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IMPROVING SOCIAL DIALOGUE IN WORKING LIFE

Methods for Establishing A Data Collection System for Identification of Anti-Union Discrimination in Private and Public Sectors and A Model Recommendation for Turkey

Assoc. Prof. Dr. Gaye BAYCIK

2019

ANKARA

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FOREWORD

Social dialogue is a core value and an ultimate goal of the International Labour Organization (ILO). The Ministry of Family, Labour and Social Services is well aware of the value and significance of social dialogue across the country in policy-making and implementation. Social dialogue is a proven record of generating sustainable solutions including in times of crises and recovery. Recognising the importance of social dialogue for economic development and social peace, the International Labour Organization for Turkey and the Ministry of Family, Labour and Social Services are implementing the "Improving Social Dialogue in Working Life" Project within the EU Instrument of Pre-Accesssion Funds. The overall objective of the project is to improve social dialogue in Turkey at all levels.

This work is a part of the research studies conducted under the Project. The objective of the study is to propose a system for collecting sound data regarding anti-union discrimination in Turkey. In order to achieve this purpose, the systems in other countries are examined, existing data collection systems and databases in Turkey were evaluated to find out to what extent they could be used to create a database on anti-union discrimination and to this end, recommendations were devised on the usability of existing databases for creating a database on anti-union discrimination. Moreover, in addition to existing data collection systems, required amendments in our legislation or practice were evaluated and direction of these amendments and in which areas in our country they should be made in order to create a database on anti-union discrimination were designed.

We thank many institutions and persons who contributed to the research including particularly our valuable professor Assoc. Prof. Dr. Gaye Baycık who undertook the study. We further thank to all social parties who supported and contributed at all stages of the research, academicians contributing to interviews and the Ministry of Family, Labour and Social Services, Social Dialogue and Tripartism Unit (DIALOGUE) and International Labour Standards Unit (NORMES) at Geneva and the Project Management Team at ILO Office for Turkey.

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I. PREPARATION AND BACKGROUND FOR THE REPORT

In the preparation of this report, first, the data collection systems developed to produce measures required to control and prevent anti-union discrimination in the European Union countries and to make these measures more aligned with facts of the country and ensure their effectiveness were researched. All European Union countries were subject to research; however, no countries were identified to produce statistics on anti-union discrimination except for Finland. Same applied to Eurostat and ILOStat databases. Therefore, in preparation of this report, data collection methods and databases on the violation of prohibition of discrimination which are used in European Union countries and followed by Eurostat which constantly undertakes works to develop them were reviewed.

During the preparation stage of the report, existing data collection systems and databases were evaluated to find out to what extent they could be used to create a database on anti-union discrimination and to this end, recommendations were devised on the usability of existing databases for creating a database on anti-union discrimination. Moreover, in addition to existing data collection systems, required amendments in our legislation or practice were evaluated and direction of these amendments and in which areas in our country they should be made in order to create a database on anti-union discrimination were designed.

A workshop was organised on 3 October 2018 at the ILO Office for Turkey with the participation of social parties as well as representatives of institutions expected to contribute in this regard. During the discussions section, which was the second part of the workshop, the Ministry of Family, Labour and Social Services, Ministry of Justice - UYAP (National Judicial Network Project) system's information processing and judge level representatives, Turkish Statistical Institute, Turkish Human Rights and Equality Institution, Ombudsman Institution as well as Ministry of Family, Labour and Social Services - Directorate of Guidance and Inspection were assessed in terms of their operation, in-house practices, whether a connection could be made between identification of union membership via e-government system and applications for authorisation, whether these institutions collect data on anti-union discrimination, whether they draft reports on this issue, whether they exchange data with each other, whether the existing data they collected could be used for creating a database on anti-union discrimination and by which institution should the data collection and preparation of statistics should be undertaken and how and also what the institutions did and would do were tangibly evaluated. This discussion has notably steered this report. Because, operation of the practice contributed greatly in forming the system to be recommended in this report. In addition, during said workshop, social parties also shared their opinions. It was particularly pointed out that there is not even a terminology on anti-union discrimination in public sector, all terminology is based on anti-union discrimination towards workers, a shared language should be used for public servants and workers and also, in addition to protecting individual freedom of association, a national policy should be established which includes measures for protecting collective freedom of association.

While solutions were offered for various problems at the workshop, it is hard to say that a solution was reached regarding mediation and conciliation systems. As to be mentioned in the report, pursuant to the Law No. 7036 on Labour Courts which was published in the Official Gazette of 12.10.2017 with provisions on mediation entering into force on 01.01.2018, the obligation to refer to the mediation system first for all disputes between workers and employers - except for actions for damages stemming from work accidents and occupational diseases as well as actions for fixing of period of service brought by persons who were never or deficiently declared to the Social Security Institution - will result both in the identification of the authenticity of anti-union discrimination claims at this stage and, although being very rare, the failure to record these even if they have been identified. Same applies to crimes subject to conciliation. However, since anti-union discrimination-based crimes subject to conciliation have a narrower scope, the problem in this regard is mostly caused by mediation. This issue was particularly emphasized at the workshop, however, due to the legal nature of the institutions of mediation and conciliation, no solutions were generated with regard to collecting data during these stages. Nevertheless, the failure to find any solutions in this regard will also be explained in this

report. In conclusion, effort will be made in this report to develop a model recommendation for Turkey in light of both data collection methods and systems on anti-union discrimination in EU countries and the information generated at the workshop.

II. METHODOLOGY AND ANALYTICAL FRAMEWORK

First, the concepts of discrimination and then anti-union discrimination will be explained in this report by considering individual and collective freedom of association and taking into consideration international sources as well. After conceptual explanations, information will be provided on ILO and European Union legislation on data collection methods. Because, ILO Resolution of 2013 Concerning Statistics of Work, Employment and Labour Underutilization and EU Regulation No. 577/98 on the Organisation of a Labour Force Sample Survey are very important for data collection methods since they regulate minimum principles. It is obvious that these principles should be taken into account while recommending a model for Turkey. This will enable the identification of amendments required to be made in the legislation and existing practices in our country and the model recommendation will be ensured to comply with said regulations.

After explaining general principles established by EU and ILO regulations, data collection methods in use in European Union countries will be elaborated. However, a database created to identify anti-union discrimination and therefore methods used to create this database were not found in any of the European Union countries except for Finland.[1] Therefore, data collection methods and databases on other criteria for discrimination such as sex, ethnic origin, religious belief and age in use in European Union member states will be reviewed and the emphasis will be put on the methods which may be preferred in our country to identify anti-union discrimination and the reasons for such a preference. Thereby, a model recommendation will be developed which will be usable in our country and identify anti-union discrimination in an accurate, effective and purposeful way.

In European Union level studies, it is pointed out that England, Finland and the Netherlands have the most successful data collection systems which are followed by Ireland.[2] Therefore, as a result of the research conducted during the preparation stage of this report, systems of Ireland, Finland and the Netherlands will be examined as examples as countries about which we were able to reach the most information and therefore will be able to relay the most accurate information. It is obvious that examining the Finnish system is a must for this study as the only member state which provided statistical information on anti-union discrimination.

Anti-union discrimination is considered as a violation of union rights which are regarded as a fundamental human right which should be respected at work (Charter of Fundamental Rights, Art. 12) rather than a type of discrimination by the European Union Acquis and therefore addressed under the equal treatment at workplace section. Thereby, while the aim in the European Union Law is to record discrimination and the combat against discrimination and create an accurate and effective database to be used at every stage of the combat against discrimination, anti-union discrimination is not considered in this scope.[3] Moreover, data collection methods to be used in identification of discrimination based on age, sex, ethnic origin, race, disability, religion, belief and sexual orientation which is governed in European Union Directives as prohibition of discrimination in order to achieve uniformity in data collection methods used at the level

1 https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_kat_001_en.html. This data is concluded solely based on surveys conducted every five years. No other data collection methods were identified in Finland on anti-union discrimination other than the mentioned survey. In fact, the necessity of collecting data was emphasized in France in terms of the combat against anti-union discrimination and recommendations were generated in this regard, *Fondation Copernic,* 108. Similarly, in *Compa*, it was mentioned that determination of whether countries comply with the freedom of association may be done by collecting data on persons who were subject to union related discrimination or even dismissed; and this may be done using court records, inspection board records and surveys, *Compa*, 287, 289, 300, 316.

2 *See* Jørgensen-Emerek, 6.

3 *Makkonen,* 18 et seq. *Dabscheck,* 14 et seq. Also see ILO Labour Conference, 106th Session, 2017, Report VI, 17 et seq.

of member states and thereby create a European Union level database constitute the topics of special studies. In fact, European Union Statistical Office (Eurostat) carries out works in order to create databases in this regard in collaboration with member states.

Although these studies do not mention a special data collection system on anti-union discrimination, *"personal data"* concept is emphasized to ensure the safety of data collected in these studies and it is pointed out that union membership is under protection in European Union members states as private personal data (sensitive data). However, it should immediately be pointed out that, data being personal does not provide a preventive nature against data about it being collected and processed for statistical purposes. Because, collection and processing of personal data by the State to produce statistics is considered as a compliance with the law. This issue will also be addressed separately in our report and amendments required to be made in this regard in our country will be recommended.

After examining the data collection methods in European Union member states, the concept of anti-union discrimination in our country and its counterpart in our legislation will be explained based on the sanctions imposed in public and private sectors. Because, without explaining the concept and taking into consideration during which stages we might encounter anti-union discrimination and its types, it will not be possible to recommend methods which are in compliance with the conditions of our country as well as being effective and serving the purpose of collecting accurate information. In fact, it should be noted that we believe the data desired to be collected to establish an authentic, reliable, consistent and therefore effective and accurate national policy in the combat against anti-union discrimination should be recorded based on detected anti-union discrimination rather than those being claimed. Therefore, recommendations on data collection methods will be established based on the sanctions imposed for anti-union discrimination in our country.

Since there are no data collection tools currently in use on anti-union discrimination in our country, existing databases or reporting systems of Ministry of Justice, Ministry of Family, Labour and Social Services (authorisation applications, tracking of union membership via the e-government system), also the Guidance and Inspection Department under the Ministry as well as the Social Security Institution (SSI), Turkish Human Rights and Equality Institution, Ombudsman Institution and Turkish Statistical Institute will be examined to find out which ones are usable in this regard. To this end, for instance it will be possible to use the declarations of separation from job of SSI as a database in this regard and when compared to the information that a high number of workers were dismissed upon an authorisation document awarded to any workers' union by General Directorate of Labour,[4] this might be considered as a sign of dismissal based on union related reasons. These data should be allowed to be used in judicial processes and administrative supervision as evidence despite not being probative evidence and by creating such a database, the goal of the combat against anti-union discrimination should also be enabled. Therefore, first the emphasis will be put on how and to what extent certain existing databases (or data entries if there is no database) in our country can be used to record anti-union discrimination.

Furthermore, there are institutions in our country which are able to collect data on anti-union discrimination without any legal amendment. Recommendations will be presented to enable data collection by these institutions. In addition, legal or practical changes required to realistically record anti-union discrimination and create a database in this regard should also be highlighted. In fact, for example, this is valid for Law No. 6701 on Turkish Human Rights and Equality Institution. Beyond these, the existence of systems preventing recording of anti-union discrimination in our country will also be discussed. In fact, it is believed that the mandatory mediation institution imposed on labour trials and the principle of confidentiality which constitutes the essence of this system prevent data collection.

4 See Özveri, 299 et seq.

In this way, existing databases and institutions with infrastructure suitable for data collection will be evaluated, data to be collected through required legal and practical amendments in this regard will be explained, however, also the existence of methods which are not used in our country but should be developed will be discussed. Finally, a model recommendation will be developed for our country by examining whether it is possible to aggregate all databases and statistics prepared using the data collected at formal, administrative and judicial registry system under a single database and statistics and if so, then which institution in our country should undertake such work.

III. CONCEPTS

In this section, first, how the concepts of *"discrimination"* and *"anti-union discrimination"* are defined in EU and ILO regulations will be explained and then the emphasis will be put on the concepts of discrimination and anti-union discrimination in international literature as well as their types. After these explanations, how discrimination and anti-union discrimination are perceived in our country and how they are incorporated in our legislation will be addressed.

It is of great importance for our subject to explain the concepts of discrimination and anti-union discrimination and identify how these are governed in our legislation. Because, by doing so, it will be possible to identify the ways anti-union discrimination may manifest itself and therefore the stages during which it may be detected by judicial and administrative authorities. However, it should be noted that, this section is only about explaining the concepts and providing general information about the legislation and sanctions to be imposed for anti-union discrimination will be addressed under Section V. Because, it is believed that it is more accurate to evaluate data collection systems by taking into consideration these sanctions.

Article 12 of European Union Charter of Fundamental Rights governs the right to assembly and association. Article 21 of the Charter of Fundamental Rights defines the prohibition of discrimination separately. Accordingly, it is clearly laid down that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation should be prohibited.[5] However, the Charter of Fundamental Rights provides no definition of discrimination.

As such, it is also clear in the Charter of Fundamental Rights that, union rights are considered as fundamental human rights in European Union Acquis however the violation in this regard is considered as a direct violation of this right rather than discrimination. In fact, this is the reason why directives on discrimination in the European Union Acquis are based on criteria of race and ethnic origin (2000/43 EC); religion, belief, disability, age and sexual orientation (2000/78 EC) and; sex (2006/54 EC); however, the violation of union rights is considered as a violation of fundamental human rights in all EU member states. However, Article 19 of the Treaty on the Functioning of the European Union which is binding for European Union member states prescribes that *"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".* Also, the Article 157 of the Treaty prohibits gender-based discrimination and incorporates the principle of equal pay for equal work among men and women. As is seen, this Treaty which is binding for member states only prohibits discrimination based on sex, race and ethnic origin, religion or belief, disability, age or sexual orientation. Member states may act in line with this prohibition of discrimination or when they desire, they may prohibit other types of discrimination based on more criteria.[6]

5 *Makkonen,* 17 et seq.

6 *Ellis*, 20 et seq.

ILO Discrimination (Employment and Occupation) Convention (No. 111) and the Recommendation No. 111 demonstrating the implementation of this Convention prescribe that signatory states must take necessary measures to prevent discrimination based on race, colour, age, religion, political opinion, national or social origin in acceptance to employment or occupation, acceptance to vocational training and working conditions. The Convention defines *"discrimination"* as, *"any distinction, exclusion or preference which has the effect of nullifying or impairing equality of treatment"*. Similarly, in the Termination of Employment Convention (No. 158) and the associated Recommendation No. 166, it is clearly regulated that there must be a valid reason for termination of employment contract by the employer connected with the capacity or conduct of the worker or based on the requirements of the undertaking and also race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin shall not constitute valid reasons for termination. These regulations also matter in terms of demonstrating the criteria considered within the scope of prohibition of discrimination by ILO. Because, similar to EU, ILO also does not consider anti-union discrimination within the scope of prohibition of discrimination and prefers to govern this issue through specific conventions.

In fact, while ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87) regulates individual and collective freedom of association; it is governed in the ILO Right to Organise and Collective Bargaining Convention (No. 98) and ILO Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service Convention (No. 151) that, respectively, workers and public employees shall not be subject to discrimination based on their union memberships or union activities in employment, determination of working conditions and termination of employment relationship and; they should be protected against any acts of interference by the employer or public authorities in their establishment, functioning or administrative and financial management. Conventions No. 98 and 151 define and prohibit anti-union discrimination under separate titles as individual and collective discrimination. Accordingly, in order to protect individual freedom of association, it has been prohibited to make the employment of a worker or public official subject to the condition that he/she shall join or not join a union; also to make union membership or lawful union activities a reason for treating differently or prejudicing within the working relationship or dismissal.

As such, it is laid down in Convention No. 98 that, workers' and employers' organisations shall not perform any acts of interference in each other's establishment, functioning or administration and also workers' organisations shall not be made subject to domination or support by employers' organisations by administrative or financial means and the State must ensure actions in line with all of these prohibitions, and thereby collective freedom of association is taken under protection. A similar regulation is laid down in Article 5 of the Convention No. 151 as provisions stipulating that public employees' organisations shall be completely independent from public authorities and enjoy adequate protection against any acts of interference by a public authority. Article 4 of the Convention No. 87 also clearly governs that, for all union organisations, workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority. By doing so, the aim is to prevent unions from being closed or suspended without a court decision and protect collective freedom of association.[7] Thereby, it should be noted that, the fact that union membership and union activities are not included in the criteria for prohibition of discrimination in ILO and EU regulations does not mean that individual and collective freedoms of association are not protected. Violation of such freedoms is considered as a violation of the fundamental human right governed by Article 12 of European Union Charter of Fundamental Rights as well as ILO Conventions No. 87, 98 and 151. In fact, the request from the Committee of Experts made as of June 2013 for our country and also included in the 2018 report to create a database on anti-union discrimination in our country in order to detect anti-union discrimination which also led to the preparation of this report was reviewed under the title of compliance with Convention No. 98.

7 For detailed information see *Caraway,* 217 et seq. *Thorpe-McDonald*, 25 et seq. *Servais,* 295 et seq.

After addressing international regulations, emphasis should be laid on the classification of the concept of discrimination and the meaning of anti-union discrimination.

1. Classification by Type of Discrimination

In line with the European Union Acquis, discrimination is examined and prohibited under two types as direct and indirect discrimination in EU member states. Similarly, despite not using explicit concepts, ILO Convention No. 111 is also considered to prohibit direct and indirect discrimination.[8]

a. Direct Discrimination

Direct discrimination is referred by the EU Directive No. 2000/43 prohibiting discrimination based on ethnic origin; Directive No. 2000/78 aiming to prevent discrimination based on religion, belief, disability, age and sexual orientation and Directive No. 2006/54 EC prohibiting gender based discrimination as to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of the criteria included in the scope of prohibition of discrimination.[9] Article 1 of ILO Convention No. 111 defines discrimination as, *"any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".* Thereby, direct discrimination may be defined as subjecting a person or group to a different treatment in an unlawful manner in comparison to another comparable person or group "directly based on" the criteria covered by prohibition of discrimination.[10]

b. Indirect Discrimination

In indirect discrimination, which differs from direct discrimination in various ways, a practice implemented the same way to everyone manifests its impact in a way to cause discrimination. Therefore, it is pointed out that discrimination is not the goal but the impact of indirect discrimination.[11] Indirect discrimination is argued to happen in three ways. First case is where a rule or practice which seems to apply equally to everyone and be impartial creates the possibility of making persons from a group with certain characteristics disadvantageous.[12] Other case is where a general impartial practice makes persons from a certain group disproportionate and disadvantageous.[13] And the final case of indirect discrimination is where a general and impartial rule or practice is applied without providing any exception to a person or group considered to have a different condition and makes this person or group disproportionate or disadvantageous where it is also not based on a reasonable and objective reason.[14]

Indirect discrimination is also defined in EU Directives as the situation where a seemingly impartial regulation causes a certain disadvantage to persons who fulfil any of the criteria covered by prohibition of discrimination in comparison to other persons and where this regulation, criterion or practice is not based on a legitimate reason and is not suitable or

8 *Karan*, 213.

