Component 1

Aligning Turkish Legislation with the EU Gender Equality Acquis

Activity 1.2

Elaboration of a report including recommendations and amendment proposals

Julia Planitzer & Alexander Sopp

with contributions by Angelika Kartusch

Part 1

Labour Law, No.4857
By-law Concerning the Working Conditions of Pregnant or Breastfeeding Mothers, Breastfeeding Rooms and Children Nursing Homes, No.25522
By-law for Hard and Dangerous Work, No.25494
By-law Concerning the Working Conditions of Female Workers at Night Shifts, No.25548
Law Proposal on Anti-Discrimination and Equality (Draft)
Maritime Labour Law, No.854
Press Labour Law, No.5953
Penal Code, No.5237
Law of Obligations, No. 818

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

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1 Labour Law and its Implementing Regulations

1.1 Labour Law No. 4857

Art. 4 LL stipulates exceptions from the scope of application of the Labour Law. A number of sectors like agricultural and forestry enterprises with less than 50 workers or domestic services are excluded.

Albeit Art. 14 Dir. 2006/54 prohibits direct or indirect discrimination on grounds of sex in the public or private sector, including public bodies. The directive does not know such exceptions. Its purpose is according to its Art. 1 to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – without exceptions.

Even though it differentiates not explicitly by gender, the list of exclusions in Art. 4 LL changes the scope of application of the directive if this exclusions cause a lack of protection against discrimination.

Therefore it is highly recommended to let the protection against discrimination as provided by Art. 5 LL (to be amended, see below) applicable.

However, Art. 14 sect. 2 Dir. 2006/54 allows to justify discriminations on ground of sex under the following circumstances: Justification is only possible or access to employment including the training leading thereto. An occupational requirement justifies a discrimination where , by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

If a difference of treatment on ground of sex is necessary for access to employment including the training leading thereto in the sectors listed in Art. 4 LL, Art. 14 sect. 2 Dir. 2006/54 allows to justify these discriminations in the described way. Therefore the exceptions of Art. 4 LL must be in concordance with this provision. Thus the benchmark for possible discriminations within these special laws regarding access to employment including the training leading thereto regulated by them is Art. 14 sect. 2 Dir. 2006/54.

Nevertheless stays discrimination prohibited in relation employment and occupation for the rest of the working life as listed in Art. 14 sect. 1 Dir. 2006/54, i. e. exceeding access to employment. Hence, the protection of discrimination of Art. 5 LL (to be amended, see below) should in any case stay applicable, either by referring to Art. 5 LL in the special laws listed in Art. 4 LL or – as recommended here – by amending Art. 4 LL.

Referring to Art. 5 LL in Art. 113 LL would not be sufficient since Art. 113 LL is only corresponding to Art. 4 subsect. 1(b) and 1(i).

Labour Law No. 4857	
Law in force	Proposals for amendment
The provisions of this Law shall not apply for the below specified businesses and business relations (...)	Without prejudice of Art. 5, the provisions of this Law shall not apply for the below specified businesses and business relations (...)

The consultation with official institutions, social partners and NGOs resulted in agreement to the proposed amendments.

1.2 Equal Treatment and Discrimination

Art. 5 LL

Art. 5 LL is the general and central provision inside the Labour Law for the principle of equal treatment. Section 1 prohibits discrimination based on language, race, sex, political thought, philosophical belief, religion, sect and similar grounds. Section 2 prohibits unequal treatment between full-time and part-time workers as well as definite-term workers against indefinite-term workers unless of founded reasons. Section 3 prohibits unequal treatment because of sex or pregnancy, unless biological reasons or those pertaining to the work qualifications oblige. Sections 4 and 5 are the provisions to prevent a gender pay gap. Section 6 provides titles for the defence of rights as well as for compensation or reparation. Section 7 stipulates the burden of proof.

a) Art. 5 Section 1 LL

The provision reads as follows: “No discrimination based on language, race, sex, political thought, philosophical belief, religion, sect and similar grounds can be made in the business relation.”

Art. 14 sect. 1 of Dir. 2006/54 prohibits direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in specified relations of the working life. Art. 2 Dir. 2006/54 defines the term “discrimination” covering direct and indirect discrimination, harassment, sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct and also the instruction to discriminate as well as any less favourable treatment of a woman related to pregnancy or maternity leave.

However, Art. 5 LL does not explicitly define the term 'discrimination', nor does it distinguish between direct and indirect discrimination. Even though the wording Art. 5 (2) does cover some elements of indirect discrimination that are relevant to women's employment rights (ban of discrimination on grounds of part-time work or limited contract duration), the Labour Law fails to prohibit indirect discrimination explicitly and comprehensively as mandated by the Directive. While Art. 5 does not explicitly limit the concept of discrimination to direct discrimination and therefore would not per se preclude a broader interpretation, there seems to be no indication that courts currently interpret the term so as to include indirect discrimination. A more comprehensive provision would therefore also serve legal clarity and certainty and might

therefore help to improve the access of victims of discrimination to justice. (Sexual) harassment and the instruction to discriminate are not mentioned at all in Art. 5 LL.

The scope of application of Art. 5 sect. 1 LL is mentioned as “business relation". Yet the directive demands the protection against discrimination before this "relation" (access to employment, selection criteria and recruitment conditions) and after this "relation" (retired and disabled workers).

Instruction to discriminate is not included in the definition/prohibition under Art. 5 LL. Adding such a provision could for instance help to address discriminatory recruitment practice in case an employer instructs an employment agency to recruit only male candidates for a particular post.

Gender reassignment is not included in the prohibited grounds of discrimination in Art. 5.

Amending Art. 5 with definitions of different forms of discrimination would also include harassment into the Labour Law where regulation on this form of discrimination should be added. Although Artt. 24 and 25 cover protection against sexual harassment, this protection is only effective for termination constellations. This limitation could be in discordance with the directive. To create a protection against harassment and sexual harassment for comprehensive constellations of the working life, Art. 5 should be amended. Artt. 24 and 25 would than become a special, but only declarative provision regarding sexual harassment in termination constellations.

Labour Law No. 4857	
Law in force	Proposals for amendment

Sect. 1: No discrimination based on language, race, sex, political thought, philosophical belief, religion, sect and similar grounds can be made in the business relation.	Supplement 1 (Text of Dir.): There shall be no direct or indirect discrimination on grounds of sex *(and of the other grounds listed there)* in the public or private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.
	Supplement 2: For the purposes of this law, discrimination includes: direct or indirect discrimination, harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct; instruction to discriminate against persons on grounds of sex; any less favourable treatment of a woman related to pregnancy or maternity leave.

	Supplement 3 (Text of Dir.): For the purposes of this law, the following definitions shall apply: (a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation; (b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary; (c) "harassment": where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment; (d) "sexual harassment": where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

The consultation with official institutions, social partners and NGOs resulted in agreement to the proposed amendments regarding the protection against discrimination in recruitment processes. However, in the opinion of employer representatives the proposed amendments regarding dismissals may lead to abuse before court.

Nevertheless, the Directive 2006/54 requires a comprehensive protection against discrimination including dismissals.

b) Art. 5 Sect. 2 LL

The provision reads as follows: “The employer cannot treat part-time worker against full-time worker and definite-term worker against indefinite-term worker differently unless on founded reasons.”

Additionally the provision should be read together with Art. 13 sect. 2 LL which provides: “The worker employed on a part-time labour contract cannot be subjected to any procedure different than a full-time equivalent worker merely on the grounds that his/her labour contract is a part-time one, unless a reason justifying such discrimination exists. Divisible benefits of the part-time worker pertaining to wage and money are paid in proportion to the employment time compared to the full-time equivalent worker.”

If part-time workers are mostly women, this may lead to indirect discriminations.

The Dir. 2006/54 foresees justification for indirect discrimination if the discriminating provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

Hence, “founded reasons” in Art. 5 sect 2 LL could be in discordance with the directive. Required is rather an objective justification by a legitimate aim, and the means of achieving that aim must be appropriate and necessary. The term "Founded" could for instance include subjective or personal reasons asserted by the discriminating person. This reasons would be “founded”, but not necessarily objective. Therefore it should be checked whether the apparently neutral provision, criterion or practice is imputed to the person using it. If so, an indirect discrimination could appear. Thus an objective justification by an legitimate aim not associated with sex as a ground of discrimination could answer the directive more effectively.

In the jurisdiction of the ECJ objective justifications by a legitimate aim while the means of achieving that aim are appropriate and necessary were found. Encouragement of mobility and additional training (Case 109/88 Danfoss) or length of service/seniority (Case 109/88 Danfoss, Case C-184/89 Nimz) were for example seen as an objective justification.

Labour Law No. 4857	
Law in force	Proposals for amendment
The employer cannot treat part-time worker against full-time worker and definite-term worker against indefinite-term worker differently unless on founded reasons.	The employer cannot treat part-time worker against full-time worker and definite-term worker against indefinite-term worker differently unless it is objectively and reasonably justified by a legitimate aim.

The consultation with official institutions, social partners and NGOs resulted in proposals to explain the term “founded reasons” in bylaws or by the jurisdiction.

Irrespective of bylaws or jurisdiction, it may be suggested to amend the provision in order to satisfy the requirement of legal certainty as required by the ECJ.

c) Art. 5 Sect. 3 LL

The provision reads as follows: “The employer cannot treat a worker differently in concluding the labour contract, establishing the conditions thereof, implementation and termination thereof due to sex or pregnancy, unless biological reasons or those pertaining to the work qualifications oblige.”

The Dir. 2006/54 prohibits any less favourable treatment on grounds of pregnancy or maternity which includes also entitlements when returning from maternity leave.

Art. 5 (3) prohibits gender-based discrimination in a number of stages/elements of the work relationship, some of which reflect elements covered in the Recast Directive, such as: concluding the work contract, working conditions, termination of the contract. Furthermore, wage discrimination is covered by Art. 5 (4) Labour Law. At the same time, the ban of discrimination of Art. 5 sect. 3 LL fails to cover the selection/recruitment process, promotion, access to vocational training, and membership in workers/employment organizations. The provision fails to include the selection/recruitment procedure. This gap has also been addressed in the CEDAW Committee's recent Concluding Observations on Turkey's State Report, in which it called upon Turkey "to improve its legislation banning discrimination within recruitment to employment".

To harmonize this provision with the directive, the justification, notably the term "biological reasons" in Art. 5 sect. 3 LL could be amended. For justification is only possible under Art. 14 sect. 2 of the Dir. 2006/54. An occupational requirement justifies a discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

It is of crucial relevance that this justification of Art. 14 sect. 2 of the directive can take place only for access to employment including the training leading thereto. If the amendments else proposed for Art 5 LL (see above) are considered, this leads to an amendment of Art. 5 sect. 3 LL only mentioning access to employment including the training leading thereto.

The term "pregnancy" never stands alone within the directive but only in combination with maternity. Therefore the term maternity should be added to pregnancy.

Provisions for maternity leave granted by Art. 15 (return from maternity leave) of Dir. 2006/54 should be added. Additionally non-discrimination in return from maternity leave is also not covered by the Bylaw on working conditions of pregnant/breastfeeding women.

Labour Law No. 4857

Law in force	Proposals for amendment
The employer cannot treat a worker differently in concluding the labour contract, establishing the conditions thereof, implementation and termination thereof due to sex or pregnancy, unless biological reasons or those pertaining to the work qualifications oblige.	(1) The employer cannot treat a worker differently in access to employment including the training leading thereto, unless, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate. (2) A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

d) Art. 5 Sect. 4 and 5 LL

The provisions read as follows: " (4) A lower wage cannot be decided for an equal or equivalent job on the grounds of sex. (5) Implementation of special protective provisions due to the sex of the worker does not justify the application of a lower wage."

The provisions should be read with Art. 32 LL which defines the term "wage" as follows: "In general terms, wage is the amount provided and paid in cash to a person by the employer or third persons in return for work performed."

Also the Dir. 2006/54 gives a definition of the term "pay" which is broader than that of Art. 32 LL by covering the wage or salary AND any consideration, whether in cash or in kind, received by the worker directly or indirectly in respect of the employment. Art. 14 sect. 1 lit. c of the Dir. 2006/54 regards Art. 141 of the Treaty whose definition of "pay" is identic.

Therefore Art. 4 sect 1 Dir. 2006/54 requires to eliminate direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration for the same work or for work to which equal value is attributed.

