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MARMARA ÜNİVERSİTESİ

AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE ACQUISITION OF IMMOVABLE PROPERTIES BY FOREIGNERS IN EUROPEAN UNION AND TURKEY

DOKTORA TEZİ

Ali Harun Balkan

İstanbul – 2009

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ONAY SAYFASI

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Onaylayan:

Prof. Dr. Sibel ÖZEL	Danışman	.....
Prof. Dr. Günseli GELGEL	Jüri Üyesi	.....
Doç. Dr. İlhan YILMAZ	Jüri Üyesi	.....
Prof. Dr. Ercüment TEZCAN	Jüri Üyesi	.....
Yrd. Doç. Dr. Murat T. YÖRÜNG	Jüri Üyesi	.....

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ABSTRACT

The legislations on acquisition of immovable properties by foreigners consist many limitations based on different priorities and approaches of the law systems. Especially, EJC's case law consists many interesting judgments.

In these thesis, we will examine acquisition of immovable properties by citizens of member states under the light of case-law of European Court of Justice. We will try to answer the question of the limit of limitations. Such an answer will be sought to found under the process of negotiations, derogations and case law. In addition to that, Turkish current legislation will be examined regarding to the immovable properties by foreigners will be taken in the consideration.

Eventually, a system proposal will be developed under the light of the case law of European Court of Justice. This proposal will be established on prevention of speculation, non-use and under-use and fragmentation of land.

ÖZET

Yabancıların taşınmaz edinmesine ilişkin mevzuat genellikle farklı öncelikler ve farklı hukuk sistemlerinin bakış açılarından bir çok sınırlama içerir. Özellikle AB hukukunun bu konudaki dava hukuku oldukça ilginç kararlar içerir.

Bu tezde AB üyesi devleti vatandaşlarının diğer AB üyesi ülkelerde mal edinmeleri konusunda Avrupa Adalet mahkemesi kararları incelenecektir. Cevap aranılan soru, AB entegresyon sürecinde, sınırlamaların sınırı nerede olacaktır sorusudur. Bu sorunun cevabı, birliğe üye olan ülkelerin üye olma süreci, derogasyonları ve Avrupa Adalet Divanı kararları ışığı altında aranacaktır.

Yine bu tezde mevcut haliyle Türk mevzuatında yabancıların gayrimenkul edinmesi ile hükümler de değerlendirilecektir.

Son olarak, Adalet divanı kararları da dikkate alınarak, bir system önerisi oluşturulacaktır. Bu öneri spekülasyonun, optimal olmayan kullanımın ve arazilerin parçalanmasının engellenmesi üzerine kurgulanacaktır.

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LIST OF ABBREVIATIONS

CSD	Commission on Sustainable Development (UN)
EBRD	European Bank for Reconstruction and Development
EC:	European Community
ECHR:	European Convention on Human Rights
ECSC:	European Coal and Steel Community
EEA:	European Economic Area
EEC:	European Economic Community
EFTA:	European Free Trade Area
EIB :	European Investment Bank
EIF :	European Investment Fund
EJC :	The European Court of Justice
EPA	Environmental Protection Agency (USA)
EU:	European Union
EMU:	European Monetary Union
FAO	Food and Agriculture Organization of the United Nations (UN)
FMC:	Free Movement of capital
FDI:	Foreign Direct Investment
FSAP:	Financial Services Action Plan
GDF:	Global Development Finance
GIS	Geographic Information System
IAS :	International Accounting Standards
ICSU	International Council of Scientific Unions
ICT:	Information and Communication Technology
IDRC:	International Development Research Centre (Canada)

IFPRI: International Food Policy Research Institute (CGIAR, USA)

ILO: International Labour Office (UN)

IMF: International Monetary Fund

ISCO: International Soil Conservation Organization

ISD : Investment Services Directive (93/22/EEC)

ISSS: International Society of Soil Science

NGO: Non-governmental Organization

OIZ: Organised Industrial Zone

OJ: Official Journal(of EU)

Para.: Paragraph

SGSV: Salzburg Land Transfer Law

SME : Small and Medium sized Enterprise

TDZ: Technology Development Zone

TOJ: Turkish Official Journal

TVGV: Tyrol Law on the Transfer of Land

TRCC: Turkish constitutional court

UN: United Nations

UNCED: United Nations Conference on Environment and Development

UNDP: United Nations Development Programme

UNDPCSD: United Nations Department for Policy Coordination and sustainable development

UNEP: United Nations Environment Programme

UNESCO: United Nations Educational, Scientific and Cultural Organization

UNIDO: United Nations Industrial and Development Organization

US/USA : United States of America

USDA: United States Department of Agriculture

VGVG: Vorarlberg Land Transfer Law

WAICENT: World Agricultural Information Centre (FAO)

WASWC: World Association of Soil of Water Conservation

WB: World Bank

WCED: World Commission on Environment and Development

WTO: World Trade Organisation

WDI: World Development Indicators

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Chapter I: Acquisition of Immovable Properties in EU

Chapter II: The Acquisition of Immovable Property By Foreigners in Turkey and a Proposal For Legislative Acts And Policy Considerations in the Accession Process to EU

Introduction

The acquisition of immovable properties by foreigners has always been an important subject for the states. Preserving national security, preventing speculation, controlling immigration and optimizing the use of land are the main reasons for this attention.

On the other hand, supranational and international organizations[1] are endeavoring to create more liberal and free regime on the subject. The balance of those and the positive approach for FDI implies that more liberal[2] markets for foreign purchasers is likely. Especially globalization[3] take new steps and caused states to conduct new series of mechanism to avoid this kind of transactions.

However, even in such globalization and liberalization trend, even in supranational organization, even the transactions defined are to be protected by the provisions of free movement of capital, the European Court of Justice, ruled that some limitations that are non-discriminatory and

[1] EU, WTO and many more organisation may fall under this scope. The evolving charesterisitcs of case law of ECJ(which will be detailed in later sections) is a good example of this attitude. In our opinion, EU represents the high end of the liberal economical integration.

[2] In our consideration, the word "liberal" is refer to a system that is well regulated, makes it possible for free entry to market, avoid cartels and more importantanly, enables humans to access their fundemantel needs. Contrary to the understanding which finally ended with credit crisis of 2008. Anyhow, we must admit that, private property and individual contracts form the basis of liberalism but to balance of individual and soceity must be established well. In other words, limititation of this rights and freedoms must be taken in to consideration. For instance, Adam Smith argued that the state has a role in providing roads, canals, schools and bridges that cannot be efficiently implemented by private entities. However, he preferred that these goods should be paid proportionally to their consumption In addition, he advocated retaliatory tariffs to bring about free trade, and copyrights and patents to encourage innovation See Consice dictionary of Economy. Retrieved 12.4.2009 from http://www.econlib.org/library/Enc/bios/Smith.html

[3] Globalization is often used to refer to economic globalization: the integration of national economies into the international economy through trade, foreign direct investment, capital flows, migration, and the spread of technology See Bhagwati. Jagdish (2004) In Defense of Globalization. Oxford. New York: Oxford University Press.

proportional found not to be precluded by the treaty. Simply, there is limitation to limitations even in such a "single market"[4].The land in fact, a natural resource[5] of nations that is essential for the fundamental needs such as air, water, food and shelter[6]. Therefore it is not hard to understand, the importance attached to it especially when acquired by foreigners.

It can be argued that, acquisition of immovable properties by foreigners is overly exaggerated or overly undermined by nationals or global actors. In our consideration, such approaches are quite inadequate to reflect the reality. As we expressed, land is a natural resource and acquisition of immovable properties by foreigners has to be evaluated case by case. It is really hard to tell that in each case, ratio legis of a legislation and the avoidance mechanism attached to is always against the foreign buyers or it is for the benefit of the nationals.

Let's assume that the national legislation is designed to create economic stability by seeking residence requirement[7] for foreigners and nationals.

[4] In our wording, The term limitation of limitations refer to exceptions of the chapter of the related freedom, general exceptions and mandatory reasons defined by ECJ. For instance, ECJ's attitude to the facts of case Osphelt supports our consideration. "…unlike supervision measures aimed at preventing construction of secondary residences after the transfer of building plots, which may be subsequent to the transaction without detracting from that objective (see, to that effect, Reisch and Others , cited above, paragraphs 37 to 39), national provisions such as the VGVG can achieve their objectives only if the agricultural use for which the plots were intended is not irretrievably impaired. In those circumstances, the very principle underlying a system of prior authorisation cannot be disputed. The Court has in any event previously held that such a system in connection with the acquisition of property ownership is not necessarily contrary to Community law." Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 45.

[5] "….interest objective in a Member State in which agricultural land is, and this is not challenged, a limited natural resource." Case C-370/05 Festersen [2007] ECR I-1129.Para 33.

[6] According to Abraham Maslow, the fundemental needs are mainly formed by air, water, food, shelter. See chapter 2.1 for the discussion of the fundemental needs and the related types of land.

[7] This content of the example is formed similarly to the case-law of ECJ. On the other hand, the suggestion is abstracted from many perspectives. Therefore the indicative nature of suggestion must be taken in to consideration.

