

THE ISSUE OF FLEXIBILITY UNDER THE NEW TURKISH LABOUR ACT¹

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Özet

İşsizlik, işletmelerin rekabet koşullarına uyum sağlamadaki zorlukları ve kadın istihdamının azlığı gibi faktörler, iş mevzuatımızdaki çalışma sürelerine ve istihdam biçimlerine dair düzenlemelerin sorgulanmasına yol açmıştır. Avrupa modelini gecikerek izleyen yeni İş Kanunumuz, çalışma sürelerinde ve istihdam biçimlerinde önemli farklılıklar getirmiştir. Atipik istihdam biçimleri formüle edilmiş ve çalışma sürelerine esneklik kazandırılmıştır. Bu yazının asıl amacı, esnek çalışmaya dair yeni hukuki düzenlemelerin incelenmesidir. Yeni hukuki düzenlemelerin olumlu veya olumsuz etkilerine dair kesin sonuçlar henüz elde edilebilmiş değildir.

Abstract

Factors such as unemployment, efficient functioning and competitiveness of the undertakings, and the low rate of female labour challenged the logic of existing working-time arrangements and modalities of employment in Turkey. With the belated Turkish Labour Act trying to follow European patterns, there has been a diversification in forms of employment in terms not only of legal status, but also of hours, periods and rates of work. Atypical types of employment were formulated and provisions on working time became a lot more flexible. The primary goal of this essay is to examine the current state of legal developments on flexible work arrangements. However, for the time being, there are no conclusive results whether positive or negative effects are stronger.

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Need for Flexibility in Employment

A philosophy of deregulation of social and labour law was adopted during the late 1970s and early 1980s as a response to increased pressures of global competition on the EEC².

Flexibility in employment was highly advocated in the United Kingdom with the neo-liberal regime by the conservative government under Mrs. Thatcher. This position reflected a neo-liberal ideological commitment to labour market flexibility. This philosophy of protecting employers (particularly small enterprises) from burdensome regulations found allies in other EEC Member States.³ The persistence of an employment crisis led to the development of modalities of flexibility and reorganization of working time. Flexibility was viewed as a means of increasing employment and it was identified as an important part of the EU employment strategy.⁴ Employment guidelines provide that the social partners (management and labour) are invited to negotiate agreements 'to modernize the organization of work, including flexible working arrangements, with the aim of making undertakings productive and competitive and achieving the required balance between flexibility and security'⁵ and that 'the women were able to benefit positively from flexible forms of work organization.'

The new European employment guidelines established by the Council in 2003 with a three-year perspective have set three overarching objectives: full employment; quality and productivity at work and strengthened social cohesion

² The EEC, in addition to its economic role, gradually took on a wide range of responsibilities including social, environmental, and regional policies and it was renamed 'the European Community' (EC) by the Maastricht Treaty (Treaty on European Union - EU) which was signed on 7 February 1992 and became effective on 1 November 1993. The EU consists of three pillars: the EC, common foreign and security policy, and cooperation in justice and home affairs.

³ Hervey (1998), p.19; Yavuz (1995), pp. 21, 39.

⁴ European Employment Strategy involves incorporation of the Social Policy Agreement into the CE Treaty by the Amsterdam Treaty, the Luxembourg process, based on implementation of the coordinated European Employment Strategy, decisions arrived at Lisbon, Nice, and Stockholm European Councils and Council Decisions on guidelines for the employment policies of the Member States.

⁵ European negotiations have resulted in agreements on parental leave, part-time work, fixed-term contracts and telework.

and inclusion.⁶ Three major innovations in the economic and employment processes took place in 2004:

- The integration of the ten new Member States into the established policy framework,
- Incorporation of the policy messages of the Report of the Employment Taskforce, “Jobs, Jobs, Jobs – Creating more employment in Europe,”⁷ in the employment policies,
- Signing of the Treaty establishing a Constitution for Europe on 29 October 2004. The Constitution reaffirms the EU role in relation to employment policies and makes full employment a EU objective (Part I, Title I, Art. 3).

The European Employment Taskforce started its work in April 2003 and reported to the Commission on 26 November 2003. In their Proposal for a Council Decision on guidelines for the employment policies of the Member States,⁸ the Commission and the Council (Employment, Social Policy, Health and Consumer Affairs) integrated the findings of the Taskforce Report. One of the four issues⁹ to which immediate priority should be given by all Member States is “Increasing adaptability of workers and enterprises: Promote flexibility combined with security in the labour market by focusing on improving work organisation and the attractiveness – for employers and employees – of both standard and non-standard labour contracts to avoid the emergence of two-tier labour markets. The concept of job security should be modernised and broadened with a view not only to covering employment protection but also to building on women and men’s ability to remain and progress in work. Maximise job creation and raise productivity by reducing obstacles to setting up new businesses and by promoting better anticipation and management of restructuring.”

⁶ 2003/578/EC: Council decision of 22 July 2003 on guidelines for the employment policies of the Member States (http://www.europa.eu.int/eur-lex/en/search/search_lif.html).

⁷ http://www.europa.eu.int/comm/employment_social/employment_strategy/task_en.htm

⁸ http://europa.eu.int/comm/employment_social/employment_strategy/prop_2004/com_2004_0239_en.pdf

⁹ Increasing adaptability of workers and enterprises; attracting more people to the labour market and making work a real option for all; investing more and more effectively in human capital; and ensuring effective implementation of reforms through better governance constitute the four key areas identified by the Employment Taskforce.

