CHAPTER XII
FREEDOM TO PROVIDE SERVICES

A- TREATY PROVISIONS (Arts. 59-66)

According to Article 60 "services" mean services for remuneration, in particular activities of an industrial and commercial character, craftsmanship and exercise of a profession.Thus services are closely connected with the right of establishment of those who provide them i.e. self-employed persons and corporations.

Services should be distinquished from establishment in so far as the latter tends to have a fixed territorial connection like a base of operations whereas services tend to be rendered across the frontiers without necessarily being anchored to a place. However often services and establishment (e.g.of a doctor or a bank) are connected but this is not the case envisaged by Article 59 of the Treaty which refers to the freedom to provide services "by persons established in a state of the Community other than that of the person for whom the services are intended" Considering this aspect the ECJ ruled in the German co-insurance case[1] that "an insurance undertaking of another member state which maintains a permanent presence in .....another member state ..... comes within the scope of the provisions of the Treaty on the right of establishment,even if that presence does not take the form of a branch or aqency,but consists merely of an office managed by the undertaking's own staff or a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency". The practical consequence is that the exercise of freedom to provide services is not conditional upon the establishment of the provider in the country where the services are received. In other words, whilst access to the market on the basis of establishment entails submission on equal terms to the legitimate exigencies of the market or the profession, the exercise of the freedom to provide services can be limited only by derogations laid down in the Treaty, i.e. public policy, public security or public health and the exception of the exercise of official authority.

The provision of services should also be distinguished from the movement of goods as explained by the ECJ which held that copyright imports are covered by the derogations under Article 36 of the Treaty whereas performing rights constitute services, not goods,and are, therefore, subject to different rules[2] However, where goods (e.g. a cinematographic film) whose movement in the Community may be restricted

by virtue of Article 36 (in order to protect intellectual property rights) are the subject of commercial exploitation which takes the form of the provision of services, the provision of such services may be limited to the same extent as is the freedom of movement of such goods.

Similarly services involving the movement of capital from one member state to another are subject to the rules governing the movement of capital (EE C Art. 61(2). However financial services (e.g. current account transactions or stock exchange operations) which do not involve the movement of capital are services[3] and are subject to derogations on the grounds of public policy, etc.

The great variety of services constitutes an important sector of the economy and its liberalization plays an important part in the completion of the internal market. It also entails the need of common rules. These rules are being developed by Community legislation. In this respect transport services form an autonomous sector which we shall examine in the context of the Transport Policy.

B-COMMUNITY LEGISLATION:GENERAL PRINCIPLES

In conjunction with the programme on the Right of Establishment the E C Council adopted in 1962 a General Programme for the Abolition of Restrictions on Freedom to provide Services[4]. The object of the Programme was to remove restrictions on the movement of persons providing services and ensure their equal treatment with the nationals of the member states; on the provision of services and on the transfer of funds in payment for services rendered. Certain services, evidently of a particular importance to the common market were singled out for harmonizing legislation. These included: agricultural and horticultural services, banking, film industry, insurance and public works.

Stressing that "trade in services is as important for an economy as trade in goods" the Commission White Paper of 1985[5] urged action in the sector not only in respect of "traditional" services like banking and insurance but also in financial services advancing an idea of "financial products" to be in free circulation in analogy to the principle of Cassis de Dijon[6].

C-BANKING AND CREDIT INSTITUTIONS

The banking sector has been harmonized so far by the following:

(1) Directive 73/183[7] implements the right of establishment and the freedom to provide services by banks and credit institutions. It deals with banking personnel but does not cover brokers, intermediaries, managers and trustees of unit trusts linked with capital and similar activities. It has removed the existing national restrictions and provided common rules for the certification of good repute. It has not resolved the question of professional qualifications but these are now covered by Directive 89/48 or Directive 92/51 which we discussed above[8]. Cases which do not fall within the Directive are subject to the old system, i.e. the necessity of qualifying in the host country pending the enactment of the directive which will regulate professional qualifications based on secondary and post-secondary educational qualifications.

(2) Directive 77/780[9] on co-ordination of laws relating to banking institutions" covered the corporate aspect of establishment. However, whilst Directive 73/183 applies to "financial instutitions" generally, Directive 77/780 applies only to "credit institutions" such as banks which receive deposits or other repayable funds from the public and grand credits for their own account. A list of such institutions is published in the Official Journal of the Community. It does not apply to Central Banks of the member states, post office giro institutions and certain national savings banks.

The main object of Directive 77/780 is to ensure uniformity of supervision of banking institutions operating in several countries by laying down certain minimum requirements which have to be observed. Institutions exempted from the system are listed in the Directive as well as Directive 86/524[10].

Directive 77/780 introduced a common licensing system whereby authorization to operate as a bank is granted only to credit institutions which possess their own seperate funds of a certain level and have at least two qualified persons of good repute in charge. The national licensing authorities cannot exclude any applicant on the ground that there is no "economic need" for granting the licence.

Directive 77/780 regulates the actual supervision of banks and in that respect it requires that the member states collaborate together and supply one another with information on the management and ownership of such institutions. It has been amended by Directive 89/646[11].

(3) Directive 83/350[12] complements directive 77/780 in so far as it provides for overall supervision of credit institutions operating in several member states where one institution is owned by another. It also provides for supervision of credit institutions whose parent institutions have their head office in a non-member state. Directive 83/350 has been repealed by directive 92/30[13] which also amended directives 89/299, 89/646 and 89/647 (below).

(4) Directive 86/635[14] provides for supervision on a consolidated basis and enables the authority supervisig a parent credit institution to supervise also their subsidiaries. It ensures that the content, format and lay-out of accounts of credit institutions in all the member states are comparable. It extends to the credit institutions the provisions of the 4th and 7th Directives on Company Law (See supra). It enables creditors, debtors and the general public to compare accounts of credit and financial institutions which may compete with each other. It makes it easier for national authorities to authorize and supervize such institutions.

(5) Directive 89/117[15] further simplifies the annual accounts and removed the need for branches of foreign banks and credit institutions to publich seperate annual accounts.

(6) "Own funds" have been defined by Directive 89/299[16] and these include the "core capital" (i.e. capital and disclosed reserves) over which the bank has control and "supplementary capital" (i.e. revaluation reserves, securities and hidden reserves). The latter may not exceed 100 % of the former.

