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IMPROVING SOCIAL DIALOGUE IN WORKING LIFE

# Analysis of Legislative Gaps and Recommended Amendments for Better Compliance with ILO and EU Standards on Social Dialogue, Freedom of Association and Right to Collective Bargaining

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-Accession 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 analyse the legislative gaps among Turkish legislation and ILO and EU standards on social dialogue, freedom of association and right to collective bargaining and develop recommendations for amendments for better compliance with international standards.

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.

### **NURCAN ÖNDER**

Ministry of Family, Labour and Social Services  
General Director of Labour

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Director of the ILO Office for Turkey

## **I. PREPARATION STAGE AND BACKGROUND OF THE REPORT**

In the preparation of this report, the ILO Conventions entitled Freedom of Association and Protection of the Right to Organise (No. 87), Right to Organise and Collective Bargaining (No. 98), Workers' Representatives (No. 135), Labour Relations (Public Service) (No. 151) and Collective Bargaining (No. 154) were reviewed, the ILO Committee of Experts' reports and the Committee on Freedom of Association' resolutions were considered and it was identified how the adjustments in such conventions were interpreted by the ILO. As such, the Directive 2009/38/EC on the Establishment of a European Works Council for the Purposes of Informing and Consulting Employees, Directive 2002/14/EC on Establishing a General Framework for Informing and Consulting Employees in the European Community and Council Directive 2001/86/EC on supplementing the Statute for a European company with regard to the involvement of employees and especially European Union progress reports were considered. In the European Union Progress Reports, especially Chapter 19: Social Policy and Employment and the legislation of our country were compared and also human rights, freedom of expression, freedom of association, labour rights and trade unions chapters were reviewed.

## **II. METHODOLOGY AND ANALYTICAL FRAMEWORK**

Much of the ILO and EU criticism before 2013 led to the 2010 Constitutional amendments, amendments of 2012 to the Law No. 4688 in line with these amendments and the preparation of Law No. 6356 of 2012 on Trade Unions and Collective Labour Agreement. For this reason, efforts were made, through such legal amendments in our country, to respond to a large part of the criticism prior to 2013; in this context, public officials were given the opportunity of collective agreement, the ban on profession-based unionisation was abolished and directly describing the actions such as solidarity strike and go-slows as illegal was prevented. However, especially the amendments made in the Law No. 4688 in 2012, unfortunately, were not sufficient in terms of compliance with ILO and EU standards. As a matter of fact, in the EU Progress Reports and the reports and resolutions of the ILO supervisory bodies, the same criticism regarding Law No. 4688 is continued every year. As such, in 2013, Law No. 6356 could not be taken into consideration yet, but the EU and ILO criticism continued after the year 2013 even though less than the previous ones.

For these reasons, in this study, while the legal amendments that should be made today in terms of compliance with ILO norms and EU standards, the ongoing criticism is taken into consideration. For this reason, criticism and suggestions for each year in the ILO Committee of Experts' reports and the EU Progress Reports during the period up to 2013 were included in the report from today backwards; to which regulations in our legislation these are related is indicated, amendments proposed in response that should be made in our legislation are given. When the report is examined, it will be seen that unfortunately the EU and ILO criticism is almost the same every year and no comprehensive amendments have been made in our country after 2012 in response to such criticism. Constitutional amendments of 2010 and legislative amendments of 2012 responded to much of the criticism before 2012, but the deficiencies that were not eliminated by the legal amendment even at that time have not been removed. For these reasons, in the report, detailed explanations were made for each year between the years 2013-2018 and the deficiencies before 2013 were tried to be transferred only in terms of the ones still continuing and in a more collective way. In addition to these, even though not included in the EU or ILO reports, The amendments that we think should be made in our legislation in order to comply with ILO norms and EU standards are also included. In this way, the report was prepared in a way enough to show the amendments that should to made in order to comply with international standards in the context of social dialogue.



### III. OVERVIEW OF INTERNATIONAL REGULATIONS AND ASSESSMENT IN TERMS OF TURKISH LEGISLATION

With the Conventions No. 87, 98, 135 and 151 which ILO submitted for signature within the framework of social dialogue and approved by our country, the Convention No. 154, which is not signed by our country, but must be taken into account in terms of the development of social dialogue and compliance with international standards, is of importance for the EU countries as well as for our country. As a matter of fact, in the EU Progress Reports and in the decisions of the European Court of Human Rights, in the complaints under the freedom of association in Article 11 of the Convention, both the ILO norms and the interpretation of these norms by the supervisory bodies and the democratic and contemporary standards in the EU countries are taken into account even though there is no explicit provision. For this reason, it is not only the explicit meaning of the contract and directive provisions, but also the way and content of their application in contemporary and democratic societies.

The basis of ILO Convention No. 87 is based on the recognition of freedom of association for all employees without any restriction. For this reason, it should be possible to establish the organizations that employees form in order to protect and develop their professional interests without being subject to any permission process, also the right to establish and join these organizations should be granted to everyone without making a distinction between working groups and the ways of work, and employees should be entitled to the right to organize at their own will. Even though such basis may seem simple and feasible, it is known that we have regulations contrary to this basic principle of the Convention No. 87 when the legislation of our country is examined.

Since Convention No. 87 covers both public and private sector employees, the fact that the Law No. 6356 is still based on organization at the sector level, the regulation in the Article 4 of Law No. 4688 concerning that organizations on an occupational and workplace basis could not be established and the obligation for all trade unions to be established in order to operate across Turkey, and the fact that the federations are not foreseen in our country constitute a violation of the said convention. As such, Article 15 of Law No. 4688 is still the subject of criticism. As such, not granting full trade union membership and right to establish trade unions to unemployed and informal employees, the fact that the employer's representatives either become members of the employer's union or are excluded from the scope of the collective labour agreement or not granting them the right to establish trade unions are considered as contradiction to ILO norms and EU standards. As such, the obligation to have the place of residence of the founders of an organization in its statutes is not removed from the law, but no amendment that should be made in response to this criticism was introduced even though the last criticism in this regard was directed in 2013.

As such, when the case-law of the European Court of Human Rights (ECtHR) on freedom of association in Article 11 of the European Convention on Human Rights (ECHR) is examined, it appears that it is concluded that the said article covers not only the right to establish and join trade unions, but also the rights to free and voluntary collective bargaining and the right to conclude collective agreements and all collective trade union activities, including the industrial action, and thus right to collective action and the scope of article 11 of the Convention by the Court's case-law is kept so wide. Therefore, the regulation of freedom of association of the Convention No. 87 is not only considered as the right to establish and join trade unions, but also, as a requirement of this Convention, the right of trade unions to be involved in activities freely, to elect their representatives in full freedom in this context, to take industrial action, to be involved in free and voluntary collective bargaining process and to sign collective labour agreement and the right to collective action is considered under this convention. As a matter of fact, it is seen that the ILO Committee of Experts made its criticism concerning the said issues under the Convention No. 87 in some years, under the Convention No. 98 and 151 in some years, and under the Convention No. 135 in some years.

Effective protection against anti-union discrimination, free and voluntary collective bargaining rights and freely determined working conditions by social partners with the exercise of this right constitute the basis of ILO Convention No. 98. In this sense, effective protection of both public and private sector employees against anti-union discrimination, imposing both legal and administrative and criminal sanctions in this sense, providing dissuasive, rapid, simple and cost-effective means of complaints and sanctions to minimize anti-union discrimination, entitling the right to freely determine of all working conditions to public personnel and enabling social partners to make collective bargaining at any level appear as a requirement of the Convention No. 98. Much of the criticism is on these issues in our country. Foremost among these, there are the fact that the legal and administrative sanctions to be imposed against the prohibition of anti-union discrimination stipulated in Article 18 of the Law No. 4688 are not regulated separately, that administrative sanctions with regard to anti-union discrimination are not stipulated in the Law No. 6356 and that this remain limited with the Article 17 and 19 of the law, that the level of collective labour agreement is regulated by Article 34 of Law No. 6356 and that the sectoral collective labour agreements have not yet been stipulated; as such, not entering into collective labour agreement covering more than one branch of activity in the private sector.