Flexible organization of work in a way which fulfills both the wishes of social partners and competition requirements resulted in time not only with employment promotion but also with reinforcement of the significance of the principle of equal opportunities for men and women. Greater flexibility in working time considerably increased the number of workingwomen in general, and married women with children in particular in industrialized countries. Sex equality has been the central and most highly developed issue of the EC's social policy. Women predominantly carry the burden of having to reconcile family and professional life and statistics clearly show that workingwomen are congregated in flexible, atypical, and deregulated forms of work. Flexible and atypical work models had to be regulated taking into consideration the issue of indirect discrimination¹⁰ as regards sex and the development of atypical types of work facilitated women's penetration onto the workforce.¹¹ But, whether atypical employment decreased gender-based segregation is another important issue of concern. Seeking atypical employment may be a necessity rather than a choice for women.

European policymakers consider the flexibilization of labour as an important instrument to create new jobs and to reduce unemployment and data from industrialized economies indicate that most of the newly created jobs were in the atypical work category.¹² Atypical types of work have always existed but since 1980s there has been a substantial growth in their proportion and persistency. This increase in the destandardisation of the labour force and labour relations in many industrialized countries and the growing needs of national and international trade have affected the general evolution of the Turkish labour relations system.¹³ Some combination and compromise between the existing system and flexibility appeared to be inevitable and of crucial importance.

Turkey, as a country eager to join the European Union, is in the process of enacting pieces of legislation envisaged by the National Program for the Adoption of the Community Acquis.¹⁴ In June 2001, the Ministry of Labour and

¹⁰ The Burden of Proof Directive 97/80 as amended by Directive 98/52/EC provides: Indirect discrimination exists where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex, unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

¹¹ Treu, Tiziano, (in) TISK – ADECCO (2003), p. 25.

¹² Ibid, pp. 24-25; Zeytinoglu (1999), pp. ix, xiv, 1, 99.

¹³ See: MESS (1995) and MESS (1999).

¹⁴ Official Gazettes of 24.3.2001 and 24.7.2003.

Social Security formed a tripartite commission composed of nine university professors, three appointed by the Government, three by the Turkish Confederation of Employers' Association (TISK) and one by each of the three labour confederations (TURK-IS, HAK-IS, and DISK). This technical commission had the task of preparing a new Labour Act. The act proposed in June 2002 constituted a drive towards flexibility in line with the Community Acquis. The Commission has not been content with a laissez-faire attitude and has played a direct role. It provided a degree of protection for atypical employment and looked favourably on the extension and relaxation of certain legal provisions. New provisions on flexibility and atypical types of employment largely drew on Council Directive 93/104/EC, of 23 November 1993, concerning certain aspects of the organization of working time as amended by Directive 2000/34/EC of June 2000 of the European Parliament and of the Council, Council Directive 94/33/EC of June 1994 on the protection of young people at work, Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time working concluded by UNICE, CEEP and the ETUC¹⁵ as amended by Council Directive 98/23/EC of 7 April 1998, and Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. ETUC-UNICE-CEEP framework agreements try to give priority to achieving a better balance between flexibility in working time and security for workers.

There is, in general, a correlation between the trends in working time and the economic cycles. Stagnant economic conditions worsened by the 2001 economic crisis and the consequent heavy unemployment led the authorities consider pronounced changes in working time and modalities of employment. Turkey wanted to increase the employment-intensiveness of growth particularly through a more flexible organization of work. The regulatory environment could not be ignored. A comparison of labour laws and institutions across the OECD in 1999 found that Turkey had no legally regulated flexible modalities of employment and greatly strict employment protection arrangements.¹⁶ Such regulations limiting the flexibility of the labour market made it difficult for the

¹⁵ UNICE (Union of Industrial and Employers' Confederations of Europe), CEEP (European Centre of Enterprises with Public Participation), and the ETUC (European Trade Union Confederation) are the social partners at the European level. The social partners may request jointly that agreements at the European Community level be implemented by a Council decision on a proposal from the Commission.

¹⁶ OECD Employment Outlook 1999, Paris.

firms to react to demand fluctuations. The organization of work needed to be modernized but its regulation proved to be a very delicate issue. Employers were well-disposed towards atypical types of employment since they permit greater flexibility in labour management. Trade unions were hostile to it with the fear that it may lead to a downward pressure on labour standards and on unionisation rates. A balance had to be achieved between two aims: Aim of making companies productive and competitive through improvement of flexitime and flexible forms of employment and the aim of fulfilling the workers' wishes for job security. For this reason, in spite of the fact that a tripartite technical commission was formed, social partners who are closer to social reality and social problems were consulted on the draft proposal laying down possible direction of flexibility and job security. Management and labour gave particular attention to these issues and made a great deal of lobbying during the enactment process. Trade unions' lobbying was successful in the sense that the provisions of the proposed act on subcontracting and atypical types of employment regarded as insecure and precarious were revised to their favour whereas the employers' lobbying was successful in the sense that increased job security was confined to workplaces employing thirty or more workers and the amount of compensation in unfair dismissals was lowered. The new Labour Act, adopted on 22 May 2003, became effective on 10 June 2003.

Here, the provisions of the new Labour Act on flexitime and flexible modalities of employment will be revealed.

Working Time Arrangements

In General

Flexibility that marked the evolution of the industrial relations system in the 1980s in European countries gave rise to individual patterns of working time. Complex and variable forms of working time emerged and working time became less and less certain for workers. New ways of living and working pronounced the gradual ending of the standard working day in the 1990s.¹⁷ The full-time work pattern of a standard working week as the traditional subordinate

¹⁷ K. Hinrichs et al, *Working Time in Transition: the Political Economy of Working Time in Industrialized Nations*, (Philadelphia: Temple University Press, 1991), p. 22.

employment started losing its universal appeal as against the destandardisation of working time.

The Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time (hereafter Working Time Directive - WTD) noting changed demands of new labour patterns went beyond the existing ILO Conventions on the same issue.¹⁸ A key feature of this Directive is the important role envisaged for the social partners not only in implementing the Directive but in setting substantive standards in relation to night work, daily rest breaks, maximum weekly working hours including overtime, and annual holidays.¹⁹ The WTD and the Young Workers Directive were both adopted under Article 118a (new Article 137 TEC). Previously there were a Council Recommendation of 1975 on the principle of the 40-hour week and four weeks' annual paid holiday, and a 1979 Resolution on the adaptation of working time aiming primarily at the reduction in working time for the purposes of job creation. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time repeals the WTD and its amendment. The references made to the repealed Directive shall be construed as references to the new Directive (Art. 27). In this article, references have been made to this new WTD that entered into force on 2 August 2004 (Art. 28). For the time being, there is a Proposal by the Commission for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time.

Article 6 of the WTD provides that although working hours should be regulated by laws, regulations, or administrative provisions or by collective agreements or agreements between the two sides of industry, the average working time for each seven-day period, including overtime, must not exceed 48 hours. The WTD requires compliance over the established reference periods. For example, the average working time must not exceed 48 hours over a reference period of four months. Another example is the weekly rest provision:

¹⁸ The Working Time Directive covered the same territory as at least nine key working time conventions: C 1, Hours of Work (Industry), 1919; C 30, Hours of Work (Commerce and Offices), 1930; C 47, Forty-Hour Week Convention, 1935; C 14, Weekly Rest (Industry) Convention, 1921; C 106, Weekly Rest (Commerce and Offices), 1957; C 89, Night Work (Women) Convention (Revised), 1948 and the Protocol to this Convention of 1990; C 171, Night Work Convention, 1990; C 132, Holidays with Pay Convention (Revised), 1970; and C 155, Occupational Safety and Health Convention, 1981 (Murray (2001), p. 185).

¹⁹ Barnard (2000), p. 414.

Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours (Art. 5) and Member States may stipulate a reference period not exceeding 14 days for the application of the weekly rest provision (Art. 16/1).

According to the WTD, every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period (Art. 3). Although this provision implies a 13-hour working day, the principle of 'humanization of work' would prevent such arrangement.²⁰ There is the right to four weeks' paid annual leave (Art. 7).²¹ Night time means any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5a.m. (Art. 2/3). Normal working hours for night work must not exceed an average of eight hours in any 24-hour period (Art. 8/1).

Reorganization of Working Time

Introduction of Flexitime

In Turkey, it was especially the management circles demanding a greater flexibility in the established rules on working time. Due to the lack of schemes such as flexitime and annualised hours, employers did not have flexibility in deployment of staff and lower labour costs could not be gained by abolishing overtime. On the other hand, the workers could not enjoy individual patterns of working time, i.e. individual derogations. Provisions on working time were rigid. The duration and organization of working time had to be harmonized in accordance with national practices and Turkey's international obligations. The new Labour Act followed the standards set by the WTD and the Young Workers Directive. Differentiation of working time arrangements by the new Turkish Labour Act may change traditional employment patterns by pushing towards flexibility and decentralization.

New rules on organization of working time and modalities of employment necessitated issuance of by-laws. So far, by laws on supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary

²⁰ Ibid, p. 408.

²¹ It is not clear whether public holidays are included (ibid, p. 409).

employment relationship,²² on works in which workers may be utilised for at most 7.5 hours,²³ on shift work,²⁴ on working time, overtime work, utilisation of children and young workers, and working time that cannot be divided into weekly workdays,²⁵ on short-time work,²⁶ on annual leave with pay²⁷ and on private employment agencies²⁸ have been issued.

Working time, as implied by relevant labour provisions, is the period during which the worker performs work at the employer's disposal. The normal weekly working time cannot exceed 45 hours (Art. 63). There is a reference period of two months that can be extended to at most four months through collective labour agreements. In works and workplaces, where due to their nature, daily and weekly work periods as envisaged by Article 63 cannot be applied, the reference period can be extended to at most six months through by-laws (Art. 76).

The maximum number of hours to be worked weekly is 45. This total is to be distributed over the workdays in such a way as not to exceed 11 hours a day. Unless agreed otherwise, 45 hours have to be distributed evenly over workdays. Deviations are possible from an even breakdown of a certain contractual hours of work over an equally contractual number of weekdays (e.g., Monday to Friday). Reference periods allow flexibility: Decreases or increases in regular work are possible for operational reasons but in such a way as to ensure that the average time worked over two or four months is that agreed upon. Use of manpower can now be better adapted to wavering demand and as a result 'unused' working time does not have to be paid. Yet flexitime practices remain sluggish. What is wrong with flexitime? Article 63 of the Labour Act attaches redistribution of normal working time into workdays to the agreement of the parties. Where the labour is unwilling, the employer cannot benefit from flexitime arrangements. The tough standing of trade unions against changes seems to be the major obstacle to implementation of flexitime.

The following periods shall be considered as part of the daily statutory hours of work (Art. 66):

²² Official Gazette, 15.5.2004, No. 25463.

²³ Official Gazette, 15.4.2004, No. 25434.

²⁴ Official Gazette, 7.4.2004, No. 25426.

²⁵ Official Gazette, 6.4.2004, No. 25425.

²⁶ Official Gazette, 31.3.2004, No. 25419.

²⁷ Official Gazette, 3.3.2004, No. 25391.

²⁸ Official Gazette, 19.2.2004, No. 25378.