Art. 4 sect. 2 Dir. 2006/54 prohibits discrimination in particular, where a job classification system is used for determining pay: This shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Essential in this regard is the ECJ jurisdiction in the case C-109/88 (Danfoss) providing a legal framework for the criteria and their limits for the award of pay supplements: the criterion of length of service for example does in principle not need special justification.

Regarding pay the ECJ ruled in the case C-109/91 (Ten Oever) that the term also covers paid benefits after termination.

Irrespective of the jurisdiction of the Turkish Supreme Court regarding its interpretation of the term "wage" it may be suggested to amend the provision in order to satisfy the requirement of legal certainty as required by the ECJ.

Labour Law No. 4857	
Law in force	Proposals for amendment
In general terms, wage is the amount provided and paid in cash to a person by the employer or third persons in return for work performed.	In general terms, wage is 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/her employment from his/her employer.

The consultation with official institutions, social partners and NGOs resulted in considerable doubts about the amendment of the definition. On the one hand, Turkey knows a minimum wage so that the amendment may not be necessary. On the other hand, Turkey knows different terms like wage, pay, and salary in different laws for different types of working contracts. The apprehension appeared that the amendment of the definition would complicate the issue at the expense of the victims of discrimination.

However, for the purposes of the Directive, the definition of pay in Art. 2 sect. 1 (e) is of primary importance. In order to secure the effective implementation of the principle of equal treatment, (at least) the definitions given in the Directive should be used literally.

e) Art. 5 Sect. 6 LL

The provisions read as follows: "In case of contradiction to the provisions of the above paragraph in the business relation or termination, the worker can demand the rights that he/she has been deprived of besides an appropriate indemnity equivalent up to four months' wage. (...)"

In cases of discrimination Art. 17 Dir. 2006/54 stipulates remedies implying defence of rights and compensation or reparation. These defence of rights applies for all persons who consider themselves wronged by failure to apply the principle of equal treatment to them. The directive demands in Art. 18 measures to secure compensation or reparation for the loss and damage

sustained by a person injured as a result of discrimination on grounds of sex. These measures must be dissuasive and proportionate to the damage suffered.

While Art. 5 sect. 6 LL foresees compensation for discrimination, the upper limit of four monthly salaries is in conflict with Dir. 2006/54, which allows in principle no upper limit. Exceptionally may compensation or reparation be restricted in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

More precisely, the directive requires comprehensive remedies regarding the whole scope of application dir. 2006/54, not only for business relations or termination constellations, i. e. access to employment, recruitment, promotion, vocational guidance and training, pay, membership and involvement in an organization of workers.

Therefore also the provisions of Artt. 20, 21, 24 (2), 25 (2) and 26 (1) LL fall short of stipulating comprehensive remedies as required by the directive. Scope of application and range are only termination constellations. To harmonize this provisions with the directive, the said articles could be amended as suggested for Art. 5 sect. 6 LL.

Labour Law No. 4857	
Law in force	Proposals for amendment
In case of contradiction to the provisions of the above paragraph in the business relation or termination, the worker can demand the rights that he/she has been deprived of besides an appropriate indemnity equivalent up to four months' wage.	In case of contradiction to the provisions of the above paragraph, the worker can demand the rights that he/she has been deprived of besides compensation or reparation for the loss and damage sustained as a result of discrimination on grounds of sex.

	Example of the German General Equal Treatment Act: (1) In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. (...) (2) Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of nonrecruitment, if the employee would not have been recruited if the selection had been made without unequal treatment.

f) Art. 5 Sect. 7 LL

The provision reads as follows: “Without prejudice to the provisions of article 20, the worker is obliged to prove that the employer has contradicted to the provisions of the above paragraph. However, when the worker puts forward a situation strongly suggesting the probability of the existence of an infringement, the employer becomes obliged to prove that no such infringement exists.”

The burden of proof is stipulated in Art. 19 of the Directive shifting the burden of proof to “facts from which it may be presumed” that there has been direct or indirect discrimination.

Facts from which it may be presumed that there has been direct or indirect discrimination are sufficient, irrespective an infringement of Art. 5 LL or the responsibility of the employer or the unclear term "strongly suggesting situation". Following the current wording, neither discrimination by colleagues nor business partners nor indirect discrimination where comprehensive statistics are potentially needed are covered.

Labour Law No. 4857	
Law in force	Proposals for amendment

Without prejudice to the provisions of article 20, the worker is obliged to prove that the employer has contradicted to the provisions of the above paragraph. However, when the worker puts forward a situation strongly suggesting the probability of the existence of an infringement, the employer becomes obliged to prove that no such infringement exists.	Without prejudice to the provisions of article 20, the worker is obliged to prove that the employer has contradicted to the provisions of the above paragraph. However, when the worker puts forward facts from which it may be presumed that there has been direct or indirect discrimination, the employer becomes obliged to prove that there has been no breach of the principle of equal treatment.

g) Amplification of Art. 5 with Regulations on Positive Action

Art. 5 LL as the central provision for protection against discrimination should be amplified with regulations on positive action. Such provisions should be added to the LL. Nevertheless after Art. 3 Dir. 2006/54 member states may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

The meaning of the term "positive action" is illustrated more comprehensively in the chapter on trade union law of this report.

While Art. 3 of Dir. 2006/54 does not go as far to *require* member states to undertake measures of positive action aimed at accelerating the facto equality of women and men, it clarifies that such measures are *permitted* and thus do not constitute discrimination. However, it should be noted that by their very nature, measures of positive action represent an important tool for the achievement of equal opportunities between women and men. This constitutes not only one of the main purposes of Dir. 2006/54, but also has been prominently placed in the *Turkish constitution: Art. 10* establishes an obligation of the state to ensure that equality between men and women exists in practice. Although mentioned in the Turkish constitution, a specific regulation is missing in the Labour Law.

Labour Law No. 4857	
Law in force	Proposals for amendment

missing	Example of the German Equality Act: Olumlu önlemler 8. ila 10. ve 20. maddelerde sayı- lan sebepler dikkate alınmaksı- zın, uygun ve makul önlemler vasıtasıyla, 1. maddede sayılan bir sebebe dayanan mevcut olumsuzluklar engelleniyor veya gideriliyorsa farklı muamele geçerlidir.

1.3 Access to Employment, Promotion and Vocational Training

Employment Ban for Women in Underground and Underwater Work

Art. 72 LL states that it is prohibited to employ women at any age in underground or underwater positions such as mine galleries, cabling, sewerage and tunnel construction.

Dir 2006/54 prohibits in Art. 14 direct discrimination on grounds of sex in relation to conditions for access to employment (Art. 14 (1) a) and in relation to employment and working conditions (Art. 14 (1) c).

The employment ban of women in underwater or underground work does not comply with Dir 2006/54. As held in a EU Screening report on Turkey, amendments regarding the 'overprotection of women in relation to (…) underground and underwater work' are necessary.[1]

According to Art.14 (2) of Dir 2006/54 exceptions to equal access to employment are possible under specific circumstances: Firstly, sex must constitute a ‚genuine and determining occupational requirement'. This has to be interpreted strictly. Secondly, the restriction has to be appropriate and necessary for achieving the legitimate aim pursued. The ECJ held that protective legislation is only allowed to protect women in relation to pregnancy and childbirth. Protective legislation cannot be used to exclude women from types of employment based on the reason that women might need greater protection than men against risks, which affect men and women in the same way.[2] However, Turkey has ratified the ILO Convention C45 (1935), which stipulates in Art. 2 the prohibition of the employment of women in underground work. The ECJ held in EC v. Austria C-203/03[3] that there is an incompatibility between the general employment ban of women in underground and underwater work and suggests the denunciation from the ILO Convention C45. Therefore it would be recommended to lift the absolute ban of female employment in underground and underwater work and - as the ECJ held in C-203/3 - consider a denunciation of the ILO Convention C45.

[1] Screening Report Turkey (2006) Chapter 19 – Social Policy and Employment, 13.
[2] See Case C-222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR I-01651; Case C-285/98 Tanja Kreil v Bundesrepublik Deutschland [2000] ECR I-00069; Case C-203/03 Commission of the European Communities v Republic of Austria [2005] ECR I-00935, in Prechal, Burri (2009) EU Rules on Gender Equality: How are they transposed into national law?, 8-9.
[3] Case C-203/03 Commission of the European Communities v Republic of Austria [2005] ECR I-00935.

Access to Hard and Dangerous Work for Women

Art. 85 LL is the legal basis for the Implementing Regulation for Hard and Dangerous Work(No. 25494). In general, this regulation defines 'heavy and dangerous' work and it defines which types of such work women may perform.

The Annex 1 of the Implementing Regulation defines the types of hard and dangerous work and lists different occupations. Women have no access to numerous of these occupations, those occupations which are marked with an (W) are accessible for women. However, the access has been improved for women due to recent amendments. Women who have graduated from schools providing specialization and vocational education can be employed in hard and dangerous work as long as it is in connection to the certificate obtained. These women can therefore have access to occupations which would normally not be accessible for women. Those women who have completed courses, which are accepted by the relevant ministries, can be employed in all the professions between the numbers 36-66 including 66 (work related to chemical industry) in Annex I.[4]

According to EU law it is possible to define types of employments for which the sex of the worker is a genuine and determining factor and exclude women. These exceptions however have to be interpreted strictly, because it is an exception to a fundamental principle of European Union gender equality law. Additionally, the exception has to be necessary and appropriate to achieving the legitimate aim.[5] The list of "hard and dangerous work" in the Turkish law excludes women from certain types of employment. These exceptions therefore need to have the sex of the worker as a determining factor. The list in general is rather long and consists of 111 different types of "hard and dangerous" work. Approximately 34 types are accessible for women. Consequently only less than the half of all defined "hard and dangerous" work is accessible for women not having graduated from the said schools or completed the said courses.

Art. 28 of the DIR 2006/54 states that 'This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.' The ECJ held that this exception has to be interpreted strictly (see C-222/84 Johnston v Chief Constable of the Royal Ulster Constabulary). It stated, that 'that provision does not allow women to be excluded from certain types of employment on the ground that public opinion demands that women be given greater protection than men against risks which affect men and women in the same way (…).' Women cannot be excluded from certain types of employment solely because they are on average smaller and less strong than men.[6]

It is in accordance with the EU acquis to define a specific list with employments for which the sex of the worker is the determining factor. This would be given, if for example the actor in a play has to be a man.[7] With regard to Annex 1 of the Implementing Regulation for Hard and Dangerous Work it is unclear how the employments not accessible for women are defined and how it is determined. These decisions are either based on the nature of the job or on the context

[4] Information about the amendment of the Implementing Regulation was received orally during research within Activity 1.1. and was given by the relevant department of the Ministry of Labour and Social Security.
[5] See for further information the chapter on 'Conditions of night work for women'.
[6] Prechal, Burri (2009) EU Rules on Gender Equality: How are they transposed into national law?, 8-9.
[7] Prechal, Burri (2009) EU Rules on Gender Equality: How are they transposed into national law?, 9.

of the specific work. Usually, these lists contain employments such as military personnel, workers in women's shelters or access to priesthood.[8]

More than half of all types of the occupations listed in the Annex 1 exclude women. Due to the required 'strict' interpretation of the exceptions, the list may contain specific employments, which do exclude women, but which do not have the sex of the worker as a determining factor. For example: Nr. 23 excludes women from "Manufacture from gold, silver, cupper, brass, aluminium and similar material". But women are allowed to work on kitchen and house hold equipment. The exception within the exception seems to be not justifiable. Nr. 92 also makes an exception for women and allows women to work in packaging of meat, but are not allowed to work in the previous steps of meat processing. This information leads to the question on how "hard and dangerous" work is defined. It is therefore suggested to further define the terms "hard and dangerous" work and to amend the list in light of the judgements of the ECJ.

This questions has also been discussed in the consultation with official institutions, social partners and NGOs which resulted in a controversial discussion. Some supported the current regulation of the Implementing Regulation and stressed the importance of protecting women. Other representatives though stressed the impact of overprotecting women which can lead to limiting access to the labour market for women. It was further mentioned, that it is necessary to initiate measures to change the gender segregation of labour market.