9 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l33114.

10 *Karan*, 203-209.

11 *Karan*, 210.

12 ABAD, O'Flynn v. Adjudication Office, Case C-237/94, 23.5.1996, prg.20-21, *Karan*, 211, dn.1046.

13 *Karan*, 211.

14 *Karan*, 211-212.

necessary for reaching the goal.[15] This definition was also adopted in EU Directives No. 2000/43, 2000/78 and 2006/54. It is also considered that the *"having the effect of impairing"* statement included in the prohibition of discrimination regulation laid down in Article 1 of ILO Convention No. 111 refers to indirect discrimination.[16] Although concepts of direct and indirect discrimination are used in terms of the criteria covered by prohibition of discrimination, these types of discrimination can also apply to anti-union discrimination.

2. Classification by Type of Violated Right

The distinction which matters in terms of anti-union discrimination is the one that is based on the type of violated right. This is the case because, freedom of association, as mentioned above, is often subject to international and national regulations in the scope of fundamental human rights and equality principle rather than the scope of prohibition of discrimination. However, of course, anti-union discrimination may also occur as indirect discrimination instead of direct discrimination.

Before explaining the data collection systems which may be established to detect anti-union discrimination, it is obviously necessary to address the ways in which freedom of association may be violated and therefore the manifestations of freedom of association as well as their violation and sanctions to be imposed in case of such violations. Freedom of association does not solely refer to the freedom of gathering together to protect and develop shared social and economic interests of persons and of becoming or not becoming a member of unions established as a result of this gathering. Assurance for individual freedom of association which is defined as such may be ensured completely by recognising and protecting collective freedom of association as well.[17] Unions also have a legal personality independent from the persons that constitute them; therefore they should have the freedom to protect their existence as a subject of law and carry out activities specific to them.[18] Collective freedom of association refers to the ability of unions to protect their existence, carry out activities specific to them and not being subject to supervision or tutelage by any administrative authority during these stages or not being financially dependent on these authorities or other social parties as well as not being closed or suspended without a court decision.[19] The necessity to address freedom of association as a whole as individual and collective freedom results in characterising it as a double-faceted fundamental right.[20]

a. Individual Freedom of Association

Individual freedom of association refers to the freedom of employees to freely establish unions, become a member of existing unions, leave a union and not be forced to become a member of a union (right to not become a union member).[21] Thereby, individual freedom of association means being in positive and negative behavioural patterns. Positive freedom of association refers to the right of employees to establish a union or become a member of an existing union. As such, the employee performs a positive act. On the contrary, negative freedom of association refers to the right to not become a member of a union at all, to withdraw from union membership and not be forced to become a member of any union. In this case the employee remains within a negative act.[22]

15 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l33114

16 *Hepple,* 8.

17 *Tuncay-Savaş Kutsal,* 31.

18 *Tuncay-Savaş Kutsal,* 31.

19 *Tuncay-Savaş Kutsal,* 34 et seq.

20 *Tuncay, Savaş Kutsal*, 31. For detailed explanations on how both rights complement each other, see *Bogg,* 90 et seq.

21 *Dabscheck,* 14 et seq. Tuncay-Savaş Kutsal, 31.

22 *Tuncay-Savaş Kutsal*, 31-33.

Article 2 of ILO Convention No. 87 enshrines the right of employees to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation and therefore demonstrates that it recognizes individual freedom of association. While the Article 51 of the Turkish Constitution of 1982 granted this right to only workers before it was amended in 2001, the right to establish and join unions of their choosing, withdraw from membership or not to become a union member without prior authorisation was granted to *"all employees"* including public officials after the amendment of 2001.

As such, Article 1 of ILO Convention No. 98 points out two types of individual freedom of association as positive and negative and governs that signatory states must prevent the violation of both rights. Similarly, positive and negative sides of individual freedom of association has been separately protected for public officials by the Article 4 of ILO Convention No. 151 and it has been explicitly governed that violation of this freedom must be prevented.

In Turkish Law, Article 51 of the Constitution grants the right to all employees to establish unions and freely become union members without prior authorisation and it is explicitly governed that no person can be forced to withdraw from membership. Similarly, paragraphs 25/1 and 25/3 of Law No. 6356 of 2012 on Trade Unions and Collective Labour Agreement explicitly govern that neither positive nor negative individual freedom of association can be violated and fourth and fifth paragraphs of the same article specifically lays down the sanction in this regard. As such, Articles 17 and 19 of the Law also provide the said protection and the administrative fine to be imposed in case of violation is prescribed in subparagraph 78/1-c of the Law.

aa. Positive Freedom of Association

It refers to employees' right to establish unions and become union members freely and without prior authorisation in order to protect and develop their shared social and economic interests. Employment of a person cannot be hindered based on union membership or carrying out lawful activities at this union. As such, treating the employee differently from his/her counterparts or dismissing on the grounds of being a union member or carrying out lawful union activities is regarded as anti-union discrimination. In such cases, individual positive freedom of association is considered violated.[23]

Article 25 of Law No. 6356 on Trade Unions and Collective Labour Agreement imposes a sanction for damages for the violation of positive freedom of association for workers and persons working independently through contracts laid down in Article 2/4 of this Law and ensures this protection in employment, working conditions and termination of employment contracts. As such, provisions stipulated in Article 17 of the Law as *"Persons are free to become union members. No person can be forced to become or not become a member of a union"* and in Article 19 as "Workers or employers cannot be forced to remain as union members of withdraw from membership" protect positive and negative freedom of association in terms of the right to membership. Where anti-union discrimination is detected as a violation of these provisions, administrative fine prescribed in subparagraph 78/1-c of the Law shall apply.

bb. Negative Freedom of Association

Negative freedom of association, which complements positive freedom of association is defined as a person's right to remain outside the unions, freely withdraw from union membership and not be forced to become a union member.[24] While ILO Convention No. 87 does not mention negative freedom of association, Article 1 of Convention No. 98 governs that negative freedom of association should also be protected.

23 *Tuncay-Savaş Kutsal,* 31 et seq.

24 *Tuncay, Savaş-Kutsal*, 33 et seq.

Articles 17, 19 and 25 of Law No. 6356 incorporate provisions on the protection of positive and negative freedom of association and thereby impose both sanction for damages and administrative fines for anti-union discrimination. Sanctions will be elaborated in Section V below.

b. Collective Freedom of Association

Collective freedom of association is mandatory for achieving full individual freedom of association.[25] Because, where collective freedom of association, which is defined as the freedom of unions and umbrella organisations to be established, to carry out activities as independent from the State, other social party and all administrative authorities and the obligation to have a court decision to close them or suspend their activities, as well as the protection and sustaining of their legal personality towards their members is not ensured, it is not possible to talk about the existence of individual freedom of association.

In fact, collective freedom of association is referred to as a right that should be separately protected in ILO Conventions No. 98 and 151 and Article 4 of Convention No. 87. Similarly in our legislation, there are many provisions on the protection of collective freedom of association in Articles 3/1, 7, 20-21, 24 and 26 of Law No. 6356.[26]

IV. METHODS OF DATA COLLECTION ON DISCRIMINATION

Council of Europe has justifiably accepted that it is necessary to create data collection systems which measure the scope and effect of discrimination in order to identify the tools to be used in the combat against discrimination and ensure their effectiveness and to this end, has initiated the Action Programme to Combat Discrimination to cover January 1st - December 31st, 2006 with the decision of 27.11.2000. In the scope of this programme, works were initiated to find out how direct and indirect discrimination based on race, ethnic origin, religion, belief, disability, age and sexual orientation is identified and recorded in EU member states and how the data in this regard is collected.[27] In fact, these works initiated pursuant to the decision of 2000 on data collection systems for identification of discrimination still continue to this day.

These works have demonstrated the importance of the data collection system. As a matter of fact, as mentioned also in the final report of 2004, data collection systems and the created database play a significant role in enabling the country to see what stage it is at in terms of combating discrimination and to plan what needs to be done accordingly and determine the national policy which incorporates legal or practical amendments in this regard; in demonstrating human rights violations based on countries and making them comparable; leading the way for social parties and materialisation of the goals of non-governmental organisations; contributing in country's development in this area by being used in academic studies; and finally having the quality of even being used as evidence in cases.[28] Moreover, it should be noted that, grounds for discrimination which all member states are liable to prevent as a minimum prescribed in the European Union Acquis are sex, race, ethnic origin, religion or belief, disability, age and sexual orientation (Treaty on the Functioning of the European Union, Art. 19). Member states are allowed to expand the limits of prohibition of discrimination beyond these. However, in EU Acquis, anti-union discrimination is considered as a fundamental human right and not regarded in the scope of discrimination. Therefore, works on data collection systems to be used in the combat against discrimination do not incorporate data collection systems on anti-union discrimination.

25 *Bogg*, 90 et seq. *Tuncay-Savaş Kutsal*, 34 et seq.

26 For detailed information, see *Tuncay-Savaş Kutsal*, 37 et seq.

27 *Oy-Reuter-Makkonen-Oosi*, 4.

28 *Oy-Reuter-Makkonen-Oosi*,14-16.

It is pointed out that England, Finland, the Netherlands and Ireland are the leading countries respectively on the list comparing EU countries regarding regular, valid, reliable comparable, utilisable and therefore effective data collection systems.[29] Among these countries, which have created such high level data collection systems, there were no data collection methods or systems on anti-union discrimination found in any of them except for Finland. Particularly in countries such as England and Ireland where efforts are made at the highest level to protect fundamental human rights, it was found out via e-mail correspondence with the Statistics Office of Ireland aiming to identify whether there is a recording system in this regard that, there were no such data collection systems on anti-union discrimination and also any information on this matter was not even included in labour surveys.

However, in the Quality of Work Life Surveys administered on the website of the Statistics Office of Finland every five years, it has been found out that in addition to other questions on discrimination, there are also questions and related statistics on identification of anti-union discrimination. In fact, tables demonstrating the results of the surveys conducted in 1997, 2003, 2008 and 2013 can be accessed on the website of the Statistics Office. These results show data on not only the level of anti-union discrimination across the country, but also on the percentage of anti-union discrimination in the processes of employment, remuneration, working conditions and termination of the employment relationship.[30] However, since there were no other data collection systems on the percentage or identification of anti-union discrimination found in other countries except for Finland, in order to present a data collection system recommendation for our country on this issue which is also a type of discrimination in addition to being a human rights violation, data collection systems on discrimination in EU countries were the subjects of examination. To this end, in our study, systems of Ireland, Finland and the Netherlands which were claimed to be the most effective data collection systems and about which we were able to collect quite detailed information will be reviewed.

However, before proceeding to this review, although our country is not a member of the EU, principles and rules of the European Union on collecting data and keeping statistics will also be mentioned briefly in order to ensure comparability of our statistics and their acceptability by the EU. Similarly, since the reason for the preparation of this report is the criticism by the current ILO Committee of Experts, it is clear that principles and rules of ILO on collecting data and preparing statistics should also be addressed. Because, this is the only way to ensure compatibility of the system to be recommended for our country with the rules of EU and ILO.

1. European Union Principles and Rules

a. European Statistics Code of Practice

Eurostat, the Statistics Office of European Union carries out continuous works to ensure comparable and high-quality data collection and statistics by European Union members states on the national level as well as within the union. To this end, the European Statistics Code of Practice, which was updated and published on 16.11.2017 by the European Statistical System Committee was prepared as the main quality framework of the European Statistical System. Eurostat stipulates that all stakeholders within the European Statistical System (ESS) created by national statistical administrations of each member state and EFTA (European Free Trade Association) should act in accordance with the Code of Practice comprising of 16 countries. To this end, European Statistical Governance Advisory Board (ESGAB) monitors both Eurostat and ESS in terms of their compliance with these principles and at the end of the year, the Board presents recommendations on facilitating compliance with the Code.[31]

29 *Huddleston*, 6.

30 https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_kat_001_en.html

31 https://ec.europa.eu/eurostat/web/products-catalogues/-/KS-02-18-142

Principles of the Code of Practice which are binding for all countries included in Eurostat and ESS which aim to access independent, impartial, professionally based, reliable, expedient, accurate and timely data which have been generated in line with the cost-effectiveness principle and can be accessed transparently[32] should clearly be adopted by our country and a data collection system in line with these principles should be created. Thereby, it is important to briefly address the principles of the Code of Practice. Professional independence principle refers to independence from all political and administrative bodies in developing, producing and disseminating statistics; granting the heads of national statistical institutes the authorisation to access all official and administrative databases in the country and the sole responsibility to generate information independently; ensuring that heads of national statistical institutes have the sole responsibility for deciding on statistical methods, standards and procedures, and on the content and timing of statistical releases; publishing statistical results free of political will and statement; and ensuring that recruitment processes are transparent and based on defined criteria. Moreover, other principles laid down in the Code of Practice include coordination and cooperation, mandate for data collection and access to data, adequacy of resources, commitment to quality, data protection, impartiality, deep, technical, scientific and constantly renewed methodology (sound methodology), appropriate statistical procedures for accessing data, non-excessive burden on respondents, cost-effectiveness, relevance, accuracy and reliability, timeliness and punctuality, coherence and comparability both among countries and time periods and accessibility and clarity.

In line with these principles, administrations of national statistical institutes should be in cooperation at all levels with public and private entities and academic circles and vested with the authority on behalf of the State to collect and access information from households, enterprises and administrations by making it obligatory by law to respond to surveys when necessary, however trust should also be established that personal data will be protected; information should be collected in line with the purpose of statistics, scope should be determined in line with this scope and human force, technology and financing should also be used in line with this scope; continuously improving procedures for collecting data and preparing statistics should be developed to achieve high quality statistics which are constantly auto-controlled, tracked and weak points of which are detected and improved; data from multiple sources should be integrated properly; duplications should be prevented and methods should be developed in this regard, personal data should only be collected for statistical purposes and trust should be established by law among persons that their data will be protected, severe sanctions should be imposed for violation of personal data, provisions should be included in contracts signed by employees of statistical institutes about protection of personal data and sanctions to be imposed in case of violation, employees should be provided with necessary information and professional rules of practice in this regard; detailed, severe and strict protocols should be applied to third parties requesting to access the statistical micro data for scientific purposes about the protection of personal data; units preparing the statistics should act in an impartial and scientifically independent manner in collecting and developing data and producing and publishing statistics; decisions on data sources, statistical methods and publication of statistics should be based on statistical observations; data sources, methods used and procedures followed should be accessible by public and transparent; publication dates of statistics should be announced in advance, public should be informed in advance about changes in methods and major revisions; statistical administration should be able to independently decide on timing of statistical releases; all persons should be able to access these statistics at the same time, statistics should not be based on political statements or favouritism; same concepts, same classifications and same standards should be used in all countries to ensure comparability, statistics should be prepared using scientific, technical, deep and constantly improving and increasingly more expedient methods, academic studies on this matter should be utilised; statistical institute employees should be provided with continuous occupational trainings; expedient procedures should be preferred; if a survey will be conducted, questions should systematically be tested beforehand; adequate amount of data should be collected, the method should not create excessive burden on the group that provides data, this burden should be spread across the large portion of the population as much as possible; data duplication should definitely be prevented; data should be collected and processed in the most cost-effective but accurate way; statistical data should serve the purposes

32 https://ec.europa.eu/eurostat/web/products-catalogues/-/KS-02-17-428

of the country and users, therefore urgent and priority works should be identified; data source, processed data and interim results and statistical results should be evaluated and updated continuously, detected sampling errors should immediately be reported, necessary revisions should be undertaken, periodical conversion of data into statistics should be done in line with the needs of users, publication programme and timing should be announced to the public as well as any changes in this regard, statistics should be comparable both in time and among countries, statistics should be easily accessed and understood by all persons however access to micro data should only be allowed for scientific research purposes and under very strict conditions. It should be noted that, it is clear for our country as well, which is not a member of the European Union, that these principles should be adopted and implemented in all statistical works, just as any State that aims to produce reliable, comparable, expedient and effective statistics. Although the model recommendation to be provided in the last section of this report is about collecting data on anti-union discrimination, it should be pointed out in the introduction that it should be implemented by considering these principles as well. Because, otherwise it is impossible to achieve a reliable and effective data collection system.

b. European Union Directive No. 577/98

Council of Europe Directive No. 577 of 09.03.1998 on the Organisation of a Labour Force Sample Survey stipulates that labour force surveys shall be administered using same concepts, same timing and same minimum questions. This directive has been published in this regard to regulate minimum conditions for labour force surveys. Accordingly, it has been governed that, although year-long continuous labour force surveys are preferable, where it is not possible, surveys should be conducted at least once a year in spring, results of labour force surveys should be provided annually and quarterly, surveys should be administered to a group of persons selected from those residing in the country at the time of the survey, this group should be comprised of unemployed persons, employees and self-employed persons, it should be ensured that persons themselves respond rather than family representatives, separate surveys should be conducted for each individual, state of employment and unemployment rates in the country should be concluded directly based on this survey, members of households should be included in the survey where it is administered as household surveys, member states may make it obligatory to take part in the survey and they may add questions to the scope of the survey in addition to the minimum questions laid down in the directive and each member state should submit their survey results to Eurostat and provide quarterly reports on the implementation of this directive.

This Directive also prescribes that minimum questions to be included in the labour force survey should cover the week up to the day of the survey. Questions which will enable access to data on anti-union discrimination include the reason for not having worked during the last week, properties of the work sought, methods used to find a job, availability to start work, duration of the last work, continuity of the work and reasons for it, searching for another job in addition to existing one and reasons for doing so, reasons why person is not seeking another job, duration of search for existing job, previous job, duration of the previous job, reason for leaving previous job, professional status in last job and actual job done at the last workplace. When responding to these questions, person will be able to provide information on whether anti-union discrimination exists during employment, working or among reasons for dismissal.

However, it should be pointed out that, information to be collected this way cannot possibly provide precise, accurate and complete data for identification of anti-union discrimination. This is the case because these questions are not directly aiming to collect information on anti-union discrimination. Therefore, these questions may only be an assistive-supplementary method for collecting information on anti-union discrimination. As a matter of fact, in the last section below comprising of recommendations, it will be concluded that in addition to the labour force surveys currently being conducted in our country, Quality of Work Life Survey which is suitable for measuring anti-union discrimination directly should also be administered.