Then local authority commences the procedure for compulsory acquisitions and tender the buildings to the persons who qualifies the requirements. What will be the result of such a case if the goal is achieved. The local economy will improve itself all the year by creating more and stable jobs whereas the nationals and foreigners who are resident will benefit from this situation. On the other hand, nationals and foreigners who do not reside have to chose to live there for 12 months to acquire a summer house or to use other possible forms of property ownership such as time-share or simply staying at touristic facilities. We should add that such a legislation may end the attractiveness of summer season for that district. This is to be decided by national authority carefully after evaluating the output of the regime, that may be by pilot applications. If this happens, pressure will be put by local politicians to government and related state authorities to amend the acquisition regime. Although the example we suggested is a hypothetical one, ignoring many branches of the law, indicatively, gives us the idea of ratio legis, legislation and the avoidance mechanism attached to it.

It should be mentioned, while some states are more protectionist on the issue, some are more liberal. For instance, in EU, Austria seems to be the most protectionist[8] while Germany seem to be more liberal.

Many countries have different concerns, shortages and mechanisms. Therefore the concerns of the states should be analyzed at first stage. The mechanisms attached to rationales forms the second step.

[8] When the case law of ECJ studied, case Konle, case Reish, Case Salzman, Case Beck, Case Ospelt were the cases againts the land transfer of laws of different regions of Austria. See Section undercase law for detailed information.

We must also add that, our examination is to find out of limitation of restrictions on the field of acquisition of immovable property by foreigners in EU law in the light of EJC's case law[9].

The limitations refer to limitation related to the exercise of fundamental freedoms of EU, such as free movement of capital, freedom of establishment…ect.

The term limitation of limitations refer to exceptions of the chapter of the related freedom, general exceptions and mandatory reasons defined by ECJ.

The term foreigner will commonly be used within the meaning of EU citizen who is not national of the member state of EU where the transaction or the attempt for the transaction takes place.

Eventually, in final chapter, suggestions and proposals will be structured on the aforementioned limitations and focus.

[9] A comparative study national legislation of member countries is beyond the scope of this thesis

1.1 The Concerns of the States

The need for restricting and regulating foreign ownership is being formulated by many concerns. The rationales may vary from state to state and machanism may vary due to priorities set by the states.

The below mentioned policy objectives seems to be the most common ones[10]:

1.1.1 National Security Concerns

This concern might be evaluated as the one of the most important concern shared by many countries[11]. The border regions or areas near military zones or military bases are high policy concerns[12]. Such an attitude is a reflection of preserving national interests and the security of its citizens from the threads that may be lead by other foreign forces that are resided inside the state.

Protecting border areas and areas near military zones have been discussed by ECJ. ECJ underlined that there has to be real specific and serious risks[13].

[10] The list is not meant to be exhaustive. On the other hand, it covers the major concerns of the states. Moreover, one or more reasons might be combined to get broader protection. Therefore the list is indicative.

[11] It should also be mentioned that following the attacks of 9/11, national security became more important concern.

[12] Hodgson Stephen.Cullinan Cormac.Campbell Karen(1999) Land ownership and foreigners: A comparative analysis of regulatory approaches to the acquisition and use of land by foreigners. FAO Legal Papers. Page 24.

[13]" The position would be different only if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures." Case C-423/98 Albore ECR [2000] Page I-5965.Para 21.The case will be examined under the ECJ's case law.

1.1.2 Prevent General Foreign Economic Domination

Any state will endavour to preserve its dominance on its economy . Therefore, the states avoid losing lands that have top priority for their economy such as mining fields, agricultural lands and golden shares of public companies(and the land). In a supranational body such as EU, the objective is hard to be achieved. For instance, in golden share cases, ECJ held that the major freedoms can not be precluded by such concerns[14].

Especially food production forms major part of the concern[15]. Ensuring food production that is sufficient for its citizens is one of the major duties of the state. Any state can not take the risk of the negative consequances that might be ocur due to lack of food. If the agrıcultural lands are dominated by

[14] "However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (Konle, cited above, paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty." Case C-367/98. ECR 2002 Page I-04731. Para 48.

[15] Food sovereignty is a concept that asserts the right of peoples to national autonomy over agricultural and food policies. It emphasises domestic consumer preferences about the food they eat and the importance of reducing dependence on international sources of food supply. In this, it promotes the formulation of trade policies and practices that support domestic food production and prevent dumping of agricultural products from other countries. Food aid to provide direct help to hungry people can create distortions in local markets and enhance dependence on outside sources. Providing funds to purchase food on commercial terms is considered more effective. Similarly, dumping of food surpluses on developing countries at lower prices than the cost of production and distribution can squeeze out local producers with damaging effects. There are questions as to whether greater food sovereignty is compatible or inconsistent with greater food security. If food sovereignty means raising trade barriers around domestic food markets, it could have negative consequences for food availability and access for the most vulnerable households. In contradicting the principle of comparative advantage in world trade, this could lead to higher domestic food prices, which would impact differently across households and types of farms. While food would be more expensive for consumers who buy food in markets, farmers who produce for the market would respond to the price incentive with higher output but only if they have access to the necessary additional farm inputs. Promoting food sovereignty has both positive and negative distributional and production effects which need to be considered. OECD (2007) Food Sovereignty in West Africa: From Principles to reality. Sahel and West Africa Club.

foreign ownership, such worries may arise. In Morocco, only Moroccans can own agricultural land, and a number of Canadian and US states that also restrict or forbid foreign ownership of farmland. Again policies under this heading may overlap with policies to prevent speculation in agricultural land and to preserve the social fabric of rural areas[16].

Especially in some EU countries, such an aim might be formulated as " ensuring farmers to farm their farms."Such concerns has been examined by ECJ in its case law. Case Fearon, Case Ospelt and Case Festersen can be taken as an example[17].

1.1.3 Prevent Speculation in Land

Prevention of speculation has always been an important issue on the subject. Especially, if the integration process speeds up or a location starts to attract foreign buyers, added that if the price difference between, the buyer's country and the country he buys is negative, for the selected type of the land, the grounds for speculation occur. On the hand, the expectancy of rise in the price has to be accompanied with the aforementioned conditions[18].

[16] Hodgson Stephen.Cullinan Cormac.Campbell Karen(1999) Land ownership and foreigners: A comparative analysis of regulatory approaches to the acquisition and use of land by foreigners. FAO Legal Papers. Page 20

[17] Case 182/83 Fearon [1984] ECR 3677.Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743.Case C-370/05 Festersen [2007] ECR I-1129.

[18] Speculation of land will be discussed in later chapters, however, relating to the type of land, it may become harmfull to the economic stability, fundamental human needs and many more. Moreover, it is hard to believe that, only foreign-based speculation in land results such an outcome.

In such conditions, many states take precautions to avoid these kind of transactions. For example, Austria, residence requirement has to be met in some cases for EU nationals[19].

1.1.4 Ensure an Adequate Supply of Affordable Housing

Ensuring an adequate supply of affordable housing is a important objective under the principle of the social state[20], in other words a onstitutional right[21.] Affordable housing is one of the basic needs of each and every individual. It must be in adequate supply for lower and middle income groups as well as for families with children and for the elderly. The need therefore continues to subsidize the construction and tenancy of social housing, to assist the above-mentioned groups in purchasing a home, and to implement a socially-oriented policy on rent control.

In the V.Enlargement, Malta, in the negotiations, has underlined this concern. Eventually, a really rare derogation was granted to the Malta by

[19] "On the other hand, as regards the requirement as to residence laid down in Paragraph 5(1)(a) of the VGVG, it is not disputed that it was established within the framework of legislation concerning the ownership of agricultural land which is intended to achieve the specific objectives of preserving agricultural communities and viable farms. Contrary to the claims of Ms Ospelt and the Foundation, it does not make any distinction between its own nationals and nationals of other Member States of the Community or, more broadly, of States party to the EEA Agreement. It is therefore not, a priori, discriminatory in nature .Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 38

[20] After the credit crisis of 2008, social duties of the states are more likely to be underlined.

[21] Article 57 of Turkish constitution reads as follows**:"**The state shall take measures to meet the need for housing within the framework of a plan which takes into account the characteristics of cities and environmental conditions and supports community housing projects."

EU[22].Malta's argument was based on the limited number of residences and limited lands to build more residences[23].

In addition to that, when the hiyerarchi of Maslow taken in to consideration, the need for shelter, in our view has to be supported by access mechanisms to affrodable clean water, food, heating and cooling, ICT infrastructure..etc. In other word, housing projects that provides solutions to fundemental needs is critical.

1.1.5 Control the Direction of Foreign Investment

Let's assume that unemployment rate is rising in the country and countries major employment areas are under tourism sector. The government may focus on the tourism and may bring strict conditions to other sectors, while liberasing tourism sector, may be in conjuction with a attractive incentives and tax exemptions regime.

In Turkey, for instance, the law on encouregent of tourism by creating exceptions for behalf of the foreigners, direct investors to the tourism.[24] There are also states that severely limit the purposes for which land may be

[22] Protocol No 6 on the acquisition of secondary residences in Malta OJ L 236. 23.9.2003.