Conditions of Night Work for Women

Art. 73 LL builds the basis for women working in night shifts. The specific regulations thereon are specified by the Implementing Regulation for the Working Conditions of Female Workers at Night Shifts. In general, night work is also accessible to women. A total ban on night work for women would violate the prohibition of discrimination as held by the ECJ in Stoeckel (C-345/89). Art. 6 of this Implementing Regulation foresees a liability of the employer to provide the transport for female workers at night shifts. It is assumed that the rational and aim behind this provision is to raise the female employment rate in night work and protect women from violence. It would therefore form a positive action (Art. 3 Dir 2006/54). The positive measure has to be proportionate, therefore appropriate and necessary in order to achieve the aim and should still be reconciled as far as possible with the principle of equal treatment.[9]

In Lommers (C-476/99) the ECJ held that childcare facilities at workplace exclusively accessible for female employees can be seen as form of positive measure. This situation can be compared to a certain extent with the exclusive accessibility of transport for the night shift for women. However, in implementing this protective rule, it might be the case that under certain circumstances a supposed privilege for women may become also an obstacle in employment. Due to higher costs or higher coordinating efforts when providing transport for women only, employers may employ less women in night work. At the same time one has to consider that lacking transport facilities for women can also form an obstacle for female employment in night shifts.

[8] Prechal, Burri (2009) EU Rules on Gender Equality: How are they transposed into national law?, 9.
[9] Mc Crudden, Prechal (2009) The Concepts of Equality and Non-Discrimination in Europe: A practical approach (European Commission) 38.

In light of the discussion above, it would be suggested to amend the existing provision and implement a provision that foresees transport for women and men who are working in night shifts.

Art. 7 Implementing Regulation for the Working Conditions of Female Workers at Night Shifts states that female employees, who work in night shifts, have to do a compulsory medical test once in six months. At the same time, Art. 69 (4) LL foresees mandatory health checks for night work in general, thus for women and men, once in two years. Art 14 Dir 2006/54 prohibits discrimination on grounds of sex in relation to employment and working conditions. The ECJ held that protective legislation is only allowed to meet women's specific need for protection related to pregnancy and childbirth. (See eg. ECJ, C-222/84 Johnston v Chief Constable of the Royal Ulster Constabulary).

Since women have to undergo the medical test more often than men, this forms therefore a specific burden for women. Since the purpose of the additional medical tests for women could not be clarified, it is recommended to assess the purpose of the medical tests.

Labour Law No. 4857 and respective Bylaws – Access to employment, promotion and vocational training	
Law in force	Proposals for amendments
Art. 72 LL: It is prohibited to employ men below the age of eighteen and women at any age in underground or underwater positions such as mine galleries, cabling, sewerage and tunnel construction.	Art. 72 LL: It is prohibited to employ **men and women** below the age of eighteen in underground or underwater positions such as mine galleries, cabling, sewerage and tunnel construction.
Implementing Regulation for the Working Conditions of Female Workers at Night Shifts, Art 6: Transport to and from Work Site The Employers of every type of work site out of the borders of Municipality, and the Employers, being in the borders of Municipality, who have difficulty in regular transport services at shift change hours, are liable for providing the transport of the female workers at night shift, with convenient vehicles from and to their residences and the nearest locations.	Implementing Regulation for the Working Conditions of Female Workers at Night Shifts, Art 6: The Employers of every type of work site out of the borders of Municipality, and the Employers, being in the borders of Municipality, who have difficulty in regular transport services at shift change hours, are liable for **providing the transport of the workers** at night shift, with convenient vehicles from and to their residences and the nearest locations.
…	…

Sex as 'Obstacle' for Employment

Art. 79 (6) states that sex can present an obstacle for employment; consequently workers can be 'prevented from being employed'.

As stated in the previous chapters on 'Employment ban for women in underground and underwater work' and 'Access to hard and dangerous work for women' Art 14 (2) provides for limitations of access to employment on ground of sex. This exception has to be interpreted strictly, since it is an exception of the fundamental principle of non-discrimination. Different treatment in access to employment is only allowed under the following circumstances. Firstly, the sex of the worker is a genuine and determining factor. This could be for example the work in a women's shelter. Secondly, this exclusion must be appropriate and necessary for achieving a legitimate aim pursued. Since the exception is interpreted strictly, the term 'obstacle' seems to be too general.

It would be therefore recommended to amend Art 79 (6) and include a specification regarding when sex forms an 'obstacle' for employment.

Labour Law No. 4857 and respective Bylaws – Access to employment, promotion and vocational training	
Law in force	Proposals for amendments
Suspension of business or closing of enterprise ARTICLE 79. – If the age, sex and health conditions of the workers employed in an enterprise present obstacle for their employment in such positions, they are also prevented from being employed.	Suspension of business or closing of enterprise ARTICLE 79. – If the age, sex and health conditions of the workers employed in an enterprise present obstacle for their employment in such positions, they are also prevented from being employed. **Sex forms an obstacle for employment when the sex of the worker is a genuine and determining factor and when the exception of one sex is appropriate and necessary for a legitimate aim.**

1.4 Working Conditions, Including Termination of Contract

Termination

a) Art. 12 LL

The provision reads as follows: “Any worker employed on a definite-termed labour contract cannot be subjected to a different treatment compared to an equivalent worker employed on an indefinite-termed labour contract merely on the grounds that his/her labour contract has a definite term, unless a reason justifying discrimination exists.

Divisible benefits regarding the wage and money payable to a worker employed on a definite-termed labour contract based on a certain period of time are given in proportion to the period that the worker has worked. When the length of service in the same business or enterprise is sought for benefiting from any working condition, the seniority taken as a basis for the equivalent worker employed on an indefinite-termed labour contract is applied for a worker employed on a definite-termed labour contract, unless a reason justifying the application of different seniority exists.

Equivalent worker is the worker employed on an indefinite-termed labour contract at the business in the same or a similar work. In case no such worker exists at the business, a worker employed on an indefinite-termed labour contract in the said line at a business with conforming conditions and undertaking the same or a similar work is taken into consideration.”

This provision may potentially lead to an indirect discrimination while the majority of persons working under a definite-termed labour contract are women.

Benchmark for the justification of indirect discriminations is Art. 2 sect. 1 lit b Dir. 2006/54, after which an indirect discrimination occurs, where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

As the ECJ ruled in the case C-17/05 (Cadman), the length of service as a determinant of pay can be an objective justification.

These requirements of an objective justification could be added to Art. 12 LL.

Labour Law No. 4857	
Law in force	Proposals for amendments

Any worker employed on a definite-termed labour contract cannot be subjected to a different treatment compared to an equivalent worker employed on an indefinite-termed labour contract merely on the grounds that his/her labour contract has a definite term, unless a reason justifying discrimination exists.	Any worker employed on a definite-termed labour contract cannot be subjected to a different treatment compared to an equivalent worker employed on an indefinite-termed labour contract merely on the grounds that his/her labour contract has a definite term, unless that reason is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

b. Art. 17 and Art. 18 LL

Art. 18 LL states that reasons such as race, colour, sex, marital status, family obligations, pregnancy, birth, religion, political opinion and similar reasons do not constitute a valid reason for termination, in particular dismissal of notice. In general one has to distinguish between workers who enjoy job security and workers who do not have job security. According to Art. 18 sect. 1 LL, job security is given, when the person works under an indefinite-termed labour contract, in a workplace with a least 30 workers and worked there for at least 6 months. Additionally, the person is not in a capacity of an employer's representative tasked with hiring and firing. Art. 18 LL is applicable to workers with job security only. In case of an invalid reason or no valid reason given by the employer, the court or special referee decides that the worker is to be reemployed and, in case the employer is not reemploying the worker, that the employers should make payment of a 'job security pay' as a compensation between 4 and 8 months' wage. Ex-workers without job security however, are protected by courts from allegedly unfair treatment by the employer. A discriminatory termination is deemed to be a wrongful termination breaching 'good faith and fair dealing'. Discriminatory dismissal is a form of abusive dismissal. An abusively dismissed worker is entitled to the 'bad-faith pay' which amounts to 3 months' wage.[10]

The LL foresees protection from discriminatory dismissal, but the level of protection for workers holding job security and those not holding job security is different. It is recommended that the level of protection from discriminatory dismissal is harmonised.

The Art. 14 (1) (c) DIR 2006/54 prohibits direct or indirect discrimination on grounds of sex in relation to dismissals. The directive does not foresee any different levels of protection within workers, since the directive applies to all forms of employment.

Therefore, it would be recommended to explicitly state in Art. 17 LL, that discriminatory dismissal forms a wrongful termination. Currently, discriminatory dismissal is deemed to be wrongful. An explicit reference or inclusion of discriminatory behaviour as unlawful would be recommended in Art. 17 sect. 6 LL. Art. 17 sect. 6 LL allows the application of Artt. 18-21, which are provisions applicable to employees with job security only, also in issues involving

[10] Süral, Economic Implications of Employment Protection Legislation in Turkey: Has Turkey found its Juste Milieu?, in Comparative Labor Law and Policy, 30 (2009). 349-350.

employees without job security under certain circumstances, such as non-compliance with the notification period. It is recommended that in Art. 17 sect. 6 also in case of discriminatory dismissals the Artt. 18-21 are applicable.

Labour Law No. 4857	
Law in force	Proposals for amendments
Art. 17 sect. 6 (2) Pursuant to first paragraph of article 18, the worker is paid an indemnity equal to three times of the notification period in case the labour contracts of workers not covered by articles 18, 19, 20 and 21 of this Law are terminated through misuse of the right of termination.	Art. 17 sect. 6 (2) Pursuant to first paragraph of article 18, the worker is paid an indemnity equal to three times of the notification period in case the labour contracts of workers not covered by articles 18, 19, 20 and 21 of this Law are terminated through **discrimination or** misuse of the right of termination.

1.5 Pregnancy and Maternity Protection

Art 74 LL is the main provision regulating work conditions during maternity leave and time of breastfeeding. The subparagraphs of Art 74 are also regulated in the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes. Articles 18-21 LL deal with the regulations on dismissal, which are also of importance for pregnant workers. In the following specific issues in relation to the working conditions of pregnant or breastfeeding women, are discussed. Based on the analysis of the Turkish legislation, those issues are shown here, for which improvements are suggested or recommendations are made in order to improve its harmonization with the EU acquis.

Protection Against Dismissal

Regarding the protection from dismissal different levels of protection exists within the Turkish Labour Law. Within the group of workers having an open-ended labour contract, one has to distinguish between workers without and with job security. job security is given, when a person works for more than 6 months under an open-ended contract for a business, which employs at least 30 (50 in agriculture) workers. For workers without job security, the following applies when dismissed during pregnancy and maternity: According to Art. 17 LL, the worker is entitled to the so-called ‘bad-faith pay’, which equals to thrice the amount of pay corresponding to the worker’s notice period. If the worker has job security, the employer has to specify the reason for dismissing. Pregnancy is not a valid reason for termination of contract (Art. 18 LL). A worker can file a lawsuit, when the reason is not valid or not specified. The court can rule on reinstatement, if the employer does not follow, she/he has to pay an amount of minimum 4 and maximum 8 times of the wage (Art. 21 LL).

Unfavourable treatment of women in relation to pregnancy or maternity is seen as discrimination according to Art. 2 (2) c of DIR 2006/54. Purpose of this directive is also to protect pregnant women from dismissal caused by the pregnancy.[11] According to DIR 92/85 (Pregnancy and Maternity Directive) dismissal of pregnant workers and those on maternity leave is prohibited during the period from the beginning of their pregnancy to the end of the maternity leave. Art 10 further states that there are exceptions possible due to reasons which are not connected to the condition (of being pregnant) and which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.[12]

The ECJ held in Tele Denmark (C-109/00) the dismissal of a worker on account of pregnancy constitutes direct discrimination, irrespective:

- the nature and extent of the economic loss of the employer as a result of absence of the pregnant worker

- the nature of the contract of the woman (fixed-term or contract for indefinite period)

- the fact, that the woman did not notice the employer about the pregnancy although this was know at the time of concluding the contract

- the fact that the woman might not be able to work during a substantial part of the term of that contract

- the fact that the woman was hired by a very large business which usually hires employees with short fixed-term contracts.[13]

Although Artt. 17, 18 and 25 LL provide a certain protection from dismissal during pregnancy and maternity, the level of protection regarding no job security and job security as well as in relation to the contract (fixed-term or indefinite contract) is different. Workers falling under Art 18 LL can claim for reinstatement, which is not possible for workers falling under Art. 17 LL. At the same time, the amount, which can be claimed, is different. Since the ECJ[14] stated that protection should be guaranteed irrespective the form of contract or size of business, it would be recommended to harmonize the level of protection from dismissal during pregnancy or maternity leave for those having an indefinite contract. However, DIR 92/85/EEC does not require in Art 10 the reinstatement of the women explicitly.[15] The protection of pregnant workers and workers who are on maternity leave could be regulated in an extra article, applicable to all forms of contracts and job security status.