As such, as the trade union density rate of workers in our country is relatively low, the number of workers covered by collective labour agreements in the private sector is also very low. It is stated that the main reason for this in the ILO Reports and EU Progress Reports is Article 41 of the Law No. 6356. In our country, where trade union density rate is low, giving the authority to sign collective agreement by double threshold procedure makes it difficult to obtain authority. In order for trade unions to obtain the authority in our country, they should exceed 1% threshold at the sector level, beside this, they should provide 50 + 1% at the workplace and 40% threshold at the enterprise level. For this reason, the trade union, which has the majority at the workplace, cannot initiate collective bargaining process with the employer as long as it cannot provide 1% organization at the sector level. For this reason, it is difficult for trade unions to obtain authority, the rate of enjoyment of workers from collective labour agreements is decreasing much due to collective labour agreements which cannot be signed, which adversely affects unionisation, both the lack of effective protection against anti-union discrimination and the low number of workers under collective labour agreement make them unwillingness to join the trade union. This situation causes both non-unionization and not being able to build a social dialogue environment in which collective bargaining agreements are effective. For this reason, we believe that sectoral threshold which is necessary to obtain an authorization for collective labour agreement in our country should be removed as well as the workplace threshold to 30% should be reduced as in France (likewise, labour organization in France is low as in our country), thus all organized trade unions should be given the authority to enter into collective labour agreement in terms of workplaces where the majority cannot be constituted and in this way, it should be avoided as far as possible to exclude workers in the workplace from the scope of the collective labour agreement. In addition, as can be seen from the report, not only the authority, but also the procedure for determining by law the level of collective labour agreement in Article 34 of the Law No. 6356, is contrary to the right to free collective bargaining and therefore to both ILO Convention 98 and ILO Conventions 151 and 154. It is clear that the choice of this should be left to the social partners, and in particular how the sectoral collective labour agreements will be signed should be regulated by law. As a matter of fact, in France, where there is a low level of unionization as in our country, the rate of workers under collective labour agreement is getting almost 100% of the labour force. The reason of this is that collective labour agreements are made at the sector level and that the extension system is used effectively. For this reason, the procedure for entering into sectoral collective labour agreements should be specially regulated in our country, the rule that the workplace collective bargaining agreements are compulsory should be abandoned and the extension system should be facilitated.

It is also evident that we face much criticism regarding Law No. 4688 in terms of both the Conventions No. 98 and 151. As a matter of fact, the fact that only social and economic rights of public personnel, not their working conditions, to be subject to collective labour agreement and that working conditions of public personnel to be regulated by law

are contrary to ILO Conventions No. 98 and 151. There is also the same contradiction in terms of the Convention No. 154. As such, the fact that public personnel do not have the right to strike and are subject to mandatory arbitration, that they are allowed to enter into only one collective labour agreement and that this agreement is prepared and signed not in full freedom, but, on the contrary, in a limited time and in accordance with many procedural rules and that employees in local administrations are not granting the right to separately sign collective labour agreements with local authorities is also the subject of criticism. The fact that public personnel do not have the right to strike and that they are subject to mandatory arbitration, which are at the heart of such amendments, first of all, require the amendment of Articles 53 and 54 of the Constitution.

In addition to these, even though the institution of trade union representation is recognized both in Law No. 6356 and 4688 in our country, worker representation is not included separately and a system that allows workers to participate in management, such as works councils is not included in our legislation. While worker representation governed in Article 20 of Law No. 6331 on Occupational Safety and Health constitutes the only example of this, if the number of employee representatives and the number of trade union representatives are the same, employee representatives are not elected separately and trade union representatives serve as employee representatives. It is clear that worker representation and work councils which are important in terms of workers to participate in management should be recognized in our legislation in line with the EU's above-mentioned directives, opinion of work councils on many issues should be received, it should be ensured that the work councils establish cooperation and dialogue between workers at the workplace and the employer. As a matter of fact, In the ILO Convention No. 135, worker representatives and trade union representatives were organized separately.

In this regard, it is not enough that only trade union representative is included in the legislation of our country. In addition, we believe that free choice of the worker's representatives separately by the workers should be provided, that work councils created in this way should be granted the right to participate in the management, that the right to participate in management without the establishment of work councils should be provided to the worker representatives in the workplaces with workers under a certain number. While such regulation are made, the details of the Convention No. 135 should be taken into consideration and it should be paid attention that the rights and authorities granted to worker representative should not overshadow the trade union representative, so that the collective union freedom should also be protected. As such, it is clear that, pursuant to both the EU Directives and ILO Convention No. 135, effective protection should be provided to the workers representatives and trade union representatives. While the Article 24 of Law No. 6356 provides effective protection for trade union representatives, it is clear that similar effective protection is not provided in terms of Law No. 4688. The fact that trade union's workplace representatives and workplace trade union representatives should not experience discrimination was regulated in Article 18 of the Law No. 4688, but no special sanction or complaint procedure to be applied in this situation was not included. For this reason, the representatives in the public sector do not have any right other than the right to sue for cancellation and full remedy action that other civil servants and public officials have. As these individuals are more likely to be exposed to discrimination, a special sanction procedure should be introduced and protection against discrimination should be ensured.

In this way, after the evaluations about the general and most important issues, the criticism and suggestions made by ILO and EU between the years of 2013-2018 as well as amendments that should be made in our country's legislation are given by headings in the report. The criticism before 2013 is included in the report in a collective way and only in terms of the ones that still no amendment is introduced in return.

## ANALYSIS OF LEGISLATIVE GAPS AND RECOMMENDED AMENDMENTS FOR BETTER COMPLIANCE WITH ILO AND EU STANDARDS ON SOCIAL DIALOGUE, FREEDOM OF ASSOCIATION AND RIGHT TO COLLECTIVE BARGAINING\*

### IMPROVING SOCIAL DIALOGUE

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#### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- Economic and Social Council has been inactive since 2009. Also, the Tripartite Consultative Committee only met once in 2017 (**EU PROGRESS REPORT 2018**).
- Economic and Social Council has been inactive since 2009 (**EU PROGRESS REPORT 2016**).
- Pursuant to ILO Convention No. 144, while legal amendments are made in the country, it is important to ensure that the social partners agree on them (**ILO HIGH MISSION MARCH 2010**).

#### B. LEGISLATION IN OUR COUNTRY

- All of the Law No. 4641

#### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- With the amendments made in Law No. 4641 in July 2018, it was regulated that the members of the Economic and Social Council will be selected by the executive body and the working method will be determined by the same method. We believe that these provisions are contrary to the social parties' autonomy and social dialogue standards. We believe that who the members of the Economic and Social Council will be should be regulated by law as it is before July 2018 and that the members should be formed in accordance with the social dialogue principles of the members in a way that represents the social parties the most. Similarly, it should be ensured that Economic and Social Council met at specific and frequent intervals.
- The Tripartite Consultative Committee held its meeting in October 2018. However, it is believed that the Committee should hold meetings at certain intervals to perform its duties effectively and to contribute to social dialogue.
- As in Article 1 of the French Labour Law, also in our country, it may be arranged that it should be given priority for the social partners to achieve consensus regarding the content of the change in matters concerning both individual and collective labour relations by inserting an opening clause into the law. In terms of this consensus, without seeking for the necessity of exceeding a specific threshold, it can be ensured that the sectors with little organization have a voice on matters that concern them by bringing in a regulation about the fact that workers' and employers' unions and confederations in every sector with the most members should be consulted.