- ❑ The time required by workers employed in mines, stone quarries or any other underground or underwater work to descend into the actual place of work;
- ❑ The time spent in travel in the event the worker is sent by the employer to work at a place other than the workplace;
- ❑ The time during which a worker remains at the disposal of the employer but is given no work to perform or is waiting for the arrival of further work;
- ❑ The time during which a worker who ought to be performing his actual work is kept busy at the house or bureau or any other place related to the employer or is sent on an errand for his employer somewhere else;
- ❑ Nursing periods for female workers;
- ❑ The time necessary for collective transportation to and from a workplace at a far distance from their place of residence which is a requirement of the job for workers employed in such jobs as the construction, maintenance, repair and alteration of railways, roads and bridges. The time spent for transportation which is not a requirement of the job but which is financed by the employer merely as a form of social assistance will not be regarded as part of the worked hours.

Breaks

Breaks are the time when the workers are allowed to have a rest during the daily statutory hours of work. The duration of breaks is linked to the length of daily hours of work (Art. 68): Fifteen minutes, when the work lasts not more than four hours; half an hour, when the work lasts more than four hours but up to and including seven-and-a-half hours; one hour, when the work lasts more than seven-and-a-half hours. The entire period shall be allowed at each break. However, these rest periods may be split up by collective labour agreements or by labour contracts where the climate, season, custom, and the nature of the work so necessitate. These breaks are not to be considered as part of the worked hours.

Weekly Rest Period

Every worker is entitled to a minimum uninterrupted rest period of 24 hours per each seven-day period (Art. 46). As a general rule, Sunday is the weekly rest day with pay.²⁹ Workers who do not have Sunday off as the weekly rest day will be provided with another rest day with pay each week (Weekly Rest Period Act, Act no. 394 of 1924).

Night Time and Night Work

The term 'night' signifies a period of at most 11 consecutive hours beginning at 8:00 p.m. at the latest and continuing until 6:00 a.m. at the earliest. Workers may work for at most 7.5 hours in night shifts. Night work cannot exceed 7.5 hours (Art. 69). With the new Act, women are no longer prohibited from night work in industrial works (Art. 73).³⁰

Annual Leave with Pay

A worker who has completed at least one year's service following employment, including the trial period, will be entitled to annual leave with pay (Art. 53). The length of annual leave with pay is 14 days' leave for 1 to 5 years of employment; 20 days' leave for 5 to 15 years of employment; and 26 days' leave for more than 15 years of employment. Weekly rest periods, national holiday (Oct. 29 – proclamation of the Republic), and general rest days (public

²⁹ Article 5(2) of the 1993 Working Time Directive provided that the minimum weekly rest period 'shall in principle include Sunday'. The UK challenged the validity of this provision (Case C – 84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union [ECR 1996 I-5755]) as a result of which the provision had to be deleted by Directive 2000/34/EC in the light of the case law of the Court of Justice.

³⁰ It is clear that, because of the prohibition of night work for women, a collective agreement or labour contract offering supplementary benefits for night work, in this way reserved for men, is indirectly discriminatory. In its decision of 25 July 1991 (Case C-345/89, Minister Public v. Alfred Stoeckel), the European Court of Justice (ECJ) declared that Article 5 of Directive 76/207/EEC was sufficiently precise to prevent member states from discriminating against women by prohibiting them (but not men) from undertaking night work, even if the prohibition was subject to exceptions. In its judgement of 2 August 1993, the ECJ ruled that Article 5 is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an earlier international agreement and observance of which is safeguarded by Article 307 (ex-Article 234) of the EC Treaty (Case C-158/91). Turkey is not a party to the ILO Convention no. 89 of July 1948 on night work for women in industry.

holidays, religious holidays and the first day of the new year) coinciding with the annual leave with pay are not included in the calculation of its duration (Art. 56/5).

Protection of Young People

Article 71 intends to prevent abuse of young people's labour while allowing some flexibility in schemes providing both work experience and training. There are two categories of young workers: First, children, defined as those less than 15 years old, and secondly, adolescents, defined as any young person who is at least 15 years old but younger than 18, who is no longer subject to compulsory full-time schooling. Work by children is prohibited and work by adolescents is strictly regulated by the Labour Act (Art. 71). In the case of children, there is the option to derogate from the basic prohibition in a single circumstance: Children over 14 can perform light work, defined to mean work which is not likely to harm the health and safety or development of young people nor harm their attendance at school. Hours of work for children who have completed compulsory schooling³¹ cannot exceed seven hours a day and 35 hours a week. These periods may be extended to eight hours a day and forty hours a week for adolescents who have completed 15 years of age. But, these periods cannot exceed two hours a day and ten hours a week outside the hours fixed for school attendance for those children who have not completed compulsory schooling. Given the vulnerability of young people, general obligations are imposed on employers to take the necessary measures to protect the safety and health of all young workers permitted to work. Young workers are prohibited from underground and underwater work (Art. 72) and work at night in industrial works (Art. 73). Workers who have not completed 18 years of age cannot perform overtime work (Overtime Work By-law, Art. 8).

Compensatory Work

The new Labour Act speaks of 'compensatory work' for the first time (Art. 64). Compensatory work and short-time working are regulated in Part 4 under the general title of 'organization of work.'

The employer may have the workers perform compensatory work within the following two-month period to compensate:

³¹ Compulsory schooling was extended from five to eight years in 1997 with Law no. 4306.

- Stoppages of work for compelling reasons (force majeure);
- Extension of national and public holidays;
- Total or substantial stoppages of work in the undertaking due to similar reasons;
- Leave granted to a worker upon his request.

Compensatory work shall not be deemed overtime work (work beyond 45 hours of weekly work) or work for more hours (work beyond the weekly contractual hours of work but at most up to 45 hours). Compensatory work cannot exceed three hours a day provided that daily maximum hours of work are not exceeded. Compensatory work shall not be performed during rest days.

