T.C.
MARMARA ÜNİVERSİTESİ
AVRUPA TOPLULUĞU ENSTİTÜSÜ
AB HUKUKU ANABİLİM DALI

A COMPARATIVE STUDY OF WORKING TIMES IN EUROPEAN UNION LAW AND TURKISH LAW

YÜKSEK LİSANS TEZİ

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ABSTRACT

A COMPARATIVE STUDY OF WORKING TIMES IN EUROPEAN UNION LAW AND TURKISH LAW

Being a crucial element of working conditions, working times have a key influence upon job satisfaction and the quality of working life, while it is also perceived by labour law as an issue of safeguarding physical existence of human beings. Thus, the main goal of labour law is to limit and shorten daily and weekly working hours which had been too long in all the European countries during the first periods of industrialization. Working time measures have been rapidly modernizing while technological developments necessitate different working types regarding duration of work. Turkish Labour Act Numbered 4857 has met the demands of different types of working time, which is also a step forward through the integration process of Turkey into the EU. Turkish legislation is in accordance in general with the acquis communautaire, regarding working time except some important points which are discussed in this thesis. Furthermore, Labour Act Number 4857 is late but not the least step for Turkish Labour Law within the context of working times.

GENEL BİLGİLER

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ÖZET

AVRUPA BİRLİĞİ VE TÜRK HUKUKUNDA ÇALIŞMA SÜRELERİNİN KARŞILAŞTIRMALI ÇALIŞMASI

Çalışma süreleri, çalışma koşullarının önemli bir öğesi olarak iş hukukunca insanın fiziksel varlığını koruyucu bir etmen olarak kabul edilir ve iş memnuniyeti ile yaşam kalitesi üzerinde kritik bir etkiye sahiptir. Bu nedenledir ki, iş hukukunun bu konudaki ana hedefi, endüstrileşmenin ilk dönemlerinde tüm Avrupa ülkelerinde oldukça uzun olan günlük ve haftalık çalışma sürelerini kısıtlamak ve kısaltmaktır. Çalışma süreleri ile ilgili yasal düzenlemeler, teknolojik gelişmeler çalışma süresi bağlamında farklı çalışma türlerini gerektirdiğinden hızla yenilenmektedir. 4857 Sayılı Türk İş Kanunu, Türkiye'nin AB ile bütünleşme sürecinde ileriye atılmış bir adım olarak farklı çalışma sürelerine ilişkin talepleri karşılamıştır. Türk mevzuatı çalışma süreleri bakımından, bu çalışmada açıklanan birkaç önemli nokta dışında, genel olarak Topluluk Hukuku ile uyumludur. Kaldı ki, 4857 sayılı İş Kanunu, çalışma süreleri bakımından geç ama önemi hafife alınmayacak bir adımdır.

ÖNSÖZ

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Başak Ozan
İstanbul, 2006

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LIST OF ABBREVIATIONS

Art. Article

CEEP European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest

EC European Community

ECJ European Court of Justice

ECR European Court Reports

EP European Parliament

ETUC European Trade Union Participation

EU European Union

IIBK Public Employment Services Organization

ILO International Labour Organization

IMF International Monetary Found

IŞKUR Employment Organization of Turkey

MESS Metal Industry Union of Turkey

no. Number

OJ Official Journal of the EC

p. Page

SSK Social Insurances Organization

TEU Treaty on European Union

TISK Turkish Confederation of Employers Association

UN United Nations

UNICE Union of Industrial and Employers' Confederations of Europe

INTRODUCTION

Once there were slaves, working intensely during their lifetime and to their last breaths, until the economic systems have evolved through industrialization, which resulted in mass production methods. Thereafter, employees gathered around social organizations, namely the unions by which they have gained a perceptible voice of demanding rights that deriving from the very reason of working, embracing working conditions. It is not a coincidence that rights of working conditions have been initially established and strongly provided in the well developed states which have gross economic strength since industrialization took its roots within these countries.

The employee protective principles of labour law are derived from the fact that the vulnerable position of the workers against the employers. Thus, democratic states form their labour legislation under the light of these principles stemming from public nature of labour law, which however, show a declining tendency due to flexibilisation aims in labour law. Nevertheless flexibility shall be considered along with security. Right to have decent working conditions in general, is acceptance of employee as individual human beings having a life of their own out of work not machines which have lent their souls to working. Limitation of working time is one of the vital interests of employees since it is strictly connected to health and safety of human beings.

Working time measures have been rapidly modernizing while technological developments and using of the computers necessitate different working types regarding duration of work. New Turkish Labour Act came into force in 2003, has met the demands of different types of working time, which also a step forward through the integration process of Turkey into the European Union.

A comparative analysis of labour legislation of Turkish and European Union, regarding working time is studied in this thesis. The study is on the basis of comparison of the acquis communautaire and Turkish legislation mainly the new Labour Act of 2003, Numbered 4857 and concerning regulations, the maritime and press labour codes are not included in this study. Employment and social policies, actors and instruments of Turkey and the European Union are briefly explained. Effect of the EC Directives over national legislations of the Member States is highlighted as they are key instruments of legislation on employment policy

of the EU. With this regard, related case law of the European Court of Justice is referred since the Court of Justice plays an active part in development of European Law, however it is therefore being criticized.

Additionally, types of working time definitions by ILO are mentioned since it is accepted as a source by EU Legislation regarding working time.

Certain facts, such as weekly working hours of Member States of the European Union are shown in statistical terms by tables while actual circumstances both within the Member States of the European Union and Turkey are represented.

Not only the actual working times but also times during which employees do not work during their employment contract, namely the rest periods and paid leaves are underlined due to a holistic point of view. Furthermore, EC Directive on Working Time obliges Member States to take necessary measures regarding rest periods and paid leaves as well as the other aspects of working time.

As it is a crucial factor for today's labour markets, concept of flexibility within the scope of working time, is discussed comparatively. On this basis, possible outcomes of flexibilisation of labour markets are briefly stated while it is underlined that flexibility without security is an ugly face of globalization, therefore flexicurity should be provided.

THE FIRST CHAPTER

THE EMPLOYMENT AND SOCIAL POLICY OF THE EUROPEAN UNION

1. General

Employment based relationships exceeded the bounds of national territories, as social facts are accelerated by dynamics of the modern social policies additionally; excess work migration gave birth to international social law.[1]

Over the coming years, an important task for policy-makers will be to provide adequate opportunities for employees to meet the new demands of improving both their living and working conditions and their quality of life at the same time.[2] Since this task is relevant to different policy fields, such as working time, social security or family policy, the social policy of the European Union is necessary to be underlined.

2. Developments under the Shadow of Lack of Eagerness

A fair global economic system should also promote social development and fundamental rights; therefore an EU position was set out in the 1999 Council Conclusions concerning this basic objective of promoting fundamental rights and sustainable development.[3]

The European Union is not only an economic based unity, but also has social aims as stated in the Preamble of the Treaty on the European Union, as well as defined as one of the objectives of the Union in the Article 2, under the headline of "Common Provisions": [4]

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[1] **Güzel - Okur**, Sosyal Güvenlik Hukuku, Beta Yayınları, 7th Edition, 1999, Istanbul, p.43.

[2] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time", Luxembourg: Office for Official Publications of the European Communities, 2003, www.eurofound.eu.int, 28.04.2006. The European Foundation for the Improvement of Living and Working Conditions is a tripartite EU body, whose role is to provide key actors in social policy making with findings, knowledge and advice drawn from comparative research. The Foundation was established in 1975 by Council Regulation EEC No 1365/75 of 26 May 1975.

[3] **EU Commission**, Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization, R. Blanpain (ed.), Confronting Globalization, 55-78, Kluwer Law International, 2005, Netherlands.

[4] Consolidated Version Of The Treaty On European Union, Official Journal Of the European Communities, 24.12.2002.

"to promote economic and social progress and a high level of employment and achieve balanced and sustainable development in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of an economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty"

But the point is whether those liabilities only stated formally, or the European Union act indeed, for the purposes set out in the Treaty on European Union (TEU). As a matter of fact, those provisions provide very few concrete conclusions to create a proper social policy[5] because; they are effective merely as a general obligation for the institutions of the European Union, on their task while implementing the policy outcomes. [6] The first step that had been taken until reaching the Treaty of Amsterdam, were The Article 2nd of Treaty of Rome declaring the task of approximating the economic policies of the Member States, also the Treaty of Rome had a Chapter entitled as "Social Policy".[7] The aim behind this article was to create a social security system for the workers entitled of free movement.[8] Because until the early 1970s, Community Social Policy was focused on the task of achieving the free movement of persons and therefore it was dependent on the market integration. [9] But the Articles under this title were not donated by the explicit legislative competence of the European Community and neither the Single European Act had more, only some additions had been made under the title of 'Health and Safety' in the working place and economic and social cohesion. [10]

European Social Law is a synthesis of legal instruments established by the ILO and the council of Europe therefore, the fundamental basis of the EU Social Policy.[11] In 1989, Social Charter of the European Union was formed which referenced the Social Charter of the

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[5] **Blanpain**, European Labour Law, Kluwer Law International, 10th Edition, 2006, Netherlands, p.176.

[6] **Daubler**, Instruments of EC Labour Law, European Community Labour Law Principles And Perspectives by Liber Amicorum Lord Wedderburn of Charlton Edited by Paul Davies, Antoine Lyon-Caen - Sciarra - Simitis, Oxford Clarendon Press, 1996, p.154.

[7] **Weatherill - Beaumont**, EU Law, Penguin Books, 3rd Edition, London, 1999, p. 717.

[8] **Güzel - Okur**, p. 44. **Mollamahmutoğlu**, İş Hukuku, Turhan Kitabevi, 2005, Ankara, p.82-83.

[9] **Weatherilll - Beaumont**, p.745. **Becker**, Avrupa'nın Sosyal Politikası, Ortak Pazar ve Anayasa Sözleşmesi, AB&Türkiye Endüstri İlişkileri, (Hekimler, ed.), Beta Yayınları, 2004, Istanbul, p.31, 32.

[10] **Weatherilll - Beaumont**, p.717.

[11] **Dereli**, Uluslararası Çalışma Normları, Sendika Özgürlükleri ve Türkiye, AB-Türkiye ve Endüstri İlişkileri, (ed. Hekimler), Beta Yayınları, İstanbul, 2004, p.293. **Odaman**, Sosyal Hukuk Alanında Uluslararası Sözleşmeler Işığında Evrensel Hukuk - Ulusal Hukuk İlişkisi, Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, No 3, 2004, Istanbul, p. 824. **Mollamahmutoğlu**, İş Hukuku, p.80.

Council of Europe.[12] The EU Charter is a source for concrete policies at EU level on the other hand it is subordinated to the aim of economic and social integration of the EU. [13]

By the entry into force of the Maastricht Treaty, new competences of the European Union were born as the Community transformed into the Union and their reflections to the social policy were of course a one more step forward in this field. [14] Maastricht Treaty brought the principle of social dialogue by obliging to consult the social partners on draft legislation prepared by the Commission.[15] Additionally, by the entry into force of the Treaty of Amsterdam, Community Social Policy were linked to employment[16] and become binding for all the Member States including the UK.[17] Though, it is clearly bare from the text of the EC Treaty that the European Union's social policy is subordinated to the economic and monetary policies[18], and moreover, the employment policy of the Member States are bounded by some economic provisions such as stated in the Article 126 of Treaty of Amsterdam as follows:

"Member States, through their employment policies, shall contribute to the achievement of the objectives referred to in Article 125 in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2)."

It is important to point out the Article 125 of Treaty of Amsterdam in order to understand how the social policy is subordinated to economic aims of the European Union:

"Member States and the Community shall, in accordance with this title, work towards developing a coordinated strategy for employment and particularly for promoting a

[12] **Dartan**, The European Union and Pressure Groups in the Context of Social Rights, Human Rights Education and Practice in Turkey in the Process of candidacy to the EU, (Dartan and Cebeci, ed.), Marmara University European Community Institute Publication, 2002, Istanbul, p.316. **Ulucan**, Esneklik İhtiyacı ve İş Hukukunun İşçiyi Koruyucu İşlevi, Can Tuncay'a Armağan, p.209 et seq. Social Charter of the Council of Europe, does not entitle rights to individuals but obliges duties to public authorities. (**Odaman**, Sosyal Hukuk Alanında Uluslararası Sözleşmeler Işığında Evrensel Hukuk - Ulusal Hukuk İlişkisi, p. 821.)

[13] For a comparison between two social charters (The EU Charter and The Charter of the Council of Europe), See: **Dartan**, The European Union and Pressure Groups in the Context of Social Rights, p. 316 et seq.

[14] **Weatherilll - Beaumont**, p. 718.

[15] **Dartan**, The European Union and Pressure Groups in the Context of Social Rights, p.322. **Süzek**, İş Hukuku p.82. **Mollamahmutoğlu**, p.84.

[16] According to the Orthodox point of view, the idea behind the addition of an Employment Section to the Treaty in Amsterdam is the "Nordic initiative" leading by the Swedish Government (**Neal**, Kötü Çocuktan Avrupa'nın Rol Modelliğine mi?- Tek bir Avrupa Yasasından Bu Yana İngiltere'nin İstihdam Politikalarının Garip Mirası, **Biagi** (ed.), İş Yaratma ve İş Hukuku: Korumadan Öngörülü Eyleme, Publishing of MESS No: 405, 2003, İstanbul, p.395.

[17] **Weatherilll - Beaumont**, p.715 and also Güzel - Okur, p. 44.

[18] **Blanpain**, European Labour Law, p.39 and 177.

skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 2 of the Treaty on European Union and in Article 2 of this Treaty."

The objectives to which that the Member States and the Community shall adapt through their employment policies, defined in the Article 2 of the both Treaties are as follows in general terms:

- to promote a harmonious, balanced and sustainable development of economic activities,
- a high level of employment and social protection
- equality between women and men,
- sustainable and non-inflationary growth,
- a high degree of competitiveness convergence of economic performance,
- a high level of protection and improvement of the quality of the environment
- to raise the standards of living and quality of life
- economic and social cohesion and solidarity among Member states.

Among these above mentioned objectives, the economic aims take the most important part, thus the Member States and the Community are bounded by these goals while shaping and implementing the employment policies.

The employee-concerned rules of the European Union are legal rules in the formal sense although those lack of some complements such as collective agreements that apply directly to individual employment relationships.[19] The European institutions have only the

[19] **Daubler**, p. 152. National labour law has sources of formal (constitutional rules, acts, et seq.) and informal rules (as a resolution of negotiations or unilateral impositions), see **Daubler**, p.151.

power that was conferred upon them by the Treaties and the Member States are free to ride in the rest of the social field. [20]

Consequently, the employment and the social policy of the European Union are limited[21] and the Union itself is not as enriched as it is in the other fields especially in the economic area. It is so clear from the blatant wording of the Article 127 of the EC Treaty that the Member States preserve their competences in the area of employment:

"The Community shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected." (Article 127(1) of the EC Treaty).

However, some affirmative vital steps at the other side of the coin are worthy to be emphasized.

Firstly, the European Employment and Social Policy endeavours to promote flexibility and new forms of work organisation, by means of finding a balance between the flexibility and the security, the so- called "flexicurity". The European Commission's *White Paper on Growth, Competitiveness and Employment*, published in 1993, which was a key instrument to draw the whole picture of the European policy level concerning job creation and social exclusion.[22] Secondly, in 1997, The *Green Paper on Partnership for a New Organisation of Work* by the European Commission also dealt with the scope for improving employment and competitiveness through better organisation of work at the workplace. This discussion resulted in the European Employment Strategy, an approach that, in principle, has as its goal the initiation of policy concepts at national level to enable individuals to handle the changes and new demands of working life. By this aim, policy guidelines were developed at the Luxembourg Employment Summit in November 1997 with the goal of assisting national action plans for employment. [23]

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[20] **Blanpain**, European Labour Law, p.176.

[21] **Daubler**, p. 165-166. Also, **Deakin**, Labour Law as Market Regulation: the Economic Foundations of European Social Policy, European Community Labour Law, Liber Amicorum Lord Wedderburn, p.92.

[22] **Webster**, Reconciling Adaptability and Equal Opportunities in European Workplaces, Report for The DG Employment of the European Commission, London, 2001, http://europa.eu.int, 05.04.2006.

[23] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time", Luxembourg: Office for Official Publications of the European Communities, 2003, www.eurofound.eu.int, 28.04.2006

The conclusions of the Vienna European Council in December 1998 took the 'Luxembourg process' further by additional documents from the European Commission, particularly the Council Resolution on the 1999 Employment Guidelines and the Proposals for Guidelines for Member States' Employment Policies 2000.[24] Both documents made the following proposals for national policy approaches which, aim at creating conditions of full employment in a knowledge-based society:

- transition from passive to active measures;

- lifelong learning;

- promotion of a labour market open to all;

- modernization of work organisation; and

- reconciling the demands of work and family life.[25]

The European Employment Strategy may be seen as a major contribution to the political agenda of the European Union. Conclusions are dedicated to economic growth, social inclusion, social cohesion and the quality of jobs, which are also objectives of the Social Policy Agenda confirmed at the December 2000 Nice Summit. In the Agenda, significant emphasis is placed on the 'promotion of quality' (European Commission, 2000a). This approach includes the promotion of quality of work, social policy and quality in industrial relations. Behind these objectives, there lie a number of key themes. For example, 'quality of work' implies creating better jobs and finding more balanced means of combining working life with personal life. 'Quality of social policy' implies a high level of social protection, good social services available to all people in Europe, real opportunities for all and the guarantee of fundamental and social rights.

Another important development at the very beginning of the new millennium, in 2000, is the coming on the scene of Lisbon Strategy. The outcome of the EU summit of March 2000 in Lisbon on economic reform, employment and social cohesion confirmed the commitment to a new economic and social agenda for the year 2000 and beyond. They also

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[24] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time", Luxembourg: Office for Official Publications of the European Communities, 2003, www.eurofound.eu.int, 28.04.2006.

[25] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time".

put strong emphasis on the modernization of the European social model and on the development of an active welfare state. For the first time, the conclusions give a high profile to social inclusion and the need for EU activity in this area. The Lisbon summit also supported the idea that a new Social Policy Agenda for the Union should adopt in 2000. This framework decision will be the successor of the Social Action Programme 1998-2000 and its major mission will be to initiate a 'virtuous circle' by better linking action on employment, social protection, social inclusion, social dialogue, equal opportunities and anti-discrimination.[26]

These efforts were enhanced in 2000 when the Social Policy Agenda was launched as the roadmap of the EU for implementing the Lisbon Strategy which is aimed at economic and social renewal and a return to full employment and also The Commission has flagged up a new action plan between 2000 and 2005 as one of the Social Policy Agenda's six main policy headings including working time, approved at the Nice Summit in 2000.[27]

The Last Social Agenda was launched in 9 February 2005, for a period of five years as usual, by The European Commission, for modernizing European social model under the renewed Lisbon Strategy for growth and jobs.[28] The new agenda focuses on providing jobs and equal opportunities for all and ensuring that everyone in society may reach the benefits of the growth of the EU and jobs.[29]

3. In Brief: What Holds Back the Eagerness of the EU in the Area of Social Policy?

Protective labour measures, such as working time restrictions, are considered to be as a hunchback on the growth and on the development of the market thus, social policy of the European Union remains mainly in the hands of the Member States in order to enforce more flexibility, social dumping[30] is accepted and organized with intent.[31] Since the every single

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[26] **European Commission**, "European Employment and Social Policy: A Policy for People", 2000, http://ec.europa.eu/, 15.04.2006.

[27] **European Commission**, **Employment and Social Affairs D.G**, Social Policy Agenda, "Modernizing the European Social Model", http://ec.europa.eu, 05.04.2006.

[28] **European Commission** Press Releases, 2005, http://europa.eu, 08.04.2006.

[29] **European Commission** Press Releases, 2005, http://europa.eu, 08.04.2006.

[30] **Blanpain**, p.40. *"Flow of capital in the EU towards new member states where the labour is cheap and easing up the accession of cheap labour into former Member States having strong economies, namely social dumping, resulted in corruption of working conditions."* **Ulucan**, Esneklik İhtiyacı ve İş Hukukunun İşçiyi Koruyucu İşlevi, p.206 et seq.

[31] **Blanpain**, European Labour Law, p.230. *"The Community will be putting its very existence in jeopardy if it pursues its monetary and economic policy as if it were a federal state but without possessing the opportunities*

undertaking as well as every single state does their best to minimize the labour costs in order to gain a piece from the cake, the social policy comes in secondary consideration, at the hazards of the workers' living and working conditions. Therefore, the European Employment Strategy has the main goals of non-accelerating inflation, flexibility of wages and labour conditions and the organization of a competitive battle, which creates job insecurity and other disadvantages for workers.[32] The only way to create a strong and serious social policy is to donate European Union with the competence to make decisions with a qualified majority voting system[33] in order to escape the risk of the veto of a single Member State, however by the post-Amsterdam EC Treaty, some important social steps has taken, also an ultra liberal policy precluding a proper European Social Policy is decided.[34]

4. Institutions of the European Union Concerning the Employment Policy

The European Community has four main institutions which are; the European Parliament (EP), the Council of the European Union, the European Commission and as the European Court of Justice.[35]

The Council and the EP are two main legislative bodies of the EU and the power of the EP is slowly expanding[36], especially by the Treaty of Amsterdam which extended the scope of the co-decision procedure and introduced a third-reading possibility for the EP.[37] Some of the areas were included in co-decision procedure are:

- incentive measures concerning employment,
- the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

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for adjusting social policy that are properly available to such a state." (**Daubler**, p.167).

[32] **Blanpain**, European Labour Law, p.230.

[33] In qualified majority voting system, the votes are weighted in respect of the population size of a Member State whereas in unanimity voting system, each Member State has one vote and legislation cannot be passed even if one Member State votes against it. See: **Hix**, The Political System of the European Union, Palgrave Mac Millan, 2005, New York, p.61 et seq.

[34] **Blanpain**, European Labour Law, p.230.

[35] The tasks entrusted to the Community shall be carried out by its institutions (Article 7 of the EC Treaty), within the limits of the powers conferred upon it (Article 5 of the EC Treaty). The Court of Auditors also is a main institution of the EU according to Article 7.

[36] For a detailed analyze on the expansion of the European Parliament's legislative powers see: **Hix**, The Political System of the European Union, p.68-69.

[37] **Weatherill - Beaumont**, EU Law, p.165.

The European Parliament has also a monitory role through the asking written or oral questions regarding the activities of other institutions while at the same time it is provided by Maastricht Treaty for the appointment of an Ombudsman who receives complaints from the citizens or legal persons of the EU concerning instances of maladministration in the Community institutions' activities as well as conducts inquiries.[38]

However, the number one legislator in the Union is still the Council of the EU, consisting of representatives of the Member States' national governments.[39] The Council of the EU exercise the powers conferred upon it by the Treaties and the most important ones in the field of labour law are[40]:

- the organisation of the free movement for workers (Art. 39-42 EC Treaty),
- the approximation of laws (including labour laws) (Art. 94-96 EC Treaty),
- the elaboration of a social policy (Articles 136-145 EC Treaty),
- the implementation of decisions regarding the Social Fund (Art. 148 EC Treaty),
- the development of quality education and vocational training (Art. 149-150 EC Treaty),
- the promotion of a stronger economic and social cohesion (Art. 158-162 EC Treaty),
- the implementation of the Social Charter (1989).

Since one of the tasks of the European Community is to raise the standard of living and quality of life of its citizens, through high-quality jobs and high levels of social protection, a Council of Employment, Social Policy, Health and Consumer Affairs (EPSCO) is composed of ministers of employment, social protection, consumer protection, health and equal opportunities, who meet four times a year.[41]

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[38] **Craig - De Burca**, EU Law, p.82.
[39] **Weatherill - Beaumont**, EU Law, p. 73.
[40] **Blanpain**, European Labour Law, p. 69.
[41] **Employment, Social Policy, Health and Consumer Affairs Council (EPSCO)**, http://www.consilium.europa.eu, 04.03.2006.

