

**Practice  
Guides**

# DIVERSITY AND INCLUSION

**Second Edition**

Contributing Editor  
Timothy Chow



LEXOLOGY

**Getting the Deal Through**

# DIVERSITY AND INCLUSION

## Practice Guide

Second edition

Contributing Editor  
Timothy Chow

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Tim Chow is the chief business integrity officer and general counsel commercial at Diageo plc. Since joining Diageo in 2004, he has held a number of corporate and geographically specific accountabilities at the company, most recently as general counsel for Diageo's Latin American and Caribbean and Global Travel operations. Mr Chow has been involved in various causes aimed at advancing issues of concern to the LGBTQ+ community and, from 2010 to 2019, he served as a board and executive committee member of the Lesbian, Gay, Bisexual and Transgender Community Center of New York. In 2018 he was recognised by the Financial Times and OUTstanding as one of the LGBTQ+ 100 Leading Executives and, in 2019, received the Chambers LGBTQ+ Equality Lawyer of the Year Award.

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# Preface

## **Timothy Chow**<sup>1</sup>

This is the second edition of the *Practice Guide – Diversity and Inclusion* published by Lexology Getting the Deal Through and is the first Practice Guide dedicated to exploring this rapidly evolving subject. Each of the chapters – true to the purposes of a practice guide – pragmatically tackles particular issues with regard to individual aspects of the growing legal, regulatory, investor and societal expectations on individuals and organisations as they relate to the ever-growing topic of diversity and inclusion. Collectively, they also represent an important contribution to the growing conversation of how to bring the aspirations that underpin the entire endeavour to life.

Most practitioners who are asked to contribute as editors to practice guides such as these are rightly considered experts in their respective subject matter areas. I cannot claim that qualification. In my 20 years or so of practising law – most of which have been spent as an in-house attorney in a large multinational organisation – I have, however, had the chance to see first-hand how a genuine commitment to diversity and inclusion can unlock performance at both an individual and collective level while qualitatively enhancing the culture of an organisation for the better. As a gay man who has been fortunate enough to have had the opportunity to work on issues of importance to the broader LGBTQ+ community, I have also seen how the rapid development of corporate commitment to diversity and inclusion over the past decade has had a material impact on the advancement of issues important to so many.

I have also seen that making meaningful progress in the area of diversity and inclusion is hard work. Leaving aside the fact that expectations of organisations are increasing at a rapid pace (and, as the chapters in this practice guide make abundantly clear, they most certainly are), articulating a strategy on diversity and inclusion, marshalling the appropriate leadership and resources to achieve it, measuring progress against stated objectives and then deciding how to embed and expand on progress are not easy tasks. Part of the challenge, of course, is that no organisation exists on its own, and each must negotiate the cultural context in which it finds itself. Many of the challenges it may face in advancing diversity and inclusion objectives

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<sup>1</sup> Timothy Chow is the chief business integrity officer and general counsel commercial at Diageo plc. The views set forth in this Practice Guide are the author's own.

## Preface

may not be of its own making nor entirely in its control to address and, for organisations that are multinational in nature, the contexts it must navigate can be that much more complex. More fundamentally, any topic as broad as diversity and inclusion – which by its very nature touches on so many aspects of the human experience – will inevitably bring to the surface competing interests, areas of debate and interpretation and questions of focus and priority. None of this is to argue, of course, that these are not the sort of the challenges that organisations should be undertaking, but a realistic assessment of the complexities of the terrain can help ensure meaningful progress.

The chapters in this *Practice Guide – Diversity and Inclusion* bring to life examples of these competing interests and the way thoughtful legal counsel can help navigate them. By focusing on topics ranging from the appropriate use of employee data to balancing the perspectives of divergent views of a diverse workforce to understanding the changing nature of disclosure obligations, the contributors to this Practice Guide provide not only practical advice on the specific issues at hand but also a useful lens through which to examine the types of issues inherent in so many aspects of implementing diversity and inclusion initiatives. While many of these risks are nascent, they are no less real, and I would like to thank all the contributors for their efforts in assembling this Practice Guide.

So, while I cannot say that I approach this subject as an expert, I can say I do so as a student and, more specifically, as a lawyer and business leader who feels both a professional and moral obligation to engage meaningfully with all aspects of what diversity and inclusion can unlock for individuals, organisations and the societies in which they operate. I invite you to join me and our contributors in the same spirit, as we help shape this critical conversation going forward.



# 5

## A Comparative Analysis of Non-Discrimination Law in Europe and Turkey

**Gönenç Gürkaynak and Ceren Yıldız<sup>1</sup>**

### **General principles, definitions and scope**

The principle of the prohibition of discrimination has many different definitions, which have emerged under various international conventions to which Turkey is a party, which have developed along with case law, or both. In Turkey, the definitions under non-discrimination legislation are limited as there is no basic and general definition. Although there is no general definition, different grounds or forms of discrimination are defined separately and specifically under relevant laws. Although such legislative definitions for different grounds or forms of discrimination might be considered a positive development as the definitions are more specific, the lack of a basic definition of discrimination in legislation might be considered a drawback.<sup>2</sup>

Apart from the specific definitions, in terms of the basic definition of the prohibition of discrimination that developed along with case law, the Turkish Constitutional Court, in line with European Court of Human Rights (ECtHR) decisions, defines the prohibition of discrimination as follows:

*The principle of the prohibition of discrimination contains the rejection of the provision of the opportunities or the deprivation from the opportunities based on religion, political opinion, sexual and gender identity, which are the elements of the personality of an individual and which are the*

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1 Gönenç Gürkaynak and Ceren Yıldız are partners at ELIG Gürkaynak Attorneys-at-Law.