2. ILO Principles and Rules

As no sources have been found on how to collect data on anti-union discrimination in ILO Conventions, recommendations or reports; there are also no statistics on anti-union discrimination produced by ILOStat. However, we believe that the *"ILO Resolution Concerning Statistics of Work, Employment and Labour Underutilization"* which was decided upon at the 19th International Conference of Labour Statisticians held in October 2013, as well as ILO Labour Statistics Convention (No. 160) and the associated ILO Recommendation No. 170 which were not signed by our country but considered useful for the model recommendation for Turkey should be briefly mentioned.

a. Resolution Concerning Statistics of Work, Employment and Labour Underutilization

"Resolution Concerning Statistics of Work, Employment and Labour Underutilization which was decided upon at the 19th International Conference of Labour Statisticians held in October 2013 is in fact not about anti-union discrimination or union membership.[33] However, it is very important for our subject since it incorporates important principles and rules on preparing statistics on employment, types of work, fields of work and inadequate employment (underutilisation of the labour force).

It has been laid down in the Resolution that, while collecting data and preparing statistics on mentioned topics; data should be disaggregated by sex, age, child labour, migrants and other economic-social characteristics, employment statistics should be compared to other economic and social statistics and new statistics should be reached, each country should establish a system for collecting data and preparing statistics to do these in line with its own national conditions however this system should also be suitable for international comparison, that it is important to use same terminology and same methods, statistics on the relationship between sex, child labour, going in and out of employment, migrant workers or employment and the socio-economic characteristics may be undertaken through longer time periods and the time period for updating information should be decided based on the conditions of the country. In fact, this is the reason why a recommendation will be provided in the last section on repeating the recommended Quality of Work Life Survey every three years in our country.

Resolution also incorporates data collection methods. Accordingly, it has been pointed out that, while collecting data on working life, population censuses and labour force surveys - household based surveys and administrative records of employment agencies and social security institutions, tax records, vocational training records and programme records similar to public benefit programmes are important in terms of collecting preliminary data for specialized household surveys (surveys focused on certain areas such as child labour, labour force migration and training - therefore victim surveys about anti-union discrimination). Moreover, the Resolution also stipulates that surveys may also be conducted at establishment level and thereby opportunities regarding workers, work relationships, vacant positions, sector-based employment opportunities, apprenticeship and internship may be identified and such surveys are called economic censuses.[34] It should be noted that, the Resolution indicates that the statistical system should be established by using population censuses, surveys, administrative records and economic censuses together. In fact, as mentioned above, collecting data and producing statistics and databases particularly in areas such as anti-union discrimination which cannot be identified directly can only be achieved by utilising multiple data collection methods at the same time.[35]

33 https://www.ilo.org/global/statistics-and-databases/standards-and-guidelines/resolutions-adopted-by-international-conferences-of-labour-statisticians/WCMS_230304/lang--en/index.htm

34 For differences between labour force surveys and establishment surveys and their advantages and disadvantages, see https://www.businessinsider.com/the-differences-between-the-household-and-establishment-employment-surveys-2014-9

35 *Oy-Reuter-Makkonen-Oosi*, 26 et seq. *Larja et al.,* 23 et seq. In fact, in *Compa*, it was mentioned that determination of whether countries comply with the freedom of association may be done by collecting data on persons who were subject to union related discrimination or even dismissed; and this may be done using court records, inspection board records and surveys, *Compa*, 287, 289, 300, 316.

Furthermore, it has also been prescribed in the Resolution that the statistics to be produced based on the data collected by countries should comply with UN Fundamental Principles of Official Statistics[36] and the Guidelines Concerning Dissemination Practices for Labour Statistics endorsed by the 16th International Conference of Labour Statisticians and statistical production processes should be transparent enough to allow monitoring, statistics must be accessible online and countries should regularly report to ILO concerning the methodology used for statistics, respondents providing the information and interpretation methods.

b. Labour Statistics Convention (No. 160)

ILO Convention No. 160 lays down the minimum for the statistics about working life to be produced by signatory states and fundamental principles to be complied with in this regard. However, the Convention does not include data collection methods. Therefore, this Convention is important in terms of identifying the principles and rules to comply with in data collection systems and producing statistics rather than data collection methods. Principles prescribed in the Convention appear to be in parallel with the principles of the European Statistics Code of Practice mentioned above however they provide much more superficial and general concepts.

Areas which require statistics are mentioned in the Convention as; employment, unemployment, active population, average wage per hour, average earnings, wage type and distribution, labour cost, consumer price indices, household expenditure, occupational injuries and occupational diseases and industrial disputes. It has been governed that, while collecting data and producing statistics in these areas, social parties should be consulted, personal data should be protected, comparability should be ensured by using the same terminology, a periodically renewed system which thereby collects up-to-date information should be used, collected information should be published, it should represent the whole population (employment, unemployment etc.) but when necessary, regional statistics should also be producible, sector statistics should be producible on topics such as wage type and labour cost and these results should be shared with ILO.

c. ILO Labour Statistics Recommendation (No. 170)

This Recommendation stipulates which classifications should be used to produce statistics in data collection systems for each of the areas identified in Convention No. 160, how often these statistics should be updated and the characteristics that the administrative structure which produces the statistics should possess. Accordingly, statistics about employment, unemployment, active population and underemployment should be informative about the whole country and updated annually. These statistics should be classified according to sex and, where possible, age group and branch of economic activity; and also where necessary and with a view to meeting long-term needs for detailed analysis and for benchmark purposes, these should be renewed at least every ten years, however under these circumstances these studies should be classified by sex, age group, occupational activity, level of education, geographical area, type of work and groups of own-account workers and unpaid family workers and long-term and more detailed statistics should be produced. As such, for instance in the Resolution, it has been prescribed that industrial disputes should be updated at least once a year and classified at least according to branch of economic activity (sector).

In the section of the Resolution which is about the structure of the institution producing statistics, it has been governed that, there should be a national administrative statistical structure in line with the conditions of the country, this administrative unit should at least have up-to-date information about establishments or enterprises to conduct surveys, it should have a co-ordinated system to interpret the results of sector and employer surveys and household surveys or surveys for certain groups and access for statistical purposes to records of administrative units such as

36 https://unstats.un.org/unsd/dnss/gp/fundprinciples.aspx

labour inspection services and social security bodies and signatory states should establish a system for harmonising statistics produced based on information compiled by different bodies. Although the Turkish Republic has not signed the Convention No. 160, creating a data collection system in line with the characteristics laid down in the Convention, Recommendation and Resolution of 2013 will prevent any criticism we may encounter in the future. As a matter of facts, principles and rules prescribed in these sources, just as the European Statistics Code of Practice, put forward the requirements for creating a reliable and effective database which reflects the truth. Therefore, it is obvious that these principles and rules should be taken into account while creating and implementing the model we will recommend for our country.

3. Irish System

It has been deemed appropriate to discuss the Irish system first, which was ranked 2nd after England on the list comparing EU countries regarding regular, valid, reliable comparable, utilisable and therefore *"effective"* data collection systems, but also was the country which provided a lot of information about data collection systems on discrimination.[37]

Pursuant to the Employment Equality Act of Ireland (1998-2005), prohibition of discrimination is based on the criteria of gender, civil status, family status, sexual orientation, age, race (citizenship), religion, disability and being minority. This Law specifically prohibits discrimination in employment, working conditions and termination of employment relationship. However, since the Law does not cover anti-union discrimination, there is no separate system for anti-union discrimination within the system for collecting data on discrimination. On the other hand, since Ireland is known for its rigour in protecting fundamental rights and freedoms,[38] the information on the existence of a separate data collection system for anti-union discrimination was also obtained via the e-mail correspondence with the Statistics Office of Ireland, Department of Labour Market Analysis, informing us that there is no such system. Moreover, considering how advanced the Irish data collection system on discrimination is, methods used in this system which are applicable to anti-union discrimination will be considered as an example while also taking into account the conditions of our country and will shed light on the model recommendation for Turkey.

In Ireland, the leading unit which collects data on discrimination and converts them into statistical information is the Central Statistics Office (CSO), which is the State's own statistical unit. However, in addition, there is another independent public body called Irish Human Rights and Equality Commission (IHREC) which was established by the IHREC Act of 2014 and acts as a national institute for human rights and equality. The purpose and duty of the Commission is stated as raising awareness on human rights across the country and ensuring the implementation of the principle of equality both in the labour market and in access to goods and services. Administration of the Commission is undertaken by fifteen independent members appointed by the Prime Minister of Ireland.[39]

Another unit which collects data and keeps records on discrimination other than CSO and IHREC is the Workplace Relations Commission (WRC). Commission is a public body in charge of ensuring resolution of disputes using alternative dispute resolution methods without resorting to judicial processes or of making decisions as the court of first instance where no resolution is achieved via such methods or parties refuse these methods; as well as inspecting the compliance of workplaces with the legislation on working life and on equality via inspectors. In addition, there are also institutes in Ireland which aim to achieve statistical results by operating scientific research principles and rules and generally conduct studies on much more specific matters.

37 *Huddleston*, 6.

38 https://www.ihrec.ie/your-rights/

39 https://www.ihrec.ie/about/who-we-are/

a. Official Records

Official records are obtained when the data from national or regional level official recording systems kept by the Ministry of Labour, Ministry of Economy, Ministry of Justice or Statistics Office depending on the choice of States as well as surveys or tests administered at national or regional levels or to certain groups of people are recorded by the Ministry or the Statistics Office.[40] In Ireland, instead of a national population registry system, there is a population census conducted every five years. It is mandatory by law for the public to participate in this census undertaken by the Statistics Office of Ireland. Otherwise, persons must pay a 25.000 Euro administrative fine.[41] Population census contains questions about the nine criteria mentioned above on which prohibition of discrimination is based in Ireland. However, the question about union membership is included in the labour force survey mentioned below, not in the population census.[42]

Information collected via population censuses serve as a fundamental data bank in terms of other detailed surveys to be conducted. This is the case because, questions asked during the census based on discrimination criteria demonstrate the areas in which probability of discrimination is higher and after the census, specific surveys are organised for persons selected among those who are more likely to be subject to discrimination.[43]

Pursuant to the Data Protection Act of Ireland (1988-2003), in addition to various discrimination criteria such as race, ethnic origin and political opinion, as it is in all other EU countries and also our country, union membership is also considered as protected personal data (sensitive data). Moreover, processes of collecting, processing, storing and disclosing this information are regulated by the mentioned Law in line with the European Union Data Protection Directive No. 95/46. Accordingly, it is accepted that this information can be collected and processed for statistical purposes, however, while producing the statistics, statistical information should be converted into numerical data and no longer be personal data known as micro data and the person to whom the information belongs should be kept as micro data and such micro data should only be disclosed to third parties for scientific purposes under very strict conditions.[44] As such, it is explicitly governed in the Statistics Act of 1993 that personal data will be protected and penal provisions will be applied to those who violate this protection and disclose data and also, in order to make sure that persons feel safe about this matter and participate in the surveys in high numbers with accurate responses, CSO website also provides contact information of data security officers from each department.

When there is a change in census questions, draft questions are shared with the public on the website and thereby the public is informed about these changes in advance.[45] As such, when changes are made, an announcement is made to the public or an explanation is added to the survey title about what each change means and therefore how they should be answered. Thereby it is ensured that the public responds to the questions by knowing what they aim. Dates of distribution and collection of surveys are also announced in advance and so participation in the survey is ensured.

Statistics about working life are produced via the quarterly labour force surveys conducted every year or the quarterly national household surveys which have been conducted until the 3rd quarter of 2017, while also utilising specific information obtained via the population census. The purpose of this survey administered by CSO is to identify the points that will steer the employment policy such as employment, unemployment, time passed until employment and

40 *Oy-Reuter-Makkonen-Oosi*, 20 et seq.

41 *Oy-Reuter-Makkonen-Oosi*, 90. *See* Jørgensen-Ruth, 93.

42 https://www.cso.ie/en/methods/labourmarket/labourforcesurvey/. https://www.cso.ie/en/census/census_pilot_survey/

43 *Oy-Reuter-Makkonen-Oosi*, 90 et seq. *See* Jørgensen-Ruth, 90 et seq.

44 *See* Jørgensen-Ruth, 91-92. *Oy-Reuter-Makkonen-Oosi*, 91.

45 https://www.cso.ie/en/methods/population/censusofpopulation/

type of employment contract sought. As a result of this survey which is repeated four times a year, results are obtained consisting of various variables and providing the public with the opportunity to search for statistics through tables of variables. In the CSO website, results of all surveys, methods used, number of respondents and the regions where the survey has been conducted are shared. Although participation in this survey is optional, it is stated that participation is around 93%.[46]

It should be noted here that population censuses and labour force surveys are distributed and collected by officials of the Statistics Office who have ID cards and name tags and wear special uniforms and when necessary, help is provided by these personnel for answering the questions at houses visited. Dates of distribution and collection of surveys and the regions where they will be conducted are announced to the public in advance and this facilitates and establishes trust in participation and responding to questions. Although these surveys are carried out by the Statistics Office, questions in these surveys are prepared by the relevant commission or Ministry. It should be mentioned that, Statistics Office is not appointed or authorised to prepare the questions. Because, considering the abovementioned international principles as well, producing statistics and collecting information in this regard should be limited to its purpose. And the institution requiring the information is the party that will determine this purpose. Therefore, while preparing questions, CSO gets support from all public entities relevant to the issue.[47] However, CSO-Central Statistics Office is in charge of converting the information collected via surveys into statistical results.[48] As a matter of fact, it will be recommended that questions of the Quality of Work Life Survey to be recommended for our country should be prepared by the Ministry of Family, Labour and Social Services whereas TURKSTAT is authorised and in charge of carrying out the survey itself and producing the results. However, the surveys conducted based on specific discrimination criteria in the Finnish system mentioned below are not undertaken by the Statistics Office of Ireland.[49]

b. Administrative and Legal Records

The reason for discussing legal and administrative records in the Irish system under the same title is due to the fact that the process undertaken by the Workplace Relations Commission (WRC) to be mentioned below under this title has both legal and administrative dimensions.[50] However, before proceeding to WRC, another body that keeps only administrative records and collects data this way, the Irish Human Rights and Equality Commission (IHREC) should be discussed.

IHREC, which directly reports to the Irish Parliament, acts as an independent public body. IHREC's duty is to detect violations of human rights and equality, guide persons in combat against these violations and raise awareness among the public in this regard. IHREC can act as a case partner for claimants at courts regarding violations of the legislation on human rights and equality, represent victims before judicial bodies upon request or guide these persons about legal matters. Furthermore, IHREC can also recommend amendments in the legislation to eliminate problems in practice and reduce discrimination and informs competent international bodies in charge about the current state of the country in terms of discrimination.[51] As for keeping records about discrimination, IHREC, in addition to its annual reports on discrimination, also drafts reports based on the discrimination criteria. IHREC reports serve as a very important source in terms of demonstrating discrimination in the country.[52]

46 https://www.cso.ie/en/statistics/labourmarket/labourforcesurvey/

47 *See* Jørgensen-Ruth, 95.

48 *See* Jørgensen-Ruth, 95.

49 *Oy-Reuter-Makkonen-Oosi*, 90.

50 https://www.workplacerelations.ie/en/

51 https://www.ihrec.ie/our-work/

52 For IHREC reports, see https://www.ihrec.ie/our-work/research-reports/. For 2016 report, see https://www.ihrec.ie/documents/annual-report-2016/

In addition to IHREC, there is also Workplace Relations Commission (WRC), which works within the framework of the Workplace Relations Act of 2015.[53] Where there is a dispute at the labour court or at a stage which is not yet subject to any judicial processes, inspectors of WRC conduct inspections at workplaces upon complaint. After the inspection, either a certain time period is granted to the employer to remedy the violation or an administrative fine is imposed.

Moreover, in Ireland, provided that parties reach an agreement, labour disputes can also be resolved via mediation. Therefore, in order for the mediation process to be operated, both parties should want to resort to mediation and reach an agreement upon it. Whether such an agreement will be reached shall be determined by the WRC official when he/she contacts parties upon the complaint he/she receives. Mediator shall act impartially to enable mutual agreement and shall not offer any solutions.[54]

Furthermore, another service provided by WRC is where a dispute is resolved in the presence of a conciliator also upon mutual agreement among parties. Similar to mediation, the conciliator also remains impartial to enable agreement among parties; however, in this case, he/she has the authority and duty to offer solutions.[55]

Apart from these, where WRC decides that complaints for disputes about certain issues[56] cannot be resolved through, it submits the complaint to WRC Adjudication for a directly binding decision. At this stage, a binding judicial decision about the dispute is made by an expert appointed by WRC for this dispute. Opposing parties have the right to appeal this decision at the labour court. However, if the decision is not appealed but is still not implemented by the employer, then the union, worker him/herself or WRC (on behalf of the worker) has the right to bring an action at the regional court on the grounds of the failure to implement the decision.[57]

As is seen, WRC acts as an inspection body, an alternative dispute resolution centre and as a court of first instance in working life in the Irish system. Mediation and conciliation are implemented when parties to the dispute agree upon these methods. Where parties agree on the methods but cannot reach an agreement this way, WRC adjudication shall be initiated and the decision of first instance shall be concluded by the WRC expert. Where parties agree on mediation or conciliation, if the dispute is based on the violation of the principle of equality, then the mediator or conciliator must be a WRC official. In such a case, mediation or conciliation must be done face-to-face. However, if the dispute is not about a violation of equality, then the mediator or conciliator can be someone outside WRC and processes can be carried out via telephone or e-mail. Where no agreement is reached as a result of mediation or conciliation, the file shall be submitted by the WRC expert to the expert for decision. This decision can be appealed at the labour court.[58]

WRC produces the official records of the year by drafting annual reports and produces statistics from these records itself as well. WRC annual reports provide statistics based on inspections, judicial processes, mediation and conciliation. Accordingly, the number of violation claims submitted to WRC that year and how many of these were sent to inspection, adjudication, mediation and conciliation are identified. WRC also produces statistics based on the topic of the complaints it receives and identifies how many of the disputes heard by the judiciary are based on underpayment, unjust termination, overtime or discrimination. WRC also produces statistics on the results of these disputes and provides as separate statistics for instance how many of the disputes that year subject to judicial processes were accepted, rejected or still unresolved. As such, WRC also produces statistics about inspection and presents a distribution of inspection requests lodged in person or by judicial authorities that year by topics, percentages of violations identified as a result