\* The proposed amendments in this report do not reflect the views of the ILO or the Ministry of Family, Labour and Social Services or any other social partner, and but reflect a merely academic perspective

## DOUBLE-THRESHOLD REQUIREMENT FOR COLLECTIVE BARGAINING

### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- The double-threshold practice for the authorisation to conclude collective labour agreement and the collective labour agreement signed by the unauthorised trade union to be deemed invalid is contrary to ILO Convention No. 98. The reason why the number of workers covered by collective labour agreement is very low in Turkey is sector threshold of 1%. Therefore, the threshold should be removed. Furthermore, it was noted that in the workplaces where the workplace threshold cannot be provided, all organized trade unions should be at least granted the authorisation to conclude collective labour agreement either alone or jointly for their members and enterprise threshold of 40% should be removed since it is high. In the event that enterprise threshold of 40% is not removed, all organized trade unions should be at least granted the authorisation to conclude collective labour agreement either alone or jointly for their members in the workplaces where the majority is not reached; in the unlikely event that the 40% operating threshold is provided by the two trade unions, both trade unions should be at least granted the authorisation to conclude collective labour agreement either alone or jointly for their members. Otherwise, in our country where the number of workers within the scope of collective bargaining is very low, it is not possible to determine the working conditions through the free and voluntary collective bargaining process targeted at the ILO Convention No. 98 and the employees cannot reach the right of collective bargaining and collective labour agreement (**ILO COMMITTEE OF EXPERTS 2018**).
- The double-threshold practice should be abolished in order to obtain authorisation for collective labour agreement at work and enterprise level (**EU PROGRESS REPORT 2018**).
- It is stated that the double-threshold practice laid down in Article 41 of Law No. 6356 should be reviewed and that threshold should be reduced. In this way, the unionization and the rate of workers covered by the collective labour agreement will be increased (**ILO COMMITTEE OF EXPERTS 2016**).
- Double-threshold practice is against EU standards and ILO norms (**EU PROGRESS REPORT 2016-2015**). The main reason for the low percentage of workers in the collective labour agreement in the private sector is the double-threshold practice (**EU PROGRESS REPORT 2015**).
- It was noted that the double-threshold laid down in Article 41 of Law No. 6356 creates difficulties in terms of obtaining authorisation to conclude collective labour agreement and in this way it reduces the number of workers under collective labour agreement, that the 1% sector threshold is high considering the unionization rate in the country, also that it should also be ensured that a union that provides a majority in the workplace should be entitled to collective bargaining in terms of that workplace even if it is not organized at the sector level, that the organization in the sector should not affect the authorisation for collective bargaining in the workplace and that the government is expected to reduce the 1% sector threshold by taking the opinions of the social partners.
- In case there is not any trade unions having the required competence in the workplace pursuant to Articles 42(3) and 45 of Law No. 6356, which trade union can negotiate collectively and conclude collective labour agreements should be regulated by law and in this case organized other unions in the workplace should be authorized (**ILO COMMITTEE OF EXPERTS REPORT 2014**).
- The coverage of collective labour agreements is still low. The practice of double-threshold is the main reason for this and even fixing the sector threshold to 1% is not sufficient; it has been stated that the threshold should be removed; sector threshold should be abolished (**EU PROGRESS REPORT 2014**).

- 50% + 1 workplace threshold should be reduced; in this case the new threshold can be set as 30% or 1/3. In the event that the workplace threshold is not provided, organized trade unions in the workplace should be granted the authorisation to conclude collective labour agreement. Reducing the workplace threshold will have a positive impact on unionization and social dialogue (**ILO COMMITTEE OF EXPERTS 2005-2012**). (**EU PROGRESS REPORTS 2009, 2010, 2012**).
- The threshold requirement of 50% + 1 in a workplace is contrary to ILO Conventions No. 87 and 98 (**ILO HIGH MISSION MARCH 2010**).

## **B. LEGISLATION IN OUR COUNTRY**

- Article 41 of Law No. 6356

## **C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE**

- The workplace threshold of 50% + 1 in Article 41(1) of Law No. 6356 makes it difficult to obtain authorisation to conclude collective labour agreement in our country, where the rate of unionization is low. Therefore, we believe that it should be a 30% threshold instead of 50% + 1 threshold and that all organized trade unions in the workplaces should be granted a common authority or an authority for each of them to conclude collective labour agreement on behalf of their members for cases where the 30% threshold cannot be provided. However, if more than one union exceeds 30% threshold, it can be prevented that more than one union obtain the authority by regulating the fact that the authority will be given to the union with the most members. However, signing more than one collective bargaining agreement in the workplace can be allowed by preferring the method of giving authority to every union that exceeds 30%. In this way, in our country where the rate of unionization is low, the authorisation for collective labour agreement may even exist in the workplaces with very little organization. This result will also increase the rate of unionization. As such, given the low rate of unionization in our country, trade unions should have the opportunity to jointly sign a single collective labour agreement with the employer as well as granting each trade union the authorisation to conclude collective labour agreement for its members; it should be regulated that the representation in the trade union side will be proportional to the number of members in the process of collective bargaining to be driven in this way. With this method, it will be ensured that the unions with few members are included in the collective bargaining process with the employer by joining forces. However, it should not make joint action obligatory, only such an “opportunity” should be given to labour unions. This is the case because, trade unions’ right to conclude collective labour agreement only for its members should be protected if there is a conflict of interests between them. It is considered that such amendments will comply with the spirit of ILO Conventions No. 87 and 98.

# **THE RIGHT TO UNIONISATION OF PUBLIC SERVANTS**

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## **A. ILO AND EU CRITICISM AND RECOMMENDATIONS**

- Not granting public servants working at penal institutions the right to establish and join trade unions constitute a breach of ILO Convention No. 98 (**ILO COMMITTEE OF EXPERTS 2018**).
- Pursuant to Article 2 of Convention No. 87, all employees in the private and public sector should be granted the right to establish and join trade unions; senior public servants and administrators, judges and public prosecutors



and prison officers should be granted the right to establish and to join trade unions by amending Law No. 4688.

- Pursuant to Convention No. 98, it was reviewed whether the right to unionisation is granted to prison officers. In this regard, the Government stated that prison officers benefit from the collective agreement signed in the public sector.
- The right to unionisation and collective bargaining would not be a matter for police and armed forces, as well as senior government executives who develop policy in state government and those carrying out undercover assignment in terms of Conventions No. 98 and 151, and these rights should be granted to all other public servants **(ILO COMMITTEE OF EXPERTS 2016)**.
- Pursuant to Convention No. 87, the prohibition to association for senior executives, judges and prosecutors and prison officers in Article 15 of Law No. 4688 should be abolished. However, it was stipulated in the Convention No. 151 that high-level state officials who take part in the state government and who are policy makers, may be prevented the right to establish and join trade unions. However, the Convention No. 151 did not expand the exception concerning restrictions on freedom of association in terms of the armed forces and the police, which was brought by the Convention No. 87, therefore the two Conventions should be interpreted in harmony. Therefore, the fact that right to establish and join trade unions of high-level state officials can be restricted is allowed by the Convention No. 151; but it should not be forgotten that these persons still have the right to association in another way other than union in order to protect their professional interests **(ILO COMMITTEE OF EXPERTS 2015)**.
- Failure to grant right to unionisation of prison officers is qualified as a breach of the Convention 98.
- In order for the realization of the right to free and voluntary collective bargaining in the public sector, organization should also be high, and right to organize should be granted to public servants other than policymakers **(ILO COMMITTEE OF EXPERTS 2014)**.
- Turkish legislation on the right to organize needs to be harmonized with European standards **(EU PROGRESS REPORT 2014)**.

## B. LEGISLATION IN OUR COUNTRY

- Article 15 of Law No. 4688

## C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- The fact that prison officers can benefit from the public collective labour agreement should not be the justification of the prevention of the right to unionisation. Therefore, Article 15 of Law No. 4688 should be amended in this direction. Article 15 of Law No. 4688 should be amended not only for the penal institution staff, but also in terms of judges and prosecutors (Committee on Freedom of Association-CFA-Case No. 2892), the central supervision staff of public institutions and organizations, rectors of the university and the higher technology institutes, deans of faculties, principles of institutes and junior colleges and their assistants, senior executives who do not perform policy making duties in state government, such as head of departments and legal consultants and right to establish and join trade unions should be also granted to the above-mentioned employees. This is the case because it was stipulated that the right to establish and join trade unions could only be restricted in terms of senior government executives who develop policy in state government, those carrying out undercover assignment, armed forces and police in ILO Conventions No. 87, 98, 151 and 154. However, as stipulated in the ILO Convention No. 151, since the right to establish and join trade unions of National Intelligence Organisation employees carrying out undercover assignment and of senior government executives who develop policy in state government such as ministers can

be restricted, the fact that these persons are within the scope of Article 15 of Law No. 4688 does not constitute a breach of ILO norms. In our country's legislation, there is no obstacle to establishing an association or organizing under a different name other than a union. For these reasons, it is considered that only the amendments mentioned in Article 15 of Law no. 4688 should be made.

