EUROPEAN UNION NON-DISCRIMINATION PRINCIPLE: REREADING STATUTORY SOCIAL SECURITY SCHEMES IN TURKEY

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ABSTRACT

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The main purpose of this thesis is to assess the alignment of statutory social security regulations applied in Turkey to the European Union non-discrimination principle. In the European Union Law, prohibition of discrimination on the grounds of nationality and gender equality has a deep-rooted history. Other areas in which prohibition of discrimination is applied in the European Union Law (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation), have been added later though the Treaty of Amsterdam. The discussion in the thesis is organized as follows: firstly, primary provisions intended for the prohibition of discrimination as laid down in the European Union Founding Treaties are presented with amendments introduced since the establishment of the Union and the legal process towards non-discrimination is reviewed within the historical perspective. Then, the focus moves to secondary legislations regarding the non-discrimination principle by considering the decrees of the European Court of Justice within the framework of statutory social security schemes. Statutory social security schemes in Turkey currently run by the Social Insurances and General Health Insurance Act No. 5510 and the Unemployment Insurance Act No. 4447 are described in detail. Next, differences between the

European Union and the Turkish practices on the grounds of nationality, gender, race or ethnic origin, religion or belief, disability, age, or sexual orientation are studied. Finally, the thesis offers to suggest steps to amend the statutory social security legislations in Turkey to render them compatible with European Union non-discrimination principle.

Keywords: Non-discrimination, European Union, Turkey, Social Security, Social Insurances

ÖZ

AVRUPA BİRLİĞİ AYRIMCILIK YASAĞI İLKESİ:
TÜRKİYE'DEKİ ZORUNLU SOSYAL GÜVENLİK SİSTEMİNİN TEKRAR ELE ALINMASI

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Bu tezin ana konusu, Türkiye'de uygulanmakta olan zorunlu sosyal güvenlik düzenlemelerinin Avrupa Birliği ayrımcılık yasağı ilkesine uyumunun değerlendirilmesidir. Avrupa Birliği hukukunda vatandaşlığa dayalı ayrımcılık yasağı ve cinsiyet eşitliği köklü bir geçmişe sahiptir. Buna karşın Avrupa Birliği hukukunda ayrımcılığın yasaklandığı diğer alanlar (cinsiyet, ırk veya etnik köken, din veya inanç, engellilik, yaş ve cinsel yönelim), Amsterdam Antlaşması ile eklenmiştir. Bu tezin tartışma konusu aşağıdaki şekilde organize edilmiştir. Öncelikle Avrupa Birliğinin kuruluşundan bu yana Avrupa Birliği Kurucu Antlaşmalarında ayrımcılığı yasaklayan temel hükümler değişiklikleriyle birlikte ortaya konmuş ve ayrımcılık yasağına yönelik yasal süreç tarihsel bir perspektifte gözden geçirilmiştir. Ardından, zorunlu sosyal güvenlik uygulamaları kapsamında Avrupa Adalet Divanı kararları da dikkate alınarak ayrımcılık yasağını konu alan ikincil düzenlemelere odaklanılmıştır. Bugün Türkiye'de 5510 sayılı Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu ile 4447 sayılı İşsizlik Sigortası Kanunuyla düzenlenmekte olan zorunlu sosyal güvenlik uygulamaları detaylı bir biçimde açıklanmıştır. Daha sonra

Avrupa Birliği ve Türkiye arasında vatandaşlığa, cinsiyete, ırk veya etnik kökene, din veya inanca, engelliliğe, yaşa ve cinsel yönelime dayalı düzenleme farklılıkları araştırılmıştır. Sonuç olarak, bu tez ile Türkiye'de uygulanmakta olan zorunlu sosyal güvenlik uygulamalarını Avrupa Birliği ayrımcılık yasağı ilkesine uyumlu hale getirebilecek değişiklik önerileri sunulmuştur.

Anahtar Kelimeler: Ayrımcılık Yasağı, Avrupa Birliği, Türkiye, Sosyal Güvenlik, Sosyal Sigortalar

To my family

for their endless support …

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LIST OF ABBREVIATIONS

AYM	Constitutional Court of Turkey
ChFR	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EP	European Parliament
EU	European Union
EUROSTAT	Statistical Office of the European Communities
GDP	Gross Domestic Product
GNAT	Grand National Assembly of Turkey
ILO	International Labour Organization
IMF	International Monetary Fund
İŞKUR	Turkish Employment Agency
MISSOC	Mutual Information System on Social Protection
MS	Member States
n/a	Not Applicable
NGO	Non-governmental Organization
SEA	Single European Act
SGK	Social Security Institution
TEC	Treaty Establishing the European Community
TEEC	Treaty Establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

TURKSTAT	Turkish Statistical Institute
UN	United Nations
USA	United States of America
WB	World Bank
WWII	World War II

CHAPTER 1

INTRODUCTION

With the foundation of the European Economic Community (EEC), two fundamental objectives were foreseen: the establishment of a common market and the development of the economies of the Member States (MS) through progressively approximating economic policies. For that reason, while targeting the common market, the abolition of activities that could hinder the free movement of goods, services, labour and capital among the MS were most critical. In relation to this study, it is important to note that while the six founding members were negotiating the Treaty of Rome, they stipulated that it would not be possible to establish a common market without regulations covering social security systems of the MS in order to promote the free movement of workers. In this way, it was evaluated that individuals who want to exercise their right to free movement would be able to evaluate job opportunities in other MS without fear of losing their right to social security. However, the structural differences of social security systems between the MS did not allow integration. Nevertheless, the protection of social security rights of workers was evaluated within the framework of the prohibition of discrimination on the grounds of nationality. In this context, it should be emphasized that prohibition of discrimination on the grounds of nationality guarantees one of the four fundamental freedoms enshrined in the Founding Treaties of European Union: the right to free movement. In fact, by the beginning of the year following the Treaty of Rome, Regulation 3/58 covering social security coordination rules came into force and discrimination on the grounds of nationality was prohibited and the protection of social security rights of workers was adopted, immediately after Regulation No. 1/58, which covered the determination of official languages to be used by the Union,

and Regulation 2/58 which covered equivalency of the European Parliament (EP) member passports were adopted.

Undoubtedly, the establishment of a proper functioning common market depends on the establishment of fair competition between the MS. In this regard, labour cost became one of the critical issues. Due to the fact that if labour costs in one member state are lower than the others, the price of the imported goods will be low, the state gains a competitive advantage. To overcome this problem, the principle of equal pay for men and women was included in the Treaty of Rome to ensure competition between MS would not turn against others that implemented social policies to prevent the payment of low wages to female employees, especially in female-dominated sectors like textiles.

As can be seen, since the foundation of the European Union (EU) it is possible to come across provisions concerning the non-discrimination principle. However, the non-discrimination principle and equal treatment were first considered in respect to the integration of markets and the right to free movement as mentioned above. In addition to these, provisions in order to prohibit discrimination on the ground of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation were included in EU law - and this time not just concerning economic issues - by the Treaty of Amsterdam, signed in 1997 and entered into force in 1999.

At this point, it should be stated that one of the most important contributions of this study is to discuss the EU non-discrimination law without limiting it to only one protected ground. Thus, to begin, primary and secondary sources of the EU non-discrimination law are presented with amendments introduced since the establishment of the Union and the legal process towards non-discrimination is reviewed within the historical perspective. An extensive body of anti-discrimination legislation was built with the secondary regulations implemented since the establishment of the Union. Furthermore, since regulations in the EU are shaped to a

great extent by decrees of the European Court of Justice (ECJ), the decrees of the ECJ are examined to gain a comprehensive frame of reference. Moreover, the regulations currently being discussed by the competent bodies of the EU are reviewed for the intention of informing policy makers in advance about possible regulations.

Apart from that, the main purpose of this study is to assess the alignment of statutory social security regulations applied in Turkey to the EU non-discrimination principle. However, even though Turkey-EU relations began with the Ankara Agreement signed in 1963, Turkey's full membership has yet to be realized. Turkey has been focusing on aligning with the EU acquis and bringing about reforms on its own, but it is hard to remain optimistic on accession due to political and economic issues. Notwithstanding, Turkey has a capacity for executing the above-mentioned universal values to solidify its respect for the worth and dignity of human beings. Therefore, the suggestions of this study will not only contribute to the realization of EU membership, but more importantly will also contribute to granting social security benefits in Turkey in a more egalitarian structure.

At this point, while evaluating the amendment recommendations, policy makers will also need to take into consideration their effects on the financial sustainability of the Turkish social security system. The reason behind such prominence is that amendments made in this field concern large groups and can reach serious levels of expenditure, thus there is a significant probability this it will affect not only the financial sustainability of the national social security system, but also the whole economy of Turkey. As a matter of fact, in the EU, MS have a hesitant attitude towards adopting common policies in the field of social security and prioritize their national interests. The most important indicator of this attitude is that unlike most other competences of the Union, a complete consensus is required to implement measures in this field. Within this framework, it is hoped that the recommendations

of the study will serve as a source for analytical studies in terms of their impact on the financial structure of the social security system.

In addition to that, differences in traditions, histories, and economic and social structures of countries are seen to influence social security systems. Those possible consequences can also be seen while assessing the social security system in Turkey. Therefore, while evaluating the amendment suggestions, consideration of both the economic outcomes and the accommodations to the values of the society is a sine qua non in terms of achieving the desired goals.

Under the scope of EU non-discrimination, the statutory social security practices in Turkey that cause differences under the scope of the protected grounds are discussed with an analytical and statistical approach. In light of the information above, provisions which generate difference in treatment within the scope of protected grounds could be categorized into three clusters: direct or indirect discriminatory provisions that are suggested to be reviewed; provisions that do not constitute discrimination within the framework of exceptional clauses of the EU regulations while still leading to difference in treatment; and lastly, provisions that may be defended based on social and employment policy objectives, budgetary potentials and the sustainability of the social security system. In this way, when suggestions related to these three clusters are examined, it could easily be perceived that some of them may have an impact on the Turkish economy or on her competitive advantage, while others may not have yet reached a significant level.

In conclusion, to ensure social security benefits in a more egalitarian structure, the suggestions of this thesis could be implemented in a layered manner starting with the ones that will not adversely affect the financial balance of the system. Next, the focus could be moved to amendment proposals that could reduce social security expenditures. However, while cost reduction amendments ensure equality between groups, it could also mean that the benefits currently offered will no longer be

granted as a result of the changes. Therefore, it is clear that cost-cutting amendments would bring political pressures. Nonetheless, if deemed appropriate to Turkey's social structure, recommendations that ensure equality under the protected grounds and contribute to the sustainability of the system should be evaluated carefully. In addition to these, it is important that the findings regarding the differences in treatment that could seriously affect the financial sustainability of the social security system should be borne in mind during the negotiation process with the EU. As is known, in the event of Turkey's membership to the EU, when national law is not in accordance with EU regulation, Turkish courts would have to apply the EU regulations first. However, during the negotiation process, candidate countries may request transition phases, temporary derogations and additional assistance, arguing that compliance with Union law on concrete reasons may cause economic, social and political problems. Therefore, statutory social security provisions that are not aligned with the EU non-discrimination principle and that can endanger the financial sustainability of the social security system are presented in this study in order to exhaustively discuss and contribute to Turkey's position when Turkey-EU negotiations for the "Freedom of Movement for Workers" and "Social Policy and Employment" begin.

CHAPTER 2

CONCEPTUALIZING SOCIAL SECURITY AND NON-DISCRIMINATION

2.1 Social Security from a Historical Perspective

Human beings have acted individually or collectively to eliminate the risks they may face. For example, it is known that a family was given financial support when their crop ran out, siblings and neighbours helped when someone fell ill or was unable to work[1,] and even in the years 2200-1800 BC, widows and orphans were taken care of by the spiritual class in Egypt[2]. In the Middle Ages, institutions, established with the help of religious teachings, extended a hand to the poor under the leadership of the church. In this sense, it can be said that the forms of cooperation in family, friends and society in ancient times in eastern and western civilizations constitute the basis of social security systems, which are offered today in modern societies. The idea of social security is a fact as old as the history of humankind, continuing throughout history and in this context, the reason for its emergence can be defined as the individual's need for protection against known or unknown, expected or unexpected dangers in the individual's life cycle. It is possible to understand the meaning and scope of social security more clearly, when the concept is studied word by word. The word *social* means of and about society. The word *society* indicates that danger concerns society as a whole, and, at the same time, show the social necessity of protection from danger. The word *security* on the other hand refers to protection from danger. Every individual within a society can face danger without economic and social discrimination, thus they should each be safeguarded for their now and

[1] DiNitto, D. M., & Dye, T. R. (1987). *Social Welfare: Politics and Public Policy* (2 ed.). Englewood Cliffs, N.J: Prentice-Hall. pp. 23.

[2] Day, P. J. (1997). *A New History of Social Welfare.* Boston: Allyn and Bacon. pp. 62-63.

their future. Moving from here, if *social security* is approached from a broader perspective, it reflects the important responsibilities of the state to protect individuals within a society from social risks and to ensure this protection[3].

On the other hand, the emergence of modern social security systems, which is a concrete indicator of the level of development, and which aims collectively to minimize the risks in society, coincides with the industrial revolution. Together with industrialization, agriculture-based economy began to unravel and triggered urban migration, creating urban problems. In this sense, although the world population increased rapidly in this period, rural populations gradually decreased. For example, while the proportion of rural population in the total population of England was nearly 66% in 1800, this rate decreased to approximately 20% in the 1900's[4]. Another striking example is from London, England's only major city of the period. While the population of London was 1 million in 1800, it had reached 2.4 million by 1850[5]. With the process of industrialization triggered by capitalism, changing work relations, population increases, and urban problems brought about social and economic change in society. On top of that, to protect workers against the risks of accidents at work and to overcome poverty in cities, individual efforts, family solidarity and religious institutions started to become inadequate. For this reason, the search for solutions to social problems intensified and the need to redefine the duties and responsibilities of states in societies emerged. Thus, the first steps towards ensuring social security in the modern sense were taken.

In this context, the emergence of social insurance practices, which are one of the social security tools of modern societies, in Germany can be explained by the fact

[3] Güzel, A., Okur, A. R., & Caniklioğlu , N. (2012). *Sosyal Güvenlik Hukuku* (14 ed.). İstanbul: Beta Yayınları. pp. 5-8.

[4] Grigg, D. B. (1980). *Population Growth and Agrarian Change: An Historical Perspective.* Cambridge: Cambridge University Press. pp. 1.

[5] Duiker, W. J., & Spielvogel, J. J. (2008). *The Essential World History, Volume II: Since 1500.* Boston: Wadsworth. pp. 519.

that Germany was one of the first industrialized countries. German Chancellor Otto von Bismarck, who served between 1871 and 1890, stated that the way to deal with social problems was not only through the suppression of social democratic excesses, but also through positively improving the situation of workers[6]. However, even though it seems that Bismarck accepted social insurance policies for social reasons, his real intention was to get the workers' votes during the upcoming election period and suppress socialist policies.

In the Bismarck era, three laws were published in a short 7 year period to establish a social insurance system for private sector workers; sickness insurance (1883), accidents at work insurance (1884), and old-age insurance (1889). After Germany, Austria (1887; accidents at work insurance), Denmark (1891; old-age insurance), Norway (1894; accidents at work insurance), Finland (1895; accidents at work insurance), Italy (1898; accidents at work insurance), the Netherlands (1901; accidents at work insurance), the United Kingdom (1908; old-age insurance), France (1910; old-age insurance), Switzerland (1911; accidents at work insurance), Sweden (1913; old-age insurance) and Belgium (1924; old-age insurance) began to implement compulsory social security programs[7]. In addition, social insurance practices, which initially included private sector workers, were gradually expanded to include other social groups[8]. Although, the first insurance schemes for the protection of workers were implemented in Europe, the term *social security* was used for the first time by US President Franklin D. Roosevelt in the Social Security Act, enacted on 14/08/1935, as a part of the new order deal policy initiated to establish a

[6] Hennock, P. E. (2007). *The Origin of the Welfare State in England and Germany, 1850-1914: Social Policies Compared.* Cambridge: Cambridge University Press. pp. 91.

[7] The dates of implementation of social insurance programs of countries listed in terms of programs for which participation is mandatory (For further information: Flora, P., & Heidenheimer, A. (1981). Modernization, Democratization, and the Development of Welfare States in Western Europe. In P. Flora, & J. Alber (Eds.), *The Development of Welfare States in Europe and America* (pp. 37-80). New Brunswick, NJ: Transaction Books).

[8] Feldstein, M., & Liebman, J. B. (2001). *Social Security.* NBER Working Paper No: 8451. Retrieved January 2018, from www.nber.org/papers/w8451.

welfare state, acting on the need for a systematic structure. In fact, this innovative policy came to the fore as a product of the needs of the period. After the worldwide economic depression in 1929, one out of four people become unemployed in the United States of America (USA) and one in six people lived below the poverty line in 1932. Most people had to sleep in parks because they had no place to go[9]. The Keynesian economic opinion that the state should actively participate in the market when necessary, support the private sector with its expenditures, increase demand for employment by opening new fields of business through its investments, protect individuals suffering as a result of market conditions, and consequently increase total demand began to dominate the world in order to ensure full employment at the time of the Great Depression; and the prescriptions of the Classical Economic school that previously held a great reputation[10] lost their importance. The Social Security Law dated 1935, which was enacted in order to overcome the troubled situation of 1929, provided the American public with the assurance of income being supported by the Keynesian economic opinion and introduced the world to the concept of the welfare state[11].

[9] DiNitto, D. M., & Dye, T. R. (1987). pp. 25.

[10] According to the classical economic thought pioneered by Adam Smith, the intervention of the state into the economy was undesirable and it was predicted that the market would distribute the economic resources spontaneously, while the welfare of the individuals seeking profit would increase and the whole society would be profitable. David Ricardo, one of the representatives of the classical economic school, favoured the gradual abolition of regulations for the poor, arguing that the government's arrangements to meet the needs of the poor would interfere with economic development (For further information: Malthus, T. R. (1798). *An Essay on the Principle of Population.* London: J. Johnson. pp. 26). In this context, social assistance was interrupted in some governments due to the fact that they would weaken the work motives of individuals and deepen the crisis. In the UK for example, while 10% cuts were made in 1931, the duration of assistance was reduced and the criteria for qualifying for assistance were further challenged (For further information: Barr, N. (2004). *Economics of the Welfare State.* Oxford: Oxford University Press. pp. 25).

[11] According to Briggs "A welfare state is a state in which organized power is deliberately used (through politics and administration) in an effort to modify the play of market forces in at least three directions first, by guaranteeing individuals and families a minimum income irrespective of the market value of their work or their property; second, by narrowing the extent of insecurity by enabling individuals and families to meet certain social contingencies (for example, sickness, old age and unemployment) which lead otherwise to individual and family crises; and third, by ensuring that all citizens without distinction of status or class are offered the best standards available in relation to a certain agreed range of social services" (Briggs, A. (1961). The Welfare State in Historical Perspective. *European Journal of Sociology, 2*(2), pp. 221-258).

On the other side of the Atlantic, in the UK, the report prepared by Sir William Beveridge and introduced as the William Beveridge Plan (20/11/1942) is considered another major document, notably in Europe, for obtaining social security in societies. The most important reason for this is that the Plan led to the adoption of the principle that social security should be disseminated to not only the workers but also the public and the rise of the idea that everyone has the right to social security, which would later on be included in many international documents[12]. Essentially, Keynes also contributed to the preparation of the Beveridge Plan, which laid the foundation for the welfare state practices of the golden age in the period following World War II (WWII). He even frequently met and advised William Beveridge, the architect of the report, during its preparation[13]. The main proposition of the report is this; rather than activating social assistance offered to prevent poverty when individuals lose their income due to reasons like old age and unemployment, a mandatory social insurance system should be established by the state and benefits should be provided taking into account contributions made by individuals.

Furthermore, Beveridge adds that non-contributory social assistances should be injected to the social security systems subsidiary, and underlines that the state should not be seen as a gift dispenser, meaning that beneficiaries could not get more than a certain benefit for a certain contribution they had already paid[14]. Today however, the differences in the traditions, histories, and economic and social structures of countries are seen to affect their social security systems and that a common method is not applied regarding which type of solidarity should be displayed against which social risks[15]. This leads to the lack of a mutually accepted international definition for the concept of social security and to its differing from country to country.

[12] Brown, J. (1995). *The British Welfare State: A Critical History.* Oxford: Blackwell. pp. 26.

[13] Timmins, N. (1995). *The Five Giants: A Biography of the Welfare State.* London: HarperCollins. pp. 17.

[14] Williams, J., & Williams, K. (1986). *Keynes, Beveridge, and Beyond.* New York: Routledge and Kegan Paul. pp. 9.

[15] George, V. (1968). *Social Security: Beveridge and After.* London: Routledge and Kegan Paul. pp. 5.

Berghman pointed out that it is impossible to explain the social security systems of all countries in a single concept, and that due to cultural and structural factors, different social security recognitions can even be found in a country at different times[16]. For example, since the structural differences of social security systems implemented in each of the EU[17] Member States do not allow integration in the mentioned area, the coordination of workers and citizens who exercise their right to free movement in order to protect the right to social security is the most obvious reflection of this situation. Nevertheless, based on common characteristics it can be clearly stated that, in modern social security systems, there is an effort to protect individuals from social risks through social insurance and social assistance. Social insurance is seen as the first tool in providing social security, while social assistance is considered a secondary means of social security, as it is offered to individuals or risks not covered by social insurance. Considering this distinction and the limitations of the study on the subject, in the following section, social security benefits, one of the tools of social security systems, will be examined with the intention of gaining a broader perspective in understanding common characteristics.

2.2 Key Concepts of Social Security

2.2.1 Social Risks

In its broadest sense, the concept of risk is related to the possible occurrence of a hazard and can be explained as suffering loss due to possible threats. Based on this

[16] Berghman, J. (1991). Basic concepts of social security. In D. Pieters (Ed.), *Social security in Europe: Miscellanea of the Erasmus programme of studies relating to social security in the European communities* (pp. 10-11). Brussels: Bruylant.

[17] EEC, which was established with The Treaty of Rome, has evolved into a three-pillar structure with the Treaty of Maastricht under the umbrella of the European Union, consisting of "European Communities", "Common Foreign and Security Policy" and the "Cooperation in Justice and Home Affairs". The Lisbon Treaty, which entered into force on 01/12/2009, abandoned the three-pillar structure and replaced the European Union with the Community and took over all its rights and obligations. In order to ensure integrity in the study, the term *European Union* will be used for the said integration movement, including the periods preceding the Lisbon Treaty.

definition, social risk is defined as any kind of expected or unexpected hazard in the dynamic world in which individuals live. For this reason, social risk phenomenon is the starting point of social insurance practices and aims to protect individuals from the risks that they may be exposed to directly or indirectly due to reasons like old-age, death, sickness, and unemployment.

Differences in perspectives of the social risk concept depend on historical structures and economic and social characteristics of countries and this is what differentiates it from social insurance systems. However, both of these concepts gained international acceptance with the Social Security Minimum Standards Convention No. 102 accepted on 28/06/1952 by the International Labour Organization (ILO) [18] and created a model for social insurance systems provided by states while establishing uniform definitions among countries.

Within this frame, social risks are classified according to their reasons for emergence or consequences. Social risks according to their reasons for emergence are occupational risks, physiological risks, and socio-economic risks. Occupational risks include diseases that may occur due to the characteristics of the workplace or profession as well as accidents that may occur in the workplace, while risks faced due to illness, maternity, disability, age, and death fall under psychological risks. Needs arising from social-economic situation changes that individuals may face due to such reasons as unemployment, marriage, or having children are considered socio-economic risks. Social risks based on consequences, on the other hand, are divided into two taking into account the effects that decrease incomes or increase expenses of individuals, depending on whether the power to work is completely, partly, permanently or temporarily lost. For example, if a female worker gets sick, has an accident, or gives birth, there will be a temporary discontinuation of work life and wages may be missed out on throughout the said period. A permanent loss of income

[18] According to the Treaty of Versailles, ILO was founded in order to improve social justice and labour rights on 11/04/1919, as a specialized agency of the UN.

occurs when it is not possible to return to the labour market due to injury or death as result of an occupational accident, and creates the risk of increasing expenses or a complete loss of savings.

The most important feature of the convention is clearly exposing the social risk phenomenon as stated earlier and determining the basic standards of the insurance benefits that will be established for nine determined risk areas. In this context, the nine risk areas and social insurance benefits to be offered in connection with them are listed as follows[19]:

- Medical care
- Sickness benefit
- Unemployment benefit
- Old-age benefit
- Accidents at work and occupational diseases benefit[20]
- Family benefit
- Maternity benefit
- Invalidity benefit
- Survivors' benefit

Another recognized international regulation, which regulates the social security rights of individuals, is the European Code of Social Security[21] enacted according to Article 12 of the European Social Charter accepted by the Council of Europe (CoE); nine social risk areas similar to ILO Convention No. 102 have been included. This

[19] A party states is required to guarantee the protection of at least three of the nine risk areas for the Convention to be signed. In addition, with the Convention in each risk area; 50% of the workers, 20% of the active population and foreign workers determined according to certain criteria are required to be covered.

[20] In other words, employment injury benefit.

[21] The European Code of Social Security was opened by the CoE on 16/04/1964 for the signature of the state parties and entered into force on 17/03/1968. Retrieved May 2019, from https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/048

similarity, in fact, is considered a concrete example of close cooperation between the CoE and ILO[22]. It should be noted, however, that the social insurance benefits set forth by the European Social Charter and the European Convention on Social Security are higher norms in comparison to the ILO Convention No. 102.

2.2.2 Social Insurance vs. Social Assistance

As previously stated, social security practices aiming to guarantee that individuals continue their lives without needing to depend on others become functional via two basic tools. The first of these is social insurance benefits, offered by the government and based on insurance principles and which compensate for the reduction in income of individuals when they face social risks such as old age, illness, disability, and others previously mentioned. The second one is social assistance offered without paying any regard to any contribution yet ensuring individuals who have become poor or needy to reach basic goods or services.

Social insurance is a social security tool organized by the state based on obligation, created to compensate for the decrease in income, due to absences from the labour market, when employees are faced with unexpected risks, particularly professionally and physiologically. Another feature of social insurance is that it is managed based on the principle of insurance, hence the name. This means that contribution is made to the fund established by the state by those that are subscribed to the system[23], and the social security benefits are provided to the insured by the related fund upon the fulfilment of the necessary conditions by the insured for the realization of the risk and the benefits provided for the risk provision. For example, old age is a physiological risk that individuals may face, and old age pension can only be paid to the insured in case of predetermined conditions such as age, and for a determined

[22] Nickless, J. (2002). *European code of social security: short guide*. Council of Europe. pp.5.

[23] The contributions can be provided through premiums cut over wages as well as through general taxes.

premium payment period. In this context, the precondition for benefiting from social insurance depends on the members payment of a premium, thus social insurance is also called a contributory tool of social security. Premiums can be paid by employers, workers or the state, but they may also be shared by the employee and the employer, or the state may have additional support for the two. However, a relationship between the premiums paid and the benefits provided is not sought, as per the social insurance approach. In this context, social insurance with the characteristic of solidarity is based on a defined benefit. In other words, a certain amount of benefit is guaranteed to the insured in the event risks are realized.

Social assistance, another means of social security is, in its broadest definition, an in kind or in cash payment made by the government without any reciprocity, in order to ensure that people in need are taken care of and to help them maintain minimum life standards. Social assistance is essentially provided for those who are not covered by social insurance or for risks not covered by social insurance. In this context, it can be said that social assistance is complementary to social insurance within social security systems. For example, in situations where beneficiaries are faced with short-term basic needs such as nutrition or housing which do not fall under the scope of insurance, or when they cannot sufficiently meet requirements to benefit from social insurance despite the need for old-age, disability, and care, social assistance should be activated to meet such needs. In this sense, it can be said that social assistance is different from the social insurance system provided by a status (employee, employer, etc.); since it is offered by the state to its citizen without expecting anything in return, acting on the state's desire to ensure a life worthy of human dignity as an individual. In this respect, the most significant difference of social assistance from social insurance is that the beneficiaries can access these payments without having to pay any contributions. For this reason, it is essential that social assistance is financed from the state budget through taxes, and considered as the non-contributory instruments of social security systems. On the other hand, it would be wrong to think that no criterion for social assistance is envisaged as they are offered depending on

the income level of the beneficiaries. In other words, in order to become beneficiaries, applicants must be found eligible based on the neediness criteria (means test). As mentioned, there is no need to determine any need in the case of social insurance. From this point of view, it can be said that those in the lower income group benefit from social assistance payments while those in the higher income group benefit from social insurance benefits.

Therefore, there are obvious differences between social insurance and social assistance in terms of function and implementation. However, the main objective of both social insurance and social assistance is to ensure that individuals lead a life that is worthy of human dignity. Within the topic limitations frame for evaluating this scheme from the point of view of EU non-discrimination principle, for the statutory social schemes implemented in Turkey, the following social insurance benefits are discussed in more detail according to their common characteristics.

2.2.3 Social Insurance Schemes

Although there may be differences in the risk understanding of each community, the main social insurance schemes and the benefits they provide are given below:

- Health Care Insurance: A social insurance scheme that covers the insured for medical needs and medical treatment in case of illness, pregnancy and related conditions. While in countries such as Germany, France, Italy, Portugal, the United Kingdom, and Turkey, a universal health care insurance program is available for the entire community based on residence, in some countries such as the United States, it can only be offered to workers.

- Sickness Insurance: A social insurance scheme aiming to compensate an actively employed insured for deduction in income in cases of temporary incapacity due to illnesses. While a certain term of employment may be sought for benefiting from

sickness insurance; the benefit amount is paid in cash, pro rata the previous income of the insured (maximum or minimum amounts can be determined) throughout the temporary incapacity (the period of assistance may be limited to 26 weeks and the grant may not be paid for the first three days).

- Maternity Insurance: This scheme aims to compensate an actively employed worker for deduction in the income in cases of temporary incapacity due to pregnancy or giving birth. While a certain term of employment may be sought for benefiting from maternity insurance, the benefit is made in cash for at least 12 weeks. In addition, within the scope of the insurance scheme, in kind benefit is also provided for medical treatments and medical needs of the insured.

- Accidents at Work and Occupational Diseases Insurance: This scheme aims to compensate the insured for deduction in income in cases of temporary incapacity due to accidents at work or occupational diseases. Cash payments are made at a certain rate (maximum or minimum amounts can be determined) of the previous income of the insured person for the duration of temporary disability. On the other hand, in cases with a certain degree of loss in the capacity to work or disability due to an accident or an occupational disease or in the event such continues, the insured or the beneficiaries in the event the insured died - will be provided with continuous payments. Finally, within the scope of the insurance scheme, in kind benefit is also provided for medical treatments and medical needs of the insured.

- Old-Age Insurance: A social insurance scheme aiming to provide a benefit through old age for any insured meeting the age criteria. For a benefit to be provided within the scope of old-age insurance, in addition to the age requirement, the premium payment period or the period of insurance may also be sought and the monthly amount is determined based on the previous income of the insured.

- Invalidity Insurance: A social insurance scheme aiming to put the insured on a permanent salary in the event the capacity to work is lost beyond a degree determined by the legislator while carrying on an activity within work life. Invalidity benefit may be offered with a certain premium payment period depending on the duration of insurance or invalidity benefit can be converted into old-age pension when the insured reaches pensionable age.

- Survivors' Insurance: This scheme aims to compensate for loss of income to the widow or children of the insured. While a certain premium payment period and working time may be required in order for benefit to be offered to the beneficiaries, the payment amount is determined based on the previous income of the insured. In addition, in order to receive benefits, widows who do not have children may be required to be married for a certain period or survivor's benefit can be terminated if beneficiaries are employed or may be subject to a cut in the event of having a certain income.

- Unemployment Insurance: This social insurance scheme aims to compensate for the temporary hold in the income of those who are faced with the impossibility of finding a suitable job despite their wish and competence to work. In order to benefit from unemployment insurance a certain period of work is required. In addition, the period of benefit may vary depending on the contribution period paid to unemployment insurance or the duration of benefiting from unemployment insurance previously; the benefits are made in cash at a certain rate (maximum or minimum amounts can be determined) of the insured's previous income.

- Family Benefits: This social insurance scheme aims to facilitate the insured's support of dependent children or aid in meeting their needs. Within this scope, in kind benefits such as food, clothing, or shelter may be provided to meet the basic needs of children, as well as in kind benefits replaced with periodic cash payments or a combination of both. Such benefits may be offered subject to residence or may also

be granted in case of fulfilment of conditions related to work or premium payment period.

At this point, it should be noted that the scope and benefits of social insurance schemes explained in detail here were compiled considering ILO Convention No. 102. However, as these standards were set at a minimum level in the Convention, they may be determined in a higher standard, varying from country to country.

2.3 Discrimination and Prohibition of Discrimination

While the industrial revolution and the discovery of new continents were influential in the formation of multi-ethnic nations, the phenomenon of discrimination was also concretely experienced. People with different social, cultural, economic, political, and psychological backgrounds have faced many problems arising from discrimination in society for centuries because of these differences. Historically, the basis for this is the sociological differences of the labour force coming from the colonies to perform manual labour for industrialized countries and resulting in social conflicts [24] . The type of discrimination, which initially emerged as racial discrimination, has since evolved into other categories of discrimination with the integration of societies, changes in social structures, and distances becoming shorter, even with the influence of technology. For example, women have been included over time into the labour force and have started to gain a place in social life with their contribution to economic value. This situation has been instrumental in the increase of inter-gender conflicts in the labour market.

Included for the first time in legal literature with the decision of an English Court, discrimination, in its simplest definition, is the differential treatment of an individual

[24] Rubin, M., & Hewstone, M. (2004). Social Identity, System Justification and Social Dominance. *Political Sociology, 25*(6), pp. 823-844.

or a group due to certain characteristics[25]. In its broadest definition, discrimination can be expressed as the intentional or unintentional unequal treatment of people considered to be equal in a legal system, in an executive or negligent manner, regarding a right or obligation, without a valid reason for their rights or obligations. The reasons that may cause differential treatment of an individual or a group may arise from many reasons such as religion, skin colour, race, gender, nationality, ethnicity, being from a national minority, sexual orientation, political opinion, or economic status. In this context, physiological differences other than the individual's intervention in the labour market, such as the preference of the employment of men due to the fertility of women, or the restriction of access to health benefits by poor people representing disadvantaged groups, ethnic minorities, or persons with different sexual inclinations, may cause discrimination. In this framework, the fact that individuals are categorically discriminated against and that they are faced with, restricted, or excluded from the rights and freedoms that the majority of the society benefits from is the subject of discrimination.

The prejudiced negative behaviours that individuals may face wherever social life exists cause the sacred value of equality to be damaged. For this very reason, the prohibition of discrimination, which is a means of ensuring equality between citizens of the state and individuals towards each other in their rights and obligations, has been entered into constitutions over time and a number of obligations have been imposed on states and individuals.

In this context, it can be seen that prohibition of discrimination initially emerged from the domestic legal systems of different states, yet its international awareness increased with the United Nations (UN); which was established following WWII and spread human rights as a fundamental value. In this respect, it is no coincidence that the first statements regarding the prohibition of discrimination on an international

[25] Yüksel, M. O. (2000). *Karşılaştırmalı Hukuk Işığında Türk İş Hukukunda Kadın Erkek Eşitliği.* İstanbul: Beta Yayınları. pp. 28.

level were found in the Charter of the United Nations, which established the UN. The Charter, signed in San Francisco on 26/06/1945 with the participation of 50 states representing approximately 80% of the world population in order to ensure lasting peace in the world, states that one of its main purposes is to ensure the human rights of individuals without discrimination is one of the founding purposes of the UN, saying (Article 1):

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The Organization has thus imposed certain duties on the party states for such matters. The Universal Declaration of Human Rights, having the highest moral strength at the international level, includes the foundations of political, national or social origins, property, birth or other status in the discriminatory grounds, which were limited to only four with the Charter of the United Nations (race, sex, language, or religion); aiming to provide broader protection against human rights discrimination. Under the scope of prohibition of discrimination by the UN, the first international treaty that was binding on the party states was the International Convention on Racial Discrimination (ICERD) signed on 07/03/1969. Another important UN regulation significant to this study is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which deals exclusively with women and was signed by 189 party states. The term discrimination in CEDAW is explained with the provisions:

> any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

In this context, a number of obligations have been imposed on party state to ensure gender equality and the Committee on the Elimination of Discrimination against

Women was established to monitor the policies of states in the area in question. Other international regulations accepted for the prevention of discrimination against vulnerable groups by the UN include; the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

Thus, it is clear that the UN continues to follow up on its efforts for the protection of human rights and the prevention of discrimination at the international level and also carries out studies to increase awareness in this area. The most recent of these is the 2030 Agenda for Sustainable Development that will be covering the years 2015-2030 with the motto "Leave No One Behind". In the UN 2030 Agenda, 17 development goals have been identified, two of which are devoted to gender equality and the elimination of inequalities. In this framework, policies aimed at strengthening the social status of women and girls as well as preventing discrimination are supported, projects with non-governmental organizations (NGOs) are realized and the formation of social awareness in the member countries is contributed to. The initial approach to prohibition of discrimination by the EU emerged from economic concerns rather than the protection of basic human rights.

The most important indicator of this is that the prohibition of discrimination in the Treaty of Rome, which is the founding treaty of the Union, addressed discriminatory grounds as nationality and gender in order to ensure that market relations function properly. However, in the following years, the ECJ was inspired by the common constitutional traditions of the MS and pointed out that basic human rights were protected against discrimination under the general principles of the Union law, thus forming the case law in this area[26]. As a result of the persistent attitude of the EJC's

[26] Leading cases: Case C-29/69 Erich Stauder v. Stadt Ulm [1969] ECR 419., Case C-11/70 Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125., Case C-4/73 Nold v. Commission [1974] ECR 491., Case C-36/75 Rutili v. French Minister of the Interior [1975] ECR 1219., Case C-44/79 Liselotte Hauer v. Land Rheinland-Pfalz

case law, regulations of the EP and NGOs aiming to prevent discrimination in terms of race, religion, disability, age and sexual orientation among individuals, and thereby aiming to obtain equality, were brought to life. Before examining the developments in EU non-discrimination principle, it is important to understand the terms that are frequently used in the field. For this reason, the basic concepts that should be taken into consideration when examining the prohibition of discrimination in EU law will be discussed in the following section.

2.4 Key Concepts of Non-Discrimination

2.4.1 Direct Discrimination - Indirect Discrimination

Discrimination can be classified into two depending on how it is realized: direct and indirect. In its simplest definition, direct discrimination is creating a difference between people in a similar situation, or treating an individual less fairly than another individual. In other words, direct discrimination emerges as a person or group being allowed to benefit less from a right, liberty or practice in proportion to its counterparts or not at all, on the grounds of race, colour, language, religion, sex, or nationality without being based on objective or reasonable grounds. Within this scope, example behaviours of direct discrimination where an individual is treated differently than others in a similar situation include but are not limited to;

- Not promoting an employee under the belief that he will not be able to commit to the job fully and fulfil the necessary responsibilities due to the care he will have to provide his mother who has a terminal illness.
- Rejecting the application of a person on the grounds that she is a lesbian since the manager of the team that she is being considered for is homophobic.
- Not allowing a person who physically looks younger to represent the company in international meetings on the grounds that he will not be shown regard to.

[1979] ECR 3745., and Case C-2/92 The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock [1994] ECR I-955.

- Not allowing an employee to use the women's toilet at work, after the employee undergoes a gender reassignment surgery.
- Decreasing the working hours of a woman who has given birth to a disabled child stating the care of the child or not appointing her back to her previous position when she returns from maternity leave.

In this respect, there are two main determinations of direct discrimination. The first is the explicit determination that a person or group subjected to discrimination has been exposed to different treatment from their counterparts, and the other is that the different treatment does not arise from legitimate, objective, or reasonable grounds. Additionally, situations that may lead to discrimination can appear in the form of regulations veiled behind other procedures that seem fair that put certain people or groups in a disadvantageous position.

Such regulations, defined as indirect discrimination, may seem equal yet may lead to discriminatory results and to differential treatment of individuals or groups. Indeed, in cases where there are discriminatory practices, the discrimination actually occurs not from behaving differently towards someone, but on the contrary, from behaviours that may cause people to be deprived of some rights by behaving similarly to those in different situations. Examples that exemplify indirect discrimination might include situations like the following:
- A workplace stipulates full-time employment only, therefore women who take care of their children would not be able to work part time, and thus would not be able to apply for a job at said workplace.
- Since the only possible way to enter a public building is by the stairs, persons with disabilities are not allowed access.
- The refusal of membership to a health club for those having temporary residence in a state because they do not meet the condition of having a permanent residence.
- An employer asking for a driver's license from an employee they are looking to appoint for building security.

As seen in the above examples, failure to make exceptions to the rules for just or reasonable reasons may also lead to indirect discrimination. Thus, in this context, any situation in which special cases are somehow neglected may constitute indirect discrimination.

2.4.2 Positive Discrimination - Affirmative Action - Positive Action

Over years of implementing applications related to this issue, it has been observed that the prohibition of discrimination is not always enough on its own to provide equal opportunities for all in a society. This has been instrumental in the realization of some compensatory policies to ensure the actual equality of individuals or groups in disadvantaged situations. The most well-known of these compensatory applications would be positive discrimination. In literature, positive discrimination is defined as all of the policies, strategies, and practices that have been developed in favour of groups discriminated against in the community and who therefore have limited or no access to rights. In this sense, with the positive discrimination practices disadvantaged groups are prioritized without any conditions[27]. An example of positive discrimination would be hiring a woman based simply on her gender without any assessment of her qualifications even though there are others who are actually more qualified for the position.

Discussed for the first time in the USA, affirmative action means that disadvantaged groups in society are prioritized by quota or preferential treatment with other strong policies. Moving forward from the previous example, if a company has a target of employing 50% women in their workplace, the choice to hire women from among men and women with the same competences is considered affirmative action. In this context, the most obvious differences between positive discrimination and affirmative action practices are first, when women are considered for higher

[27] Jennings , M. (2010). Positive Action in Politics - Lessons and Challenges from Employment Equality Law. *The Political Studies Association of Ireland Annual Conference Papers*, pp. 3.

positions without having their qualifications checked and second, when women are selected over men in situations where they have the same competences.

Regulations towards ensuring the full and effective equality of disadvantaged groups in practice is carried out in EU law as well and the mentioned practices qualify as positive action[28]. In this context, it is not interpreted as contrary to the principle of equality to support the access of social goods such as employment, health, and education by eliminating the disadvantaged positions of individuals resulting from past or de facto discriminatory treatment. However, equality of opportunity lies at the basis of positive action practices and regulations provide training or incentives for disadvantaged individuals to benefit from a right. In this context, the following examples may all be seen as positive action:

- Encouraging or financially supporting the participation of asylum seekers in language courses teaching the mother tongue of the country they are in so that they may access the labour market and integrate into social life.
- Covering the education costs of researchers who are legally defined as minorities in a system and who are receiving a doctorate.
- Admitting young people whose parents are primary school graduates to university, even if lower points than required are achieved in the university entrance exam.
- Bringing to life special practices that will facilitate or improve accessibility of the workplace to disabled people in order to enable their integration into the labour market[29].

Thus, in the case of positive action, it is not possible for individuals to be prioritized without being subjected to a condition or quota simply because they belong to that

[28] Positive action in the EU primary law is first mentioned in the Agreement on Social Policy, which is the Annex of Maastricht Treaty.

[29] European Commission. Directorate-General for Employment, & Equal Opportunities. Unit G. (2009). *International Perspectives on Positive Action Measures: A Comparative Analysis in the European Union, Canada, the United States and South Africa.* Office for Official Publications of the European Communities. pp. 56-59.

group. Indeed, in EU law, the absence of strong policies that allow for priority treatment, with the exception of persons with disabilities, is considered discrimination. In the case law on gender equality, the EJC has held that measures, which give absolute and unconditional priority to the under-represented sex (typically women) at the point of employment selection, constitute unlawful discrimination against members of the opposite sex[30]. As a result, although both positive discrimination and affirmative action are similar in terms of their definitions, they go beyond positive action regulations. In this framework, regulations directed at disadvantaged persons under EU law aim at equal opportunities rather than preference.

2.4.3 Burden of Proof

Determining a violation in EU law, when such violation is due to the discrimination of a right, is dependent on whether the person subjected to a different treatment in the concrete case can be compared to or measured with another person or group who is in a similar situation. For example, the salary of a driver and a computer programmer working for the same company cannot be the basis of discrimination because their pay is not comparable. Therefore, the basic element of the claim of discrimination is that the person to be compared with the referenced person is in the same or similar situation. On the other hand, it is not a common situation to state that the behaviours that cause discrimination are caused clearly by different treatment, as it is difficult to find evidence that proves such negativity in disadvantageous situations where the workers are simply less powerful than the employers do. In addition, while direct discrimination demonstrating different treatment directed explicitly is easy to prove, indirect discrimination, which has an ambiguous appearance, becomes even more difficult to detect.

[30] Ibid, pp. 25.

In this context, although the burden of general proof depends on the claimant proving the claim, if the loss of a right in EU law is due to discrimination, the burden of proof is divided between the parties taking into account the difficulties mentioned above. Thus, the general proof rule is softened in favour of the claimant who claims to have been discriminated against and it is sufficient for the claimant to reveal the facts that suggest he has been discriminated against in the concrete case. Thus, it is accepted that the burden of proof will pass to the defendant in the second stage. In this context, the claim of discrimination is adopted as *prima facie* (a case having sufficient and valid proof for accepting the claimant's claim, until proven otherwise). In other words, the presentation of evidence that may apparently reveal claims related to discrimination is seen as sufficient[31]. For example, in a case involving a gender-based discrimination claim, statistics showing the wage difference between male and female employees are considered sufficient and the burden of proof is passed on to the employer. Thus, it is necessary for the employer to prove that the increase or decrease of the wage difference is due to reasonable grounds.

2.4.4 Other Relevant Concepts of Non-Discrimination

There are some special cases and concepts within the scope of non-discrimination in EU law. For example, *harassment* is a special type of discrimination. Harassment is defined as behaviours that have the purpose of violating a person's dignity and creating a frustrating, hostile, undignified, humiliating, or offensive environment, directed towards a person's individual traits. Brodsky defined harassment as "repeated and persistent attempts by one person to torment, wear down, frustrate, or get a reaction from another. It is treatment that persistently provokes pressures, frightens, intimidates, or otherwise discomfits other people."[32] For example, posting cartoons containing racial or cultural jokes about an employee of Japanese descent

[31] Palmer, F. (2006). Re-dressing the balance of power in discrimination cases: the shift in the burden of proof. *European anti-discrimination law review, 4*, pp. 23-31.

[32] Brodsky, C. (1976). *The Harassed Worker.* Lexington, MA: Lexington Books. pp. 2.

working at a Chinese restaurant as a cleaner by other Asian employees, or making comments as the employee passes by, or any attempts to humiliate the employee are considered harassment.

Reasons for harassment may be caused by many factors such as an individual's race, language, physical appearance, education, or gender, which has a higher probability of being experienced than other possibilities. The negative situation that individuals may be exposed to base on their gender is defined as *sexual harassment*. It may be expressed as behaviours that are denounced by humiliating, unwanted words or physical behaviour of a sexual nature other than words, with the purpose of violating the person's dignity in any way.

Just as harassment and sexual harassment are forbidden in EU non-discrimination principle, *instruction to discriminate* is also considered a type of discrimination and is prohibited. For example, when a market owner instructs the security officer at the entrance not to let customers of a certain ethnic origin in or if an employer requests a male under the age of 30 from an employment agency for a job interview, these fall under instruction to discriminate. As can be seen, in this type of discrimination, the event that leads to discrimination occurs as a result of an instruction depending on the power relation.

Again, in EU law, two more different instruments are used to ensure full equality between individuals. The first is *victimization*. Victimization aims to allow individuals to lodge complaints. In this context, the EU expects its MS to implement legal regulations that will protect the complainants, or their witnesses complaining about discrimination, from damages that may be inflicted by the defendants.

Another noteworthy method to achieve equality in the EU is *mainstreaming*. In general, mainstreaming can be defined as integrating all aspects of the principle of equality in the process of policy formulation, implementation, and evaluation. The

mainstreaming approach first emerged containing gender-based discrimination with the Commission's Communication on Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities and then was included in the Treaty of Amsterdam (Article 3(2))[33]. With the Communication, it was deemed that ensuring the equality of women in social life in certain topics would not be enough, so the principle of taking precautions that would enable male-female equality in all of the policies of the Union was adopted, emphasizing the needs of a long-term cultural transformation in both individual and social relations. In this context, for the purposes of the principle of mainstreaming, equality between women and men should be enabled based on planning and within an integrated system beyond statistics and the possible consequences of policy and strategy at any level should be evaluated to maximize it [34] . Finally, although the implementation of the mainstreaming principle at the EU level has initially became functional on the basis of equality between men and women, it must be expressed that common targets for other types of discrimination, especially for discrimination against race and disability, have been determined and methods towards obtaining equality are now being used[35].

[33] Stratigaki, M. (2005). Gender Mainstreaming vs Positive Action: An Ongoing Conflict in EU Gender Equality Policy. *European Journal of Women's Studies, 12*(2), pp. 165-186.

[34] European Commission. (1996). *Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*. Brussels, COM(1996) 696 final.

[35] Bell, M. (2004). Equality and the European Union Constitution. *Industrial Law Journal*, *33*(3), pp. 242-260.

CHAPTER 3

EUROPEAN UNION NON-DISCRIMINATION PRINCIPLE

Since the foundation of the EU, it is possible to come across provisions concerning the non-discrimination principle in Union law. However, as discussed in the previous chapter, EU non-discrimination principle has been driven first by economic concerns rather than protection of human rights. Without doubt, one the four fundamental freedoms necessary for the common market is the free movement of people within the Union, yet prohibition of discrimination based on nationality is still one of the main issues to be addressed. Because if a functional common market wants to be built within the Union, it can only be achieved by ensuring fair competition between the MS. In this context, it is important to ensure that labour costs do not turn against the MS that keep social costs high among their employees. This immediately brings to mind the concept of equal pay for equal work, which forms the basis of prohibition of gender discrimination. For this reason, in addition to the prohibition of discrimination on the ground of nationality, the prohibition of discrimination on the ground of gender has been foreseen since the foundation of the Union. In addition to these, it is important to mention that provisions in order to prohibit discrimination on the ground of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation were included in EU law - and this time not just concerning economic issues - by the Treaty of Amsterdam, signed in 1997 and entered into force in 1999. However, the last phase of EU non-discrimination principle was realized with the TFEU. While the Charter of Fundamental Rights of the European Union (ChFR) become a binding legislative norm of the EU with the TFEU, the human rights dimension gained importance fighting against discrimination and it opened a new window to the interpretation of Union non-discrimination principle, especially for the EJC.

3.1 Primary Sources of EU Non-Discrimination Principle

The primary sources of EU law are Treaties. They provide the basic principles on which European law is founded and set out a broad framework and establish fundamental legal concepts. Besides Treaties, protocols annexed to Treaties, additional Treaties making changes to specific sections of the Treaties, and the Treaties of accessions are also among primary sources of EU law. The secondary sources of EU law, which are based on Treaties, are made by the European institutions in exercise of the powers conferred on them. In other words, regulations, directives, decisions, recommendations, and opinions formed within the competencies granted by the Treaties are the EU's secondary legal sources[36]. In this chapter, non-discrimination provisions of the EU will be discussed according to primary and secondary sources. However, as described above, the prohibition of discrimination against nationality, gender, and other protected grounds is characterized by different dynamics within themselves. For this reason, where the sources of the prohibition of discrimination in EU law are examined, the provisions in the primary and secondary sources are presented with a triple distinction in terms of protected foundations. With this method, it is anticipated that the arrangements for each protected foundation can be easily monitored and a suitable environment be provided for subsequent studies.

3.1.1 EU Treaties

3.1.1.1 Non-Discrimination in the Area of Nationality

When the TFEU is examined, many provisions, which prohibit discrimination and foresee equality on the grounds of nationality will be immediately noticeable. In spite of that, the general provision that prohibits discrimination on the ground of

[36] Petkov, M., M., & Krastev, D. (2018). Sources of European Union Law. *International E-Journal of Advances in Social Sciences, 4*(11), pp. 471-479.

nationality is *Article 18 TFEU,* and states, "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." This provision has been left almost unchanged since the Treaty of Rome, which established the Union, signed on 25/03/1957 and came into force on 01/01/1958. Therefore, aside from being one of the most important, Article 18 TFEU is historically one of the oldest provisions of EU non-discrimination principle. Article 18 TFEU and its amendments are presented in Table 3.1 with the intention to compare the provision within former Treaties. When the table is examined, it is explicit that the amendments made in the provision are limited to the expressions of the article number and the legislative body and procedure for the realization of the non-discrimination on the grounds of nationality.

Table 3.1 General Prohibition of Discrimination in the Area of Nationality

		Treaty of Lisbon **TFEU**		
Article 18 Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. **The European Parliament and the Council, acting in accordance with the ordinary legislative procedure,** may adopt rules designed to prohibit such discrimination.				
Treaty of Rome **TEEC**	**Single European Act** **TEEC**	**Treaty of Maastricht** **TEC**	**Treaty of Amsterdam** **TEC**	**Treaty of Nice** **TEC**
Article 7 Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council may, on a proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such discrimination.	Article 7 Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council may, on a proposal from the Commission and **in co-operation with the European Parliament,** adopt, by a qualified majority, rules designed to prohibit such discrimination.	**Article 6** Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. **The Council, acting in accordance with the procedure referred to in Article 189c, may adopt rules designed to prohibit such discrimination.**	**Article 12** Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in **Article 251,** may adopt rules designed to prohibit such discrimination.	Article 12 Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

With the Treaty of Rome, the power to prohibit discrimination on the grounds of nationality is granted to the Council by a qualified majority, upon the EC's proposal. Furthermore, as with the majority provisions of the Treaty of Rome, the EP is

assumed to be a characteristic of only an advisory body. However, it will be recalled that when the Single European Act (SEA) is enforced, the power of the EP is relatively increased with the *co-operation procedure.* This led to the emergence of a new procedure, which included the inclusion of the EP in the legislative process by removing the EP from an ineffective advisory body and evaluating the Commission's proposals to put law in this area. As one will recall again, the Maastricht Treaty introduced many novelties such as the establishment of the Economic and Monetary Union, the adoption of European Citizenship, and the transition to a three-column structure of Union. After debate over the influence and power of the EP, another novelty of the Maastricht Treaty, a newly *co-decision procedure*[37][38] was added to the EU's legislative arsenal[39]. In that context, the EP started to share legislative power with the Council, as in co-decision procedure requires consensus to be reached between the EP and the Council for legislation to be adopted. Lastly, this provision is amended again in accordance with the expression of legislative procedure with the TFEU, as co-decision procedure renamed *ordinary legislative procedure*.

In addition to the general provision of discrimination on the ground of nationality found in Article 18 TFEU, the Articles below also touch on non-discrimination based on nationality:

- An EU citizen can exercise his right to vote and to stand as a candidate at municipal elections and elections to the EP even if he is not a national of the MS in which he resides (Article 22 TFEU)
- EU citizens have the right to diplomatic or consular protection of the MS in a third State (Article 23 TFEU)

[37] Although the Treaty of Maastricht was initiated for the first time, the complex application of the procedure was modified by the Treaty of Amsterdam (Article 251). The policy areas to which the co-decision procedure will be implemented have been extended with the Amsterdam and the Nice Treaty.

[38] Boyron, S. (1996). Maastricht and the Co-decision Procedure: A Success Story. *The International and Comparative Law Quarterly*, pp. 293-318.

[39] Tsebelis, G., Jensen, C. B., & Kreppel, A. (2001). Legislative procedures in the European Union: An empirical analysis. *British Journal of Political Science*, pp. 573-599.

- Producers and consumers in accordance with the Common Agricultural Policy objectives (Article 40 TFEU)
- Employees who work in another MS and have different citizenship of that State (Article 45 TFEU)
- An EU citizen can exercise his right to freedom of business establishment or self-employment in another MS even if he is not a national of the MS in which he establish business (Article 49 TFEU)
- Service consumers or providers with the nationality of the MS concerned (Article 56 and 61 TFEU)
- Transportation using the same line regardless of the country of origin or destination of goods (Article 95 TFEU)
- Higher internal taxation of similar products of other MS (Article 110 TFEU)

However, since this study aims to align statutory social security schemes in Turkey with the EU non-discrimination principle, relative to other Articles, examining *Article 45 TFEU,* which prohibits non-discrimination on the ground of nationality for migrant workers, is more substantial. Fundamentally, Article 45 TFEU outlines the free movement rights of workers under Union law. Considered from the point of view of this study, Article 45(2) TFEU is important: "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." In this context, for example, if an Italian citizen works in Belgium, he is guaranteed the same rights offered to Belgian workers under Belgian legislation without discrimination based on nationality. When the provision is examined more carefully, it can be noted that the areas where non-discrimination on the grounds of nationality are given a broader framework through the statement "… other conditions of work and employment". In this way, it can be considered that the Treaty aims to create a flexible space for adopting regulations to comply with the changes due to the economic and social conditions.