[23] In Malta, the prior authorization is the basic mechanism. Only secondary residence of limited size could be acquired by non-residents, and the value of property had to be above a certain limit. The rationale for these restrictions was to retain a measure of control on land use and to prevent speculation. Foreigners could acquire additional property in Malta beyond the secondary residence only if they obtained Maltese nationality.During negotiations, Malta requested to be able to keep these restrictions on a permanent basis. The authorities were in particular concerned that if EU residents had unrestricted access to the real estate in their small island country, this could lead to more widespread economic and social problems. They supported their case by several arguments. First, they argued that, with population of 395,000 and territory of just 316 km2 Malta was by far the most densely populated country in the EU-25.As a result, land available for construction could only cover the basic needs of the local population. The topic will be studied in detail under section 2.4 "the country examples".

[24] TOJ 16.3.1982-17635. Also see "Law amending the the law on encouregement of tourism".TOJ 15.5.2008-26877.

purchased, such as Thailand and Malta, to ensure that such land holdings are in accordance with national economic development aims and objectives[25].

1.1.6 Prevent Non-use of the Land

Non-use of land according to our consideration might be an issue to intervene by authorities according the type of the land.

Extensive absentee ownership where the landowner has no connection with the land in agricultural land seems to be a problem for many countries. Especially, countries that experienced lack of food in particular periods of their history is more sensitive on the issue. That attitude might be taken as as a lesson learned by the ancestors. For instance, Irish Land Commission was strictly against such conditions. In case Fearon, a partial breach was found not to be precluded by EU law[26]. France and some Nordic Countries are against such abuse or reluctance of the land owner. According to our consideration, non use of agricultural land is more than optimizing "national resource" is directly linked to the "our heritage of the next generations" and naturally the sustainable development. The main reason for that is, as long as, agricultural land left to its destiny, not enriched by such as organic fertilezers, it may lose its "soil values" and eventually lose its optimal use capabilities. We should always keep in mind that, agricultural lands are rare, arable area may be the 11% of total land. If we concentrate on more special

[25] Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 20.
[26] Case 182/83 Fearon [1984] ECR 3677.

soil quantities, let's say, lands suitale for cultivating kivi or cherry [27], we are talking about may be the %1 percent of the total land.

It should also be mentioned that, underuse can be related to many types of the land. For instance, in case Konle, national legislation was aiming to a create a stabil local economy whole year. It was against the use of summer houses for a short period of time. Such concern is mainly based on the underuse of the houses[28].

1.1.7 Preserve the Village Life

Preserving villagelife or viable farming throuh small farms represents such an objective. The objective might be linked with sustaining cultural heritage, envoiremental protection, support touristic objectives...etc.

This desire to retain an essentially underdeveloped rural environment is not merely for the benefit of local residents but to give visitors a recrational opportunity to enjoy rural way of life, walking, riding, cycling and local sports. Such a scheme will not be possible to maintain, if all the properties

[27] The one of the high value added subsectors of Agriculture is fruit production. Kivi & cherry seem to be the most profitable ones. Kocal Yakup Bilgin(2007) Küreselden Yerele Geleceğin İnşası. IQ Kültür Sanat Yayıncılık. Page 185-186.

[28] In our opinion, such concerns might be solved through condo-hotel type of developments. Condo hotels are typically high-rise buildings developed and operated as luxury hotels, usually in major cities and resorts in the touristic cities.These hotels have condominium units which allow its owner a full-service vacation home. When they aren't using this home, they can leverage the marketing and management done by the hotel chain to rent and manage the condo unit as it would any other hotel room
Michael Corkery Condo Hotels(2006) The Latest Twist In Buying a Vacation Residence The Wall Street JournalRetrieved 1.1.2009 from
http://www.realestatejournal.com/secondhomes/20060228-corkery.html

sold to the buyers who are detached with that local culture and moreover, who will use their houses for very short terms in a whole year[29].

1.2 The Commom Mechanisms for Restricting or Limiting the Foreign Ownership

As we have discussed above, states may have different priorities and rationales. This such complex structure of attitudes mainly result different sort of avoidance mechanisms[30].

However, as stated above under the rationales, the below mentioned mechanism seem to be the most popular ones:

1.2.1 Restrictions arising of National Security Concerns

As we expressed, national security forms the one of the major concern. A couple of other motivations justifying foreign ownership restrictions are also defensible on grounds analogous to national interest or security[31]. National interest therefore encompasses concerns around food security, protection of coastal and sensitive land and water protection, communal lands, national monuments, security or military installations, and other areas of national

[29] Especially the aim of creating a stable local economy that is active whole year accomppanied with the aim "preserving social structure" . More over preserving natural landscape objective may be added to the concerns in this area as well. The concern hass be examined under ECJ's case law. "In its judgment in Konle the Court refers in this context to a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions. I would add that the protection of nature or of fragile landscapes may also be an obvious goal for regional planning." Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 24.

[30] The mechanisms may vary on the state's integration level to the any supranational body. For instance, if any member of EU taken in to consideration, since they can not rely on reciprocity on acquisition of immovable property by EU citizens, they have to rely on different mechanisms such as prior authorization.On the other hand, for instance, Turkey can rely on the principle of reciprocity for now, for the citizens of EU members.

[31] Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 23.

strategic importance. The national security commonly associated with the restriction of acquisition of lands near military zones. We should also add that this type of restriction might be linked with linked to "prior authorisation" or permit regimes. For instance corcern is linked to request of permit in Turkey[32]. Similarly, in EU, Italy, Greece and Spain have restrictions on the acquisition of land by foreigners in border areas.[33]

In Brazil, foreigners are only entitled to purchase property located in border areas considered essential for national security simillarly, in Mexico, Foriners cannot own land within a zone 100 kilometres along the borders and 50 kilometres along the country's beaches[34].

[32] Article 1 of regulation regarding acquisition of immovable properties by companies with foreign investment(in Turkey) reads as follows:…..a) Forbidden military zone and restricted military security zone: Forbidden military zone and restricted security zone that are designated at the Law of Forbidden Military Zones and Restricted Military Security Zones no. 2565 dated December 18, 1981, …ç) Private security zone: Private security zones that are designated in the Law of Forbidden Military Zones and Restricted Military Security Zones No. 2565,…e) Strategic Zone: The strategic zones designated at the 28th Article of the Law of Forbidden Military Zones and Restricted Military Security Zones No. 2565," and Article 7 reads as follows:" (1) If the real estate is located within forbidden military zones, restricted military security zones and strategic zones, General Staff of Turkish Army or its authorized Local Command evaluates the application for acquiring real estate property subject to the national security principles and notifies the Governorship of the outcome. If the evaluation is affirmative, Governorship finalizes the application subject to the opinion of City Directorate of the Ministry of Industry and Commerce regarding the company's field of activity determined in its Articles of Association.(2) General Staff of Turkish Army or its authorized Local Command may request additional information or documents regarding the purchase of real estate property from the related authorities and/or the company if necessary.(3) If the evaluation resolves to approve such inquiry, the decision of the Commission is notified in writing to the inquiring company and to the relevant title registry; if the evaluation resolves to reject the inquiry, only the company is notified accordingly. " For ruther information, see: Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık.. Page 241-244.

[33] Such practices are very common in South and Central America.Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foreigners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 4. In case Albore and Greece, ECJ examined the above mentioned restrictions. See Case 305/87 Commission v Greece [1989] ECR 1461. Case C-423/98 Albore ECR [2000] Page I-5965

[34] Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 36.

1.2.2 Land Quantity Restrictions

Land quantitity restrictions is one of the popular restriction mechanism. For instance, legislation may restrict acquisition of a land more than certain size by a foreign buyer. Moreover, quatas might be defined, after the limit of the quates surpassed, ignoring the size no, transactions may not be allowed.

In Spain, in the border areas land owned by non-EU foreigners may not exceed 15%. In Turkey, first limitation is 2.5 hectars and the quate is the 10 % of the total area of the province[35].In Brazil there are limits on the amount of agricultural land which foreign individuals resident in Brazil can own. The maximum holding per individual must not exceed 50 "modules" taken separately or together and the acquisition of between 3 and 50 modules requires preliminary government authorisation[36].

We should also add that lease or term restrictions are used to avoid foreign dominance on the economy. However, this mechanism is not directly related to acquisition of real estate by foreigners. On the other hand, when combined with land quantitiy restrictions, it might be become a part of a restriction such as in Brazil[37].

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[35] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık.. Page 231.

[36] In Brazil, the quatas are defined for each region by the Ministry of Agriculture and Land Reform. Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 37.

[37] In Brazil, these restrictions also apply to land leased to foreigners. Further, the total proportion of rural areas owned or leased by foreign individuals or legal entities must not exceed 25 per cent of the land area of each municipality and individuals of the same nationality must no hold more than 10 per cent of that land area - presumably to prevent the creation of foreign enclaves.See Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 37.
In Romania, the most significant lease restriction is the requirement that lessees who are natural persons must be Romanian citizens. Additionally, lessees which are legal entities must be "of Romanian nationality" and have a representative office in Romania.The

1.2.3 Permit or Prior Authorisation Requirement

In cases where foreign ownership is not prohibited, either state-wide or in specific sectors, a requirement for prior authorisation is a common method of restricting foreign ownership. As we stated above, national security concerns may result such a mechanism. Moreover, many other concern might be linked with this mechanism such as objectives like preserving the land scape, preventing speculation..ect.

