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TOPIC 2
LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE ASPECTS) AND PRODUCTIVE DECENTRALIZATION

REPORT OF TURKEY

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Decentralization of production process is a phenomenon which shows its impacts in Turkey as other countries. Both externalization of operations and manpower seem easier to be implemented in countries like Turkey, whose management culture is formed by wings coming from the other side of the Ocean. In particular, the absence of a modern employee participation model and decreasing trade unionism rate facilitate and fasten these practices. This liberalisation tendency, which has been dominating since 1985-1990's, resulted in an absolute freedom of employer on the management of enterprises. Thus, the organisation of production belongs to the entrepreneurial liberty of employer. This structure gives a considerable facility in decentralization of production with an aim of increasing profitability. Furthermore, due to the high unemployment rate, the employee as an individual party to the contract hesitates to oppose such operations.

Under Turkish law, the problem of decentralization of production process is dealt with the liability approach. Therefore, the legal provisions focus on the protection of the employee's

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rights in the form of adopting liability clauses rather than discussing employee's roles in decision process. Even long before the born of new organization forms, Turkish Labour Act No. 3008 dated in 1936, included a provision regulating the liability of the principal employer vis-à-vis the sub-contractor's employees[1]. This clause envisaging the joint liability of the principal employer for the rights of sub-contractors employees is kept in the following Labour Acts No. 1475 and actual Labour Act No. 4857. Apart from this liability clause, Act No. 4857 dated in 2003, brought rules in respect of transfer of workplaces and temporary contracts with an aim of harmonising Turkish law with EU regulations and protecting individual employee's rights.

I. MANAGEMENT PRACTICES AND PRODUCTIVE DECENTRALIZATION

Although a general observation points out a trend toward increased productive decentralization, there are not many empiric studies showing the real figures. However, the jurisprudence of the Turkish Court of Cassation and the discourse of trade unions give clues about details of these practices.

Sub-contracting practices may be shown as the oldest and the most current forms of productive decentralization. These practices are divided in two categories: first, sub-contractor employer executes the main job in his/her own workplace outside the principal employer's workplace[2] and second, sub-contractor performs his activities under the roof of the workplace belonging to the principal employer.

Due to joint liability norms which will be examined below, the outsourcing of production stages to other enterprises which function out of the main enterprise becomes more frequent in recent years, particularly in holding companies. Group of companies restructures their organization by collecting certain departments under one different company. For instance, instead of having a marketing department in each company of the group, a distinct subsidiary company, whose business basis is marketing, serves to all other companies. However, it should be underlined that this practice is not limited within holding companies. Nothing prevents companies from composing a network by charging each by different stages of the production[3].

Not only externalization of operations but also externalization of manpower and the number of employees employed by atypical employment contracts are increasing continuously. In certain cases, employee continues to works in the same workplace under the direction of

[1] T. Canbolat, *Türk İş Hukukunda Asıl İşveren-Alt İşveren İlişkileri*, İstanbul 1992, 1-6.
[2] E. Yazmaz, "Esnek Üretime Dayalı Bir Rekabet Stratejisi Geliştirilebilir mi? Türkiye'de Fason Üretim", *Yearbook for 1995 & 1996 Petroleum, Chemical, Rubber, Worker's Union of Turkey*, 707-715
[3] M. Ekonomi, "İşyerinin Bir Bölümünün Devri (Kısmi Devir) ve İş İlişkilerine Etkisi", *Prof. Dr. Turhan Esener'e Armağan*, Ankara 2000, 337.

different employers without knowing who his/her real employer is. Thus, in the same workplace, different employees work for different employers under different contractual terms.

An employment strategy based on three steps is adopted in a lot of enterprises. According to this strategy, in the core, the employer recruits employees with a contract for indefinite period in return for high wages and social benefits. There is a second circle which consists of employees recruited by either fixed-term or part time contracts. And on the periphery, the employer employs not his own employees, but temporary employees or sub-contractor's employees. New norms about the prohibition of discrimination based on the nature of the employment contract will prevent benefits from having a second circle. Legal regulations in respect of the third circle will be examined below.

These strategies have a global impact of dismissals and reduction of wages in certain sectors. Employees whose jobs are assigned to sub-contractors or outsourcing companies loose their jobs. In most of cases, they are re-engaged by sub-contractors with reduced wages and social benefits. Moreover, even if their wages are maintained at the same level, as regards their rights calculated on the base of seniority, the length of time is cut off by such practices. Except the transfer of workplace, the change of employer accompanies to a new start from square one.

In addition, because of the system of collective bargaining, these practices have destructive impacts on employee's rights in collective labour law. Primary motifs behind these new strategies are to escape from mandatory regulations of labour law and decrease trade unions power in the workplace[4]. According to Article 12 of Act No. 2822 about Collective Agreements, Strike and Lock-Out, only a trade union who represents as members more than half of the number of employees recruited in the workplace has right to conclude a collective agreement in that workplace. By transferring his own employees to sub-contractors, the principal employer tries to keep a core employee group who won't be member of a trade union. Therefore, the trade union faces with great difficulty to conclude a collective agreement. In addition, the employees may only be member of a trade union which is established in the branch of activity to which the main work performed in this workplace belongs. As it will be examined in a more detailed manner below, the possibility to conclude a collective agreement covering both employees of principal and sub-contractor employer is thus very limited.