2 Karan U, İK Davası Işığında Türk Ceza Kanunu'nun 122. Maddesi Üzerine Bir Değerlendirme, Toplum ve Hukuk Araştırmaları Vakfı (TOHAV) – Eşit Haklar İçin İzleme Derneği (EŞHİD), İstanbul 2021, Accessible at [www.esithaklar.org/wp-content/uploads/2021/05/ayrimciliga\\_karsi\\_dava\\_rapor1.pdf](http://www.esithaklar.org/wp-content/uploads/2021/05/ayrimciliga_karsi_dava_rapor1.pdf), page 10. Last accessed on 6 June 2022.

*personal preferences, or based on the personal characteristics such as gender, race, disability and age, which cannot be preferred in any way.*<sup>3</sup>

There is no explicit definition of discrimination within the scope of the European Convention on Human Rights (ECHR) as well, and the related definition has been developed along with the case law of the ECtHR. As per the case of *Rasmussen v Denmark*, 'a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.<sup>4</sup>

The specific forms of the discrimination that are prohibited as well as defined under Turkish legislation are as follows:

- direct discrimination;
- indirect discrimination;
- assumed discrimination;
- multiple discrimination;
- harassment;
- mobbing;
- victimisation;
- instruction to discriminate and compliance with such instruction;
- segregation; and
- failure to provide accommodation.

The specific grounds of the prohibition of discrimination regulated under Turkish legislation are as follows:

- race;
- language;
- colour;
- gender;
- disability;
- political opinion or thought;
- philosophical belief or opinion;
- religion;
- sect (denomination);
- nationality;
- national origin;
- ethnic origin;
- social origin;
- birth;
- economic or other social status;

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3 Constitutional Court, *Tuğba Arslan*, Application No. 2014/256, 25 June 2014, para 114, Accessible at <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/256?Dil=en>. Last accessed on 6 June 2022.

4 ECtHR, *Rasmussen v Denmark*, Application No. 8777/79, 28 November 1984, para 38, accessible at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57563%22%5D%7D>. Last accessed on 6 June 2022.

- family;
- marital status;
- class;
- profession;
- regional differences;
- health;
- age; and
- other general prohibitions without indicating any grounds.<sup>5</sup>

### Direct discrimination

Direct discrimination is defined under article 3(1)(a) of Law No. 5378 on Persons with Disabilities (Law No. 5378) and article 2(1)(d) of Law No. 6701 on the Human Rights and Equality Institution of Turkey (Law No. 6701). Both laws set forth similar definitions for direct discrimination as 'any differential treatment, based on the grounds enumerated in this law, which obstructs or limits a natural or legal person from the enjoyment of legally recognised rights and freedoms on equal terms with others in comparable situations'. Compared with EU legislation, although such definitions might be quite compatible with EU legislation, sexual orientation is not within the scope of the grounds of direct discrimination under Law No. 5378 and Law No. 6701 and, although gender/sex is included, there is no reference to gender identity. Considering 'gender' and 'sex' have the same Turkish equivalent *cinsiyet*, whether gender identity is included in the legislation remains a grey area.

### Indirect discrimination

Indirect discrimination is defined under article 3(1)(b) of Law No. 5378 and article 2(1)(e) of Law No. 6701. As per article 2(1)(e) of Law No. 6701, indirect discrimination means that 'natural or legal person being put in a disadvantageous position that cannot be objectively justified in terms of enjoying from legally recognised rights and freedoms, on the discrimination grounds enumerated in this law, as a result of any action, procedure or practice that does not appear discriminatory'. Law No. 5378 defines indirect discrimination as well by specifically regulating such prohibition for disabled persons. The Constitutional Court evaluated indirect discrimination by referring to the ECtHR, stating that 'if the same treatment is applied to individuals in different situations, but this treatment affects a certain individual or the members of a group in a disproportionate and negative way, then the discrimination can be mentioned'.<sup>6</sup>

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5 Karan U, Country report Non-discrimination Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 Turkey 2020, 2020, pages 18–19, accessible at [www.equalitylaw.eu/downloads/5281-turkey-country-report-non-discrimination-2020-2-35-mb](http://www.equalitylaw.eu/downloads/5281-turkey-country-report-non-discrimination-2020-2-35-mb). Last accessed on 6 June 2022. (Article 3 of the Law on the Establishment and Duties of the Turkish Football Federation prohibiting the Federation from engaging in racism and any kind of discrimination, and article 4(c) of the Child Protection Law prohibited discrimination more generally, without enumerating any grounds.)

6 Constitutional Court, *Tuğba Arslan*, Application No. 2014/256, 25 June 2014, para 115, accessible at <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/256?Dil=en>. Last accessed on 6 June 2022.

### Assumed discrimination

Discrimination on the grounds of assumption of a person's characteristics is prohibited under Turkish law and assumed discrimination is defined under article 2(1)(m) of Law No. 6701 as 'the discriminatory treatment of a natural or legal person from the enjoyment of legally recognised rights and freedoms assuming that s/he is related to one of the discrimination grounds enumerated in this law, although that is not the case in reality'. Discrimination by association is not included in the scope of such prohibition.

### Multiple discrimination

Multiple discrimination is defined under article 2(1)(ç) of Law No. 6701 as 'discriminatory treatment related to more than one discrimination ground' and multiple discrimination has been stipulated as an aggravating factor in calculating administrative monetary fines to be imposed on persons engaging in discriminatory treatment.

### Harassment

Harassment is described as a form of discrimination and defined under article 2(1)(j) of Law No. 6701 as 'any kind of intimidating, humiliating or embarrassing conduct, including psychological and sexual, based on one of the grounds enumerated in this law, which aims or has the effect of violating human dignity'. This definition might be evaluated as compatible with EU legislation.