53 https://www.workplacerelations.ie/en/

54 https://www.workplacerelations.ie/en/Complaints_Disputes/Mediation/

55 https://www.workplacerelations.ie/en/Complaints_Disputes/Conciliation/

56 For these issues, see https://www.workplacerelations.ie/en/Complaints_Disputes/Adjudication/

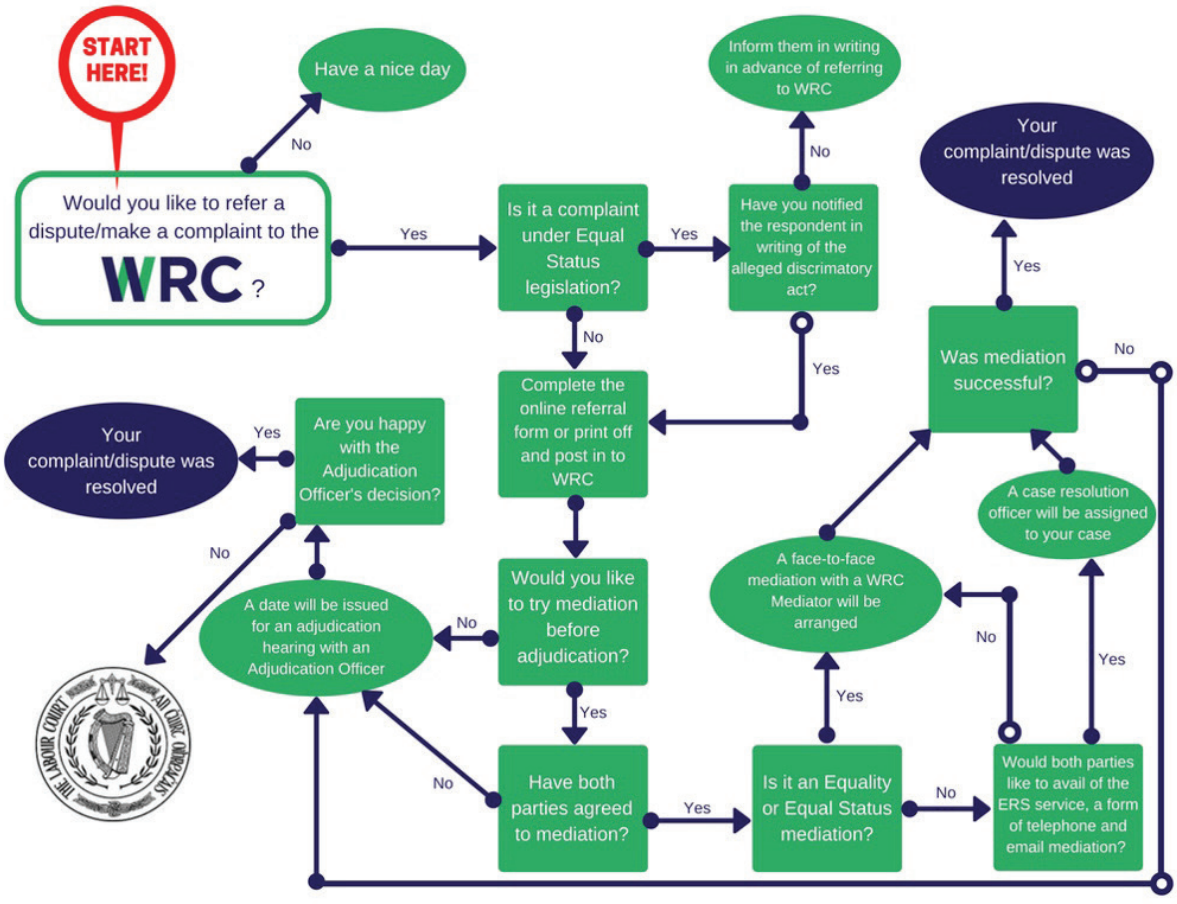
57 https://www.workplacerelations.ie/en/Complaints_Disputes/Enforcement/

58 See Table 1.

by topics and percentages of admonitions and administrative fines imposed on employers and their distribution by topics.

Similarly, WRC also produces statistics on mediation and conciliation processes. First, WRC reports on the percentage of agreements reached as a result of mediation and conciliation. Moreover, disputes subject to conciliation are converted into topic-based statistics and thereby demonstrate the topics for which conciliation was preferred and the percentages of these preferences. Same statistics are produced for mediation as well. However, it should be noted that, in terms of mediation and conciliation, statistics are produced only based on claims or complaints and on whether they have resulted in an agreement. The difference between these institutions and inspection or adjudication is that, since a mediator or conciliator does not carry out any judicial processes, there could be no violations to detect. Therefore, in terms of these institutions, records and reports can only be drafted on the type of complaint and whether it ended in agreement.[59] Same applies to our country. However, the difference between our country and the Irish system is that worker-employer disputes based on anti-union discrimination in our country are subject to mediation as an obligation. Assessments in this regard will be provided in the last section.

In addition to WRC, courts in Ireland also draft annual reports.[60] In these reports, workloads of both WRC and labour courts for that year are published and the information on which procedure has been operated more is presented to the public. Moreover, distribution of dispute claims brought to labour courts that year by topics as well as their results are also published as statistics. To this end, when annual reports of both WRC and labour courts are evaluated together, total variety of labour disputes and their results can be identified at the end of the year. We believe that this method is effective and fruitful in terms of producing statistics on all disputes included in the legal system.



59 For reports of WRC for 2017 and other years, see https://www.workplacerelations.ie/en/Publications_Forms/Annual_Reports_Reviews/

60 https://www.workplacerelations.ie/en/news-media/Workplace_Relations_Notices/Labour_Court_publishes_Annual_Report_for_2017.html

c. Records of Research Institutes

There are many institutes in Ireland established for research purposes. However, among these, there is the Economic and Social Research Institute (ESRI) which was established in 1960 by academicians and public officials and is completely independent from political authority in terms of administration and finance, owns a foundation, conducts research upon requests from public bodies and private sector and is vested with the authority to publish the results of this research without the permission of the requesting person or body. This Institute conducts research and drafts publications based on the projects requested by IHREC. The significance of ESRI stems from its impartial and objective nature, administrative and financial independence, its own foundation with large funds and its exclusive authority to publish research results. Due to these properties, public bodies including IHREC request research from ESRI in more specific topics and areas. For example, upon request from IHREC, in 2017, ESRI conducted a research called *"Who Experiences Discrimination?"* and published the results as a report and utilised the results of the Quarterly National Household Survey conducted by CSO for preliminary information.[61] The results of the research carried out by ESRI are also important for seeing the state of the country in the specific area of research.

4. Dutch System

In the Netherlands, on the contrary to Ireland, there are no periodical population censuses but an official registry system that keeps information about the public.[62] The Central Bureau of Statistics (CBS), which is the statistics office of the Netherlands conducts surveys and thereby collects information about discrimination and produces statistics. Other than the Bureau of Statistics, the records, which form the basis for the reports on discrimination municipalities are obligated to submit to the Ministry of Interior every year are collected via Anti-Discrimination Bureaus (ADBs) established within municipalities.[63] It should be mentioned in this regard that, information about the public in the Netherlands is kept in the official registry system via municipalities while also information about discrimination is being recorded via the Anti-Discrimination Bureaus and converted into annual reports. These reports are open to public access.

In addition to the official records, there is also the Netherlands Institute for Social Research (NISR) which has been established as the State's research centre and conducts requested research in more specific areas and presents reports in this regard.[64] Moreover, the prosecutor's office and the police and prosecutor's offices in the Netherlands are also obligated to collect data on cases of violation of the prohibition of discrimination which constitute a crime and report them. In this system, which is called the Polices and Prosecution Service of the Netherlands (PPS), the police and the prosecutor's office keep records on the notices and complaints they receive as well as crimes of discrimination they detect and publish a report at the end of the year on the number of files relating to the crime of discrimination and decisions concluded in this regard throughout the year.[65]

a. Official Records

Official records are kept within municipalities in the Netherlands rather than population censuses. This allows for the identification of various characteristics of persons which are covered by the prohibition of discrimination such as age, sex, race, citizenship and disability via these records. However, these records do not contain any information about union membership or anti-union discrimination.[66] Moreover, in Anti-Discrimination Bureaus established within

61 https://www.esri.ie/news/who-experiences-discrimination-in-ireland/

62 *Oy-Reuter-Makkonen-Oosi*, 92.

63 *See* Jørgensen-Ruth, 129.

64 *See* Jørgensen-Ruth, 128.

65 *See* Jørgensen-Ruth, 129.

66 *Oy-Reuter-Makkonen-Oosi*, 92.

municipalities, all notices and complaints submitted to these bureaus about cases of violation of the prohibition of discrimination as well as discriminatory actions and activities detected ex officio by the bureau are recorded.[67] There is information on various methods included in the website in order to facilitate public's access to bureaus.[68] Thus, guiding texts are published for the public on how to report discrimination via internet, telephone or even anonymously by hiding their identity and on how to submit notices or complaints to the prosecutor's office or police. However, since the types of discrimination which can be reported to the Anti-Discrimination Bureau are limited to types of violation defined in the Acts on Prohibition of Discrimination and the Criminal Code of the Netherlands, anti-union discrimination is not included in this scope. If anti-union discrimination is also included in the scope of prohibition of discrimination, it is obvious that, it will be ensured that municipalities and therefore bureaus keep records in this regard as well. Municipalities are obligated to present a report on the data they collect via Anti-Discrimination Bureaus at the end of the year. These reports are prepared at national and regional levels and are open to the public access.[69]

In addition to the records which must be kept by Anti-Discrimination Bureaus and reported at the end of the year, surveys on working life conducted by the Central Bureau of Statistics of the Netherlands (CBS) also collect data on discrimination. The most prominent surveys conducted by CBS are labour force surveys[70] and national working conditions surveys.[71]

The question on union membership is separately asked in the labour force survey conducted by CBS. However, the aim of this survey is not to identify discrimination but reveal the current state of employment in the country in order to determine national socio-economic policies on employment, unemployment, part-time work and night time work. Therefore, the data collected via the labour force survey known as LFS only play a guiding role for the execution of other surveys.[72] Results of the labour force survey are published by CBS on an annual, quarterly and monthly basis. This survey is primarily conducted via face-to-face (via computers) or telephone interviews. After the first interviews, persons are called four times in quarterly periods. Since it is a labour force survey, a maximum of 8 persons at the age of 15 or higher are included in the survey.[73]

The type of survey which may actually provide data on discrimination is the National Working Conditions Survey (NWCS) which is also conducted by CBS. Because, in this survey, unlike LFS, it is possible to collect information on the working conditions of persons regarded as the active labour force population who are of the 15-64 age group and work at least ten hours a week.[74] This survey is also used as a tool for identifying discrimination since it incorporates questions of whether persons experienced discrimination based on age, sex, colour, religion or any other grounds.[75]

National Working Conditions Survey is administered every year periodically and allows access to almost 23,000 people. Based on persons' preferences, either survey questions are mailed to homes or a password is provided via computer. Since the website for the survey provides explanations about survey questions, respondents are able to get information about what the question demands while answering the questions. As such, help is also provided over the telephone. Since participation in the survey is not mandatory, one in every ten people is provided with a reward in order to increase participation. According to the Dutch statistics, October is the month in which survey participation is the highest and therefore this survey is also conducted in October every year.[76]

67 *See* Jørgensen-Ruth, 129.

68 https://www.government.nl/topics/discrimination/reporting-discrimination

69 *See* Jørgensen-Ruth, 129.

70 https://www.cbs.nl/en-gb/our-services/methods/surveys/korte-onderzoeksbeschrijvingen/dutch-labour-force-survey--lfs--

71 https://www.researchgate.net/publication/237303191_The_Netherlands_Working_Conditions_Survey.

72 *Oy-Reuter-Makkonen-Oosi,* 92-93. *See* Jørgensen-Ruth, 128.

73 https://www.cbs.nl/en-gb/our-services/methods/surveys/korte-onderzoeksbeschrijvingen/dutch-labour-force-survey--lfs--

74 https://www.researchgate.net/publication/237303191_The_Netherlands_Working_Conditions_Survey

75 *See* Jørgensen-Ruth, 128.

76 https://www.researchgate.net/publication/237303191_The_Netherlands_Working_Conditions_Survey

We believe that the survey which can be easily used to identify anti-union discrimination and produce statistics is the survey on working conditions. However, there are no statistics produced on this matter in the Netherlands either. This survey collects information on various issues encountered in the working life about working hours, night work, working in shifts, overtime, working at weekend offtime; psychological risks: work pressure, work speed, work control, chain of command, emotional demands; physical risks: noise, repeated behaviours, vibration etc; violence and discrimination at work (only including intimidation, sexual harassment and violence); health risks, communicable diseases; absenteeism due to work accidents and occupational diseases; long lasting absenteeism and causes; number of days not worked in the last 12 months and causes; productivity; satisfaction about working conditions; work-family life conflict; and pregnancy, however it does not aim at collecting any data on anti-union discrimination. Data can be easily collected about this issue by mentioning anti-union discrimination separately under psychosocial risks and asking whether there is any pressure in this regard. Therefore, a recommendation will be provided below for our country in this direction. As a matter of fact, it will be demonstrated below that data on anti-union discrimination is collected using these surveys in the Finnish system.

Furthermore, CBS also conducts surveys called victim surveys for persons who are directly under the risk of becoming victims.[77] Victim surveys[78] are conducted among groups who may experience discrimination based on the information in the official records collected within municipalities and therefore enables presentation of the real discrimination rate.

b. Legal Records

In terms of violations of the prohibition of discrimination which are regarded as crimes in the Netherlands, the prosecutor's office and the police organisation are obligated to keep records and draft annual reports. Therefore, complaints and notices submitted about discriminatory acts which constitute a crime in the Netherlands as well as ex officio identifications are recorded and results of these are prepared separately as statistical reports at the end of the year.[79] However, since these records are only about discriminatory acts and actions which constitute a crime and are based on the criteria of prohibition of discrimination identified by the European Union, it is not possible to keep records about anti-union discrimination this way. Moreover, as it will be laid down in the recommendations section, upon ensuring certain conditions in our country and since it is a crime to hinder enjoyment of union rights, it is necessary to develop such a recording system in our country.

c. Records of Research Institutes

The Netherlands Institute for Social Research, which was established as a state-affiliated research centre, is in charge of collecting data on all social matters and all discrimination criteria and of drafting annual or shorter-term reports on these matters. Reports drafted by NISR are used by state bodies, public entities, regional administrations, public officials and academicians and socio-economic policies are determined in line with these reports. It should be noted that NISR undertakes studies on more specific matters by also drawing on the results of the survey conducted by CBS and drafts reports. For instance, it published A Comparative Research Book on the Care for People with Intellectual Disabilities in 2018.[80]

77 *Oy-Reuter-Makkonen-Oosi*, 90.

78 For general information on this topic, see *Oy-Reuter-Makkonen-Oosi*, 23.

79 *See* Jørgensen-Ruth, 129.

80 *See* Jørgensen-Ruth, 128-129. https://www.scp.nl/english/Research_and_Data

5. Finnish System

Since the official registry system kept by the Finland Population Registry Centre which covers the whole population is very advanced, there is no need for conducting additional population censuses in Finland.[81] Many types of information about persons such as sex, age, language and citizenship are available through this system.[82] Moreover, information about persons in Finland is also recorded upon their own declarations.[83] For instance, in order for a person to receive disability aid or be exempt from tax due to being foreign, he/she needs to apply to the administration with documentation of his/her condition. In such cases, it is not required for the State to collect information separately as the data is recorded upon direct declaration from the person.[84]

In Finland, the body essentially in charge of producing statistics and responsible in this regard is Statistics Finland, whereas the obligation and duty to control violations of the principle of equality and prohibition of discrimination were initially assigned to the Ministry of Labour and Economy and then to the Ministry of Justice.[85] However, some of the surveys relating to the working life are carried out by the Ministry of Labour and Economy whereas some are carried out by Statistics Finland and then results about the prohibition of discrimination and principle of equality are sent to the Ministry of Justice.[86] This is the case because the duty to follow and control the principle of equality and prohibition of discrimination has been assigned to the Ministry of Justice. Furthermore, statistics about the results of surveys conducted by Statistics Finland are produced by Statistics Finland whereas statistics about the results of surveys conducted by the Ministry of Labour and Economy are produced by this Ministry and in addition, data and statistics collected from various sources such as surveys, administrative records and legal reports are compiled by the Ministry of Justice and converted into single and general statistics and published on the website of Statistics Finland.[87] On 29 January 2016, Ministry of Justice prepared a draft data collection system for controlling the violation of equality and identification of discrimination. Although there are many data collection sources included in this draft, those which may be taken into consideration in terms of anti-union discrimination are the quality of working conditions survey, specific research and surveys on the basis of discrimination criteria, administrative records of the inspection unit, ombudsman records, judicial records, discrimination statistics and enterprise surveys.[88] Rather than this draft, the data collection system on discrimination currently being used in Finland today is operated in a very advanced manner and is based on data collection methods drawing on multiple sources.

Although Statistics Finland is the institution in Finland in charge of producing statistics, it conducts surveys on working life itself but also draws on official, administrative and legal records as well.[89] Moreover, it should be noted that in Finland, union membership is also protected as sensitive personal data just as age, religious belief and political opinion. However, in Finland, the Personal Data Act No. 523/1999 governs that personal data can be collected and processed upon express content for use in a case or for scientific or statistical research, while also incorporating a specific regulation on union membership information and stipulates that union membership information can be collected and processed for the purposes of unions as well as for identifying and controlling whether rights are violated in the working life. Thereby, data on anti-union discrimination is also collected for this purpose and both legal and administrative authorities are vested with the power to collect information in this regard.[90]

81 *Oy-Reuter-Makkonen-Oosi,* 82. *See* Jørgensen-Ruth, 60 et seq.

82 *Larja et al.,* 33.

83 *See* Jørgensen-Ruth, 62.

84 *See* Jørgensen-Ruth, 62.

85 *Oy-Reuter-Makkonen-Oosi,* 81. *See* Jørgensen-Ruth, 62.

86 *See* Jørgensen-Ruth, 62-63.

87 *See* Jørgensen-Ruth, 63-64, dn. 304.

88 *See* Jørgensen-Ruth, 63.