[4] S. Taş, *Taşeronluk (Alt İşverenlik) ve Endüstriyel İlişkilere Etkileri*, 2. Bası, İstanbul 2002, 103-105.

II. GROUPS OF COMPANIES AND UNITY OF ENTERPRISE

According to Article 2 of Labour Act, the employer is a natural or legal person who recruits employees. Rights and duties arising from the contract of employment belong to the parties to the contract, which mean the employer is the primary person addressed by labour and social protection law. The principal feature in order to determine the employer is the ability to conclude a contract, therefore the ability to carry legal rights and duties. Hence, contractual analysis of employer is determinant.

Nevertheless, there exist certain cases wherein the Court of Cassation treated subsidiary companies in calculating severance payment as if they were a single enterprise both in public[5] and private sector[6]. In all these cases, the employee was assigned to another subsidiary company. The common point of all these decisions is the assignment between different companies was realized without waiting the end of the notice period, which is necessary to terminate the contract for an indefinite period. Thus, the employee started to his new job in a new company without having waited until the expiry of the notice period. The absence of an indemnity demand by the former employer points out his implicit consent to this transfer. Certain authors explain theoretical base of these judgments by referring to the theory of "disregarding the corporate entity"[7]. Others argue for the "transfer of employment contract" between different legal entities[8]. But anyone has not focused yet on the reliability of the contractual analysis of the employer in such cases.

Therefore, these Court decisions do not cause to the responsibility of holding company. In principle, a corporate group has no legal identity as such. The legal persons are the individual companies that make up that group. Therefore, the Court of Cassation refuses, in principal, the responsibility of the holding company from the obligations of its affiliated companies[9].

Article 2 of new Labour Act wherein institutions and organisations without legal personality are stated as employer, may bring a new dimension to this question. However, up to now, this norm has not been interpreted in a manner to treat principal company and its affilies, subsidiary companies or partners as if they were a single enterprise.

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[5] Cour. Cass., 9th Ch., 7.11.1985, 9811/10052, M. Çenberci, *İş Kanunu Şerhi*, Ankara 1986, 139-140; 2.11.1987, 9215/9740, *Çimento İşv. Der.*, Ocak 1988, 35; 9.4.1982, 2940/3520, Judgment and Notes by A.R. Okur, *İHU 1982/II*, İşK. 14 (No. 26).

[6] Cour. Cass., 18.6.1998, 8721/10489, *Tekstil İşv. Der.*, Aralık 1999, 16-17.

[7] V. Yanlı, *Anonim Ortaklıklarda Tüzel Kişilik Perdesinin Kaldırılması ve Pay Sahiplerinin Ortaklık Alacaklılarına Karşı Sorumlu Kılınması*, İstanbul 2000, 35-36; İ. Aydınlı, *Türk İş Hukukunda İşyeri ve İşletme Kavramları*, Ankara 2001, 146-147, 155-156.

[8] M. Ekonomi/Ö. Eyrenci, "Hizmet Akdinin Devri ile İşverenin Değişmesi", *Prof. Dr. Nuri Çelik'e Armağan II*, İstanbul 2001, 1206-1212; M. Ekonomi, "Şirket Topluluklarında – Holdinglerde İşçi-İşveren İlişkileri", *İstanbul Barosu Çalışma Hukuku Komisyonu Bülteni*, 2001/5, 22-27.

[9] Cour. Cass., 9th Ch., 28.9.1998, 11031/1364, M. Ekonomi, *Yargıtay'ın İş Hukukuna İlişkin 1998 Yılı Emsal Kararları*, Ankara 2000, 1.

III. TRANSFER OF UNDERTAKINGS

1. Transfer of workplace or part thereof

In Turkish law, under previous Labour Act there was no provision regulating the transfer of workplace. The Court of Cassation held the maintenance of employment contracts in case of transfer of the workplace by its jurisprudence. The transfer of workplace was introduced by new Labour Act in 2003 with a view of bringing Turkish law in line with European Union regulations. According to Article 6 of Labour Act, in case wherein the workplace/establishment or part thereof is transferred to another employer as a result of a legal transfer, contracts of employment which exist in the workplace on the date of the transfer, will be transferred to the transferee.

Turkish law generally focuses on the concept of "establishment/workplace" rather than the one of "undertaking". Undertaking is the unit which pursue an economic objective and composed of establishments. It is deemed as related to the legal personality of the employer. However, workplace is defined by Article 2 of Labour Act as the unit wherein workforce, material and immaterial elements are organised by the employer with a view to ensure the production of goods and services. The workplace is an integrated organisational entity composed of annexed and adjunct facilities, as well as vehicles. Adjunct facilities of workplace are defined as all premises used by the reason of the nature and execution of the work organized under the same management. In addition, facilities annexed to the workplace make part of the organizational entity; such as restrooms, day nurseries, dining rooms, dormitories, bathrooms, rooms for medical examination and nursing, places for physical and vocational training, courtyards and such similar places, as well as vehicles (Art. 2 of Act No. 4857).

Up to the enactment of Article 6 of Labour Act, the transfer of workplace was evaluated as the transfer of the global ensemble of entity by the Court of cassation. Although the transfer of parts of workplace was examined in the doctrine[10], as far as we know, there exists no Court decision with this regard. One of the reasons of this absence may be found in a specific regulation of Turkish law regarding sub-contracting relations, which will be examined below.