(7) Directive 89/646[17] provides for a minimum capital requirement of 5 mil.ECU for credit institutions to be granted authorization for the first time (1 mil. ECU for cooperatives and building societies). It has also introduced a single banking licence which permits a branch to be opened in another member state without the need for separate endowment capital.

It improved the consultative machinery between member states and made provisions for the harmonization of rules concerning the maintenance of the initial capital, the control of the acquisition of holdings of credit institutions, the maintenance of sound administrative and accounting procedures and internal control.

The Directive requires that credit institutions have a fixed establishment in the host countries (the home-country control principle) and lists the "core banking activities"

which can be performed in any member state through branches or direct services.

(8) Directive 89/647[18] which complements Directive 89/646 defines the solvency ratios aiming at protection of both the depositors and investors. It provides for a weighting of assets and off-balance sheet items according to the degree of credit risk and ensures a solvency ratio of 8 %.

(9) Directive 91/308[19] purports to eliminate dangers arising from the laundering of the proceeds of criminal activities to the integrity of the European financial market.

(10) Recommendation 87/62[20] counsels the monitoring and control of "large exposure". This occurs where a large proportion of the loans of a bank is committed to a single client or a group of related clients. "Large exposure" means 15 % or more of own funds. Recommendation 87/63[21] lays down harmonized minumum requirements for deposit-guarantee schemes and counsels the introduction of such schemes by all member states to provide protection of the depositor in the event of the credit institution becoming bankrupt. Recommendation 90/109[22] suggests transparency of banking conditions in cross-border financial transactions.

(11) Proposed measures include a draft directive on mortgage credit[23] to remove obstacles to the provision of such credit and to improve the co-operation between the supervising authorities of the member states in that respect; and another one (OJ.1986, C.36) on the re-organization and winding-up of credit institutions with the object of establishing mutual recognition of the national systems in this field.

Recommendation 87/598 envisages a European Code of Conduct relating to "electronic payments".

D-THE EFFECT ON THE TURKISH BANKING SYSTEM[24]

The legal principles which govern the banking system in Turkey are based upon the Banking Code 3182[25] which was passed in its most recent form on 25 April 1985 and went into effect on 2 May 1985. Foreign banks established abroad which are present or intend to be engaged in activities in Turkey by means of opening branches are also subject to the provisions of this Code.

A comparison of Turkish law with the relevant EC directives reveals the following similarities and differences.

Article 51 (2) of Law 3182 provides that:

Banks are required to make use of a Uniform Statement of Account and standard balance sheets and profit and loss statements prepared by Turkish Banks Association put into effect on 1 January 1987 pursuant to Provisional Article 7 of the Banking Law and confirmed by the Undersecretary of the Treasury and Foreign Trade."

Article 54(1) also states that:

Banks have to submit their balance sheets and profit and loss statements confirmed by the auditors together with audit reports to the Under secretary of Treasury and Foreign Trade, the Ministry of Industry and Commerce and the Central Bank of the Turkish Republic within one month since the date of the Board of Directors meeting. Balance sheets must be published in the Official Gazette and also in a national newspaper.

Article 56 provides that:

Banks have to prepare summaries of quarterly accounts in accordance with the principles and specimen determined by the Undersecretary of Treasury and Foreign Trade by the end of the months March, June, September and December. Quarterly account summaries are sent to the Ministry of Industry and Commerce and to the Central Bank.

Thus, the Turkish Banks Association and the Undersecretary of the Treasury and Foreign Trade are able to fulfill the requirements of EC Directive 86/635 by using the powers laid down in the above provisions.

The equity capital of banks in Turkey is defined in Article 3 (8) of Law 3182. It states that the equity capital is the sum of the paid-up capital and capital set aside as reserve.

The concept of paid-up capital and the reserved funds are defined in the 6th and 7th paragraphs of the same Article. Accordingly "the paid-up capital is equal to the

amount remaining after subtracting the capital set aside for the branches outside Turkey and the loss stated in the balance sheet and not compensated by the reserve funds. The reserved fund provided for according to Article 32 (1) of Law 3182 and the foundation agreement of the banks, is equal to the amount remaining after subtracting the balance sheet loss from the total of the quarterly reserved funds.

In consequence, the definition of the equity capital in Turkish Law should be changed completely and adapted to the EC standards.

There are very significant differences between the basic principles of the Second Banking Directive (i.e. Directive 89/646) and the current Turkish Laws. For that reason, it will be unavoidable for the Turkish banking laws to be changed in the case of becoming member of the EC.

According to the EC Directive, subject to certain exceptions, the foundation capital of a bank must be minimum 5 million ECU and the equity capital during its operations must not be below this amount.

According to Article 5(e) of Law 3182[26], for a new bank to be established, its equity capital has been raised from TL. 1 billion to TL. 20 billion excluding the capital reserved for each branch other than the headquarters. This requirement can be easily raised under Article 78 of Law 3182 without any necessity for a change in the Law. However, the rule which says that the capital during the bank's operations cannot fall below the foundation capital, must be added to Turkish laws. Thus, Law 3182 must be amended by Turkish Parliament.

According to the current Turkish Banking Law (Article 38 and subsequent of Law 3182) the solvency of the banks is protected by determining certain ratios between the cash loans that the banks can give, bonds and similar assets that they can buy, the letters of credit that they can give, the total loans that they can provide to their clients, the funds that they can invest in real estates and the bank's equity capital. Article 56(3) of Law 3182, states that "the Undersecretary of the Treasury and Foreign Trade has the authority to determine the solvency ratios in relation to the financial status and use of the capital, and to determine the methods and principles for the publication of those ratios as required. Banks have to keep up with the determined ratios." Depending on this Article, the Undersecretary of the Treasury and Foreign Trade has determined the method of calculating the solvency ratio (capital base/risk weihted ratio) by the official bulletin no.6 and decided this ratio to be 87.

The solvency ratio determined above does not correspond to the EC Directive. Article 50 provides that banks are not permitted to trade in real estate for commercial gain. They may not acquire immovable properties in any way whatsoever other that those they need in order to conduct their banking activities and which comply with decisions adopted by the Turkish Central Bank in this regard.

According to the same Article the total value of funds banks may invest in immovable properties (within the limits of Article 38 of the Banking Law) may not exceed their total net assets.

