Component 1

Aligning Turkish Legislation with the EU Gender Equality Acquis

Activity 1.2

Elaboration of a report including recommendations and amendment proposals

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Part 3

Report on the Social Insurance and Universal Health Insurance Law No. 5510

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

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List of Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFREU	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CRT	Constitution of the Republic of Turkey
DIR 75/117/EEC	Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 045/19 of19/02/1975
DIR 76/207/EEC	Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 039/40 of 14/02/1976
DIR 79/7/EEC	Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), OJ L 006/. 24 of 10/01/1979
DIR 86/378/EEC	Council Directive of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 051/56 of 20.2.1987
DIR 92/85/EEC	Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 089/391/EEC), OJ L 348/01of 28/11/1992
DIR 2006/54 EC	Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23 of 26.7.2006
DIR 2010/18/EU	Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ L 068/13 of 18/3/2010
DIR 2010/41/EU	DIRECTIVE 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180/1 of 15/07/2010
EC	European Community

ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms; short: European Convention on Human Rights
ECoSS	European Code of Social Security
ECSS	European Convention on Social Security
EEC	European Economic Community
ESC	European Social Charter
ECJ	Court of Justice of the European Union *(previously: European Court of Justice)*
et seq	et sequens (= and the following)
et seqq	et sequentia (= and those that follow)
EU	European Union
HTP	Health Transformation Programme
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
ILO Convention	Convention of the International Labour Organisation
IMF	International Monetary Fund
LFPR	Labour force participation rate
MoH	Ministry of Health
MS	Member State *(of the European Union)*
No/ no	number
OJ	Official Journal *(of the European Communities and European Union respectively)*
p	page
para	paragraph
pp	pages
Reg	Regulation
SIA	Social Insurance Act
SII	Social Insurance Institution
SIUHIL	Social Insurance and Universal Health Insurance Law
SSI	Social Security Institution
TCO	Turkish Code of Obligations
TEC	Treaty on the Establishing of the European Community
TEEC	Treaty on the Establishing of the European Economic Community
TEU	Treaty on European Union, consolidated version in: OJ C 83/13 of 30/03/2010
TFEU	Treaty on the Functioning of the European Union, consolidated version in: OJ C 83/47 of 30/03/2010
TL	New Turkish Lira
TLA	Turkish Labour Act
TurkStat	Turkish Statistical Institute
UDHR	Universal Declaration on Human Rights
UN	United Nations
Working Conditions Reg	Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes

Part One: General Introduction

The aim of this report is to evaluate the implementation of gender equality in working life in Turkey. It focuses on the Social Insurance and Universal Health Insurance Law *(SIUHIL)*. With view to the candidate status awarded to Turkey in 1999 the Turkish legislation at issue will be, first of all, monitored in the light of the EU gender equality acquis. However, it will also be assessed in the light of the relevant Turkish constitutional provisions and with standards guaranteed by international law where the EU law fails.

Empowering women in social, economic and political fields relates to questions of effective democracy, equality of rights for all citizens and the sustainable development of pluralist societies[1]. Besides its juridical dimension, gender equality has an important economic impact. Throughout much of the 1990's the international community, inter alia in 1994 at the 'International Conference on Population and Development' in Cairo[2], and in 1995 at the 'Fourth World Conference on Women' in Beijing[3], concurred that 'eliminating social, cultural, political and economic discrimination against women is a prerequisite of eradicating poverty'. A World Bank research[4] documents that economic growth and poverty reduction efforts are undermined by gender discrimination and gender-based division of labour and gender inequality in access to power and resources.

The present report works on the juridical dimension. At first, it seems to be convenient to show up, in an overview, the general guidelines and principles which are common to all relevant legislations. Their contents and juridical quality will be briefly outlined in Part Two of this report. They form the legal framework and basis for the analysis of Turkish legislation in Part Three. In Part IV the conclusions are summarized in a table.
On a worldwide standard, the international law guarantees equality between women and men as a universal and an inalienable human right. It had been established in the 'Universal Declaration on Human Rights' in 1948 and reiterated in numerous international conventions, declarations and resolutions, i.e. in the 'Convention of the Elimination of all Forms of Discrimination against Women', in the 'Vienna Declaration and Programme of Action' adopted by the 'World Conference of Human Rights' in 1993, in the 'Beijing Declaration and Platform for Action' adopted at the Fourth Conference on Women in Beijing 1995 and in the '2006 UN Economic and Social Council Ministerial Declaration on Decent Work'. These resolutions point out that a gender mainstreaming should be respected worldwide. The UN Economic and Social Council[5] has defined that concept in 1997 as follows: 'Mainstreaming a gender perspective is the process of assessing the implications for women and men, of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring and evaluation of all policies and programmes in

[1] Špidla, Vladimír: Empowering Women in Turkey: A Priority in the Pre-Accession Process, available under http://www.turkishpolicy.com/images/stories/2007-01-womeninTR/TPQ2007-1-02-vladimirspidla.pdf, last access on 26/1/2011

[2] International Conference on Population and Development (ICPD), Cairo 1994, Summary of the Action Programme, Chapter IV: Gender Equality, Equity and Empowerment of Women, available under http://www.un.org/ecosocdev/geninfo/populatin/icpd.htm, last access on 2601/2011

[3] Beijing Declaration and Platform for Action,1995, Annex II: Platform for Action, paragraph 47, available under http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf, last access on 26/01/2011

[4] Engendering Development through Gender Equality in Rights, Resources and Voice, January 2001, available under http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/01/000094946_01020805393496/Rendered/PDF/multi_page.pdf, last access on 26/1/2011

[5] Report for 1997, Chapter IV, I. Concepts and Principals, A. Definition of the concept of gender mainstreaming, http://www.un.org/documents/ga/docs/52/plenary/a52-3.htm, last access on 15/3/2011.

all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal of gender mainstreaming is to achieve gender equality'.

On the European level, it has to be differentiated between the law of the Council of Europe *(CoE)* and the law of the EU. As to the first one, gender equality has been anchored as a human right in Article 14 of the 'European Charter of Human Rights and Fundamental Freedoms' and in Protocol No. 12 thereto. The Revised European Charter of Social Rights imposes on the signatories the obligation to recognize the right to equal opportunities in matters of employment and occupation.

The EU has created similar standards. Equality between women and men is one of the fundamental values espoused by the EU and shared by its Member States. Just from the start in 1957 the principle of equal remuneration for equal work as between male and female workers had been enshrined in the 'Treaty on Establishing the European Economic Community' *(TEEC, ex Article 119 thereof)*. It had covered only the area of labour law. No specified provision in the TEEC empowered the EC directly to prohibit discrimination on grounds of sex in the field of social security. Insofar the European Council had to rely on the general competence rule of Article 235 TEEC when adopting secondary legislative acts. This concept was kept up until the 'Amsterdam Treaty' amending the 'Treaty on Establishing the European Community' *(TEC)* had entered into force (*1/5/1999)*. It inserted a special enabling provision which empowers the Council to adopt the appropriate actions to combat discrimination based, inter alia, on sex *(Article 13 thereof)*.

The Amsterdam Treaty had also introduced a gender mainstreaming strategy which, from then on, forms part of the EU law *(Article 3 para 2 TEC)*. However, it took more than 10 other years until the gender equality principle has been enshrined as a fundamental right in the written EU law. This occurred when the Charter of Fundamental Rights of the European Union (*CFREU)* became part of the binding primary law (*1/12/2009)*. But already before that amendment the EU institutions and the Member States *(the latter ones when implementing EU law)* had to respect that principle as part of the non-written EU general principals, due to a consistent ECJ case-law. The ECJ relied on general principles of law to make it possible to review Community rules in the light of fundamental rights. The Court has drawn these rights both from the constitutional traditions common to the Member States and from international instruments, in particular from the ECHR.

All in all, it can be noted that the right to equal treatment for men and women has become a worldwide recognized human right. All UN Member States have undertaken to use a gender mainstreaming strategy in all their activities. The same goes for the EU. It has made significant progress in achieving equality between women and men over the last decades. Nevertheless, it is an ongoing process. Inequalities still exist in EU Member States. It is not for this report to show up these inequalities. Insofar it may be sufficient to refer to the European Commission's 'Roadmap for Equality between Women and Men 2006-2010'[6], to the 2010 European Women's Lobby (EWL) report[7] and to the 'Annual Report 2010' of the European Agency for Fundamental Rights[8].

[6] Issued by the Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.1, Manuscript completed in April 2006

[7] 'From Beijing to Brussels – An Unfinished Journey'

[8] Conference edition, in particular pp. 101 (No. 4.3.5)

Part Two: Legal Framework with Relevance to Social Security

The present report monitors the legal situation in most of the social security branches covered by the Turkish law in the light of gender equality standards guaranteed by EU law and, where necessary due to short-comings of the EU law, in the light of the Turkish Constitution and international law. Before analysing the relevant Turkish provisions in detail, it seems to be convenient to outline the legal framework. This allows concentrating the analysis in Part III of this report on the SIUHIL without overloading it with explanations of Union's law, Turkish constitutional provisions and international law.

Chapter One: EU Gender Equality Acquis

At its meeting on 30/11 and 1/12/2006, the European Council has reaffirmed that the values of social justice and equal opportunities and the respect of human rights are integral parts of Community law and important components of the EU's internal and external policies. It has referred to the 2005 UN World Summit Outcome and the Ministerial Declaration of the UN Economic and Social Council High Level Segment 2006 as well as to the ILO Decent Work Country Programmes and relevant ILO Conventions and has emphasised that decent work is an employment and social protection issue as well as a governance issue.

One of the most important components of decent work is to secure equal treatment between men and women. Insofar the cited Council's commitment is in line with the gender mainstreaming strategy laid down in Article 8 of the 'Treaty on the Functioning of the European Union' *(TFEU, ex Article 3 para 2 TEC)*. It determines that the Union shall aim, in all its activities, to eliminate inequalities and to promote equality between men and women. The provision provides a general guideline, but does not create binding law on which individuals may rely before national courts. Such subjective rights are enshrined in the Union's primary and secondary law.

I. Primary Law

Since the 'Treaty of Lisbon' has entered into force on1/12/2009, the Union's primary law is covered by three agreements: 'Treaty on European Union', 'Treaty on the Functioning of the European Union' and the 'Charter of Fundamental Rights of the European Union'.

1. Treaty on European Union

The TEU in its new version created by the Lisbon Treaty has not directly enshrined the principal of gender equality. However, its Article 6 para 3 reaffirms the ECJ case-law mentioned above according to which fundamental rights, among them the principle of gender equality, have always form part of the non-written EU-Law. The provision sets forth that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union law. However, according to the ECJ case law these principles put an obligation, first of all, only on the EU institutions, but not on the Member States. These ones have to respect the unwritten fundamental rights only when and where they are implementing EU law. As the principle of equal treatment between men and women has now been enshrined in the CFREU, the quoted ECJ case law is no longer of great importance, at least insofar, as equivalent rights are provided for under CFREU *(thereto below under no 3 of this part of the report)*.

2. Treaty on the Functioning of the European Union

According to the Lisbon Treaty the TFEU has replaced the TEC which had succeeded the TEEC. Right from the start in 1957, the TEEC prohibited two forms of discrimination and enshrined two corresponding rights to equal treatment respectively. Within the scope of application of the 'Treaties', and without prejudice to any special provisions contained therein, it prohibited any discrimination on grounds of nationality (Article 7 TEEC, later on Article 6 TEC, then Article 12 TEC, now Article 15 TFEU). The second prohibition concerned any discrimination on grounds of sex, but it had a limited scope of application. It applied to labour law, not to social security law. Only the branch of labour relations was covered by directives adopted on the basis of the empowering provision of Article 119 TEEC. This concept has been maintained in ex Article 141 TEC and – since 1/12/2009 – in Article 157 TFEU.

So it has to be stated that the TFEU does not establish a general prohibition of discrimination of grounds of sex. Article 19 thereof (ex Art TEC) enables the EU to combat discrimination based, inter alia, on sex in all areas coming under its legislation power, but it is only an empowering provision that creates no subjective rights on which a European citizen can rely before a national court. To this end, acts of secondary law have to be adopted.

3. Charter of Fundamental Rights of the European Union

Since 1/12/2009 the CFREU forms part of the binding primary law *(see Article 6 para 1 TEU)*. Its Article 21 prohibits any discrimination based, inter alia, on ground of sex. Article 23 para 1 thereof specifies that prohibition by determining that equality between women and men must be ensured in all areas, including employment, work and pay. This does not prevent Member States from maintaining or adopting measures of so-called positive discrimination. Insofar Article 23 para 2 thereof provides that the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Articles 21 and 23 CFREU have, principally, also to be respected in social security matters. The problems result from the Charter's limited scope of application. According to Article 51 CFREU, the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity (para 1 thereof). The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties (para 2 thereof).

As to the Member States, the Charter imposes obligations on them only when they are implementing Union law. Article 51 CFREU does not define the expressions 'implementing' and 'Union Law'. The same goes for the TEU and the TFEU. Nevertheless, the expression 'Union law' can be determined by referring to Article 288 TFEU. It is obvious that all acts listed up in that provision form part of the Union law, regardless whether they are binding or not. Thus the Union law compromises regulations, directives, decisions, recommendations and opinions. However, not all of these forms are covered by Article 51. A restriction results from the expression 'implementing'. Only Union law that the Member States are 'implementing' is concerned.

Legal acts of the Union which come under Article 51 CFREU are, firstly, directives in the sense of Article 288 para 3 TFEU. Except for special cases (direct effect of some provisions) directives have to be implemented in order to become applicable national law. Regulations

and decisions in the sense of Article 288 para 2 and 4 thereof are not needed to be implemented; they form directly part of the national law. So they are of no interest as far as Article 51 CFREU addresses the Member states. Recommendations and opinions mentioned in Article 288 para 5 TFEU have no binding force; they must not be implemented. But that does not prevent the Member States from doing so. When they are implementing them, they have to observe the fundamental rights set forth in the Charter. Article 51 does not differentiate between Union law that the Member States have to implement compulsorily, and those that they implement voluntarily.

II. Secondary Law

The empowering provision of Article 19 TFEU (ex Article 13 TEC), allows the Council to take appropriate actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Leaving directives apart which concern other characteristics than sex, the Council took the chance to revise the existing anti-discrimination directives in the field of labour law by adopting the DIR 2006/54 to ensure an equal treatment for men and women. That directive replaces several directives previously adopted. In the field of social security, it is still DIR 79/7/ECC that provides the legal standards when legal provisions of national social security schemes have to be examined in the light of gender equality. But also some other directives, which are not directly focused on social security schemes, may be of interest.

1. DIR 79/7/EEC

(Gender) DIR 79/7/EEC is the most important directive in the field of statutory social security schemes. Regarding the short-comings of TEEC, the directive had to be based on the general provision of ex Article 235 TEEC *(later on Article 308 TEC, now Article 352 TFEU)*. It sets out the conditions for 'the progressive implementation of the principle of equal treatment between men and women in matters of social security'. Until now, the Council has restrained from a revision of DIR 79/7/EEC.

The directive covers statutory, but not occupational social security schemes. The latter ones come under DIR 2006/54/EC[9]. Significant for the 'progressive implementation' is that the directive covers – in the current state of law – not all branches of social security. It shall not apply to provisions concerning survivors' benefits and family benefits *(Article 3 para 2 thereof)*. These gaps cannot be bridged by applying Articles 21 and 23 CFREU. Such an application is doomed to failure because of the Charter's limited substantive scope of application. As mentioned above, it imposes obligations on the Member States only when they are implementing Union law *(Article 51 thereof)*. According to Article 3 para 2 DIR 79/7/EEC, the Member States are not obliged to implement gender equality in schemes concerning statutory survivors' insurance and family benefits. So they are not obliged to observe Articles 21 and 23 CFREU where these branches are at issue.

Further on, Article 7 DIR 79/7/EEC emphasises the incomplete *('progressive')* state of the current EU law. It allows to uphold some inequalities, in particular the determination of personable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits *(see para 1 item <a> thereof)*. If the social insurance scheme of a Member State has determined different personable ages for men and women for

[9] ECJ, judgment of 6/10/1993, C-109/91, ECR 1993, I-4879 *(case Ten Över)*, concerning the former DIR 86/378/EEC

the purpose of granting old-age pensions and these differences were in force at the date when the directive had entered into force *(23/12/1984)*, the differences can be kept up. In case that a new member joins the Union, it is the legal status at the date of accession that is decisive.

The central provision of DIR 79/7/EEC is Article 4. It determines that the principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex, either directly or indirectly. The provision does not provide any definition of direct and indirect discrimination. However, a consistent ECJ case-law enables the necessary determination. It refers to the case-law established in the field of labour law, starting with the judgment of 8/4/1976 in the case Defrenne II[10]. Consequently, also in the field of social security a direct discrimination has occurred where already the wording of a provision makes it clear that one sex is treated less favorable than another is. An indirect discrimination has been given where a national measure, although formulated in neutral terms, works to the disadvantage of far more women than men or, the other way round, far more men than women, unless that measure is based on objectively justified factors unrelated to any discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue and are appropriate to achieve that aim and are necessary in order to do so[11].

Having in mind this case-law, Article 4 para 1 DIR 79/7/EEC is sufficiently precise to be relied upon in legal proceedings by an individual and applied by the courts[12]. So it has direct effect. In the absence of measures implementing this article into the national legislation the individuals of the disadvantaged sex are entitled to be treated in the same manner and to have the same national rules applied to them as individuals of the advantaged sex who are in the same situation[13].

2. DIR 92/85/EC

This directive aims to protect women during periods of pregnancy and maternity. As it addresses the situation of female workers, the principle of equal treatment is not the direct subject-matter of its rules. Nevertheless, it can be relevant where provisions in social security schemes apply to pregnancy and maternity.

3. DIR 2010/18/EU

This directive has to be transposed into national law till 08/03/2012 at latest. It implements the revised Framework Agreement on parental leave concluded between the European Social Partners. It is, first of all, of interest for labour law, but may also touch some aspects of this report.

4. DIR 2010/41/EU

This directive has to be transposed into national law till 05/08/2012 at latest. It establishes the principle of equal treatment for men and women who are engaged in self-employed activities.

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[10] C-43/45, ECR 1976, 455 , para 16, 19 et seqq; further examples: ECJ, judgment of 31/3/1981, C-96/80. ECR 1981, 911, para 10, 13 *(case Jenkins)*; judgment of 13/5/1986, C-170/84, ECR 1986, 1607, para 29 – 31 (*case Bilka)*

[11] ECJ, judgment of 24.02.1994, C-343/92, ECR 1994, I-571, para 33, 34 *(Roks and others)*

[12] ECJ, judgment of 04/12/1986, C-71/85, ECR 1986, 3855, para 12 – 21 *(case Federatie Nederlandse Vakbeweging – FNV)*

[13] See ECJ ruling under footnote 12

The principle of equal treatment has also to be observed in national social security schemes protecting self-employed workers. In addition, the directive extends the social protection to their spouses not being employees or business partners where they habitually participate in the activities of the self-employed workers. These provisions go beyond those enshrined in the precedent DIR 86/613/EEC. Article 3 DIR 2010/41/EU establishes definitions of direct and indirect discrimination as follows:

- **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;
- **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.

The definitions correspond with those under other anti-discrimination directives, such as DIR 2006/54/EC, 2000/78/EC and 2000/43/EC. They all have implemented the consistent ECJ case-law cited above into EU secondary law.

Chapter Two: Turkish Legislation

First of all, provisions on gender equality are enshrined in the Turkish constitution. As to the parliamentary acts, an explicit anti-discrimination provision exists only in labour law (Article 5 TLA). But the enactment of a general anti-discrimination act is to be expected. At least, a proposal of such an act has been drawn up.

I. Constitution of the Republic of Turkey

Several provisions of the Constitution of the Republic of Turkey *(CRT)* are of interest for this report.

1. Right to Equal Treatment for Men and Women

Article 10 para 1 CRT provides that all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. The constitutional provision corresponds to a principle which is included in all European constitutions and is recognized by the ECJ as a fundamental principle of Community law. Embodying the principle of the equality of men and women in its national constitution Turkey fulfils, by the way, an obligation resulting from Article 2 CEDAW.

Article 10 para 2 sentence 1 CRT stipulates that men and women have equal rights. According to its sentence 2 the State shall have the obligation to ensure that this equality exists in practice. Sentence 3 thereof, added by the constitutional amendment 'package' 2010[14], determines that measures taken for this purpose shall not be interpreted as contrary to the principle of equality. In connection with the foregoing sentence 2 it emphasizes that all measures, which the Turkish legislator has to adopt, in order satisfy the constitutional obligation of promoting and ensuring gender equality, are not contrary to the equality principle.

[14] Law No 5982 Amending Certain Provisions of the Constitution, approved by the constitutional referendum of 12/09/2010

2. Inviolable and Inalienable Fundamental Rights and Freedoms

Article 12 para 1 of the Constitution ensures that everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable. This provision refers to the preamble of the UDHR and implements the rights and freedoms set forth in the UDHR as part of the Turkish constitution.

3. Protection of the Family and Children's Rights

(Amended) Article 41 underlines that the family is the foundation of the Turkish society and is based on the equality between the spouses *(para 1* thereof). It imposes on the Turkish legislator the obligation to adopt positive actions to ensure the peace and welfare of the family as well as the adequate protection of every child *(para 2 and 3 thereof)*. The substantive scope of this constitutional provision goes far beyond the area of family law. In connection with Article 10 CRT it obliges the Turkish legislator to adopt positive actions which shall promote, in the benefit of women, the compliance of family duties and working life and adjust e.g. provisions of SIUHIL by taking into account 'typical female risks'. Again in connection with Article 10 CRT, but also in line with Article 42 thereof *(Right and Duty of Training and Education)* the Turkish legislator shall be obliged to take all necessary measures to improve the qualification chances of girls.

4. Introduction of Health Services

According to Article 56 CRT, everyone has the right to live in a healthy and balanced environment. The state has to ensure that everyone leads his / her life in conditions of physical and mental health. It shall regulate central planning and functioning of the health services. To establish widespread health services, general health insurance may be introduced by law.

5. Right to Social Security

According to Article 60 para 1 CRT everyone has the right to social security. The notion ‘everyone’ shows that men and women have the same right. Such an interpretation follows as well from Article 10 thereof. The notion ‘social security’ is obviously used in the sense of Article 22 UDHR, Article 9 ICESCR, ILO Convention No. 102. Article 12 ECS and Article12 ECS (Revised) all ratified by Turkey *(see below Chapter III)* and Article 3 para 1 Reg No 883/2004/EC.

6. Persons Requiring Special Protection in the Field of Social Security

Article 61 CRT imposes an obligation on the Turkish legislator to protect particularly vulnerable persons. Thus it has to provide for

- a decent standard of living for widows and orphans of those killed in war and in the line of duty, together with the disabled and war veterans;
- measures to protect the disabled and secure their integration into community life;
- protection of the aged by adopting laws on state assistance to the aged and other rights and benefits;
- social resettlement of children in need of protection

To achieve these aims the Turkish State has to establish the necessary institutional framework *(organisations and facilities)*.

7. Financial Proviso

Using its power of discretion, the Turkish State has to take into consideration the capacity of its financial resources and the priorities appropriate with the social aims and duties when deciding how and to what extent it shall materialize them *(Article 65 CRT)*.

8. General Principles Relating to Public Servants

The general principles relating to public servants are laid down in Article 128 CRT. With view to social security, para 2 thereof is of interest. It determines that, inter alia, all rights of civil servants shall be regulated by law. This provision does not guarantee certain rights and their value, but ensures that all rights, whatever their content may be, have to be regulated by law. The objective is to exclude any arbitrary treatment so that the provision meets the rule of law.

II. Law Proposal on Anti-discrimination and Equality in Draft

Recently, a law proposal on anti-discrimination and equality has been drawn up. It is not yet pending before the Turkish Parliament. The law will guarantee the right of individuals to receive equal treatment, while making sure that they are effectively protected against all kinds of discrimination. It will forbid any and all discriminative acts, practices, procedures and adjustments of any public agencies and establishments, any legal entities and natural persons based on gender, race, colour, language, belief, religion, ethnic origins, sexual orientation, philosophical and political thoughts, social and marital conditions, health conditions, disability, age or any other similar grounds. Types of discrimination are those such as isolation, issuing and fulfilling discriminating orders, multiple discrimination, direct discrimination, indirect discrimination, intimidation at workplace, victimization, non-fulfilment of reasonable adjustments, expressed discourse of hate, harassment, and discrimination on presumed grounds. The definitions of direct and indirect discrimination will correspond with EU law *(see the definitions under Section 2 items <d> and <e> thereof)*. The law in draft covers, inter alia, expressly the areas of social security, social services and social assistance.

Chapter Three: International Law

As for international law, it has to be distinguished between two geographical areas and levels respectively: a worldwide level set up by UN law and a European level determined both by the law of the Council of Europe and the European Union *(the law of the latter one has already been treated above)*.

I. Law of the United Nations and UN Organisations

Graph No1 gives on overview on declarations and agreements with relevance to gender equality and on the dates when signed and ratified by Turkey.

UN law with relevance to social security and social protection schemes	Signed	Ratified

Universal Declaration of Human Rights	09/09/2000	24/07/1985
Convention on the Elimination of All Forms of Discrimination Against Women *(CEDAW)*	08/09/2000	29/10/2002
Optional Protocol to the CEDAW	15/08/2000	23/09/2003
International Covenant on Economic, Social, and Cultural Rights *(ICESCR)*	./.	./.
Optional Protocol to the ICESCR	15//08/2000	23/09/2003
International Covenant on Civil and Political Rights *(ICCPR)*	03/02/2004	24/11/2006
Optional Protocol to the ICCPR		19/07/1967
Discrimination (Employment and Occupation) Convention No. 111		

1. Universal Declaration of Human Rights

The UDHR adopted by the UN General Assembly on 10/12/1948 is the primary UN document establishing human rights standards and norms. All member states have agreed to uphold the UDHR. Although the declaration was intended to be nonbinding, through time its various provisions have become so respected by states that it can now be said to be customary international law. Thus the gender equality principle, expressly enshrined in Article 2 UDHR, has to be respected by all states.

2. Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol thereto

The CEDAW was adopted on18/12/1979 by the UN General Assembly. It entered into force as an international treaty on 3/9/1981. For the purpose of considering the progress made in the implementation of the Convention a ‘Committee on the Elimination of Discrimination against Women’ was established. The signatories undertake to submit a report, generally every four years, on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Convention and on the progress made in this respect.