Length of Maternity Leave

[11] Fuchs, Marhold (2010) Europäisches Arbeitsrecht, 174.
[12] O'Leary (2010) Protective measures for pregnant workers, presentation March 2010, 10.
[13] Case C-109/00 Tele Danmark [2001] ECR I-6993 in Fuchs, Marhold (2010) Europäisches Arbeitsrecht, 174.
[14] Case C-109/00 Tele Danmark [2001] ECR I-6993 in Fuchs, Marhold (2010) Europäisches Arbeitsrecht, 174.
[15] COM(1999)100 final, Report from the Commission on the Implementation of Council Directive 92/85/EEC of 19 October 1992 on the Introduction of Measures to Encourage Improvements in the Health and Safety at Work of Pregnant Workers and Workers who have recently given Birth o rare Breastfeeding, 10.

Art. 74 LL as well as Art. 11 of Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes state, that a female worker is not allowed to work 16 weeks in total, 8 weeks before and 8 weeks after the confinement.

This rule is in full conformity with Art. 8 DIR 92/85/EEC, which states, that women have to get at least 14 weeks of maternity leave. The new proposal of this directive[16] increases the weeks of maternity leave to 18 weeks. This period should be continuous and be granted before and/or after the confinement. This period includes compulsory leave of 6 weeks after the confinement. In the case that the proposal enters into force, Art. 74 LL and Art. 11 of Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes have to be adapted to 18 weeks instead of the current 16 weeks of maternity leave.

The new proposal of this directive[17] includes also in Art 8 regulations on cases of premature birth (Art. 8 (4)) and child birth after the due date (Art. 8 (3)). In relation to childbirth which occurs after the due date, the post-natal portion of the leave is not reduced. The pre-natal portion of maternity leave is longer than expected, but nevertheless the post-natal portion is not shortened. It should guarantee that women have sufficient time to recover.[18]

Art. 74 LL or the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes do not contain any provision regulating the length of post-natal maternity in case of child birth which occurs after the due date.

The new proposal of this directive[19] includes also in Art. 8 that in case of premature birth, children hospitalized at birth, children with disabilities and multiple births additional leave is granted.

Art. 74 LL includes a new provision which regulates that in case of premature birth the period between the actual date of birth and presumed date of birth can be added to the post-natal leave.

However, Art. 74 LL or Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes would cover only partly the new proposal of the directive and would need to be expanded also to children hospitalised and to children with disabilities. For multiple births, Art. 74 LL as well as the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes already foresee an extension of the maternity leave in Art. 11.

[16] COM(2008) 637 final
[17] COM(2008) 637 final.
[18] COM(2008) 637 final, 8.
[19] COM(2008) 637 final.

Labour Law and Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes	
Law in force	Proposals for amendments
Art 74 Working during maternity and breast feeding leave ARTICLE 74. – It is the principle that the female workers should not be caused to work for a period of sixteen weeks in total, eight weeks before and eight week after delivery. In case of plural pregnancy, such eight-week period before delivery is increased by two weeks. If, however, health condition allows, the female worker may work until three weeks before delivery, upon approval of physician. In this case, such worked periods are added to the periods after delivery. The non-employment periods granted to female workers and which the women worker cannot benefit from prior to birth in the event of premature birth are granted by means of adding such to periods after birth. The above mentioned periods may be prolonged before and after delivery, when required, depending on the health condition of the worker and the nature of the job. Such periods are established by a physician report. Female workers are granted paid leave for periodic checks during pregnancy. The pregnant female worker is employed in lighter positions suitable for her health, when required by physician report. In this case, no discount is made in her wage. The female worker is granted unpaid leave for up to six months after expiry of sixteen-week, or in case of plural pregnancy, eighteen-week period, upon request. Such period is not considered in calculating the annual paid leave right. Female workers are granted breast feeding leave for one and a half hours a day in total to feed their infants below the age of one. The worker is entitled to determine the time segments and the number of parts in which she should use such leave. This period is reckoned from daily working hours.	ARTICLE 74. – It is the principle that the female workers should not be caused to work for a period of sixteen weeks in total, eight weeks before and eight week after delivery. In case of plural pregnancy, such eight-week period before delivery is increased by two weeks. If, however, health condition allows, the female worker may work until three weeks before delivery, upon approval of physician. In this case, such worked periods are added to the periods after delivery. The non-employment periods granted to female workers and which the women worker cannot benefit from prior to birth in the event of premature birth are granted by means of adding such to periods after birth. **The prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date and the actual date of childbirth, without the remaining portion of leave being reduced.** Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes Article 11 — It is essential that the pregnant worker cannot be asked to work eight weeks before and after the birth, total sixteen weeks. In multi-pregnancy, extra two weeks are added to the leave of four weeks in which the worker will not be asked to work. **In the case that children are hospitalized at birth or children are born with disabilities extra two weeks are added to the post-natal leave.**

Return from Maternity Leave

Art. 15 of DIR 2006/54 states that a woman on maternity leave is entitled to return to her job after the period of maternity leave. The woman can also get an equivalent post, but this post may not be less favourable than the previous post.

An explicit regulation of the entitlement to return to the same or equivalent post is missing in the Labour Law. It would be recommended to include the right to return specifically in Art. 27 Labour Law.

Labour Law	
Law in force	Proposals for amendments

Art 74 Working during maternity and breast feeding leave ARTICLE 74. – It is the principle that the female workers should not be caused to work for a period of sixteen weeks in total, eight weeks before and eight weeks after delivery. In case of plural pregnancy, such eight-week period before delivery is increased by two weeks. If, however, health condition allows, the female worker may work until three weeks before delivery, upon approval of physician. In this case, suck worked periods are added to the periods after delivery. The non-employment periods granted to female workers and which the women worker cannot benefit from prior to birth in the event of premature birth are granted by means of adding such to periods after birth. The above mentioned periods may be prolonged before and after delivery, when required, depending on the health condition of the worker and the nature of the job. Such periods are established by a physician report. Female workers are granted paid leave for periodic checks during pregnancy. The pregnant female worker is employed in lighter positions suitable for her health, when required by physician report. In this case, no discount is made in her wage. The female worker is granted unpaid leave for up to six months after expiry of sixteen-week, or in case of plural pregnancy, eighteen-week period, upon request. Such period is not considered in calculating the annual paid leave right. Female workers are granted breast feeding leave for one and a half hours a day in total to feed their infants below the age of one. The worker is entitled to determine the time segments and the number of parts in which she should use such leave. This period is reckoned from daily working hours.	**Working during maternity and breast feeding leave ARTICLE 74. –** **Include in Art 74 also:** **A female worker is entitled to return to her job or to an equivalent post on terms and conditions which are no less favourable to her after maternity leave. At the same time, she benefits from any improvement in working conditions to which she would have been entitled during her absence.**

Action Further to the Assessment of Risk

The Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes holds in Art. 8 regarding the necessary actions following a risk assessment of work places for pregnant and breastfeeding workers the following:

‘Article 8 — In case that the Employer has found a negative effect on the pregnancy or breastfeeding of the worker, or a security or health risk due to the results of the evaluation done; the working conditions and/or working hours of the concerned worker are temporarily changed, in such a manner that they will prevent the worker to experience these risks.

In case that a change in the adaptation of the working conditions and/or working hours is not available technically and objectively; employer takes the necessary precautions to forward the worker to another work.

In case that determined necessary by a medical report, the pregnant worker is asked to work in easy work suitable for her health. At this point no reduction will be done to the wage of the worker.

In case that forwarding to another work is not technically and logically available, with the scope of protecting the security and health of the worker, within the due time, relying upon the demand of the worker, unpaid leave is provided. This period is not taken into consideration in the calculation of the annual paid leave.’

The employer conducts a risk assessment of the work place. If there is a security or health risk at the actual work place, the working conditions of the pregnant or breastfeeding woman have to be adapted. If an adaption is not possible, she must be moved to another job. If this is also not possible, the woman must be granted leave. Consequently, Art. 8 of the Implementing Regulation implements Art. 5 of the DIR 92/85/EEC[20].

Turning to the EU acquis, Art. 11 (1) DIR 92/85/EEC foresees that also in cases of Art. 5 (which means adaption of workplace, if this is not possible then moving to another job, if this is not possible either, then granted leave) the rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for pregnant women must be ensured.[21] The worker has a right to the maintenance of a payment or to an adequate allowance. Pay during this period is a mixture of payment from the employer and state benefits.[22]

As held by the ECJ in Gassmayr (C-194/08, para. 69) the measures of the directive would lose their effect if not accompanied by the maintenance of rights linked to the employment contract, including maintenance of a payment and/or entitlement to an adequate allowance.

In the case that a woman has to be granted leave because the work place is a security or health risk and an adaption is not possible (Art. 5 (3) DIR 92/85/EEC), then the Member States have to define the arrangements for that entitlement. The outcome cannot undermine the objective of protecting the safety and health of pregnant workers and have to take into account that the leave is the last resort.[23] The Member States may guarantee a payment in cases of leave according to Art. 5(3) DIR 92/85/EEC in the form of an adequate allowance, a payment, or a combination of

[20] Council Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Health and Safety at Work of Pregnant Workers and Workers who have recently given Birth or are Breastfeeding.
[21] ECJ, Parviainen, C-471/08, para. 33.
[22] Report from the Commission on the Implementation of Council Directive 92/85/EEC (1999) 15.
[23] ECJ, Gassmayr, C-194/08, para. 67-68.

the two. The form of payment and level of income the Member State decides, but the form must not undermine the effectiveness of the directive.[24]

Within the Turkish legislation, Art. 8 of the Implementing Regulation states that the leave is unpaid. But women can be entitled to an allowance based on Art. 18 of the Social Insurance and General Health Insurance Act. Since the directive requires any form of payment, it has to be ensured that these women receive also payments. A respective recommendation is made regarding the Social Insurance and General Health Insurance Act.[25]

Nightwork and Pregnancy/Breastfeeding

Art. 7 DIR 92/85/EEC provides that if it is necessary in order to protect the health of the woman or the baby, and the employer is entitled to demand a medical certificate to that effect, they cannot be forced to work nights.[26] If night work is not possible, two options, in accordance with national legislation and/or national practice, have to be offered: a) transfer to daytime work; or b) leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.

This provision is partly missing in the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes and Implementing Regulation for the Working Conditions of Female Workers at Night Shifts. Art 9 of Implementing Regulations for the Working Conditions of Female Workers at Night Shifts contains the possibility to be transferred to daytime work. However, this Art 9 does not include the possibility to have leave granted under specific circumstances when a move to daytime work is not possible.

Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes and Implementing Regulation for the Working Conditions of Female Workers at Night	
Law in force	Proposals for amendments

[24] ECJ, Gassmayr, C-194/08, para. 70.

[25] Please see for further detailed information the section of the report related to social security.

[26] Report from the Commission on the Implementation of Council Directive 92/85/EEC (1999) 9.