### Mobbing

Mobbing is another form of discrimination under article 2(1)(g) of Law No. 6701 and thus 'the conduct intended to alienate, exclude or tire the person from his or her job, based on the grounds listed in this law' is evaluated as discriminatory. In general practice, mobbing could be included under harassment, and thus these two forms of discrimination could lead to confusion in the examination of discriminatory treatment.<sup>7</sup>

### Victimisation

As for victimisation as discrimination, regulated under article 4(2) of Law No. 6701, if there is any adverse treatment or consequences for a person who lodges a complaint or initiates legal proceedings in order to enforce compliance with the principle of equal treatment, then it might be concluded that there is victimisation discrimination. Such regulation differs from the EU legislation in terms of its scope as it is not clear whether other parties who are not subject to the legal proceeding or the complaint, such as witnesses, are included in its scope.<sup>8</sup> Moreover, the Labour Law<sup>9</sup> and Regulation on Complaints and Applications of Civil Servants<sup>10</sup> also set forth provisions prohibiting victimisation.

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7 Karan U, Turkey 2020, op cit (footnote 5), page 30.

8 *ibid*, page 94.

9 Article 18 indicates that dismissal of an employee for using their rights against the employer and applying to judicial and administrative authorities against the employer is prohibited.

10 Article 10 prohibits penalising civil servants using their right to file complaint due to their complaint.

### Instruction to discriminate

Instruction to discriminate and compliance with such instruction is evaluated as a form of discrimination and is defined under article 2(1)(b) of Law No. 6701 as 'the instruction to discriminate given by an individual to others she or he has authorised to carry out conduct or transactions in his or her name or behalf of or by a public official to other individuals'. Article 137 of the Constitution<sup>11</sup> and article 10 of Law No. 657 on Civil Servants<sup>12</sup> regulate specific rules on this matter to be applicable to civil servants. The Turkish Penal Code is also applicable to the instruction to discriminate. Article 24 of the Penal Code prohibits complying with instructions that constitute a crime, otherwise the instructing and instructed will be responsible. However, if the law obstructs examining the illegality of the instruction, the instructing party will be responsible.

### Segregation

Segregation is defined under article 2(1)(a) of Law No. 6701 as 'the situation where individuals are segregated from others as a result of actions or inactions due to one or more of the grounds enumerated in this law'.

### Failure to provide accommodation

As per article 5(2) of Law No. 6701, the responsible person and institutions are obliged to consider the needs of different disabled groups and provide reasonable accommodation. This provision is related to persons with disabilities. Reasonable accommodation is defined under article 2(1)(i) of Law No. 6701 as 'the proportionate, required and appropriate changes and measures, to the extent that financial resources permit, in cases where needed in order to ensure persons with disabilities enjoy their rights and freedoms fully and as equal as other individuals'. The obligation to provide reasonable accommodation is also regulated under Law No. 5378 and Law No. 657 on Civil Servants. Differently from EU legislation, Law No. 5378 sets forth the obligation to provide reasonable accommodation measures; however, it does not regulate specific sanctions in the case of failure to meet this obligation.<sup>13</sup>

### Scope of prohibition

In terms of the personal scope of the prohibition of discrimination in legislation, the person conducting the discriminatory treatment can be both a natural and a legal person, and both could be liable for discrimination, including the private and public sectors and public bodies.<sup>14</sup> With respect to the person protected against discrimination, both article 14 of the ECHR and

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11 If a person employed in any position or status in public services finds an order given by his or her superior to be contrary to the provisions of by-laws, presidential decree, laws, or the Constitution, he or she shall not carry it out, and shall inform the person giving the order of this inconsistency. However, if his or her superior insists on the order and renews it in writing, his or her order shall be executed; in this case the person executing the order shall not be held responsible.

12 A superior shall not give orders against the laws and by-laws to civil servants the superior supervises.

13 Karan U, Turkey 2020, op cit, page 33. ESCR, Conclusions 2016: Turkey, 2016/def/TUR/15/2/EN, 9 December 2016, article 15-2, accessible at: <http://hudoc.esc.coe.int/eng/?i=2016/def/TUR/15/2/EN>. Last accessed on 6 June 2022.

14 European Commission, *A comparative analysis of non-discrimination law in Europe 2020, 2021*, accessible at [www.equalitylaw.eu/downloads/5349-a-comparative-analysis-of-non-discrimination-law-](http://www.equalitylaw.eu/downloads/5349-a-comparative-analysis-of-non-discrimination-law-)

article 10 of the Turkish Constitution adopt an open-ended approach in terms of the personal scope of the prohibition and thus the discriminatory treatment might be examined regardless of whether such treatment is explicitly indicated. On the other hand, apart from the Turkish Constitution, Law No. 6701 determines the scope with a limited approach by specifically indicating the grounds.<sup>15</sup>

In terms of the material scope of the prohibition of discrimination, article 10 of the Constitution adopts an open-ended approach and does not set forth the limit for the subject of the discrimination. However, the Turkish Constitutional Court decided that in order to carry out examination regarding the prohibition of discrimination it is required to associate it with other rights protected under the Constitution and included in the scope of ECHR and the additional protocols to which Turkey is a party.<sup>16</sup> The ECtHR also adopts a limited approach as it rules that, in order to be protected under article 14, the relevant matter is required to be associated with other rights and freedoms under the ECHR.<sup>17</sup> However, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Additional Protocol No. 12) introduces broader protection and the ECtHR expands the scope by examining specific rights and freedoms under the broader ones, such as examining the right to social security under the right to property.<sup>18</sup> As Turkey has signed but not ratified Additional Protocol No. 12, the protection scope remains limited with the ECHR. Therefore, the ratification of Additional Protocol No. 12 might be evaluated as a significant development in order to ensure broader protection as well as harmonisation with EU legislation.<sup>19</sup>

Moreover, national legislation regulates certain sectors or more specific issues such as employment, self-employment and occupation, working conditions, social protection, social advantages, education, access to and supply of goods and services available to the public and housing. There are some exceptions related to the armed forces, the grounds of age

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in-europe-2020-1-31-mb, page 51 (last accessed on 6 June 2022); Karan U, Turkey 2020, op cit, pages 37–39.