In Table 3.2, Article 45 TFEU is presented with its previous provisions to examine the amendments made in historical process. Note that since the Treaty of Rome, no amendments have been made to the provision both in terms of the scope of the right and for the limitations and exceptions of it. The amendment is limited to erasing the statement "…by the end of the transitional period at the latest" and the displacement of the article number with the Maastricht Treaty and subsequent Treaties. The reason for the former amendment is of course related to the establishment of a single market, a goal of the Treaty of Rome, which has gained momentum with the SEA and which was finally achieved with the Maastricht Treaty on 01/01/1993[40].

Article 46 TFEU, however, establishes the framework of the area and the legislative procedure that would be utilized to adopt secondary legislation, enabling a guarantee of free movement for workers. According to the provisions in question, the EP and the EC are granted the power to adopt secondary legislation through directives or regulations, with the ordinary legislative procedure after consultation with the Economic and Social Committee. When reviewing the writings of the provisions, they mainly define whom and by which legislative procedure will take measures to carry out the tasks specified in accordance with Article 45 TFEU.

However, an interesting point is that in the relevant article of the Treaty of Rome (Article 49 TEEC), consulting the EP was not even deemed necessary while making secondary legislation to ensure the free movement of workers. Yet, while the Treaties were amended in order to create a more democratic Union in the following years, the EP found its place in sharing legislative powers to ensure the free movement of workers did not go unnoticed.

[40] FKorthals Altes, W. K. (2016). Freedom of establishment versus retail planning: The European case. *European Planning Studies, 24*(1), pp. 163-180.

Table 3.2 Abolition of any Discrimination in the Area of Nationality between the Workers of EU Member States

Treaty of Lisbon

TFEU

Article 45

1. Freedom of movement for workers shall be secured within the **Union.**
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Treaty of Rome **TEEC**	**Single European Act** **TEEC**	**Treaty of Maastricht** **TEC**	**Treaty of Amsterdam** **TEC**	**Treaty of Nice** **TEC**
Article 48 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. 4. The provisions of this Article shall not apply to employment in the public service.	Article 48 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. 4. The provisions of this Article shall not apply to employment in the public service.	Article 48 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. 4. The provisions of this Article shall not apply to employment in the public service.	**Article 39** 1. Freedom of movement for workers shall be secured within the Community **~~by the end of the transitional period at the latest~~** . 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. 4. The provisions of this Article shall not apply to employment in the public service.	Article 39 1. Freedom of movement for workers shall be secured within the Community. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. 4. The provisions of this article shall not apply to employment in the public service.

Table 3.3 Measures Taken in the Field of Free Movement for Workers

Treaty of Rome TEEC	Single European Act TEEC	Treaty of Maastricht TEC	Treaty of Amsterdam TEC	Treaty of Nice TEC
Article 49 As soon as this Treaty enters into force, the Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48, in particular: (a) by ensuring close co-operation between national employment services; (b) by systematically and progressively abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers; (c) by systematically and progressively abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned; (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries..	Article 49 As soon as this Treaty enters into force, the Council shall, acting **by a qualified majority** on a proposal from the Commission, **in co-operation with the European Parliament** and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48, in particular: (a) by ensuring close co-operation between national employment services; (b) by systematically and progressively abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers; (c) by systematically and progressively abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned; (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.	Article 49 As soon as this Treaty enters into force, the Council shall, acting **in accordance with the procedure referred to in Article 189b** and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48, in particular: (a) by ensuring close co-operation between national employment services; (b) by systematically and progressively abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers; (c) by systematically and progressively abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned; (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.	**Article 40** The Council shall, acting in accordance **with the procedure referred to in Article 251** and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about by~~, progressive stages,~~ freedom of movement for workers, as defined in **Article 39**, in particular: (a) by ensuring close cooperation between national employment services; (b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers; (c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned; (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.	Article 40 The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 39, in particular: (a) by ensuring close cooperation between national employment services; (b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers; (c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned; (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Treaty of Lisbon TFEU
Article 46 **The European Parliament** and the Council shall, acting in accordance with **the ordinary legislative procedure** and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in **Article 45,** in particular: (a) by ensuring close cooperation between national employment services; (b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers; (c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned; (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Other important statements regarding prohibiting discrimination on the grounds of nationality, including free movement of workers in EU law, can be found in *Article 48 TFEU*. In summary, Article 48 TFEU protects the social security rights of workers, self-employed persons, and their family members while exercising their free movement right.

The main purpose of the free movement right in the EU is to allow labour markets more flexibility and productivity, to improve careers of individuals, and to facilitate employers finding the employees they need within the common market. On the other hand, the probability of losing old age pension, which one can be eligible for after a long standing career, while exercising the right to free movement may bring irreparable social problems and may create a blocking effect to free movement.

As stated in the previous chapter, the right to social security, a benefit helping people live with human dignity, affects people faced with occupational, physiological, and socio-economic risks. When the 2017 Statistical Office of the European Communities (EUROSTAT) free movement statistics are examined, it is understood that in the year in question, 4.1% of the working age (20-64 years) population of the EU (12.4 million EU citizens) moved from one MS to another. Moreover, according to EU Labour Force Survey, approximately 9.5 million moves were active (consisting of either working or seeking employment. In addition, 1.4 million frontier workers worked in one MS while living in another[41]. Considering the importance of the right to social security and the fact that approximately 4.1% of the EU working age population moves from one MS to another annually, the protection of social security rights of individuals is necessary to materialize one of the fundamental freedoms in the Union: the right to free movement.

[41] Fries-Tersch, E., Tugran, T., & Markow, A. (2018). *2018 Annual Report on intra-EU Labour Mobility*, *European Commission.* Brussels: European Commission. Retrieved March 2019, from https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8174&furtherPubs=yes

Table 3.4 Measures Taken in the Field of Social Security to Provide Free Movement for Workers

Treaty of Lisbon

TFEU

Article 48

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for **employed and selfemployed migrant** workers and their dependants:
(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
(b) payment of benefits to persons resident in the territories of Member States

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:
(a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or
(b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

Treaty of Rome **TEEC**	**Single European Act** **TEEC**	**Treaty of Maastricht** **TEC**	**Treaty of Amsterdam** **TEC**	**Treaty of Nice** **TEC**
Article 51 The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, It shall make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.	Article 51 The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, It shall make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.	Article 51 The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, It shall make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.	**Article 42** The Council shall, acting in accordance with the procedure referred to **in Article 251,** adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States. **The Council shall act unanimously throughout the procedure referred to in Article 251.**	Article 42 The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States. The Council shall act unanimously throughout the procedure referred to in Article 251.

For this reason, since the Treaty of Rome, all these concerns have been taken into consideration. In that context, from the Treaty of Rome, the social security rights of migrant workers are protected with the measures of the aggregation of social insurance periods by considering the several MS legislation and the entitlement of benefit payments to persons who reside in the territories of MS. However, the most important feature at this point, unlike the other articles described above, is that the EP did not have any power for the adoption of regulations until the Treaty of Amsterdam. Another point is that the Council acts unanimously to approve regulations in the field of social security, thus differing from most of the other competences of the Union. As can be seen, making a regulation in this area comes with strict conditions and a complete consensus of the MS is necessary. The reason behind such prominence is the concern of countries for social security expenditures, as they can reach serious levels if the number of persons who exercise free movement to higher rates, and thus adversely affect not only the financial sustainability of the national social security system, but also whole economy of countries.

In order to demonstrate the importance of this issue more clearly, Figure 3.1 displays the share of total social security expenditures in EU Member States and in Turkey within the Gross Domestic Product (GDP), according to EUROSTAT statistics. When the figure is analysed, in EU28 the first three countries with the lowest share of social security expenditures in GDP for the year 2016 are: Romania (14.6%), Latvia (15.2%) and Lithuania (15.4%), while the highest three countries are France (34.3%), Finland (31.8%) and Denmark (31.6%). Furthermore, the EU28 average is 28%[42] while the level of social security expenditures in GDP in Turkey was 12% in 2015.

[42] No data is available for Croatia before the year 2010. In addition to that, the 2015 data is used for Turkey, as no data is available for the year 2016. EUROSTAT. (2016). Social protection expenditure, (spr_exp_sum).

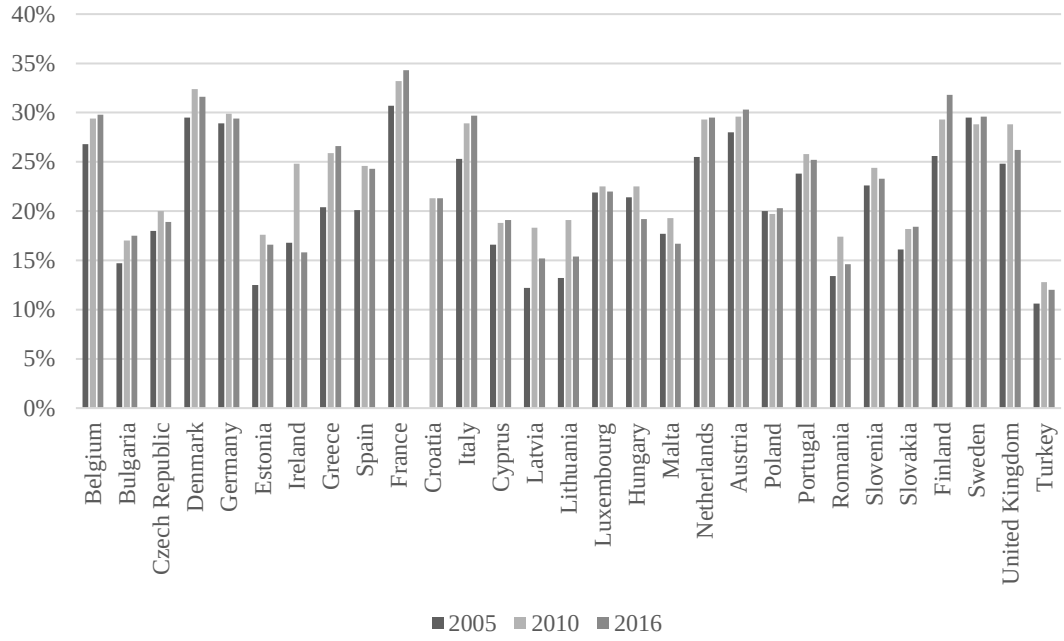

Figure 3.1 Expenditure on Social Protection, 2005, 2010, 2016 (% of GDP)

As a result, considering the fact that a significant part of the income of the country's economies goes to social security expenditures, it is justified that the MS need a full consensus in arranging in this area. Actually, although the co-decision procedure (now known as the ordinary legislative procedure) became the dominant procedure while adopting secondary legislation in many political areas after the Treaty of Amsterdam, the fact that the Council's unanimity is sought in adapting social security measures directed at migrant workers clearly displays the sensitivity of MS. In fact, when Table 3.4 is examined, it may be considered that strict conditions were introduced with the new second subparagraph. According to statements, a MS may request discussion in the European Council and suspend the ordinary legislative procedure if the legislative act to provide freedom of movement for workers in the field of social security would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system. Once the matter is discussed and not more than four months, the European Council may refer the draft legislation back to the Council and the

suspension of ordinary legislative procedure is terminated, does not take action, or requests the Council to submit a new proposal. When examining those statements, it should not be forgotten that before the TFEU, if unanimity were not reached in Council to adapt measures in the field of social security measures, the process would naturally become obsolete. Therefore, it is not accurate to say that this amendment has brought about a novelty in terms of eliminating the process in practice because if a MS wants to exercise this provision, it needs to declare how the draft legislative act could affect the financial balance of its social security system. Although a wide frame has been drawn with the term *declare*, it is obvious that serious evidence will be expected from a MS that will act in accordance with the mention provision.

All this sensitivity is most probably related to political debates on the impact of immigration to the employment opportunities of native workers, and to the MS' social security systems and their economies in the recent years, both within the EU community as well as the United Kingdom's EU Referendum on 23/06/2016 (Brexit Referendum). In this context, what is emphasized in those discussions is that the disadvantage of free movement since it triggers migration to host countries, which have higher income levels and increasing the population of that country more than usual. For example; while the UK's natural population was increase of 159,800 people in mid-2017, net migration reached 232,400 people[43]. Moreover, free movement is also criticized for suppressing wages in sectors with unskilled labour[44] and even for causing native workers to become unemployed[45]. On the other hand, the advocates of free movement argue that this right is the fundamental value of the EU and add that migrant workers make an additional contribution to the public finances

[43] UK Office for National Statistics. (2019). *Population estimates for the UK, England and Wales, Scotland and Northern Ireland: mid-2017*. Retrieved May 2019, from https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2017

[44] Nickell, S., & Saleheen, J. (2015). *The impact of of immigration on occupational wages: Evidence from Britain.* London: Bank of England Staff Working Paper No. 574. pp. 20.

[45] Borjas, G. J. (2003). The labor demand curve is downward sloping: reexamining the impact of immigrationon the labor market. *Quarterly Journal of Economics, 118*(4), pp. 1335-1374.

of the MS through the taxes or premiums they have paid[46]. In addition, in many studies conducted on the effect of immigrant population growth on wages and employment of the local population, it has been calculated that, contrary to general belief, even if the rate of immigrants in the population increases by 10%, it may cause a decrease of not more than 1% in wages[47]. As a result, the positive or negative impact of migrants on the country's economy and social security system emerges as an issue that should be evaluated by taking into account the characteristics of the host country's economy, employment structure and migrants, rather than the number of migrants.

Overall, while examining the prohibition of discrimination on the ground of nationality in EU law following citations should take into consideration:

- Free movement is a fundamental value of the EU which is guaranteed by the Treaties
- To protect the right to free movement of workers, an open list is envisaged to comply with changes due to economic and social conditions
- Thus, since the establishment of the Union, the scope of worker protection on the grounds of nationality discrimination does not change
- And its scope is fundamentally shaped with secondary legislation
- While adapting secondary legislation in this area, the legislative power of the EP has been increased since the SEA
- However, since arrangements to protect social security rights of workers has led to effects on financial sustainability of national social security systems, legislative procedures to adopt measures in this field are kept separate from most of the other competences of the Union
- That, in fact, to adopt measures in the field of social security the unanimity of the MS is necessary

[46] Dustmann, C., & Frattini, T. (2013). *The Fiscal Effects of Immigration to the UK*, . London: CReAM Discussion Paper Series CDP No 22/13.

[47] Friedberg, R. M., & Hunt, J. (1995). The Impact of Immigrants on Host Country Wages, Employment and Growth. *The Journal of Economic Perspectives, 9*(2), pp. 23-44.

- Moreover, while secondary legislation is carried out in matters concerning social security systems, the EP was included in the legislative process only after the Treaty of Amsterdam

3.1.1.2 Non-Discrimination in the Area of Gender

When the Treaty of Rome founded the EEC, two fundamental objectives, very different from today, were included in Article 2 TEEC, which explicitly states the tasks of the Union. The first of these is the establishment of a common market and the second is the development of the economies of the MS through progressively approximating the economic policies of MS. In that sense, for a Union targeting the common market, the establishment of fair competition between MS and the abolition of activities that would distort competition among them are not forgotten (Article 3(f) TEEC). *Article 157 TFEU*, which ensures equal pay for equal work for men and women today, was included in Article 119 of the Treaty of Rome, precisely for this reason. In fact, France requested the inclusion of Article 119 in the Treaty of Rome during the drafting of the treaty[48]. France's demand is also related to concerns that social policies in the country, which were recently implemented to prevent women from getting lower wages than men, would prevent competition with other countries when the common market was established, especially female-dominated sectors like textiles[49]. Therefore, the phenomena to prevent gender discrimination arose from economic concerns towards creating fair competition between MS rather than equality between the genders[50] and it has given rise to the principle of *equal pay for equal work* in Union law. In that context, since the Treaty of Rome, the provision that guarantees equal pay for equal work between male and female workers is presented in Table 3.5.

[48] Van der Vleuten, A. (2007). *The Price of Gender Equality: Member States and Governance in the European Union* (1 ed.). London: Routledge. pp. 66.

[49] Rossillli, M. (1997). The European Community Policy on the Equality of Women. From the Treaty of Rome to the Present. *The European Journal of Women's Studies*, *4*, pp. 63-82.

[50] Kantola, J. (2010). *Gender and the European Union.* New York: Palgrave MacMillan. pp. 26-49.

Table 3.5 Principle of Equal Pay for Equal Work

Treaty of Lisbon

TFEU

Article 157

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
Equal pay without discrimination based on sex means:
(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.
3. **The European Parliament and the Council,** acting in accordance with **the ordinary legislative procedure,** and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Treaty of Rome	**Single European Act**	**Treaty of Maastricht**	**Treaty of Amsterdam**	**Treaty of Nice**
TEEC	**TEEC**	**TEC**	**TEC**	**TEC**
Article 119	Article 119	Article 119	Article 141	Article 141
Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.	Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.	Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.	1. Each Member State **shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.**	1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.	For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.	For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.	2. For the purpose of this Article, ''pay'' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.	2. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
Equal pay without discrimination based on sex means:	Equal pay without discrimination based on sex means:	Equal pay without discrimination based on sex means:	Equal pay without discrimination based on sex means:	Equal pay without discrimination based on sex means:
(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;	(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;	(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;	(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;	(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.	(b) that pay for work at time rates shall be the same for the same job.	(b) that pay for work at time rates shall be the same for the same job.	(b) that pay for work at time rates shall be the same for the same job.	(b) that pay for work at time rates shall be the same for the same job.
			3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.	3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
			4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.	4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

As can be seen in the table, gender equality is limited to payments from employers regarding work done. Whereas pay is defined as basic or minimum wage or salary and any other consideration, paid directly or indirectly in cash or in kind. Furthermore, equal pay without discrimination on the ground of sex means "(a) pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement, (b) pay for work". To comply with this principle, the Commission adopted a gradual program in 1961. According to the program, wage differences exceeding 15% by 30/06/1962 were to be reduced to 15%, and to 10% by 30/06/1963, and by the end of 1964, gender-based wage differences had been completely eliminated in MS[51].

With the Treaty of Amsterdam, two new paragraphs were added to Article 141 (also enumerate) which led to three main novelties. The first of these is to grant power to the Council to adopt measures to ensure the principle of equal pay for equal work. The second is the scope of protection of discrimination on the grounds of gender be widened (not only in matters of pay, but also to ensure equality between men and women with regard to labour market opportunities and treatment), and the last one is to implement positive action practices.

However, when evaluating all these developments, to make a correct judgement, ECJ's *Defrenne II*[52] decision and the amendments made by the Maastricht Treaty should be examined more closely. The first of these was the Defrenne II case, which was a claim for damages filed by Ms. Defrenne, who worked as a flight attendant for the Belgian national airline Sabena. Defrenne's claim that female flight attendants and male members of the aircrew performing identical duties did not receive equal pay, so that the individual right to equal pay vested to her directly under Article 119 TEEC was violated. As a result of this lawsuit, the ECJ rendered an important

[51] Jensen, F. B., & Walter, I. (1965). *The Common Market: Economic Integration in Europe.* Lippincott. pp. 106.

[52] Case C-43/75 Defrenne v. Sabena (No. 2) [1976] ECR 445.

decision on the issue of discrimination based on gender and stated for the first time that the principle of equal pay for equal work for both men and women in both public and private sectors is one of the foundations of the Union. In addition to this decision, Article 119 TEEC has also have a direct effect whereby individuals can rely on this mentioned provision independently of any national provision. Therefore, granting power to the Council to adopt the assurance of equal pay for equal work, which is included with the Treaty of Amsterdam, is nothing more than a declaration rather than a novelty.

For the second novelty of the Treaty of Amsterdam, ensuring equality between genders with regard to labour market opportunities and treatment, the Treaty of Maastricht must be examined since it first refers to social protection, quality of life, social cohesion and solidarity as tasks of the Union (Article 2 TEC), prior to the Treaty of Amsterdam. In fact, the mentioned acquisition is the result of the Commission's insistence during the negotiation phase of the Treaty of Maastricht for the expansion of the social policy area and the implementation of the co-decision procedure in this field[53]. Despite the Commission's insistence on including a social chapter in the Treaty of Maastricht, the conservative Thatcher government ruling the United Kingdom opposed the proposal in a manner that would lock the negotiations. The problem was overcome by removal of the social chapter from the body of the treaty itself, and the Agreement on Social Policy, which was signed by 11 MS except the UK[54], was annexed to the Protocol on Social Policy of the Treaty of Maastricht. With the Agreement on Social Policy, equality between men and women with regard to labour market opportunities and treatment was mentioned for the first time and it was projected that minimum requirements of the MS would be implemented gradually through directives (paragraphs 1 and 2 of Agreement on Social Policy Article 2).

[53] Addison, J. T. (2009). In the Beginning, There Was Social Policy: Developments in Social Policy in the European Union from 1972 through 2008. *The Rimini Centre for Economic Analysis, PR*, pp. 5.

[54] Belgium, Denmark, Germany, Spain, France, Ireland, Greece, Italy, Luxembourg, Netherlands and Portugal

Table 3.6 Social Policy to Promote Improved Working Conditions and Standard of Living for Workers of EU Member States

Treaty of Lisbon

TFEU

Article 153

1. With a view to achieving the objectives of **Article 151, the Union** shall support and complement the activities of the Member States in the following fields:
(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;
(e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5;
(g) conditions of employment for third-country nationals legally residing in **Union** territory;
(h) the integration of persons excluded from the labour market, without prejudice to **Article 166;**
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).
2. To this end, **the European Parliament and the Council:**
(a) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;
(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
The European Parliament and the Council shall act in accordance with the **ordinary legislative procedure** after consulting the Economic and Social Committee and the Committee of the Regions
In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.
The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render **the ordinary legislative procedure applicable to paragraph 1(d), (f) and (g).**
3. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph 2, **or, where appropriate, with the implementation of a Council decision adopted in accordance with Article 155.**
In this case, it shall ensure that, no later than the date on which a directive or a decision must be transposed **or implemented** ~~in accordance with Article 249~~**,** management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive **or that decision.**
4. The provisions adopted pursuant to this Article:
- shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
- shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Treaty of Maastricht

TEC Annex: Agreement on Social Policy

Article 2

1. With a view to achieving the objectives of Article 1 , the Community shall support and complement the activities of the Member States in the following fields:
- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- equality between men and women with regard to labour market opportunities and treatment at work;

Treaty of Amsterdam

TEC

Article 137

1.With a view to achieving the objectives of **Article 136**, the Community shall support and complement the activities of the Member States in the following fields:
- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- the information and consultation of workers;
- the integration of persons excluded from the labour market, without prejudice to Article 150;

Treaty of Nice

TEC

Article 137

1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) **social security and social protection of workers;**
(d) **protection of workers where their employment contract is terminated;**
(e) the information and consultation of workers;
(f) **representation and collective defence of the interests of workers and employers**

Table 3. 6 Social Policy to Promote Improved Working Conditions and Standard of Living for Workers of EU Member States (continued)

Treaty of Maastricht TEC Annex: Agreement on Social Policy	Treaty of Amsterdam TEC	Treaty of Nice TEC
Article 2 (continued) - the integration of persons excluded from the labour market, without prejudice to Article 127 of the Treaty establishing the European Community (hereinafter referred to as "the Treat"). 2. To this end, the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. The Council shall act in accordance with the procedure referred to in Article 189c of the Treaty after consulting the Economic and Social Committee. 3. However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee, in the following areas: - social security and social protection of workers; - protection of workers where their employment contract is terminated; - representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6; - conditions of employment for third-country nationals legally residing in Community territory; - financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund. 4. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3. In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 189, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive. 5. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty 6. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.	**Article 137 (continued)** - equality between men and women with regard to labour market opportunities and treatment at work. 2. To this end, the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee **and the Committee of the Regions.** **The Council, acting in accordance with the same procedure, may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences in order to combat social exclusion.** 3. However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions in the following areas: - social security and social protection of workers; - protection of workers where their employment contract is terminated; - representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6; - conditions of employment for third-country nationals legally residing in Community territory; - financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund. 4. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3. In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 249, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive. 5. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty. 6. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.	Article 137 (continued) **including co-determination, subject to paragraph 5;** (g) **conditions of employment for third-country nationals legally residing in Community territory;** (h) the integration of persons excluded from the labour market, without prejudice to Article 150; (i)equality between men and women with regard to labour market opportunities and treatment at work; (j) **the combating of social exclusion;** (k) **the modernisation of social protection systems without prejudice to point (c).** 2. To this end, the Council: **(a)** ~~acting in accordance with the same procedure~~ may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, ~~in order to combat social exclusion.~~ **excluding any harmonisation of the laws and regulations of the Member States;** **(b)** may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. **The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions, except in the fields referred to in paragraph 1(c), (d), (f) and (g) of this article, where the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the said Committees. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the procedure referred to in Article 251 applicable to paragraph 1(d), (f) and (g) of this article.** **3.** A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraph **2.** ~~and 3~~ In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 249, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive. **4.** The provisions adopted pursuant to this article: - **shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,** - shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty. 5. The provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

As shown in Tables 3.6, expressions related to positive action regulations can be found again in the Agreement on Social Policy (Article 2(5))[55]. According to the mentioned provision, in order to realize these objectives, adoption of more stringent protective measures in relation to the Treaty [56] can be taken. Therefore, the importance of the Agreement on Social Policy in terms of EU non-discrimination principle with its novelties is an undeniable fact. However, it is important to note that the UK opt-out from the Agreement created a twin-track in EU social policy. Nevertheless, when the Labour Party came to power in the United Kingdom in 1997 and decided to sign the Agreement on Social Policy, it integrated into the Treaty of Amsterdam in the form of a new Chapter on Social Policy. Moreover, with the Treaty of Amsterdam, while adopting measures within this field, the Council consults not just with the Economic and Social Committee but also with the Committee of the Regions[57] with the purpose of having local administrations join the process. With the Treaty of Nice, a new secondary instrument was introduced separate from the directives in order to achieve the mentioned objectives. In fact, even though the Treaty of Amsterdam only included the fight against social exclusion, the Treaty of Nice extended this tool to other objectives in the field of social policy. In this respect, in accordance with equal opportunities between men and women in particular, it may be said that Article 137(2)(a) stipulates measures for the support and cooperation between MS which allow for initiatives aimed at improving knowledge, developing information exchange and best practice, promoting innovative approaches and evaluating experiences, all without harmonization of each State's legal system.

[55] Gerapetritis, G. (2016). *Affirmative Action Policies and Judicial Review Worldwide.* Switzerland: Springer International Publishing. pp.119.

[56] These provisions exist in Article 153(4) TFEU.

[57] The European Committee of the Regions was established under the Treaty of Maastricht in 1994 to represent local and regional authorities, and Amsterdam and then the Lisbon Treaty extended the areas of jurisdiction. (For further information: Loughlin, J. (1996). Representing the Regions in Europe: The Committee of the Regions. *Regional and Federal Studies, 6*(2), pp. 147-165).

Moreover, the point to be emphasized regarding the Treaty of Amsterdam in terms of the prohibition of discrimination on the grounds of gender is undoubtedly the fact that it extends gender equality not only to labour market conditions but also to other areas of Union activities. In fact, the most important indicator of this is that gender equality is clearly considered among the tasks of the Union (Article 3(2) TEC), thus mainstreaming strategy was included in the primary sources of EU law for the first time. Along with this development, Article 13 TEC was added to the Treaty of Amsterdam, including five newly protected grounds of discrimination (racial or ethnic origin, religion or belief, disability, age or sexual orientation). As can be seen, the Treaty of Amsterdam has opened the doors of a new era in terms of EU prohibition of discrimination by moving the issue of gender equality not only to employment but also to other policy areas.

Table 3.7 Tasks of the Union and Gender Mainstreaming[58]

		Treaty of Lisbon **TFEU**		
Article 8 In all its activities, the **Union** shall aim to eliminate inequalities, and to promote equality, between men and women.				
Treaty of Rome **TEEC**	**SEA** **TEEC**	**Treaty of Maastricht** **TEC**	**Treaty of Amsterdam** **TEC**	**Treaty of Nice** **TEC**
Article 2 The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.	Article 2 The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.	Article 2 The Community shall have as its task, by establishing a common market and **an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a,** to promote throughout the Community a harmonious **and balanced** development of economic activities, **sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection,** the raising of the standard of living and **quality of life, and economic and social cohesion and solidarity among Member States.**	Article 2 The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and **4,** to promote throughout the Community a harmonious, balanced **and sustainable** development of economic activities, a high level of employment and of social protection, **equality between men and women,** sustainable and non-inflationary growth, a high degree of **competitiveness and** convergence of economic performance, **a high level of protection and improvement of the quality of the environment,** the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.	Article 2 The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4 to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

[58] With the Treaty of Lisbon, the objectives of the Union previously included in Article 2 TEC and Article 2 TEU are united under Article 3 TEU and re-emphasized. Furthermore, competencies of the Union outlined between Article 3 to 6 TFEU, lastly Article 2 and 3(1) TEC were removed from the body text of the Treaty. Because of these changes, comparison between the Treaties is not possible and those articles are not shown in Table 3.7.

As shown in Table 3.7, provisions regarding mainstreaming strategy on gender equality moved to the *Article 8 TFEU*. With the newly added Article 10, once again emphasized this mainstreaming strategy and clearly stated that all policies and actions of the Union together with other areas mentioned in the Treaty would be tackled along with gender discrimination. As a result of all these changes, it may be concluded that a major change in gender equality has not been the case with the TFEU's so-called Reform Treaty. However, apart from the TFEU continuing its old policies, such evaluation will be incomplete without looking into the relevant articles of the TEU to comprehend the Union's declaration of intention towards establishing gender equality.

Firstly, it should be mentioned that the concept of *values* found a place in primary law for the first time with Article 2 TEU. The fact that equality, non-discrimination, and gender equality were listed within the values of EU is a significant indicator showing the Union's sensitivity on non-discrimination. The most significant enforcement of Article 2 TEU is that if a country does not respect the values of the EU and is not committed to promoting them, it cannot apply to become a member of the Union (Article 49 TEU)[59]. In fact, upon determination by the Council that a MS who seriously and persistently violates the values of the Union, it may be possible to suspend certain rights of the said MS arising from Treaties, including voting rights at the Council (Article 7(3) TEU). In Article 3 TEU, while listing the competencies of the Union, the target of gender equality was included again. As it will be remembered, these provisions are not new and have already been listed as among the objectives of the Union since the Treaty of Amsterdam (Article 2 TEC). On the other hand, since simplifying the primary law was also a goal during the negotiation phase of the Treaty of Lisbon, the objectives of the Union previously included in Article 2 TEC and Article 2 TEU were united under Article 3 TEU, new objectives were added, or the prevailing objectives of the Union were re-emphasized.

[59] Piris, J. C. (2010). *The Lisbon Treaty: A Legal and Political Analysis.* Cambridge University Press. pp. 71.

Table 3.8 Objectives of the Union to carry out its Specified Tasks

Treaty of Lisbon TEU		
Article 3 1. **The Union's aim is to promote peace, its values and the well-being of its peoples.** 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, **a highly competitive social market economy,** aiming at **full** employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall **combat social exclusion and discrimination**, and shall promote **social** justice and protection, equality between women and men, **solidarity between generations and protection of the rights of the child.** It shall promote economic, social and territorial cohesion, and solidarity among Member States. **It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced**. 4. The Union shall establish an economic and monetary union whose currency is the **euro.** 5. **In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.** 6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties .		
Treaty of Maastricht **TEU**	**Treaty of Amsterdam** **TEU**	**Treaty of Nice** **TEU**
Article B The Union shall set itself the following objectives: - to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty; - to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence; - to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union; - to develop close cooperation on justice and home affairs; - to maintain in full the 'acquis communautaire' and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the Treaty establishing the European Community.	Article 2 The Union shall set itself the following objectives: - to promote economic and social progress **and a high level of employment and to achieve balanced and sustainable development,** in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty; - to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the **progressive** framing of a common defence policy, which might **lead to a common defence, in accordance with the provisions of Article 17;** - to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union; - **to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;** - to maintain in full the acquis communautaire and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined **in Article 5** of the Treaty establishing the European Community.	Article 2 The Union shall set itself the following objectives: - to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty, - to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17, - to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union, - to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime, - to maintain in full the acquis communautaire and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community.

However, looking at the new wording of Article 3 TEU in Table 3.8, it can be observed that it goes well beyond the listed objectives. For the first time promotion of peace, the Union's values, and the well-being of its citizen were included among the tasks of the Union. In addition, the goal of becoming solely an economic union was left behind with new objectives such as combating social exclusion,

discrimination and poverty, promoting social justice and solidarity between generations, protecting children's rights, respecting cultural and linguistic diversity, and ensuring the safeguarding and enhancement of cultural heritage. In that sense, a new era of protecting and promoting human rights began in the Union. As a result of this, the objective in order to ensure equality between men and women should be seen as the desire to protect one of the fundamental human rights, not as a requirement of a functioning market economy.

3.1.1.3 Non-Discrimination on other Protected Grounds

Although regulations on the prevention of discrimination in nationality and gender equality in work life have a deep-rooted history in EU law, the regulations for the prevention of discrimination on other protected grounds are still very recent. Undoubtedly, this delay is related to the objectives of the Union, which took direction with the idea of economic integration stemming from the fact that, at first, economic integration was evaluated only from the perspective of not disturbing fair competition and guaranteeing the free movement of individuals. In fact, with the Treaty of Amsterdam, EU citizens achieved the possibility of protection at the level of the Union for sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, in different yet limited areas in regards to discriminatory behaviours.

However, when statistics on discriminatory practices are evaluated, it becomes apparent that there may have been a bit of delay for the Union to act on the motto of *unity in diversity*. At the top of these statistics rests the fact that in 2015, 12% of EU citizens (61 million people) felt that they belonged to one or more groups that could be discriminated against. Comparing this ratio with the ratio of citizens using the right to free movement in that year (3.7%, 11.3 million people), it can be seen that the common policies to combat discrimination within the Union can alleviate the lives of the larger masses. Another striking statistic is that 21% of EU citizens in

2015 (107 million people) stated that they were discriminated against for one or more reasons within the last year[60].

Other indicators, including the perceptions of individuals on discrimination based on a Eurobarometer survey conducted in 2015 and 2012[6162], are given in the Figure 3.2 on the next page and show that discriminatory behaviours within the scope of ethnic origin (2015: 64%, 2012: 56%) are felt more widely than in other fields. This is followed respectively by sexual orientation (being gay, lesbian or bisexual), gender identity (being transgender or transsexual), religion or beliefs, and disability. Moreover, although a candidate who is 55 years or older is seen in a more disadvantaged position than other candidates with the same qualifications while applying for a job in high percentages for both years, disability of individuals (2015: 46%, 2012: 40%) also has a negative influence on job applications. The policies implemented in the fight against discrimination in the work place were found to be effective by approximately half of the participants, except for the areas of sexual orientation and gender identity. Finally, when the uncomfortableness perceptions of individuals in respect to minority groups was evaluated, a low rate of 8% of respondents expressed that they may be uncomfortable with women being elected to a high political position. Considering that this attitude was expressed at the level of 15% for 2012, significant progress has been achieved in recent years. However, in the case of transgender or transsexuals, despite positive changes in attitude as opposed to previous years, 47% of participants stated that they would be uncomfortable if a transgender or transsexual individual were elected to a high position. Lastly, young people at management levels are not very appreciated. (2015: 39%, 2012: 49%).

[60] European Commission. (2015). *Special Eurobarometer No. 437: Discrimination in the EU 2015*.

[61] European Commission. (2012). *Special Eurobarometer No. 393: Discrimination in the EU 2012*.

[62] Special Eurobarometer No. 437 covers 28 MS, while Special Eurobarometer No. 393 covers 27 MS, excluding Croatia.

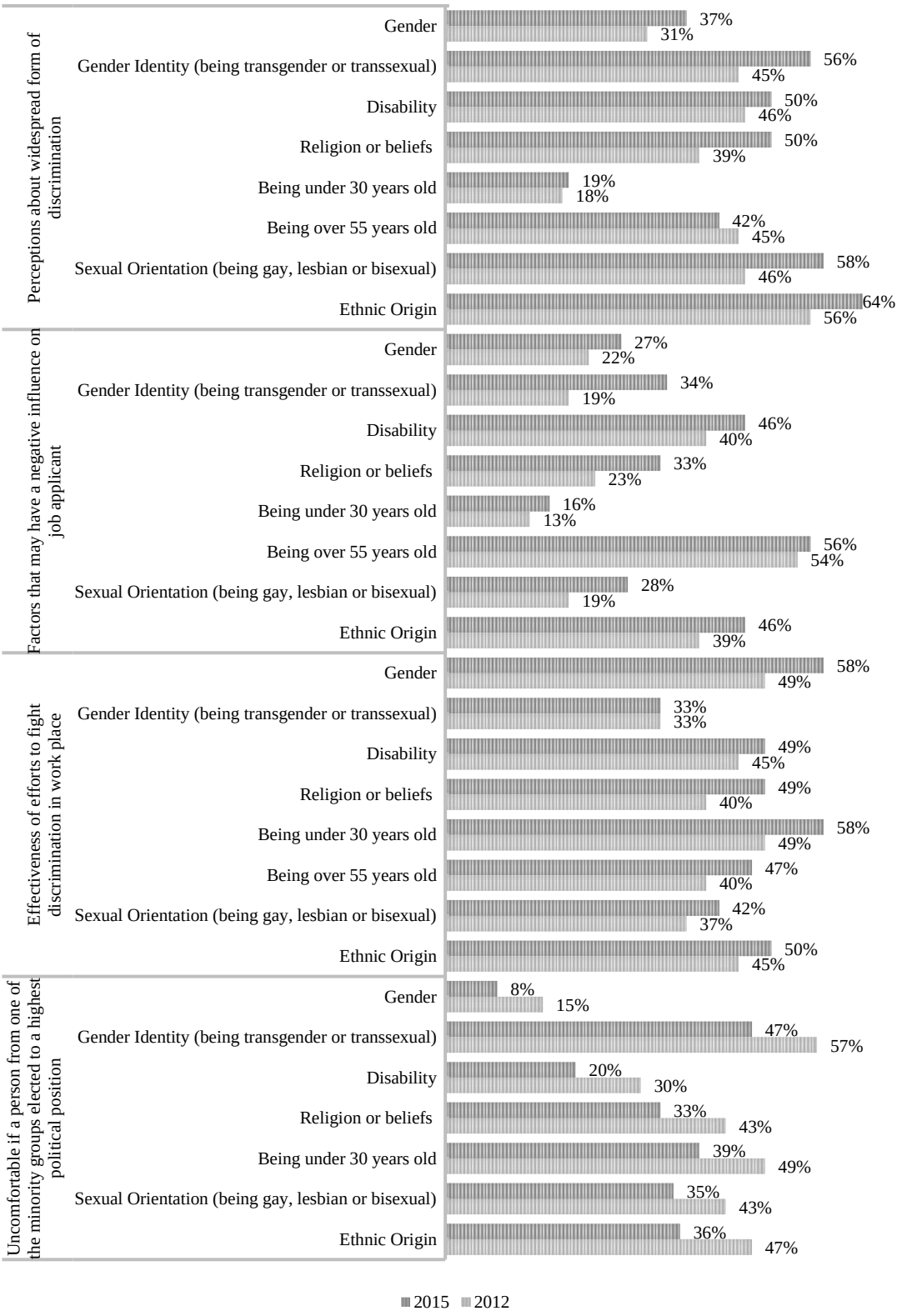

Figure 3.2 Attitudes toward Discrimination in the EU, 2015 and 2012

Undoubtedly, all these statistics show that some individuals are still at the bottom of the ladder in battling discriminatory behaviours that they may face because of different characteristics such as sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation. Yet, it was not easy feat for the Union to have the same voice in other protected grounds[63] like the prevention of discrimination on the grounds of nationality and gender. The main reason for this is the fact that MS are willing to transfer their national competencies to the Union, if they have economic priorities. On the other hand, in the 1990's, this attitude changed due to the actions of NGOs, the pressure of the EP[64][65], the amendment of national laws necessary to comply with the obligations of international treaties, as well as removal of obstacles to the right to free movement. However, since the dynamics of the mentioned new protected grounds are different from each other, they are examined separately below.

Racial or ethnic origin: The change in the perspective of the Union towards migrant workers within the historical process is effective in adopting the prohibition of discrimination the field of racial or ethnic origin. After WWII, European countries tried to meet their labour needs through migrant workers. When the acceptance of migrant workers was accelerated in 1960, the number of migrant workers in nine European countries was 2.5 million. However, in 1970 it increased to 5.4 million and in 1973, it went up to 6.3 million[66]. On the other hand, when the oil crisis in 1973 severely and adversely affected the continent and led to unemployment, societies' views on migrant workers, who were previously considered necessary for economic

[63] The term *other protected grounds* will be used for the prevention of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

[64] European Commission. (2004). *Equality and Non-Discrimination in an Enlarged European Union: Green Paper.* Luxemburg: Office for Official Publications of the European Communities. pp. 9.

[65] Howard, E. (2010). *The EU Race Directive Developing the Protection against Racial Discrimination within the EU.* Routledge pp. 7-36.

[66] Hansen, B. (1993). Immigration Policies in Fortress Europe. In L. Ulman, B. Eichengreen, & W. T. Dickens, *Labor and an Integrated Europe* (1 ed, pp. 224-249). Washington: The Brookings Institute.

growth, suddenly changed. In this framework, measures for ceasing the acceptance of migrant workers commenced. However, since it is difficult to send migrant workers back to their home countries, and also because of family reunification and high birth rates of migrants, the number of migrants in European states continued to increase[67]. While migration waves brought the issue of integration of migrants into society, the fact that immigrants instead of national workers filled open employment positions at a time of economic crisis, and were taking a share of the welfare of the country, triggered xenophobia[68].

The Commission, perturbed by the integration problem of immigrants and xenophobia, assessed that the Union needed a common policy for migrant workers. In this respect, based on Article 118 of the TEEC, the Commission wanted to make a regulation for migration control, integration of immigrants, and the prevention of xenophobia directed at third country nationals, on the Union level, with Decision 85/381/EEC[69]. However, this regulation was brought to the EJC with the claim of five MS under the leadership of Germany, reasoning that it was not within the Union's competence[70]. Briefly, the EJC judged that Article 118 of the TEEC gives the Commission the task of promoting close cooperation between MS in the social field, particularly in matters relating to employment and working conditions, thus establishing common immigration policies that may affect the employment market and working conditions is within the scope of Article 118 of the TEEC, yet provisions containing racial or ethnic integration cannot be considered within the scope of the mentioned Article.

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[67] Zimmermann, K. F. (1995). Tackling the European Migration Problem. *Journal of Economic Perspectives, 9*(2), pp. 95-62.

[68] Jacobson, D. (1996). *Rights across borders: immigration and the decline of citizenship.* Baltimore: Hopkins University Press.

[69] Decision of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ L 217 of 14/08/1985, pp.25-26.

[70] Germany, Denmark, United Kingdom, France and Netherlands (Case C-281, 283, 284, 285 and 287/85 Germany and Others v. Commission [1987] ECR 3203.)

In fact, many European countries ratified the "International Convention on the Elimination of All Forms of Racial Discrimination" from the 1970's onwards and implemented necessary regulations to prevent racial discrimination in their domestic laws[71]. Therefore, the main purpose of MS for bringing Directive 85/381/EEC to the ECJ was due to the fact that they did not want to lose their national authority by transferring their powers on third-country nationals within their own borders to the Union, in brief just for political reasons[72]. Similarly, concerned about increasing racist discourse in the EP, the "Committee of Inquiry into the Rise of Fascism and Racism in Europe" was founded in 1984. In its reports, prepared both in 1985 and in 1991, the Committee suggested that xenophobia had reached a serious level and that the Union should take preventive measures. However, the Council's response to this proposal was that the issue involved national laws and the Union was not authorized to act in this area[73].

Notwithstanding, the establishment of common policies for the prevention of racial discrimination suddenly grasped hold in the 1990's. The primary reason for this sudden change of attitude was due to the differences in national legislations. For example, since no arrangements were made to prevent racial discrimination in Ireland[74], material containing propaganda for racist groups were produced in Ireland and exported to other countries, which then affected the economies of countries that had already ratified the International Convention on the Elimination of All Forms of Racial Discrimination. In this context, MS started to ask the Union to interfere in the distortion of the common market and to arrange common policy with respect to racial

[71] Germany (1969), United Kingdom (1969), Denmark (1971), Netherlands (1971), Australia (1975), Belgium (1975), Italy (1976)

[72] Papagianni, G. (2006). *Institutional and Policy Dynamics of EU Migration Law.* Leiden: Brill. pp. 6-9.

[73] Bell, M. (2002). *Anti-Discrimination Law and the European Union.* Oxford University Press. pp. 59-72.

[74] Ireland was only ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 2000.

discrimination. In addition to this, it was evaluated that minorities would feel vulnerable in countries that did not prohibit racial discrimination in their national laws, and thus would not choose to go to those countries even if there were an employment opportunities. In this way, the right to free movement, one the four fundamental freedoms necessary for the establishment of a common market, was also in danger. As a result, the demand for forming Union policy to prevent discrimination in other protected grounds began to be accepted initially due to the right of free movement.

However, the end of the Cold War and the war that started in Yugoslavia in 1991 caused a new migration pressure to be felt within the Union. While the Union tried to compensate for these immigration problems through common and rigid policies, the Council was criticized by both national and European NGOs for aggravating conditions towards third-country nationals and for its discriminatory attitudes. While human rights organizations, NGOs defending the rights of migrants, and the EP raised their voices with their lobbying activities, other NGOs united under the "Starting Line Group". The Group first prepared the 1992 Draft EC Directive[75] for the prohibition of discrimination at the Union level and then the proposed the amendment of the Treaty. The proposal, which concluded that the fight against discrimination should become a common policy, not only won the support of the Commission and the Parliament together with nearly 300 NGOs; it also transformed into a political element of oppression directed at governments of MS.

While these political pressures were instrumental in carrying the issue of racial discrimination to the European Council on several occasions, they also caused the adoption of non-binding regulations[7677]. In fact, in 1994, France and Germany, who

[75] The Draft EC Directive was rejected due to the fact that prohibition of discrimination on the grounds of racial or ethnic origin was not within the Union's competence.

[76] Resolution of 5 October 1995 on the fight against racism and xenophobia in the fields of employment and social affairs, OJ C 296, 10/11/1995, pp. 13-14.

had brought the proposal for Directive 85/381/EEC to the ECJ, requested the Council to establish the "Consultative Commission on Racism and Xenophobia" which would consist of representatives from MS. By the end of 1995, and as suggested by the Consultative Commission on Racism and Xenophobia, the Treaty amendment, which included the prohibition of discrimination against race, religion or ethnicity or third-country nationals, began to gain acceptance by the majority of MS; except for the United Kingdom, which advocated for the discussion of the matter at the national level.

Sexual orientation: The developments in the fight against discrimination towards sexual orientation at the Union level gained momentum after the 1990's. In fact, in the 1980's EP members expressed concerns in this area, as well as racial discrimination. However, unlike racial discrimination, there was no consensus among the members of the Parliament during those years, in fact debates arose due to cultural and ethical reasons. Nevertheless, the Parliament itself was one of the driving forces behind the formation of Union-level policies for sexual orientation in the 1990's.

One of the major changes in the point of view of both the Parliament and the Union was of course affected by the social understanding of the protection of lesbian and gay rights as well as the national regulations that entered into force[78]. In addition, governments observing the health issues people with AIDS had and the problems they faced, after the 1980's, started becoming more familiar with the issue and acting more sensitively towards these people and those involved with them so that they would not be exposed to discrimination. Although this sensibility towards AIDS-affected individuals was not seen in terms of human rights at the Union level, it was

[77] Resolution of 23 October 1995 on the response of educational systems to the problems of racism and xenophobia, OJ C 312, 23/11/1995, pp. 1-3.

[78] The Netherlands 1991, Ireland 1992, Spain and Finland 1995, Denmark 1996, Luxemburg 1997, Sweden in 1999, introduced national laws prohibiting discrimination against sexual orientation in employment.

effective to realize common policies in the field of health, displaying that these people could not be ignored. In addition, the Commission started to implement financial support programs to conduct research for gay and lesbians. All these positive developments were influential in the gradual transfer of the agenda to the EU level and both national (Stonewall; UK Lesbian and Gay Rights Lobbying Group) and international (International Lesbian and Gay Association (ILGA)) NGOs advocating lesbian and gay rights increased their lobbying activities directed at the Parliament and Commission after the 1990's. These organized lobbying activities took place within the framework of the fact that the differences in national criminal laws for lesbian and gay people constituted an obstacle for the right to free movement.

However, the fact that the Union was authorized neither in preventing discrimination against sexual orientation nor in criminal regulations left this debate unanswered. Notwithstanding, the Roth Report prepared by the EP in 1994 brought another perspective to the issue, including the creation of joint policies to prevent discrimination against sexual orientation in the employment of individuals, and pointed out that free movement of same sex partners was prevented because of existing regulations[79]. Although the "Resolution on Equal Rights for Gays and Lesbians in European Communities" was approved by the Parliament upon the Roth Report, the Resolution received serious criticisms for moral and family spirituality and created a divided EP. As in the case of racial discrimination, the Commission's response to the Resolution was again in the same direction that the Union did not have competence in this field[80].

Disability: Another protected ground to prevent discrimination is disability and integration of disabled persons into working life started to be discussed, focusing on

[79] Swiebel, J. (2009). Lesbian, gay, bisexual and transgender human rights: the search for an international strategy. *Contemporary Politics, 15*(1), pp. 19-35.

[80] Bell, M. (2002), pp. 88-107.

the needs of the market at first. In this respect, non-binding arrangements were made with financial support programs to ensure the professional development and social integration of people with disabilities at the Union level since the mid 1970's[81]. Programs (HELIOS (1988-1992) and HELIOS II (1993-1996)) provided for the visibility of individuals with disabilities at the national and Union level through the establishment of dialogue between civil society organizations.

The inclusion of discrimination against disabled persons in the Treaty of Amsterdam is essentially the result of the persistent attempts of NGOs. The "Invisible Citizens Report" which covers the fact that individuals with disabilities were ignored in the founding Treaties, the insufficiency of their employment opportunities and lack of consumer rights within the Union, the need to battle with disability discrimination as well as covering wider legal protection needs, drafted by the support of the NGOs (European Disability Forum mainly) and jurists changed the viewpoint of both the Commission and the Parliament[82]. In this respect, the Commission stated that the necessary sensitivity should be shown to prevent discrimination against disabled individuals when amendments will be made in the Treaties[83]. While lobbying activities of NGOs were continuing, in the documents that they were accepted, the Commission in 1996[84] and later on the Council[85] expressed that comprehensive

[81] Resolution of 21 January 1974 concerning a social action programme provides for, inter alia, the implementation of a programme for the vocational and social integration of handicapped persons, OJ C 13, 12/02/1974, pp. 1., Resolution of 27 June 1974 established the initial Community action programme for the vocational rehabilitation of handicapped persons, OJ C 80, 09/07/1974, pp. 30-32., Resolution of 21 January 1974 concerning a social action programme provides for, inter alia, the implementation of a programme for the vocational and social integration of handicapped persons, OJ C 13, 12/02/1974, pp. 1., Recommendation 86/379/EEC of 24 July 1986 on the Employment of Disabled People in the Community, OJ L 225, 12/08/1986, pp. 43-47.

[82] Priestley, M. (2007). In search of European disability policy: Between national and global. *ALTER-European Journal of Disability Research/Revue Européenne de Recherche sur le Handicap, 1*(1), pp. 61-74.

[83] European Commission. (1995). *The Commission takes a stand against discrimination [Press release]*. Retrieved November 2018, from http://europa.eu/rapid/press-release_IP-95-1365_en.htm

[84] European Commission. (1996). Communication of the Commission of 30 July 1996 on equality of opportunity for people with disabilities: A new European Community disability strategy . Brussels, COM(96) 406 final.

policies should be implemented to ensure the equal opportunities of disabled persons and measures should be taken to prevent the discrimination of persons with disabilities on the grounds that discrimination is one of the main problems faced by the disabled individuals.

As a result, towards the mid 1990's, both the EP and European Commission (EC) were convinced to make the necessary amendments in the Founding Treaty in order to prevent discrimination in the areas of race, religion, sexual orientation, age or disability, as a result of the organized lobbying activities of NGOs representing various minority groups[86].

However, while moving towards the Treaty of Amsterdam, apart from not reaching a full consensus on the protected grounds to prevent discrimination, some countries, who were afraid of facing political pressure from their citizens, trusted Britain to veto the relevant amendments due to their persistent opposition[87]. However, just five months before the signing of the Treaty of Amsterdam (May 1997), the Labour Party came to power in England, changing the course of events, and Article 13 stipulating that prevention of discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation was placed in the Treaty.

In Table 3.9, *Article 13 TEC*, which is an indicator that the right to non-discrimination is accepted as a human right with respect to social reasons and no longer for market-oriented reasons in the EU law, is presented with its' amendments with the intention to compare the provision within Founding Treaties.

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[85] Resolution of 20 December 1996 on equality of opportunity for people with disabilities, OJ C 012, 13/01/1997, pp. 1-2.

[86] European Council. (1995). *Reflection Group's Report of 5 December 1995.* Brussels. Retrieved November 2018, from http://www.europarl.europa.eu/enlargement/cu/agreements/reflex2_en.htm

[87] Bell, M. (2002). pp. 106-107.

Table 3.9 Principle of Non-Discrimination Based On Sex, Racial or Ethnic Origin, Religion or Belief, Disability, Age or Sexual Orientation

Treaty of Lisbon TFEU	
Article 10 **In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.** **Article 19** 1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the **Union,** the Council, acting unanimously **in accordance with a special legislative procedure and after obtaining the consent of the European Parliament,** may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, **the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures,** excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1. ~~it shall act in accordance with the procedure referred to in Article 251.~~	
Treaty of Amsterdam **TEC**	**Treaty of Nice** **TEC**
Article 13 Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.	Article 13 1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. **2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.**

With the Treaty of Amsterdam, the Council unanimously took appropriate action to enable a secondary legislation in eight different areas (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation), upon the Commission's proposal after consulting with the EP. However, it is important to take a closer look at the wording of Article 13 of TEC and compare it with provisions prohibiting discrimination based on nationality (Article 12 TEC) as well as provisions that guarantee equal pay for equal work for men and women (Article 141 TEC) in the Treaty of Amsterdam. In this way, although a new era began in the field of discrimination prevention, the unwillingness of MS with respect to transferring their national authority to the Union or reservations on the topic can be clearly understood. Non-discrimination on the grounds of nationality is guaranteed in the Founding Treaties with the expression of "… any discrimination on grounds of nationality shall be prohibited" and an equal wage for equal employment for men and women in employment with the expression "…. ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal

work". Nonetheless, Article 13 of the TEC affirms that the Council may make secondary legislation in these areas. In other words, while there is the direct effect of the provisions for both discriminations based on nationality and on equal pay for men and women in terms of employment, it is not possible for EU citizens to claim discrimination based solely on the Treaty.

Secondly, while the Council makes arrangements with the co-decision procedure for discrimination based on nationality and on equal pay for men and women, adopting the consensus principality in Article 13 of the TEC, gives MS veto power while making secondary legislation, thus it may be impossible to pass a regulation in these areas. Moreover, the Parliament is involved in the decision-making mechanism as a competent body in the co-decision procedure, but in Article 13 of the TEC, it is seen as an advisory body only. Consequently, apart from the fact that the provisions do not have direct effects, it is difficult in reality to implement the provisions of the adaption of the principle of unanimity while arranging secondary laws in this area.

However, an attempt is made to overcome this difficulty with paragraph 2 added to Article 13 of the Nice Treaty stating that without harmonization in the national laws, incentive measures may be taken by the Council in order to contribute to the achievement of protected grounds with the co-decision procedure. While the provisions of Article 13 of the TEC moved to *Article 19* with the TEFU, this time it can be observed that steps have been taken towards the criticisms regarding the competence of the Parliament. As the secondary regulations are made with respect to the amendment, the role of the EP is now strengthened and a consent procedure is sought. If it is taken into account that the consent procedure is used in the areas of membership of the Union, withdrawal from the Union, or important budgetary implications with the TFEU, it may be clearer to understand what the position of the Union is in preventing discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation with the TFEU.