Prior authorization regimes are very common mechanisms. Such regimes easily be interpreted as an indication of an attitude of prohibition foreign land ownership under a legal scheme. That interpretation can be avoided through a well defined legislations that are non discrenatory, non disrimanatory and more than that, a legislation which in its true nature, is aiming to create legal certainty[38].

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restriction on foreigners leasing in land is more onerous than a restriction on sale of land to foreigners, primarily because lease arrangements do not have the definitive results of a sale, if the lease is not of a long-term nature. Another limiting restriction is that a lessee who is a physical person must have agricultural education, agricultural experience, or hold a certificate issued by the Ministry of Agriculture that testifies the lessee's knowledge. This requirement adds a level of complexity to the lease transaction process, since the lessor must somehow determine that the lessee meets the standard.This requirement also manifests a lack of confidence in the workings of the market, which is premised upon private actors undertaking endeavors in which they believe they will be successful See Giovarelli Renee.Bledsoe David.(2001) Land Reform in Eastern Europe Western CIS, Transcaucuses, Balkans, and EU Accession Countries. Washington:RDI.Page 7. In U.S. , Montana, Coal leases may not be issued to a citizen of another country or entity controlled by interests foreign to the US unless like privileges are provided to US citizens by such country.See National Association of Realtors(2006) Alien Land Ownership Guide
State Laws Relating to Ownership of U.S. Land by Aliens and Business Entities. 1.5.2009 retrieved from
http://www.realtor.org/NCommSrc.nsf/files/Alien%20Land%20Ownership%20Guide%20(November%202006).pdf/$FILE/Alien%20Land%20Ownership%20Guide%20(November%202006).pdf.

[38] From the point of ECJ, legal certainty is one of the major element of single market. "That minimum requirement of prior notification has the advantage, unlike supervision procedures which are applied only a posteriori, of providing the acquirer of title with an element of legal certainty " Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 36.

Such regimes are very common in EU countries. In Italy applications by non-EU nationals to live in the border areas are made to the perefect or police, in Finland such applications are made to the county council, in Greece applications to rent or buy land in the border areas by Greek and EU nationals are required to be made to the local prefecture, for evaluation by an ad-hoc committee, but to the Ministry of Defence by other foreigners. In Poland, the joint approval of the Minister of Interior and the Minister of Defence is required for foreign land purchases. In Liechtenstein applications by resident and non-resident foreigners, or by legal entities in which foreigners have a majority interest to buy land have to be licensed by a special commission . Applications to own land in Denmark are addressed to the Ministry of Justice while in order to own land in Norway foreigners require a concession from the Minister of Agriculture.[39]In Austria, land transfer laws of many regions uses this mechanisms as we will discuss in later chapters, Salzburg Land Transfer Law, Vorarlberg Land Transfer Law, Tyrol Land transfer of law[40].

1.2.4 The Principle of Reciprocity

The principle of reciprocity involves permitting the application of the legal effects of specific relationships in law when these same effects are accepted equally by foreign countries[41]. In international law, reciprocity means the right to equality and mutual respect between states[42].

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[39] Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Pages 37-40.

[40] See Section 2.3 Case Law.

[41] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık. Page 239. Tekinalp Gülören(2003)Türk Yabancılar Hukuku. İstanbul:Beta.Pages 20-21. See Also: Özel Sibel(2004)Yabancıların Türkiye'de Taşınmaz Edinme Hakkı ile ilgili Tapu Kanunu Mad.35'te Yapılan Son değişiklerin Değerlendirilmesi. İ.Ü. Hukuk Fakültesi Mecmuası. C.LXII. Vol(1-2) Page 436.

[42] Retrieved: 5.5.2009 from http://www.duhaime.org/LegalDictionary/R/Reciprocity.aspx

Under the acquisition of immovable properties this type of avoidance mechanism forms relative restrictions regime. This relative nature can include iure and/or de facto implementation. In former, written law, while in latter, practice will be taken in to consideration. In such regime, the rules governing the transactions will be restricted due to the rules of the country regarding the citizenship of the purchaser[43].

In Turkey, according to Article 35 of the land registry law, such a regime, is in force. In other words from the point of view of ownership, does not only mean that countries reciprocally permit real persons and corporate bodies to acquire property in the other country; there must also be parallels between countries with reference to the way restrictions are applied on the enjoyment of such rights[44]. In addition to that, it must be mentioned that the principle is not, mandatory, rather a political choice. The examination of restrictions regime in the foreigner's country may constitute difficulties. However, Turkish Republic Ministry of foreign affairs representatives in foreigner's country can provide with the information that is needed to evaluate the reciprocity principle. [45]

1.2.5 Pre-emption and Right of First Refusal

Pre-emption right, simply, is a right of claiming or purchasing before or in preference to others , or privilege to take priority over others in claiming property[46]. It is the right to buy before others .Although the right's common use by private legal or natural persons, in rare cases, public bodies such as municipalities or public funds that are defined by law as a beneficiary can

[43] Such a regime can not be applied in any supranational body as long as the integration is not reached its final steps, namely, free movement of capital.
[44] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık. Page 239.
[45] Özel Sibel(1998) Yabancıların Türkiye'de Taşınmaz Edinmesi gerekli Karşılılık Şartının Yargıtay Kararları Işığında Değerlendirilmesi. İstanbul Üniversity. Milletlerarası Özel hukuk ve Milletlerarası Münasabetler Araştırma ve Uygulama Merkezi.Vol(1-2).Page 314.
[46] Gardner A. Bryan(2000) Black Law's Dictionary. 7th ed. West Group. Page 958.

use this right[47]. In particular cases where the pre-emption right applies, other land development instruments can also be applied, such as compulsory purchase including expropriation.In EU countries, such as France, Slovenia[48], Finland, Sweden, Ireland such applications observed. The right of first refusal is associated with the beneficiary's will. If the beneficiary does not accept the offer(namely, use the right of first refusal), the others who has been granted with this right, in a decending order will have the opportunity to use this right. In its case-law ECJ proposed to have tenant(farmers) to have this right[49].In our opinion, such rights vested to public authorities have to accompanied with a fund that has purchasing power.

[47] Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 32.

[48]In Slovenia,The right of pre-emption may be claimed in the purchase of agricultural or forest land by beneficiaries in the following order: the co-owner, the farmer whose land in his/her ownership is adjacent to the land to be sold, the hirer of the land to be sold, another farmer, agricultural organisation or a self-employed person that requires land or a farm holding to perform their agricultural and/or forestry activities, and the National Farm Land and Forest Fund of the Republic of Slovenia.Information regarding the selling of an agricultural parcel must be announced on the notice board at the Administrative Office of Agriculture for thirty days. Among farmers ranked together under the same conditions, the farmer whose agricultural activity is the sole or main activity shall have the pre-emption right, followed by the farmer who just cultivates land, and the farmer designated by the seller. The Administrative Office of Agriculture assembles all interested potential buyers with pertaining information and arranges them in pre-emption rights order. The first in line can purchase the property or give up this right to the next buyer. If the potential beneficiary did not exercise his/her right, the notice must stay at the administrative office on the notice board for another thirty days. If nobody is interested in buying the agricultural land, then the land should be sold to other potential buyers. If none of the beneficiaries exercises the pre-emption right, the seller may sell the agricultural land to any person who accepted the offer in time and was approved by the administrative unit. Ferlan Miran.Zevenbergen Jaap.Mattsson Hand (2005) Contribution to: Real Property Transactions; Procedures, Transaction Costs and Models.Pre-emption rights compared – Netherlands, Slovenia and Sweden. Retrieved: 15.5.2009 from http://costg9.plan.aau.dk/Book_Closing/cost%20book%20preemption%202.2.doc. Page 2.

[49] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 52.

1.2.6 Residence Requirement as a Part of the Restriction Regime

The acquisition of immovable properties, especially, agricultural lands might be linked with residence requirement. This can be a part of prior authorization regime or a requirement when breached resulting cumpolsary acquisition.In Brazil only residents may acquire agricultural land[50]. In EU, in Austria, Denmark and Ireland such conditionality exists. Moreover ECJ discussed this requirement in many cases. We will discuss this topic in detail in later sections.

[50] Hodgson Stephen. Cullinan Cormac. Campbell Karen(1999) Land Ownership and Foregners: A Comparatıve Analysis of Regulatory Approaches to the Acquısıtıon and Use of Land by Foreıgners. FAO Legal Papers. Page 40.

CHAPTER I

Acquisition of Immovable Property in EU

In spite of the fact that the acquisition of immovable property in EU is mainly related to the free movement of capital[51], we will concentrate on the nature of freedoms & the free movement of capital at first. Following the examination of freedom, we will examine the case-law of ECJ on the acquisition of immovable property.

