



EU Twinning Project TR 08 IB SO 01
Promoting Gender Equality in Working Life



Component 1

*Aligning Turkish Legislation
with the EU Gender Equality Acquis*

Activity 1.2

*Elaboration of a report including
recommendations and amendment proposals*

Introduction

Executive Summary

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This project is co-funded by the European Union and the Republic of Turkey.

EU-Twinning Project “Promoting Gender Equality in Working Life”

Component 1: Align Turkish legislation with EU gender equality acquis

1. Policy background and purpose of the Twinning Project

The start of the EU-Twinning Project “Promoting Gender Equality in Working Life” was marked by the remarkable referendum on the Turkish Constitution. The referendum contained among others the amendment of Art. 10 of the constitution which allows now affirmative action in order to promote and ensure equality of women and men.

In this favourable framework the project has been well suited to support the Turkish administration to implement amendments in legislation and provide expertise on how gender equality can be supported in practice. The project focussed on gender equality in working life.

According to TurkStat in August 2011, female participation in the Turkish labour market is considerably beneath global and European average, but it follows a worldwide trend of rising labour market participation of women. In May 2011 it amounted to slightly less than 30% again – a level which was only much higher in the 70ies and 80ies. The reasons for this are diverse: educational gaps, socio-cultural assumptions, and a rapidly decreasing agricultural labour market (considering that more women are currently employed in rural than in urban areas) might contribute to this trend. Precarious working conditions and employment in the informal sector are additional threats for women in the labour market.¹

Gender inequality and high female unemployment therefore appear as obstacles to economic development. Presently, Turkey’s economy is growing; nonetheless, one might only speculate as to the impressive results that an exploration of the vast potential of Turkey’s female labour force might achieve. Moreover, there is an increasing consensus that the fight against gender discrimination and the promotion of gender equality is one of the pivotal goals of international labour policies and cooperation. The latest World Development Report 2012 focussing on “Gender Equality and Development” which the World Bank published only a few months ago documents this trend at international level.

Hence, Gender Equality is a key issue of the European Union. The European Commission’s roadmap for Equality between Men and Women (COM(2006) 92 final, p. 9) states, that countries joining the EU must fully embrace the fundamental principle of equality between women and men.

Gender Equality is to be found at a significant location in the EU Treaty (TFEU). Art. 8 TFEU reads as follows: “In all its activities, the Union shall aim to eliminate inequalities, and to promote equality between men and women.” This general principle and at the same time this prospective confession for gender equality of the European Union has at least two dimensions: Firstly, the elimination of inequalities for instance in abolishing discriminatory legal provisions in the Community law and the law of the member states. Secondly, the active

¹ Gülay Toksöz, ‘Women’s Employment Situation in Turkey’ (ILO Country Report for the ILO Ankara Office, 2007) 35; Kadın Emeği :ve İstihdamı Girişimi (KEİG), ‘Women’s Labor and Employment in Turkey: Problem Areas and Policy Suggestions’ (KEIG Publishing 2nd edn. 2009) 12; Prime Ministry of Turkey – General Directorate on the Status of Women, *National Action Plan: Gender Equality 2008-2013* (Ankara 2008) 38.

promotion of equality for instance through positive action measures, gender equality policy and – even broader – gender mainstreaming.

Whereas positive action measures correspond absolutely with legal matters building its written protection and justification, gender mainstreaming is on the other hand the integration of the gender perspective into every stage of policy processes – design, implementation, monitoring and evaluation – with a view to promoting equality between women and men. It is less a legal question – and therefore hardly part of this report of Component 1 – than the assessing which impact policies on the life and position of both women and men might have and assuming the responsibility to re-address these policies if necessary.

Part 4 of this report on Law on Trade Unions and Collective Agreements, Strikes and Lock-outs describes more comprehensively the EU Gender Equality Policy, especially Positive Action and Gender Mainstreaming.