The Optional Protocol to the CEDAW provides that states who become parties thereto recognise the competence of the Committee to receive and consider communications under the protocol. It provides a Communications Procedure which allows either individuals or groups of individuals to submit individual complaints to the Committee.

Because of its comprehensive scope of application the Convention is sometimes also called the 'bill of rights for women'. Article 1 CEDAW defines the notion ‘discrimination against women’. The term shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. According to Article 2 thereof the signatories undertake

- to embody the principle of the equality of men and women in their national constitutions,
- to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women,
- to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- to repeal all national penal provisions which constitute discrimination against women.

3. International Covenant on Economic, Social, and Cultural Rights

The ICESCR was adopted on 16/12/1966 by the UN General Assembly. It entered into force as an international treaty on 3/01/1976. On 10/12/2008 the UN General Assembly adopted the Optional Protocol to the ICESCR. It establishes complaint and inquiry mechanisms for the ICESCR and has been opened for signature on September 24, 2009. It will enter into force when ratified by 10 parties. As of July 2010, the Protocol has 32 signatories and 2 parties. Turkey has not yet signed and ratified it.

According to Article 2 ICESCR the signatories undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind, inter alia, such as to sex. Article 3 thereof specifies that the national legislation has to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant. One of the rights provided for is the right of everyone to social security, including social insurance *(Article 9 thereof)*.

4. International Covenant on Civil an Political Rights

The ICCPR was adopted on 16/12/1966 by the UN General Assembly. It entered into force as an international treaty on 23/3/1976. At the same time the UN General Assembly adopted the (First) Optional Protocol to the ICCPR. It establishes complaint and inquiry mechanisms for the ICCPR. It entered into force on 23/3976. Turkey has signed and ratified it in 2004 and 2006 respectively.

According to Article 26 thereof all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, inter alia, such as sex.

5. ILO Conventions

Gender equality is also at the heart of the ILO's 'Decent Work Agenda and the Global Employment Agenda'[15]. The term 'decent work' sums up the aspirations of people in their work-

[15] International Labour Conference, 98th Session, 2009, Report VI: 'Gender equality at the heart of decent work', ISBN 978-92-2-120654-5, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_105119.pdf; last access on 15/3/2011; International Labour Office, 'Gender Equality

ing lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. Combating discrimination is an essential part of promoting decent work. The lack of decent work conditions is typical for the so-called informal economy which typical feature is the lack of any protection in the field of labour law and social security law[16].

ILO's gender mainstreaming strategy for the employment sector has been developed with the aim to ensure that gender equality is fully integrated into ILO's technical work related to formulation, implementation, monitoring and evaluation of employment policies, programmes, and other actions[17]. Conventions and Recommendations lay down international labour standards which are one of the ILO's primary means of action to improve working and living conditions of women and men, and promote equality in the workplace for all workers. ILO standards apply equally to women and men, with some exceptions, in particular those standards addressing issues relating to maternity and women's reproductive role. Gender-related conventions are, in particular, the

- Equal Remuneration Convention No. 100 (1951);
- Discrimination (Employment and Occupation) Convention No. 111 (1958);
- Workers with Family Responsibilities Convention No. 156 (1981);
- Part-Time Work Convention No. 175 (1994);
- Home Work Convention No. 177 (1996);
- Maternity Protection Convention No. 183 (2000);

Most of these conventions are addressed to labour relations between employers and employees. None of them prohibits expressly the discrimination based on sex in the field of social security and social protection. The only convention concerning directly this issue is the 'Equality of Treatment (Social Security) Convention No. 118' (from 1962)'; but it prohibits any discrimination on grounds of nationality, not of sex. So it is necessary to rely on the ILO Convention No.111 which refers to the 'ILO Declaration of Philadelphia' from 1944 and on the UDHR in order to tackle gender-based discrimination in the field of social security and social protection.

The large scope of application of Convention No. 111 covers these areas. Article 1 para 1 item (a) thereof defines the term 'discrimination'. It includes any distinction, exclusion or preference made on the basis, inter alia, of sex, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. According to Article 1 para 3 thereof the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

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and Decent Work'; Selected ILO Conventions and Recommendations Promoting Gender Equality', Geneva, 2006, ISBN 92-2-119356-3, http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_088023.pdf, last access on 15/3/2011.

[16] International Labour Conference, 90th Session, 2002, Report VI: 'Decent Work and the Informal Economy', ISBN 92-2-112429-0; http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf, last access on 15/3/2011.

[17] International Labour Office, 'Strategy for Gender Mainstreaming in the Employment Sector for the implementation of the ILO Action Plan for Gender Equality 2008-09, ISBN 9789221220824, http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_103610.pdf, last access on 15/3/2011; International Labour Office, 'ILO Action Plan for Gender Equality 2010–15', ISBN 972-92-2-123436-4, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_141084.pdf, last access on 15/3/2011

Thus the provision describes the substantive scope of application. It does not expressly mention the field of social security, but this area is covered by the term ‘conditions of employment’. Insofar one can rely on the official recommendations to the Convention[18]. They set out that all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of social security measures and welfare facilities and benefits provided in connection with employment *(Chapter II No. 2 lit. b, vi thereof)*. Therefore equal treatment between men and women is also guaranteed in social security and social protection schemes, but only for persons who can be considered as 'workers'.

Convention No. 111 has an impact on other conventions establishing general or special standards in the field of social security. After having ratified the conventions the ILO Member States have to undertake the necessary measures so that the national law does not only comply with theses standards, but also respects the gender equality principal established in Convention No. 111. Although Turkey has not yet ratified most of the pertinent conventions, it might be of interest to give an overview of them. The relevant conventions are the

- Social Security (Minimum Standards) Convention No. 102 (1952), ratified by Turkey on 29/01/1975;
- Employment Injury Benefits Convention No. 121 (1964), not ratified by Turkey;
- Invalidity, Old-Age and Survivors' Benefits Convention No. 128 (1967), not ratified by Turkey;
- Medical Care and Sickness Benefits Convention No. 130 (1969), not ratified by Turkey;
- Maintenance of Social Security Rights Convention No. 157 (1982), not ratified by Turkey;
- Employment Promotion and Protection against Unemployment Convention No. 168 (1988), not ratified by Turkey.

At least the combination of the Conventions No. 102 and 111 imposes on Turkey the obligation to respect the gender equality principle when organizing its social security schemes.

II. Law of the Council of Europe

In 1949, Turkey was one of the founding members of the Council of Europe *(CoE)*. According to Article 1 of its Statute the aim of the Council is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. This aim shall be pursued, inter alia, by agreements and common actions in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

Some of the CoE conventions have obvious parallels to UN and ILO conventions. They express a close cooperation between these organizations resulting in a good coordination when working out agreements. Graph No.2 gives on overview on agreements with relevance to gender equality and on the dates when signed and ratified by Turkey.

Conventions with relevance to social security and social protection schemes	Signed	Ratified
European Interim Agreement on Social Security Schemes Relating to Old Age, Invalidity and	14/4/1967	14/4/1967

[18] R 111 Discrimination (Employment and Occupation) Recommendation, 1958

Survivors		
European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors	1/5/1967	1/5/1967
Convention for the Protection of Human Rights and Fundamental Freedoms	04/11/1950	19/03/1954
European Social Charter	18/9/1961	16/06/1989
European Code of Social Security	13/5/1964	7/3/1980
Protocol to the Code of Social Security	13/5/1964	
European Code of Social Security (Revised)	6/11/1990	
Additional Protocol to the European Social Charter	5/5/1988	
European Social Charter (Revised)	6/10/2004	27/6/2007
European Convention on Social Security	14/12/1972	2/12/1976
Supplementary Agreements for the Application of the European Convention on Social Security	14/12/1972	2/12/1976

1. Convention for the Protection of Human Rights and Fundamental Freedoms and the 12th Protocol thereto

The ECHR guarantees rights and freedoms for individuals. One of the basic rights of the Convention is the prohibition of discrimination based, inter alia, on sex *(Article 14 thereof)*. The provision has a limited substantive scope of application. It prohibits discriminations only where rights and freedoms set forth in the Convention are concerned. The 12th Protocol has enlarged the field of application by establishing an extended scope of protection. Its Article 1 provides that the enjoyment of any right set forth by 'law' shall be secured without discrimination on any ground, inter alia, such as sex. This general non-discrimination clause expands the scope of protection beyond the enjoyment of the rights and freedoms set forth in the Convention to all matters regulated by national law.

Notwithstanding that the text of Article 14 of the Convention as well as that of Article 1 of the Protocol mention only the 'non-discrimination principle', but not explicitly the 'equality principle', it should be noted that both principles are closely intertwined. The principle of equality requires treating equal situations equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists[19]. So the two provisions do not only prohibit discrimination based on sex, but, at the same time, order to treat men and women equally.

Apart form the enlarged scope of application the list of non-discrimination grounds in Article 1 of the 12th Protocol is identical with that in Article 14 of the Convention. This goes also for the meaning of the term of 'discrimination' that has been consistently interpreted in the case-law of the European Court of Human Rights. The Court has made clear that not every

[19] See para 15 of the official Explanatory Report to the 12th Protocol

distinction or difference of treatment amounts to discrimination. A difference of treatment is discriminatory, if it has no objective and reasonable justification. This is given, if it does not pursue a 'legitimate aim' and if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'[20].

Article 1 of the 12th Protocol is *(as well as Article 14 of the Convention)* does not impose a general obligation on the contracting parties to adopt positive measures providing for specific advantages in order to promote equality. On the other hand, the Protocol does not prevent the signatories to take such measures in favour of certain groups or categories of persons who are disadvantaged. Insofar the 3rd recital of the preamble reaffirms that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.

Finally, it has to be noted that Article 1 of the 12th Protocol protects only against discrimination by public authorities. The term 'public authority' in para 2 has been borrowed from Article 8 para 2 and Article 10 para 1 ECHR. It has the same meaning as in those provisions. It covers not only administrative authorities, but also the courts and legislative. Purely private matters are not affected.

2. European Social Charter and the Additional Protocol hereto

The ESC is the counterpart of the ECHR in the sphere of economic and social rights. It guarantees the enjoyment, without discrimination, of fundamental social and economic rights listed up in Part I and specified in Part II. Three of its 'hard core' provisions secure the right to social security *(Article 12 thereof)*, the right to social and medical *assistance (Article 13 thereof)* and the right to benefit from social welfare services *(Article 14 thereof)*.

According to Article 12 ESC the contracting parties undertake to establish and maintain a social security system at a satisfactory level at least equal to ILO Convention No. 102.

Further on, the signatories of the ESC have to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources shall be granted adequate assistance and, in case of sickness, the care necessitated by his condition. Thirdly, the Contracting Parties undertake to promote or provide services which contribute to the welfare and development of both individuals and groups in the community, and to their adjustment to the social environment.

States Parties to the Charter must submit annual reports on a part of the provisions of the Charter showing how they implement them in law and in practice. The European Committee of Social Rights *(ESCR)* is the body responsible for monitoring compliance in the States party to the Charter. Turkey has submitted its last report (the 15th) of the implementation of the ESC in April 2009 concerning the period from January 2003 to July 2007.

The Additional Protocol to the ESC includes provisions which address the needs of specific groups of people. Article 1 requires State Parties to recognize the principle of equal treatment and equal opportunities in the field of employment without discrimination on the ground of sex. Article 4 provides for the right of elderly people to social protection, including the 'pro-

[20] Judgment of 28/05/1985, Series A, No. 94, para 72 (case Abdulaziz, Cabales and Balkandali v. United Kingdom)

vision of information about services and facilities available for elderly persons and their opportunities to make use of them'. These additions extend the protection of social and economic rights to give all workers the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the right to be informed and consulted, and the right to participate in the determination and improvement of working conditions and the working environment. In addition, the elderly are given the right to social protection.

3. European Code of Social Security and the Protocol thereto

Convinced that it was desirable to establish standards at a higher level than the minimum standards embodied in ILO Convention No. 102, the Council had adopted the European Code of Social Security *(ECSS)* and the Protocol thereto. They contain precise regulations on all social security benefits. The ECSS has been signed and ratified by Turkey, but not the Protocol thereto.

4. European Code of Social Security (Revised)

The European Code of Social Security was revised in 1990. Until now, it has been ratified only by one Member States so that it has not yet entered into force. Turkey has signed, but not ratified it.

5. Revised European Social Charter

The Revised ESC has not established significant amendments as far as social rights of relevance for the present report are concerned. As to the right to social security the Revised ESC has amended Article 12 para 2 by referring explicitly to the European Code of Social Security. Articles 13 *(right to social and medical assistance)* and 14 *(right to benefit from social welfare services)* have not been amended.

Contrary to the ESC, the Revised ESC establishes explicitly the gender equality principle. Its Article 20 guarantees the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on grounds of sex. The provision corresponds to Article 1 of the Additional Protocol to the ESC which has been signed, but not ratified by Turkey.

6. European Convention on Social Security and, partly, replaced Interim Agreements

The ECSS and the Supplementary Agreement for the application thereof are designed to replace two agreements concluded in 1953, namely the 'European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors' and the 'European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors', both signed and ratified by Turkey. The two Interim Agreements cease to be applicable in relations between contracting parties. Although only eight Member States of the Council of Europe have ratified the ECSS and the Supplementary Agreement, both entered into force (*1/3/177)*, because three ratifications were sufficient for that. As Turkey has ratified the ECSS and the Supplementary Agreement, the two former Interim Agreements are no longer applicable between Turkey and the seven other contracting parties. They continue to be applicable in relations to other Member States.

The ECSS and the Supplementary Agreement govern questions relating to social security for foreigners and migrants, particularly with regard to equality of treatment with their own nationals and to the maintenance of acquired rights and rights in course of acquisition. Its substantive impact corresponds to ILO Convention No. 118 on Equality of Treatment and to Regulation No 1408/71/EEC, now Regulation No. 883/2004/EC. As it prohibits discrimination on grounds of nationality, not of sex, it can be neglected in the present report.

Part Three: Social Security and Universal Health Insurance Law Evaluated in the Light of the Gender Equality Principle

Chapter One: Introduction

In the 1990's and the beginning of the 2000's, the reform of the Turkish social security system has been given a push by IMF and World Banc who have insisted on institutional and parametric changes in order to reduce the financial imbalances. In 2005, the social reform process which is of particular interest for this report has been initiated by the Justice and Development Party[21] government and has occurred with the EU membership process. This process requires from the Turkish legislator considering EU requirements and recommendations on social inclusion[22].

As a candidate country Turkey is passing through a phase of adoption of the Community acquis. The Helsinki European Council held in December 1999 concluded that Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States, i.e. to the Copenhagen criteria adopted in 1993 and specified at the Madrid Council 1995. Building on the existing European Strategy, Turkey, like other candidate States, will benefit from a pre-accession strategy to stimulate and support its reforms. The Accession Partnership was formally adopted by the European Council on 8/3/2001. Its priorities were reflected in Turkey's 'National Program for the Adoption of the Acquis' adopted on 19/3/2001. It sets out the policy framework, the schedule for adopting new legislation, policies and practices, and the administrative and budgetary requirements needed for Turkey to adopt the acquis. The Community dimension of the promotion of gender equality is considered in the making of new legislation and amendments. The national starting point is the incorporation of the relevant acquis and this has to be followed by an effective implementation.

This report does not deal with all social security and social protection schemes, enacted in Turkey. The term 'social security' is to be understood in the sense of Article 3 para 1 Reg No 883/2004/EC which has taken into account the recent developments in the field of social security and goes beyond the previous Article 4 of Reg No 1408/71/EEC orientated at ILO Convention No 102. But neither unemployment benefits *(see thereto: Turkish 'Unemployment Insurance Act', adopted in 1999 and in force since 2000)* nor family benefits will be examined in this report. The evaluation on to which extent social provisions are in line with gender equality is limited to the 'Social Insurance and Universal Health Insurance Law' *(SIUHIL = Sosyal Sigortalar ve Genel SağlıkSigortası Kanunu)*. Regulations issued by SSI on the basis of empowering provisions enshrined in the SIUHIL could not be evaluated, as English versions thereof were not available.

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[21] Adalet ve Kalkinma Partisi (AKP)

[22] Duyulmus, Cem Utku, "Different uses of Europe: Social security reform in Turkey", paper presented at the annual conference of the International Sociological Association's (ISA) Research Committee on Poverty, Social Welfare and Social Policy (RC19) entitled 'Social Policies: Local Experiments, Travelling Ideas' , 20-22 August 2009, Montreal, Quebec, available under http://www.cccg.umontreal.ca/RC19/PDF/Duyulmus-C_Rc192009.pdf <*(last access on 26/01/2011*>

Prior to the enactment of SIUHIL, there were five different insurance acts covering five different groups of insured persons. The enforcement was incumbent on three different institutions. The 'Social Insurance law No 506' applied to workers employed under service contract and the 'Social Insurance Law For Agricultural Employees No 2925' to agricultural workers. The competent institution for both systems was the 'Social Insurance Institution' *("Sosyal Sigortalar Kurumu" – SSK)*. Two other acts applied to self-employed persons. The 'Social Insurance Law No 1479' on Craftsmen, Artisans and other Self-employed' covered craftsmen, artisans and other self-employed. The 'Social Insurance Law No 2926 on Self-employed in Agriculture' applied to self-employed at agricultural sector. Both schemes were administered by the 'Self-employed Persons Social Insurance Institution' *("Bağımsız Çalışanlar Sosyal Sigortalar Kurumu" – Bağ-Kur)*. A special pension scheme existed for civil servants regulated by the 'Law on Retirement Fund No 5434', organized and administered by the 'Pension / Retirement Fund for Civil Servants' *("Emekli Sandığı" – ES)*.

The objective of the reform package launched by the Turkish government was to establish a system that unifies all employed and self-employed workers, in whatever branch (private or administrative) they carry out their work, under the same law and under the same institution. The amendment of the administrative structure was materialized by the 'Law of Social Security Institution' No 5502. It has unified the three former social security institutions under a same roof by establishing a new single institution named 'Social Security Institution' *(SSI = "Sosyal Günvenlik Kurumu", SGK)*. The SIUHIL regulating the new substantive law has been adopted on 31/5/2006. The initially planned date of enactment (1/1/2007) had to be delayed. Upon an annulment request sued by the Turkish President and 118 Members of the Parliament the Turkish Constitutional Court has abolished, in a judgment of 15/12/2006 *(No 2006/112)*, some articles of bill No 5510 including all aspects of pension reform pertaining to civil servants. Relying on Articles 2, 10 and 128 CRT, it has ruled that different regulations for civil servants have to be adopted because the bill would engender loss of their social rights[23]. After the necessary amendments had been introduced by the Law No 5754[24], the SIUHIL came into force on 1/10/2008.

Regarding the benefits of SIUHIL awarded to insurance holders[25], right holders[26], universal health insurance holders[27] and their dependants[28], the law distinguishes between cash benefits granted under social insurance[29] branches and benefits in kind granted under universal health insurance[30]. The latter one shows elements of a Beveridge social system. In general, the system is financed by premiums paid by insurance holders, holders of voluntary insurance and universal insurance holders in a 'pay-as-you-go-system'. The cash benefits are wage replacement benefits awarded and calculated in relation to periods of paid premiums and earnings subject to premiums. Insofar the Turkish system shows elements of a Bismarckian system.

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[23] Thereto: Yasemin Körtek, Die Reform der sozialen Sicherheit in der Türkei und die Staatsbediensteten – Die Entscheidung des türkischen Verfassungsgerichts vom 15.12.2006 *(Reform of Social Security in Turkey and Civil Servants – The Ruling of the Turkish Constitutional Court of 15/12/2006),* in: Zeitschrift für Internationales Arbeits- und Sozialrecht (ZIAS) 2007, pp 331 et seqq; Azuman Özgür, 'Pension Reform. The Turkish Case in the European Context', September 2008, http/etd.lib.metu.edu.tr/upload/12610055/index.pdf, last access on 24/2/2011

[24] Law on Amendments to Social Security and Universal Health Insurance Law and to Certain Laws and Decrees

[25] see the definition under Article 3 no (6) SIUHIL

[26] see the definition under Article 3 no (7) SIUHIL

[27] see the definition under Article 3 no (9) SIUHIL

[28] see the definition under Article 3 no (10) SIUHIL

[29] see the definition under Article 3 no (3) SIUHIL

[30] see the definition under Article 3 no (8) SIUHIL

In the focus of this report are the provisions of two sections of the SIUHIL. Section Two' contains the social insurance provisions, Section Three the universal health insurance provisions. The following Sections Four to Seven provide provisions on premiums, common and miscellaneous provisions, administrative fines, provisions on dissolution as well as abrogated ones, amended, final and interim provisions; they are of less interest, regarding gender equality problems.

In a project on gender equality issues the most important terms are those of direct and indirect discrimination. It is not necessary to repeat the definitions already given above (Part Two Chapter One No II 1 = page 16). Here, before the beginning of the evaluation of the law, it could be useful to call to mind the indicators that signalize discrimination. It could help to develop a sense for these subjects so that it would be easer, in practice, to reveal discriminations.

Normally, it causes no problem to discover a direct discrimination. In such a case the provision applies either to women or men. Two constellations are possible. The provision can have a positive effect fort the persons of the sex mentioned; then the persons of the sex not mentioned are directly discriminated. If the provision has a negative effect for the .persons of the sex mentioned, then these ones are directly discriminated compared with the persons of the sex not mentioned.

In order to discover an indirect discrimination it could be helpful to have two constellations in mind. The first one concerns the personal scope of application. All provisions deviating from the general rule by excluding certain categories of individuals, who would otherwise come under the general rule, could provoke gender discrimination, if the derogation rule affects more persons of one sex than of the other one.

The second constellation of an indirect discrimination concerns the substantive scope of application. If the conditions of entitlement to a benefit or favourable calculation conditions can be fulfilled only by persons of one sex, then persons of the other sex could be discriminated indirectly. The same goes for a constellation where persons of one sex have more difficulties than persons of the other one to fulfil the conditions mentioned before.

However, not all unequal treatments between men and women establish a forbidden discrimination. The inequality is not illegal if it is based on objectively justified factors (e.g. a legitimate social policy aim) and if it is proportional that means if the legal objective is pursued by appropriate and necessary means.

Chapter Two: Short- and Long-Term Insurance Branches

The social insurance provisions are laid down in Part One of Section Two of SIUHIL *(Articles 4 – 59*: The Law differentiates between short- and long-term insurance branches. Work accidents and professional diseases, sickness and maternity insurances form part of the short-term branches[31], invalidity, old age and survivors' insurances of the long-term insurance[32].

I. Provisions Common to Short- and Long-Term Insurances Branches

[31] see the definition under Article 3 no (4) SIUHIL
[32] see the definition under Article 3 no (5) SIUHIL

The provisions on insurance branches start with a common part (Articles 4 – 10) followed by several parts dealing with special subjects.

1. Personal Scope of Application (Scope Ratione Personae)

The conditions on access to short and long-term insurance branches are laid down in Articles 4 – 6 SIUHL. Common to all insurance holders is that they must execute an activity for which premium should be paid in terms of short- and long-term insurance branches[33]. Leaving apart three exceptions, the access to insurance does not depend on lower or upper earnings limits or working hours limits. There are lower and upper earnings limits, but they concern the calculation of premiums to be collected and benefits to be granted. These earnings limits do not affect the access to insurance. Minor / marginal permanent employments or short-term employments are, principally, not excluded from insurance. Thus the access to Turkish social insurance is easier and more favourable than in some EU Member States[34].

1.1 Individuals Who are Deemed to be Insurance Holders

Article 4 SIUHIL determines who shall come compulsorily under the social insurance scheme, i.e. who is deemed to be insurance holder. Although none of the provisions under Article 4 shows any gender discrimination, it could be helpful for the understanding of other provisions to give a short overview on this article.

1.1.1 Employed Workers Who are Deemed to be Insurance Holders

According to Article 4 para 1 item (a) SIUHIL individuals who are employed by one employer or more employers through a 'service contract' are deemed to be insurance holders. Article 3 para 1 point 11 thereof determines that the term 'service contract' shall be construed as meaning a service contract defined in the Turkish Code of Obligations *(TCO)*[35] and work contract or service contract defined in the labour law legislation. Articles 313 TCO provides, as a general rule, that service contracts are agreements between an employed worker and an employer. Such a service contract is identical with an 'employment contract' in the sense of the modern Turkish labour law defined in Article 8 of the Turkish Labour Act *(TLA)*. In the end, the service contract in the sense of Article 4 para 1 item (a) SIUHIL covers both an employment contract under Article 8 TLA and – if the contract between an employee and employers does not come under the scope of application of TLA pursuant to its Article 4 – a service contract under Articles 313 et seqq TCO.

1.1.2 Village and Quarter Headmen and Self-employed Workers

Article 4 para 1 item (b) SIUHIL covers, on one hand, village and quarter headman and, on the other hand, all individuals working on their own name and account without being bound by a service contract. The latter ones are the most important group. Previously, they had been insured under Law No 1479. Their assignment to SIUHIL has broadened their social protection to work accident, occupational disease and maternity insurance branches.

Although the rules on service contracts in the sense of the TCO apply generally only to employed workers, they apply in some cases analogously also to freelancers *(Article 353 TCO)*. the term 'service contract' in Article 4 refers obviously to the general understanding of TCO

[33] see the definition under Article 3 no (6) SIUHIL

[34] for instance in Germany, where individuals are not subject to compulsory social insurance if they earn less than 400 € monthly or are occupied less than 2 months in a calendar year.

[35] Law No 818 of 22/04/1926 which has incorporated elements mainly of the Swiss Code of Obligations

and is used under items (a) and (b) of para 1 Article 4 SIUHIL, in order to draw a clear line between employed and self-employed workers. The term 'not bound to service contract' clarifies that it does not matter on what contractual basis self-employed workers carry out their work, provided it is not a service contract in the meaning of item (a).

The further numbers (1) till (4) under this provision deliver additional details on the self-employed concerned by referring to income tax payers, individuals who are exempt from income tax, associates of joint-stock companies who are members of the board of directors, active partners of commandite companies, all partners of other company and maritime joint-adventures and, last not least, individuals who carry out agricultural activities.

1.1.3 Individuals in Public Administrations

Article 4 para 1 item (c) SIUHIL relates to individuals in the public administration who are not covered by items (a) and (b), i.e., first of all, civil servants in different functions. They come only under long-term, but not short-term insurance *(para 7 of Article 4)*. Insofar the Civil Servants Law continues to be applied. In addition, some particular provisions have to be observed in applying SIUHIL *(Articles 43 till 49)*.