89 https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_kat_001_en.html

90 *See* Jørgensen-Ruth, 61.

a. Official Records

Records kept by the Finland Population Registry Centre via municipalities naturally do not contain any information on union membership. However, since official records contain information on unemployment rates, types of acquiring housing, educational levels, levels of expectations from life, health status, income levels, employment and causes of entering and quitting jobs, official records have a more guiding nature compared to other countries.[91] Causes of quitting jobs may enable producing statistics on dismissal on the grounds of union related issues. However, such statistics on anti-union discrimination have not been observed in Finland. Furthermore, it should also be noted that it is not considered as an accurate method to directly identify or produce statistics on discrimination in general and anti-union discrimination specifically only based on official records.[92] Because, these records aim to reveal the general state of the country rather than identifying discrimination. Also, it may lead to a completely false assessment that based on a single variable information such as age, sex, disability or union membership even if non-existent, these persons earn lower incomes and are therefore subject to discrimination based on these criteria.[93]

Surveys conducted in Finland on working life are much more diverse compared to other countries.[94] Four main surveys conducted at the national level are; Finnish Working Life Barometer administered by the Ministry of Labour and Economy; Quality of Work Life Survey (QWLS) administered by Statistics Finland; Labour Force Survey (LFS) also administered by Statistics Finland; as well as the Work and Health Survey administered by the Occupational Safety and Health Institute.[95] Working Life Barometer conducted by the Ministry is renewed every year and therefore focuses on less broad subjects with shorter questions and reaches less people. In addition, this survey is conducted on employees of 18-63 age group who work at least 10 hours a week. However, this survey is being criticised for only covering persons whose mother tongue is Finnish and it is argued that it fails to provide data about the whole country. In fact, it is stated that 1000-2000 people participate in the survey annually.[96] Therefore the Quality of Work Life Survey conducted every five years and the Work and Health Survey conducted every three years are considered to be more comprehensive in terms of the number of people they reach as well as the topics on which questions are based. Among these four surveys, only the Working Life Barometer incorporates a question on anti-union discrimination.[97] In fact, in this survey, questions are asked about not only witnessed but also experienced discrimination.[98]

The Quality of Work Life Survey, which has been conducted every five years since 1977 by Statistics Finland, is significant for our discussion as it is the only survey which collects information about anti-union discrimination both in terms of experiencing and witnessing. As a matter of fact, statistics about anti-union discrimination in Finland are also published every five years based on this survey[99] (see Table 2). This survey reaches 3,000 to 6,500 people, targets all persons of 15-64 age group who work at least ten hours a week and sample groups to be included in the survey accordingly are selected among regions and persons that will represent the whole public. In addition, foreigners who are not native Finnish speakers are also included in the survey. Percentage of non-participation in these surveys which are conducted face-to-face ranges between 8 to 20% and results are published within six months. Similar to other discrimination criteria, anti-union discrimination is also classified based on the indicators of recruitment, remuneration, career planning, distribution of work shifts, occupational training, social benefits and behavioural patterns and separate

91 *Larja et al*., 34.

92 *Larja et al.* 33-34. *Oy-Reuter-Makkonen-Oosi*, 20 et seq, 82.

93 *Larja et al*., 34.

94 *Larja et al.,* 23 et seq., *Oy-Reuter-Makkonen-Oosi,* 81 et seq. *See* Jørgensen-Ruth, 60 et seq.

95 *Larja et al*., 26 et seq.

96 *Larja et al.,* 26 et seq.

97 *Larja et al.,* 26 et seq. https://tem.fi/en/publication?pubid=URN:NBN:fi-fe201801252270. https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_tau_001_en.html. https://www.stat.fi/keruu/tolo/index_en.html

98 *Larja et al.,* 27.

99 https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_kat_001_en.html

statistics are produced for each one.[100] Also, distribution of each discrimination criteria by gender is also prepared as statistics and this allows for the demonstration of the distribution of anti-union discrimination among men and women.[101] This survey, which has a very broad scope in terms of both topics and persons, is considered to be the survey that provides the most accurate results about work life.[102]

Furthermore, Statistics Finland carries out labour force surveys biannually. Similar to other surveys, participation in this survey is also optional, however since this survey, which is conducted over the telephone covers all persons of 15-64 age group who are unemployed, students, retired, employees or self-employed, it is pointed out that each survey reaches 12,000 people. However, since the purpose of labour force surveys is to reveal the socio-economic structure and state of employment in the country, discrimination is only an indirect result of LFS rather than a direct one.[103] However, just as they are in other countries, results of LFS are also important in Finland in terms of demonstrating fundamental information for carrying out other surveys, especially the victim surveys.[104]

Statistics Finland also conducts more specific surveys. One of the most prominent ones is the victim surveys. These surveys are significant as they are based on obtaining direct responses from persons. Because, information is collected from the primary source, the person who directly experiences discrimination. Moreover, third person surveys are also conducted. These are either witness surveys or attitude surveys targeting a certain group, as for our topic, employers.[105] In witness surveys, persons are asked about whether they have ever witnessed any discriminatory acts, how many persons they have witnessed to be subject to discrimination and how frequent it happens. In employer surveys, the aim is to reveal the point of view, in other words the attitude of employer about discrimination. Here, ensuring that employers provide accurate responses depends on determining the right questions. Because, asking too general questions will hinder accurate responses whereas it should also be kept in mind that a direct question such as *"what do you think about discrimination?"* will not result in honest responses. In these surveys, questions should be prepared in a way that will steer the respondent towards a concrete response but ensure that he/she answers honestly without noticing. For instance, instead of asking the employer *"what do you think about discrimination?"* or *"would you recruit a unionised person?"* asking questions such as *"which points do you consider while recruiting a person?"* or *"what do you think about the latest amendment of law, do you think there are parts that needs to be changed?"* will enable getting accurate responses.[106] However it should be noted here that, it would be inaccurate to argue that persons' point of view about discrimination and for example their attitudes against unionised employees are exactly overlapping. A person may also demonstrate behaviours which are opposite of his/her attitudes and points of view. Therefore, attitude surveys are considered to provide information only about the future and efforts are made to obtain results from these surveys based on this acknowledgement.[107]

Surveys are administered by Statistics Finland using quite various ways. Moreover, it is pointed out that results obtained from surveys usually indicate less discrimination compared to the reality.[108] This is the case because surveys are based on subjective assessment and despite the existence of discrimination, persons are unable to provide responses in this direction due to their effort to maintain respect, or their inability to even accept that they experienced discrimination or when they truly do not realise that the incident they witnessed or experienced is actually discriminatory. As such, in some cases, even though there are no actual discriminatory acts, persons may think that all negative behaviours

100 https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_kat_001_en.html

101 https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_kat_001_en.html

102 *Larja et al.* 26 et seq.

103 *Oy-Reuter-Makkonen-Oosi,* 82.

104 *Larja et al.,* 23 et seq., *Oy-Reuter-Makkonen-Oosi,* 22 et seq., 81 et seq. *See* Jørgensen-Ruth, 60 et seq.

105 For general information about types of surveys, see *Oy-Reuter-Makkonen-Oosi,* 22 et seq. Also see *Bartolomei de la Cruz,* 26.

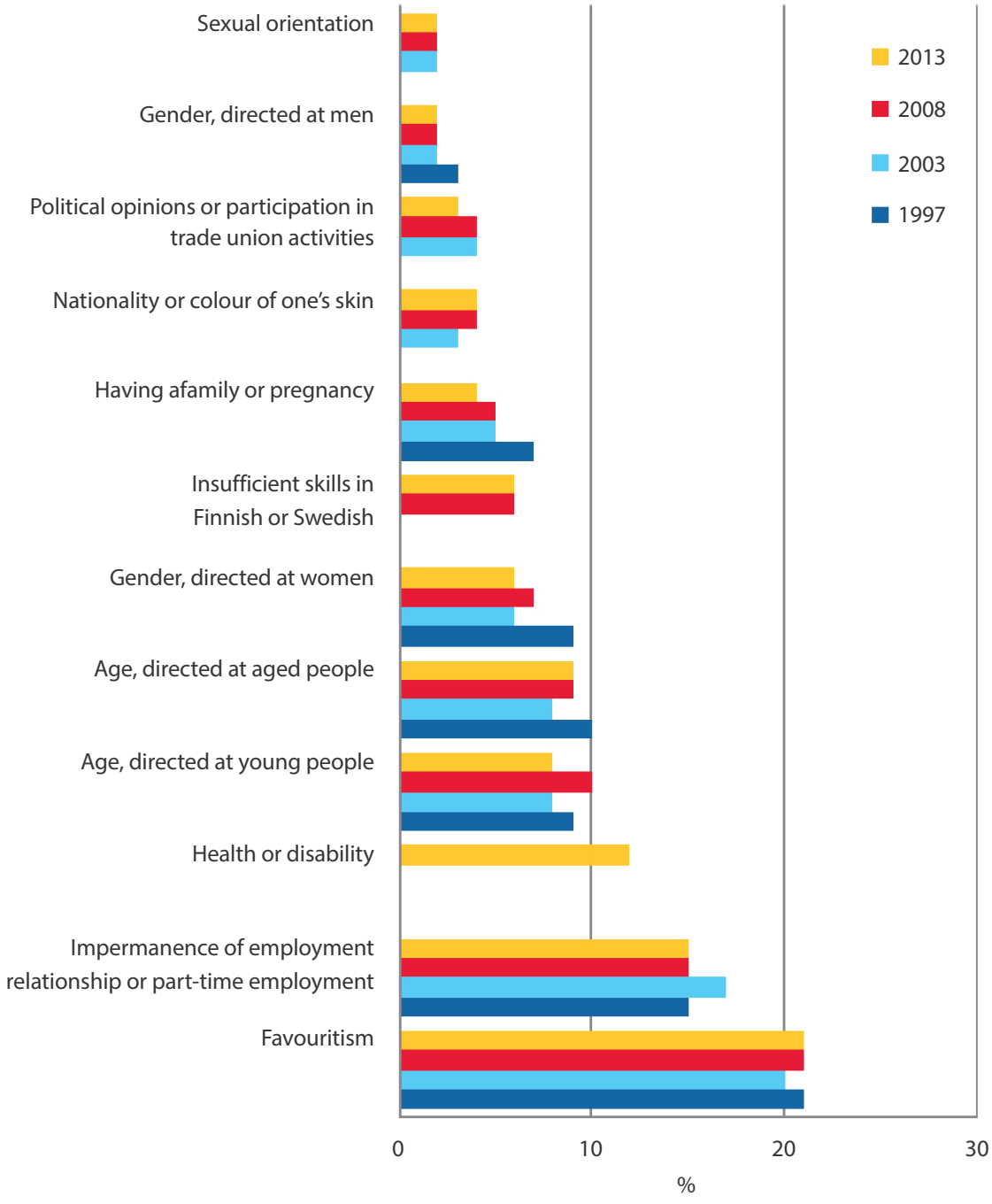
106 *Larja et al.,* 23 et seq., *Oy-Reuter-Makkonen-Oosi,*22 et seq, 81 et seq. *See* Jørgensen-Ruth, 60 et seq.

107 *Oy-Reuter-Makkonen-Oosi,* 22 et seq. *Larja et al,* 23-25.

108 *Larja et al.* 26.

they are subject to are discriminatory and may provide information about existence of discrimination despite the lack of it.[109] However, despite all, according to Finnish sources, survey results cause the reflection of a much lower level of discrimination into statistics compared to the actually existing levels.[110] Despite all of this criticism, as seen below, the fact that persons restrain themselves from referring to administrative or legal authorities about discrimination due to their distrust in the system or their fear of losing their jobs leads to achieving more accurate results via surveys compared to administrative and legal records.[111]

Figure 1. Share of employees that have observed unequal treatment or discrimination at their workplace (%), by grounds for discrimination



109 *Larja et al.*, 26.

110 *Larja et al.*, 26.

111 *Larja et al.*, 26-28, 36.

We believe that we also need to specifically discuss the structure of Statistics Finland. Because, we believe that the structure of this institution is a type of organisation which is exemplary due to its independence in terms of its operations and finances. According to the Finland Statistics Law No. 48 of 1992 which is comprised of only five articles, Statistics Finland has been established within the Ministry of Finance; however, it is independent in terms of administrative decision-making, functioning about methods and programmes as well as finances. According to the Law and the Bylaw issued based on this law, the director-general of the institution is appointed by a Decree of Council of Ministers, whereas the deputy director-general is appointed by the Minister of Finance. Other managers and employees are appointed by the director-general in line with the rules of the regulation. As such, qualifications sought for the director-general and deputy director-general are explicitly governed by the law and the regulation. One of the members of the Advisory Board of the institution should be elected among the employees of Statistics Finland whereas others should be appointed by the Ministry of Finance for a period of four years. Director-general is in charge of and responsible for making all decisions about managing funds and the whole functioning of the institution. Director-general is naturally vested with the power to delegate this authority and responsibility. Internal regulations of the institution are drafted upon the approval from director-general and they lay down the whole functioning of the institution. Thereby, director-general is vested with the power to make decisions on matters not included in the internal regulations. All programmes of Statistics Finland are planned within the power and responsibility of director-general and these programmes determine which data will be collected and when and by using which methods they will be collected. Director-general or the persons he/she delegates the power to are responsible for the security, reliability, accuracy, consistency and transparency of the data collected via these studies.

b. Administrative Records

The Non-Discrimination Act of 2004 of Finland has covered many more discrimination criteria compared to other EU member states.[112] These are laid down in the Article 6 of the Act as age, ethnic or national origin, citizenship, language, religion, belief, opinion, health, disability, sexual orientation or other personal characteristics. As is seen, these criteria are not limited to a certain number and the scope of prohibition of discrimination is kept broad by using very general expressions such as health and opinion. Anti-union discrimination was also considered within the scope of discrimination only in Finland among all EU member states.

Although anti-union discrimination is not directly listed among the criteria of prohibition of discrimination laid down in Article 5 of the Non-Discrimination Act of Finland, administrative units in Finland consider freedom of thought, political opinions and union membership and activities within this scope. Therefore, anti-union discrimination is included among the questions in the Quality of Work Life Survey as well as being subject to the inspection by the Ombudsman of Non-Discrimination and the Occupational Safety and Health Administration.[113]

As a matter of fact, in the official website of the Ministry of Labour and Economy, political activities and union activities are shown under a separate title among the criteria based on which employers cannot discriminate pursuant to the Non-Discrimination Act.[114] As such, in the results of the Quality of Work Life Survey conducted by Statistics Finland in 2013, anti-union discrimination has been evaluated under the same segment as political opinion.[115] Thereby, it should be pointed out that anti-union discrimination in Finland is considered within the scope of the Non-Discrimination Act and is therefore covered by the jurisdiction of the Occupational Safety and Health Administration and the Ombudsman of Non-Discrimination which may be referred to under this law and is subject to the administrative records kept by these units.

112 https://www.equalitylaw.eu/country/finland

113 https://tem.fi/en/non-discrimination-and-equality-in-working-life

114 https://tem.fi/en/non-discrimination-and-equality-in-working-life

115 https://www.stat.fi/til/tyoolot/2013/02/tyoolot_2013_02_2014-05-15_kat_001_en.html

The Non-Discrimination Act, which keeps a broad set of discrimination criteria, also provides for identification and tracking of violations of the prohibition of discrimination by multiple administrative bodies. Accordingly, while the primary administrative unit that controls and tracks the violations under the Non-Discrimination Act has been designated as the Occupational Safety and Health Administration which operates at a regional level, in addition to the Ombudsman of Non-Discrimination who investigates prohibitions of discrimination covered by the law and therefore anti-union discrimination as well, also an Ombudsman of Equality who specifically deals with violations of gender equality as well as an Ombudsman of Minorities who specifically deals with violations of equality against minorities have been appointed. This system is criticised for creating too many institutions which cause confusion among persons in deciding where to apply for the violation of which type of discrimination.[116]

Pursuant to the Non-Discrimination Act, the OSH administration may send a warning to the employer and, where the violation is not remedied within the period prescribed in the warning, then it may notify the employer that he/she should eliminate this unfair situation or else an administrative fine will be imposed. If the OSH Administration determines that the submitted discriminatory act also constitutes a crime, then it is obligated to inform the police organisation. OSH Administration, which evaluates the accuracy of the discrimination complaint must also inform the Ombudsman of Non-Discrimination so that the Ombudsman can help the victims. Moreover, the OSH Administration may request an interpretation of the law by the Ombudsman of Non-Discrimination. Both the OSH Administration and the Ombudsman of Non-Discrimination keep records on discrimination.

Furthermore, in order for the Occupational Safety and Health Administration and the Ombudsman of Non-Discrimination to keep records, there must be complaints and notices submitted in this regard. However, even in Finland, such records reflect only a much smaller portion compared to the actual levels of discrimination due to persons' fear of losing their jobs or belief that their complaints will not serve a purpose.[117] Therefore, surveys are preferred for producing statistics in Finland as they are considered to provide more accurate results. Administrative records on the other hand are only used for improving the administrative complaint system, not for creating a database on discrimination.[118] Data on violations of the prohibition of discrimination in Finland are compiled at the Ministry of Justice including the results of the surveys conducted by the Ministry of Labour and Economy, however statistics are produced by Statistics Finland.[119]

c. Legal Records

According to the Non-Discrimination Act of Finland, the victim may bring an action within two years following the date the discriminatory act took place. In cases when the discriminatory act also constitutes a crime, a criminal case is also initiated. Ministry of Justice keeps yearly legal reports. However, these reports are based on the concluded cases. Therefore, concluded cases matter rather than the records of the prosecutor's office or the police organisation. This way, only the actions for claims and criminal cases in which existence of discrimination has been concluded are reflected in the records rather than those at the complaint stage.[120]

Such a finding will be presented below in the system to be recommended for our country and it will be argued that the data to be recorded should be based on finalised court decisions. We believe that such a method yields more accurate results.

116 *Larja et al.,* 34 et seq.

117 *Larja et al.,* 34-36.

118 *Larja et al.,* 35-36.

119 *Larja et al.,* 26 et seq.

120 *Larja et al.*, 34-36.

V. USABILITY OF EXISTING RECORDED DATA IN TURKEY AND RECOMMENDATIONS FOR CHANGE

The aim of this report is to demonstrate how a database on anti-union discrimination can be created which is in compliance with the principles and rules of the European Union and ILO on data collection and is reliable, consistent, based on deep research and scientific work and therefore effective in the combat against anti-union discrimination both for private and public sectors. To this end, first the stages during which anti-union discrimination occurs in our country as well as the ways and how it occurs will be discussed and then the sanctions to be imposed in these cases will be explained. Because, as mentioned in the introduction part of this report, we believe that what matters is to record cases of anti-union discrimination determined to be true first, rather than the claims of anti-union discrimination. This will enable recording of claims which have already been evaluated objectively and processing of actual data. However, it is of course important to record cases which were determined to contain anti-union discrimination via subjective evaluations as well in order to understand the public perception about this issue. Therefore, recommendations will be presented below on recording these cases as well.