Short-time Working (Work-sharing) and Forced Vacation Period (Compulsory Leave; Furlough)

The concept of work-sharing varies in its usage from country to country. In Turkey, work-sharing denotes only those temporary short-time working arrangements whereby an immediate threat of lay-off is averted by a temporary reduction in work-time.³² Short-time working concerns workers who, as the result of general economic crisis or compelling reasons, are on hours below those normally worked during the reference week (Art. 65). Workers on short-time are workers of undertakings in difficulty. In the reasons to the Article, it is emphasized that difficulties arising from the undertaking itself or a sectoral crisis due to the market conditions shall not justify short-time working. This forced reduction in working hours is unconnected with any demand on the part of the workers themselves.

An employer who makes a temporary substantial reduction in hours of work or stops functioning of the undertaking totally or partially has to make an immediate declaration in written form with the reasons thereof to the Employment Office and to the signatory union, if there is any. The Ministry of Labour and Social Security shall attest the validity of this request.

Workers on short-time and forced vacation period are considered to be employed, but receive short-time work benefits from the unemployment

³² In some other countries, work-sharing denotes the overall concept of job creation and job maintenance through a permanent reduction in working time, by such means as shorter weeks, reduced overtime, longer holidays, earlier retirement, etc.

insurance, if they have fulfilled the conditions to be qualified for unemployment benefits, for the period they are not utilized by the employer. The short-time work period cannot exceed the effective period of the compelling reasons and cannot, in any case, exceed three months.

Inter-group worker conflict may appear in practice in this form of work distribution: Spreading available work among more workers may be resisted by workers not affected or less affected by the crisis.

Flexible (Atypical) Modalities Of Employment

In General

Point 7 of the Community Social Charter 1989 referred to the need for action to ensure the improvement in living and working conditions of forms of employment other than open-ended labour contracts, such as fixed-term contracts, part-time working, temporary work and seasonal work. Consequently three Directives were issued: Directive 91/383/EEC on Health and Safety³³ encouraging improvement in the health and safety of atypical workers, Directive 97/81/EC on Part-time Work,³⁴ and Directive 99/70/EC on Fixed-Term Work³⁵.

Atypical work (non-standard, flexible, alternative or contingent work), was defined in the relevant EC Directives as including: (i) part-time employment involving shorter working hours than statutory, collectively agreed, or usual working hours; (ii) temporary employment relationships in the form of: (a) fixed-term contracts, including seasonal work, concluded directly between the employer and the employee, where the end of the contract is established by objective conditions such as reaching a specific date, completing a specific task or the occurrence of a specific event; and: (b) temporary employment which covers any relationship between the temporary employment business (a temp agency), which is the employer, and its employees (the temps), where the employees have no contract with the user undertaking where they perform their activities. In other words, the workers have a contract with the temp agency which sends them to work as a temp for a user company needing additional staff.

³³ Directive 91/383/EEC was proposed on the basis of Article 118a (new Article 137).

³⁴ Directive 97/81/EC was proposed on the basis of Article 100 (new Article 94).

³⁵ Directive 99/70/EC was proposed on the basis of Article 100a (new Article 95).

In Turkey, contracts of an indefinite duration (indefinite contracts; open-ended contracts; permanent contracts) are the general form of employment relationship. Existing provisions for permanent contracts remained to a great extent practically unaltered. The new Labour Act, with the aim of making undertakings productive and competitive, places on a legislative footing the atypical types of work that existed in practice. The parties have the freedom of determining the type of the labour contract to be concluded (Art. 9). Trade unions feel uneasy and oppose especially the issues of deregulation and flexibility wanting to continue to be covered by a protective legislation. The employers, on the other hand, highly favour such developments demanding more deregulatory intervention since they permit greater flexibility in labour management. Atypical types of work are hoped to provide the employers with the numerical flexibility necessary to meet changing consumer demands.

While trying to facilitate access to new forms of employment, application of the principle of non-discrimination was ensured, where necessary, by the new Labour Act to improve the quality of flexible types of employment and security and to prevent abuse arising from the use of atypical types of employment. Where appropriate, the principle of *pro rata temporis* shall apply.

Easing the recourse to atypical works make it easier for employers to hire workers, thereby improving the job chances of groups which are subject to entry problems, such as women, young first entrants, retirees and disabled. Are the new rules in the Labour Act likely to activate a flexible and dynamic labour market? OECD ranks the member states on the basis of three main components: Regulation on temporary forms of employment, protection of permanent workers against individual dismissals, and specific requirements for collective dismissals. Turkey ranks the second after Portugal in the strictness of employment protection legislation.³⁶ Turkey still seems to have overly regulated labour markets and tougher rules. Excessive interference to “protect” people in work can be an impediment not only to employment creation but also to efforts to transform undeclared work into regular employment.³⁷

³⁶ OECD Employment Outlook 2004, p. 72.

³⁷ The most important contribution of temp bureaus would be transforming undeclared work into regular employment (Tuncay, Can, (in) TISK – ADECCO (2003), p. 47).

Fixed-term Contracts

Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP was the basis of the relevant articles in the new Labour Act. The Framework Agreement tried to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse from the use of successive fixed-term employment contracts. The Agreement is to be applied to fixed-term workers with the exception of those placed by a temporary work agency at the disposition of a user enterprise.

A 'fixed-term worker' means a person having an employment contract where the end of the employment contract is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event (Art. 11). The principle of non-discrimination has been accepted with respect to employment conditions: Fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract unless different treatment is justified on objective grounds (Arts. 5, 12). Where appropriate, the principle of *pro rata temporis* shall apply. Period of service qualifications relating to particular conditions of employment shall be the same for fixed-term workers as for permanent workers except where different length of service qualifications are justified on objective grounds (Art. 12/2).

The term 'comparable permanent worker' means a worker with an employment contract of indefinite duration, in the same establishment engaged in the same or similar work. Where there is no comparable permanent worker in the same establishment, the comparison shall be made by reference to a worker engaged in the same or similar work in a similar establishment in the same industry (Art. 12/3).