1.1.4 Other Individuals Who are Deemed to be Insurance Holders

Article 4 para 2 till 5 SIUHIL lists up several groups of individuals to which para 1 items (a), (b) or (c) shall also be applicable. It can be refrained from discussing them in detail.

1.2 Individuals to Whom Only Certain Branches Shall be Applied

Article 5 SIUHIL lists up individuals who are not insured under all short- and long-term insurance branches, but only under those explicitly mentioned, such as

- convicts and arrested individuals who are employed, but not working on a service contract are insured under work accident, occupational disease and maternity insurance;candidate apprenticeship and apprenticeship education come under work accident, occupational disease and health insurance;
- students subject to internship and trainees, participating in the professional learning, are protected under work accident and occupational disease insurance;
- Turkish workers working in abroad work places come under all branches of short term and universal health insurance, if they are undertaking works in countries not having social security contracts with Turkey. If they request to be subject to long term insurance, voluntary insurance shall be applicable;
- war veterans and disabled individuals who will receive continuous payment of pensions when starting insured work.

All these provisions show no gender discrimination.

1.3 Individuals Who are Not Deemed to be Insurance Holders

Article 6 para 1 SIUHIL lists up different groups of individuals who are not deemed to be insurance holders. With view to gender equality these provisions are to be evaluated more detailed.

1.3.1 Spouse of an Employer Working Free of Charge

Article 6 para 1 item (a) SIUHIL rules that the spouse of an employer, working free of charge in his/her business place, is not insured. The expression 'free of charge' signalizes that the spouses concerned do not carry out paid work. Even if more women then men are concerned, Article 4 para 1 DIR 79/7/EEC would not be violated. The EU law does not require that spouses of employers working free of charge must be subject to a national statutory social insurance scheme. Problems may arise from DIR 2010/41/EU. It stipulates that the Member States must ensure a certain social protection for the spouses habitually carrying out works in the business of their husbands/wives, without being employed or business partners. But that is not an access problem, but a problem to what extent not insured spouses have to be protected by the system.

1.3.2 Relatives up to Third degree Working in The Same Residence Where They Live

Article 6 para 1item (b) SIUHIL excludes relatives up to third degree from insurance provided they live together in the same residence and carry out works in that residence without having anybody from outside. This provision corresponds with Article 4 TLA according to which the Labour Act does not apply to works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3rd degree (3rd degree included).

The negative condition 'without having anybody from outside' indicates that this provision applies to a situation where only family members who live together in their workplace are concerned. So the provision at issue does not come under ILO Home Work Convention No 177 *(until now only ratified by 7 countries, not by Turkey)*. It imposes, inter alia, on the states an obligation to promote statutory social security protection and the protection against any discrimination in the field of employment and occupation *(Article 4 thereof)*. The Convention applies to a situation where the 'homeworker' works in his or her home or in other premises of his or her choice, other than the workplace of the employer *(Article 1 thereof)*. So the Convention covers only situations where the workplace of the employee and the employer are different, whereas Article 6 para 1 item (b) SIUHIL addresses those who work and live at the same place *(additionally, only employment relationships, but not self-employed activities come und the Convention)*.

Article 6 para 1 item (b) SIUHIL is to be read in a systematic context with Article 4 thereof. The latter one establishes the general rule; all cases ruled under Article 6 para 1 are exceptions from the general rule. That means all individuals listed in Article 6 para 1 are principally covered by Article 4. The only reason that they are not subject to compulsory social insurance is that they come under the derogation rule of Article 6 para 1. The argument, Article 6 para 1 would also apply to individuals not coming under Art 4, is not convincing. To exclude individuals from insurance who are in any event not insured would simply be incomprehensible. Consequently, the relatives listed in Article 6 para 1 item (b) SIUHIL must principally belong to one of the insured groups listed in Art 4. That means Article 6 para 1 item (b) applies both to situations where one of the relatives is the employer and the other one or ones are his/her employees and to situations where all relatives work together on an equal basis as self-employed.

The personal scope of Article 6 para 1 item (b) SIUHIL applies to relatives up to the 3rd degree. Further on, they have to live and to work in the same residence. If such forms of family connections are not given, they come under the general rule of Article 4 thereof. In the end, the provision refers to so-called small family enterprises and excludes their members from statutory social security.

Thus a vulnerable group of the Turkish society is not sufficiently protected against typical social risks. Its members are only covered by the general health insurance scheme, but not by the branches of short and long term insurance. It is not clear whether their exclusion from short and long term insurance creates a gender equality problem. No relevant statistics were available. However, this does not mean that the derogation rule has to be accepted. Insofar it has to be recalled that the gender equality principle is a special form of the general principle of equal treatment. So, in case that gender discrimination cannot be noticed, it has always to be examined whether the provision in question is in line with the general principle of equal treatment. In case of Article 6 para 1 item (b) SIUHIL it has to be stated that individuals, who are relatives, but not up to the third degree or, even if they are such relatives, do not live and work together in the same residence, will be subject to compulsory social insurance according to Article 4 para 1 item (a) or (b). So, the unequal treatment of the relatives concerned needs a justification. The Turkish legislator has to explain why it could be assumed that these persons are not in need of social protection,

In lack of any justification, one of the possible consequences could be to abrogate the provision at issue. But it could also be justifiable to limit the exclusion from social insurance to cases where the individual concerned carry out so-called marginal activities. To meet the special economic and social situation of such small 'family undertakings' it could be recommendable to introduce, at least, a regulation comparable with those under item (ı) and (k) of para 1 of Article 6. This would mean that family members would be excluded from insurance, only if they are exempt from income tax and their monthly average of income would be less than thirty times the lower limit of daily earning subject to premium. According to the ECJ case law the exclusion of marginal activities from compulsory social insurance is, principally, justified by a legitimate aim of social policy *(see below footnote 39)*.

It is not sure if such a regulation would invite the 'heads' of small family undertakings to reduce the payments awarded to the family members so that they would not be insured *(leaving aside, that in case of an employment relationship the pay of a minimum wage is guaranteed)*. If this should become a relevant social problem, the Turkish legislator could adopt the 'radical' solution and abrogate the derogation rule completely.

1.3.3 Home Services

Article 6 para 1 item (c) SIUHIL determines that individuals who work in home services (excluding charged and permanent workers) are not deemed to be insurance holders. As the term 'work' is used without any restrictions, such works can be carried out on the basis of an employment contract with employees or a contract with self-employed workers. So Article 6 para 1 item (c) establishes derogation from items (a) and (b) of para 1 Article 4 SIUHIL.

1.3.3.1 Definition of Home Services

Before discussing possible problems of gender equality, it seems to be helpful to clarify the meaning of the legal provision. Of course, it is only for the Turkish legislator to decide as to how a national provision shall be set out. But a precise and easily understandable legal wording would be helpful evaluating whether it provokes gender equality problems.

The provision does not define the term 'home services'. Applying a common understanding, it indicates that it applies to services that include all works necessary to keep things in order in the house or apartment of another person. During a discussion in December 2010, some ex-

perts of SSI have taken the view that the term 'home services' in Article 6 para 1 item (c) SIUHL and the term 'domestic services' in Article 4 TLA have an identical meaning. It might speak for this view that the corresponding provision in the former Social Insurance Act *(SIA)* had used also the term 'domestic service' *(see Article 3 No I item B thereof)*. Without having further background information, it is not clear whether the textual amendment in Article 6 para 1 item (c) SIUHIL involves also an amendment as far as the content is concerned. But it seems very likely that the textual amendment is due to the different personal scope of SIA and SIUHIL. The SIA covered employed individuals so that the same term could be used both in social security legislation and the labour legislation *(TLA)*. The SIUHIL has included also self-employed persons so that a new term has to be enshrined that covers both employed and self-employed persons. Following such an interpretation, the term 'home services' would indicate that the different terms concern only a different personal scope of application, but not an amendment in its content.

Even if so, a reference to Article 4 TLA is of little help, because this provision, too, does not give a definition. It could be possible that the Turkish Parliament has referred to an international understanding, when it has enshrined the term 'domestic services' in Article 4 TLA and thus has taken over the term from the former SIA. If so, it looks like that this term corresponds with the term 'domestic works' used in the international discussion. In such a case it could be recommendable to rely on descriptions and information that have been given by ILO and have been the basis of the new ILO Domestic Workers Convention No 189, adopted on June 16, 2011 *(in this context it is irrelevant that the Convention is not yet in force)*. According to Article 1 thereof, the term 'domestic work' means work performed in or for a household or households. Of course, this again is only a vague definition. Relying on reports and information given by ILO[36] it can be stated that domestic works cover, inter alia, those such as cleaning, cooking, washing the laundry and looking for elderly or persons with disability or even domestic animals. Domestic workers may also carry out works as guardians, gardeners or drivers of vehicles for private use.

So, in the end, there might be good reasons for using the term 'home services' in Article 6 para 1 item (c) SIUHIL and the term 'domestic services' in Article 4 TLA, although both provisions apply substantively to the same kind of works.

1.3.3.2 Definition of Permanent / Non-Permanent Worker

The terminology problem dealt with above is not the only problem that makes the understanding of Article 6 para 1 item (c) difficult. Severe interpretation problems are generated by the restriction enshrined in that provision. It does not apply to 'charged and permanent workers'. In lack of any definitions, the wording does not make it quite clear which persons are addressed. This does not go for the term 'charged worker'. It seems that it applies to those who receive a pay on a contractual basis. So, in the end, it is the term 'permanent worker' that causes an interpretation problem.

A possible interpretation could be that the concept of a 'permanent worker' refers to Article 10 TLA. Pursuant to this provision, an employment which, owing to its nature, lasts only up to

[36] As to classifying domestic works and the categories thereof, see: ILO law and practice report on domestic work, pp 7, 28 et seqq, which had been prepared for the 99th Session of the International Labour Conference in June 2010 (http://www2.ilo.org/public/libdoc/ilo/2009/109B09_24_engl.pdf); see also the brief information given under: ILO home > topics > domestic workers (http://www.ilo.org/travail/areasofwork/lang--en/WCMS_DOC_TRA_ARE_DOM_EN/index.htm)

30 days is transitory work, and employment which requires a longer period is continual work. However, several criteria are against such an interpretation.

One argument follows from the different terminology in both articles. While Article 6 para 1 item (c) SIUHIL uses the term 'permanent worker', Article 10 TLA uses the term 'continual worker'. If the first provision would refer to the second one, it should be expected that both provisions apply the same terminology.

In addition, it seems to be doubtful whether the substantive scope of application of Article 6 para 1 item (c) SIUHIL corresponds with that of Article 10 TLA. SSI representatives have commented that all home services of 'temporary nature' come under that provision, even if they are carried out consecutively for more than 30 days *(without a work contract)*. This seems to be doubtful. Disregarding that the TLA applies only to persons working on an employment contract *(Articles 1 para 1 and 2 para 1 thereof)*, the wording of Article 10 thereof stipulates that two conditions have to be fulfilled concurrently: (1.) a specifically described work must be performed and (2.) a time limit has to be observed: To be considered as a 'transitory employment', it must be a work that **'lasts only up to 30 days'** and, second, not every kind of temporary work, but only that one which lasts up to the cited period, **'owing to its nature',** is covered by the provision. There may be many reasons why home services in the sense of Article 6 para 1 item (c) SIUHIL last only up to 30 days. However, it is not clear, why they could be limited to 30 days just owing to their 'nature'. At least, the term 'owing to its nature' would need a particular interpretation.

A reference made by SSI representatives to special provisions concerning cloth production, does not seem to be of interest for the interpretation problem at issue. It may be that in this branch, even a one-day work is considered to be a permanent work, but it is obvious that such a regulation does not exist under SIUHIL as far as home services are concerned. So provisions concerning cloth production do not seem to be of great help for the interpretation of Article 6 para 1 item (c) SIUHIL.

Finally, a reference to Article 10 TLA would imply that only home services carried out by employed workers and not by self-employed workers would come under Article 6 para 1 item (c) SIUHIL. The personal scope of application of TLA applies only to employees working on an employment contract *(see Articles 1 para 1 and 2 para 1 thereof)*.

So it seems very likely that a reference to Article 10 TLA cannot be construed. The mere wording of Article 6 para 1 item (c) SIUHIL does not discover its scope of application. It only shows that 'charged and permanent workers' do not come under the derogation provision. The conjunction 'and' instead of 'or' makes it clear that the permanent worker must be, at the same time, a charged worker. This stands to reason. The term 'charged' refers to a paid work which is always based on a contract. An unpaid work on a non-contractual basis is not of interest for the social insurance law. This goes also for non-permanent workers, otherwise it would not have been necessary to enshrine Article 6 para 1 item (c).

In lack of a legal definition in Article 6 para 1 item (c) SIUHIL, a reference to a general international understanding of the term could be helpful. According to DIR 1999/70/EC[37] and clause 3 point 2 of the annexed Framework Agreement, a permanent worker means a worker

[37] of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ L 175/43 of 10/07/1999)

with an employment contract or relationship of indefinite duration. According to ILO[38] the term 'non-permanent workers' covers several categories of workers, namely

- casual workers,
- temporary workers,
- task workers,
- seasonal workers and
- contract workers.

It looks, as if Article 6 para 1 item (c) refers to temporary workers. A temporary employee (the some goes for a self-employed temporary worker) is someone who is employed for a fixed time period or for a specific task only *(once that task is completed, the employment relationship ends*). If this category of workers comes under the provision at issue, it could be recommendable to precise its wording and, of course, it has not apply only to employed, but also self-employed workers.

It could be appropriate to introduce a concrete time limit *(e.g. 30 days or whatever)* which may not be exceeded. As the works at issue are not automatically limited to a certain period of time, just 'owing to their nature', it would be helpful to enshrine a concrete time limit. Finally, it could be necessary introducing a reference period *(e.g. of half a year or one calendar year or whatever)*, i.e. a period during which the work, restricted to the time limit at issue, may be executed only once. Otherwise it would not be clear what should happen, if a worker picks up, after a short interruption, again a similarly limited work at the same or another place. Are workers who perform several of such works in succession during a certain reference period not deemed to be insurance holders?

1.3.3.3 Possible Indirect Discrimination

Article 6 para 1 item (c) SIUHIL could create a gender equality problem. It excludes short-term occupational activities from social insurance, deviating insofar from Article 4 para 1 SIUHIL. If more persons of one sex than of the other one would be put at that disadvantage, the exclusion could provoke an indirect discrimination, unless the unequal treatment could be justified. Principally, a national legislation, excluding marginal employments from access to social insurance, does not constitute discrimination on grounds of sex, provided the discrimination is justified by legitimate aims of national social policy[39]. In case of Article 6 para 1 item (c) SIUHIL a problem may arise from the fact that the provision excludes only non-permanent / temporary works carried out as 'home services', but not other professional activities. It might be more difficult to justify discrimination in a specific sector than in cases of a general application covering all branches of professional activities.

Sufficient information on home services in Turkey has not been available. So it can only be stated that domestic workers are explicitly excluded from TLA *(Article 4 thereof)* and from SIUHIL, but come under the provision on payment of minimum wage[40]. Any information on home services carried out by self-employed workers is missing. In the present report it cannot be proved by statistics whether home services are carried out by more women than men. But

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[38] see: Booklet 4, Gender Equality, A Guide to Collective Bargaining, Defending Rights of Non-permanent and Vulnerable Workers, http://www.ilo.org/public/english/dialogue/ifpdial/downloads/papers/booklet4.pdf; last access on 29/1/1011.

[39] ECJ, judgment of 15/12/1995, C-317/93, ECR *1995, I-04625 (case Nolte);* judgment of 15/12/1995, C-444/93, ECR *1995, I-04741 (case Megner/ Scheffel)*

[40] ILO law and practice report on domestic work, footnote 36, Appendix p 121

as it seems that this kind of services cover the same kind of works coming under the international term of domestic works, it could be recommendable to rely on reports and information given by ILO in order to illustrate the situation in this sector of professional activities.

The cited ILO law and practice report on domestic work *(see footnote 36 p 1 thereof)* has pointed out that 'domestic work is one of the oldest and most important occupations for millions of women around the world. Domestic work is undervalued and poorly regulated. It is undervalued because the skills and competencies associated with it are considered to be a woman's innate, rather than acquired capacity. It is poorly regulated because it is not regarded as "real" work, and, where the law protects it, enforcement is often problematic. Decent work deficits for this large category of workers are huge. Many domestic workers remain overworked, underpaid and unprotected. This state of affairs is due in part to the fact that paid domestic work remains virtually invisible as a form of employment in many countries. Domestic work does not take place in a factory or an office, but in the home. The employees are not male breadwinners, but overwhelmingly women. They do not work alongside other coworkers, but in isolation behind closed doors. Their work is not aimed at producing added value, but at providing care to millions of households. Domestic work typically entails the otherwise unpaid labour traditionally performed in the household by women. This explains why domestic work is not only undervalued in monetary terms, but is also often informal and undocumented'[41].

If the results of the ILO research published in the quoted report are also typical for the situation in Turkey, it had to be stated that the overwhelming majority of individuals performing home services would be women. They are put at a disadvantage due to their exclusion from social protection provided for under SIUHIL *(and under TLA)*. Such an unequal treatment would create an indirect discrimination in the sense of Article 4 para 1 DIR 79/7/EEC, unless it could be justified by objective reasons and the legislative solution would be in line with the principle of proportionality. The easiest way to avoid all the gender equality problems would be to abrogate Article 6 para 1 item (c) SIUHIL. Having in mind that non-permanent workers, and among them temporary workers, belong to the group of vulnerable workers (*see ILO guide cited above)* and having in mind that the most vulnerable among them are domestic workers *(see the above cited ILO report on domestic workers)*, such a solution could be indicated.

If the Turkish legislator wants to keep up the current legal version, it has to be explained which objective reasons of the social policy pursued by the State might justify the indirect discrimination of women and why there are no other solutions possible that would affect women in a less disadvantageous way. One solution could be to limit the exclusion to marginal activities. This time-limit must not be identical with that one that shall characterize the term temporary and non-permanent worker respectively as suggested above. Otherwise the insertion of another time-limit would not be necessary. A marginal activity excluding from social insurance could, e.g., be given where the non-permanent worker does not carry out home services for more than 30 days in one calendar year. Of course, also another time-limit is conceivable, such as two months in a year etc. Further on, the Turkish legislator could consider enshrining a lower earning limit. If the home services are carried out for more than one client, the earnings have to be added up. When the added earnings exceed the lower earning limit, the home service worker will become insured in all activities.

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[41] ILO law and practice report on domestic work, footnote 36, pp 1, 87 and 94

It has to be recognized that the enforcement of rules protecting the non-permanent workers in question will produce a lot of problems. In all EU Member States where domestic workers are subject to compulsory social insurance exists an extremely large so-called black market of unregistered activities (*e.g. for Germany an estimated rate of more than 90 % is reported)*. Due to the fact that virtually invisible' activities are concerned, controls are very difficult. In most cases the illegal activities are discovered by chance *(e.g. due to a work accident or through information from another public administration which has obtained knowledge of the engagements or through information from a 'kindly' neighbour mostly communicated by an anonymous announcement)*. However, difficulties of the enforcement should not prevent a legislator from adopting necessary measures and legal provisions respectively. The acceptance in practise could be enhanced by accompanying awareness raising programmes. Moreover, the owner of a household takes a great risk if he/she does not notify the competent social security institution of the start of an insured activity in the sector of home services. In case of discovery he/she has to pay premiums for the past period and has to expect a fine.

1.3.4 Workers Employed in Temporary Works on Service Contracts in Agricultural Works or Forestry Works and Self-employed Workers Carrying out Agricultural Activities

Article 6 para 1 item (ı) SIUHIL applies to two different groups of workers. Common to both is that they must work in private economic sectors, because public authorities are excluded.

- *Employed workers carrying out 'temporary works' in agricultural or forestry works*

This group comprises employed workers on service contract, i.e. those who come principally under item (a) of para 1 of Article 4 SIUHIL. The provision does not define the term 'temporary work'. In lack of a definition it could be construed as having different meanings.

If the legislator of SIUHIL has had in mind to refer to similar contractual forms under labour legislation, it has to be noticed that the TLA uses a similar term exclusively in Article 7 thereof. This provision lays down the rules on 'temporary employment relationship'[42]. It allows the transfer of an employee to another establishment within the structure of the same holding company or the same group of companies, or to another employer. All the evidence seems to indicate that Article 6 para 1 item (ı) SIUHIL does not refer to temporary employment relationship in the meaning of Article 7 TLA, because it would simply not be understandable, why in cases of temporary employment relationship social insurance should be excluded.

It looks very much as if the term 'temporary work' has to be construed as meaning work for a definite period. In such a case Article 6 para 1 item (ı) SIUHIL could correspond to two provisions of TLA. On one side, it could refer to a transitory employment in the sense of Article 10 TLA. On the other hand, it is also imaginable that it could correspond with Article 11 para 1 TLA which applies to an employment contract for a definite period (= fixed-term work) Applying an international understanding of the term 'temporary work' *(see above No 1.3.3.2)*, it looks like, as if the provision applies to fixed-term work. In such a case, its duration should be put in concrete terms.

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[42] As to EU law, see: Directive 2008/104/EC of the European parliament and of the Council of 19 November 2008 on temporary agency work, OJ L327 of 5/12/2008; Council Directive 91/383/EEC of 25/06/1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship; *OJ L 206/21 of 29/07/1991*

If the provision refers to fixed-term work, it would enshrine a lower working-days limit. As already mentioned above *(no 1.3.3..2 of this part of the report)*, the exclusion of short-term employment from access to social insurance, does, principally, not constitute discrimination on grounds of sex, if it is justified by a legitimate aim of national social policy. An experience seems to indicate that in case of forestry works more men than women could probably be affected by the derogation rule, whereas the situation in the agricultural sector is not so obvious. Anyway, it has to be clarified which sex could be more affected by the provision at issue. If necessary, it has to be explained why temporarily employed workers in the agricultural and forestry sectors are treated differently compared with workers in other economic sectors. In order to improve the social protection of the workers concerned, it could also be worth considering abrogating the provision completely.

- *Self-employed workers executing agricultural activities*

The second group coming under Article 6 para 1 item (ı) SIUHIL compromises individuals who work independently on their own account and who are active in agricultural activities. They are not deemed to be insurance holders if they can document that, after deducting the costs of the activity, the monthly average of their income from this activity is less than thirty times the lower limit of daily earning subject to premium. A similar provision applies to traders and artisans (see below the explanations on item <k> thereof). Differing from Article 4, Article 6 para 1 item (ı) SIUHIL creates a lower earning limit. The experience seems to indicate that more men than women are affected. Even if so, the exclusion of such marginal activities could be principally justified with a legitimate aim of social policy.

But another problem remains to be solved. The derogation rule could violate the general principle of equal treatment. Other self-employed who are not working in the agricultural sector (or who are not traders or artisans), but who are in a similar economic situation are not excluded from social insurance. So it seems necessary to set out the reasons, why men in agricultural activities are treated unequally in relation to self-employed in those other economic sectors. If a justification could not be given, the law should refrain from a special rule for agricultural activities. The other solution could be to amend Article 6 para 1 item (ı) SIUHIL in a way that covers all self-employed exempt from income tax and gaining a low income as described.

1.3.5 Registered Traders and Artisans Exempt From Income Tax

Article 6 para 1 item (k) SIUHIL covers individuals who work on their own names and accounts and are exempt from income tax and registered to the registry of traders and artisans. They are not deemed to be insurance holders, provided that they can document that, after deducting the costs of the activity, the remaining amount of their monthly activity income is less than thirty times the lower limit of daily earning subject to premium.

It is not obvious that the provision creates a gender equality problem. With view to the general principle of equal treatment, it has to be stated that all traders and artisans in Turkey are registered to the registry of traders and artisans so that there is no unequal treatment among these professional groups. The question that remains is why only traders and artisans exempt from income tax are excluded from social insurance, but not other self-employed who are also exempt from income tax and have a similar low income. The problem is comparable with that which has been shown under the proceeding no 1.3.4. If a justification for the unequal treatment cannot be given, it should be considered broadening the scope of application by deleting the words 'and registered to the registry of traders and artisans'. Then all self-employed, in whatever profession and economic sector they may be active and who

come under the lower earning limit will be excluded from insurance (as to the agricultural sector see above no 1.3.4). But, of course, it could also be worth considering abrogating the provision completely.

2. Beginning of Insured Status and Notification and Registration

The rules on the beginning of the insured status laid down in Article 7 SIUHIL create no problems with view to gender equality. Like in nearly all national social security schemes, the insurance rights and obligations start, principally, from the beginning of work or self-employed activities. It is not necessary to deal with further details. The same goes for the rules on notification and official registration of insurance holders laid down in Article 8 SIUHIL.

3. Termination of Insurance

Also the general rules on the termination of the insurance laid down in Article 9 para 1 SIUHIL do not provoke any gender equality problems. Generally, the insurance ends when the conditions of access to it are no longer fulfilled, e.g. in cases of termination of the service contract, termination of self-employed activities, cancellation of registry etc. *(to further details see Article 9 para 1*).

Some problems may arise from Article 9 para 2 SIUHIL which provides a special termination in case of sickness and maternity. The peculiarities do not relate to all situations which might occur in case of maternity and sickness, but only to cases of unpaid leave, strike or lockout (item <a>). All other situations will come under the general rules of para 1 thereof (item <b>)

Leaving aside sickness, it is the termination of insurance during maternity in case of unpaid leave which could raise questions in the light DIR 92/85/EEC. Article 9 para 2 item (a) SIUHIL rules that, in cases of execution of provisions on maternity, the insurance status shall be deemed to be lost starting from the 'thirtieth' *(correctly: tenth)* day following the date, on which an unpaid leave ends *(as to an exception from this provision, see Article 16 para 5)*. The English text contains an obvious translation mistake, when mentioning the 'thirtieth' day. According to the Turkish version it is the 'tenth' day.

This termination provision concerns only the area of social insurance, but not of universal health insurance, i.e. it does not imply the lost of the universal health insurance *status (see Article 60 para 1 item <g>, read in connection with Article 61 para 1 item <f>)*. The problem arises from the term 'unpaid leave'. The wording does not make it clear to which period of unpaid leave is meant. Article 9 para 2 item (a) SIUHIL refers, on one hand, to 'provisions on maternity' and, on the other hand, to 'unpaid leave'. Thus the wording and its context seem to indicate that the provision addresses an unpaid leave during the period of maternity. Where the law refers to the term 'maternity', it has to be construed as meaning 'maternity status' in the sense of Article 15 para 2 SIUHIL and therefore the period from the date of pregnancy till the end of maternity leave. In such a case the provision would refer to an unpaid leave granted till the end of maternity status, but not for a successive period. So Article 9 para 2 item (a) SIUHIL could address, inter alia, Article 8 para 3 of the 'Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes' *(in the following abbreviated as 'Working Conditions Reg')*. This provision grants an unpaid leave to women who are not able to carry out a work at their workplace, due to pregnancy. Supposed such a situation may come under the scope of Article 9 para 2 item (a) SIUHL, the termination of insurance during maternity status could be problematic with view to DIR 92/85/EEC that aims to protect pregnant women.