## RIGHT TO STRIKE OF PUBLIC SERVANTS

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- The lack of a right to strike for public servants is contrary to ILO norms and European standards (**EU PROGRESS REPORT 2018**).
- Pursuant to Convention No. 151, the mandatory arbitration is the way to be applied only in exceptional cases, where collective bargaining cannot be reached (**ILO COMMITTEE OF EXPERTS 2016**).
- Although the ECtHR ruled that public employees should enjoy their right to strike; the ECtHR and the Constitutional Court ruled that public servants should enjoy their right to collective action in accordance with ILO conventions, this ruling has not been followed up yet (**EU PROGRESS REPORT 2015**).
- The fact that the public servants do not have the right to strike should be ended (**EU PROGRESS REPORT 2014**).
- The failure to grant the right to strike to public personnel and stipulating mandatory arbitration in Articles 33 and 34 of Law No. 4688 constitutes a breach of ILO Convention No. 87 (**ILO COMMITTEE OF EXPERTS 2013**).
- The right to strike of public servants should be recognised by law; and necessary Constitutional amendments should be made accordingly (**ILO HIGH MISSION 2010**).
- The prohibition to strike should be provided for the cases that endanger public life, personal security and public health (**ILO HIGH MISSION 2008**) (**ILO COMMITTEE OF EXPERTS 2003-2011**).

### B. LEGISLATION IN OUR COUNTRY

- Articles 53 and 54 of Constitution
- Articles 33 and 34 of Law No. 4688

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- The ILO Committee of Experts and Committee on Freedom of Association criticize the general prohibition to strike in the public sector and accept that only those who use public power on behalf of the state, such as judges and prosecutors, customs officers or those who carry out activities that may endanger the public life, personal security, the health of a part of or the entire population can be prohibited from striking. For this reason, both the right to strike in Article 54 of the Constitution should be granted to civil servants and other public servants, and who does not have the right to strike should be clearly defined in Law 4688. Apart from them, it is possible that only some persons who carry out minimum (essential) services are subject to a strike ban. Therefore, with the amendments to be made to Law No. 4688, especially Articles 53 and 54 of the Constitution, the right to collective action, including strike, should be granted to civil servants and public servants in accordance with EU standards and ILO norms. The



prohibition to strike and mandatory arbitration should be provided in very exceptional cases- in terms of those who use public power on behalf of the state and those who have the risk to endanger the public life, personal security, the public health in part or at national level if they go on strike. Providing general prohibition to strike may occur in very extraordinary circumstances such as natural disasters or putting down a coup. Therefore, hospitals, electricity services, water supply services, telephone services, air traffic control services, fire brigades and prisons are seen as the sectors that the prohibition to strike can be imposed.

- Although the Constitutional Court considered especially the one-day work stoppage of civil servants as compliant with the ILO Conventions No. 87, 98 and 151 and the case law of ECtHR, no legal regulation on the recognition of the right to strike and collective action to civil servants and public servants is still made in our country. It should first be stated that the amendments to Articles 53 and 54 of the Constitution should be made.
- In addition, the ILO Supervisory bodies state that services that do not fall within the scope of the prohibition to strike but that will prevent the basic needs of the individuals in the society to be met in case they stop completely are minimum (essential) and that in terms of these services, rather than the complete prohibition of the strike, only prohibition of the strike with the objective of ensuring the continuity of the minimum mandatory part may be imposed. Article 65 of Law No. 6356 also provides social partners with this opportunity. A similar arrangement should be made in accordance with Law No. 4688.

## THE RIGHT TO FREE AND VOLUNTARY COLLECTIVE BARGAINING AND TO COLLECTIVE BARGAINING OF PUBLIC SERVANTS

### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- Pursuant to Articles 4 and 6 of ILO Convention No. 98, collective bargaining issues should not be limited only to the social and economic rights of public servants. All working conditions such as working time, promotion system as well as disciplinary sanctions should be subject to collective bargaining also for public servants. While the Convention is compatible with systems requiring TGNA approval of certain labour conditions or financial clauses of collective agreements accepted as such, all public servants, except those in the top management of the State, should have the right to determine their conditions of employment by free and voluntary collective bargaining. The regulation of the conditions, rights and obligations to which they would be subject is incompatible with the ILO Convention No. 98; therefore, necessary constitutional amendments should be also made in this regard.
- Since the fact that Public Servants' Unions Delegation represents the employee's party of the collective agreement signed for public employees is regulated by law, at least one trade union representing each service branch is prevented from bargaining with the government. Also, the fact that general and branch specific sections negotiated and finalised simultaneously and in a one-month period suppresses the collective bargaining process; therefore, more flexible bargaining should be provided. In the collective bargaining process, general and branch specific sections should be negotiated in separate sessions. The Committee notes that authorized unions in the branch specific sections should be able to give proposals for general sections in collective agreements. In addition, each branch specific section, especially the service sector and technical sectors, should be negotiated in separate sessions. It is noted that a complete right to free and voluntary collective bargaining can be mentioned for public servants in the event that these happen.
- The fact that only the representative of the majority confederation is entitled to sign the general part of the collective agreement and that only this confederation has the authority to apply to the Public Employees' Arbitration Board is criticized.

- The fact that Public Employees' Arbitration Board is designated predominately by the employers and the State creates doubts about the impartiality and independence of this body. The fact that the selection of other members except the union representatives by the President since 2018 is criticized by the ILO.
- It is stated that bargaining directly with the mayor or governor prevents the effective use of the collective bargaining right in the local governments. Employees working at the local governments should be allowed to determine their working conditions and social and economic rights through collective labour agreements applied at their specific, regional level and reached as a result of mutual bargaining and agreement with mayors or governors, who are their own employer. The fact that these persons also benefit from the general collective agreement is contrary to ILO Convention No. 98 (**ILO COMMITTEE OF EXPERTS 2018**).
- Gaps in the right to collective bargaining and strike could not stop being a problem (**EU PROGRESS REPORT 2014**).
- The right to collective bargaining and to strike of public servants should be recognised by law; and necessary Constitutional amendments should be made accordingly (**ILO HIGH MISSION 2010**).

## **B. LEGISLATION IN OUR COUNTRY**

- Articles 53 and 54 of Constitution
- Articles 28-34 of Law No. 4688

## **C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE**

- It is considered that public servants and civil servants should be granted not only the right to free collective bargaining but also the right to strike by amending Articles 53 and 54 of the Constitution. This is the case because, the right to collective bargaining regulated under Article 53 of the Constitution does not have the characteristics of an agreement based on free collective bargaining; this issue constitutes a breach of ILO Conventions No. 87, 98 and 151. As a matter of fact, the collective agreement signed for public servants is criticized by the ILO Committee of Experts in terms of both content and procedure.
- For this reason, in Articles 53 and 54 of the Constitution, and accordingly, in Articles 28 et seq. and 33 and 34 Law No. 4688, amendments should be made to allow for all working conditions of civil servants and public servants to be individually regulated by collective agreements by creating an effective and effective negotiation environment, in a way that features of each service branch can be considered and the opportunity that the right to strike can be used during these negotiations should be regulated taking into account the separation of minimum (essential) services.
- Therefore, it is clear that fundamental amendments should be made to Articles 28 et seq. of Law No. 4688 and that Articles 53 and 54 of the Constitution should be also amended so that these can be done. First of all, the opportunity to determine all the working conditions of public servants such as promotion, working time, disciplinary sanctions by collective agreements signed as a result of collective bargaining should be allowed and Article 28 of Law No. 4688 should be amended in this direction. In addition, it is recommended to abandon the method of regulating the working conditions of civil servants and other public servants by law. Therefore, in the amendment to Article 28 of Law No. 4688, it should be noted that other working conditions, such as social and economic rights, can be determined by collective agreements more in favour of civil servants and public servants, thus the opportunity of regulations of law to be minimum requirements, but of more favourable working conditions to be agreed with collective agreements should be given.
- In addition, even the collective bargaining agreement in the public sector is composed of general and specific sections for each sector, although the general section is implemented in each service branch, trade unions does

not allow to have a voice in this section. Similarly, the staff employed in the local governments are not entitled to collective bargaining with the mayor or the governorship or the district governorship. It is therefore considered that the procedure laid down in Articles 28 et seq. in Law No. 4688 needs to be completely amended. It is possible to conclude a general collective agreement in order for uniform and minimum working conditions in the public sector at national level to be ensured. However, the requirement for this agreement to be the only collective agreement in terms of the public sector should be abolished, in addition to this single agreement, the possibility for employees working at local administrations and in every service branch to conclude collective agreement regulating special conditions for such service branch should be provided. In the preparation of the general part of the collective agreement to be applied in the whole public sector at general and national level, it should be ensured that the union with the most members in each service branch have a voice in behalf of employees in proportion to their number of members, the authority to sign and to apply to the Public Servants Arbitration Board on this regard should not be only belong to the representative of the majority confederation. In this way, it will be ensured that the nationwide general agreement applicable to all public servants will include provisions that cater the interests of each sector. However, this agreement should not be the only single contractual right for the public sector and the union with the most members in each service branch in the public sector should also have the possibility to conclude collective agreement at the service branch level. In addition to these, civil servants and other public servants working at local governments should also be granted the right to negotiate collectively and to conclude collective agreement with the mayor, governors and district governors who are their own employers.