The European Commission's five-year strategy for promoting equality between women and men in Europe adopted in September 2010 aims in particular to achieve better use of women's potential, thereby contributing to the EU's overall economic and social targets. It translates the principles set out in the European Commission's Women's Charter into specific measures, ranging from getting more women into company boardrooms to tackling gender-based violence. The brand new Turkish Anti-Violence Law is in this context most appreciable.

The European gender equality strategy spells out a series of actions based upon five priorities, three of them - the economy and labor market; equal pay and equality in senior positions – are relevant for this project, e.g.: supporting the Europe 2020 target employment rate of 75% overall for women and men by getting more women into the labor market, targeting initiatives to get more women into top jobs in economic decision-making, promoting female entrepreneurship and self employment and dedicating an annual European Equal Pay Day to raise awareness of the fact that women continue to earn an average of nearly 18% less than men across the EU.

The Twinning Project and namely this report shall help to make legal obstacles referring to these challenges visible, show possible amendments and secure legal framework to achieve comparable aims also in Turkey.

2. The Turkish and the European Legal Framework

The EU gender equality acquis – consisting of provisions in the EU primary law like Art. 8 TFEU as well as various EU directives – is the European default and legal framework which Turkish legislation was aligned with by strict analysis, instructive discussions and fruitful consultations leading to the elaboration of this report including amendment proposals.

Component 1 of the Twinning Project comprises of the alignment of Turkish legislation with EU gender equality acquis. Therefore the Turkish primary legislation such as the Individual and Collective Labour Law, the Law on Civil Servants, the Law on Social Security as well as the secondary legislation on labour and social security related to gender equality were analysed. Turkish laws and bylaws as defined in the contract of the Twinning Project have been analyzed. The report had to limit itself to the 18 laws and by-laws defined in the contract

of the Twinning Project. Throughout the assessment further legislation or legal amendments having an impact on gender equality in working life in Turkey were raised and discussed in working meetings.

It is in fact remarkable that the Twinning Project was facing a multitude of different laws. Some of them were without official translation into English language so that the experts had to organize an unofficial translation of the relevant articles through the valuable support of RTA's assistants. Other laws were recently amended or in a current amendment process. This is appreciable from the perspective of legal progress, but it was on the same hand influencing negatively an effective working process.

The report takes in consideration those laws which need to be aligned with the EU gender equality acquis according to the experts. All of the laws mentioned in the Twinning Contract were analysed. However, not all of them will be found in the report. The experts abstained from mentioning especially those being in line with the EU gender equality acquis. Hence, the report focuses only on the provisions to be amended although the major part of the Turkish legislation answers mostly EU legal requirements. But the legal amendment of small parts of a provision can lead to big advantageous improvements.

Due to defined and limited resources available for Component 1 of the Twinning Project, it was not possible to assess further laws nor new legislation. However, in the report on Labour Law and its bylaws the experts had the possibility to reflect shortly upon the draft of the Anti-Discrimination Law. Consequently the report cannot claim to be a comprehensive assessment of all relevant legislation. This is regrettable since the experts recognized with pleasure an engaged process of amending and improving the Turkish legislation for instance by new bylaws, omnibus laws or circulars of Turkey's Prime Minister like the most appreciable one on increasing women's employment and ensuring equal opportunities (2010/14). Yet especially the circulars lead to the open question of legal certainty, as it is strictly required by the ECJ (see more comprehensively on this topic: Part 2, General remarks).

Nevertheless, the legislation in the relevant field can be aligned with the EU acquis rather since laws are upgradable and progressive legal developments have been made. However, at some point the experts found also weighty requirements for revisions, having in mind that amendments of the legal framework are only one aspect of promoting gender equality in working life. Other aspects like awareness raising and implementing gender equality are wisely and necessarily part of this Twinning Project and should also apply to lawyers, judges and other legal experts.

The experts' view was mainly towards the existing EU gender equality acquis in consideration of the jurisdiction of the ECJ. There are some remarkable future legal developments at European level though:

- The proposal for a directive on maternity leave faces currently a dismissive majority of the Council of the European Union regarding a period extension of maternity leave as well as a better allocation for parents.