These problems would be avoided, if Article 9 para 2 item (a) SIUHIL could be construed as referring to an 'unpaid leave' granted after the expiry of maternity status. Thus it could, for example, cover an unpaid leave awarded by Article 74 para 5 TLA. According to this provision a female worker who has given birth to a child can demand an unpaid leave up to 6 months after maternity leave. However, wording and context of Article 9 para 2 item (a) SIUHIL are against such an interpretation. So it should be advisable, to supplement the provision text by enshrining explicitly that the provision applies to an unpaid leave after the expiry of maternity leave, or by simply referring to Article 74 para 5 TLA, if only this kind of unpaid leave should be addressed.

II. Short-term Insurance Branches

Cash benefits are provided for under short-term insurance (*kısa vadeli sigorta kolları)*. Its branches cover social risks that are protected in all modern social security schemes.

1. Substantive Scope of Application (Scope Ratione Materiae)

The branches coming under short-term insurance are generally listed up under Article 3 point 4 SIUHIL. The provisions in Part Three of Section Two describe the scope of application in detail, such as for accident insurance in Article 13, occupational disease insurance in Article 14, sickness insurance in Article 15 para 1 and maternity insurance in Article 15 para 2. The substantive scope of application provokes no problems regarding gender equality. However, some of the provisions on benefits could be not in line with gender equality.

2. Rights Provided from Work Accident, Occupational Disease, Sickness and Maternity Insurance

Article 16 provides six different kinds of cash benefits which can be subdivided in three categories (temporary, permanent and single payments):

- **Benefit** for periods of **temporary incapacity** due to work accident, occupational disease, sickness or maternity status *(Article 16 para 1 item <a> and para 2)*, paid from work accident, occupational disease, sickness or maternity insurance;
- *(temporary)* **Nursing benefit** applicable by the date of delivery over the tariff determined by the Board of Directors of the SSI, paid from maternity insurance *(Article 16 para 3*;
- **Permanent incapacity income** for insurance holders whose earning power in the profession has been reduced by at least 10% due to a work accident or occupational disease *(Article 16 para 1 item <b> and Article 19)*, paid from work accident and occupational disease insurance;
- *(permanent)* **Income** awarded to right holders of insurance holders who died due to work accident or occupational disease *(Article 16 para 1 item <c> and Article 20 para 1 – 5)*, paid from work accident and occupational disease insurance;
- **Marriage bonuses** *(single payment)* to female children who were put on income *(Article 16 para 1 item <d> and Article 20 para 6)*, paid from work accident and occupational disease insurance;
- **Funeral benefit** *(single payment)* given for insurance holders who have died of work accident or occupational disease *(Article 16 para 1 item <e> and Article 20 para 6*.

The provisions on funeral benefits cause no problems in the light of gender equality *(see Article 20 para 6, read in connection with Article 37 para 3 – 5)*. So they can be ignored in the following.

3. Permanent Incapacity Income for Insurance Holders

The permanent benefit awarded to insurance holders is the permanent incapacity income *(sürekli iş göremezlik geliri)*.

3.1 Conditions of Entitlement

The insurance holder is entitled to permanent incapacity income, if his / her earning power in the profession, due to the disease or disabilities caused by work accident or occupational disease, is reduced by 10 %, at least *(Article 19 para 1 SIUHIL)*. The extent of lost has to be determined by the SSI's Health Committee based on reports issued by the health committees of health-care service providers authorized by SSI: Male and female workers are qualified under the same conditions.

3.2 Calculation and Start

The benefit has to be calculated on the basis of the rate of losing earning power in the profession. In case of permanent full incapacity the insurance holder is put on an income of 70 % of the monthly earning calculated in accordance with Article 17 SIUHIL: In case of permanent partial incapacity the payable amount shall be calculated on the basis of the amount to be paid in case of full incapacity multiplied with the degree of incapacity. Where the insurance holder is in need of permanent care of another person, he / she shall be put on 100 % income.

The permanent incapacity benefit shall start at the beginning of the month following the date on which temporary benefit ends or the date of health committee report. These provisions, too, do not show any gender discrimination.

3.3 Joining Permanent Incapacity Income and Pension

The owner of a right to permanent incapacity income may also be entitled to a pension granted from long-term insurance *(thereto see the explanations under the following no III)*. They shall be granted the total of the highest of the pensions or incomes and half of the lower one. In case of equality, all of the income from work and occupational insurance and half of the pension from invalidity, duty disability and old-age shall be payable to the insurance holder *(Article 54 para 1 item <c> SIUHIL)*. The provision causes no gender equality problems.

4. Income for Right holders of the Deceased Insurance Holder

The permanent benefit awarded to right holders of an insurance holder who has died due to work accident or occupational disease is called 'income'.

4.1 Conditions of Entitlement

The only condition for the award of an income is that the individual is a right holder, i.e. spouse, child or parent of an insurance holder who has died due to work accident or occupational disease *(Article 20 para 1 SIUHIL)*. It shall not be considered whether the death is connected with work accident or occupational disease where the insurance holder has lost 50 %

or more of his / her earning power in profession. Male and female right holders are qualified under the same conditions.

4.2 Calculating Income and Dividing Between Right Holders

To fix the amount of income granted to right holders, a basic amount has to be determined from which a different percentage has to be granted to the survivors. As to the basic amount, Article 20 SIUHIL differentiates between two constellations *(see para 2 and 3 thereof)*. If the insurance holder has died with the permanent incapacity income due to losing 50 % or more of the earning power in profession, the right holder shall be put on income at a basic rate of 70 % of the monthly earnings calculated in accordance with Article 17. If the deceased insurance holder has suffered from losing less than 50 % of the earning power in profession the right holder shall receive the same amount that has been granted to the insurance holder, however, if the death is related with a work accident or occupational disease this shall be at a rate of 70%.

Which share of the basic amount has to be awarded to the right holders depends on the family status. Insofar Article 20 para 1 – 3 SIUHIL refers to Article 34 *(50 % or 70 % to the spouse, 25 % to a child and 25 % to the parents)*. As different rules apply, partly, to sons and daughters of a deceased insurance holder; the inequality may create gender discrimination *(see hereto the explanations below under no III 6.5.3 <page 70 et seqq>)*.

4.3 Joining Incomes

Under short-term insurance an individual may be qualified, on one side, for both a permanent incapacity income granted from his / her own insurance and for income due to his / her deceased spouse, and, on the other side, for several incomes.

If an individual is eligible for a permanent incapacity income as well as income due to the deceased spouse, both incomes shall be granted *(Article 54 para 1 item <b> no <1> SIUHIL)*.

Individuals qualified also for next spouse in case the marriage is terminated due to death, the preferred income shall be payable *(no <5> thereof)*.

If individuals are entitled to survivors' income both from spouse and from parents, it depends on their preference which income shall be payable (*no 4 thereof)*.

For children qualified for income separately from mother and father, all of the higher and half of the lower one shall be payable *(no 2 thereof)*.

If mother and father are qualified for income from more than one child, all of the income from the first two files allowing the highest payment and the half of the lower one shall be payable *(no 3 thereof)*.

5. Marriage Bonuses

Article 20 para 6 SIUHIL refers to Article 37 para 1 and 2 that provide the conditions according to which marriage benefits have to be granted under survivors' insurance. (So reference can be made to the corresponding explanation below under no III 6.6.< page 73>)

6. Benefits Payable for Periods of Temporary Incapacity

Article 18 SIUHIL provides different rules according to which it depends on the short-term insurance branch to whom and under which conditions a temporary incapacity benefit *(geçici iş göremezlik ödeneği)* has to be awarded.

6.1 Temporary Incapacity Due to Work Accident or Occupational Disease

An insurance holder suffering from temporary incapacity due to work accident or occupational disease shall receive the benefit for each day of incapacity *(Article 18 para 1 item <a> SIUHIL)*. There are, principally, no further eligibility conditions and no waiting periods.

The provision does not refer to a special group of insurance holders. Thus all insurance holders can claim for the benefit, if the temporary incapacity is due to work accident or occupational disease, provided they are not excluded by special other provisions. Such an exclusion exists for the insurance holders listed up under item (c) of para 1 of Article 4 SIUHIL. Para 7 thereof provides that provisions of SIUHIL on short-term insurance shall not be applicable to the insurance holders under item (c) as long as they are only insured under this item and not under another item of para 1 thereof. They continue to be covered by the Civil Servants Law.

In the end, all insurance holders listed up under items (a) and (b) of para 1 of Article 4 can claim for a temporary incapacity benefit, if the incapacity is due to work accident or occupational disease. The same goes for insurance holders under Article 5 thereof, if they are covered by work accident and occupational disease insurances.

Regarding the broad scope of application of Article 18 para 1 item (a) SIUHIL, which does not differentiate between men and women, it can be noticed that the provision does not produce any gender equality problems.

6.2 Temporary Incapacity Due to Sickness

Employed workers suffering from temporary incapacity due to sickness shall receive temporary incapacity benefit starting from the third day of incapacity *(two days waiting period)*, provided that minimum 90 short-term insurance premium is notified within one year before the starting day of temporary incapacity. This provision covers only insurance holders under item (a) of para 1 of Article 4 and, further on, those who are deemed to be insurance holders under this provision according to Article 5 item (e) and (g).

Pursuant to the wording of Article 18 para 1 item (b), insurance holders under item (b) of para 1 of Article 4 cannot claim for the benefit where the incapacity is due to sickness. Self-employed workers have to cover them-selves by private sickness insurance. Insurance holders under Article 4 para 1 item (c) are not named in Article 18, because they are excluded from short-term insurance pursuant to Article 4 para 7.

The exclusion of self-employed workers may povke a problem under premium law. The short-term insurance premium is the same for employed and self-employed workers *(Article 81 item (c) read in connection with Article 83 SIUHIL)*, none the less they are not covered to the same extent. However, this is not a problem of gender equality, but of the general principle of equal treatment.

6.3 Temporary Incapacity in Case of Maternity

Article 18 para 1 item (c) SIUHIL rules that in case of maternity of headmen stated in item (a) and (b) of para 1 of Article 4 and female insurance holders under numbers (1), (2) and (4) of the same item, each day of not working including eight-week-periods before and after birth *(in case of multi birth adding another two weeks)* a benefit for temporary incapacity shall be payable, provided that minimum 90 day short-term insurance premium is notified within one year before birth. On one hand, the wording of the English version of the provision is a bit irritating. On the other hand, the provision seems to be only partly in line with EU law.

First, it has to be noticed that 'headmen' are, contrary to the English text, not mentioned under item (a), but under item (b) of para 1 of Article 4 SIUHIL: Then the text refers only to female insurance holders under numbers (1), (2) and (4) 'of the same item'. As these numbers are only mentioned under item (b) thereof, the text of the provision does not cover female insurance holders under item (a) of para 1 of Article 4. It cannot be supposed that female workers employed through a service / employment contract should be excluded. To avoid such an absurd result which would also obviously violate DIR 92/85/EEC, the provision has to be construed as covering both female insurance holders under item (a) and (b) of para 1 of Article 4 SIUHIL.

As to the period of payment, the provision corresponds with Article 74 para 1 TLA, at least in so far as employed female workers are entitled under Article 18 para 1 item (c) SIUHIL. According to the labour law provision a *(n unpaid)* leave of 16 weeks has to be awarded. The provision complies, principally, with DIR 92/85/EEC protecting women during periods of pregnancy and maternity. Article 8 thereof requires a continuous period of maternity leave of at least 14 weeks so that the Turkish rules are more favourable for women. It is not sure whether the proposals of the European Commission and the European Parliament for a directive amending DIR 92/85/EEC *(extension of the minimum length of maternity leave up to 18 and 20 weeks respectively[43])* will become applicable law. The award of temporary incapacity benefit during maternity leave also complies with Article 11 point 2 item (b) and 11 point 3 DIR 92/85/EEC[44].

Regarding insured self-employed female workers or the wives of insured self-employed workers, Article 18 para 1 item (c) SIUHIL has to be evaluated in the light of DIR 2010/41/EU. The provision seems to be not in line with EU law where it excludes two groups of women from the benefit.

As to female self-employed workers coming under item (b) of para 1 of Article 4, a restriction has to be observed. Article 18 para 1 item (c) refers only to the numbers (1), (2) and (4) of that provision, but not to number (3). That means that female associates of joint-stock companies who member to board of directors, active partners of commandite companies, all partners of other company and maritime joint-adventures cannot apply for temporary incapacity benefit in case of maternity. As the SIUHIL considers them to be self-employed workers and therefore categorizes them under item (b) of para 1 of Article 4, their exclusion from incapacity benefit in case of maternity seems to be not in line with Article 8 DIR 2010/41/EU. According to this provision the Member States shall take the necessary measures to ensure that female self-employed workers may, in accordance with national law, be granted a sufficient maternity allowance enabling interruptions in their occupational activity owing to pregnancy or motherhood for at least 14 weeks (para 1 thereof). The allowance shall be deemed to be sufficient, if it guarantees an income at least equivalent to the allowance which

[43] As matters stand on July 13, 2011
[44] see ECJ, judgment of 27/10/1998, C-411/96, ECR 1998, I-06401, para 31 – 35 *(case Boyle)*

the person concerned would receive in the event of a break in her activities on grounds connected with her state of health *(para 3 item <a> thereof)*.

So Article 18 para 1 item (c) SIUHIL complies with DIR 2010/41/EU where it provides temporary incapacity benefit for female self-employed coming under Article 4 para 1 item (b) numbers (1), (2) and (4), but not where it excludes those listed up under number (3) thereof. At least at a first glance, the exclusion of no (3) thereof is not understandable and needs to be justified. Even if DIR 2010/41/EU leaves a broad margin of discretion to the Member States on how to implement the Directive, it has to be observed that they shall take the necessary measures to ensure that female self-employed workers have access to any existing services supplying temporary replacements or to any existing national social services *(Article 8 para 4 DIR 2010/41/EU)*. Also female self-employed workers coming under number (3) at issue shall be, principally, entitled to temporary incapacity benefit during a period of 16 weeks.

Turkish experts do not share this view. They have argued that temporary incapacity benefit is a payment made in order to compensate the income loss suffered by the insured due to work accident, occupational disease, illness and maternity. Thus, as the operations of the company shall continue and there shall be no loss of income in the event of maternity of a female associate of a company, benefiting from temporary incapacity benefit has not been foreseen.

As temporary incapacity benefits are earnings replacement benefits, they are, of course, designed to compensate income loss resulting from the fact that the persons concerned are not able to work and to earn an income due to their sickness or maternity status. This should not arise any problems in so far as employed workers are concerned. According to the 'no work/no pay principle' they do not receive wages for periods during which they do not work *(unless a legal or contractual provision orders something different)*. A problem could arise in case of self-employed. It might occur that they get income which covers periods during which they are not able to work. In such a case the refusal of an earning replacing benefit can be objectively justified.

Article 18 para 1 item (c) SIUHIL causes four problems. Firstly, it excludes female workers coming under no (3) of item (b) of para 1 of Article 4 from temporary incapacity, i.e. also those workers who possibly do not gain any income during the period at issue. Secondly, the exclusion affects only cases of maternity, not those of work accident or occupational disease (in case of sickness/illness self-employed are not entitled to temporary incapacity benefit). Thirdly, the regulation in force creates an unequal treatment between insured self-employed persons. It could be possible that the self-employed workers coming under no (1), (2) and (4) thereof also receive an income covering periods during which they do not work, in particular, if they work together with other self-employed workers, in whatever form of cooperation. Fourthly, Article 18 para 2 sentence 2 SIUHIL ensures a temporary incapacity benefit for self-employed in case of maternity under the only condition that they do not work before or after birth. Thus this provision refers only to a non-working period, but does not stipulate that the self-employed concerned have at the same time also an income loss.

In summary, it can be noted that the provision in force does not justify the exclusion of the female self-employed workers concerned. It excludes persons who possibly receive no income during the periods at issue. It creates an unequal treatment between insured self-employed persons and is not in line with sentence 2 of para 2 of Article 18. In its present version it does not comply with Article 8 DIR 2010/41/EU.

However, the Turkish legislator is not prevented from amending the law in force so that income which is really gained can be taken into account. Article 8 para 3 DIR 2010/41/EU requires that a 'sufficient' maternity allowance has to be granted enabling interruptions in occupational activities owing to pregnancy or motherhood. Where women receive an income for the same period, they possibly do not need a support enabling them (economically) to interrupt their work. So Article 18 para 1 item (c) SIUHIL could be amended as follows: The restriction to no (1), (2) and (3) of item (b) of para 1 of Article hast to be abolished so that the female workers coming under no (3) thereof are principally also entitled to temporary incapacity benefit. Then a new sentence 2 may be incorporated providing that income received for the same period shall be deducted from the amount of the temporary incapacity benefit for which the female workers are eligible.

In the light of DIR 2010/41/EU also the exclusion of another group of women seems to be problematic. Article 18 para 1 item (c) SIUHIL covers only female insurance holders, but not an uninsured wife of a male insurance holder[45]. The lack of a right to cash benefits might cause problems, where a spouse of a male self-employed worker is concerned, provided she works in his business.

Art 8 DIR 2010/41/EU does not only apply to self-employed female workers, but also to spouses of insured male self-employed workers. Read in connection with Article 2 para 2 thereof, it stipulates that the wife of a self-employed worker who works in his business without being employee or his business partner shall be granted a sufficient maternity allowance. Thus the wives concerned must be eligible for such a benefit, if it is provided for in the national insurance system. The reason might be that women working in the business of their husbands have a 'quasi-employee-status'. The Turkish social insurance provision in question does not meet the requirement of Article 8 DIR 2010/41.

Even on a national legal level this does not conflict with Article 6 para 1 item (a) SIUHIL according to which employer's spouses working free of charge in his/her business are not deemed to be insurance holders. A national social security scheme can provide a certain social protection also for not insured persons, in particular for family members. Overmore, the EU law at question applies expressly to not insured spouses.

Finally it should be notified that the gender equality problem provoked in item (c) of para (1) of Article 18 is likely to continue in item (d) thereof. This provision provides that, if in case of maternity the insured female worker works until three weeks before birth, a benefit for temporary shall be payable for the periods added to the rest period after birth. Article 29 of Law No 6111 has added a same regulation in case of a premature birth. In consequence of the legislative decision under item (c) thereof, female self-employed workers coming under no (3) of item (b) of para 1 of Article 4 SIUHIL are again excluded. Again the exclusion is not in line with Article 8 DIR 2010/41/EU. The same goes for the exclusion of not insured wives of insured male self-employed workers.

6.4 Peculiarities for Self-employed Workers

Article 18 para 2 SIUHIL enshrines a special rule concerning exclusively self-employed persons, namely those deemed to be insurance holders under item (b) of para 1 of Article 4 thereof. This group can only profit from temporary incapacity benefits payable in cases of work accident, occupational disease and maternity. In these cases the benefit shall be paid to

[45] Of course, she will receive health care services under the Universal Health Insurance Law

them during the period of inpatient treatment or the period of rest report granted due to such treatment or after inpatient treatment, provided that any kind of premiums or debts related with premiums, including universal health insurance, are paid. Differing from the general rule, temporary incapacity benefit is awarded to insured self-employed only during periods of inpatient treatment (or subsequent periods related with such a treatment) and, further on, only, if all premiums have been paid. This does not go for periods of temporary incapacity due to maternity. In these cases a temporary in incapacity benefit can also be granted for an outpatient treatment. The special rules on granting temporary benefits to self-employed might cause problems regarding the general principal of equal treatment, but do not affect gender equality.

6.5 The Amount of Temporary Incapacity Benefit

During periods of temporary incapacity due to risks listed up above the insured persons are not entitled to receive pay from the employer. They only have a right to temporary incapacity benefit. This social benefit does not replace completely the average earnings. During inpatient treatment the replacement is half of the daily earnings as to be calculated per Article 17 and during outpatient treatments two third of those earnings *(Article 18 para 3 SIUHIL)*. Daily earnings to be used as basis in the calculation of temporary incapacity benefit shall be calculated by dividing the sum of earnings subject to premium *(Article 80 SIUHIL)* in the last three months in twelve months before the date on which one of the risks at issue has been materialized, divided by the number of days of paid premiums. *(Article 17 para 1 thereof)*.

From a formal point of view the calculation of temporary incapacity benefits is in line with EU law. Insofar it can be referred to the ECJ case-law in cases of sick pay to be paid by the employer. Community law does not require the maintenance of full pay. This goes also for female workers who are absent by reasons of pregnancy-related illness. However, it has to be ensured that the pregnant women is treated in the same way as a male worker who is absent on grounds of illness. Further on, it must be provided that the amount of payment made is not so low as to undermine the objective of protecting pregnant workers[46].

The same principles have to be applied, where the national legislation does not provide a right to (statutory) sick pay against the employer, but a right to sickness benefit to be paid from the statutory social insurance scheme. The Turkish law guarantees half of the daily earnings gained in the last three months during inpatient treatment and two third of those earnings during outpatient treatments. As female workers receive the same amount as male workers in case of illness, there is no discrimination on grounds of sex.

However, it could be doubtful whether the amount undermines the objective of protecting pregnant workers. In its conclusions on the 10th Turkish report on the application of ESC *(reference period 1/1/2001 to 31/12/2002)* the European Committee of Social Rights has pointed out that the rates of the former 'temporary incapacity allowance' seems to only just meet the poverty threshold in 2002. The Committee had deferred its conclusion because of outstanding statistical information. As the same formal rates determine the amount of the 'temporary incapacity benefits', in force since 2008, statistics on the real / effective average benefits are needed in order to judge whether the amounts awarded to pregnant workers satisfy the requirements set out by the ECJ in its case-law quoted above. The statistics given by the Turkish government in its 1st National Report on the implementation of the European Social Charter (revised) <*reference period 1/8/2007 to 31/12/2002*> have listed up only the

[46] ECJ, judgment of 8/09/2005, C-191/03, para 57 – 62 *(McKenna)*; judgment of 19/11/1998, C-66/97, CJR 1997, I-07327, para 34 – 41 *(Høj Pedersen)*

minimum *(= statutory minimum wages)* and maximum daily earnings that do not reflect the average earnings. For the first period of 2011 the Minimum Wage Commission has set the monthly minimum wage at 796.50 TL gross and at 837 TL for the second half. Turkish experts argue that minimum wage is not in accordance with the poverty line[47].

7. Nursing Benefit

According to Article 16 para 3 SIUHIL nursing benefit *(emzirme ödeneği)* applicable by the date of delivery shall be payable to the female insurance holders or to the male insurance holders due to his not insured wife giving birth, provided the newborn lives. As the provision applies to all female insurance holders coming under items (a) and (b) of para 1 of Article 4, both employed and self-employed female workers are covered. This goes also for those of them who receive income or pension or for the spouse of a male insurance holder who receives income or pension due to own works. Eligibility condition is that minimum 120 day short term insurance branches premiums within one year before birth have been notified. For self-employed the premiums must be deposited and any kind of debts, related with premium, must have been paid. Further details for granting nursing benefit are ruled by the tariff determined by the Board of Directors of SSI.

~~This provision does not correspond with regulations laid down in Article 74 para 6 TLA. It allows female workers a total of one and a half hour of nursing leave to enable them to feed their children below the age of one year. From the view of social insurance, it is of no relevance that the right to nursing leave is awarded only to female workers so that men carrying out feeding and devoting time to the child could be discriminated. It is a problem of the Turkish labour legislation, but not of the Turkish social security legislation, to consider that Article 74 para 6 TLA could violate DIR 20064/EC[48]. Pursuant to Article 16 para 3 SIUHIL it is not relevant who provides the nursing. This provision does not even require that the activity is actually done. According to information from an SSI expert, the relevant secondary legislation *(not available in English)* orders that the nursing benefit has to be paid as a lump sum. It is designed to compensate increasing family costs.~~

Article 16 para 3 SIUHIL does not refer to a situation such as that one regulated under Article 74 para 6 TLA. This provision allows employed female workers a total of one and a half hour of nursing leave to enable them to feed their children below the age of one year. It is a problem of the Turkish labour legislation, but not of the Turkish social security legislation, to consider whether Article 74 para 6 TLA could violate DIR 2006/54/EC[49]. Article 16 para 3 SIUHIL meets another situation. It does not apply only to employed, but also self-employed workers. So it is obvious that it cannot refer to a situation such as that one regulated under labour law. Consequently, it grants a nursing benefit, regardless of whether the female worker enjoys one and half hour nursing leave. It only states that nursing benefit is applicable by the date of delivery over the tariff determined by the competent Turkish authorities, provided the insurance condition is fulfilled. According to information given by a SSI expert during public consultations in September 2011, the relevant secondary legislation *(not available in English)* orders that the nursing benefit has to be paid as a lump sum. It is to be designed to compensate increasing family costs.

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[47] Todays Zaman of April 30, 2011, http:// www.todayszaman.com/news-231065-new-minimum-wage-is-way-under-poverty-line.html

[48] See ECJ, judgment of 30/09/2010, C-104/09 *(case Roca Alves)* that ruling concerned Article 4 and 5 of the previous DIR 76/207/EEC

[49] See ECJ, judgment of 30/09/2010, C-104/09 *(case Roca Alves)* that ruling concerned Article 4 and 5 of the previous DIR 76/207/EEC

Regarding the purpose of the law, it is not quite understandable why only women, but not men are eligible for nursing benefit. A male insurance holder is only entitled to the benefit if his not insured wife has given birth to a child. If his wife is also insured, only she shall be eligible. There may be practical reasons for such an approach taken by the Turkish legislator. But from a 'formal position of law' the provision at issue could provoke a direct discrimination against men.

Turkish experts have argued that the provision could not be considered as discrimination against men. On one side, it would be biologically impossible for men to breastfeed children. On the other side, the award of the benefit would be based on whether the person concerned is insured or not. Thus, there would be no gender based discrimination.