- In addition to increasing the types and levels of collective agreements in this way, it is considered that the 1-month period provided for signing a collective agreement in the public sector is too short and needs to be amended. For this reason, in Law No. 4688, general collective labour agreement for all sectors at national level and collective agreements to be concluded at every service branch and local government level should be allowed, the parties should be granted the right to apply to the Tripartite Mediation Board or conciliator or mediator in case they desire, but application to them should be based on the free will of the social partners and the mandatory arbitration method should be abandoned.
- Finally, it should be noted that we believe that changes should be made in the direction of eliminating doubts about impartiality and independence in the structure of the Public Servants' Arbitration Committee. It is clear that there should be made a change in the composition of the Public Employees' Arbitration Board and that this change needs to be done in a way to increase the representation and autonomy of the social partners. Therefore, instead of the method of selecting and appointing members by the executive body, ensuring that members to be determined by the social partners themselves, which is laid down in terms of the composition of High Board of Arbitration in Article 54 of Law No. 6356 is of capital importance in terms of compliance with ILO norms. In addition, regulation can be made in a way that the board will convene *"under the presidency of the most senior Presidents, Vice-Presidents of the Court of Cassation, Council of State and Court of Auditors"* instead of *"a member to be selected as the Chairman by the President of the Republic from among the Presidents, Vice-Presidents, Deputy Presidents or Heads of Department of the Court of Cassation, Council of State and Court of Auditors"*. In this way, it will be ensured that one of the heads of the high judicial organs will be included in the board, and since the most senior among them will be a direct member, no election difficulty will be experienced, and a board dominated by the executive body brought by the ILO will be abandoned. It can be provided that the faculty member to be chosen from the universities may be selected by the Council of Higher Education instead of the executive body. Even before this selection, it is clear that there may be a procedural provision for the nomination of university rectors and the rectors in the direction of the proposal of the deans of the faculties. In the same way, the amendment to be made on the fact that the faculty member to be proposed by the social partners would be selected by the Council of Higher Education, not by the executive body shall ensure the impartiality and independence of the ILO.

## UNIONIZATION LEVEL

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- With reference to Article 2(1)(ğ) of Law No. 6356, the inclusion of the “sector” base in the definition of trade unions was criticized, and also it was explicitly asked how domestic workers could be organized by notifying that unionization cannot be possible other than specified 20 sectors. The obligation to organize at the sector level is considered to be a breach of the Convention (**ILO COMMITTEE OF EXPERTS 2014**).
- Turkish legislation on the right to organize needs to be harmonized with European standards. Prohibition for public servants to establish trade unions at profession and workplace level is still continuing (**EU PROGRESS REPORT 2014**).
- Obligation to establish trade union based on sector principle should be abolished; unionisation should be allowed based on profession and workplace (**ILO HIGH MISSION 2008**) (**ILO COMMITTEE OF EXPERTS 2010**) (**EU PROGRESS REPORTS 2006, 2009, 2010, 2012**).

### B. LEGISLATION IN OUR COUNTRY

- Article 4 of Law No. 4688
- Articles 2(1)(ğ), 2(4), 8(1)(c), 17, and 19 of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- Firstly, it is considered that the obligation to organize at the sector level in terms of Law No. 6356 should be abolished. For this purpose, the “sector” principle laid down in Articles 2(1)(ğ) and 8(1)(c) of Law No. 6356 should be removed and the right to establish trade unions on the basis of the profession should be granted. In this way in our country, the necessity of specifying the sector in which the persons who work independently, thus who carries out his professional activities in accordance with the agreements laid down in Article 2(4) of Law No. 6356 will carry out activities in the statutes of the unions that they establish would be eliminated. This is the case because the profession-based trade union aims to protect the interests of people working in a single occupation but in more than one sector, not always and mostly the interests of the people operating in a single sector. For this reason, for example, the Actors’ Union of Turkey (Sahne, Perde, Ekran, Mikrofon Oyuncuları Sendikası) was established to operate in the 10th sectors called “*trade, office, education and fine arts*” even though it should be originally based on profession. As a matter of fact, the aim of the union is to protect the professional interests of the players. As such, it was accepted that “Domestic Workers Solidarity Union”, which was accepted as a union by the decision dated 07.07.2014 and numbered 2014/23540 of 9th Civil Chamber of the Court of Cassation after a long legal struggle, was established by women who do manual work at home in the 20th sector “general works” and that it is in accordance with the law; This is the case because, it is accepted that independent workers can also establish trade unions. It should be noted that, the purpose of organization in these cases is to protect and develop the specific interests of those working in a specific profession and not in a specific sector. For this reason, we believe that unionisation on the basis of profession should also be allowed and that it is necessary to remove the obligation to establish unions to operate in the sector and that in this way the compliance with ILO Conventions No. 87 and 98 will be ensured.
- It is considered that Article 4 of Law No. 4688 should be repealed as a whole. As a matter of fact, a similar amendment was made with 2010 constitutional amendments, the ban on establishing trade unions based on

workplace and profession principle and the ban in question was abolished in 2012 with Law No. 6356. In terms of Law No. 6356, the reason for not establishing trade unions based on profession principle, as mentioned above, is that the establishment of trade unions in Articles 2 and 8 of Law No. 6356 is based on the sector principle. Therefore, to carry out Turkey-wide activities and to be established based on service branch principle should be also removed from Article 4 of Law No. 4688 and we believe that the ban on the establishment of trade unions based on profession and workplace principle should be also abandoned.

## DETERMINATION OF BRANCH OF ACTIVITY

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- Branch of activity should be determined by a council and not by the Ministry (**ILO COMMITTEE OF EXPERTS 2005**).

### B. LEGISLATION IN OUR COUNTRY

- Article 4 of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- In Article 4 of Law No. 6356, it is stated that the sectors will be shown in the schedule attached to the law, but the works covered by these sectors will be regulated by the regulation to be issued by the Ministry. The establishment of a Tripartite Council / Mediation Board as both as a decision-maker and as a dispute resolution unit for the issues such as determining the authorized union in our country, conducting mediation activities, determining the sectors and stipulating that the work to be included in the these sectors will be determined by this Council/ Board will contribute to the development of free and voluntary collective bargaining and social dialogue, and will comply with ILO norms and EU standards.

## RIGHT TO UNIONISATION

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- Pursuant to Convention No. 98, it was reviewed whether the right to unionisation is granted to those working at domestic services. In this regard, it has been stated by the Government that those working at domestic services are able to establish trade unions (**ILO COMMITTEE OF EXPERTS 2016**).
- Informal employees, retirees and unemployed as well as many public servants are not entitled to organize (**EU PROGRESS REPORT 2016**).
- All employees and employers should be granted the right to association in accordance with Convention No. 87 (**ILO COMMITTEE OF EXPERTS 2015**).
- Illegal workers are not provided access to trade unions (**EU PROGRESS REPORT 2015**).

- It is stated that the e-government system stipulated in Articles 17 and 19 of Law No. 6356 will adversely affect unionization rights in terms of persons for whom this means is not accessible, so that, for example, the unemployed could not be a member of the union (**ILO COMMITTEE OF EXPERTS 2014**).
- Turkish legislation on the right to organize needs to be harmonized with European standards (**EU PROGRESS REPORT 2014**).
- Unemployed people should be granted the right to establish and join trade unions. (**ILO HIGH LEVEL MISSION 2008**) (**ILO COMMITTEE OF EXPERTS 2011, 2012**).