- Regarding Commissioner Reding's project on Gender Balance in the boards of companies (eg quota for women), the first step of the "Women on Board Pledge for Europe" will be done by March 2012. After evaluating the results, the Commission plans to take legal measures to increase the number of women in the boards of companies, unless the market proves itself.

- Three studies on paternity leave, gender pay gap and caregiver leave will be published shortly, possibly after consultation with social partners.

This development should be considered when discussing the findings of this report and when using the recommendations of this report.

3. The Experts

This report is based on an assessment of the relevant Turkish legislation and was conducted by Austrian and German short term experts. The legal experts of the EU Twinning Project came from research institutions, from national courts in Austria and Germany, from law-related units in German Ministries and from the German Gender Equality Body.

The experts were assigned to those legal topics and laws mentioned in the Twinning Contract they are most competent and familiar with. Working in small teams gave the experts the possibility to discuss and exchange knowledge and experience.

Due to commitments made in the Twinning Contract, the Turkish partner provided corresponding responsible contact persons supporting cooperatively the experts in answering ad-hoc questions and in attending the frequent and intensive meetings.

4. Methodology and procedures

Several missions from end of 2010 until beginning of 2012 have been conducted in which eight experts analysed the specific laws and compiled the report.

The methodology followed the EU screening process of the years 2005/2006 of Turkish legislation and was adapted to the needs of the project.

The activity 1.1 of Component 1 consisted of the analysis of Turkish legislation compared to the EU gender equality acquis. A gap analysis was prepared on the basis of the laws the Turkish partner made available for the experts. Both partners endeavoured to make all of the laws mentioned in the Twinning Contract available, to make them available in English language or an official translation and to make them available in their up-to-date version, which was sometimes challenging.

The gap analysis was presented to legal experts of the Turkish Ministry of Labour and Social Security (MoLSS) after each mission. The suggestions of aligning Turkish labour and social policy legislation in order to correspond to EU gender equality directives have been collected and forwarded to the Turkish counterpart of the project for feedback.

On the basis of the gap analysis and the feedback of the Turkish partner four reports were drafted as activity 1.2 of Component 1: One report on the Labour Law and its bylaws, one report on the Law on Civil Servants and its bylaws, one report on the Law on Trade Unions and the Law on Collective Agreements, Strikes and Lock-outs and finally one report on the Social Insurance and Universal Health Insurance Law.

These draft reports were presented to MoLSS legal experts. The suggestions of aligning Turkish legislation with the EU gender equality acquis have been formulated comprehensively in the report and forwarded to the project partner MoLSS for feedback.

After taking the feedback into account, social partners and NGOs were involved in the process of aligning the legislation with EU gender equality acquis (Component 1/ activity 1.3). Therefore, a 2-day-consultation was organized and generously hosted by the Ministry for Labour and Social Security (MoLSS). In working groups the reports have been presented by the experts and discussed with the participants. This consultation with official institutions, social partners and NGOs resulted in valuable comments and remarks. Component 1 ended with additional remarks and comments of MoLSS legal experts to the reports finalized after the consultation meeting. The valuable remarks and comments were taken into consideration by the experts. Finally, the four reports were joined with this common introduction and an executive summary of the essential conclusions of the reports.

Hence, this report (Component 1/ activity 1.2) consists of an Executive Summary and four pieces of analysis (Part 1: Labour Legislation, Part 2: Civil Servants' Law and Trade Unions for the Public Service Law, Part 3: Social Insurance and Universal Health Insurance Law, Part 4: Trade Unions Law and Collective Agreements, Strikes and Lock-outs Law).

Executive summary

The executive summary shall give an overview of the very essential findings of the different parts of the report. The summary can therefore not be comprehensive; in particular and for further details it is referred to Part 1 to 4 of the report herewith.

Part 1: Labour Law and its Bylaws

Main focus on amendments should be on Art. 5 LL. It should be amended by introducing definitions of discrimination and a provision on positive action, by extending the scope of application, by objectifying the justification of an unequal treatment and by shifting the burden of proof in favour of the victim of discrimination.