Another innovation of the TFEU is that the mainstreaming strategy towards equality of gender, which entered Union law with the Treaty of Amsterdam, also started to be foreseen regarding discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. However, it should be remembered immediately that the mainstreaming strategy stated in *Article 10 TFEU* points to EU institutions to prevent discrimination in other protected grounds, the same as the principle of gender equality, and not the institutions of the MS. Nonetheless, the provisions of Article 10 TFEU should be assessed in the extent to which the EU institutions touch upon the lives of EU citizens, in this way the importance of Article 10 TFEU can be understood with respect to protection from discrimination.

3.1.2 Charter of Fundamental Rights of the European Union

While the foundations of the EU were being laid, the priority was to ensure long-lasting peace in the continent and to promote the economic development of the six founding countries. For this reason, it is impossible to discuss fundamental rights-based integration since social policies only started to be discussed after many years. However, the ChFR, which became a binding legal norm with the Treaty of Lisbon and took its place among the primary legal sources of the Union, became an indicator for the desire to move forward in terms of fundamental rights including the provision of equality and the elimination of discrimination. Nonetheless, after the *Stauder*[88] decision of the ECJ in 1969, protecting fundamental rights within the Union began to develop within the frame of the common constitutional principles of MS[89]. This case was brought to the EJC with the claim that Commission Decision 69/71/EEC, stipulating that individuals who are beneficiaries of social assistance and would like to buy butter at a reduced price should show a document stating their name to sellers

[88] Case C-29/69 Erich Stauder v. Stadt Ulm [1969] ECR 419.

[89] Lock, T. (2016). *The EU and Human Rights.* Enlightening the European Debate. The Royal Society of Edinburgh. pp. 1.

directly contradicts the provisions of the Federal Republic of Germany Constitution that protects the principles of human dignity and equality. Stauder argued that forcing an individual to display his/her identity with such a document was humiliating and discriminatory. In fact, while the Dutch and German versions of the Decision stated that the name of individuals had to be included in a document presented for gaining the right to assistance, the French and Italian translations did not include such a statement and only referred to the existence of the document. Even though the problem arose from the difference in translation, the Commission stated that the intention was not the collection of personal information and removed the clauses for the requirement that the name of the beneficiary appear on documents in the Dutch and German texts of Decision 69/71/EEC. The EJC, on the other hand, decided that even if such a regulation were implemented, the controversial problem did not include discrimination in the sense of Union law. In the Stauder case however, the ECJ referred to fundamental rights leading the way and expressed that fundamental rights are protected among the general principles of unwritten Union law, inspired by the general principles of law in force in MS for the first time[90].

Parallel to the EJC's decision and with almost the same statements, paragraph 2 of Article F TEU added provisions to the Treaty of Maastricht stating that:

> The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law[91].

These statements were moved to Article 6 of the TEU with the Treaty of Amsterdam. Moreover, it was included that the Union was founded on the common principles of

[90] Neuwahl, N. A. (1995). The Treaty on European Union: A Step Forward in the Protection of Human Rights? In A. N. Neuwahl, & A. Rosas, *The European Union and Human Rights* (Vol. 42, pp. 1-22). London: Martinus Nijhoff Publishers.

[91] The CoE opened the ECHR to the signatures of the contracting states on 04/11/1950 and it entered into force on 03/09/1953. As of April 2019, ECHR is in force in 47 party states and 28 of these are EU Member States.

the MS; liberty, democracy, respect for human rights and fundamental freedoms and the rule of law principle and Unions' stance in this area was reinforced.

Table 3.10 Recognition of the Charter of Fundamental Rights of the European Union and Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Treaty of Lisbon TEU		
Article 6 **1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.** **The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.** **The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.** **2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.** **3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.**		
Treaty of Maastricht **TEU**	**Treaty of Amsterdam** **TEU**	**Treaty of Nice** **TEU**
Article F 1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.	**Article 6** 1. The Union **is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.** 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. ~~whose systems of government are founded on the principles of democracy.~~ 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.	Article 6 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. 3. The Union shall respect the national identities of its Member States. 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Yet, when the statements of these provisions are examined, either in the Treaty of Maastricht or Amsterdam, it can be understood that the protection of fundamental rights did not become a binding legal norm with the mentioned Founding Treaties. Nevertheless, the protection of fundamental rights was accelerated immediately after the Treaty of Amsterdam and under the presidency of Germany. In this context, during the Cologne European Council (June 1999), a decision was made to form a working group under the presidency of the EC and with the participation of the MS government representatives, national parliamentarians, and the members of the EP in

order to put the fundamental rights together under a Charter and make them visible. Furthermore, in the Cologne European Council it was stipulated that the decision on whether or not the Charter would be included in the Treaties and become a binding force would be made at the European Council in Nice that would be held in December 2000[92]. At the Nice Summit, however, it was decided to declare the Charter only as a political declaration of the EP, the Council and the EC, thus the Charter did not turn into a binding legal norm[93].

The ChFR became an integral part of the EU's primary law with the Treaty of Lisbon, as shown in Table 3.10, which displays the place of fundamental rights in the Treaties. However, it should be pointed out that the ChFR, which the Treaty of Lisbon made legally binding, was not the first Charter announced at Nice in December 2000 as stated in *Article 6(1) of the TEU*, but the Charter accepted in Strasbourg in December 2007, which was adopted after the provisions of previous Charter were amended. The Treaty of Lisbon is undoubtedly a turning point in terms of the Charter becoming legally binding. Although the subject of its binding force will be focussed on later, it is more suitable to mention Article 21 of the Charter, which prohibited discrimination, in order to grasp the matter within the scope of this study.

In Article 21(1) of the ChFR, new grounds (colour, social origin, genetic features, language, political or any other opinion, membership of a national minority, property, birth) are included in addition to the non-discrimination grounds (sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation) affirmed in Article 19 TFEU. On the other hand, in Article 21(2) ChFR, prohibition of discrimination on the grounds of nationality is expressed with the same provisions

[92] Bercusson, B. (2009). *European Labour Law.* Cambridge University Press. pp. 198-257 (For further information: Cologne European Council, 3 and 4 June 1999, Retrieved April 2019, from http://www.europarl.europa.eu/summits/kol2_en.htm)

[93] Bercusson, B. (2009). pp. 12 (For further information: Nice European Council, 7 and 10 December 2000, Retrieved April 2019, from http://www.europarl.europa.eu/summits/nice1_en.htm)

with respect to Article 18 TFEU. In Article 23 ChFR, gender equality is foreseen in all areas, including employment, work and pay. Yet, it is also stated that the measures in favour of the under-represented sex should not violate the principle of equality. Although, the statements are more similar to a summary of Article 153(1)(i) and Article 157 of the TFEU for ensuring the equality of women and men in the work life; it can be seen that with the statement of "… in all areas" in Article 23 ChFR, a wider range of areas are included in economic and social life, including both the public and private sector[94]. Whereas, provisions for the prevention of gender discrimination, except for Article 8 TFEU, which stipulates mainstreaming strategy with respect to gender equality, are all in regards to employment conditions (labour market opportunities, treatment at work, and equal pay).

All these comparisons may lead to the conclusion that, in terms of discrimination and equality, the ChFR gives the Union greater powers than the Founding Treaties, or in other words, establishes new competencies to the Union on the matter of fundamental rights. However, as clearly stated in the second subparagraph of Article 6(1) TEU; "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties". For example, unless there is an amendment made in the TFEU, it is not possible to bring a claim related to discrimination of genetic features, language, political or any other opinion to the national courts or the EJC. Additionally, the third subparagraph of Article 6(1) TEU briefly implies that Article 51 and 52 of the ChFR will be taken into account in the interpretation and application of the ChFR. In summary, the authority of the Union is not expanded with the provisions under the scope of the ChFR and, more importantly perhaps, the Charter imposes obligations to the institutions of the Union and when MS are implementing EU law[95]. Within this framework, the acts of Union institutions that are incompatible with the Charter could be brought to the EJC. Lastly, the ChFR does not have influence on regulations or laws in the United

[94] Bercusson, B. (2009). pp. 39-43.

[95] Lock, T. (2016). pp. 1.

Kingdom or Poland due to Protocol No. 30[96] annexed to the Treaty of Lisbon. The Czech Republic[97] was then added to these two countries thus making it implausible to make any claims based on the Charter in the UK, Poland, and the Czech Republic, not is it possible to check on the compliance of the Charter's suitability to the laws in those countries.

Another issue related to the protection of fundamental rights at the EU level is the stipulation of the Union's participation in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). As presented in Table 3.10 above, for the first time, with the Treaty of Maastricht it was expressed that the Union respected the fundamental rights guaranteed by the ECHR (paragraph 2 of Article F TEU). These statements, in the form of a political declaration, can be seen in the subsequent Founding Treaties. However, as an innovation of the Treaty of Lisbon, in precise language and without any prejudice, it is foreseen that Union will accede to the Convention (Article 6(2) TEU)[98]. Nevertheless, in the case of EU accession, a question arises regarding what kind of relationship the ECHR and the ChFR will have as well as what the relationship between the ECJ and European Court of Human Rights (ECtHR) will look like, because when this accession takes place, the legal nature of the ECHR will change in terms of Union law and the ECHR will become a legally binding source of the Union, thus it will not be interpreted solely within the scope of the international obligations of the MS.

Generally speaking, it would not be wrong to say that the ChFR is compatible with the ECHR and, in fact, it guarantees additional rights not included in the ECHR such

[96] Protocol No. 30 of the TFEU on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, OJ C 115, 09/05/2008, pp. 313-314.

[97] Declaration No. 53 of the TFEU by the Czech Republic on the Charter of Fundamental Rights of the European Union, OJ C 202, 07/06/2016, pp. 355-356.

[98] According to Article 59(1) ECHR, only the contracting states of the CoE may accede the Convention. However, with Protocol No. 14, which entered into force 01/06/2010 and a new paragraph 2 added to the Article 59 ECHR, the necessary legal basis was provided for the EU to the accession of the Convention.

as the right to protection of personal data, freedom of the arts and sciences, right to asylum and protection in the event of removal, right to a fair trial, and the right not to be punished twice. In addition, it is clear that the solidarity and citizens' rights chapters included in the ChFR offer broader rights than the ECHR. Although the prohibition of discrimination is regulated in both of these documents, it is also noteworthy that there are fundamental differences between them. In this context, in Article 14 ECHR, the protected grounds of discrimination are listed (as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status), but unlike the ChFR, an open list is established with the usage of the term *any ground*. As well, the material scope of Article 14 ECHR is limited to discriminatory acts that relate to other rights stipulated in the Convention. In regards to eliminating this deficiency, Protocol No. 12 was prepared and enacted on 01/04/2005 and in this way, the fundamental rights stipulated within the scope of national laws are protected against discrimination on these grounds. However, Protocol No. 12 is in effect in only ten EU Member States (Croatia, Cyprus, Finland, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, and Spain). In this context, Article 14 ECHR can be said to have a more limited scope than Article 21(1) ChFR[99]. In fact, in accordance with Article 52(3) ChFR, in the event that the fundamental rights of the ChFR correspond to the rights guaranteed by the ECHR, Union law can provide more extensive protection. Finally, accession to the ECHR will not affect the competences of the Union, as stated in Article 6(2) TEU. For example, if there is a conflict between the decisions or duties of the ECJ and the ECtHR after accession, as per Article 2 of Protocol No. 8 annexed to the TFEU, the ECJ will remain the highest court of the Union in matters of EU law after the accession. As a result, while the Treaty of Lisbon provided significant improvements in the protection of fundamental rights in the general sense as well the prohibition of discrimination within the scope of this study, it did not offer new rights in practice due to the explanations given above. However, these mentioned expansions are effective in reinforcing

[99] Lock, T. (2016). pp. 2.

fundamental human rights, making them visible and exhibiting a clear stance. Moreover, first and foremost, the ChFR became an important source of reference in the decisions of the EJC.

One of the EJC judgements referring to the ChFR is the case of *Ms. Küçükdeveci*[100]. The subject of the dispute arose from the calculation of her termination notice period, in which her working period before the age of 25 was not taken into consideration. Ms. Küçükdeveci had been working at the firm Swedex since the age of 18. Although Ms. Küçükdeveci had worked at the said company for 10 years as of the date of her dismissal, the company ignored her working periods before the age of 25 in accordance with German legislation and made the notice of termination based on three years. When the dispute was brought to the national court, it referred to the preliminary ruling procedure to clarify whether the unaccounted periods were within the scope of Employment Equality (Framework) Directive (2000/78/EC) in respect to discrimination on the grounds of age. In its decision, the EJC not only stated that discrimination on the grounds of age was prohibited by Article 13 TEC, but also expressed that the ChFR has the same legal value as the Treaties due to Article 6 TFEU and Article 21 ChFR, thus referencing the statement "especially... all age-based discrimination was prohibited." In this context, the EJC expressed that the termination notice periods are within the scope of the Union law and therefore, even if the national regulations are contrary, Union law has priority in implementation. In addition, as per Article 6(1) of Directive 2000/78/EC which was arranged based on Article 13 TEC:

> the differences of treatment on grounds of age will not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

[100] Case C-555/07 Seda Kücükdeveci v. Swedex GmbH & Co. KG. [2010] ECR I-00365.

Although the framework of the exemption area was broadly drawn in this Directive, the ECJ judged that the regulation which German authorities put into force aimed to give employers more flexibility in personnel management due to the fact that mitigating the burden of dismissal of young workers who have high personal and occupational mobility was not considered within the exception clause of the mentioned Directive. The reason for this judgement was explained by non-compliance of the regulation with the alleged employment policy, because the regulation in question applied to all workers employed before the age of 25, regardless of age during their dismissal. Because, since it is not possible to discuss the professional mobility of a person dismissed at 60, her/his working periods before the age of 25 were also not taken into consideration with respect to the mentioned German regulation.

Another important decision of the ECJ regarding the ChFR was made upon the annulment request of Belgian Consumer Organization: Test-Achats[101]. The subject matter of the case was about the annulment of the Belgian law of 21/12/2007 transposing the Goods and Services Directive 2004/113/EC to the national legislation, on the basis that it violated the principle of equal treatment between men and women. In accordance with Article 5(1) of Directive 2004/113/EC:

> in all new contracts concluded after 21/12/2007, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

However, Article 5(2) of Directive provides an exception in this regard, allowing MS to permit proportionate differences in individuals' premiums and benefits before the mentioned date, where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. In addition, as per the relevant regulation, MS who implemented the exclusion clause of the Directive and

[101] Case C-236/09 Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil desministres [2011] ECR I- 00773.

determined different premium rates should review their decisions in regards to whether or not to equalize the premium rates five years after 21 December 2007. Meaning that, even if the principle of equality between men and women was foreseen concerning premiums and benefits, the statement within Article 5(2) of Directive 2004/113/EC "… five years after 21 December 2007" permitted the continuation of the exemption clause without temporal limitation. In this context, Test-Achats argued that the Belgian law of 21/12/2007, which derives from the exception in question, was contrary to the fundamental principle of equality between women and men. For this reason, the case was brought to the EJC for its preliminary ruling procedure to clarify whether Article 5(2) of Directive 2004/113/ EC complies with the principle of equality and non-discrimination on the grounds of gender as guaranteed by Article 6(2) TEU. In the judgment of the EJC, it referenced the ChFR and expressed that Article 5(2) of the mentioned Directive must be assessed in light of Articles 21 and 23 of the Charter. In addition, the EJC stated that there could be transposing periods while implementing Directives, but without maintaining temporal limitation, the regulation works against the achievement of the objective of equal treatment between men and women, which is the purpose of the Directive and thus is incompatible with Articles 21 and 23 of the Charter. The EJC also concluded that Article 5(2) of the Goods and Services Directive 2004/113/EC was invalid as of 21/12/2012, which was the deadline set for transposing the Directive in question to national legislations.

In conclusion, it can be seen that many of the EJC's decisions, in reference to the Charter, explain the fundamental rights that must be recognized as the general principles of Union Law[102]. However, it should also be kept in mind that the ChFR has constituted a provision for the institutions of the Union and when MS are implementing Union law, whereas the Treaties, and consequently the secondary legislations established against them affect private citizens and entities[103].

[102] Bercusson, B. (2009). pp. 15.

[103] Lock, T. (2016). pp. 3.

3.2 Secondary Sources of EU Non-Discrimination Principle

Secondary sources of EU law, which are based on Treaties, are created by European institutions in exercise of the powers conferred on them. Regulations that are one of the EU secondary sources are binding and must be transposed directly to domestic law on the date specified. Even in cases where national law is not in accordance with EU regulation, the national courts must apply the regulation first. Therefore, MS are obliged to implement the provision of a regulation, even if it is not in line with their national interests, without having even the authority for reduction, correction or selection. Another secondary source of EU law is directives. Directives are as binding as regulations. The main difference is that the desired target to be reached is given in directive, but the method of reaching the target and the procedure of compliance with the national law is left to the authorities of the MS. Decisions, recommendations and opinions are also other secondary legal sources of Union.

Considering the development of EU prohibition on discrimination principle, it is important that secondary legislation aiming to prevent discrimination on the grounds of nationality was first adopted in the field of social security. The position of the Union can also be clearly understood by looking at the preferred form of arrangement while protecting the social security rights of individuals against discrimination on the grounds of nationality because rather than other forms of secondary sources it was arranged via Regulation. Another point that can draw attention to the firm stance of the Union is that Regulation 3/58 concerning the coordination of social security systems between MS was adopted, after the adoption of Regulation 1/58 which covered the determination of official languages to be used by the Union and Regulation 2/58 which covered equivalency of EP Member passports[104]. However, regulations aimed at maintaining gender equality in working life were implemented via directives. In this context, Equal Pay Directive

[104] Paju, J. (2017). *The European Union and Social Security Law* (Vol. Modern Studies in European Law). Portland, Oregon: Hart Publishing. pp. 18.

75/117/EEC was prepared for the realization of the principle of equal pay for equal work between women and men for the first time. One year after the adoption of the Equal Pay Directive, Equal Treatment Directive 76/207/EEC, intended for the realization of equal opportunity and equal treatment between women and men in work life, was adopted. Directive 79/7/EEC, which is an important source of this study and which has not been amended since its adoption in 1975, targeted to provide gradual gender-based equality in the area of statutory social security schemes of MS.

Other secondary sources foreseeing gender-based equality according to their dates of adoption are as follows: the Occupational Pension Schemes Directive, the Equal Treatment in Self-Employment Directive, the Pregnant Workers Directive, the Parental Leave Directive, the Burden of Proof Directive, and the Goods and Services Directive. Lastly, since other protected grounds against discrimination have become the competencies of the Union with the Treaty of Amsterdam, their regulations were naturally adopted after the 2000s. Furthermore, as it will be discussed extensively below, some of the Regulations and Directives concerning the prohibition of discrimination that have come into force since the Treaty of Rome have been amended in accordance with EJC decisions, giving way to more comprehensive ones.

In Figure 3.3, secondary sources of EU non-discrimination principle are presented together with the regulations that they have replaced. However, not all of the secondary sources aim to prevent discrimination or ensure equality in the field of statutory social security schemes of MS. For this reason, and in the context of the limitations of this study, secondary sources that provide protection under the scope of statutory social security schemes are discussed in the following headings, but secondary sources of EU non-discrimination principle, without distinguishing their material scope, are summarized in Table 3.12 in order to ensure the integrity of the study.

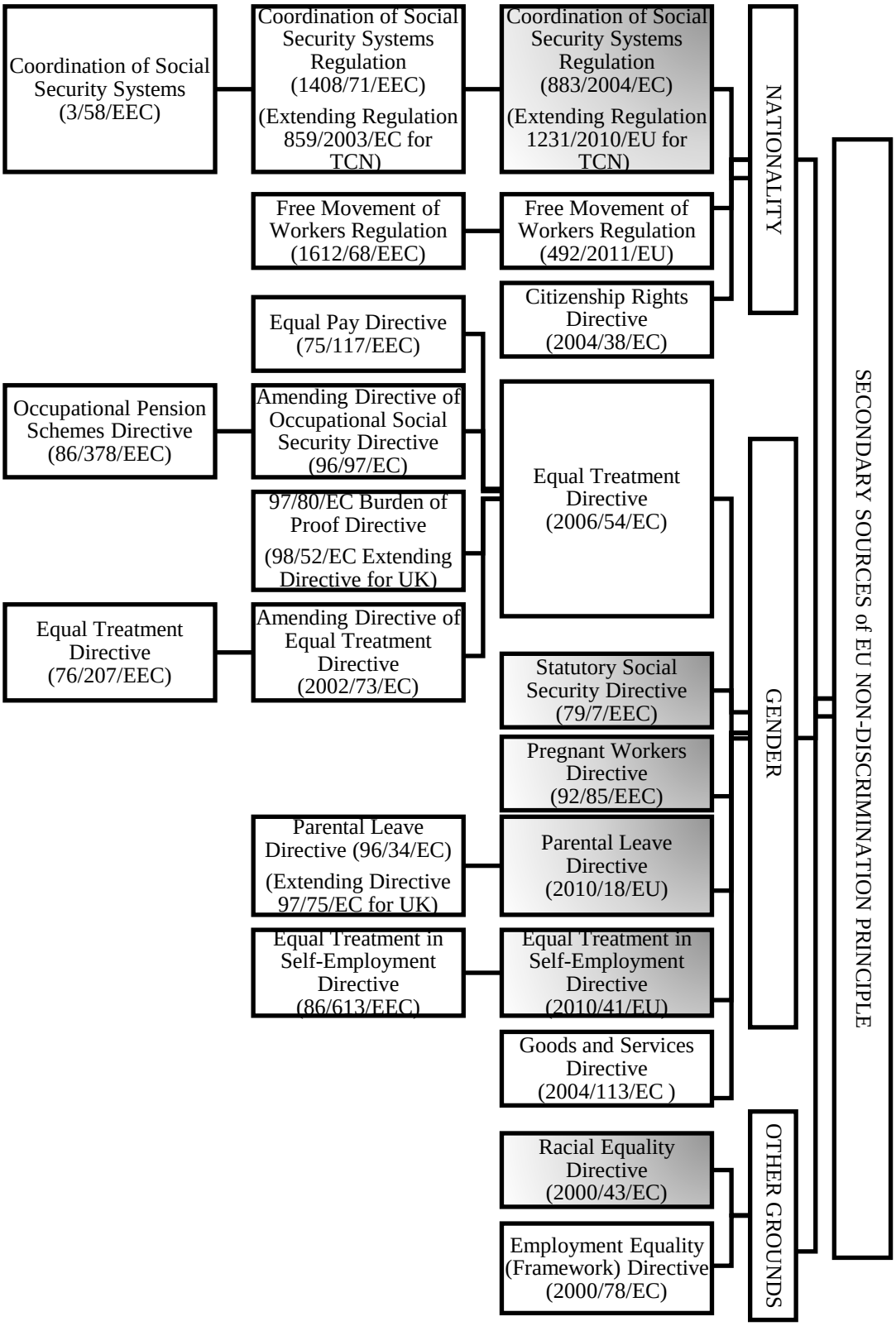

Figure 3.3 Evolution of Secondary Sources of EU Non-Discrimination Principle

3.2.1 Regulation 883/2004/EC: Nationality Equality in the Matters of Coordination of Social Security Systems

The non-discrimination principle on the grounds of nationality in EU law is implemented mostly in the field of right to free movement[105]. While the six founding countries were negotiating the Treaty of Rome, they stipulated that it was not possible to establish a common market without the regulations covering the social security systems of the MS to promote the free movement of workers[106]. Upon which, in the year following the adoption of the Treaty of Rome, Regulation 3/58, concerning social security coordination rules, and its implementing Regulation 4/58 went into force and discrimination on the grounds of nationality was prohibited in respect to social security systems of MS[107]. However, social security systems are systems that are alive and open to changes not only on the basis of MS, but also at the Union level. In addition to diverse structures of social security systems such as the entitlement conditions, financing and scope, factors such as the aging of the population, changes in the family structure, the emergence of new employment types and economic changes also cause MS to reform their social security systems. When the EJC's decisions are added to all of these factors, the adoption of social security coordination rules, which have a history of nearly 60 years, becomes inevitable. Within this framework, Regulation 1408/71/EEC was adopted in place of Regulation 3/58[108]. In the following period, Regulation 883/2004/EC[109], composed of more

[105] Pennings, F. (2013). Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR. *Utrecht Law Review, 9*(1), pp. 118-134.

[106] Paju, J. (2017). pp. 15-18.

[107] Regulation 3/58 on social security of the migrant workers, OJ No. 30, 16/12/1958, pp. 561-596. and Regulation 4/58 on fixing the procedure for implementing and completing the provisions of Regulation 3/58 concerning the social security of migrant workers, OJ No. 30, 16/12/1958, pp. 597-664.

[108] Regulation 1408/71/EEC of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149, 05/07/1971, pp. 2-50. and Regulation 574/72/EEC of 21 March 1972 fixing the procedure for implementing Regulation 1408/71/EEC on the application of social security schemes to employed persons and their families moving within the Community, OJ L 74, 27/03/1972, pp. 1-83.

modern and basic rules, was entered into force on 01/05/2010 by replacing Regulation 1408/71/EEC. It should be noted however, that Regulation 883/2004/EC is based on the coordination of national legislations, as its name suggests.

The harmonization of social security systems of the MS is not only technically difficult, but also because this political field is related to the economic and, more importantly, the acquired rights of the individuals, it is also practically impossible to implement a social security system at the Union level. Therefore, while the coordination method allows for cooperation between MS, the regulations such as the scope of the insurance schemes, their financing method, the conditions and amounts of the benefits are freely determined by MS within the framework of the subsidiarity principle. In this context, Regulation 883/2004/EC neither gives new rights regarding social security benefits nor eliminates the rules of national legislations. For this reason, when discussing Regulation 883/2004/EC, it should be remembered that its fundamental aim is to protect the social security rights of individuals while they are exercising one of the four fundamental freedoms enshrined in the EU Treaties: the right to free movement. Geographically, Regulation 883/2004/EC is implemented in thirty-two European countries, including the MS of the EU and Norway, Iceland, Liechtenstein, and Sweden [110]. Thus, individuals who are under the scope of Regulation 883/2004/EC and exercising their right to free movement in at least two of the mentioned countries can evaluate job opportunities without fear of losing their old-age pensions or other benefits granted by the different national social security systems.

[109] Regulation 883/2004/EC of 29 April 2004 on the coordination of social security systems, OJ L, 166, 30/04/2004, pp. 1-23. and Regulation 987/2009/EC of 16 September 2009 laying down the procedure for implementing Regulation 883/2004/EC on the coordination of social security systems, OJ L 284, 30/10/2009, pp. 1-42 .

[110] Social security coordination rules started to be implemented to Norway, Iceland, and Liechtenstein in accordance with the "Agreement on the European Economic Area", which entered into force on 01/01/1994. In addition, coordination rules are implemented in Sweden in accordance with the "Agreement between the European Community and the Swiss Confederation on the Free Movement of Persons", which entered into force on 01/06/2002.

The personal scope of the mentioned Regulation is as large as its geographical scope. As it is known, the personal scope of the right to free movement has enlarged since the Treaty of Rome and today not only workers but all EU citizens have the right to free movement. Thus, as a natural consequence of this enlargement and with the decisions of the EJC, the personal scope of social security coordination rules has expanded in accordance with the amending regulations that replaced or extended the previous ones. As shown in the Figure 3.4, with Regulation 883/2004/EC, coordination rules cover both active and inactive populations. Finally, with the extension of Regulation 1231/2010/EU, third-country nationals who are legally residing in the territories of MS are protected within the scope of social security coordination rules[111].

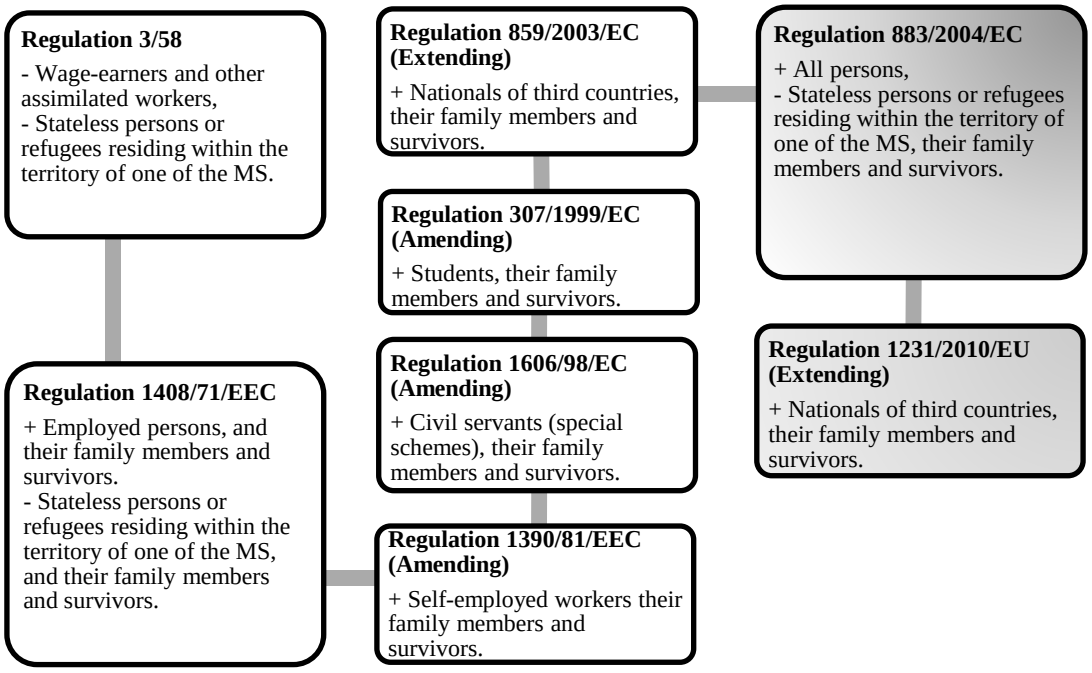

Figure 3.4 Enlargement of the Personal Scope of Social Security Coordination Rules

[111] Denmark and the United Kingdom opted out from Regulation 1231/2010/EU. On the other hand, the former Regulation 859/2003, which is extending the Regulation 1408/71/EEC to nationals of third countries, remains applicable in the United Kingdom.

The protected social security benefits which fall within the scope of Regulation 883/2004/EC are listed in Article 3. When the aforementioned Article is examined, it can be seen that the benefits are presented with a closed listing method by taking account of the ILO Social Security Minimum Standards Convention No. 102. Accordingly, sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits, and family benefits that are granted by the statutory social security schemes of MS are subject to rules of coordination. On the other hand, social and medical assistance (such as study grants and housing benefits) or benefits in relation to which a MS guarantees liability for damages to persons (such as those for victims of war and military action or their consequences; victims of crime, assassination or terrorist acts; victims of damage occasioned by agents of the MS in the course of their duties; or victims who have suffered a disadvantage for political or religious reasons or for reasons of descent) are excluded from the scope of the Regulation[112].

Undoubtedly, the most powerful arrangement of social security coordination rules is that it prohibits discrimination on the grounds of nationality. Since the principle of equal treatment based on nationality is a *sine qua non* of coordination rules, this principle is interpreted in a broad framework in the EJC regarding free movement[113]. However, it is worth noting that with Regulation 1408/71/EEC, a strong will to prevent discrimination on the grounds of nationality is displayed. In this context, with Regulation 1408/71/EEC, four principles began to be implemented; equal treatment, single applicable legislation, aggregation of periods and exportability (waiving of residence), which form the basis of the non-discrimination principle on the grounds of nationality.

[112] Amending Article 1(4) of Regulation 988/2009/EC.

[113] Jacobson, G. C. (2008). *A divider, not a uniter: George W. Bush and the American people: The 2006 election and beyond.* Longman Publishing Group. pp. 36-42.

The first one, the *equal treatment principle*, means that migrant workers and their family members should not be discriminated against on the grounds of nationality and should be treated equally as though they are citizens of the country, while they benefit from social security schemes of national legislations or they are subject to obligations (Article 4 of Regulation 883/2004/EC). Prohibition of discrimination on the basis of nationality includes not only direct but also indirect discrimination. In national regulations, provisions that include direct discrimination on the grounds of nationality can be very clearly seen. Nonetheless, eligibility conditions, such as residency, which seem to be appear equal in theory, may prevent equality for migrant workers as they may be put into a more disadvantaged position compared to citizens of MS in terms of completing the residence requirements, thus, in practice, may lead to indirect discrimination of migrant workers.

For example, a former migrant worker *Mr. O'Flynn*[114] requested funeral payment, which is a means-tested social benefit, from the responsible institution in the United Kingdom for the burial ceremony of his son which would took place in Ireland. The responsible institution of the United Kingdom rejected this grant request, reasoning that the payment could only be made for funeral arrangements carried out in the United Kingdom. When the dispute was brought to the EJC, it was stated that migrant workers must enjoy advantages under the same conditions as national workers. Although the EJC explained that the funeral payment should be granted in a non-discriminatory manner, it also stated that migrant workers might want to perform burial ceremonies in their home country due to their family ties in their countries of origin. In this context, the EJC underlined that national law must be regarded as indirectly discriminatory, if a provision is intrinsically liable to affect migrant workers more than national workers or if there is a consequent risk that it will place the migrant workers in a disadvantaged position. Thus, the EJC concluded that expecting migrant workers to hold funerals in the United Kingdom and

[114] Case C-237/94 John O'Flynn v. Adjudication Officer [1996] ECR I-02617.

otherwise not grant funeral payments would lead to indirect discrimination of migrant workers.

In this context, it should be emphasized that the principle of equal treatment includes not only the employees but also the family members of employees who are under the scope of Regulation 883/2004/EC. Within this scope, EJC's *Mr. & Mrs. Fracas*[115] decision is exemplary. Mr. Fracas, an Italian citizen who had been residing in Belgium for many years, requested handicapped assistance, which is offered to workers for their disabled children in accordance with Belgian social security law. The related institution assessed that Mr. Fracas' son, was not a worker and a Belgian citizen, therefore was not under the personal scope of Regulation 883/2004/EC and denied the request for handicapped assistance. Moreover, the Belgian institution argued that to benefit from handicapped assistance, one should reside in Belgium for at least 15 years after the age of 20. The EJC shared Mr. Fracas' view, who believed that he had been subjected to discrimination on the grounds of nationality. The EJC noted that Article 2 ("Persons Covered") and Article 4 ("Equality of Treatment") of Regulation 883/2004/EC should be read together and explained that the equality of treatment principle not only covers employees but also their family members. In addition, it was pointed out that seeking the residence condition may put both the migrant workers and their family members in a more disadvantaged position than those with MS nationalities and that it may prevent the right to free movement as stipulated in the fifth recital of the preamble of Regulation 883/2004/EC.

Finally, in the EJC's *Mrs. Gattardo*[116] decision, it was concluded that MS should fulfil their obligations to the Union in their agreements with non-member countries. Mrs. Gattardo, a French citizen who worked in Italy, wanted to aggregate her working periods in the Swiss Confederation and in Italy to become eligible for an Italian old-age pension. However, the Italian institution did not accept her request.

[115] Case C-7/75 Mr. and Mrs. Fracas v. Belgian State [1975] ECR I- 679.

[116] Case C-555/07 Seda Kücükdeveci v. Swedex GmbH & Co. KG. [2010] ECR I-00365.

Italy argued that Mrs. Gattardo was not within the personal scope of the bilateral social security agreement signed between the Italian Republic and the Swiss Confederation. However, Mrs. Gattardo believed that she was being discriminated against on the grounds of nationality since the insurance period of Italian citizens spent in both countries were united as per the bilateral social security agreement. When the dispute was brought to the ECJ, it detailed that the principle of equality must be observed not only in the national social security regulations of the MS, but also bilateral social security agreements that the MS signed with non-member countries. Following this decision, after 2002, MS began to revise their bilateral social security agreements to make them compatible with the EJC's decision[117].

While the framework of the principle of equality on the grounds of nationality became clearer with the ECJ's decisions, Regulation 883/2004/EC strengthened the principle of equality with its new provision, containing the principle of equal treatment of benefits, income, facts or events (Article 5 of Regulation 883/2004/EC)[118]. This principle means that, for example, when granting old-age pension, the duration spent within the scope of military service as required by the national legislation of a MS is added to the actual working period of an insured to lower the age requirement to benefit from old-age pension, duration spent within the scope of military service in another MS territory should also be considered by the MS. Or, if receiving old-age pension is required in order to eligible for any kind of benefit, even if the old-age pension is paid by another MS, such benefit must be provided by the relevant state. In fact, the principle of assimilation of incomes, benefits, facts or events is not a new concept. It was included in Regulation

[117] ILO. (2012). *Social security coordination for non-EU countries in South and Eastern Europe: a legal analysis.* Decent Work Technical Support Team and Country Office for Central and Eastern Europe, Budapest. pp. 7-10. Retrieved November 2018, from https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_205316.pdf

[118] Ghailani, D., Guardiancich, I., Natali, D., & Ferrera, M. (2011). Scope of the coordination system in the pension field. *European Social Observatory Deliverable, 15*. pp. 11-20.

883/2004/EC, inspired by the decisions of the ECJ to prevent discrimination on the grounds of nationality.

The first of these decisions is related to the case of *Mrs. Paraschi*[119]. Mrs. Paraschi was a Greek citizen whose working life in Germany was interrupted due to illness, leaving her unable to work. She applied for invalidity pension from the German authorities. However, her request was rejected according to the new amendment made to eligibility conditions for invalidity pension. In this context, the German institution stated that to be eligible for the pension, insureds should have 36 months of premium payment within 60 months before the starting date of the illness. Mrs. Paraschi, on the other hand, argued that her unemployment or sickness period spent in Greece should be taken into account by pointing out the fact that the 60 months period could be extended under the aforementioned circumstances according to German legislation. In its decision, the EJC ruled that the Union does not have competences to intervene in the amendments of social security legislation of MS, even if those amendments make the eligibility conditions more difficult. However, the ECJ explained that migrant workers might inclined to return to their home countries when they become ill or unemployed. For this reason, since the reference period of the regulation can be extended due to unemployment or sickness, similar periods spent in another MS should also be taken into account while granting invalidity pension to prevent discrimination of migrant workers.

In the decision of *Mr. More Romero*[120], the EJC expressed that, in cases where the legislation of a MS provides for extension of the orphan's benefit beyond the age of 25 for a period equal to the duration of military service, refusing to consider military service performed in another MS is contradictory to the rule laid down in Article 3(1) of Regulation No 1408/71/EEC and, thus, leading to direct discrimination based on

[119] Case C-349/87 Elissavet Paraschi v. Landesversicherungsanstalt Württemberg [1991] ECR I-04501.

[120] Case C-131/96 Mora Romero v. Landesversicherungsanstalt Rheinprovinz [1997] ECR I- 03659.

nationality. In this respect, the ECJ stated that German authorities should consider military service performed in another MS the same as military service under their own legislation. In relation to this, in the Mrs. *Kauer*[121] decision, the EJC ruled that, since the child-rearing period is taken into consideration to benefit from old-age pension in accordance with Austrian legislation, Austrian citizen, Mrs. Kauer's child-rearing period in Belgium should be considered as if she was in Austria when she requested old-age pension.

Another principle implemented via social security coordination rules to prevent nationality discrimination is the *application of single legislation* (Article 11 to 16 of Regulation 883/2004/EC). According to this principle, individuals are subject to only one MS social security legislation with respect to their rights and obligations. Therefore, even if a person works in four different MS throughout their career, the legislation of one state can be applied at any time. In this way, double premium payment is prevented for more than one MS, just like in taxation[122]. In this context, the general rule is that; active persons are subject to the legislation of the MS they work in *(lex loci laboris),* and non-active people are subject to the legislation of the MS they reside in *(lex loci domicilii)*[123].

The remainder of the aggregation of periods and waiving of residency principles are complementary to the equal treatment principle. In this context the *aggregation of periods principle* refers to the idea that if any MS legislation makes the acquisition, retention, duration or recovery of the right to benefits or coverage by legislation, or the access to or the exemption from compulsory, optional continued or voluntary insurance conditional upon the completion of periods of insurance, employment,

[121] Case C-28/00 Liselotte Kauer v. Pensionsversicherungsanstalt der Angestellten [2002] ECR I-01343.

[122] Rogers, N., & Scannell, R. (2005). *Free movement of persons in the enlarged European Union.* London: Sweet and Maxwell. pp. 220.

[123] Out of the general rule, there are five exceptional groups. These are; posted workers, persons pursuing activities between two or more MS, civil servants, unemployed frontier workers, and mariners.

self-employment or residence, the aforesaid duration completed in another MS will be taken into account as the duration completed in the related MS legislation (Article 6 of Regulation 883/2004/EC). For example, in accordance with German legislation, it is necessary to pay a 45-year premium in order to be entitled to old-age pension, thus the 20 years spent in England should be added to the periods spent under the legislation of Germany and according to that the eligibility conditions for old-age pension should be evaluated. The principle of aggregation, which is particularly important in long-term insurance schemes such as old-age, invalidity and survivors' benefits is of vital importance in terms of eliminating the limiting effects of national legislation on duration conditions. However, although the principle of aggregation is similar to assimilation of benefits, income, facts or events principle, they are different in terms of their content. This is because, while the aggregation of periods is effective in adding the periods of insurance in different MS to decide whether or not individuals are entitled to benefits, the latter is limited to the consideration of the periods spent in another MS if the right is determined by the income of the employees or by the events they are experiencing. There is no doubt that after determining that a person is entitled to benefits, the question of which MS will be responsible for the amount of payments must be answered. In order to determine the obligations of MS in accordance with Regulation 883/2004/EC, firstly, a theoretical pension is calculated by taking into account the total insurance periods and revenues of individuals in different MS. Then, the theoretical pension is proportioned regarding the duration of work in that particular MS, and each MS pays a prorated pension to the insured.

Finally, it is important whether the insured is required to reside in the MS for payment of the pension. The most important reason for this is the desire that the payments made from the budget of the particular MS should be spent on their own territory in order not to cause economic loss. However, the introduction of mandatory residence to persons who are entitled to benefits, with such an economic concern, would be contradictory with the right to free movement. For this reason,

here the *exportability principle (waiving of residence)* of the coordination rules becomes functional (Article 7 of Regulation 883/2004/EC). In accordance with this principle, any reduction, amendment, suspension withdrawal or confiscation of the cash benefits provided by the institutions of the MS based on the reason that the insureds or their family members reside in another MS is considered to be contrary to the Regulation. However, unemployment benefits constitute the exception to this principle. Under this exception, if the beneficiary goes to another MS to seek job opportunities, unemployment benefits are granted for three months by the component MS institution and the duration of unemployment benefits may be extended to up to six months under certain conditions, after this duration MS are not required to grant unemployment benefits to individuals who are in another MS.

In fact, Regulation 883/2004/EC on the Coordination of Social Security Systems of MS is one of the best-known in EU law due to its binding nature and direct influence on MS and individuals. Also, considering possible economic effects on a country, it is inevitable that this regulation is closely monitored by MS governments and their social security institutions. In addition, new decisions of the ECJ in this field lead to the revision of existing provisions of national legislations. In this context, the Commission made a proposal to amend Regulation 883/2004/EC in 2016, negotiations of which are still on-going, in order to ensure coordination of rules in a more modern and simple manner and to enable a more equitable distribution of social security expenditures between the MS. The new proposal, in summary, focuses on regulations related to; clarifying the circumstances in which MS can limit access to social benefits claimed by economically inactive EU mobile citizens, establishing a coherent regime for the coordination of long-term care benefits (currently dealt with under the sickness chapter) by introducing a separate Chapter, coordination of family benefits intended to replace income during child-rearing periods, aggregation of unemployment benefits, extending the exportability of unemployment benefits from

three to six months, and coordination of unemployment benefits for frontier and other cross-border workers[124].

3.2.2 Directive 79/7/EEC: Gender Equality in Matters of Statutory Social Security Schemes

The Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security[125] aims to enable equality in the field of statutory social security schemes[126] between women and men at the Union level. Before mentioning the scope of the Directive, it should be mentioned that the realization of equality within the field of statutory social security schemes is envisaged progressively. As a matter of fact, the most basic indicator of this progressive implementation is that a period of six years was given to MS for transposing the Directive into national laws, with exceptions in some areas, instead of immediately establishing full equality between the genders. This sensitive approach, no doubt, is due to the differences of MS social security systems in terms of historical structures and welfare regimes, as well as the extent of the impact of changes in social security systems on national economies.

The personal scope of the Directive is stipulated in Article 2. Accordingly, the Directive applies to the working population, including self-employed persons. However, in order for the Directive to cover such persons their activity must be

[124] European Commission. (2016). Proposal for a Regulation of the European Parliament and of the Council Amending Regulation 883/2004/EC on the coordination of social security systems and Regulation 987/2009/EC laying down the procedure for implementing Regulation 883/2004/EC. Brussels, COM(2016) 815 final.

[125] Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10/01/1979, pp. 24-25.

[126] Article 3(3) of Directive 79/7/EEC states that the Council will adopt arrangements to ensure implementation of the principle of equal treatment in occupational schemes between women and men. This arrangement was accepted with Occupational Social Security Directive 86/378/EEC. In the following period, Equal Treatment in Employment Directive 2006/54/EC was entered into force by replacing Directive 86/378/EEC. The principle of equal treatment in occupational schemes is introduced in a separate Chapter.

interrupted by illness, accident, involuntary unemployment, retirement or invalidity. In this case, it can be considered that the Directive would not include persons who were economically inactive and it is also clear that if a person's activity is interrupted for reasons other than listed, they will not be within the scope of the Directive. The social insurance risks which are protected in regard to gender equality are listed in Article 3. In this context, gender equality is ensured under the statutory social security schemes that protect individuals against the risks of sickness, invalidity, old-age, accidents at work and occupational diseases, and unemployment, as well as the social assistance benefits that replace or supplement these insurance schemes.

Within this framework, the personal scope of the Directive is defined broadly. For example, in the case of *Mrs. Drake*[127], the EJC emphasized that the expression *working population* must be interpreted broadly. Mrs. Drake, who was married and living with her husband, worked for many years under the United Kingdom Social Security Act. After her mother became severely disabled, she gave up her work in order to look after her mother. In this context, when she applied for invalid care allowance, her request was rejected due to the fact that she was residing with her husband. On the other hand, under the aforementioned law, male insureds' were entitled to invalid care allowance even if they reside with their spouse. For this reason, the case was brought to the EJC for its preliminary ruling procedure to clarify whether a benefit paid to a person caring for a disabled person as part of a statutory scheme providing protection against invalidity is pursuant to Article 3 of Directive 79/7/EEC. While the EJC explained the personal scope of the Directive, it mentioned that the term working population should be defined broadly to include workers and self-employed persons whose activity is interrupted by the risks pursuant to Article 3. In this context, the EJC concluded that Mrs. Drake, who gave up her work solely because of one of the risks listed in Article 3, namely the invalidity of her mother, must be regarded as a member of the working population for the purposes of the Directive. Lastly, the EJC added that legislation which provides a benefit under the

[127] Case C-150/85 Drake v. Chief Adjudication Officer [1986] ECR 1995.

statutory schemes referred to in Article 3 of Directive 79/7/EEC but which is not payable to a married woman who lives with or is maintained by her husband, although it is paid in corresponding circumstances to a married man, constitutes discrimination.

The second most important consideration is that Directive 79/7/EEC does not envisage equality between women and men with respect to family benefits and survivors' pension in almost every national social security system. Furthermore, in order to evaluate any benefit within the material scope of Directive 79/7/EEC, it must be directly aimed at eliminating social risks listed in Article 3. For example, in the decision of *Mr. Atkins*[128], the subject of the dispute is related to public transport services. In accordance with the relevant provision of the United Kingdom Transport Act, individuals who are entitled to the old-age pension are provided concessions in public transport services. In this context, to benefit from old-age pension, female and male insureds should be 60 and 65 respectively. When Mr. Atkins applied for the concession in question at the age of 63, his request was denied. Although Mr. Atkins argued that he was being discriminated against, since female insureds have the right to concession with a lower age limit, the EJC did not share the same opinion. In its decision, the EJC concluded that the concession for public transport services was implemented in order to meet the needs of a certain group of people that may have difficulty in transportation or for those that had financial difficulty, thus the relevant benefit was *directly and effectively linked* to the protection provided towards eliminating the risk of old-age. Therefore, although the requirement to be eligible for certain benefits is subject to conditions such as the age limits, the benefit in question must be aiming to directly and effectively eliminate the risks listed in Article 3 in order to be considered under the scope of the Directive.

[128] Case C-228/94 Stanley Charles Atkins v. Wrekin District Council and Department of Transport [1996] ECR I-3633.

With Article 4 of Directive 79/7/EEC, both direct and indirect discrimination is prohibited in regards to the scope of the schemes and the conditions of access thereto, the obligation to contribute and the calculation of contributions and the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits for those whose employment was interrupted due to the above mentioned risks.

In this context, MS should take the necessary measures to abolish their practices contrary to the principle of equal treatment between women and men. Therefore, after the completion date of transposing the Directive into national laws (23 December 1984) or after this date when a state becomes a member of the Union, individuals who claim that they are subjected to discrimination can rely on Article 4, which is directly applicable. In this context, national courts must implement provisions of the Article 4 before their domestic laws.

For instance, the government of the Netherlands, while no conditions were sought for men, intended to change provisions that excluded married women who were not described as bread-winners and those who did not live permanently separated from their husbands from the right to unemployment benefits to comply with the Unemployment Benefit Law of Directive 79/7/EEC. However, the Unemployment Law was repealed, with retroactive effect from 23 December 1984, with the Law of 24/04/1985, which entered into force on 01/05/1985, after the date on which the Directive should have been transposed into national law, due to the approval process.

This setback was reflected to the ECJ with the *Netherlands v Federatie Nederlandse Vakbeweging*[129] case. The EJC ruled that MS must take measures to implement the Directive within the prescribed period, and if not, individuals could rely on Article 4 in order to preclude the application of any national provision inconsistent with it as

[129] Case C-71/85 Netherlands v. Federatie Nederlandse Vakbeweging [1986] ECR 3855.

of 23 December 1984. Perhaps the most crucial provision of the Directive is Article 7(1), which allows exceptions for equality of women and men in the field of statutory social security practices. In this context, the following regulations of the MS are excluded from the scope of Directive 79/7/EEC:

- Determination of different pensionable age to benefit from old-age pension, and other benefits arising from them,
- Providing advantages in respect of old-age pension to those who interrupt their employment due to raising children,
- Granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife,
- Granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife,
- Consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.

The scope of Article 7 (1) has been subject to numerous preliminary decisions of the EJC[130]. The basis of those disputes arose, undoubtedly, from age differences applied by MS in eligibility for old-age pensions. The age limit to be eligible for old-age pension for female and male insureds is given in Figure 3.5. As can be seen, among the 28 MS, female insureds in Austria, the United Kingdom, Bulgaria, Croatia, the Czech Republic, Greece, Italy, Lithuanian, Poland and Romania are entitled to an old-age pension at an earlier age and this distinction does not constitute discrimination according to the relevant exception article of the Directive.

[130] Ingeborg, H. (2004). Sex equality and social security; Selected rulings of the European Court of Justice. *International Labour Review*, *143*(4), pp. 299-399.

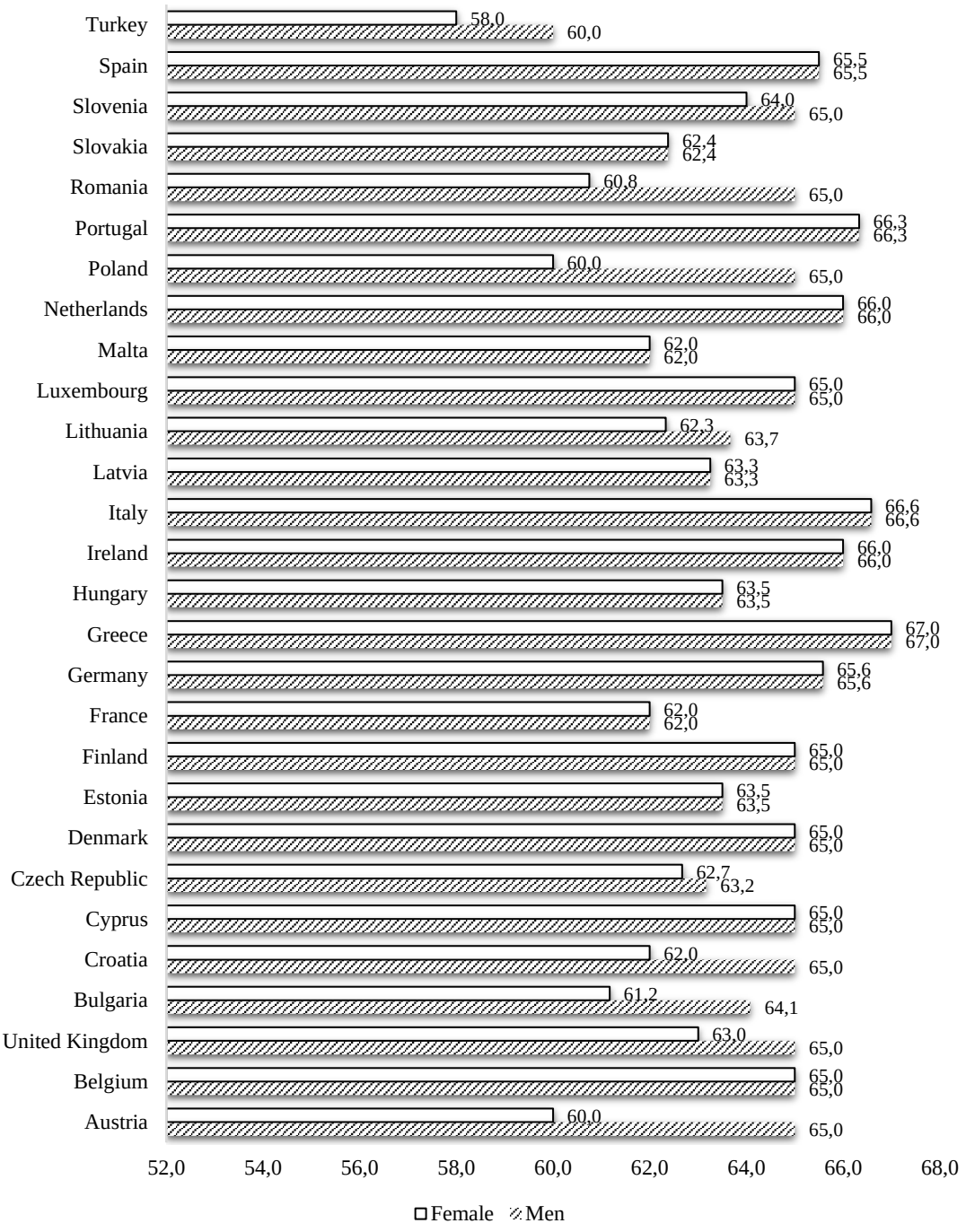

Figure 3.5 Statutory Pensionable Age Implemented in EU Member States and Turkey[131]

[131] Social Security Administration. (2018). *Social Security Programs Throughout the World: Europe.* Washington DC: SSA Publication No. 13-1180. pp. 21-22.

In this context, in the case of *The Queen v Secretary of State for Social Security*[132], the pensionable age implemented according to the United Kingdom National Insurance Act was examined. According to the Act, in order to qualify for a full pension, male insureds have to pay contributions for five years longer than female insureds. Furthermore, male insureds who continue in gainful employment between the ages of 60 and 64 have to continue to pay contributions up to that age, while the contribution obligation of female insureds end after the age of 60. In fact, the requirement from male insureds to contribute for a longer period is due to the assumption that individuals who start to work at the age of 16 will contribute until their retirement age, as per the relevant law, because to benefit from old-age pension female and male insureds should be 60 and 65 respectively. When the differences regarding contribution payments were brought to the EJC, it explained that "pensionable age referred to in Article 7(1) of Directive 79/7/EEC concerns the moment from which pensions become payable".

In addition, the EJC judged that, although the preamble of the Directive does not state the reasons for the exceptions, the Directive aims for progressive implementation of equal treatment between genders without disrupting the financial equilibrium of national social security systems. For this reason, the determination of different pensionable ages and the requirement of longer periods of contribution payment from male insureds, which are linked to that difference of age limits, does not constitute discrimination as it aims to not disturb the financial equilibrium of pension systems. When the dispute is concerning the age limit with respect to old-age pensions, it can be easily determined. However, in MS, the conditions of entitlement to other benefits can be linked to the pensionable age and may lead to discrimination by hiding behind the exceptional provisions of the Directive. In this context, it can be seen that many cases involving retirement ages were brought to the EJC under the scope of Directive 79/7/EEC.

[132] Case C-9/91 The Queen v. Secretary of State for Social Security, ex parte Equal Opportunities Commission. [1992] ECR I-4297.