## **B. LEGISLATION IN OUR COUNTRY**

- Article 82 of Constitution
- Articles 2(2), 2(3), 2(4) and 9(6) of Law No. 6356

## **C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE**

- The world of work is an area in which not only the interests of the employees but also the unemployed should be protected and the unemployed should participate in employment. For this reason, the inclusion of the unemployed in unionisation like the employees is important for the protection of their interests. It should be noted that even the unemployed need unionization as much as the employees. Also, the sole purpose of the unionisation is not to conclude a collective labour agreement. Issues such as participation in employment, development and expansion of employment areas and vocational training are also issues that need to be protected and developed within the scope of unionisation. For these reasons, the absence of an employer to negotiate collectively before them is not a justification for depriving the unemployed of unionization right.
- In addition to unemployed, the right to establish and join trade unions should be granted to freelancers, retirees regardless of an organ, those who perform a certain profession independently on the basis of the profession without taking into account the criterion of dependency on an employer or working in a sector, those who take part in political party institutions or those who participate in the election of mayor or member of parliament and employers' representatives. For this reason, by amending the specified provisions of Constitution, Law No. 2839 and Law No. 6356, in terms of Law No. 6356, the concept of "worker" should be extended and even the concept of "employee" should be used instead of "worker".
- It should be noted that to be a candidate for member of parliament or mayor do not affect the union membership or its duties performed within the union or organ membership.
- As such, we believe that considering persons who are in the position of employer's representatives who manages the whole enterprise as employers and the fact that they are obliged to be a member of the employers' union should be abandoned by amending Article 2(2) of Law No. 6356. the existence of trade unions established by employers' representatives, which are also called cadre unions in France and Germany, should be allowed by law in order to prevent practice of keeping "*personnel out-of-scope*" who are employer's representatives except the highest level, which is available in our country, in addition to employer representatives. However, the complementary element of this is to allow to establish a trade union on the basis of profession. This is the case employer's representatives and because, personnel keeping out-of-scope are generally persons with different interests from other workers working in the workplace, who belong to a particular occupational group, who are confronted with special problems and conflicts of interest related to this occupational group.
- In order to implement the recommendations in this part, the e-government system will need to be amended in accordance with the legislative amendments.



## EFFECTIVE PROTECTION AGAINST ANTI-UNION DISCRIMINATION

### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- The failure to ensure an effective protection against anti-union discrimination is contrary to ILO Convention No. 98 (ILO 98 Articles 1 and 3).

For effective protection:

- Presence of protective provisions in the legislation,
- Presence of procedures providing dissuasive, rapid, simple and cost-effective means of complaints of anti-union discrimination,
- Presence of preventive or corrective mechanisms,
- Effective and deterrent sanctions are required (**ILO COMMITTEE OF EXPERTS 2018**).
- The Committee stated that, especially in the public sector, the workplace and duties of the representatives of the trade union were changed, that they were subjected to disciplinary proceedings and sanctions, that they were experienced suspension or dismissal from the post and that the representatives were deprived of many facilities and that it did not receive a response from the Government (**ILO COMMITTEE OF EXPERTS 2017**).
- Pursuant to ILO Convention No. 87, individual and collective union freedom should be fully ensured, trade union activities and those engaged in such activities must be able to exercise trade union rights and freedoms in a free environment without pressure (**ILO COMMITTEE OF EXPERTS 2016**).
- In order for anti-union discrimination to be prevented as stipulated in Convention No. 98, it is stated that data on trade union discrimination in private and public sector should be collected and statistics should be kept (**ILO COMMITTEE OF EXPERTS 2016**).
- No effective protection against anti-union discrimination is provided (**EU PROGRESS REPORT 2016**).
- Within the scope of the Article 25 of Law No.6356, the inclusion of workers who are out of job security is a positive development. Unlawful dismissals of trade union members and long-lasting trials discourage workers from joining trade unions (**EU PROGRESS REPORT 2015**).
- It was noted that no effective protection against anti-union discrimination would be provided without keeping statistics on the determination of anti-union discrimination and without the establishment of a database on this issue. According to the Committee, although the government stated that a work inspection was carried out, the failure to keep records on trade union discrimination as a result of inspection prevents the effective implementation of ILO norms (**ILO COMMITTEE OF EXPERTS 2014**).
- Lack of and uncertain protection for union members against dismissals, and gaps in the right to collective bargaining and strike could not stop being a problem (**EU PROGRESS REPORT 2014**).
- It is stated that statistics should be kept, and a database should be established on anti-union discrimination in order to comply with the Convention No. 98 (**ILO COMMITTEE OF EXPERTS 2013**).
- In the decision dated 04.08.2011 taken at the review of the Case No. 2892 which is still ongoing at ILO Committee on Freedom of Association- CFA, the change of station of Yargı-Sen executives was considered to be contrary to the ILO norms and as anti-union discrimination, it was noted that no effective protection in this matter was provided in Law No. 4688. In the decision, it was emphasized anti-union discrimination ban should be introduced in term of not only dismissal but also not promoting, task and workplace change, practice of downgrade and any and all acts and actions that are harmful to the public servant such as those (**ILO CFA 04.08.2011**).

## B. LEGISLATION IN OUR COUNTRY

- Article 18 of Law No. 4688
- Articles 25 and 78 of Law No. 6356
- Law No. 6701

## C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- Article 18 of Law No. 4688 prohibited anti-union discrimination; but could not provide an effective protection against it. Firstly, the fact that anti-union discrimination could not be practised in recruitment, in the application of working conditions (including change of duty and workplace, giving disciplinary action) and in dismissal this should be regulated clearly and in more detail, in case of breach of these, those experienced discrimination should be granted to sue for damages amounted to at least two-year gross salary by indicating that the compensation will be recourse to the public servant carrying out such discrimination and even enabling the opportunity to file a case directly against the relevant public servant. It should be noted that, we believe that in order to be deterrent, even the said compensation amount should be arranged in such a way that it is amounted to at least two-year salary and that a similar amendment should be made in Article 25 of Law No. 6356.
- Also, it is considered that the means of administrative complaint which could be invoked directly and rapidly by those public servants experienced anti-union discrimination and which would lead to the implementation of effective and dissuasive fines should be included in our legislation. As this means may be a supervisory function to be established within the Ministry to be applied in Law No. 4688, this deficiency also present in the private sector can also be realized as direct application to the Provincial Directorate of ISKUR or providing an administrative fine of high amount which will be imposed in the event of anti-union discrimination. Instead of applying to separate units in separate laws as such, all employees can be provided with the application to Turkish Human Rights and Equality Institution pursuant to Law No. 6701 in the event that they are experienced anti-union discrimination. The inclusion of anti-union discrimination under Law No. 6701 will lead to providing opportunities of rapid, simple and cost-effective means and deterrent sanctions requested by ILO. Since the only regulation available in Law No. 4688 is Article 18, both the legal sanction (compensation) and administrative fine sanction, which is administrative sanction, should be explicitly stipulated in this law and the application procedure for the implementation of the administrative fine should be arranged in a simple, cost-effective and rapid way.
- However, in Article 25 of Law No. 6356, union compensation that workers can receive in the event of anti-union discrimination is specifically regulated. For this reason, the deficiency in terms of Law No. 6356 is the regulation on cost-effective and simple means of administrative complaint to be applied in the event of anti-union discrimination and rapidly finalising this complaint and stipulating deterrent administrative sanctions. As explained above, in terms of Law No. 6356, it is possible to achieve this result through the delivery of worker's complaints to be brought to Provincial Directorate of ISKUR to the inspection authorities or the applications to the district governorship or governorships within the framework of Law No. 6701. However, in the event of choice of one of them, it is clear that there is a need for legal arrangements. This is the case because, imposing unlawful administrative fines will not comply with the law. Also, increasing the compensation amounted to at least one-year salary to at least two-year salary is of capital importance in terms of deterrence.
- While there is no known EU country where the statistics of anti-union discrimination are continuously kept on the whole country basis, it is possible to create a database by using both administrative and legal sources and by conducting work-life quality surveys as in Finland.



## MEDIATION

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- During collective conflict of interests, it was noted that the fact that a mediator is appointed by the competent authority in case the parties cannot agree on one is contrary to free and voluntary collective bargaining principle and that this is the case because, the social partners had no right to change the appointed mediator (**ILO COMMITTEE OF EXPERTS 2018**).
- Government should not interfere with the internal functioning and public activities of trade unions so that they can exercise their trade union rights in accordance with Convention No. 87 (**ILO HIGH MISSION 2010**).