Furthermore, we believe that in terms of recording anti-union discrimination, it would be appropriate to base the works on sanctions imposed in this regard. Because, this will enable obtaining the data on anti-union discrimination identified in the administrative and legal system first. In addition, surveys will be discussed and effort will be made to identify a recording system at the stage after data based on subjective evaluation has been passed through objective evaluation. To this end, how existing data recording systems can be used for this purpose will be discussed, possible amendments to be made in the existing system and legislation will be pointed out and then data collection methods which have never been used in our country before but will contribute in accurate and effective data collection and processing on anti-union discrimination when established will be evaluated for our country and recommendations will be presented. It should be noted that, just as all other types of violations of the prohibition of discrimination, anti-union discrimination is not a fact to be revealed based on a single data source either. Therefore, multiple data collection methods should be utilised simultaneously, and data collected from each source should be converted into statistics.[121]

a. Types of Occurrence of Anti-Union Discrimination in Our Country

As mentioned in the section on concepts of this report, freedom of association has two types as individual and collective freedom of association.[122] Individual freedom of association also emerges as two types as positive and negative freedom of association.[123] Individual freedom of association includes the rights, without prior authorisation, to establish a union, become a member of an existing union, withdraw from union membership, not being forced to become a union member and to remain outside unions. Collective freedom of association on the other hand includes the rights of unions to preserve their existence, engage in union activities and make propaganda to attract new members to the union. Thereby, appointment of a workplace representative by a union as well as his/her security should be regarded both in terms of individual freedom of association due to union activities of the representative and of collective freedom of association due to the activities of the union.[124]

In our country, individual freedom of association has been granted to workers both in public and private sectors covered by the Law No. 6356 as well as self-employed persons only working under the contracts laid down in Article 2/4 of this Law and also to public servants and other public officials by the Law No. 4688; whereas collective freedom

121 Similarly, *Oy-Reuter-Makkonen-Oosi*, 26 et seq. *Larja et al.,* 23 et seq. *Compa*, 287, 289, 300, 316.

122 For a comparative study demonstrating that these are inseparable and complementary freedoms, see *Bogg,* 90 et seq.

123 *Tuncay-Savaş Kutsal*, 31 et seq. Özveri, Sendikal Haklar [Union Rights], 32 et seq.

124 Compare *Tuncay-Savaş Kutsal*, 36 et seq.

of association has been granted to unions and confederations established by these mentioned employees.[125] Since this report is about data collection systems on anti-union discrimination and a model recommendation for our country, naturally the current state of individual and collective freedoms of association in comparison to ILO and EU regulations will not be discussed here.

It is not possible to identify what the data will be collected about without providing a brief explanation about during which stages and how these freedoms can be violated in our country. Therefore, in order to develop an accurate and effective data collection recommendation for our country, it is clear that, first, how these freedoms are violated should be explained. However, this report is only about data collection systems for identifying union related discrimination, not about the violation of all freedoms of association. Therefore, in order to present recommendations for the system of our country in terms of anti-union discrimination, in which ways, during which stages and how anti-union discrimination occurs should be explained. Thereby, the discrimination among unions established in the public sector mentioned by public servants' unions at the workshop organised on 03.10.2018 at the ILO Office for Turkey and argued to emerge due to the political decisions in our country is not included in the scope of this report. It is because such a differentiation is in fact a violation of the collective freedom of association rather than discrimination and can only be caused by political preferences and decisions as argued by some participants at the workshop. As it is not possible to record these, also any intervention in or combat against such arguments can only be undertaken by using political tools or by the efforts of the unions to eliminate such differentiation. Therefore, despite being pointed out by some participants at the workshop, it should be noted that these arguments are not in line with the subject of this report and therefore cannot be included in the scope. However, as criticised at the workshop, it is not an accurate and effective approach to consider the concept of *"anti-union discrimination"* in a manner that it is only a term created for the freedom of association of workers. In fact, since this report is not only about anti-union discrimination in the private sector but also in the public sector, in all explanations and evaluations provided below, anti-union discrimination will be discussed both in terms of workers covered by the Law No. 6356 on Trade Unions and Collective Labour Agreement and public servants and other public officials covered by Law No. 4688 on Public Servants' Labour Unions and Collective Agreement, and recommendations will be presented including both sectors.

Anti-union discrimination in our country usually occurs during the stages when employees become union members, become a member of a union they want or want to remain outside unions or refuse to become a member of a union requested by the employer, when they engage in union activities, are appointed as union representatives, when the workers' union lodges an application for authorisation to conclude a collective labour agreement, when the workers' union which obtained the authorisation document calls for concluding a collective labour agreement with the employer or wins a lawsuit about authorisation or during the commencement of the collective bargaining process.

It is known that anti-union discrimination is an issue that can be encountered in hiring, determining working conditions and remuneration as well as termination of the employment relationship. In the private sector, recruitment of workers, determining working conditions and remuneration and termination of the employment contract may happen upon any union membership or activity mentioned above. As for public officials, the most prominent issue is the discrimination in working conditions on union related grounds. Anti-union discrimination, which may also be encountered in the recruitment process of public officials, is separately governed by Article 18 of Law No. 4688.[126] However, this possibility still exists in terms of the workers employed in the public sector and it is clear that Article 25 of Law No. 6356 will apply to workers. Moreover, it is not common for anti-union discrimination to occur as the dismissal of a public official. This is the case because the cases which may lead to a dismissal of a public servant are laid down in the subparagraph 124/E of Law No. 657 on Civil Servants as limited to any work, transaction or action that severely violates the law. As such, similar

125 *Tuncay-Savaş Kutsal*, 31 et seq, 481 et seq.

126 Compare *Tuncay-Savaş Kutsal*, 500.

regulations were added to other specific legislations which apply to other public officials who are not public servants and cases leading to the dismissal of a public official are in parallel with subparagraph 125/E of this Law. However, public officials may also be subject to an unfair disciplinary investigation due to being a member of a union or being a member of a union other than the desired one, or engaging in union activities, being appointed as workplace union representatives or union workplace representatives or engaging in union activities to fulfil these duties and this may lead to their dismissal from public office. Therefore, it is obvious that, by considering all of these possibilities, recording of anti-union discrimination should be ensured in a way that includes all stages of employment, working conditions and termination of the employment relationship in both private and public sectors.

In addition to stages, causes and types of anti-union discrimination, also the sanctions to be imposed in cases of anti-union discrimination as well as application stages in this regard should also be explained before discussing data collection systems. This will enable the identification of how and through which institutions accurate, reliable and consistent data can be collected in compliance with ILO and EU principles and rules.

b. Sanctions on Anti-Union Discrimination in Our Country

aa. From the Perspective of Law No. 6356 on Trade Unions and Collective Labour Agreement

aaa. Administrative Sanctions

Where workers and persons working independently through contracts laid down in Article 2/4 of Law No. 6356 are subject to anti-union discrimination in employment, working conditions or termination of the employment relationship, due to the violation of paragraph 17/3 of Law No. 6356 stipulating that *"Persons are free to become union members. No person can be forced to become or not become a member of a union"* or the provision that; *"Workers or employers cannot be forced to remain as union members of withdraw from membership",* an administrative fine shall be imposed pursuant to the subparagraph 78/1-c of the mentioned Law. Although it is stipulated in paragraph 78/3 of the Law that these administrative fines will be imposed by Provincial Directorates of ISKUR, according to a representative from the Directorate of Guidance and Inspection under the Ministry of Family, Labour and Social Services who participated in the workshop organised on 03.10.2018 at the ILO Office for Turkey pointed out that, it is governed in Law No. 6356 that administrative fines will be imposed by Provincial Directorates of ISKUR, however since there is no specific regulation for inspections to be carried out by the Directorate of Guidance and Inspection, when they find any contradiction of Law No. 6356 during inspections, they must obtain special permission to conduct an inspection in this regard.

We believe that the Article 91 of Labour Law No. 4857 prescribing that; *"State shall monitor, supervise and inspect the implementation of the legislation on work life. This duty shall be fulfilled by work inspectors of adequate number and qualifications who are affiliated with the Ministry of Family, Labour and Social Services and are authorised to inspect and supervise"* as well as the Labour Inspection Bylaw of 1979 which regulates inspections at workplaces and is still in force have delegated the power and duty to monitor and supervise the whole labour legislation and not just the Labour Law No. 4857 to the work inspectors working under the Directorate of Guidance and Inspection.[127] As a matter of fact, considering the Bylaw's provisions, inspectors are obligated to draft reports after each inspection at the workplaces assigned to them and present these reports to group directorates. Where the inspector identifies contradictions of the legislation at the workplace, he/she may grant a term of respite to the employer one time only or may directly draft a report for an administrative fine or for ceasing the work. Inspector's opinion on imposing an administrative fine laid down in the report shall be sent to the Provincial Directorate of ISKUR by the group directorate. If the provincial

127 *Süzek*, 857 et seq.

directorate decides that the inspector's report is in compliance with the legislation, administrative fine shall be imposed on the employer by the provincial directorate. Moreover, where the inspector finds out a criminal activity, transaction or act at the workplace in his/her report or ex officio, the provincial directorate should inform the Public Prosecutor's Office (Bylaw, Art. 22).[128] As is seen, Article 91 of Labour Law No. 4857 and the provisions of the Labour Inspection Bylaw provides for the monitoring, following, supervision and inspection of the whole labour legislation and not just Labour Law No. 4857 and delegates the power in this regard to the Directorate of Guidance and Inspection; and delegates the duty of imposing administrative fines and filing criminal complaints to the Public Prosecutor's Office to provincial directorates. In fact, as also prescribed in the Labour Inspection Bylaw, it is explicitly governed in paragraph 78/3 of Law No. 6356 that, administrative fines shall be imposed by the Provincial Directorate of ISKUR. To this end, we believe that there is no need to obtain special permission to supervise violations of freedom of association and impose administrative fines when such a violation has been detected pursuant to Article 78 of Law No. 6356 and this power and duty has already been delegated to the work inspectors employed under the Directorate of Guidance and Inspection. Nevertheless, if there are still some doubts within the Board Directorate about this issue, it is principally recommended to provide required information within the framework of our explanations and, if necessary, although not deemed necessary, to also pass legislation in this regard.

Another issue in this regard is there are no administrative sanctions stipulated in our legislation for cases of contradiction of Article 25 of Law No. 6356. While anti-union discrimination acts undertaken by the employer based on worker's union membership, non-membership or his/her membership in the union he/she desires may be subjected to inspection and administrative fines under Article 17 or 19 of Law No. 6356; there are no administrative sanctions prescribed in our law to be imposed in cases of discrimination on the basis of union activities, being a union manager or workplace union representative. We believe that it is possible to consider these situations under Article 17 or 19 of the Law as well. Because, it is a fact that beneath every union activity lies union membership. To this end, we believe that this matter should be taken into account as well during inspections and fines should be imposed in mentioned situations and anti-union discrimination should be recorded.

bbb. Sanction for Damages

Sanction for damages has been governed in Article 25 of Law No. 6356 for all persons regarded as workers pursuant to Law No. 6356 and therefore all workers working through employment contracts in our country as well as persons working independently through contracts laid down in Article 2/4 of this Law. Actions for reinstatement and damages to be brought against the employer in cases of anti-union discrimination in employment, working conditions and termination of the employment relationship are regulated in this article. Accordingly, *"(1) Employment of workers shall not be subject to becoming or not becoming a member of a certain union, maintaining their membership at a certain union or withdrawing from membership or becoming or not becoming a member of any union. (2) Employer shall not discriminate among union member workers and non-union member workers or among workers who are members of different unions, in terms of working conditions or termination of employment. Provisions of the collective labour agreement shall be reserved in matters of social benefits about remuneration, bonuses, premiums and money. (3) Workers shall not be dismissed or treated differently on the grounds of being or not being a union member, for participating in the activities of workers' organisations or engaging in union activities outside working hours or within working hours upon permission by the employer. (4) Where the employer acts in contradiction to abovementioned paragraphs, union compensation of no less than a yearly wage of the worker shall be imposed. (5) Where a worker's employment contract has been terminated on union related grounds, worker is entitled to bring action pursuant to the provisions of Articles 20 and 21 of Law No. 4857. Where it has been found out that the employment contract has been terminated on union related grounds, upon application from the worker pursuant to Article*

128 *Süzek*, 859 et seq.

21 of Law No. 4857, without reference to the condition that the employer reinstates the worker or not, union compensation shall be decided. However, where the worker is not reinstated, the compensation laid down in the first paragraph of Article 21 of Law No. 4825 shall not be imposed additionally. Worker's failure to bring an action pursuant to the abovementioned provisions of Law No. 4857 shall not hinder the request for union compensation".

Thereby, in our country, workers who have been subject to anti-union discrimination in employment, determination of working conditions or termination of the employment contract, are entitled to demand a compensation in the amount of at least their yearly wage according to the Article 25 of the Law whether they have job security or not. It is acknowledged in the doctrine that the amount for a worker who experienced anti-union discrimination in recruitment can be calculated based on the reference wage implemented in our country for the job he/she applied for.[129] In other cases, compensation is calculated based on the base gross wage the worker actually earns. The burden of proof in lawsuits with claims for union compensation other than cases of termination has been governed in paragraph 7 of the mentioned article as; *"Except for termination cases, worker is obligated to prove the claim that employer had engaged in anti-union discrimination. Only when the worker provides hard evidence that there has been anti-union discrimination, then the employer would be obligated to prove the reason for his/her actions".*

In cases of termination of the employment contract, the worker may directly bring an action for union compensation or instead, may bring an action for reinstatement which also includes the claim for termination on union related grounds. Burden of proof under these circumstances has been regulated in the paragraph 6 of the mentioned article as *"In a case which is based on the claim that the employment contract was terminated on union related grounds, the employer is obligated to prove the reason for termination. If the worker claims that the termination was not based on the reason stated by the employer, then he/she is obligated to prove that the termination was indeed based on a union related reason".* As is seen, in cases of termination, first the employer needs to prove the reason for termination and if this can be proved, then the worker needs to show that the actual reason for termination was union membership or union activities. If the worker files a claim for reinstatement, when it is proved that the termination was based on a union related reason and not on a valid reason, a decision should be concluded for reinstatement. Under these circumstances, even if the worker does not submit an application to the employer for commencing work (this is the difference between terminations on union related grounds and other reinstatement cases) the employer must pay a union compensation to the employer in the amount of at least his/her yearly wage.[130] However, there is no difference in terms of the amount to be paid as compensation between reinstatement or non-reinstatement of the worker. Since reinstatement cases cannot be subject to appeal pursuant to Article 8 of Law No. 7036 of 2017 on Labour Courts, they are finalised through lower appeals at regional courts of justice. However it should be kept in mind that, where a direct action is brought only for union compensation instead of a reinstatement claim, and the union compensation is more than 47.530,00 TL which is the appeal limit for 2018, then the case may be brought to the Court of Cassation for appeal, otherwise it will be finalised upon the lower appeal process at the regional court or justice.

Apart from Article 25 of Law No. 6356, it has been governed in Article 24 which specifically aims to protect workplace union representatives that, the employment contract of a workplace union representative shall not be terminated without a justification and unless this justification is declared in writing in a clear and precise way; and also without written consent from the workplace union representative, his/her workplace or job shall not be subject to a major change (in a way to make working conditions more severe against the workplace union representative); and this provision shall also apply to union managers (amateur managers) still working at the workplace .

129 *Ulucan-Nazlı,* 1680-1681. Özkaraca, 201.

130 For detailed information, see *Güzel,* 318 et seq., *Süzek,* 643 et seq., *Tuncay-Savaş Kutsal*, 104 et seq., Özkaraca, 200 et seq.

It is clear that legal records can be kept on the results of reinstatement cases brought by the representative or his/her union within a month of the termination undertaken in contradiction to this provision as well as on finalised decisions in cases opened against major changes made in the duty or workplace of the workplace union representative or amateur manager. Legal consequences of a filed reinstatement case have been governed in the third paragraph of Article 24 as; *"If the decision is made for the reinstatement of the representative, termination shall be considered invalid and wages and other rights for the period between the date of termination and the date when the decision was finalised shall be paid provided that it does not exceed the duration of representation. On the condition that the representative applies for the job within six workdays following the finalisation of the decision, if he/she is not reinstated within six workdays, the employment relationship shall be considered to be continuing and the wage and other rights shall continue to be paid for the duration of representation. This provision shall also apply in cases of reappointment as representative".* A representative who files a reinstatement claim based on this provision does not need to prove additionally that he/she experienced anti-union discrimination to benefit from these legal consequences.[131] Because, the law directly connects these legal consequences to being a union representative and does not stipulate a condition of proving that the employer had performed discriminatory acts in order to achieve these consequences. However, the perspective lying beneath this regulation is the idea that the reason for the unfair-invalid termination the representative has been subject to is already caused by representative activities and that collective freedom of association should also be specifically protected.

Where in a reinstatement claim filed by the representative or the union, decision is made for the reinstatement of the representative, or in other words it has been determined that the employment contract was terminated without justification or that this justification was not declared to the representative in writing in a clear and precise way, the representative is obligated to refer to the employer within six workdays and demand reinstatement. Otherwise the termination will be valid and the representative will only be able to get the wages and other rights he/she was entitled to during the time between the termination and the finalisation of the decision. His/her separate right to demand severance pay is of course reserved.[132]

Furthermore, if the representative who referred to the employer for reinstatement is not reinstated by the employer within six workdays, he/she would be entitled to wages and other rights without working throughout his/her term as a representative and the period for which he/she is reappointed as representative. Therefore, a representative who benefits from the provision governed in Article 24 of the Law cannot also benefit from Article 25 of the Law which specifically regulates anti-union discrimination.[133] Because, in this case, the representative has benefited from Article 24, which is a specific provision for him/her and its consequences. However, in cases when the representative or union misses the one month period for bringing an action, or where the representative is unwilling to go back to work or where there is only a short amount of time until the end of his/her term as a representative and therefore he/she foresees that Article 24 would not provide sufficient protection, then the representative shall be entitled to union compensation based on Article 25 of the Law instead of Article 24 provided that he/she proves existence of anti-union discrimination.[134]

There are also legal remedies governed, to which workplace union representatives and amateur managers can refer for cases other than termination such as being subject to discrimination due to union duties and activities and particularly experiencing major changes in their duties or workplaces which make the working conditions more severe. Article 24 of the Law only stipulates the provision that; *"Employer shall not change the workplace of a workplace union representative or make major changes in his/her job without his/her written consent. Otherwise such changes shall be considered invalid",*

131 *Güzel,* 334-335.

132 For detailed information, see *Tuncay-Savaş Kutsal*, 136 et seq. Özkaraca, 193 et seq.

133 *Güzel*, 332-336. Özkaraca, 197.