- 15 Karan U, İK Davası İşliğinde Türk Ceza Kanunu'nun 122. Maddesi Üzerine Bir Değerlendirme, Toplum ve Hukuk Araştırmaları Vakfı (TOHAV) – Eşit Haklar İçin İzleme Derneği (EŞİD), İstanbul 2021, accessible at [www.esihaklar.org/wp-content/uploads/2021/05/ayrimciliga\\_karsi\\_dava\\_rapor1.pdf](http://www.esihaklar.org/wp-content/uploads/2021/05/ayrimciliga_karsi_dava_rapor1.pdf), pages 10–18. Last accessed on 6 June 2022.
- 16 Constitutional Court Onurhan Solmaz application, 2012/1049, para 33.
- 17 'According to the Court's established case law, article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of article 14 does not necessarily presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.' European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v United Kingdom*, para 71.
- 18 Karan U, Turkey 2020, op cit, pages 19–22.
- 19 Prof Dr Üzeltürk, Sultan Tahmazoğlu, Yeditepe Üniversitesi, İnsan Hakları Avrupa Mahkemesi ve Türk Anayasa Mahkemesinin Bireysel Başvuru Kararlarında Ayrımcılık Yasağı, page 4, accessible at <https://anayasatakip.ku.edu.tr/wp-content/uploads/sites/34/2017/08/Sultan-Tahmazog%CC%86lu-Bireysel-Bas%CC%A7vuru-Kararlar%C4%B1nda-Ayr%C4%B1mc%C4%B1l%C4%B1k-Yasag%CC%86%C4%B1.pdf>. Last accessed on 6 June 2022.

(recruitment and employment processes) or the grounds of nationality (legal status or residence for non-nationals).<sup>20</sup>

### **Legislative framework**

Article 10 of the Turkish Constitution adopts the equal treatment of all individuals without discrimination before the law and provides a non-exhaustive list of the protected grounds by stating that 'language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such consideration'.<sup>21</sup>

Turkey has no general anti-discrimination legislation covering all forms and grounds of the prohibition of discrimination. However, Law No. 6701 could be considered as Turkey's non-discrimination legislation as this law prohibits direct, indirect, multiple discrimination and instruction to discriminate, discrimination by assumption, segregation, harassment and mobbing covering the grounds of sex, race, colour, language, religion, belief, sect, philosophical and political opinion, ethnic origin, wealth, birth, marital status, health status, disability and age, as explained above. Law No. 6701 generally sets forth that in the case of a breach of the prohibition of discrimination, relevant public authorities and professional organisations with public institution status will be obliged to cease the breach, to eliminate the consequences of such breach and to prevent its recurrence and to take necessary measures before judicial and administrative proceedings.<sup>22</sup>

Moreover, there are non-discrimination provisions in several laws. In this context, disability is specifically covered by Law No. 5378 and the material scope of this law is limited to employment. The Labour Law also includes a variety of non-discrimination provisions, again with the material scope of employment. In addition, the following laws have provisions with regard to the prevention of discrimination: the Turkish Penal Code, the Basic Law on National Education, the Law on Civil Servants, the Turkish Civil Code, the Law on Political Parties, the Law on Social Services, the Law on the Establishment and Broadcasting of Radio and Television, the Law on Trade Unions and Collective Bargaining Agreements, the Law on the Ombudsman Institution, the Turkish Armed Forces Discipline Law, the Law on Prevention of Violence and Disorder in Sports,

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20 Karan U, Turkey 2020, op cit, pages 39–81.

21 The full text of the article reads as follows:

*Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.*

*Men and women have equal rights. The state has the obligation to ensure that this equality exists in practice.*

*Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.*

*Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality.*

*No privilege shall be granted to any individual, family, group or class.*

*State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.*

22 Contributions By Turkey For The Report Of The Secretary-General On The Implementation Of Resolution On A Global Call For Concrete Action For The Total Elimination Of Racism, Racial Discrimination, Xenophobia And Related Intolerance And The Comprehensive Implementation Of And Follow-Up To The Durban Declaration And Programme Of Action, accessible at [www.ohchr.org/Documents/Issues/Racism/IWG/Session15/Turkey.docx](http://www.ohchr.org/Documents/Issues/Racism/IWG/Session15/Turkey.docx).

the Law on the Execution of Penalties and Security Measures, the Law on the Establishment and Duties of the Turkish Football Federation and the Child Protection Law.

As per article 90(5) of the Constitution, 'In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail'. In this context, Turkey is a party to a variety of international treaties including provisions on non-discrimination and equal treatment.

Considering Turkey's status regarding signature and ratification of international conventions, Turkey has signed and ratified the ECHR,<sup>23</sup> the Revised European Social Charter,<sup>24</sup> the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, the Convention on Elimination of All Forms of Racial Discrimination, the ILO Convention No. 11 on Discrimination, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. Turkey has signed but not ratified Protocol No. 12 of the ECHR.<sup>25</sup> Last, Turkey has not signed and ratified the Framework Convention on the Protection of National Minorities. Turkey also supports certain works of the Human Dimension of the Organization for Security and Cooperation in Europe, which primarily functions as a regional security forum but assists with the efforts of the participating states in the field of respect for democracy, the rule of law and human rights. Turkey prioritises the topics of xenophobia, Islamophobia, intolerance and discrimination in the work of the Human Dimension.<sup>26</sup>

Turkish legislation does not ignore sexual identity and gender confirmation, though it does not specifically recognise sexual identity terms such as queer, intersex and non-binary or sexual identities, except men and women. Article 40 of the Turkish Civil Code allows a person to change their gender by personally applying to the court provided that the person is at least 18 years old, unmarried and transsexual. The individual must document the mandatory nature of the gender change through an official medical board report obtained from an education and research hospital, and the relevant court only allows the necessary official changes to be made in the registry if it is confirmed by an official medical board report that the relevant person has gone through gender change surgery in accordance with the purpose and medical methods. Before its cancellation by the Constitutional Court in its decision of 29 November 2017,<sup>27</sup> another condition was for the medical board report to include that the relevant person was permanently devoid of reproduction capabilities. Application of gender confirmation and identity procedures differ from