Article 9 — Female workers, from the determination of their pregnancy by the doctor until the birth; and Breastfeeding female workers starting from the birth date, cannot be asked to work at night shifts for a period of six months. For Breastfeeding female workers; in case that, it is determined necessary when the health of the mother and the child is considered, and this situation is proven by the doctor of the work site, common health unit of the work site, workers health clinics, and in absence of these by the nearest social Insurance Institute, Local Health Centers, by the doctors of Government or Municipality, this period can be extended to one year. Keeping reserved the provisions of the Implementing Regulation concerning the Working Conditions of Pregnant or Breastfeeding Women and, Breastfeeding Rooms and Child Care Homes, published in Gazette numbered 25522 and dated 14/7/2004; the working durations of these workers are arranged in such a manner that it meets day shifts.	Article 9 — Female workers, from the determination of their pregnancy by the doctor until the birth; and Breastfeeding female workers starting from the birth date, cannot be asked to work at night shifts for a period of six months. For Breastfeeding female workers; in case that, it is determined necessary when the health of the mother and the child is considered, and this situation is proven by the doctor of the work site, common health unit of the work site, workers health clinics, and in absence of these by the nearest social Insurance Institute, Local Health Centers, by the doctors of Government or Municipality, this period can be extended to one year. Keeping reserved the provisions of the Implementing Regulation concerning the Working Conditions of Pregnant or Breastfeeding Women and, Breastfeeding Rooms and Child Care Homes, published in Gazette numbered 25522 and dated 14/7/2004; the working durations of these workers are arranged in such a manner that it meets day shifts. **If a transfer is technically and/or objectively not feasible or cannot reasonably be required, a leave from work or an extension of maternity leave have to be possible.**

Breastfeeding Time

Art. 14 of the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes states, that female workers are granted a daily total period of one and half hours for breastfeeding their children under the age of one year. The exact time of this period and the division of this period are determined by the worker. This period is considered as daily working period.[27]

DIR 92/85/EEC does not contain any provision regulating a breastfeeding time. Also the new proposal does not contain any provision on this issue. However, the European Parliament suggested including also a regulation on time off for breastfeeding. A mother should be granted two hours for breastfeeding, which are separated in two periods.[28]

The implementation of this breastfeeding time in Turkey shows in practice that women prefer to use the breastfeeding time collectively and to have one workday off per week.[29] It can be assumed that execution of this provision in practice might lead to an obstacle in raising female employment. The actual implementation is contradictory to the idea of the provision, therefore the implementation should be according to its idea. Women who breastfeed their babies should get the possibility to do that during the working time. The underlying idea of this regulation is to

[27] See also Art. 74 LL (6) which foresees also that women are entitled to 1,5 hours daily in the first 12 months.
[28] COM(2008) 637 final, European Parliament legislative resolution of 20 October 2010, Art. 11a.
[29] Süral (2009) Compatibility of Turkey's Legal Rules on Pregnancy and Maternity with the EU Acquis, in European Gender Equality Law Review No 2/2009, 18.

actually raise female employment, since working and breastfeeding would be made possible. But the implementation of regulations in this way, taking off the breastfeeding time collectively, can also 'backfire' and discourage employers to hire women.[30]

Breastfeeding Rooms and Child Nursing Homes

Art. 15 of the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes foresees quotas for the establishment of nursing homes. In case more than 150 female workers are employed, the employer is obliged to offer nursing homes. These nursing homes take care of children up to the age of 6. In the case that between 100 and 150 women are employed, breast feeding rooms should be made available. The breastfeeding rooms are child care facilities for children up to the age of 1. Art. 16 of Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes regulates the access to these rooms. Only female workers can benefit from these institutions, fathers only in exceptional cases.

Obligation of employers to offer child care facilities can be seen as a positive measure in accordance with Art. 3 DIR 2006/54. These measures seek to raise female employment. The circumstance that only women can use these facilities and men only in exceptional cases, was also dealt with by the ECJ already. In Lommers (C-476/99) the ECJ held, that the restriction of child care facilities to only female employees (in this case civil servants) is proportional, since it is necessary and appropriate for the aim of raising female employment.

The purpose of these measures in the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes is to improve working conditions for working mothers and to raise female employment in general. When assessing the impact of these measures, one might come to the conclusion that these measures do not fully support female employment. As research shows, only a limited number of women may benefit from these measures. Since employers have to bear the costs of the childcare facilities, this is also a financial burden. Only very few enterprises are obliged to install breastfeeding rooms or child nursing homes, enterprises even try to be below the thresholds.[31] Consequently, these measures may not fully support the raise of female employment. In the above-mentioned ECJ decision of Lommers (C-476/99) no quota for offering the child care facilities were given. Spots for children of female workers were reserved in child care facilities. Differently the situation in the Turkish Implementing Regulation, in which quota are decisive factor for the establishment or offering of these facilities.

The European Union clearly promotes a reconciliation of private life and work and it also clearly promotes the role of both parents in the child care. In Recital 11 of DIR 2006/54 it is stated that the Member States together with the social partners should work on means which should support both, men and women, to better combine family and work commitments. Balanced participation of women and men both in professional life and in family life is a material condition to achieve gender equality at work, and therefore encourages the Member States to take the necessary steps

[30] Süral (2009) Compatibility of Turkey's Legal Rules on Pregnancy and Maternity with the EU Acquis, in European Gender Equality Law Review No 2/2009, 21.
[31] Toksöz (2007) Women's Employment Situation in Turkey, International Labour Office, 81.

to protect fathers who wish to contribute to this more balanced reconciliation. Another example is the DIR 96/34 on parental leave, which grants parental leave to both, the father and the mother of a child.[32]

Having these developments in mind, counting female employees for the quota only and excluding male workers from access to these facilities shows that childcare is still perceived as an obligation for women only. Women's organisations therefore request that also the number of male employees is taken into account.[33] This would also support the European Union's efforts towards a balanced reconciliation of work and family life between both parents.

In the consultation with official institutions, social partners and NGOs concerns were raised regarding the expected costs for employers. A conclusion of this consultation was that it might be considered to count male and female employees for the quota, but increase the required number of total employees (currently 150) for offering a nursing home.

1.6 Reconciliation of Work and Family Life/Parental Leave

As shown above, employers try to avoid their obligations and limit deliberately the number of female workers in relation to offering breastfeeding rooms and child nursing homes. At the same time, most of the female workers are working in small-medium enterprises or in informal enterprises, therefore do not benefit from the quota regulation of the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes based on the Labour Law. As a consequence, alternative solutions to share child care are suggested. Like education and training, also preschool education and child care should be seen as a basic public service.[34]

Turkish legislation contains in Art. 74 (5) that female workers can have an unpaid leave for up to six months after the period of maternity protection (16 weeks or 18 weeks in case of plural pregnancy).

At European level, parental leave is regulated in the Council Directive 2010/18/EU, which implements a framework agreement on parental leave. This agreement was firstly formulated in 1996 and was amended significantly in 2009. This agreement was the first European collective labour agreement, which was concluded by the recognised social partners under the Maastricht Agreement on Social Policy.[35] The current agreement was adopted by BUSINESSEUROPE, UEAPME, CEEP and ETUC. The main purpose of this agreement is to facilitate the reconciliation between private and professional life and sets minimum requirements.[36]

Giving a brief overview, the agreement regulates the following:

[32] Palma Ramalho (2009) Reconciling Family and Professional Life and the Gender Equality Principle in Employment, in European Gender Equality Review No 2/2009, 12.
[33] Toksöz (2007) Women's Employment Situation in Turkey, International Labour Office, 81.
[34] Toksöz (2007) Women's Employment Situation in Turkey, International Labour Office, 82.
[35] Blanpain (2010) European Labour Law, 1479.
[36] Blanpain (2010) European Labour Law, 1483.

- Scope of application: The agreement applies to all workers, men and women, who have an employment contract or employment relationship. Persons who have a part-time work or persons who have a contract with a temporary work agency should not be excluded by this agreement (Clause 1 (2-3) of the Framework Agreement on Parental Leave).
- Duration of parental leave: Women and men have an individual right to parental leave. The leave can be granted up to an age of the child, which has to be determined by the EU Member States and/or social partners. The parental leave can only be granted up to an age of 8 years. Each parent has the right to take parental leave of 4 months. Some of the months are transferable to the other parent. So, for example the father can transfer 'his' months to the mother. One month cannot be transferred. This month will be lost, if only one parent takes the parental leave.[37]
- Return after leave: Employees have the right to return to the same job or to an equivalent or similar job after the parental leave (Clause 5). At the same time it should be possible to change working hours after the return (Clause 6).
- Non-discrimination: Workers who apply for or take parental leave have to be protected from less favourable treatment or dismissal (Clause 5 (4)).

Offering affordable child care services is a prerequisite for a successful reconciliation of private and professional life and for equal opportunities at the labour market for women. Lack of child care services is a major barrier for women's participation in the labour market. In every EU Member State though the demand for affordable child care services exceeds the supply. However, the European Union issued a Recommendation on Child Care[38] in 1992. It is recommended that services offered should be affordable and that services are available in all areas and regions of Member States, in rural and urban areas.[39] The European Council set targets regarding child care services in 2002 ('Barcelona Targets'), which foresee that at least 90% of children between 3 years and school age and at least 33% of children under 3 years receive child care. In 2008 only 5 Member States (DK, NL, SE, BE, ES) achieved the target for children under 3 years. Regarding the target on children older than 3 years 8 Member States (BE, DK, FR, DE, IE, SE, ES, IT) achieved the 90% target.[40]

An analysis of the EU Member States shows that in most countries parental leave unpaid. In a few countries, the leave can be a benefit by social security. In other countries, the leave can be paid partly by the employer as a result of the collective agreement. Parental leave is in general taken by mothers.[41] However, countries in the EU initiate measures in order to attract more men for parental leave. In Germany for example, in the meantime almost every fourth father makes use of a paid parental leave.[42]

[37] Burri (2009) Introduction, in European Gender Equality Law Review 2/2009, 3.
[38] 92/241/EEC: Council recommendation of 31 March 1992 on child care.
[39] Art.3 Council recommendation.
[40] See http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/592 (22 March 2011).
[41] Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women (2007) Report on Pregnancy, Maternity, Parental and Paternity Rights, 11.
[42] See http://www.bundesfamilienministerium.de/BMFSFJ/familie,did=174370.html (in German).

The discussion in the consultation with official institutions, social partners and NGOs showed that private child care is very expensive and it was stressed that further affordable child care facilities need to be available.

Assessment of Art. 74 LL

Art. 74 (5) LL grants unpaid leave up to 6 months for female workers after the period of maternity protection (16 weeks or 18 weeks).

In DIR 2010/18/EU the agreement states, that 4 months individually by the mother and the father can be granted.

Consequently, Art. 74 (5) LL does not fulfil the minimum standards of DIR 2010/18/EU. DIR 2010/18/EU foresees a minimum of parental leave of 4 months, which can be granted to both, the mother and the father. Art. 74 (5) LL offers leave to the female workers only.

But the Framework Agreement on Parental Leave provides for the possibility to transfer months to each other. 3 months can be transferred from one parent to the other, one month is lost when only one parent takes the leave. Every parent can take 4 months, 3 months can for example be transferred to the mother or father, but 1 month would be lost, in the case that only the mother takes the leave.

In the Turkish Law on Civil Servants (Law No. 657) the possibility of a paternal leave has been introduced. Art 104 of Law No. 657 foresees that fathers can get a leave of 10 days when their spouses give birth to a baby. This amendment shows that the Turkish legislation considers paternity leave. This provision offers a good example also for implementation in the Turkish Labour Law.

Art. 74 (5) LL does not provide for any regulation in relation to leave in case of adoption of a child. This does not fulfil DIR 2010/18/EU: Its clause 2 (Parental Leave) entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years. The leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis.

Both, DIR 2010/18/EU in Clause 5 (1) and DIR 2006/54 in Art. 16, state, that parents who take parental leave have the right to return to the same job or to an equivalent or similar job. This is not included in the LL. It is therefore recommended to include a section in Art. 74 on this issue.

Labour Law	
Law in force	Proposals for amendments

Working during maternity and breast feeding leave Art .74 (5) The female worker is granted unpaid leave for up to six months after expiry of sixteen-week, or in case of plural pregnancy, eighteen-week period, upon request. Such period is not considered in calculating the annual paid leave right.	Working during maternity and breast feeding leave Art.74 (5) Upon her request, following the expiry date of 16 week maternity leave or 18-week maternity leave in case of multiple pregnancy given to the female employee; or following the expiry date of the paid leave of a female employee who made a temporary care agreement to **adopt a child under 8 years of age the female employee or her employee husband, or her employee husband,** upon their request, may be granted unpaid leave for a period of up to 6 months. **Men and women workers have an individual right to parental leave. This period may, upon couples' request, be used as two consecutive periods.** This period shall not be taken into account in the calculation of paid annual vacation. (…) **A female worker is entitled to return to her job or to an equivalent post on terms and conditions which are no less favourable to her after maternity leave. At the same time, she benefits from any improvement in working conditions to which she would have been entitled during her absence.** **At the end of parental leave, female and male workers have the right to return to the same job or to an equivalent or similar post. When returning from parental leave, the workers can request changes to their working hours and/or patterns for a certain period of time.**

Assessment of Art. 18 LL

Art. 18 (3) LL states, that absence at work during maternity protection and the unpaid leave after the maternity protection does not constitute a valid reason for termination.

Art. 18 (3) LL fulfils DIR 2010/18/EU only partly. DIR 2010/18/EU Framework Agreement on Parental Leave states in Clause 5 (4) that all workers should be protected against less favourable treatment or dismissal when applying for leave. Additionally it states in Clause 1 (3) that no differentiation between part-time and full-time employment or fixed term contract workers can be made. At the same time, Art. 16 DIR 2006/54 states that Member States take 'necessary measures to protect working men and women against dismissal due to exercising those rights '.