In these fields, the Council usually decides by qualified majority voting, acting together with the European Parliament under the co-decision procedure, adopts rules to harmonize or coordinate national laws, in particular on working conditions.[42] However, unanimity is required in some important fields of labour law such as; the rights of employed persons (Article 95 of the EC Treaty), economic and social cohesion (Article 161 of the EC Treaty), social security, conditions of employment for third country nationals.[43]

The Commission on the other hand has the main task of participation in legislative procedure of the European Union and also has the duty of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant are applied under Article 211 of the EC Treaty. Regarding working time, the Commission is authorized to submit a report to the EP, the Council and to the Economic and Social Committee on application of the EC Working Time Directive (93/104) (Article 24(3) of the Working Time Directive). In addition, Member States are obliged to report to the Commission every five years on the practical implementation of the Working Time Directive provisions whereas the Commission has the duty to inform the EP, the Council and related committees[44] thereof (Article 24 of the Working Time Directive).

The European Court of Justice has a golden place nearby the other institutions with its task of ensuring the law is observed in the interpretation and application of the EC Treaty (Article 220). Therefore, the primary concern of the Court of Justice is the effectiveness of Community Law and to promote its integration into Member States' national legal systems.[45]

Social partners have a role in employment policy of the European Union. There are mainly three social partners at the European level which are; UNICE (Union of Industrial and Employers' Confederations of Europe), CEEP (Centre Européen des Entreprises Publiques) and ETUC (European Trade Union Confederation).[46]

In view of the fact that employment and social protection polices remain the responsibility of the Member States, the Community's contribution is limited to setting

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[42] **Employment, Social Policy, Health and Consumer Affairs Council (EPSCO)**, http://www.consilium.europa.eu, 04.03.2006.
[43] **Blanpain**, European Labour Law, p. 71.
[44] Economic and Social Committee and the Advisory Committee on Safety, Hygiene and Health Protection.
[45] **Craig - De Burca**, EU Law, p.87.
[46] **Kılıç - Özdemir**, Avrupa Birliği'nde Sosyal Diyalog, AB&Türkiye Endüstri İlişkileri, (Hekimler, ed.), p.293.

common objectives for all the Member States, analyzing measures taken at national level and adopting recommendations to the Member States.[47]

5. Legal Effect of the Directives As the Main Instruments of EC Legislation in the Social Field

Directives have been used as a form of general legislation[48] more frequently than the other types of secondary legislation; namely, regulations, decisions, recommendations and opinions. [49]

According to the Article 137 of the Treaty on European Community under the chapter of social provisions, allows the Council to formulate directives with a view to achieving the objectives of Article 136, such as the promotion of employment, improved living and working conditions, proper social protection, dialog between management and labour and the development of human resources. Therefore the term of "working conditions" cover the working time, including hours of work, part-time, overtime, night work annual vacation and holidays, the legislation of the EC in this area have been made through the directives, such as Directive 93/104 of 23 November 1993 Concerning Certain Aspects of the Organization of Working Time.

According to the rulings of the ECJ, there are three main conditions that must be satisfied in order to be possible for an individual to rely on the direct effect of a directive, these are:

- the provision of the directive in concern, must be unconditional and sufficiently precise,
- the time limit for implementation of the directive must have expired,
- the action must be brought against the state.

[47] **Employment, Social Policy, Health and Consumer Affairs Council (EPSCO)**, http://www.consilium.europa.eu, 04.03.2006.
[48] **Weatherill - Beaumont**, EU Law, p. 152.
[49] **Daubler**, p. 159, et seq. Founding Treaties constitute primary legislation of the Union and have direct effect in Member States' national laws as determined by the Court of Justice in *Van Gend en Loos Case* (Case 26/62), in which the Court also stated that the treaty had created a *'new legal order'* and it is independent of the legislation of the Member States, Community Law not only imposes obligations on individuals but is also intend to confer rights upon them (**Weatherill - Beaumont**, EU Law, p. 396, 397).

According to the Article 137 of the EC Treaty, the main instrument of the Council is entitled to formulate directives regarding the working conditions in the Member States and many other important social and economic policies are enacted into legislative form by means of Directives.[50] The importance of the subject of the legal effect of the directives on the Member States' law; must therefore inevitably be underlined.

In the EC Law, the binding effect of the directives has been accepted by the Article 249 of the EC Treaty. The crucial point is hidden in the answer of the question that whether or not a directive has direct effect, which means that provisions of a directive may confer rights upon individuals and therefore are required to be directly applied by national courts without the need for domestic implementing legislation. Surprisingly, the answer did not come from the legislative bodies of the European Union, but from the case law of the European Court of Justice, as an example of its activist approach. [51]

Direct effect as a term, means that provisions of EC Law may confer rights upon individuals and are required to be applied by national courts of the Member States, without the need of any further legislative implementation.[52]

In *Van Duyn v. Home Office Case*, the European Court of Justice laid down that the directives could have direct effect as a necessary result of their binding character and in order to strengthen their effect on the national law of the Member States. [53]

In *Marshall Case*, the ECJ stated that, as it had held before in 1979 in *Ratti Case*[54], a Member State which has not adopted the required implementing measures of a directive within the prescribed time period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.[55] In this sense, another important point stressed by the Court in Marshall Case that a legal person was accepted as a party of a case

[50] **De Burca**, Giving Effect to the European Community Directives, Modern Law Review Vol. 55, No.2, March 1992.

[51] Judicial activism is beyond legal interpretation, which is only a legitimate expression, but judicial activism involves a judge's arbitrary intrusion into the political arena by giving priority to values other than legal ones, such as, in the case of the ECJ, supporting the process of European integration. (**Pollicino**, Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint, German Law Journal No. 3 (1 March 2004), p. 285.

[52] **De Burca**, Giving Effect to European Community Directives.

[53] **European Court of Justice**, *Yvonne van Duyn v Home Office* Case 41/74, [1974] ECR 1337, http://www.curia.eu.int, 25.04.2005.

[54] **European Court of Justice**, *Criminal Proceedings against Tullio Ratti* Case 148/78, [1979] ECR 1629, http://www.curia.eu.int, 25.04.2005.

[55] **European Court of Justice** *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority,* Case 152/84, [1986] ECR 723, http://www.curia.eu.int, 25.05.2005.

that was brought against it by an individual depending on a directive. Thus, by the case law of the ECJ the vertical direct effect of the directives was secured.[56]

[56] Vertical direct effect of the directives means the ability of a directive to be invoked by the individuals against their member states and/or (as in Marshall Case it is accepted) such legal persons as employers. On the other hand horizontal direct effect, if it is accepted, enables the individuals bring about cases against other individuals depending on a directive. The type of the relation between the parties of a legal proceeding defines the type of the direct effect. (**Craig-De Burca**, EU Law, p.203-208).

THE SECOND CHAPTER

EMPLOYMENT AND THE SOCIAL POLICY OF TURKEY

1. General

Development of the Labour Law depends on the development of industrialization and the expansion of the number of the workers[57], which are the facts that Turkey has met late compared with the occidental world, which mostly includes the European countries.[58]

Statue law had not been formed until the period of administrative reforms in mid 1800s, when a number of laws were carried headed by *Mecelle*, which involved a few insufficient articles concerning labour relations under the headline of "*lease agreement*", additionally there were three other acts regarding labour relations, which were namely the Mine Regulation of 1863, Pasha Dilaver Regulation and Maadın Regulation involved of job security and health provisions. [59]

During the term of constitutional monarchy, employment related acts continued to be enacted, especially at the time of the Second Constitutional Monarchy, owing to number of strikes resulted in the enactment of a general holiday law, "Ta'til-i Eşgal" in 1909, which was followed by a number of laws.[60]

Turkey lacked of a comprehensive organisation regarding social security and employment since the proclamation of the Republic and until the first Labour Act Number 3008, was enacted in 1936 after the first steps taken for establishment of a national industry in 1930s[61], which provided basic principles concerning establishment of social security, the system of which has not been established until 1945.[62]

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[57] **Tunçomağ - Centel,** İş Hukukunun Esasları, Beta Yayınları 4th Edition, Istanbul 2005, p. 14. **Akyiğit,** İş Hukuku, Seçkin Yayıncılık, 2006, Ankara, p.37.

[58] **Çelik**, İş Hukuku Dersleri, p. 5. **Tunçomağ - Centel,** İş Hukukunun Esasları, p.17. **Akyiğit**, İş Hukuku, p.39. **Aktay - Arıcı - Kaplan Senyen,** İş Hukuku, Seçkin Yayıncılık, First Edition, 2006, Istanbul, p. 39.

[59] **Çelik**, İş Hukuku Dersleri, p. 6. **Tunçomağ - Centel,** İş Hukukunun Esasları, p.17 and 18. **Ergin**, İş Sağlığı ve Güvenliği Açısından Türkiye Geneli, Can Tuncay'a Armağan, p.130. **Akyiğit**, İş Hukuku, p.40. **Mollamahmutoğlu**, İş Hukuku, p.28.

[60] One of which is the Weekly Holiday Law No. 394 of 1924 is still in force with various amendments, **Çelik**, İş Hukuku Dersleri, p. 7.

[61] **Süzek**, İş Hukuku Beta Yayınları, 3rd Edition, 2006, İstanbul, p. 11. **Şahlanan**, Genel Hükümler ve Temel

Legislation on labour increased in number right after the Second World War, such as the one under which a Ministry of Labour was established in 1946 and the one on the establishment of Labour Courts in 1950. [63]

Adoption of the 1961 Constitution made an epoch in employment and social security system in Turkey by legalizing concerning basic principles.[64] It is indicated that the Republic of Turkey is a welfare state of law (Article 2) and social and economic rights under the Third Chapter were ushered into Turkish Labour Law by the Constitution of 1961.[65] Thus, fundamental rights regarding working life has gained a constitutional value.[66] In the light of the Constitution of 1961, Social Insurance Law Number 506 in 1964 and Labour Law Number 1475 in 1971[67], Trade Unions Act Law Number 274 and Collective Labour, Strike and Lockout Act Number 275 in 1963 were enacted.[68]

After the adoption of 1982 Constitution of Turkey, which defined Turkey as a welfare state of law and social and economic rights and obligations were regulated under the third chapter. Accordingly to the Constitution of 1982, Trade Unions Act and Act on Collective Labour Agreement, Strikes and Lockouts were enacted. Finally, Labour Act Number 4857, which adopted in accordance with the legislation of the European Union and ILO, was formed and published in Official Journal in 10th of June in 2003.[69]

Conformation to fundamental labour standards would cause rather than a lost in price advantage by means of cost increase, instead; it would conduce to the improvement of production quality and to increase in productivity.[70] Therefore, Turkey has to fulfill the implementation of legislation concerning fundamental labour standards, which has been

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Kavramlar, Yeni İş Yasası Sempozyumu, Istanbul Bar Association, 2003, Istanbul, p.25. **Aktay - Arıcı - Kaplan Senyen**, p.40.

[62] **Güzel - Okur**, p. 30.

[63] **Süzek**, p. 11.

[64] **Tunçomağ - Centel,** İş Hukukunun Esasları p. 18. **Güzel - Okur**, p. 34-35.

[65] **Tunçomağ - Centel,** İş Hukukunun Esasları p.18. **Mollamahmutoğlu**, İş Hukuku, p.33.

[66] **Süzek**, p. 12.

[67] Article 14 regarding severance pay, of the former Labour Act Number 1475 is still in force. See: **Mollamahmutoğlu**, p.41.

[68] **Süzek**, p. 12. **Tunçomağ - Centel,** İş Hukukunun Esasları p.18. **Mollamahmutoğlu**, p. 34. **Akyiğit**, p.41. **Aktay - Arıcı - Kaplan Senyen,** p.40.

[69] **Çelik**, İş Hukuku Dersleri, p. 13, **Tunçomağ - Centel,** İş Hukukunun Esasları p.19. **Taşkent**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, Legal Yayıncılık, 2005, Istanbul, p.21-22, **Süzek**, p.13., for criticism of 1982 Constitution regarding labour law principles, see: **Mollamahmutoğlu**, p.36, et seq. **Aktay - Arıcı - Kaplan Senyen**, p.41.

[70] **Akman-Dartan-Nas**, Çalışma Standartları - Ticaret İlişkisi: Türkiye'nin Avrupa Birliğine Katılım Sürecinde Bir Değerlendirme, Marmara Journal of European Studies, Vol.12, No.1-2, 2004, İstanbul, p.291.

enacting through the integration process to the EU, in order to gain competitive power by means of an efficient productivity process.[71]

2. Institutions in Turkey Regarding Employment Policy

Ministry of Labour and Social Security, headed by a Minister, is responsible for encouraging co-ordination measures in order to maintain industrial peace and settlement procedures for the benefit of the country, for improving the labour force productivity, for implementing measures to provide full employment and adequate social security.[72]

The Social Security Institution, which depends on the Ministry of Labour and Social Security, is responsible for providing standardization between the social security institutions and İŞKUR (Article 1 of the Law on the Organisation of Social Security Institution).

Other institutions attached to the Social Security Institution are: the Social Insurances Institution (SSK), the Social Insurances Institution for the Self Employed (BAĞ-KUR) and Turkish Employment Organisation (İŞKUR).

The Social Insurances Institution (SSK), which has a financial autonomy, is in charge of the application of social security legislation to insured employers.[73] The Social Security Reform studies resulted in four main draft legislations,[74] including the Act on Social Security Institution (Act No.5502)[75], in order to bring Turkish Social Security System under one umbrella.[76] The Social Security Institution Act has been in force since its publishing date in the Official Journal in 20 May 2006. However; SSK, BAĞ-KUR exist until 01.01.2007, which is the enforcement date of other draft acts within the context of social security reform.[77]

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[71] **Akman-Dartan-Nas**, p.257.
[72] **Mollamahmutoğlu**, p. 96; **Pennings - Süral**, Flexibilisation and Modernisation of the Turkish Labour Market (Pennings, ed.) 1-11, Kluwer Law International, 2006, Netherlands, p.9. **Süzek**, p. 86,
[73] **Çelik**, İş Hukuku Dersleri, p. 28.
[74] Draft legislations are: Social Security Institution Act, Retirement Insurance Act, General Health Insurance Act and Payment without Premium Act.
[75] Official Journal No: 26173 of 20.05.2006.
[76] **Okur**, Sosyal Güvenlik Reformu ve Genel Sağlık Sigortası, Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, Vol. 12, 2006, Istanbul, p. 1286.
[77] For a critical view at legislations within the context of social security reform, see: **Okur**, Sosyal Güvenlik Reformu ve Genel Sağlık Sigortası, p.1287, et seq. **Güzel,** Türk Sosyal Güvenlik Sisteminde Yeniden Yapılanma; Öngörülen Modelin Değerlendirilmesi, İş Hukuku Uygulama sorunları ve Türk Sosyal Güvenlik Sisteminde Yeniden Yapılanma Semineri, İstanbul Barosu Yayınları, 2006, Istanbul, p.107 - 124.

The Institution of Employment and Employees (IIBK) was established to carry out public employment services by means of providing labour market mediation services in finding jobs and employees. However, unemployment experienced during the oil crisis of 1973, as a result, the role of public services in the labour market was gradually reduced.[78] The quality of services for employers and employees needed to be improved since IIBK were centred mainly on the public sector, it became ill-equipped to handle the problems of modern markets, which is led by the trends of privatization.[79] In 2003, the IIBK was restructured as the Turkish Employment Organization (İŞKUR), the aim of which was to establish a modern employment organization providing high-quality services to an increased labour force, implement both active and passive labour market policies effectively, and analyze the problem of unemployment in Turkey and it is linked to the social Security Organization of the Ministry of Labour and Social Security. The law establishing İŞKUR ensured a working and organizational model which is open to social dialogue and participation.[80]

3. Sources of Turkish Labour Law

The main statutory instruments of Turkish Labour Law are constituted by general and private sources of law, case law, international agreements, such as ILO Conventions and general principles of law.

The Constitution heads the general sources of law, all the other sources of law must be in conformity with the Constitution and they shall be interpreted in the light of the constitutional rules and principles.[81] Laws in force on labour in Turkey are mainly, Labour Act Numbered 4857, Maritime Labour Act Numbered 854, Press Labour Act Numbered 5953, Act on Collective Labour Agreement Strike and Lockout Numbered 2822, Trade Unions Act Numbered 2821 and Code of Obligations Numbered 818.

Enforcement rules composed of regulations and by-laws, which are enacted by the executive organ, organizes the implementation of the labour laws in detail.[82]

The case law of the courts, which have an auxiliary function, has an undeniable role on the interpretation of law (Article 1 of the Civil Code). The case law of the courts of first

[78] **European Commission**, European Employment Observatory Review Autumn 2004, p. 25.
[79] **Pennings - Süral**, p.10.
[80] **European Commission**, European Employment Observatory Review Autumn 2004, p. 25.
[81] **Süzek**, p. 45.
[82] **Süzek**, p. 46.

instances and the Court of Appeal does not binding however landmark decisions of the Court of Appeal have a binding character on the courts in related matters (Article 45(5) of the Act on Court of Appeal). The jurisprudence is counted among the auxiliary sources from which the judges may benefit in order to minimize the probable errors (Article 1(3) of the Civil Code).[83]

Private sources of labour law are collective labour agreements, individual employment agreements, internal administrative regulations and the instructions of the employers depending on their right of administration.[84]

International agreements, such as ILO Conventions, UN Agreements and European Union Labour Law are among the sources of Labour Law in Turkey. The amendment of Article 90 of the Constitution, by Law Number 5170, has turned over a new leaf regarding the hierarchy discussions concerning international agreements. Article 90 of the Constitution indicates that: *"International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In case of contradiction between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provisions of international agreements shall be considered."*

International agreements on basic rights and principles which are duly put into effect, have gained a superior position over the national law, thus in case of a contradiction between those will result in favour of the international law in concern.[85]

However, the character of the European Union Law is not accepted as international since international law does not involve conferral of powers. As the Court of Justice underlined in its case law that in order to preserve uniformity and efficiency of Community Law, primacy of which shall be accepted over national constitutions of the Member States[86] owing to the fact that the Member states have limited their sovereign rights, albeit within

[83] **Süzek**, p. 49.
[84] **Çelik**, İş Hukuku Dersleri, p.25. Akyiğit, p. 45.
[85] **Süzek**, p. 49. For the view of Turkish Court of Appeal on direct applicability of international agreements regarding social rights, see: **Taşkent**, İş Sözleşmelerinin Gemi Adamlarına Uygulanması, Can Tuncay'a Armağan, p.589 et seq. Also see: **Odaman**, Sosyal Hukuk Alanında Evrensel Hukuk - Ulusal Hukuk İlişkisi, p. 828 et seq.
[86] Case 11/70 *Internationale Handelsgesellsschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel.*

limited fields and have created the community with its own personality which binds both their nationals and themselves.[87]

[87] Case 6/64 *Costa v. ENEL,* **Weatherill - Beaumont**, EU Law, p. 433.

"Every worker has the right to have working
conditions which respect his or her
health, safety and dignity."[88]

THE THIRD CHAPTER

WORKING TIME

1. Working Time

Working time is a crucial element of working conditions and a key influence upon job satisfaction and the quality of working life,[89] while it is also perceived by labour law as an issue of safeguarding physical existence of human beings thus, the main goal of labour law is to limit and shorten daily and weekly working hours which had been too long in all the European countries during the first periods of industrialization.[90]

Initial period of industrial relations in modern sense, goes back to the times when the workers were understood as the components, who should work continuously to increase the incomes of employers.[91] While today, new technological developments have altered the traditional concepts of working time and in this respect and the harmonization of the workers to their jobs is aimed by new working types.[92]

According to the ILO's research, a clear link between long working hours and the increased risk of industrial accidents due to loss of concentration and the workers who work more that 48 hours in a week suffer a higher risk of heart disease, stress related and mental illnesses, diabetes and have more tendency to smoke or to drink. [93]

The data showed in the table below shows the link between reduced working hours result in higher productivity for five industrialized countries:

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[88] Charter of Fundamental Rights of the European Union Article 31(1), OJ 18.12.2000, C 364/1.

[89] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time", Luxembourg: Office for Official Publications of the European Communities, 2003, www.eurofound.eu.int, 28.04.2006.

[90] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, Çalışma Hayatında Esneklik, Çeşme Altınyunus Semineri, Yaşar Eğitim ve Kültür Vakfı Yayınları, 1994, İzmir, p. 161.

[91] **Centel**, Kısmi Çalışma, Kazancı Hukuk Yayınları No: 106, 1st Edition, 1992, Istanbul, p.1.

[92] **Centel**, Kısmi Çalışma, p.1.

[93] **European Trade Union Confederation (ETUC)**, Working Time Directive, http://www.etuc.org, 08.05.2006. For he research by the ILO: http://www.ilo.org/public/english/protection/condtrav/infosheets/index.htm, 08.05.2006

Table I

Development of Working Time, Productivity and Gross National Product Per Capita in Five Industrialized Countries (1870 to 1992)

	USA	Germany	Japan	France	UK
Working Time	- 46.3%	-46.9%	-36.3%	-47.6%	-50%
Productivity per hour worked	+ 1287.6%	+1734.7%	+4352.2%	+2127.9%	+918.8%
GNP per capita	+ 918.6%	+998.3%	+2632%	+967.1%	+501.7%

Source: G. Bosch and S. Lehndorff, in Cambridge Journal of Economics, No.25, 2001, pp.209-243;
*** From ILO,** Conditions of Work and Employment Programme, Working time and Productivity, Information Sheet No.WT-18, June 2004, http://www.ilo.org/travail, 08.05.2006.

In all of these countries, a rise of GNP per capita and labour productivity per hour was accompanied by a reduction of working hours, consequently the reduction of working time partly contributed to the productivity growth in these countries.

§ 2. Organizing the Working Time

The aim of the employment law in respect to the working time is to shorten the long daily and weekly working times by limiting the working hours. [94] Instead of being a concept regarding merely working howsoever, right to work embraces working conditions as well.[95] Limiting the number of working hours is one of the most essential trade union demands dating back to the 1880s and the first international convention on working conditions was held in Washington by the ILO, establishing the principle of working hours of eight hours per day and the 48 hours per week.[96]

The European Community is not a member of the ILO, but an observer.[97] According to the EC Directive on Working Time 93/104, the ILO principles with regard to the organization of working time are taken into account while forming and implementing

[94] **Akyiğit,** Bireysel İş Hukuku, p.266. **Subaşı**, İş Hukukunda Çalışma Süreleri, A. Can Tuncay'a Armağan, Legal, First Edition, 2005, İstanbul, p. 303.
[95] **Kaboğlu**, Özgürlükler Hukuku, 4th Edition, Afa Yayınları, 1998, İstanbul, p.263.
[96] **ILO**, Hours of Work (Industry) Convention, No. C1, 1919, may be found at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C001
[97] The lack of Community membership of an international organization may rise some difficulties of participation to negotiations which first arose regarding Convention No 153 on working hours and rest periods in transport in late 1970's. For a comprehensive study on the question of EC competences regarding international organizations, see: **Eeckhout**, External Relations of the European Union, Oxford University Press, 2004, p. 199, et seq.

concerning EC legislation. Thus, basic definitions of the concepts by ILO regarding working time are henceforth cited in this study.

The organization of working time is one of the basic factors of dispute between the employer and the employee. [98] There are two main waves in historical evolution in respect of this; the first one is to shorten the working hours by putting restrictive limits in order to protect the health of the employees; the second one is to make the parties as possible as free to regulate the working hours. [99] The former is a result of the industrial revolution while the latter is a result of the technological developments and the globalization[100] whilst it is symbolized by the "flexibility" by which the need of "production on time" is aimed.[101]

The organization of the working time; basically, limiting the daily and weekly working hours, is related strongly to the health protection of the workers because of the fact that the need for resting and sleeping at the end of a working day, is one of the essential natural needs of the workers.[102]

However, beyond the aim of health protection, social and economic aims lie beneath the idea of limiting the hours that worked, former is expressed such as enabling the workers to benefit from social activities, education and to allow them time for family and caring responsibilities while latter is expressed as fighting against unemployment. [103]

The globalization and the developments in the productivity techniques carried out the new working types and methods. In view of these events, all developed countries are changing their labour law codes without prejudice to the principle of protecting the workers' rights. [104] Because how the competition in international world of trade, keeping in step with the computer and information technologies and reducing the outcomes are vital for the enterprises and for the state's economy, it is that much vital also for the workers not to be deprived of minimum standards of working conditions. [105] The duration of the working time is a distinctive socio-politic element to show a country's international competition power and

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[98] **Mollamahmutoğlu**, 667. **Subaşı**, p.310.
[99] **Mollamahmutoğlu**, 670. Subaşı, p.310.
[100] **Subaşı**, p.310.
[101] **Mollamahmutoğlu**, p.669-670. Subaşı, p.310.
[102] **Eyrenci,** (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, Legal yayınları, 2nd Edition, 2004, Istanbul, p.196.
[103] **Eyrenci,** (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.196.
[104] **Subaşı**, p.304.
[105] **Subaşı**, p.305.

therefore the length and the flexibility of the hours of work, is an effective factor on competition. [106]

2.1. EC Legislation on Working Time

First, there was a mere recommendation, which is only a historical value at present, concerning the principle of 40-hours' work week and the principle of four weeks' annual paid leave. [107]

After 15 years, in 1990, the Commission made a proposal on the basis of Article 137 of the EC Treaty, which provides that the Community is to support and complement the activities of the Member States with a view to improving the working environment to protect workers' health and safety, for a directive concerning the organization of working time with aim of implementing points 7 and 8 of the Community Charter of Fundamental Social Rights.[108] Finally the Directive 93/104/EC main requirement of which was that no individual should work more than 48 hours in any week was formed.