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23 Article 14 of the ECHR reads as follows:

*The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

24 Turkey has not accepted the collective complaints procedure under the revised European Social Charter.

25 'Protocol No. 12 prohibits discrimination in relation to the "enjoyment of any right set forth by law" and "by any public authority" and is thus greater in scope than article 14, which relates only to the rights guaranteed by the ECHR.' (*Handbook on European non-discrimination law*, European Union Agency for Fundamental Rights and Council of Europe, 2018, page 32, accessible at [www.echr.coe.int/Documents/Handbook\\_non\\_discrim\\_law\\_ENG.pdf](http://www.echr.coe.int/Documents/Handbook_non_discrim_law_ENG.pdf)).

26 Republic of Turkey Ministry of Foreign Affairs, Foreign Policy, Main Issues, Human Rights, accessible at <https://www.mfa.gov.tr/%C4%B0nsan-haklar%C4%B1.en.mfa>. Last accessed on 7 June 2022.

27 Decision No. E: 2017/130, K: 2017/165.



country to country, with some embracing a model of self-determination and some imposing even stricter medical conditions compared with Turkey, such as sterilisation.<sup>28</sup>

A Constitutional Court decision in June 2021 made name changing permissible during the transition period. Before, in practice, it was up to the courts to interpret article 40 to consider surgery requirements, including the entire process in transition, instead of just gender change in terms of identity (male to female or female to male). The Constitutional Court's decision finalised the discussion by finding that denying a request to change a name was a violation of the right to respect for private life. In the judgment, the Constitutional Court emphasised that the inferior courts failed to interpret the rules applicable in terms of the applicant's request for the change of her name, which is an integral part of a person's existence and identity and, in this case, was important for the applicant's private life and for her relations with her family and friends. The Court also stated that the state failed to fulfil its positive obligations concerning the right to respect for private life, since the inferior courts failed to make an assessment in the particular circumstances of the case regarding the change of name and their decisions did not contain relevant and sufficient grounds complying with the constitutional guarantees.<sup>29</sup>

The European Union has the following key directives dedicated to non-discrimination, equality, diversity and inclusion:

- Directive 2000/43/EC against discrimination on grounds of race and ethnic origin;
- Directive 2000/78/EC against discrimination at work on grounds of religion or belief, disability, age or sexual orientation;
- Directive 2006/54/EC on equal treatment for men and women in matters of employment and occupation;
- Directive 2004/113/EC on equal treatment for men and women in the access to and supply of goods and services; and
- proposed Directive (COM(2008)462) against discrimination based on age, disability, sexual orientation and religion or belief beyond the workplace.

Moreover, Chapter 3 of the EU Charter of Fundamental Rights focuses on equality, including the following rights: (1) equality before the law, (2) non-discrimination, (3) cultural, religious and linguistic diversity, (4) equality between women and men, (5) the rights of the child, (6) the rights of the elderly and (7) integration of persons with disabilities.<sup>30</sup>

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28 European Commission, European network of legal experts in European network of legal experts in gender equality and non-discrimination, *Trans and intersex equality rights in Europe – a comparative analysis*, page 58, accessible at [https://ec.europa.eu/info/sites/default/files/trans\\_and\\_intersex\\_equality\\_rights.pdf](https://ec.europa.eu/info/sites/default/files/trans_and_intersex_equality_rights.pdf). Last Access on 7 June 2022.

29 Press Release No: Individual Application 65/21, accessible at <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/42944?Dil=en>. Last accessed on 7 June 2022.

30 European Commission, Know your rights, Equality, Non-discrimination, accessible at [https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/equality/non-discrimination\\_en#:~:text=Any%20discrimination%20based%20on%20any,sexual%20orientation%20shall%20be%20prohibited](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/equality/non-discrimination_en#:~:text=Any%20discrimination%20based%20on%20any,sexual%20orientation%20shall%20be%20prohibited). Last accessed on 7 June 2022.

## Legal remedies and mechanisms

Discrimination lawsuits can be brought through civil, administrative and criminal courts and the parallel procedures are available in these courts, as well as administrative procedures that can be followed.<sup>31</sup> Victims of discrimination may claim compensation with a court proceeding.

Moreover, the victims may file individual application to the Constitutional Court to be limited to the right and freedoms regulated under the Turkish Constitution within the scope of the ECHR and the additional protocols. If the individual application is found inadmissible by the Constitutional Court, the victim may reserve the right to petition the ECtHR. Another international procedure is available: Turkey is a signatory to the United Nations First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), where individuals may file a complaint with the Human Rights Committee as per article 26 of the ICCPR's non-discrimination clause.

In Turkey, there are also non-judicial bodies to which victims may apply to remedy discriminatory treatment. The victims may file discrimination complaints with the Human Rights and Equality Institution of Turkey (established under Law No. 6701), which has the authority to impose an administrative monetary fine in the case of discrimination, and victims may file a complaint with the Ombudsman Institution, which is authorised to examine the complaint regarding human rights issues.<sup>32</sup> Apart from these institutions, there are also other non-judicial bodies such as the Human Rights Inquiry Commission of the Turkish Grand National Assembly, human rights boards in provincial districts and the Bureau for Inquiry on Allegations of Human Rights Violations, Grand National Assembly of Turkey-Committee on Equality of Opportunity for Women and Men, the Council of Ethics for Public Service and the Board Fighting Against Mobbing at Work. The individual may also pursue alternative dispute resolution, including mediation, which is mainly popular in employment issues, and administrative procedures that may be applicable for requesting reasonable accommodation.