2. Maintenance of employment contracts

The maintenance of the contract of employment has always been one of the primary concerns for labour lawyers. Even before the enactment of Article 6, the doctrine and the Court of Cassation established the principle of maintenance of employment contracts in case of transfer of workplace. The legal reasoning was based on the fact that the personality of

[10] Ekonomi, (2000), 325-361.

the employer is not deterministic for employees in the contract of employment. In this direction, Article 347 Paragraph 2 of Code of Obligations states that the death of employer shall not, in principle, terminate the contract of employment. In addition, entertaining an analogical reasoning with specific provisions of Labour Act No. 1475, in particular those about the unification of length of services as regards severance payment (Art. 14/2), calculation of notice periods (Art. 13), annual paid leave (Art. 53), the principle of the maintenance of employment contracts in case of the transfer of workplace was established[11]. According to this jurisprudence, the transferee was responsible for the whole period passed under the subordination of both employers as regards the rights calculated on the length of service. However, the responsibility of the former employer was continued for obligations such as wages and overtimes due during the period passed under his conduct[12].

Due to new Article 6, in case of transfer of workplace or part thereof, the contracts of employment are passed on to the transferee with all rights and obligations involved except the situation wherein the transfer is a result the liquidation of the employer's assets due to his insolvency.

The transferor and transferee shall be jointly liable for the obligations which are due on the date of the transfer. Nevertheless, in cases where the legal personality status ceases to exist as a result of a merger, participation or where the corporate type is changed, joint liability norm is not applicable.

The liability of the transferor is limited to two year period following the date of transfer. Only as regards severance payment, there exists a specific provision that the liability of the transferor is limited by the length of time during which the transferor had the employee under his employment and the wage rate which the employee is receiving at the time of the transfer[13]. Therefore, two years restriction is not applicable in respect of severance payment[14].

3. Information and consultation of employees

There exists no specific consultation or information duty of employer. Due to the absence of worker participation model under Turkish law, employer's decisions about outsourcing or

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[11] A. Güzel, *İşverenin Değişmesi-İşyerinin Devri ve Hizmet Akitlerine Etkisi*, İstanbul 1987, 281 et seq.; Ekonomi, (2000), 329-331; N. Çelik, *İş Hukuku Dersleri*, 15. Bası, İstanbul 2000, 54-55; H. Mollamahmutoğlu, *İş Hukuku*, 2 Bası, Ankara 2005, 165-167; S. Süzek, *İş Hukuku*, 1. Bası, İstanbul 2003, 187-191.

[12] See Çelik, (2000) 55-56; F. Şahlanan, "İşverenin Değişmesi-İşyerinin Devri ve İş Hukukuna İlişkin Sonuçları", *TÜHİS*, Kasım 2000-Şubat 2001, 17-20.

[13] Cour. Cass., 9th Ch. 11.4.2005, 23994/12847, *Legal-İSGHD*, (2005) 8 1740-1741; 24.2.2005, 15040/6243, *Legal-İSGHD*, (2005) 8, 1771-1772 see also T. Dereli, *Labour Law and Industrial Relations in Turkey*, Kluwer 1997, 159.

[14] F. Şahlanan, 4857 Sayılı Yeni İş Kanunu Değerlendirme Konferans Notları, Bolu 12-13 Temmuz 2003, 75; K. Tunçomağ/T. Centel, *İş Hukukunun Esasları*, 4. Bası, İstanbul 2005, 63.

subcontracting constitute part of his entrepreneurial liberty. Employers are free to take such a decision without undertaking any information or consultation process in the workplace.

4. Relationship between transferor and transferee enterprises

To apply Article 6 of Labour Act, the transfer must result in a change of employer; it must concern two undertakings. If the workplace is transferred as a whole, there is no doubt that the contracts of employment will be maintained by the transferee. The transferee as the new employer has the right to give orders and instructions.

The contract of employment is kept as it is. Thus, wages and other employment conditions would continue to be maintained. Nevertheless, parties to individual contract have the freedom to vary contractual terms via mutual agreements. According to Article 22 of Labour Act, essential variations of the employment contract shall only be offered to employees by a written notification. Only with a written acceptance of employee given in six working days following notification, the modification shall come into effect.

However, the transferor and the transferee are not authorised to terminate the employment contract solely because of the transfer of the workplace or part thereof. Nevertheless, the termination is allowed for reasons required by economic, technological and organisational changes (Art. 6/5 of Act No. 4857)[15].

A particularity of Turkish law arises from a specific regulation in respect of sub-contracting. In case of the transfer of the part of a workplace, if the transferee continues to perform his activities in the workplace wherein also the transferor continues to operate, this specific regulation that details are examined below may also apply.

IV. SUBCONTRACTING AND JOINT LIABILITY

1. Conditions for joint liability of the principal employer

The responsibility of the principal employer against employees of the subcontractor employers has been regulated by specific provisions since 1936[16]. In cases wherein the sub-contractor undertakes a service by his own employees in the workplace belonging to the principal employer, the later is held jointly liable vis-à-vis the sub-contractor's employees. The main approach of Turkish law to this problematic is to guarantee sub-contractor's employees' rights. However, it turned out that joint liability provisions are insufficient to prevent sham sub-contracts. Therefore, the legislator felt the need to prohibit certain malicious practices in new Labour Act.