Art. 18 LL applies to only a very specific group of employees. It applies exclusively to workers holding an indefinite working contract and who work more than 6 months in businesses, which are bigger than 30 employees. The amendment of Art. 18 (e) ensures that also men are protected, when taking leave, as well as women, when taking leave or the parents when taking the temporary care agreement for adoption.

Consequently, to be in line with the DIR 2010/18/EU and DIR 2006/54 the following is missing in the LL: protection of workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave.

It is recommended to include the protection against dismissal not only in Art. 18 LL. All employees are entitled to protection from dismissal in these cases, not just employees who are falling under Art. 18. Furthermore it is suggested to amend Art. 5 and include a provision on protection against less favourable treatment in relation to parental leave there.

1.7 Remedies and Sanctions

Missing provisions

Chapter 3 of Dir. 2006/54 implies general horizontal provisions to obligate the member states to ensure the implementation of the principle of equal treatment, in particular to protect employees. Measures shall be introduced to counter victimisation, to implement penalties, to prevent discrimination or to assure the dissemination of information about the protection against discrimination.

Such provisions should be added to the Labour Law: The Labour Law does neither provide for voidness of discriminating collective contracts or agreements, nor for complaint procedures within the undertaking nor for the employers` obligation to inform the employees about their rights as laid down in the Directive. (Please check with the comments on Law no. 2822 on collective Labour Agreement, Strike and Lockout; also see table below)

Admittedly Art. 18 lit c. LL states a protection against victimization. But this provision clarifies an invalid reason for termination only.

The provisions of the Dir. 2006/54 read as follows: “Art. 23: Member States shall take all necessary measures to ensure that: (…) (b) provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended (...)

Art. 24: Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Art. 30: Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all suitable means and, where appropriate, at the workplace.”

Therefore appropriate provisions should be added implying the following:

a. Any collective contracts or agreements which violate the prohibition of discrimination shall be ineffective.

b. Employees shall have the right to lodge a complaint with the competent department within the undertaking.

c. Information about the protection against discrimination and concerning the departments competent to handle complaints under Art. 24 of the directive shall be made known in the enterprise.

d. Employees may not face dismissals or other adverse treatment by the employer after they complained of violation of the principle of equal treatment (prohibition of victimisation).

Labour Law No. 4857	
Law in force	Proposals for amendment: Examples taken from the German General Equal Treatment Act
a. missing	7 (2): Any provisions of an agreement which violate the prohibition of discrimination under Subsection (1) shall be ineffective.
b. missing	13 (1) Employees shall have the right to lodge a complaint with the competent department in the firm, company or authority when they feel discriminated against in connection with their employment relationship by their employer, superior, another employee or third party on any of the grounds referred to under Article 1. The complaint shall be examined and the complainant informed of the result of the examination. 13 (2) The rights of worker representatives shall remain unaffected.

c. missing	(1) The employer has the duty to take measures necessary to ensure protection against discrimination on any of the grounds referred to under Article 1. This protection shall also cover preventive measures. (2)The employer shall draw attention to the inadmissibility of such discrimination in a suitable manner, in particular within the context of training and further training, and shall use his or her influence to ensure that such discrimination does not occur. Where an employer has trained his or her employees in an appropriate manner for the purpose of preventing discrimination, he or she shall be deemed to have fulfilled his or her duties under section (1). (3) Where employees violate the prohibition of discrimination under Article 7 (1), the employer shall take suitable, necessary and appropriate measures, chosen in a given case, to put a stop to the discrimination; this may include cautioning, moving, relocating or dismissing the employee in question. (4) Where employees are discriminated against in the pursuance of their profession by third persons within the meaning of Article 7 (1), the employer shall take suitable, necessary and appropriate measures, chosen in a given case, to protect the employee in question. (5) This Act and Article 61b of the Labour Courts Act (Arbeitsgerichtsgesetz), as well as information concerning the departments competent to handle complaints pursuant to Article 13 shall be made known in the enterprise or public authority. This may be done by putting up a notice or displaying information leaflets in a suitable place or by using the information and communication channels normally used in the enterprise or authority.

d. missing	(1) The employer shall not be permitted to discriminate against employees who assert their rights under Part 2 or on account of their refusal to carry out instructions that constitute a violation of the provisions of Part 2. The same shall apply to persons who support the employee in this or who testify as a witness. (2) The rejection or toleration of discriminatory conduct by an affected employee may not be used as the basis for a decision affecting that employee. Section (1) second sentence shall apply mutatis mutandis.
Law no. 2822 on collective Labour Agreement, Strike and Lockout	
a. Art. 5: Provisions in breach with indivisibility of the State with its country and nation, national sovereignty, Republic, national security, public order, general order, general ethics and general health and provisions that incite encourage and protect actions that are considered as offences by the laws and that are in breach with the imperative provisions of the laws and bylaws cannot be included into the collective labour agreements.	

Burden of Proof in Relation to Pregnant or Breastfeeding Workers

The new proposal for the Directive on the 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 (92/85/EEC)[43] also includes in the proposed Art 12 (a) a rule on the burden of proof. In the case that a female workers claims rights under this directive are violated, the employer has to prove that no such breach happened. This could be relevant for the rules on dismissals of pregnant or breastfeeding workers (e.g. Art 20 LL).

1.8 Equality Body and Anti-Discrimination Organisations

[43] COM(2008) 637 final

Art. 20 Dir. 2006/54 requires the establishment of an equality body to promote, analyse, monitor and support the principle of equal treatment. The equality body shall work independently.

Art. 20 reads as follows: "1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality."

Currently no such body exists in Turkey. A draft law, prepared by the Ministry of Interior, has been proposed, but its analysis is not covered by the current project. As expected this draft might imply the legal basis for the establishment and operation of an equality body. Whether its further competencies, legal framework and independency will answer the directive, should be analysed separately.

EQUINET is the European Network of Equality Bodies. It develops co-operation and facilitates information exchange between Equality Bodies across Europe. As soon as established the Turkish equality body could apply to become a member of EQUINET.

One of EQUINET´s publications deals with the independency of the equality bodies. The independency is a controversial and difficult issue regarding the equality body. For more detail see the publication: http://www.equineteurope.org/practices_of_independence_to_print_1.pdf

Labour Law No. 4857	
Law in force	Proposals for amendment: Examples of the Austrian Equal Treatment Act

missing	4 (1) The Ombud for equal treatment between women and men in employment is entrusted with the task of counselling and supporting persons who feel discriminated within the intent of Title One of the Equal Treatment Act. She acts on her own initiative and independently.

Apart from the equality body Art. 17 of the directive asks Member States to ensure "that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive."

A provision allowing Anti-discrimination organisations to support victims of discrimination should be added to the Labour Law or to an Anti-discrimination Law. A draft law, prepared by the Ministry of Interior, has been proposed, but its analysis is not covered by the current project.

It should be taken into account that this support of discrimination victims could also be attended in judicial an/or administrative procedures so that (labour) procedural law might be amended as well.

Labour Law No. 4857	
Law in force	Proposals for amendment: Examples of the German Equal Treatment Act

missing	(1) “Anti-discrimination organisation” shall refer to any association of persons which attends to the particular interests of persons or groups of persons discriminated against within the meaning of article 1; in accordance with their statutes these organisations must operate on a non-profit and non-temporary basis. The powers set out in sections (2) to (4) shall be granted to such organisations with at least 75 members or an association comprising at least seven organisations. (2) Anti-discrimination organisations shall be authorised, under the terms of their statutes to act as legal advisor to a disadvantaged person in the court hearings. Otherwise, the provisions set out in the rules of procedure, in particular those according to which legal advisors may be barred from being heard, shall remain unaffected. (3) Anti-discrimination organisations shall be permitted to be entrusted with the legal affairs of disadvantaged persons under the terms of their statutes. (4) The special rights of action and powers of representation of associations for the benefit of disabled persons shall remain unaffected.

Equality Body and Competences in Relation to Pregnant or Breastfeeding Women

The new proposal for the Directive on the 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 (92/85/EEC)[44] foresees in Art 12 d that equality bodies established pursuant to DIR 2006/54 should also have the competence of issues in relation to the equal treatment of pregnant and breastfeeding workers.

2 Press Labour Law No 5953

Prohibition of Discrimination in the Press Labour Law (Press LL)

Firstly, the Press LL does not include any provision on equal pay. Since the LL is not applicable for media employees, the non-discrimination regulations of the LL (especially Art 5 LL) are also not applicable.

[44] COM(2008) 637 final

As stated in Art. 4 DIR 2006/54 direct and indirect discrimination with regard to pay, which includes all aspects and conditions of remuneration, is prohibited.

The Press LL does not protect from direct or indirect discrimination with regard to pay. It is recommended to include Art 5 LL also in the Press LL. Recommendations for amendments of Art. 5 LL are described in the part of the report dealing with LL in detail. It is recommended to include the necessary definitions regarding equal pay of Art. 4 DIR 2006/54. This could be done by including Art. 5 LL as suggested in this report in the Press LL. The current Press LL in force does not comply with Art. 4 DIR 2006/54.

Secondly, the Press LL does hardly include any provisions on access to employment, promotion in employment, access to vocational training and working conditions including conditions governing dismissal. According to Art. 14 DIR 2006/54 direct and indirect discrimination on grounds of sex in respect to the aspects listed like access to employment or working conditions are prohibited.

Since any regulations on non-discrimination are missing in the Press LL, it is necessary to insert specific provisions in order to comply with DIR 2006/54. As suggested above, one possibility is to include Art. 5 LL also in the Press LL.

Maternity Leave and Pregnancy

The Press LL contains in Art 16 regulations regarding pregnancy. Regulations regarding return from maternity are not given. Consequently, the Press LL does not fully implement DIR 2006/54.

Art. 15 DIR 2006/54 states that after maternity leave, women are entitled to return to the same job or to an equivalent post. At the same time the conditions after the return may not be less favourable to her.

Consequently, it is recommended to include in Art. 16 Press LL a provision regulating the return from maternity.

Law on the Regulation of Relations between Employees and Employers in the Media Sector	
Law in force	Proposals for amendments

Article 16 (8) In the event of pregnancy of female journalists, they will be considered on leave starting from month 7 of pregnancy until the second month after delivery. During this period, the business shall pay the journalist half of the salary the journalist was receiving. As soon as the delivery takes place or in the event that the infant is born dead, salary will be paid for one month as of the date of occurrence of such incident. The benefits that the journalist will get from the security or other entities he is associated with will not affect such payment.	Article 16 (8) In the event of pregnancy of female journalists, they will be considered on leave starting from month 7 of pregnancy until the second month after delivery. During this period, the business shall pay the journalist half of the salary the journalist was receiving. As soon as the delivery takes place or in the event that the infant is born dead, salary will be paid for one month as of the date of occurrence of such incident. The benefits that the journalist will get from the security or other entities he is associated with will not affect such payment. **A female worker is entitled to return to her job or to an equivalent post on terms and conditions which are no less favourable to her after maternity leave. At the same time, she benefits from any improvement in working conditions to which she would have been entitled during her absence.**

The Press LL does not contain any regulation regarding the protection of pregnant women from dismissal. In Art. 10 DIR 92/85/EEC (safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding) the prohibition of dismissal is stated. From the beginning of pregnancy until the end of maternity leave women may not be dismissed.

Since no protection is given in the Press LL, it is recommended to include a provision on the protection from dismissal. The current Press LL in force does not fulfil the requirements of DIR 92/85/EEC.

Law on the Regulation of Relations between Employees and Employers in the Media Sector	
Law in force	Proposals for amendments

Article 16 (8) In the event of pregnancy of female journalists, they will be considered on leave starting from month 7 of pregnancy until the second month after delivery. During this period, the business shall pay the journalist half of the salary the journalist was receiving. As soon as the delivery takes place or in the event that the infant is born dead, salary will be paid for one month as of the date of occurrence of such incident. The benefits that the journalist will get from the security or other entities he is associated with will not affect such payment.	Article 16 (8) In the event of pregnancy of female journalists, they will be considered on leave starting from month 7 of pregnancy until the second month after delivery. During this period, the business shall pay the journalist half of the salary the journalist was receiving. As soon as the delivery takes place or in the event that the infant is born dead, salary will be paid for one month as of the date of occurrence of such incident. The benefits that the journalist will get from the security or other entities he is associated with will not affect such payment. **Without regard to whether or not the labor contract between the employer and the journalist is made for a definite term, the labor contract cannot be terminated by the employer during the period of pregnancy until the end of maternity leave (second month after delivery).** **A female worker is entitled to return to her job or to an equivalent post on terms and conditions which are no less favourable to her after maternity leave. At the same time, she benefits from any improvement in working conditions to which she would have been entitled during her absence.**

Art. 27 Press LL foresees that the employer should be fined with an administrative penalty when the employer fails to pay certain salaries to employees.