134 *Güzel,* 335. Özkaraca, 197.

however it does not put forward any remedies. As justifiably pointed out in the doctrine, where the workplace of a workplace union representative or amateur manager has been changed without his/her written consent, this change should be considered invalid and the worker should be able to submit a request to the labour court for identification of invalidity of this change and for his/her reinstatement to his/her previous workplace.[135] Under these circumstances, the worker actually brings an action for reinstatement based on the claim that his/her employment contract has been terminated on union related grounds due to not being allowed to his/her previous workplace.[136] Consequences of this action include, as explained in the paragraph above, the payment of all rights of the worker for the whole duration of representation. However, in this case, workplace union representative or amateur manager may directly request only union compensation without requesting reinstatement based on the claim of termination on union related grounds under Article 25 of the law instead of Article 24. However, in this situation, it is clear that he/she must also prove the existence of anti-union discrimination.

Where not the workplace but the job of the workplace union representative or amateur manager has been subject to a major change, although such changes are considered invalid pursuant to the relevant provision of the law, since there is no termination, the worker cannot file a reinstatement claim. Under such circumstances, the worker may demand wage and other rights without working pursuant to Article 408 of Turkish Code of Obligations which governs the default of the employer. If the employment contract is terminated due to the worker's reluctance to accept the change, then he/she may refer to legal remedies by choosing either Article 24 or 25 of the law. It should be noted here that, when the worker's job has been changed, he/she is also entitled to file a claim for union compensation pursuant to Article 25 while also continuing to work in line with the mentioned change. However, in this case, he/she must prove that the change was made on union related grounds. It is clear that he/she will benefit from the ease of proof laid down in paragraph 25/7 of the Law.

Finally, it should be mentioned that, in Article 23 of the Law, job security of members of management boards in central and branch units of confederations and unions who are considered as professional union managers in our legal system for when they cannot continue working due to being a member of management board is separately governed. Accordingly, a professional union manager is entitled to demand severance pay without working due to being a manager. However, unless the manager submits a notification in this regard, the employment contract remains suspended, and during this period of suspension, the manager may demand termination of the contract as well as the payment of his/her severance pay.[137] In these two cases, if the employer refuses to pay severance pay despite the request in this regard from the manager, it is obvious that the reason for non-payment would not be sufficient to directly accept existence of anti-union discrimination. Because, we believe that the failure to pay severance pay should not be legally considered as anti-union discrimination on its own. Therefore, in the section below on recommendations for the UYAP system, Article 23 of the Law will not be mentioned. Article 23 of the Law, similar to paragraph 18/8 of Law No. 4688, regulates security of union managers and thereby serves both individual and collective freedom of association but is not concerned with anti-union discrimination or any sanctions in this regard.

Paragraph 23/2 of Law No. 6356 stipulates that; *"A manager whose employment contract has been suspended may apply to the employer to be reinstated to his/her previous workplace within a month after his/her duty ends due to the termination of the legal personality of the union, failure to re-participate in the election or failure to be re-elected or withdrawal of his/her own accord. Employer must reinstate these persons to their previous jobs or another job in line with their previous jobs under existing conditions within a month following the request. If these persons are not stated within the specified period, then their employment contract shall be considered terminated by the employer".* Thereby, where the professional manager duties

135 Özkaraca, 197-198.

136 Özkaraca, 197-198. Compare *Süzek*, 658.

137 *Tuncay-Savaş Kutsal*, 81 et seq., *Süzek*, 652 et seq., Özkaraca, 178 et seq.

of the manager end due to the limited reasons laid down in the article, if the manager, provided that he/she has not ended his/her suspended contract yet by demanding severance pay,[138] applies to the employer to be reinstated within a month following the ending of his/her duties, then the employer is obligated to reinstate the manager. However, this obligation is not absolute. Because, the following part of the provision governs the contrary case and prescribes that in such a case, the employment contract would be considered terminated by the employer. Accordingly, it should be acknowledged that in case of non-reinstatement, all rights obtained when the employment contract is terminated by the employer shall be granted to the professional manager.[139] Therefore, the manager may get severance and termination notice pay as well as filing a claim for reinstatement. It is obvious that the decisions finalised as a result of these cases will not be sufficient for direct identification of anti-union discrimination. Because, we believe that it is not possible to accept that the employer's reason for non-reinstatement is directly based on union membership or activities unless there is evidence in this regard presented during the litigation process. Therefore, the reinstatement claim filed based on non-reinstatement of the manager being considered as termination by the employer, should also be based on Article 25 of the Law and anti-union discrimination should be proved during this case by the worker. Only under these circumstances it would be possible to accept the existence of anti-union discrimination. It should also be noted that, in such a case, it would not be easy to prove that the non-reinstatement was based on union related reasons. Because, the worker would not be able to show as an example another worker under the same conditions as him/her and would not know according to whom he/she would identify the discrimination. Thereby, since this situation would be processed under Article 25 in the record within the UYAP system, we believe that it is unnecessary in terms of anti-union discrimination to create another recording system within UYAP based on Article 23.

It should be noted here that, pursuant to the provision laid down in Article 3/1 of Law No. 7036 of 2017 on Labour Courts which had its provisions on mediation enter into force on 01.01.2018, stipulating that; *"In actions brought for worker or employer claims or compensation or for reinstatement based on the Law, individual or collective labour agreements, it is a condition for litigation to refer to a mediator",* before cases based on Articles 23, 24 and 25 of Law No. 6356 can be brought before labour courts, it is mandatory for the claimant to refer to mediation. Otherwise the case would be dismissed on procedural grounds due to the lack of the condition for litigation. It should be mentioned here that, if an agreement is reached in the presence of the mediator, it will not be possible to keep a record of anti-union discrimination data due to the reasons to be explained below and it will not be possible to reflect the reality into the statistics through the legal system. Therefore, as mentioned above, it will be appropriate to collect data on anti-union discrimination from multiple sources rather than a single one. For instance, cases of discrimination which could not be recorded due to agreements reached during mediation will be revealed via the Quality of Work Life Surveys which we will recommend to be administered by TURKSTAT.

ccc. Criminal Sanction

Article 118 of Turkish Criminal Code No. 5237 defines *"prevention of the enjoyment of union rights"* as a crime. Accordingly, *"(1) A person who uses force or threats in order to compel another person to be, or not to be, a member of a trade union, to attend or not to attend activities of a trade union, to leave a trade union or to leave a position of management of a trade union shall be sentenced to a penalty of imprisonment for a term of six months to two years. (2) In the event that the activities of a trade union are prevented by the use of force, threats, or by means of any other unlawful act, a penalty of imprisonment for a term of one to three years shall be imposed".* As is seen, in order for anti-union discrimination to be subject to a criminal case in our country, prevention of the enjoyment of union rights mush occur by force or threat. However, since force refers to material coercion whereas threat refers to emotional coercion in the Turkish Criminal Code system, it should be

138 Özkaraca, 184.

139 Özkaraca, 184-185.

pointed out that this article covers both material and emotional coercion and therefore prevention of the enjoyment of union rights by the employer by creating effective emotional fear will also constitute the crime prescribed in Article 118 of TCC (TCC, Art. 28, 118).[140]

Furthermore, it should be mentioned that the crime of preventing the enjoyment of union rights is not a crime covered within the scope of conciliation. The only exception is when the offender is a child drawn into crime. This exception has been governed by Law No. 6763 of 24.11.2016. Thereby, in order to practice conciliation in a case where anti-union discrimination also constitutes a crime, the crime itself must be committed by a child drawn into crime, which is quite rare since this requires the employer to be under 18 and engage in anti-union discrimination. Therefore, although the issues to be discussed below in the section on mediation are also relevant for conciliation, since there are no matters to hinder data recording regarding anti-union discrimination which is the subject addressed by this report, there will be no recommendations presented in this regard.

Article 118 of Code No. 5237 is a regulation applicable for public servants and other public officials not only covered by Law No. 6356 but also Law No. 4688. Therefore, there will be no additional explanations below in the section on criminal sanction regarding the sanctions stipulated in our legislation in terms of Law No. 4688.

bb. From the Perspective of Law No. 4688 on Public Servants' Labour Unions and Collective Agreement

Article 14 of Law No. 4688 governs acquisition of union membership. Accordingly, public officials shall apply for union membership by filling a three-copy form. After this application is accepted, union shall send one of these three copies to the employer for the membership fee deduction. This informs the public body about the union membership of the public official. The fact that the membership due and fee deduction is made by the employer is criticised in our country and it is justifiably pointed out that this is a relationship between the union and the member and fees should be directly paid by the member to the union and the union should follow-up this process.[141] As long as this system, which is called the check-off system in our country exists, the employer will always have the information about union memberships of public officials which is supposed to be protected as personal data. Therefore, we believe that this system should be abandoned and the membership relationship should only be known between the member and the union.

Article 18 of Law No. 4688 governs the guarantees for union members, representatives and managers. Unlike Law No. 6356, Law No. 4688 prefers to identify all types of union security under a single article. Accordingly, *"Public officials shall not be subject to a different treatment or dismissed due to participation in activities of unions or confederations mentioned in this Law outside working hours or within working hours upon permission by the employer. Public employer shall not change the workplace of the workplace union representative, union workplace representative, provincial and district union representative or union or union branch manager without stating the reason in a clear and precise manner. Public employer shall not discriminate among public officials on the grounds of being or not being a union member".*

In the following part of the same article, union managers are secured by the provision which prescribes that; *"Members of the management board who will govern the union or confederation until the next general assembly, members who have been elected for the management board at the general assembly and members of union branch management board shall inform their institution in writing within a maximum of thirty days following the date they were elected. According to the provisions of the union statute, these managers shall go on unpaid leave upon their written request during their duty. Those who do not submit such a request shall continue their duties at their institutions. Members of the management board who are not on leave shall be considered on leave one day a week at their institutions. In order for the members of the management*

140 *Hafızoğulları-Özen*, 175 et seq., 185 et seq., 216 et seq. Şen, 485 et seq.

141 See Akademik Forum discussions.

board to enjoy the rights laid down in this paragraph, their union must reach the required number of members prescribed to establish a branch; and in order for the members of the management board of a confederation to enjoy the rights laid down in this paragraph, the total number of members of the unions affiliated with the confederation must reach the level of union members required to convene their general assemblies through delegates … If persons among those considered on unpaid leave who has resigned from their duties at the union or confederation bodies for any reason apply in writing to their institutions within thirty days following the ending of their duties, public employer is obligated to reinstate them to their previous jobs or another job in line with their previous jobs within thirty days. Persons who fail to apply for reinstatement within thirty days shall be considered resigned".

It has been explicitly governed that, union workplace representatives who have been appointed based on union membership, union activities, union managers, workplace union representatives and the right granted to other organised unions which do not have the highest number of members in the public sector shall not be subject to discrimination on union related grounds in terms of their working conditions and termination of their duty; however there are no administrative, penal or legal sanctions prescribed in the law in this regard. As such, there are no legal remedies stipulated in the law for when a professional union manager wants to be reinstated but the public employer fails to do so.

First, it should be emphasized that, where a violation of Article 18 of Law No. 4688 also constitutes the crime of preventing the enjoyment of union rights regulated in Article 118 of TCC, then this may be subject to a criminal case. However, an act of anti-union discrimination performed by the public employer which does not constitute a crime in terms of the criminal code for lack of the conditions laid down in Article 118 of the law would not be subject to an administrative or criminal fine.[142] As such, although Law No. 6701 on Turkish Human Rights and Equality Institution has the authority regarding discriminatory acts in all public and private sector workplaces, since anti-union discrimination is not listed among types of discrimination in the law, unless the anti-union discrimination is accompanied by a claim for discrimination based on political opinion, the Institution has no power in investigating this complaint or imposing an administrative fine.

In fact, for this reason, it will be recommended to make an amendment in Law No. 4688 for imposing administrative or criminal fines in cases of violation of Article 18 of the Law as well as including anti-union discrimination into the scope of Law No. 6701 in a way to cover all other situations. Because, currently the Ombudsman Institution which has the power to investigate anti-union discrimination in the public sector and undertakes inspection pursuant to Law No. 6328 is vested with the authority to draft a report at the end of the year, publish this report and present it to TGNA but not to impose administrative fines. Therefore, it is obvious that our legislation should be amended in order to ensure administrative supervision of anti-union discrimination in the public sector, impose administrative sanctions and keep records in this regard.

Moreover, any claim for damages to be filed by public servants or other public officials in cases of violation of Article 18 of Law No. 4688 has not been clearly regulated either. However, lack of such a regulation in the law does not mean that they cannot file a claim for damages for anti-union discrimination. Because, pursuant to Article 125 of the Constitution, persons can recourse to a full remedy action against all actions and acts of administration. Compensation to be paid in this regard shall be recovered from to the person whose fault caused the damages pursuant to Article 129 of the Constitution. Thereby, any public official who claims that he/she had suffered material or emotional harm due to anti-union discrimination is entitled to file a claim for damages against the administration. Therefore, pursuant to the provision in Article 43 of Law No. 4688 prescribing that; "For cases not stipulated in this Law, relevant provisions of Law No. 2821 on Trade Unions, Law No. 2908 on Associations, Turkish Civic Code No. 743 and personnel laws covering public

142 *Tuncay-Savaş Kutsal,* 500.

officials about persons to undertake a duty in unions and confederations", it is argued in the doctrine that it is possible to think that Article 25 of Law No. 6356 may also apply to public servants and other public officials and therefore public officials would be entitled to a union compensation in the amount of at least their yearly wage.[143] However we were not able to find any judicial decisions concluded in this regard.

The case to be filed for the violation of Article 18 of Law No. 4688 is not only a full remedy action but can also be brought as an action for annulment of the act performed by the administration which violates this provision such as changing the workplace of a public official based on the ground that he/she is a union member. During this case which will be subject to a trial at the administrative court, if the public official proves that this act is based on anti-union discrimination, after the finalisation of this decision, anti-union discrimination will be subject to an administrative judicial decision and thereby this information will be transferred to the legal records system.

c. Conclusion and Recommendations

aa .Connecting Existing Data

aaa. Before the application for determination of authority

Unfortunately, cases of anti-union discrimination are observed in our country during the union membership of persons even before the application for determination of authority is lodged. This can be easily demonstrated using official records. Because, integration of applications submitted via e-government for union membership and declarations of separation from job submitted to the Social Security Institution will provide a clue for identifying possible dismissals on union related grounds happened before the application for determination of authority. Identification of whether all of these dismissals during this process were union related should of course be undertaken by the courts. However, since these data are not public, they are provided by the Ministry upon request from the courts. Integration between the declarations of separation from job submitted to the Social Security Institution and union membership applications submitted via the e-government system and records of withdrawal from unions plays a significant role in terms of providing data on anti-union discrimination encountered before the authorisation process.

aab. After the application for determination of authority

Anti-union discrimination may also occur in our country upon the application of the union for authorisation as well. Thereby, after the period between the date of application for authorisation lodged by the union to the General Directorate of Labour and the date the union called for a collective labour agreement with the employer, or as a result of the lawsuits for objections to authorisation which unfortunately last more than a year sometimes in our country, courts decide on the authorisation of the union. During the period when the union has applied for authorisation and while the litigation process continues, it should be followed whether employment contracts of union member workers have been terminated or whether workers have withdrawn from union membership during this period. This is easily identified by integrating the declarations of separation from job employers are obligated to submit to the Social Security Institution and the e-government system which tracks union membership. It is a known fact that since this integration has been ensured since 2012, the Ministry provides this information upon request from courts.

Therefore, upon the request for authorisation by the union, when declarations of separation from job are submitted to SSI for a high number of workers at the same workplace who are members of the same union or even when workers

143 *Tuncay-Savaş Kutsal*, 500.

for whom declarations of separation from job were not submitted but who submitted their requests for withdrawal from union membership via the e-government system, it provides a significant data source in terms of revealing the existence of anti-union discrimination. There is already a data system which has been governed in our legislation since the entry into force of Law No. 6356 in which union membership of workers is acquired or lost via the e-government system. Moreover, employers are obligated to make a declaration to the SSI when workers leave their jobs upon termination of their employment contracts using a declaration of separation from job. Anti-union discrimination can be easily identified by integrating the records on the e-government system on union memberships, requests for new membership and requests for withdrawal from membership which must be updated at the end of each month by the Ministry of Family, Labour and Social Services pursuant to the regulation as well as the declarations of separation from job submitted to SSI which is also affiliated with the same Ministry. Statistics to be produced this way can be used as evidence in cases as well.[144] Establishing an integrated system such as this greatly facilitates the identification of discrimination in claims of anti-union discrimination. This is the case because, discrimination is not a situation that can be easily proven by a single evidence or single fact. As in all other claims of discrimination, what needs to be proven here is the motive hidden by the employer. As a matter of fact, this is the reason why judicial bodies in our country investigate multiple incidents and facts in a chronological order to identify anti-union discrimination and evaluate all evidence as a whole and decide on the existence of anti-union discrimination.[145] Therefore, the system which monitors separately and automatically the period until the union which has initiated the authorisation process obtains the authorisation and makes the call to the employer and the period starting on this date and lasting until the conclusion of the collective labour agreement and conducts this monitoring process in terms of SSI records of separation from job and job commencement as well as the requests for union membership and for withdrawal from membership submitted via the e-government system, supports the identification of anti-union discrimination with official records.

Furthermore, pursuant to Law No. 4688, applications of public officials for union membership are lodged via membership forms they submit to their employers which are then sent to the union. However, as pointed out by some of the social parties at the workshop, ensuring that applications of public officials for union membership or for withdrawal from membership are submitted via the electronic system strictly monitored by the Ministry may make it easier to present proof in actions for annulment or full remedy actions brought by public officials for the discrimination they experience on union related grounds in terms of their working conditions. Because, since there is no application for authorisation process for public officials' unions and public officials may usually experience psychological harassment such as changes in their workplaces or duties or disciplinary investigations rather than being dismissed on the grounds of exercising their union rights, during the lawsuits they are going to file against these actions, obtaining the list of persons working at the same workplace who are members of the same union from the Ministry, which is a reliable source, and revealing how many of the union members at the respondent public entity were subject to changes in their workplaces or disciplinary investigation will facilitate proof for the case. This will enable proof in many lawsuits and thereby ensure the entry of this data into the legal records system upon identification of anti-union discrimination while also enabling a higher number of lawsuits on anti-union discrimination to be filed by public officials due to their trust in this data system. As employees begin trusting this system more, number of lawsuits and therefore identifications of anti-union discrimination will also increase and together with the legal records system, this will ensure data recording on this matter. Therefore, works on ensuring that applications of public officials for union membership and for withdrawal from membership are also submitted via the electronic system will contribute to reducing anti-union discrimination.