Under the new Labour Act, possibilities to make fixed-term contracts are restricted. An objective reason is required at the time of its first conclusion and a substantial cause is required for its renewal.³⁸ The Labour Act tries to prevent abuse arising from the use of successive fixed-term employment contracts, the so-called 'chain contracts,' by stating that unless there is a substantial cause

³⁸ Eyrenci – Taşkent – Ulucan (2004), pp. 48-50, 54-55; Süzek (2005), p. 199-200; Akyiğit (2003), p. 114.

justifying the renewal, fixed-term employment contracts cannot be renewed. In case of a renewal, the fixed-term employment contract is to be reclassified as an indefinite contract (Art. 11/2-3).³⁹

Part-time Work

There were no legal rules in the previous Labour Act on part-time work but, in practice, especially due to the rulings of the Court of Cassation, part-time workers were not treated in a less favourable manner than comparable full time workers solely because they work part-time, unless different treatment was justified on objective grounds. Courts also ensured that part-timers did not receive a basic wage that was lower than the basic wage of comparable full-timers.

Council Directive 97/81/EC of 15 December 1997⁴⁰ concerning the framework agreement on part-time working concluded by UNICE, CEEP and the ETUC served as a model for the provisions on part-time in the new Labour Act. This Framework Agreement converges with the ILO Convention 175 on part-time work especially in underlying purpose. Both of these regulations relate to employment conditions of part-time workers in the context of the principle of non-discrimination. The drafting of the Agreement was much influenced by the ILO Convention 175.⁴¹

The new Labour Act tries to achieve the required balance between flexibility and security as regards flexible working arrangements. According to Article 13/1, 'part-time worker' refers to a worker whose normal hours of work, calculated on a weekly basis are substantially less than the normal hours of work of a comparable full-time worker. 'Substantially less' is interpreted as 'less than 2/3 of the contracted weekly hours of work in the reasons to the

³⁹ As regards limits on the number of occasions on which fixed-term contracts can be renewed, Directive 99/70/EC Clause 5 provides: To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships.

⁴⁰ The Directive was extended to the UK by Council Directive 98/23/EC.

⁴¹ Barnard (2000), p. 430.

article and by the Working Time By-law (Art. 6). 'Comparable full-time worker' means a full time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work. Where there is no comparable worker in the same establishment, the comparison shall be made by reference to a full time worker in an establishment in the same industry having the same type of employment contract or relationship, who is engaged in the same or a similar work (Art. 13/3). Under the principle of non-discrimination, in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* shall apply (Arts. 5b and 13/2).⁴² The Act also considers the question of the movement of workers from full-time to part-time work, and vice versa: Employers should give consideration to requests by workers to transfer from full-time to part-time work and vice-versa if there is such availability in the establishment (Art. 13/4).

Where part-time work was performed, the Social Insurances Institution (SSK) would consider each worked day as a single day in the calculation of entitlements to long-term insurances. Time worked during the day was not significant. The Court of Cassation deemed it unfair and stated that the worked hours had to be aggregated and divided by 7.5 to find the number of days worked during a month. Where the part-timer makes less than the minimum wage, it is solely the employer to pay both the worker's and his own contributions for the part between the part-timer's actual earnings and the minimum wage that is at the same time the minimum amount of monthly earnings subjected to contributions (SIA, Art. 78). Therefore, the employer may find such a part-timer expensive and may either refrain from employing him or remain undeclared. On the other hand, a part-timer employed by a single employer may find it too difficult to be entitled to old-age benefits and may consequently prefer to remain undeclared. The Retirement Insurances Bill proposes a solution to this particular problem: A part-timer whose monthly total employment is less than thirty days may become voluntarily insured for the remaining period through paying contributions (Art. 70b). If atypical works have the purpose of reducing unemployment in the country, then they have to be

⁴² Since the majority of those working part-time are women, the European Court of Justice ruled that less favourable treatment of part-timers is indirectly discriminatory. The Part-time Workers Directive legislates the case law of the Court.

enhanced and promoted also under the Social Insurances Act (SIA). Otherwise, efforts to transform undeclared work into regular employment may be adversely affected.

Job-sharing is an arrangement in which two part-timers share one full-time job. The workers can split up their activities on a daily or a weekly basis and are in fact part-timers in terms of the number of hours worked. The advantages are mostly connected with child-minding possibilities. There are no special rules regulating job-sharing in the new Labour Act; the rules on part-time employment and the general principle of *pro-rata temporis* shall apply to job-sharing.

On-call Work

On-call work was regulated for the first time by the new Labour Act (Art. 14). On-call work is defined as part-time employment relying on a call to work upon emergence of a work undertaken by the worker. If the duration of work has not been specified by the parties on a weekly, monthly or yearly basis, it will be deemed as twenty (ten under the proposed Act) hours a week. Whether the worker involved actually performs work or not, he shall be entitled to remuneration for the specified period. Unless otherwise specified, the concerned employer has to make the call at least four days prior to the workday. The worker is obligated to perform work upon a call in conformity with the law. If daily hours of work have not been specified by the parties, then the employer has to utilize the worker for at least four (three under the proposed Act) consecutive hours in a day.