There are great differences between the EC Directive and the current Turkish laws and, the laws and regulations governing the re-organization and the liquidation of credit institutions.

The merger of a bank with one or more banks and the take over of a bank's obligations, claims and deposits by another bank engaged in activities in Turkey are subject to the permission of the Ministry of Industry and Commerce.

Articles 70-72 state that banks which wish to wind up their activities are obliged to advertise this in at least two newspapers printed and circulating throughout Turkey, to provide written notification to all their depositors and other creditors of this fact, and to return any and all outstanding account balances and borrowings within two months. All claims whose owner's cannot be found are turned over to the Central Bank of the Republic of Turkey. The Ministry has the authority to have bankruptcy or dissolution proceedings audited through chartered banking accountants and their assistants.

Certain changes should be done in the Banking Law. However, it should emphasized that such changes will not affect the re-organization and the liquidation procedures of the branches of foreign banks in Turkey.

E- INSURANCE

(1) Harmonization of insurance law began with Directive 64/225[27] which, in respect of both individuals and corporate operators, abolished general restrictions on the freedom of establishment and the right to provide services in the field of re-insurance

and retrocession, as well as particular restrictions (e.g. a trading permit) in certain member states.

(2) Directive 86/653[28] has complemented Directive 64/224[29] which provided for the liberalisation of rules governing the activities of intermediaries in commerce and industry but excluded insurance agents,brokers and assessors. Freedom to provide services of intermediaries applies now to the insurance sector.

(3) Directive 78/473[30] removed similar restrictions in the field of co-insurance and allowed the leading insurer to select the co-insurers from any but at least one of them must be established in another member state. However the risk must be situated in the Community and must be covered by one policy for which a single premium is charged. The leading insurer must be treated as if he were the sole insurer covering the whole risk and he must determine the terms, conditions and premium rates of the policy. If these conditions are not satisfied the operation remains subject to national law.

(4) Directive 77/92[31] harmonized the national requirements regarding the educational and professional qualifications necessary for the exercise of the activities of insurance agents and brokers pending the enactment of directives on the mutual recognition of diplomas and other evidence of formal qualifications[32].

(5) The first co-ordinating Directive 73/239[33] amended by Directive 76/580[34] and Directive 87/343[35] and Directive 92/44[36] is concerned with non-life insurance. It covers all classical non-life business, i.e. accident, sickness, vehicles, railway rolling stock, aircraft, ships, goods in transit, damage by fire and forces of nature, other damage to property, motor vehicle liability, aircraft liability, liability for ships, general liability, credit, suretyship, miscellaneous financial loss and legal expenses. Each member state must make the taking-up of the business subject to official authorization for each particular class of insurance listed above for its entire territory or only a part of it if its legislation so permits and the applicant for authorization so desires. Member states are free to set up insurance undertakings under public law but such undertakings must operate under the same conditions as private undertakings and authorization of neither of these can be subject to the economic need of the market.

Domestic insurers must limit their activities to the business of insurance and operations directly arising therefrom to the exclusion of any other commercial activities. They must possess the minimum guarantee fund as being one third of the solvency

margin subject to certain minimum depending on the class of risks covered. To maintain this guarantee they must have sufficient technical reserves determined according to the rules fixed by the state as well as supplementary reserve, i.e. the solvency margin consisting of the assets of the undertaking, free of all foreseeable liabilities.

The Directive lays down conditions for the establishment of agencies and branch offices for undertakings having their head office in another member state. Undertakings with their head office outside the Community are subject to a special regime common to all the member states. They too have to obtain authorization from a member state and operate on a sound financial basis having assets in the host state and maintaining the requisite technical reserves and solvency margin. In exercising their supervisory function the member states must co-operate with one another. In particular the host state must verify the undertaking's solvency upon the information from the other states.

(6) Directive 73/239 was complemented by Directive 73/240[37] which purported to abolish restrictions on the freedom of establishment and discriminations in the field of direct insurance other than life insurance generally and any specific restrictions remaining in certain countries, in particular. It was amended by Directive 90/618[38] which extended the freedom to provide services in respect of motor vehicle liability insurance.

(7) Directive 88/357[39] laying down provisions to facilitate effective exercise of the freedom to carry on non-life insurance business amends Directive 73/239. It makes a distinction between "large risk" and "mass risk" business. The former comprises transport risks (including goods in transit) regardless of size; credit and suretyship risks if linked to trade; fire and other property damage, general liability, and pecuniary loss; where the policyholder or the group to which he belongs meets two out of three conditions relating to balance sheet size, turnover and number of employees. Mass risks comprise all other cases where there is considered to be a greater need of consumer protection.

Large risks are to be subject to lighter control than mass risks; in particular no prior approval of policy conditions and premium rates is required, thus leaving the parties free to negotiate their own terms. Mass risks, on the other hand may be subject to stringent control in the state of the provision of the service including the authorization requirements; technical reserves needed to ensure that funds are available to meet claims; and policy conditions laid down by the state.

The Directive also applies to the powers of the supervising authorities, the determination of the currencies in which assets have to be held and the transfer of portfolios. It does not apply to third party motor liability and construction insurance. It enables the state where the risk is situated to impose taw on the premiums paid in respect of such risks regardless of where the insurer is established.

(8) Directive 79/267[40] amended by Directive 90/618 (as above) covers life directive 92/96[41] insurance repeating substantially the provisions of Directive 73/239 applicable to non-life insurance. It also governs the access to the market of undertakings established outside the Community on the same conditions as laid down in the non-life Directive. However the Directive insists on specialization, i.e. the separation of life insurance from non-life insurance. Whilst the existing undertakings may be engaged in both, the new ones are prohibited from crrying on simultaneously activities covered by the life and non-life Directives. Where mixed operations are allowed to continue each line of business must be managed separately. Moreover where a non-life insurance undertaking has financial, commercial or administrative links with a life insurer the supervising authorities of the host state (i.e. where the head office is situated) must ensure that its accounts are not distorted by agreements with such undertakings or any arrangement which could affect the apportionment of expenses and income.