144 In fact, in the United Kingdom, statistics presented by UNISON to the court during the action for annulment for raising court fees indicating that number of lawsuits declined after the date when court fees were raised and the statistics indicating that higher fees reduced the number of lawsuits filed by women in cases of violation of gender equality, and based on these, the decision to raise court fees was annulled for being unlawful based on the grounds that it violated the right to legal remedy and caused indirect discrimination against women. UNISON announced this development as "*data wins*", https://www.unison.org.uk/news/ps-data/2017/08/data-court/

145 *Bayram,* 1222 et seq. *Doğan Yenisey*, 76.

bb. Usability and Improvement of the Existing UYAP system of Ministry of Justice

As discussed in the workshop organised on 03.10.2018 at the ILO Office for Turkey, it is going to be a very easy step with a very important result in terms of collecting data on anti-union discrimination to keep separate records within the UYAP system on the finalised decisions concluded in claims filed based on Articles 24 and 25 of Law No. 6356 mentioned above during which anti-union discrimination has been identified. At the workshop, it was mentioned that, during the process when cases are filed, the distribution bureau enters the case into the UYAP system according to its subject. However, it should be mentioned that, we do not think that it is possible to use this entry and categorisation made by the distribution bureau to be used for accessing actual data. This is the case because, employees at the distribution bureau are not jurists and also considering the workload of judicial bodies in our country as well as the number of cases filed every single day, it is clear that a claim for union compensation may easily be recorded only as a case for claims. Moreover, where there are other labour claims within the case in addition to union compensation such as severance and termination notice pay and overtime pay, this record may become even more complicated for the personnel.

Therefore, in our country, if it is also requested to access data on how many of the claims for anti-union discrimination ended with identification of anti-union discrimination and finalisation of this decision and to produce statistics in this regard, first, it will be useful to ensure that the information on the subject of the case is entered in the UYAP system in a more conscious manner by enhancing the quality and quantity of the personnel and to appoint judges to control this process. Ensuring accurate data flow into the UYAP system during the processes of both filing a case and finalisation of the decision will enable separate and reliable recording of the parts of anti-union discrimination claims which are brought to court and concluded.

Furthermore, if the only request is to record anti-union discrimination and to base this information on reliable data, we believe that what is important is whether actual anti-union discrimination has been identified in terms of the dispute at hand rather than the claim on which the case was based when it was filed. Therefore, the category under which the case was classified in the UYAP system when it was filed is not important in terms of identifying the actual extent of anti-union discrimination and collecting reliable data in this regard. What matters is to be able to record in the UYAP system the finalised cases in which anti-union discrimination has been proven. Thereby, first a separate segment should be created in the UYAP system of Ministry of Justice for finalised anti-union discrimination decisions and this segment should be divided into two part as regular and administrative judicial decisions (annulment and full remedy) and then separately classified in terms of civil and criminal justice of regular judiciary. Civil justice part of the anti-union discrimination segment should only contain data on the final decisions concluded based on Articles 24 and 25 of Law No. 6356; whereas the administrative jurisdiction part should only contain data on the final decisions concluded based on the first four paragraphs of Article 18 of Law No. 4688 and it should be mandatory of the person who enters the data to select one of the mentioned articles of law while recording the data. This will enable the incorporation of actual data into the legal records system on cases in which actual anti-union discrimination has been identified among all disputes containing claims for anti-union discrimination brought before the judicial body.

It should also be pointed out here that, legal characterisation of the matter of dispute in the case should be done by the judge. Because, the judge is not bound by the legal characterisation of parties and has the authority and responsibility to conduct the actual legal characterisation of the effective case (Civil Procedure Code, Art. 33, Turkish Code of Obligations, Art. 19). Thereby, where the claimant does not mention Articles 24 or 25 of Law No. 6356 or Article 18 of Law No. 4688 while filing the case, but files a claim for damages on the grounds that he/she was subject to mobbing, if the judge decides that the grounds for mobbing were union membership or union activities, then the judge should be obligated to ensure that this decision is recorded in the UYAP system under the anti-union discrimination category. Since accurate transfer and recording of legal data will also enhance the reliability and accuracy of the database and statistics to be created, we believe that the data entry into the UYAP system in this regard should be done directly by

the judge or assistant judge or it should be ensured that entered data is not recorded without being controlled and approved by the judge or assistant judge.

cc. Recording the Results of the Inspection by Directorate of Guidance and Inspection

It is clear that, the cases where a violation of Articles 17 or 19 of Law No. 6356 by the employer has been identified by labour inspectors will also qualify as anti-union discrimination. It should be overemphasized that, since the violations of freedom laid down in these provisions may also be committed by the union, in order for such violations to be considered as anti-union discrimination, they must be committed by the employer or his/her agents. Because, as mentioned above, not all violations of freedom of association qualify as anti-union discrimination and included in the data collection on anti-union discrimination aimed in this report.

Therefore, it is obvious that, when labour inspectors identify a work, action or act performed by the employer or his/her agent which violates Article 17 or 19 of the said Law at workplaces, this matter should also be recorded as *"anti-union discrimination"*. However, since the administrative fine recommended in the reports drafted by labour inspectors is imposed by the Provincial Directorate of ISKUR (Labour Inspection Bylaw, Art. 22), we believe that it would be more appropriate for the Provincial Directorate to undertake the process of data entry into the new system as well. Because, pursuant to the provision laid down in paragraph 22/6 of the Labour Inspection Bylaw stipulating that; *"Actions laid down in the inspector reports must be implemented by regional directorates of ISKUR without delay. However, if there are parts of the report in contradiction with the legislation, then it shall not be implemented and the Ministry shall be informed by explaining the arguments for contradiction",* if an inspector's report is in contradiction with the legislation then it might be returned. However, unless a contradiction with the legislation has been identified in the inspector's report, the administrative fine will be imposed by the provincial directorate. Since the finalisation of the report in a sense and its conclusion with an administrative fine happens during the stage at the provincial directorate, accurate and precise data will be entered in the system if the records are kept by the provincial directorate as well. Thereby, the findings collected during the inspection regarding anti-union discrimination will be converted into data using the administrative records system method. As such, upon the annulment of the fine as a result of a case filed against this administrative fine and the finalisation of this decision, again the Provincial Directorate of ISKUR should enter the information on the annulment of the mentioned fine into the administrative records system. Thereby, anti-union discrimination acts identified during the inspection of workplaces will be subject to accurate administrative recording.

However, it should be noted here that, data produced using the administrative records system will not reflect the whole existing anti-union discrimination. It should be kept in mind that unions play a major role in the identification of anti-union discrimination. Because, unions should encourage their members to inform their unions about the anti-union discrimination they experience by informing and training members or inform them about how they should proceed about legal remedies. As such, it will also contribute in the process when unions declare the anti-union discrimination complaints they identify or receive in order to initiate a workplace inspection.

In addition, there should be telephone lines and online complaint boxes which are easily accessible by workers and free of charge, they should be announced separately for all discriminatory violations and anti-union discrimination and a culture of complaints should be developed among workers. This, in other words increasing the number of complaints lodged to the Directorate of Guidance and Inspection is the only way to ensure that the records of anti-union discrimination cases identified after inspections serve the establishment of an effective data system. Otherwise, keeping administrative records of a few complaint results will not be sufficient to evaluate the actual state of our country and determine the extent of anti-union discrimination and develop effective programmes to combat anti-union discrimination. Therefore, free telephone lines and online complaint boxes should be provided for persons to apply to anonymously, specifically for discrimination and anti-union discrimination notices and complaints, information

about these should be announced as mandatory public messages or through the media and also unions should provide information in this regard. Moreover, unions should explain the importance of the matter to their members and inform them about reaching out to the Ministry about cases of anti-union discrimination they experience either by using specified methods or at least reaching out to the union to submit a notification. This will allow the recording of administrative fines to have a significance within the data collection system.

Furthermore, as explained above in the section about sanctions, although there are no administrative sanctions prescribed in our legislation for the violation of Article 25 of Law No. 6356, we believe that, in cases of discrimination based on the grounds of union activities, being a union manager or workplace union representative, this can be addressed under Article 17 or 19 of Law No. 6356. Because, it is a fact that beneath every union activity lies union membership. Therefore, during the inspections carried out by labour inspectors, they should be informed about the fact that acts of anti-union discrimination committed based on mentioned grounds should also be considered under Article 17 or 19 of the Law and thereby acts of anti-union discrimination caused by the violations laid down in Articles 24 and 25 of Law No. 6356 will also be identified by labour inspectors and subjected to sanctions and recorded by provincial directorates.

Finally, it should be mentioned that, since there are no administrative or criminal sanctions laid down in the mentioned law to be imposed in case of an identification of a violation of Article 18 of Law No. 4688, there are no administrative inspections or records in this regard in our country. Only after public employers are also inspected in this regard and the administrative fines to be imposed for identification of anti-union discrimination are regulated by amending the legislation and after complaint and notice facilities are offered to public officials just as workers and after they are informed by unions and the State about how to utilise these facilities, then it will be possible to reflect the actual levels of anti-union discrimination in the public sector into the administrative records system.

dd. Mediation Records or Recording Barrier

We believe that the ultimate barrier to the identification of anti-union discrimination and collecting real data in this regard is the mediation system called as "mandatory mediation" in our country which is a condition for litigation which has been imposed by Article 3 of Law No. 7036 on Labour Courts. Because, it is mandatory to refer to mediation before filing a case for claim for damages and reinstatement between workers and employees regarding anti-union discrimination. Pursuant to Articles 4 and 5 of Law No. 6325 on Mediation for Civil Disputes, mediator and all persons participating in these meetings are obligated to keep all information confidential and also, none of the information and documentation presented during these meetings including all acknowledgements can be used as evidence in any lawsuit. Thereby, even if the mediator comes to a conclusion that there is anti-union discrimination, he/she cannot legally record this information or upload this information to any system or share it.

As such, it should also be pointed out that, mediator's opinion in this regard is not actually important in terms of reaching accurate data. Because, the mediator is not the person who undertakes adjudication but is the one that provides an appropriate ground for parties to reach an agreement. Therefore, the mediator is not vested with the power to conduct adjudication or identify whether there is anti-union discrimination in the matter of dispute. Even if the mediator comes to a conclusion in this regard, this will only remain as an opinion.

However, since all disputes containing anti-union discrimination must go through the mediation stage, if the worker comes to an agreement with the employer in the presence of the mediator, then it will not be possible to record the case of anti-union discrimination. This is the case because, there will be no declaration of acceptance that the employer had engaged in anti-union discrimination in the final mediation report or meeting minutes and only the amount of compensation agreed at the end of the meetings will be transcribed. The worker who waives his/her right of action in exchange for this compensation will sign the final report and will not be able to file another case in this regard pursuant

to the provision in Article 18/5 of MCD stipulating that; *"Where an agreement has been reached as a result of mediation, parties shall not bring an action against matters which they have agreed upon".* Therefore, the dispute containing the claim for anti-union discrimination will be closed without being subject to any adjudication or any decisions concluded in this regard; data about this incident will in no way be procured. Making the recourse to mediation mandatory as a condition for litigation in worker-employer relationships, which is the area in which fundamental human rights can be violated the most, causes the labour law to lose its effectiveness and meaning and will also hinder the data collection in such important issues and production of statistics which reflect the truth.

ee. Usability of Reports Drafted by the Ombudsman Institution

Ombudsman Institution, which operates based on Law No. 6328, is only responsible for supervising the lawfulness of acts and actions of public entities. Thereby, being the institution public officials can refer to when they experience anti-union discrimination, Ombudsman Institution is important in terms of filling the gap in this regard. However, it should be mentioned that the Ombudsman Institution does not have the authority to impose any sanctions on public employers but ensures the publication of unlawful acts of entities and their presentation to the Turkish Grand National Assembly through the annual reports it drafts.

Thereby, applications to the Institution can be increased by announcing the ways to lodge a complaint to the Ombudsman Institution to the public and informing the public about the existence of this Institution and its functions. By doing so, the Institution may also include data on anti-union discrimination in its annual reports. However, since the incidents reflected in the report drafted by the Institution will be limited to the incidents submitted to the institution, it is obvious that it is not possible to reach accurate and complete data through the reports of the Institution. Thereby, ways of application to the Institution should be announced to the public in a much better way and the public should be informed about the results of these applications and thereby their trust in the system should be enhanced. This will increase the number of applications lodged to the Institution and therefore the number of anti-union discrimination cases investigated and recorded, and Institution reports and related statistics will reflect the truth better in terms of numbers.

ff. Recommendation on the Surveys of Turkish Statistical Institute and the Duty of Producing Statistics

It was explained above that, in studies about EU member states which have been reviewed in terms of their data collection systems on discrimination, the information of union membership is considered as "personal data" in accordance with the EU Acquis but it is allowed to collect and process this data for producing statistics, scientific studies or to be used in a lawsuit. On the other hand, in Finland, it is also acceptable for unions to collect and process the information about union membership in order to carry out their own operations as well as supervising the compliance with the labour legislation.

In our country, it has been governed in Article 6 of Law No. 6698 of 2016 on Protection of Personal Data that the information about union membership is private personal data. Second paragraph of this article prescribes that private personal data can only be processed upon express content whereas the third paragraph stipulates that *"personal data, with the exception of data about health and sexual life laid down in the first paragraph can be processed without seeking express content in cases prescribed by the law"* and thereby states that information about union membership can be processed without seeking express content in cases prescribed by the law. Thereby, we believe that it is sufficient and necessary to add explicit provisions to the law on incorporating questions about union membership and both witnessing and experiencing anti-union discrimination into the Quality of Work Life Survey, which we recommend to be administered by TURKSTAT and which is the source that can be used to produce the most accurate anti-union

discrimination data as seen in the Finland example. This will enable adding the question on union membership to the survey. Such an amendment can be done directly in Law No. 6698 or in the Turkish Statistics Law No. 5429. Thereby, we believe that a regulation which will allow collection and processing of the information about union membership and violation of union rights will be sufficient in terms of producing statistics and identifying anti-union discrimination.

After this legal amendment about the protection of personal data, we believe that the Quality of Work Life Survey should finally be added to the surveys planned to be conducted by TURKSTAT and that it should primarily be implemented at least every three years. This survey is conducted every five years in Finland and every year in the Netherlands. However, as explained above, applying the survey frequently does not necessarily mean that it always provides accurate information. In order to ensure compatibility with the conditions of the country, frequency of the survey should be decided jointly by TURKSTAT and the Ministry of Family, Labour and Social Services. Thereby, we believe that the frequency of the survey should be decided by these two bodies which are the experts in this field.

Another important point about these surveys is to select the groups that will represent the whole country and conduct the survey in a manner to represent the environment as broadly as possible and to prepare comprehensive questions that will also reveal other issues in the work life including anti-union discrimination. Therefore, in order to keep its topics and the pool of respondents broad, we think that conducting the Quality of Work Life Survey every three years rather than conducting it every year but implementing it through a long period of time (for instance, 6 months) would be more effective in terms of achieving more accurate data. Moreover, considering the results of the surveys conducted every five years in Finland, it has been observed that discrimination in Finland is not at very high levels. However, since it is predicted that the percentages of violations of many types of prohibitions of discrimination such as anti-union discrimination are high in our country and there are many issues in the work life requiring identification such as occupational safety and health, working hours, mobbing etc., we think that the three-year period is appropriate for our country to ensure fastest follow-up of these issues and programming necessary measures as well as creating the perception among the public and particularly the employers that these issues are being monitored.

In EU member states, unlike the labour force surveys, the Quality of Work Life Survey is administered to persons of 15-64 age group who work as employees at least 10 hours a week. Thereby, the aim is to include persons to the survey who are directly within the work life and therefore can know the problems the best and reach real data. In addition, it should be mentioned that, another important point in terms of this survey is that the questions should be prepared by units which have complete knowledge of the problems stemming from work life. It is obvious that TURKSTAT may and should administer the survey and produce the results due to its expertise. However, the problems about work life and the questions to reveal these problems can be decided by the Ministry of Family, Labour and Social Services. Therefore, it is believed that the Ministry should be in charge of preparing the questions.

Furthermore, participation in the survey should be optional; however, it should be announced to the public in advance that prizes will be given by drawing lots among respondents as well as what these prizes will be and thereby participation rates should be increased. However, providing accurate and informed decisions is as important as participating in the survey. Therefore, before the survey period, announcements should be made to the public about the dates by using all means such as the Internet, newspapers and television advertisements and the public should be informed in advance about what the questions in the surveys mean. Moreover, multiple options should be provided for participating in the survey in order to ensure that persons participate using the easiest way possible and respondents should be able to choose among options which are face-to-face interviews, online access via passwords or on the phone. Quality of Work Life Survey should cover all employees both in the private and public sectors and thereby the aim should be to identify anti-union discrimination in our country in the most accurate way.

Although surveys may not always be sufficient on their own for identifying discrimination either, they are considered as the data source that provides the most reliable results.[146] This is caused by the fact that the complaint process often required for legal or administrative records is not required for surveys, that persons believe in data security and when provided with the technical facilities in responding to the questions, they can easily talk about the incidents they have been through. Therefore, it is clear that surveys may also reveal hidden cases of anti-union discrimination. However, survey responses are also based on subjective assessment and persons may sometimes think that the different treatment they have experienced is caused by anti-union discrimination even when it is not. Moreover, it is pointed out that survey results still reflect discrimination data lower than the actual levels and persons are unable to reflect the existing discrimination in their responses due to their desire to maintain self- respect, their inability to accept what happened or belief that sharing this information will not serve a purpose or when they truly do not realise that what they have experienced is discrimination.[147]

gg. Using Records for Creating a Database and Statistics

As mentioned in the section on EU member states, discrimination data in Ireland, the Netherlands and Finland are produced based on official records including surveys as well as legal and administrative records. However, in these countries, units which keep the records also produce their own statistics based on their records. Thereby, for instance WRC in Ireland drafts its own reports on inspection, mediation, conciliation and adjudication activities and produces annual statistics. In Finland, annual legal reports are drafted separately, results of the working life barometer are reported separately, and the records of OSH Administration are reported separately, and statistics are produced on an institution basis.

A question was asked to the TURKSTAT representative at the workshop organised at ILO Office for Turkey whether it would be possible to compile all of these records under a single set of statistics if requested. The representative stated that it would be possible only if key data existed. Because, the major problem in data collected from multiple sources is the existence of the same case in multiple sources. Therefore, it is not an accurate method to compile all data and reports mathematically to determine the level of anti-union discrimination in the country. Therefore, the key data, for example Turkish identification number should be selected and it should be identified how many times the same case has been declared by this number and this case should only be counted once. In line with this information provided by the TURKSTAT representative, it would not be wrong to say that, if the desire is to produce a general and single statistics base on anti-union discrimination in our country, it is technically possible to compile all of these data under a single database within TURKSTAT or the Ministry of Family, Labour and Social Services as the policy-making ministry, in a way that will enable creating links among relevant data by using a common key data, provided that the data to be procured from different institutions are in the appropriate format and structure.

146 *Larja et al.,* 26-28, 36.

147 *Larja et al.,* 26.

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