Whether the parties may decide for lesser periods or not is a legal disputation.⁴³ So far, there has not been a decision by the Court of Cassation on the issue. If these periods are regarded as binding, then recruitment of an on-call worker for less than twenty hours a week will be expensive for the employer since he will have to pay premiums on the basis of twenty hours a week. Moreover, where the part-timer makes less than the minimum wage, it will solely be the employer to pay both the workers share and his own share for the part between the part-timer's actual earnings and the minimum wage. On the other hand, to be entitled to old-age pensions is too difficult for an on-call

⁴³ Supporters of the "binding nature" are Eyrenci – Taşkent – Ulucan (2004), pp. 66-67; Akyiğit (2003), p. 124. Adversarial approaches: Çelik (2004), p. 91 and Süzek (2005), p. 223.

worker employed by a single employer. A 58-year-old woman worker or a 60-year-old male worker may get entitled to old-age benefits either through at least 7000 contribution-paid days (19 years, 5 months, 10 days) or by fulfilling a 25-year insurance period with at least 4,500 contribution-paid days (12 years, 6 months) (SIA, Art. 59). A rough calculation on the basis of twenty hours a week ends with lengthy periods to be entitled to old-age benefits:

$$52 \text{ weeks} \times 20 = 1040 \text{ hrs/yr}$$

$$1040/7.5 = 138.7 \text{ days/yr}$$

$$\text{To fulfil 4500 premium-paid days: } 4500/138.7 = 32.44 \text{ yrs}$$

$$\text{To fulfil 7000 premium-paid days: } 7000/138.7 = 50.47 \text{ yrs}$$

Therefore, both the worker and the employer may prefer to have the work undeclared. The Retirement Insurances Bill envisages voluntary insurance for such cases.

Temporary Employment

Interim employment is legally of a temporary nature and it is characterized by a triangular relationship between the user firm, the interim work agency (temp agency), and the temporary worker (temp). The agency has the role of intermediary. The worker is hired out to carry out a 'work mission.' The workers have a contract with the temp agency (temporary help supply service) which sends them to work as a temp for a user company needing additional staff.⁴⁴

The ILO Convention 181 concerning Private Employment Agencies, 1997, referring to the importance of flexibility in the functioning of labour markets, revises the Fee-Charging Employment Agencies Convention (Revised), 1949, and the Fee-Charging Employment Agencies Convention, 1933. The Convention cites 'services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (user enterprise) which assigns their tasks and supervises the execution of these tasks' as one of the labour market services to be provided by private employment agencies (Art. 1). A Member shall determine and allocate, in

⁴⁴ For a comprehensive study see: Akyigit (1995).

accordance with national law and practice, the respective responsibilities of private employment agencies and of user enterprises in relation to: Collective bargaining; minimum wages; working time and other working conditions; statutory social security benefits; access to training; protection in the field of occupational safety and health; compensation in case of occupational accidents and diseases; compensation in case of insolvency and protection of workers' claims; and maternity protection and benefits, and parental protection and benefits (Art. 12). Unlike the preceding one, this article does not mention freedom of association since the temps have no contract with the user firm where they perform their activities.

Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers⁴⁵ aims at improving quality of temporary work by ensuring that the principle of non-discrimination is applied to temps and to establish a suitable framework for the use of temporary work to contribute to the smooth functioning of the labour and employment market (Art. 2). The most controversial issue of the draft directive is that the equal treatment principle is based on the comparison of a temp with a comparable worker in the user enterprise.⁴⁶

Turkey has ratified the revised ILO Conventions but it has not yet ratified Convention no. 181. But, ILO Convention 181 was followed in the preparation of the proposed act together with the EC Directives 91/383⁴⁷ and 96/71.⁴⁸

The proposed act envisaged establishment of temp agencies and brought measures to prevent abuses and fraudulent practices by temp agencies but their establishment was not accepted by the legislature. Provisions of the proposed act (Articles 8, 93) on interim employment were severely criticized by trade unions on the basis of lack of job stability and being a threat to the security of open-ended labour contracts. This considerable opposition on the part of the trade unions reflected itself during the negotiations held in the legislature. Interim employment was accused for 'permitting slavery' by the opposition party. The term 'hired-out (lent) labour relations' used for interim employment

⁴⁵ COM/2002/0149 final, COD 2002/0072.

⁴⁶ Blanpain (2003), p. 353.

⁴⁷ Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.

⁴⁸ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

was changed to 'temporary work relations' and its scope was largely limited to holdings and a conglomeration of identical companies by the new Labour Act (Art. 7). Under the new Labour Act, an employer may hire out his worker to another workplace within the structure of the same holding or a conglomeration of identical companies, for at most six months. Where hiring out is made to another employer, the worker has to be utilised in a similar job. Hiring out may be renewed only twice. Due to the amendments made in the proposed act by the legislature, there does not exist a triangular relationship but only limited staff leasing under the title of "temporary work."

Monopoly of public employment offices no longer exists in Turkey (LA, Art. 90; Turkish Employment Office Act, Art. 32). But, the continuing prohibition of temp agencies is both illegal and obsolete under the European competition law (Art. 86 TEC), 1991 and 1997 landmark decisions of the Court on the issue and Convention no. 181 of the ILO.⁴⁹ Placement of workers at the disposal of user enterprises has to be regulated and widened.

Home Workers and Domestic Workers

A home worker (out-worker) undertakes vocational work either alone or with the help of the family in his own place, basically home, for one or more employers upon whom he is dependent. It is too difficult to assess the development of this form of employment. This form of activity easily lends itself to illegalities and probably undeclared to a great extent. Unlike the German law, a home worker is not a quasi worker. Following the Swiss Obligations Code, he is considered a worker (Obl. Code, Art. 322).⁵⁰ There are no legal rules in the new Labour Act and nothing is done either to encourage or to discourage home working. The 21st Law Chamber of the Court of Appeals, in its Decision no. 2000/4611, Merit no. 2000/4584, dated 08.06.2000, held that '...where the work of finishing the products is carried out by the worker during the daily hours of work, under subordination on an employer, the fact that this is performed at home and paid at piece rates does not alter the nature of the work performed under a labour contract.'

⁴⁹ Blanpain (2003), pp. 363-366.