1.1 Nature of Four Freedoms

1.1.1 Nature of Four Freedoms Under the Light of Economic Integration Theories

Any economic integration(between states) endeavors will mainly follows the below mentioned consequence in other words the degree of economic integration can be categorized into six stages[52]:

1. Preferential trading area
2. Free trade area[53]
3. Customs union
4. Common market

[51] In case-law , treaty provisions and chaptering of the negotiations , acquısıtıon of ımmovable property is placed –mainly- under free movement of capital therefore we will firstly examine the nature of freedoms, free movement of capital and related case law on the acquısıtıon of ımmovable property.

[52] Economists such as Wilhelm Röpke, Ludwig von Mises and Friedrich von Hayek in 1940's were developing the theory. Belassa is the most known economist on the subject matter. See Balassa Bela(1978) .Types of Economic Integration".The McMillan Press Ltd. London.

[53] Unlike a customs union, members of a free trade area do not have the same policies with respect to non-members, meaning different quotas and customs. To avoid evasion (through re-exportation) the countries use the system of certification of origin most commonly called rules of origin, where there is a requirement for the minimum extent of local material inputs and local transformations adding value to the goods. Goods that don't cover these minimum requirements are not entitled for the special treatment envisioned in the free trade area provisions. In the prefential trading area, there usually is a trading bloc with reduced custom tariffs.

5. Economic and monetary union
6. Complete economic integration [54]

This guideline of economic integration will be helpful to undertand the dynamics of treaties, in other words, the evolution of EU. In this context, the freedoms related the early stages such as free movement of goods will become more sophisticated and applicable before a freedom that belongs to later stages such as free movement of capital[55].

EU for example, represents the end product of EC[56], from the wiev of Balassa because he believes that political integration is, in fact, naturally generate demand for further integration. It is easy to support his suggestion with the EU project itself. Moreover, if the economic success could not be achieved in the process, integration would be slowed or halted.[57]

As any internal market targeted to be, EU internal market is based on the principle of the "four freedoms" of movement: of goods, services, capital and people.

Accordingly by the Treaty establishing the european community , four kinds of basic freedom was quaranteed in internal market. Article 11 of the EC treaty reads as follows:

> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons,

[54] Complete economic integration is the final stage of economic integration. After complete economic integration, the integrated units have no or negligible control of economic policy, including full monetary union and complete or near-complete fiscal policy harmonisation.
[55] The directly applicable Article 56 was included in the EC Treaty by the Maastrischt Treaty . The free movement of capital became - compared with the other freedoms defined in the EC Treaty - a full freedom following that.
[56] EEC will be a better wording from the perspective of Balassa.
[57] In the times of congestion in legislative process, ECJ's critical role of expanding freedoms must be taken in to consideration.

> services and capital is ensured in accordance with the provisions of this Treaty.

However, it should be mentioned that, integration projects are progressive and concurrent. For example, free movement of goods is highly related to the first stages, but when it comes to free movement capital, monetary union and fiscal measures, these are at the final stages[58].

1.1.2 The Scope of Non-Discrimation and the Level Of Economic Integration

Article 12 (ex Article 6) is read as follows:

> Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

As we expressed repeatedly, in an economic integration, especially, in the early stages, protectionist maneuvers by members is likely to be observed therefore the first non discriminatory ground is nationality. When the integration get in to higher levels , its content and the interpretation of term gets wider[59].

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[58] We will discuss free movement of capital and monetary union in section 2.2.

[59] The content of the prohibition got larger by the insertion of a new Article 13 into the Treaty of Amsterdam which stated that: 'Without prejudice to other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Directives now exist to combat discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation (Article 1 of Directive 2000/78 of 27 November 2000) as well as discrimination on the grounds of racial or ethnic origin in and beyond employment and occupation (Articles 1 and 3 of Directive 2000/43 of 29 June 2000). Clauses embodying the non-discrimination principle have also been inserted in directives on part-time work (Directive

The non-discrimination principle requires the equal treatment of an individual or group irrespective of their particular characteristics, and is used to assess apparently neutral criteria that may produce effects which systematically disadvantage persons possessing those characteristics. Therefore it is obvious that as long as the integration proceeds, the principle will cover more areas.[60]

1.1.3 The Need for the Three Pillars

As we discussed above, economic integration wise, a "three pillar" structure established in the EU is not a structure unexpected . The economic integration process eventually brings the political integration. The latter's success is depending on the success of the former. Moreover, the pillar or in other words a layered structure , on the other hand, "where the transfer of some parts of the sovereignty is a part of the process" is in a way a balancing structure in the early stages of the integration.[61]

It must be added that such a structure is vital for early periods of integration. As long as the integration deepens and reaches its final stages, the structure

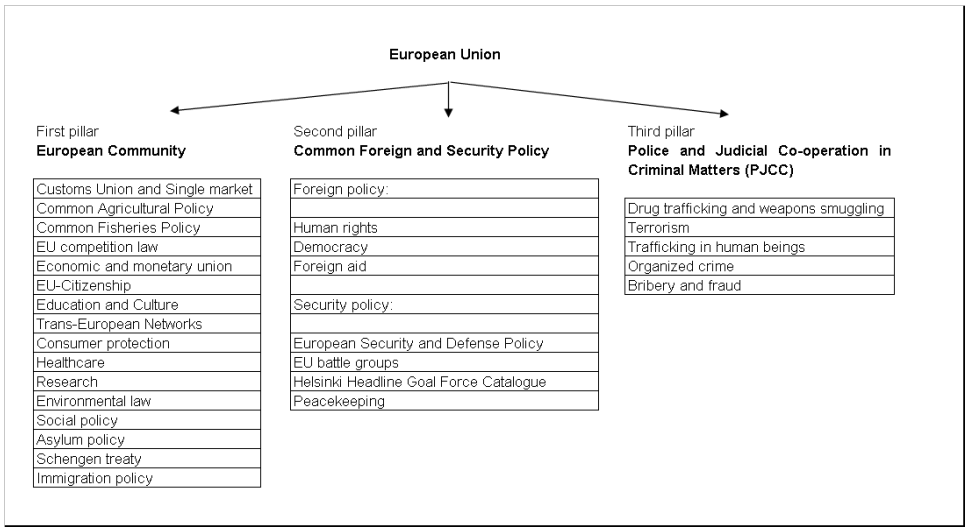
97/81/EC of 15 December 1997, Clause 4) and fixed-term work (Directive 1999/70/EC, Article 4).

[60] The principle of non-discrimination has been affirmed by Article 21 of the 2000 Charter of Fundamental Rights of the European Union and has been included among the Union's values in the Treaty establishing a Constitution for Europe text, as adopted by the Intergovernmental Conference of Member States meeting in Brussels on 17-18 June 2004. In the context of employment and industrial relations in the EU, the principle has two applications in the EC Treaty: Article 12 which prohibits discrimination on the grounds of nationality, and Article 141 with its requirement for 'equal pay for female and male workers for equal work'. The principle of non-discrimination on the basis of nationality was essential for the establishment of a common labour market in Europe (Article 39 EC). The principle of equal pay for women and men was considered similarly significant for ensuring that fair competition among employers in different Member States was not distorted by different regulatory labour standards involved in the implementation of the principle of equal pay.

[61] Within each pillar, a different balance is struck between the supranational and intergovernmental principles. It must be noted that.some member-states opposed the addition of these powers to the Community on the grounds that they were too sensitive to national sovereignty for the community method to be used, and that these matters were better handled intergovernmentally.

will be deemed to abolished. The structure can be evaluated as a temporary but very critical structure.

Table 1: Three Pillars&Binding Structure



1.1.4 Free movement and free movement of capital

Free movement form one of the most important freedoms of the EU. First of all, the freedoms existance, by it self, the achievement of intregration[62]. Therefore, EU is not willing to accept candidate countries or its members requests to limit these freedoms because this could have a significant impact on competition and the functioning of the internal market in other words, EU does not wish to stepback from the stage of integration achieved till that time. [63]

[62] Turkey,as all EU candidates before it – will thus have to allow basically unrestricted movement of services, capital and people by the time it accedes to the EU.
[63] We will discuss this topic in the field of candidate countries in depth under section 2.4. "derogations"

The Treaty Establishing the European Community prohibits in particular all restrictions on movement of capital between member states but also between the member states and third countries, although certain restrictions in relation to countries outside the EU can be retained[64].

1.2 Free Movement of Capital and Acquisition Of Immovable Properties

1.2.1 The Evolution of the Freedom

1.2.1.1 First Phase: Before Directive 88/361

The free movement of capital has evolved in different speeds since the establishment of the EEC. The speed was, as expected, very low. Treaty of Rome included free movement of capital among the fundamental freedoms of the European Common Market, this freedom was expressed in more ambiguous terms than the other freedoms[65].

The first phase is the period til the adoption of Directive 88/361[66]. It must be mentioned that the Treaty contained a provision on the free movement of capital, although it lacked any direct effect. As we discussed earlier, the free movement of capital is a more sophisticated freedom that belongs to final phases of economic integration.[67]

[64] See discussion on Article 57.1 under section 2.2.3.1.
[65] Article 67 of the Treaty of Rome read as follows: 1. During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.
[66] Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, O.J. 1988, L 178/5.
[67] See section 2.1.