(9) Directive 72/166[42] amended by Directive 72/430[43] and and further amended by Directive 90/232[44] provides for compulsory insurance of the users of motor vehicles against (undefined) civil liability and for the enforcement of the obligation to insure within the EC. It is based on two assumptions, i.e. that all users of motor vehicles registered in the EC are insured and that there are national insurers' bureau which guarantee compensation in accordance with the national law for any loss or injury resulting from the use of such vehicles whether or not insured. Thus the Green Card, so far used in international transport, can be dispensed with, though not for vehicles of a non-member state, which must either carry a Green Card or be insured at the point of entry to the Communtiy.

A member state may exempt certain users and certain vehicles but these derogations have to be notified to the Commission. In such cases, however, the other member states can require on entry the possession of a Green Card or the cover at the frontier.

The Directive covers also the procedure in cases of accidents.

(10) Directive 72/166 was complemented by Directive 84/5[45] and Directive 90/232 (as above) which clarified its scope by providing for compulsory cover of both personal injury and damage to property and, without prejudice to any higher guarantee under national laws, laid down the minimum protection of:

(a) 350,000 ECU in the case of injury where one person is involved, the amount to be multiplied by the number of injured where more than one victim in a single claim is involved;

(b) 100,000 ECU for damage to property per claim irrespective of the number of victims.

However member states may replace the above limits by a minimum of 500,000 ECU for personal injury where more than one victim is involved in a single claim and in the case of both personal injury and damage to property to a minimum overall amount of 600,000 ECU per claim irrespective of the number of victims or the nature of the damage. Each member state is bound to set up an office charged with the task of providing compensation for personal injury and damage to property caused by an unidentified or uninsured vehicle. This does not preclude claims in tort under Civil Law or recovery by the office from the wrongdoer or from requiring the social security institutions to compensate the victim. However member states may exclude the payment of compensation by the office to persons who voluntarily entered the vehicle in which they were injured if they were aware that the driver of the vehicle was not insured.

(11) Directive 87/343[46], amends Directive 73/239, as regards credit insurance and surety insurance. It purports to eliminate the German requirement that these two classes may be carried on only by specialist insurers and provides for additional financial guarantees to credit insurance underwriters which is to be achieved by-setting up an equalisation reserve. Four permitted methods of calculating such reserve are listed in the Annex to the Directive.

(12) Directive 87/344[47] which amends Directive 73/239 on the insurance of legal costs aims to eliminate the German requirement that only specialist insurers may underwrite such risks and provides rules for the co-ordination of national systems in that field.

Legal expenses insurance covers the cost of legal proceedings and other services for the settlement of claims except those connected with sea-going vessels. Insurance undertakings have to provide a separate contract or a separate section of a single policy to underwrite these risks. Furthermore they must have either a separate management for legal expenses insurance or entrust the management of claims in this field to another undertaking. They must also allow the insured to have a lawyer of his choice to defend his interests.

(13) Directive 84/568[48] concerns the reciprocal obligations of member states in the field of export guarantees. It provides that they must ensure that their export credit insurance organizations comply with the model export credit agreement annexed to the Directive. The model agreement defines the scope of the export contract guarantee, the obligations of the principal insurer being the sole manager of the risk and of the joint insurers.

(14) Directive 84/641[49], amending Directive 73/239 extends the latter to direct insurance in the form of tourist assistance. It provides cover to ensure assistance to persons who get into difficulties while away from home or from their permanent residence. It applies to motorists and covers on-the-spot breakdown service, the conveyance of the vehicle to the most convenient location provided the accident has occurred in the member state of the insurer.

(15) Directive 91/674[50] provides for annual and consolidated accounts of insurance undertakings adapting the provisions of the 4th and the 7th Directives on company accounts. The object is to make accounts of insurance undertakings in different member states comparable, thus contributing to a single insurance market.

(16) Directive 92/49[51] extends further the non-life insurance in respect of mass risks. Articles 70-72 state that banks which wish to wind up their activities are obliged to advertise this in at least two newspapers printed and circulating throughout Turkey, to provide written notification to all their depositors and other creditors of this fact, and to return any and all outstanding account balances and borrowings within two months. All claims whose owner's cannot be found are turned over to the Central Bank of the Republic of Turkey. The Ministry has the authority to have bankruptcy or dissolution proceedings audited through chartered banking accountants and their assistants.

Certain changes should be done in the Banking Law. However, it should emphasized that such changes will not affect the re-organization and the liquidation procedures of the branches of foreign banks in Turkey.

(17) The following proposals are under consideration:

(a) Draft Directive on Insurance Contract Law[52] which defines the standard policy terms for non-life insurance, provides for standardized documentation and for the protection of third party rights.

(b) Draft Directive on uniform procedure for winding-up insurance undertakings[53] which fall within the scope of the Directive on non-life and life insurance. The rules ought to apply not only to undertakings established in the Community but also those outside the E.C.

(c) Draft Directive to extend the provisions of the non-life insurance service directive to motor liability insurance. Insurers would be required to join the national motor insurers' bureau in the member state concerned and appoint a local representative to settle claims.

(d) Directive to facilitate the taking out of life insurance by private individuals.

(e) Proposed Regulation to enable the Commission to grant a block exemption from the competition rules in the insurance sector.

F- TURKISH INSURANCE LAW[54]

INSURANCE SECTOR IN TURKEY

The effect of Community Legislation on the Law and Practice in the Turkish Insurance sector would be as follows:

In Turkey, between the years 1968 and 1984, the establishment of insurance companies was not allowed due to the Second Five-Year Plan and its 1972 Application Programme which sought to prevent the diversification of the insurance portfolios and to effect amalgamation of small insurance companies. By amending Law 7397

on the supervision of insurance companies by the laws 3379 and 304 (dated 11 June 1987 and 18 December 1987, respectively), the establishment of new insurance companies has been permitted.

The other Turkish measures on insurance include:

Turkish Commercial Law No.6762[55] , İnsurance Supervision Board Regulation[56] , Insurance Supervisory Board and Tariff Committee Directive[57] , Insurance Experts Directive[58] The Directive on the Principles of Establishment and Functions of Insurance and Reinsurance Companies[59] . The Directive upon the Insurance and Reinsurance Intermediaries[60] , Road Traffic Law No.2918[61] . Turkish Insurance and Reinsurance Companies Union Motor Vehicle Office Directive , Guarantee Fund Directive[62] Turkish Civil Aviation Law.[63]

Turkish insurance law is not as extensive as that of the EC member states. Therefore it should be brought up to the European standard and to the requirements of the EC Directives.

