Women Lawyers Association
(EWLA)*

Resolutionen

verabschiedet bei der Mitgliederversammlung am 3. Juni in Sevilla, Spanien

I. Resolution on

Directive of the European Parliament and of the Council 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 EWLA welcomes the European Commission's proposal of 7 June 2000 for a change of Directive 76/207/EEC, and the legislative proposal of the European Parliament adopted on 31 May 2001. EWLA has also carefully noted the reaction of the Commission's representative to Parliament's proposal. EWLA takes note of the fact that the final response of the Commission to the proposals is not yet known. EWLA will therefore respond to the discussions in Parliament in general.

EWLA regards it as essential to include in the text of the revised directive 76/207, and requests that the following points should be taken into account:

1. Discrimination

EWLA underlines that a definition of direct discrimination should be introduced according to the one included in directive 00/43/EC. The definition of indirect discrimination also, should be adapted to the one included in directive 00/43/EC. The currently accepted EP-proposal for the text of art. 2 (2) of Directive 76/207/EEC which deals with genuine and determining occupational requirements is inconsistent and does not clarify the point properly.

The EWLA proposes that the text of art. 4 of Directive 00/43/EC be used, where appropriate, with the following important clarification. The words "in individual cases" should be added in order to make it clear that general exclusions of people of one sex from specific occupations should never be allowed. The text of art. 2(2) should read:

"Notwithstanding Article 2 paragraph 1, Member States may provide that in individual cases a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activity concerned, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

2. Positive action

Art. 141 (4) EC-Treaty which deals with positive measures in order to ensure full equality in practice between women and men is of great value. However, in order to achieve substantive gender equality, positive action is necessary in all aspects covered by the directive, including access to employment, vocational training and promotion, and working conditions. It is therefore necessary to include a specific provision in the text of the revised directive and in the preamble confirming and clarifying the scope of positive action.

3. Burden of proof

EWLA regrets that the European Commission has not adopted clear rules for the burden of proof into the amendment to directive 76/207. The burden of proof plays a central role in discrimination cases. Therefore, the same principles as expressed in Art. 8 of Council Directive 00/43/EC should be included in the amended Directive 76/207 also.

4. Maternity protection and parental leave

EWLA notes that the right of women to return to the workplace after giving birth is an essential part of Community Law on the protection of women during pregnancy and maternity. EWLA welcomes the provision proposed by the European Parliament that this should mean a right to return to the same job, with the same working conditions, as well as to benefit from any improvement in working conditions to which they would have been entitled during their absence. Only when inevitable, in cases such as restructuring, an equivalent job is acceptable.

The protection of parents during parental leave needs to be included into Art. 2 (2) of Directive 76/207/EC. However, the protection of women during pregnancy and motherhood as well as parental leave should not as a rule be dealt with as an exception to the principle of equality of treatment between women and men. These provisions are a prerequisite for the equality of treatment between women and men.

The effective implementation of maternity and paternity rights, as well as the right of women and men to reconcile family and working life is a condition sine qua non for gender equality, as well as for the achievement of the strategic social and economic goals of the Union.

5. Women's organisations for achieving gender equality

Women's trade unions or organisations which strive for gender equality and women's rights should be allowed and acknowledged as a form of positive action. Positive measures within the meaning of Arti-

cle 141 (4) of the EC-treaty, may include continuing the activity of, or creating organisations or sections of organisations whose main objective is the promotion of gender equality and women's rights and/or interests and which seek the membership of women only.

Such organisations have a pivotal role in achieving equality in practice for women and men and it would be a most serious step backward to make them illegal or to obstruct their work. Therefore, EWLA asks for one sex organisations to be allowed by way of positive action. An addition to article 3 (1) d should be made to this effect.

6. *Social and civil dialogue*

Like the Commission, EWLA is of the opinion that the social partners play an essential role in the realisation of equal treatment for women and men. Yet, it furthermore demands that a rule promoting the dialogue with non-governmental organisations should be included into the directive as well, following the wording of Article 12 of directive 00/43/EC.

7. *Legal action of associations*

According to EWLA, the proposed right of associations to sue in their own name for the benefit of a third party will further advance the principle of equal treatment for women and men. However, EWLA fears that in the process of implementing this rule into national law the rule will be reduced to a mere possibility of associations to act in support of the complainant, not to sue in their own name in cases of discrimination of a more general character. Therefore, EWLA supports that the right of associations to bring actions in their own name should also be included. In individual cases, it is of course indispensable to have the consent of the individual(s) concerned.

8. *Independent bodies*

EWLA explicitly welcomes the regulation concerning the set-up of independent bodies. It is of the opinion that these bodies can in general help to monitor and support – beyond the acting of the state – the enforcement and promotion of equal treatment for women and men. It is of course of crucial importance that these bodies are financed and staffed sufficiently.