### B. LEGISLATION IN OUR COUNTRY

- Article 50 of Law No. 6356
- Article 60(7) of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- Pursuant to Article 50 of Law No. 6356, mediation is a mandatory step to be applied before the strike or mandatory arbitration. While the regulation as a mandatory method of mediation as the last peaceful solution before the strike is not contrary to the ILO norms, the fact that a mediator is appointed by the competent authority in case the social partners do not or cannot agree on one is accepted as contrary to free and voluntary collective bargaining principle. Indeed, it is clear that the mediator, who will assist the parties to reach an agreement, should be freely determined by the parties, provided that the mediator has the qualifications specified in the law. Therefore, Article 50 of Law No. 6356 should be amended as such, and amendment should be made in a way that the parties agree on one or three mediators by abandoning the official list method and they will inform the competent party about the person(s) they choose or if established by law, as proposed by the ILO, inform the tripartite commission. In our opinion, instead of mediation, conciliation and in this way, to adopt a mechanism that would at least offer a settlement to the parties would be more functional. As such, the application to the mediator should be removed from being a mandatory phase and should be left to the parties' will.
- Similarly, in addition to mediation, another peaceful and discretionary method of settlement should be arranged as application to a tripartite mediation board and social parties should be granted the right to apply to the Tripartite Mediation Board that has at least the right to make an offer even if it is not binding, instead of a mediator who does not even have the right to make any offers. However, this process should be also voluntary and as the social partners can freely apply to the special arbitrator, they should be able to use the right to strike or to collective action by going through neither mediation nor settlement phase or should be able to continue collective bargaining without resorting to any of them.
- The fact that Government and the public authorities should not interfere with the internal functioning of unions and their activities, especially with the process of collective bargaining is a requirement of both ILO Convention No. 98 and Convention No. 151. The same issue is also obligatory in terms of Convention No. 154 which is not yet approved in our country. The provision that The Minister of Family, Labour and Social Services may act as a mediator or designate someone as a mediator for the settlement of a dispute about which a decision to call a lawful strike has been taken in Article 60(7) of Law No. 6356 constitutes a clear breach of the ILO Convention No. 98 and 151.

The Minister's interference with the collective bargaining process in this way is contrary to the free and voluntary collective bargaining principle. It should be noted that even the failure to sign any agreement as a result of collective bargaining may be the result of being voluntary and free and that public authorities should even respect and not interfere with the common will to not sign the agreement (non-agreement). Forcing the social partners to reach an agreement reluctantly is contrary to the purpose of the ILO Conventions No. 98 and 151. In addition, if the agreement is to be reached, this must be carried out with the help of a mediator/conciliator who can be freely selected by the parties or an arbitrator who can be freely applied by them. For these reasons, the removal of the extraordinary mediation principle in Article 60(7) of Law No. 6356 from our legislation will be in place in order to comply with ILO norms.

## **RIGHT TO COLLECTIVE ACTION**

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### **A. ILO AND EU CRITICISM AND RECOMMENDATIONS**

- The Committee noted that the abolition of the 2010 constitutional amendments related to the prohibition of the resistance such as politically motivated strikes, solidarity strikes, occupation of work premises, go-slows and yield reduction cannot be made is a positive step in terms of compliance with the ILO norms but whether there is a practical application in contrast to these should be further investigated (**ILO COMMITTEE OF EXPERTS 2015**).
- Use of excessive force persisted against routine trade union activities such as strikes, press announcements, protests and demonstrations, even if non-violent in nature (**EU PROGRESS REPORT 2014**).

### **B. LEGISLATION IN OUR COUNTRY**

- Articles 58 et seq., 62 and 63 of Law No. 6356, the right to collective action
- Articles 53 and 54 of Constitution

### **C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE**

- Although the regulations regarding the fact that the resistance such as politically motivated strikes, solidarity strikes, occupation of work premises and go-slows are unlawful were abolished with 2010 constitutional amendments, the fact that strike laid down in Articles 58 et seq. of Law No. 6356 are subject to very strict procedural rules. As a result of the ILO Conventions No. 87 and 98 and the case-law of ECtHR on the right to collective action, which are justifiably taken into account by the judicial bodies of our country, the right to collective action is granted to all employees, taking into account international standards and the limits of this right are shaped in line with the case law of the ECtHR. However, in our opinion, we believe that the strict procedural rules concerning strike laid down in Articles 58 et seq. of Law No. 6356 should be abandoned now and any act used for the right to collective action, which is not just for political purposes and which is peaceful, commensurate and appropriate to the principles of last resort should be considered as lawful and this should be recognized as the fundamental right of the employees.

## POSTPONEMENT OF STRIKE

### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- The authority of the Council of Ministers (as of 2018 the President of the Republic) to postpone the strike was turned into a de facto strike ban; by the possibility of using this means to be based on grounds of the continuity of economic stability and continuation of service, postponements of strike and de facto ban of strikes become widely applied **(EU PROGRESS REPORT 2018)**.
- Pursuant to Article 3 of Convention No. 87, the activities of worker's organizations should be kept away from interference of the State. In this sense, it is clear that this issue should be taken into consideration after the suspension of the strikes of the Kristal-Is Union and its recognition as a violation of rights by the Constitutional Court **(ILO COMMITTEE OF EXPERTS 2016)**.
- The Committee also noted with satisfaction that Constitutional Court was removed the prohibition to strike at the banking sector and urban public transport sector in 2014 but whether there is a practical application in contrast to these should be further investigated **(ILO COMMITTEE OF EXPERTS 2015)**.
- The postponement of strikes in non-essential services and mandatory arbitration seriously impaired the right to strike **(EU PROGRESS REPORT 2015)**.
- Reasons such as "national security" and "public health" are used disproportionately to prevent strikes **(EU PROGRESS REPORT 2014)**.
- Government should not interfere with the internal functioning and public activities of trade unions so that they can exercise their trade union rights in accordance with Convention No. 87 **(ILO HIGH MISSION 2010)**.
- The rule of mandatory arbitration in the event of a postponement of strike must be abandoned. The postponement of strike should be decided by the Ministry and not by an impartial organ. **(ILO HIGH LEVEL MISSION 2008) (ILO COMMITTEE OF EXPERTS 2010-2012) (EU PROGRESS REPORTS 2009-2010)**.
- The prohibition to strike should be provided for the cases that endanger public life, personal security and public health. Therefore, the prohibition to strike and mandatory arbitration should be provided in very exceptional cases- in terms of those who use public power on behalf of the state and those who have the risk to endanger the public life, personal security, the public health in part or at national level if they go on strike. Providing general prohibition to strike may occur in very extraordinary circumstances such as natural disasters or putting down a coup **(ILO HIGH MISSION 2008) (ILO COMMITTEE OF EXPERTS 2003-2011)**.

### B. LEGISLATION IN OUR COUNTRY

- Article 63 of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- "Postponement of strikes", which is regulated in Article 63 of Law No. 6356, only needs to be implemented in a very limited manner and mandatory arbitration should not be stipulated at the end of the suspension period. It is considered that especially the provision related to the fact that a lawful strike may be suspended "*if it is prejudicial to urban public transportation services of the metropolitan municipalities, or economic or financial stability in banking services*" brought

by Decree-Law No. 678 should be abolished in accordance with the decision of the Constitutional Court dated 22/10/2014 and numbered E. 2013/1 and K. 2014/161. Furthermore, it is also considered that the authorisation to decide on the postponement of strike is given to a tripartite Council/Board/Commission rather than to the executive body and that the area of application should be confined to very narrow and important situations. Also, the result of the postponement of the strike should not be arranged as mandatory arbitration, to continue to strike should be allowed after a period of time and parties should also be granted the right to apply to a conciliator or mediator or to a tripartite commission to be established by law if so desired.

- In addition, making an amendment concerning the fact that Tripartite Council/Board/Commission, which is also stated above as appropriate to be assigned for the issues such as determination of authority and sector and resolution of the collective interest dispute, should decide on the postponement of strike will ensure compliance with ILO norms and EU standards.
- As well as the authority to decide the postponement of the strike, the methods to be applied on the postponement of strike are also important. As included in ILO and EU criticism, the practice of mandatory arbitration which leads to the postponement of strike to turn into the prohibition to strike should be abandoned and in such a case, alternative rights, such as recourse to conciliation or to continue to strike after the period of the postponement of strike.
- The ILO and EU standards on the prohibition to strike and mandatory arbitration and the case-law of the ECtHR are in this direction in terms of both public and private sector. For this reason, prohibition to strike in Article 62 of Law No. 6356 should also comply with these standards. As a matter of fact, even though “banking services” and “urban public transportation services” included in these prohibitions were removed from the prohibitions to strike by the decision of the Constitutional Court in 2014 (these parts of the provision were cancelled), going on strikes in the sectors mentioned are still prevented through the practices of the postponement of strike which turns into prohibition to strike. As a matter of fact, with the Decree-Law No. 678 and Law No. 7071, banking services and urban public transportation services of the metropolitan municipalities are included in the areas where strikes can be postponed. It is clear that this amendment is contrary to the ILO norms and EU standards, as well as the case law of ECtHR. For this reason, the sectors in question should be removed from Article 63 of Law No. 6356.