For example, the dispute arising from the severe disablement allowance granted to people who are incapable of work and invalid care allowance provided to people engaged in caring for a severely disabled person, according to the United Kingdom Social Security Act, was brought to the ECJ. As per the regulation, those allowances were not granted to individuals who had attained retirement age, which is 65 for men and 60 for women. The applications of *Ms. Thomas*[133] and four other women for severe disability allowance were rejected due to the fact that they had reached the retirement age. Ms. Thomas argued that she had been discriminated against, since male insureds have the right to benefit from severe disability allowance for five more years. While their appeal was proceeding, the national court asked the EJC for clarification regarding whether the United Kingdom legislation was incompatible with Directive 79/7/EEC.

As can be seen, the subject matter of the case was the differences in access to other benefits, as a consequence of the determination of different retirement ages. In its decision, the EJC underlined that the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive 79/7/EEC must be interpreted strictly. Furthermore, the EJC stipulated that the exceptions aim to allow maintenance of temporary advantages provided to women, while ensuring financial sustainability of social security systems. However, it pointed out that the severe disablement allowance, which is granted under non-contributory schemes, has no direct influence on the financial equilibrium of contributory pension schemes. Therefore, the EJC decreed that the relevant regulation was not pursuant to Article 7(1)(a) of Directive 79/7/EEC, since the wording referring to "… the possible consequences thereof for other benefits" in the Directive allowed for exceptions that are limited to necessity and objectively linked to the difference in retirement age.

Another case is related to the winter fuel payment provided to those who do not have sufficient income and have become eligible for State retirement pensions under the

[133] Case C-328/91 Secretary of State for Social Security v. Thomas and Others, [1993] ECR I-1247.

scope of United Kingdom legislation, in order to support their expenses during the winter. *Mr. Taylor*[134], who retired at the age of 62 and became a recipient of a Post Office pension, requested winter fuel payment. However, his request was denied due to the fact he was not a recipient of a State retirement pension. Mr Taylor claimed that he was the victim of unlawful discrimination under the scope Directive 79/7/EEC, because a woman at that age could get a state retirement pension (retirement age is 65 for men and 60 for women), therefore winter fuel payment would be granted.

The United Kingdom authorities argued that the winter fuel payment was not under the scope of the Directive, due to the fact that it was not part of a statutory scheme, however, the EJC did not share this view. In this context, the court's attitude was similar to the Ms. Thomas decision. In its decision, the EJC stated that although the winter fuel payment is offered under the scope of social assistances, it aim to eliminate old age risk, which is mentioned in Article 3 of Directive 79/7/EEC. For this reason, the EJC concluded that the winter fuel payment should be evaluated within the scope of the Directive, and the age difference that was put forth with the regulation was discriminatory, since the allowance did not have direct affect to the financial structure of the social security system.

In conclusion, the determination of different age conditions between women and men is possible, if the nature of the benefit is not directly and effectively linked to protection against one of risks listed in Article 3 or if the benefit in question should have direct effect on the financial sustainability of the social security system under the exceptional clauses in Article 7(1).

[134] Case C-382/98 The Queen v. Secretary of State for Social Security, ex parte Taylor, [1999] ECR I-8955.

3.2.3 Directive 92/85/EEC: Encouraging the Safety and Health of Pregnant Workers

The main goal of the Pregnant Workers Directive (92/85/EEC)[135] is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding due to their circumstances of motherhood[136]. Therefore, the personal scope of the Directive 92/85/EEC is workers who are pregnant, have recently given birth, or who are breastfeeding[137]. The protection of motherhood is considered to be not only an exception to the principle of equal treatment, but also a tool which assures the active implementation of this principle[138]. As a matter of fact, the Directive makes it possible to treat women in such circumstances under a special category, while at the same time protecting the gender-based equality principle[139].

As per the provisions of the Directive, in case of the presence of risks (activities involving physical labour, biological or chemical agents, and industrial processes) that might affect the health or safety of pregnant workers or workers who are breastfeeding; the employer shall take the necessary measures to remove such risky conditions, if this is not possible, the employee shall be transferred to a another job,

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[135] Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28/11/1992, pp. 1-7.

[136] Foubert, P. (2002). *Foubert, P. (2002). The legal protection of the pregnant worker in the European Community: sex equality, thoughts of social and economic policy and comparative leaps to the United States of America* (Vol. 214). The Hague: Kluwer Law International. pp.105.

[137] The definition of terms *pregnant worker, worker who has recently give birth or worker who is breastfeeding* are left to the national legislations and in order to benefit from the Directive the employees must inform their employers about their conditions.

[138] Fitzpatrick, B., Docksey, C., & Jacqmain, J. (1994). Pregnancy as Grounds for Dismissal: Case C-421/92, Habermann-Beltemann v Arbeiterwohlfart, Bezinksverband Ndb/Opf eV. *Industrial Law Journal, 23*(4), pp. 355-359.

[139] Maliszewska-Nienartowicz, J. (2013). Pregnancy Discrimination in the European Union Law Its Legal Character and the Scope of Pregnant Women Protection. *Mediterranean Journal of Social Sciences, 4*(9), pp. 441-448.

if relocation is not possible due to technical and objective reasons, the employee shall be granted a leave. Additionally, MS should take necessary measures with respect to female workers in order to ensure that they not perform night work during their pregnancy and for a period following childbirth, that they are entitled to paid maternity leave, that they are permitted to attend ante-natal examinations without loss of pay even if they take place during working hours, that they are protected from dismissal from the beginning of their pregnancy to the end of the maternity leave (except for justified situations)[140] and that they are guaranteed employment rights connected with their contract.

In terms of this study, the provisions of Directive 92/85/EEC on minimum measures for maternity leave[141] and maternity allowances are important. According to the Directive, national social security systems should provide maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, with at least 2 weeks which are obligatory, due to pregnancy or motherhood. Moreover, MS must provide workers a payment of adequate allowance in order to compensate for income losses during maternity leave.

However, national legislations lay down the fulfilment conditions of the maternity allowances, which may take into account the 12-month period of employment immediately prior to the presumed date of birth. Lastly, the amount of allowance should not be less than the amount of payment to an employee whose activity is interrupted due to any health condition, and a ceiling of payment may be determined by the national legislation.

[140] The prohibition of dismissal is only limited to the period of maternity. According to ECJ, sickness of a female worker following the maternity leave, which is not attributable to pregnancy or confinement, should evaluated like the illness of a male workers (For further information: Case C-179/88 Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, [1990] ECR I-3979 and Case C-394/96 Brown v. Rentokil Ltd, [1998] ECR I-4185).

[141] In the study, the *term maternity leave* is used for period which is defined before and/or after the birth in accordance with national legislation.

In this context, in both the *Ms. Gillespie*[142] and *Ms. McKenna*[143] judgments, the EJC stated that there was no regulation under the scope of EU law regarding the continuous payment of full wages during maternity leave or the determination of specific criteria on the amount of benefit payable during maternity leave. However, in relation to the amount of allowance, it was deemed to be adequate if it guaranteed income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health.

Finally, it should be added that, in 2008, the Commission proposed amending Directive 92/85/EEC to extend maternity leave from 14 to 18 weeks in order to ensure positive impact on the mother's health[144]. However, the Parliament took the view that maternity leave should last 20 weeks and be fully paid. As can be seen in Figure 3.6, the duration of maternity leave (in total, including mandatory and non-mandatory leave) in MS varies from 14 to 56 weeks.

In this context, it can be said that there are major differences in the duration of maternity leave in MS. As a matter of fact, the proposal was withdrawn by the Council in 2015 on grounds of possible difficulties in the harmonization of maternal leave periods among MS. However, efforts to increase maternity leave have been continued through different means by the Parliament. However, due to implementation differences in MS, increasing the maternity leave period does not seem to be possible in the near future.

[142] Case C-342/93 Joan Gillespie and others v. Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board, [1996] ECR I-475.

[143] Case C-191/03 North Western Health Board v. Margaret McKenna, [2005] ECR I-7631.

[144] European Commission. (2008). Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Brussels, COM(2008) 637 final.

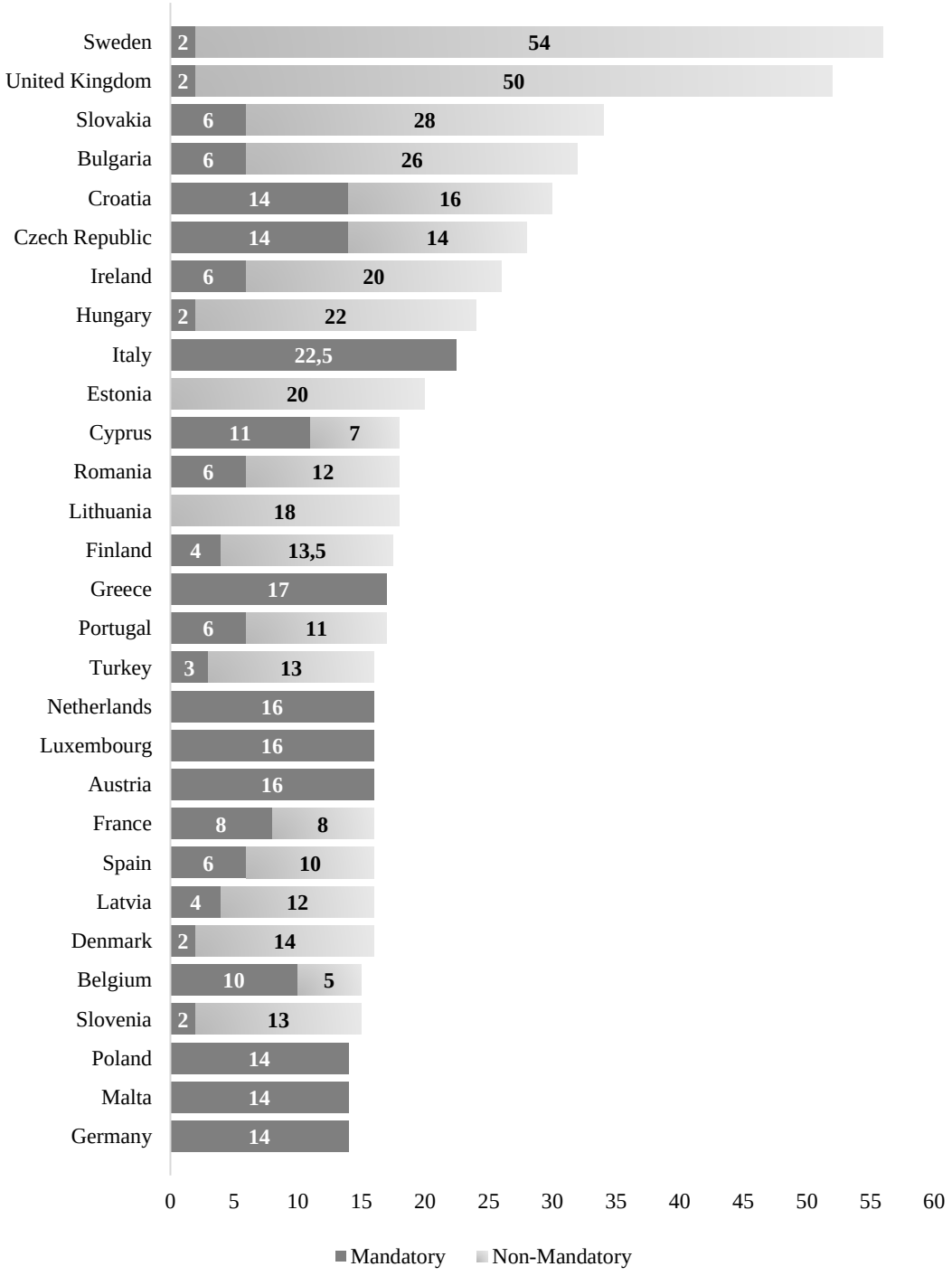

Figure 3.6 Duration of Maternity Leave of EU Member States and Turkey (weeks)[145]

[145] Eurofound. (2015). *Maternity leave provisions in the EU Member States: Duration and allowances.* Luxembourg: Publications Office of the European Union.

3.2.4 Directive 2010/18/EU: Minimum Requirements on Parental Leave Reconciling Professional and Family Responsibilities

Parental leave or other family-related leaves are primarily used by women due to reasons such as traditional value judgments on childcare, the male-dominated perception in employment life where women are perceived as secondary, and the inadequacy of childcare services. In addition, as a consequence of the failure in equal distribution of family responsibilities among parents, female employees are subjected to direct or indirect discrimination in working life. Due to all these reasons, in 1983, the Commission proposed the first Directive on parental leave to promote the participation of men in family responsibilities and to harmonize the work and family responsibilities of parents. Nevertheless, unanimity could not be reached among MS in the Council during the negotiations of the Directive, therefore, it was rejected. However, three general cross-industry organizations[146] came together in 1995 and signed the "Framework Agreement on Parental Leave", which promoted minimum measures regarding parental leave, and their demands concerning parental leave were brought to the Council by the Commission. Then, since it would not be difficult to realize the Framework Agreement on Parental Leave due to the fact that MS had already implemented necessary regulations regarding parental leave in their domestic laws[147], the Council accepted the Agreement and it was entered into force with Parental Leave Directive (96/34/EC).

Directive 96/34/EC received positive feedback on the grounds that it was the first step towards a society in which the responsibilities of work and family life were harmonized. However, it was criticized on many occasions, since MS were left with great discretion for the implementation of the Directive and no penalty was

[146] Union of Industrial and Employers' Confederations of Europe (UNICE, now known as BUSINESSEUROPE), European Centre of Employers and Enterprises Providing Public Services and Services (CEEP) and European Trade Union Confederation (ETUC).

[147] Bolger, M. (23 – 24 May 2016). Reconciliation of Work and Family Life. *ERA Conference on EU Gender Equality Law.* Trier, Germany. Retrieved December 2018, from http://www.era-comm.eu/oldoku/SNLLaw/06_Pregnancy/116DV03_Bolger_Paper.pdf

enforced[148]. As a matter of fact, to implement more effective measures, the revised Framework Agreement on Parental Leave[149] was entered into force with Directive 2010/18/EU[150].

The personal scope of Directive 2010/18/EU encapsulates all workers, including part-time workers, fixed-term contract workers and temporary agency workers. In this context, parental leave for a period of at least four months after the birth or adoption of a child of up to 8 years of age is as an individual right to for both male and female employees to be granted by MS. In principle, at least one month of those four months is non-transferable between the parents. In addition, MS should ensure the right of workers to return to their initial job at the end of their parental leave; if this is not possible, the employee shall be transferred to an equivalent or similar job. Also, workers may request changes to their working hours when they return to their jobs and they are entitled to time off from work on grounds of force majeure for urgent family reasons in cases of sickness or accident. The directive also obliges MS to protect the employment rights of workers acquired before the parental leave or acquired during the leave. Lastly, workers should be protected against less favourable treatment or dismissal, while they are exercising their right to parental leave.

With regard to the social security provisions of Directive 2010/18/EU, it can be assessed that, similar to the whole Directive, they have a flexible nature. In this context, while the importance of sustaining social security rights, especially health care, for workers during parental leave is emphasized, the decision to continue

[148] Drew, E. (2005). *Parental Leave in Council of Europe Member States.* Strasbourg: Equality Division, Directorate General of Human Rights. pp. 13-15.

[149] Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 68, 18/03/2010, pp. 13-20.

[150] It was expected from MS to transpose Directive 2010/18/EU into national law by 08/03/2012. However, if there was difficulties that may arise due to the implementation of the Directive, a maximum extension period of one further year was provided.

implementation of social security programs is again left to MS. Although Directive 2010/18/EU aims to enhance work-life balance and thus to promote female participation rates in employment, the indicators show that the gender gap in employment still exists within the Union. In this context, according to EUROSTAT statistics, the male employment rate is 79%, while for females it is 67.4%. However, the gross hourly earnings of a female worker are 16% lower than male workers on average. Moreover, 31.7% of female workers do not participate in the labour market due to their family care responsibilities, while this rate is only 4.6% for male workers. However, the male tertiary educational attainment rate is 35.7%, while for females 45.8%[151]. When the above indicators are considered together, it seems that even if women are better educated, they still do not have sufficient participation in the labour market. As a matter of fact, 2015 statistics show that female workers prefer to benefit from parental leave rather than male workers, and that the gender gap in employment is expected to be 9% in 2055 for the EU[152].

In this context, the Commission proposed Directive (COM(2017) 253 final) to the Council aimed at encouraging male employees to benefit from parental leave. This directive contains amendments to parental leave, paternity leave and new provisions on childcare and flexible working order. According to the new proposal; a parental leave of at least 10 days after birth, and care leave for five days each year is to be recognized; while the minimum parental leave period of four months, which can be used until the child reaches the age of 12, will not be transferrable. However, the new proposal also stipulates that, for all parental leaves (except for those involving emergency family needs), wages will be paid in accordance with illness allowance levels. What is most important for the present study is that, unlike the Directive

[151] EUROSTAT; Employment rate by sex, age group 20-64, 2018 (t2020_10), Gender pay gap in unadjusted form, 2017 (sdg_05_20), Inactive population due to caring responsibilities by sex, 2018 (sdg_05_40), Tertiary educational attainment by sex, age group 30 to 34 2018 (sdg_04_20) statistics.

[152] European Commission. (2017). *Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.* Commission Staff Working Document, Impact Assessment, Brussels. Retrieved December 2018, from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52017SC0202

2010/18/EU, the provisions of the new proposal necessitate that employees who are entitled to their rights of paternity leave, care leave and parental leave continue their social security rights; therefore, no discretion is leaving to MS in respect to sustaining social security rights. Although, the final decision of the Council is still pending; it is widely believed that the provisions of the new proposal might be effective in moving some family care responsibilities from women to men and have an impact on women's participation in employment. However, the development of public childcare services and further regulations on the issues of compulsory school age, school hours and out-of-school care in the MS would probably contribute to the achievement of objectives[153].

3.2.5 Directive 2010/41/EU: Gender Equality in the Matters of Self-Employment

An analysis of EU employment indicators seems to suggest that the ratio of self-employed workers decreases with each passing year. As a matter of fact, according to 2018 EU employment indicators, the ratio of self-employed workers in total employment was as low as 13.74%. However, while the ratio of males in total self-employed workers was 67.3%, the ratio of females was calculated at 32.7%[154]. Another striking statistic is that 18% of self-employed workers are in the EU and 6% of workers are from the lower classes[155]. It is necessary to interpret these statistics within the framework of the fact that self-employment, as a type of employment is an important tool in the fight against unemployment by creating new jobs. Therefore,

[153] Méndez, L. M., & Serrani, L. (2015). In *Work-Life Balance and the Economic Crisis: Some Insights from the Perspective of Comparative Law* (Vol. I: The Spanish Scenario). Cambridge Scholars Publishing. pp. ix.

[154]Compiled from EUROSTAT; Population by sex, age, citizenship and labour status (20-64, 2018) (lfsq_pganws) and Self-employment by sex, age and economic activity (20-64, 2018) (lfsa_esgan2) statistics.

[155] European Commission. (2010). European Employment Observatory Review: Self-Employment in Europe. pp. 26. Retrieved 2018 September, from http://ec.europa.eu/social/BlobServlet?docId=6137&langId=en

considering that, the EU employment rate was 73.2% for 2018 and that 75% is targeted in the 2020 Strategy, policies to increase the self-employment rate (which remains at a low level in total employment) will undoubtedly contribute.

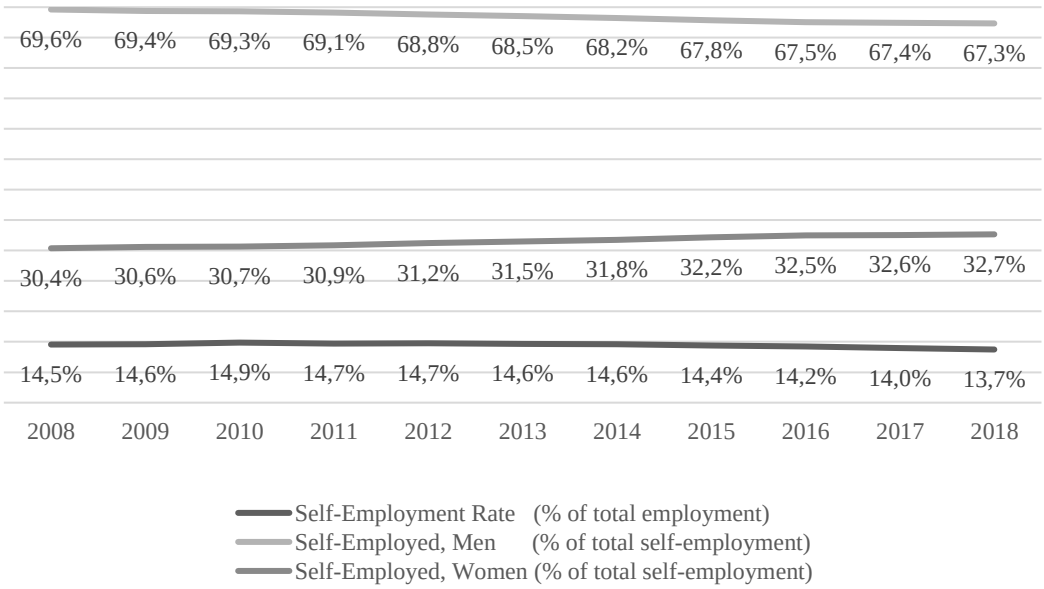

Figure 3.7 Self-Employment Rates in EU Member States (Age group 20 to 64)

Directive 86/613/EEC, which mainly envisages the protection of independent workers at the EU level, the harmonization of the implementations of MS in this regard, the protection of all independent working women, including those working in the agricultural sector during pregnancy and maternity, thus envisaging gender equality, dates back to 1986. However, the Directive was criticized in the following years for many reasons including the fact that it limited the term *spouse* to married spouses not *life partners*, that is was insufficient in terms of the protections provided, and that is did not envisage the establishment of national bodies that could provide

support to the injured [156]. In fact, Directive 86/613/EEC was abolished and 2010/41/EU was adopted, entering into force on 05/08/2012[157].

As per the criticisms, the life partners of self-employed workers (if identified by national laws) were included in the personal scope of the new Directive 2010/41/EU alongside self-employed workers and their spouses. However, in order for spouses and life partners to be included in the scope of the Directive, they must neither be a business partner of nor employed by the self-employed worker. According to Directive 2010/41/EU, the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of gender in both public and private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity. However, provided that special conditions are reserved, MS should remove regulations that prevent spouses or partners from founding a company together, thus treating people who desire to do so equally as any other two persons founding a company together. So, the equal treatment duty in question is especially related to MS or their institutions, which are in a position to allow or authorize the establishment of companies. Therefore, a consumer reluctant to receive services from a company on grounds that its owner is a woman is out of the scope of the Directive 2010/41/EU[158].

From the perspective of social security, it can easily be acknowledged that the Directive does not provide new rights to self-employed workers. However, it includes provisions for the realization of legislation to ensure that spouses or life

[156] European Commission. (1994). Report from the Commission on the implementation of the Council Directive 86/613/EEC. Brussels, COM(94) 163 final. pp. 41-42.

[157] Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Directive 86/613/EEC, OJ L 180, 15/07/2010, pp. 1-6.

[158] Barnard, C., & Blackham, A. (2015). *Self-Employed: The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.* Publications Office of the European Union. pp. 8-11.

partners of self-employed workers benefit from any social security that the self-employed worker might be entitled to (if the national legislation provides self-employed worker with any). Therefore, in accordance with the relevant provisions, obstacles to access social protection systems are removed in order to avoid the risk of poverty of spouses and life partners. However, the participation of spouses or life partners in the social protection system may be determined as mandatory or voluntary by MS. The most prominent innovation by the Directive was with regard to maternity allowance, which had never been envisaged at the EU level. As per the provisions of the Directive, MS shall pay a minimum 14 weeks of maternity allowance to self-employed women, spouses of self-employed worker, and life partners of self-employed worker provided that the national law recognizes them. MS can decide whether the maternity allowance is granted on a mandatory or voluntary basis. The benefit in question is considered sufficient if it matches sick pay or average loss of income or profit or other family related allowances.

Directive 2010/41/EU stands out with its inclusion of partners and improvements concerning maternity allowance. However, the inclusion of spouses/partners of self-employed workers in the social security system or their benefit from maternity allowance are determined by MS as mandatory or voluntary, which makes the effectiveness of the protection controversial. However, acknowledging the fact that the functionality of policies regarding social security systems depends on the budgetary means of governments and that the sustainability of the systems is too precious to endanger would ensure more consistent evaluations.

3.2.6 Directive 2000/43/EC: Equal Treatment Irrespective of Racial or Ethnic Origin

For many years, as a result of their constitutional traditions and their membership in the UN and the CoE, MS have issued regulations that prohibit discrimination based on race and ethnic origin in their national legislations. However, the Racial Equality

Directive (2000/43/EC) [159] and later, the Employment Equality (Framework) Directive (2000/78/EC) [160], both based on Article 13 of TFEU were adopted by the Council, for the first time in 2000. The Racial Equality Directive has been considered a turning point in terms of non-discrimination. This is because it sets minimum standards, thus ensuring the removal of inconsistencies among regulations of MS that are on different levels regarding the issue, expanding the scope of protection, and guaranteeing implementation in all MS.

At its core, Directive 2000/43/EC prohibits any direct discrimination and indirect discrimination on the grounds of racial or ethnic origin in a broad range of fields, including employment, social protection and social advantages (as well as social security and healthcare), education, involvement in organization of workers and employers, and goods and services available to the public, including housing. Moreover, the provisions of the Directive need to be implemented in both the public and private sectors, including the fight against racial and ethnic harassment and victimization. In this context, the Directive defines and prohibits four different forms of racial and ethnic discrimination (direct discrimination, indirect discrimination, harassment and victimisation); in addition, it considers instruction to discriminate as illegal.

However, it is conspicuous that Directive 2000/43/EC does not include any definitions of *race* or *ethnic origin*. Although, within the preamble of the Directive, it is explicitly stated that the EU rejects theories suggesting that different races exist and that the use of the term *racial origin* within the Directive is not intended as an acknowledgement of the theories in question. This causes some flexibility in the interpretation of the Directive, but it also leads to a legal gap. On the other hand, it was argued that the third recital of the preamble of Directive 2000/43/EC refers to

[159] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19/07/2000, pp. 22-26.

[160] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 02/12/2000, pp. 16-22.

many international treaties, thus making it possible for the EJC to clarify the term racial origin[161].

As a matter of fact, the case of *CHEZ RB*[162] wherein racial origin was identified for the first time by the EJC, is a turning point for the issue at hand[163]. In this case, Ms. Nikolava, a Bulgarian citizen working in a neighbourhood predominantly populated by Roma people, issued a complaint to the Commission for Protection against Discrimination against CHEZ RB, an electricity distribution company, on grounds that they had discriminatory practices. Ms. Nikolava argued that while electricity meters were placed at an attainable height of 1.7 metres in other districts, they were placed at an unattainable height of 6-7 metres in her working district, which made it impossible to check electricity consumption, claiming that this implementation was discriminatory. The company's response in relation to Ms. Nikolova's claims was that the metres were frequently damaged in that particular district, and that unlawful connections to the network were becoming increasingly common.

When the case was brought to the EJC, it was questioned whether Bulgarian citizens of Roma origin fall under the definition of ethnic origin as per the provisions of Directive 2000/43/EC. The EJC ruled that the implementation caused indirect discrimination, citing examples of the concept of ethnicity from other ECHR cases and defining it as "societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds". Moreover, it was stated that the equality principle of the Directive could not be limited by membership to an ethnic group, and that people who found themselves in

[161] Šimonović Einwalter, T. (2008). Far, But Not Far Enough: An Idealist Critique of the Racial Equality Directive. *Croatian yearbook of European law & policy, 4*(4), pp. 195-222.

[162] Case C-83/14 CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia [2015] ECR I-480.

[163] Schafhauser Boçon, M. (2007). The CJEU's Judgment in CHEZ and Indirect Discrimination by Association: An Analysis of Progress in Combating Racial or Ethnic Discrimination in the European Union. *UNIO EU Law Journal, 3*(2), pp. 20-33.

unfavourable or disadvantaged positions due to a discriminatory implementation would be considered within the scope of the Directive.

In terms of the goals of increasing employment, raising the living standards of individuals, strengthening the economy, social justice and solidarity and, more importantly, ensuring the rapprochement between the peoples of Europe; the personal scope of the Directive addresses all individuals living in the EU, including nationals of third countries, which makes it clear that the intention is to address all individuals living within the borders of Europe. Therefore, it is possible for any person living in Europe to apply to the Directive due to reasons such as being deprived of promotions or pay raises on grounds of ethnicity, disability, or sexual orientation while co-workers enjoy these benefits. Similarly, exclusion from the social security system, different treatment in terms of the right to receive benefit, rejection of registration application to a standard public school, or having difficulty entering a place of business just due to ethnic origin constitutes an infringement of the Directive.

However, it is worth mentioning that while the citizens of third countries are within the personal scope of the Directive, the different treatment must be based on race or ethnic origin rather than nationality. In addition, since the applications of third country nationals for entry, residence, employment and occupational conditions are regulated in other legal frameworks under EU law, these areas are excluded from the Directive[164]. Undoubtedly, the limitation for third country nationals is a result of the EU's immigration policies and the desire of MS to have a say in the matter without any transfer of authority in that regard[165].

[164] Case C-571/10 Servet Kamberaj v. Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others [2012] ECR I-233.

[165] Howard, E. (2007). The EU Race Directive: Time for Change? *International Journal of Discrimination and Law, 8*(4), pp. 237-261.

The first case discussed by the EJC under Directive 2000/43/EC is the conflict regarding *Feryn NV*[166]. The basis of the conflict is the public announcement made by the director Feryn NV. In this announcement, the director stated that the company's customers were not happy with immigrant personnel, which in turn led the company to prefer not to recruit immigrants. Disturbed by the possibility of this statement to be embraced by other companies and turn into a common policy, the Belgium Centre for Equal Opportunities and Combating Racism took the matter to court at the Court of Labour in Belgium. The national court applied to the EJC, in accordance with the preliminary ruling procedure, to assess whether the dispute contained direct discrimination under the Directive. The EJC stated that the press statement in question caused direct discrimination in violation of Directive 2000/43/EC and that such statements could prevent migrant workers from applying for employment and prevent their participation in employment.

There are two exceptions to the Directive's general principle, which prohibits direct and indirect discrimination as per its scope. The first one is included in Article 4 as part of the genuine occupational requirements. According to this first exception, different practices may be envisaged by MS based on race and ethnic origin on grounds of the nature of a professional activity or the conditions for conducting the activity. For instance, in a biographical movie, for authenticity purposes, individuals might be needed to be members of a specific race, in which case the choice of candidates from the relevant race would not constitute an infringement of the provisions of the Directive. As for a second example, while NGOs coordinate donations for a particular ethnic group, it is possible to employ representatives from this group in aid activities, considering that they can communicate more easily with members of their ethnic group. However, when an exception is in question, the different treatment needs to be legitimate and proportionate to the requirement. As such, although the practice of the exception is narrowly limited, it is also stated by

[166] Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV, [2008] ECR I-5187.

the Commission that the exception can be applied in extreme cases and should be interpreted in a very restricted scope[167].

The second exception to the directive is stated in Article 5 as positive action. According to this exception, in order to ensure full equality in practice, MS were permitted to implement special measures, which would not be considered violations of the Directive, in areas of disadvantage for individuals and groups of racial and ethnic origin such as business life, education or services. A three-year period was allowed for MS to comply with Directive 2000/43/EC and they were required to make the necessary national regulations in accordance with its material and personal scope by 19/07/2003. In this framework, MS needed to abolish all legal regulations contrary to equal treatment, and in case of agreements and rules, including individual and collective agreements, any regulations contrary to the Directive needed to be declared invalid or amended. As stated earlier, the Directive provides minimum requirements for combating discrimination based on race and ethnic origin. In this context, as stated in Article 6, MS may create a higher level of protection in scope. Also, the Directive does not constitute a basis for the withdrawal from regulations that currently provide greater protection in combating racial and ethnic origin. In addition, MS are to bring in legal arrangements to protect individuals from victimization or negative behaviour when they make a complaint, create sanctions to pay compensation to the victims[168], raise awareness of the society, develop an anti-discriminatory social dialogue among the parties of business life, encourage NGOs, and establish national bodies[169] aiming to prevent discrimination based on race and ethnic origin.

[167] European Commission. (1999). Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Brussels, COM(99) 566 final.

[168] Although there was no public victim affected by public disclosure in the Freyn NV case, the EJC had to apply effective, proportionate and dissuasive sanction in accordance with Directive 2000/43/EC Directive Article 15.

[169] On 26 November 2014 the European Commission launched infringement proceedings against the Republic of Finland for failing to designate a body to carry out the tasks laid down in Article 13 of

In the context of all these, Directive 2000/43/EC may be considered the most comprehensive regulation in terms of combating discrimination (including gender-based discrimination) among European societies both in terms of the extent of its material coverage and the flexibility of its personal scope[170].

3.2.7 Proposed Directive COM(2008) 426: Equal Treatment outside the Labour Market Irrespective of Religion or Belief, Disability, Age or Sexual Orientation

As is commonly known, following the Amsterdam Treaty, two new ground-breaking regulations were adopted to promote the participation of different groups in both employment and social life: the Racial Equality Directive (2000/43/EC) and the Employment Equality (Framework) Directive (2000/78/EC). The Racial Equality Directive is acknowledged as the most comprehensive secondary regulation for the prohibition of discrimination and for ensuring equality due to the fact that it includes social protection, social advantages, education, housing, goods and services, whereas the Employment Equality (Framework) Directive material scope is limited to employment. This resulted in non-security for groups with differences such as religion or belief, disability, age or sexual orientation in other areas of life such as education, housing, goods and services as well as social security. For instance, currently, while the prevention of a homosexual Roma couple from entering a restaurant constitutes racial discrimination, it is not possible to claim unlawfulness on grounds of discrimination based on sexual orientation. Also, since the prevention from entering the restaurant is not related to equality between women and men, the couple in question would not be under the protection of the Goods and Services Directive 2004/113/EU. While it is a requirement for MS to establish national bodies for the fight against discrimination based on racial and ethnic origin, and secondarily,

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Directive 2000/43/EC. Case C-538/14 European Commission v. Republic of Finland, [2015] ECR I-401.

[170] Howard, E. (2007). pp. 237-261.

for gender equality, there is no such obligation in other areas of discrimination. In general, when we compare the material scopes of secondary regulations regarding the prevention of discrimination based on nationality as well as the maintenance of gender equality, they seem to be at a lower level than those regarding the fight against discrimination on the grounds of racial and ethnic origin, and at a higher level than those regarding other areas of discrimination. In short, varying material scopes for different protected grounds of discrimination result in a hierarchical classification. The following table shows the hierarchical classification of different groups based on EU discrimination prohibitions through a comparison of protected grounds.

Table 3.11 Hierarchy of Protected Grounds[171]

Fields/Grounds	Nationality	Gender	Racial or Ethnic Origin	Religion	Disability	Age	Sexual Orientation
Employment	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Social Protection	Yes	Yes	Yes	n/a	n/a	n/a	n/a
Social Advantages	Yes	n/a	Yes	n/a	n/a	n/a	n/a
Goods and Services	Partly (housing)	Yes	Yes	n/a	n/a	n/a	n/a
Education	Yes	n/a	Yes	n/a	n/a	n/a	n/a

As such, this hierarchical classification based on the varying protection levels for different discrimination grounds results in controversy over the levels of significance of different groups, making the EU discrimination prohibition self-contradictory. Upon the criticisms of both NGOs and the EP in this regard, the EC proposed a new

[171] Kádár, T. (2013). *Overview on EU anti-discrimination legislation.* [PowerPoint Presentation]. Equinet - European Network of Equality Bodies. Retrieved September 2018, from https://slideplayer.com/slide/15129483/

Directive in 2008[172]. The new proposal, the Horizontal Equal Treatment Directive, aims to protect groups with differences such as religion or belief, disability, age or sexual orientation also in areas other than employment such as social protection, including social security and health care, social advantages, education and access to and supply of goods and services, including housing. In the proposal, just as in the 2000/43/EC and 2000/78/EC Directives, direct discrimination and indirect discrimination, harassment, and instruction to discriminate are prohibited.

Moreover, a new principle of equality covering the necessary changes to ensure access to means including housing and transport is added in order to ensure that persons with disabilities do not experience direct discrimination. Also, as in previous Directives, clauses on minimum requirements, positive action, victimization, and encouragement of dialogue with relevant stakeholders are present in the Directive, and the establishment by MS of national bodies aiming to prevent discrimination based on religion or belief, disability, age, or sexual orientation became obligatory; which ultimately became a point of criticism against Directive 2000/78/EC. However, a significant problem is that the MS have not been able to reach unanimity over the Directive in the 10 plus years since the proposal was made. According to criticisms that prevent its adoption, the proposed Directive contradicts the principle of subsidiarity and the improvements it envisages regarding access rights of the disabled might place a financial burden on businesses.

Undoubtedly, the proposed Directive is an important step in the removal of variety in implementations regarding different protected grounds of discrimination. However, when its provision prohibiting discrimination in social security is taken together with the absence of EU's authority over the union of marriage, questions begin to arise. The basis of the problem is that same-sex marriage or equivalent same-sex

[172] European Commission. (2008). Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Brussels, COM(2008) 426 final.

partnership regulations are not present in the legal systems of some MS[173]. While social security regulations grant spouses or children of employees' certain rights such as survivors benefit or health care, this does not cover cases of same-sex couples in countries where same-sex marriage is not legally recognized. Therefore, in such states, since the union of same sex couples are not accepted as marriage, it is not possible for them to benefit from social insurance or social assistance. On the other hand, Regulation 883/2004/EC grants the family members of employees' certain rights. Therefore, from the perspective of Regulation 883/2004/EC, such partnerships may be recognized in one MS but not another, and couples moving to such a country under their right of free movement would not be able to claim family member rights, and thus be deprived of benefits. From a general point of view, while the proposed Directive prohibits discrimination in the area of social protection, it signals the possibility of a risk of not achieving equality in practice when sexual orientation is in question. However, even if the Directive is to be adopted in its current form, it would be possible for the EJC to reach verdicts that are considered in the framework of human rights and that take into account the ChFR, thus guiding the EU towards higher egalitarianism.

[173] In Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia, same-sex marriage or equivalent same-sex partnerships are not legally accepted. Retrieved September 2018, from https://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm

Table 3.12 Secondary Sources of EU Non-Discrimination Principle

Protected Grounds	Legal Basis	Regulation/Directive	Personal Scope	Material Scope	Exceptions	Direct Discr.	Indirect Discr.	Harassment	Sexual Harassment	Instruction to Discr.	Victimisation	Positive Action	Proposal
Nationality	Article 42 TEC (Article 48 TFEU)	Coordination of Social Security Systems Regulation (883/2004/EC)	- Nationals of EU Member States, Iceland, Norway, Liechtenstein and Switzerland, irrespective of the place of residence, - Stateless persons and refugees residing in a MS, - Third country nationals, who have legal residence in MS, - Members of family and survivors, irrespective of their nationality.	Under the grounds of statutory social security schemes; - Sickness benefits, - Maternity and equivalent paternity benefits, - Invalidity benefits, - Old-age benefits, - Survivors' benefits, - Accidents at work and occupational diseases benefits, - Death grants, - Unemployment benefits, - Pre-retirement benefits, - Family benefits.	- Social and medical assistance, - Benefits for victims of war, military actions, crime, terrorist acts, - Special non-contributory cash benefits, - Some family benefits (maintenance payments and special childbirth and adoption allowances), - Posted workers, persons pursuing activities between two or more MS, civil servants, unemployed frontier workers and mariners, - Exporting unemployment benefits after the three (max six) months.	+	+	-	-	-	-	-	COM(2016) 815 final. (Ongoing)
Nationality	Article 46 TFEU	Free Movement of Workers Regulation (492/2011/EU)	Workers who are nationals of EU Member States and the members of their family irrespective of their nationality	- Access to employment, - Working conditions (pay, dismissal, unemployed, reinstatement or re-employment) - Access to training, - Social and tax advantages, - Trade union rights, - Access to housing, - Access to education for the children.	- Reasonable and necessary linguistic knowledge required for the job, - Access to posts involving the exercise of public authority and duties designed to safeguard the general interests of the MS.	+	+	-	-	-	-	-	-
Nationality	Article 12, 18, 40, 44 and 52 TEC (Article 18, 21, 46, 50 and 59 TFEU)	Citizenship Rights Directive (2004/38/EC)	EU citizens and their family members irrespective of their nationality	- Right to exit and entry, - Right to residence 1. Right to residence for up to three months (as long as they do not become an unreasonable burden on the social assistance system of the host MS) 2. Right to residence for more than three months (worker/self-employed in the host MS or have sufficient resources not to become a burden on the social assistance system of the host MS and comprehensive sickness insurance, or enrolled as student, sufficient resources not to become a burden on the social assistance system of the host MS and comprehensive sickness insurance) 3. Right to permanent residence (EU citizens who have resided legally for a continuous period of five years in the host MS)	- Entitlement to social assistance during the first three months of residence, - Entitlement to social assistance for the jobseekers, - Granting students maintenance aid for the economically non-active persons during the first five years of residence.	+	+	-	-	-	-	-	-
Gender	Article 141(3) TEC (Article 157(3) TFEU)	Equal Treatment Directive (2006/54/EC)	Working population whose activity is interrupted by illness, maternity, accidents or involuntary unemployment and persons seeking employment and to retired and disabled.	- As regards both the public and private sectors, including public bodies; 1. Access to employment, to self-employment, to occupation, to promotion, and to vocational training, 2. Working conditions including pay, dismissals, trade union rights, - Return from maternity leave, - Return from paternity and adoption leave, - Occupational social security schemes (sickness, invalidity, old age, early retirement, industrial accidents and occupational diseases, unemployment, survivors' benefits and family allowances).	Under the grounds of access to employment; - Legitimate and proportionate genuine occupational requirements. Under the grounds of occupational social security schemes; - Individual contracts for self-employed persons, - Single-member schemes for self-employed persons, - Insurance contracts to which the employer is not a party, in the case of workers, - Optional provisions of occupational social security schemes offered to participants individually, - Occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.	+	+	+	+	+	+	+	-

Table 3.12 Secondary Sources of EU Non-Discrimination Principle (continued)

Protected Grounds	Legal Basis	Regulation/Directive	Personal Scope	Material Scope	Exceptions	Direct Discr.	Indirect Discr.	Harassment	Sexual Harassment	Instruction to Discr.	Victimisation	Positive Action	Proposal
Gender	Article 235 TEEC (Article 352 TFEU)	Statutory Social Security Directive (79/7/EEC)	Working population whose activity is interrupted by illness, accidents or involuntary unemployment and persons seeking employment and to retired and disabled.	Under the grounds of statutory social security schemes protection against sickness, invalidity, old age, accidents at work and occupational diseases and unemployment risks, including social assistance, intended to supplement or replace the schemes referred; - the scope of the schemes and the conditions of access thereto, - the obligation to contribute and the calculation of contributions, - the calculation of benefits including increases due to a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.	- Survivors' or family benefits - Determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits, - Advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children, - Granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife, - Granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife, - Consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire rights or incur obligations under a statutory scheme.	+	+	-	-	-	-	-	COM(87) 494 final. (Withdrawal)
Gender	Article 118(a) TEEC (Article 153(a) TFEU)	Pregnant Workers Directive (92/85/EEC)	Pregnant workers and workers who have recently given birth or who are breastfeeding	- Protection against hazardous agents, processes or working conditions, - Prohibition of night work during pregnancy and for a period following childbirth, - At least 14 weeks maternity leave, including compulsory of at least two weeks, - Without loss of pay, attending ante-natal examinations even if such examinations have to take place during working hours, - Entitlement to employment rights during pregnancy, confinement, breastfeeding and maternity leave, including the maintenance of a payment and to adequate allowance relating to employment contract, - Prohibition of dismissal	Dismissal of worker under substantiated grounds.	-	-	-	-	-	-	-	COM(2008) 637 final. (Withdrawal)
Gender	Article 155(2) TFEU	Parental Leave Directive (2010/18/EU)	All workers	- Individual parental leave right to be granted a period of 4 months until the child has reached the age of eight (one of the four months has to be provided on a non-transferable basis), - Return to the same job or to an equivalent or similar job, - Prohibition of dismissal during and end of the parental leave - Right to request working hours changes, leave on grounds of force majeure for urgent family reasons, entitlement to employment rights during and end of the parental leave, encouraging contact between workers and employers during the parental leave in order to facilitate the return the work.	-	-	-	-	-	-	-	-	COM(2017) 253 final. (Ongoing)
Gender	Article 157(3) TFEU	Equal Treatment in Self-Employment Directive (2010/41/EU)	Self-employed workers and assisting spouses or life partners (who are not employees or business partners of the self-employed workers)	- Establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity, - Ensuring social protection for spouses and life partners of the self-employed persons, - Ensuring at least 14 weeks maternity allowance for female self-employed persons or female spouses and life partners of the self-employed persons.	-	+	+	+	+	+	+	+	-

Table 3.12 Secondary Sources of EU Non-Discrimination Principle (continued)

Protected Grounds	Legal Basis	Regulation/Directive	Personal Scope	Material Scope	Exceptions	Direct Discr.	Indirect Discr.	Harassment	Sexual Harassment	Instruction to Discr.	Victimisation	Positive Action	Proposal
Gender	Article 13(1) TEC (Article 19(1) TFEU)	Goods and Services Directive (2004/113/EC)	All persons who provide goods and services	Goods and services available to the public (public and private sectors, including public bodies) except those which are provided in the area of private and family life and contents of media, advertising and public or private education.	- Provisions protecting women in pregnancy and maternity, - Legitimate justification of goods and services exclusively and primarily to members of one sex (the protection of victims of gender-based violence, reasons of privacy and decency, the freedom of association which allows membership of single-sex private clubs and the organization of sporting single-sex sport events), - Specific provisions regarding actuarial factors in insurance contracts	+	+	+	+	+	+	+	-
Racial or ethnic origin	Article 13 TEC (Article 19 TFEU)	Racial Equality Directive (2000/43/EC)	All persons (natural and legal) in the EU, regardless of their nationality (except differences of treatment based on nationality and entry and residence of third-country nationals and their access to employment and to occupation).	As regards both the public and private sectors, including public bodies; - Access to employment, to self-employment and to occupation, including promotion, - Access to all types of vocational training, - Employment and working conditions, including dismissals and pay, - Membership of and involvement in an organisation of workers or employers, - Social protection, including social security and healthcare, - Social advantages, - Education, - Access to and supply of goods and including housing (only in public).	Legitimate and proportionate genuine occupational requirements.	+	+	+	-	+	+	+	-
Religion, belief, disability, age or sexual orientation	Article 13 TEC (Article 19 TFEU)	Employment Equality Directive (2000/78/EC)	All persons (natural and legal) in the EU, regardless of their nationality (except differences of treatment based on nationality and entry and residence of third-country nationals and their access to employment and to occupation).	As regards both the public and private sectors, including public bodies; - Access to employment, to self-employment and to occupation, including promotion, - Access to all types of vocational training, - Employment and working conditions, including dismissals and pay, - Membership of and involvement in an organisation of workers or employers.	- State social security or social protection schemes, - Marital status and the benefits dependent on them, - Armed forces on the grounds of disability and age, - Legitimate and proportionate genuine occupational requirements, - Legitimate and justified genuine occupational requirements on the grounds of religion or belief, having regard to the organisation's ethos (churches, public or private), - Duty of employers to make disproportionate accommodation and adaptations for disabled persons, - Legitimate differences of treatment on the grounds of age, having regard to appropriate and necessary employment policy measures, - National provisions on retirement ages, - Occupational social security schemes of ages for retirement and invalidity benefits.	+	+	+	-	+	+	+	-

* Table is compiled by taking into consideration of relevant legislation dated on 02/05/2019

CHAPTER 4

SOCIAL INSURANCES AND THE NON-DISCRIMINATION PRINCIPLE IN TURKEY

Social security in Turkey is primarily shaped by a culture of solidarity, religious teachings and traditions. Although social insurance practices began to be understood in the early 20th century, it took almost a century in order for them to reach a certain level with legal regulations. Many other factors, such as the inability to keep up with the pace of the industrial revolution in Western societies, world wars, coups in the country and economic crises have delayed the implementation of modern practices in the field of social security, as well as in working life.

On the other hand, efforts to ensure the principle of equality and prevent discrimination, especially for females, took place for the first time in the Republic of Turkey, the country that inherited its social heritage from the Ottoman Empire, during the revolutions of Mustafa Kemal Atatürk, the founder of the Republic. Significant improvements were made in this regard; in fact, the right for Turkish women to vote and to be nominated or elected was granted in 1934, far before many other democratic states. However, for many years, the rights offered by the state have been considered sufficient, thus no serious progress has been made in this field for a long time. It has also been claimed that, despite being included in all of the constitutions in force since the proclamation of the Republic, the real assurance of the principle of equality was provided after the Constitution of 1961, with the introduction of special procedure for inspection of conformity with the Constitution. Additionally, Turkey's membership to international organizations and the recognition of candidate status at the Helsinki European Council in 1999 have been effective in ensuring the principle of equality and the prohibition of discrimination. In this

context, it was in the early 2000s when constitutional amendments were made to ensure equality and prevention of discrimination, and then national regulations were revised and important steps were taken in this field.

In this part of the study, first the development of social insurances in Turkey will be examined from a historical perspective. Then national legislation regarding working life in Turkey, aimed at ensuring the principle of equality and prohibition of discrimination, will be discussed, and an attempt will be made to understand the place of those principles in national legislation[174].

4.1 Social Insurances in Turkey from a Historical Perspective

4.1.1 Social Insurances in the Ottoman Era

Since the early ages in Anatolia, institutions such as hospices *(imarethane)*, soup kitchens *(aşhane)* and hospitals *(şifhane)* were established in order to provide assistance and treatment services to poor and needy people[175]. In addition to these, practices in religious systems in Anatolia, for example, fitrah *(fitre)*, zakat *(zekat)* and alms (*sadaka)* were important social assistance practices for the protection of the poor.

Although it is not possible to discuss the industrialization movement in the Ottoman Empire as in Europe, traditional practices were effective in providing social security during the period in question. The first steps regarding social security in the imperial

[174] Other regulations aimed at ensuring equality and preventing discrimination between individuals in Turkey: Turkish Civil Code No. 4721, National Education Basic Act No. 1739, Social Services Act No. 2828, Disabled People Act No. 5378, Political Parties Act No. 2820, Establishment of Radio and Television Enterprises and their Media Services Act No. 6112 and Execution of Penalties and Security Act No. 5275.

[175] Devlet Planlama Teşkilatı. (1979). *VI. 5 Yıllık Kalkınma Planı: Sosyal Güvenlik ve Sağlık Hizmetlerinin Rasyonalizasyonu.* Özel İhtisas Komisyonu Raporu, Ankara. pp. 9.

period emerged in the 13th century under the name Ahi-Order *(Ahilik)*[176]. Ahi-Order was an organization that regulated intra-occupational relations in accordance with customs and traditions, as well as religious understandings, in the master–apprentice–journeyman order, where absolute authority dominates[177]. For this reason, in the system of tradesmen organizing the labour market, solidarity prevailed over competition[178]. Although not in today's sense, Ahi-Order was organized as an institution having a social security function. In the organization of Ahi-Order, tradesmen were classified according to the branches of profession, and an assistance fund was created for each branch of profession. These funds assisted members of the profession in the event of risks such as sickness, occupational accidents, and death[179].

The Ahi-Order began to weaken in the 15th century and was replaced by the Guild *(Lonca)* organization. The Guild organization emerged as a result of religious reasons and solidarity between tradesmen, without the contribution of the state[180]. In Guilds, a solidarity fund, called the *orta sandığı*, was created in order to compensate for the losses of their members arising from risks such as sickness, occupational accidents, old-age, death and unemployment. In addition, Guilds provided social assistance such as capital to those who wanted to open their own enterprises or financial aid to those who wanted to marry. These funds were supported through donations, money grants given by masters and craftsmen after their promotions, and dues received from members. However, the emergence of machine power through industrialization in the 19th century weakened the system of tradesmen in the Ottoman Empire, thus rendering Guilds powerless and causing their

[176] Devlet Planlama Teşkilatı. (2001). *VIII. 5 Yıllık Kalkınma Planı: Sosyal Güvenlik.* Özel İhtisas Komisyonu Raporu, Ankara. pp. 10.

[177] Başol, K. (2001). *Türkiye Ekonomisi* (7 ed.). İzmir: Anadolu Matbaası. pp. 38.

[178] Tabakoğlu, A. (2000). *Türk İktisat Tarihi.* Dergah Yayınları: Ankara. pp. 304.

[179] Akbulak, S., & Akbulak, Y. (2004). *Sosyal Güvenlik Kurumlarının Kaynak Sorunları ve Çözüm Önerileri.* Ankara: Maliye Hesap Uzmanları Vakfı Yayını. pp. 4.

[180] Korkusuz, R., & Uğur, S. (2009). *Sosyal Güvenlik Hukukuna Giriş.* Karahan Kitabevi. pp. 96.

disappearance[181]. When Ahi-Order and its continuation Guild systems disappeared from the Ottoman Empire, an attempt was made to fill the gap formed in terms of social security with social assistance institutions. The most important of these were the foundations *(vakıf)* [182]. It is worth noting that foundations were of great importance during the Ottoman Empire and were established for everyone in need of help in addition to other distinct reasons. The foundations were formed in two ways: Avarız Foundations [183] and Hayriye Foundations. Avarız Foundations were established in order to help the poor and needy in cases such as occupational accidents and diseases, sickness, poverty and old-age[184]. Hayriye Foundations, on the other hand, functioned as social security institutions, which were used in cases where the functions of Avarız foundations were inadequate.

After the Edict of Gülhane in 1839, adopted with the beginning of the Westernization movements in the Ottoman Empire, a new period began in terms of the provision of social security. During the Tanzimat period, funds from the previous period were nationalized and started to be managed by one hand and some regulations were made regarding working life. In addition, in 1826, the Ministry of Foundations was established with the aim of eliminating corruption within foundations and to benefit from the potential of foundations in other sectors of the state by collecting the foundations, which had a scattered structure, under a single umbrella. In the Dilaver Pasha Regulations, adopted in 1865, provisions determining working conditions of employees in the Ereğli Coal Basin were included. However, in the mentioned regulations, although some measures were taken regarding the treatment of employees in the event of sickness, its provisions were mainly aimed at avoiding the

[181] Akbulak, S., & Akbulak, Y. (2004). pp. 5.

[182] Korkusuz, R., & Uğur, S. (2009). pp. 97.

[183] The word Avarız is the plural of the word arıza (fault/malfunction) and it refers to the harms of social risks.

[184] Tuncay, A. C., & Ekmekçi, Ö. (2005). *Sosyal Güvenlik Hukuku Dersleri* (7 ed.). İstanbul: Beta Yayınları. pp. 68.

disruption of production rather than protection of the employees[185]. The first step towards the institutionalization of social security was the Military Retirement Fund, which was established in 1866 to regulate the pension benefits of military personnel. Then, with the Maadin (Mines) Regulations dated 1869, employees were provided with protective measures against occupational accidents, and employers were liable to pay compensation to employees or their family in case of such accidents[186]. Later, some official and private retirement funds were established with the aim of protecting employees, limited to public employees and military personnel. These were the Retirement Fund of Civil Servants (1881), Retirement Fund of Mariners (1890), Retirement Fund of Military and Civil Servants (1909), Retirement and Disability Fund of Shipyard Employees (1909), Sickness and Accidents at Work Fund of the Hicaz Railroad Civil Servants and their Dependants (1910), and the Retirement Fund of the Şirket-i Hayriye Marine Transportation Company (1917)[187], which helped their members in various ways, particularly in old-age pension, even though in a scattered manner and narrow sense[188].

4.1.2 Social Insurances in the Republican Era

The first step towards social security in Turkey was taken before the Republic was declared on 29/10/1923. With the Act on Mine Employees Working in the Ereğli Basin No. 151 dated 10/10/1921, during the days of the Battle of Sakarya, the working conditions and rights of mine employees were regulated, and it was stipulated that both employees and employers would be obliged to contribute in

[185] Dilik, S. (1971). *Türkiye'de Sosyal Sigortalar: İktisadi Açıdan Bir Tahlil Denemesi.* Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi. pp. 13.

[186] Tunçomağ, K. (1988). *Sosyal Güvenlik Kavramı ve Sosyal Sigortalar* (4 ed.). İstanbul: Beta Yayınları. pp. 44.

[187] Şirket-i Hayriye is the first predominantly Muslim-owned joint-stock company of the Ottoman Empire (For further information: Kuran, T. (2005). The Absence of the Corporation in Islamic Law: Origins and Persistence. *The American Journal of Comparative Law, 53*(4), pp. 785-834).