It would be recommended to include in Art. 27 (b) also a penalty when not paying for the remuneration during maternity leave.

Law on the Regulation of Relations between Employees and Employers in the Media Sector	
Law in force	Proposals for amendments
Article 27 b) employers who fail to pay the amount payable to the journalist in the events written in the first, second or third paragraphs of article 16,	Article 27 b) employers who fail to pay the amount payable to the journalist in the events written in the first, second, third **or eighth** paragraphs of article 16,

Parental Leave

As shown in the chapter on 'Reconciliation of work and family life/parental leave' with regard to Art. 74 LL, the European Union declares minimum requirements for parental leave in the Council Directive 2010/18/EU. The framework agreement on parental leave applies to all workers, men and women, who have an employment contract or employment relationship.

Since the Press LL contains no provision on parental leave, amendments are necessary in order to comply with DIR 2010/18/EU. The regulation of the LL (6 months of unpaid leave for mothers) is not sufficient for a full compliance with the framework agreement on parental leave. Parental leave according to the framework agreement is an individual right of men and women and each parent has the right to take parental leave of 4 months duration.

3 Maritime Labour Law No 854

As stated in Art. 1 of the Code on Sea Labour (in the following Maritime LL), the law is applicable to persons working on ships, which weigh 100 gross tons and more. The application of this law to employed women seems to be rather limited. First of all, the Implementing Regulation for Hard and Dangerous Work excludes women from typical occupations on ships. Women consequently do not have access to employment in fishery work (see Annex I, Nr 113 of the Implementing Regulation for Hard and Dangerous Work) or transportation work done in sea (see Annex I, Nr 95). According to the list of the Implementing Regulation for Hard and Dangerous Work, women have access to all works related to smaller ships (see Annex I, Nr 141). As elaborated in the chapter on the Implementing Regulation for Hard and Dangerous Work, the regulation will be amended soon and currently female workers can have access to these occupations when relevant courses are completed. At the same time, the law itself gives hints that also women might fall under this law. In Art 42 for example, 3 days leave are granted in case of death of the husband. Consequently, it is possible, that also women may fall under the regulation of the Maritime LL.

As also discussed in the chapter on the Implementing Regulation for Hard and Dangerous Work, the planned amendments are fully supported and necessary in order to comply with the strict interpretation of the ECJ in relation to employment prohibitions for women.

In addition, the European Union has interest in promoting the maritime transport sector as employment opportunity for women. For implementing the EC Gender Equality Strategy 2010-2015 the working environment should be more favourable and work opportunities and recruitment for women in this sector should be improved.[45]

As elaborated regarding the Press LL also within the Maritime LL the main principles of non-discrimination and protection during maternity and parental leave are not included. In the chapter

[45] See European Commission (2010), Strategy for equality between women and men 2010-2015, Action to implement the Strategy, 3.

on Labour Law, comprehensive recommendations regarding Art. 5 LL are made. It would be recommended to include Art. 5 LL also in the Maritime LL.

Prohibition of Discrimination in the Maritime LL

The Maritime LL does not contain any provision on equal pay. In case the work on ships is accessible also to women, it has to be ensured that women and men receive the same wage for equally valued work. According to Art. 4 DIR 2006/54 it is prohibited to discriminate directly or indirectly with regard to aspects and conditions of remuneration.

As also recommended regarding the Press LL, it would be advisable to include Art 5 LL or a comparable provision also in the Maritime LL. Recommendations for amendments of Art. 5 LL are described in the part of the report dealing with LL in detail. It is recommended to include the necessary definitions regarding equal pay of Art. 4 DIR 2006/54. This could be done by including Art. 5 LL as suggested in this report in the Maritime LL. The current Maritime LL in force does not comply with Art. 4 DIR 2006/54.

Maternity Leave and Pregnancy

The Maritime LL does not contain any provision on maternity leave and pregnancy. Since this law is technically exclusively applicable to male workers, regulations on maternity and pregnancy would not be necessary. Since there is the possibility that also female workers may fall under this law, the requirements of the EU acquis have to be fulfilled.

The requirements are explained in greater detail in the report with regard to Art. 74 LL and the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes.

Generally, the main provisions are:

- Maternity leave of at least 14 weeks (Art 8 DIR 92/85/EEC)
- Exclusion from nightwork, risk assessment of working conditions and right to be referred to another post (Art 7, Art 5 DIR 92/85/EEC)
- Prohibition of dismissal between pregnancy and end of maternity leave (Art 10 DIR 92/85/EEC)
- Right to return to post after maternity leave (Art 15 DIR 92/85/EEC);

Parental Leave

The law does not provide for the possibility of parental leave. As shown in the chapter on ‘Reconciliation of work and family life/parental leave’ with regard to Art 74. LL, the European Union declares minimum requirements for parental leave in the Council Directive 2010/18/EU. The framework agreement on parental leave applies to all workers, men and women, who have an employment contract or employment relationship.

The main provisions on parental leave are:

- Duration of parental leave: Individual right to parental leave of 4 months each. (Clause 2, DIR 2010/18/EU)
- Return after leave: Right to return to the same job or to an equivalent or similar job after the parental leave (Clause 5), right to change working hours after the return (Clause 6).
- Non-discrimination: Workers who apply for or take parental leave have to be protected from less favourable treatment or dismissal (Clause 5 (4)).

4 Penal Code No 5237

Art. 105 penalises sexual harassment. The perpetrator can be sentenced with imprisonment of up to two years. When abusing hierarchy for example, the punishment has to be increased by one half.

According to Art. 26 of DIR 2006/54 Member States have to implement 'effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace'.

Consequently, Art. 105 Penal Code supports the implementation of the DIR 2006/55. However, harassment as defined in the Framework Agreement on Harassment and Violence at Work, harassment can take many forms such as physical, psychological and/or sexual harassment among colleagues or even committed by third parties such as clients, customers, patients or students.[46] Since not all forms of harassment are covered by the Penal Code, it is recommended to include all forms of harassment in the Labour Law (Art. 5 LL). For further details see the chapter on Labour Law, Art. 5.

5 Law of Obligations

5.1 General Remarks

Art. 14 sect. 1 lit. a of the Directive 2006/54 prohibits discrimination in the public or private sector, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

Since general provisions on protection against discrimination and on maternity and paternity leave should be added to the Law of Obligation, it is recommended to amend the Law of Obligations for example by referring to Art. 5 and Art. 74 LL. These articles could be made applicable for all forms of employments and occupation falling under the Law of Obligations.

The scope of application of the Directive 2006/54 is quite broad. It covers employment, self-employment and occupation. The Law on Obligation is the general norm for remunerated contracts, among which contracts according to the Labour Law are regulated specially. Apart from the forms of employment comprised by the Labour Law and special laws referring to it,

[46] Blanpain (2010) European Labour Law, 1524-1526.

other contracts of employment or occupation exist. These contracts of employment or occupation shall fall under the Law of Obligations as service contracts. They also pertain to the protection of discrimination provided by the DIR 2006/54.
However, a protection of discrimination is missing in the Law of Obligations, just as well as a provision of obligation for equal pay for male and female workers. Both should be added to the Law of Obligations to answer the Directive.

As the Labour Law is also lacking a comprehensive protection against discrimination, this report made suggestions to amend the Labour Law, especially by amending Art. 5 and 74 LL. The amended version of Art. 5 LL (as seen above) would contain for instance provisions of definitions of the forms of discrimination and pay, exemptions of the scope of application and rules on part-time workers. The proposals for amendments given to Art. 5 LL should be taken into account also for the Law of Obligations.

A provision for example to protect part-time workers against unequal treatment could be added as suggested for Art. 5 sect. 2 LL, since part-time workers are often women and a protection against possible indirect discrimination (see above, Art. 5 sect. 1 LL) is advisable.

Law of Obligations	
Law in force	Proposals for amendments
Art. 393 section 2 Service contracts, in which the employee undertakes to provide a service regularly on part-time basis to the employer, are also construed as service contracts.	Art. 393 section 2 Service contracts, in which the employee undertakes to provide a service regularly on part-time basis to the employer, are also construed as service contracts. **The employer cannot treat part-time worker against full-time worker and definite-term worker against indefinite-term worker differently unless it is objectively and reasonably justified by a legitimate aim.**

It is important to secure the prohibition of discrimination within the Law of Obligations explicitly. This could be done for instance in adding the prohibition of discrimination to the provision dealing with the establishment of a service contract. Therefore a provision as follows could be added to Art. 394 sect. 1 of the Law of Obligations.

Law of Obligations	
Law in force	Proposals for amendments
missing	In these contracts shall be no direct or indirect discrimination on grounds of sex.

The consultation with official institutions, social partners and NGOs resulted partly in doubt whether an amendment of the Law of Obligation is necessary. According to the discussion of the consultation, the amendments proposed for the Labour Law might be sufficient. Additionally Turkey's big sector of small and medium-sized businesses should be taken into account.

However, this approach overlooks the many working contracts constellations not covered by the Labour Law and its bylaws as well as the Directive's comprehensive protection against discrimination in occupation and employment regardless of the size of undertakings and companies.

5.2 Remedies and Sanctions

Art. 417 of the Law of Obligations gives protection of the personality of the employee. It obliges the employer to protect the employee especially against psychological and sexual harassment. It provides also compensation for the employee suffering harm to physical integrity or violation of the personality rights.
Although this corresponding to Art. 105 of the penal code which penalizes sexual harassment (see above, 1.4), DIR 2006/54 requires nevertheless a protection against all forms of discrimination including non-sexual harassment on grounds of sex, including compensation and reparation. Thus Art. 417 of the Law of Obligations covers currently only parts of the requirements of the Directive 2006/54.
Mobbing on grounds of sex could therefore be seen as harassment penalised by DIR 2006/54 as far as the unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment (Art. 2 no. 1 lit. c of the Directive).
Furthermore Art. 417 provides compensation only as compensation due to violation of the service contract. However, the directive obliges to provide compensation or reparation for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex.
Currently Art. 417 of the Law of Obligations covers protection against discrimination only if it appears as sexual harassment. Also “psychological” harassment is mentioned. Nevertheless this term is not a term of the Directive which covers all forms of harassment not only harassment with sexual or psychological components. To answer the Directive fully, Art. 417 could be enhanced in covering also all other forms of discrimination (see above, Art. 5 sect. 1 LL).

The regulations of the compensation are only subjected to the provisions of liability extending from violation of contract. These provisions should secure that the compensation is not only paid for the damage arising from the violation, but also for damage, which does not constitute economic loss. In this context the regulation should respect that the Directive 2006/54 demands in its Art. 18 “real and effective” compensation or reparation.
Thus the law of obligations could for instance be amended as suggested for Art. 5 sect. 6 LL (see above).

The consultation with official institutions, social partners and NGOs resulted in agreement with the protection against harassment and sexual harassment. Difficulties of the victims in their burden of proof predicate the necessity of an effective protection against these forms of discriminations.

5.3 Prohibition of Victimisation

Corresponding to the rights given to employees to demand compensation as provided in Art. 417 sect. 2 of the law of obligations, there should be rights to repel victimisation in case the employee s assert their rights. Art. 24 of the Directive 2006/54 obliges to introduce measures to protect employees (and their representatives) against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.
Therefore the employer shall not be permitted to discriminate against or to make decisions affecting employees who assert their rights, reject or tolerate discriminating conduct. An explicit provision granting protection against victimisation is currently missing in the law of obligations. Hence, it is suggested to add an explicit prohibition of victimisation to the law of obligations. As suggested for the Labour Law in this report, comparable provisions could amend the law of obligations.

Art. 417 section 3:

As elaborated in greater detail with regard to the Labour Law (chapter ‘Action further to the assessment of risk), the DIR 92/85/EEC foresees several provisions in order to ensure the health and safety of pregnant workers and mothers who recently gave birth or who are breastfeeding. Provisions of this kind are not given in the Law of Obligations. Art. 4 DIR 92/85/EEC foresees that a risk assessment of the workplace has to be conducted. If there is a risk for the pregnant women, then the workplace has to be adapted. If this is not possible then the pregnant worker shall be moved to another job and if this is not possible either, then the worker shall be granted leave. Provisions regulating this protective measures for pregnant workers are missing in the Law of Obligations. It is therefore recommended, that the regulations of the relevant provisions (especially Artt. 5-8) of the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes are implemented in Art 417 section 3 of the Law of Obligations.