⁵⁰ Süzek (2005), p. 225; Akyigit (2003), p. 129.

Domestic workers (home helpers) such as servants, maids, home care nurses, baby sitters and cooks are outside the scope of the Labour Act (Art. 4e) but if they are employed on a permanent basis they will be covered by the social insurances scheme (SIA, Art. 3/I/D).

A family worker is a person working in a workplace belonging to a relative, generally a spouse without any remuneration. Remuneration is one of the essentials of the labour contract. Therefore an unpaid family worker is not a worker in the meaning of the Labour Act. According to the Social Insurances Act, employer's spouse working in return of no remuneration is excluded from the coverage of the social security scheme (Art. 3/I/B).

Handicrafts such as weaving or carpet making performed by members of the same family or with relatives including the third degree in the home without any outside help are not covered by the Labour Act (Art. 4d).

Form of the Labour Contract

Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship⁵¹ obliging employers to provide all employees with a document containing information about the essential elements of their contract or employment relationship served as a basis for Article 8 of the new Labour Act on form of labour contracts.

Unless specified otherwise, conclusion of a labour contract is not subject to a particular form (Art. 8/1). Labour contracts for a definite period of one year or more have to be concluded in written form (Art. 8/2).⁵² Where a written contract of employment is not provided, the employer shall be obliged to give the worker, not later than two months after the commencement of employment, a written declaration covering:

- General and special conditions of work;
- The length of normal working day or week; the initial basic amount;
- The initial basic amount, the other component elements and the frequency of payment of the wages;

⁵¹ German and Italian laws recognize a distinction between these two terms. In Turkish law, the terms 'employment contract' and 'employment relationship' are considered same.

⁵² This contradicts Article 11 requiring written form for all fixed-term labour contracts.

- In the case of a fixed-term contract, the expected duration thereof;
- The rules to be observed by the parties should their contract be terminated.

This provision shall not apply to workers having a fixed-term contract with a total duration not exceeding one month. Where the contract comes to an end before expiry of a period of two months as from the date of start of work, the information provided for in Article 8/3 must be made available to the worker by the end of this period at the latest.

Conclusions

1. Differing periods draw attention to one or other somewhat diverse areas of labour law. At the present moment, the great activity and attention is directed to the area of flexibility and security. Change and debate and political controversies were most vigorous on the place and effectiveness of the new Labour Act in these issues where substantial changes have been made. A controversial terrain has been entered.
2. There is indisputable impact of EU law on the evolution of Turkish labour law. Relevant directives, including ones on working time and atypical works are being transposed into national legislation. The shift from traditional protective measures to flexibility has given impulse to the evolution of national labour law.

The original purpose of labour legislation was regulation of social powers with the main idea of establishing and maintaining an equilibrium between social partners. This classical model of labour legislation designed to protect the weaker party is undergoing changes. There is the emergence of new debates such as employment creation through flexibility, corporate governance, corporate social responsibility, and alternative dispute resolution. Promotion of employment together with ascertaining efficient functioning of undertakings were anticipated from the new Turkish Labour Act. The actual and difficult problem is how to evaluate the trade-off between levels of protection and employment promotion.

3. It is the employers who have recently been taking the initiative in pressing for flexibility. The trade unions contented themselves with defending existing levels of protection and institutional arrangements that stand in the way of decentralisation and destandardisation of employment relations without offering alternatives generating new employment. The renunciation of set normal working time and atypical employment were regarded as heralding the end of trade unionism. Unfortunately, due to misunderstandings and misinterpretations, issues of flexibility were twisted by the labour circles and the opposition party as a result of which the degree of flexibility in the proposed act could not be maintained but reduced as a concession. Domestic politics appeased union protestors against change.
4. The trade unions heavily criticised flexitime and flexible types of employment regarding them as "revival of laissez faire" in spite of the guarantee to flexicurity far beyond the Community directives. They made an analysis of the situation before the present Act as a weapon to attack these newly introduced provisions and fought the battle in the arena of social ethics. In fact, this highly controversial issue has to be discussed in the arena of social expediency. If economic and social necessities require it, difficulties must be faced and overcome. Social dialogue may serve as a platform for the social partners to reach a common understanding on the issue. Therefore, developing co-operation in setting objectives for labour legislation is of importance for Turkey.
5. Turkey has overly regulated labour markets and tougher dismissal and flexibility rules. Excessive interference to "protect" people in work penalises those who are out of work. Remodelling of the labour market with an increasing flexibility will continue being one of the main issues and concerns in the fields of labour law and industrial relations. At first, it may be difficult for a traditional worker, the less educated and/or less skilled worker, to adapt to a multiple option work environment offered by deregulations and flexibility measures. On the other hand, the non-traditional worker may enjoy and benefit from these variations, special arrangements and choices. Flexibility may make it easier for the workers to combine work with family responsibilities. Expansion of part-time employment may cause belated rise in activity rates of (married) women.
6. Changes provided by the new Turkish Labour Act in the organisation of work towards flexibility indicate a different approach to the issue of

working time implying new answers. The debate on the factors and reasons underlying these recent trends and their operation and possible outcomes in a different socio-economic context show some convergence and much divergence. For the time being, it is too early to highlight the national characteristics, institutions and habits associated with the development of these new modalities of employment and to figure out whether they will innovate substantial job creation and mobilize the female labour force. The temptation is to hang expectations on labour laws but we ought to be modest in our expectations of labour laws' potential to deliver change; there are solutions that can be proposed and effected outside legal measures. The legislation appears to be one of the tools available, and more importantly, radical changes cannot be expected as outcomes of such a strict regulation of flexible modalities of employment. But, it is beyond doubt that flexitime arrangements may gradually attain a considerable degree of momentum especially in the private sector.

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