An introduction of definitions of discrimination would strengthen an effective protection against (sexual) harassment.

Regarding remedies and sanctions there are provisions lacking or insufficiently articulated concerning the inefficiency of discriminating collective agreements, the right of complaint within undertaking, the prohibition of victimisation, an independent equality body (the Anti-Discrimination and Equality Law is still a draft) and the empowering of NGOs.

Employment contracts outside the Labour Law require comprehensive protection against discrimination: Therefore the Law of Obligations, the Press Labour Law and the Maritime Labour Law should be amended in this regard as well as Art. 4 LL.

Regarding pregnancy and maternity protection and reconciliation of work and family the Labour Law, its bylaws and secondary labour laws are insufficient. Provisions regarding pregnancy and maternity or parental leave as well as the right to return after maternity leave and protection from dismissal are missing or regulated insufficiently with regard to the directives 2006/54 and 2010/18.

Part 2: Civil Servants Law, Trade Unions for the Public Servants Law

One of the biggest challenges is the narrow scope of application: The Civil Servants Law only applies to Civil Servants according to Art. 4 type A Law Nr. 657. The other types such as workers, contracted staff and temporary staff are not covered under Law No. 657.

Due to a lack of regulation or of providing the relevant articles, some topics mentioned in Dir. 2006/54 (e. g. defense of rights, maintenance of employment rights, time off for ante-natal examinations or prohibition of dismissal) could not be analysed. Others were insufficient like for instance disciplinary measures which cannot be interpreted as compensation and reparation or penalties, within the meaning of Art.18 and 25 Dir 2006/54/EC.

The report strongly recommends positive action measures such as part-time work, child care facilities or tele-work.

Part 3: Social Insurance and Universal Health Insurance Law

Part 3 discovers first shortcomings of the European Law: The shortcoming substantive scope of the directive 79/7 causes that the Directive does not apply to provisions on survivors' benefits and family benefits. Applying Art. 10 of the Turkish Constitution and International Conventions on the gender (equality) issue shall bridge these gaps of the directive.

It is recommended to amend Art. 3 Social Insurance and Universal Health Insurance Law and add definitions. Art. 6 para 1 lists up different groups of individuals who are not deemed to be insurance holders. The constellations covered by the article concern especially women and this may lead to indirect discrimination. Consequently, it is recommended to amend Art. 6 para 1.

The Social Insurance and Universal Health Insurance Law should protect efficiently pregnancy and maternity by considering the topic and its effects for instance in Art. 9 (2), 18 or 26.

Child care credits, as known in many EU member states and explained in the report, could be a suitable option to improve the pension schemes by amending several Articles and introducing a new provision on this issue.

Part 4: Law on Trade Unions; Collective Agreements, Strikes and Lock-outs Law

This part of the report describes comprehensively the legal aspects of positive action and Gender Mainstreaming.

Regarding the internal constitution of trade unions it is of major importance for gender equality that they need to attract and promote women in their own ranks as well, which is currently not the case. However, the paramount importance of trade unions and collective bargaining for promoting gender equality in working life is ascertained in the report.

The report focuses in addition on the main problem areas concerning trade unions in Turkey: precarious and informal work, discrimination structures in working life and – as said – male-dominated structures of trade unions.

It is therefore suggested to amend Art. 2 Trade Union Law in terms of its narrow definition and in terms of its double quota. Furthermore part 4 lists several examples of actual equality measures trade unions could take to fight discrimination structures in working life as well as suggestions for legal amendments as of Art. 7, 9 and 32 ff. on gender equality measures like minimum standards or ombudpersons.

Regarding the increase of female participation in trade unions part 4 suggests new provisions to enlarge composition of the organs of trade unions with women's committee or representative as well as other measures to relieve women to participate in trade unions. Positive action measures – as described at the beginning of part 4 – are proposed for each of the said problem areas.