Britain negotiated an opt-out clause that allows individuals to waive their entitlement to a 48-hourweek. Other countries also opt out, most commonly in specific sectors such as health care.[109] Consequently, the European Commission published proposals for change, calling for the opt-out to be retained but only on an individual basis. The UK Government pledged to defend the opt-out, thus the issue has divided member states between those, led by Britain, that want to preserve the opt-out and others, led by Sweden, which want it to be scrapped.

Directive 93/104/EC was amended and was replaced by the Directive 2003/88/EC by the European Parliament and the Council of the European Union, concerning certain aspects of the organization of working time, which lays down minimum safety and health requirements.[110] The working time Directive 2003/88/EC is part of the EU's health and safety regulations to protect workers also; it updates key aspects of the 1993 directive: the definition

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[106] **Subaşı**, p.305.
[107] **O.J. of the EU,** L 199, 30.07.1975, p.32-33.
[108] **Blanpain**, European Labour Law, p.534.
[109] **Johnston**, Briefing: EU Working Time Directive, Times Online, http://www.timesonline.co.uk, 11.05.2006.
[110] Directive 2003/88/EC of the European Parliament and of the Council of 04.11.2003 concerning certain aspects of the organization of working time. **O.J. of the European Union**, L 299, 18.11.2003.

of on-call time, the reference periods for calculating the 48-hour maximum working hours per week and the opt-out from the 48-hour working week.[111]

The EC Directive concerning working time, reflects the practice in the Member States of the EU of controlling maximum limits of working hours for the purposes such as to protect the health of the employees and to some extent to create jobs for diminution of unemployment.[112]

In September 2004, the European Commission issued a proposal to amend the EU working time Directive, focusing on the opt-out from the maximum average working week, the treatment of on-call working and reference periods for the calculation of maximum average working time.[113]

A high proportion of workers in Ireland and UK are the most benefited ones from the Directive concerning the organization of working time since these countries had very few and limited standards on that issue. [114]

2.1.1. Provisions of the Directive

The Directive, lays down minimum safety and health requirements for the organisation of working time. It also deals with periods of daily rest, breaks, weekly rest, annual leave and aspects of night work and shift work sectoral provisions exist for road transport, work at sea and civil aviation. Seafarers and the workers employed in road transport sector, including office staff, are excluded from the scope of the Directive.

Working time is defined in the directive as; *"any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice."*

According to the Directive, the Member States should take the necessary measures to ensure that every worker is entitled to:

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[111] **European Commission**, Working Time Directive, Press Releases, http://www.eu.int, 28.05.2006.
[112] **Collins**, Employment Law, Oxford University Pres, 2003, p. 91.
[113] **Broughton**, Industrial Relations Service, "Commission proposes Amendments to Working Time Directive", http://www.eiro.eurofound.ie, 10.05.2006.
[114] **Falkner - Treib - Hartlapp - Leiber**, Complying with Europe: EU Harmonization and Soft Law in the Member States, Cambridge University Press, 2005, New York, p. 116.

- A minimum daily rest period of 11 consecutive hours per 24-hour period;
- A rest break, where the working day is longer than six hours;
- A minimum uninterrupted rest period of 24 hours for each seven-day period, which is added to the 11 hours' daily rest;
- Maximum weekly working time of 48 hours, including overtime;
- Paid annual leave of at least four weeks.

According to the Article 15, the Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favorable to the protection of the safety and health of workers. This provision is derived from the characteristic of the directive that it only sets minimum standards and principles.

Article 23 under the headline of Level of Protection, hold that without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions in the field of working time, as long as the minimum requirements provided for in this Directive are complied with, implementation of this Directive shall not constitute valid grounds for reducing the general level of protection afforded to workers.

2.1.2. Derogations

According to Article 17 of the Directive, Member States may derogate from Articles 3 to 6, 8 and 16 with due regard for the general principles of the protection of the safety and health of workers, when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, particularly if they are:

- Managing executives or persons with autonomous decision-taking powers;

- Family workers,

- Workers officiating at religious ceremonies in churches and religious

Communities.

Derogations may only be adopted by means of laws, regulations or administrative provisions or collective agreements or agreements between the two sides of industry without prejudice to the compensatory periods of rest for workers in concern or in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection.

In accordance with paragraph 2 of this Article, derogations may be made from Articles 3, 4, 5, 8 and 16 in some cases such as offshore work, security and caretaking sectors, activities involving the need for continuity of service or production as it is in hospitals, docks, airports, urban transportation, also in media, tourism and agriculture sectors and in cases of accident or imminent risk of accident.

In accordance with paragraph 2 of this Article, derogations may be made from Articles 3 and 5 in the cases of shift work activities, each time the worker changes shift and cannot take daily and/or weekly rest periods between the end of one shift and the start of the next one and also in activities involving periods of work split up over the day, particularly those of cleaning staff.

In accordance with paragraph 2 of this Article, derogations may be made from Article 6 and Article 16(b), in the case of doctors in training, in accordance with the provisions set out in the second to the seventh subparagraphs of this paragraph.

On condition that equivalent compensating rest periods are granted to the workers concerned or the workers concerned are afforded appropriate protection, .Article 18 of the Directive enables derogations from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

2.1.3. Critics Concerning the Directive

The EC Directive concerning working time is being criticized to be insufficient to regulate the working hours in member states by many scholars especially from UK where the long hours of work is ordinary.[115]

The EU Working Time Directive has so far had little impact on an ingrained culture of long-hours working in the UK as case studies show that the principal reason for this is the individual opt-outs from the 48-hour limit on weekly working time. [116] Because the legislation permits individual employees to agree to opt out of the upper limit of working hours, which an employer can achieve by simply inserting a suitable term in the employment contract.[117] However, removal of the individual opt-out is unlikely to make much difference to UK practice in the absence of a wider review of working time policy because of the fact that the UK's individualized system of workplace bargaining is currently ill-placed to adapt to a continental European model of working time regulation. [118]

The directive fixes an upper limit of 48 hours per week for work which is a high limit compare to the ILO proposed norm of 40 hours. [119] The Directive excludes many occupations that generally require work for longer hours such as doctors and senior managers.[120]

2.1.4. Future of the Directive

In June 2006, the Council of the European Union of Employment, Social Policy, Health and Consumer Affairs will have on its agenda the next steps to take concerning the proposals for the revision of the Working Time Directive, especially with regards to the opt-out provision widely used in the UK, which allows workers to agree to opt out of the 48-hour week and time spent on call, on which The European Court of Justice has ruled that it should be considered as working time.[121]

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[115] (e.g.) **Collins**, p.91.
[116] **Barnard - Deakin - Hobbs**; "Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK", Oxford Industrial Law Journal, Vol. 32, No: 4, 2003, p.223.
[117] **Collins**, p.91.
[118] **Barnard - Deakin - Hobbs**; p.223.
[119] **Collins**, p.91.
[120] **Collins**, p.91.
[121] **Commission of the European Communities**, Proposal for a Directive of the European Parliament and of the Council at: http://ec.europa.eu/employment_social/news/2004/sep/working_time_directive_proposal_en.pdf, 11.06.2006.

The European Commission is content to allow the opt-out to continue, however, some countries want the opt-out to be phased out, as does the European Parliament contrary to UK. According to the EC Treaty and Charter of Fundamental Rights, every worker within the EU has a right to limitation of his or her working hours, and protection of his health and safety at work. The European Treaties also oblige the European institutions to work with the aim at improving the living and working conditions of European citizens.

The European Trade Union Confederation (ETUC) has called on the European Institutions that they should promote and enforce implementation of Community legislation while respecting its interpretation by the European Court of Justice. [122] By these concerns, in its letter, the ETUC asked to President of the Council of Ministers to do everything within his competence[123]:

"- to ensure that the key principles of the Working Time Directive are upheld and that any proposals for revision, developed in the Council of Ministers, are compatible with the European Treaties and the Charter of Fundamental Rights;

- to take a firm stand: to only accept a political agreement in the Council if it also provides for a phasing out of the individual opt-out from maximum working hours, and to prevent 'salami-tactics' that would provide only for partial solutions while major issues remain unsolved;

- to not accept the argument that 'long working hours' have anything to do with enhancing flexibility and productivity, and therefore would be indispensable for the competitiveness of companies and economies; experiences in various Member States show that productivity and adaptability are better served with 'smart' working time arrangements that combine flexibility with the protection of workers against long working hours;

- to take into account that demographic change will demand from European citizens a high commitment to longer working lives, while also bearing the burden of raising families and caring for relatives and other dependents. Modern working time legislation will have to provide for genuine measures to reconcile work and family life and to protect the health and safety of working parents and careers;

[122] Especially SIMAP and Jaeger Cases (e.g.) which are underlined below pages between 23-26.
[123] **European Trade Union Confederation (ETUC)**, Letter to Minister Bertenstein, http://www.etuc.org, 02.06.2006.

- to take the concerns of European citizens and workers seriously, and respect the compromise amendments that were adopted by a convincing majority of the European Parliament on the key issues of on-call work, reference periods, opt-out and reconciliation of work and family life. We ask you to convince your fellow Ministers that clear support for these amendments is the only sustainable way forward."

If the member states ever reach agreement, the law will go back to the European Parliament for a second reading. It could take a while for the EU member states and the parliament to agree on a text. If they cannot agree, the legislation will fail.

2.2. Turkish Legislation Concerning Working Time

There are two main national legislations related to the organization of working time, which are, the Turkish Labour Act Number 4857 and the Regulation of Working Time Regarding the Labour Act[124], issued by the Ministry of Labour and the Social Security in 2004. However there is another regulation to remind, which is "the Regulation of Working Time Which Cannot Be Divided into the Working Days of the Week", was published on the Official Journal at the same date with the Regulation of Working Time Regarding the Labour Act.

Unlike the recent one, the former Labour Act Number 1475 was insufficient for organizing the modern forms of work and included rigid provisions concerning working time and Labour Act Number 4857, has met the needs of flexibility.[125]

One of the most amended chapters of the Labour Act of Turkey is the working time whilst including the terms of "overtime work", "compensatory work", "part-time work" and "short working", the provisions for the organizing flexible working time was formed.[126] The provisions concerning directly the organization of working time is between the Articles 63 and 70, the Articles 73 and 74, the Article 13 for part-time work and the Articles between Number 41 and 60 on overtime work and work on the rest days and the annual leave.

[124] **Official Journal** of 06.04.2004, No. 25425.

[125] **Çelik**, İş Hukuku Dersleri, p. 298. **Mollamahmutoğlu**, p.671. **Kutal**, Türkiye'de İstihdam Politikaları, Esneklik ve Yeni İstihdam Türleri, **Hekimler**, ed., AB&Türkiye Endüstri İlişkileri), p. 127, 129. **Aktay - Arıcı - Kaplan Senyen,** p.43. **Alpagut,** İş Süreleri ve Ücret, İş Hukuku Uygulama Sorunları ve Türk Sosyal Güvenlik Sisteminde Yeniden Yapılandırma Semineri, İstanbul Barosu Yayınları, 2006, İstanbul, p.16.

[126] **Eyrenci**, "4857 sayılı İş Kanunu İle Getirilen Yeni Düzenlemeler Genel Bir Değerlendirme", Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, No.1, 2004, p. 40 and also **Tuncay**, "Türk İş Hukukunun Avrupa Birliği İş Hukukuna Uyumu, Hekimler (ed.), AB-Türkiye Endüstri İlişkileri, Beta Yayınları, 2004, İstanbul, p. 67.

Nevertheless, some other important provisions of the Labour Act, which are effective even indirectly on the organization of the working time. These are the Article 5 on equal treatment, Article 9 on the freedom to determine the type and conditions of the employment contract, the relevant provisions of supervision and inspection of working conditions and administrative penal provisions of the Act.

THE FORTH CHAPTER

TYPES OF WORKING TIMES

1. Normal Working Time

According to the European Social Charter by Council of Europe, the parties of the charter are obliged to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit (Article 2/1).[127]

1.1. EC Legislation and Working Times in Member States

1.1.1. EC Legislation

According to the Directive 93/104 on Certain Aspects of organization of Working Time, the term of "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice (Article 2).

Maximum weekly working time is referred in Article 6 of the Directive 93/104, which obliges Member States to take the necessary measures, in keeping with the need to protect the safety and health of workers, to ensure that:

- The period of weekly working time is limited by means of 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, does not exceed forty-eight hours.

The upper limit of weekly working time is same as the one set by ILO Conventions on Limiting the Hours of Work in Industrial Undertakings (1919)[128] and Hours of Work in Commerce and Offices (1930).[129]

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[127] **Council of Europe**, European Social Charter (Revised), 03.05.1996, http://conventions.coe.int, 21.04.2006.
[128] **ILO Convention (C-1)**, Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty- Eight in the Week came into force in 1921.
[129] **ILO Convention (C-30)**, Convention concerning the Regulation of Hours of Work in Commerce and Offices

1.1.2. Working Time Variety in Member States

According to the survey results shown at the table below; the longest working times are found in Finland and Ireland (both 40.7 hours) and the United Kingdom (41.5 hours) concerning the full-time employees, whilst the shortest are in Greece, Belgium, France and Denmark, which have working times of less than 39 hours. The gap between the longest and shortest working times is only three hours. The discrepancies between the 15 EU Member States show no sign of disappearing. One group of countries, including Belgium, Denmark, Germany, the Netherlands and France, stands out with average weekly working hours of less than 40, while others, Ireland, Finland and the United Kingdom still have long (over 40) weekly working hours.

Table II
Average Working Hours by Country (hours per week)

	Total	Men	Women	Full-time Employees	Full-time men	Full-time women
Belgium	35.35	38.50	30.77	38.51	39.50	36.28
Denmark	**35.33**	**37.44**	**32.90**	**38.53**	**39.10**	**37.62**
Germany	36.30	39.42	32.28	39.63	40.16	38.62
Greece	**38.68**	**40.21**	**36.27**	**38.77**	**40.28**	**36.46**
Spain	38.47	40.20	33.51	40.65	41.52	38.72
France	**36.45**	**38.86**	**32.80**	**38.88**	**39.59**	**37.69**
Ireland	37.56	41.45	32.88	40.71	42.41	37.99
Italy	**37.66**	**39.95**	**34.27**	**39.36**	**.40.58**	**37.06**
Luxembourg	37.87	41.20	32.31	40.26	41.18	37.90
Netherlands	**32.50**	**37.16**	**25.94**	**39.24**	**40.07**	**36.57**

came into force in 1933.

Austria	37.69	40.67	33.92	40.46	41.20	39.14
Portugal	**39.59**	**41.40**	**37.62**	**40.68**	**41.92**	**39.14**
Finland	39.13	40.60	37.62	40.74	41.34	40.05
Sweden	**37.47**	**39.56**	**35.33**	**40.48**	**40.95**	**39.81**
UK	36.63	42.42	30.20	41.51	43.08	38.66
Total	**36.74**	**39.99**	**32.53**	**39.91**	**40.84**	**38.19**

Source: **European Foundation for the Improvement of Living and Working Conditions, 2003.**

The differences between the Member States can also be seen from the indicators of average working time. Given the variety in the incidence of part-time work from country to country, the fact of whether or not part-time employees are taken into account has a considerable impact on the relative positions of the different countries.[130] For instance, the United Kingdom is eleventh in descending order (36.6 hours) when all employees are included, but second (41.5 hours) when only full-time employees are counted. For the 15 Member States, the average working time is under 37 hours for all employees and almost 40 hours (39.9 hours) for full-time employees. The working hours for all employees, are relatively long in most Mediterranean countries and Portugal has the longest with average of 39.59 hours.

Average working time varies from country to country in the European Union. Since the most significant examples are UK with a reputation of long working hours and Germany with decreased working hours; these two countries is focused in brief at below paragraphs.

[130] **Boisard - Cartron - Gollac – Valeyre**, European Foundation for the Improvement of Living and Working Conditions, Time and Work: Duration of Work, 2003, Luxembourg, p.7.

1.1.3. Comparison of German and British Approach to Working Time

Before comparing UK and German approach to working time, a short notice on the spirits of British and German economies might be useful in order to comprehend the differences of labour market dynamics of these two Member States of the European Union.

According to Michel Albert[131], there are two main forms of capitalism: "Neo-American" and "Rhennish". The former is based on individual achievement and short-term profits whilst in the latter, collective achievement and public consensus are seen as the keys to long-term success.

A distinction can be drawn between two models in which capitalism is embedded in social institutions, in other words, between the "liberal market economy", which is the characteristic of Anglo-Saxon economies (USA, UK, Australia, New Zealand and Ireland), and the "co-ordinated market economy", which is typical form of most continental European countries (Switzerland, Germany, Benelux, Northern Europe) especially of Germany and partly, of Japan.[132]

1.1.3.1. Germany with *'Rhineland Capitalism'*

German Labour Law is among the most advanced in the world, although the lack of a labour code such as 'Code du travail' in France; instead, specific labour acts were developed after World War II, nevertheless, despite the Continental legal system in this country, some of the most important aspects of collective labour law are not regulated by statutory law, nonetheless the case law of Federal Labour Court (*Bundesarbeitsgericht)* and the Federal Constitutional Court (*Bundesverfassungsgericht)* filled the gaps of the labour legislation.[133]

The main structures of today's German labour law were developed in the decades of the so-called *Rhineland capitalism*, standing for a market economy which is, although capitalist in principle, characterized by important social protection and a more cooperative attitude between employers and trade unions.[134] At the beginning of the 1990s, many

[131] **Albert**, Capitalisme Contre Capitalisme, Editions du Seuil, Paris, 1991 (Published in English as "Capitalism against Capitalism" by Wiley Publishers in December 1992).

[132] **Hoffmann**, Co-ordinated Continental European Market Economies Under Pressure From Globalization: Germany's Rhineland Capitalism, German Law Journal No.8, 01 August 2004, http:// www.germanlawjournal.com, 24.06.2006.

[133] **Körner**, German Labour Law in Transition, German Law Journal No.4, 01 April 2005, http:// www.germanlawjournal.com, 24.06.2006.

[134] **Körner**, German Labour Law in Transition, German Law Journal No.4, 01 April 2005,

countries with comparable industrial structures underwent major economic adjustments, including their social systems (e.g. in Scandinavia), while Germany profited from East Germany's enormous demand for goods, by which the West German economy obtained special conditions against the global trend. [135]

The current Hours of Work Act[136] in force, laid down in 1994, while bringing much more flexi-time clauses compare to the former ones, it also sets the upper limit of eight hours for daily working time, which is the normal working day pattern since 1920s.[137]

In the second section of the Hours of Work Act, normal working time is defined as the time from the beginning until the end of work without breaks. Differently from the EC Directive 93/104, the German Hours of Work Act does not limit the weekly working hours directly, instead the limitation is based on daily basis as eight hours except Sunday and statutory holidays and it may be extended to ten hours only if within six calendar months or within 24 weeks an average of 8 hours per day is not exceeded (Section 3 of the Act). Although the condition of that, eleven hours of uninterrupted rest after daily work must be provided, this provision encourages flexibility of working time[138] Thus; the statutory weekly working time is forty-eight hours however, in many cases it is reduced by collective agreements.[139]

According to the Maternity Protection Act,[140] expectant and nursing mothers' daily working time of 8 hours must not be exceeded, (Section 8 of the Maternity Protection Act). Also the same is provided for employees or trainees under 18 years old by Young Work Protection Act.[141]

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http:// www.germanlawjournal.com, 24.06.2006. **Körner** also indicates in the same article that, *"Rhineland capitalism grew after the Second World War in the prosperous decades of the "old" Bonn Federal Republic. Since the collapse of the Soviet Union and the reunification of West and East Germany in 1989, priorities have shifted, slowly but steadily."*

[135] **Körner**, German Labour Law in Transition, German Law Journal No.4, 01 April 2005, http:// www.germanlawjournal.com, 24.06.2006.

[136] German Hours of Work Act dated 09.06.1994, (Bundesgesetzplatt, 10.06.1994, No.33, p.1170-1177), may be found at: http:// http://www.ilo.org/dyn/natlex/, 23.06.2006.

[137] **Weiss - Schmidt**, "Almanya'da İş Yaratma Politikaları: İş Hukuku, Sosyal Güvenlik Hukuku ve Endüstrinin Rolü", **Biagi** (ed.), İş Yaratma ve İş Hukuku, 211-244, MESS, 2003, Istanbul, p. 235.

[138] **Jung**, ILO, National Labour Law Profile: Germany, International Observatory of Labour Law, http:www.ilo.org, 23.06.2006. Also for a similar interpretation: Çalışma Sürelerinde Esneklik, Geleceğe Açılım, Publication of MESS No:378, 2002, İstanbul, p.30.

[139] **Weiss - Schmidt**, "Almanya'da İş Yaratma Politikaları: İş Hukuku, Sosyal Güvenlik Hukuku ve Endüstrinin Rolü", **Biagi** (ed.), İş Yaratma ve İş Hukuku, 211-244, MESS, 2003, Istanbul, p. 236.

[140] Mutterschutzgesetz-MuSchG., Bundesgesetzplatt, Part I, 02.07.2002, No.43, p.2318-2324.

[141] **Jung**, ILO, National Labour Law Profile: Germany, International Observatory of Labour Law,

From the beginning of the mid 1980s, the reduction of working hours by means of flexibility has been provided without prejudice to the level of remuneration; however in 1994, novel patterns of flexibility has been brought, which reduce both working hours and the wages and compensate the fall in the remuneration by labour security clauses and the collective agreement concluded at Volkswagen Company was the leader in this respect[142], which reduced the working time to 28,8 hours distributed to four days a week and reduced the wages by 10% whilst giving a safeguard of that there would not be any dismissal on economic grounds for the forthcoming couple of years. [143]

Germany is one of the few countries in the EU, where representatives of workers (employees of the company or trade union business agents) have seats on the supervisory boards of the companies[144] and in enterprises with more than 2000 employees (about some 500 enterprises, some of which are multinational companies e.g. Volkswagen), representatives of workers have 50% of the supervisory seats. [145]

All these facts mentioned above, help understanding the principal causes of advanced labour standards particularly the ones concerning working time, in Federal Republic of Germany.

1.1.3.2. UK with its Liberal Market Economy

According to the UK Legislation on Working Time, working time should not exceed forty-eight hours per week, including overtime. This reference period is usually 17 weeks but it can be increased to 26 in some cases, or up to 52 weeks by agreement. The period cannot include any time off such as holiday, sick or maternity leave and for any such period an equivalent number of working days is added to the reference period. Although employees are entitled to voluntarily work more than 48 hours by signing an individual "opt out" agreement,

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http:www.ilo.org, 23.06.2006.

[142] In 06.06.2002, Volkswagen AG, the World Works Council of Volkswagen AG and the International Metalworkes' Federation agreed on a global agreement named "Declaration on Social Rights and Industrial Relationships at Volkswagen" (Full text of the convention may be found at International **Metalworkers Federation (IMF)** website: http://www.imfmetal.org, 24.06.2006). according to the Declaration, "The work hours correspond at least to the respective national legal requirements or to the minimum standards of the respective economic sectors" (Article 1.6).

[143] **Weiss - Schmidt**, "Almanya'da İş Yaratma Politikaları: İş Hukuku, Sosyal Güvenlik Hukuku ve Endüstrinin Rolü", Biagi (ed.), İş Yaratma ve İş Hukuku, 211-244, MESS, 2003, Istanbul, p. 236.