## Key issues

### Sexual orientation

In terms of sexual orientation as a ground of discrimination, the provisions regarding non-discrimination do not specify sexual orientation as a reason to be protected against discrimination. On the other hand, the Constitutional Court stated explicitly in its decisions, by referring to the case law of the ECtHR, that sexual orientation is a ground of discrimination by referring to the term 'sexual preference' and by including sexual orientation to the open-ended list of non-discrimination grounds, although the case relates to gender identity.<sup>33</sup> Therefore, it might be concluded that there is a difference in the assessment of whether sexual orientation is included in the grounds of discrimination between the national legislation and Constitutional

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31 Karan U, Turkey 2020, op cit, page 7.

32 ibid, page 87.

33 Constitutional Court, *Sadika Şeker*, Application No. 2013/1948, 23 January 2014, accessible at <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/1948>; Constitutional Court, *Cemal Duğan*, Application No. 2014/19308, 15 February 2017, accessible at <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/19308>. Last access on 6 June 2022.

Court precedents. It was further stated in the European Commission's Turkey 2020 report,<sup>34</sup> and reiterated in the Turkey 2021 report,<sup>35</sup> that: 'Turkey should urgently adopt a law on combating discrimination in line with the EU *acquis* as well as the ECHR, including sexual orientation and gender identity.'<sup>36</sup>

### Gender equality

In terms of gender equality, the terms 'gender' or 'sex' in the area of non-discrimination are not defined under national legislation; however, when regulating non-discrimination the term used in the national legislation is 'sex'.<sup>37</sup> As per the Istanbul Convention, 'gender' is defined as 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men' (article 3(c)). An amendment to article 10 of the Constitution in 2004 brought into force the positive obligation to ensure equality between men and women. Although the provisions ensuring equality between men and women are in effect both legislatively and institutionally, the EU's Turkey Progress Report pointed out that: 'due to continued weak implementation, lack of coordination between institutions and lack of awareness and commitment of law enforcement officials on how to address gender based violence, gender disparity and violence against women remain of serious concern.'<sup>38</sup> The report also refers to the *Civek v Turkey* case concerning the murder of the applicant's mother by the father by indicating that: 'the ECtHR condemned Turkey for the second time for the inadequate response of the duty bearers in protecting the victims of violence against women.'<sup>39</sup> In this context, Turkey has issued relevant strategy and policy documents to eliminate such deficiencies and the Gender Equality Monitoring and Evaluation Commission has been established in the Turkish Employment Agency (İŞKUR) to overcome inequalities in terms of employment issues.

There are several noteworthy ECtHR cases on gender equality regarding Turkey,<sup>40</sup> for instance, the case of *Opuz v Turkey*: 'assaults and injuries inflicted by a man on his wife and mother-in-law over several years, culminating in the murder of the mother-in-law, despite a number of complaints by the victims and the institution of several sets of criminal proceedings by the prosecution authorities, the ECtHR found its first violation of article 14 in a case concerning

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34 Commission Staff Working Document, Turkey 2020 Report, Brussels, 6.10.2020 SWD(2020) 355 final, page 38, accessible at [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey\\_report\\_2020.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf), Last accessed on 6 June 2022.

35 Commission Staff Working Document, Turkey 2021 Report, Strasbourg, 19.10.2021 SWD(2021) 290 final/2, page 38, accessible at <https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-10/Turkey%202021%20report.PDF>. Last accessed on 6 June 2022.

36 *ibid.*, footnote 34.

37 Bakirci K, Country Report, Gender equality. *How are EU rules transposed into national law?*, Turkey 2021, accessible at [www.equalitylaw.eu/downloads/5415-turkey-country-report-gender-equality-2021-2-17-mb](http://www.equalitylaw.eu/downloads/5415-turkey-country-report-gender-equality-2021-2-17-mb), page 17. Last accessed on 6 June 2022.

38 *ibid.*, footnote 34.

39 *ibid.*

40 Other ECtHR decisions are as follows: *Unal Tekeli v Turkey*, *MG v Turkey*, *Halime Kılıç v Turkey*, *Tuncer Güneş v Turkey*, *Emel Boyraz v Turkey*, *Hülya Ebru Demirel v Turkey*, *Leyla Şahin v Turkey*.

domestic violence and held that the violence suffered by the applicant and her mother had been gender-based, amounting to a form of discrimination against women.<sup>41</sup>

Another example from the precedents of the Constitutional Court, prior to the decision of the Constitutional Court in 2013, is that equal treatment of men and women was not protected adequately under Turkish law to the extent of letting women to keep their maiden name after getting married. The only right granted to women under the Turkish Civil Code (TCC) regarding their surname was to have their maiden name as a second surname besides the surname of their husband. In the individual application by Sevim Akat Ekşi, the Constitutional Court evaluated the application under article 17 of the Constitution, but also referred to article 8 of the ECHR regulating the right to respect for private life. On this matter the Constitutional Court touched upon the approach of the ECHR, which interprets the term 'private life' broadly. This interpretation of private life includes the right to choose one's name. Furthermore, the Constitutional Court mentioned that denying women the right to choose their name but granting this right to men is also a violation of article 14 of the ECHR, which prohibits gender discrimination. The Constitutional Court cited article 90 of the Constitution, which states that international agreements to which the Turkish government is a party have to be applied in the case of conflict with Turkish law. Accordingly the Court stated that the law under the ECHR should apply, since article 8 of the ECHR and article 187 of TCC are in conflict. As a result the Court found the practice of the public authorities unlawful and determined that such acts violate articles 8 and 14 of the ECHR.<sup>42</sup>

### Withdrawal from the Istanbul Convention

Turkey was the first country to sign (on 11 May 2011) and ratify (on 14 March 2012) the Convention for Eliminating Violence against Women and Prevention of Domestic Violence adopted by the European Council (the Istanbul Convention). However, Turkey has withdrawn from the Istanbul Convention with Presidential Decree No. 3718, published on 20 March 2021, effective from 1 July 2021. The Istanbul Convention is considered as the 'European landmark treaty to end violence against women' and it sets out 'legal standards to ensure women's right to be free from violence' as well as covering different forms of gender-based violence against women, namely:

- psychological violence;
- stalking;
- physical violence;
- sexual violence (including rape);
- forced marriage;
- female genital mutilation;
- forced abortion;
- forced sterilisation; and
- sexual harassment.<sup>43</sup>

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41 ECtHR, Press Country Profile, Turkey, Accessible at [www.echr.coe.int/Documents/CP\\_Turkey\\_ENG.pdf](http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf), page 4. Last accessed on 6 June 2022.