[15] Ö. Eyrenci, "4857 Sayılı İş Kanunu İle Getirilen Yeni Düzenlemeler Genel Bir Değerlendirme", (2004) 1, *Legal-İSGHD*, 24-25; Şahlanan, (2003), 75-76; N. Çelik, *İş Hukuku Dersleri*, 18. Bası, İstanbul 2005, 59; Ö. Eyrenci / S. Taşkent / D. Ulucan, *Bireysel İş Hukuku*, 2. Bası, İstanbul 2005, 93-94; Mollamahmutoğlu, (2005), 168; Süzek, (2005), 170-171.

[16] F.H.Saymen, *Türk İş Hukuku*, İstanbul 1954, 456-457.

To rule joint liability, Article 2/5 of new Labour Act No. 4857 enumerates conditions as follows: First of all, the one who awards the contract to the sub-contractor must be employer, which means he/she should employ employees in the workplace where the sub-contractor performs his activities. Therefore, for contracts on a turn-key basis, the principal employer has no legal responsibility[17]. Secondly, the sub-contractor must also be employer, in other words he/she should perform activities via his/her own employees[18].

Thirdly, the subcontractor must perform his activities in the workplace of the principal employer. This plant becomes sub-contractor's own workplace as well. Therefore, one production plant constitutes two different workplaces from legal point of view. Sub-contracting activities performed at the workplace of the sub-contractors out of the principal employee's workplaces do not fall under the cover of Article 2 Paragraph 5[19].

A very important amendment was introduced also by the enactment of new Labour Act No. 4857 in 2003. No restriction to entrust auxiliary works to sub-contractors. However, in order to award main works to sub-contractors, sub-contracting should be required by works or enterprise necessities and by the needs for expertise because of technological reasons.

Lastly, the employees of the subcontractor must exclusively work for the principal employer. This condition shows the legislator's approach to the problem: the principal employer is liable vis-à-vis the subcontractor's employees under condition that they work only in the workplace of the principal employer. However, if the subcontractor's employee performs activities in different enterprises, the relationship between the principal employer and the employee of the subcontractor is not firm enough to justify the joint liability of the principal employer[20].

2. The scope of joint liability

If all these conditions are fulfilled, the principal employer is jointly liable for obligations of the sub-contractor arising from the contract of employment and from obligations ensuing from the Labour Act[21]. The principal employer is responsible for obligations, such as wages, social benefits, over times, paid annual leaves; in case of dismissal notice period, the severance payment etc. that the employee is entitled against sub-contractor in his capacity of being employer. In addition, in case of an industrial accident or occupational sickness, the sub-

[17] See as example, Süzek, (2005), 137; F. Demir, *İş Hukuku ve Uygulaması*, 4. Baskı, İzmir 2005, 20; Eyrenci/Taşkent/Ulucan, (2005), 36; Mollamahmutoğlu, (2005), 138-139; Tunçomağ/Centel, 55-56.

[18] Süzek, (2005), 137; Eyrenci/Taşkent/Ulucan, (2005), 36.

[19] See as example, Süzek, (2005), 138; Demir, (2005), 20; Eyrenci/Taşkent/Ulucan, (2005), 36; Mollamahmutoğlu, (2005), 142; see also A. Güzel, "İş Yasasına Göre Alt İşveren Kavramı ve Asıl İşveren-Alt İşveren İlişkisinin Sınırları", *Çalışma ve Toplum*, (2004) 1, 39-40; S. Taşkent, "Alt İşveren", (2004) 2, *Legal-İSGHD*, 364; G. Alpagut, "4857 Sayılı İş Yasası ile Alt İşveren Kurumundaki Yeni Yapılanma", *Yeni İş Yasasının Alt İşveren Kurumuna Bakışı, Sorunların Değerlendirilmesi ve Çözümleri*, Ankara 2004, 17.

[20] Çelik, (2005), 49; Demir, (2005), 22; Eyrenci/Taşkent/Ulucan, (2005), 36; Mollamahmutoğlu, (2005), 142-143; Süzek, (2005), 141-142; Alpagut, (2004) 19; Tunçomağ/Centel, (2005), 55.

[21] See as example, Cour. Cass. 9th Ch., 11.4.2005, 20368/12913, *Legal-İSGHD*, (2005) 8, 1738-1739; Güzel, (2004) 1, *Çalışme ve Toplum*, 51-55; Taşkent, (2004) 2 *Legal-İSGHD*, 366; Çelik, (2005), 47-48; Eyrenci/Taşkent/Ulucan, (2005), 38; Mollamahmutoğlu, (2005), 143-144; Süzek, (2005), 142-143.

contractor's employee may also sue principal employer for his material and immaterial damages. Moreover, where there exists a collective agreement covering sub-contractor's employees, the principal employer is jointly responsible for rights arising from the collective agreement.

Not only duties ensuing from Labour Act, but also those arising from Social Insurance Act fall under the scope of joint liability. Due to Article 87 of Social Insurance Act, the principal employer is liable for all kind of sub-contractor's duties in his capacity of employer such as notification of the insured employee, contributions, duties of giving certain documents, etc[22].

Therefore, the liability of the principal employer is regulated by mandatory rules to guarantee the rights of the sub-contractor's employees. The employee has right to recourse both his own employer and the principal employer. After the payment, the principal employer may ask to the sub-contractor for the withdrawal of payments.