[144] For a detailed analyze on employee participation, see: **Hekimler**, Avrupa Birliği ve Birlik Üyesi Ülkelerde Yönetime Katılım, Legal Yayıncılık, 2006, Istanbul.

[145] **Blanpain**, Globalization and Workers' Participation, Blanpain (ed.), Confronting Globalization, 211-218, Kluwer Law, 2005, Netherlands, p.214.

employers cannot force or coerce employees to do so, nor can signing such an agreement be made a condition of employment. Workers can cancel their opt out with between 7 days and 3 months notice, depending on the wording of the original opt out agreement.[146]

During seventeen years of implementing the liberal philosophy and after the tough opposition to any development through "Social Europe", UK began dealing with the unemployment problem and showing willingness to be the part of the Europe in every aspect including employment strategy since the Labour Party took over the government in 1997.[147] However, this attitude might be derived from that the UK sought to direct the employment strategy by take place in it, instead of standing at the doorway and opposing the developments.

The largest influence of the EC Directives on employment and social policy, have occurred in the UK since the adoption of the Social Chapter, because of the fact that UK labour market is the least regulated. However, some exceptions to the adoption of EC directives in the UK still remain, as for instance, in the case of the Working Time Directive.[148]

1.2. Legislation in Turkey

Turkey met industrialization notably late compared with the western countries. Consequently the social partnership and collective labour agreements have been unfamiliar to Turkish markets. This is the main reason it is not so easy to define at which side does Turkish economy fall beyond; liberal or socially balanced?

First of all, incapability of the governments of hindering the informal labour market, is the millstone against a socially balanced economy since considerably high amount of workers lack of social protection. According to the data provided by Statistics Institution of Turkey, 10.656.000 workers, which is equal nearly the half of the employed population, are informally employed.[149]

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[146] **Amicus** (One of the Leading Trade Unions in the UK) Guide to the UK Working Time Regulations, 2005, London, http://amicustheunion.org, 01.07.2006, p. 5

[147] **Lorber**, İngiltere'nin İstihdam Politikası: Bir Başarı Öyküsü mü?, **Biagi** (ed.) İş Yaratma ve İş Hukuku: Uygulamadan Öngörülü Eyleme, Publishing of MESS No.405, 2003, İstanbul, p.413.

[148] **European Commission**, EU Research on Social Sciences and Humanities, Precarious Employment in Europe: A Comparative Study of Labour Market Related Risks in Flexible Economies, p.21, http://ec.europa.eu/research/social-sciences/pdf/finalreport/hpse-ct-2001-00075-final-report.pdf, 24.04.2006.

[149] **Statistics Institution of Turkey**, http://www.tuik.gov.tr/PreIstatistikTablo.do?istab_id=473, 20.07.2006.

The EU encourages Turkey to take all necessary steps to ensure the financial stability of the social security system and effective coordination among the social security institutions.[150] Secondly, collective agreements and unionism are rare concepts[151] at least for today's Turkish Labour Market. Another difference of Turkey from a *"social economy"* is that the employee participation in management is indirect by means of employee organizations, which are also not common.[152] Without a proper market economy Turkey has neither a liberal economy as U.K., in the proper sense.

However, keeping to the course through the EU, could lead Turkey at least to a better level of both social protection and a proper market economy. Even the Member States having long working hours offer better social protection to their employees, such as U. K.

The definition of working time is mentioned in the Article 3 of the Regulation of Working Time as; "the time period, which a worker spend at work, where he/she is been working." The article continues the definition as: "The periods mentioned in the Article 66(1) of the Labour Act, are also considered as working time though, the rest breaks mentioned in the Article 68 of the same Act are not considered as working time."

As it is appears from the definition by the Regulation, no matter if the employee is under duty or is kept waited for a duty to come out, this waiting periods are considered as working time, provided that the employee is at the employer's disposal.[153]

The former Labour Act[154] was criticized often for the provision of equal division of working hours into the working weekdays; moreover, this provision was used to break by collective agreements by enabling workers to have spare time.[155]

An important amendment is the abolishing of the rule of the equal division of the working time into the week days that have been worked. According to the Article 63 of the Act Number 4857, an upper limit to the weekly working time was set to be 45 hours and a as it may equally be divided into the week days that have been worked, another adjustment can

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[150] **Dereli - Sengers - Donders**, Flexibilisation of Formal and Informal Labour Markets, in Flexibilisation and Modernisation of the Turkish Labour Market (ed. **R. Blanpain**), Kluwer Law, 2006, Netherlands, p.18.

[151] **Ulucan**, Esneklik İhtiyacı ve İş Hukukunun İşçiyi Koruyucu İşlevi, (Uçum, ed.), A. Can Tuncay'a Armağan, p.216.

[152] **Çelik**, İş Hukuku Dersleri, p. 23.

[153] **Eyrenci**, (Eyrenci, Taşkent, Ulucan), Bireysel İş Hukuku, p.195.

[154] Labour Act No 1457, **Official Journal** of 01.09.1971, No. 13943.

[155] **Şahlanan**, Çağdaş Bir Kanuna Doğru: İş Güvencesi, Kıdem Tazminatı, Esneklik İlişkileri Semineri, TISK, 07 June 2001, Ankara.

be decided by the parties of the employment contract as well, without prejudice to the rule of upper limit of 11 working hours a day.[156] The application methods of working time in line with the principles mentioned in the Article 63 of the Labour Act are indicated in the Regulation of April 2004.

According to the Article 5 of the Regulation, under the headline of "working on the basis of balancing", by means of a written agreement of the parties, the normal working time may be distributed over the days of the week in different forms, provided that not to exceed the daily working limit of 11 hours and that the balancing period shall be maximum two months, which may be increased up to four months by collective agreements (Article 63(2) of Labour Act), the employer cannot increased the balancing period by his or her unilateral act.[157] Balancing working time enables employees to work under or over forty-five hours in certain weeks, without prejudice to the two weeks' average limit of forty-five hours.[158] As a matter of fact, in cases where the principle of balancing is applied, work which exceeds forty-five hours a week shall not be deemed overtime work, unless the average weekly working time does not exceed the normal weekly working time (Article 41(1) of Labour Act).

The upper limits on working hours are set by the purpose to protect workers as individuals and therefore they are affiliated with the worker as an individual not with the work itself as it is identified in the article 11 of the regulation concerning working time. As a result, the upper daily limit of 11-hours include an employee's total daily work regardless the number of the working places he/she works; the total working hours of the workers are important.[159]

An upper limit of working hours is set in the Regulation of Working Time as to be 45 hours a week which is 48 hours in EC Working Time Directive therefore, Turkish provision in this aspect is accordance with *the acquis communautaire.* Also, it is mentioned in the Labour Act that the parties of the employment contract may deviate from the principle of equal division of working hours into the week days that have been worked.

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[156] **Alpagut,** p.18 and the sixth subtitle on the same page.

[157] **Soyer**, İş Kanunu Tasarısının Çalışma Süresinde Esneklik Sağlayan Düzenlemeri, Yeni İş Yasası Sempozyumu, İstanbul Barosu Yayınları, 2003, Istanbul, p. 187. **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.199. On the fact that application of balancing is out of the scope of the employer, see: **Alpagut,** p.18

[158] **Soyer**, İş Kanunu Tasarısının Çalışma Süresinde Esneklik Sağlayan Düzenlemeleri, p. 187.

[159] **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.197.

In order to meet the needs of flexibilisation of Turkish labour market, which was rigid at the time of the former Labour Act, flexible patterns of work, one of which is the *compensatory work*, were entered by Labour Act No.4857. On the other hand, compensatory work is a means of preventing the mass dismissals during the economic recession periods.[160]

In case work is performed substantially below normal work periods[161] or stopped entirely for reasons of suspending work due to necessary reasons[162], or on the days before or after the national and public holidays or where the worker is granted time off upon his request, the employer may call upon compensatory work, which is not considered overtime or work at extra hours, for vacant periods within two months in order to compensate for the time lost due to periods during which the employees have not worked (Article 64(1)). Compensatory work may be done during the revision and maintenance periods.[163]

Compensatory work shall not exceed three hours a day, and must not exceed the maximum daily working time in any case and shall not be carried out on holidays (Article 64(2)).[164]

Another different working type brought by the new Labour Act in accordance with the flexibilisation of working times is *short work*.

The employer who temporarily shortens the weekly working time or who temporarily suspends work wholly or partially in his establishment due to a general economic crisis or force majeure must communicate this matter immediately to Turkish Employment Organization and to the union, which is a party of the collective labour agreement if there exists. The acceptability of the request shall be decided by the Ministry of Labour and Social Security (Article 65(1)). The consent of the employee is not required for short work contrary to German legislation.[165]

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[160] **Subaşı**, İş Hukukunda Çalışma Süreleri, p. 335.

[161] Since the definition 'considerably shorter than the normal working time' of part-time work in Labour Act is expressed in the explanatory memorandum to the Article as *'less than two-thirds of the contracted weekly number of hours of work',* the condition of compensatory work that work is performed below normal work periods, shall also be considered to be less than two-thirds of the normal weekly work period. (**Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p. 224. Also, see: **Çelik**, İş Hukuku Dersleri, p.306, **Ekonomi**, Telafi Çalışması, Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, Vol.4, 2004, İstanbul, p. 1253 and 1254.

[162] Necessary reasons don't reach the level of force majeure, with this regard, see: **Ekonomi**, Telafi Çalışması, p.1251. Also, **Alpagut,** p.35.

[163] **Çelik**, p.306. **Mollamahmutoğlu**, p.709. Süzek, p.617.

[164] **Ekonomi,** Telafi Çalışması, p.1257.

[165] **Alpagut,** p.42.

In case where work is suspended or shorter working hours are applied at the workplace for a minimum of four weeks is applied due to the above-mentioned reasons, short work benefits are paid to the workers for the periods that they do not work.[166] Short time work period may not exceed the duration of force majeure and in any case three months. In order to be entitled to short work benefit, the employees shall meet the conditions required for entitlement to unemployment benefits in respect of working periods and number of days of unemployment insurance contributions (Article 65(2)). According to Article 65(3), amount of daily short work benefit equals to that of unemployment benefit.

2. Periods Considered as Working Time

There are certain periods that considered as working time even though the employees do not actually perform their works.

2.1. EC Legislation and Case Law of the ECJ

The role of the European Court of Justice by its case-law is considerably crucial on assessing the scope of the working time. However the European Commission made a proposal in 2004, for a new working time directive, revising key aspects of the original directive on working time.

It is aimed by revision of the working time directive to deal with the consequences of recent European Court of Justice Rulings, stating that on-call duty and stand-by shifts must be considered as working time. Cases Simap (C-303/98) and Jaeger (C-151/02) are the golden samples of those:

2.1.1. SIMAP Case[167]

SIMAP[168], which is the union representing public health workers in the Valencia region of Spain, brought a collective action against the Ministry of Health of the Valencia Region on behalf of medical staff providing primary health care at health centers in that region.

[166] **Mollamahmutoğlu**, p.715.
[167] 3 October 2000, *Sindicato de Medicos de Asistencia Publica (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana*, Case C-303-98, ECR, 2000, 7963.
[168] Sindicato de Medicos de Sanidad de Asistencia Publica (Union of Doctors in the Public Health Service).

By that action, SIMAP sought the implementation of certain provisions concerning the length and organization of working time for all doctors working in primary health care teams in Valencia region. According to SIMAP, the doctors in concern should enjoy the rights such as having a working time with an upper limit of 40 hours including overtime, a schedule of night work not exceeding eight hours in any period of a day and special protection measures of the Directive 93/104 concerning the organization of working time should be implemented for them as night and shift workers.

The Tribunal superior de Justicia de la Comunidad Valenciana referred to the European Court of Justice for a preliminary ruling[169] under article 234 (ex 177) of the EC Treaty on the interpretation of the Community legislation concerning the promotion of improvements in the safety and health of workers at work[170] and certain aspects of the organization of working time.[171]

The Court of Justice ruled firstly that, doctors in primary health care teams are in the scope of the Directive 89/391 on improvements in the safety and health of workers at work, and in particular the Directive 93/104 Concerning certain aspects of organization of working time (Para. 75/1).

The court held that, if the doctors in concern are actually present at the health centers time spent on call by them must be regarded in its entirety as working time under the provisions of the Directive 93/104. On the other hand, if they are merely contactable at all times on-call, only time actually spent providing primary health care services will must be regarded as working time (Para. 75/3). Court explained that if duty on-call is excluded from working time and physical presence is required, it would seriously undermine the objective of the Directive 93/104, which is to ensure safety and health of workers by granting them minimum periods of rest and adequate breaks as it is mentioned in the eight recital of the preamble of the directive (Para. 49).

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[169] Where a question concerning the interpretation of the EC Treaty or acts of the EU Institutions, raises before a Member State's national court, that court request the Court of Justice to give a ruling thereon (Article 234 of the EC Treaty).

[170] **Council Directive 89/391** of 12 June 1989.

[171] **Council Directive 93/104** of 23 November 1993.

Finally, the Court of Justice ruled that individuals affected by any derogations from certain aspects of the provisions of the directive concerning working time must give their own consent and that a collective agreement cannot be substituted for such consent. (Para.75/7) [172]

2.1.2. Jaeger Case[173]

Mr. Jaeger has worked as a doctor and has on-call duty of six periods each month and during his on-call duty he presents at the hospital in a room with bed and is allowed to sleep when his services is not required.

The case between Landeshauptstadt Kiel and Mr. Jaeger (the doctor), arose from the dispute of that whether on-call duty of Mr. Jaeger, constitutes working time even he is permitted to sleep at times when he is not required to work or not.

In September 2003, German national Court, LandesarbeitsgerichtSchleswig-Holstein referred to the European Court of Justice under Article 234 of EC Treaty by preliminary ruling procedure asking:

Does time spent on call by an employee in a hospital, in general, constitute working time within the meaning of article 2(1) of the Directive 93/104 EC even where the employee is permitted to sleep when he is not required to work?

The European Court of Justice ruled as: "*Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time must be interpreted as meaning that on- call duty performed by a doctor where he is required to be physically present in the hospital must be regarded as constituting in its totality working time for the purposes of that directive even where the person concerned is permitted to rest at his place of work during the periods when his services are not required with the result that that directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty.*"

In this case, the Court of Justice also underlined that in order to come within the derogation clauses of the directive by Article 17(2) subparagraph 2.1(c)(i)[174], a reduction in

[172] **Blanpain**, European Labour Law, p. 539.

[173] **European Court of Justice**, 9 September 2003, Landeshauptstadt Kiel v. Norbert Jaeger, The Judgement is at: ECR, 2003, 8389, **OJ** C 264/14 of 01.11.2003, the Reference may be found at: OJ C156/7 of 29.06.2002.

[174] Article 17 under the Headline of Derogations of Directive 93/104, as follows:
(1). With due regard for the general principles of the protection of the safety and health of workers,

the daily rest period of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times right after the corresponding working hours. The Court also stated that such a reduction in the daily rest period may not be exceed the maximum weekly working time laid down in Article (6) of the Directive.

2.2. Legislation in Turkey

Not only the actual hours work, but also the periods mentioned in the Labour Act (Article 66) fall into the scope of the working time. Thus, the working time is not limited to the time period of a worker while performing his/her job.

According to the Article 66 of the Labour Act, the following periods shall be considered as the daily working time of an employee:

- the time required for employees employed in mines, stone quarries or any other underground or underwater work to descend into the or corridors or to the actual workplace and to return from there to the surface (Art. 66/a),
- travelling time, if the employee is sent by the employer to a place outside the establishment (Art. 66/b),
- the time during which the employee has no work to perform, pending the arrival of new work but remains at the employer's disposal (Art. 66/c),

If the employer refuses to accept the labour of the employee without the employee's will, the employer's behaviour constitutes *mora creditoris*[175], which may also be subjected to the provisions of the Obligations Act states that *"the employee is entitled to demand the*

Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:
(a) managing executives or other persons with autonomous decision-taking powers;
(b) family workers; or
(c) workers officiating at religious ceremonies in churches and religious communities.
(2). Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection: 2.1. from Articles 3, 4, 5, 8 and 16."
(2)subparagph 2.1(c)(i) as follows: " in the case of activities involving the need for continuity of service or production, particularly: (i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons".

[175] Default of the creditor.

payment of his wage, without having to perform the work agreed upon in the labour contract, if the employer defaults to accept his/her labour provided that the amount the employee has saved by not performing the work or the amount he has gained by doing, or failed to gain by not doing some other work must be deducted from his wage" (Article 325). [176]

- the time during which the employee who ought to be performing work within the scope of his duties in the establishment is sent on an errand for his employer or is employed by him in his household or office, instead of performing his own duties (Art. 66/d),
- the time allowed to a female employee who is a nursing mother to enable her to feed her child (Art. 66/e),
- the time necessary for the normal and regular transportation of groups of employees engaged in the construction, maintenance, repair and alteration of railways, roads and bridges to and from a workplace at a distance from their place of residence (Art. 66/f).

Whereas, it is mentioned at the second paragraph of the Article 66, time for transportation to and from the establishment which is not a requirement of the activity itself, but is provided by the employer solely as a form of amenity shall not be regarded as part of the statutory working time.[177] This provision contains a hidden value for the sake of the employees despite the fact that it appears to be in the employers' interest prima facie. The provision is aimed at eliminating employers' worries that time spent on employer-financed transportation facilities may be considered as part of the regular working time, hence encouraging by not intimidating them to provide such services. [178]

However, in practice it has been difficult to determine whether the transportation of employees is one of those mentioned in Article 66 and in the scope of working time, or it is the one mentioned at the last paragraph of the same article and left out of the scope of the working time. The case law of the Court of Appeal has clarified such occasions arise from these kind of confusing disputes ruling that, if the nature of the work has a permanent character, time spent on the transportation of the employees should not be treated as part of

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[176] **Dereli**, Labour Law and Industrial Relations in Turkey, Kluwer Law International, 1997, p.121

[177] **Mollamahmutoğlu**, p.681. **Süzek**, İş Hukuku, p.610-611. **Aktay - Arıcı - Kaplan Senyen,** İş Hukuku, p.234.

[178] **Dereli**, Labour Law and Industrial Relations in Turkey, p.104.

the regular working time even though the work place is far from any center or habitation.[179] It appears that the Court of Appeal treats the time spent on transportation as working time only at the clauses of Article 66 and on condition that the work is temporary at the character, if the work is permanent in its nature, the time during transportation is not considered as working time and therefore it may not be possible for the workers to demand a remuneration for this period.

Court of Appeal held also that the Article 66(2) is a mandatory rule that opposite provisions cannot be enacted by means of collective agreements. [180]

3. Overtime Work

Overtime refers to all hours worked in excess of the normal hours[181], and it is a short term response by the employer to increases in output demand or demand for services or to meet a deadline.[182]

In order to minimize the potentially negative consequences of overtime such as difficulties in balancing work and family life, due to reduced time available for care work and domestic tasks and/or negative health and safety impacts caused from the long working hours; employers should facilitate the participation of the labour force in the process of determining overtime work. [183]

3.1. EC Legislation

The 1993 EU Directive (93/104/EC) on certain aspects of the organisation of working time is of direct significance to the regulation of overtime.

The working time Directive provides that the period of weekly working time in Member States must be limited by means of 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, over a

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[179] Ruling of the **General Council of the Court of Appeal**, 21.10.1970, 9-501/600; 13.06.1972, 9-318/443; **Court of Appeal, 9. Div.** 18.02.1976, 1975/34811; 27.11.1984, 10531/10466.

[180] **Court of Appeal, 9. Div**., 27.11.1980, 1980/14117.

[181] **International Labour Organization (ILO) Social Protection Sector**, Conditions of Work and Employment Programme, Overtime, http://www.ilo.org, 12.05.2006.

[182] **Vaguer - Van Bastelaer**, Working Overtime, Statistics in Focus, Population and Living Conditions Eurostat, 2004, http://epp.eurostat.cec.eu.int, 01.06.2006, p.1.

[183] **International Labour Organization (ILO) Social Protection Sector**, Conditions of Work and Employment Programme, Overtime, http://www.ilo.org, 12.05.2006.

reference period not exceeding four months. Furthermore, all workers are entitled to: a minimum daily rest period of 11 consecutive hours per 24-hour period; in each seven-day period, a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in the previous point, over a reference period not exceeding 14 days (this rest period should in principle include Sunday, but if objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied); and where the working day is longer than six hours, a rest break. The normal hours of work for night workers must not exceed an average of eight hours in any 24-hour period. Working time vary from the EU-15 to the ten new member states, as employees appear to work longer hours on average in the latter.

Overtime working systems in the EU have changed in recent years by reforms taken by the Member States in order to comply with the acquis communautaire.[184] In 2001, the average employers of the European Union, performed around five hours of paid overtime work per week.[185] However, a large amount of overtime is unpaid according to the Eurostat Labour Force Survey results.[186] If paid and unpaid overtime are taken together, most overtime hours in the European Union (in the area of EU-15) occur in the service sector, among high-skilled workers, legislators and managers, as well as in agriculture.

Table III
Principal Features of Overtime Schemes

Country	Specific Maximum Overtime Limits	Conditions for Use of Overtime	Enhanced Pay rate and/or time Off in lieu
Austria	5 Hours per Week and additional 60 hours per year	No Conditions	+50% pay rate or +50% time off
Belgium	None	May only be used on specific grounds, exceptional peaks of work, force majeure, unforeseeable needs.	+50% pay rate (+100% at weekends and public holidays) May be converted into time off in lieu if provided for by collective agreement.
Denmark	12 hours over 4 weeks	Notice period required.	Companies with agreements increase pay rate, then time off in lieu for overtime hours over a threshold. Companies without agreement, mostly time off in lieu.

[184] **EIRO, European Industrial Relations Observatory Online**, Overtime in Europe, http://eiro.eurofound.ie, 05.06.2006, p.1.
[185] **International Labour Organization (ILO) Social Protection Sector**, Conditions of Work and Employment Programme, Overtime, http://www.ilo.org, 12.05.2006.
[186] **Eurostat**: *Labour Force Survey* (2002), presented at the Joint UNECE-Eurostat-ILO Seminar on Measurement of the Quality of Employment, Geneva, 27-29 May 2002, CES/SEM.48/14.

Finland	138 hours over a 4-month period, 250 Hours per year over statutory threshold of 40 hours, raised by 80 Hours per year if the 138 hours over a 4-month period is complied with.	Individual agreement of the employee required for work over 40 hours per week.	+50% pay rate for the first 2 hours per day, +100% above that. May be converted into time off in lieu by agreement.
France	180 hours per year or set by collective agreement	No conditions. Permission from authorities required for exceeding annual limits.	Between 35th and 43rd weekly hour-minimum pay rate of +10% (+25% without agreement) or time off in lieu by agreement. From 44th hour +50% par rate.
Germany	Varies between sectoral agreements.	Agreement of works council required, except where sectoral agreement includes specific provisions.	Increased pay rate and/or time off in lieu, by collective agreement.
Greece	3 hours per day over 43 hours (in case of emergency no limits on the first day, and 4 hours on the next 4 days). Annual limits, varying by sector and region set every six months by Ministry of Labour.	Over 43 hours per week requires justification, notification of authorities and record-keeping.	From the 40th to the 43rd weekly hour+50% pay rate. From 44th hour +150% pay rate.
Hungary	200 hours pr year, may be raised to 300 hours by agreement.	Reasons required, notice to be given, record-keeping compulsory.	+50% pay rate or time off in lieu by agreement. +100% pay rate for work on a holiday or +50% time off in lieu.
Ireland	2 hours per day, 12 hours per week, 240 hours per year or 36 hours over 4 consecutive week. Limits can be exceeded with permission from the authorities.	No conditions.	+25% pay rate (Agreements often lay down higher rates).
Italy	250 hours per year (may be lower by agreement)	Collective agreement required (sector or company level).	+10% pay rate (in absence of agreement on higher rate).
Luxembourg	None, but overall statutory daily and weekly working time limits.	Permitted only on specific grounds, permission from the authorities required.	+25% pay rate for blue-collar workers, +50% for white-collar worker. May be converted into +50% time off in lieu for all.
Netherlands	None, but overall statutory daily weekly and quarterly working time limits, which may be extended within limits by agreement.	Must be incidental and not structural. Collective agreements often require agreement of works council and/or employees concerned.	Increased pay rate and/or time off in lieu, by collective agreement.
Poland	4 hours per day, 150 hours per year.	Permitted only on specific grounds, monitored by authorities.	+50% pay rate for the first 2 hours, +100% for further hours (and work at night, on Sunday and holidays). May be converted into time off in lieu at

			request of employee and with employer's agreement.
Portugal	2 hours per day, 200 hours per year.	Permitted only on specific grounds, record keeping required.	+50% pay rate for the 1st hour, +75% thereafter that, +100% on rest days and holidays. Plus time off in lieu at +25% of the hours worked.
Slovakia	18 hours per week, 150 hours per year (excluding certain overtime, such as in the event of disasters). Up to 300 hours in special cases by company level agreement and with authorities' permission.	No conditions for up to 150 hours per year.	+25% pay rate (Higher by company level agreement).
Spain	80 hours per year.	Requires collective agreement or agreement by employee.	Increased pay rate (average +18%) or time off in lieu, by collective agreement.
Sweden	None, but overall statutory weekly working time limits. Temporary exemptions possible by company or workplace level agreement.	Must be justifiable and often subject to agreement (company or workplace level). Record-keeping compulsory, monitoring by staff representatives.	Increased pay rate (Usually +50% to +100%) or time off in lieu, by collective agreement.
UK	None, but overall statutory weekly working time limits (from which individuals may 'opt out').	No conditions.	Increased pay rate or time off in lieu, by agreement.