42 Constitutional Court, *Sevim Akat Ekşi* Individual Application No. 2013/2187, accessible at [www.resmigazete.gov.tr/eskiler/2014/01/20140107-8.pdf](http://www.resmigazete.gov.tr/eskiler/2014/01/20140107-8.pdf).

43 Council of Europe Portal, Key Facts about the Istanbul Convention, accessible at [www.coe.int/en/web/istanbul-convention/key-facts](http://www.coe.int/en/web/istanbul-convention/key-facts). Last accessed on 6 June 2022.

Unlike national law, the Istanbul Convention covers more grounds of discrimination by also including LGBTQ+ individuals in its scope than the relevant law in Turkey, which might be considered as the legal ground to include sexual orientation in the scope of the protected grounds against discrimination. As the Council of Europe states:

*Applying the provisions of the Istanbul Convention without any discrimination on the basis of gender identity would mean, for example, ensuring that the gender identity of transgender persons should not bar them from the support and protection guaranteed in relation to domestic violence, sexual assault, rape or forced marriage. The same goes for women in same-sex relationships, so that all women, including lesbian, bisexual and transgender women have access to domestic violence shelters, for example, and the right to live a life free from violence. This may also include gay men who are confronted with domestic violence.*<sup>44</sup>

Although the Law on Protection of the Family and the Prevention of Violence against Women, which refers to the Istanbul Convention, is still in force and applicable in Turkey, such withdrawal is still considered as backlash for Turkey under relevant EU reports<sup>45</sup> as the Istanbul Convention also covers LGBTQ+ individuals in its scope. With the exception of certain parts that have caused controversy, such as the scope of its protection, the national law aims to provide regulation generally in parallel with the Istanbul Convention. It enacted – specifically as per Turkey’s obligation under the Convention – provisions to protect women against all types of violence and to prevent, prosecute and eliminate violence against women and domestic violence. The political tension surrounding the Istanbul Convention,<sup>46</sup> which eventually led to Turkey deciding to withdraw from the Convention, also led the state to adopt an action on its own terms: the Fourth National Action Plan for Combating Violence against Women (2021–2025).<sup>47</sup> A parliamentary commission has been established to investigate the causes of violence against women and determine the measures to be taken within the Grand National Assembly of Turkey.<sup>48</sup>

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44 The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and answers, pages 9–10, accessible at <https://rm.coe.int/istanbul-convention-questions-and-answers/16808f0b80>. Last accessed on 6 June 2022.

45 Bakirci K, 2021, op cit (footnote 32), pages 16 and 124.

46 Istanbul Convention: How a European treaty against women’s violence became politicized, Deutsche Welle, accessible at <https://www.dw.com/en/istanbul-convention-how-a-european-treaty-against-womens-violence-became-politicized/a-56953987>. Last accessed on 7 June 2022.

47 Fourth National Action Plan for Combating Violence against Women (2021–2025), accessible at <https://www.aile.gov.tr/media/82082/kadina-yonelik-siddetle-mucadele-iv-ulusal-eylem-plani-2021-2025.pdf>. Last accessed on 7 June 2022.

48 The decision of the Grand National Assembly of Turkey regarding the member selection for the relevant commission, accessible at <https://www.resmigazete.gov.tr/eskiler/2021/04/20210423-1.pdf>. Last accessed on 7 June 2022.

## People with disabilities

In terms of inclusion of people with disabilities, the United Nations Committee on the Rights of Persons with Disabilities, in its report of 1 October 2019,<sup>49</sup> raised some concerns regarding inclusion and equality regarding persons with disabilities. These include discriminatory legislation and practices against persons with disabilities, such as the denial of legal capacity on the basis of impairment, unjustifiable provisions restricting the appointment of persons with disabilities as judges, prosecutors, governors or diplomats, and the legal prohibition of disability-based discrimination; the criminal offence of disability-based discrimination requires proof of being motivated by hatred, the absence of effective (recorded) sanctions in legislation in cases of denial of reasonable accommodation and the lack of information available about effective redress, and measures taken to address multiple and intersectional forms of discrimination against persons with disabilities belonging to ethnic groups.

The committee was also concerned about the lack of specific indicators and mechanisms to measure and monitor the outcomes of public policies as regards achieving inclusive equality for women with disabilities and the *de facto* inequality of women with disabilities in access to education and work, compared with men with disabilities.

Aside from those, the report included many other significant concerns including the lack of effective mechanisms to support children with disabilities, absence of awareness, lack of managing accessibility, lack of information and monitoring on the situation of persons with disabilities in institutions and the reported deaths, absence of information on a comprehensive strategy and action plan that ensures the inclusion and accessibility of disaster risk reduction measures, lack of equal recognition before the law and lack of access to justice. The report included many other concerns that are relevant to rights of liberty and security of the person, freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from exploitation, violence and abuse, protection of integrity, liberty of movement and nationality, living independently and being included in the community, freedom of expression and opinion, access to information, respect for home and family, health, work and employment, adequate standard of living and social protection, participation in political and public life and participation in cultural life, recreation, leisure and sport.