3. Restrictions to sub-contracting practices

Although the principal employer is held jointly liable for sub-contractor's obligations, this does not result in the equal treatment between the employees of the principal employer and those of the sub-contractor[23]. Thus, the difference of wages or social benefits continues to exist between two groups of employees. The principal employer generally prefers to recruit a core group of employees with better remuneration and social benefits, while the sub-contractor's employees recruited with less attractive working conditions. In addition, liability provisions do not prevent the conclusion of sham sub-contracts.

Envisaging malicious sub-contracting practices wherein the principal employer continues to conduct sub-contractor's employees in his own workplace as if they were his own employees, the Court of Cassation qualified such contracts as invalid. This jurisprudence of Supreme Court was introduced to the Act by Paragraph 6 Article 2 of Act No. 4857 in 2003[24].

The legislator brought a legal presumption that the opposite may be proven by the interested parties[25]. According to this new amendment, firstly it is prohibited to deteriorate the rights of the employees by way of their engagement by sub-contractor. This was the most misused practice that the legislator aims to prevent. However, it is not prohibited that the sub-

[22] A. Güzel/A.R. Okur, *Sosyal Güvenlik Hukuku*, 10. Bası, İstanbul 2004, 138-142.
[23] Güzel, (2004) 1, *Çalışma ve Toplum*, 51-55.
[24] Eyrenci, (2004) 1, *Legal-İSGHD*, 21; see also C. İ. Günay, "Yargıtay Kararları Açısından Alt İşveren Sorunlarının Değerlendirilmesi", *Yeni İş Yasasının Alt İşveren Kurumuna Bakışı Sorunların Değerlendirilmesi ve Çözümleri*, Ankara 2004, 26-31.
[25] Eyrenci, (2004) 1, *Legal-İSGHD*, 22; Süzek, (2005), 147; Yeni İş Yasasının Alt İşveren Kurumuna Bakışı Sorunların Değerlendirilmesi ve Çözümleri, Panel, İNTES, Ankara 2004, 44; contr. Ö. Ekmekçi, "26 Haziran 2002 Tarihli İş Kanunu Tasarısının Bazı Hükümleri Üzerine", *Çalışma Hayatımızda Yeni Dönem*, 25-29 Eylül 2002, 67; F. Şahlanan, "Genel Hükümler ve Temel Kavramlar", *Yeni İş Yasası Sempozyumu*, İstanbul 30-31 Mayıs 2003, 32; comp. Alpagut, (2004) 20-21; Çelik, (2005), 51.

contractor recruits the employees of the principal employer. The Act restricts only the reduction of employees' rights by this way[26].

Secondly, it is prohibited to entrust certain activities to persons who worked before for the principal employer with a contract of employment. Thirdly, the main activity shall not be awarded to sub-contractors, unless a work or business/operational necessity, or the expertise required by technological reasons calls for to do so on. In all these cases and others wherein sub-contracting practice is based on sham awarding contracts, the employees of the sub-contractor shall be treated as the employees of the principal employer.

There is no restriction for entrusting auxiliary jobs to sub-contractors, such as cleaning, security or fire departments[27]. The debated issue concentrates on the main activity of the undertaking; whether the employer may entrust main activities of the undertaking to different sub-contractors. Certain authors argue for a strict interpretation of the Act that only in cases wherein technological reasons AND work-related or operational necessities require such a sub-contracting, the main activity may be awarded to third persons[28]. Others put forward that such a strict interpretation of the norm would result in prohibition of sub-contracting, which is not the aim of the Act. Thus, either technological requirements OR business necessities may justify sub-contracting of main activity. Even reducing labour costs may be assessed under business necessities[29]. A third group of authors argue that either the necessities of work or business or technological expertise may justify sub-contracting. However, the sole reason to reduce labour costs or to increase profit is not be acceptable[30]. For the moment, the Court of Cassation seems to adopt a strict approach to sub-contracting practice: in a case wherein a municipality awarded cleaning works to a sub-contractor company, the Court of Cassation held that cleaning works constitute main part of services performed by municipalities. With the introduction of the new amendment, main works shall not be awarded to sub-contractor employers[31]. The legal consequence of such an operation is that sub-contractor's employees will be considered employees of the principal employer from the beginning.

5. The transfer of part of workplace and sub-contracting

[26] Ekmekçi, (2002), 66; Güzel, (2004) 1, *Çalışma ve Toplum*, 56-57; Taşkent, (2004) 2, *Legal-İSGHD*, 365; Eyrenci/Taşkent/Ulucan, (2005), 37; Mollamahmutoğlu, (2005), 146; Süzek, (2005), 146; contr. Çelik, (2005), 50.
[27] Cour. Cass., 9th Ch., 1.6.2005, 12985/20130, *Legal-İSGHD*, (2005) 8, 1705-1707; Alpagut, (2004), 17; Süzek, (2005), 139; Demir, (2005), 20.
[28] Güzel, (2004)1, *Çalışma ve Toplum*, 45-50; Taşkent, (2004)2, *Legal-İSGHD*, 364-365; Eyrenci/Taşkent/Ulucan, (2005), 37; E. Ünsal, "4857 Sayılı Yasaya Göre Asıl İşveren-Alt İşveren İlişkisinin Kurulması", *Legal-İSGHD*, (2005) 6, 543-544; M. Şakar, *İş Hukuku Uygulaması*, 6. Baskı, İstanbul 2005, 51; similar Mollamahmutoğlu, (2005), 140-141.
[29] F. Şahlanan, (2003), 70-71; Yeni İş Yasasının Alt İşveren Kurumuna Bakışı Sorunların Değerlendirilmesi ve Çözümleri, Panel, İNTES, Ankara 2004, 47-48; Tunçomağ/Centel, (2005), 57.
[30] Süzek, (2004), 43-44; (2005), 140-141; Alpagut, (2004), 18-19.
[31] Cour. Cass., 9th Ch., 30.5.2005, 14383719766, *Legal-İSGHD*, (2005) 8, 1714-1715.