[188] Devlet Planlama Teşkilatı. (1979). pp. 9.

funds that would be established and employers would provide health care benefits to employees. Then, these funds were merged and the Labour Union (Amele Birliği) was established, which is known to be the first employees' insurance institution in the history of the Republic of Turkey.

The primary regulations made in the field of social insurance in the history of the Republic are given in chronological order in the Table 4.1. As can be seen in the table, the regulations on social insurance gained momentum after the 1930s. This situation can be explained by the fact that the young Republic, which did not have any industrial production in the first years of its establishment, started industrial production only after 1930s, and therefore needed social security policies for the working classes[189]. In this respect, there are criticisms in Turkey that both the regulations in the field of working conditions and social security were imposed from top to bottom without the struggle of the working class[190]. As summarized, the first class to acquire the right of social security in the Republic of Turkey was civil servants. First of all, it should be mentioned that the Retirement Fund of Military and Civil Servants was established during the Ottoman Empire to manage social security benefits which had previously been managed in scattered structure for both civil servants and military personal under a single umbrella. Even though the Fund served on the basis of a premium payment, its sources started to become inadequate due to the increase in benefits to be paid to beneficiaries of the insureds as a result of deaths in wars. In this context, there was a need for a new regulation for civil servants and military personal, so the premium system was abandoned and the new Retirement Fund of Military and Civil Servants Act No. 1683, to which only the state contributed, entered into force. For this reason, Act No. 1683, regarding the pensions provided to civil servants and military personal without paying any premiums, can be considered a reformist regulation.

[189] Boratav, K. (2006). *Türkiye'de Devletçilik* (2 ed.). Ankara: İmge Kitabevi. pp. 25.

[190] Akpınar, T. (2014). Türk Sosyal Güvenlik Sisteminin Ekonomi Politiği: Kuruluş Süreci. *Çalışma ve Toplum Dergisi, 3*, pp. 137-158.

Table 4.1 Regulations on Social Insurance during the Republican Era[191]

Ac No.	Act	Date of Ratification	The Significance of Regulation in Terms of Social Insurances
818	Obligation Act	04/22/1926	Implemented the provision that in cases of temporary incapacity due to sickness of employee, income payment would be provided by the employer.
1593	Public Hygiene Act	04/24/1930	In order to protect the employees' health and to provide their health care, workplaces with more than 50 employees were obliged to employ a physician. In addition, it was implemented that children under the age of 12 years, and female employees for three weeks prior to giving birth and three weeks postpartum would not work and that female employees would be given breastfeeding leave for six months postpartum, one hour per day.
1683	Retirement Fund of Military and Civil Servants Act	11/06/1930	In order to ensure unity, different acts concerning pensions previously provided to civil servants and military personnel were abolished, and provisions relating to old-age, invalidity and survivors benefits to be given from their public institutions with general state budget were combined in a single Act No. 1683.
3008	Labour Act	08/06/1936	It is the first Labour Act to regulate the rights and obligations of employees and employers with regard to working conditions and working environment. The scope of the Act was limited to employers employing ten or more employees per day. This included provisions stipulating that employees would be provided benefits against the risks of accidents at work and occupational diseases, sickness, maternity, old-age, invalidity and death, and that the Employees Insurance Institution would be established by 15/06/1937 for the management of these benefits[192].
4763	Establishment and Duties of the Ministry of Labour Act	22/06/1945	The Ministry of Labour was established in order to make and manage regulations related to working life[193].
4772	Accident at Work and Occupational Diseases and Maternity Act	27/06/1945	Pursuant to the relevant articles of Act No. 3008, benefits granted under the scope of accidents at work, occupational diseases and maternity insurance schemes and the conditions of entitlement were determined for the first time. In addition, provisions were stipulated that the financing of the benefits in question would only be provided by premiums to be paid by employers.
4792	Employees Insurance Institution Act	09/07/1945	The Employees Insurance Institution was established for the first time under the Ministry of Labour to implement Act No. 4472 and to make other regulations related to other insurance schemes stated in Act No. 3008.
5417	Retirement Insurance Act	02/06/1949	In accordance with the relevant articles of Act No. 3008, long-term insurance schemes were implemented, for the first time, with regards to granting old-age, invalidity and survivors pension. In addition, provisions were stipulated that the financing of the benefits in question would only be provided by premiums to be paid by employers. In order to be eligible for old-age pension, the insured must be at least 60 years of age with 20 years of insurance period and have an average of 210 days of premium payment per year.

[191] Compiled from the Relevant Acts' Commission Reports of the GNAT Retrieved December 2018, from https://www.tbmm.gov.tr/kutuphane/tutanak_sorgu.html

[192] Employees Insurance Institution could only be established nine years later due to the start of WWII.

[193] Before this date, the implementation of Labour Act No. 3008 and the work related to business life were carried out by the Department of Labour, which was organized within the Ministry of Economy.

Table 4.1 Regulations on Social Insurance during the Republican Era (continued)

Ac No.	Act	Date of Ratification	The Significance of Regulation in Terms of Social Insurances
5434	Retirement Fund of the Republic of Turkey	08/06/1949	The benefits provided to civil servants that were working in public institutions with general state budgets under Act No. 1683 became unsustainable because they were not based on premium payment. Furthermore, since Act No. 1683 did not include civil servants not working in institutions with general state budgets, twelve different Funds were established for civil servants outside the scope of Act No. 1683. For these reasons, in order to eliminate the differences arising from the acts enacted on different dates, and to protect the retirement benefits of civil servants and military personnel, and to establish a system based on premium payment obligation, the relevant acts were abolished and unity was ensured regarding the social insurance benefits of civil servants and military personnel. Additionally, the Retirement Fund was established under the Ministry of Finance to carry out social insurance services for civil servants. In order to be eligible for old-age pension, the insured must be at least 55 years of age with 30 years of insurance period.
5502	Sickness and Maternity Act	04/01/1950	Pursuant to Act No. 3008, provisions concerning sickness insurance schemes were put into effect for the first time. It was stated that both employees and employers would pay premiums for the financing of the benefits to be provided.
6900	Disability, Retirement and Survivors' Act	04/02/1957	Retirement Insurance Act No. 5417, which was implemented for employees, was abolished. With Act No. 6900, benefits and obligations related to old-age, invalidity and survivors' insurance schemes were reorganized.
506	Social Insurance Act	17/07/1964	Different acts for employees concerning their social insurance rights, which were enacted on different dates and in a scattered structure, were abolished and united into a single text. Furthermore, the Social Insurance Institution, which was concerned with the management of accidents at work and occupational diseases, sickness, maternity, old-age, invalidity and survivors' insurance schemes, was established.
1479	The Organisation of Social Insurances for Craftsmen, Shopkeepers and Independent Workers Act	02/09/1971	For the first time, benefits started to be provided within the scope of social insurance depending on old-age, invalidity and survivors insurance schemes for self-employed workers. In addition, the Organization of Self-Employed Workers (BAĞ-KUR) was established for the management of these benefits.
2925	Social Security and the Agricultural Sector Act	17/10/1983	Employees who work in the agricultural sector were included in the scope of the social insurance system in terms of accident at works and occupational disease, old-age, invalidity and survivors' insurance schemes.
2926	Social Insurance of those Working in the Agricultural Sector in their own Names and Accounts Act	17/10/1983	Self-employed persons who work in the agricultural sector were included in the scope of the social insurance system in terms old-age, invalidity and survivors' insurance schemes.
4447	Unemployment Insurance Act	25/08/1999	Unemployment insurance schemes started to be implemented for employees who are subjected to employment contracts.
5502	Social Security Institution Act	16/05/2006	With Social Security reform, the Social Security Institution was established in order to manage social insurance systems in Turkey, thus the Retirement Fund of the Republic of Turkey, Social Insurance Institution (SSK) and the Organisation of Self-Employed Workers (BAĞ-KUR) were united under the Social Security Institution.
5510	Social Insurance and General Health Insurance Act	31/05/2006	The Social Security and General Health Insurance Act was enacted in order to provide a norm and standard unity in the rights and obligations of workers who were previously regulated by five different acts, to arrange health benefits in kind for the whole population with equal and improved standards and ensure the financial sustainability of the social security system.

However, the economic problems experienced after WWII increased the financial burden of the system, which was maintained through the general state budget without collecting premiums, and made it unsustainable. As well, twelve different funds based on the insurance system were established in this period due to the fact that civil servants who did not work in public institutions with general budgets were considered outside the scope of Act No. 1683. In order to eliminate the differences in retirement funds that were managed among the funds established under various names for civil servants and military personnel, 75 different acts and provisions concerning retirement in 86 different acts were abolished and the Retirement Fund of the Republic of Turkey Act No. 5434 entered into force on 08/06/1949. This new Act sought to base the social insurance system on 5% contribution from civil servants and 10% contribution from public institutions. In addition, the Retirement Fund was established under the Ministry of Finance to carry out social insurance services for civil servants.

The first regulation regarding the requirement of establishing an institution in order to provide benefits against the risks of accidents at work and occupational diseases, sickness, maternity, old-age, invalidity and death of the employees were included in Labour Act No. 3008 dated 08/06/1936. However, with the start of WWII, it was necessary to wait for the Employees Insurance Institution Act No. 4792, which came into force on 09/06/1945, for the establishment of the mentioned Institution. Nevertheless, prior to Act No. 4792, employees were protected under social insurances with respect to accidents at work and occupational diseases, and maternity insurance schemes pursuant to the provisions of Act No. 4772. After the Employees Insurance Institution was established and according to Act No. 5417, old-age, invalidity and survivors' insurance practices were implemented for employees, and, with Act No. 5502, a sickness insurance scheme was provided to employees for the first time[194]. Lastly, with Act No. 6900, benefits and obligations of the employees

[194] Benefits related to maternity insurance in Act No. 5502 were offered if they were outside the scope of Act No. 4772.

within the scope of old-age, invalidity and survivors' insurance schemes were reorganized.

As can be seen, the social security rights offered to employees between the years 1945-1960, which included long-term insurance branches (old-age, invalidity and survivors' insurance schemes) and short-term insurance branches (accidents at work and occupational diseases, sickness and maternity insurance schemes), were regulated by three different acts. In addition, the Employees Insurance Fund, which has an independent act, was tasked with executing said acts.

At this point, it is worth remembering that with Article 48 of the Constitution of 1961, the right to social security is denoted a civil right and the financing of the social security system is the duty of the state. In order to carry out this principle of the Constitution, the aim of providing the social security right to broad masses, and in this direction, transforming the social insurance acts, which were in a scattered structure, into a single text was proclaimed in the I. Five-Year Development Plan[195], which covered the years 1963-1967. Towards this target, Social Insurance Act No. 506 was adopted in 1964 regarding the social security right of employees. In this context, Acts No. 4472, 4792, 5502, 6900 and other relevant acts were abolished and unity was achieved in order to protect the social security right of employees.

As in many other countries of the world, the inclusion of self-employed persons in the social insurance system in Turkey was achieved much later compared to employees. In this context, the social security rights of self-employed persons were secured only by old-age, invalidity and survivors' insurance schemes within the scope of the Organisation of Social Insurances for Craftsmen, Shopkeepers and Independent Workers (BAĞ-KUR) Act No. 1479 in 1971. In addition, health care insurance schemes for self-employed workers were carried out in 1985. Finally, it was not until the Social Insurances and General Health Insurance Act No. 5510 came

[195] Devlet Planlama Teşkilatı. (1963). I. Beş Yıllık Kalkınma Planı. pp. 109-112.

into force on 01/10/2008 that self-employed persons could obtain benefits under the scope of accident at work, occupational diseases and maternity insurance schemes.

When it was determined in the general population censuses in the 1980s that approximately 58% (10,483,000 people) of the active population consisted of individuals employed in the agriculture, forestry, hunting and fishing sectors, efforts with the purpose of including employees and employers in the agricultural sector in the social security system started[196]. In this context, employees in the agricultural sector, with Social Security and the Agricultural Sector Act No. 2925 adopted in 1983, and employers in the agricultural sector, with Social Insurance of those Working in the Agricultural Sector in their own Names and Accounts Act No. 2926, which was adopted on the same day, were considered to be insured under the scope of BAĞ-KUR.

Besides these, before 01/03/1965, the Funds organized to provide benefit under the scope of old-age, invalidity and survivors' insurance schemes to the employees of banks, insurance and reassurance companies, chambers of commerce, chambers of industry, stock exchanges or the unions they constitute were ensured to continue their activities within their own structure, and with provisional Article 20 added to Social Insurance Act No. 506, ensuring that employees subject to employment contracts were considered insured under the said scope.

As explained above, in the beginning of the 2000s, regulations of three different institutions (the Retirement Fund of the Republic of Turkey, Social Insurance Institution (SSK) and the Organisation of Self-Employed Workers (BAĞ-KUR) and five different acts regarding the social security rights of workers in different statuses were in effect in the Republic of Turkey.

[196] TBMM, Tutanak Dergisi, Tarımda Kendi Nam ve Hesabına Çalışanlar Sosyal Sigortalar Kanunu Tasarısının Danışma Meclisince Kabul Olunan Metni ve Millî Güvenlik Konseyi Sosyal Güvenlik, İş ve İşçi İlişkileri Komisyonu Raporu (Retrieved December 2018, from https://www.tbmm.gov.tr/tutanaklar/TUTANAK/MGK_/d01/c010/mgk_01010174ss0697.pdf)

In this context, in order to ensure norm and standard unity among workers in different status, resolve administrative, financial and regulatory differences of these institutions, adapt to the transformations in demographics and changes in the working life of the country, and to ensure the sustainability of the system, the necessity of revising the system was emphasized. Thus, the Social Security Institution (SGK) was established on 16/05/2006 with Act No. 5502 in order to manage the social insurance needs of the aforementioned individuals involved in working life as a whole without distinguishing one from another. Furthermore, Social Insurances and General Health Insurance Act No. 5510 came into force on 01/10/2008 in order to order to provide a norm and standard unity in the rights and obligations of workers who were previously regulated by five different acts, to arrange health benefits in kind for the whole population with equal and improved standards, and ensure the financial sustainability of the social security system.

4.2 Non-Discrimination Principle in Turkey

4.2.1 International Agreements

In Article 90 of the Constitution of the Republic of Turkey, it is stated that "… International agreements duly put into effect have the force of act. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional". Yet, this provision regarding the place of international agreements in domestic acts has led to long-standing debates among Turkish lawyers. In this framework, some of the authors argue that international agreements are equivalent to the acts[197], while others argue, even though implicitly

[197]Özbudun, E. (2005). *Türk Anayasa Hukuku* (6 ed.). Ankara: Yetkin Yayınları. pp. 212., Gözler, K. (2004). *Milletlerarası Andlaşmalara Kanun Üstü Bir Değer Tanınabilir mi? (Anayasa Değişikliği Teklifi Hakkında Bir Eleştiri).* Retrieved January 2019, from Türk Anayasa Hukuku: www.anayasa.gen.tr/madde90.htm, and Pazarcı, H. (2011). Türk Hukukunda Andlaşmalar ile Yasaların Çatışması. *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 24*(1-2), pp. 651-674.

stated, that they are superior to the acts[198]. However, with the 2004 amendment to Article 90 of the Constitution adding the clause:

> In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the acts due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Thus, it is clearly acknowledged that international agreements are superior, in case of conflict arising between acts and international agreements on human rights, as stated in the justification of the amendment proposal. Therefore, when human rights and the prohibition of discrimination in this respect are concerned, the administrative and judicial authorities should prioritize international agreements. In this regard, Turkey is party to many conventions, declarations and charters that prohibit discrimination, in the framework of the UN, ILO and CoE, and their provisions are explained briefly within the limitations of this study.

The Charter of the United Nations, the founding treaty of the UN, was signed on 26/06/1945 by representatives of fifty states, including Turkey, to ensure lasting peace in the world, and entered into force on 24/10/1945[199]. The charter is the first international document including provisions on anti-discrimination, which is clearly stated in Article 1:

> 3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

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[198] Soysal, M. (1985). Anayasaya Uygunluk Denetimi ve Uluslararası Sözleşmeler. *Anayasa Yargısı, 2*, pp. 5-18., Çelik, E. (1988). Avrupa İnsan Hakları Sözleşmesi'nin Türk Hukukundaki Yeri ve Uygulanması. *İdare Hukuku ve Bilimleri Dergisi, Lütfî Duran'a Armağan, 1*(3), pp. 47-56., and Akad, M., & Dinçkol, B. V. (2002). *Genel Kamu Hukuku* (2 ed.). İstanbul: DER Yayınları. pp. 260.

[199] Turkey ratified the Charter of the United Nations on 15/08/1945 and the Approval Act of GNAT No. 4801 on the Charter of the United Nations was published in the Official Gazette dated 24/08/1945 with No. 6902.

In this respect Charter of the United Nations showing that one of the purposes of the UN is to promote human rights and fundamental freedoms, regardless of race, sex, language, or religion. In addition, with the regulations that the "United Nations shall promote: … (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion …" in Article 55 of the Charter and the obligations with regard to the said area of the UN and the states party to the Charter are emphasized in Article 76.

In addition, the Universal Declaration of Human Rights[200], which has a high moral influence at the international level, includes provisions on prohibition of discrimination in Article 2, expressing that:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Thus mention article exemplifies the desire to protect international human rights against discrimination at an international level by adding new areas to the discriminatory bases previously confined to four different areas (race, sex, language, or religion) in the Charter of the United Nations. In addition to this, the provision in Article 23 stating that "... (2) Everyone, without any discrimination, has the right to equal pay for equal work" is noteworthy in the adoption of the principle of equal pay for equal work as a universal right in those years.

Turkey is also party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social

[200] The Universal Declaration of Human Rights was declared by the UN General Assembly on 10/12/1948. In Turkey, Decision of Council of Ministers No. 9119 on the Universal Declaration of Human Rights dated 06/04/1949 was published in the Official Gazette dated 27/05/1949 with No. 7217.

and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Op CEDAW), the Convention on the Rights of the Child (CRC), the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), the Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol to the Convention on the Rights of Persons with Disabilities (Op CRPD), which are legally binding sources of the UN. These Conventions include prohibition of discrimination regarding their fields, and Table 4.2 summarizes Turkey's status to those Conventions, along with the number of states party to the Conventions.

Table 4.2 Turkey's Status to the UN Non-discrimination Conventions[201]

Convention	The Date of Signature	The Date of Entry Force	Number of State Parties	Ratification Date of Turkey	Entry Force Date of Turkey	Declarations and Reservations Made by Turkey
ICERD	07/03/1966	04/01/1969	180	13/10/1972	16/10/2002	– 2 Declarations – Reservation: Article 22.
ICESCR	16/12/1966	03/01/1976	169	15/08/2000	23/12/2003	– 3 Declarations – Reservations: Article 13(3) and 13(4).
CEDAW	18/12/1979	03/09/1981	189	25/07/1985	19/01/1986	– Reservation: Article 29(1).
Op CEDAW	06/10/1999	22/12/2000	112	08/09/2000	29/10/2003	-
CRC	20/11/1989	02/09/1990	196	14/09/1990	04/04/1995	– 1 Declaration – Reservations: Article 17, 29 and 30.
ICRMW	18/12/1990	01/07/2003	54	13/01/1999	27/09/2004	– Reservations: Article 15, 40, 45(2), 45(3), 45(4), 46, 76 and 77.
CRPD	13/12/2006	03/05/2008	177	30/03/2007	28/09/2009	-
Op CRPD	13/12/2006	03/05/2008	95	28/09/2009	26/03/2015	– 1 Declaration

[201] Compiled from the UN Human Rights Treaties. Retrieved May 2019, from https://treaties.un.org/PAGES/Treaties.aspx?id=4&subid=A&lang=en

Furthermore, Turkey is one of the 187 members of the ILO, which is a specialized agency of the UN to protect human rights in working life and increase standards[202]. The ILO determines four main policies in working life as: a) the right of workers to associate freely and bargain collectively, b) the end of forced and compulsory labour; c) the end of child labour; and d) the end of unfair discrimination among workers. In this context, the ILO adopted Equal Remuneration Convention No. 100 [203], Discrimination (Employment and Occupation) Convention No. 111[204], and Workers with Family Responsibilities Convention No. 156[205] aiming to prevent discrimination and ensure equal treatment in working life[206]. In this framework, in Turkey, both Convention No. 100 and Convention No. 111 are in force, while Convention No. 156 has not yet been ratified.

One of the aims of Convention No. 100 is to prevent discrimination on the grounds of gender in wage policies. The provision in Article 2(1) states that:

> Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

This requirement could be fulfilled by:

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[202] The ILO Member Countries Retrieved May 2019, from https://www.ilo.org/public/english/standards/relm/country.htm

[203] The ILO accepted Convention No. 100 on 29/06/1951 and it entered into force on 23/05/1953. In Turkey, Convention No. 100 was ratified on 13/12/1666 and the Approval Act of GNAT on the Equal Remuneration Convention No. 810 published in the Official Gazette dated 13/06/1967 with No. 12620.

[204] The ILO accepted Convention No. 111 on 25/06/1958 and it entered into force on 15/06/1960. In Turkey, Convention No. 111 was ratified on 13/12/1666 and the Approval Act of GNAT on the Discrimination (Employment and Occupation) Convention No. 811 published in the Official Gazette dated 21/09/1967 with No. 12705.

[205] The ILO accepted Convention No. 156 on 23/06/1981 and it entered into force on 11/08/1983.

[206] The ILO Equality of Opportunity and Treatment Conventions, Retrieved May 2019, from https://www.ilo.org/dyn/normlex/en/f?p=1000:12000:7903565100037::::P12000_INSTRUMENT_SORT:2

> (a) national acts or regulations; (b) legally established or recognized machinery for wage determination; (c) collective agreements between employers and workers; or (d) a combination of these various means.

While ILO Convention No. 111 extends the prohibition of discrimination into policies in the field of labour and occupation, it is not limited to protection on the grounds of gender. In this context, with Article 1, the term discrimination is clarified to:

> include any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

In Article 2, the scope of the prohibition of discrimination and practices needed to be implement are presented, concerning:

> (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy; (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy; (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy; (d) to pursue the policy in respect of employment under the direct control of a national authority; (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority; (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Finally, Turkey is a member of the CoE and one of the first fourteen states that signed the ECHR on 04/11/1950[207]. While the ECHR guarantees the civil and

[207] Turkey ratified the ECHR on 10/03/1954 and the Approval Act of GNAT No. 6366 on the European Convention for the Protection of Human Rights and Fundamental Freedoms was published in the Official Gazette dated 19/03/1954 with No. 8662. The explanations for the ECHR have not been reiterated in order to avoid repetition, as they are discussed under the heading 2.1.2 EU Charter of Fundamental Rights.

political rights of individuals, the European Social Charter[208], which guarantees the social and economic rights of individuals, is described as complementary to the ECHR[209]. In this context, a total of nineteen social and economic rights, including the right to a fair remuneration, the right of employed women to protection, the right to protection of health, the right to social security, the right to social and medical assistance, the right to benefit from social welfare services, and the right to protection and assistance for migrant workers and their families are guaranteed by the European Social Charter, to which Turkey is a party. In addition, in the preamble of the Charter it is mentioned that the social rights of individuals should be promoted, regardless of discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin. The Additional Protocol[210] of the Charter, which entered into force on 04/09/1992, and the Revised European Social Charter[211], which entered into force on 01/07/1999, added new social rights, thus defining thirty-one social and economic rights under the scope of Revised European Social Charter. In this context, it should be noted that the principle of

[208] The CoE accepted the European Social Charter on 18/10/1961 and it entered into force on 26/02/1965. Although Turkey ratified the European Social Charter on 18/10/1961, the Approval Act of GNAT No. 3581 on the European Social Charter was only published in the Official Gazette dated 04/07/1989 with No. 20215.

[209] Çiçekli, B. (2001). *Avrupa Sosyal Şartı Temel Rehber.* Ankara: Seçkin Yayıncılık. pp. 19.

[210] The CoE accepted the Additional Protocol of the European Social Charter on 05/05/1988 and it entered into force on 04/09/1992. Although Turkey ratified the Additional Protocol on 05/05/1988, the approval procedure has not yet been realized. Social rights newly included in the Protocol: the right for workers to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the ground of sex; the right for workers to be informed and consulted within the undertaking; the right for workers to take part in the determination and improvement of working conditions and the working environment in the undertaking; the right for elderly persons to social protection.

[211] The CoE accepted the Revised European Social Charter on 03/05/1996 and it entered into force on 01/07/1999. Turkey ratified the Revised European Social Charter on 27/09/2006 excluding Article 5 (The right to organize), Article 6 (The right to bargain collectively), Article 2(3) (to provide for a minimum of four weeks' annual holiday with pay) and Article 4(1) (to recognize the right of workers to a remuneration such as will give them and their families a decent standard of living). Approval Act of GNAT on Revised European Social Charter No. 5547 was published in the Official Gazette dated 03/10/2006 with No. 26308. Social rights newly included in the Protocol: right to protection against poverty and social exclusion; right to housing; right to protection in cases of termination of employment; right to protection against sexual harassment in the work place and other forms of harassment; rights of workers with family responsibilities to equal opportunities and equal treatment; rights of workers' representatives in undertakings.

discrimination contained in the preamble of the European Social Charter is specifically regulated by the clause in Article E of the Revised European Social Charter:

> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

In addition, the present provisions of the Revised European Social Charter, which affirm the principle of equality and non-discrimination, are given below.

> Part I
> …
> 20. All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.
> …
> 27. All persons with family responsibilities and who are engaged or wish to engage in employment have a right to do so without being subject to discrimination and as far as possible without conflict between their employment and family responsibilities.
> …
>
> Part II
> Article 4 – The right to a fair remuneration
> With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake … 3) to recognise the right of men and women workers to equal pay for work of equal value;…
>
> Article 12 – The right to social security
> With a view to ensuring the effective exercise of the right to social security, the Parties undertake:… 4) to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure; (a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; (b)the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.
>
> Article 20 – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

> With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following field; (a) access to employment, protection against dismissal and occupational reintegration; (b) vocational guidance, training, retraining and rehabilitation; (c) terms of employment and working conditions, including remuneration; (d) career development, including promotion.
>
> Article 27 – The right of workers with family responsibilities to equal opportunities and equal treatment
> With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake; 1) to take appropriate measures: (a) to enable workers with family responsibilities to enter and remain in employment, as well as to re-enter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training; (b) to take account of their needs in terms of conditions of employment and social security; (c) to develop or promote services, public or private, in particular child day-care services and other childcare arrangements; 2) to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice; 3) to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.

The other treaties of the CoE that should be mentioned within the scope of this study are the European Code of Social Security[212] and the European Convention on Social Security [213] . Essentially, the European Code of Social Security clarifies the framework of the social security right stipulated in Article 12 of the European Social Charter. As discussed under the heading 1.2.1 Social Risks, the European Code of Social Security affirms nine social risk areas similar to ILO Convention No. 102 and sets minimum standards for the right to social security in states party to the

[212] The CoE accepted the European Code of Social Security on 16/04/1964 and it entered into force on 17/03/1968. Turkey ratified the European Code of Social Security on 21/09/1978, excluding Part IV Unemployment benefit and Part VII Family benefit of the Code. Approval Act of GNAT on the European Code of Social Security No. 2170 was published in the Official Gazette dated 29/09/1978 with No. 16419.

[213] The CoE accepted the European Convention on Social Security on 14/12/1972 and it entered into force on 01/03/1977. Turkey ratified the European Convention on Social Security on 13/07/1976 and the Approval Act of GNAT on the European Convention on Social Security No. 2023 was published in the Official Gazette dated 23/07/1976 with No. 15655.

convention. Furthermore, the Code, expresses the prevention of discrimination on the ground of nationality in national social security systems with regulation (Article 73):

> The Contracting Parties shall endeavour to conclude a special instrument governing questions relating to social security for foreigners and migrants, particularly with regard to equality of treatment with their own nationals and to the maintenance of acquired rights and rights in course of acquisition.

Similar to the 883/2004/EC Regulation, which aims to protect the right to social security of those who exercise their right to free movement by providing coordination between the national social security systems of EU Member States, the European Convention on Social Security, which is based on Article 73 of the European Convention on Social Security, prevents the loss of rights within this scope, by including the principles of preventing non-discrimination on the ground of nationality along with the principles of single applicable legislation, aggregation of periods and exportability in states party to the convention.

Before concluding explanations with respect to international agreements, it should be noted that today the European Convention on Social Security is in force in Turkey as well as eight party states (Austria, Belgium, Italy, Luxembourg, Netherlands, Portugal, and Spain). Turkey also has bilateral social security agreements with thirty different states[214]. Moreover, as discussed under the heading 2.2.1 Regulation 883/2004/EC: Nationality Equality in the Matters of Coordination of Social Security Systems, the social security rights of individuals who work in more than one EU Member States are regulated with the mentioned Regulation. In that case, if there is a bilateral social security agreement between the two states and they are both party to

[214] Bilateral social security agreements are currently in force between Turkey and the United Kingdom, Germany, the Netherlands, Belgium, Austria, Switzerland, France, Denmark, Libya, Sweden, Norway, Northern Cyprus, Canada, Macedonia, Albania, Azerbaijan, Georgia, Romania, Quebec, Bosnia and Herzegovina, the Czech Republic, Luxembourg, Croatia, Slovakia, Serbia, Italy, Korea, Montenegro, Tunisia and Hungary. In addition, bilateral social security agreements with, Iran, Moldova, Poland, Mongolia and Kirghizstan are still in the ratification process. Retrieved May 2019, from http://www.sgk.gov.tr/wps/portal/sgk/tr/emekli/yurtdisi_islemler/sosyal_guvenlik_sozlesmeleri

the European Convention on Social Security or if the two EU Member States are party to the convention, the question of which regulations will be applied may arise.

In fact, the problem related to conflict situations is resolved in accordance with provisions included in Article 5 of the Convention:

> 1) Subject to the provisions of Article 6, this Convention replaces, in respect of persons to whom it is applicable, any social security conventions binding; a) two or more Contracting Parties exclusively; or b) at least two Contracting Parties and one or more other States in respect of cases calling for no action on the part of an institution of one of the latter States.
> 2) However, where the application of certain provisions of this Convention is subject to the conclusion of bilateral or multilateral agreements, the provisions of the conventions referred to in sub-paragraphs a and b of the preceding paragraph shall remain applicable until the entry into force of such agreement.

To use Turkey as an example, since there is a bilateral social security agreement between Turkey and Belgium, which are both party to the Convention, the provisions of the bilateral social security agreement are taken into account. However, if Turkey and Spain are considered, although both are a party to the agreement, and since there is no bilateral social security agreement between them, the provisions of the European Convention on Social Security are taken into consideration. Lastly, although both the Netherlands and Spain are parties to the Convention and also MS of the EU, the provisions of 883/2004/EC Regulation is implemented pursuant to Article 5 of the Convention.

Finally, it should be noted that the Revised European Code of Social Security, which includes new provisions for extending the scope of social security benefits, facilitating the conditions for entitlement, extending the duration of the provision of benefits, the prohibition of discrimination based on gender, and even the inclusion of new benefits, was opened to signature of contracting state parties on 06/11/1990, and signed by fourteen states, including Turkey[215]. However, the Revised European Code

[215] Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden and Turkey.

of Social Security has only been ratified by the Netherlands and has not yet entered into force in any of the other states, including Turkey[216].

4.2.2 The Constitution

The principle of equality has been affirmed in all constitutions since the declaration of the Republic. However, there are claims that the actual assurance came after The Constitution of 1961 because the Constitution prior to 1961 did not have a specific procedure for inspection of conformity with the Constitution[217]. Nevertheless, the principle of equality and the prohibition of discrimination have been regulated both in the Constitution of 1961 and Constitution of 1982. In this context, the Constitution of 1982 states that everyone is equal before the law without being discriminated against on the grounds of language, race, colour, sex, political opinion, philosophical belief, religion, sect or any such grounds, and that no privilege shall be granted to any person, family, group or class[218].

Additionally, the obligation to act in accordance with the principle of equality in all proceedings of all organs of the state and administrative authorities is included (Article 10). Therefore, all state organs, namely the legislative, executive and judiciary, have the obligation to pay regard to the principle of equality and not to discriminate in administrative regulations or judicial decisions.

[216] Turkey ratified the Revised European Code of Social Security on 06/11/1990. However, the approval procedure has not yet been realized. In order for the Revised Code of Social Security to enter into force ratification of at least two state parties are required Retrieved May 2019, from https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/139/signatures?p_auth=arXccn0Q

[217] İnceoğlu, S. (2001). Türk Anayasa Mahkemesi ve İnsan Hakları Avrupa Mahkemesi Kararlarında Eşitlik ve Ayrımcılık Yasağı Çerçevesinde Af, Şartlı Salıverme, Dava ve Cezaların Ertelenmesi . *Anayasa Dergisi, 18*, pp. 41-70.

[218] In the Constitution of 1961, *colour* was not listed as one of the protected areas of discrimination, and by not including the expression of *or any such grounds* a closed list with respect to protected areas was foreseen.

Moreover, in the Constitution of 1982, many amendments were made to strengthen the principle of equality. The first of these was to add the statement that "Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice" in 2004 to emphasize the constitutional equality of women, while giving the obligation of providing such equality to the state. With the establishment of the Republic and the reforms of Mustafa Kemal Atatürk, significant improvements were made in the social positions of women[219], as exemplified by the fact that Turkish women had the right to vote and to be nominated or elected since 1934, far before many other democratic states.

However, since the regulations for the equality of women were offered by the newly established state, and because of the period of the conservative Democratic Party and the coups, which occurred in 1960 and 1980, no progress could be made in this field for a long time and women have been content with these rights. Although Turkey was affected by global feminist movements after the 1980s, it was a product of international expectations that women's equality with men was accepted as a principle and entered into the Constitution of 1982[220]. As a matter of fact, it is stated in the justification of the mentioned provision added to the Constitution that the amendment was made within the framework of EU harmonization[221]. In 2010, positive discrimination provisions aimed at ensuring equality in practice for women, children, the elderly, disabled people, widows and orphans of martyrs, and veterans were included in the Constitution for the first time. As a result of all these amendments, Article 10 of the Constitution, which includes equality before the law, contains the following provision:

[219] Doğramacı, E. (1998). Atatürk ve Kadın Hakları. *Atatürk Araştırma Merkezi Dergisi, 5*(13), pp. 91-106.

[220] Verjin, E. (2008). *Ayrımcılık Yasağı Işığında Türkiye Siyasetinde Kadın* . (Yüksek Lisans Tezi). pp. 56-67.

[221] The Act on the Amendment of some Articles of the Constitution of the Republic of Turkey No. 5170.

X. Equality before the law
Artıcle 10- Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.
Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.
Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality.
No privilege shall be granted to any individual, family, group or class.
State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.

Apart from the fundamental equality and non-discrimination article mentioned above, the Constitution also includes other provisions that may be closely related to this subject. The first of these is the provision in Article 41 that states that the family is based on equality between spouses. This provision was added in 2001 and constituted the basis for the adoption of Turkish Civil Code No. 4721, based on the principle of equality, replacing Turkish Civil Code No. 743, which undermined the law related to equality of women and men in the family.

In Article 42, it is stated that primary education is compulsory for all male and female citizens. Article 49 grants everyone the right to work, while Article 50 states that no one can be employed in jobs that are not appropriate for their age, gender and capacity, and that women, children and people with disabilities will be protected in terms of their working conditions. While Article 60 guarantees the right to social security for individuals, with Article 61, the disabled, the elderly, children in need of protection, the widows and orphans of martyrs, invalids, and the veterans are designated special protection in terms of social security.

Finally, another provision that could have led to gender discrimination and thus worth discussing stated that “The citizenship of a child who has a foreign national father and a Turkish mother shall be regulated by act”, This clause was removed in 2001, leaving Article 66, which states that “Everyone bound to the Turkish State

through the bond of citizenship is a Turk. The child of a Turkish father or a Turkish mother is a Turk", this preventing gender-based discrimination in the right to citizenship.

It is necessary, however, to add that the principle of equality and prohibition of discrimination has been interpreted in the case laws of the Constitutional Court of Turkey (AYM) by referring to international agreements[222], and that both absolute and relative equality are indicated[223]. The fact that persons in the same situation are subjected to the same treatment without being subjected to discrimination is interpreted as absolute equality by AYM; on the other hand, it does not consider the implementation of different practices on the persons in different positions contrary to the Constitution. However, in order to defend this type of equality, different practices need to be based on a justified reason or public interest. Criteria such as "related to purpose, reasonable, requisite, balanced, and being fair attempt to concretely justify reasons of the regulation leading to a difference"[224].

4.2.3 The Non-Discrimination Principle in Labour Law

4.2.3.1 Labour Act No. 4857[225]

In general, economic, social and political conditions of countries influence their labour legislation. As a matter of fact, the rapid development of technology since the 1980s and increasing unemployment in the late 1990s has affected working life in most countries. In this context, while new types of employment have become widespread, national labour acts have started to be reviewed in line with all these

[222] AYM, K.T. 28/04/2011, E.S. 2009/86, K.S. 2011/70.

[223] AYM, K.T. 15/12/2006, E.S. 2006/111, K.S. 2006/112. and AYM, K.T. 23/11/2016, E.S. 2016/22, K.S. 2016/177.

[224] Özbudun, E. (2005). pp.139.

[225] Labour Act No. 4857 was accepted on 22/05/2003 and it was published in the Official Gazette dated 10/06/2003 with No. 25134.

universal changes. The fact that Labour Act No. 1475, which was adopted in 1971 in Turkey, has been unable to respond to changes in working life and requirements to comply with EU norms in the candidacy process meant that provisions of a new labour act became mandatory.

The most important feature of the new Labour Act No. 4857 adopted in 2003 in terms of this study is that it makes the principle of equality, which is one of the employer's obligations during the previous act period, one of the main characteristics of working life[226]. The principle of equal treatment expressed in Article 5 of the Labour Act is undoubtedly a reflection of Article 10 of the Constitution, which includes the principle of equality before the law. The obligation of the employer to provide equal treatment pursuant to the relevant provision is based on four principles. The first of these is the provision prohibiting employers' discrimination among the employees on the grounds of language, race, colour, sex, disability, political thought, philosophical belief, religion and sect or any such grounds[227]. Second, unless the employer has a substantial reason, she/he cannot follow different practices among employees with certain types of contracts. The third is the prohibition of discrimination on grounds of sex, unless the biological reasons or the natures of the work make it compulsory. Finally, it is regulated that a lower wage cannot be paid on the basis of gender for the same job or for work of equal value.

It should also be noted that the principle of equal treatment of the employer mentioned above is in line with EU Directives as stated in the justification of the Act. For example, in Article 14(2) of Directive 2006/54/EC, it is stated that MS can apply different treatment between genders on the basis of the nature of the particular

[226] Yenisey, K. D. (2006). İş Hukuku'nda Eşitlik İlkesi ve Ayrımcılık Yasağı. *Çalışma ve Toplum Dergisi, 4*(11), pp. 63-81.

[227] When Labour Act No. 4857 was first enacted, *colour* and *disability* were not expressed as protected grounds. However, with the amendment made in 2014, both new fields were added to the provision of the article, although it is stated in the justification of the amendment provision that it is aiming to prevent non-discrimination of disabled persons in working life. It seems as though, in the first text of the Act, the protected ground of *colour*, mentioned in the Constitution, was forgotten, and this deficiency was corrected with the mentioned amendment.

occupational activities, provided that their objective is legitimate and the requirement is proportionate. On the other hand, as in the prohibition of discrimination in EU law, Article 5(7) of Act No. 4857 also adopts the *prima facie* principle. Finally, it is stated that the employee may claim compensation from those who act contrary to the principle of equal treatment in the amount equivalent up to her/his four-month wage (Article 5(6) of Act No. 4857). In addition to this, the obligation of the employer with respect to prohibition on discrimination begins after the employment relationship has been established. For example, when an employer advertises a job that may lead to discrimination it is not considered discrimination. In its decision, the Court of Cassation also made it clear that the principle of equal treatment stipulated in accordance with the Act would begin after the adoption of the employment contract: "...In order to be able to talk about the obligation of the employer to treat employees equally, there is no doubt that the existence of employees who have a business relationship with the employer is required..."[228]. At this point, it may seem that this provision contradicts EU Directives. However, it is important that Turkish Criminal Code No. 5237, which includes the crime of discrimination (Article 122), be taken into consideration in order to correctly evaluate the situation. In order to provide a clearer understanding of the subject and to avoid repetition, this topic is re-discussed under the heading 3.2.3.4 The Turkish Criminal Code.

Another regulation of the Labour Act that prevents discrimination is the fact that the termination of the employment contract by the employer on the grounds of race, colour, sex, marital status, family obligations, pregnancy, birth, religion, political views or any such grounds does not constitute a justified cause. In addition, in cases where the employment contract is terminated in violation of the principle of equality, the employee will be reinstated, or the employee will be paid compensation equivalent of to a minimum of four months salary to a maximum of eight months if the employee is not reinstated.

[228] Yargıtay, 9.HD, 14/03/2011, E.2010/26763, K.2011/6748.

An important innovation in the Labour Act is the inclusion of provisions regarding sexual harassment. In this respect, both the employer's sexual harassment of the worker or the employee notifying the employer that he or she has been sexually abused by other workers or third parties (Article 25), or the fact that the worker sexually harasses another employee of the employer (Article 26) may cause the contract to be terminated for a just cause. It should also be noted, however, that the concept of sexual harassment is not defined in Act No. 2857, but rather is expressed in Article 105 of Turkish Criminal Code No. 5237 as "If a person harasses someone for sexual purposes, …" The fact that the concept of sexual harassment is not clearly defined and its limits are not determined was subject to a constitutional review by the AYM with the concern that the implementation could lead to discrimination. However, in the decision of the Court, it is stated that from the justification of Article 105, sexual harassment is understood to be an act that does not reach the extent of sexual assault or sexual abuse and courts should give their decision by evaluating the specific circumstances of each incident, and expressed that provision of the Act is not contrary to the Constitution[229].

Before ending discussions with respect to Labour Act No. 4857, it should be underlined that the regulation also includes practices aimed at the protection of women, children, the disabled, ex-convicts, and soldiers injured due to terrorist incidents. In this context, in the relevant Act, the age at which children can be employed and the works in which children cannot be employed even if their age is appropriate are arranged in line with the Young Workers Directive (94/33/EC). In addition, the Pregnant Workers Directive required compliance with the minimum maternity leave period of fourteen weeks. In this context, it was proposed to increase maternity leave to fourteen weeks in the Draft Labour Act Proposal, since the maternity leave period in the period concerned was twelve weeks. However, during discussions for Labour Act No. 4857 in the Grand National Assembly of Turkey (GNAT), it was decided to enact a period of 16 weeks by taking into account

[229] AYM, K.T. 25/02/2010, E.S. 2008/55, K.S. 2010/41.

maternity leave periods in European states. However, no proposal has been made regarding the six-month parental leave period stipulated for female employees, as it was the case previously in Labour Act No. 1475. In addition, thanks to amendments made in 2016, female employees are granted the right to a half-time leave without pay, and fathers are given the right to benefit from maternity leave. However, in order for fathers to benefit from maternity leave, it is important to emphasize that the mother should die during childbirth or while she is on maternity leave.

The other provision of the Act, which includes positive discrimination, is related to disabled persons, ex-convicts, and victims of terror. In this context, for private sector employers who employ fifty or more persons in their establishments, there is an obligation to ensure that at least 3% of the total employees are disabled personnel; similarly, public workplaces are obliged to employ 2% ex-convicts or victims of terror (Article 30), and it is stipulated that a fine will be imposed on both private and public establishments that act contrary to the aforementioned rule.

4.2.3.2 Civil Servants Act No. 657[230]

Civil Servants Act No. 657, adopted in 1965, regulates the public personnel management regime in Turkey on the basis of qualifications, terms of service, promotion, and rights and obligations of civil servants, and constitutes the basis of Turkey's public management model[231]. In this context, the Act, which includes the obligations of civil servants, prohibits discriminatory behaviours based on language, race, sex, political opinion, philosophical belief, religion, sect, and other similar reasons towards public employees while performing their duties (Article 7). Moreover, it is affirmed that civil servants cannot act for the benefit or harm of any political party, person or group. In this context, disciplinary action is stipulated for

[230] Civil Servants Act No. 657 was accepted on 14/07/1965 and it was published in the Official Gazette dated 23/07/1965 with No. 12056.

[231] Yılmazöz, M. (2009). Türkiye'de kamu personel yönetimi sorunu. *Maliye Dergisi*, *157*, pp. 293-302.

civil servants who act contrary to the Act, and sanctions are also implied. Moreover, when the provisions in question are examined within the framework of the principle of equality of the Constitution, they form the basis for ensuring that civil servants, who are within the executive power and therefore enforce acts, act in accordance with the prohibition of discrimination, and for implementation of the Constitutional equality principle.

4.2.3.3 Trade Unions and Collective Labour Agreements Act No. 6356[232]

One significant way to correct and improve the working conditions of employees is to strengthen trade unions established to help their members. In general terms, while legal regulations for trade unions and collective bargaining support countries in achieving social policy goals, they are also becoming an important tool in ensuring social justice and working peace[233].

In order to strengthen the trade unionism that lost power in the face of global competition and rising unemployment in Turkey, and to pave the way for collective bargaining processes and to adapt to international agreements, Trade Unions Act No. 2821 and Collective agreement, Strikes and Lock-out Act No. 2822, which came into force in 1983, were combined, and Trade Unions and Collective Labour Agreements Act No. 6356 was adopted instead in 2012. In fact, the foundations of Act No. 6356, which aim to promote more democratic participation through the recognition of trade union's freedom, are also based on Constitutional amendments and obligations arising from international agreements. In this framework, with the Constitutional amendment of 2001, restrictions on the right to establish trade unions in Turkey were removed, and the way to participatory democracy was opened a bit further by granting civil servants the right to establish a union. In 2010, a provision that

[232] Trade Unions and Collective Labour Agreements Act No. 6356 was accepted on 18/10/2012 and it was published in the Official Gazette dated 07/11/2012 with No. 28460.

[233] Yorgun, S. (2013). Sosyal Politika Açısından 6356 Sayılı Sendikalar ve Toplu İş Sözleşmesi Kanunu. *Çalışma ve Toplum Dergisi, 4*(39), pp. 357-379.

constituted a contradiction to ILO Freedom of Association and Protection of the Right to Organise Convention No. 87, which prevented membership in more than one union, was abolished, and civil servants were also granted the right to collective bargaining agreements[234].

All of these changes, which attempt to guarantee trade union rights, have been effective in the formation of a two-tier structure with Act No. 6356 for employees not to be discriminated against by their employers and by their membership in unions. In this context, employers are prohibited from discriminating in hiring employees and determining their working conditions or termination of their job depending on whether the employees are members of any union. Similarly, dismissal or being subjected to different procedures is also considered discrimination based on whether or not employees participate in trade union activities.

As can be seen, in addition to the protected grounds outlined by Labour Act No. 4857, discrimination relating to trade union membership was also added. In fact, it is necessary to add that trade union assurance provides a higher level of protection by differentiating it from other protected grounds because, in case of termination of employment due to trade union discrimination, it is not necessary for the employee to present any evidence. The employer is obliged to prove that the reason for termination is based on another reason. In addition, in the case of the determination of trade union discrimination, a higher amount (not less than the annual wage of the employee) of union compensation is stipulated without seeking the condition of whether the employee is reinstated, as stated in Labour Act No. 4857. The second layer guarantees trade union freedom within the framework of trade union organizations. In this context, trade unions have an obligation to comply with the principle of equality and prohibition of discrimination among their members. Furthermore, trade unions are obliged to pursue gender equality in their activities.

[234] Civil servants are not granted the right to strike.

4.2.3.4 Turkish Criminal Code No. 5237[235]

Turkish Criminal Code No. 5237 came into force in 2005, when the previous Turkish Criminal Code No. 765 was repealed. Within the scope of this study, two novelties of Code No. 5237 are important. The first is the prohibition of discrimination in the implementation of Code No. 5237 in the context of the principle of equality, while the other is that discrimination is clearly considered a crime for the first time.

The principle of equality in the implementation of Code No. 5237 is defined by the statement in Article 3(2) that:

> In the application of the Code, individuals cannot be discriminated against based on race, language, religion, sect, nationality, colour, sex, political or other opinion, philosophical belief, national or social origin, birth, economic or other social status, and no one can be privileged.

The principle of equality in the implementation of criminal acts may be considered complementary to the principle of legality in crime and punishment. As is known, it is essential that the acts constitute a crime and how they will be punished in return be regulated by the act for the protection of the rights and freedoms of individuals. Ensuring equality and prohibition of different treatment among individuals in the determination of offenses and penalties, which have profound effects on the material and spiritual existence of the individual, means the protection of human dignity as a fundamental value by preventing abuse of criminal act instruments. In this framework, in Article 3(2) of Code No. 5237, while areas related to the prohibition of discrimination are outlined, it is worth noting that more protected grounds are included than in the Constitution with the expression of "or other social status"[236]. While the reason for this regulation is not clearly explained in the justification of this Code, it seems that the reason for pointing out social issues rather than using the

[235] Turkish Criminal Code No. 5237 was accepted on 26/09/2004 and it was published in the Official Gazette dated 12/10/2004 with No. 25611.

[236] Same statements are found in the Article 2(1) of Execution of Penalties and Security Act No. 5275.

expression “or any such grounds” as in other previously mentioned regulations is due to the fact that it provides flexibility to the prohibition of discrimination in the implementation of the criminal act against changes in social life.

It is also possible to verify this opinion from the regulation on the crime of discrimination, which is another novelty of the Code. In Article 122[237], which regulates the crime of discrimination, the Code outlines protected grounds against discrimination as “language, race, nationality, colour, sex, disability, political thought, philosophical belief, religion or sectarian differences”. Although the areas that gave rise to discrimination in Article 122 are listed in the same way as the Constitution, the exclusion of the expression “or any such grounds” creates a closed list[238]. Therefore, although the constitutional principle is known by the legislator, a closed list method is preferred, so that the definition of crime is more clearly defined. Thus, efforts are made not to move away from the principle of legality in crime and punishment. In the content of the provision on the crime of discrimination:

> (1) Any person who makes discrimination between individuals because of their racial, lingual, religious, sexual, political, philosophical belief or opinion, or for being supporters of different sects and therefore; a) Prevents sale, transfer of movable or immovable property, or performance of a service, or benefiting from a service, or bounds employment or unemployment of a person to above listed reasons, b) Refuses to deliver nutriments or to render a public service, c) Prevents a person to perform an ordinary economical activity, is sentenced to imprisonment from six months to one year or imposed punitive fine.

Therefore, these optional acts seem to be, in general, of an economic character. It is noteworthy that it is foreseen that a person could be discriminated against in the course of her/his being hired, but not during her/his dismissal or during the

[237] Although, the title of the Article was “Discrimination” when the Code No. 5237 was first enacted, it was changed to “Hate and discrimination” with an amendment in 2014.

[238] Despite the fact that the expression “or any such grounds” was included in the first written form of the article of the Code No. 5237, this expression was removed from the text of the article with the amendment made in 2014, taking into consideration the decision of the Constitutional Court emphasizing the principles of “certainty” and “clarity” of the Criminal Code. AYM, K.T. 27/03/2014, E.S. 2013/99, K.S. 2014/61.

employment contract. However, according to Labour Act No. 4857, the employer's prohibition of discrimination begins after the employment relationship is established. Another provision that should be considered in this regard is Article 15(3) of Misdemeanour Act No. 5326. According to this article, if an act is defined as both a misdemeanour and a crime, sanction can only be applied for the crime[239]. Therefore, if a person is prevented from being hired due to discrimination, a penalty will be imposed in accordance with the provisions of Criminal Code No. 5237; however, if discrimination occurs following the establishment of an employment contract, the provisions of compensation of the Labour Act will be implemented. Therefore, in the case of sanctions on discrimination, both regulations are complementary to each other. In fact, in cases of discriminatory behaviour during the recruitment process, imprisonment is stipulated to further strengthen the right to work. This is because discrimination in working life is manifested primarily during job applications, and it affects the participation of individuals in economic life in the first place. In addition, such an attitude to prevent discriminatory behaviour with stronger measures before the employment relationship starts, also guarantees the rights of individuals within the scope of social insurance. The main reason for this is that access to social insurance is dependent on the fact that they can enter the scope of the definition of insured, and this can be achieved through the establishment of an employment relationship in a legal sense.

Finally, sexual harassment is considered a crime with Article 105 of Code No. 5237. According to the relevant provision, a prison sentence of up to two years or a judicial fine will be imposed upon the complaint of the victim. However, if the crime of sexual harassment is carried out to benefit from the convenience of working in the same workplace, the punishment would be increased by half. In fact, by stating that if the victim had to quit her/his job due to sexual harassment, imprisonment cannot be less than one year, thus the punishment for sexual harassment at work is aggravated.

[239] Yenidünya, C. (2006). 5237 sayılı Türk Ceza Kanunu'nda Ayrımcılık Suçu. *Çalışma ve Toplum Ekonomi ve Hukuk Dergisi, 11*, pp. 97-115.

As discussed above, several amendments have been made for ensuring equality and preventing discrimination in Turkey since the beginning of the 2000s within the framework of the EU harmonization process. Moreover, all of these improvement efforts aimed towards these regulations have led to the revision of other national regulations, in particular working life. In the following chapter, the evaluation of statutory social security legislation of Turkey and its alignment within the framework of the EU non-discrimination principle is assessed.

CHAPTER 5

ALIGNING STATUTORY SOCIAL SECURITY SCHEMES IN TURKEY WITH THE EU NON-DISCRIMINATION PRINCIPLE

Statutory social security schemes applicable in Turkey are a result of reform processes that aimed to create a norm and standard unity in the rights and obligations of workers, to bring health care services to the whole population and, most importantly, to establish the financial sustainability of the system. For this reason, in this Chapter, Social Security Reform, instituted in 2008, is briefly examined, then the enactment process of Social Insurances and General Health Insurance Act No. 5510 is discussed. After that, statutory social security schemes are screened under three headings. The first heading is devoted to social insurance schemes that aim to compensate increases of expenses or the decreases of income of individuals who may encounter social risks during their working life via cash benefits. The second is the general health insurance scheme, which is compulsory for anyone who resides in Turkey and provides for the medical needs of individuals through health benefits in kind. Under the third heading, the unemployment insurance provisions within the scope of Unemployment Act No. 4447 are examined. Within this context, individuals who are under the scope of social security schemes and the eligibility conditions to benefit from insurance schemes are explained in detail. Moreover, considering the purpose of this thesis regarding statutory social security provisions; differences in practices on the grounds of nationality, gender, race or ethnic origin, religion or belief, disability, age, or sexual orientation are closely examined. In this way, the focus is on alignment proposals to amend several provisions of statutory social security legislations of Turkey for the realization of EU non-discrimination principle.

5.1 The Dynamics behind the Social Security Reform

In the last decade of the previous century, many countries around the world enacted radical reforms in their social security systems to adapt to transformations in demographics, family responsibilities, the needs of society, the emergence of new employment styles, and, most importantly, to compensate for serious financial burdens on these systems caused by the aforementioned changes.

Similarly, discussions regarding the restructuring of social security systems in Turkey also began during the early 1990s. The World Bank (WB) and the International Monetary Fund (IMF) voiced criticisms, for the first time, regarding the reduction of increasing deficits of the social security system, accrued as a result of populist policies, and pushed for the realization of radical reforms. The main concern of these criticisms was that deficit of the social security system had been increasing for years and how it had exacerbated the general public sector deficit[240]. According to WB statistics, the deficit between pensions and contributions by the three institutions was 0.8% of GDP during 1992, and this climbed to 1.5% in 1995 and to 2.3% in 1998. Moreover, the total social security deficit to GDP ratio increased to 2.7% during 1998, which was larger than one third of the total public budget deficit[241]. ILO Report, which is one of the outputs of the loan agreement known as the Privatization Implementation Assistance and Social Safety Net Project[242] signed between the Turkish Government and the WB on 05/05/1994, analysed the current retirement system and suggested four different reform alternatives, including the

[240] Yakut-Cakar, B. (2007). Turkey. In B. Deacon, & P. Stubbs, *Social policy and International Interventions in South East Europe* (pp. 103-129). Cheltenham: Edward Elgar.