Article 3 (2) states that the company must be of the "anonyme" (Joint Stock Limited Liability) or mutual insurance type in order to transact insurance activities.

The paid-up capital of insurance and reinsurance companies must be TL.1.000.000.000.- at the minimum. Thes capital amount shall be in cash at the time of incorporation. The Council of Ministers is authorised to increase fivefold the amount of minimum capital and the shares of the partners when it is deemed necessary to satify the requirements of the market.

Mutual insurance companies are established according to cooperative society incorporation principles. The minimum number of partners and the amount of shares per partner may not be less than 800 persons and TL. 1.000.000.- respectively.

The tariff regulations to be applied by the mutual insurance companies must be certified by the Ministry of Industry and Commerce.

Article 4 (4) also applies to the obligation of insurance companies to submit financial statements to the Ministry of Industry and Commerce for approval in order to obtain

a Licence Certificate. In their statements they must show maximum and minimum retention rates for branches in which they operate and maximum rate of premium reserves on the date of balance sheet covering respective indemnity periods, which reserves will not be less than 25 % in transport insurance and 33 1/3 % in the other branches, except the life branch.

Law 7397 allows the establishment of foreign insurance companies incorporated as "anonyme" and of their branch-offices. According to Article 4 the paid-up capital of foreign insurance and reinsurance companies must be TL. 1.000.000.- at the minimum as well as that of national companies.

A separate licence shall be issued for each insurance branch which is idependent and for which the fixed amount of gurantee deposit has been determined. Licence Certificates are issued for an indefinite period of time. Insurance companies, according to Article 6 of the Law, are not required to obtain additional Certificates of Licence for branch offices to be established within the country. Agency operations cannot be performed unless and until the above formalities are fulfilled. Persons to be appointed as agents cannot engage in any other business (banks excluded). Insurance agents are obliged to enroll in professional organizations.

Article 9 of Law 3379 amends Article 12 of Law 7397 as follows:

1-Fixed Gurantee for:

The fire branch	TL.-30.000.000,
The transport branch	TL.-30.000.000,
The causalty branch	TL.-40.000.000,
The life branch	TL.-40.000.000,
The machinery installation branch	TL.-10.000.000,
The hail damage branch	TL.- 5.000.000,
The livestock mortality branch	TL.- 5.000.000,

The amount of fixed guarantees that the insurance companies, which intend to transact business in one branch only, shall provide will be TL.-60.000.000 whereas

this amount will be TL.-100.000.000 for companies intending to work in two branches only and TL.-120.000.000 for those intending to work in three branches only.

The Council of ministers is authorized to increase the fixed guarantee amount upto five times the original amount to establish new branches as needed and to determine the fixed guarantee amounts provided the maximum guarantee amounts are not exceeded and taking the previous increases into account.

Reinsurance companies are obliged to provide fixed guarantees in doubles of the amounts above.

According to Law 3379 which amends Law 7397 on the supervision of the insurance companies, the life insurance companies have the obligation to account and perform their operations seperately from the other branches of insurance. By this law, the degree of compatibility with Directive 73/239 of the European Community on non-life insurance activities has been achieved.

As we have seen above Directive 73/239, as amended, covers 18 branches of non-life insurance, however, in Turkey the non-life insurance companies can operate in 7 branches only i.e.:

1.Fire 2.Transportation 3.Accident 4.Machinery Installation 5. Hail 6.Death of animals 7.Illness

According to EC law, the amount of the capital that the insurance companies must reserve while being established is determined according to the branch that they choose and if the company is an on-going insurance company the capital is determined in terms of the solvency margin.

For a foreign insurance company to operate in Turkey, it must not only be organized as a branch or an incorporated company, but it must also be incorporated company or equivalent in its own home country. The company should obtain a licence to start its operations as is the case in EC law. The licence is granted for each insurance branch separately. But a licence for more than one insurance branch can be obtained. Foreign insurance companies should follow the general rules laid down by the Ministry of Industry and Commerce.

Technical reserves are obligatory in Turkish law and those reserves are required for every company that will operate in Turkey.

However, transport insurance in connection with exports and imports, the hull insurance exclusively limited to the amount of foreign credit until the loans on ships and aeroplanes purchased on credit are fully repaid; liability insurance of ships; life insurance and injury and motor vehicle insurance of persons traveling in foreign countries may also be transacted abroad according to the principles to be determined by the Ministry of Industry and Commerce.

By the regulation of the Undersecretary to the Treasury and Foreign Trade (dated 15 March 1990), the amounts of premiums that should be paid for the accident, machinery installation, death of animal, hail, fire, transportation and illness insurances (except the obligatory financial responsibility and the personal bus seating accident insurance) have been set free. By this regulation, the compatibility of Turkish laws with the EC insurance regulations has been increased.

G- FILM INDUSTRY

(1) Directive 63/607 [64] has implemented in respect of the film industry, the provisions of the General Programme for the abolition of restrictions on the freedom to provide services and Directive 65/264[65] hasdone likewise in respect of establishment. "Film" has been defined in Directive 63/607 as "any copy which conforms to a master copy of a completed cinematographic work intended for public or private exhibition arising under international conventions or other international arrangements. If a film satisfies the criteria laid down in Directive 63/607 it has the nationalty of a member state and must be allowed to circulate freely in the E.C. for the purposes of distribution and commercial exploitation. Therefore member states had to abolish any restrictions relating to the opening of cinemas specialising exclusively in the exhibition of E.C. films in the language of their country of origin, import quotas and screen quotas and the dubbing of films. In its Recommendation 64/242[66] the Commission advised the member states to adopt a standard certificate establishing the nationalty of films so as to facilitate their circulation.

(2) Directive 68/369[67] concerns the freedom of establishment in respect of the activities of self-employed persons in film distribution and renting which comprise the transfer of the rights of commercial exploitation of a film with a view to its being distributed on a commercial basis in a specific market and the temporary transfer of

the right of public exhibition in the host country.

(3) Directive 70/45l[68] promotes the freedom of establishment and freedom to provide services of self-employed persons in film production. All restrictions, including the requirement of citizenship of the producers or financial aid to national production, must be abolished.