Source: **EIRO**[187]

Beyond long working weeks, the case studies, such as Eurostat's, seem to confirm that a considerable amount of overtime is unpaid especially among the new Member States of the EU.[188] For example, more than 70 % of workers in Poland do not receive any additional remuneration for overtime. The case of Lithuania is also remarkable; as only 6.5 % of workers who are working more than 48 hours per week receive extra payment. The best situation seems to be in Slovakia, where only 48.5 % of employees working overtime reported not being paid. A similar situation exists for the payment of weekend work. In Cyprus and Lithuania, fewer than 10 % of workers are paid extra for working on Sundays. [189]

While the phenomenon of unpaid overtime is not unknown in EU-15, it includes generally managers and white-collar employees rather than manual workers, while in many of

[187] **European Industrial Relations Observatory** online, http://eiro.eurofound.ie, 05.06.2006, p.3-6.
[188] **Eurostat**, Proportion of Workers who do Not Receive Extra Payment for Overtime, 2001.
[189] **Eurostat**, Proportion of Workers who do Not Receive Extra Payment for Overtime, 2001.

the new Member States it tends to concern all types of workers. Many reasons cause employees to accept such conditions such as unemployment.[190]

3.2. Legislation in Turkey

Clauses of the Labour Act concerning overtime work take place between the Articles 41 and 43. A regulation was formed depending on the Article 41/9[191], in April 2004 named as "the regulation of Overtime Work and Working at Extra Hours" aimed at organizing the procedure and the defining the essential elements of working at extra hours and overtime work (Article 1).

3.2.1. Definition and General Provisions

Unlike the definition of "beyond the daily working time specified under the act" by the previous Labour Act (No.1475), overtime work is defined at weekly basis and by clear words in the recent Labour Act by Article 41 and also at Article 3(a) of the related regulation as: "it is the work which exceeds 45 hours a week." However, when applying principal of balancing in accordance with Article 63, if work duration exceeds 45 hours a week that shall not be deemed overtime work unless the average working time of the employee does not exceed the normal weekly working time (Article 41(1)). [192]

According to Article 3(b) of the Regulation concerning overtime, if the regular working time is determined under 45 hours a week, any work exceeds the agreed working time and up to 45 hours at weekly basis, is deemed to be "working at extra hours".

According to the Regulation of Overtime Work, junior (under 18) employees, pregnant or nursing employees or the employees at maternity care, part-time employees[193] and employees who is not suitable by certificated health problems are not permitted to overtime work (Article 8). It also should be mentioned that; overtime work is prohibited in operations where the hours of work must up to 7.5 hours a day for health reasons, also in night work, operations in the mines, in sewage work, cable laying and tunnel construction works (Article 7 of the regulation).

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[190] **European Commission**, Industrial Relations in Europe 2004, Luxembourg 2004, p.158.

[191] Article 41/9of the Labour Act: "Overtime and its methods shall be indicated in a regulation to be issued."

[192] **Court of Appeal, 9. Div**., 16.06.2005, 2004/24384, 2005/26172.

[193] Regarding the issue that prohibition of overtime for part-time employees, see: **Süzek,** İş Hukuku, p. 629. **Alpagut,** İş Süreleri ve Ücret, p.27. **Akyiğit,** İş Hukuku, p.281. **Aktay - Arıcı - Kaplan Senyen,** İş Hukuku, p.247.

Wages for each type of overtime work shall be paid for each hour of overtime by increasing the amount of normal hourly wage by fifty percent and (Article 41/2 of Labour Act and Article 4 of the Regulation concerning Overtime). The parties may decide on a higher amount of payment since the amount mentioned in the Labour act sets a minimum level and is relatively statutory clause so that may be changed in benefit of the employees.[194]

If the employee so wishes, he/she may use a spare time of one hour and 30 minutes for each hour of overtime or one hour and 15 minutes for each hour of working at extra hours, instead of receiving extra payment (Article 41/4 of Labour Act).[195] According to the Article 6(1) of the Regulation concerning overtime, the employee should make a personal application to the employer with respect to his demands of spare time instead of overtime wage. Provided that the employer is notified by written form, the employee may use that spare time within six months, in between his working time and continuously (Article6/2 of the Regulation). However, the employee's consent is legitimate unless it is not on lump sum basis since spare time in lieu of overtime wage is an exception whereas the payment for overtime is the rule.[196] Thus, it may be argued that the collective agreement provisions, which stipulate the spare time to take place of overtime wage, do not have a binding effect for the employees since the choice is beyond the scope of the collective agreements and belongs entirely to the personal area.[197]

Overtime work should be performed under the employers' knowledge and will; otherwise, it does not entitle overtime payment. On the contrary, if overtime work is performed even under the ban by the consent of the parties of the employment contract that work entitles of overtime payment to the worker.[198]

Burden of proof with respect to the existence of overtime work is upon the employee, whereas the employer shall prove that the wage of overtime has paid to the employee. [199]

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[194] **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.212; **Tunçomağ - Centel**, İş Hukukunun Esasları, p. 150.

[195] Giving a rest period in lieu of payment depends the demand of the employees, the employer shall not avoid his/her obligation to pay the overtime wage by his or her own will. (**Soyer**, Yeni Düzenlemeler Karşısında Fazla Saatlerle Çalışma, Legal İş Hukuku ve Sosyal Güvenlik Dergisi, No: 3, 2004, Istanbul, p.803.)

[196] **Süzek**, İş Hukuku, p. 634. **Alpagut,** İş Süreleri ve Ücret, p.32.

[197] **Soyer**, İş Kanunu Tasarısının Çalışma Süresinde Esneklik Sağlayan Düzenlemeri, p. 194. **Alpagut,** İş Süreleri ve Ücret, p.32.

[198] **Tunçomağ - Centel**, İş Hukukunun Esasları, p.147; **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.211.

[199] **Özdemir**, İş Sözleşmesinden Doğan Uyuşmazlıklarda İspat Yükü ve Araçları, p. 181: "While all sorts of evidence is available to shift the burden of proof on employees, concerning the existence of overtime work,

3.2.2. Types of Overtime Work

There are mainly three types of overtime work depending on by which legal grounds it is constituted.

3.2.2.1. Normal Overtime Work

Normal overtime work, as it is defined at article 41 of the Labour Act, is performed for purposes such as the country's general interest, the nature of the job itself or he need to increase output. However these grounds are in general deemed to be economic grounds of a workplace by some scholars.[200] According to Article 41(8), normal overtime work of an employee shall not exceed 270 hours in a year.[201] In this regard, Turkish legislation is not compatible to the EC Working Time Directive 93/104 which stipulates a three hours weekly limit for overtime work. The limit of the duration of overtime is employee oriented (Article 5 of the Regulation concerning Overtime), thus if overtime exceeds 270 hours a year in a workplace it does not constitutes a breach of the limit as long as each employee does not work over the overtime limit.[202]

According to Article 41(7), the consent of the employee is required for overtime working.[203] According to the regulation concerning overtime, the consent of the employee should be in written form and it is required for both overtime work and work at extra hours and may be received by the employer at the beginning of every calendar year and is kept at each workers personal file (Article 9 of the Regulation concerning Overtime). It may be received at the beginning of the employment contract but even in such a case, it also should be obtain at the beginning of a year.[204] If the worker does not work overtime, which he or she had given consent of; the employer may terminate the employment contract on justified grounds unless the employee has justified grounds for not overtime working (Article 25 of the Labour Act).[205]

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however employers shall prove that the wage of overtime work has paid, only by means of documentary evidence."

[200] **Tunçomağ - Centel**, İş Hukukunun Esasları, p. 149.

[201] See: **Alpagut,** İş Süreleri ve Ücret, p. 29 for the unfavorable effects of annual limit for overtime.

[202] **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.212.

[203] If the employer does not take the employees' consent on overtime, he/she shall be liable to a fine for each employee according to Article 102(c) of the Labour Act.

[204] **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.210.

[205] **Çelik,** İş Hukuku Dersleri, p.311; however, **Tunçomağ - Centel**, İş Hukukunun Esasları, p. 150; **Eyrenci** - **Taşkent - Ulucan**; Bireysel İş Hukuku, p.211.

3.2.2.2. Compulsory Overtime Work

In the case of urgent work to be performed on machinery, tools or equipment or in the case of force majeure, provided that it shall not exceed the time necessary to enable the normal operating of the establishment (Article 42 of the Labour Act). The characteristic of compulsory overtime work is that it is temporary and urgent to be performed.[206]

There is not a clear upper limit by hours for the compulsory overtime, instead, as stated in Article 42(1) that, it shall not exceed the time necessary to enable the normal operating of the establishment.

Despite the consent of the employee is not required on compulsory overtime (Article 9 of the Regulation), it must be accepted that the employee, whose health situation is not suitable, should not be demanded to overtime work.[207]

3.2.2.3. Overtime Work in Emergency Situations

During the periods of mobilization, the Council of Ministers may, if it deems it necessary and limited only by that period, extend the daily hours of work up to the maximum of which the employees working in establishments serving the needs of national defense are capable, according to the nature of the operations and urgency of the needs in question (Article 43 of Labour Law).

The consent of the employee is not required for overtime work at emergency situations (article 9 the Regulation).

3.2.3. Work at Extra Hours

Work at extra hours defined in subparagraph three of Article 41 in Labour Act as the work up to 45 hours in a week but exceeds the average working time, which is arranged to be less that 45 hours in a week, is deemed to be work at extra hours. [208]

The consent of the employee is also required for work at extra hours as it is for overtime work. However, it is not required to be in a written form at the beginning of each calendar year, since this provision is only anticipated for overtime work, thus it would be

[206] **Tunçomağ - Centel**, İş Hukukunun Esasları, p. 151. **Akyiğit**, İş Hukuku, p.278.
[207] **Tunçomağ - Centel**, İş Hukukunun Esasları, p. 151.
[208] It is equally defined also in the Article 3(b) of the regulation concerning overtime work.

adequate to take the employees' consent at the beginning of the employment contract or anytime it is needed (Article 9 of the Regulation).[209]

Wage for work at extra hours shall be paid for each hour by increasing the amount of normal hourly wage by twenty-five percent (Article 41/3 of Labour Act and Article 4/2 of the Regulation concerning Overtime).

4. Night Work

4.1. Definition

Night work is defined in the ILO Night Work Convention as: "all work which is performed during a period of not less than seven consecutive hours, including the interval from midnight to 5 a.m." [210]

According to the European Social Charter, it shall be ensured that, workers performing night work benefit from measures which take account of the special nature of the work (Article 2/7).

4.2. Night Work in the European Union

4.2.1. EC Legislation

According to the Article 2(3) of the Directive 2003/88/EC, which amended the Directive 93/104/EC, 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 5.00. And at 4th paragraph of the Article 2, night worker defined as:

(a) On the one hand, any worker, who, during night time, works at least three hours of his daily working time as a normal course; and

(b) On the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:

(i) By national legislation, following consultation with the two sides of industry; or

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[209] **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.216. For the counterview see: **Akyiğit,** İş Hukuku, p.282.

[210] **ILO Night Work Convention**, 1990, No.171.

(ii) By collective agreements or agreements concluded between the two sides of industry at national or regional level.

Member States have the liability to take the measures necessary to ensure that the provisions concerning the organizing of the night work is under the standards, set by the Directive 2003/88/EC, specified below.

Length of normal hours of night work shall not exceed an average of eight hours in any 24-hour period (Article 8 of the Directive).

Night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work. For this purpose; work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work (Article 8/b of the Directive).

Under the headline of the health assessment and transfer of night workers to day work; before their assignment and thereafter at regular intervals, a free health assessment shall be provided for night workers, which must comply with medical confidentiality and may be conducted within the national health system (Article 9 of the Directive).

If health problems of night workers, deriving from the fact that they perform night work, are recognized, the workers in concern must be transferred whenever possible to day work to which they are suited (Article 9 of the Directive).

Member States may make the work of certain categories of night workers subject to certain guarantees, under conditions laid down by national legislation and/or practice, in the case of workers who incur risks to their safety or health linked to night-time working (Article 10 of the Directive).

The Directive obliges Member States to take the measures necessary to ensure that an employer who regularly uses night workers brings this information to the attention of the competent authorities if they so request (Article 11 of the Directive).

Under the headline of safety and health protection (Article 12), Member States shall take the measures necessary to ensure that night workers and shift workers have safety and

health protection appropriate to the nature of their work and also appropriate protection and prevention services or facilities with concerning the safety and health of night workers and shift workers are equivalent to those applicable to other workers and are available at all times.

4.2.2. Facts with Respect to Night Work in the EU

According to the European Working Conditions Survey carried out in 2000, 19 percent of employees in the European Union worked at night at least occasionally:

As stated before, the Directive 2003/88/EC concerning certain aspects of the organization of the working time also includes some provisions regarding the organization of the night work. Those provisions are quite similar to those of ILO Convention's.

According to the Directive, researches have shown that the human body is more sensitive at night to environmental disturbances and also to certain burdensome forms of work organization and that long periods of night work can be detrimental to the health of workers and can endanger safety at the workplace. Thus, night work is a special case, the duration of it must not exceed an average of eight hours in any 24 hours' period.

As night work involves special hazards or heavy physical or mental strain, it is governed by national legislation or practice or by collective agreements, there is a need to limit the duration of periods of night work, including overtime.

Night workers must have a level of safety and health protection adapted to the nature of their work. They are entitled to a free health assessment before being assigned to night work and thereafter at regular intervals. If they are deemed to be unsuited to night work, they must be transferred to day work where possible.

Employers who organize work according to a certain pattern must take account of the general principle of adapting work to the worker, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate. Employers who regularly use night workers must bring this information to the attention of the competent health and safety authorities.

The situation of night and shift workers requires that the level of safety and health protection should be adapted to the nature of their work and that the organization and functioning of protection and prevention services and resources should be efficient.

4.3. Legislation in Turkey

In the Article 69 of the Labour Act Numbered 4857, for the purposes of working life, night is defined as: "The part of the day beginning not later than 20.00 and ending not earlier than 06.00, and lasting not longer than 11 hours in any case." Differently from the EU Directive's, the definition is made on the maximum hours criterion in Turkish Labour Act.

If the work is performed at both night and day time, it is deemed to be as night work if more than half of the working hours fall into the night time (Article 7 of the Regulation concerning Special Procedure and Principles on the Employment by Work Shifts[211]). In cases of equality of the hours fall in night and day time, the type of the working shall de deemed to be as night work in light of the employee-protective principles of employment law.[212] According to Article 69 of Labour Act, a minimum period of eleven hours shall be given to the shift workers before rotation of shifts between night and day[213].

Due to the fact that night work has negative effects on health, social and family life; duration of night work is limited by law as seven and a half hours per day (Article 69/3 of Labour Law).[214] Also overtime work is forbidden for night workers (Article 41/6 of Labour Act).

The obligations for the employers of night workers, brought by the Labour Law No. 4857 are in accordance with the EC Directive on Organization of Working Time. First of all, before they begin to night work, employees' suitability for night work shall be certified by a health report. The health control of the workers employed at night work shall be provided by the employers at least once in every two year (Article 69/4 of Labour Act). In case of an employee certifies his/her health problem deriving from night work, the employer is under the obligation to assign the employee to a suitable job in the day shift (Article 69/5). Night time employment of children and young employees under the age of eighteen, on industrial work is forbidden according to the Article 73(1) of Labour Act.

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[211] **Official Journal**, 07.04.2004, No.25426.
[212] **Çelik**, Bireysel İş Hukuku, p.304.
[213] **Mollamahmutoğlu**, p.689. **Süzek**, p. 613. **Tunçomağ - Centel**, p.157.
[214] In case of a violation of this provision, the administrative fine is applied to the employer (Article 104/1 of Labour Act).

4.4. Women as Night Workers

4.4.1. EU Perspective

ILO Convention No.89 on night work by women, adopted in 1948, provides for a ban in principle on night work by women in industry. Nevertheless, ongoing researches such as of the Obstetrics and Gynaecology study the University of North Carolina, which looked at the working conditions of 1,900 pregnant women, shows that, although standing for long periods and lifting heavy weights did not increase the risk of premature labour, working nightshifts in the first three months was linked to a doubling in a woman's risk of early labour.[215] However, as well as the researchers underline that the findings from this study are based on a small sample size and need to be interpreted with caution.

However, in *Stoeckel Case*[216], issued on 25 July 1991, the Court of Justice of the European Union declared this Convention to be incompatible with the principle of the equality of the sexes proclaimed by Community Directive 76/207. The Court considered that a form of discrimination was involved, an impediment to equality of opportunity between men and women with regards to access to the labour market.[217] Following this ruling, the International Labour Conference, acting on a call to revise Convention 89, adopted in 1990 both a protocol to Convention 89, with a view to facilitating its ratification, and a new Convention on night work, No. 171, which no longer bans women from night work in industry, but regulates such work for men and women alike. This Convention came into force in 1995.[218]

In July 2002, the Austrian Parliament adopted new legislation on night work to replace the existing ban on night work for women, which must be abolished due to EU law; however, the new law, in a gender-neutrally regulating night work, provides reduced

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[215] **BBC** News, "Night work Premature Birth Link", 12 December 2005, http://news.bbc.co.uk, 12.06.2006.

[216] **Ruling of the European Court of Justice**, 25 July 1991, *Criminal proceedings against Alfred Stoeckel*, Case 345/89.

[217] "As far as the aims of protecting female workers are concerned, they are valid only if, having regard to the principles mentioned above, there is a justified need for a difference of treatment as between men and women. However, whatever the disadvantages of night work may be, it does not seem that, except in the case of pregnancy or maternity, the risks to which women are exposed when working at night are, in general, inherently different from those to which men are exposed." **The European Court of Justice**, in *Stoeckel* Case.

[218] **Grumiau**, "Night Work, The Dark Side", http:www.ilo.org, 15.05.2006

protection for female employees in comparison with the former legislation, and is insufficient to meet the demands of trade unions.[219]

4.4.2. In Turkey

Women employment at night work in industrial work places was prohibited at the time of previous Labour Act Number 1475, until recent Labour Act Number 4857 came into force. In conformity with the developments in European countries with respect to the equality of women and men, the ban for female employees on night work was abolished.

The procedure and the principles of employment of female workers under eighteen in night shifts are established by a regulation on "the Conditions of Employment of Female Workers on Night Shifts", prepared by virtue of the Article 73(2) by the Ministry of Labour and Social Security. [220]

5. Part Time Work

Despite the general system of that the part-time work is not included in monographs concerning "working time", the special importance of that subject especially in the new century, parallel to the technological developments and the globalization resulting with the flexibilisation of the labour markets, makes it necessary to be highlighted in this very thesis.

5.1. The Evaluation

As a reflection of the economical and technological developments in the last 25 years and by the entrance of increased number of women into the working-life, traditional "full time" employment contracts has replaced with atypical employment contracts such as "part-time employment" in many countries as the main model of flexible working types. [221]

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[219] With Austria's accession to the European Union in 1995, labour law provisions providing specific protection for female employees had to be adapted to Community law, under which deems a specific ban on night work for women is deemed to be unlawful. Thus, Austria was obliged to reform its regulations on night-time employment up by the end of 2001. The coalition government of the conservative People's Party (Österreichische Volkspartei, ÖVP) and the popular Freedom Party (Freiheitliche Partei Österreichs, FPÖ) failed to meet this deadline. (**Adam**, "New Night work Legislation applies to both Women and Men", European Industrial Relations Observatory Online, http://eiro.eurofound.eu.int, 12.06.2006).

[220] **Official Journal**, 09.08.2004, No.25548.

[221] **Centel**, Kısmi Çalışma, p.2 and 9. G. **Lemaitre, P. Marianna - A. van Bastelaer** (1997), "The definition of Part-Time Work For the Purpose of International Comparisons", OECD Labour Market and Social Policy Occasional Papers No.22, OECD Publishing, p. 5.

Since the beginning of the 1980s the part-time employment has increased in many developed countries in some of which, this is the result of the political decision to promote part-time work in order to decrease unemployment because of the fact that, lower unemployment rates may be provided by the growth of the part-time work. [222]

In Germany for instance, part-time working is regulated for the first time by the Law on Improvement of Employment Possibilities (1985), which both defines it and also affirms the principle of equal treatment of part-timers[223], in order to support this type of working.[224]

5.2. Definition

Without taking into account the definitions of international authorities such as European Union, ILO and OECD, there are actually "definitions" instead of a single definition differing from country to country at national level.

Part-time working defined in The ILO Convention No.175 as; employing workers whose normal working hours are less than those of comparable full-time workers. [225] European Framework Agreement dated 1997, contains a similar definition: "The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker."[226] Accordingly, part-time work is defined in relation to full-time with reference to the number of hours worked which varies not only from occupation to occupation but also from country to country.[227] However, those definitions differ from one country to another according to their national legal definitions of part-time work. For example; in France, a person works up to four-fifths of normal hours of work is considered to be a part-time worker, whereas in Spain, the part-time worker is the one who

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[222] **European Commission**, Employment in Europe 2005, Luxembourg, 2005, p.100.; **Patrick Bollé**, Perspectives, "Part-time Work Solution Or Trap?", International Labour Review, ILO, 1997, Volume 136, Number 4.

[223] German Federal Labour Court is so puritan regarding the equal treatment principle of part-timers that the grounds of justification in case of a breach are only accepted at exceptional circumstances. (**M. Weiss, M. Schmidt**, "Almanya'da İş Yaratma Politikaları: İş Hukuku, Sosyal Güvenlik Hukuku ve Endüstrinin Rolü", **Biagi** (ed.), İş Yaratma ve İş Hukuku, 211-244, MESS, 2003, Istanbul, p. 235.)

[224] **Weiss - Schmidt**, "Almanya'da İş Yaratma Politikaları: İş Hukuku, Sosyal Güvenlik Hukuku ve Endüstrinin Rolü", **Biagi** (ed.), İş Yaratma ve İş Hukuku, 211-244, MESS, 2003, Istanbul, p. 235.

[225] **ILO Convention No.175** Article (1), http://www.ilo.org/ilolex/english/ , (01.03.2006)

[226] **European Communities**, "Council Directive 97/81/EC of December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC", Official Journal of the European Communities, Luxembourg, Vol. 41, No. L14, 1997, p. 13.

[227] **Lemaitre - Marianna - Van Bastelaer** (1997), p.6.

works up to two-thirds of the normal working hours while in Ireland and the United Kingdom, a person who has to work less than 30 hours a week, is considered to be a part-time worker.[228]

In addition to the above mentioned legal definitions, the statistical definitions are required in order to comprehend the economy-wide incidence of part-time work. Statisticians have three methods to determine whether a household survey respondent is a part-time worker or not. The first method is to rely on the respondent's judgment while responding the question of whether he or she works part-time; the second is to ask the person how many hours a week he or she works and the last but definitely not the least method is to combine the first two ways in order to make the correct definition.[229] Some countries use only the second method to draw the line between full-time and part-time working, referring to usual weekly hours of work and define the work less than those hours, as part-time; 35 hours in Austria and Sweden, 36 in Turkey and Hungary while as some countries combine the first two methods such as Germany, Spain, United Kingdom and Netherlands.[230]

Greece and Italy uses methods apart from the countries' above; in Greece a part-time worker is the one who works fewer hours than stipulated in the collective agreements on the same type of activity, whereas in Italy if a worker works fewer hours than the number set for the job in concern.[231]

5.3. Characteristics of Part-Time Employment in Member States

Women are still primarily responsible with child care as well as contributing the house income by joining the work force in labour markets. The twin obligation of women torn between house and work, necessitate for most of them the non-standard working types, one of which is part-time work.