The original signatories of the Treaty are well aware that the complete liberalisation of capital movements is related later stages[68]. The Member States, at least has to retain the power to control capital transactions, till completion of the single market . The secondary legislation in this field was like the, treaty articles, is away from defining a community freedom. On the other hand, in the first phase, Council Directive 72/156/EEC of 21 March 1972 on "regulating international capital flows and neutralising their undesirable effects on domestic liquidity" provided for coordinating measures that are related to exceptionally large capital movements[69].

The main development towards the liberalisation of capital movements was taken with the adoption of Directive 88/361. In the second phase, the Member States were required to abolish the barriers on the intra-Community movement of capital. The Directive is a, in a way, indication of the completion of the internal market at the end of 1992[70]. As we mentioned, free movement of capital is one of the freedoms that is a freedom belonging to the last stages of economic integration.

1.2.1.2 Second Phase: Directive 88/361 & Nomenclatura

The EEC Treaty guarantees of free movement of goods, services, workers, and enterprise were recognized as having direct effect at an early stage of the evolution of EC law. However, it was not until 1990, when the third Council directive on the subject, Directive 88/361, became effective that capital movements were defined for the purposes of EC law, "the Member States were legally required to eliminate barriers to free movement of capital, and individuals and companies could invoke the right to free

[68] Damian Chalmers, Hadjiemmanuil Christos, Monti Giorgio, Tomkins Adam(2006). European Union law: text and materials. Cambridge University Press. 2006. Page 508.
[69] OJ L 91. 18.4.1972. page 13.
[70] Damian Chalmers, Hadjiemmanuil Christos, Monti Giorgio, Tomkins Adam(2006). European Union law: text and materials. Cambridge University Press. 2006. Page 509.

movement of capital to challenge national tax laws in the Member States courts, with access to the preliminary ruling process of the ECJ."[71]

The key provisions of Directive 88/361, Articles 1 and 4, were taken into the EC Treaty by amendments agreed in the Treaty of Maastricht. The new relevant EC Treaty Articles were renumbered as Articles 56-58 by the Treaty of Amsterdam.

1.2.1.3 Third Phase: Maastrischt Treaty

The third phase commenced by the entering of Maastrischt Treaty in force. The directly applicable Article 56 was included in the EC Treaty. The free movement of capital became - compared with the other freedoms defined in the EC Treaty - a full freedom[72]. Free movement of capital in form of full freedom , was in fact, a must, for the establishment of Economic and Monetary Union [73].

1.2.1.4 Fourth Phase: European Monetary Union & Euro as an international reserve

It must be mentioned , by the completion of Economic and Monetary Union as the fourth phase, national legislation that attaches conditions to the movement of capital between Member States is no longer permitted. Within the completed Economic and Monetary Union within the Euro Zone, public-law restrictions on capital transactions are no longer conceivable.

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[71] In joined cases C-358/93 and 416/93 Bordessa [1995] ECR I-361, a non-tax case, Directive 88/361 was held to have direct effect.

[72] Buti Marco, Sapir André(1998) Economic Policy in EMU: A Study by the European Commission Services. Oxford University Press. Page 3.

73 A first attempt to create an economic and monetary union between the members of the European Communities goes back to an initiative by the European Commission in 1969, which set out the need for "greater co-ordination of economic policies and monetary cooperation" (Barre Report). For detailed information on barre reports, see: Karluk Rıdvan(2005) AB ve Türkiye. Beta Basım Yayın. Page 526-536

Eventually, single money and capital market has emerged. Under Article 105, monetary policy has been removed from the Member States responsibility and is now pursued at the level of the Union. Within this framework legislation on capital flows - in part as a result of the establishment of the European Central Bank - is necessarily adopted and supervised at Community level[74].

The activities of individual financial institutions, for example, are supervised at national level. In addition, national legislation governing financial markets results from the interest in maintaining public order in the areas of, say, insider dealing in shares and money-laundering. The Member States are also permitted to maintain domestic tax legislation. Article 58 EC leaves the Member States scope for this. Paragraph 3 of this article emphasises that such measures shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments[75].

1.2.2 Treaty Provisions on Free Movement of Capital

1.2.2.1 Article 56 : Free Movement of Capital and Payments

Article 56 reads as follows:

> 1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

[74] Karluk Rıdvan(2005) AB ve Türkiye. Beta Basım Yayın. Page 590-599
75 See section 2.1.

> 2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 56 refers to the movement of capital and payments between Member States and between Member States and third countries[76]. In addition to that, it should be mentioned that the article does not impose any conditions for the removal of the restrictions to capital and payments freedom[77].

It should also be added that persons who are neither nationals nor residents of an EU Member State may thus invoke the free movement of capital guarantee in EU Member State courts[78].

The clear wording of article 56, guaranteeing the free movement of capital between EU Member States and third countries in the same sentence and apparently on an equal basis with intra-EU capital movements cannot be lightly dismissed, nor can it be taken as unconditionally extending every aspect of free movement of capital as it applies in the EUs internal market to third countries.

Basically, it seems reasonable to view the wording of article 56 as the article extends the free movement of capital to third countries as fully as possible.On the other hand, it must be added that article 56 has limitations,

[76] As concerns payments, this implied only a codification of liberalisation that had already been achieved by all Member States in accordance with their commitments under the Articles of Agreement of the International Monetary Fund.
[77] Karluk Rıdvan(2005) AB ve Türkiye. Beta Basım Yayın. Page 381.
[78] See, Joined cases C-163/94. C-165/94. C-250/94 Sanz de Lera [1995] ECR I-04821, C-452/01Ospelt [2003] ECR I-9743.

in particular, of Article 57, as well as general principles of Community law, and any specific factual or legal conditions in a particular case[79].

In the case of the third country dimension of free movement of capital, the aim pursued by the treaty might be, in a way one of the final stages of economic integration ,to establish the euro as an international reserve currency.[80]

1.2.2.2 Articles 57 and 58: Limitations on Article 56.1

1.2.2.2.1 Article 57.1: The Standstill Clause

Article 57 reads as follows:

> 1. The provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets.

As noted above, Article 57.1 is a standstill clause permitting Member States to continue to apply to third countries restrictive measures in force at the end of 1993 in four broad categories:

[79] Contrary to directive 88/361, the requirement that the capital move between residents (of Member States) was deleted, so that it is sufficient that the capital move between Member States, or between a Member State and a third country.
[80] Karluk Rıdvan(2005) AB ve Türkiye. Beta Basım Yayın. Pages 599-600.

i. direct investment (including in real estate),
ii. establishment,
iii. provision of financial services and
iv. admission of securities to capital markets.

The ECJ held that new measures that do not change the substance of a pre-1994 measure, or that reduce or eliminate obstacles to free movement of capital are also permitted to remain[81].

The wording in the beginning both paragraphs of article 56 "Within the framework of the provisions set out in this Chapter", implies that any interpretation of these articles should take into consideration the complementary provisions laid down in the succeeding Articles 57 to 60 EC, which offer several possibilities either to limit this principle of absolute freedom or to be exempted from the freedom in rare occasions[82].

It should also be added that, in regard to the member states which acceded after 31.12.1993, the scope of standstill principle will be based on the legislation which were in existence at the date of accession[83].

Shortly, despite the content of article 56 , Article 57.1 clearly indicates that the extension of this freedom to third countries is not unlimited. The Member States and the Community have the right to maintain restrictions on

[81] " It is clear from Article 57(1) EC that Article 56 EC is without prejudice to the application to non-member countries of any restrictions which existed on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from non-member countries involving direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets" Case C-157/05 Winfried L. Holböck v.Finanzamt Salzburg-Land [2007] ECR I–4051.
[82] Barnard Catherine. Scott Joanne(2002) The law of the single European market: Unpacking the premises. Hart Publishing. Page 335.
[83] C-302/97, Konle [1999] ECR I-3099. Para 52.

capital movements that existed as at 31 December 1993 under, respectively, national and Community law, in relation to the specific transactions that are mentioned in Article 57.1.

1.2.2.2.2 Article 57.2: A Step Back Mechanism

Article 57.2 read as follows:

> Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment — including investment in real estate — establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries.

Article 57.2 sets out the Councils power to legislate by qualified majority in the same broad categories of capital movements with respect to third countries, and requires unanimity where the measure "constitutes a step back" in liberalization of capital movements. [84]

[84] Article 57.2 adds little protection for third State capital movements at least where direct taxation measures are concerned as all such measures must be adopted unanimously whether or not they represent a "step back".

It is a very low possibility that any significant Council legislation affecting Member States direct tax treatment of free movement of capital will be adopted that the EU has 27 Member States, as unanimity is required in this area.

1.2.2.3 Article 58: The Exceptions of Free Movement of Capital

1.2.2.3.1 Article 58 Under The Field of Taxation

Article 58.1.(a) reads as follows

> "1. The provisions of Article 56 shall be without prejudice to the right of Member States:
>
> (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

The free movement of capital limits severely Member States ability to protect the integrity of their national tax system. Especially in the direct taxation, negative impacts relating to the personal and corporate income tax as well as taxation of interests and dividends are being observed[85].