Turkey's law regulating the film industry has to be erected so as to make the Directives effective.

H-BROADCASTING[69]

1-EC Position:

Directive 89/552[70] lays down the minimum rules for the coordination of member states' national laws on television broadcasting. The ultimate aim of the Directive is to abolish all restrictions on freedom to provide broadcasting services within the Community and to guarantee free movement of television broadcasts via satellite, cable or air. All broadcasts emanating from and intended for reception within the Community and, in particular,those intended for reception in another member state, should respect the law of the originating member state applicable to broadcasts intended for reception by the public in that member state and the provisions of the Directive. The requirement that the originating member state should verify that broadcasts comply with national law as coordinated by the Directive is sufficient under Community law to ensure free movement of broadcasts without secondary control on the same ground in the receiving member states; however, the receiving member state may, exceptionally and under specific conditions, provisionally, suspend the retransmission of televised broadcasts.

The minimum rules laid down in the Directive are concentrated on the following major areas:

1.Promotion of distribution and production of television programmes:

Articles enforcing broadcasters to reserve a mojority proportion of their transmission time for European works; and to reserve at least 10% of their transmission time for European works created by independent producers. Also, rules on broadcasting of cinematographic works on television;

2. Television advertising and sponsorship:

Rules on duration, form and presentation, insertion, standards and content of advertising to be shown on television. Also rules on broadcasting of sponsored television programmes;

3. Protection of minors:

An article aiming to protect minors against pornography and violence on television;

4. Right of reply:

An article entitling each State to ensure that a right of reply is given to injured persons.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive not later than 3 October 1991.

2-Turkey's law regulating television broadcasting would be affected as follows:

Article 133 of the Turkish Constitution states that "radio and television stations shall be established only by the state and shall be administered by an impartial corporate body". In accordance with this article, Law No.2954 of 1983 establishes TRT as the corporate body to provide and administer broadcasting in Turkey. Within this legal framework, broadcasting in Turkey is currently under state monopoly. However, this monopoly has been violated by some private companies since the end of 1990, who initiated satellite transmissions directed to Turkey and, therefore, created a de facto "privatization".

Given this picture,the existing state monopoly on broadcasting is in our view, in contradiction to the Community law, i.e. the principle of "freedom to provide services" in general and to the Directive 89/552 in particular. The overall effect of Community law on Turkish legal order on broadcasting would have to be amended that the relevant laws and.Article 133 of the Constitution above with a view to abolishing the state monopoly on broadcasting services.

Since such change is likely to be realised in a very near future (it is on the agenda of the Parliament at the moment), it is prefered here to wait and see the results of Parliament's work though it is essential to note that such work should certainly take into account the EC principles and law on broadcasting.

I-NEW TECHNOLOGICAL SERVICES

The Community has taken seriously the challenge of new technology in the field of services by enacting a series of directives to harmonize the rapidly developing national systems. Thus:

(1) Directive 86/529[71] enjoins the member states take the necessary measures to ensure co-ordination and the exclusive use of the MAC/packet family of standards for direct satellite broadcasting of television programmes and their distribution by cable;

(2) Directive 92/28[72] provides for the adoption of standards for satellite broadcasting of television signals;

(3) Council Decision 89/337[73] urges the member states to develop a comprehensive strategy for the introduction of High Definition Television (HDTV) services in Europe;

(4) Council Decision 89/630[74] urges the member satates to take a common action with respect to the adoption of a single world-wide HDTV production standard;

In the field of information technology;

(1) Council Decision 87/95[75] urges action to be taken on standardization in this field;

(2) Directive 86/361[76] imposes upon the membe states the duly of recognizing the results of tests of conformity with common specifications in mass-produced telecommunications terminal equipment;

(3) Directive 91/263[77] provides for the approximation of national lavvs concerning telecommunications terminal equipment including the mutual recognition of their conformity;

(4) Directive 90/387[78] provides for the establishment of the internal market for telecommunication services through the iimplementation of Open National Provision (ONP);

(5) Directive 92/44[79] defines conditions for the provision of open telecommunications network as regards based lines to promote the development of pan-European land-based cellular communications by ensuring free movement of mobile telephones and the compatibility of networks and EC standards for manufacture the Community issued:-

(1) Directive 87/372 [80] on the frequency bands to be reserved for the co-ordinated introduction of public pan-European cellular digital land-based mobile communications in the EC;

(2) Council Recommendation 87/371 [81] engage the member states to inform the Commission at the end of each year on actions taken and problems occurring in implementation;

(3) Directive 90/544[82] defines the frequency bands designated for the co-ordinated introduction of pan-European land-based public radio paging in the EC.;

(4) Council Recommendation 90/543[83] urges action on the co-ordinated introduction of pan-European land-based public radio paging;

(5) Council decision 91/396 [84] provides for the introduction of a single European emergency callnumber 112 in the public telephone network;

(6)Council Decision 92/264 [85] provides for the introduction by member states of the Code 00 in the public telephone networks as a common access code to international telephone service;

Digital cordless telecommunications (DECT) attracted the following:

(1) Directive 91/287 [85] on the frequency bands to be designated to the coordinated introduction of digital European cordless telecommunications;

(2) Council Recommendation 91/288[87]requiring the member states to inform the Commission at the end of each year from 1992 onwards of the meassures taken and of the problems encountered;

(3) Commission Directive 90/388 which organised open competition in the markets for telecommunication services;

(4) Proposal for a Council Directive[88] concerning the protection of personal data and privacy in the context of public digital communications in particular, the Integrated Services Digital National (ISDN) and public digital mobile networks.

(5) Council Decision 92/242[89] providing officials to advise the Commission on the action to be taken on information security;

(6) Council Decision 91/385[90] purporting to ensure that the setting up of the trade electronic data exchange systems takes place in the most efficient manner (TEDIS Programme);

(7) Following Council Decision 88/524[91] which launched large-scale pilot and demonstration projects aiming for an information services market, Decision 91/691[92] setting in motion a new programme of action in this field;

(8) Proposal for a Council Directive[93] on common frequency bands to be designated for the co-ordinated introduction of the terrestial flight telecommunication system (TETS) in the EC;

(9) Council Resolution of 19 November 1992[94] confirming the role of the European Radio Communications Committee (ERC) in assigning the frequencies needed for new radio communications services in the EC;

(10) Proposal for a Council Directive[95] on the mutual recognition of licences and other national authorizations to operate telecommunication services, including the establishment of a single Community telecommunications licence and the setting up of a Community Telecommunications Committee.