[241] OECD. (1999). *OECD Economic Surveys: Turkey.* Paris: OECD Publication Service. pp. 73-110. Retrieved November 2018, from https://read.oecd-ilibrary.org/economics/oecd-economic-surveys-turkey-1999_eco_surveys-tur-1999-en#page72

[242] Privatization Implementation Assistance and Social Safety Net Project - Japanese Grant Agreement Retrieved November 2018, from http://documents.worldbank.org/curated/en/792481468104366851/pdf/Loan-3728-Turkey-Privatization-Implementation-Assistance-And-Social-Safety-Net-Project-Loan-Agreement.pdf

establishment of private retirement funds[243]. Within the framework of the ILO Report, Act No. 4447 dated 25/08/1999, emergency measures were enacted and the first phase of the social security reform was applied[244]. In this context, a transitional period was prescribed to ensure the financial sustainability of the social security system and important provisions were adopted for individuals who were currently insured; such as increasing the retirement age of women and men from 50 and 55 to 58 and 60 respectively, extending waiting periods for old-age pensions (number of premium days and insurance period), changing the rules regarding the calculation of pensions, and enacting an unemployment insurance benefit.

However, as mentioned before, the changes of 1999 were only emergency measures and did not have the necessary depth. For this reason, the transfers made from the State budget to social security institutions showed a decrease in the year 2000[245], but continued to increase over the next years, revealing the need for new reforms. That the increase of retirement age to be applied to current insured persons was spread via transitional stages over the next twenty years is a clear indication of the reality that these changes would not decrease expenses in near terms. This is because current employees would not be significantly affected by the increment of the retirement age and continue to be entitled according to previous conditions. Therefore, the actual impact of the 1999 reform would only be visible twenty years after the regulation entry into force.

At this point, criticisms regarding the social security system were not limited to international credit institutions such as the IMF or WB. It is well known that Turkey gained candidacy status at the EU Helsinki Summit of 1999 and accession

[243] OECD. (1999). pp. 148-150.

[244] World Bank. (2005). *Turkey - The World Bank in Turkey, 1993-2004: country assistance evaluation.* Washington, DC: World Bank. Retrieved December 2018, from http://documents.worldbank.org/curated/en/727811468120267453/Turkey-The-World-Bank-in-Turkey-1993-2004-country-assistance-evaluation

[245] Brook, A. M., & Whitehouse, E. (2006). *The Turkish pension system: Further reforms to help solve the informality problem.* OECD Publishing. pp. 7.

negotiations began in 2005. In this regard, the social security system vulnerabilities that endanger the financial sustainability of Turkey now started to appear in EU documents. Progress Reports of Turkey emphasize in general three main issues regarding the social security system from 1999 to 2008: the urgency of controlling the fiscal deficit by reform measures, administrative and management problems under different institutional frameworks, and the non-universal character of social protection health-care and social assistance. Furthermore, four Accession Partnership documents prepared for Turkey in 2001, 2003, 2006 and 2008 addressed the priority of social security reform such as to develop a financially sustainable social protection system and to strengthen the administrative structures for the coordination of social security schemes[246].

Social security reform studies were accelerated due to the EU accession process and announced to the public as "White Paper" on July 2004, after consulting various social parties, public institutions and academicians[247]. In this context, components of the reform were arranged under four main headings. The first of these components is the creation of the general health insurance scheme, which finances the provision of equitable, equal, protective and curative quality healthcare services to the whole population. The second is the establishment of an insurance regime with short-term and long-term insurance branches. The third is to consolidate social assistances, which were in a dispersed structure, and provide them to all vulnerable groups based on objective utilization criteria [248] . The fourth and final component is the establishment of a new institution that would enable the arrangement of the abovementioned components in a modern and effective manner.

[246] Duyulmuş, C. U. (2011). Social Security Reform in Turkey: Different usages of Europe in shaping the national welfare reform. In P. R. Graziano, S. Jacquot, & B. Palier, *The EU and the Domestic Politics of Welfare State Reforms* (pp. 280-315). London: Palgrave Macmillan.

[247] Sosyal Güvenlik Kurumu. (2007). *Sosyal Güvenlik Reformu: Uygulama Öncesi Yeni Yaklaşım.* Ankara. pp.45-46.

[248] The third component of Social Security Reform regarding social assistance has not yet been applied.

As a result, the Draft Act on Social Security and General Health Insurance and the Draft Act on Social Security Institution were referred to the GNAT on 04/04/2005 and 08/12/2005 respectively. Social Security Institution Act No. 5502 dated 20/04/2006, which combines three previous social security institutions (the Retirement Fund of the Republic of Turkey, the Social Insurance Institution (SSK) and the Organization of Self-Employed Workers (BAĞ-KUR)) under the same roof and which is responsible for the management of arrangements related to social insurance schemes, entered into force and the SGK was established. In addition to that, Social Insurances and General Health Insurance Act No. 5510, which aimed to create a norm and standard unity in the rights and obligations of workers who are in different insurance statuses and also to provide health benefits in kind the whole population with equal and improved standards, was published on 16/06/2006. However, due to the Constitutional Court decision dated 15/12/2006, some of its provisions regarding civil servants were cancelled. After that, Social Insurances and General Health Insurance Act No. 5510 was amended and entered into force on 01/10/2008.

5.2 Statutory Social Security Schemes in Turkey

5.2.1 Social Insurance Schemes

Within the scope of the statutory social security schemes applicable in Turkey, social insurance benefits are provided to compensate for increased expenses or decreases in income of individuals who may encounter social risks during their working life. These social risks are distinguished into short-term and long-term insurances branches. Social insurance benefits arranged within the scope of short-term insurance branches are designed regarding social risks that individuals might encounter during any stage of their working life, thus long-term waiting periods are not required in order for individuals to benefit from them. In contrast, the long-term insurance branches cover social risks that usually end with the termination of working life, and

in order to benefit from these, a long-term insurance period is needed. In this framework, the social insurance granted under Act No. 5510 are as follows: accidents at work and occupational diseases insurance, sickness insurance and maternity insurance in regards to short-term security branches and old-age insurance, invalidity insurance, and survivor's insurance in terms of long-term insurance branches[249].

5.2.1.1 Access to Social Insurance Schemes

Under the personal scope of the social insurance schemes, there are two distinct groups. These groups are active insured persons and passive insured persons. Active insured persons are employees, self-employed persons and civil servants, and voluntary insured persons and in order to be eligible for the benefits of social insurance schemes, they actively pay premiums to the system.

Active insured persons who are dependent on their employer under an employment contract and whose wages are paid in return for their work are considered to have the status of employee (Article 4(1)(a)). Additionally, the following are also considered employees:

- Presidents and board members of labour unions and confederations (including union branch directors) which are organized to improve working conditions of employees,
- Artists, intellectuals, and authors who are employed by employers,
- Foreign nationals who are subject to an employment contract (excluding the citizens of countries with which international social security contracts are entered),
- Guardians assigned to protect areas, vehicles, water and farm roads related to agricultural activities (according to Act. 4081),
- Women who are sex workers (according to Act. 1593),

[249] There is no general scheme in Turkey regarding family benefits.

- Individuals who are tasked as qualified instructors in courses organized by the Ministry of National Education,
- Educators who provide education in public administrations who are paid per course and,
- Individuals who are benefiting from Public Work Programs of the Turkish Employment Agency (İŞKUR).

However, those listed below are considered to have a self-employed status within the scope of Act No. 5510 (Article 4(1)(b)):

- Income tax payers due to their commercial or self-employed earnings,
- Traders and artisans exempt from income tax,
- Company partners[250],
- Individuals engaged in agricultural activities,
- State officials who are tasked with the administration of villages (village governors)[251],
- Administrators of parishes[252] that are structured as the smallest administrative units within municipal boundaries and
- Jockeys and trainers.

Finally, in public administrations, civil servants are considered those who provide essential and continuous services and, despite being employed with an employment contract, those who are not accepted under employee status by the laws that regulate

[250] Shareholders of joint-stock companies, members of the board of directors, shareholder partners of capital companies divided by shares, and other partners of all companies and equipment subsidiaries.

[251] According to Village Affairs Law Act No. 442, villages are the smallest of the local administrations in Turkey, which are established in dwelling units with populations less than 2000 as a separate legal entity. Village Affairs Law Act. 442 was accepted on 18/03/1924 and published in the Official Gazette dated 07/04/1924 with No. 68.

[252] Municipal Law Act No. 5393 was accepted on 05/05/2005 and published on the Official Gazette dated 13/07/2005 with No. 25874.

their working conditions (Article 4(1)(c))[253]. Moreover, the following are also considered civil servants:

- Presidents and board members of unions and confederations (including branch directors) which are organized to improve working conditions of civil servants,
- The Prime Minister, vice president of the Republic, ministers, members of the GNAT, members of the executive body elected by the municipal mayors of the municipalities,
- Military school students who have graduated from their schools and started their duty, and
- Police school students who have graduated from their schools and started their duty.

In addition to these three fundamental forms of employment, within the context of Article 5, different forms of employment are considered to be special and are subject to certain insurance branches. In this framework, short-term and long-term insurance branches were not subjected as a whole and which of the seven different social insurances to be applied within the scope of Act No. 5510 are determined regarding their working conditions. The forms considered in this context include: convicts and detainees who work in prisons, students who are receiving occupational education or work part-time or as interns, war veterans and disabled persons who continue working despite receiving duty invalidity pension, individuals who participate in İŞKUR courses, and Turkish employees who are sent to work abroad by their employers and undertake works in countries not having a social security contract with Turkey. In addition to these, employees who work in domestic services

[253] After Social Security Reform in Turkey, a dual regime was created in the rights and obligations of civil servants regarding social insurance. In this context, the rights and obligations of those insured as civil servants for the first time after 01/10/2008 started to be governed within the scope of Act No. 5510. On the other hand, rights and obligations of those employed as civil servants before 01/10/2008 are still based on the Retirement Fund of the Republic of Turkey Act No. 5434 due to Provisional Article 4 of Act No. 5510 and due to protect losses of earned rights of civil servants. Due to the limitations of this study, the regulations of Act No. 5434 are not included. For this reason, in the study, the term *civil servant* will be used for those who started to work as a civil servant after 01/10/2008.

(Additional Article 9) and village guards (Additional Article 15) were included within the scope of statutory social insurance in 2014 and 2017 respectively[254].

Although the personal scope of statutory social insurance covers the individuals listed above, some individuals are excluded from the scope of Act No. 5510 (Article 6). In this context, the following individuals are not deemed to be within the scope of statutory social insurance schemes:

- An employer's spouse who works free of charge at the workplace of the employer,
- Relatives up to the third degree who reside in the same residence and participate in the works carried out at that residence without contribution from the outside,
- Those who work less than ten days a month in domestic services and do not request to be insured under long-term insurance branches and general health insurance,
- Those who are performing compulsory military service,
- Employees who are sent to Turkey for less than three months by companies with headquarters in foreign countries,
- Self-employed persons who reside in a foreign country and are protected under social insurance schemes of the concerned country.
- Students who work in applicative construction and production works carried out during their higher education,
- Patients or disabled individuals being trained to work or rehabilitated by health care service providers,
- Self-employed workers and civil servants who are below the age of 18,
- Seasonal agricultural or forestry workers who do not request to be insured (except public administrations),
- Self-employed workers involved in agricultural activities who have documented that their net monthly income is below gross minimum wage,

[254] Except for these, seasonal workers in forestry and agricultural works (except in public administrations) (Additional Article 5), workers who work in public transportation vehicles in the employment of one or more employers for less than ten days a month with a partial labour contract and artists, intellectuals and authors can be subjected to social insurance (Additional Article 6) according to their request.

- Self-employed workers involved in agricultural activities who are above the age of 65 years and do not request to be insured,
- Self-employed workers who are exempt from income tax and have documented that their net monthly income is below gross minimum wage,
- Turkish citizens who work in foreign agencies of public administrations under a contract and have permanent residence or citizenship in the country concerned and certify that they protected under the social insurance schemes of the concerned country,
- Turkish citizens who work in foreign agencies of public administrations under a contract and are insured according to social security agreements of the related country with Turkey and
- Individuals who are temporarily tasked within the context of youth and sports activities,
- Self-employed workers who are receiving old-age pensions and are carrying out economic activities, upon their request and without the discontinuation of their pension in question.

Therefore, whether or not a person is within the scope of statutory social insurance schemes is primarily dependent on whether they are considered to be employees, self-employed persons, or civil servants (Articles 4 and 5). Then, regardless of the general rule above, exceptions should be taken into account (Article 6) and individuals with special circumstances should be considered out of the scope of statutory social insurance schemes. Additionally, those who do not actively participate in working life have the opportunity to benefit from social insurance schemes upon their request. In this context, if individuals are not considered obligatory or voluntary insureds or if they are working for less than 30 days per month due to their employment contract and who are over the age of 18 residing in Turkey and are not entitled to income/pension due to their own insurance can benefit from the provisions of voluntary insurance (Article 50).

Even though personal and material scopes of social security insurance are as indicated above, the personal and material scopes of Act No. 5510 do not wholly overlap with one another. The first discrepancy is directed towards civil servants. This is because regulations regarding short-term insurance branches are directed only to employees and the self-employed; civil servants are not included within the scope of short-term insurance[255]. As mentioned above, Article 5 envisages different compulsory insurance practices for different styles of employment. In this context, the personal scopes, insurance statuses and social insurance benefits regarding compulsory social insurance schemes in Turkey are summarized with Table 5.1.

In this respect, although the Social Security Reform in 2008 attempted to create a unity of standards and norms between insured persons, due to circumstances of employment types, there are differences in social security applications. However, it is not the correct approach to view these differences from a general perspective and consider them as inequalities or discrimination. This is because, as it is very well known, equality is subject to the same procedures before law for individuals with equal circumstances. Discrimination, however, emerges from taking advantage of a right, freedom or practice by an individual or group at the same status less than others or not being able to take advantage from said rights at all due to reasons such as race, colour, language, religion, gender, or nationality without being based on objective or justified reasons. Therefore, the provision of different arrangements for different styles of employment does not equate to inequality or discrimination. Additionally, states have a wide range of authority in determining the scope of their social insurance legislation based on their employment and social policy goals, and budgetary potentials.

[255] On the first publication of Act No. 5510 dated 16/06/2006, civil servants were considered to be under short-term insurance branches. However, after the decision of the Constitutional Court dated 15/12/2006, some articles of Act No. 5510 regarding civil servants were annulled due to Articles 2, 10, 128 of the Constitution, which resulted in the removal of civil servants from short-term insurance branches. Additionally, work accident, occupational disease, sickness and maternity leaves of civil servants are determined according to Civil Servants Act No. 657 and their pays for the leave in question are protected and paid for by the Institutions that they are employed under (Articles 104 and 105 of Civil Servants Act No. 657).

Table 5.1 Personal and Material Scope of Compulsory Insurances

	Status	Short-term Insurance Benefits				Long-term Insurance Benefits		
		Accidents at Work	Occup. Diseases	Sickness	Maternity	Old-Age	Invalidity	Survivor
Employees	4(a)	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Self-Employed Persons	4(b)	Yes (excep.)	Yes (excep.)	n/a	Yes (excep.)	Yes	Yes	Yes
Civil Servants	4(c)	n/a	n/a	n/a	n/a	Yes	Yes	Yes
Convicts and Detainees who Work in Prisons	4(a)	Yes	Yes	n/a	Yes	n/a	n/a	n/a
Students Receiving Occupational Education	4(a)	Yes	Yes	Yes	n/a	n/a	n/a	n/a
Students who Work Part-Time or as Interns	4(a)	Yes	Yes	n/a	n/a	n/a	n/a	n/a
Employees Receiving Duty Invalidity Pension	4(a)	Yes	Yes	n/a	n/a	On Request	On Request	On Request
Self-employed Persons Receiving Duty Invalidity Pension	4(b)	Yes	Yes	n/a	n/a	On Request	On Request	On Request
Civil Servants Receiving Duty Invalidity Pension	4(c)	n/a	n/a	n/a	n/a	Yes	Yes	Yes
Attendees of İŞKUR Courses	4(a)	Yes	Yes	n/a	n/a	n/a	n/a	n/a
Turkish Employees Sent Abroad	4(a)	Yes	Yes	Yes	Yes	On Request	On Request	On Request
Employees Working in Domestic Services (<10 days)	4(a)	Yes	Yes	n/a	n/a	On Request	On Request	On Request
Employees Working in Domestic Services (=> 10 days)	4(a)	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Village Guards	4(a)	n/a	n/a	n/a	n/a	Yes	Yes	Yes

The second group included within the scope of the statutory social insurance scheme is passive insured persons who have gained the right to benefit from income through short-term insurance branches or pensions through long-term insurance branches based on their own previous insured status or due to the death of an insured. Therefore, passive insured persons are individuals who are being paid income/pension, and right holders of the insureds'. In this context, the active insured persons are the primary financiers of the system paying social insurance premiums, and passive insured persons are the beneficiaries of the system. Thus, social insurances in Turkey are based on the pay-as-you-go schemes. Moreover, pensions are paid on a defined-benefit basis[256].

5.2.1.2 Aligning Access to Social Insurance Schemes with the EU Non-Discrimination Principle

It could be said that the personal scope of social insurance schemes being implemented in Turkey are organized in a broad framework. However, examination of the provisions regulating access to social insurance schemes reveals that some of them may constitute problems in regards to the EU non-discrimination and equality principle. Evaluations in this context are given below.

[256] The most commonly used methods of financing in social security systems are pay-as-you-go schemes and funding. In the pay-as-you-go method, the premiums collected from active insured persons are used to cover the expenses of passive insured persons. Therefore, since revenues and expenses are met, no fund is formed. In the funding method, premiums are collected in a fund and income is generated through the use of market instruments. When risks are realized, the benefits to be provided are covered by the premiums paid and the revenues obtained. In the funding method, the premiums of all insured persons are collected in a common pool or held in a separate account for each. In the determination of the benefits to be provided by the social security systems, the defined-benefit basis method or defined-contribution basis method are used. On the basis of the defined-benefit, it is guaranteed that a certain income will be provided to the insureds. On the other hand, on the basis of the defined-contribution, a separate account is opened for each insured person and payments are made to the individuals with the incomes obtained from contributions. Therefore, the defined contribution basis is not a guarantee of income and the investment risk belongs to the insureds (World Bank. (2005). *Transition : Paying for a Shift from Pay-as-You-Go Financing to Funded Pensions.* Washington, DC: World Bank. Retrieved February 2019, from https://openknowledge.worldbank.org/handle/10986/11242).

Nationality: When the provisions regulating access into social insurance schemes are examine within the scope of Regulation 883/2004/EC, it is seen that foreign nationals who are subject to an employment contract are counted and clearly considered to under the status of employee. In addition, tax liability is the reference point for determining self-employed persons. In this context, Personal Income Tax Act No. 193, which regulates tax liability and tradespeople's exemptions, does not prescribe different provisions for foreign nationals[257]. For this reason, in the provisions regulating access of employees or self-employed persons into the scope of the social insurance scheme, differences on the grounds of nationality are not stipulated and foreign nationals are considered to be insured.

However, provision for implementation of certain insurance branches to Turkish employees, who are sent to work abroad by their employers and undertake works in countries not having social security contracts with Turkey (Article 5(g)) creates some doubts about prohibition on nationality discriminations. First of all, there is a distinction based on nationality for employees working abroad. Secondly, although the provision in question is reminiscent of workers posted abroad as mentioned under Article 12(1) of Regulation 883/2004/EC, this employment style does not prescribe any temporal limitations, which may present a problem regarding aligning to the EU acquis. This is because, due to the provisions Article 12(1) of Regulation 883/2004/EC, workers posted abroad shall continue to be subject to the legislation of the country of origin for 24 months at most. After this period, the legislation of the posted country should be applied[258]. Apart from these, there are differences in

[257] Personal Income Tax Act No. 193 was accepted on 31/12/1960 and published in the Official Gazette dated 06/01/1961 with No. 68 (For further information: The Republic of Turkey Ministry of Finance Revenue Administration. (2016). *Turkish Taxation System.* Ankara. pp. 3-14. Retrieved February 2019, from http://www.gib.gov.tr/sites/default/files/fileadmin/taxation_system2016.pdf).

[258] Article 12(1) of Regulation 883/2004/EC: "1) A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he is not sent to replace another person. …"

premium obligations for employees according to Act No. 5510. In that context, long-term insurance premiums are not paid for Turkish employees who are sent to work abroad by their employers and a ceiling premium rate is applied threefold rather than 7.5 (Article 82). It is obvious that the mentioned provision aims to encourage employers to do business abroad and to ensure a competitive advantage. However, if an employer would like to send an employee abroad, regarding the related provision, a Turkish employee would be preferable rather than an employee having foreign nationality, or these employers should not recruit foreign employees while they are in that business sector. Lastly, it is obvious that Turkish employers benefit from the provisions of Article 5(g), rather than employers having foreign nationality.

Gender: Within the personal scope of Act No. 5510, the only provision containing direct discrimination is towards sex workers. Due to Article 4(2)(e), it is compulsory for female sex workers to be insured, whereas male sex workers cannot benefit social insurance like female sex workers. As male sex workers are not counted under the personal scope of compulsory insurance provisions, they can only access coverage from the social insurance scheme via voluntary insurance. In that case, for example, the premium obligations of male sex workers will be higher than female sex workers and they have to wait five more years to benefit from old-age pension. It is probable that the reason for this deficiency is caused by the fact that Public Hygiene Act No. 1593, which defines sex workers, has not undergone a significant amendment since its adoption in 1930[259]. In addition to that, it may that males working as prostitutes are ignored or marginalized in Turkish society. In this context, the mentioned provision should be revised according to the terms of Article 4(1) of Directive 79/7/EEC, in order not to cause direct discrimination against male sex workers[260].

[259] Public Hygiene Act No. 1593 was accepted on 24/4/1930 and published in the Official Gazette dated 06/05/1930 with No. 1489.

[260] Article 4(1) of Directive 79/7/EEC: "1) The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns : - the scope of the schemes and the conditions of access thereto, …."

Before evaluating provisions that may cause discrimination on the grounds of gender, it is worth mentioning the 2014 amendment made to workers in domestic services as this change is a point of progress on the grounds of gender that was achieved in recent years[261]. There is no data on the number and gender distribution of employees who are active in domestic services. However, statistics from Turkish Statistical Institute (TURKSTAT), which explain why individuals do not participate in the workforce, may provide guidance for an evaluation in this context. According to 2018 TURKSTAT statistics, 55% of women surveyed stated that they were not involved in the workforce because they were engaged in domestic duties. On the other hand, no male respondents stipulated this reason for not being in the workforce during the entirety of the period between 2014 and 2017[262]. Therefore, it can be said that domestic services are provided mostly by women. Per Act No. 5510, enacted on 01/10/2008, temporary domestic services employees were excluded from the scope of Act No. 5510. Likewise temporary domestic services are excluded from the scope of Article 4 of Labour Act No. 4857. Moreover, *temporary* is not defined in any of the mentioned Acts. In the following period, however, exclusion of temporary domestic services and ambiguity of the term temporary created some serious doubts regarding the personal scope of Act No. 5510 because this ambiguity caused all female employees in domestic services to be excluded from coverage under the statutory social insurance scheme, whether they work temporarily or permanently. In that context, with the amendments made in 2014 towards workers in domestic services, a dual regime is created in terms of duration of work done in domestic services. In this regard, employees who work more than ten days per month in domestic service have to be insured under the scope of short and long-term insurance branches, while those who work less than ten days shall be insured against accidents at work and occupational diseases risks. Additionally, if the employees who work less than ten days in a month would like to benefit from other social insurance benefits, especially old-age pension, they can consider becoming insured by paying

[261] Article 9 of Act No. 5510 Additional, 10/9/2014-6552/55.

[262] TURKSTAT. (2018). Reasons of not being in labour force by years and sex.

their own premiums upon their request. Therefore, employees who work in domestic services according to Article 6(1)(c), are defined as individuals who work less than 10 days and do not request to be insured along with the scope of long-term insurance branches.

A provision that may cause indirect discrimination on the grounds of gender is Article 6(1)(a), which states that an employer's spouse working free of charge in the business place of the employer is not covered under the scope of statutory social security schemes. According to 2017 SGK statistics, 80% of self-employed workers who are considered to be employers due to their commercial, agricultural and self-employment earnings are men, while 20% are women[263]. In this context, it could be said that female workers who support the activities of their spouses would be affected by the provision in question. On the other hand, women who are within the aforementioned group could benefit from general health insurance and old-age, invalidity, and survivor's insurance by paying their own premiums under the provisions of voluntary insurance (Article 50). However, the provision of Article 8 of Directive 2010/41/EU requires that, on a mandatory or voluntary insurance basis, national social security systems should provide at least fourteen weeks of maternity allowance for female spouses of self-employed workers, due to pregnancy or motherhood[264]. Despite this, since voluntary insurance provisions that are in effect in Turkey do not provide temporary incapacity allowance, such as maternity allowance, there is a need for revisions that will ensure the alignment of Article 6(1)(a) of Act No. 5510 to Article 8 of Directive 2010/41/EU.

[263] Sosyal Güvenlik Kurumu. (2017). *Statistical Yearbook.* Distribution of Insured Person by Gender and Provinces (Under Article 4(1)(b) of Act 5510. Retrieved May 2019, from http://www.sgk.gov.tr/wps/portal/sgk/tr/kurumsal/istatistik/sgk_istatistik_yilliklari

[264] Article 8 of Directive 2010/41/EU: "1) The MS shall take the necessary measures to ensure that female self-employed workers and female spouses and life partners referred to in Article 2 may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks. 2) The MS may decide whether the maternity allowance referred to in paragraph 1 is granted on a mandatory or voluntary basis. …"

Another provision that may cause gender-based discrimination is Article 6(1)(b). According to the provision in question, relatives up to the third degree who live in the same residence and are employed in the work carried out in the residence where they live, without contributions from the outside, are excluded within the scope of insurance. In this context, although there are no statistics available to fully reflect the situation, TURKSTAT statistics for 2018 indicate that[265], among all employed individuals, 10.48% are employed as unpaid family workers. 29% of this figure is male, while 71% is female. On the other hand, the percentage of wage-workers within total employment is 68% while self-employed independent worker's rate is 4.46%[266]. Therefore, it could be said that the presence of unpaid family workers in working life is significant and women are the most likely to be affected demographic of these provisions. On the other hand, it would be wrong to say that social insurance schemes are fully closed-off to such individuals. Upon their request, those individuals can benefit from long-term insurance branches through 4(b) insured status or, in case they are employed as seasonal workers in the agriculture sector, they can benefit from insurance for accidents at work, occupational diseases insurance and long-term insurance schemes, within the scope of 4(a) status. (Additional Article 5). However, even though they are in the same circumstances, they will be subjected to different provisions due to the difference in their insurance statuses (for example, if they request to be insured in 4(b) status, they have to pay premiums for five more years in order to receive old-age pension). Additionally, if the activity is carried out with relatives up to third degree in a different place from the residence they live or if the activity is performed with relatives above the third degree in the same residence where they live, these individuals shall be insured under the scope of compulsory social insurances. According to EU regulation, MS have the authority to decide which groups will be covered under the statutory social insurance

[265] According to TURKSTAT, "unpaid family workers are persons who work in enterprises run (owned) by one of the members of the same household, who have no partnership status in the enterprise and who are not paid in return for their work. In some cases, an unpaid family worker might have worked in a workplace owned by another relative who does not live in the same household."

[266] TURKSTAT. (2018). Employment status by years and sex.

schemes. However, within the framework of these explanations, if the provision of Article 6(1)(b) cannot be defended within the context of social policy goals, it may be considered to be in contradiction with the prohibition of gender discrimination according to Article 4(1) of Directive 79/7/EEC[267] and principle of general equality in Article 2 TEU[268]. For this reason, the provision needs to be revised and, as with Article 6(1)(ı) or Article 6(1)(k), ensuring these individuals can benefit from voluntary insurance based on their income will be a more inclusive approach[269].

Lastly, considering that individuals who are temporarily tasked within the context of youth and sports activities[270] are not deem to be insured, like domestic service workers mentioned above, there may be a need for a revision on the provision, as the term temporary is not specified. The justification of this provision states that these activities are generally carried out by public or private sector employees on a voluntary basis for short durations, there are, on average, 300.000 activities each year and at least five personnel are tasked for each activity. In this context, it can be argued that these activities are directed to a marginal group. Additionally, ECJ consistently holds that MS have broad authority in choosing the measures to attain social and employment policy objectives which are appropriate and necessary. And adds that if a provision is necessary for a MS to reach its social policy goals which, although formulated in neutral terms, works to the disadvantage of far more women than men, the provision will not be considered to have gender-based

[267] For Article 4(1) of Directive 79/7/EEC, see footnote 260.

[268] Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[269] EU Twinning Project. (2008). *Promoting Gender Equality in Working Life: Report on the Social Insurance and Universal Health Insurance Law No. 5510.* (TR/2008/IB/SO/01). pp. 31-32. Retrieved May 2018, from https://bim.lbg.ac.at/sites/files/bim/3_Social_Security_Law_EN.pdf

[270] Likewise, temporary youth and sports activities are excluded from the scope of Article 4 of Labour Act No. 4857.

discrimination[271]. In this regard, temporary activities made for youth and sports are on the marginal scale and if the provision on exclusion of individuals who do those kinds of activities from the scope of social insurance scheme is based on legitimate and objective social policy aims, it can be claimed that it does not constitute a basis for discrimination.

Other Grounds: Discrimination on the grounds of racial or ethnic origin is prohibited in Directive 2000/43/EC, while discrimination based on religion or belief, disability, age or sexual orientation is prohibited within the scope of Directive 2000/78/EC. Even though Directive 2000/43/EC prohibits discrimination on the grounds of racial or ethnic origin regarding social insurance schemes, social insurance schemes are excluded from the material scope of Directive 2000/78/EC. For this reason, only Directive 2000/43/EC was considered within the scope of this study and it is considered that the personal scope of the Act No. 5510 is in compliance with Directive 2000/43/EC.

Lastly, within the scope of this study, discriminatory differences on the grounds of nationality, gender or other protected grounds between spouses and parents who are right holders of the social insureds are not examined. However, it should be underlined that gender differences play an important role on the rights of children who are right holders of the social insureds. However, since conditions to become right holders, amount of benefits, and the duration of payments are presented under the heading 5.2.1.5.3 Survivor Pension, explanations regarding the differences on the rights of children are not included in this section in order to avoid repetition.

[271] Case C-226/91 Molenbroek v. Sodale Verzekeringsbank [1992] ECR I-5943., Case C-343/92 M. A. De Weerd, née Roks and others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others. [1994] ECR I-571., and Case C-444/93 Ursula Megner and Hildegard Scheffel v. Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz [1995] ECR I- 4741.

5.2.1.3 Short-Term Insurance Benefits

Under short-term insurance branches, insureds are protected against accidents at work, occupational diseases, sickness, and maternity risks. In this context, short-term insurance branches consist of four insurance elements; accidents at work insurance, occupational diseases insurance, sickness insurance, and maternity insurance. The premium for short-term insurance is 2% of the monthly earnings of the employee[272] and the total amount is paid by employers. Short-term insurance premiums are applied at the same rate to self-employed workers, but in these cases the premium is paid by the self-employed workers. Benefits granted under short-term insurance branches are;

- Temporary incapacity allowance
- Permanent incapacity income
- Survivor income
- Birth grant
- Marriage bonus
- Funeral payment

Benefits granted under the scope of short-term insurance branches and their eligibility conditions are detailed under the following headings.

5.2.1.3.1 Temporary Incapacity Allowance

The basic benefit provided in cash via short-term insurance branches is temporary incapacity allowance. As a general condition of all benefits within the scope of Act No. 5510, to benefit from incapacity allowance, it is sufficient that the employee is notified as an insured even if their short-term insurance premium is not paid by the employer. Self-employed persons, on the other hand, must not have any unpaid

[272] The short-term insurance branch premium is applied as 1% for vocational education students, students in an internship, students who work part-time jobs, and individuals attending İŞKUR courses.

insurance premiums or premium related debts in order to benefit from temporary incapacity allowance.

Additionally, although temporary incapacity allowance is provided to employees in regards to all risks included within the scope of short-term insurance branches, the situation is different and more complicated for self-employed workers. The first major difference is that even though the same rate (2%) of short-term insurance premium is applied to self-employed workers, temporary incapacity allowance is not provided within the scope of sickness insurance. Moreover, employees are paid temporary incapacity allowance for both their inpatient and outpatient treatments. On the other hand, self-employed workers only receive temporary incapacity allowance within the scope of accidents at work and occupational diseases insurances for inpatient treatments and the treatment period following their inpatient treatments. Although temporary incapacity allowance is provided within the scope of maternity insurance for both outpatient and inpatient treatments to self-employed workers, company partners are held separately and temporary incapacity allowance is not offered to them under the scope of maternity insurance.

Although the personal scope of temporary incapacity allowance is as explained above, there is a dual regime between the insurance statuses in regards to waiting periods for gaining the right to benefit. If the risks in question are accidents at work or occupational diseases, which are considered to be among occupational risks, there is no waiting period to benefit from temporary invalidity allowance. On the other hand, in cases of maternity and sickness, which are considered to be social risks, notification/payment of 90 days short-term insurance premium within one year before the starting date of the temporary incapacity is required.

In the calculation of temporary invalidity allowance, the average daily income of the insured comes to the fore. In this context, the total income of the last three months of the twelve months prior to the occurrence of maternity, accidents at work,

occupational disease or sickness are divided by the total number of days worked in the three months and forms the basis of the average daily income of the insured. Moreover, through this method, insureds are provided temporary incapacity allowance at a rate proportionate with their income, to benefit from allowance as close as possible to their current income[273]. However, the daily amount of temporary incapacity allowance varies according to whether the treatment is outpatient or inpatient. Daily temporary incapacity allowance is paid at a rate of one-third of daily earnings for outpatient treatment and half for inpatient treatments. The reason behind the decrease in daily temporary incapacity allowance is that there is an expectation that the insured's expenses will be lower for in inpatient treatments since basic needs such as food and heating will be met by the health care provider. Lastly, as a rule, temporary incapacity allowance is paid for each day of a health report given by an authorized medical doctor in cases of accidents at work and occupational diseases. In case of sickness, allowance is provided for each day starting from the third day of the temporary incapacity. Finally, for maternity, temporary incapacity allowance is granted for sixteen weeks in total – eight weeks before birth and eight weeks postpartum[274].

5.2.1.3.2 Permanent Incapacity Income

Employees and self-employed workers whose working power in their professions has decreased by at least 10% due to an accidents at work or occupational disease are the

[273] According to the upper and lower limits of daily earnings subject to premiums in calculations, the amount of temporary incapacity allowance cannot be less than one-thirtieth of the current gross minimum wage or more than 7.5 times the amount of the current gross minimum wage (first subparagraph of Article 82). Additionally, while the benefits are being paid, changes in gross minimum wage are reflected in the amount of allowance, thus the amount of benefits are recalculated for further payments.

[274] In the case of multiple births, two more weeks are added to the said eight weeks before the birth. Additionally, if the health condition of the mother allows and upon their request, female insureds can work until three weeks before the birth. In that case, the five weeks that are not used by the female insured before birth will be added to the weeks after birth and temporary incapacity allowance is paid for those weeks. With the amendment made in 2011 regarding this provision, any periods not used due to pre-term birth can be transferred to the postpartum period (Articles 18(1)(c) and (1)(d)).

recipients of permanent invalidity income. In this context, permanent invalidity income is granted without a period and the amount of allowance is calculated by considering the daily income of the insured[275]. However, in cases of permanent incapacity, the daily income of the insured is first multiplied by the percentage loss of working power in the profession of the insured then divided by 70%. Lastly, the daily permanent incapacity income is multiplied by thirty to reach a monthly payment total[276]. However, if the insured becomes dependent on permanent care from another person, the 100% ratio is used instead of 70% in order to increase the amount of the permanent incapacity benefit.

5.2.1.3.3 Birth Grant

Another benefit provided via short-term insurance branches to employees and self-employed workers within the scope of maternity insurance is the birth grant. Although the benefit in question is included within the provisions of short-term insurance branches, since its aim is supporting the family in the face of increased expenses due to child birth, it would not be wrong to state that it is a type of family benefit[277]. This is because the birth grant is provided to all insureds who are eligible to benefit with a fixed amount regardless of their insured status or previous incomes before birth.

[275] For the calculation of the daily income of insureds, see 5.2.1.3.1 Temporary Invalidity Allowance.

[276] Formulation of monthly permanent incapacity income: (((daily income of the insured * percentage of earning power loss)/70%)*30).

[277] The benefit in question was translated as "breastfeeding benefit" in the official web page of the SGK which is the responsible public authority to implement provisions of Act No. 5510 (Retrieved November 2018, from http://www.sgk.gov.tr/wps/portal/sgk/en/detail/short_term_insurance). On the other hand, mention benefit is for one time and it aims to support the initial expenses of parents incurred due to childbirth. For this reason, in accordance with the definition provided in the "Mutual Information System on Social Protection (MISSOC) - Glossary", it was deemed appropriate to translate one of the family benefit within the scope of the research as *birth grant*. (Retrieved November 2018, from https://www.missoc.org/documents/Glossary_EN.pdf).

Within the scope of maternity insurance, female insureds or male insureds whose uninsured spouse is giving birth or female insureds who receive income/pension from their own insurance or male insureds who receive income/pension from their own insurance and whose uninsured spouse is giving birth are eligible for the birth grant if they have been notified/paid at least 120 days of short-term insurance premium within one year before the birth. As with all benefits provided to self-employed workers, to benefit from the birth grant, there should not be any unpaid premiums or any premium related debts. Additionally, if the birth occurred during the first three hundred days after the termination of the insured status and 120 days of short-term insurance premium is paid during the fifteen months before the date of birth, those insureds can benefit from the birth grant.

5.2.1.3.4 Survivor Income

In the event that employees or self-employed workers die due to accidents at work or occupational diseases, their survivors are entitled to income. However, the calculation method of survivor income varies depending on whether the cause of death was due to an accidents at work or an occupational disease and the rate of loss of working power of insured persons who die while receiving permanent invalidity income. Accordingly, the daily income or permanent invalidity income of insureds is indexed according to the change in rate of the general consumer prices index and divided between the survivors;

- If insured persons die due to an accidents at work or occupational disease.
- If insured persons die while receiving permanent invalidity income due to at least losing 50% of the working power in the profession as a result of an accidents at work or occupational disease and without considering whether the death is related to the accidents at work or occupational disease.
- If insured persons die while receiving permanent invalidity income due to losing less than 50% of the working power in the profession as a result of an accidents at

work or occupational disease and the death is related to the an accidents at work or occupational disease.

On the other hand, if insured persons die while receiving the permanent invalidity income due to losing less than 50% of the working power in the profession as a result of an accidents at work or occupational disease and the death is not related to the accidents at work or occupational disease, without indexation, the permanent invalidity income received at the date of their death is distributed between the survivors.

Lastly, since eligibility conditions for survivors and the methods of payment division between survivors are explained in detail under the heading 5.2.1.5.3 Survivors Pension, they are not included in this section in order to avoid repetition. In addition, under the scope of short-term insurance branches, funeral payments and marriage bonuses are offered. With the same intention in relation to repetition, the examinations of those benefits are revealed under the headings of 5.2.1.5.5 Funeral Payments and 5.2.1.5.6 Marriage Bonuses.

5.2.1.4 Aligning Short-term Insurance Benefits with the EU Non-Discrimination Principle

The provisions of short-term insurance benefits being implemented in Turkey do not include any differences on the grounds of nationality and racial or ethnic origin. For this reason, the related provisions are evaluated as aligning with Regulation 883/2004/EC and Directive 2000/43/EC respectively. On the other hand, when provisions regulating short-term insurance branches are examined, some of them may reveal doubts with regards to prohibition of gender discrimination and the principle of general equality, as they implement different practices on the grounds of gender or individuals who are considered to be in similar situations respectively. The provisions containing these differences, rather than the eligibility conditions or

calculations regarding the benefit payments, are based on the personal scope of the benefits and thus, the assessments in this context are given below.

Gender: According to Article 8 of Directive 92/85/EEC, national social security regulations should ensure that workers are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and after the birth and under the Article 11, the amount of maternity allowance granted during the maternity leave shall be at least equivalent to allowance that workers would receive in the event of a break in their activities on grounds connected with their state of health. Moreover, national legislations lay down the fulfilment conditions of the maternity allowances, which may take into account the 12-month period of employment immediately prior to the presumed date of birth[278]. Similarly, Directive 2010/41/EU prescribed for the first time, the provision of duration of the leave and allowances regarding maternity to self-employed workers including those who work in the field of agriculture[279]. Within the scope of Act No. 5510, temporary incapacity allowance (maternity allowance) is provided to employees and self-employed workers with shorter waiting periods (paid ninety days of premium within one year before the birth) and above the minimum period of the maternity leave (sixteen weeks) than foreseen by EU law.

[278] Article 8 of Directive 92/85/EEC: "1) Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and / or after confinement in accordance with national legislation and / or practice. 2) The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and / or after confinement in accordance with national legislation and/ or practice."

Article 11 of Directive 92/85/EEC: "… 2) in the case referred to in Article 8, the following must be ensured: (a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below; (b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2; 3) the allowance referred to in point 2 (b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation; 4) Member States may make entitlement to pay or the allowance referred to in points 1 and 2 (b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation. These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement."

[279] For Article 8 of Directive 2010/41/EU, see footnote 264.

Also, the amount of temporary incapacity allowance in Turkey is equivalent to sickness benefit, as described by EU Directives. Despite this, temporary incapacity allowance is not provided to females who support the activities of their self-employed spouses, due to pregnancy or motherhood, as prescribed by Article 8 of Directive 2010/41/EU. For this reason, the second subparagraph of Article 16, which indicates the individuals who have rights to temporary incapacity allowance under maternity insurance and Articles 18(1)(c) and 18(1)(d), which determine the period of payment in terms of temporary incapacity allowance, should be revised in a manner which will include the females who support the activities of their self-employed spouses including in the agriculture sector, in order to ensure the alignment of Act No. 5510 to Article 8 of Directive 2010/41/EU.

Another point of doubt regarding temporary incapacity allowance is the fact that, while company partners are counted amongst self-employed workers in Article 4(1)(b)(3), they are not included within the regulations of Article 18(1)(c) and 18(1)(d), thus they do not have the right to benefit from temporary incapacity allowance due to pregnancy or motherhood. This situation causes differences among self-employed workers and poses a problem in terms of the principle of general equality. Apart from this, within Article 2(a) of Directive 2010/41/EU, self-employed workers are defined as "all persons pursuing a gainful activity for their own account, under the conditions laid down by national law". Therefore, if individuals who are carrying out gainful activities are defined as self-employed workers under the national legislations, such individuals should be covered under Directive 2010/41/EU. Although there are no statistics available to reflect the gender distribution of company partners, it is clear that female company partners who interrupt their activities due to maternity will be negatively affected by the provisions of Act No. 5510 in question. It may be argued that even if their work is interrupted, their earnings will not be, as they are company partners. However, this point of view is contradictory to situations in which these individuals have the right to benefit from accidents at work and occupational diseases insurances, as they receive temporary

incapacity allowance during their inpatient treatment because in cases of accidents at work and occupational diseases, the earnings of the company partners are not interrupted and are continued based on their shares. In this context, it is necessary to include company partners in Articles 18(1)(c) and 18(1)(d), where the personal scope of temporary incapacity allowance due to pregnancy or motherhood is stated for the alignment of Articles 2(a) and 8 of Directive 2010/41/EU[280].

Another point which creates differences in maternity insurance is the birth grant provision stated in the third subparagraph of Article 16. According to this provision, both female insureds and male insureds whose uninsured spouse is giving birth have the right to receive the birth grant upon childbirth. Therefore, if both parents are insured, the gender which will benefit from the birth grant is female. Despite being under maternity insurance, the birth grant aims to support the family as a whole in the face of increased expenses caused by childbirth and if it is examined from the perspective of Mutual Information System on Social Protection (MISSOC) – Glossary, the birth grant as stated under the scope of statutory social security legislation of Turkey can be defined within the scope of family benefits. In regards to this evaluation, it is important at this point to determine whether the birth grant is considered a maternity allowance or a family benefit because if it is determined to be a maternity allowance, in the cases where both parents are insured, male insureds will be adversely affected by this provision, thus the provision will be in conflict with Directive 79/7/EEC since Article 4(1) of the mentioned Directive stipulates equal treatment between genders[281].

On the other hand, if the birth grant is considered a family benefit, the provision is not at odds with the EU's principle of gender equality despite creating differences to the detriment of male insureds, as national legislations regarding family benefits are

[280] For Article 8 of Directive 2010/41/EU, see footnote 264.

[281] For Article 4(1) of Directive 79/7/EEC, see footnote 260.

not within the scope of Directive 79/7/EEC[282]. The most important legal point of reference for believing that the birth grant should be interpreted as a family benefit is Regulation 883/2004/EC. One can see that under Article 1 of Regulation 883/2004/EC, definitions regarding benefits are given. In this way, although benefits are provided by MS under different names or systems, the benefits are clarified and consolidated by their definitions. According to Article 1(z) of the referenced Regulation, family benefits are defined as "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I". In this way, although benefits are provided by the MS under different names or systems, the benefits are clarified and consolidated by their definitions. Within the framework of these explanations, the opinion is that the birth grant is a type of family benefit practice, thus the related provision is not contrary to Directive 79/7/EEC, because family benefits which provide protection against family expenses due to childbirth are not protected under the scope of the Directive. However, if it is desired to provide the birth grant in a more egalitarian structure among genders, it can be suggested to review the third subparagraph of Article 16 and add the statement *When both spouses are insured, it shall be left up to their preference to determine who will be paid the birth grant.*

General Equality: Employees and self-employed workers both fall under the scope of short-term insurance branches and both pay the same rate of (2%) short-term insurance premium. However, despite the fact that short-term insurance branch premiums are received from self-employed workers the same as regular employees, temporary incapacity allowance is not provided within the scope of sickness insurance. Moreover, temporary incapacity allowance for outpatient treatment in the case of accidents at work or occupational disease is not granted to self-employed

[282] Article 3(2) of Directive 79/7/EEC: "… 2) This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1 (a). …"

workers. MS have a broad authority to determine the scope of statutory social insurance schemes. However, the fact that self-employed workers cannot take advantage of temporary incapacity allowance like employees, despite paying the same rate of premiums to short-term insurance branches, creates doubts in regards to the general equality principle of Article 2 TEU[283]. In this context the matter of providing self-employed workers the right to benefit from temporary incapacity allowance due to sickness or accidents at work and occupational diseases may be evaluated. If it is not possible to award temporary incapacity allowance to self-employed workers in the face of the social risks in question due to the budgetary potential of the social security system and their employment type, creating different premium ratios may be an option in regards to meeting the general equality principle.

Another regulation which raises doubts in terms of the principle of general equality is the fifth subparagraph of Article 16. As mentioned in the birth grant section, employees have the right to benefit from the birth grant if they have notified at least 120 days of short-term insurance premium within one year before the date of birth or if the delivery occurred during the first three hundred days after the termination of insured status and 120 days of short-term insurance premium were paid in the fifteen months prior to the date of birth. The difference between the two clauses is that the *notification* of premiums is sufficient, if birth occurs within the employment period.

On the other hand, as a second option, if birth is occurs after the termination of insured status, premiums should be *paid* in order to benefit from the birth grant. According to Articles 87(a) and 87(b), employers are obliged to pay the premiums of employees, while self-employed workers are obliged to pay their own premiums. For this reason, most of the provisions regarding benefit from allowance or income or pension in Act No. 5510 are based upon notification of premium days for employees, however, notification of premiums is not sufficient for self-employed workers. They also have to pay premiums not only for their own insurance obligations but also their

[283] For Article 2 TEU, see footnote 268.

obligations regarding their employees. This general rule with respect to premium payments of self-employed workers allows not only protection of the rights of employees by forcing self-employers to fulfil their obligations, but also guarantees the financing of the social security system. In this respect, the fifth subparagraph of Article 16, which acknowledges premium payment requirements regarding the birth grant, does not aim to create differences among individuals. This difference is probably caused due to mere incorrect wordings or lack of regulations.

Apart from these, there are provisions that lead to discriminatory differences on the grounds of gender of the children who are right holders of the social insureds related to survivor income and marriage bonuses offered within the scope of short-term insurance branches. However, since the relevant provisions are included in the section related to the long-term insurance branches of Act No. 5510 and the provisions in question have similar effects on survivor's pension, evaluations regarding those discriminatory differences are focused under heading 5.2.1.6 Aligning Long-term Insurance Benefits with the EU Non-Discrimination Principle.

5.2.1.5 Long-Term Insurances Benefits

Under long-term insurance branches, in order to compensate for income losses, insureds are protected against old-age and invalidity risks, as they can cannot work in those circumstances. Moreover, long-term insurance branches protect beneficiaries against the risk of the insured's death. In this context, long-term insurance branches consist of three insurance elements: old-age insurance, invalidity insurance and survivors insurance. The most important difference between long-term insurance branches and short-term insurance branches is the fact that the personal scope of long-term insurance branches cover civil servants and voluntary insureds in addition to employees and self-employed persons. The premium for long-term insurance is 20% of the monthly earnings of the employee or civil servant with 9% of this premium being paid by the insured and 11% by the employer. For self-employed

persons or voluntary insureds, the long-term insurance premium is 20% of their monthly declared earnings and the total amount is paid by insured directly. Benefits granted under long-term insurance branches include;

- Old-age pension
- Invalidity pension
- Survivors pension[284]
- Lump-sum payment and revitalization of insurance
- Marriage bonus
- Funeral payment

Benefits granted under the scope of long-term insurance branches and their eligibility conditions are detailed in the following sections.

5.2.1.5.1 Old-age Pension

Within the scope of old-age insurance, pension is granted to employees, self-employed workers, civil servants and voluntary insureds. Individuals who become insured for the first time after the enhancement of Act No. 5510 should meet requirements regarding age limits and number of premium days at the same time in order to be entitled to old-age pension[285]. In this context, to benefit from old-age

[284] There are special regulations for civil servants within the scope of Articles 43 to 49 of Act No. 5510. In this framework, Article 47 explains that duty invalidity pension is provided to civil servants who have lost at least 60% of the earning power in their profession due to accidents at work, which occurred during the execution of their tasks and meet other requirements regarding the mentioned Article. Furthermore, individuals who have become disabled due to war can benefit from veteran pensions. Since the relevant provisions apply only to civil servants and do not cause any discriminatory differences, this study does not focus on duty invalidity pensions and veteran pensions.

[285] The eligibility conditions and calculation method of the amount of payments regarding old-age pension were altered with Act No.4447 and Act No. 5510. For this reason, eligibility conditions and the calculation method of the amount of payments for old-age pension are divided into three distinct periods: before 08/09/1999 (including the date itself), between 09/09/1999-30/04/2008 and post 01/05/2008. Since the main focus of this study is statutory social security schemes under the scope Act No. 5510, only the regulations for individuals who have become insured for the first time after the

pension, female and male insureds should be 58 and 60 respectively. In terms of the required number of premium days, a dual regime is implemented depending on the individuals' insurance status. For employees, in addition to the age requirement, old-age pension is awarded if the employee has been notified 7200 days of long-term insurance premium, on the other hand, 9000 days of long-term insurance premium should be paid for self-employed workers, civil servants and voluntary insureds.

A noteworthy point in terms of entitlement to old-age pension is the gradual increase in the age requirement (58/60) to qualify for pension, which was carried out in order to prevent early retirement. In this context, a regulation was enacted to increase the age requirement to benefit from old-age pension every two years starting on 01/01/2036. This age will be equalized to 65 for both genders starting on 01/01/2048. However, age requirements with respect to this gradual increase provision depend on the date on which insureds complete their notification/payment of 7200/9000 days long-term insurance premium.

Although, general old-age pension conditions are as stated above, due to their special circumstances, five distinct groups are eligible for old-age pension with easier conditions. These specific groups are briefly summarized below.

- Insureds who are unable to meet the long-term insurance premium notification/payment requirement of 7200/9000 days due to advanced age (those who are three years older than the limit of the general age, but in any cases for individuals above the age of 65, and have notified/paid at least 5400 days of long-term insurance premium)
- Insureds who have lost at least 60% working power in their profession before starting to work for the first time and thus who are not eligible for invalidity pension

enhancement of Act No. 5510 (including the date of 01/05/2008) are evaluated in regards to old-age insurance.

(without any age requirements, 15 years of insurance period and notified/paid at least 3960 days of long-term insurance premium)

- Insureds who have lost less than 60% working power in their profession and thus are not eligible for invalidity pension (without any age requirements; those who have lost between 40-49% working power in their profession, if they have 18 years of insurance period and have notified/paid at least 4680 days of long-term insurance premium or those who have lost between 50-59% working power in their profession if they have 16 years of insurance period and have notified/paid at least 4320 days of long-term insurance premium)
- Employees who are employed underground in mining workplaces (age of 50 and 20 years of insurance period)
- Insureds who suffer premature aging (age of 55, 20/25 years of insurance period and have notified/ paid at least 7200/9000 days of long-term insurance premium)
- Guardians who work under the scope of Act. 4081, and are thus assigned to protect areas, vehicles, water and farm roads related to agricultural activities (age of 55, 15 years of active duty)

As indicated above, the primary parameters of general old-age pension are age limits and number of premium days. However, for individuals who work under special circumstances, requirements regarding age limits, insurance period[286], and number of premium days come to the fore, even within the different combinations. Moreover, the primary parameters that are determinant to entitlement of old-age pension are affected by special periods which can lead to an increase in the number of premium days, and sometimes to a reduction in the age limits, thus allowing pensions to be granted earlier. Within this framework, the periods that increases the number of premium days and reduce the age limits are summarized below.

[286] Insurance period is a duration between the starting date of the insurance status when long-term insurance premium is paid for the first time and the date of application for old-age or invalidity pension or the date of the insureds' death. However, if an individual worked before the age of 18, the working period before the age of 18 is not taken into consideration in regards to insurance period.

Periods that increases the number of premium days include:

- Additional periods that are calculated according to the proportion of actual working hours of employees and civil servants engaged in heavy or hazardous labour[287].
- In regards to old-age pension, one-fourth of the premium days of female insureds' who have children in need of the permanent care of another person (premium days after the date of 01/10/2008)
- Periods which may be added to insurance period by paying long-term insurance premium;
    - Paid maternity leaves of female insureds granted pursuant to Laws.
    - Unpaid maternity leaves of female insureds granted pursuant to their request which are limited to up to three child and not exceeding two years following the date of birth.
    - Military service for males, regardless of whether they were previously insured or not.
    - Unpaid leaves of civil servants granted pursuant to Laws[288].
    - Regular doctorate or specialty education in medicine, in or out of Turkey, regardless of being previously insured or not.
    - Regular law internships, regardless of being previously insured or not.
    - Periods while under arrest or in police custody for insureds who have been arrested or placed under police custody for any offence and then acquitted from such offence.
    - Periods under strike or lock–out.
    - Voluntary assistantship periods of insured medical doctors.
    - Unemployed periods between the date of resignation and elections of insureds who resign from their duties due to elections.
    - Part-time periods.

[287] For further information: third and fourth subparagraphs of Article 40 of Act No. 5510.

[288] Article 108 of Act No. 657

- Foreign education periods (after the age of 18) of insureds sent to foreign countries as official students and fulfil compulsory services after their foreign education.

Periods that reduce age limits include:

- Total or half additional periods that are calculated according to the proportion of actual working hours of employees and civil servants engaged in heavy or hazardous labour[289].
- In regards to old-age pension, one-fourth of the premium days of female insureds' who have children in need of permanent care from another person (premium days after the date of 01/10/2008)

Another issue regarding old-age pension is the method of calculating the pensions. As with the general old-age pension, in almost all benefits (excluding funeral payment and lump-sum payment) provided within the scope of long-term insurance branches, the average monthly income, the total number of premium days, and the replacement rate of the insured is important. In this context, the monthly income of insureds is indexed and divided with the total number of premium days of the insured to determine the average daily income. After that, the average daily income is multiplied by thirty to reach an average monthly income. In addition, replacement rate is calculated with the formula: ((total long-term insurance premium payment days/360)*2) [290] . Lastly, the average monthly income is multiplied by the replacement rate to calculate the amount of general old-age pension.

With respect to the old-age pension of specific groups who fall outside the scope of general old-age pension, whether the insured has completed payment of 7200/9000 days of long-term insurance premium is an important point for the calculation of

[289] For further information: third and fourth subparagraphs of Article 40 of Act No. 5510.

[290] For the insured, the replacement rate can be up to 90%. Values above this rate are not taken into consideration.

replacement rate. In this context, replacement rate is calculated with two different formulas:(((rate of loss in working power *7200/60%)/360)*2) for employees who have been notified less than 7200 days of long-term insurance premium, and (((rate of loss in working power*9000/60%)/360)*2) formula for self-employed workers, civil servants and voluntary insureds who have paid less than 9000 days of long-term insurance premium. However, as a rule, the replacement rate of insureds does not exceed 40%/50% under any circumstances. For insureds who have been notified/paid more than 7200/9000 days of long-term insurance premium, the replacement rate is calculated based on the total notified/paid number of premium days, just as general old-age pension, and multiplied by the average monthly income to determine the amount of old-age pension[291].