Under Turkish law, if a sub-contractor undertakes an activity which will be performed in the same workplace of the principal employer, the law envisages joint liability of the principal employer under certain conditions, which are examined above. However, this sub-contracting practice may also constitute a transfer of a part of the workplace. In that case, which norm will be applicable is a matter of discussion[32].

Certain authors regard these two provisions as mutually exclusive[33]. Others argue for a cumulative application of both norms[34]. Although this question has not been examined directly yet, the Court of Cassation upholds the maintenance of employment contracts in cases wherein the cleaning activity was entrusted to different sub-contractors by whom the employee was kept to have been worked[35].

Considering European Court of Justice jurisprudence as regards transfer of undertakings, in our opinion, entrusting certain activities to a sub-contractor who performs his activities in the workplace of the principal employer may constitute a transfer of the part of the workplace. In that case, the employment contracts executed in this part will be maintained by the sub-contractor. In addition, if conditions are fulfilled, the principal employer shall be jointly liable vis-à-vis the subcontractor's employees. Therefore, a double protection is provided.

However, Turkish legislator did not aim such a double protection. The reason for this cumulative application may be found in historical evaluation. The liability of the principal employer vis-a-vis the employees of the sub-contractor has always been a matter of discussion in Turkish law. However, up to now, the transfer of the part of the workplace has never been examined in a detailed manner. The harmonisation of Turkish law with EU regulations would bring a new regard to the concept of "workplace", as well as the transfer of the workplace.

V. LEASE OF EMPLOYEES: TEMPORARY WORK CONTRACTS

One of the most debated provisions of Labour Act is related to the temporary work relation. Despite the strong trade unions' opposition, the lease of employees is regulated by Article 7 of Labour Act under the title of "temporary work relation".

1. Conditions

Temporary work contracts were concluded in a large scale in certain sectors, before the enactment of new Labour Act. The legislator with an aim of preventing abusive practices brought restrictions to these practices[36]: According to Article 7, in order to conclude a

[32] Güzel, (2004) 1, *Çalışma ve Toplum*, 57-58.
[33] Çelik, (2005), 50; Eyrenci, (2004) 1, *Legal-İSGHD*, 21; Güzel, (2004)1, *Çalışma ve Toplum*, 57-58.
[34] Alpagut, (2004), 22-23; comp. Ekmekçi, (2002), 88.
[35] See as example Cour. Cass., 9th Ch.,15.11.1999, 14460/17426, İ. C. Günay, *Şerhli İş Kanunu*, I, Ankara 2001, 270.
[36] For unconstituonality of Article 7 of Labour Act see Şakar, (2005), 124-126.

temporary work relationship between two distinct undertakings, three conditions must be satisfied: First of all, the employee who will be leased by a temporary work contract must give his/her written approval at the moment of the transfer. Therefore, consents given in the conclusion of the contract are not valid[37].

Secondly, the lease of the employee by temporary employment relationship shall only be established between companies which lay down under the same holding structure or group of companies. If the employee will be leased to another company which falls out of the groups of company, temporary work contract may be concluded under condition that he/she will be employed in the same or similar jobs that she/he has being employed in the workplace of the principal employer. Certain authors argue for a large interpretation of the term of "similar jobs"[38]

Lastly, the temporary work contract may be concluded for a period not to exceed six months and if required, it may be renewed twice. The consent of the employee is required for each renewal[39].

In addition, it is prohibited to engage a temporary employee during the execution of the strike and lock-out. Also in undertakings wherein a collective dismissal has taken place, no temporary employment relationship may be concluded within the six months period following the collective dismissal.

2. Rights and duties during temporary work relation

In case of the lease of the employee to another employer, the main contract of employment between the principal (leasor) employer and the temporary employee is maintained. Therefore, the principal employer carries all duties arising from the contract of employment, which means the employment contract continues with all its terms relating to wages and other working conditions[40]. However, the parties may conclude the responsibility of the temporary employer for wages.[41].

Being the party to the contract of employment, the principal employer keeps the right to terminate the contract. However, valid reasons may arise from employee's general duty of loyalty to his own employer and employee's conduct and performance of work in temporary employer's workplace[42].

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[37] C. Tuncay, "İş Sözleşmesinin Türleri ve Yeni İstihdam Biçimleri", *Yeni İş Yasası Sempozyumu*, İstanbul 30-31 Mayıs 2003, 142; Şahlanan, (2003), 78; Ö. Ekmekçi, "4857 Sayılı İş Kanunu'nda Geçici (Ödünç) İş İlişkisinin Kurulması, Hükümleri ve Sona Ermesi", *Legal-İSGHD*, (2004) 2, 371; Eyrenci/Taşkent/Ulucan, (2005), 96; Süzek, (2005), 230.