First of all it has to be made clear that the problem only arises in a situation where both parents are insured. The constellation that only the mother or only the father is insured is regulated in a positive statutory manner under Article 16 para 3 SIUHIL. The legislative decision to give the right to nursing benefit only to women, but not to men, in case both are insured, is not in line with Article 4 para 1 DIR 79/7/EEC.

Of course, it has to be conceded that there are no good reasons to doubt the biological fact that a man cannot breastfeed his child. However, this truth does not answer the question how the provision at issue has to be interpreted. Considering the English version of Article 16 para 3 SIUHIL, it has to be noticed that the provision uses the term of 'nursing benefit' instead of 'breastfeeding benefit'. This could indicate that the eligibility condition has been detached from the biological fact of breastfeeding, so that it can be considered as time purely devoted to the child (see to this problem the comparable Spanish legislation on which the ECJ had ruled in the case Roca Alves <footnote 48>). But perhaps the English translation is not in line with the original Turkish text. It uses the term "emzirme ödeneği" which can be translated with 'breastfeeding benefit". However, in the end, it is not only the name of a benefit which determines the interpretation of the provisions at question, but rather decisive are the concrete qualification criteria.

The concept realized in Article 16 para 3 SIUHIL documents that the provision cannot be construed strictly by referring only to the name of the benefit. Its award is linked to the date of delivery. In addition, it is required that the newborn lives. As the provision is designed to compensate increasing family costs, such an additional eligibility requirement seems comprehensible. Leaving aside the insurance criteria, there are no further qualifying conditions. In particular, the provision does not refer to the period after delivery. So it is irrelevant how the female worker provides for her child. The provision grants a lump sum to all women coming under its personal scope of application, irrespective of whether they breastfeed the child or not.

Unfortunately, the relevant Turkish secondary legislation has not been available. So it cannot be proved how its provisions corresponding with Article 16 para 3 SIUHIL are formulated. But this is not necessary to answer the question of eventual gender discrimination. As the competent Turkish authorities are only empowered to determine the tariff, the insertion of any additional requirement would not be in line with the higher-ranking parliamentary act and therefore void.

Summarizing the above, it can be stated that Article 16 para 3 SIUHIL creates a direct discrimination in the sense of Article 4 para 1 DIR 79/7/EEC by excluding men from nursing

benefits. So it could be recommendable introducing the following new sentence: In case both parents are insured, mother and father determine the one who shall be eligible for nursing benefit by presenting a unanimous declaration to the institution. In lack of such a declaration nursing benefit shall be granted to the mother.

Turkish experts have criticized that requiring the declaration of the parents may cause disagreement and disputes. Further on, the explanation of the reasons for a discrimination would not be persuasive by specifying that it would not be quite understandable why only women, but not men are eligible for nursing benefit, although the payment would be designed to meet family expenses. Such an arguing could entail the meaning that the task of meeting family expenses belongs only to men and, thus, it itself would evoke discrimination.

The standpoint that the demand of a unanimous declaration could cause disagreement and disputes is merely an assumption. In individual cases such problems may arise, but there is no evidence and no experience tells us that this might occur in a considerable number of cases. Further on, it is incomprehensible why that argument cited before could produce discrimination where it refers to the purpose of the law. The task of meeting family expenses is imposed neither only on men nor only on women, but on both of them. So there are no good reasons to refuse the award of the lump sum to insured men in the situation in question.

8. Not Sickness-Related Interruptions of Work During Periods of Pregnancy Before the Beginning of Maternity Leave

Objective of DIR 92/85/EEC is the protection of the safety and health of pregnant workers. The directive governs two different periods, namely the period of pregnancy before legal maternity leave starts and, second, the periods of maternity leave. The latter one is addressed under Article 8 thereof and has already been analysed above. Regarding the first period, it has to be distinguished between situations during which the pregnant woman continues to work, even if under temporarily adjusted conditions *(Article 5 para 1 and 2 thereof)*, and those where the pregnant woman has to interrupt working *(Article 5 para 3 thereof)*. Principally, the same goes for night work *(see Article 7 point 2: transfer to daytime work or interruption and award of leave)*. An absolute prohibition on working is stipulated in cases referred to in Article 6. For all situations the women concerned have to be economically secured *(Article 11 thereof)*.

The Turkish legislator has obviously looked at DIR 92/85/EEC, when adopting the Working Conditions Reg based on the enabling provision of Article 88 TLA. Its Article 8 corresponds with Article 5 DIR 92/85. Although the problems arising from the DIR 92/85/EEC and the Turkish regulation might, above all, affect labour law, they can also influence social security law.

In the cases, ruled under Article 5 para 1 and 2 DIR 92/85 and Article 8 para 1 and 2 Working Conditions Reg, the pregnant woman continues to work and receives a wage. If the pay should be less favourable now, because of adjusted working conditions, the actual payment has to be evaluated in the light of Article 11 para 1 DIR 92/85/EEC[50]. Such a problem concerns, first of all, labour relationships, but does not create, generally, a problem under social insurance legislation. The problem which is of interest for this report arises from Article 8 para 3 Working Conditions Reg. It grants a right to unpaid leave to the pregnant women, if it is impossible for them to carry out any work. Neither Turkish labour nor social insurance law

[50] see hereto: ECJ, judgment of 1/07/2010, C-471/08, para 39 – 44, 49 – 62, 68 – 70 *(case Parviainen*

foresees a financial support during these periods. This seems to be not in line with the EU law.

Article 11 para 1 DIR 92/85/EEC provides that in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract must be ensured in accordance with national legislation and / or national practice. The rights concerned include the maintenance of a payment to **and / or entitlement to an adequate allowance for** workers. Article 11 has direct effect and gives rise to rights on which the women can rely against a Member State which has failed to implement that directive in national law or has implemented it incorrectly[51]. The term 'adequate allowance' in this article is to be understood as 'adequate **social** allowance'[52].

Article 11 para 1 (*the same goes for para 2)* imposes on the Member States an unequivocal obligation. In the cases referred to in Article 5 the income of the women concerned must be guaranteed in accordance with national legislation and / or national practice. The reference to national legislation and practice does not reduce or abolish the direct effect of Article 11. The provision leaves to the Member States a certain degree of latitude when they adopt rules in order to implement it. But the implementing rules cannot, by any means, apply to the content of the right enshrined by Article 11 para 1 and cannot thereby limit the existence or restrict the scope of that right. The same goes for Article 11 para 4 according to which a power is left for the Member States to award the right to pay or allowance only to those female workers who fulfil the national legal conditions for the entitlement to those advantages. The conditions of entitlement do not affect the minimum protection laid down in Article 11 para 1 (*and para 2 and 3)* and are, in any event, open to judicial review[53].

So it can be stated that in case of Article 5 para 3 of DIR 93/85/EEC the national legislation must guarantee an income for the women concerned. The Member States have a broad margin of discretion to determine whether the worker concerned shall have a right to *(continuous)* pay or to adequate *(social)* allowance. They also can decide what conditions of entitlement must be fulfilled and to what amount benefits shall be granted. Where an allowance is to be granted, it might be recommendable to orientate at Article 11 para 3 which applies to a comparable situation *(interruption of working during maternity leave)* and guarantees income at least equivalent to that which the worker receives in case of temporary incapacity due to her state of health.

Article 8 para 3 Working Conditions Reg provides an unpaid leave. This decision of the Turkish legislation has to be respected. However, on the other hand, if the employer is not charged to pay, the national legislation has to provide for 'compensation' by granting a right to an adequate social allowance, in order to comply with Article 11 para 1 DIR 92/85/EEC. As to the Turkish legislation, it could stand to reason to enshrine the implementing provision under Article 18 SIUHIL, regarding the comparable situation during maternity leave. It is for the Turkish legislator to decide under which national social scheme and under which conditions the necessary provision shall be adopted, but, of course, it has to be adopted.

9. Periods of Unpaid Leave After the Expiry of Maternity Leave

[51] ECJ, judgment of 1/07/2010, C-194/08, para 42 – 53 *(case Gassmayr)*

[52] Although the English version of the ECJ ruling in the cases Parviainen and Gassmayr does not contain the word 'social' it is obvious that 'social allowances' are referred to *(see, inter alia, the German version of the cited ECJ ruling)*.

[53] ECJ (footnote 51), para 46 – 51

The SIUHIL does not contain any provision addressing periods of unpaid leave after the expiry of maternity leave. Such a situation is only ruled under labour law. According to Article 74 para 5 TLA the female employee shall be granted an unpaid leave of up to six months after the expiry of maternity leave, if she so wishes. This provision might partly not comply with DIR 2010/18/EU, but the directive does not create any problem regarding SIUHIL:

Article 1 of DIR 2010/18/EU is to be read in connection with the annexed 'Framework Agreement on Parental leave (revised)' of 19/06/2009 concluded between the European Social Partners. According to No II Clause 2 point 2 thereof the parental leave shall be granted for at least a period of four months. Pursuant to Clause 5 point 5 all matters regarding social security in relation to this agreement are for consideration and determination by Member States and / or social partners according to national law and / or collective agreements. The same goes for all matters regarding income.

It is not for this report to evaluate whether Article 74 para 5 TLA is in line with No II Clause 2 point 2 of the cited Framework Agreement by restricting the right to unpaid leave only to female worker. This problem affects labour law, but not social insurance law. In the light of the relevant European law it cannot be criticized that the female worker concerned has not a right to social replacement benefits during that period of unpaid leave, because the Framework Agreement leaves it to the Member States, whether and to what extent their national legislation shall grant a financial support during such periods.

III. Long Term Insurance Branches

Like short-term insurance branches, long-term insurance branches *(uzun vadeli sigorta kolları)* award cash benefits. They cover risks applying to events that create a permanent personal status of the insurance holder and their survivors (rightholders).

1. Substantive Scope of Application (Scope Ratione Materiae)

The branches coming under long-term insurance are listed up under Article 3 point 5 SIUHIL. It comprises invalidity, old-age and survivors insurance branches. Details are laid down in Section Two Part Four (Articles 25 – 42 thereof). The provisions on public servants laid down in Section Two Part Five (Articles 43 – 48 thereof) provide supplementary rules on the benefit awarded to this category of workers.

2. Invalidity Insurance

The right granted from invalidity insurance *(malûllük sigortası)* to insurance holders is to be put on invalidity pension. A special kind of 'invalidity pension', called 'duty disability pension' shall be awarded to disabled insurance holders under item (c) of para 1 of Article 4 SIUHIL, i.e. workers in public administration, and disabled veterans. Their survivors are eligible for a special survivors' pension calculated on the basis of the amount of the duty disability pension.

2.1 Invalidity Pension

All insurance holders have a right to invalidity pension under the same conditions.

2.1.1 Conditions of Entitlement

Insurance holders are entitled to invalidity pension, if they are disabled and have completed a minimum contribution period *(Article 26 SIUHIL)*.

Article 25 para 1 SIUHIL which defines the term 'disabled' differentiates between insurance holders under item (a) and (b) of para 1 of Article 4 and, on the other hand, those under item (c) thereof. An insurance holder of the first group shall be deemed to be disabled, if he / she has lost either his / her working power *("çalışma gücü")* or minimum 60 % of the earning power in profession *("meslekte kazanma gücü")* due to work accident or occupational disease.

Insurance holders of the second group *(workers in public administration)* shall be deemed to be disabled, if they have lost minimum 60 % of the earning power in profession or at a degree which does not allow them to carry out their duties. Anyhow, insurance holders under item (c) of para 1 of Article 4 SIUHIL shall be deemed to be disabled if their sickness persists longer than the periods laid down in the provisions on sick leave of 'Law No 657 on Public Servants' *(Article 25 para 5 and 6 SIUHIL)*.

The lost of capacity must have occured after entry into the insurance system *(Article 25 para 2 SIUHIL)*. The necessary assessment of invalidity has to be established by the SSI Health Committee, as a result of examining the reports and medical documents the report is based on, prepared duly by the providers of healthcare services authorized by SSI, upon request of the insurance holder or the employer *(Article 25 para 1 SIUHIL)*.

As for the contribution period, Article 26 para 2 stipulates a period of minimum 10 years of insured employment and 1800 premimum days. 10 years of insured employment is not sought for those who are disabled to the extent that they need permanent care of another person.

Contrary to Article 25 para 2 SIUHIL, not all workers who had been disabled in the sense of para 1 before the starting to work for the first time are excluded from receiving an invalidity pension. If they are insurance holders for a minimum of 15 years and minimum 3960 days of invalidity, old-age and survivors insurance premiums are notified, they can be put on invalidity pension *(Article 28 para 4 thereof)*.

The health and insurance conditions described above apply equally to men and women; thus they do not create any discrimination on grounds of sex.

2.1.2. Start, Termination and Re-start of Invalidity Pension

For insurance holders under items (a) and (b) of para 1 of Article 4 SIUHIL the invalidity pension shall start at the beginning of the month following the date of the report used as basis for disability or the date of written request, if it has been filed after the date of the report (*Article 27 para 2 items <a> and <b> thereof)*. For insurance holders under item (c) of para 1 of Article 4 the invalidity pension shall start at the beginning of the month following the date of quitting duty due to disability. If they start again a work which will create an insurance status under SIUHIL or under the legislation of a foreign country, the invalidity pension shall be terminated. If they quit this work and submit written request for re-asking for invalidity pension or retire or are sent to pension, the invalidity pension shall be re-calculated starting from the period following the date of quitting work *(Article 27 para 3 thereof)*.

All these provisions do not show any gender discrimination.

2.2 Duty Disability Pension

Besides a 'general' invalidity pension whose conditions of entitlement are laid down in Article 25 and 26 SIUHIL, the provisions on public servants provide two special forms of invalidity pension, called duty disability pension. As for the conditions of entitlement and the calculation of the amount of pension, the Law provides, on one side, a pension awarded to all duty disabled and, on the other side, a pension granted to disabled veterans. The right holders of both groups are eligible for a survivors' pension.

2.2.1 Pension Granted to all Duty Disabled

2.2.1.1 Conditions of Entitlement

The conditions of entitlement for this kind of pension are enshrined in Article 47 SIUHIL. The personal scope of application covers those individuals who become insurance holder under item (c) of para 1 of Article 4 for the first time after the date on that SIUHIL has come into force *(para 1 thereof)*. For other civil servants the corresponding provisions of Law No 5434 shall continue to be applied.

As to the term 'disability', the provision refers to the definition given under Article 25 para 1. In addition to the general rule, a duty disability has to be occurred under certain circumstances. Workers in public administration are eligible for duty disability pension, if the disability has occurred while they have carried out their duties or have carried out other duties of any public administration to which they are charged with duty by their won administrations out of their duties. The same goes for the performance of a work defending the interests of their institutions. Finally, they are entitled to duty disability pension where the disability has occurred by an accident during going to or coming from work or at the workplace.

Thus the duty disability pension shows elements of an invalidity pension combined with those of permanent income payable from work accident and occupational disease insurance. It has to be noticed that such a special pension grants a privilege to civil servants, compared with other insurance holders who have paid equivalent premiums and might also have been injured while carrying out duties imposed to them by contract. This may raise questions with view to the general principal of equal treatment. The inequality could not be justified by Article 61 para 2 CRT according to which the State shall take measures to protect the disabled and secure their integration into community life. That constitutional provision does not restrict its scope of application to civil servants, but covers all citizens. However, there is no gender equality problem, because men and women are equally qualified for a duty disability pension *(see also the remarks below under no 4.3.1.1. of this part of the report)*.

2.2.1.2 Start and Termination

As a general rule, the pensions of the ones who start to work under item (c) of para 1 of Article 4 SIUHIL shall be terminated at the payment day following the starting date of work and long term insurance branches shall be applicable *(item <a> of para 14 of Article 47)*. As item (c) of Article 5 has to be preserved, the pensions of war veterans coming under Law No 3713 *(on Fighting against Terrorism)* and Law No 2330 (*on Granting Compensation in Cash and Pension)* shall not be terminated. In other cases the individuals may submit written request for not terminating the pension. Then the benefit shall continue to be paid, but the disabled concerned shall pay a social security support premium at the rate of 15 % of the pension they are receiving (item <b> thereof). Insofar the same provision has to be applied as for those receiving old-age pensions.

2.2.2 Pension for Disabled Veterans

A special duty disability pension is provided for military stuff *(Article 47 para 7 SIUHIL)*. The group concerned is composed of officers, non-commissioned officers, specialist gendarme, professional enlisted specialists and insurance holders under item (c) of para 1 of Article 4 charged with duty by the Turkish Armed Forces. They are eligible for pension, if they have been injured during the participation in war or other military operations listed up in detail under Article 47 para 7 items (a) – (f). Due to the injuries, they must have become 'disabled' in the sense of Article 25. They are called disabled veterans.

It seems to be obvious that more men than women profit from the provisions on duty disability pension granted to disabled veterans. None the less, these provisions do not create any discrimination on grounds of sex. Principally, they provide an equal treatment to all individuals in the same situation. Even if it is not for this report to discuss problems possibly caused by the general principal of equal treatment, it should be mentioned that the advantageous provisions on disabled veterans do not violate that principal. Article 61 para 1 CRT imposes a constitutional obligation on the Turkish State to protect the disabled veterans and to ensure that they enjoy a decent standard of living.

2.2.3 Pension for Survivors of Duty Disabled and Disabled Veterans

The right holders of a deceased duty disabled civil servant or disabled veteran is entitled to a survivors' pension *(Article 47 para 12 SIUHIL)*. The Turkish legislator has fulfilled an obligation imposed on the State by Article 61 para 1 CRT, by adopting provisions on the protection of the widows and orphans of disabled veterans killed in war.

According to para 15 of Article 47 SIUHIL, the general rules of the survivors' insurance branch concerning the amount of pension and division of it as well as the provisions on the start and termination of the pension *(Articles 34 and 35)*, have also to be applied in case of survivors' of duty disabled or disabled veterans. The same goes for the right to marriage benefit and funeral benefit provided for under Article 37. Some of the provisions of the survivors' insurance branch provoke gender equality problems; insofar it can be referred to the explanations below under no 6.5.3 of this part of the report.

3. Old-age Insurance

Two cash benefits are provided for in this insurance branch *(yaşlılık sigortası)* an old-age pension and a single payment *(Article 28 para 1 SIUHIL)*.

A single payment calculated on the basis of paid premiums can be granted, if the insurance holder has no right to be put on invalidity pension or old-age pension, although the required age is fulfilled. The regulation can be neglected in this report, because it is obvious that it does not provoke any gender problems *(for details see Article 31 SIUHIL)*. This report focuses on old-age pension.

In this context it should be mentioned that the provisions on public servants enshrined in Part Five of Section Two SIUHIL provide special rules for public servants. Different from the general provisions on entitlement to and calculating of old-age pension, an old-age pension is foreseen for the highest representatives of the Turkish State. Upon request, the President of Republic, the President of Turkish Grand National Assembly and the Prime Minister are eligible for old-age pension, when they resign from office whatever the reasons. The President

of Republic shall receive a pension at the rate of 40 % of the monthly benefit payable to the President of Republic, the President of Turkish Grand National Assembly and the Prime Minister 70 % of the pension payable to the President of Republic *(for details see Article 43 thereof)*.

Further on, special insurance conditions may apply to other public servants who are put on old-age pension *(see Articles 44 – 46 thereof)*. All these regulations are of no interest regarding gender equality. In the following, the report will deal exclusively with the general legal provisions on old-age pension.

3.1. Conditions of Entitlement for Old Age Pensions

All insurance holders are entitled to old-age pension, if they have completed a certain age and a certain contribution period. The conditions of entitlement laid down under Article 28 shall apply to the individuals who are deemed to be insurance holder with this Law for the first time *(para 1 of Article 28)*.

According to Article 28 para 2 item (a) an old-age pension shall be granted to a female insurance holder if the she is over 58, and to a male insurance holder if he is over 60. Item (b) thereof establishes a progressive amount of the age limits during the period from 2036 to 2047 so that, from 2048 on, the personable age both for men and women will be 65 years. Special age-limits apply to some groups of insurance holders. Those who have carried out, continuously or in rotations, underground works of mining workplaces determined by Ministry can be put on pensions at the age of 55 *(Article 28 para 6 thereof)*. The same right is awarded to the ones who have passed the age 55 and are determined to suffer from premature aging *(Article 28 para 7)*.

As for the insurance condition, the law differentiates between civil servants and self-employed on one side and employed workers on the other side. For persons of the first group minimum 9000 days of invalidity, old-age and survivors premiums must have been notified. In case of employed workers 7200 premiumd days are sufficient *(Article 28 para 2 item <a>)*.

The different personable ages for men and women laid down under Article 28 para 2 do not create a forbidden discrimination in the sense of EU law. Insofar Article 7 para 1 item (a) DIR 79/7/EEC accepts unequal regulations. If the social insurance scheme of a Member State has determined different personable ages for men and women and these differences were in force at the date when the directive had entered into force (23/12/1984), the differences can be kept up. In case of new EU members it is the legal status at the date of accession that is decisive. Thus the different age limits in the Turkish old-age insurance do not create discrimination on grounds of sex.

This does not go for Article 28 para 8 SIUHIL. This provision provides that one fourth of the paid premium days after the enactment of the law shall be added to the sum of number of premium payment days and these added periods shall be subtracted from the retirement age limits in cases where a female insurance holder has a child disabled to the extent of being in need of the permanent care of another person. The provision allows reducing the pensionable age for the women concerned and awarding them an old-age pension earlier. It creates a direct discrimination of men who have a child disabled to the extent described in the law. So the Turkish legislator has to explain why this unequal treatment is justified by objective reasons

and is proportional. Otherwise the law would not be in line with Article 4 para 1 DIR 79/7/EEC.

3.2. Start and Termination of Old-age Pension

As a general rule, the old-age pension of insurance holder under items (a) and (b) of para 1 of Article 4 SIUHIL shall start at the beginning of the month following the date of request. Those under item (c) thereof shall be put on pension at the beginning of the month following the date on which the connection with their duties are terminated based on competent authority's approval of transfer to retirement.

Excluding self-employed in agricultural activities *(no 4 of item <b> of para 1 of Article 4 SIUHIL),* the pension of individuals who become insurance holders for the first time after the enactment of this law shall be terminated at the beginning of the period following the starting date of a work insured under SIUHIL or under the legislation of a foreign country *(Article 30 para 3 item <a> thereof)*. If the insured persons concerned submit a written request for not terminating, their pensions shall continue to be paid, but they shall pay a social security support premium at the rate of 15 % of the pension they are receiving *(item <b> thereof)*.

All these provision do not create any gender discrimination.

4. Calculation rules

As to the calculation of pensions, it has to distinguish between common rules applying to all pensions and those applying to specific pensions.

4.1 General Rules

The examination of general calculation rules focuses on the pension allocation formula and its impact on female insurance holders.

4.1.1. Factors of the Pension Allocation Formula

According to Article 29 SIUHIL, two factors determine the formula. First, the monthly average earning has to be established; second, the replacement rate has to be found. In this context, the following factors are of interest.

4.1.1.1. Earnings Subject to Premiums

The days of paid premiums are one of the conditions of entitlement to pension rights. However, not the paid premiums and their amount have to be considered, when the formula factor 'the average monthly earning' has to determined, but all earnings subject to premium pursuant to Article 80 SIUHIL during the whole insurance career have to be taken into account.

4.1.1.2. Days of Paid Premiums

Periods of paid premiums subject to long-term insurance branches form the most important element when the replacement rate has to be calculated. In addition two different forms of increments have to be taken into account.

4.1.1.3. Actual Service Term Increments

Actual service term increments shall be added to the numbers of paid premium days. They have the same effect and are considered in the conditions for entitlement to pension. Further on, they have a positive effect on the calculation of pensions. They are enshrined in favour of insurance holders who have worked at workplaces with special health risks.

Article 40 SIUHIL lists up works and workplaces where the insurance holder is exposed to special risks. To fulfil the conditions of entitlement, he / she must have actually worked at the workplaces at issue and have been exposed to the risk described by the Law. The numbers of days to be added to each 360 days differ corresponding to the workplace *(from minimum 60 days to maximum 180 days)*.

These provisions do not create any discrimination on grounds of sex, even though it seems that more men than women profit from the advantages. All insurance holders who are confronted with the same risk at the same places are treated equally.

4.1.1.4. Nominal service term increments

Nominal service term increments are not directly connected with actual services. Like actual service increments they raise the replacement rate in the calculation of pensions *(Article 29 SIUHIL)* and thus their amount, but, contrary to actual service term increments, they have a restricted scope of application *(see the following no 4.1.2)* and do not qualify for the entitlement to pensions.

4.1.2. The Pension Allocation Formula in Detail

Article 29 para 1 to 3 SIUHIL establish the pension allocation formula which applies to both old-age and invalidity pensions. It applies to workers in public administration, if they have started to work as insurance holders for the first time after the enactment of this Law. If workers of the private sectors and self-employed have completed insurance periods before 1/10/2008, these ones shall be calculated on the basis of the relevant provision of the previous law and those completed after that date on the basis of Article 29 SIUHIL *(Provisional Article 2 para 1 item <a>)*. Article 29 para 1 provides the following pension formula:

Pension = average monthly earning multiplied by the replacement rate
(As to a minimum pension, see Article 55 para 3 SIUHIL).

To determine the monthly earning, it is necessary to fix, in a first step, the daily earning found by dividing the sum of *(updated)* earnings subject to premium by the total paid premium days. The result has to be multiplied by 30 to find the monthly earning *(Article 29 para 2)*.

To determine the replacement rate, 2 % for each 360 days of total paid premium days have to be considered (*para 3 thereof)*. For instance, in case of 9000 premium days (25 x 360) the replacement rate is 50 %.

The Law provides increments that shall raise the amount of pensions. The increments for actual service periods *(Article 40 SIUHIL)* apply to all kinds of pension. This does not go in the same way for nominal service periods. Expressly, the Law mentions nominal service terms in Article 49. It provides the addition of six months of nominal service term for all kinds of pension in cases listed up under items (a) till (c) of paragraph 1. However, this provision belongs to Part Five of Section Two (= Articles 43 – 49) which contains special provisions applying only to public servants, not to other insured persons. Consequently nominal service

terms increments can be considered for these individuals only where other provisions of the SIUHIL order expressly its consideration. There are two other provisions that provide such increments. Though they do not use the term 'nominal service term increments', they have the effect of such increments. One provision, namely Article 47, concerns pensions on duty disability and applies again only to public servants. The other one, namely Article 27 para 1, applies to all insured individuals, but concerns only invalidity pensions. So, contrary to actual service term increments, nominal service term increments have a restricted scope of application. Of course, all increments raise the amount of survivors' benefits, where these benefits are calculated on the basis of the pensions mentioned before.