Additionally, Art. 9 DIR 92/85/EEC requires the possibility of pregnant women to undergo necessary medical examinations during working hours without loss of pay. This is also held in Art. 74 section 3. This provision should also be implemented in Art. 417 section 3 of the Law of Obligations.

5.4 Pregnancy and Maternal/Parental Leave

In order to align the standards of the Law of Obligations with those of the Labour Law, it is recommended to include also in Art. 398 Law of Obligations a provision on overwork of pregnant, nursing and breastfeeding workers. As held in Art 8 of the Bylaw on Overtime Work and Work for Extra Duration under Labor Law, pregnant, nursing and breastfeeding female workers shall not do overwork.

Regarding the cease of work by the employee as regulated in Art. 409 the following is recommended. As held in Art. 11 section 2 b DIR 92/85/EEC adequate allowances have to be provided during the time of maternity leave. Adequate allowance can consist of payments of the employer and social security payments. Turkish social security legislation should cover also employment relationships falling under the Law of Obligations.

Since there is an obligation to provide any form of adequate allowance during the period of maternity leave, maternity leave should be explicitly mentioned in Art. 409.

Law of Obligations	
Law in force	Proposals for amendments
Article 409 In the event of the employee not being able to perform his/her work for a short period of time compared to the period in which work has been performed without any reason attributable to the employee as a result of illness, compulsory military service or work required by the laws and similar reasons, in a long term service relationship, the employer shall be obliged to make payments for said period on an equitable basis for said period unless it is covered by any other means.	Article 409 In the event of the employee not being able to perform his/her work for a short period of time compared to the period in which work has been performed without any reason attributable to the employee as a result of illness, compulsory military service or work required by the laws and similar reasons, **or in the event of maternity leave,** in a long term service relationship, the employer shall be obliged to make payments for said period on an equitable basis for said period unless it is covered by any other means.

For Art. 421 it is recommended to include a section on maternity leave for female employees who will give or gave birth to a baby. Maternity leave should be regulated under Art. 421 section 3.

Art. 423 foresees in section 3 that the employer shall not be entitled to make any deductions in the annual paid leave period of the female employee, who cannot perform her work obligation for a period of not more than three months due to pregnancy and giving birth. As suggested regarding Art. 421 it would be necessary to align this time period with the EU acquis, which requires a time period of 14 weeks at the moment. 3 months (or 12 weeks) does not fulfil the current requirement of Art 8 of DIR 92/85/EEC of at least 14 weeks, which should be raised soon to 18 weeks by the new proposal of amendment of this DIR (COM(2008)637). As elaborated in more detail in the above chapter on ‘Pregnancy and maternity protection’ and ‘Reconciliation of work and family life/parental leave’ of the Labour Law, the possibility of parental leave for employed persons should be introduced.

Law of Obligations	
Law in force	Proposals for amendments

Missing	**Art. 421 a Maternity Leave** **It is the principle that the female workers should not be caused to work for a period of sixteen weeks in total, eight weeks before and eight week after delivery. In case of plural pregnancy, such eight-week period before delivery is increased by two weeks. If, however, health condition allows, the female worker may work until three weeks before delivery, upon approval of physician. In this case, such worked periods are added to the periods after delivery. The non-employment periods granted to female workers, which cannot be used due to premature birth, are granted by means of adding to periods after birth. The prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date and the actual date of childbirth, without the remaining portion of leave being reduced. In the case that children are hospitalized at birth or children are born with disabilities extra two weeks are added to the post-natal leave.**
	Art. 421 b Parental Leave Upon her request, following the expiry date of 16 week maternity leave or 18-week maternity leave in case of multiple pregnancy given to the female employee; or following the expiry date of the paid leave of a female employee who made a temporary care agreement to adopt a child under 8 years of age the female employee or her employee husband, or her employee husband, upon their request, may be granted unpaid leave for a period of up to 6 months. Men and women workers have an individual right to parental leave. This period may, upon couples' request, be used as two consecutive periods. At least one of the six months shall be provided on a non-transferable basis. This period shall not be taken into account in the calculation of paid annual vacation. (…) **A female worker is entitled to return to her job or to an equivalent post on terms and conditions which are no less favourable to her after maternity leave. At the same time, she benefits from any improvement in working conditions to which she would have been entitled during her absence.** **At the end of parental leave, female and male workers have the right to return to the same job or to an equivalent or similar post. When returning from parental leave, the workers can request changes to their working hours and/or patterns for a certain period of time.**

Law of Obligations	
Law in force	Proposals for amendments
Article 423 (3) Employer shall not be entitled to make any deductions in the annual paid leave period of the female employee, who cannot perform her work obligation for a period of not more than three months due to pregnancy and giving birth.	Article 423 (3) Employer shall not be entitled to make any deductions in the annual paid leave period of the female employee, who cannot perform her work obligation for a period of **16 weeks** due to pregnancy and giving birth.

Art. 439 regulates the right of the employer to claim compensation from the employee when the employee does not work without rightful grounds.

It would be recommended to define the term 'rightful grounds' in order to have legal certainty about the reasons, which enables an employee not to work. In this list of rightful grounds time for medical checks during pregnancy, maternity leave and breastfeeding times after the maternity leave should be explicitly mentioned.

5.5 Termination of Contract

Art. 14 sect. 1 of the Directive prohibits discrimination in relation to employment and working conditions, including dismissals. The law of obligations provides comprehensive regulations regarding termination in its articles 430 following. A specific protection against discriminating dismissals is nevertheless missing. A provision comparable to the suggested amendment of Art 17 LL (see above at 1.1) is recommended to be added to create an explicit reference or inclusion of discriminatory dismissal as unlawful.

Especially the termination on rightful grounds of Art. 435 of the law of obligations could contain the danger of discriminating grounds since a definition of the term 'rightful' is missing. It should be made clear that sex as well as pregnancy or maternity are no 'rightful' grounds to terminate a service contract. As an example, Art. 18 sect. 3 lit. d LL could be used, which is comprehensively analysed above in this report. This article clarifies unlawful grounds for termination and could be added likewise to the law on obligation.

As elaborated in detail in the chapter 'Protection against dismissal' regarding the Labour Law, any unfavourable treatment of women in relation to pregnancy and maternity is seen as discrimination according to Art 2 section 2 DIR 2006/54. According to Art. 10 DIR 92/85 it is prohibited to dismiss a female worker in the period from the beginning of the pregnancy until the

end of maternity. Also the nature of the contract the woman holds does not influence the protection from dismissal.

Consequently it is recommended to include for all types of contracts an explicit prohibition of dismissal of women during pregnancy and maternity leave. In the current version of the Law of Obligations this explicit protection from dismissal is not given.

Law of Obligations	
Law in force	Proposals for amendments
Missing	**Pregnancy, birth and maternity leave do not constitute a valid reason for termination of any form of contract.**

6 Law Proposal on Anti-Discrimination and Equality (DRAFT)

For this analysis, the draft law proposal on anti-discrimination and equality was assessed, but due to limited resources only the most relevant articles in the draft regarding gender equality in working life are reviewed. Consequently, the assessment of this draft law proposal is not as detailed as the assessment of the other laws in the previous chapters.

The 2011 law proposal on anti-discrimination and equality is Turkey´s first step to codify the principle of equal treatment and the protection against discrimination in only one law. It covers any and all discriminative acts, practices, procedures and adjustments of any public agencies and establishments, any legal entities and natural persons. It goes therefore further than the analysed labour law of this report.

During the consultation with official institutions, social partners and NGOs it was agreed on the last-mentioned.

Consisting of five parts it gives definitions, statues the principle of equality and non-discrimination, the anti-discrimination and equality council, its staff regulations and penalty provisions.

Sect. 3 defines different types of discrimination. Relevant in this context is the definition of indirect discrimination in sect. 3 lit. e, which reads as follows: “Indirect discrimination: shall purport the act of putting any natural person or legal entity or community in a disadvantageous position or imposing or proposing to impose unfavorable terms upon such persons to access to and exercise by the same of their protected rights and freedoms without showing any justifiable grounds, in relation to the grounds of discrimination herein enlisted, as a result of any and all kinds of actions, procedures and practices that are seemingly non-discriminative”. Art. 2 sect. 1 lit. b of the Directive statues that an indirect discrimination is not found in cases of objective

justification by a legitimate aim, and the means of achieving that aim are appropriate and necessary. Since the draft demands “any justifiable ground” only, this could be less protective than the Directive requires. Therefore, it is recommended to amend the wording as suggested for Art. 5 sect. 2 LL (see above at 1.2 lit. b): “unless it is objectively and reasonably justified by a legitimate aim”.

Sect. 6 paragraph 1 of the draft mentions the full-time employee only. Since part-time employees are not covered by the wording and yet part-time workers are often women, an indirect discrimination could be possible. As the Directive 2006/54 comprises broadly all forms of employment, self-employment and occupation independent of full-time or part-time arrangement, the draft should be designed likewise. Consequently, sect. 6 paragraph 1 should contain also the term ‘part-term employees’.

Sect. 6 paragraph 3 of the draft prohibits refusing a job application on grounds of pregnancy, maternity and childcare. The draft should take into account that a comprehensive protection should also include dismissals and the return after maternity leave. This would correspond to the Directive 2006/54 which provides in Art. 15 the right to return from maternity leave to the same job or an equivalent job on no less favorable terms and conditions. This right is part of the principle of non-discrimination and should be considered in the draft. Additionally the draft could clarify the definition of direct discrimination in section 2 lit. d by including any less favorable treatment of a woman related to pregnancy or maternity leave as DIR 2006/54 requires in Art. 2 sect. 2 lit. c.

Sect. 7 lists cases not counting as discrimination and exceptions. The provision reads as follows: “(1) The following conditions shall be cases not counting as discrimination and therefore exceptions to the coverage and implementation of this Law:

a) Differentiating treatment proportionate and in line with the objectives, when there exist mandatory occupational requirements to be fulfilled in areas of employment and freelance based on-demand service provisions,

b) Cases which require the employment of workers of only a certain sex;

(...)”

According to Art 14 sect. 2 of DIR 2006/54 a difference of treatment which is based on a characteristic related to the sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate. Though this is only relevant for access to employment including the training thereto.

Neither lit. a nor lit. b of Sect. 7 of the draft restrict their regulation to access to employment. Apart from that an objective occupational requirement is necessary to except the prohibition of discrimination. This report made comprehensive remarks to this context to be seen above (see above at Art. 5 LL) to which can be referred here. As written there, also the jurisdiction of the ECJ should be taken into account (see above).

Sect. 8 of the draft regulates applications to ad prompt ex officio response by the Council. According to that anyone with a valid discrimination claim may apply to the Council. In addition to the procedures at the council the draft could provide the right to lodge a complaint with the competent department within the company the victim is working at. This right of appeal could be provided before or at the same time as the application to the Council. Art. 24 of the Directive 2006/54 assumes that this procedure of mediation can be created.

The consultation with official institutions, social partners and NGOs, especially from the employers' point of view, acknowledged the necessity of a procedure of appeal within the undertakings and companies.

Sect. 10 of the draft regulates the burden of proof and rests it to the person or corporate body against whom allegations of discrimination have been directed. This outreaches Directive 2006/54, because facts from which it may be presumed that there has been direct or indirect discrimination must be established.

However, the limitation mentioned at the end of sect. 10 is unclear. It should be clarified that the misuse of the right of application does not lead to any limitation of the right to defend against a violation of the prohibition of discrimination or, in addition to that, to withdraw the limitation regarding the misuse of the right of application.

Sect. 11 of the draft constitutes the anti-discrimination and equality council. Paragraph 2 prohibits orders or instructions with the purpose of influencing the decision of the council. Art. 20 of the Directive 2006/54 requires an equality body working independently in providing assistance to victims, conducting surveys and publishing reports. This independency in its work should be added explicitly to sect. 11 (or sect. 12 where its duties and powers are set out).

Although the council can charge administrative fines after sect. 23 in case of violation of the prohibition of discrimination, the draft lacks regulations on compensation or reparation for the benefit of the victim. However, these regulations are required by Art. 18 of the Directive 2006/54. This report made comprehensive remarks to this context to be seen above (see above the report regarding Art. 5 sect. 6 LL).