According to the EU Labour force survey (LFS), there is a strong dimension of part-time work on gender, nearly one in three women have a part-time job in Member States:[232]

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228 **Lemaitre - Marianna - Van Bastelaer** (1997), p.7.
229 **Bollé**, "Part-time Work Solution or Trap?"
230 **Lemaitre - Marianna - Van Bastelaer** (1997), p.7.
231 **Lemaitre - Marianna - Van Bastelaer** (1997), p.8.
232 **European Commission**, Employment in Europe 2005, p. 100.

Table IV

Proportion of Part-Time Working by Gender and Age Groups (Percentages)

Age Groups		**15-64**	**15-24**	**25-49**	**55-64**
EU-15	Male and Female	19.0	26.0	17.4	22.9
	Female	34.9	34.6	33.9	42.1
	Male	6.6	18.8	4.3	10.3
EU-25	Male and Female	17.3	24.5	15.5	22.0
	Female	31.1	32.3	29.7	39.9
	Male	6.3	18.0	4.1	10.3

Source: Eurostat, Labour Force Survey (annual averages based on quarterly data); European Commission, Employment in Europe 2005, Luxembourg, 2005, p.100.

Two women out of three in Netherlands, Sweden and Turkey, between one out of four and one out of three in Germany, France, Denmark, Belgium and in Austria.[233]

In the United Kingdom, 44% of female employees worked part-time while only 11% of men employees are part-timers by the year of 2004. [234] As it is shown in the table below, in the United Kingdom, the 59% of women workers, who have dependant children, work part-time whilst this rate is 4% for men workers having dependant children:[235]

[233] **Lemaitre - Marianna - Van Bastelaer** (1997), p.9.
[234] **Equal Opportunities Commission**, Facts About Women and Men in Great Britain, March 2005, at: http://www.eoc.org.uk, p. 8. 08.05.2006.
[235] **Equal Opportunities Commission**, p.14

Table V

Parents' Employment 2004 in Great Britain

	Age of Youngest Dependent Child			**Without Dependent Children**
	0-4	5-10	11+	
Women	Thousands			
Employees	1307	1487	1553	7083
- Full time	459	520	804	4709
- Part-time	847	966	749	2372
- % part-time	65	65	48	33
Men	Thousands			
Employees	1702	1293	1225	7583
- Full time	1638	1245	1179	6672
- Part-time	64	48	46	909
- % part-time	4	4	4	12

Source: ONS (2004) Labour Force Survey Spring 2004 dataset; Equal Opportunities Commission, Facts About Women and Men in Great Britain, March 2005, http://www.eoc.org.uk, 08.05.2006.
* includes self-employment, government-supported training and employment programmes, and unpaid work for their own or a family business.

Apparently, part-time work is the most common type of flexible, non-standard working type especially for women with family responsibilities.

Part-time work is also frequent among young population as well as female population and also it is a form of employment for the people who has retired and have will to remain in the labour life.[236]

[236] **Lemaitre - Marianna - Van Bastelaer** (1997), p.9.

5.4. Advantages and Disadvantages of Part-Time Employment

5.4.1. Advantages

Part-time employment answers to the employers' requirements of long opening hours of their establishments while at the same time responds the workers' needs of having more domination on their time of living.[237]

5.4.1.1. For Workers

Part-time workers may have the chance of having a more balanced life between working life and individual life of their own. [238]

5.4.1.2. For Employers

Firms prefer part-time work to adjust their employment technique towards a flexible management of labour in order to adapt to fluctuations in activity and to changes in production processes.[239] By part-time work, greater flexibility is provided by utilization of increased capacity or extending opening hours.[240]

5.4.1.3. At Governmental Level

Part-time work has a pre-eminent place in policies for the reduction and distribution of working time owing to the result of increased participation and employment rates achieved by part-time employment; therefore, some governments offers firms financial and tax incentives to encourage this type of work.[241]

5.4.2. Disadvantages

5.4.2.1. For Workers

In comparison with full-time workers who have equivalent work, the remuneration of the part-time workers is much lower and they lack of certain social benefits; and also their career prospects are more limited.[242]

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[237] **Blomeyer**, Çalışma Hayatında Esneklik Semineri, p. 200.
[238] **Bollé**, "Part-time Work Solution or Trap?"
[239] **Lemaitre - Marianna - Van Bastelaer** (1997), p.5.
[240] **Bollé**, "Part-time Work Solution or Trap?"
[241] **Lemaitre - Marianna - Van Bastelaer** (1997), p.5.
[242] **Bollé**, "Part-time Work Solution or Trap?"

There is another fact that, the economic situation of involuntary part-time workers is only the one more step beyond from the unemployed.[243] Here, the fact that must be underlined is the "underemployment" which occurs under the term of the involuntary part-time working, when the people accept the reduced hours of work only because they cannot find full-time jobs, the part-time work becomes a form of unemployment.[244]

According to ILO reports, part-time workers are frequently disadvantaged in respect of direct or indirect remuneration, social security benefits, training and participation in trade union activity and they are subjected to discrimination. [245]

Part-time work does not necessarily protect workers from being involved in schedules that fall out of the standard of daytime, weekday hours. On the contrary, part-time workers have higher rates of involvement in evening, night-work and weekend work than full-time workers. Moreover, part-timers are also more likely to work a variable number of days and hours per day. This evidence is supported by a Dutch study[246], which shows that full-time workers have more regular working hours than part-time workers. Working only at weekends, evenings or at night is most common among part-timers, especially among those who work less than 16 hours per week.[247]

Consequently, part-time working may be helpful in the short term, especially when an employee is starting a family or wishes to combine work with care obligations. They may, however, be counterproductive in the longer term, because long term disadvantages in terms of career prospects, employment conditions, social security and even security of income in old age can still involve in part-time work.[248]

[243] **Bollé**, "Part-time Work Solution or Trap?"
[244] **Bollé**, "Part-time Work Solution or Trap?"
[245] **Bollé**, "Part-time Work Solution Or Trap?"
[246] **Goudswaard - Andries**, *Employment Status and Working Conditions* , European Foundation for the Improvement of Living and Working Conditions, Dublin, 2002, www.eurofound.ie, 12.05.2006.
[247] **European Foundation For The Improvement of Living and Working Conditions**, Part-Time work in Europe, http://www.eurofound.ie, 12.05.2006.
[248] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time", Luxembourg: Office for Official Publications of the European Communities, 2003, www.eurofound.eu.int, 28.04.2006.

5.4.2.2. For Employers

Part-time employment causes some organizational difficulties and raises the fixed costs per worker such as training and social security contributions. [249]

5.5. EC Legislation Concerning Part-time Work

The first main regulation at the international level concerning the part-time employment was the Part-Time Work Convention (No.175) and Recommendation (No.182) adopted in International Labour Conference in 1994. The second was a Framework Agreement on 6 June 1997, between the social partners of the European Union, namely, the European Trade Union confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Centre of Enterprises with Public Participation (CEEP).[250] This Framework Agreement is an example for the mechanism brought by Maastricht Treaty, that labour law norms can be developed between trade associations and trade unions and implemented throughout the European Union.[251] EC Directive 97/81 was formed upon this Framework Agreement, in accordance with the provisions of the social protocol annexed to the Maastricht Treaty. [252] The directive amended by Council Directive 98/23/EC of 7 April 1998.

The purpose of the Directive was to eliminate discrimination against part-time workers to improve the quality of part-time work and to balance the needs of the workers and the employers while contributing to the flexible organization of working time by providing the implementation of the framework agreement on part time work on 6 June 1997. [253]

A part-time worker is defined in relation to full-time worker as follows: *"An employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours work of a comparable full-time worker."* [254] In order to hold a right definition of part-time worker the meaning of "comparable worker" is defined at the next paragraph of the Article 3.2.3. as follows: *"A full-*

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[249] **Bollé**, "Part-time Work Solution or Trap?"
[250] **Bollé** "Part-time Work Solution or Trap?"
[251] **Engelbrecht**, Economic and Social Councils and Trade Unions, p.4-5 communication paper for Labour Law Seminar by Labour Law Commission of Union Internationale des Avocats in collaboration with the Bar Association of İstanbul and with the assistance of Galatasaray University, 3-4 April 1998, İstanbul.
[252] **Bollé,** "Part-time Work Solution or Trap?"
[253] **European Communities**, "Council Directive 97/81/EC of December 1997, Article 3.2.1.
[254] **European Communities**, "Council Directive 97/81/EC of December 1997, Article 3.2.3.

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/occupation" [255]

According to the directive, 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 and in respect to the dismissal conditions, refusal of a worker to transfer from full-time to part-time work or vice versa should not in itself constitute a valid dismissal ground.[256] The sanction of the discrimination prohibition is not clarified in the Directive. The crucial point regarding the discriminating part timers is that this generally hides indirect gender discrimination since usually female employees work part time thus; any discrimination between part time and full time workers constitutes a gender inequality at workplace.[257]

Beside the negative obligation of discrimination, the directive also brought an obligation of giving information for the employers. According to the Article 2.8, when the opportunity arise, employers should give consideration to requests by workers to transfer from full-time to part-time or part-time to full-time work and they also should inform the workers on the availability of part-time and full-time jobs in the establishment.

The Directive sets out minimum principles preventing the discrimination of part-time workers and therefore Member States can maintain or introduce provisions providing a higher protection than set out in the agreement.

5.6. Case Law of the Court of Justice Concerning Part-Time Work

Article 141 of the EC Treaty prohibits the employers from direct discrimination among the workers based on sex. On the other hand covert discrimination is a truth of working life. Covert discrimination is that the one not obviously according to sex but by selecting a criterion disadvantages one sex; therefore it is called "indirect discrimination", which is likely to fall of Article 141. [258] At this point, the importance of judicial activist[259] role of the ECJ is obvious.

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[255] **European Communities**, "Council Directive 97/81/EC of December 1997, Article 3.2.3.
[256] **European Communities**, "Council Directive 97/81/EC of December 1997.
[257] For a detailed definition of indirect discrimination, see: **Doğan Yenisey**, Eşit Davranma İlkesinin Uygulanmasında Metodoloji ve Orantılılık, Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi, Vol.7, 2005, İstanbul, p.981.
[258] **Weatherill - Beaumont**, p. 723.

In *Jenkins v Kingsgate Ltd.* Case[260]; part-time workers were being paid under an hourly rate of remuneration which was lower than that of the full-time workers doing the same work. Although the discrimination was not based on the sex but on the number of hours of work, since the part-time workers were mostly females, the fact of that women were indirectly disadvantaged by this practice, could not fall out of the notice of the ECJ. The Court held that this practice was capable of violating the Article 141. [261] According to the Court, the employer should refer to his or her motivation while choosing the criterion when demonstrating an objective justification. Here, the ECJ made an impression that it examines the intent of the employer. [262] The reflection of the court's case law to "written law" has found itself in Directive 97/81 concerning part-time work. It is stated in that Directive that any different treatment between part-time and full-time workers must be based on objective justifications. But neither the Court nor the Directive has clear definitions for objective justification, examples of which has given by the Court in its case law such as *Danfoss,*[263] where it is held that the quality may be rewarded unless it does not lead a sex discrimination.

In *Bilka* Case,[264] arose from the complaint concerning the occupational pension discrimination between the part-time and full-time workers. Part-time workers were able to obtain pensions under the condition that they had to cross a threshold of sufficient previous full-time work. Being a part-time female worker Weber complaint that the practice in concern violates the Article 141 since the amount of the women part-time workers is higher than male workers. The Court made a reference to its decision in *Jenkins* Case, and held that once a practice shows an effect of discrimination on grounds of sex, that practice is acceptable only if an objective justification exists and unlikely in the Jenkins Case, the Court does not refer to the employer's intention.[265] The concerned enterprise in this case, Bilka, submitted that it has objective justification on grounds of economical reasons that it aimed to attract full-time workers by that practice since the full-timers were tend to work on Saturdays and late

[259] As a simple definition, judicial activism is law making of a court by using interpretation methods of law. It is sometimes described as the use of power excessively and as also creating policy by broad interpretation of law. (**Reinert**, The Myth of Judicial Activism, p.2, at: www.vtbar.org/ezstatic/data/vtbar/journal/dec_2003/JudicialActivism.pdf (20.12.2004).

[260] Case 96/80 dated 1981.

[261] The principal of that indirect discrimination differs from the direct discrimination since it is susceptible to objective justification and this general principal of Community Law, has been given legislative form by Directive 97/80 on the burden of proof in sex discrimination cases.

[262] **Doğan Yenisey**, Eşit Davranma İlkesinin Uygulanmasında Metodoloji ve Orantılılık, p.984.

[263] Ruling of the **European Court of Justice**, Case 109/88.

[264] *Bilka Kaufhaus v. Weber*, Case 170/84.

[265] **Doğan Yenisey**, Eşit davranma İlkesinin Uygulanmasında Metodoloji ve Orantılılık, p.984.

afternoons. The court held that a national court should apply a three-stepped test when deciding whether there is an objective justification or not:

- First of all a national court should determine that the measures taken must correspond to *a real need* on the part of the undertaking,

- They must be *appropriate* as means of achieving the end in view,

- Finally, the measures taken must be *necessary* to achieve that end. It means that the measures taken have to be the last resort for the undertaking in concern.[266]

5.7. Legislation in Turkey

Until the New Labour Act Number 4857 enters into force, there has been no clear legal provision defining part-time work and its characteristics. Being one of the major types of work in this era of modern technology and inevitable rising of globalization, part-time work legislation is a must for all national labour acts.

By EC Directive "part-time worker" is defined whilst at Article 13th of Turkish Labour Act, part-time employment contract is defined and the definition is in relation to the duration of full-time working as it is in the Directive, as follows: *"The employment contract shall be considered as a part-time contract where the normal weekly working time of the employee has been fixed considerably shorter in relation to a comparable employee working full-time."* The use of the term *'considerably'* causes a remarkable difference between the definition of part-time working in the EC Directive and in the Turkish Labour Act since considerably shorter is expressed in the explanatory memorandum to the Article as *'less than two-thirds of the contracted weekly number of hours of work'* means that a part time work above a certain weekly limit is considered as full time.[267] However, EC Directive defined part time employees as whose normal hours of work are less than the normal hours of work of a comparable employee. The term *"considerably"* in the definition of the part-time working,

[266] The principle of the necessity to be the last resort is also applied in matters of dismissal on economic grounds at national level, as well as in Turkish Labour Law doctrine and practice. See: **Güzel**, İş Sözleşmesinin Geçerli Nedenle Feshinde Ultima Ratio (Son Çare) İlkesi ve Uygulama Esasları, Can Tuncay'a Armağan, p.57-90.

[267] **Hendrickx - Sengers**, The Implementation of Flexible Work Provisions In the Labour Act in Flexibilisation and Modernisation of the Turkish Labour Market (ed. R. Blanpain), Kluwer Law, 2006, Netherlands, p. 93.

may bring some problems in practice because while defining this limit, judge will take into consideration the conditions case by case.[268]

The comparable employee is defined at the third paragraph of the Article, as the full-time employee working at the same establishment and is engaged in the same or similar job; in case there is not such an employee in the same establishment, the employee who is working full-time and engaged in the same or similar job at an appropriate working place under same branch of activity, will be taken as the basis of the definition as a *"comparable employee"*. [269]

In accordance with the EC Directive concerning part-time work, the prohibition of discrimination is stated at Article 13/2 of Labour Act as follows: *"Unless there is a justifiable ground, an employee working under a part-time employment contract must not be subjected to different treatment in comparison to a comparable full-time employee solely because his/her contract is part-time."* The discrimination of part-time workers is prohibited but the sanction of it is not mentioned. The general sanction for the breach of discrimination prohibition on grounds of variable reasons is stated at Article 5 of Labour Act, under the headline of "The Principle of Equal Treatment". Equal treatment obligation of the employer has gain a broader sense than it used be in the former labour act as it covers not only the general prohibition of discrimination but also language, religion, gender, race and type of the employment contract based discrimination is prohibited.[270] At the second paragraph of Article 5, the discrimination by employer between part-time workers and full-time workers is prohibited unless there are essential reasons and at the sixth paragraph, it is stated that the employer who is in breach of the article in concern, shall pay a compensation up to the worker's four months' wages plus other claims that the worker in concern has been deprived. The compensation of discrimination depends on the general prescription of 10 years.

According to the Article 5, although the burden of proof regarding the discrimination is on the workers; if the worker shows a situation of high probability of the existence of a breach, the employer has the burden of proof that the breach does not exist. When the burden of proof is on the worker's side, he/she should prove a positive incident whereas the employer

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[268] **Ulucan**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.67.

[269] A comparable worker should be the one who works at the same branch of activity and the workplace he/she works must have similar technical and working organization whereas she/he does not have to do the exact same job. See: **Doğan Yenisey**, Eşit davranma İlkesinin Uygulanmasında Metodoloji ve Orantılılık, p.986 et seq.

[270] **Doğan Yenisey**, Eşit davranma İlkesinin Uygulanmasında Metodoloji ve Orantılılık, p.1003.

under the burden of proof should prove the negative incident. As a result of the principle of protecting the worker, the burden of proof is easier for the workers.

As mentioned in the written argument section, the main object of the Article 5 concerning the proof of discrimination as well as the obligation of equal treatment is to harmonize Turkish Labour Legislation in accordance with the European Union Directive No. 97/80 which includes also the burden of proof of discrimination. The Labour Act number 4857 is in accordance with the Directive 97/80, which is formed right after the precedence of the European Court Of Justice[271] regarding the relieving the burden of proof in favour of the workers and obliges the Member States to amend their national law in accordance of this principle.[272]

The obligation for the employers to give information to the workers about the availability of part-time and full-time jobs in the establishment and the necessity to give consideration of the requests by workers to transfer from full-time to part-time or part-time to full-time is mentioned in the last paragraph of the Article 13 within harmony to the EC Directive concerning part-time.

Transforming full time contract into part-time is considered to be an essential change in working conditions, so that the conditions are subject to Article 22 of the Labour Act which makes a written notice of the employer necessary in order to inform the employee, about the changes in working conditions.[273] If the employee so accepts, he or she shall accept the changes made by the employer in written form within six working days (Article 22). If the employee does not accept he new conditions of his or her work, the employer may terminate the employment contract based on valid reason, the employees' right of file a suit is reserved.

The formulation, which gives a right of termination on valid grounds to the employer, owing to the employee's refusal to accept his full time contract to be transferred into part-time, does not answer the purpose of protection of employees.[274] Instead it should

[271] Above page 13.
[272] **Özdemir**, İş Sözleşmesinden Doğan Uyuşmazlıklarda İspat Yükü ve Araçları, p. 219.
[273] **Meriç**, Türk ve Alman İş Hukukunda Kısmi Süreli Çalışma, Legal İş ve Sosyal Güvenlik Dergisi, No.8, 2005, İstanbul, p.1563.
[274] **Meriç**, p.1565.

have been stipulated merely as a right of management for the employer, against which the employee may file a suit on grounds of misuse of that right of management. [275]

No matter it has some imperfect sides, including provisions on part-time employment into Labour Act is itself a late but progressive step for Turkish Labour Law.

[275] As in German Labour Law, **Meriç**, p. 1565.

"Everyone has the right to respect for his or her private and family life, home and communications."[276]

THE FIFTH CHAPTER

REST PERIODS AND PAID LEAVES

1. General

Rest periods and paid leaves are not considered as working time. However, the EC Directive on Working Time states these periods while obliging Member States in order to take necessary measures due to concerning provisions, rest periods and paid leaves are worthy to be emphasized.

Despite the fact that the employers are entitled to organize the working time, the working hours are limited due to the principle of protecting the workers and prevent the impairment of their health from overtime working by long hours.[277]

The employees' right of having rest periods is guaranteed by international agreements, such as the ILO Convention No. 14[278] (Article 2/1), which underlines the right of having a weekly rest period but without mentioning whether it shall be paid or unpaid.

European Social Charter by Council of Europe[279] obliges the parties of the charter to provide for public holidays with pay; for a minimum of four weeks' annual holiday with pay; to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations; to ensure a weekly rest period which shall, as far as possible, coincide with the day recognized by tradition or custom in the country or region concerned as a day of rest (Article 2 under the headline of "the right to just conditions of work").[280]

According to the Charter of Fundamental Rights of the European Union[281], *"every worker has the right to limitation of maximum working hours, to daily and weekly rest periods*

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[276] **Charter of Fundamental Rights of the European Union**, Article 7, OJ of 18.12.2000, C364.
[277] **Tunçomağ - Centel**; İş Hukukunun Esasları, p. 155.
[278] **ILO**, C14 Weekly Rest (Industry) Convention, 1921.
[279] It shall be mentioned hereby that Council of Europe is a completely different entity from the European Council, which is an organ of the European Union.
[280] **Council of Europe**, **European Social Charter** (Revised), 03.05.1996, http://conventions.coe.int, 21.04.2006.
[281] **OJ**, 18.12.2000, C 364/1.

and to an annual period of paid leave" (Article 31/2, under the headline of "fair and just working conditions").

2. Daily Rest and Breaks

2.1. EC Legislation

Entitlement to rest periods during working hours is recognized as a basic right of workers in the European Union. Article 2(9) of the EC Directive on organization of working time, "adequate rest", the duration of which is expressed in units of time and which are sufficiently long and continuous, is underlined as a basic need for the employees to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term.

2.1.1. Daily Rest Period

According to the EC Directive on organization of working time, every worker is entitled to a minimum daily rest period of eleven consecutive hours per 24-hour period (Article 3). Rest period is defined as any period, which is not working time by Article 2(2) of the directive.

The principle of the 'humanization of work' and the emphasis in Scandinavian countries on the psychological and social drawbacks of working time, such as monotony, lack of social contacts at work or a rapid work pace, were the inspiration for the Commission's proposal on working time regulation.[282] Breaks at work are not stipulated solely for avoiding dangers to health and safety, but also for the aim of humanizing working types.

The minimum EU standard for the duration of the working day is, 11 consecutive hours of rest, and a maximum 13 hours of work punctuated by at least one long break, or two or more shorter breaks, the intervals being not more than six hours apart. In any case, a working time regime which opted for such a long working day would be constrained by the provisions on maximum hours in a working week.[283]

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[282] **European Foundation for the Improvement of Living and working Conditions**, European Industrial Relations Dictionary, http://www.eurofound.eu.int, 17.06.2006.

[283] **European Foundation for the Improvement of Living and working Conditions**, European Industrial Relations Dictionary, http://www.eurofound.eu.int, 17.06.2006.

2.1.2. Rest Breaks

Member States are obliged to take the necessary measures to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation (Article 4 of the Directive). As it is appears from that provision that the priority is given to collective agreements over legislation in determining the EU standards on rest breaks. The duration of the rest period is required to respond to the human needs of the worker.[284]

The directive obliges employers to take account of the general principle of adapting work to the worker, especially regarding breaks during working time and Member States shall necessitate employers to organize working time taking into account the principle of the humanization of work. Member State legislation which does not secure such rest breaks are provided would arguably be in violation of the duty to implement the directive's requirements, and state liability might be imposed to compensate the workers affected.[285]

2.2. Legislation in Turkey

Entitlement of rest periods is guaranteed by the Constitution as a fundamental right, as it is in many other countries. [286] It is stated that: *"the rest is a right of the workers"* (Article 50/3 of the Constitution).

It must be initially underlined that, the rest breaks are not considered as working time (Article 68/5 of the Labour Act). But the rest breaks outside the scope of the Article 68, such as tea or smoke breaks shall be deemed to be counted as working time.[287]

According to the article 68(1), employees are entitled to have a rest break approximately in the middle of the working day organized due to the customs of the area and to the requirements of the work as:

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[284] **European Foundation for the Improvement of Living and Working Conditions**, European Industrial Relations Dictionary, http://www.eurofound.eu.int, 17.06.2006.

[285] Judgment of the **European Court of Justice** of 19 November 1991, C-6/90 and C-9/90, *Francovich and others v. Italian Republic.*

[286] **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.229.