The legal arrangements have been adopted in favour of the individuals concerned. Article 29 para 2 excludes nominal and actual service period increments where the average monthly earning has to be found. They have to be neglected in the mathematical operation; otherwise they would run counter to the legal objective. As these are unpaid periods, their consideration would not increase the dividend, but only the divisor and thus reduce the quotient (= daily earning).

To materialize the positive effect intended by law, the increments have to be considered only in the operation finding the replacement rate. There they increase the factor 'total paid premium days' *(of which each 360 days have to multiplied by 2 %)* and thus the mathematical product *(= replacement rate)*.

4.1.3. Negatives Effects from the Pension Formula on Female Workers and Proposals for Amendments

The pension allocation formula does not create discrimination on grounds of sex. According to a consistent case-law of the ECJ, social policy is, in the current state of Community law, a matter for the Member States[54]. It is for them to choose the measures capable of achieving the aim of their social and employment policy. In exercising that competence, they have a broad margin of discretion. The calculation method, provided for in Article 29 SIUHIL, does not violate Article 4 para 1 DIR 79/7/EEC. Principally, the EU law does not stipulate taking into consideration periods for which premiums have not been paid.

Leaving aside the increments mentioned above, it is obvious that a pension allocations formula like the Turkish one has negative impacts especially on women. The disadvantages are mainly caused by the following reasons.

Turkish women gain often lower wages than men. One reason is that they are oftener than men employed in unqualified employments, partly due to a low educational level[55]. Programmes promoting and increasing the education level of women are needed. But this is surely not the only reason for the huge pay gap of 22 % between average wages of men and women in the cities, even more than 50 % in private sector[56]. Insofar the principle of 'equal pay for equal work' still waits for being realized. Low wages result consequently in low average monthly earnings that have to be considered in the legal pension formula.

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[54] see e.g. ECJ, judgment of 7/05/1991, C-229/89, ECR 1991, I-2205 (case Commission v. Belgium)

[55] For more details see: Gülay Toksöz, Women's Employment Situation in Turkey, Ankara 2007, published by International Labour Office, ISBN 978-92-2-120551-7, http://www.ilo.org/public/english/region/eurpro/ankara/info/womenemp.pdf, last access on 15/3/2011, pp 15 et seqq

[56] Füsun Yenilmez / Burhanettin Işıklı, The Comparison of Labour Force Participation Rate of Women in Turkey with the World Country Groups, Anadolu University Journal of Social Sciences, Cilt/Vol.: 10 - Sayı/No: 3 : 77–92 (2010), http://www.anadolu.edu.tr/arastirma/hakemli_dergiler/sosyal_bilimler/pdf/2010-3/2010_03_06.pdf, last access on 15/3/2011, p 88

Second, women have, on average, a shorter insurance career than men. One reason is, surely, a traditional social pattern according to which women are, first of all, mothers. This is a barrier for working outside of home and for interruptions in the employment record. Women could be encouraged working outside by having access to affordable care for their children[57] *(beside a probably needed change in the attitude of men)*.

But also a trend in the labour force participation rate (LFPR)[58] has to be stopped. Already the overall LFPR is relatively low in Turkey *(49.4 % in May 2010[59])*. The rate of women has declined dramatically from 72 % in 1955 to 27.9 % in 2002 and to 23.5 % in 2009 *(in 2008: 21.6 %; in February 2010: 22.3 %[60])*. In comparison, the LFPR for the EU and OECD countries is about 61 %[61]. One reason might be the fall of LFPR in agricultural areas where female employment was concentrated[62]. In addition, the effect on the economical and social situations of women is worsened by a low participation rate in the formal and a high rate in the informal employment market[63]. Educated men and women are more likely to have a formal employment[64].Differentiating between the formal and informal employment market, it has to be stated that, in 2007, the LFPR was 24.9% for females and 71.5% for males in the formal sector. The low female participation rate corresponds with a high participation rate in the informal employment market. 48.5% of male and female workers worked without any social security related to the main job. So 66% of total female employment is out of the protection of short- and long-term social insurance branches[65]. As to TurkStat, the overall participation rate in the informal sector has declined to 43.6 % in May 2010[66].

Due to these facts one should expect that there would be a significant gap between the average monthly amounts of pensions paid to male and female insurance holders. The statistics given by SSI to the author of this report and relating to the year 2001 seem to be contrary to those expectations. The following table gives on overview on the figures communicated by SSI.

Distribution of monthly pensions for 2001/ March period aggregated by sex			
Type of pension	**Number of**	**Total amount**	**Average monthly**

[57] Füsun Yenilmez / Burhanettin Işıklı (footnote 56), pp 80, 88

[58] According to a common definition, LPFR is the percentage of persons of the age between 15 and 64 who are employed or, if unemployed, looking for an employment

[59] TurkStat, Press Release No 146 of August 16, 2010

[60] Anke Siebold, Arbeitsmarkt- und Sozialpolitik unter Berücksichtigung von Gender Equality (Labour Market and Social Policy <in Turkey>) , Vortrag gehalten am 14.6.2010 in Berlin, available from the German Ministery of Labour and Social Affairs, p 4 <referring to TurkStat>

[61] Füsun Yenilmez / Burhanettin Işıklı (footnote 56), pp 1, 80 and Table 1 on p 81, referring to TurkStat

[62] Gülay Toksöz (footnote 55), last access on 15/3/2011, pp 19 et seqq

[63] As to the concept of informal economy and analysis thereto see: Sylvia Chant / Carolyn Padwell, Women, gender and the informal economy: An assessment of ILO research and suggested ways forward, published by International Labour Office in 2008, ISBN 9789221206088 , http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_091228.pdf; International Labour Office, Women and Men in the Informal Economy, published 2002, ISBN 92-2-113103-3, http://www.ilo.org/public/libdoc/ilo/2002/102B09_139_engl.pdf, last access on 15/3/2011

[64] Erol Taymaz, Growth, Employment, Skills and Female Labor Force, published by the State Planning Organization of the Republic of Turkey and World Bank, Ankara March 2010, http://02b47e1.netsolhost.com/IGED-TR_Documents/6-Growth%20and%20Employment%20in%20Turkey.pdf, last access on 15/3/2011

[65] Gülay Toksöz (footnote 55) , p 35

[66] TurkStat, Press Release No 146 of August 16, 2010

	insurance holders	of pensions (TL)	amount (TL)
Old-age			
Men	3,146,508	3,121,809,713.67	992.15
Women	738,830	684,457,036.09	926.41
Invalidity			
Men	58,290	51,134,097.38	877.24
Women	8,501	7,516,433.71	884.18

At a first glance, the results seem to be surprising. As to old-age pensions, the average amount paid to women is 6.63 % lower than that of men. As to invalidity pensions, nearly the same average amounts have been paid to men and women *(there is even a difference of 0.8 % in favour of women, which is, however, negligible)*. Having in mind the pay gaps mentioned above and the supposed shorter insurance careers of women, greater differences should have been expected. Before drawing final conclusions from these statistics, not only updated figures, but also more information are needed. At the moment, the statistics give the following impression:

First, the number of insurance holders reflects the low labour market participation of women, especially in the formal (protected) labour market. Second, women who carry out unqualified and low paid jobs are often members of the informal labour market and excluded from social protection. Their working conditions do not influence the average amount of pensions paid by the statutory social security scheme. The nearly equal average amounts of invalidity pensions could be due to the fact that minimum premium days have to be taken into account (see below no. 4.2).

Leaving aside the need of a final analysis of the statistics communicated by SSI, the Turkish legislator should, nevertheless, consider adopting positive actions in order to promote women and thus compensate disadvantages produced probably by the pension formula. Especially periods during which women are prevented from carrying out paid works because of so-called typical 'female risks' should be taken into account. Of course, those positive actions are part of the social policy which has to be decided by the Turkish legislator. But, in this context, one should have in mind that 'positive discriminations' could be demanded by Article 10 CRT, in particular in its amended version of 2010. Besides Article 10, also Article 2 CRT *(social state principle)* and Article 41 *CRT (protection of family)* as well as the international law binding Turkey (*see, in particular, Article 4 CEDAW)* may put an obligation on the Turkish State to undertake such positive actions[67]. With view to gender equality it would also be necessary to examine for which of those periods men, too, should be eligible. Following amendments could be recommendable:

- **Child care credits**

[67] As to the needed positive actions, see e.g. (the Turkish) 'National Action Plan Gender Equality 2008 – 2013', (the Turkish) 'Action Plan of Strategy for Fight Against The Informal Economy'; Prime Minister's 'Circular 2010/14' (subject: Increasing <Promoting> Women's Employment and Ensuring Equal Opportunities).

Child care credits are foreseen in several national legislations of EU Member States. Such measures would go beyond Article 41 SIUHIL *(thereto below under no 7 of this part of the report)*. They should have two effects: On one side, they should qualify for the access to pension and thus have the same effect as premium days. On the other side, they should have the effect of increments increasing the replacement rate *(Article 29 para 3)*.

The legislation of several EU Member States show best practice examples for child care credits[68]. The German pension scheme provides child care credits granted for 3 years after birth. Credits are granted on the basis of average earnings and regardless of employment. That means that the credits can be added to contributions gained from employment up to a maximum limit. Further credits exist for a parent of at least one child who is working part-time. The contributions gained from employment are topped up by 50 % with a maximum limit of contributions based on average earnings[69].

Other national schemes provide more flexibility to women. In the Hungarian system either parent providing child care can choose between three different options: (1) child care credits for children up to 2 years where the contribution base amounts to 70 % of the previous wage; (2) child care credits for the care of a child up to the age of 3 years with the contribution based on the minimum pension; (3) child care credits until the youngest of at least three children turns eight with the contribution based on the minimum pension. In all cases parallel employment is possible[70].

The Swedish system offers a parent several options. The most favourable is automatically chosen when calculating pension. Credits are granted for 4 years in accordance with one of three alternatives: (1) the credits cover individual income losses up to a maximum income ceiling; (2) the credit covers 75 % of the average income; (3) a credit based on 20 % of the average income is added to the actual contribution paid from earnings[71].

- **New Nominal Service Term Increments**

In addition, the Turkish legislator should consider enshrining other periods of non-paid premium days as nominal service term increments. They would not qualify for rights granted with the SIUHIL, but increase the replacement rate regulated in Article 29 para 3 thereof.

First, this regards periods during which statutory benefits have been paid in case of temporary incapacity due to maternity. Where those benefits cover the same period for which child care credits have to be awarded *(periods after birth)*, the latter ones shall be taken into account.

Second, periods of unpaid leave granted due to pregnancy before the beginning of maternity leave shall be considered being nominal service terms for which increments shall be credited under long-term insurance.

Third, for periods of unpaid leave awarded to female workers after the expiry of maternity leave, according to labour law legislation, nominal service term increments shall be granted. These periods might meet with periods for which child care credits can be granted. If the fe-

[68] See Sabine Horstmann and Joachim Hülsmann, 'The Socio-Economic Impact of Pensions Systems on Women, February 2009, Report financed by prepared for the use of the European Commission, General Directorate for Employment, Social Affairs and Equal Opportunities

[69] See Sabine Horstmann and Joachim Hülsmann (footnote 68), p. 11

[70] See Sabine Horstmann and Joachim Hülsmann (footnote 68), p. 11

[71] See Sabine Horstmann and Joachim Hülsmann (footnote 68), p. 11

male worker is also eligible for these credits, only the days of child care credits shall count. If her male spouse can claim for the credits, the female worker can separately apply for nominal service term increments.

Fourth, beside periods during which only women are typically prevented from carrying out an insured work, also other periods of replacement benefits should be regarded as nominal service terms. This goes, in particular, for periods for which statutory temporary incapacity benefits in case of sickness have been paid, and for periods for which statutory unemployment benefits have been granted. Regarding the low employment rate of women in the formal sector of the Turkish employment market, it seems to be obvious that more men than women would profit from such a regulation. However, if the Turkish legislator fulfils its obligation to promote the employment of women in the formal employment market, also more and more women will benefit from those increments.

Article 49 para 1 sentence 1 SIUHIL defines the term of nominal service terms. It makes it clear that they are considered in the calculation of pensions *(or single payments)* payable pursuant to this Law, but do not qualify for those rights like paid premium days. As already mention above, Article 49 applies only to public servants. The provision has been enshrined in favour of those servants who have suffered disadvantages because of military actions.

Six months of nominal service term shall be added for each year of actual service of officers, non-commissioned officers, specialist gendarme and professional enlisted specialists including who have been captivated during war or combat. The same goes for civilian officers, private or enlisted specialists who partake in such actions and for all insurance holders who are captivated or interned by enemy in war *(For more details see Article 49 para 1 sentence 2 item <a> till <c> SIUHIL)*. The nominal services to be added shall not exceed three years.

Three months of nominal service term shall be added for each year of actual service term of pilots or non-pilot aviators, submariners, divers, scuba or parachuters in public administrations passed in such duty *(para 2 thereof)*.

At the end of each year, for each thirty day of nominal service term added to the actual service term of the insurance holder a nominal service premium is collected separately from the employer *(para 3 thereof)*.

4.2 Nominal Service Term Increments to be Observed in the Calculation of all Pensions Awarded to Public Servants

Article 49 para 1 sentence 1 SIUHIL defines the term of nominal service terms. It makes it clear that they are considered in the calculation of pensions (or single payments) payable pursuant to this Law, but do not qualify for those rights like paid premium days. As already mention above, Article 49 applies only to public servants. The provision has been enshrined in favour of those servants who have suffered disadvantages because of military actions.

Six months of nominal service term shall be added for each year of actual service of officers, non-commissioned officers, specialist gendarme and professional enlisted specialists including who have been captivated during war or combat. The same goes for civilian officers, private or enlisted specialists who partake in such actions and for all insurance holders who are captivated or interned by enemy in war *(For more details see Article 49 para 1 sentence 2 item <a> till <c> SIUHIL)*. The nominal services to be added shall not exceed three years.

Three months of nominal service term shall be added for each year of actual service term of pilots or non-pilot aviators, submariners, divers, scuba or parachuters in public administrations passed in such duty *(para 2 thereof)*.

At the end of each year, for each thirty day of nominal service term added to the actual service term of the insurance holder a nominal service premium is collected separately from the employer *(para 3 thereof)*.

4.3 Nominal Service Term Increments to be Observed in the Calculation of Invalidity Pensions

Article 27 para 1 establishes that the invalidity pension for the insurance holders with the number of premium days less than 9000 (7200 for employees) shall be calculated over 9000 (7200). As 9000 days are the product of 25 x 360 day, the rate amounts to 50 % at least *(2 % x 25, see Article 29 para 3)*. The added periods have the effect of nominal service term increments. They raise the replacement rate for insurance holders with a relative short insurance career, i.e. less than 9000 premium days (25 years) and 7200 (20 yea
rs) respectively. Although the provision applies to both men and women, especially women will benefit from the nominal service period, because they have often a shorter insurance career than men.

4.4 Peculiarities in the Calculation of Duty Disability Pensions

An advantageous calculation is provided for duty disability pensions. The Law differentiates between the pension for duty disabled and disabled veterans. However, the provisions shall be applied only to those who become insurance holders under item (c) of para (1) of Article 4 SIUHIL for the first time after the enactment of this Law *(Article 47 para 1 thereof)*. In other cases the corresponding provisions of Law No 5434 continue to be applied. Anyway, it has to be ensured that duty disability and disabled veteran pensions are not less than those that have to be granted pursuant to the corresponding provisions of Law No 5434 *(Article 47 para 16 SIUHIL)*.

4.4.1 Calculation Provisions Applying to the Pension of all Duty Disabled

Article 47 para 6 and 7 SIUHIL provides special calculation rules that differ from the general rule of Article 29.

4.4.1.1 Minimum Replacement Rate Guaranteed by Nominal Service Term Increments

Nominal service terms have to be added to paid premium days so that the rate has to be calculated on the basis of a total number up to 10800 days *(item <a> of para 1 of Article 47)*. Thus a minimum replacement rate is guaranteed. As 10800 days are the product of 30 x 360 days, the minimum rate amounts to 60 % *(2 % x 30, see Article 29 para 3)*.

The minimum replacement rate in case of invalidity pension runs up to 50 % *(see above no 4.2 of this part of the report)*. The more advantageous rate guaranteed to duty disabled, may engender problems in the light of the general principle of equal treatment. Since the right owners of invalidity pensions and duty disability pension come under the same law, have to be disabled at the same extent and have to pay premiums at the same rate, it might have become doubtful whether it is in line with the general principle of equal treatment, enshrined in Article 10 CRT, to foresee such a privileging regulation only for workers in public admini-

stration: The only reason for a different treatment could be that their disability has occurred while carrying out their public duties, but this would refer to a formal and not to substantive reason for an unequal treatment. Also workers in private economic branches might become disabled while carrying out their duties.

Social rights for workers in public administration are not unchangeable. The previous adoption of social rights does not prevent the legislator from abrogating them or changing their cash value to the disadvantage of their owners, provided that fundamental rights, such as the principle of equal treatment, the social state principle or the rule of law including the principal of proportionality *(that may, for instance, require adopting transitional provisions)* have been respected.

The advantages, granted to civil servants under the Turkish social insurance law, do not only rise questions in the light of the principle of equal treatment, it is also difficult to justify them in the light of other constitutional provisions. The social state principal laid down in Article 2 CRT does not require a different treatment between workers in private and public sectors. Also Article 128 para 2 CRT does not guarantee certain rights and cash values to public servants. It only requires regulating rights by law, but not the adoption or maintenance of certain rights. However, in this report it is not necessary to deal with these problems in detail and to discuss, in particular, the ruling of the Turkish Constitutional Court[72] which has, relying on Articles 2, 10 and 128 CRT, required different regulations for civil servants in order to avoid any losses of their social rights[73]. The provisions at issue may create problems in the light of the principle of equal treatment, but they do not create any discrimination on grounds of sex. They provide an equal treatment for men and women. Nothing indicates that one sex is put at a greater disadvantage than the other one.

4.4.1.2 Monthly Earning to be Determined by the Final Earning Subject to Premium

To find the monthly earning as a factor of the pension allocation formula, the periods of nominal service term increments that form part of the minimum number of 10800 days shall be neglected when calculating the monthly earning *(Article 47 para 6 item <b> SIUHIL)*. This is in line with the general rule of Article 29 para 2 thereof *(thereto see above the explanations under no 4.1.2 of this part of the report)*. Differing from the general rule, not all earnings subject to premium are to be taken into account, but only the final earning. Experience shows that this is, generally, the highest earning gained during a professional career, at least in public administration.

This provision, too, puts duty disabled and disabled veterans at an advantage compared with invalid insurance holders. It might again create problems in the light of the general principle of equal treatment, but not in the light of the principal of gender equality.

4.4.1.3 Additional Nominal Service Term Increments Based on Degrees of Disability

The third advantage for duty disabled exists in increments that have to be added according to the degree of disability *(Article 47 para 6 item <b> SIUHIL)*. The Law differentiates between six degrees. According to the degree, increments from 30 % to 2 % have to be applied.

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[72] Judgment of 15.12.2006, No 2006/112; the rulings of the Turkish Constitutional Court are binding for the Turkish legislator

[73] Critical: Yasemin Körtek (footnote 23), pp 340 et seqq

The legal wording does not make it very clear, whether these increments have to be added to the total number of 10800 days, even if this number includes, besides paid premium days, periods of nominal services term increments provided for under item (a) thereof, or whether these additional increments are excluded where they cover the same periods that come already under item (a). The wording of item (b) refers, first, to the calculating of the monthly earning *(as one of the factors of the pension allocation formula)* and, second, continues with the words '…, and also making increments at the pensions to be calculated pursuant to Article 29 at the following rates based on their degree of disability'. In particular the words ‘and also making increments' might indicate that these increments are to be added to the number of 10800 days.

Again it has to be noticed that also this provision privileging duty disabled public servants might cause problems in the light of the general principle of equal treatment, but not in the light of the principal of gender equality.

4.4.2 Particularities Applying to Disabled Veteran Pensions

An even more advantageous regulation is provided for disabled veterans. The advantages in calculating their duty disability pension result from two regulations.

4.4.2.1 Higher Earnings Taken as Basis

To the benefit of disabled veterans, Article 47 para 8 SIUHIL provides a special regulation concerning the earning that influences the amount of pensions. The earning to be observed does not correspond with the actual rank and degree of the veterans, but with those that have been raised to higher levels. The extent of increase differs between the groups concerned *(for details see para 8 thereof)*.

Regarding the wording of Article 47 para 8 SIUHIL it seems to be doubtful what effect the increase of ranks and degrees and thus of earnings shall have. The provision rules that these *(higher)* earnings subject to premium 'shall be payable'. The term 'payable' could indicate that the amount of the pension granted to disabled veterans shall be equivalent to the earnings described. But that would be a really surprising privilege. So, applying a systematic interpretation method, para 8 thereof has to be seen in the context wiht the preceding provisions of Article 47. This article establishes the conditions of entitlement to a duty disability pension and the rules for calculating the payable amount of it. The basic calculation rules are enshrined in para 6 thereof. It refers, on one side, to the the general pension allocation formula in Article 29 and provides, on the other side, pecularities concerning the earning and two forms of nominal service term increments.

The systematic context of the provisions on disabled veterans laid down in para 7 to 11 with the preceding paragraphs makes it clear that the general rules on duty disabled also cover the benefits granted to disabled veterans if no specific provisions, derogating form the general rules, are enshrined. So para 8 has to be construed as meaning that it only provides a specific provision on earning that has to be observed as 'final earning' mentioned in para 6. All the other rules on duty disabled laid down in para 6 and explained above, apply also to disabled veterans.

4.4.2.2 Disabled Veteran Increment

The second advantage granted to disabled veterans is provided for in para 10 of Article 47. Based on the degree of disability an amount shall be added separately. It has to be found by

multiplying the indicators, corresponding with six different degrees of disability and listed up in that provision, with the public servant pension coefficient. The amount is called 'disabled veteran increment'.

To those disabled veterans who have personally ensured that an *(military)* operation concluded successfully and have shown model courage and self-sacrifice the disabled veteran increments shall be applied 25 % higher, upon positive opinion of Chief of General Stuff and approval of the Ministry of National Defence *(Article 47 para 11)*.

As already have been mentioned above *(see no 2.2.2 of this part of the report)*, the conditions of entitlement to a duty pension for disabled veterans do not affect the principal of gender equality. Consequently, the same goes for the calculation of their pension and the special increment.

5. Joining of Pensions and Incomes

As the insurance holders might be eligible for different pensions from long-term insurance and / or incomes from short-term insurance, it has to be decided by law which one of them shall be payable.

5.1 Pensions from Long-Term Insurance

For insurance holders qualified for both invalidity and old-age pension, only old-age pension shall be payable if the pensions are equal (*Article 54 para 1 item <a> no <1> SIUHIL)*.

For individuals qualified for both duty disability and invalidity, Article 54 only applies to cases where the individual concerned became again insurance holder when receiving duty disability pursuant to SIUHIL. In such a case only duty disability pension shall be payable if the pensions are equal *(no 6 thereof)*.

If the individual is qualified for both duty disability and old-age pension, both of the pensions shall be payable *(no 6 thereof)*.

None of these provisions affect the principle of gender equality.

5.2 Pensions from Long-term Insurance and Permanent Incapacity Income from Short-term Insurance

The relevant Article 54 para 1 item (c) has already been presented above under no II.4.3. So it should be sufficient to refer to explanations given there.

6. Survivors' insurance

Survivors' insurance *(ölüm sigortası)* forms the third branch under long-term insurance.

6.1 Short Comings of the EU Law

In the area of social security, the EU law, in its current state, has a restricted substantive scope of application as far as discrimination on grounds of sex is concerned.

Regarding DIR 79/7/EEC, it has to be stated that the directive covers only statutory, but not occupational social security schemes. The latter ones come under DIR 2006/54/EC[74]. Second, pursuant to Article 3 para 2 DIR 79/7/EEC, the directive shall not apply to provisions concerning survivors' benefits *(and, by the way, family benefits)*. Consequently, DIR 79/7/EEC cannot be the benchmark to evaluate whether provisions on survivors' benefits, provided for in statutory insurance schemes, comply with the principle of gender equality.

In the end, the same goes for Article 21 CFREU. It prohibits any discrimination *(inter alia)* on grounds of sex. Article 23 thereof specifies that equality between women and men must be ensured in all areas, including employment, work and pay. The application of these provisions is doomed to failure, because of the limited substantive scope *(scope ratione materiae)*. As already mentioned above *(Part Two Chapter One No I.3.)*, the Charter imposes obligations on the Member States only where they are implementing Union law *(Article 51 thereof)*. According to Article 3 para 2 DIR 79/7/EEC, the States are not obliged to implement gender equality in their statutory survivors' insurance schemes. So they are not obliged to observe Article 21 and 23 CFREU as far as this special insurance branch is concerned.

Having in mind the gender mainstreaming strategy, laid down in Article 8 TEU, and many official declarations urging an effective and complete implementation of gender equality[75], it is really surprising that nothing indicates that the Commission is willing to abolish the obvious shortcomings of DIR 79/7/EEC by making a proposal for a revision.

6.2 Application of Article 10 of the Constitution of the Republic of Turkey and International Law

As the objective of this report is to analyze whether the Turkish social insurance provisions comply with the principle of gender equality enshrined in EU law, this report could refrain from controlling the relevant provisions on survivors' benefits. But with view to the principle of gender equality established in Article 10 CRT and the prohibition of discrimination laid down in several international conventions and covenants, all of them signed and ratified by Turkey *(see above Part Two Chapter Three No I. and II.)*, it seems to be appropriate monitoring the provisions of the survivors' insurance in the light of the Turkish Constitution and the relevant international law.

6.3 Personal Scope of Application (Scope Ratione Personae)

Right holders *(hak sahibi)* can apply for rights provided for in the survivors' insurance *(Article 32 para 1 SIUHIL)*. According to the definition given under Article 3 point 7, right holders shall mean the spouse *(eş)*, child *(çocuk)*, mother *(anne)* and father *(baba)*.

6.4 Substantive Scope of Application (Scope Ratione Materiae)

The benefits provided for under survivors' insurance are listed up in Article 32 para 1 SIUHIL. These are the following:

- survivors' pension,
- single payment,
- marriage support to daughters receiving pension *(marriage benefit)* and

[74] ECJ, judgment of 6/10993, C-1091, ECR 1993, I-04879 *(Ten Över)* concerning the previous DIR 86/378/EEC

[75] see e.g. the 'Roadmap for Equality between men and women - 2006 – 2010' published by the European Commission

- funeral benefit.