[38] Ekmekçi, (2004) 2, *Legal-İSGHD*, 370-371; Çelik, (2005), 94.

[39] Ekmekçi, (2004) 2, *Legal-İSGHD*, 371-372; Çelik, (2005), 95; Demir, (2005), 56.

[40] Ekmekçi, (2004) 2, *Legal-İSGHD*, 373-374; Eyrenci/Taşkent/Ulucan, (2005), 96; Süzek, (2005), 231; Mollamahmutoğlu, (2005), 281-282.

[41] Eyrenci/Taşkent/Ulucan, (2005), *Legal-İSGHD*, 97; Süzek, (2005), 233.

[42] Ekmekçi, (2004) 2, *Legal-İSGHD,* 374-375; Çelik, (2005), 96; Süzek, (2005), 235-236.

The temporary employee is under obligation to perform his work in the workplace of the user employer. It is the temporary employer (user enterprise), who keeps right to conduct and give orders vis-à-vis the temporary employee. Therefore, the assignment of tasks is determined by the temporary employer. The user employer has not only the right to give orders and instructions, but also the duty of providing necessary training about health and security risks faced by temporary employees[43]. According to the Regulation on the Health and Security Measures at Temporary or Fixed Term Works[44], user undertaking shall specify to the leasing undertaking, the occupational qualifications required and the specific features of the job to be filled and the specific risks that the job may entail, in addition to risks the temporary employee faces in the workplace of the temporary undertaking. The principal employer shall bring all these facts to the attention of the employee concerned (Art. 5, 9).

Although the main employer carries all obligations arising from the contract of employment, such as payment of wages and overtimes, social insurance contributions, the Act provides a joint liability of temporary employer for wages and social insurance contributions during the length of time that temporary work relationship is continued. Furthermore, temporary employer has duty to care against temporary employees, which means that the employee who suffers from an industrial accident or occupational disease may sue against temporary employer (user undertaking), as well as his own employer for material and immaterial indemnities[45]. Although the Act enumerates the situations wherein joint liability occurs, certain authors argue for a larger interpretation of the Act; therefore indemnities resulting from the termination of the contract may also be considered under the joint responsibility of the temporary employer[46].

However, it should be underlined that there is no duty of equal treatment between temporary employees and user's company's own employees. Whether the temporary employee may ask for the payment of wages or premiums which are being paid to main employees is answered negatively[47]. Nevertheless, in respect of the right to conduct and give orders, temporary employer must behave equally between his own employees and temporary employees[48]. In addition, due to Article 4 of above mentioned Regulation, as regards working conditions relating to the health and security measures in the workplace, especially in respect of access to personal protective equipment, there exist an obligation of equal treatment between the main and temporary employees[49].

3. Supply of employees through temporary work agencies (TWA)

[43] Süzek, (2005), 232-233.
[44] OJ 15.5.2004, No. 25463.
[45] Ekmekçi, (2004) 2, *İSGHD,* 375-376.
[46] Süzek, (2005), 236.
[47] Ekmekçi, (2004) 2, *İSGHD* , 377; Çelik, (2005), 96.
[48] Çelik, (2005), 96; Süzek, (2005), 235.
[49] Süzek, (2005), 234.

The Draft Bill of Labour Act had a specific provision about temporary work agencies (TWA). However, because of the strong opposition of trade unions, this provision was removed in the Parliament. Opinions about TWA activities are divided in two[50]: Certain authors argue for the liberty of TWA activities. Car, the absence of a legal regulation does not mean a prohibition. Others think that TWA activities are prohibited, referring to the removal in the Parliament, as well as to the wording of the Act. As mentioned above, Article 7 allows the lease of the employee to a company which fall out of the holding companies, only under condition that the leased employee will be employed for the tasks he/she has been working by the main employer[51]. In TWA cases, since the leased employee does not work, any temporary work contract through TWAs shall not be concluded[52].

The Court of Cassation seems to adopt the second view. According to the Court, if the employee is recruited through the agency of TWA, the contract between TWA and the employee will deemed as a contract for job intermediary, whilst the TWA has no workplace wherein a subordinated work may be performed. Therefore, in these cases there exists a direct employment relationship between the user company and the employee[53]. The problem occurs particularly at the moment of the termination of the contract. Supposing himself as temporary employer, by the expiry of temporary relationship, the temporary employer does not accept the employee to the workplace. However such a conduct may be evaluated as an act terminating the contract. Such a termination is invalid under new job security system[54].

VI. FRANCHISING

Franchising contracts belong to the contracts called “no name contracts” concluded under the contractual liberty of the parties. Therefore, there exists no specific regulation about franchising contracts.