[287] **Tunçomağ - Centel**, İş Hukukunun Esasları, p.156.

- fifteen minutes, for the work lasts less than four hours or equal,
- half an hour, for the work lasts between four and seven and a half hours (including seven and a half hours),
- one hour, for the work lasts more than seven and a half hours.

These are the lower limits for the rest periods, thus, they may be subject to an increase by agreement, but not by any how, to decrease (Article 68/2).

According to the Article 68(3), these break periods may be split up by agreements where the climate, season, local custom or nature of the work so requires, albeit the principle that they shall be used continuously.[288]

3. Paid Leaves

Paid leaves is a subject which belong to organization of work, however, Turkish Labour Act has articles which are incompatible with *the acquis* regarding paid leaves, this subject is therefore briefly underlined in this section.

Weekly rest period and annual leave, take place in the EC Directive on organization of working time, between the Articles 5 to 7.

Turkish Constitution, by unambiguous terms, declares that paid weekly rest and paid annual leaves as to be fundamental rights (Article 50(4)).

In addition, Turkish Labour Act Number 4857 provides rights of paid rest periods and paid leaves for the employees and these rights are guaranteed as to be the "protected rights" by a general Article of 45 holds that; *"No provisions may be inserted into collective agreements or employment contracts contravening the rights granted to employees on the weekly rest day, national and public holidays, paid vacations and to the rights of employees working under a percentage system recognized to them by this act"*.

[288] Employers or/and their representatives, who fail to comply with the provisions regarding the rest periods, shall be liable to a fine (Article 104/1of the **Labour Act**).

3.1. Weekly Rest Period

The historical background of the right "weekly rest period", goes back to the religious habit of that one day of the week is saved for worshipping therefore the term "Sabbath", which means the seventh day of the week observed from Friday evening to Saturday (commonly Sunday) evening as a day of rest and worshipping by Jews and some Christians, means a time for rest, as well. [289]

3.1.1. EC Legislation

Weekly rest period is referred in the Article 5 of the EC directive on organization of working time, by which the Member States are obliged to 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 plus the 11 hours' daily rest.

If objective, technical or work organization conditions so justify, a minimum rest period of 24 hours may be applied (Article 5(2)).

In UK v Council of the European Union Case[290], the UK's challenge to the validity of the Directive was dismissed by the ECJ, except for the annulment of the second sentence of Article 5, which provided that the minimum 24-hour weekly rest period should "in principle include Sunday". The Court justified its annulment on the ground that linking the weekly rest period to a specific day of the week had no connection with the improvement of workers' health and safety and also for the reason that *"the Council had failed to explain why Sunday, as a weekly rest day, is more connected with the health and safety of the workers than any other day of the week".* [291]

However; the psychological health beside the physical one, should not be disregarded while explaining the connection between the Sunday and the health of the workers. Since the schools are off at Sundays and therefore children are home, the opportunity both for them and for their working parents to gather and spend time together as a family, is one of the essential needs of human beings. Not all workers have families of course, but while giving the right of leave for parental reasons or leaves for nursing mothers, it does not make sense not to consider that obvious need of men and women and also children when

[289] **Merriam-Webster English Dictionary**.
[290] **European Court of Justice**, *UK v. Commission*, C-84/94 [1996] ECR I-5755.
[291] **Fairhurst**, "The Working Time Directive: A Spanish Inquisition", http://webjcli.ncl.ac.uk, 20.06.2006.

mentioning the health of the workers. Recommending for an additional paragraph as "it may set differently by means of collective agreements or employment contracts" instead of annulment of the provision of the provision: *"in principle include Sunday",* might have been a more employee-protective approach.

3.1.2. Legislation in Turkey

Weekly rest period legislation in Turkey dates back to 1920s, when the Economic Pact was agreed in Izmir Economic Congress held in 1923, declared Friday as the official weekly rest day for everyone in Turkey.[292] Weekly Rest Act Numbered.394, which is still in force, was enacted in 1924. Until now, weekly rest day has been taken place in Labour Acts in variable forms

Weekly rest period is regulated by the Weekly Rest Act[293] and by the National Holidays and General Vacations Act[294]. The remuneration for weekly rest day is organized by the Labour Act at the Articles 46 and 50.

According to the Weekly Rest Act, the enterprises, located in the cities which have population of ten thousand or higher, shall be closed one day per week (Article 1). National Holidays and General Vacations Act stipulated this rest day as to be Sunday (Article 3). Another weekly rest day shall be given to the employees if they have worked on Sunday (Article 4(2) of Weekly Rest Act). Any provision of a collective agreement or employment contract, stipulating Sunday as a working day is invalid according to the Article 45 of the Labour Act.

The Labour Act indicates that the minimum twenty-four hours rest period without interruption within a seven day time period shall be given to the employees, working at the enterprises covered by Labour Act, provided that they have worked on the days, preceding weekly rest day[295] (Article 46(1)). Therefore, an employee working at an enterprise covered by Labour Act may be enjoy the right of weekly rest period even if the enterprise is not located in a city with ten thousand or high.[296]

[292] **Kepenek**, Türkiye Ekonomisi, Teori Yayınları, 1st Edition of 3rd Revision, 1987, Ankara, p. 33.
[293] The Law Numbered 394, **Official Journal** of 21.01.1924, No.54.
[294] The Law Numbered 2429, **Official Journal** 27.04.1972, 14171.
[295] The periods considered as working time, mentioned in the Labour Act Article 66, are also taken into consideration when accounting the working days, preceding weekly rest day.
[296] **Tunçomağ - Centel**, İş Hukukunun Esasları, p.159.

Weekly Rest Act points out some exceptional enterprises for weekly rest periods provided that a permit valid for one year is taken from the municipalities. These exceptional enterprises are: the ones respond to the necessary needs of the society (e.g. hospitals, ferries, trams, telephone or electric companies, museums, theatres and cinemas, hotels, etc.), the enterprises producing or using fragile materials and the ones where the work should be done continuously (Article 6).

The normal daily wage shall be paid to the employee for the weekly rest day. If the employee is work at the weekly rest day and exceeds the average weekly working time of 45 hours, an increased amount of normal hourly wage by fifty percent shall be paid to him or her owing to the legal provisions of overtime work.[297]

3.2. Paid Annual Leave

According to the definition of ILO, paid leave is an annual period during which workers take time away from their work while continuing to receive an income and to be entitled to social protection. For employers, paid annual leave provides a period of rest and recovery that enables them to remain healthy and enhance the motivation.

The ILO Holidays with Pay Convention[298] entitles workers to a right to take a minimum period of three weeks' paid leave each year (Article 3(3) of the Convention) on condition that the employee has a minimum period of service not exceeding six months, which shall be determined by a competent authority or through the appropriate machinery (Article 5). Those who have been employed with an employer for less than one year, but longer than six months, are to have a right to a proportional period of paid leave. The EC Legislation is one more step ahead from the ILO Convention in this regard, as the employees are entitled to annual paid leave regardless their length of service according to the Directive 93/104 while Turkish Labour Act is behind those two, on the ground of the necessity of at least one year's length of service for an employee to be entitled to the right of annual paid leave (Article 53(1)).

According to the Article 8(2) of the ILO Convention, one of the parts of the annual leave shall consist at least two weeks in one block without interruption. The Convention also

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[297] **Tunçomağ - Centel**, İş Hukukunun Esasları, p.160; **Eyrenci**, (Eyrenci-Taşkent-Ulucan), Bireysel İş Hukuku, p.67 and also the Court of Appeal shares the same opinion.

[298] **ILO Holidays with Pay Convention** (Revised), No. C132 of 24. 06.1970, may be found at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C132, 01.07.2006.

provides that the timing of the leave period should in principle be determined by the employer, in consultation with the employee or his or her representatives (Article 10(1)).

Legislation in many countries provides for a longer period of paid annual leave than is prescribed by the ILO Convention, generally, the regulations on paid leave laid down in collective agreements are more favourable than statutory entitlements. [299] Countries differ in the degree to which workers can influence the timing of their leave. In some countries such as Germany, Sweden, Hungary and the Czech Republic intensive consultation or even bargaining with the employees or their representatives is required to decide on when paid leave is taken. In Sweden, Germany and the Netherlands employees are entitled to pay higher than their normal wage during their paid annual leaves.[300]

3.2.1. EC Legislation and the Case Law of the ECJ

EC Working Time Directive 93/104 obliges Member States to take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice (Article 7). This means that if an employee works five days a week, he/she entitle an annual leave of twenty days.[301] The average length of paid annual leave across old Member states is 26.5 days a year, the length of paid annual leave of some of the Member States are below:[302]

- Austria: entitlement expressed as 30 working days, including Saturdays, increases by five days after 25 years' service.
- Belgium: entitlement expressed as four weeks.
- Denmark: entitlement expressed as five weeks.
- Finland: entitlement is two days' leave per calendar month worked

[299] **ILO**, Paid Annual Leave, Conditions of Work and Employment Programme, Information Sheet No.WT-6, July 2004, p.1.
[300] **ILO**, Paid Annual Leave, p. 1.
[301] **Hendrickx - Sengers**, The Implementation of Flexible Work Provisions in the Labour Act, Pennings, Flexibilisation and Modernization of the Turkish Labour Market, Kluwer Law International, 2006, Netherlands, p.115.
[302] **EIRO**, **European Industrial Relations Observatory**, Working Time Developments 2002, http:www.eiro.eurofound.eu.int, 04.04.2006.

- France: entitlement expressed as 30 working days or five weeks.

- Germany: entitlement expressed as 24 working days.

- Portugal: employees aged over 59 are entitled to a minimum of 25 days.

- Slovakia: entitlement expressed as four weeks.

- Spain: entitlement expressed as one month.

- UK: entitlement expressed as four weeks.

The directive stipulates that the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated (Article 7(2)).

The provisions of the Working Time Directive concerning the paid annual leave, has been a dispute matter in front of the Court of Justice by means of preliminary ruling procedure. The contribution to the community Law of the Court of Justice in this respect is therefore undeniable and worthy to refer.

In the Queen v. Secretary of State for Trade and Industry Case[303], Court of Justice held that, Article 7(1) of the Directive does not allow a Member State to adopt national rules which stipulates the condition of that a worker shall complete a minimum period of 13 weeks' uninterrupted employment with the same employer in order to begin to accrue rights to paid annual leave.[304] The Court based on the grounds of that; *"National rules of that kind are manifestly incompatible with the scheme of Directive 93/104 which, in contrast to its treatment of other matters, makes no provision for any possible derogation regarding entitlement to paid annual leave and therefore, a fortiori, prevents a Member State from unilaterally restricting that entitlement which is conferred on all workers by that directive. Article 17 makes the derogations for which it provides subject to an obligation on Member States to grant compensatory rest periods or other appropriate protection. Given that no such condition is laid down in relation to the right to paid annual leave, it is all the more clear that Directive 93/104 was not intended to authorise Member States to derogate from that right."*

[303] Ruling of the **European Court of Justice**, 26 June 2001, *The Queen v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and theatre Union (BECTU)* Case C-173/99.

[304] **Blanpain**, European Labour Law, p. 541.

Concerning whether a worker is able to take her annual leave during a period other than her maternity leave, if the maternity leave coincides with the general period of annual leave fixed for the entire workforce by a collective agreement, Court of Justice stated that paid annual leave of at least four weeks, is a particularly important principle of Community social law ensuring that workers take a proper break. It stated also that Community law requires that a worker should be able to take her annual leave during a period other than the period of her maternity leave, including where the period of maternity leave coincides with the general period of annual leave fixed for the entire workforce by a collective agreement. It also ruled that the pregnant workers' Directive should, in this case, apply to the longer annual leave entitlement set out by national legislation, rather than the minimum of four weeks as set out by the working time Directive.[305]

Court of Justice also pointed out in the same case that the argument is based on the assumption that a worker employed under short-term contracts has been able to take an adequate period of rest before entering into a new employment relationship, which does not necessarily hold true in the case of workers employed under a succession of short-term contracts. On the contrary, such workers often find themselves in a more precarious situation than those employed under longer-term contracts, thus it is more important to ensure that their health and safety are protected in a manner in accordance with the purpose of Directive 93/104. Court of Justice found that the practice by which some agency workers received an additional payment-supplement instead of paid holidays contravened EC Working Time Directive which requires specific payment for the particular period during which the worker took leave. [306]

3.2.2. Legislation in Turkey

Entitlement of paid annual leave is one of the constitutional rights of the employees (Article 50 of the Constitution), which is prescribed by mandatory rules by Labour Act by implying its character of indispensable, therefore it cannot be a subject of waive (Article 53(2)) and it cannot be divided by the employer unless if mutual consent of the parties exist on the division of the leave into three parts maximum (Article 56).

[305] Ruling of the **European Court of Justice**, *María Paz Merino Gómez v Continental Industrias del Caucho SA,* 18 March 2004, Case C-342/01.

[306] Ruling of the **European Court of Justice**, *Robinson-Steele v. RD Retail Services Ltd*., 16 March 2006, Case C 131/04.

It is imposed on employees not to work during annual leave by Article 58. If a worker infringes the restriction on gainful employment during his or her annual leave, he/she may be asked to reimburse of the annual leave remuneration already paid to him/her. It would also constitute a controversial behaviour to *bona fides* principle mentioned in Article 2 of Civil Code.[307]

According to the Paid Annual Leave Regulation[308], no discrimination shall be made against part-time employees with respect to the right of paid annual leave (Article 13 of the Regulation).

The condition of entitlement of paid annual leave is to complete a minimum of one year of service in the establishment since their recruitment, including the trial period (Article 53(1)). As referred above, the European Court of Justice found national rules sought qualification clauses of that kind to be incompatible with the scheme of Directive 93/104 since the Directive 93/104 lays down a right to four weeks annual leave for all workers unconditionally without a qualifying period. Thus, in order to comply with the EC Directive, the qualifying period clause regarding paid annual leave must be abolished.[309]

If the worker in concern has been employed in one or more establishments of the same employer, total period shall be taken into consideration while calculation of the length of service (Article 54(1)).

Periods that have not been worked are defined on the basis of *numerus clauses* principle, in Article 55 of Labour Act to be treated as having been worked although on calculation of one year period, such as weekly rest days and national holidays, days on which the employee fails to work owing to an accident or illness, days on which the female employee is not permitted to work before and after her confinement. The minimum length of the paid annual leave is defined by Labour Act Article 53 according to the workers' age and their length of employment as:

- fourteen days, if worker's length of employment is between one and five years (five years included),
- twenty days, if it is more than five and less than fifteen years,

[307] **Tunçomağ - Centel**, İş Hukukunun Esasları, p. 170
[308] **Official Journal** of 03.03.2004, No. 25391.
[309] **Hendrickx - Sengers**, p. 115-117.

- twenty six days, if it is fifteen years and more,

If the employee is at the age of eighteen or under and at the age of fifty or above, the length of paid annual leave shall not be under twenty days. However, the length of paid annual leave may be increased by employment contracts and collective agreements.

Article 53 defining the minimum leave period does not comply with the EC Directive 93/104, which requires paid annual leave of at least four weeks.[310]

Employees' remuneration of annual leave shall be paid as a lump sum or as an advance payment before the beginning of the leave (Article 57). The burden of proof regarding the payment of annual leave is on the employers by a roster bearing the signature of the employee. [311]

4. Parental and Maternity Leaves

4.1. EC Legislation

In Chapter Article 23 of the EU Charter of Fundamental Rights, which was proclaimed in December 2000, in Nice, based on Articles 2, 3(2) and 141(3) of the TEC, establishes that equality between women and men must be ensured in every field, including employment, work and pay, and admits the validity of positive action in favour of the under represented sex. Finally, Article 33 of the Charter contains the right to reconciliation of professional and family life: *"everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child."* Despite the Charter's lack of legally binding status, the symbolic value of the text cannot be denied.[312]

Concerning the protection of motherhood, EC Directive 92/85 was formed in 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or breastfeeding.[313]

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[310] **Hendrickx - Sengers**, p.115 and 116.
[311] **Ozdemir**, İş Sözleşmesinden Doğan Uyuşmazlıklarda İspat Yükü ve Araçları, p. 193.
[312] **Arribas - Carrasco**, Gender equality and the EU, Eipascope of EIPA-European Institute of Public Administration, 2003/1, http://www.eipa.nl, p.3.
[313] **OJ** L 348/1, 28.11.1992.

According to the Directive 92/85, employers have the duty of taking necessary measures to ensure that risks of the work to the pregnancies or breastfeeding are avoided by temporarily adjusting working conditions of the concerning worker.

Maternity leave should last at least fourteen weeks allocated before and after confinement (Article 8 of the Directive 92/85). Besides; dismissal of the concerning workers, during the period from the beginning of the pregnancy to the end of the maternity leave, is prohibited under Article 10 of the same Directive.

Parental leave was introduced by EC Directive 96/34[314] on the framework agreement, which was the first European collective labour agreement concluded by the recognized social partners under the rubric of “Social Policy” of Maastricht Treaty, sets out minimum requirements on parental leave and time off from work on grounds of force majeure, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women.[315]

This agreement grants, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, granted on a non-transferable basis to promote equal opportunities and equal treatment between men and women (Clause 2(2)), for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour (Clause 2(1)).

Member States and/or management and labour are obliged to take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements or practices in order to ensure that workers can exercise their right to parental leave (Clause 4). However, the Directive is limited to the minimum requirements and refers to Member States and social partners for the establishment of the conditions of access and specified rules of application in order to take account of the situation in each Member State, in accordance of the principles of subsidiarity and proportionality.[316]

The Directive also set a provision against dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements or

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[314] **OJ** L 145/4, 19 June 1996. May be found at: http://eur-lex.europa.eu, 03.07.2006.
[315] **Blanpain**, European Labour Law, p. 567.
[316] **Blanpain**, European Labour Law, p. 568.

practices (Clause 2(4)). At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship (Clause 2(5)).

Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply (Clause 6).

Member States and/or management and labour shall define the status of the employment contract or employment relationship for the period of parental leave (Clause 7).

All matters relating to social security in relation to this agreement are for consideration and determination by Member States according to national law, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care (Clause 8).

The right of parental leave granted by the framework agreement, has a minimum-level characteristic, hence, as it is stated at the final provisions of the agreement that Member States may enact more favourable provisions, and that the provisions of the Agreement will not be themselves justify reducing the general level of protection afforded to workers in this field. [317]

The Parental Leave Directive is a progressive measure; however, the limiting power of economic factors is most evident concerning the cost since the Directive gives no right to pay during leave at all. The extent to which this undermines the substance of the right cannot be overestimated for the reason that unpaid leave will only be a real option for families who can afford to live on one salary and that salary is most likely to be the father's. [318]

The proportion of women that are inactive because of personal or family responsibilities has decreased by almost 13 percentage points in the EU, during the past ten years due to better public care facilities, higher income so that more people can afford private

[317] **Craig - De Burca**, EU Law, Text, Cases and Materials, Oxford University Pres, 3rd Edition, 2003, p. 911.

[318] **Fredman**, Transformation or Dilution: Fundamental Rights in the EU Social Space, European Law Journal, Vol. 12, No. 1, January 2006, p.47.

care facilities, more extensive parental leave, lower fertility rate or changes in social or cultural norms.[319]

4.2. Legislation in Turkey

Labour force participation rate of women is one the leading indicator for showing a country's sustainable development, however Turkish female labour force, which was 34,1% in 1990, has been reducing in recent years and it was equal to an amount of 25,4% in 2004 owing to lack of necessary mechanisms supporting the women on their qualitative development and being participate into labour market.[320]

Labour Act has no specific provision on parental leave; maternity and nursing leave is stipulated by Article 74 of Labour Act under the rubric of *"Work During Maternity and Nursing"*, in accordance with the EC Directive 92/85 [321] on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding, which aims to ensure the protection of the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding. The preamble to Directive 92/85/EEC provides that the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding on the labour market should not be treated are unfavourably nor detrimental of Directives concerning equal treatment for men and women.

A Regulation for pregnant and nursing mothers was prepared in accordance with the Article 88 of Labour Act, which specifies the conditions and procedures they should abide by and also how the nursing rooms and child care centres shall be established.[322]

Article 74 of the Labour Act states that, female workers must not be employed eight weeks before confinement and eight weeks after confinement, composing a total period of sixteen weeks (Article 74(1)), which may be increased if it is necessary for the female worker's health and the nature of her work with provided that it is indicated in a physician's report Article 74(2)). However, if a female employee's health condition is suitable as

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[319] **European Commission**, Employment in Europe 2005, Recent Trends and Prospects, 2005, Luxembourg, p.14.

[320] **T.C. Başbakanlık, Kadının Statüsü Genel Müdürlüğü**, Kadın İstihdamı, Türkiye'de Kadınların Çalışma Yaşamına Katılımı ve Avrupa Birliği'ne Uyum Sürecinde Gerçekleştirilen Çalışmalar, http://www.kssgm.gov.tr/, 06.07.2006. **Hekimler,** Avrupa Birliği - Avrupa İstihdam Stratejisi ve Türkiye'nin Güncel Durumu, Mercek, Mess, Vol.42, 2006, Istanbul, p.112.

[321] **OJ** L 348, 28.11.1992.

[322] **Official Journal** 14.07.2004, No. 25522

approved by a physician's certificate she may work until the three weeks before delivery if she wishes so. In this case the time period that has been worked, shall be added her leave period after confinement.

Total duration of sixteen weeks for the maternity leave is quite shorter than the one which was set to be twenty-eight weeks by the EC Directive. It should be increased in order to provide protection of motherhood of the workers.

The employee is not entitled to payment during her leave of pre and post pregnancy stipulated in Article 74(1) of Labour Act, save as otherwise provide by employment contracts or collective agreements.[323] Nevertheless, if the employee is granted wage in full during her other excused absences, it is accepted that the maternity leave would not affect her wage either. [324]

The female employee is entitled to paid leave for periodic examinations during her pregnancy (Article 74 (3)) and if the physician so reports, she may be assigned to lighter duties without prejudice to her amount of wage (Article 74(4)).

If the female employee wishes, she shall be granted an additional unpaid leave of up to six months after the expiry of the sixteen weeks, which shall not be considered in determining the employee's one year of service for entitlement to paid annual leave (Article 74(5)).

A total of one and a half hour nursing leave, which shall be treated as part of working time, shall be granted to the female employees in order to enable them to feed their children under the age of one. The employee decides herself when to use and how many installments she will use her nursing leave (Article 74(6)).

On the contrary to the EC Legislation, instead of the equal sharing of family duties between men and women, Turkish law have solutions sought to lighten the burden of child care which is assumed to be a responsibility belongs to women. Hence, concerning rules does

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[323] Press Labour Act (Law No. 5953) grants female journalists maternity leave with pay equal to half their wages starting from the seventh month of their pregnancy until the end of the second month after birth (Article 16). Nevertheless, the female civil servants are granted wages in full during their leave of pregnancy (Article 104/A of Civil Servants Act No. 657).

[324] **Kandemir**, 4857 Sayılı İş Kanunu'nun Kadın İşçiler İle İlgili Düzenlemeleri, A. Can Tuncay'a Armağan, Legal Yayınları, 1st Edition, 2005, İstanbul, p.435.

not reflect a political choice, which aims at equal opportunities for women at Turkish labour market.[325]

Beside the legislative process on equality of men and women, measures are to be adopted which would be supportive in order to implement the principle of gender equality in everyday labour life. [326]

[325] **Eraltuğ**, Avrupa Birliği Hukuku'nda Ebeveyn İzni, Legal İş Hukuku ve Sosyal Güvenlik Dergisi, No.9, 2006, İstanbul, p.131.
[326] **Eraltuğ**, p.132.