Already the wording of Article 36 and Article 37 para 3 – 5 SIUHIL makes it clear that the provisions on single payment and funeral benefit do not create any gender discrimination. The same goes for the provision on starting, termination and repayment of pensions of right holders. So the present report focuses on the provisions on survivors' pension and marriage benefit.

6.5 Right to Survivor's Pension

Survivors' pension can be awarded, if the deceased insurance holder has completed a certain insurance period and the right holders fulfil personal conditions. As to the latter ones, the law differentiates between the spouse and the children of the deceased insurance holder. These conditions are laid down in Article 32 SIUHIL. Further personal conditions are provided for in Article 34.

6.5.1 Insurance Conditions

The insurance conditions are laid down in Article 32 para 2 SIUHIL. The provision differentiates between conditions applying to all right holders and those applying to special groups of them. A survivors' pension shall be payable

- to all right holders of a deceased insurance holder, if minimum 1800 days of invalidity, old-age and survivors premium are notified *(item a thereof);* in case of right holders of deceased insurance holder under item (b) of para 1 of Article 4, it is obligatory that the entire premium or any kind of debts related premiums, including the universal health insurance, should not be present or paid;
- to right holders of deceased insurance holders under item (a) of para 1 of Article 4 if there is an insurance status of minimum 5 years and totally 900 days of invalidity, old-age and survivors premium are paid, excluding any kind of debt periods *(item a thereof)*;
- to right holders of deceased workers in public administration who have suffered from an accident described under Article 47 and was receiving or had, at least, the right to invalidity, duty disability or old-age pensions *(item b thereof);*
- to right holders of deceased workers whose invalidity, duty disability or old-age pensions were terminated due to the fact that they had started *(again)* to work under insurance *(item <c> thereof)*.

These provisions do not create any discrimination based on sex.

6.5.2 Personal Conditions Applying to the Widowed Spouse

A survivors' pension is granted to the 'spouse' of the deceased insurance holder *(Article 34 para 1 item (a) SIUHIL)*. That means that the right holder must have been married with the insurance holder at the date of his / her death.

In this context it should be noted that the English version of Article 34 para 1 item (a) SIUHIL, that has been available, shows a translating error. According to it, the provision would apply only to the 'widow' spouse, but not to the 'widower' spouse. The English text is not in line with the Turkish wording which applies to the "dul eş" that means to the 'widowed spouse'. The Turkish term "eş" covers both husband and wife and corresponds with the

English term 'spouse'. Therefore the English wording of Article 34 para 1 item (a) is to be read as meaning 'widowed spouse'. Consequently, there is no gender discrimination.

6.5.3 Personal Conditions Applying to the Orphans

As to the children of the deceased insurance holder, the law differentiates between three groups. Common condition for all of them is that they are not put on income or pension due to not working under this law *(Article 34 para 1 item (b) SIUHIL)*. That means that a pension is not granted to them if they carry out a paid and insured work. In addition, the three groups have to fulfil the following different conditions:

6.5.3.1 Age Limits

According to Article 34 para 1 item (b) no (1) SIUHIL the children of the deceased insurance holder are entitled to survivors' pension, if they do not exceed the age limits established in that provision and, where necessary, take part in certain forms of education. The law differentiates between three age limits.

- All children can receive survivors' pension, until they have completed the age of 18.
- They are eligible for pension till the age of 20, if they receive education in high school.
- The pension can be granted to them till the age of 25, if they receive higher education.

Contrary to the former law (at least that one, which had been in force until 2003), Article 34 para 1 item (b) no (1) SIUHIL applies to both sons and daughters. This follows already from its wording which uses, in the English version, the term 'children' and, in the Turkish version, the term "çocuklar" The clear wording leaves no room for another interpretation. Except age limits and, where necessary, special forms of education, no further conditions have to be fulfilled. Thus a survivors' pension has to be granted irrespective, inter alia, of the family status of the child. It is irrelevant whether the child is married, not married, divorced or widowed.

Nothing otherwise results from Article 3 no (10) item (b) SIUHIL, according to which 'dependants' shall mean, inter alia, unmarried children under specific ages listed up in that provision. The provisions on survivors' pension, do not refer to 'dependants', but to 'rightholders' of the deceased insurance holder (see Article 32 para 2 SIUHIL). Pursuant to the definition in Article 3 no (7) thereof the term 'rightholder' covers, inter alia, a child who becomes qualified to receive income or pension. It does not restrict that term to unmarried children like no (10) item (b) thereof in case of dependants. So, principally, rightholders can be unmarried, married, divorced or widowed children, except the pertinent law rules something different. As Article 34 para 1 item (b) no (1) applies to children without any restriction, not only unmarried, but also married, divorced or widowed children are covered by the personal scope of application of that provision.

Turkish experts do not share the view that Article 34 para 1 item (b) no (1) SIUHIL applies both to sons and daughters. They do not deny that the wording of no (1) at issue covers all children, but they refer to Article 60 para 1 no (1) of the Social Insurance Process Regulation (the Regulation has not been available in English). They point out that, according to that provision, 'everyone' (i.e. all children) until the age of 18 would be entitled to survivors' pension, whereas until the age of 20 and 25 respectively only male children could apply for it if attending secondary or higher education as described in the law. The term 'male children'

would be used in no (1) of the Regulation just to explain the Law. Thus, the provisions of the Regulation and the Law definitely would not conflict.

If there would exist another arrangement under Article 34 SIUHIL which would compensate the partial 'exclusion' of daughters from item (b) no (1), one could adopt the view of the Turkish experts. In such a case it would be of no importance of whether daughters could rely on that provision. There is a regulation, namely no (3) thereof (see to this provision the explanation under the following no 6.5.3.3), that is of interest. It entitles daughters, whatever their age, to survivors' pension, on condition that they are not married, divorced or widow. In these three constellations it would not be necessary to rely on no (1) thereof, in order to grant the benefit to daughters because age limits would be of no relevance. However, married daughters do not come under no (3) thereof. Having regard to no (1) thereof they could demand a survivors' pension only until the age of 18, if this provision would have to be construed in the light of the Regulation. Married sons, in turn, could profit from the higher age limits, provided they attend the specific education forms. In the end, the gender equality problem is limited to married daughters. If they attend secondary or higher education, they would not have the right to claim survivors' pension, pursuant to Article 60 para 1 no (1) Social Insurance Process Regulation.

This provision is not in line with the parliamentary act. Article 34 para 1 item (b) no (1) SIUHIL does not use the term "erkek çocuklar" (= sons), but "çocuklar" that covers both sons and daughters. Article 34 para 1 item (b) SIUHIL gives no hint that its no (1) applies only to sons, where the age limits of 20 and 25 are of relevance. In addition, it has to be observed that in 2003 the word 'male' (in Turkish: "erkek") had been eliminated in the corresponding provision of the preceding Law No 506[76]. So the Regulation does not clarify the wording of the Law, but amends its substance. It can be left open whether it has simply been forgotten to adjust the regulation provision to the amended parliamentary act. With view to the supremacy of the parliamentary act, the differing wording in the Regulation has to be neglected. It is void. So it has not to be discussed whether no (1) at issue could create a direct discrimination of daughters.

6.5.3.2 Disabled Children

Children who are found disabled by losing minimum 60 % of working power are granted a survivors' pension, irrespective of their age and education status *(Article 34 para 1 item <b> no <2> SIUHIL)*. This provision applies to sons and daughters, irrespective of their family status.

6.5.3.3 No Age Limits for Daughters

Article 34 para 1 item (b) no (3) SIUHIL provides a survivors' pension for daughters, whatever the ages are, who are not married or divorced or widow. If they are married, they will, of course, not come under this provision. But that does not mean that they are excluded from entitlement. If they fulfil the conditions provided for under no (1) or (2) thereof they are eligible for pension pursuant to these provisions.

Article 34 para 1 item (b) no (3) SIUHIL constitutes a direct discrimination of sons who are not married or divorced or widowers. Insofar a justification for the unequal treatment is

[76] The preceding Law No 506 *(Social Insurance Act of* 17/7/1964) has amended the corresponding Article 68 No I lit C item (a) that had initially applied to "erkek çocuklar" (= 'sons'). The word "erkek" was eliminated *by Article 35 of Law No 4958 of 29/7/.2003*.

needed. Possible reasons could be – apart from tradition – substantive actual economic and / or social disadvantages of the daughters concerned. Even if so, it might be problematic to maintain that provision for an indefinite period. It could be recommendable to enshrine a time limit on its application and – having in mind, in particular, Article 10 CRT and Articles 3 to 5 CEDAW, Articles 3 and 7 ICESCR– to adopt, during a transitional period, all positive actions which will make the maintenance of the provision no longer necessary[77].

6.5.4 Calculating of Survivors' Pension and Dividing Between Right Holders

For calculating survivors' pension the amount of the invalidity, duty disability or old-age pension that the insurance holder had received or the amount of the pension determined in accordance with Articles 27 and 30 SIUHIL shall be taken as basis *(Article 33 SIUHIL)*. How many percent of the amount has to be paid to the spouse and children of the deceased insurance holder is regulated under Article 34 thereof. By the way, this *(dividing)* provision applies also to survivors eligible for income paid in case of an insurance holder who has died due to work accident or occupational disease *(Article 20 para 1 – 3 SIUHIL).*

The amount of the pension calculated pursuant to Article 33 SIUHIL has to be divided between the right holders. 50 % of it shall be payable to the widow or widower *(Article 34 para 1 item <a> thereof)*. The percentage shall be increased to 75 %, if the widowed spouse is

- childless;
- put on pension;
- not put on income or pension due to not working under this Law or under legislation of a foreign country *(that means he / she has no chance to receive an in come or pension because of being not insured),*
- not put on income or pension due to his / her own insurance status *(that means he / she does not fulfil the insurance conditions for receiving income or pension)*.

Each child who is entitled to pension shall receive 25 % of that amount *(item <b> thereof)*. They will get 50 % in case they are both motherless and fatherless *(item <c> thereof)*

The total of pension cannot exceed the amount of the pension of an insurance holder. If necessary, proportional reductions shall be applied, in order to observe the limit *(Article 34 para 3)*.

These provisions do not show any gender discrimination.

6.5.5 Pension for Parents of the Deceased Insurance Holder

Both mother and father can be entitled to survivors' pension due to the death of a child that has been insured. The provision differentiates between two situations. If they are less than 65 years old and there are shares left over from the rights for spouse and children, 25 % totally shall be payable as pension to mother and father. In addition, the award depends on the further condition that the payable figure is less than the net amount of minimum wage and that they are not put on income and / or pension excluding the income and pension rights granted because of other children. If the mother and father is over 65 years of age, then 25 %

[77] As to the needed positive actions, see footnote 67

shall be payable under the above conditions, without considering the left over share. As the provision applies to both mother and father there is no gender equality problem.

6.5.6 Joining of Pensions from Long-term Insurance Branches

The problems of joining permanent incapacity pension and survivors' income under short-term insurance have already been represented above under no II.4.3. Similar problems arise under long-term insurance. The relevant provision is Article 54 para 1 item (a) SIUHIL.

An individual may be qualified for invalidity, duty disability or old-age pension granted from his / her own insurance and for pension due to his / her deceased spouse. In such a case both pensions shall be payable *(no <2> thereof)*.

Individuals qualified also for next spouse in case the marriage is terminated due to death, the preferred pension shall be payable *(no <7> thereof)*.

If individuals are entitled to survivors' pension both from spouse and from parents, it depends on their preference which pension shall be payable *(no <5> thereof)*.

For children qualified for pensions separately from mother and father, all of the higher and half of the lower one shall be payable *(no <3> thereof)*.

If mother and father are qualified for pension from more than one child, all of the pension from the first two files allowing the highest payment and the half of the lower one shall be payable *(no <4> thereof)*.

6.6 Marriage Bonuses / Benefits

Article 37 SIUHIL provides a special benefit for daughters in case of marriage, if they are receiving income from work accident and occupational disease insurance or pension from survivors' insurance. Upon marriage and request of daughters, a marriage benefit shall be payable in advance, for once, at the amount of two years of pension or income to those whose income or pension should be terminated due to marriage *(para 1 thereof)*. This means that daughters are only entitled to marriage benefit, if they receive income or pension according to Articles 20 para 1 and 34 para 1 item (b) no (3) SIUHL, because only in such cases the status of being not married is a condition for entitlement so that a marriage will terminate the award of pension. In the cases of no 1 and 2 thereof the income or pension is granted irrespective of the family status. So under these provision the benefits will not be terminated due to marriage and continue to be paid, even in case of a marriage.

Article 37 para 1 SIUHIL favours unmarried daughters. Thus it creates a direct discrimination of sons and needs a justification. Insofar a reference can be made to the explanations given above under no 6.6.3.3.

7. Women's Right to Pay Premiums for Not Insured Periods

Article 41 para 1 SIUHIL establishes a right for several groups to pay premiums for periods where they have not been insured. For this report, only the provisions concerning women are of interest.

In case of the birth of a child, Article 41 para 1 item (a) SIUHIL provides that for female insurance holders certain terms shall be counted from their insurance status under the following conditions:

- The individual concerned must not work at workplace on service contract;
- the child must live;
- terms that are to be taken into account are unpaid birth and maternity leave terms granted pursuant to Laws and terms requested by female insurance holders under item (b) of para 1 of Article 4;
- the extent of the term is limited. First, it cannot be demanded for every birth, but only twice. Second, each term must not exceed a two-year-period following the date of birth. Thus the term is restricted to 4 years at most.

The premiums to be paid are calculated over 32 % of the daily earning to be determined by the individuals concerned. The amount has to be in range of upper and lower limits pursuant to Article 82.

The provision applies only to women. Where the wording refers to unpaid birth and maternity leave it makes it clear that employed female workers are concerned, because only these ones are eligible for such a leave. The other group are self-employed female workers, to whom the provision explicitly refers. Thus the provision favours women.

The unequal treatment of men needs a justification. If the right to pay premiums would cover only the period of maternity leave, the discrimination of men could surely be justified by the objective reason 'maternity'. However, the provision does not cover only this period, but a period up to two and four years respectively. So it seems that not maternity, but birth and child raising are the objective reasons for awarding this right. In such a case the same right must be given to a man, too, if he is the one who cares for the child.

IV. Provisions on Optional Insurance

According to Article 50 SIUHIL optional insurance is the insurance which allows individuals to be subject to long-term insurance branches and universal health insurance by paying premiums. Whereas the former law *(see ex Article 85 of Law No 506)* allowed the access to optional insurance *(there called voluntary insurance)* only under the condition having already paid contributions for invalidity, old age and survivors insurance for at least 1080 days, the law in force does not require the completion of any paid contribution periods under compulsory insurance. Furthermore, the substantive scope of application has been enlarged. Whereas the optional insurance under former law covered only invalidity, old age and survivors insurance, now also the access to universal health insurance is included.

The personals scope of application covers all residents in Turkey. Turkish citizen who reside in Turkey, but are in a foreign country *(e.g. for work)* with which Turkey has not concluded a social security convention, are also eligible for optional insurance. The further conditions of access are the following:

- not carrying out a work that comes under compulsory insurance;
- not being put on pension due to own insurance;
- being over the age of 18;
- request filed to SSI.

The premium to be paid is 32 % of the earning determined by insurance between the lower and upper limit of earning subject to premium. 20 % of this amount is invalidity, old-age and survivors' insurances premium and 12 % is universal health insurance premium.

The provisions on optional insurance do not cause any gender equality problems.

Chapter Three: Universal Health Insurance

I. Introduction

The Turkish health system is in transition[78]. Prior to 2003, health-care was funded and provided by several public agencies. They served different social groups and left significant gaps in coverage. The previous three main institutions covered salaried workers in the formal sector, self-employed workers as well as active and retired civil servants. Informal-sector workers were not insured; they were eligible for health care only if they were dependants of an insurance holder. A tax-financed programme called 'Green Card Programme' and introduced by Law No 3816 in 1992[79], applied to low-income individuals not insured under one of the existing schemes. Although the majority of the population was covered by one of the health insurance schemes, including the 'green card' *("yeşil cart")* and all citizens were eligible for free primary and emergency hospital care, there were serious problems on the delivery side. The Ministry of Health (MoH) operated a very large network of preventive and primary health care centres and hospitals. The 'Social Insurance Institution' *("Sosyal Sigortalar Kurumu")*, competent for providing health services under the former Law No 506, ran their own network of facilities. Health services were also offered by private facilities, many of which were not effectively regulated[80].

Since 2003, the government's 'Health Transformation Programme' *(HTP)* has been under implementation. One of the main components of the reform package was to establish a general health insurance that covers the whole population and ensures a high quality health service, which is fair, equal, protective and curative. This has resulted in significant changes in the health system[81].

The majority of the hospitals are now under the umbrella of MoH. The various former social institutions are now integrated under one institution, the SSI. A strict separation between purchaser of health services from provider has bee materialized. The benefits package is unified. Provider payment mechanisms are regulated in prospective-payment systems incorporating pay-for-performance. Since the enactment of SIUHIL, in October 2008, a single-payer system has been established for public patients. An integrated primary health care, based on the model of family medicine, is under implementation in several provinces. Public hospitals have been given more autonomy over resource allocation. On the other hand, they operate under a more rigorous MoH accountability framework.

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[78] OECD Reviews of Health Systems – Turkey *(Joint OECD / World Bank review of the Turkish health system)*, 2008, ISBN 978-92-64-05108-9, http://www.oecd.org/bookshop

[79] Thereto: Alpay Hekimler, Die Grundlagen der Krankenversicherung in der Türkei (Basics of the Health Insurance scheme in Turkey), published in: ZFSH/SGB 2006, pp 264, 268

[80] OECD Reviews (footnote 78), pp 11, 12

[81] See to the following: OECD Reviews (footnote 78), pp 12 and 43 et seqq; Sarbani Chakraborty, Health Systems Strengthening: Lessons from the Turkish Experience, World Bank, ECA Knowledge Brief, December 2009, Volume 12; http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/0,,contentMDK:22430928~pagePK:146736~piPK:146830~theSitePK:258599~isCURL:Y,00.html; last access on 1/03/2011

II. Personal Scope of Application (Scope Ratione Personae)

Due to the principal of universal coverage, nearly all individuals residing legally in Turkey are protected by health insurance. The Turkish legislator could rely on Article 56 CRT when introducing a universal health care system[82]. That constitutional provision provides that everyone has the right to live in a healthy and balanced environment. The state has to ensure that everyone leads his / her life in conditions of physical and mental health. In order to establish widespread health services, general health insurance may be introduced by law.

1. Individuals Who Are Deemed to be Insurance Holders

Article 60 para 1 SIUHIL distinguishes between 'citizens', that means Turkish nationals in the sense of Article 66 CRT, and foreigners. The latter ones are insured if they reside in Turkey with a residence permit for period of at least one year, provided that the principal of reciprocity is taken into consideration and they are not insurance holders under the legislation of a foreign country. This group and all the other groups insured are listed up in a positive list enshrined under the items (a) till (f) of para 1 of Article 60. First of all, workers on service contract, self-employed workers and workers in administration are covered. In addition, the law applies, inter alia, to individuals who receive income or pension or other social benefits, to those whose income per capita is less than one thirds of .minimum wage and to refugees and stateless persons.

Finally, the general clause of item (g) thereof provides that citizens who are out of the above items and who do not have the right to benefit from health insurance at a foreign country shall also deemed to be insurance holders. Thus, principally, everyone who resides *(legally)* on the territory of Turkey is insured.

According to Article 60 para 2, also the dependants of an insurance holder *(as to the definition of dependants see Article 3 para 1 no <10>)* are protected. Thus the spouse and unmarried children of the insurance holder are covered, if they are not *(already)* insurance holders or holders of voluntary insurance. As regards children, age limits have to be observed *(see Article 3 para 1 no <10>)*. Children who have not completed the age of 18 shall always come under health insurance, irrespective of whether their parents are considered to be insured[83]. Parents come under universal health insurance, if they are supported by the insurance holder.

Due to the universal coverage, the provisions on health insurance holders are, generally, not discriminatory regarding gender equality. This does not go for Provisional Article 12 para 8 SIUHIL (see page 83).

2. Individuals Who Are Not Deemed to be Insurance Holders

Article 60 para 3 SIUHIL lists up the individuals who are excluded from universal health insurance. These are

- individuals under items (d), (e) and (l) of paragraph one of Article 6 (individuals who fulfil their military obligations, posted workers, Turkish citizen employed in abroad representa-

[82] Yasemin Körtek, Die Einführung der allgemeinen Krankenversicherung in der Türkei (Introduction into the General Health Insurance in Turkey), published in: Hilmar Krüger / Yasemin Körtek, Beiträge zum türkischen Recht – Erbrecht und Sozialrecht (Contributions to the Turkish Law – Law of Succession and Social Law), Berliner Wissenschafts-Verlag, 2010, pp 51, 53

[83] Yasemin Körtek (footnote 82), p 57

tive offices of public administration and insured under the legislation of the foreign country),
- convicts and arrested individuals under sentence execution institutions and detention houses,
- foreigners residing in Turkey for a period of less than one year,
- individuals who do not reside in Turkey and are put on pension by getting into service debt pursuant to abrogated Law Number 2147 of 30/5/1978 and to Law Number 3201 of 8/5/1985.

In the end, the provision excludes individuals from the universal health insurance most of whom are already covered by other systems. The exclusion of foreigners who are residing in Turkey for a period of less than one year does not create any discrimination on grounds of sex. It is not for this report to evaluate if the exclusion of EU nationals might not comply with EU law. The exclusion concerns the EU prohibition of discrimination on grounds of nationality, but not of sex.

III. Substantive Scope of Application (Scope Ratione Materiae)

The universal insurance holder and his / her dependants benefit from 'principal services' and 'supplementary *(additional)* services'. Services that are not listed up in the law are not financed by SSI. This goes without saying also for those services that are expressly excluded.

1. Principal Health-Care Services

Health-care cervices mean the health-care products and services listed up in Article 63 SIUHIL *(see the definition under Article 3 no <22>).* According to para 1 thereof the following services have to be financed by SSI:

- Protective health-care services, i.e. personal preventive health-care services with the purpose of protecting individuals from diseases or maintaining their health status *(item <a>; see also the definition under Article 3 no <23>)*.
- In case of sickness, inpatient or outpatient examination, including laboratory examinations and analyses and other diagnostic methods, medical operations and treatments, patient follow-up and rehabilitation services, emergency health-care services as well as health-care services for organ, tissue and stem cell transfer and treatment *(item <b> thereof)*.
- In case of sickness, laboratory examinations and analyses and other diagnostic methods, medical operations and treatments, tooth extraction, conservative tooth treatment and channel treatment, patient follow-up, denture applications, emergency health - care services for oral and dental diseases, orthodontic dental treatment of individuals under age of 18 up to the amount to be determined pursuant to Article 72 *(item <d> thereof)*.
- In case of maternity, inpatient or outpatient examinations, including laboratory examinations and analyses and other diagnostic methods, medical operations and treatments, patient follow-up, uterus discharge, medical sterilization and emergency health-care services *(item <c> thereof)*.
- Application of in vertico-reproduction methods under the conditions provided for in item (e) thereof.
- Delivery of medical auxiliary means and material *(item <f> thereof)*.

None of these provisions puts men or women at a disadvantage in the light of gender equality.

2. Additional Benefits

Article 65 SIUHIL imposes on SSI to bear additional expenses in the following three cases:

- Transportation expenses: If, upon medical requirement of medical doctor or dentist, the insurance holder an his / her dependant have to be transferred out of the settlement where they are examined and treated, the transportation expenses for both directions are borne by SSI.
- Daily allowance: In case of a necessary transfer out of settlement, the universal insurance holder and his / her dependant are eligible for a daily allowance.
- Companion expenses: During the inpatient treatment of insurance holders or their dependants the accommodation and food expenses of the companion limited to one person shall be borne by SSI, under the condition of necessity determined by medical doctor or dentist.

3. Excluded Health-Care Services

There are three constellations where health-care services are not to be financed by SSI *(Article 64 SIUHIL)*.

- Any kind of health-care service for aesthetic purposes and orthodontic dental treatment for aesthetic purposes, excluding those which are made to ensure the integrity of body and are caused due to work accident or occupational disease, accident, sickness or congenial reasons.
- Health-care services not permitted or licensed by MoH and those not accepted to be a health-care service in medical terms.
- Chronic sickness of foreigners which was present before the date they became universal insurance holders.

Again there is no gender equality problem.

IV. Conditions for Benefiting from Health-Care Services

Benefiting from health-care services and other rights of universal health insurance pursuant to Law is a right for the universal health insurance holders and his / her dependants *(Article 62 para 1)*. The conditions to benefit from them are laid down in Article 67 SIUHIL.

1. Conditions of Entitlement

To benefit from one of the health-care services listed up in Article 63 SIUHIL the insurance holder must meet the following conditions:

- **Universal health insurance premiums to be paid:** Principally, a minimum contributory period of 30 days in year preceding the date of application has to be completed *(item <a> of para 1 thereof)*.
- **No premium debts:** Besides the insurance condition mentioned above, self-employed universal insurance holders and those coming under the general clause of item (g) of para 1 of Article 60 must not have premium debts and premium related debts in the preceding 60 days *(item <b> thereof)*. Optional insurance holders and foreigners must not have any contribution related debts.

- **Presentation of an identity document:** For the universal health insurance holders and their dependants it is obligatory to present an identity document (identity card, driver's licence, marriage certificate, passport or photographed health card) at the time of application to health-care service providers. Emergency cases are excluded *(Article 67 para 3)*.

2. Exemption from Insurance Conditions

Certain individuals are entitled to health-care services, even if premiums are not paid. Also certain kinds of health-care services are provided, even if the insurance condition is not fulfilled *(Article 67 para 1 SIUHIL)*. Concerned are

- children under the age of 18,
- persons in the need of medical care from another person,
- emergency cases,
- work accidents and occupational diseases situations,
- contagious diseases with notification obligation,
- protective health-care services,
- maternity,
- disaster and war cases as well as strike and lock-out cases.

3. Entitlement to Health-Care Services After the Termination of Insurance

Principally, the entitlement to receive health-care services ends at the time when the insurance is terminated. An exception has been enshrined in two constellations.

Employed and self-employed workers as well as workers in Public Administrations continue to benefit from universal health insurance for a period of 10 days following the termination date of compulsory insurance. They and their dependants are protected for a longer period of 90 days if they have a compulsory insurance of 90 days within the year before the date they loose their insurance status (*Article 67 para 4 SIUHIL)*.