When the lack of harmonisation in the fiscal area at Community level, the provisions of Article 58.l.a seems to be right for the setting. The main motivation behind this article is to set a limit to any abusive use of the

[85] Directorate-General for Internal Market and Services (DG MARKT) and Directorate-General Taxation and Customs Union (DG TAXUD) co-operate for issues of direct taxation (e.g. taxation of dividends)

freedom of capital movements, as they allow Member States to apply their national tax legislation.

Article 58.1.a. of the Treaty allows for different tax treatment of non-residents and foreign investment, but with the reservation that this must not represent a means of arbitrary discrimination or a distinguished restriction in the sense of Article 58 .3.[86]It should be borne in mind that Article 58.1 represents an exception to the fundamental principle of free movement, and must therefore be interpreted restrictively.

The possibility retained for Member States in Article 58 to differentiate between persons in different situations has been upheld in the case law of the ECJ.[87]

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According to that case law, such provisions may be compatible with Community law in so far as (1) they apply to situations which are not objectively comparable or (2) they are justified by overriding reasons in the general interest. However, these provisions may not in any event be more restrictive than is necessary in order to achieve the aim pursued, ın other words they must be consistent with the principle of proportionality.[88]

[86] COM(2003) 810 final of 7.12.2004. OJ 2004 C-302 Page 70.

[87] "In addition, the possibility granted to the Member States by Article 73d(1)(a) of the Treaty of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested has already been upheld by the Court. According to that case-law, before the entry into force of Article 73d(1)(a) of the Treaty, national tax provisions of the kind to which that article refers, in so far as they establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were not objectively comparable (see, in particular, Case C-279/93 Schumacker [1995] ECR I-225) or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system (Case C-204/90 Bachmann v Belgian State [1992] ECR I-249 and Case C-300/90 Commission v Belgium [1992] ECR I-305)." Case C-35/98 Verkooijen ECR [2000] Page I-04071. Para 43.

[88] "For a measure to be covered by Article 73d of the Treaty, it must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the

1.2.2.3.2 Article 58 and the Declaration Procedures

Article 58.1.b reads as follows

> "1. The provisions of Article 56 shall be without prejudice to the right of Member States:
>
> …
>
> (b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

Article 58.1 .b provides also for the right of Member States to lay down procedures for the declaration of capital movements for administrative or statistical information". This kind of restriction was already foreseen tor certain Member States under the previous regime on capital movements and was extended under the present regulation to all Member States.

Nonetheless, the divergent interpretations given to this exception, under both regimes, clarified through ECJ judgments .

objective it pursues and must not go beyond what is necessary to attain it."Case C-478/98 Commission v. Belgium (DEM Eurobonds) [2000] ECR I-7589. Para 41 .

The Bordessa case[89] is an important mile stone in the case law related to article 58.1.b. According to Article 6.2. of Directive 88/361, certain Member States, such as Spain, were allowed a transitional period to be in full compliance with its provisions. Subsequently, Spain maintained a prior authorisation procedure for physical import and export of financial assets. However, the Court judged this measure to be incompatible in so far as a prior declaration procedure, permissible in its opinion under the Directive, could have had the same effect[90].

Another important case is Sanz de Lera and Others[91] , which basically dealt with the same Spanish measures, but with regard to third countries and under the new Treaty provisions. The Court confirmed the Bordessa judgment by declaring that national laws prohibiting the export of currency without prior authorisation are contrary to Community law, and confirmed that declaration of financial assets before taking them out of the country may be required by Member States[92].The ECJ added that admissible

[89] Joined cases C-358/93 and C-416/93 Bordessa ECR [1995] Page I-00361.

[90] " A requirement of that nature would cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory (see Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 34). It might have the effect of impeding capital movements carried out in accordance with Community law, contrary to the second paragraph of Article 4 of the Directive. Pursuant to that provision, the application of the measures and procedures referred to in the first paragraph "may not have the effect of impeding capital movements carried out in accordance with Community law". A prior declaration, on the other hand, may be one of the requisite measures which Member States are permitted to take since, unlike prior authorization, it does not entail suspension of the transaction in question but does still allow the national authorities to exercise effective supervision in order to prevent infringements of their laws and regulations. However, the Spanish Government defended the need for prior authorization, claiming that it was only by virtue of such a system that non-compliance could be classified as criminal and hence criminal penalties imposed. Failure to meet that requirement could also lead to confiscation of the capital sums involved in the crime. That view must, however, be rejected." Joined cases C-358/93 and C-416/93 Bordessa ECR [1995] Page I-00361. Paras 26-29.

[91] Joined cases C-163/94. C-165/94. C-250/94 Sanz de Lera [1995] ECR I-04821.

[92] " It follows that Articles 73b(1) and 73d(1)(b) of the Treaty preclude rules which make the export of coins, banknotes or bearer cheques conditional on prior authorization but do not by contrast preclude a transaction of that nature being made conditional on a prior

exceptions towards third countries were formulated in a precise manner in Article 57 , which left no room for appreciation on the restrictions that can remain[93].

It should be added that, on the cases related to the acquisition of immovable properties, court examined the similarities and differences of the money transfers and acquisition of real estate. This topic will be examined in dept under section 2.3, Case-law.

1.2.2.3.3 Article 58 in the Context of Public Policy and Security

The public policy and security considerations were already mentioned as acceptable exceptions in the other economic freedoms, the incorporation of

declaration." Joined cases C-163/94. C-165/94. C-250/94 Sanz de Lera [1995] ECR I-04821.Para 30.

[93] "The Court of Justice has, however, taken the view that provisions making currency exports conditional upon prior authorisation, in order to allow Member States to exercise supervision, may not cause the exercise of a freedom guaranteed by the Treaty to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory (Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 34; Joined Cases C-358/93 and C-416/93 Bordessa and Others [1995] ECR I-361, paragraph 25; and Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821, paragraph 25). The Court has stated that the restriction on the free movement of capital resulting from the requirement of prior authorisation could be eliminated, by virtue of an adequate system of declaration, without thereby detracting from the effective pursuit of the aims of those rules (see Bordessa and Others, paragraph 27, and Sanz de Lera and Others, paragraphs 26 and 27). That reasoning cannot be applied directly to a procedure prior to the acquisition of immoveable property, since the intervention of the administrative authorities does not, in that case, pursue the same objective. National administrative authorities cannot lawfully prevent a transfer of currency, with the result that their supervision, which reflects essentially a need for information, can also, in that field, take the form of a compulsory declaration. However, prior verification, in connection with the acquisition of property ownership, does not reflect merely a need for information, but can result in a refusal to grant authorisation, without necessarily being contrary to Community law. " Case C-302/97 Konle [1999] ECR I-3099. Paras 45-46.

these exceptions in the capital movements area by the entry into force of the present regime was justified[94].

It should be added that the Treaty does not detail the definitions of public policy and public security like the many ambiguous concepts under the chapter of free movement of capital and payments. This structure leaves quite a margin of discretion available to Member States to invoke these exceptions to forbid specific capital movements.

ECJ in the case, Paris Church of Scientology v PrimeMinister[95] on the compatibility of a prior authorisation procedure of investments for public policy and public security reasons can be relied upon "if there is a genuine and sufficiently serious threat to a fundamental interest of society"[96].

When the broad application article 56 taken in to consideration, the examples of public policy[97] and public security in the context of capital movements is likely to increase in the upcoming years through the case law.

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[94] The ECJ had developed in various judgements the notion of 'general interest' (also known as "mandatory requirements"), which appears to be close to the concept of 'public policy' and 'public security', but with a potentially broader scope of application.

[95]" It should be observed, first, that while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, to this effect, Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219, paragraphs 26 and 27). Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, to this effect, Rutili, cited above, paragraph 28, and Case C-348/96 Calfa [1999] ECR I-11, paragraph 21)." Case C-54/99 Eglise de Scientologie [2000] ECR I-1335. Para 17.

[96] This phrasing "a genuine and sufficiently serious threat " is quite parallel to the "The position would be different only if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to **real, specific and serious risks** which could not be countered by less restrictive procedures." On the assesment of article 297. See ; Case C-423/98 Albore ECR [2000] Page I-5965.

[97] Public policy might be more clear in the meaning of 'public order'.

1.2.2.3.4 Article 58 and the Right of the Establishment Reference

Article 58.1.(b) reads as follows

> 2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

Article 58(2) EC establishes a link between both Chapters of the Treaty by stating that "The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.", while Article 43 EC introduces a similar reference by providing that the right of establishment is "subject to the provisions of the Chapter relating to capital". In conclusion, the field of application of the two chapters on establishment, on the one hand, and on capital movements, on the other hand, arc distinct even if they overlap.

On the other hand , establishment is also a subset of direct investment under the Community legislation. According to the definition in the nomenclatura, direct investment includes in particular "establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings ".[98]

[98] "The nomenclature annexed to Directive 88/361 lists, the following movements under direct investments:
'I. Direct investments …
1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings. "Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty .OJ 1988 L 178. page.5.