9. *Contract compliance*

EWLA welcomes the provision in the text of the European Parliament, stating that in public procurement tenders, authorities may include demands that provide for positive action measures with a view to ensuring full equality in practice for women and men.

10. *Linguistic style / wording*

Finally EWLA would like to point out that it is necessary to revise the Directive concerning the

wording in some language versions. Wherever in a language nouns are used that are not gender-neutral, both the male and the female version of the nouns should be used.

II. Resolution on The Charter of Fundamental Rights of the European Union

(gekürzt um einen Teil der Begründungen)

EWLA welcomes the Charter of Fundamental Rights, which the Council, the European Parliament and the Commission proclaimed jointly in December 2000. This proclamation is an indication that the Union does not have only an economic character. The process by which the Charter was elaborated is without precedent in the Union. The body which drafted it (the "Convention"), composed of representatives of Heads of State and Government, of the Commission, the European Parliament and national Parliaments, worked in a transparent way which allowed civil society to express its views. The Convention met the challenge of combining, in a single text, civil, political, economic, social and cultural rights, which until now were laid down in a variety of international, European or national instruments. EWLA regards the Charter as an important step in guaranteeing fundamental rights in the Union. (...)

EWLA considers that it is its duty, as a lawyers' organisation at European level, to participate in the "deeper and wider debate" to which the Nice Intergovernmental Conference has invited civil society and to make all possible efforts in order to contribute to the effective guarantee of fundamental rights in the Union. EWLA recalls that only improvements of the Charter are permitted by Article 2 EU Treaty and it presents in the Annex, as its first contribution to the debate, some examples of improvements of the Charter which it deems necessary.

ANNEX

1. *Right to the free development of one's personality* (new)

EWLA proposes the addition of the following Article after Art. 1:

Article 1a **Right to the free development of one's personality**

Everyone is entitled to the free development of one's personality as long as the rights of others are not infringed. The core of the personality remains free of any intervention by the States or the Union.

Explanation: This provision reflects the common Constitutional traditions of Member States and is an expression of the principle that "human dignity is inviolable" proclaimed by Article 1 and of the affirmation

that the Union "places the individual at the heart of its activities" which appears in the Charter's preamble.

The absolute guarantee of the core of the personality goes beyond the respect for private and family life as enshrined in Article 7, which reduces the right to privacy to the territory of one's home, outside public life. This level of protection is necessary, but not yet sufficient. The protection of personal data as laid down in Article 8 is to be welcomed, but seems also insufficient. The core of the personality represents an absolute limit, linked to areas such as slavery, torture, death penalty or euthanasia.

Moreover, the rapid changes in technology which lead to recent legal developments show that issues such as the use of diary entries, the protection of the name, the right to know one's own descent e.g., are not sufficiently covered by either the general reference to human dignity or the provisions of Article 7 or 8 of the Charter.

2. *Prohibition of torture and inhuman or degrading treatment*

Article 4 No one shall be subjected to torture or to inhuman or degrading treatment, including sexual mutilation. Any kind of physical or moral violence, including domestic violence, shall be prohibited.

3. *Right to marry and right to found a family (Article 9)*

EWLA proposes to add a second sentence to Article 9 as follows:

Article 9 The right to marry, or not to marry, and the right to found a family shall be guaranteed in accordance with national laws governing the exercise of these rights.

4. *Right to asylum (Article 18)*

EWLA proposes the reformulation of this Article as follows:

Article 18 Any person who is persecuted on political, religious or racial grounds or whose freedom or fundamental rights, including his/her physical or moral integrity, is threatened, has a right to asylum, as well as a right of residence in the State where he/she seeks asylum until the conclusion of the relevant procedure.

Explanation: (...) the Charter (...) should formulate clearly and concisely the conditions for asylum, so as to satisfy the requirement of transparency and "visibility". It should, moreover, be clear that the right to asylum belongs also to Union citizens; this Article will thus complement Article 7 EU Treaty, which provides for sanctions in case of "a serious and persistent breach by a Member State of principles mentioned in Article 6(1)".

5. *Equality between men and women (Article 23)*

EWLA welcomes the specific Article on equality between men and women. Gender equality, which was recognised long ago as a fundamental right by the Court of Justice, has been strengthened by the Treaty of Amsterdam. The new Articles 2 and 3(2) EC Treaty make gender equality a "task" and an "aim" of the Community and impose on it the positive obligation "to eliminate inequalities, and to promote equality, between men and women" "in all its activities" ('mainstreaming'). The Treaty thus requires not only formal, but moreover, substantive, de facto gender equality. "Inequalities", mainly to the detriment of women, continue to subsist due to "prejudices and stereotypes concerning their role and capacities", according to the Court.