5.2.1.5.2 Invalidity Pension

Insureds under the coverage of long-term insurance branches whose working power in their professions decreases by at least 60% due to illnesses that occur after starting to work for the first time are eligible for invalidity pension. In this context, individuals who lose working power at the aforementioned rate before becoming insured should not have the right to benefit from invalidity pensions and additionally, in order for the benefit to be assigned, occupational activities should be terminated. Moreover, to be eligible for invalidity pension, the insureds must have notification/payment of 1800 days of long-term insurance premium and have at least 10 years of insurance period. However, if the insured becomes dependent on permanent care from another person, having notified/paid 1800 days of long-term insurance premium is sufficient, regardless of the insurance period, in order to benefit from invalidity pension.

[291] There are special provisions regarding eligibility conditions and calculation methods for the President of the Republic, vice presidents, prime ministers, ministers, the speaker and members of the GNAT (Article 43).

The method of calculation of invalidity pension is similar to that of old-age pension. In this context, invalidity pension is equal to the multiplication of the average monthly income of the insured by the replacement rate. However, it is important to determine whether or not the insured has completed payment of 7200/9000 days of long-term insurance premiums at the time that they are eligible for invalidity pension. In this context, for insureds having notified/paid more than 7200/9000 days of long-term insurance premium, the replacement rate is calculated in a similar way to the old-age pension using the formula ((total days of paid premiums/360)*2), while for individuals having less than 7200/9000 days, the replacement rate is calculated as though they have 7200/9000 days of notified/paid premiums and the rates of 40% for employees and 50% for self-employed workers, civil servants and voluntary insureds are applied. Lastly, for individuals who become dependent on permanent care from another person the replacement rate is increased by 10% in order to increase the amount of the pension.

5.2.1.5.3 Survivors Pension

In cases where an insured dies while working or while receiving pension, survivors pension is assigned to the widowed spouse, to the children and to the parents of the insured to compensate for their income loss. To become eligible for survivors pension, the deceased insured must have notified/paid at least 1800 days of long-term insurance premium or been receiving pensions. Additionally, in contrast with other insurance statuses, beneficiaries of employees are granted survivors pensions with the condition that the deceased insured had five years of insurance period and had been notified at least 900 days of long-term insurance premium (except for premium days paid within the scope of Article 41), even if the deceased employees does not have 1800 days of premium.

As with invalidity pension, if an insured had less than 7200/9000 days of notified/paid long-term insurance premium, the replacement rate of survivors

pension is implemented at rates of 40% for employees and 50% for self-employed workers, civil servants and voluntary insureds. On the other hand, if insureds have more than 7200/9000 days of long-term insurance premium, the replacement rate is calculated based on actual values of the total number of notified/paid premium days, just as general old-age pension. After calculation of the replacement rate, it is multiplied by the average monthly income of the deceased insured to consider the total amount of survivors' pension. Lastly, if the insured died while receiving pension, the last monthly pensions of the deceased are taken into consideration for the survivors pension and distributed between the survivors.

Beneficiaries of deceased insureds include the spouse, children, and mother/father of the insured. The only condition required for the spouse to benefit from survivors pension/income is that she/he is legally married to the insured. In this case, 50% of the survivors' pension/income, which is calculated according to the rules mentioned above, is granted to the spouse. However, if the deceased insured is childless or any of her/his children are not eligible for survivors pension/income and if the spouse is not working or not receiving pension/income from her/his insurance, then the share for the spouse is increased to 75%. For children, the general condition to benefit from survivors pension/income is that if they are not entitled to pension/income due to their own insurance. Additionally, the gender of the children, whether the child is deem to be insured, and whether she/he is disabled are the decision points in regards to their eligibility for survivors pension/income. In this case, male children are provided survivors pension/income if they are not deem to be insured, excluding those who are accepted under employee status[292], and regardless of their marital status until the age of 18, during secondary education on the condition that they do not exceed the age of 20, and during tertiary education on the condition that they do not exceed the age of 25. In contrast, for female children, marital status and whether she is deem to be insured are the important bases to benefit from survivors pension/income because female children are provided survivors pensions/income if

[292] First subparagraph of Article 34 of Act No. 5510, 21/03/2018-7103/66.

they are not married and not deem to be insured, excluding those who are accepted under employee status, until the age of 18/20/25 in line with the educational requirement and after 18/20/25 if they are not married and not deem to be insured.

Finally, survivors pension/income is paid until the age of 18/20/25 to disabled children whose working power has decreased by at least 60% if they are not deem to be insured, excluding those who are accepted under employee status, and regardless of their marital status and after 18/20/25 if they are not deem to be insured and regardless of their marital status. Although different criteria are envisaged for children to benefit from survivors pension, the share of the pension/income to be implemented is without any gender-specific implementation remains 25%. However, for children who become orphaned after the death of the insured or whose parents do not have a legal marriage at the time of death or whose parent is re-married later or there is no other beneficiary of the insured, then the share of the children survivors pension/income is increased to 50%.

Lastly, the mother and/or father of the insureds are considered beneficiaries of the insured, thus if their household income per person is below the monthly net minimum wage and they do not receive any pension/income from their own insurance, they are granted survivors pension/income with a share of 25% (12.5% per person). In spite of this, the right of parents in regards to survivors pension/income is dependent on the share remaining after the pension/income is distributed to the widowed spouse and children of the deceased. In other words, if 50% of the pension/income is provided to the widowed spouse and the other 50% is paid to two surviving children, parents cannot receive pension/income. In contrast, when the widow is offered income/pension at rates of 50% or 75%, parents can receive pensions/income if there are no children who are deemed to be beneficiaries of the insured. However, on the condition that they meet the other requirements, survivors pension/income is provided to parents regardless of whether any share is left from other right holders after they reach the age of 65.

5.2.1.5.4 Lump-sum Payment and Revitalization of Insurance

Other rights offered under long-term insurance branches are lump-sum payments and revitalization of insurance. These benefits are provided to those who do not meet requirements for old-age pension, invalidity pension, and survivors pension in regards to the insurance period and/or the number of notified/paid long-term insurance premium days. In this context, lump-sum payment is granted to employees and civil servants who, despite meeting the age requirement, do not have enough insurance period and/or number of paid long-term insurance premium days. The amount of lump-sum payment is the share of the long-term insurance premium (9%) paid by employees and civil servants. Since self-employed workers and voluntary insureds are responsible for payment of the total share of long-term insurance premiums (20%), the total amount of long-term insurance premium that they paid is granted as a lump-sum payment. For survivor insurance, depending on the insured's status as explained above (9%/20%), the long-term insurance premiums are paid with respect to how much each beneficiary is entitled. However, in all cases, while lump-sum payment is granted, the total amount of long-term insurance premiums are restructured with an updated coefficient each year, for the years from the year of the premium up to the date of the lump-sum payment request, and then provided to the insureds or their beneficiaries.

The main consequence to benefit from lump-sum payment is the elimination of all insurance periods. With a meaning that if this right is exercised, it considered that the individual has not worked under statutory social insurance before. Despite this, insureds and their beneficiaries who exercise the right to benefit from lump-sum payments may request the revitalization of their insurance with a belief that they can meet the requirements in question and thus have the opportunity to benefit from pensions, if they continue to be employed or pay the long-term insurance premiums of the periods defined under heading 5.2.1.5.1 Old-age Pension. In such cases, the lump-sum payment previously granted to the insureds and their right holders is

updated with the new coefficient each year for the years between the date of the lump-sum payment and the date of the revitalization of insurance request and is paid to SGK by them.

5.2.1.5.5 Funeral Payment

Funeral payment, which aims to support expenses related to funeral costs, is provided to beneficiaries if an insured dies while receiving either permanent incapacity income, old-age pension, or invalidity pension, or if the insured dies due to an accidents at work or occupational diseases or if the insured has notified at least 360 days of long-term insurance premiums. Within this context, the funeral payment is provided to all insureds with a fixed amount regardless of their insured status or previous incomes. Apart from the provisions in Act No. 5510 in regards to funeral payment, there are some special regulations for civil servants under Civil Servants Act No. 657 that bear mentioning. According to Article 208 of Civil Servants Act No. 657, family members of deceased civil servants are provided with a death grant in an amount equal to the gross monthly salary of a highest ranking civil servant (including additional index), and under Article 210, a death grant shall be paid by the public institution where the civil servant was employed. Therefore, in contrast with other insurance statuses, in cases where civil servants lose their lives, beneficiaries have rights to both death grants and funeral payments under Act No. 657 and Act No. 5510 respectively. However, if the public institution of the deceased civil servant provides funeral payment, funeral payment is not made under Act No. 5510, but the right of family members to benefit from the death grant is keep in reserve.

5.2.1.5.6 Marriage Bonus

According to Act No. 5510, survivors income/pension of female children is terminated upon the marriage of the female child. However, female children of insureds are granted a marriage bonus in the amount of two years of the

income/pension they received. In addition to that, to prevent double benefit from social insurance, if female children divorce, their share of survivors income/pension will be paid after a period of two years, which is when the female child become a rightful beneficiary again.

5.2.1.6 Aligning Long-term Insurance Benefits with the EU Non-Discrimination Principle

The provisions of long-term insurance benefits being implemented in Turkey do not include any differences on the grounds of nationality and racial or ethnic origin. For this reason, the related provisions are evaluated as aligning with Regulation 883/2004/EC and Directive 2000/43/EC respectively. However, there are certain noteworthy practices in regards to long-term insurance branches that implement differences on the grounds of gender or individuals who are considered to be in similar situations. In this respect, the assessments of the question of alignment of long-term insurance benefits under the EU acquis are given below.

Gender: Under the scope of long-term insurance branches, some of the provisions that lead to differences on the grounds of gender are noteworthy. The first is that female insureds should be 58 years of age to become eligible for old-age pension, while males should be 60. However, Article 7(1)(a) of Directive 79/7/EEC has an exemption clause which allows the MS to implement different age limits for genders regarding rights to benefit from old-age pension. For this reason, applying different age limits for genders does not constitute discrimination[293]. Moreover, the regulation for gradual increases on the age limits for both genders under the scope of old-age pension and equalization for both genders at the age of 65 starting on 01/01/2048 is important because Article (1) of Directive 79/7/EEC foresees progressive implementation of the principle of equal treatment of genders in matters of social

[293] Article 7(1)(a) of Directive 79/7/EEC: "1) This Directive shall be without prejudice to the right of MS to exclude from its scope: (a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits; …"

security [294] and Article 7(2) is important in terms of not including indefinite exemptions.

Another exemption within the scope of Directive 79/7/EEC is included in Article 7(1)(b)[295]. According to this provision, it is not considered discriminatory to provide benefit from old-age pensions to increase the right to benefit of those who employment periods were interrupted in order to raise children. In this context, in accordance with the eighth subparagraph of Article 28 which provides advantage for female insureds who have children in need of permanent care from another person, one-fourth of the female insured's paid premium days after 10/10/2008 are added to the insurance period and that added time is deducted from the age requirement for old-age pension. Pursuant to Article 7(1)(b), this practice is not considered discriminatory. However, according to Article 7(2) of Directive 79/7/EEC[296], the MS should periodically review provisions that create exemptions in light of social developments in the matter concerned and examine if there are valid justifications to maintain the exemption Moreover, according to Article 8 of Directive 79/7/EEC, the MS also need to inform the Commission for maintaining exemptions and their possible revisions[297]. In this context, regardless of gender, revision may be envisaged within the scope of eighth subparagraph of Article 28 to establish a more egalitarian

[294] Article 1 of Directive 79/7/EEC: "The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as 'the principle of equal treatment"

[295] Article 7(1)(b) of Directive 79/7/EEC: "1) This Directive shall be without prejudice to the right of Member States to exclude from its scope: … (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children; …"

[296] Article 7(2) of Directive 79/7/EEC: "… 2) Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned."

[297] Article 8 of Directive 79/7/EEC: "… 2) Member States shall communicate to the Commission the text of laws, regulations and administrative provisions which they adopt in the field covered by this Directive, including measures adopted pursuant to Article 7(2). They shall inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date."

structure among parents who take responsibility in regards to care for their disabled child. According to this suggestion, if both parents are insured then care periods of the disabled child may be distributed between the parents depending on their preferences. Additionally, in cases where the mother of a disabled child dies or custody rights are given to the father, that the male insured would benefit from the eighth subparagraph of Article 28 may be a point to consider.

Another advantageous provision with respect to female insureds who raise children is in Article 41(1)(a), which allows them to increase their number of premium days in entitlement to benefits. In this context, upon her request, a female insured has the right to pay long-term insurance premiums of her unpaid maternity leaves which are limited to up to three children and may not exceeding a two-year period following the date of birth. According to Article 4(2) of Directive 79/7/EEC, the principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity[298]. However, even if Article 41(1)(a) may seem like it is compliant with the exemption provision of Article 7(1)(b) of Directive 79/7/EEC, it reveals some doubts[299]. This is not because Article 41(1)(a) affects only old-age pensions, but it also leads to an increase in the number of paid premium days required to benefit from invalidity pensions, thereby providing advantage that is not foreseen as exemption under the scope of Directive 79/7/EEC. To specify, Article 7(1)(b) of Directive 79/7/EEC contains exemption related only to old-age pensions. However, the advantage provided by Article 41(1)(a) creates indirect discrimination in regards to invalidity pension of male insureds. Therefore, the scope of provision in question should be revised under the regulations of Article 7(1)(b) of Directive 79/7/EEC by limiting old-age pension and without interfering in 16 weeks of paid maternity leave.

[298] Article 4(2) of Directive 79/7/EEC: "… 2) The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity."

[299] For Article 7(1)(b) of Directive 79/7/EEC, see footnote 295.

Another provision which includes gender-based difference is the rights of children in survivors pension/income. Provided that the children meet the other requirements, differences are based on their age and marital status. In this context, male children of insureds have a greater advantage in being eligible for survivors pension/income until the age of 18/20/25, while female children are at a greater advantage after that age. With respect to the advantage of male children, even if male children are married, their pension/income continues to be paid until the age of 18/20/25, but the pension/income of female children is terminated in the event of marriage. However, male children of an insured cannot receive survivors pension/income after the age of 18/20/25, while it continues to be paid to female children until the end of their lives, provided that they do not marry. Moreover, when the female children of an insured marry, they have the right to benefit from marriage bonus (in the amount of two years of pension/income they receive), while male children have no right to benefit from marriage bonus. This aim of establishing an advantageous position for female children in regards to pension rights may be the reason for their disadvantaged position in social and economic life. According to 2018 TURKSTAT statistics, the employment rate of males in the working population (15-64 years of age) is 70.9% while this rate is 32.9% for women. Unemployment rate for men is 9.7%, while it is 14.2% for women. Lastly, while 15.6% of males between the ages of 15-24 are not pursuing an education or are not employed, this rate is 33.6% for females[300]. These statistics prove that the gender gap in rates of employment is significant in Turkey. In order to not leave them unprotected, there is motivation in guaranteeing income to females whose parents die. Moreover, due to the social structure of Turkey, females are considered to be under the responsibility of their spouses after marriage and thus their pension is terminated. Nevertheless, in the context of the EU non-discrimination and equality principle, differences between the children of deceased insureds cannot

[300] TURKSTAT. (2019). *Labour Force Statistics, 2018 [Press Release]*. Retrieved May 2019, from http://www.turkstat.gov.tr/PreTabloArama.do?metod=search&araType=hb_x

be asserted as gender-based discrimination. This is because of the fact that survivors benefits are not within the scope of Article 3(2) of Directive 79/7/EEC[301].

General Equality: Although Article 41(1)(a) is evaluated as having an indirect discrimination effect against male insureds in regards to invalidity pensions, from a different perspective, it could be assessed that it is discriminatory against women within the scope of the general equality principle. As mentioned before, the regulatory nature of Article 41(1)(a) is to the advantage of female insureds. Despite this, as only men are subjected to compulsory military service, according to Article 41(1)(b), men have the opportunity to increase their premium days by paying premiums for the period that they have spent under military service. Due to the compulsory military service responsibility of males, their entrance to the labour market would be delayed if they perform their military service before starting work, on the other hand, their activities would be interrupted if they perform their military service after starting work. For this reason, male insureds have the right to pay long term-insurance premiums during their military service period whether it is performed before or after starting work and subsequently increases their number of premium days. Therefore, Articles 41(1)(a) and 41(1)(b) aim to eliminate the negative effects of not being in the labour market due to physiological structure for females and males, because the former can give birth and the latter has the power to perform military service.

Despite the goals being the same, within the scope of Article 41(1)(b), whether the male is insured or not does not matter in taking advantage of the military service period, whereas, to benefit from Article 41(1)(a), females need to be insured and their employment needs to be interrupted due to childbirth. The primary result of this difference is the fact that the insurance period starting date has effects on the requirements regarding pensions. As explained by Footnote 286, the eligibility conditions and calculation method of the amount of payments regarding pensions are

[301] For Article 3(2) of Directive 79/7/EEC, see footnote 282.

divided into three distinct periods, thus the eligibility conditions change according to a person's insurance starting point. For example, a male insurance holder who has carried out his military service before 08/09/1999 and started working after the date of 01/05/2008 can move his insurance attachment date to a date before 08/09/1999 if he pays premiums for the period of his military service. In such a case, instead of the requirements of being 60 years of age and having 7200 days of paid long-term insurance premiums for old-age pension, he can retire at 58 years of age, with 5975 days of paid long-term insurance premiums and 25 years of insurance period. However, female insureds cannot pay the premiums of the date before their first date of insurance, thus there are no transitions between the three distinct periods and they cannot retire with easier conditions. Despite the fact that the goals of these two provisions are the same, like the military service advantage for male insureds, to provide advantage for female insureds with respect to payment of premiums of the dates before the first insurance date in regards to their unpaid maternity leave period can seriously affect the financial aspect of the social security system. Depending on the level of education, military service periods in Turkey vary between six and twelve months, and with the exception of the change in insurance period, male insureds' pensions start to be provided at most one year earlier. For this reason, the cost of the provision regarding the military service period is the sum of one year of unpaid premiums and pension payments, which start one year earlier. On the other hand, according to estimates from TURKSTAT, the total fertility for the year 2017 is 2.07[302]. If a similar provision is implemented for female insureds, not only will the eligibility requirements for women be altered but, within the framework of statistics regarding fertility rate and the assumption that two children will be born before the first insurance date of insured, pension payments will start four years earlier than the actual retirement date without any corresponding premium payments for those four years. For this reason, the fact that Article 41(1)(a) does not include pre-insurance births may be defended on the grounds of budgetary potential and the sustainability of the social security system in regards to the general equality principle.

[302] TURKSTAT. (2017). Basic fertility indicators.

Other provisions considered within the context of the general equality principle are related to the replacement rate that is used in the calculation of the old-age pensions of specific groups and invalidity pensions. In this context, the replacement rate for employees who are within specific groups and meet the requirements regarding the old-age pensions but have less than 7200/9000 days of long-term premium payments is calculated with the formula (rate of loss in working power *7200/60%)/360)*2), while this formula is (((rate of loss in working power*9000/60%)/360)*2) for self-employed workers, civil servants and voluntary insureds. Additionally, as a rule, the replacement rate of those insured does not exceed 40%/50% under any circumstances. An example within this framework could be the following: if the working power loss of an individual who is eligible for pension is 40%, the replacement calculated with the formula of (((40% x 7200/60%)/360)*2) results in 27% for an employee, while the calculation for self-employed, civil servants and voluntary insureds with the formula of (((40% x 9000/60%)/360)*2) results in 33%. Other than this, for those who meet the criteria of being eligible for invalidity pension other than 7200/9000 days of long-term premium payments, the replacement rate is 40% for employees and 50% for self-employed workers, civil servants and voluntary insureds. Consequently, despite paying the same amount of premium, employees are paid a lesser amount of pension due to replacement rates which come to fore in the calculation of the amount of old-age pensions and invalidity pensions. However, both pensions are granted to individuals who are unable to work due to overall general health problems, and the nature of their ailments need not be related to their working types. As it is known, determining the calculation methods to be used in social security benefits is under the authority of the MS. However, the use of the numbers 7200 and 9000 is likely a result of the preference to create a parallel rule with the number of premium days which are used to benefit from old-age pension. In this context, it is assumed that employees are worn down more during their working life in comparison to the civil servants and self-employed workers; therefore, it is considered that they should be entitled to pensions with a condition of a lesser amount of days (7200 days rather than 9000 days). However, the perspective of

creating provisions in parallel to old-age pension has created disadvantageous circumstances for employees. Accordingly, providing employees with a lesser amount of specific old-age pension and invalidity pension due simply to the calculation method used should be defended based on objective or justified reasons. If it is not the case, the fourth subparagraph of Article 29, which clarifies the calculation method for old-age pensions for specific groups, and the first and fifth subparagraphs of Article 27, which state the calculation method for invalidity pensions, should be revised according to Article 2 TEU in order to maintain the general equality principle[303].

The last assessment regarding the general equality principle is related to the existence of different practices based on insurance status regarding requirements to benefit from survivors pension and their calculation methods. As explained under the heading 5.2.1.5.3 Survivors Pension, except for the general rule, there is another possibility for beneficiaries of employees to benefit from survivors pension. Within this scope, if the deceased insured had five years of insurance period and had been notified at least 900 days of long-term insurance premium (except for premium days paid within the scope of Article 41), beneficiaries are granted a survivors pension. However, in the context of the method for the calculation of survivors pension, a provision which provides advantage to self-employed workers, civil servants and voluntary insureds in comparison to employees is envisaged. According to this provision, the replacement rate of survivor pension for beneficiaries of employees who meet the requirements without 7200/9000 days of long-term insurance premium payments is 40%, while this rate is 50% for beneficiaries of self-employed workers, civil servants and voluntary insureds. Therefore, despite paying the same amount of premium, beneficiaries of employees are paid 10% less pension in comparison to those of self-employed, civil servants and voluntary insureds. In this framework, the previous insurance status of the individuals plays an instrumental role in respect to

[303] For Article 2 TEU, see footnote 268.

the requirements to benefit from survivors pension and the amount of pension that will be paid to right holders of the insured.

The goal of the survivors pension is to compensate for income losses of beneficiaries due to the death of the insured. In this context, the fact that there is a discrepancy between the provisions that are in effect for employees and self-employed workers, civil servants and voluntary insureds in regards to survivors pension should be defended based on objective or justified reasons. Since employees' working conditions are assumed to be more difficult than other working types, there may be easier conditions for their right holders to be eligible for survivors pension. However, this assumption is contradicted with the fact that the replacement rate for pensions for employees (who have less than 7200/9000 days of premium payments) is lower than other insurance statuses, thus the beneficiaries of employees are being paid less pensions. Consequently, the provision that leads to a disadvantage for the right holders of self-employed workers, civil servants and voluntary insureds in eligibility for survivors pension and the provision that leads to a disadvantage to employees' beneficiaries in the calculation of pension should either be defended based on objective or justified reasons. If it is not the case, Article 32(2)(a), which regulates the conditions for survivors pension eligibility, and Article 33(1)(c) , which states the calculation method for survivors pension, should be revised according to Article 2 TEU[304].

5.2.2 General Health Insurance

5.2.2.1 Access to General Health Insurance

As a social state, it is important to implement social security practices for the whole population in order not to leave nobody behind. In this sense, the most important feature of the general health insurance in Turkey is that it covers the entire

[304] For Article 2 TEU, see footnote 268.

population for the creation of a healthy society. In this context, when Articles 3(1)(10) and 60 Act. No. 5510 are examined together, all persons residing in Turkey are entitled to health benefits in kind via the general health insurance scheme. The personal scope of general health insurance consists of two basic groups: the person insured under the scheme, and their dependants.

In this context, those covered by general health insurance are individuals who reside in Turkey (Article 60) and;

- have compulsory or voluntary insurance and their dependants.
- receive pension/income under social security laws and their dependants.
- get unemployment benefits or short-term employment and their dependants.
- are performing compulsory military service and their dependents.
- jail and prison staff who are attending pre-service training and their dependants.
- are Turkish citizens whose household income per person is less than one third of the monthly gross minimum wage.
- are Turkish citizens under the age of 18 whose mother and father are not eligible to benefit from general health insurance; such as parents of a child have premium debt or child left an orphan.
- are free beneficiaries of protection, care and rehabilitation services.
- are given the decision for protection measure.
- are legal practitioners.
- are military students.
- are stateless persons and asylum seekers.
- are Turkish citizens who fall outside the list above and not entitled to health insurance in a foreign country and their dependants.

It can be seen in Article 60 that in some cases under the scope of personal insurance people under social protection are listed, or both the insured person and his/her dependants are listed, or solely the insured is listed. Furthermore, by the statement "Turkish citizens who fall outside the list above and not entitled to health insurance

in a foreign country and their dependants", those who are not under social protection coverage are included under the scope of general health insurance by establishing a legal framework, which entitles the whole population to health benefits in kind. Within this framework, Turkish citizens who do not have social insurance coverage and those whose household income per person is more than one third of the minimum wage, and their dependants benefit from general health insurance by paying a monthly general health insurance premium. On the other hand, those whose household income per person is less than one third of the minimum wage also have access to health care services for themselves and their dependants, but their premiums are paid by the state.

It should be added that foreign nationals and their dependants who are not under social insurance coverage in Turkey or in a foreign country have the right to benefit from general health insurance depending at their request. In addition to their request, they should reside in Turkey for a period longer than one year. The requirement of this one-year period of residence from foreign nationals also affects voluntary insurance provisions because foreign nationals who benefit from the voluntary insurance, again depending on their request, are not required to pay the general health insurance premium and thus are not considered general health insureds as long as their residence period exceeds one year (second subparagraph of Article 52).

The second group that should be expressed in the framework of personal scope of general health insurance is the dependants (or family) of the insured person: spouse, children, and mother/father of the insured. First, as a general condition, dependants are eligible for health care benefits if they are not considered obligatory or voluntary insureds in Turkey or abroad and if they are not entitled to pension/income due to their own insurance. Another condition required for the spouse to benefit from general health insurance is that she/he is legally married to the insured person. In the assessment of eligibility of children, Article 3(1)(10), the eleventh subparagraph of Article 60 and the eighth subparagraph of Provisional Article 12 should be assessed

jointly. Under Article 3(1)(10), without gender-specification, children who are not married are deemed dependants of the insured until the age of 18, during secondary education on the condition that they do not exceed the age of 20, and during tertiary education on the condition that they do not exceed the age of 25[305]. In addition, the eleventh subparagraph of Article 60, amended in 2016, reads that after graduation from secondary or tertiary education, dependent children have the right to benefit from general health insurance for two more years unless they exceed the age of 20 or 25 and their general health insurance premiums are paid by the state[306].

Furthermore, in accordance with the amendment in Provisional Article 12 made in 2011, female children of insured persons are deemed dependants if they were considered dependants of the insured by social security laws which were applied before the date of entry into force of Act No. 5510. According to all social security laws that were implemented before Act No. 5510 in Turkey, female children of insured persons who are not married, do not work under the scope of social insurance, and do not receive pension/income due to their own insurance, are considered dependants of the insured person. Therefore, a dual regime started to be used for female children of insured persons after the amendment of Provisional Article 12. In this context, female children who do not work and do not receive pension/income due to their insurance;

- Those who were born before 01/10/2008 and their parents were insured before 01/10/2008 are deemed dependants regardless of their age, unless they are married.
- Those who were born after 10/10/2008 and whose parents were insured after 01/10/2008 are deemed dependent in accordance with the conditions of age, education, and marital status, likewise male children of the insured person.

[305] According to Provisional Article 4, male children whose parents were insured under civil service status before 01/10/2008 can benefit from health care without condition of education until they exceed the age of 25.

[306] The reason for this amendment was to build a safety-net for young individuals between the times of graduation and starting to work because they would not be able to benefit from their parents general health insurance coverage during this time as they do not fulfil the education condition.

It should be noted that children with disabilities are regarded as dependants without any gender-specific implementation unless they are married. Finally, the mother and/or father of the general health insured person are considered dependant, thus having the right to benefit from general health insurance through the insured person's coverage, if their household income per person is below the monthly gross minimum wage.

As a result, it can be said that the scope of general health insurance in Turkey has a generous structure. However, some individuals and their dependents are not considered under general health insurance according to the provision of the third subparagraph of Article 60 and due to their own labour laws. These are:

- Foreign nationals and their dependants who are not under social insurance coverage in a foreign country and have resided in Turkey for less than one year period.
- Employees who are sent to Turkey for less than three months by companies with headquarters in foreign countries and protected under social insurance schemes of the concerned country.
- Self-employed persons who reside in a foreign country and are protected under social insurance schemes of the concerned country.
- Turkish citizens who work in foreign agencies of public administrations under a contract and have permanent residence or citizenship in the country concerned and certify that they protected under the social insurance schemes of the concerned country.
- Turkish citizens who work in foreign agencies of public administrations under a contract and are insured according to social security agreements of the related country with Turkey.
- Bank workers or retirees and their dependants who are insured under Bank Retirement Funds (Provisional Article 20)
- Those who are not under the coverage of social insurance among convicts and detainees in prisons.

- Turkish Armed Forces senior managers.
- Members or pensioners of the GNAT and their dependants,
- Members or pensioners of the Constitutional Court and their dependants.
- Members or pensioners of the Supreme Court and their dependants.
- Members or pensioners of the Court of State Council and their dependants.

When those above who are not under the scope of general health insurance are considered, it would be wrong to say that they lack health care, except for foreign nationals who reside in Turkey for less than one year, because those who are under the scope of social insurance of a foreign country can access health care benefits through the relevant country's regulations. Moreover, from the list above, those who are not under the scope of the general health insurance scheme because their labour laws health care expenditures are covered by the budget of the institutions for whom they work. Lastly, it should be stated that the health care services of those who are not under the coverage of social insurance among convicts and detainees in prisons are met by the Ministry of Justice and the Ministry of Health.

5.2.2.2 General Health Insurance Benefits

Like the personal scope of general health insurance in Turkey, the health care services offered are also organized in a generous manner. In this context, preventive health care services, examinations and treatments, oral and dental health services including orthodontic dental treatment of children under 18, assisted reproductive treatments, and health services such as medicines, orthotics, and prosthesis necessary for treatment processes of the insured are financed by the SGK according to a framework of reimbursement rules (Article 63). In addition, along with health care services that are provided within Turkey, emergency health care expenditures of employees and civil servants who have been sent abroad by their on a temporary assignment (maximum six months), and regardless of emergency, health care expenditures of not only employees and civil servants who have been sent abroad by

their employers on a permanent assignment (more than six months) but also their dependants who reside abroad with them are reimbursed. Finally, if determined treatments of the general health insured person cannot be done in Turkey, it is possible to receive health care services abroad (Article 66).

Health care services not financed by the SGK are (Article 64);

- Any health care services including orthodontic dental treatments done for aesthetic purposes (except those which are necessary to ensure physical integrity or are necessary due to workplace accidents, occupational disease, accident, disease or congenital reasons).
- Traditional, complementary, alternative medical practices.
- Health care services not permitted or authorized by the Ministry of Health.
- Health care services which are not accepted as medical services by the Ministry of Health.
- Chronic diseases of foreign nationals which were present before their date of entry into the scope of general health insurance,
- Health care services, which are determined to be out of the scope of reimbursement by the Institution after the assessment of method, type, quantity and usage period according to Article 63.

Just as in social insurance schemes, in order to benefit from health care services, individuals should pay general health insurance premiums. In this context, not including premiums paid by the government directly, the general health insurance premium is applied at four different rates. Accordingly, the monthly general health insurance premium rate is;

- 12.5% of the earnings of compulsory insured persons (5% of which is paid by the employee and 7.5% of which is paid by the employer)[307].

[307] General health insurance premium; is applied 5% for the students who take occupational educations, work as an intern, or work as part-time, 4.5% for the ones who attend the courses of İŞKUR and 6% for the legal practitioners.

- 12% of the declared earnings of voluntary insured persons (totally paid by insured).
- 3% of the monthly gross minimum wage for Turkish citizens who are not considered to be compulsory or voluntary insureds and whose household income per person is more than one third of the minimum wage (totally paid by insured).
- Twofold of 12% of the monthly gross minimum wage for foreign nationals who are not considered compulsory or voluntary insureds and request to benefit from general health insurance (totally paid by insured).
- 4% of the monthly gross minimum wage for foreign students who request to benefit from general health insurance (totally paid by insured).

However, those who receive pension/income under social security laws have the right to benefit from general health insurance benefits without paying general health insurance premiums.

Within this framework, to benefit from health care services along with their dependants, employees and civil servants should pay at least thirty days of general health insurance premium back in the previous one year from the date on which they applied for health care. Therefore, it can be said that there is a thirty-day waiting period in the general health insurance practice. For self-employed persons and Turkish citizens whose household income per person is more than one third of the minimum wage, in addition to thirty days of paid premiums within the last one year, they should not have more than sixty days of unpaid premiums or any premium related debts. Finally, the conditions of the thirty-day waiting period and no premium debts should be provided together for voluntary insured persons and foreign nationals to benefit from health care services (Article 67)[308].

[308] Moreover, it should be stated that different conditions are required in order to finance the assisted reproductive treatments, which are provided up to three times. In that context, one of the spouses should be a general health insurance holder or dependant for at least five years and 900 days of general health insurance premium should be paid. For other conditions and details regarding the assisted reproductive treatments, see Article 63(1)(e).

In some special cases, general health care services are provided to individuals regardless of waiting period or premium debt. These special cases are traffic accidents, emergency services, work accidents and occupational diseases, contagious diseases with notification obligation, drug addiction treatments, protective health care services, maternity treatments, disasters, war, strikes, and lockouts. In addition to those cases, health care services to individuals who are under the age of 18 or who are medically in need of another person are also provided regardless of waiting period or premium debt conditions[309].

5.2.2.3 Aligning General Health Insurance Benefits with the EU Non-Discrimination Principle

The provisions of general health insurance being implemented in Turkey do not include any differences based on racial or ethnic origin. For this reason, the general health insurance scheme is evaluated as aligning with Directive 2000/43/EC. On the other hand, some of the provisions relating to personal scope and eligibility conditions to benefit from health care services create questions with respect to EU non-discrimination principle or the general principle of equal treatment, as they implement different practices on the grounds of nationality or gender or individuals who are considered to be in similar situations. In this context, evaluations of each are given below.

Nationality: The provisions on general health insurance implement different rules on the ground of nationality, especially for the personal scope and eligibility conditions to benefit from health care services. For example, under Act No. 5510, general health insurance is mandatory for Turkish citizens who are not protected under social security law (Articles 60(1)(g) and 61(1)(f)), however, it is provided to foreign

[309] In addition to the general health insurance premium, a contribution fee is charged from the insured person for health care services. However, since there are no different practices related to the contribution fees within the scope of this study, explanations of the related provisions are not included (Articles 68 and 69).

nationals in similar situations on their request only (Articles 60(1)(d) and 61(1)(c)). In addition, foreign nationals who are not protected under social security law are required to have residence permits and reside in Turkey for more than one year in order to receive health care benefits (third subparagraph of Article 60). Apart from these, for Turkish citizens who are not protected under social security law, a dual distinction is implemented depending on their incomes in order to define their premium payment obligations. Accordingly, premiums are paid by the State for Turkish citizens with a household income per person less than one third of the gross minimum wage. On the other hand, Turkish citizens with a household income per person more than one third of the gross minimum wage must pay a general health insurance premium at the rate of 3% of the gross minimum wage ($12.79) and they should not have any premium or premium related debts of more than sixty days (fourth subparagraph of Article 80, Articles 81(1)(f) and 67(1)(b). Although no distinction is made for foreign nationals depending on their income to reimburse their health care expenditures; in any case they shall pay twofold of 12% of the monthly gross minimum wage ($102.34) for their general health insurance premium and they should not have any premium or premium related debts without any time limitation to access the health care benefits (fourth subparagraph of Article 80, Articles 81(1)(f) and 67(1)(c)[310].

In addition, nationals of foreign countries who request access general health insureds is not excepted unless they have resided in Turkey for a period of one year or more. Therefore, under the scope of the voluntary insurance scheme, general health insurance premiums are not received from foreign nationals while the health care benefits are not offered for a period of one year (second subparagraph of Article 52). Another provision that leads to difference on the grounds of nationality is in the context of material scope of general health insurance (Article 64(c)). According to the provision in question, the expenses of treatments of chronic diseases that existed

[310] For 2019, the gross minimum wage is 2,558.40 TL, and the calculation was made by assuming that $1 was equal to an average of 6,00TL.

before the date on which foreign nationals or their dependants are considered general health insureds are not met.

On the other hand, according to Article 4 of Regulation 883/2004/EC, national social security regulations should provide the same benefits and obligations to citizens of MS (EU Member States and Norway, Iceland, Liechtenstein, and Sweden) as well as to the stateless and asylum seekers (including family members and beneficiaries) residing in the MS, thus individuals should be treated equally and not be discriminated against on the grounds of nationality.

Also, as required by the Aggregation of Periods principle in Article 6 of Regulation 883/2004/EC, if any MS legislation makes the acquisition, retention, duration or recovery of the right to benefits or the coverage by legislation, or the access to or the exemption from compulsory, optional continued or voluntary insurance conditional upon the completion of periods of insurance, employment, self-employment or residence, the aforesaid duration completed in another MS will be taken account as the duration completed in the related MS legislation.

In this context, considering the provisions of Act No. 5510 for foreign nationals and Articles 4 and 6 of Regulation 883/2004/EC together, direct discrimination on the grounds of nationality is observed. Therefore, in the case where Turkey becomes a member of the EU, in terms of EU Member States and Norway, Iceland, Liechtenstein, Sweden citizens, it will not be possible to implement second subparagraph of Articles 52, 60(1)(d), 60(1)(g), third subparagraph of Article 60, Articles 61(1)(c), 61(1)(f), 64(c), 67(1)(b), 67(1)(c), fourth subparagraph of Article 80 and Article 81(1)(f); thus, it is important to review those provisions.

Another important issue to which attention should be drawn is that, in the case of Turkey's membership to the EU, the provisions of Regulation 883/2004/EC related to benefits in kind will be applied. As mentioned, the main condition to be eligible for

general health insurance is the requirement of residence in Turkey (Article 60) and general health insurance will end as of the date that the residence is out of Turkey (fourth subparagraph of Article 61). But when Turkey becomes an EU member, Regulation 883/2004/EC shall apply and for general health insured persons and their dependents expenses of health benefits in kind below will be reimbursed by Turkey to the MS where they received treatment, as though individuals were insured under the legislation of the country in which they received health benefits in kind;

- Those who receive health benefits in kind while residing[311] in another MS even if they do not reside in Turkey (considering Article 17 of Regulation 883/2004/EC).
- Those who receive health benefits in kind while staying[312] in Turkey even if they do not reside in Turkey (considering Article 18(1) of Regulation 883/2004/EC)[313].
- Those who receive health benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay necessary in MS for different reasons such as education, tourism or temporary assignment while they reside in Turkey (considering Article 19 of Regulation 883/2004/EC).
- Those who travel to MS with the purpose of receiving appropriate health benefits in kind with a favourable opinion of Turkish authorized institutions while residing in Turkey (considering Article 20 of Regulation of 883/2004/EC).
- Those who receive health benefits in kind in Turkey (considering Article 23 of Regulation 883/2004/EC) or medical treatments necessary during their stay in another MS (considering Article 27(1) of Regulation 883/2004/EC) or travel to MS with the purpose of receiving appropriate in kind health benefits with a favourable opinion of Turkish authorized institutions (considering Article 27(3) of Regulation

[311] According to Article 1(k) of Regulation 883/2004/EC, "stay" means temporary residence.

[312] According to Article 1(j) of Regulation 883/2004/EC, "residence" means the place where a person habitually resides.

[313] In kind health benefits to be given to the dependants of frontier workers may be limited to the necessary medical treatments as in Denmark, Estonia, Ireland, Spain, Italy, Lithuania, Hungary, Netherlands, Finland, Sweden or the United Kingdom. (Article 18(2) of Regulation 883/2004/EC - Annex III).

883/2004/EC) while receiving a pension or pensions both under the legislation of Turkey and other MS and residing in Turkey.

- Those who receive health benefits in kind in Turkey (considering Article 24(2)(b) of Regulation 883/2004/EC), medical treatments necessary during their stay in another MS (considering Article 27(1) of Regulation 883/2004/EC) and travel to MS with the purpose of receiving appropriate in kind health benefits with a favourable opinion of Turkish authorized institutions (considering Article 27(3) of Regulation 883/2004/EC) while receiving a pension or pensions both under the legislation of Turkey and other MS and do not reside in Turkey, but have been insured for the longest period of time in Turkey or if the insurance periods are equal, the latest of which is in Turkey.

So, one of the most important effects of Regulation 883/2004/EC for the social security system of Turkey is that it will not be possible to implement the fourth subparagraph of Article 61 of Act No. 5510 while general health insurance holders and their dependants reside in EU Member States, Norway, Iceland, Liechtenstein and Sweden and Turkey will be responsible for the cost of health benefits in kind, as though they were residing in Turkey.

Apart from this, according to Article 66(a) of Act No. 5510, emergency health care expenditures of employees and civil servants is provided during temporary assignments abroad. But, as required by Article 19 of Regulation 883/2004/EC, it is obligatory to provide for not only employees and civil servants but also all general health insureds and their dependants, meaning any citizen of Turkey, for whom medical treatments become necessary while staying in MS for touristic, educational or similar reasons and without the condition of assignment, in accordance with the provisions of the legislation of the MS as though the concerned were insured under the said legislation. In that context, the cost of health benefits in kind will be reimbursed to the related country by Turkey.

Consequently, as required by the provisions of Regulation 883/2004/EC below, the whole population of Turkey, as they are considered under the scope of general health insurance, and those who get pension from Turkey even if they do not reside in Turkey and their dependants' health care expenditures will be financed by Turkey, not only in Turkey but also in EU Member States and Norway, Iceland, Liechtenstein and Sweden. Therefore; the financial sustainability of the general health insurance scheme, which is provided to the whole population mainly based on the residency condition and designed by taking low ($12.79 per monthly) or none premium from people without having social insurance coverage and not taking any premium from people who entitled to the pension, should be fastidiously evaluated in the case of Turkey's membership to the EU.

Gender: Act No. 5510, enacted on 01/10/2008, along with Article 3(1)(10), states that children, regardless of gender, who are not married, do not work or receive income/pension due to their insurance are considered dependents of general health insureds until 18 years of age, on the condition of not exceeding age of 20 during their high school education, and of not exceeding age of 25 during tertiary education. When the previous social security laws are compared to Act No. 5510, considering male children's rights to from benefit health care services through their parents' insurance, except for the children of civil servants, there was no loss of rights for male children as the same rules are in place. However, in all previous social security laws, provisions regarding female children stated that they were considered dependants if they do not work, are not entitled to income/pension due to their insurance or are not married regardless of their age. For this reason, the new provisions enacted with Act No. 5510 caused the loss of rights for female children of the insured. In this context, when Act No. 5510 entered into force, in order to prevent the loss of rights of female children, it is stated that they will receive health care benefits until they change their condition and after that they will be evaluated in the same way as male children. (Provisional Article 12). In this framework, for example, a 32-year-old woman who was considered a dependant on 01/10/2008 is subject to

the provisions of Article 3(1)(10) after leaving her job or getting divorced, in the same way as male or female children who were not considered dependant on 01/10/2008. However, with the new statements added to Provisional Article 12 in 2011, a backwards step was taken in terms of equality, and female children who were considered dependant on the date when Act No. 5510 entered into force were provided access to health benefits, regardless of their age, even if they changed their status. If we set out from the previous example, as a result of the change in 2011, a 32 year-old woman considered to be a dependant on 01/10/2008, has the possibility to be provided public health services without obligation of paying premiums regardless of age until she dies after leaving her job or getting divorced.

While the different practices towards child dependants of insured persons on the basis of gender mentioned above are noteworthy, it is not possible to claim that they lead to gender-based inequalities within the scope of Directive 79/7/EEC since Article 2 of the Directive, where personal scope is disclosed, points to the working population. In this respect, it is not possible to question gender-equality in the framework of Directive 79/7/EEC for those who are economically inactive or whose working lives are not interrupted for reasons such as illness, accident, involuntarily unemployment, retirement, or invalidity. For this reason, it can be argued that the provisions regarding children being entitled to health benefits in kind are mainly because of their parents' economic activities, or not of their own economic activities. In that context, child dependants of insured persons are not under the scope of Directive 79/7/EEC, thus related provisions of Act No. 5510 are not contrary to the principle of gender equality.

In summary, the change in 2011, performed to prevent the loss of rights of female child dependants of insured persons, did not make a difference only between male and female children, because female children who were not considered dependants on 01/10/2008 are able to benefit from general health insurance as dependents just as male children depending on age, education, and marital status. Thus, female children

who were considered dependant before 01/10/2008 benefit from the general health insurance more advantageously regardless of their age as long as they are not married. The protection of acquired rights is understandable, but if it is desired to provide health care benefits in a more egalitarian structure among children it can be suggested to remove the statements "If the condition of female children changing status is removed, these individuals will once again be considered dependants according to their related laws." that were added to the eighth subparagraph of Provisional Article 12 in 2016, considering the Article 2 TEU.

5.2.3 Unemployment Insurance

5.2.3.1 Access to Unemployment Insurance

In Turkey, with Unemployment Insurance Act No. 4447 enacted in 1999, unemployment insurance started to be implemented for the first time[314]. In Article 46 of Act No. 4447, which covers the scope of unemployment insurance, it is stated that those who work on the basis of an employment contract and are insured under the terms of Article 4(1)(a) or second subparagraph of Article 4 of Act No. 5510 will receive unemployment insurance benefits. In this context unemployment insurance covers

- Employees who are dependent on their employer under an employment contract and whose wages are paid in return for their work (including employees insured by Bank retirement funds) and;
- Foreign nationals who are subject to an employment contract (excluding the citizens of countries with which international social security contracts are entered).

In this respect, it is mandatory to pay unemployment insurance premiums a total of 4% of the earnings of workers within the scope of unemployment insurance. 1% of

[314] Unemployment Insurance Act No. 4447 was accepted on 25/8/1999 and published in the Official Gazette dated 08/09/1999 with No. 26200.

this amount is paid to the unemployment insurance fund by the employer, 2% by the employer and 1% by the State.

In addition, along with the amendment made in 2011, on a partial-term contract, employees who work less than 30 days per month, employees who work in public transport less than 10 days per month and artists in entire fine arts, intellectuals and authors who employed by employers and work less than 10 days per month can benefit from unemployment insurance depending on their request. However, for those who wish to benefit from voluntary unemployment insurance, the related premiums are applied at 3% (1% for the employees, 2% for employer's share), so that the State does not subsidize the Fund for voluntary unemployment insured persons.

5.2.3.2 Unemployment Insurance Benefits

Unemployment benefits are given to employees in order to compensate for loss of income if a job is lost without any will or fault of their own while working under statutory unemployment insurance. In order to qualify for unemployment benefit, it is necessary to have worked the last 120 days subject to the employment contract and to pay unemployment insurance premium for a minimum of 600 days within three years. The payment period for unemployment benefits varies according to the number of days paid for unemployment insurance in the last three years. Within this framework, in the last three years, those who have paid unemployment insurance premiums for 600 days get unemployment benefits for 180 days, those who pay for 900 for 240 days, and those who pay for 1080 days for 300 days.

Although there are upper and lower limits on the amount of unemployment benefit, it is affected by the wage of the insured person because the amount of daily unemployment benefit is calculated by taking into account 40% of the average daily gross earnings of the insured person in the last four months before the employment

contract ended. However, the amount of unemployment benefit to be given should not be less than 40% and no more than 80% if the gross minimum wage.

Within the scope of active employment policies, re-employment services and courses or programs are also offered to help employees improve themselves professionally while they are receiving unemployment benefit. In addition, while receiving this benefit, general health insurance premiums of the individuals are paid by the İŞKUR, thus their access to health care services is provided (Article 87(d) of Act No. 5510).

5.2.3.3 Aligning Unemployment Insurance Benefits with the EU Non-Discrimination Principle

The personal scope of the unemployment insurance scheme indicated by Act No. 5510 is limited to employees who are bound to employers under an employment contract and receive wages for their work. In this context, as stated in the section entitled 5.2.1.2 Aligning Access to Social Insurance Schemes with EU Non-Discrimination Principle, in the provisions regulating the entry of employees into the scope of the social insurance scheme, differences on the grounds of nationality, and racial or ethnic origins are not stipulated and foreign nationals are clearly considered to be insured persons. In parallel with these provisions; there are no provisions in the scope of unemployment insurance that will lead to differences based on nationality, and racial or ethnic origins. In the provisions that define the scope of unemployment insurance, there are also no differences in regulation between male and female employees. In addition, for unemployment insurance benefit, there are no differences in terms of nationality, gender, and racial or ethnic origins in the conditions of qualification for eligibility for payments, payment amounts, and payment durations. In this context, Unemployment Insurance Act No. 4447 is compatible with Regulation 883/2004/EC, Directive 79/7/EEC, and Directive 2000/43/EC.

CONCLUSION

Jean Monnet, a European Union founding father, once claimed, “Crises are the great unifier.” It is possible to see the reflections of this expression throughout human history. For instance, the Industrial Revolution brought with it a great deal of problems, yet also provided new opportunities for the economy of countries. However, the utilization of machinery in production enabled the accumulation of capital, migration from the countryside to cities to supply manpower for industry, the inability of cities to satisfy the basic needs of an increasing population, an increase in the number of occupational accidents, and the normalizing of poverty. Personal efforts, domestic solidarity, and religious institutions remained incapable of solving the problems of workers and caused the questioning of employees rights. After the Great Depression, the requirement of taking collective measures against poverty not only for employees, but also for society as a whole became accepted globally. Since confronting these social risks for the first time in the Industrial Revolution, and facing them again in the Great Depression, left humanity adrift in misery and death, governments started to redefine their responsibilities and laid the foundations of modern social security systems. Social security rights that minimize risks and secure the future of individuals and guarantee them human dignity without relying on others have become an inalienable fundamental right in constitutions of modern states and international documents.

Nowadays nations attempt to protect the social security rights of individuals via the social insurance and social assistance tools of social security systems. However, differences in tradition, history, economic, and social structures of different states affect their social security systems and a common method of solidarity against social risks has not been applied as yet. On the other hand, definitions regarding social insurance benefits have reached an international qualification via Social Security Minimum Standards Convention No. 102 accepted by the ILO on 27/16/1952. Through this Convention, social insurance benefits in nine risk areas became

functional and minimum standards were determined. The nine risk areas and social insurance benefits to be offered are as specified as: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivors benefit; and in accordance with those insurance benefits the compensation of increase of expenses or the decrease of income of individuals are targeted.

Equality and prohibition of discrimination, which are widely accepted as universal values, are also the products of measures taken to ensure against not having adverse experiences. The spread of colonialism with the discovery of new continents, the Industrial Revolution, and WWII revealed that individuals having social, cultural and economic differences confronted many problems. Within this scope, the responsibilities of individuals to each other and the responsibilities of states to individuals were highlighted to protect individuals against biased and discriminatory behaviour arising from reasons such as race, religion, skin colour, gender, nationality, being a member of a national minority, in addition to providing equality as a sacred value. In brief; equality is subject to the same procedures before the law; everybody is equal before the law. Discrimination, however, emerges from one individual or group having less accessibility to a right, freedom or practice than others at the same status level or not being able to take advantage of rights at all due to reasons such as race, colour, language, religion, gender, or nationality without being based on objective or justified reasons. In this sense, the Charter of the United Nations, the founding treaty of the UN, which was signed to ensure lasting peace in the world after WWII, states that showing respect to human rights and fundamental freedoms effectively without discriminating against race, gender, language and religion all around the world will facilitate international peaceful and amicable relations. It also stipulates that party states need to work both individually and together to be able to achieve this goal. The Universal Declaration of Human Rights, which has a high moral influence at the international level, was adopted to exemplify the desire to protect international human rights against discrimination at an international level on

the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. More than one hundred party states accepted international regulations of the UN concerning the non-discrimination principle, which provide an insight to national regulations. Similarly, the ECHR and the Revised European Social Charter accepted by states party to the CoE are legally binding regulations at the international level that protect fundamental rights including the prevention of discrimination and the provision of equality for all individuals.

The establishment of the EU, which coincided with the end of WWII, is considered the most ambitious integration movement across the world. The integration process commenced with the intention of putting an end to wars that had been experienced in the region for hundreds of years and rebuilding a devastated Europe. From this, the Union formed by six founding states became an enormous organization with twenty-eight members and a *sui generis* legal order.

In relation to this study, it is important to note that while the six founding countries were negotiating the Treaty of Rome, they stipulated that it would not be possible to establish a common market without regulations covering MS social security systems to promote the free movement of workers. However, the structural differences of social security systems between MS do not allow integration in the area of social security. Due to this reason, the protection of social security rights of workers was evaluated within the framework of the prohibition of discrimination on the grounds of nationality. Therefore, in the EU, the prohibition of discrimination on the grounds of nationality is a result of economic integration rather than guaranteeing fundamental rights and freedoms of individuals. In this context, prohibition of discrimination on the grounds of nationality guarantees one of the four fundamental freedoms enshrined in the EU Treaties: the right to free movement, which is secured via secondary legislation owing to its flexible structure foreseen in the Founding Treaties. However, the secondary legislations created within this scope could affect

not only the financial balance of national social security systems, but also national economies. For this reason, secondary legislation that prohibits discrimination on the grounds of nationality in the field of social security could only be accepted unanimously by MS due to the Founding Treaties. Consequently, by the beginning of the year following the Treaty of Rome, Regulation 3/58 covering social security coordination rules came into force and discrimination on the grounds of nationality was prohibited in the protection of social security rights of workers.

The position of the Union can also be clearly understood by looking at the preferred form of arrangement used to protect the social security rights of individuals against discrimination on the grounds of nationality because rather than other forms of secondary sources it was arranged via Regulation. Regulations as EU secondary sources are binding and must be transposed directly to domestic law on the date specified. Even in cases where national law is not in accordance with EU regulation, the national courts must apply the regulation first. Another point that can draw attention to the firm stance of the Union is that Regulation 3/58, concerning the coordination of social security systems between MS, was adopted after the adoption of Regulation 1/58, which covered the determination of official languages to be used by the Union, and Regulation 2/58 which covered equivalency of EP Member passports. However, social security systems are systems that are alive and open to changes not only on the basis of MS, but also at the Union level. In addition to diverse structures of social security systems such as the entitlement conditions, financing and scope, factors such as the aging of the population, changes in the family structure, the emergence of new employment types and economic changes also cause MS to reform their social security systems. The adaptation of social security coordination rules, which have a history of almost 60 years, becomes inevitable when the EJC's decisions are added on top of all these factors. Within this framework, Regulation 1408/71/EEC was adopted in place of Regulation 3/58. In the following period, Regulation 883/2004/EC, composed of more modern and basic rules, was entered into force on 01/05/2010 by replacing Regulation 1408/71/EEC.

On the Union level, workers are protected against discrimination on the grounds of nationality not only in the field of social security, but also under conditions regarding work life such as their entrance into the job market, training opportunities and social and tax advantages. Within this framework, Free Movement of Workers Regulation 1612/68/EEC was adopted in 1968. Later on, some provisions of Regulation 1612/68/EEC were amended and removed for the purposes of codification and then replaced by Free Movement of Workers Regulation 492/2011/EU. Apart from these, the Treaty of Maastricht was an important milestone with regards to the enlargement of the scope of freedom of movement, because with the said Treaty, the concept of European Citizenship became the main topic on the agenda and the right to free movement and right to residence of citizens of the Union started to be regulated. In this way, the scope of the right to free movement was enlarged not only towards workers but also towards all citizens. In this context, Citizenship Rights Directive 2004/38/EC was adopted, which prohibits discrimination of EU citizens and family members on the grounds of nationality while residing in or exercising their rights to move freely in MS.

In the adoption of the principle of gender equality in relation to this study, the aim of fair competition between MS was more influential than social justice. While the Union aimed to establish a common market, it did not neglect the establishment of fair competition between MS and the abolition of activities that would distort competition among them. Therefore, the idea of preventing gender discrimination which arose from economic concerns towards creating fair competition between MS and gave rise to the principle of equal pay for equal work in Union law, which aimed to ensure competition between MS would not turn against other MS that had imposed social policies preventing the payment of low wages to women.