The new technological services are relatively recent in modern systems but their development at this stage merit a conserted action at the Community level. The above instruments have to be implemented by the member states and any country aspiring to the membership of the Community has to adopt a positive position in this field not only for the sake of membership primarily for the sake of progress. Turkey is not behind the Community.

J- AGRICULTURE, HORTICULTURE AND FORESTRY

(1) Directives 63/261[96] provided for the freedom of establishment in the E.C. of those who had worked in agriculture for an uninterrupted period of two years and for the freedom of establishment on agricultural holdings abandoned or left uncultivated for more than two years, respectively. Thus the Community nationals must receive equal treatment with the nationals of the host state as regards rights to acquire and exploit land, obtain credits, aids and subsidies and to be members of or hold managerial positions in co-operatives or any other agricultural associations.

Directive 65/1[97] extended the scope of its predecessors covering virtually all activities both in the field of agriculture and horticulture on the basis of non-discrimination including access to various credits and the customary tax allowances, conclusion of contracts under private and public law in pursuit of their professional activity and authorization to carry out work which involves the use of toxic and dangerous products for which a special permit is required.

Directive 67/530[98] complements Directive 65/1 as it enables nationals of a member state established as farmers in another member state to transfer from one holding to another. It also extends to activities ancillary to farming such as commercial exploitation of woodlands, and planting and re-planting of trees.

Directive 67/531[99] further extends the principle of non-discrimination to agricultural leases and to the exercise and enjoyment by the tenant (whether an individual or a corporation) of the rights arising thereunder, including the right of pre-emption, where all or part of the property held under the lease is sold.

Directive 67/532[100] provides for the free access to co-operatives and national companies or firms established or to be established in agriculture. Any restrictions, which

deny the beneficiaries of the Directive the membership of co-operatives or make such access subject to special conditions, have to be abolished.

Directives 68/192[101] and 68/451 complete the process of liberalisation of the access to various forms of agricultural credit and the various forms of agricultural aids, respectively. Any administrative restrictions and discriminatory practices have to be abolished. Not only must there be equal access to sources of credit but also the member states must refrain from granting to their nationals any direct or indirect aid including loans to enable them to establish themselves in another member state.

(2) Directive 65/1 applies both to agriculture and horticulture. Further details can be found in Directive 71/18[102] putting into effect the right of establishment and the provision of services in both sectors of self-employed persons as well as companies and firms. Member states must abolish special authorisations, and discriminations of any kind, allow access to professional and trade organizations including the appointment to high offices in such organizations unless such posts involve the exercise official authority, i.e. a function in the service of the state.

(3) Directive 67/654[103] extends to forestry the provisions applicable to agriculture and horticulture.

(4) Directives 65/1, 67/654, and 71/18 mentioned above provide, in identical terms, for the documentation regarding good repute and character of the persons whose rights of establishment and freedom to provide services in those fields have been secured.

(5) In a recent case[104] the ECJ ruled that the Greek law restricting the ownership of Greek land (housing, in casu) to Greek citizens was incompatible with Community law, i.e. arts. 48, 52 and 59 of the EEC Treaty. The principle applies to all land, including agricultural holdings.

The question of restrictions on the ownership and exploitation of agricultural land in Turkey is dealt with in Chapter 15.

K- THE ENTERPRISE POLICY

The EC Enterprise Policy reflects the economic conditions in the eighties. According to the EC Commission (Commission of the European Communities Document (88) 241, p.9-10 June 1988) this policy has three objectives:

(1) to help to create conditions in which the legal and administrative business environment meets the needs of a modern and rapidly changing economy;

(2) to encourage the creation of new firms and the development of small businesnes;

(3) to set up a coherent framework for the ways in which other Community policies are implemented throughout the enterprise sector.

To achieve these objectives an Action Programme for small and medium-size enterprises was adopted in 1986[105] . In it a distinction was drawn between Community action to improve the business environment generally and specific measures to help to create and develop SM Es.

Taking into account the fixed assets and the percentage holding of a firm's capital by a larger one as well as the number of employees not exceeding 500, it is considered that 95 % companies within the EC providing more than two-thirds of total employment i.e. approximately 60 % in industry and more than 75 % in services, fall into the category of SM Es. This is an important feature of the EC economy. Therefore the development of the EC policies must take this into account.

The completion of the internal market resulting from the elimination of barriers to trade and the removal of protectionism carry a risk to the S M Es. Therefore on 26 February 1986 the Commission decided that every proposal for regulatory or legislative measures ought to be evaluated with reference to its impact on firms and employment. Should this evaluation prove to be negative the proposal would not be proceeded with unless suitably modified. This has already been considered with regard to the harmonization of indirect taxes.

The Commission is also anxious to see the S M Es playing their part in public procurement contracts not only nationally but also in the entire Community. Similarly when examining State Aids to industry the Commission would take into account the position of the S M Es in less favoured regions.

The Commission intends also to give a favourable consideration to the S M Es in the field of competition bearing in mind their contribution to research, specialization and technological innovation. This can be done within the Community philosophy of competition under the de minimis principle and within the policy on exemptions.

Under the de minimis rule certain restrictive practices can be tolerated if their impact on the market is not "significant". At present the Commission holds the view that agreements between undertakings engaged in the production or distribution of goods or in the provision of services generally do not fall under the prohibitions of Article 85(1) if "the goods or services which are the subject of the agreement... together with the participating undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more than 5 % of the total market of such goods... in the area of the common market affected by the agreement and... the aggregate annual turnover of the participating undertakings does not exceed 200 million ECU[106].

In order to encourage co-operation among the S M Es the Commission has granted exemptions in respect of exclusive distribution and supply contracts; joint research and development projects; manufacturing or supply under subcontracts; specialization agreements; patent licensing; know-how licensing and franchise contracts.

The Community has made available to the S M Es certain services such as:

(a) European Information Centres with access to data banks which provide information and advice and act as an internal market early warning system;

(b) Research programmes especially within the ESPRIT and BRITE schemes;

(c) Advisory service on innovation and technology transfer within the SPRINT programme;

(d) Training to develop cross-border co-operation in acquiring industrial and technological skills within the COMETT programme;

(e) Business co-operation Centre integrated into DGXXIII of the Commission which provides information to firms searching for business partners to engage in technical, commercial, financial or sub-contracting co-operation.