THE SIXTH CHAPTER

WORKING TIME FLEXIBILITY

1. "Flexibility": Term of the New Era

1.1. The Concept

Economic and technological structures have vitally changed from the oil crisis in 1970's and globalization as well as increased competition and unemployment resulted in atypical new forms of employment.[327]

Rough conditions of competition, brought by the globalization, exposed the need for flexibility in labour law, as well as in other fields, around the world.[328] Globalization dwells upon the need of cost reduction. Since David Ricardo put forward the rule of *"comparative advantage"*; entrepreneurs and business executives started leading their technical knowledge and capital to the overseas countries in order to gain competitive advantage by means of international cooperation depending on optimal use of the productivity resources of the world.[329]

Productivity should be based on flexibility in order to be harmonized fast with the changing conditions and methods in this area thus; briefly, the aim of the flexibility is to increase the competition power and to facilitate the productivity.[330]

Flexibility shall not be understood as being lawless[331]; on the contrary, flexibility should be understood as regulating conditions in order to harmonize with the economic and technological developments while giving more choices to the social parties of collective

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[327] **Tuncay**, İşin Düzenlenmesi Bakımından Esnekleşme Türk Mevzuatının Durumu ve Uygulama Sorunları from the seminar book "Çalışma Hayatında Esneklik ve İş Hukukuna Etkileri", Istanbul Bar Association, 2002, İstanbul, p.153. **Centel**, Türkiye'de Yeni İstihdam Türleri ile İş İlişkilerinin Esnekleştirilmesi, Çalışma Hayatında Esneklik Seminar Book of Çeşme Altınyunus, Yaşar Foundation of Education and Culture, 1994, İzmir, p.241. **Tunçomağ - Centel**, p. 16. **Kutal**, Türkiye'de İstihdam Politikaları, Esneklik ve Yeni İstihdam Türleri, p. 121. **Şen**, Esnek Üretim Esnek Çalışma ve Endüstri İlişkilerine Etkileri, Turhan Kitabevi, 2004, Ankara, p.39.

[328] **Subaşı**, p.306.

[329] **Kutal**, Küreselleşmenin Emek Piyasalarına Etkileri, from the seminar book "Çalışma Hayatında Esneklik ve İş Hukukuna Etkileri", p. 22.

[330] **Subaşı**, p.307.

[331] "*Working time is not such an area to be left solely to the parties' self determination by waiving aside the ideas of protection and social state.*" **Ulucan**, Türk Toplu İş Hukukunda Esneklik ve Uygulama Sorunları, Çalışma Hayatında Esneklik ve Türk İş Hukukuna Etkileri, Seminar Book, Istanbul Bar Association, p.301. **Ekonomi**, Türk İş Hukuku'nda Esnekleşme Gereği, Çalışma Hayatında Esneklik Seminar Book of Çeşme Altınyunus, p.60.

employment agreements without prejudice to the principle of protecting the rights of the employees.[332] It would be a misunderstanding of flexibility if it is deemed to be a concept brings by the wide and limitless freedom, as contrary, it is a system which involves of rules in sense of widening individual autonomy of the employment contract parties while determining the working conditions.[333]

The main factors behind the demands of flexibility are[334]:

- Economic crisis and recessions, which result in decrease in productivity, investment and the growth of unemployment
- The necessity to harmonize with harsh competition emerged through globalization,
- Extraordinary developments in technology and the widespread usage of the computers

The consequence deduced by above mentioned facts, is that the main goals of flexibility are simplifying production and growing power of competition.[335]

The main reason of the creation of the Labour law which is to protect the workers shall not be sacrificed for the need of flexibility. The legislators are under the duty of keeping the balance between the high level of protection and flexibility. [336] It is formulated by some scholars in favour of flexibility, as "flexibility when possible, protection when necessary" [337]

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[332] **Güzel**, İş Hukuku, İş Hukukunda Yeniden Yapılanma Süreci Ve İşin Düzenlenmesinde Esneklik, Prof. Dr. Turhan Esener'e Armağan, İş Hukuku Ve Sosyal Güvenlik Hukuku Milli Komitesi Yayını, Ankara, 2000, p.220.

[333] **Subaşı**, p.317.

[334] **Süzek**, İş Hukuku, p. 18. **Tuncay**, İşin Düzenlenmesi Bakımından Esnekleşme, p.163 – 164. **Ekonomi**, Türk İş Hukuku'nda Esnekleşme Gereği, p. 58-59. **Ulucan**, Esneklik İhtiyacı ve İş Hukukunun İşçiyi Koruyucu İşlevi, p.216. **Alpagut,** İş Süreleri ve Ücret, İş Hukuku Uygulama Sorunları ve Türk Sosyal Güvenlik Sisteminde Yeniden Yapılandırma Semineri, İstanbul Barosu Yayınları, 2006, İstanbul, p.15.

[335] **Ekonomi**, Türk İş Hukuku'nda Esnekleşme Gereği, Çalışma Hayatında Esneklik Semineri, p. 58.

[336] **Subaşı**, p.316.

[337] **Eyrenci**, 4857 sayılı İş Kanunu ile Getirilen Yeni Düzenlemeler Genel Bir Değerlendime, Legal İş Hukuku ve Sosyal Güvenlik Dergisi, Sayı:1, 2004, p. 17. Also: **Ekonomi**, Türk İş Hukuku'nda Esnekleşme Gereği, p. 61.

1.2. Working Time Flexibility

It is emphasized by most scholars that working times are engaged strongly in working periods of the machines of production which are too far expensive and it would not be economical that those machines to work only for forty or thirty-five hours a week.[338]

The institutionalized life time spent in three main phrases, which includes of separate phases of education, paid work and retirement, is no longer the rule while new working arrangements such as part-time work, flexible working-time schedules, leave for caring or parental responsibilities, educational leave, career breaks, sabbaticals, working-time reduction on a daily, weekly, monthly or yearly basis, schemes for combining work and voluntary based non-work activities and early retirement schemes, have become more widespread.[339] Taken together, they represent a significant change in the traditional organization of working time. It is, moreover, becoming increasingly obvious that the trend is in the direction of a more flexible working life in which work, learning, caring and leisure time no longer follow the classic sequential cycle.[340]

Working time flexibility was applied firstly in West Germany in 1967, as a remedy for the problem of transportation and time while it was considered as means of providing the participation of women with family responsibilities into labour market in Switzerland.[341]

However there exists various flexible working time patterns, main types of the flexi-time working are; part-time working[342], gliding working time, shift work and work-on call.

- Gliding working time: German oriented gliding working time is one of the first applied flexi-time forms, which dates back to the 1960s, spread out to other European countries and to United States, Canada and Japan.[343] Gliding working time is based on a 'blocked time' system that the employees are free to determine when to start, rest or to finish

[338] **Loritz**, Çalışma Hayatında Esneklik Semineri, p. 95.
[339] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time", Luxembourg: Office for Official Publications of the European Communities, 2003, p.13, http://www.eurofound.eu.int, 28.04.2006.
[340] **European Foundation for the Improvement of Living and Working Conditions**, 2003, "A New Organization of Time Over Working Time", Luxembourg: Office for Official Publications of the European Communities, 2003, p.13, http://www.eurofound.eu.int, 28.04.2006.
[341] **Şen**, Esnek Üretim-Esnek Çalışma ve Endüstri İlişkilerine Etkileri, p.142.
[342] Part-time work has been studied above, between pages 57-69.
[343] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, Çalışma Hayatında Esneklik Çeşme Altınyunus Semineri, p.164. **Mollamahmutoğlu,** p.275. **Tuncay**, İşin Düzenlenmesi Bakımından Esnekleşme, p. 164-165.

working during the time period excluding the blocked time.[344] Gliding working time may occur in two types; simple or qualified. The former enables the employees only to determine the beginning, resting and finishing time of their work; while the in the later, workers are able to decide not only when to start, rest and finish the work, but also they can have a voice on the duration of the daily working time.[345] Gliding working time is suitable for office work, such as banking and insurance companies. [346]

Gliding working time has advantages for employees since it provides workers to spend time on their families, social life, education and leisure.[347] On the other hand, this system has handicaps for undertakings such as the programming and financing of the system, supervising of the employees and the problems regarding the communication.[348]

- Shift Work: According to the ILO, shift work is a method of organization of working time in which workers succeed one another at the workplace so that the establishment can operate longer than the hours of work of individual workers at different daily and night hours.[349] A broad distinction can be made between a fixed shift system and a rotating shift. Under the former, working time can be organized in two or three shifts; the early, late and night shifts, which means that one group of workers might work during the morning and early afternoon while another group will work during the late afternoon and evening, and the third group will work during the night. However; under the later, which is the flexible type of the shift work, workers might be assigned to work shifts that vary regularly over time. [350]

Shift work is much more beneficial for the employers that for the workers since the duration of the working time of the machines' stand in the forefront; however employees grant financial advantages and domination on their spare times.[351]

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[344] **Hueck**, Almanya'da Çalışma Sürelerinin Esnekleştirilmesine Yönelik Çalışmalar, Çalışma Hayatında Esneklik Semineri, p.117.
[345] **Hueck**, p.117. **Akyiğit,** İş Hukuku, p.291-292.
[346] **Hueck**, p.117.
[347] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, p.165.
[348] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, p.166.
[349] **ILO**, Conditions of Work and Employment Programme, Informaton Sheet No. WT-8 of May 2004, Shift Work, http://www.ilo.org/public/english/protection/condtrav/pdf/infosheets/wt-8.pdf, p. 1.
[350] **ILO**, Conditions of Work and Employment Programme, Shift Work, p.1.
[351] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, p.114.

In order to limit the potential negative impacts of shift work, especially when it involves night work, it is recommended that a shift system should be structured with the following aspects[352]:

- a short cycle period with regular rotations should be used;
- individual workers should work few nights in succession;
- individual workers should have some free weekends with at least two full days off;
- short intervals between shifts should be avoided;
- flexibility regarding shift change times and shift length is needed.

- Work on Call: Work on call, which is a type of part-time working, is named in Germany as capacity variable working time, shortly as KAPOVAZ. [353] This system requires the consent of an employee before his or her employment under KAPOVAZ system in Germany.[354]

It is described in Turkish Labour Act as: *"Employment relationship which foresees the performance of work by the employee upon the emergence of the need for his services, as agreed to in the written employment contract, qualifies as a part-time employment contract based on work on call"* (Article 14(1)).

According to Article 14(2) of Turkish Labour Act, the weekly working time is considered to have been fixed as twenty hours unless the parties differently determined. However, under German Employment Promotion Act, if parties have not determined its duration, it is considered to have been ten hours in weekly basis.[355] According to Tuncay, Turkish legislation provides more flexibility for the employees owing to stipulation of longer duration time periods.[356] The employee is obliged to perform work upon the call communicated to him within the said time limit, if the daily working time has not been

[352] **ILO**, Conditions of Work and Employment Programme, Shift Work, p.4.
[353] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, p.166. For criticism on KAPOVAZ, see: **Buschman**, Alman İşçileri Açısından İş Hukuku'nda Esneklik, Çalışma Hayatında Esneklik Seminar Book of Çeşme Altınyunus, Yaşar Foundation of Education and Culture, 1994, İzmir, p.301 et seq.
[354] **Tuncay**, İşin Düzenlenmesi Bakımından Esnekleşme, p.162.
[355] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, p.167.
[356] **Tuncay**, Türk İş Hukukunun Avrupa İş Hukukuna Uyumu, Hekimler (ed.), AB&Türkiye Endüstri İlişkileri, p. 73.

decided in the contract; the employer must engage the employee in work for a minimum of four consecutive hours at each call (Article 14(4)).

According to Article 14(2)), the employee is entitled to wages irrespective of whether or not he is engaged in work during the time announced for work on call. Unless the contrary has been decided, the employer who has the right to request the employee to perform his obligation to work upon call must make the said call at least four days in advance (Article 14(3)).

Work on call provides a high level of benefit and productivity for the employers by means of employing workers only at times of busy periods.[357] It is a working scheme that mostly in favour of the employers since it enables them to a broad authority over the working times of the employees.[358]

1.2.1. Working Time Flexibility in the EU

According to the EC Directive 93/104 amended by 2003/88, *"in view of the question likely to be raised by the organisation of working time within an undertaking, it appears desirable to provide for flexibility in the application of certain provisions of this Directive, whilst ensuring compliance with the principles of protecting the safety and health of workers."* The purpose of this provision is to reconcile the need for flexibility and the labour law's protective rules, concerning security in favour of employees.

In Britain, notorious for its long-hours working, a full time job generally is involved of 44 hours per week including both paid and unpaid overtime and one in eight employers work more than 48 hours each week in full-time jobs.[359] The reasons such as financial need for overtime payments, promotion or a higher salary make the workers accept these long hours.[360] In Britain, nearly a quarter of all jobs require less than full-time work and employers prefer to offer part-time jobs because it enables them to increase the labour force at times of high demand. [361] But part-time work opportunities are inadequate to be a solution for the problem of the work and life balance because of the fact that the most part-time jobs are paid

[357] **Eyrenci**, Türkiye'de Çalışma Sürelerinin Esnekleştirilmesi, p.168.
[358] **Hueck**, p.122.
[359] **Collins**, p.90.
[360] **Collins**, p. 90.
[361] **Collins**, p. 90.

low and therefore these jobs rarely provide a living wage. [362] Until recently UK Law made very few attempts to regulate working hours except parental leave regulations but the EC directive of Working Time demands new laws from Member States. [363]

Netherlands showed a splendid performance on growth and job creation without suffering a loss of social security, in 1990's, which is the result of reconstruction of labour market by a dozen of agreements providing flexible working types, mostly part-time.[364] However, the milestone of this flexible working model in Netherlands was that part-time and temporary employees were fully covered by national health, unemployment and retirement plans, unlike the model in USA.[365]

Beyond the low unemployment rates and a balanced economic growth in Sweden, Denmark and Norway, there lies mutually agreed flexibilisation of working conditions and labour markets.[366]

In Denmark, no additional security has been introduced regarding hiring and firing of the workers; instead, high levels of income and reintegration policies entitled to employees when they are fired. Thus, hiring and firing flexibility beside high levels of social security with fast reintegration strategies form a golden triangle of flexicurity.[367]

With their above-average growth, in new Member States the employers and employees have showed a very strong capacity for adaptation by institutional innovations and legal changes although increasing unemployment and problems regarding to working conditions such as working hours, unpaid overtime still exist.[368] However, as an advantage of EU membership, improvements in working conditions is possible by implementing the EU legislation in the social field whilst promoting the social dialogue and partnership for the goal of achieving a balance between "*the need of employers for flexibility and the desire of employees for security*" [369]

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[362] **Collins**, p. 90.
[363] **Collins**, p. 91.
[364] **Castells**, The Information Age: Economy, Society and Culture, Vol. 1: The Rise of the Network Society, İstanbul Bilgi Üniversitesi Yayınları No.97, 1st Edition, 2005, İstanbul, p. 366.
[365] **Castells**, p. 366.
[366] **Castells**, p. 366.
[367] **Velzen - Wilthagen**, In search of a Balance: Flexibility and Security Strategies in Employment Protection Legislation, Temporary Work and Part-Time Work, (**Pennings**, ed.), Flexibilisation and Modernisation of Turkish Labour Market, 153-182, p.180.
[368] Industrial Relations in Europe 2004 Manuscript by **European Commission Directorate-Generale for Employment and Social Affairs**, Belgium, 2004, p.172.
[369] Industrial Relations in Europe 2004, p.172.

The new Member States will challenge the need to promote more sustainable labour policies and to establish a society based on social cohesion. [370]

A new survey on working time from the European Foundation for the Improvement of Living and Working Conditions reveals that; the highest proportion of companies and organizations offering flexible working time arrangements in Europe is found in Latvia, Sweden, Finland and the United Kingdom while on the other hand; Cyprus, Portugal, Greece and Hungary are at the opposite end of the scale, having the fewest number of companies offering flexible arrangements. [371]

According to the same survey of European Foundation for the Improvement of Living and Working Conditions, on average, flexible working time arrangements exist in about almost one in two (48%) establishments with 10 or more employees in Europe. However, such flexi-time schemes vary in operation from one establishment to another: 16% of the establishments surveyed allow workers to vary only their starting and finishing times on the same day whilst 7% of the establishments have more sophisticated schemes, allowing the accumulation of credit or debit hours. Furthermore, 12% of establishments offer at least some of their workers the opportunity to take full days off in compensation for accumulated credit hours. Finally, 13% of establishments offer the most advanced flexible working time option by permitting workers to compensate for credit hours by taking longer periods off work. [372]

The preamble to each of two flexible work directives of the European Union, the Part-time Workers Directive and the Fixed Term Workers Directive these provisions attempts to set out the synthesis of a third way of a synthesis between economic and social policy, market and state: on the one hand to improve social policy and on the other, to enhance the competitiveness of the Community economy and to avoid burdens which might impede the development of small and medium-sized businesses.[373]

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[370] Industrial Relations in Europe 2004, p.172.

[371] **European Survey on Working Time and Work - Life Balance in Companies**, Press Releases, http://www.employmentweek.com, 27.05.2006.

[372] **European Survey on Working Time and Work - Life Balance in Companies**, Press Releases, http://www.employmentweek.com, 27.05.2006.

[373] **Fredman**, Transformation or Dilution: Fundamental Rights in the EU Social Sphere, p. 48.

1.2.2. Working Time Flexibility in Turkey

The need of flexibility was provided by Labour Act number 4857 came into force in 2003, the explicit objective of which was to consider the *acquis* on flexible work.[374] It was a late but not the least reply for the call of modernization in labour market. Late; because until the midterm of 2003, there was lack of legal definition and organization of modern types of work, namely atypical forms of work, and as it is usual, the arbitrariness used to replace the gap of lawfulness. Turkey has two main reasons to be interested in flexibility; to increase national competitiveness in today's world and to harmonize its legislation with the acquis communautaire.[375]

During the debates concerning the new labour act draft, social partners were divided into two groups; the pros of flexibility, mostly the employers by the thought (and hope) of that the flexibility would provide a free riding area of organizing the working conditions and the cons, mostly the employees afraid of losing their rights against the employers owing to clauses which puts legal foundations of flexibility.[376] In fact, both interpretations were based on a wrong information of the real aim of flexibility, which was strengthening the power of competition of undertakings while at the same time, providing flexible working conditions for employees by enable them to facilitate their spare time and family needs without prejudice to their job security.

Flexible working types regarding working time such as part-time work, work on call and unequal distribution of weekly working time over the days of the week in different forms, have been introduced in Turkish labour law by the adoption of Labour Act Number 4857 in 2003.[377]

Although flexibilisation is considered to be a solution also for unemployment, it may hardly be said that this goal will be achieved in the near future for Turkey with its high rate of unemployment.[378] Flexibilisation of Turkish labour market especially by means of the provisions of Labour Act Numbered 4857 would not be efficient unless the undeclared

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[374] **Hendrickx - Sengers**, p.81.

[375] **Pennings**, Preface, Flexibilisation and Modernisation of the Turkish Labour Market, Kluwer Law, Netherlands, 2006.

[376] **Centel**, "AB'ye Üye Olmak İsteyen Türkiye, Esnek Çalışma Biçimlerine İlişkin Düzenlemeleri Görmezden Gelemez", TİSK İşveren Dergisi, Vol.41, No.5, January 2003.

[377] **Ulucan**, Esneklik İhtiyacı ve İş Hukukunun İşçiyi Koruma İşlevi, p. 214.

[378] **Kutal,** Türkiye'de İstihdam Politikaları, Esneklik ve Yeni İstihdam Türleri, p. 136.

employment is prevented.[379] The rule is being out of rule for such establishments employing undeclared workers where they are employed under the minimum wage and without belonging to social security system.[380] Successful and sustainable flexibility strategies along with security measures are dependent on the support of the social partners through a social dialogue, which is the key instrument for Turkish Labour Law to achieve equilibrium between flexibility and security.[381]

2. Beyond the Ideal, What is the Reality of Flexibility?

Since the countries, which has not approved ILO Conventions and has insufficient social policy measures, have taken the biggest share from the investments the investments while the investments are limited around certain areas at the same time; thus, globalization has not provided an optimal use of world's resources, as contrary to expectations so far.[382]

Flexibility may cause negative consequences on workers side by means of insecure working conditions.[383] As a solution for this unfair situation the flexi-security concept has occurred which is aimed the well execution of the both flexibility as well as the job security.[384] Flexicurity strategies were resulted from the fact that the demand for further labour market flexibilisation, set against an equally strong demand for providing security to employees, especially to the vulnerable ones such as women workers, imposing conflicting requirements on labour market actors.[385]

A balance between flexibility and security is manifested within the European Employment Strategy by inviting social partners in European Employment Guideline 13 to negotiate and implement agreements to modernize the organisation of work, including flexible working arrangements, with the aim of making undertakings productive and competitive, achieving the required balance between flexibility and security, and increasing the quality of jobs.[386]

The dream of flexicurity is far beyond at least for today's labour markets, since the flexibility riding alone forgetting its necessary but hindering companion, the "security". The

[379] **Soyer**, İş Kanunu Tasarısının Çalışma Hayatında Esneklik Sağlayan Düzeltmeler, p.198.
[380] **Ulucan**, Esneklik İhtiyacı ve İş Hukukunun İşçiyi Koruma İşlevi, p. 215.
[381] **Velzen - Wilthagen**, p.182.
[382] **Kutal**, Küreselleşmenin Emek Piyasalarına Etkileri, p. 25.
[383] **Subaşı**, p.317.
[384] **Subaşı**, p.317.
[385] **Velzen - Wilthagen**, p.153.
[386] **Velzen - Wilthagen**, p.157.

result is a precarious labour force with low remuneration, low job security and low status especially for working women since they are now both home workers and breadwinners.[387]

[387] **Fredman**, Women at Work: The Broken Promise of Flexicurity, Oxford Industrial Law Journal, Vol.33, No.4, December 2004, p.299.

CONCLUSION

Turkish Labour Act Number 4857 which has introduced modern types of working times including flexible ones, is in compliance with the concerning EC Directives. It is a late but not a least step forward for Turkish Labour Law.

Organizing working time is a crucial factor for labour law since it is strictly related both to workers' health and to productivity of labour markets. Turkish Labour Act Number 4857 is in accordance with the *acquis* regarding working time except some important points:

Firstly, Labour Act excludes many types of workers, such as family workers and workers in agriculture who normally are in the scope of the European Working Time Directive. Employees in maritime and press sector are not included in Act Number 4857, which brought job security and modern schedules of employment on working time basis. Instead, Maritime Labour Act No. 854 of 1967 and Press Labour Act No. 5953 of 1952 are in force for the employees in concern. Both of these acts are incapable in answering the requirements of a modern labour market owing to their limited provisions regarding working time and flexibility. However, lack of rules providing job security is the main question concerning maritime and press employees. It is quite a similar position to the situation of that *"all workers are equal, but some workers are more equal than others"* as in George Orwell's novel, 'Animal Farm'. An amendment is required in Labour Act to comprehend most of employees or Maritime and Press Labour Acts should be modernized in accordance with EC Directives.

Secondly, the definition of part-time work differs from the EC Working Time Directive which defines part-time employee as the one whose normal working hours are less then the working hours of a comparable full-time worker. However, part-time work is defined as considerably shorter than normal hours of work of a comparable employee, 'considerably shorter' is explained as less than two-third of normal working hours in the explanatory memorandum of the article. It would be better if a more explicit is made by the article.

Thirdly, the qualifying employment period of one year, which is needed for entitlement to annual leave, is not suitable for seasonal jobs or jobs last less then one year in their nature and shall be abolished in accordance with the *acquis*. Fourthly, minimum annual

leave periods do not comply with the Working Time Directive, under which workers are entitled to have at least four weeks of paid annual leave.

Concerning the maternity leave, the duration of it is far too shorter than the EC Directive in concern in Turkish Labour Act. It should be increased in order to protect motherhood of the employees and prevent workers from leaving working life due to maternal reasons. Moreover, parental leave should be provided not only for female workers but also male employees for supporting equal sharing of family responsibilities and disburden women in labour life.

With regard to flexibilisation, Turkey's integration process through the European Union is a well motivation for improving working conditions, in this way not only the employees but also Turkish economy may reach better standards by gaining competitive power through implementation of flexibility along with security. Today, no matter their sizes, there exist many enterprises vary from factories to small and medium sized enterprises (SMEs) which are very common in Turkish economy, therefore more comprehensive security measures are needed if improvement of working conditions are aimed.

On the other hand, the problem of Turkish Labour Market having priority is undeclared labour force, which covers almost half of it. Without preventing informal employment, being in compliance with the European Union Legislation does not make any sense as long as high amount of workers do not benefit from the protective measures of labour legislation. In order to prevent undeclared employment, Government and social partners should take steps on the basis of social cooperation, which is also not well developed in Turkish labour market.

Consequently, provisions of Turkish Labour Act No. 4857 concerning working time are generally in compliance with the acquis communautaire. Nevertheless, the same is hardly can be argued for Turkish labour market. Because of the high rates of undeclared work and as much again uncovered workers from different sectors fall out of the scope of EC Law compatible labour legislation.

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