Where the universal insurance holders and their dependants are under medical treatment at the date of loosing the insurance status, the health-care services have to go on until the individuals concerned recover.

V. Health-Care Delivery and Its Financing by SSI and Additional Fees Charged from Insurance Holders

SSI purchases the services; it is not the service provider. Health-care providers are the real persons and public and private legal persons who provide these services *(see the definition under Article 3 no <25>)*. SSI is contracting with domestic or abroad providers for delivery of inpatient and outpatient health-care services *(Article 73 para 1)*. More than third of them are private hospitals. Except emergency cases, the health-care services purchased by individuals from non-contracted health-care providers shall not be payable by SSI *(Article 73 para 6)*.

According to Article 70 SIUHIL the MoH has to divide health-care providers in three categories. Consequently, when applying for health-care services the insurance holders and their dependants have to observe a transfer chain consisting of three levels[84].

[84] Therero:Yasemin Körtek (footnote 82), p 63 et seq; OECD Reviews (footnote 78), p 50 et seq

- **Primary level**: The provider on the first level shall be a medical doctor trained in family medicine. A family medicine model was launched in 2004. The insurance holders can choose their family doctor. Family doctors are given a monthly payment based on the number of persons enrolled with them. They can cooperate with the 'old' health centres.

  In provinces, where the family model is under implementation, community health centres are establishing. One of the biggest barriers of to the effective implementation of the family medicine system is the shortage of doctors *(especially general practitioners)*[85]. So the 'old' system of health centres remains operational where the new system is not under implantation[86].

- **Secondary level**: Family doctors have a 'gatekeeper' function. That means that the insurance holders have, at first, to contact the family doctor. If necessary, the family doctor refers the individual to a provider on the secondary level; these are mainly hospitals.

- **Third level**: Providers on this level are university hospitals.

The Law foresees no sanctions in case insurance holders and their dependants do not act in accordance with the transfer chain (*Article 70 para 2)*.

Financing the benefits of health care services and rights is an obligation of SSI *(Article 62 para 1 SIUHIL)*. The prices of the health-care services are determined by the 'Health-care Services Pricing Commission'. The 'Council of Ministers' is authorized to determine the upper limit of the additional fee to be charged from universal health insurance holders and their dependants up to one fold of these values. The additional fees can be charged by private providers and foundation universities, but not by providers of public administration *(Article 73 para 2 and 3)*. Individuals receiving honorary p pension, pension on compensation or disabled veteran pension *(no <4>, <6> and <8> of item <c> of Article 60)* shall not be charged with additional fees.

The amount of the daily allowance as well as transportation, accommodation and food expenses is also determined by the Health-Care Services Pricing Commission *(Article 72 para 1 SIUHIL)*. Contracted health-care service providers may request additional charges from universal health insurance holders and their dependants up to three fold of the determined prices for hotel services fulfilling the requests over standards and for extraordinary health-care service determined by the Health-care Services Pricing Commission considering issues such as not having vital importance or having alternative treatments (*Article 73 para 4)*. Since 1/4/2010 public providers are no longer allowed to charge these additional fees[87].

No gender equality problems are caused by these provisions. However, it should be noticed that it seems doubtful whether many insurance holders and their dependants are able to pay the additional fees that can be charged by some health-care service providers[88]. If health-care service providers are allowed to charge additional fees, these fees should also be covered by

[85] Yasemin Körtek (footnote 82), p 55
[86] OECD Reviews (footnote 78), p 51
[87] Yasemin Körtek (footnote 82), p 62
[88] See e.g. the case reported in Hürriyet Daily News of 6/3/2011, where a girl needed a brain surgery; the costs charged by a university hospital added up to 50,000 TL; as the parents (father unemployed, mother working as textile worker) were not able to bear these costs and the health insurance covered only 20,000 TL, the needed 30,000 TL were collected thanks to friends' efforts.

health insurance, otherwise the system does not meet the requirements of a 'universal' health insurance scheme.

VI. Charging Contribution Fees

In some cases the insurance holders are charged with contribution fees. According to the definition under Article 3 no 26 SIUHIL, contribution rate shall mean the amount payable by the universal insurance holders or their dependants in order to benefit from health-care services. The provisions presented in the following do not show any discrimination on grounds of sex.

1. Health-Care services for Which a Contribution Fee is Charged

According to Article 68 para 1 SIUHIL a contribution fee has to be paid for

- medical doctor and dentist examinations for outpatient treatment;
- orthesis, prosthesis, treatment tools and equipment;
- medication provided for outpatient treatment.

Two TL shall be charged for examinations for outpatient treatment (*Article 68 para 2)*. Due to a decision of the Council of State *(the highest Turkish administrative court)*, of 22/3/2010 *(2009/13840E*), the SSI has decided not to collect this fee[89]. The contribution fee shall be between 10 and 20 % for medical tools and equipment as well as for medication. Details are determined by SSI in a regulation. The fee payable in the latter cases shall not exceed 75 % of the minimum wage. The fee payable by poor universal insurance holders shall, upon request, be refunded.

2. Health-care Services for Which no Contribution Fee is to be Paid

Certain individuals and certain health-care services are exempt from contribution fees, for example

- Cases of work accident and occupational diseases,
- Health-care services provided due to disaster and war cases,
- Family physician examinations and personal protective health-care services,
- Chronic diseases and vital health-care services and organ, tissue and stem cell transfers,
- Individuals receiving certain pensions and other social benefits

For more details see Article 69 SIUHIL.

Chapter Four: Provisions on Premiums

SSI is obliged to collect the premiums for short- and long-term insurance as well as for universal health insurance *(Article 79 SIUHIL)*. For the most part, these schemes are financed by premiums. As for the working population (employed, self-employed workers and workers in public administration), the premiums are calculated on the gross earnings and collected on the basis of a pay-as-you-go system. Details for the three groups concerned are laid down under para 1, 2 and 3 of Article 80. A lower limit *(one thirtieth of the minimum wage)* and an upper limit *(6.5 times the lower limit)* of daily earnings have to be respected. Earnings under the

[89] Yasemin Körtek (footnote 82), p 61 et seq

lower limit shall be calculated using the lower limit, earnings over the upper limit shall be calculated using this limit *(Article 82)*. For individuals who do not carry out an insured work and who come only under universal health insurance, the monthly premiums are calculated on the basis of minimum wage (para 4 of Article 80.

Article 81 lists up the rate of insurance premiums to be collected and the insurance holders' and employers' shares. The total of rate for long-term insurance premiums is 20 %. As regards short-term insurance, the law does not determine an exact figure, but gives a frame from 1 – 6.5 %. It is for SSI to determine the concrete percentage by taking into account the gravity of the danger of work in terms of work accident and occupational disease. These premiums are exclusively paid by the employers. The others are shared between employee and employer in case of employed work. The total of premium rate for universal health insurance is 12.5 % for the working population and 12 % for all the others (those subject only to universal health insurance and those specified under Article 60 para. 1 item (e) and provisional Article 13 of Law no. 5510).

The government has also to contribute to the financing of the social insurance and universal health insurance. It has to pay a rate of one fourth of the total of all premiums collected by SSI per *month (Article 81 para 2 SIUHIL)*.

The following table gives an overview on the premium rates and shares imposed by SIUHIL. In addition, it has to be noticed that unemployment insurance premium rates are applied as 1% as share of insured, 2% as share of employer and 1% as the share of the government.

Premium rates imposed by SIUHIL				
Insurance branches	Share of employed	Share of employer	Total	Share of government
Long-term insurance: Invalidity, old-age, and survivorship	9 %	11 %	20 %	The government's share amounts up to ¼ of the total contributions collected annually
Sort-term insurance: Work accident, occupational disease, sickness and maternity	./.	1 – 6.5 %	1 – 6.5 %	
Universal health insurance	5 %	7.5 %	12.5 %	
Total	14 %	19.5 % to 25.0 %	33.5 % to 39.0 %	

The provisions on premiums do not provoke any gender equality problems.

Chapter Five: Common and Miscellaneous Provisions, Administrative Fines and Provisions for Dissolution

The provisions laid down under Section Five and Six SIUHIL *(= Articles 92 – 103)* do obviously not create any discrimination on grounds of sex.

Chapter Six: Provisional and Final Clauses

Section Seven SIUHIL contains two chapters. The first one (Articles 104 – 107) concerning 'amended and abrogated provisions'; is of no interest with view to the gender equality principal. In the end, the same goes for Chapter Two and its provisional and final clauses. But as it might be helpful for the understanding of the concept of SIUHIL a few remarks should be made.

Provisional Article 1 determines that all pensions, incomes and other allocations assigned or entitled with the previous Acts No 506, 1479, 2925, 2926 *(see thereto the explanation under Part III Chapter One of this report)* shall continue to be paid. If these former laws should contain provisions that might be not in line with the principal of gender equality, their continuous payment could create discrimination on grounds of sex. Unfortunately, only the English version of the Social Insurance Act No. 506 was at disposal and could be examined in this report.

Following the English version of Act No 506, there could be a gender equality problem where spouses are eligible for survivors' pension. According to Article 68 para 1 lit A of Act No 506 only widows had been eligible for such a pension. That would mean that a widower whose wife had been subject to Act No.506 and had died before the new social insurance law entered into force in 2008, would have no right to a survivors' pension. But insofar we have the same translation problem that has already been discussed under Part III Chapter II No III 6.5.2. of this report. The Turkish version of this provision applies to the spouse and not only to widows. So there is no gender equality problem.

The problems that may arise from a continuous payment of a survivors' pension granted to the children of the deceased insurance holders in application of the former law, are the same ones that have already be discussed above regarding the new Article 34 SIUHIL (*see the explanations under Part III Chapter II No III 6.5.3.1. and 6.5.4.)*.

Provisional Article 2 para 1 item (a) addresses problems that arise in the calculation of old-age and invalidity pensions where insurance periods have been completed both under the former Acts No 506, 1479, 2925 and 2926 and under SIUHIL. .In such a case the insurance periods completed before 1/10/2008 shall be calculated on the basis of the relevant provision of the previous law and those completed after that date on the basis of the relevant provisions of SIUHIL.

A gender equality problem may arise from Provisional Article 12 para 8 SIUHIL. As Turkish experts have pointed out, a discrimination against sons might have been introduced by an amendment implemented by Law No 6111 (of 13/02/2011). Prior to Law No. 5510, daughters were considered dependents without an age limit in the Laws (e.g. Law No. 506). With the arrangement made in Article 12 of Law No. 5510, a provision has been imposed to the effect that daughters shall be subject to Law No. 5510, i.e. lose their title of being a dependent after the age of 18, 20, 25 based on their education situation, in the event of a change in their status (marriage or becoming insured as result of employment). Now the amendment introduced by Law No 6111 has restored the legal situation prior to SIUHIL when the change of the status no longer exists. Thus daughters have been provided again the right to benefit from the health services over their parents without an age limit. No such arrangements have been made for sons.

The impact of other provisional articles concerning the principle of gender equality could not be evaluated in this report, as English versions of the relevant former law were not available.

Part Four: Conclusions

Based on the analysis and comments set out above the following table summarizes the proposals for amendments. If convenient, different proposals are presented.

Social Insurance and Universal Health Insurance Law	
Law in force	**Proposals for amendments**
Article 3 (**Definitions**) *For the purposes of this Law;* *1) – 10) ……..* 11) Service contract: shall mean the service contract defined in Code of Obligations number 818 dated 22/4/1926 and work contract or service contract defined in the labour legislation,	11) Service contract: shall mean the service contract defined in Code of Obligations number 818 dated 22/4/1926 and work contract or service contract or employment contract defined in the labour legislation, *The following definitions shall be appended:* 11a) Home services: shall mean all paid services that are performed in or for a household or households, 11b) Charged worker: shall mean a worker who carries out paid work on the basis of a contract defined under number 11, 11c) Non-permanent worker: shall mean a worker who works for a definite period for another individual, 18a) Actual service term increments: shall mean increments awarded because of disadvantages suffered during the insurance career due to special risks and having the effect to be added to premium days in calculation of pensions and single payments, 18b) Nominal service term increments: shall mean increments awarded for days where premiums have not been paid, but which have to be added to premium days in calculation of pensions and single payments, 18c) Child care credits: shall mean credits granted for periods of child raising which shall have the same effect as paid premium days,

Article 6 para 1: *For the purposes of implementing short and long term insurance branches of this Law;* *a) …….* b) Relatives up to third degree, who live together in the same residence and work in the works carried out in the residence where they live, without having anybody else from outside, *c) – l) …….* *shall not be deemed to be insurance holders pursuant to Articles 4 and 5.*	**First proposal:** b) abrogated **Second proposal:** *If the first proposal should be rejected, item (b) should be formulated as follows:* b) Relatives up to third degree, who live together in the same residence and work in the works carried out in the residence where they live, without having anybody else from outside, and who document that, after deducting the costs of the activity, monthly average of their income from this activities is less than thirty times the lower limit of daily earning subject to premium defined by Law,
Article 6 para 1: *For the purposes of implementing short and long term insurance branches of this Law;* *a) – b)…….* c) *(Amended: 17/4/2008 - 5754/4th Art.)* Individuals who work in home services (excluding charged and permanent workers), ……. *d) – l) …….* *shall not be deemed to be insurance holders pursuant to Articles 4 and 5.*	**First proposal:** c) abrogated **Second proposal:** *If the first proposal should be rejected, the words '(excluding charged and permanent workers)' in item (c) shall be deleted and the item shall be formulated as follows:* Individuals who work in home services as charged and non-permanent workers, provided their works last only up to 30 days within one calendar year,

Article 6 para 1: *For the purposes of implementing short and long term insurance branches of this Law;* *……..* *a) – h)……..* ι) Excluding public authorities, among the individuals who are employed in temporary works on service contract in agricultural works or forestry works and who work independently on his/her own account, the ones who are active in agricultural activities and who document that, after deducting the costs of the activity, monthly average of their income from agricultural activities is less than thirty times the lower limit of daily earning subject to premium defined by Law, *……..* *j) – l) ……..* *shall not be deemed to be insurance holders pursuant to Articles 4 and 5.*	**First proposal:** ι) abrogated **Second proposal:** *If the first proposal should be rejected, item (ι) should be formulated as follows:* ι) Excluding public authorities, among the individuals who are employed in temporary works only up to 30 days within a calendar year on service contract in agricultural works or forestry works and who work independently on his/her own account, the ones who are active in agricultural activities and who document that, after deducting the costs of the activity, monthly average of their income from agricultural activities is less than thirty times the lower limit of daily earning subject to premium defined by Law,
Article 6 para 1: *For the purposes of implementing short and long term insurance branches of this Law;* *a) – j)……..* k) *(Amended: 17/4/2008 - 5754/4th Art.)* Among the individuals who work on their own names and accounts and are exempt from income tax and registered to the registry of traders and artisans, the ones who document that, after deducting the costs of the activity, the remaining amount of their monthly activity income is less than thirty times the lower limit of daily earning subject to premium, *l) ……..* *shall not be deemed to be insurance holders pursuant to Articles 4 and 5.*	**First proposal:** k) abrogated **Second proposal:** *If the first proposal should be rejected, item (k) should be formulated as follows:* In item (k) the words 'and registered to the registry of traders and artisans' shall be deleted.

Article 9 para 2: *However, in cases of execution of provisions on diseases or maternity, the insurance status shall be deemed to be lost starting from the tenth day following*; a) in cases where the insurance holder is on unpaid leave, participates in strike or the employer announces lockout pursuant to the relevant laws, the date on which such statuses end,	*Item (a) of para 2 should be amended as follows:* a) in cases where the insurance holder is on unpaid leave awarded after the expiry of maternity leave, participates in strike or the employer announces lockout pursuant to the relevant laws, the date on which such statuses end,
ARTICLE 16: …….. ***Paragraph 3:*** Nursing benefit applicable by the date of delivery, over the tariff determined by the Board of Directors of the Institution and approved by the Minister, shall be payable from the maternity insurance to the female insurance holder or to the male insurance holder due to his not insured spouse giving birth, and, among the insurance holders under item (a) and (b) of paragraph one of Article 4 of this Law, to the female insurance holder receiving income or pension or to the spouse of male insurance holder receiving income or pension due to own works, for each newborn, provided that the newborn lives. ***Paragraph 4:***In order to pay nursing benefit to a female insurance holder or to male insurance holder due to his spouse giving birth; *a) …….* *b) …….*	*The two paragraphs at issue should be amended as follows:* ***Paragraph 3:*** Nursing benefit applicable by the date of delivery, over the tariff determined by the Board of Directors of the Institution and approved by the Minister, shall be payable from the maternity insurance to the female insurance holder or the male insurance holder due to his not insured spouse giving birth provided that the newborn lives. In case of a female insurance holder whose husband is also insurance holder, father and mother determine the one who shall be eligible for nursing benefit by presenting a unanimous declaration to the institution. In lack of such a declaration nursing benefit shall be granted to the mother. Among the insurance holders under item (a) and (b) of paragraph one of Article 4 of this Law, the benefit shall be payable to the female insurance holder receiving income or pension or to the spouse of male insurance holder receiving income or pension due to own works, for each newborn, provided that the newborn lives. ***Paragraph 4:*** In order to pay nursing benefit to a female insurance holder or to a male insurance holder

ARTICLE 18 para 1: *Provided that rest report is granted by medical doctor or health committees authorized by the Institution;* c) *(Amended: 17/4/2008 - 5754/11th Art.)* In case of maternity of headmen stated in item (a) and (b) of paragraph one of Article 4 and female insurance holders under numbers (1), (2) and (4) of the same item, each day of not working including eight - week periods before and after birth and, in cases of multi birth, adding another two weeks to the said eight weeks before the birth, provided that minimum ninety days short term insurance premium is notified within one year before the birth, *a benefit for temporary incapacity shall be payable*	*Item (c) should be amended as follows:* *After the words '... female insurance holders' the following words 'under numbers (1), (2) and (4) of' shall be deleted, the wording of the provision has to be more precise and a right to the benefit for certain spouses of a self-employed insurance holder has to be inserted. So item (c) shall be formulated as follows:* c) In case of maternity of female insurance holders under item (a) of paragraph one of Article 4, of headmen stated in item (b) thereof and female insurance holders under the same item and not-insured wives of self-employed insurance holders working in their business without being employee or business partner of their husbands, each day of not working including eight - week periods before and after birth and, in cases of multi birth, adding another two weeks to the said eight weeks before the birth, provided that minimum ninety days short term insurance premium is notified within one year before the birth, …….. *After the words 'a benefit for temporary incapacity shall be payable, the following sentence could possiblye added:* Income received for the same period shall be deducted from the amount of temporary incapacity.

ARTICLE 18 para 1: *Provided that rest report is granted by medical doctor or health committees authorized by the Institution;* …… d) In case the insurance holder works until three weeks before the birth, upon request of headmen stated in item (a) and (b) of paragraph one of Article 4 and female insurance holders under numbers (1), (2) and (4) of the same item and with the consent of medical doctor or in case of non-employment periods that insured woman can not benefit from in the event of premature birth, for the periods added to the rest period after birth, *a benefit for temporary incapacity shall be payable*	*Item (d) should be amended as follows:* …… d) In case insured women coming under the preceding item (c) work until three weeks prior to birth upon her own request and with the approval of physician and or in case that they can not benefit from the rest period in the event of premature birth, for the periods added to the rest period after birth, ……
Article 18 para 1: *Provided that rest report is granted by medical doctor or health committees authorized by the Institution;* ……. *a benefit for temporary incapacity shall be payable*	*The following item (e) shall be appended:* e) In case of pregnancy each day of unpaid leave awarded before the beginning of maternity leave pursuant to Article 8 of the Implementing Regulation for the Working Conditions of Pregnant or Breastfeeding Women, Breastfeeding Rooms and Child Nursing Homes, ……..
Article 26 para 2 *In order to put an insurance holder on invalidity pension, the insurance holder should;* *a) ……..* b) *(Amended: 17/4/2008 - 5754/14th Art.)* be holding insurance for a period of minimum ten years and should have paid totally 1800 days or …….	*In case Article 40a should be adopted, item (b) of para 2 of Article 26 should be amended as follows:* b) be holding insurance and child care credits for a period of minimum ten years and should have paid totally 1800 days or …….

Article 28 para 2 *Amended second paragraph: 17/4/2008 - 5754/16th Art.) For the individuals who are deemed to be insurance holder with this Law for the first time;* a) old-age pension shall be granted provided that the individual is over 58 if the individual is female or over 60 if the individual is male and that minimum 9000 days of invalidity, old-age and survivors' insurance premiums are notified. However, the number of premium days condition shall be applied as 7200 premium days for the insurance holders under item (a) of paragraph one of Article 4.	*In case Article 40a should be adopted, item (a) at issue should be amended as follows:* a) old-age pension shall be granted provided that the individual is over 58 if the individual is female or over 60 if the individual is male and that minimum 9000 days of invalidity, old-age and survivors' insurance premiums and child care credits are notified. However, the number of premium days and child care credits days condition shall be applied as 7200 premium days and child care credits days for the insurance holders under item (a) of paragraph one of Article 4.
Article 28 para 8: ..... *(Appended paragraph: 17/4/2008 - 5754/16th Art.)* One fourth of the paid premium days after the enactment of this Law of the ones, among the female insurance holders who request to be put on retirement or old - age pension, who have disabled child to the extent of being in need of permanent care of another person, shall be added to the sum of number of premium payment days and these added periods shall be subtracted from the retirement age limits.	After the words '.... *the ones, among the*' the following word 'female' shall be deleted.
Article 29 para 2: Average monthly earning is thirty times the average daily earning, calculated by the sum of insurance holder's earnings subject to premium, found by updating with the update coefficient realized every year, for the years passed from the year of the earning up to the date of requesting pension, divided by the total paid premium days excluding the nominal service period and actual service period increment.	*In case Article 40a should be adopted, para 2 at issue should be amended as follows:* Average monthly earning is thirty times the average daily earning, calculated by the sum of insurance holder's earnings subject to premium, found by updating with the update coefficient realized every year, for the years passed from the year of the earning up to the date of requesting pension, divided by the total paid premium days excluding the nominal service period and actual service period increment and periods of child care credits.

Article 29 para 3: Replacement rate shall be applied as 2% for each 360 days of total paid premium days of the insurance holder, passed subject to invalidity, old - age and survivors insurances. Periods less than 360 days shall be considered proportionally in this calculation. However, the replacement rate shall not be over 90%.	*In case Article 40a should be adopted, item (a) at issue should be amended as follows:* Replacement rate shall be applied as 2% for each 360 days of total paid premium days of the insurance holder, passed subject to invalidity, old-age and survivors insurances, of child care credits days and actual and nominal service term increment days. Periods less than 360 days shall be considered proportionally in this calculation. However, the replacement rate shall not be over 90%.
Article 34 para 1: *b) (Amended: 17/4/2008 - 5754/21st Art.) Among the children, who are not put on income or pension due to not working under this Law, excluding items (a), (b) and (e) of paragraph one of Article 5, or under legislation of a foreign country or due to their own insurance status;* *1) ……* *2) ……* 3) the daughters, whatever the ages are, not married, divorced or widow, *shall receive 25% each.*	**First proposal:** 3) abrogated **Second proposal:** *If the first proposal should be rejected, the provision at issue should be applicable for a limited ongoing period, to avoid hardships. So the following new Article 108a (item <a>) shall be appended:* **Article 108a (Annulment)** a) Article 34 paragraph one item (b) number (3) of this Law shall be rendered invalid on December 31, 2021.

Article 37 **Paragraph 1:** Marriage benefit shall be payable in advance, for once, at the amount of two years of pension or income they receive, upon marriage and request of the daughters, whose income or pensions should be terminated due to marriage. In case a right holder who is receiving marriage benefit becomes right holder within two years following the termination date of the pension, no income or pension shall be payable until the end of two - year period and such individuals shall be deemed to be holders of universal health insurance under item (f) of paragraph one of Article 60. **Paragraph 2:** In case marriage benefit is granted, pensions or incomes of other right holders shall be re-determined in accordance with Article 34, starting from the payment period following the end of the period during which marriage benefit is granted.	**First proposal:** Paragraph 1: abrogated. Paragraph 2: abrogated. **Second proposal:** *If the first proposal should be rejected, para 1 and 2 at issue should be applicable only for a limited ongoing period. So the following new Article 108a (item <b>) should be appended:* **Article 108a (Annulment)** b) Article 37 paragraph one and two of this Law shall be rendered invalid on December 31, 2021.

./.	**Article 40a** – Child care credits* –: (appended) Child care credits are granted for three years after birth if the child has been raised on the territory of Turkey or in a country where the residence is equivalent to a residence in Turkey. Child care credits shall have the same effect as paid premiums. Where child care credits and paid premiums cover the same period both of them are to be taken into account. The right to child care credits shall be granted to the parent who actually raises the child. Where both mother and father provide child care, they determine the one who shall be eligible for the right by presenting a unanimous declaration to the Institution. They can also determine that the period of child care credits shall be divided between them and which peeriod of it shall be assigned to either parent. In lack of such a declaration child care credits shall be granted to the mother. *This proposal is orientated at the German law. Of course, it is for the Turkish legislator to decide which solution shall be favoured. So also the Swedish or Hungarian example presented under Part III Chapter III No 4.1.2. of this report could be taken into consideration or a combination of the best practice examples. Also a totally new concept could be imaginable.

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ARTICLE 41 para 1: *For the insurance holders under this Law;* a) **(Amended: 17/4/2008 - 5754/67th Art.)** unpaid birth or maternity leave terms granted pursuant to Laws and terms requested by female insurance holders under item (b) of paragraph one of Article 4, for twice, but not exceeding two-year period following the date of birth, provided that the concerned individual does not work at workplace on service contract and the child lives, b) – h) …… *shall be counted from their insurance status, upon written request of themselves or of their right holders, by placing the insurance holders under debt, provided that they pay their premiums, to be calculated over 32% of the daily earning to be determined by themselves, within one month following the date of notification of the debt, and that the amount is in the range of lower and upper limits of daily earning subject to premium determined in accordance with Article 82 on the date of request.*	**First proposal:** *In case Article 40a should be adopted, Article 41 para 1 item (a) would become irrelevant. From this results the following proposal:* a) abrogated **Second proposal:** *In case Article 40a should not be adopted, Article 41 para 1 item (a) should be amended as follows*: a) unpaid birth or maternity leave terms granted pursuant to Laws and terms requested by female insurance holders under item (b) of paragraph one of Article 4 and periods of child care provided by men, for twice, but not exceeding two-year period following the date of birth, provided that the concerned individual does not work at workplace on service contract and the child lives,