Moreover various forms of financial assistance are available to the S M Es i.e.:

(a) Community loans offered by the European Investment Bank and loans under the New Community Financial Instrument with priority for small firms;

(b) Grants by the European Regional Developments Fund and since 1986 within the Integrated Mediterranean Programme;

(c) Acess to capital in the form of a loan or a grant to promote joint ventures facilitated by the Commission's participation in the European Venture Capital Association which has launched a pilot project known as "Venture Consort".

The developing Enterprise Policy is of a particular interest in the context of the internal market as the Community opens up internal frontiers and tends to strengthen the external barrier. It has to be studied by any country contemplating accession to the Community. In preparation for such an event a parallel national policy should be developed.

NOTES:

1 205/84:EC Commission v Germany (1987) 2CMLR 69

2 Case 62/79:Coditel v Cine Vog (1980) ECR 881

3 Case 15/78 Societe Generale Alsacienne de Banque v Koestler (1978) ECR 1971 at 1979

4 OJ.1962, p.32

5 COM (85)310

6 Case 120/78 Rewe-Zentral.....(Re Cassis de Dijon) [1979] ECR 649

7 OJ.1973, L.194

8 OJ L 209, p.25

9 OJ.1977, L.322

10 OJ 1986, L.306/15

11 OJ. 1989, L.386 and O.J.1990, L.296

12 OJ. 1983, L.193

13 OJ. 1992, L.110

14OJ. 1986. L.372

15 OJ. 1989, L.44/40

16 OJ. 1989, L.12 4/16 to be implemented by 1 January 1993 as amended by directive 92/30

17 OJ.1989, L.386/1 to be implemented by 1 January 1993 as amended by directive 92/30

18 OJ. 1989, L.386/14 to be implemented by 1 January 1991 as amended by directive 92/30

19 OJ. 1991, L.166

20 OJ. 1987, L.33/10 now proposal for directive

21 OJ. 1987, L.33/16 now proposal for directive

22 OJ. 1990, L.67

23 OJ. 1984, C.42

24 Meral Varış

25 amended OG 22-3-1992, no.92/2875 and OG 22-04-1992 no.21207

26 Official Gazette 1964, p.878

27 OJ. 1964, 056, p.878
28 OJ. 1986, L.382/17
29 OJ. 1964, 056, p.869
30 OJ.1978, L.151/25
31 OJ.1977, L.26/14
32 See Dir. 89/48, supra
33 OJ. 1973 L.228/3
34 OJ.1976, L.189/13
35 OJ.1987, L.185
36 OJ. 1992 L.228
37 OJ. 1973, L.228/20
38 OJ. 1990, L.330
39 OJ. 1988, L.172/1 amended by Directive 90/618 (as above)
40 OJ.1979, L.63/1 amended by Directive 90/618 (ab above)
41 OJ. 1992, L360
42 OJ. 1972, L.10361
43 OJ. 1972, L.291/102 and further amended by Directive 90/232
44 OJ. 1990, L.129
45OJ. 1984, L.8/17 and Directive 90/232 (as above)
46 OJ. 1987, L.185
47 OJ. 1987, L.185 which amends Directive 73/239
48 OJ. 1984, L.314/24
49 OJ. 1984, L.339/21
50 OJ. 1991, L.374
51 OJ. 1992, L.228
52 OJ. 1979, C.190/2
53 COM (86) 8768 FINAL; OJ 1986, C.71
54Meral Varış
55 Official Gazette July 9, 1956, Book 5: Insurance Law-Articles 1263-1459
56 Official Gazette, September 12, 1962 No.11204
57 Sigorta Tetkik Kurulu ve Tarife Komiteleri Yönetmeliği

58 Official Gazette, July 6, 1968 No.12943

59Official Gazette, January 30, 1990, No.20065

60 Official Gazette, August, 21,1988, No.19906

61 Official Gazette, October 18, 1983, No. 18195

62Official Gazette, June 26, 1985, No.18793

63 Official Gazette, October 19, 1983 No.18196

641963, OJ.159, p.2661

65 1965, OJ 085, p.1437

66 1964, OJ 063, p.1025

671968, OJ L 260, p.22

68 OJ L 218, p.37

69 Cem Pekman

In June 1993, just before the publication of this research, the alteration of Article 133 of the Constitution has been realized, allowing private radio and television stations to be established and broadcast. Related laws and regulations are also to be altered and such work is now in progress. As far as it is understood, the new regulation will be in conformity with the Council of Europe's Convention on Transfrontier Television, which itself is almost the same in content and wording with the European Community's Directive 89/552.

70 OJ. No.L.298

71 OJ. 1986, L.311

72 OJ. 1992, L.132

73 OJ. 1989, L.142

74 OJ. 1989, L.363

75 OJ. 1987, L.36

76 OJ. 1986, L.217

77 OJ. 1991, L.128

78 OJ. 1990, L.192

79 OJ. 1992, L.165

80 OJ. 1987, L.372

81 OJ. 1987, L 196 , p.81

82 OJ. 1990, L.310, p.28

83 OJ. 1990, L 310

84 OJ. 1991, L.217

85 OJ. 1992, L.137

86 OJ. 1991, L.144

87 OJ. 1991, L.145

88 OJ. 1990, C.277

89 OJ. 1992, L.123

90 OJ. 1991, L.208

91 OJ. 1988, L.288

92 OJ. 1991, L.377

93 OJ. 1992, C.222

94 OJ. 1992, C.318

95 OJ. 19092, C.248

96 OJ. 1963, p.1323) and 63/262 OJ.1963, p.1326

97 OJ. 001, p.1 (08.01.65)

98 OJ 1967, L.190/1

99 OJ. 1967, L.190/3

100 OJ. 1967, L.190/5

101 OJ. 1968 p.91

102 OJ. 1971, L.8/24

103 OJ. 1967, L.263/6

104 305/87: EC Commission v Greece, Re ownership of landed property (1991) 1CMLR 611

105 COM (86) 445

106 Commission Notice, OJ. 1986, C.231/2