In 2021, the Ministry of Family and Social Services published its 'Vision 2030 Without Barriers' policy document determining the needs of disabled people and highlighting the possible solutions, purposes and monitoring activities to meet these needs.<sup>50</sup> The Ministry of Family and Social Services also declared 2020 as the 'Accessibility Year' to recognise efforts for services to people with disabilities. It is expected that there will be more studies and campaigns in this area in 2022. It is also expected that the National Action Plan on Disability Rights will become effective in 2022.<sup>51</sup> However, despite such studies, action plans and campaigns, according to the European

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49 Concluding observations on the initial report of Turkey: Committee on the Rights of Persons with Disabilities, Accessible at <https://digitallibrary.un.org/record/3848320>. Last accessed on 7 June 2022.

50 'Vision 2030 Without Barriers' policy document, accessible at [https://aile.gov.tr/media/94447/2030\\_engelsiz\\_vizyon\\_2021.pdf](https://aile.gov.tr/media/94447/2030_engelsiz_vizyon_2021.pdf), Last accessed on 6 June 2022.

51 News, Republic of Turkey, Ministry of Family and Social Services, accessible at <https://www.aile.gov.tr/eyhgm/haberler/2030-engelsiz-vizyon-belgesi-engellilere-yonelik-politika-ve-hizmetlere-yon-verecek/>. Last accessed on 7 June 2022.

Commission's Turkey 2021 report, 'Turkey lacks an independent implementation and monitoring framework in line with the UN Convention on the Rights of Persons with Disabilities [and] lacks reliable, up-to-date data on the situation of persons with disabilities.'<sup>52</sup>

### Restriction of LGBTIQ rights

The controversies regarding lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) rights in 2021 have caused concern in the European Union. The European Commission's Turkey 2021 report addressed the protection of the fundamental rights of LGBTIQ persons. The Commission concluded that freedom of assembly and association and freedom of expression for LGBTIQ NGOs was largely being restricted and that LGBTIQ activities and pride parades were being banned or prevented by police in several provinces.

### Discriminatory hate speech

In relation to discriminatory hate speech, there is no universally agreed definition on hate speech. However, hate speech can be defined as public speech that expresses hate or encourages violence toward a person or group based on something such as race, religion, sex or sexual orientation.<sup>53</sup> Article 10 of the Constitution covers protection against hate speech and article 122, entitled 'Discriminatory Behaviour',<sup>54</sup> and article 216, entitled 'Provoking people to be rancorous and hostile',<sup>55</sup> of the Turkish Penal Code also criminalise hate speech. It is indicated in the EU's Turkey Country Report that as hatred and incitement to hatred are prohibited under the Penal Code, 'hate speech grounds are exhaustive and do not include ethnicity, age and sexual orientation. The anti-discrimination law does not prohibit hate speech or hate crime.'<sup>56</sup>

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52 Commission Staff Working Document, Turkey 2021 Report, Strasbourg, 19.10.2021 SWD(2021) 290 final/2, page 39, accessible at <https://ec.europa.eu/neighbourhood-enlargement/system/files/2021-10/Turkey%202021%20report.PDF>. Last accessed on 7 June 2022.

53 Definition accessible at <https://dictionary.cambridge.org/us/dictionary/english/hate-speech>. Last accessed on 6 June 2022.

54 Article 122(1) reads as follows:

*Any person who discriminates between individuals because of their racial, lingual, religious, sexual, political, philosophical belief or opinion, or for being supporters of different sects and thereby:*

*(a) prevents sale, transfer of movable or immovable property, or performance of a service, or benefiting from a service, or binds employment or unemployment of a person to the above-listed reasons;*

*(b) refuses to deliver nutriments or to render a public service; or*

*(c) prevents a person from performing an ordinary economic activity;*

*is sentenced to imprisonment from six months to one year or given a punitive fine.*

55 Article 216(1) reads as follows:

*(1) Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another heritage, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years if such act causes risk from the aspect of public safety.*

*(2) Any person who openly humiliates another person just because he or she belongs to a different social class, religion, race, sect, or comes from another heritage, is punished with imprisonment from six months to one year.*

*(3) Any person who openly disrespects the religious belief of a group is punished with imprisonment from six months to one year if such act causes potential risk to public peace.*

56 Karan U, Turkey 2020, op cit, page 6.

## **Policies to fight discrimination**

In Turkey there are several action plans, programmes and strategies to ensure the protection of individuals against discrimination, to enhance the implementation of the relevant legislation and to overcome deficiencies regarding the protection of individuals from discriminatory treatment. These documents aim to carry into effect specific strategies, plans, policies and actions between the specified dates. The relevant policies to fight discrimination include:

- the Human Rights Action Plan;
- the 2021 Annual Presidency Programme;
- the 11th Development Plan (2019–2023);
- Turkey’s National Action Plan for EU Accession (2016–2019);
- the Strategy Paper and Action Plan on Women’s Empowerment (2018–2023);
- the Third National Action Plan For Combating Violence Against Women (2016–2020);
- the National Employment Strategy (2017–2023);
- the Strategy Paper on Roma People (2016–2021); and
- the National Disability Rights Strategy Document and Action Plan for policies on disability rights (in progress).

## **Conclusion**

In light of the foregoing, it is expected that, with the reports issued by the EU and the national strategies and action plans issued by the government, the differences between EU and Turkish legislation and the differences in the effect of such legislation will be reduced in the future, and the protection of individuals against discrimination in its broadest sense may be ensured.



# Appendix 1

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Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997 and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the regulatory and compliance department of ELIG Gürkaynak Attorneys-at-Law. His main areas of practice include the fields of competition law, anticorruption and irregularities, internet law, freedom of expression and fundamental rights and freedoms, compliance projects, contract law, administrative law and commercial litigation.

He has also written more than 200 articles in English and Turkish for various international and local publishers.

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She provides legal consultancy to various multinational and domestic clients in a wide range of fields concerning their day-to-day operations, sector-related regulatory issues and contracts. Ms Yıldız has also co-authored a number of articles pertaining to regulatory matters in both Turkish and English.

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