The adoption of Equal Pay Directive 75/117/EEC in 1975, created as an attempt to realize the principle of equal pay for equal work for women and men, raises the question of whether there has been a delay occurred with regards to progress in this

area. The answer to this question lies behind the gradual program accepted by the Commission in 1961 for the elimination of wage differences between genders because, in accordance with this program, wage differentials beyond 15% by 30/06/1962 were required to be reduced to 10% by 30/06/1963, and by the end of 1964, gender-based wage differences were completely eliminated in MS. One year after the adoption of the Equal Pay Directive, Equal Treatment Directive 76/207/EEC, intended for the realization of equal opportunity and equal treatment between women and men in work life, was adopted. Directive 79/7/EEC, which is an important source of this study and which has not been amended with a new directive since its adoption in 1975, aimed to provide gradual gender-based equality in the area of statutory social security schemes of MS. At the same time, it is striking that gradual equality was foreseen in the area of statutory social security schemes and exceptions were implemented in some areas. It is possible to explain this vulnerability in secondary legislation in social security via the differences of national social security legislations and the significant impact of arrangements to the economies of MS. Other secondary sources foreseeing gender-based equality according to their dates of adoption are as follows: the Occupational Pension Schemes Directive, the Equal Treatment in Self-Employment Directive, the Pregnant Workers Directive, the Parental Leave Directive, the Burden of Proof Directive, and the Goods and Services Directive. It is also evident that secondary legislation foreseeing gender-based equality was intended for various areas and has been modified several times. Nevertheless, in three fundamental areas, gender-based discrimination has been prohibited and an attempt to achieve equality has been made. These fundamental areas are employment, social protection, and access to supply of goods and services.

Based on these explanations, the regulations intended to achieve gender equality and the prevention of discrimination on the grounds of nationally have a long history in Union Law. On the other hand, the prohibition of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, defined as

other protected areas in this study, are rather new and have only been gained via The Treaty of Amsterdam. Without a shadow of a doubt, this delay is relevant to the objectives of the Union, because social policies were evaluated within the scope of securing the freedom of movement of citizens and without disturbing the fair competition by the Union guided by the idea of economic integration. However, this approach changed direction in 1990s due to amendments made to national laws with the decisive support of the EP as well as lobby activities of NGOs and jurisprudence of the EJC towards fundamental human rights by giving indication to the removal of barriers against freedom of movement. Following the Treaty of Amsterdam, Racial Equality Directive (2000/43/EC) prohibiting the discrimination against racial or ethnic origin, and shortly afterwards, Employment Equality (Framework) Directive (2000/78/EC) prohibiting the discrimination on the grounds of sex, religion or belief, disability, age or sexual orientation were adopted. However, amongst these, only Directive 2000/43/EC covers social security practices. This condition can only be explained by the long-standing presence of regulations within a MS national legislation which prohibit discrimination based on race and ethnic origin as a consequence of both constitutional traditions and membership to the UN and CoE of MS, thus an association in this field was foreseen easily.

In addition to all these, three innovations incidental to the Treaty of Lisbon are worth mentioning. The first one of these is that the ChFR became a binding legal norm with the Treaty of Lisbon and took its place among the primary legal sources of the Union, presenting an indicator for the desire to move forward in terms of fundamental rights including the provision of equality and the elimination of discrimination. The second development of the Treaty of Lisbon introduced in the field of fundamental rights is that as a legal entity the Union will accede to the ECHR, in precise language and without any prejudice. Both developments, in the protection of fundamental rights in the general sense as well the prohibition of discrimination within the scope of this study, actually, did not offer new rights in practice. However, they are effective in reinforcing fundamental human rights,

making them visible and exhibiting a clear stance. Another innovation of the Treaty of Lisbon from the point of view of this study is the mention of the concept of values for the first time in primary law in Article 2 TEU. Within this scope equality, non-discrimination and gender equality were declared within the values of the Union. If we interpret Article 7 TEU specific to this study, if the Council determines that a MS seriously and persistently violates the non-discrimination value of the Union, it may be possible to suspend certain rights of the said MS arising from Treaties, including voting rights at the Council.

When the focus is turned to Turkey; factors such as the Ottoman Empire's inability to keep up with the pace of the industrial revolution in Western societies and insufficiency of industrial resources, world wars, domestic coups and economic crises after the establishment of a new Republic were all reasons for the delay of implementation of modern practices in the field of social security, as well as in working life. Although the right to social security was first proclaimed in the 1961 Constitution, it took almost a century in order for the legal arrangements to reach a certain level with legal regulations. However, efforts to ensure the principle of equality and prevent discrimination, especially for females, took place for the first time in the Republic of Turkey, during the revolutions of Mustafa Kemal Atatürk, the founder of the Republic. Significant improvements were made in this regard; in fact, the right for Turkish women to vote and to be nominated or elected was granted in 1934, far before many other democratic states. However, for many years, since the rights offered by the state were considered sufficient, no serious progress was realized in this field for a long time. Despite being included in all of the constitutions in force since the proclamation of the Republic, the real assurance of the principle of equality was provided after the Constitution of 1961, with the introduction of special procedures for inspection of conformity with the Constitution. However, the recognition of the candidate status of Turkey in Helsinki European Council in 1999 together with Turkey's membership to international organizations are seem to be effective on the development of the principle of equality and non-discrimination.

Within this scope, it was not until the early 2000s when constitutional amendments were made to ensure equality and prevention of discrimination, and then national regulations were revised and important steps were taken in this field.

In this framework, the main approach of this thesis is the alignment assessment of statutory social security regulations applied in Turkey to EU non-discrimination principle. In this context, it should be noted that discussions regarding the restructuring of social security systems in Turkey also began during the early 1990s. The WB and the IMF criticized Turkey for the first time as a result of increasing deficits accrued due to populist policies of the social security system and pushed for the realization of radical reform. In response, emergency measures were enacted and the first phase of social security reform was applied by Law No. 4447 dated 25/08/1999. Since the applied changes did not have the necessary depth, serious progress was not obtained in line with the financial sustainability of the system and deficit emanating from the balance of income and expenditures continued to increase in the following years. The concerns regarding the financial aspects of the social security system were indicated in Progress Reports of Turkey prepared by the EU from 1999 to 2008. With the intentions of strengthening its membership process to the EU, Turkey accelerated its Draft Reform studies regarding the social security arrangements. Within this scope, Social Security Institution Act No. 5502 dated 20/04/2006, which combines three previous social security institutions (the Retirement Fund of the Republic of Turkey, the Social Insurance Institution (SSK) and the Organization of Self-Employed Workers (BAĞ-KUR)) under the same umbrella and which is responsible for the management of arrangements related to social insurance schemes, entered into force and the Social Security Institution (SGK) was established. After Social Security Institution Act No. 5502; Social Insurances and General Health Insurance Act No. 5510 entered into force on 01/10/2008, which aimed to create normalized and standard unity in the rights and obligations of workers in different insurance statuses and also to provide health benefits in kind to

the whole population with equal and improved standards, instead of regulations related to social security implemented via five different Laws.

In ILO Convention No. 102, nine social risk areas are listed; and within the scope of Act No. 5510 social insurance benefits for seven risk areas are offered (medical care, sickness benefit, old-age benefit, accidents at work and occupational diseases benefit, maternity benefit, invalidity benefit, and survivors benefit). In addition to these, unemployment benefit is regulated within the scope of Unemployment Insurance Act No. 4447. However, it should be noted that there is no general scheme in Turkey regarding family benefits.

Within this framework, statutory social security schemes implemented within Act No. 5510 and Act No. 4447, as well as the individuals who are under the scope of social security schemes and the eligibility conditions to benefit from insurance schemes have been explained in detail in this study. In the framework of statutory social security legislations of Turkey, differences in practices on the grounds of nationality, gender, race or ethnic origin, religion or belief, disability, age, or sexual orientation have been closely examined and specified differences are evaluated within the scope of EU non-discrimination principle.

First of all, in the case that Turkey becomes a member of the EU, *for the assurance of alignment to Regulation 883/2004/EC prohibiting discrimination on the grounds of nationality in statutory social security schemes of Turkey*, it will not be possible to implement the provisions listed below for citizens and family members of EU Member States and Norway, Iceland, Liechtenstein, Sweden, thus, it is important to review those provisions:

- Article 5(g) of Act No. 5510 on the implementation of certain insurance branches to Turkish employees who are sent to work abroad by their employers and undertake works in countries not having social security contracts with Turkey; considering the provisions of Article 12(1) of Regulation 883/2004/EC,

- Articles 60(1)(d), 60(1)(g), the third subparagraph of Article 60, Articles 61(1)(c), 61(1)(f), 67(1)(b), 67(1)(c), the fourth subparagraph of Article 80, Articles 81(1)(f) of Act No. 5510, since different practices are implemented for foreign nationals who are not under social insurance coverage in Turkey or in a foreign country regarding general health insurance premium rates and access to health benefits in kind; considering the provisions of Articles 4 and 6 of Regulation 883/2004/EC,
- The second subparagraph of Article 52 of Act No. 5510 on the implementation of different practices for foreign nationals regarding access to health benefits in kind under the scope of the voluntary insurance scheme; considering the provisions of Articles 4 and 6 of Regulation 883/2004/EC,
- Article 64(c) of Act No. 5510 on the implementation of chronic disease treatment expenses for diseases which existed before the date on which foreign nationals or their dependants are considered general health insureds, considering the provisions of Article 4 of Regulation 883/2004/EC.

Moreover, *for the assurance of alignment to Directive 79/7/EEC and Directive 2010/41/EU prohibiting discrimination on the grounds of gender in statutory social security schemes of Turkey,* it is suggested to review the provision listed below:
- Article 4(2)(e) of Act No. 5510, although female sex workers are covered under the under the scope of statutory social security schemes, male sex workers are not covered; considering the provisions of Article 4(1) of Directive 79/7/EEC,
- Article 6(1)(a), the second subparagraph of Article 16, Articles 18(1)(c) and 18(1)(d) of Act No. 5510, since an employer's spouse working free of charge at the workplace of the employer is not covered under the scope of statutory social security schemes, temporary incapacity allowance (maternity allowance) is not provided for female spouses of self-employed workers in the event of pregnancy or motherhood, even if they want to benefit from voluntary insurance scheme; considering the provisions of Article 8 of Directive 2010/41/EU,
- Article 6(1)(b) of Act No. 5510 since relatives up to the third degree who reside in the same residence and participate in work carried out at that residence without

contribution from the outside are not deemed to be insureds; considering the provisions of Article 4(1) of Directive 79/7/EEC,

- Articles 18(1)(c) and 18(1)(d) of Act No. 5510, since maternity allowance is not provided to company partners who are considered self-employed insureds, considering the provisions of Articles 2(a) and 8 of Directive 2010/41/EU,
- Article 41(1)(a) of Act No. 5510, since the right to pay long-term insurance premiums of the unpaid maternity leave of female insureds not only increases their number of premiums with respect to old-age pension, but to invalidity pension, thus the advantage of the provision in question should be limited to old-age pension; considering the provisions of Article 7(1)(b) of Directive 79/7/EEC.

In addition to these, *for the assurance of alignment in general equality and prohibition of discrimination specified in Article 2 TEU,* below provisions suggested to review:

- Article 18(1)(b) and the second subparagraph of Article 18 of Act No. 5510, even though the same short-term insurance premium rate is applied for both employees and self-employed workers, self-employed workers do not have the right to benefit from temporary incapacity allowance within the scope of sickness insurance, in addition, temporary incapacity allowance is not provided to self-employed workers in cases of accidents at work or occupational disease for outpatient treatment,
- The fourth subparagraph of Article 29 and the first and fifth subparagraphs of Article 27 of Act No. 5510, since, due to the calculation of the replacement rate, employees who are entitled to a specific old-age pension and invalidity pension with a long-term premium payment of less than 7200 days receive a lesser amount of pension than self-employed workers, civil servants and voluntary insureds under the same conditions,
- Article 32(2)(a) of Act No. 5510, since beneficiaries of employees are eligible for survivors pension with easier conditions than the beneficiaries of self-employed workers, civil servants and voluntary insureds,

- Article 33(1)(c) of Act No. 5510, since, due to the calculation method of the replacement rate, beneficiaries of employees who meet the requirements of survivor pension without 7200 days of long-term insurance premium payments are granted a lesser amount of survivors pension than self-employed workers, civil servants and voluntary insureds under the same conditions.

Lastly, although, these differences in treatment do not constitute problems in regards to the EU non-discrimination and equality principles, *in case it is desired to provide statutory social security schemes in Turkey in a more equalitarian structure,* it is suggested to review the provision listed below:

- The statement *When both spouses are insured, it shall be left up to their preference to determine who will be paid the birth grant.* could be added into the third subparagraph of Article 16 of Act No. 5510, thus if both parents are insured, the birth grant would not be paid solely to the female insured, but male insureds could also benefit according to their preferences,
- The advantageous provisions with respect to female insureds who have children in need of permanent care from another person within the eighth subparagraph of Article 28 of Act No. 5510 could be extended to male insureds who take responsibility regarding care for their disabled children. Additionally, in cases where the mother of a disabled child dies or custody rights are given to the father, the male insured would benefit from these provisions.
- While survivors pension/income of male children continues to be paid until the age of 18/20/25 regardless of marital status, survivors pension/income for female children is terminated in the event of marriage by the age of 18/20/25 (excluding other conditions), thus amendments should be considered to Article 34(1)(b) of Act No. 5510 in order to not grant survivors pension/income to married children of deceased insureds regardless of gender (by foreseeing a transition period if it is necessary),
- While the survivors pension/income of female children continues to be paid if they are not married regardless of age until they die, it is granted to male children

only until the age of 18/20/25 in line with the educational requirement, thus amendments should be considered to Article 34(1)(b) of Act No. 5510 in order to provide survivors pension/income to all children until the age of 18/20/25 regardless of gender (by foreseeing a transition period if it is necessary) or if it protection for female children due to their disadvantaged position is preferred, they might be entitled to survivors pension/income at the pensionable age if they are not entitled to pension/income due to their own insurance,

- While female children have the right to benefit from marriage bonus, it is not granted to male children, thus it might be considered to remove provisions in regards to marriage bonus (by foreseeing a transition period if it is necessary) in the first and second subparagraph of Article 37 and other statements regarding marriage bonus hole in Act No. 5510,
- While female children considered dependant before 01/10/2008 benefit from general health insurance more advantageously regardless of their age as long as they are not married, female children not considered dependants on 01/10/2008 are only able to receive health benefits in kind as dependents, just as male children 18/20/25 (excluding other conditions). “If the condition of female children changing status is removed, these individuals will once again be considered dependants according to their related laws.” could be removed from the eighth subparagraph of Provisional Article 12, which was added to Act No. 5510 in 2016.

In addition to these, most of the provisions regarding benefit from allowance or income or pension in Act No. 5510 are based upon notification of premium days for employees, however, unlike the general rule, if birth occurs after the termination of insured status, premium payment is required to benefit from birth grant not only from the self-employed workers but also employees. For this reason, it could be suggested to correct errors in wordings or add the lack of regulations to the fifth subparagraph of Article 16. In addition, a similar error can be observed regarding benefit from funeral payment, thus, the third subparagraph of Article 37 could also be reviewed in this same framework.

In conclusion, in advancing in the process of candidacy, Turkey has to review the above mentioned statutory social security schemes from the point of view of its alignment to the non-discrimination and equality principles. If the amendments in question are not made, then it is important to defend the provisions in question based on objective or justified reasons. In this context, it should not be forgotten that Turkey has a wide range of authority in determining the scope of their social insurance legislation based on their employment and social policy goals, and budgetary potentials. Moreover, if different practices on the grounds of nationality, gender or race and ethnic origin in the field of statutory social security regulations of Turkey are brought to national courts or the EJC, they can be defended within the framework of exceptional clauses. If Turkey reviews its statutory social security legislations and makes the relevant amendments while there is still time, it will not only ensure its alignment to EU norms, but will also reinforce the universal values of the non-discrimination and equality principles. Furthermore, if Turkey's membership to the EU is realized, the financial sustainability of its general health insurance scheme should be considered by evaluating the fact that general health care is provided to the whole population based on the residency condition and the system was designed by taking very low (12.79 USD/month) premiums from citizens with no social insurance and no premiums from those entitled to pensions. Thus, as required by the provisions of Regulation 883/2004/EC, the health care expenditures of the whole population of Turkey and those who get pension from Turkey, even if they do not reside in the country, will be financed by Turkey, not only in Turkey but also in EU Member States and Norway, Iceland, Liechtenstein and Sweden. All of these approaches would allow to ensure protecting the right to social security in Turkey based on EU norms, while without jeopardize the financial sustainability of the system.

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APPENDICES

APPENDIX A. TÜRKÇE ÖZET / TURKISH SUMMARY

Avrupa Birliğinin (AB) Kurucularından Jean Monnet, "Krizler mükemmel birleştiricilerdir" ifadesini kullanmıştır. İnsanlık tarihine bakıldığında, bu ifadenin yansımalarını görmek mümkündür. Örneğin Sanayi Devrimi pek çok sorunu beraberinde getirirken, devletlerin ekonomilerinde yeni kapıları da aralamıştır. Üretimde makinelerin kullanılmaya başlanması sermaye birikimine imkan tanırken; sanayide işgücünün sağlanması için kırdan kente göçlerin hızlanması, şehirlerin artan nüfusunun temel ihtiyaçlarının karşılanmasında yetersiz kalınması, birbiri ardına yaşanan iş kazaları ve yoksulluk hayatın olağan bir parçası haline gelmiştir. Bu hususlar bireysel çabaların, aile içi dayanışmanın ve dini kurumların işçilerin karşılaştıkları sorunları çözmekte yetersiz kalmasına ve işçilerin haklarının sorgulanmasına neden olmuştur. Büyük Buhranın ardından sadece işçilerin değil toplumun yoksulluktan koruması için kolektif önlemlerin alınması gerekliliği dünya genelinde kabul görmüştür. Bu kapsamda Sanayi Devrimi ile ilk defa karşı karşıya kalınan, Büyük Buhran ile şartları daha da ağırlaşan sosyal tehlikeler insanlığı yoksulluk sefaletine sürüklerken, devletlerin sorumluluklarının yeniden belirlenmesine ve modern sosyal güvenlik sistemlerinin doğuşuna neden olmuştur. Bireylerin karşılaşabilecekleri riskleri minimize ederek bugünü ve yarınını güvenceye alan, başkasına muhtaç olmaksızın insan onuruna yakışır biçimde yaşamalarını garanti eden sosyal güvenlik hakkı, modern devletlerin anayasalarında ve uluslararası belgelerde vazgeçilemez temel haklardan biri haline gelmiştir.

Günümüzde ulusların sosyal güvenlik sistemlerinin sosyal sigortalar ve sosyal yardımlar araçlarıyla, bireylerin sosyal güvenlik hakkı korunmaktadır. Ancak devletlerin gelenekleri, tarihleri, ekonomik ve sosyal yapılarındaki farklılıklar, sosyal

güvenlik sistemlerini etkilemekte ve hangi sosyal risklere karşı nasıl bir dayanışma içinde olunması gerektiği noktasında ortak bir yöntem bulunmamaktadır. Buna karşın sosyal sigortalar özelinde yorum yapılacak olursa, Uluslararası Çalışma Örgütü (ILO) tarafından 28/06/1952 tarihinde kabul edilen 102 sayılı Sosyal Güvenlik Asgari Standartlar Sözleşmesi ile sosyal sigorta yardımlarına ilişkin tanımlamalar, uluslararası niteliğe kavuşmuştur. Bu çerçevede Sözleşme ile dokuz riskli alanda sosyal sigorta yardımlarının işlerlik kazandığı ve minimum standartların belirlendiği ifade edilmelidir. Dokuz riskli alana bağlı olarak sunulacak sosyal sigorta yardımları: sağlık yardımı, hastalık yardımı, işsizlik yardımı, yaşlılık yardımı, iş kazası ve meslek hastalığı yardımı, aile yardımı, analık yardımı, maluliyet yardımı ve ölüm yardımı olup, söz konusu yardımlarla bireylerin giderlerindeki artışın veya gelirlerindeki azalışın telafisi hedeflenmektedir.

Bugün evrensel değerlerden olan eşitlik ve ayrımcılık yasağı da insanlığın yaşadığı olumsuz tecrübelerin yeniden yaşanmaması amacıyla alınan tedbirlerin ürünüdür. Yeni kıtaların keşfiyle sömürgeciliğin yaygınlaşması, Sanayi Devrimi ve II. Dünya Savaşı sosyal, kültürel ve ekonomik farklılıklara sahip bireylerin birçok sorunla karşı karşıya kaldığını göstermiştir. Bu kapsamda kutsal bir değer olan eşitliğin sağlanmasına ilave olarak, bireylerin ırk, din, ten rengi, cinsiyet, milliyet, etnik köken, ulusal bir azınlığa mensubiyet gibi nedenlerle önyargılı ve ayrımcı tutumlardan korunabilmesi amacıyla devletlerin bireylere ve bireylerin birbirine olan yükümlülükleri vurgulanmaya başlamıştır. Özetle ifade edilmek istenirse eşitlik, aynı durumda olan kişilerin kanunlar önünde aynı işlemlere tabi tutulmasıdır. Ayrımcılık ise aynı durumdaki kişilerin objektif veya makul nedenlere dayandırılmaksızın, ırk, renk, dil, din, cinsiyet, vatandaşlık gibi gerekçelerle benzerlerine oranla bir haktan, özgürlükten veya uygulamadan daha az yararlandırılması ya da hiç yararlandırılması biçiminde ortaya çıkmaktadır. Bu anlamda II. Dünya Savaşı sonrasında dünyada kalıcı bir barışı sağlamak üzere kurulan Birleşmiş Milletlerin kurucu antlaşmasında bütün dünyada ırk, cinsiyet, dil ya da din ayrımı gözetmeksizin herkesin insan haklarına ve temel özgürlüklerine etkin bir biçimde saygı gösterilmesinin,

uluslararası barışçı ve dostça ilişkilerin sağlanmasını kolaylaştıracağına yer verilmiştir. Bu amaca ulaşmak için de üye devletlerin gerek birlikte gerekse ayrı ayrı işbirliği içinde hareket edeceği ifade edilmiştir. İnsan Hakları Evrensel Beyannamesi kapsamında ayrımcılığı yasaklayan temeller daha geniş bir yelpazede sıralandırılarak (ırk, renk, cinsiyet, dil, din, siyasal veya başka bir görüş, ulusal veya sosyal köken, mülkiyet, doğuş veya herhangi başka bir statü), bireylerin ayrımcılığa karşı korunması arzusu pekiştirilmiştir. Bu doğrultuda Birleşmiş Milletlerin yüzü aşkın taraf devletince, farklı ayrımcılık temellerine ilişkin uluslararası düzenleme kabul edilmiş olup, ulusal düzenlemelere yol gösterici olmuştur. Benzer şekilde Avrupa Konseyine taraf devletler tarafından kabul edilen Avrupa İnsan Hakları Sözleşmesi ve Gözden Geçirilmiş Avrupa Sosyal Şartı, bireylerin eşitliğinin sağlanması ve ayrımcılığının önlenmesi dahil olmak üzere temel hakların korunmasında uluslararası düzeyde hukuki bağlayıcılığı olan diğer belgelerdendir.

Dünya ölçeğinde en iddialı bütünleşme hareketi olarak görülen AB'nin kuruluşu da II. Dünya Savaşı sonrasına rastlamaktadır. Altı kurucu devletin bir araya gelerek yüzyıllardır kıtada yaşanan savaşlara son verilmesi ve yıkılan Avrupa'nın yeniden inşası arzusu ile başlayan bütünleşme sürecinin sonunda, Birlik yirmi sekiz üyesiyle ve kendine münhasır hukuk düzeniyle devasa bir örgüte dönüşmüştür.

Çalışmamız bakımından, kurucu devletlerin henüz Roma Antlaşması görüşmelerinde önceliklendirilen ortak pazarın kurulması için üye devletlerin sosyal güvenlik sistemlerini içeren bir düzenlemenin yapılması gerekliliğini vurgulamaları önemlidir. Ancak üye devletlerin her birinde uygulanmakta olan sosyal güvenlik sistemlerinin yapısal farklılıkları, sosyal güvenlik alanında bütünleşmeye imkan vermemiştir. Bu nedenle işçilerin sosyal güvenlik hakkının korunması vatandaşlığa dayalı ayrımcılığın yasaklanması çerçevesinde değerlendirilmiştir. Bu doğrultuda AB'de vatandaşlığa dayalı ayrımcılığın yasaklanması, bireylerin temel hak ve özgürlüklerine zarar gelmesi kaygısından ziyade, ekonomik bütünleşme hedefinin ürünüdür. Bununla birlikte vatandaşlığa dayalı ayrımcılık yasağı AB'nin temel

değeri olan serbest dolaşım hakkının garantisi olup, Kurucu Antlaşmalarda öngörülen esnek yapısı sayesinde ikincil düzenlemelerle şekillenmektedir. Ancak bu kapsamda yapılacak ikincil düzenlemelerin ulusal sosyal güvenlik sistemlerinin mali dengesini etkileme olasılığı büyüktür. Bu nedenle sosyal güvenlik alanında vatandaşlığa dayalı ayrımcılığı yasaklayan ikincil düzenlemeler, ancak üye devletlerin oybirliğiyle kabul edilmesi kuralı getirilmiştir. Bu kapsamda Roma Antlaşmasını takip eden yılın başında, sosyal güvenlik koordinasyon kurallarını içeren 3/58 sayılı Tüzük yürürlüğe girmiş ve işçilerin sosyal güvenlik haklarının korunmasında vatandaşlığa dayalı ayrımcılık yasaklanmıştır. Birliğin sosyal güvenlik hakkının korunmasında vatandaşlığa dayalı ayrımcılığı önlenmeye yönelik net duruşu düzenlemenin tüzük biçiminde hazırlanmasından anlaşılabilir. Çünkü AB'nin hukuksal boyutunu oluşturan ikincil düzenlemelerden tüzükler yayınlandığı tarih itibariyle bağlayıcı olup, doğrudan iç hukuka aktarılması gerekmektedir. Ayrıca ulusal düzenlemeler tüzüklere uygun olmadığında, ulusal mahkemelerce tüzüğün öncelikli olarak uygulanması gerekmektedir. Birliğin sosyal güvenlik alanında vatandaşa dayalı ayrımcılığı önlemek konusundaki kararlı duruşunu göstermek için dikkat çekmek istediğimiz bir diğer husus sosyal güvenlik koordinasyon kurallarını içeren 3/58 sayılı Tüzüğün, Birlik tarafından kullanılacak resmi dillerin belirlenmesini içeren 1/58 sayılı Tüzük ile Avrupa Parlamentosu (AP) üyelerinin pasaportlarının diplomatik pasaportlara eşdeğerliğinin kabul edilmesini içeren 2/58 sayılı Tüzükten hemen sonra kabul edilmesidir. Diğer yandan sosyal güvenlik sistemleri, sadece Birlik düzeyinde değil üye devletler bazında da canlı ve değişime açık sistemlerdir. Sosyal güvenlik sistemlerinin kapsamı, finansmanı, hak kazanım koşulları gibi farklı yapılarına ilave olarak, ekonomik değişiklikler, yeni istihdam türlerinin ortaya çıkışı, aile yapılarının değişmesi ve nüfusun yaşlanması gibi etkenler üye devletlerin kendi sistemlerini reforme etmelerine sebebiyet vermektedir. Tüm bu etkenlere Avrupa Birliği Adalet Divanının (ABAD) kararları da eklendiğinde, yaklaşık 60 yıllık bir geçmişe sahip olan sosyal güvenlik koordinasyon kurallarının adaptasyonu kaçılmaz olmuştur. Bu çerçevede 3/58 sayılı Tüzük yerine 1408/71/EEC sayılı Tüzük kabul edilmiştir. İlerleyen dönemde 1408/71/EEC sayılı

Tüzük yerine, daha modern ve basit kuraları içeren 883/2004/EC sayılı Tüzük 01/05/2010 itibariyle yürürlüğe girmiştir.

Birlik düzeyinde çalışanların sadece sosyal güvenlik hakkı değil, aynı zamanda işe kabulleri, eğitimleri, sosyal ve vergi avantajları gibi çalışma hayatına ilişkin koşullarda vatandaşlığa dayalı ayrımcılığa maruz kalmamaları da amaçlanmıştır. Bu çerçevede 1968 yılında 1612/68/EEC sayılı İşçilerin Serbest Dolaşımı Tüzüğü kabul edilmiştir. Daha sonra 1612/68/EEC sayılı İşçilerin Serbest Dolaşımı Tüzüğünün bazı hükümlerinde değişikliğe gidilmiş ve düzenlemenin kodifikasyonu amacıyla kaldırılarak, yerine 492/2011/EU sayılı İşçilerin Serbest Dolaşımı Tüzüğü yürürlüğe girmiştir. Bunların dışında, bilindiği gibi Maastricht Antlaşması serbest dolaşım hakkının kapsamının genişlemesi bakımından dönüm noktası niteliğindedir. Çünkü söz konusu Antlaşma ile Avrupa Vatandaşlığı kavramı gündeme gelmiş ve Birlik yurttaşlarının serbest dolaşım ve ikamet hakkı düzenlenmiştir. Böylelikle serbest dolaşım hakkının kapsamı sadece işçilere yönelik değil, tüm vatandaşlara yönelik olarak genişlemiştir. Bu çerçevede AB vatandaşlarının ve aile bireylerinin üye ülkelerde serbest dolaşım haklarını kullanırken veya ikamet ederken vatandaşlığa dayalı ayrımcılığını yasaklayan 2004/38/EC sayılı AB vatandaşları ve Ailelerinin Serbest Dolaşım ve Yerleşme Hakkı Hakkındaki Direktif kabul edilmiştir.

Çalışmamızla ilişkili olarak yer verdiğimiz eşit işe eşit ücret ilkesinin benimsenmesinde de sosyal adaletten ziyade, üye devletler arasında adil rekabet ortamının inşa edilmesi etkili olmuştur. Birlik ortak pazarı kurmayı hedeflerken, rekabeti bozan eylemlerin kaldırılmasını öngörmüştür. Bu kapsamda Roma Antlaşmasında, üye devletler arasındaki rekabetin kadınlara düşük ücret ödenmesini engelleyen sosyal politikaları hayata geçiren üye devletler aleyhine dönmemesi amaçlanarak, kadın ve erkeklere eşit ücret ödenmesi ilkesine yer verilmiştir.

Kadın ve erkeklere eşit ücret ödenmesi ilkesini gerçekleştirmek üzere ilk defa hazırlanan 75/117/EEC sayılı Eşit Ücret Direktifinin 1975 yılında kabul edilmesi, bu

alanda ilerleme kaydedilmesi bakımından gecikme yaşanıp yaşanmadığını sorusunu akla getirebilir. Bu sorunun cevabı, Komisyonun 1961 yılında cinsiyetler arası ücret farklılıklarının giderilmesine yönelik kabul ettiği tedrici programda yatmaktadır. Çünkü söz konusu programa göre 30/06/1962 tarihine kadar 15%'i geçen ücret farklılıkları 15%, 30/06/1963 tarihine kadar 10% seviyesine düşürülmüş ve 1964 yılı sonunda, cinsiyete dayalı ücret farkları tamamıyla üye devletlerde kaldırılmıştır. Eşit Ücret Direktifinin kabulünden bir yıl sonra çalışma hayatında kadın ve erkekler arasında fırsat eşitliği ile eşit muameleyi sağlamaya yönelik 76/207/EEC sayılı Eşit Muamele Direktifi kabul edilmiştir. Çalışmamız bakımından önemli kaynaklardan bir olan ve 1975 yılında kabul edildiğinden beri yeni bir Direktifle değişikliğe uğramayan 79/7/EEC sayılı Direktif ile de zorunlu sosyal güvenlik programları alanında cinsiyete dayalı eşitliğin aşamalı bir biçimde sağlanmasını amaçlamıştır. Bununla birlikte zorunlu sosyal güvenlik programları alanında aşamalı eşitliğin öngörülmesi ve bazı alanlarda istisnalara yer verilmesi dikkat çekidir. Sosyal güvenlik alanında öngörülen ikincil düzenlemelerdeki bu hassasiyetin, yine ulusal sosyal güvenlik düzenlemelerinin birbirlerine olan farklılığı ve yapılacak düzenlemelerin devletlerin ekonomilerine olan büyük etkisiyle açıklanması mümkündür. Kabul ediliş tarihlerine göre cinsiyete dayalı eşitliği öngören diğer ikincil düzenlemeler: Mesleki Emeklilik Programları Direktifi, Bağımsız Çalışanlar Hakkında Eşit Muamele Direktifi, Gebe İşçilerin Korunması Hakkındaki Direktif, Ebeveyn İzni Direktifi, İspat Yükü Direktifi ile Mal ve Hizmetler Direktifleridir. Diğer yandan cinsiyete dayalı eşitliği öngören ikincil düzenlemelerin çeşitli alanlara yönelik olduğu ve pek çok defa değişikliğe uğradığı görülebilir. Buna karşın üç temel alanda cinsiyete dayalı ayrımcılığın yasaklandığı ve eşitliğin sağlanmaya çalışıldığı ifade edilebilir. Bunlar: istihdam, sosyal koruma ve son olarak mal ve hizmetlere erişimdir.

Yukarıdaki açıklamalarımız çerçevesinde, Birlik hukukunda vatandaşlığa dayalı ayrımcılığın önlenmesine ve cinsiyet eşitliğinin sağlanmasına yönelik düzenlemelerin köklü bir geçmişe sahip olduğu görülebilir. Buna karşın

çalışmamızda diğer alanlar olarak tanımladığımız cinsiyete, ırk veya etnik kökene, din veya inanca, engelliliğe, yaşa ve cinsel yönelime dayalı ayrımcılığın yasaklanması çok yeni olup, ancak Amsterdam Antlaşması ile kazanılabilmiş değerledir. Hiç kuşkusuz bu gecikme, Birliğin hedefleri ile ilgili olup, ekonomik bütünleşme fikri ile yön alan Birlik için sosyal politikaların ancak adil rekabetin bozulmaması ve kişilerin serbest dolaşımının garanti edilmesi çerçevesinde değerlendirilmesinden kaynaklanmıştır. Ancak üye devletlerin bu tavrı 1990'lı yıllarda serbest dolaşımın önündeki engellerin kaldırılması işaret edilerek; ABAD'ın temel insan haklarına yönelik içtihattı, sivil toplum örgütlerinin lobi faaliyetleri, AP'nin kararlı desteği ve ulusal yasalardaki değişiklikler sonucunda yön değiştirmiştir. Amsterdam Antlaşmasını takiben ırk veya etnik kökene dayalı ayrımcılığı yasaklayan 2000/43/EC sayılı Irk Eşitliği Direktifi, kısa bir süre sonra da cinsiyete, din veya inanca, engelliliğe, yaşa ve cinsel yönelime dayalı ayrımcılığı yasaklayan 2000/78/EC sayılı İstihdamda Eşitlik Direktifi kabul edilmiştir. Ancak bunlardan sadece 2000/43/EC sayılı Irk Eşitliği Direktifi, sosyal güvenlik uygulamalarını kapsamına almaktadır. Bu durum ise üye devletlerin, gerek anayasal gelenekleri gerekse Birleşmiş Milletlere ve Avrupa Konseyine üyeliklerinin bir sonucu olarak, uzun yıllardır ulusal mevzuatlarında ırk ve etnik kökene dayalı ayrımcılığı yasaklayan düzenlemelerinin mevcut olması ve kolaylıkla birlikteliğin sağlanabileceğinin öngörülmesiyle açıklanabilir.

Tüm bunlara ilave olarak Lizbon Antlaşmasının üç yeniliğine değinmek yerinde olacaktır. Bunlardan ilki Avrupa Birliği Temel Haklar Şartının, Birliğin birincil hukukunun ayrılmaz bir parçası haline gelmesidir. Bu da Birliğin sadece ekonomik hedeflerle hareket etmediği, bireylerin eşitliğinin sağlanması ve ayrımcılığının önlenmesi dahil olmak üzere temel haklar alanında da yol alınmak istenildiğinin göstergesidir. Lizbon Antlaşmasının temel haklar alanında ortaya koyduğu ikinci gelişme, Birliğin tüzel bir kişilik olarak Avrupa İnsan Hakları Sözleşmesine katılımının açık bir dille öngörülmüş olmasıdır. Her iki gelişme de temel hakların pekiştirilmesinde, görünür kılınmasında ve korunmasında net bir duruşun

sergilendiğini göstermektedir. Lizbon Antlaşmasının çalışmamız bakımından önem arz eden diğer gelişmesi ise ikinci maddesinde yer alan Birliğin Değerleri kavramına, ilk defa birincil hukukta yer verilmesidir. Bu kapsamda eşitlik, ayrımcılık yapmama, kadın ve erkek eşitliği, Birliğin değerleri arasında deklare edilmiştir. Lizbon Antlaşmasının pek çok hükmünde Birliğin değerlerinin teşviki hususunda kararlılık görülebilir. Bunlar içinde yedinci maddeyi çalışmamız özelinde yorumlayacak olursak, bir üye devletin ayrımcılık yasağı veya eşitlik ilkelerini ciddi ve sürekli biçimde ihlal ettiğinin Konsey tarafından oybirliğiyle tespitinden sonra, ilgili üye devletin Konsey'deki oy hakları dahil, Antlaşmadan kaynaklanan bazı haklarının askıya alınması mümkündür.

Yönümüzü Türkiye'ye çevirdiğimizde ise Osmanlı İmparatorluğu döneminde batı toplumlarında gerçekleşen sanayi devriminin hızına yetişilememesi, genç Cumhuriyetin kuruluşunun ardından sanayi birikiminin azlığı, dünya savaşları, ülkede yaşanan darbeler ve ekonomik krizler gibi diğer çok sayıda etkenin, modern sosyal güvenlik uygulamalarının hayata geçirilmesini geciktirdiğini göstermektedir. Nitekim sosyal güvenlik hakkı ancak 1961 Anayasasında kendine yer bulurken, yasal düzenlemelerin belli bir noktaya gelmesi için neredeyse bir asrın geçmesi gerekmiştir. Diğer yandan toplumsal mirasını Osmanlı İmparatorluğundan devralan Türkiye Cumhuriyetinde, başta kadınlar olmak üzere toplumsal eşitliğin sağlanması ve ayrımcılığın önlenmesine yönelik çabalar, ilk defa Cumhuriyetin kurucusu Mustafa Kemal Atatürk'ün devrimleri döneminde gerçekleşmiştir. Bu hususta ciddi iyileştirilmeler yapılmış, hatta 1934 yılında Türk kadınına seçme ve seçilme hakkı birçok demokratik devletten önce verilmiştir. Ancak devletin eli ile sunulan haklarla uzun yıllar yetinilmiş ve uzun bir dönem bu alanda ciddi bir ilerleme sağlanamamıştır. Ayrıca Cumhuriyetin ilanından itibaren yürürlükte olan Anayasaların tamamında yer almasına karşın eşitlik ilkesine gerçek güvencenin, anayasaya uygunluk denetimine yönelik özel usul getirilmesiyle, 1961 Anayasası sonrasında sağlanabildiğinin de ileri sürüldüğünü belirtmek gerekir. Diğer yandan Türkiye'nin uluslararası örgütlere üyelikleri ile 1999 yılında Helsinki Zirvesinde

adaylık statüsünün tanınmasının, ulusal mevzuatta eşitlik ilkesinin ve ayrımcılık yasağının gelişiminde etkili olduğu görülmektedir. Bu kapsamda 2000'li yılların başları eşitliğin sağlanması ve ayrımcılığın önlenmesinde Anayasal değişikliklerin yapıldığı, ardından da ulusal düzenlemelerin gözden geçirildiği yıllar olmuştur.

Bu çalışmanın amacı da Türkiye'de uygulanmakta olan zorunlu sosyal güvenlik düzenlemelerinin AB ayrımcılık yasağına uygunluğunun değerlendirilmesi çerçevesinde şekillenmiştir. Bilindiği gibi Türkiye'de sosyal güvenlik sisteminin yeniden yapılandırılmasına yönelik arayışlar, 1990'lı yılların başında tartışılmaya başlamıştır. Sosyal güvenlik sisteminin popülist politikalar sonucu yıllar geçtikçe artan açıkları ilk defa Dünya Bankası (WB) ve Uluslararası Para Fonu (IMF) tarafından eleştirilmiştir. Bunun üzerine acil olarak alınması gereken tedbirler, 25/08/1999 tarih ve 4447 sayılı Kanunla hayata geçirilmiştir. Buna karşın yapılan değişiklikler yeterli derinliğe sahip olmadığından, sistemin mali sürdürülebilirliği doğrultusunda ciddi bir ilerleme kaydedilemediği gibi gelir-gider dengesi açığı ilerleyen yıllarda artmaya devam etmiştir. Sosyal güvenlik sisteminin mali sistemine yönelik kaygılara, 1999-2008 yıllarında AB tarafından hazırlanan Türkiye'nin İlerleme Raporlarında da yer verilmiştir. Bu çerçevede, AB'ye üyelik sürecini güçlendirmek isteyen Türkiye, sosyal güvenlik düzenlemelerine ilişkin reform Tasarısı çalışmalarına hız vermiştir. Bu kapsamda sosyal sigortalara ilişkin düzenlemeleri yönetmekten sorumlu üç farklı sosyal güvenlik kuruluşunu tek bir yapı altında toplayan 5502 sayılı Sosyal Güvenlik Kurumu Kanunu 20/04/2006 tarihinde yürürlüğe girmiştir. Diğer yandan daha önce beş farklı Kanun ile uygulanan sosyal sigortalara ilişkin düzenlemeler yerine çalışanların hak ve yükümlülüklerinde norm ve standart birliğinin sağlanmasını ve nüfusun tümüne ayni sağlık yardımlarının eşit ve kaliteli bir biçimde sunulmasını amaçlayan 5510 sayılı Sosyal Sigortalar ve Genel Sağlık Sigortası Kanunu 01/10/2008 tarihinde yürürlüğe girmiştir.

Uluslararası Çalışma Örgütünün 102 sayılı Sosyal Güvenlik Asgari Standartlar Sözleşmesinde sayılan dokuz sosyal riskli alandan yola çıkılacak olursa; 5510 sayılı Kanun kapsamında yedi riskli alana yönelik sosyal sigorta yardımları (sağlık yardımı, hastalık yardımı, yaşlılık yardımı, iş kazası ve meslek hastalığı yardımı, analık yardımı, maluliyet yardımı ve ölüm yardımı) sunulmaktadır. Diğer yandan işsizlik sigortası yardımı, 4447 sayılı İşsizlik Sigortası Kanunu kapsamında düzenlenmiştir. Buna karşın Türkiye'de aile yardımına ilişkin genel bir düzenleme bulunmadığını eklemek gerekir. Bu çerçevede çalışmada 5510 ve 4447 sayılı Kanunlar kapsamında düzenlenen zorunlu sosyal güvenlik uygulamaları kapsamındaki kişiler ve sosyal sigorta yardımlardan yararlanma şartları ile birlikte detaylı bir biçimde açıklanmıştır. Söz konusu açıklamalar yapılırken zorunlu sosyal güvenlik uygulamalarında; vatandaşlığa, cinsiyete, ırk veya etnik kökene, din veya inanca, engelliliğe, yaşa ve cinsel yönelime dayalı düzenleme farklılıklarına odaklanılarak, tespit edilenler farklılıklar AB ayrımcılık yasağı çerçevesinde değerlendirilmiştir.

Sonuç olarak, AB adaylık süreci devam eden Türkiye'nin zorunlu sosyal güvenlik uygulamalarında *vatandaşlığa dayalı ayrımcılığı yasaklayan 883/2004/EC sayılı Tüzüğe uyumunun sağlanması amacıyla;*

- Yurt dışına götürülen Türk işçilere bazı sosyal sigorta kollarının uygulanacağına yönelik 5510 sayılı Kanunun 5(g) maddesinin, 883/2004/EC sayılı Tüzüğün 12(1) maddesi,
- Yabancı ülke vatandaşlarından sosyal güvencesi bulunmayanların ayni sağlık yardımlarından yararlanmaya başlama süresi ve prim yükümlülükleri vatandaşlığa dayalı ayrımcılığa neden olabileceğinden, 5510 sayılı Kanunun 60(1)(d), 60(1)(g), 60 ıncı maddesinin üçüncü fıkrası, 61(1)(c), 61(1)(f), 67(1)(b), 67(1)(c), 80 inci maddesinin dördüncü fıkrası ve 81(1)(f) maddelerinin, 883/2004/EC sayılı Tüzüğün 4 ve 6 ıncı maddeleri,
- Yabancı ülke vatandaşlarının isteğe bağlı sigortalılık düzenlemelerinde ayni sağlık yardımlarından yararlanmaya başlama süresi yükümlülükleri vatandaşlığa dayalı

ayrımcılığa neden olabileceğinden, 5510 sayılı Kanunun 52 nci maddesinin ikinci fıkrasının, 883/2004/EC sayılı Tüzüğün 4 ve 6 ıncı maddeleri,

- Yabancı ülke vatandaşlarının kronik hastalıkların tedavilerine ilişkin masrafların karşılanmayacağına yönelik düzenleme vatandaşlığa dayalı ayrımcılığa neden olabileceğinden, 5510 sayılı Kanunun 64(c) maddesinin, 883/2004/EC sayılı Tüzüğün 4 üncü maddesi, gereği AB'ye üye ülkelerin ve Norveç, İzlanda, Lihtenştayn ile İsveç vatandaşlarına ve bakmakla yükümlü olduklarına yönelik uygulama imkanı bulunmadığından gözden geçirilmesi önerilmiştir.

Zorunlu sosyal güvenlik uygulamalarında *cinsiyete dayalı ayrımcılığı yasaklayan 79/7/EEC ve 2010/41/EU sayılı Direktiflere uyumun sağlanması amacıyla;*

- Seks işçisi erkekler zorunlu sosyal sigortalar kapsamı dışında bırakıldığından, 5510 sayılı Kanunun 4(2)(e) maddesinin, 79/7/EEC sayılı Direktifin 4(1) maddesi,
- İşverenin işyerlerinde ücretsiz olarak çalışan eşi sigortalı sayılmadığından, analık halinde isteğe bağlı sigortalılık hükümlerinden yararlansa dahi geçici iş göremezlik ödeneğinden faydalanamadığından, 5510 sayılı Kanunun 6(1)(a), 16 ncı maddesinin ikinci fıkrası, 18(1)(c) ve 18(1)(d) maddelerinin, 2010/41/EU sayılı Direktifin 8 inci maddesi,
- Aynı konutta birlikte yaşayan ve üçüncü derece dahil akrabalar arasında ve aralarına dışardan başka kimse katılmaksızın, yaşadıkları konut içinde yapılan işlerde çalışanlar sigortalı sayılmadığından, 5510 sayılı Kanunun 6(1)(b) maddesinin, 79/7/EEC sayılı Direktifin 4(1) maddesi,
- Kendi adına bağımsız çalışan sigortalılardan şirket ortaklarına analık halinde geçici iş göremezlik ödeneği sunulmadığından, 5510 sayılı Kanunun 18(1)(c) ve 18(1)(d) maddelerinin, 2010/41/EU sayılı Direktifin 2(a) ve 8 inci maddesi,
- Kadın sigortalıların doğum sonrası üç defaya mahsus olmak üzere ve her defasında en çok iki yıla kadar çalışmadığı sürelerine ilişkin primlerini ödeyerek, aylıklara hak kazanımda prim gün sayılarını arttırabilmesine yönelik avantaj, maluliyet aylığında erkek sigortalıların ayrımcılığına neden olabileceğinden, 5510 sayılı Kanunun 41(1)(a) maddesinin analık izin süresi hariç yaşlılık aylığı ile

sınırlandırılarak, 79/7/EEC sayılı Direktifin 7(1)(b) maddesi, kapsamında gözden geçirilmesi önerilmiştir.

Bunlara ilave olarak, *Avrupa Birliği Antlaşmasının (TEU) ikinci maddesinde yer alan ayrımcılık yasağı ve genel eşitlik ilkelerinin sağlanmasını amacıyla;*

- İşçiler ve kendi adına bağımsız çalışanlardan aynı oranda kısa vadeli sigorta kolları primi alınmasına karşın, kendi adına bağımsız çalışanlara hastalık sigortasından ayakta ve yatarak tedavilerinde, iş kazası ve meslek hastalığı durumunda ise ayaktan tedavilerinde geçici iş göremezlik ödeneği sunulmadığından, 5510 sayılı Kanunun 18(1)(b) ve 18 inci maddesinin ikinci fıkrasının,
- İstisnai yaşlılık aylığına ve maluliyet aylığına hak kazanmak için yeterli şartlara sahip olmakla birlikte, 7200 günden az prim gün sayısı olan işçilere, aylık bağlama oranının hesaplama yöntemi nedeniyle diğer sigortalılık statülerine göre daha düşük aylık sunulduğundan, 5510 sayılı Kanunun 29 uncu maddesinin dördüncü fıkrası ile 27 nci maddesinin bir ve beşinci fıkrasının,
- İşçilerin hak sahipleri diğer sigortalılık statülerinin hak sahiplerine göre daha avantajlı şartlarla ölüm aylığına hak kazanabildiğinden, 5510 sayılı Kanunun 32(2)(a) maddesinin,
- İşçilerin hak sahiplerinden yeterli şartlara sahip olmakla birlikte 7200 günden az prim gün sayısı olanlara aylık bağlama oranının hesaplama yöntemi nedeniyle diğer sigortalılık statülerine göre daha düşük aylık sunulduğundan, 5510 sayılı Kanunun 33(1)(c) maddesinin, gözden geçirilmesi önerilebilir.

Son olarak, AB ayrımcılık yasağı ilkesine ters düşmemekle birlikte *daha eşitlikçi bir yapıda zorunlu sosyal sigortalar yardımlarının sunumu arzu ediliyorsa;*

- Doğum yardımının sunumunda ebeveynlerden her ikisinin sigortalı olması durumunda taleplerine bağlı olarak kadına veya erkeğe doğum yardımının sunulabilmesi amacıyla, 5510 sayılı Kanunun 16 ncı maddesinin üçüncü fıkrasına *Evli olanlar için, eşlerden hangisine doğum yardımı ödeneceğinin tespiti kendi tercihlerine bırakılır* ifadesinin eklenmesi,

- Başka birinin bakımına muhtaç malul çocuğu olan kadın sigortalıların yaşlılık aylığı taleplerinde, 01/10/2008 tarihinden sonraki çalışma sürelerinin dörtte birinin prim gün sayılarına eklenmesi ve eklenen sürelerin yaşlılık aylığına hak kazanımda yaş şartından indirilmesine yönelik düzenlemenin, ebeveynlerin her ikisinin de sigortalı olarak çalışması durumunda tercihlerine bağlı olarak malul çocuğun bakımını üstlenen erkek sigortalıları içerecek şekilde genişletilmesi. Buna ilave olarak annenin ölümü veya çocuğun velayetinin babaya verilmesi durumlarında çocuğun bakımını üstlenen erkek sigortalıların 5510 sayılı Kanunun 28 inci maddesi sekizinci fıkrası kapsamında sunulan avantajdan yararlandırılması,
- Ölen sigortalının evli erkek çocuklarına 18/20/25 yaşına kadar ölüm geliri/aylığı ödenirken (diğer şartlar hariç) evlenen kız çocuklarına ödenmediğinden, 5510 sayılı Kanunun 34(1)(b) maddesinde değişikliğe giderek (gerekirse geçiş dönemi öngörülerek), 18/20/25 yaşına kadar evli olan çocuklara cinsiyetlerinden bağımsız olarak ölüm geliri/aylığı ödenmemesi,
- Ölen sigortalının kız çocuklarına evli olmadıkları sürece (diğer şartlar hariç) ölünceye kadar ölüm geliri/aylığı ödenirken erkek çocuklarının eğitim durumuna göre en çok 18/20/25 yaşına kadar ölüm geliri/aylığı ödendiğinden, 5510 sayılı Kanunun 34(1)(b) maddesinde değişikliğe giderek (gerekirse geçiş dönemi öngörülerek), çocukların cinsiyetinden bağımsız olarak en çok 18/20/25 yaşına kadar ölüm geliri/aylığının ödenmesi veya kadınların korunması arzu ediliyorsa kendi sigortalılıklarından gelir/aylığa hak kazanamayanlara yaşlılık aylığına hak kazanımda aranan yaş şartını doldurduklarında ölüm gelir/aylığının ödenmesi,
- Ölen sigortalının erkek çocukları için öngörülmemiş olmasına rağmen kız çocuklarına evlendiklerinde ödenen evlenme ödeneğinin kaldırılması için (gerekirse geçiş dönemi öngörülerek), 5510 sayılı Kanunun 37 nci maddesinin bir ve ikinci fıkrası ile Kanunun genelinde evlenme ödeneğini içeren ifadelerin kaldırılması,
- 01/10/2008 tarihinden önce bakmakla yükümlü olunan kız çocukları yaşları ne olursa olsun evli olmadıkları sürece ayni sağlık yardımlarından yararlanırken, 01/10/2008 tarihinden sonra bakmakla yükümlü olunan kız çocukları ile erkek çocukları 18/20/25 yaşına kadar sağlık yardımlarından yararlanabildiğinden (diğer

şartlar hariç), 2016 yılında 5510 sayılı Kanunun Geçici 12 nci maddesi sekizinci fıkrasına eklenen "Kız çocuklarının durum değişikliklerinin ortadan kalkması halinde, bu kişiler tekrar ilgili kanunlarına göre bakmakla yükümlü olunan kişi sayılır." ifadesinin kaldırılması değerlendirilebilir.

Bunlara ek olarak, bilindiği gibi 5510 sayılı Kanunun kapsamında sunulan ödenek, gelir veya aylıklardan yararlanabilmek için çalışanların adlarına primlerinin bildirimi yeterli görülmüştür. Söz konusu genel kuralın aksine, doğumun sigortalılığın sonlandırılmasından sonra gerçekleşmesi durumunda gerek kendi adına bağımsız çalışanların gerekse işçilerin emzirme ödeneğinden yararlanabilmeleri için adlarına prim ödenmesi öngörülmüştür. Bu kapsamda 5510 sayılı Kanunun 16 ncı maddesinde yer alan yazım yanlışının düzeltilmesi veya düzenleme eksikliğinin tamamlanması önerilebilir. Ayrıca benzer bir hata cenaze ödeneğinde de yer aldığından, cenaze ödeneğine ilişkin 5510 sayılı Kanunun 37 nci maddesinin aynı çerçevede gözden geçirilmesi değerlendirilebilir.

Sonuç olarak, AB adaylık sürecinde ilerleyen Türkiye'nin eşitlik ilkesi ve ayrımcılık yasağına uyum bakımından zorunlu sosyal güvenlik düzenlemelerini gözden geçirmesi gerekmektedir. Buna karşın değişiklik yoluna gidilmiyorsa, söz konusu düzenlemelerin haklı gerekçelerle savunabiliyor olması önemlidir. Bu çerçevede, Türkiye'nin zorunlu sosyal güvenlik uygulamalarının kapsamını sosyal ve istihdam politikası hedefleri ile bütçe olanakları doğrultusunda belirlemekte geniş bir yetkiye sahip olduğu unutulmamalıdır. Buna ilave olarak, zorunlu sosyal güvenlik uygulamalarında vatandaşlığa, cinsiyete ve ırk veya etnik kökene dayalı farklı uygulamalar ABAD veya ulusal mahkemelere taşındığında, istisna hükümleri çerçevesinde de savunulabilecektir. Türkiye'nin henüz vakit varken zorunlu sosyal güvenlik düzenlemelerini gözden geçirmesi, EU normlarıyla korunduğu kadar, evrensel değerlerden olan eşitlik ve ayrımcılık yasağı ilkelerine uyum için gerekli değişikliklerin yapılmasına da olanak sağlayacaktır. Ayrıca üyeliğin gerçekleşmesi durumunda, sosyal güvencesi olmayanlardan düşük düzeyde genel sağlık sigortası

primi alınan (aylık $14,21), aylığa hak kazanmış olanlardan ise prim alınmadan tasarlanan ve ikamete dayalı olarak tüm nüfusa sunulan genel sağlık sigortası düzenlemelerinin, sistemin mali sürdürülebilirliği bakımında ciddiyetle değerlendirilmesi gerekmektedir. Çünkü 883/2004/EC sayılı Direktif gereği, genel sağlık sigortası kapsamına alınan tüm nüfusun ve Türkiye'den aylık alanların, Türkiye'de ikamet etmeseler dahi sadece Türkiye'de değil AB'ye üye devletler ile Norveç, İzlanda, Lihtenştayn ve İsveç'te ihtiyaç duyacağı ayni sağlık yardımları Türkiye tarafından finanse edilecektir. Böylelikle sistemin mali sürdürülebilirliği tehlikeye atılmadan, Türkiye'de sosyal güvenlik hakkı AB normları düzeyinde korunabilecektir.

APPENDIX B. TEZ İZİN FORMU / THESIS PERMISSION FORM

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.....

TEZİN TÜRÜ / DEGREE**:** **Yüksek Lisans** / Master ■ **Doktora** / PhD ☐

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