Under Turkish law, the franchisee are not considered as a subordinated agent of the franchisor. Although there exist restrictions to the economic liberty to the franchisee, he keeps his legal independence that he runs his undertaking on his own behalf and account. It is the franchisee who carries the economic risk of the enterprise. Therefore, the franchisor has no right to give concrete instructions concerning the management of this enterprise. Although franchisor may always audit the franchisee’s enterprise and examine his documents, he has no right to give instructions about personal planning or prices. The

[50] For discussions see Yeni İş Yasası Seminer Notları, Çeşme, 25-29 Haziran 2003, 78-79, 80-81,
[51] Eyrenci, (2004) 1, *Legal-İSGHD*, 29; Ekmekçi, (2004) 2, *Legal-İSGHD*, 370-371; Eyrenci/Taşkent/Ulucan, (2005), 99-100.
[52] Ekmekçi, (2004) 2, *Legal-İSGHD*, 370-371.
[53] Cour Cass. 9th Ch., 4.4.2005, 774/11838, *Legal-İSGHD*, (2005) 8, 1754-1757; also see Cour. Cass., 9th Ch., 8.7.2004, 17098/17432, Judgment and Notes by D. Ulucan, *Çalışma ve Toplum,* (2004) 3, 145-152.
[54] Cour Cass. 9th Ch., 4.4.2005, 774/11838, *Legal-İSGHD*, (2005) 8, 1754-1757.

degree of the personal subordination does not sufficient to qualify franchising contract as a contract of employment [55].

For the moment, there is no court decision even there is no discussion in the doctrine about the responsibility of franchisor vis-a-vis franchisee's employees. Since their employment contracts are concluded by franchisee, it is the franchisee who carries all responsibility arising from the contract of employment.

VII. PRODUCTIVE DECENTRALIZATION AND ITS IMPACTS ON COLLECTIVE LABOUR LAW

One of the initial motifs in implementing productive decentralization strategies was to weaken trade union's force in the workplace. The nature of the Turkish collective bargaining system, in particular, norms related to the competency for collective bargaining, enabled the success of these strategies. As mentioned above, the absence of worker participation model facilitates these practices.

Act No. 2822 about Collective Agreements, Strike and Lock-Out provides two preconditions to recognise the competence of a trade union for a collective agreement: first, the union must have as members a minimum of 10% of the employees engaged in the branch of industry where the union is active. Secondly, the union must represent as members more than half of the employees in the concerned collective bargaining unit. An employer aiming to de-unionise workplace first reduces the number of employees who may be member of the union. Awarding certain jobs to sub-contractors or using temporary employees appears as the easiest way in this regard.

In Turkish law, a collective agreement may be concluded at three different levels: workplace, enterprise as a whole or different workplaces of different employers (group collective bargaining). If an enterprise, which belongs to a real person, corporate body or a public body or an institution, has several workplaces in the same branch of activity, only one collective agreement called enterprise agreement shall be made (Art. 3/2 of Act No. 2822). Enterprise has a specific definition for the purposes of Act No. 2822. It should be underlined that both workplace and enterprise collective agreements are concluded with the same employer having real or legal personality. The only way to conclude a collective agreement binding for different employers is that competent trade union must fulfil the collective bargaining

[55] O. B. Gürzumar, *Franchise Sözleşmeleri ve Bu Sözleşmelerin Temelini Oluşturan "Sistem"lerin Hukuken Korunması*, İstanbul 1995, 7; Ç. Kırca, *Franchise Sözleşmeleri*, Ankara 2000, 24-25, 64-65, 100-105.

requirements in each of the workplace or enterprise belonging to different employers, who undertake activities in the same branch of activity[56].

Therefore, the structure of this system does not allow that employees of the principal employer and those of sub-contractor organise under the roof of same union. Thus, the workplace is the principal bargaining unit that employees in that workplace can only be members of a trade union, which has been established in the industry to which the workplace in question belongs (Art 4 of Act No. 2822). The branch of industry wherein the workplace belongs is determined according to the main activity done in the workplace. When a sub-contractor undertakes an activity in the workplace of the principal employer, the same plant becomes also a distinct workplace, which belongs to the sub-contractor. Since the main works of the principal employer and sub-contractor are different in most of cases, both workplaces belong to different branch of industries. Therefore, it is not possible to have a collective agreement, which covers all employees.

As regards temporary employees, they can only be member of the trade union, which is established in the branch of activity to which the workplace of the principal employer belongs. All collective labour law problems are resolved considering the fact that the temporary employee keeps his contract with the principle employer (leaser undertaking), therefore must be counted within the number of his employees[57]. Furthermore, the temporary employee does not benefit from a collective agreement concluded for temporary employer's workplace (user undertaking). However, such a collective agreement may include provisions regarding the employer's right to conduct. These provisions are also applicable to temporary employees, while due to Article 31/3 of Trade Union Act No. 2821, except provisions relating to monetary rights, all provisions of collective agreement including those relating to the conduct and distribution of tasks are applicable to all employees in the workplace, either they are covered by the collective agreement or not. Therefore, temporary employees are entitled to benefit from these provisions of collective agreement under condition that these provisions are in favour of them [58].

Under such a system regulated by mandatory rules, it is not easy for trade unions to represent the whole of the employees of the group of companies or to have a collective bargaining covering all of a group undertakings or having strikes or other forms of collective action. It should be remembered that the group collective agreements may only be concluded with employers whose activities fall into the scope of the same branch of activity.

[56] For further information see K. Doğan Yenisey, "The Actors of Collective Bargaining-Turkey", (2004) 51, *Bulletin of Comparative Labour Relations*, 289.
[57] Ekmekçi, (2004) 2, *Legal-İSGHD*, 378-379; Çelik, (2005), 97-98; Süzek, (2005), 237.
[58] Çelik, (2005), 98; Süzek, (2005), 237-238.

Consequently, the production decentralisation strategies have an impact on de-unionization of workplaces. As a result of all these practices, the Turkish labour law is transforming into a structure based on individual labour relations.