Women are neither a minority nor a group. Therefore, general non-discrimination clauses don't suffice for eliminating gender inequalities and substantive gender equality cannot be achieved without positive measures. Such measures do not constitute discrimination or derogations from the gender equality principle; they are necessary means for its effective implementation. This is expressly stipulated in the CEDAW and it results from the new Treaty provisions. Women's human rights are constantly violated and their status is in many respects inferior to that of men. This is a serious concern in the Union. This is why the Nice Council, in endorsing the European Social Agenda, has made substantive gender equality a strategic social and economic goal of the Union.

In view of the above, EWLA proposes the reformulation of Article 23 as follows:

Article 23 Equality between men and women

- (1) Equality between men and women must be ensured and promoted in all areas, including employment, work and pay. Any direct or indirect discrimination on grounds of sex is prohibited.
- (2) Measures providing for specific advantages with a view to ensuring full equality in practice between men and women in any area do not constitute gender discrimination or derogations from the principle of gender equality. They are indicated, in the first instance in favour of women, until full and substantive gender equality is achieved.

6. *Reconciling of family and professional life (Article 33)*

EWLA welcomes the inclusion and development of the aspect of reconciling family and professional life into the Charter. However, in view of the restrictive wording of the Charter, EWLA proposes the following:

Article 33 Reconciling of family and professional life

- (1) Every person has the right to legal, economic and social protection of his/her family life.
- (2) The special protection of women and men with family responsibilities and the reconciling of family and professional life shall be guaranteed by the Union and Member States. Women have a right to maternity protection. Any unfavourable treatment directly or indirectly related to maternity, paternity or the reconciling of family and professional life is prohibited.

Explanation: (1) It is preferable and clearer to guarantee an individual right to family protection. (...)

7. Citizen's rights

The principle of the balanced participation of women and men in decision-making at all levels should be proclaimed by the Charter.

8. General provisions

In accordance with the well-established case law of the Court and in order to avoid a restriction of the application of fundamental rights in the Member States, the first sentence of Article 51 should be improved as follows:

Article 51 Scope

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard to the principle of subsidiarity and to the Member States when they are acting within the scope of Union law.

9. Limitations of the rights should be carefully re-examined with a view to make them clear and transparent and to be sure that they do not affect the core of the rights. This re-examination should concern all the Articles of the Charter.

III. Resolution on Trafficking in Human Beings

(...)

The following measures are recommended to the Council, the Commission and the European Parliament:

1. The Framework Decision should oblige member states to undertake preventive anti-trafficking measures. This should include an obligation to encourage and support efforts in the countries of origin in order to address the root causes of trafficking, such as feminisation of poverty, gender discrimination at the labour market and violence against women, as well as an obligation to support information campaigns for potential victims, in the field of bilateral or international cooperation.

2. Given the need for a clear and harmonised definition, the Framework Decision should define "trafficking in human beings" according to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the UN Convention against Transnational Organised Crime.

3. The Framework Decision should oblige member states to take the necessary measures to establish its jurisdiction over the offences covered by the Decision, without regard to the location where the offence was committed and to the law applicable in the state where the offence was committed.

4. The criminal sanctions established under the Framework Decision should include the seizure and confiscation of proceeds derived from trafficking in order to compensate the victims for any damages suffered as a consequence of trafficking.

5. The Framework Decision should oblige member states to refrain from the immediate expulsion of trafficked persons because of their irregular residence and/or labour status. Persons who decide to give testimony in criminal proceedings should be entitled to residence permits for at least for the duration of such proceedings. Whether or not trafficked persons decide to make a witness statement, they should be entitled to remain in the member state's territory for an adequate period of time in order to take control of their lives, which should be at least six months (as foreseen by the Italian legislation). This should include the right to have access to the labour market. If required by humanitarian reasons, permanent humanitarian residence permits should be issued to trafficked persons, whether or not they have decided to act as witnesses in criminal trials.

6. The Framework Decision should require member states to provide appropriate assistance to trafficked persons, including accommodation in a safe shelter, medical, psychological and social care, legal counselling in their native language, access to voca-

tional training and employment programmes. Member states should also undertake adequate measures to protect the victims against intimidation, threats of reprisals or reprisals. Such measures of assistance and protection should be undertaken for the duration of the stay of trafficked persons within the member state's territory, and whether or not the persons concerned decide to act as witnesses. If necessary, protection measures should be extended to the victims' family members as well as members of NGOs providing assistance to the victims.

7. The Framework Decision should also oblige member states to cooperate with countries of origin, transit and/or destination, in order to facilitate the safe and humane repatriation of trafficked persons and their reintegration in their home states. For this purpose, psychological counselling, medical treatment, legal advice, financial support as well as vocational training should be made available.

8. The Framework Decision should include a non-discriminatory clause, obliging member states to ensure that all anti-trafficking measures should be carried out in a non-discriminatory manner, without any distinction of any kind, such as discrimination based on nationality, sex, racial or ethnic origin, religion or belief, disability, sexual orientation, property, birth or other status.

Der volle Wortlaut steht im Internet: www.ewla.org (dort: ewla in action, sevilla)

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