## LEVEL OF COLLECTIVE LABOUR AGREEMENT

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- Supporting collective bargaining and allowing for collective labour agreements at the regional or national level covering more than one sector in the private sector shall be in accordance with Article 43 of ILO Convention No. 98 (**ILO COMMITTEE OF EXPERTS 2018**).
- The number of workers covered by the collective labour agreement in the private sector is very low (**EU PROGRESS REPORT 2016**).

### B. LEGISLATION IN OUR COUNTRY

- Articles 34 and 35 of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- It is considered that determining the level of collective bargaining as workplace in Law No. 6356 and making it mandatory are the reasons for the low number of workers in the collective labour agreements in our country. This is the case because, in France, in which unionization rate is very low as in our country, concluding collective labour agreement at the sector level and even as covering more than one sector at the occupation level or signing of collective labour agreements for more than one occupation. In the member states of the European Union, it is known that the scope of collective labour agreements in countries with collective labour agreements at the sector level is regardless of the unionization rate in the country. Therefore, collective labour agreements should be allowed to be concluded at sector level and at national or regional level in our country. Since the framework agreement is not designed to be a substitute for the sector collective labour agreement, it is clear that there is still a need for a sector collective labour agreement under the conditions of our country. As such, in addition to sector collective labour agreement, workplace collective labour agreements should still be allowed and the conflict between them should be eliminated by the favourability principle. For this reason, through the amendment made in our Constitution in 2010, even if the prohibition that there shall not be more than one collective labour agreement in a workplace was abolished, the provisions of only giving authorization for a workplace collective labour agreement and giving authorization for concluding a new collective labour agreement before the expiry of the previous agreement (Article 35(4) of Law No. 6356) continue to exist. The opportunity of the workers in a workplace to be covered by collective labour agreements at different levels such as workplace and sector, aimed at such Constitutional amendment should be provided by making legal amendments. For reasons explained, workplace level should be removed from being the mandatory level of collective labour agreement in Article 34 of Law No. 6356, actually, concluding collective labour agreement at sector level should be the principle, and also to sign a collective labour agreement at the workplace level should be allowed on condition that it brings more favourable principles at the workplace level; therefore, the practice of more than one collective labour agreement in a workplace should be allowed.
- As such, the obligation to conclude a single collective labour agreement for the workplaces in the same sector of the same employer should be abolished, and in this case, the level of the collective labour agreement should be left to the free will of the social partners. Furthermore, it will not be already possible to make the enterprise collective labour agreement obligatory by regulating sector collective labour agreement in law as given above and a requirement in this direction would be also eliminated.

## TIME CONSTRAINTS WITHDRAWING THE AUTHORITY OF THE TRADE UNION

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- In Articles 46(2), 47(2), 49(1), 51(1), 60(1) and 63(3) of Law No. 6356, the fact that the authorisation of the labour unions to conclude collective labour agreement may be withdrawn in the event of not performing the specified operations in short time or if certain conditions are realized, which is a breach of free and voluntary collective bargaining principle laid down in ILO Convention No. 98, it should be provided information on whether these provisions are allowed to be used or not, as well as the social partners need to be granted the authorisation to continue collective bargaining where the parties so desire (**ILO COMMITTEE OF EXPERTS 2018**).
- The fact that stipulated times and procedural rules in Articles 46(2), 47(2), 49(1), 51(1), 60(1) and 63(3) of Law No. 6356 lead to the withdrawal of the certificate of competence of the labour union is contrary to the right to free

collective bargaining and hence to Convention No. 98. Indication of the need for social partners to strike after a certain period of time also restricts the right to free collective bargaining. Social partners should be given the right to continue collective bargaining if they so desired (**ILO COMMITTEE OF EXPERTS 2014**).

## **B. LEGISLATION IN OUR COUNTRY**

- Articles 46(2), 47(2), 49(1), 51(1), 58 et seq., 60(1) and 63(3) of Law No. 6356

## **C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE**

- In the response given from the government to these criticisms of the ILO, it is stated that the said periods serve to the signing of the collective labour agreement as soon as possible and also that it has been criticized by the social partners that these periods are even longer. While the regulations on the withdrawal of the certificate of competence of the labour union in Law No. 6356 aim to accelerate the collective bargaining process, the collective bargaining process becomes a series of processes that should be carried out at short intervals, by granting a very short period of time to labour union and the principle of free collective bargaining is therefore dissolving. Therefore, the process should be left to the free will of the parties, the arrangements for the sequence of such processes should be removed in line with ILO criticism.
- As mentioned above, short-term procedural rules in our law should be abolished, by abandoning the regulations on the fact that trade unions should take a strike decision after the mediation process in the event that collective labour agreement cannot be signed within 60 days, social partners should be given the right to select the mediator of their choice in the free and independent collective bargaining process and, in the event that the parties fail to come to an agreement before a mediator, they should be granted the right to go on strike when they so desire but in accordance with the principle of prohibition of surprise strike, provided that the employer is notified before a certain period of time and that it is peaceful and last resort. As such, the process of collective bargaining should not be limited to 60 days and the social partners should be able to move freely and at any time to the stage of applying to the mediator, the conciliator or the arbitrator or of going on strike. In addition, the right to collective action should be allowed to be exercised instead of a strike. Although the right to collective action is recognized by the judicial decisions in our country, the strict requirements on procedure and form of the strike laid down in Articles 58 et seq. of Law No. 6356 should be abolished in our opinion.

# **GETTING DONATIONS FROM EXTERNAL SOURCES**

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## **A. ILO AND EU CRITICISM AND RECOMMENDATIONS**

- Government should not interfere with the internal functioning and public activities of trade unions so that they can exercise their trade union rights in accordance with Convention No. 87 (**ILO HIGH MISSION 2010**).

## **B. LEGISLATION IN OUR COUNTRY**

- Article 24(2) of Law No. 4688
- Article 28(3) of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- In our opinion, if the permission in Article 24(2) of Law No. 4688 is regulated only as notice to the Ministry, it will become more compatible with ILO norms. This is the case because, pursuant to aforementioned regulation, the fact that the trade unions and confederations can accept aid or donations from external sources other than international organizations of which they or the Republic of Turkey are the members is subject to the permission of the President. However, in terms of trade unions subject to Law No. 6356, only the notice to the Ministry is accepted as sufficient (Article 28(3)). In our opinion, it will be in place that the same regulation shall be made in regard to Law No. 4688.

## THE OBLIGATION FOR THE FOUNDERS TO BE INDICATED THEIR RESIDENCE

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- It was stated that the obligation for the founders of trade union and confederation to be indicated their residence in the statute, is contrary to ILO Convention No. 87 (**ILO COMMITTEE OF EXPERTS 2013**).

### B. LEGISLATION IN OUR COUNTRY

- Article 7(1)(d) of Law No. 4688
- Article 8(1)(ç) of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- The obligation for the founders of trade union and confederation to be indicated their residence in the statute should be removed from the text of the law in order to comply with ILO Convention No. 87.

## REMOVAL OF BOARD OF DIRECTORS FROM OFFICE

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### A. ILO AND EU CRITICISM AND RECOMMENDATIONS

- The fact that the application made by the Ministry is considered as sufficient for the board of directors of trade union or confederation to be removed from office by the labour court in Article 10(8) of Law No. 4688 is considered as contrary to ILO Convention No. 87 (**ILO COMMITTEE OF EXPERTS 2013**).

### B. LEGISLATION IN OUR COUNTRY

- Article 10(8) of Law No. 4688
- Article 12(6) of Law No. 6356

### C. AMENDMENTS DEEMED NECESSARY FOR BETTER COMPLIANCE

- The requirement of the application made by the Ministry should be removed from both two articles of law; the right to apply to the court for the removal of the board of directors from office should be granted to those who have legal interest in this process.



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