As we stated under integration theories, the time table for achieving a complete freedom will differ to the complexity of the freedom . The liberalisation of capital movements and payments was only completed in 1994 with the introduction of Article 56 and following as a free- standing chapter in the Maastricht Treaty. In contrast, the Chapter relating to the right of establishment was already included m the 1957 Treaty.

1.2.2.3.5 Article 58 and the Principle of Non-Discrimination

> 3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.

First of all, contrary the general impression one can have, Article 58 is a article, that can be invoked in rare cases. However, the mentioned exceptions have to be interpreted by Member States in the light of the provisions of Article 58.3 , which provide that restrictions permitted under Article 58.1 and 58.2 must not constitute an arbitrary discrimination or a disguised restriction, as well as in accordance with the ECJ jurisprudence in this area. Article 58 must, as an exception to a fundamental freedom, be strictly interpreted.[99]

In other words, In exceptional circumstances, Member States may impose restrictions on the free movement of capital. The restrictions must be compatible with all the provisions of the Treaty.

[99] On public policy or security in see C-54/99 [2000] ECR I-1335. Para. 17 ; C-315/02 Lenz [2004] ECR I-7063. Para. 26.

As far as non-discriminatory measures are concerned, in case law of the ECJ The Court has confirmed in a number of judgments that restrictions liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions[100]:

i. they must be applied in a non-discriminatory manner;
ii. they must be justified by imperative requirements in the general interest;
iii. they must be suitable for securing the attainment of the objective which they pursue;
iv. they must not go beyond what is necessary in order to attain it.

1.2.3 General exceptions of the Treaty

Besides the exceptions detailed under the field of free movement of capital the EC Treaty provides also for more general exceptions in its final provisions.

Moreover, in the case law, the ECJ developed in its jurisprudence, the notion of general interest to justify exceptions to EEC Treaty rules which could not be justified by reference to public policy.

These three areas are as follows:

i. Article 295: Property Ownership

[100] " It follows, however, from the Court' s case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fullfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 Kraus v Land Baden-Wuerttemberg [1993] ECR I-1663, paragraph 32)." Case C-55/94.ECR [1995] Page I-04165.Para 39.

ii. Article 296: National security and defense

iii. General Interests

1.2.3.1 Property ownership exception and its limits

Article 295 EC reads as follows:

> This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

This article states that the Treaty is not interfere the system of property ownership existing in Member States, which means that public and private ownership may exist concurrently in the legal order of Member States. This allows Member States to maintain their system of property ownership in any case. In a sense of dualism, much can be expected from the exception. However, ECJs interprets the article strictly.[101]

The ambiguity and the abstract character of the had to be clarified by the court through case –law. For instance, cases arising from "golden shares" , the court ruled that that article does not have the effect of exempting the Member States systems of property ownership from the fundamental rules of the Treaty.[102]

[101] In the major cases, that we will examine in the following chapter, the interpretations of the court will be given in detail.

[102] "… However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (Konle, cited above, paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty." Case C-367/98. ECR 2002 Page I-04731.Para 42.

Moreover, as we discussed, from Maastricht criterion or Kopengahen criterion, from freedoms to principle of non discrimination and proportionality the room left for this article is very limited. As ECJ repeatedly states "National legislation on private ownership in Member States have to be compatible with basic Treaty provisions".

1.2.3.2 National Security and Defense Exception and Its Limits

Article 296 EC reads as follows:

> 1. The provisions of this Treaty shall not preclude the application of the following rules:
>
> (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
>
> (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.
>
> 2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

On the basis of this article, Member States may derogate from their capital movements obligations when national security is threatened either in general or in connection with the production of or trade in defense material. Typical measures that could serve that purpose are restrictions to investments in defense material manufacturers[103].

1.2.3.3 General Interest (Mandatory Requirements)

The ECJ had developed in various judgments the notion of general interest (also known as general good or mandatory requirements), which appears to be close to the concept of public policy and public security, but with a potentially broader scope of application[104]. In these judgments, the Court considered that the need to protect the general interest authorises Member States to derogate from Treaty obligations, including those governing capital movements.

It should be mentioned that the open ended list given by the court is not unlimited and may not be invoked any instance. The mandatory

[103] Although the list referred to in Article 296(2) EC should help defining the scope of application of this exception, it appears to be somewhat old-fashioned insofar as the original version adopted in 1958 was never updated afterwards. Anyhow, compatibility of restrictions with Treaty rules must be assessed on a case-by-case basis.

[104] "In the absence of common rules relating to the production and marketing of alcohol - a proposal for a regulation submitted to the council by the commission on 7 december 1976 (official journal c 309 , p . 2) not yet having received the council ' s approval - it is for the member states to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory .Obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision , the protection of public health , the fairness of commercial transactions and the defence of the consumer ." Case 120/78. ECR [1979] Page 00649. Para 8.

requirements are availed only in the absence of harmonization provided that the harmonization occupies the filed to the exclusion of member state competence[105].

The Court has recognized the following non exhaustive list of mandatory requirements

i. Effectiveness of fiscal supervision
ii. The protection of public health
iii. The fairness of commercial transactions
iv. The protection of the consumer
v. The protection of the environment
vi. The protection of the working conditions,
vii. The protection of the cinema as a form of cultural expression
viii. The protection of the social cultural character
ix. The protection of the fundamental rights
x. Preserving the maintenance of order in society
xi. Preventing the risk of seriously undermining the finance of social security system[106].

Under the free movement of capital, the case Veronica, court mentioned the notion of general good as a justification to derogate from the obligation to fully liberalise capital movements.

In this case, the ECJ examined the compatibility of a Dutch legislation preventing a domestic broadcasting organisation to carry out capital movements aiming at investing in a Luxembourg-based television station

[105] Barnard Catherine (2007) The substantive law of the EU: The four freedoms. Oxford University Press.Page 115.
[106] Barnard Catherine (2007) The substantive law of the EU: The four freedoms. Oxford University Press.Page 116.

targeting the Dutch market. The ECJ declared that the restriction imposed was justified by the general good, covering in this particular case cultural policy considerations[107].

There are many attempts in case law that Member States try to defend national restrictions by the need to protect the general interest. Anyhow to achieve such a defense they usually claim that protective provisions of Community directives were insufficient to actually guarantee the quality and the continuity of service in crisis situations. For this reason, commission published a communication on the Treaty provisions relating to these basic Single Market freedoms, on the basis of the EC J case -law in this matter. [108]

The Communication focuses on the exceptions that could justify discriminatory restrictions against investors and policy and public security. Following this explanations it considers under which non- discriminatory restrictions, based on general interest requirements, could be considered as compatible with the Treaty. The principles given is not different from the Gerhard case[109].

Moreover, when such national measures are enforced through general authorization procedures , these can only be considered as compatible with Articles 56 and 43 if they satisfy three additional conditions:

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[107]" It must first be borne in mind that, as the Court held in its judgments in Case C-353/89 Commission v Netherlands [1991] ECR I-4069, paragraphs 3, 29 and 30, and Case C-288/89 Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media [1991] ECR I-4007, paragraphs 22 and 23, the Mediawet is designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands." Case C-148/91 Veronico ECR [1993]Page I-00487.Para 9.

[108] Communication of the Commission on certain legal aspects concerning intra-EU investments" OJ C 220 /19.07.1997. Page 15.

[109] Case C-55/94.ECR [1995] Page I-04165.Para 39.

i. they must be based on a set of objective criteria,
ii. stable over time,
iii. made public.

These conditions seems not be sui generis. The main motivation behind this conditions is reducing to a minimum the discretion of national authorities. Thus, legal certainty in behalf of investor will increase. Otherwise, each non-discriminatory authorisation procedure could be implemented in such a way that its outcome would inevitably be discriminatory, while the ECJ indicated on several occasions that fundamental freedoms of the Treaty cannot be rendered illusory and exercising these rights cannot be submitted to the discretion of the administrative authorities[110].

Eventually, the Communication[111] declares in parallel to the court law that exceptions to Treaty rules exclude any interpretation based on economic considerations .

1.2.4 The Definition of "Movement Of Capital"

Article 56 EC or no other provision of the EC Treaty gives a detailed definition of movements of capital. Therefore the Court often made reference to Annex I to Directive 88/361/EEC, which includes a

[110] " As the Court held in paragraph 24 of Bordessa, authorization has the effect of suspending currency exports and makes them conditional in each case upon the consent of the administrative authorities, which must be sought by means of a special application. The effect of such a requirement is to cause the exercise of the free movement of capital to be subject to the discretion of the administrative authorities and thus be such as to render that freedom illusory (see Bordessa, paragraph 25, and Joined Cases 286/82 and 26/83 Luisi and Carbone v Ministero del Tesoro [1984] ECR 377, paragraph 34). "Joined cases C-163/94. C-165/94. C-250/94 Sanz de Lera [1995] ECR I-04821.Paras 24-25.

[111] The Communications goal was to aims to avoid any misinterpretation by Member States of Treaty exceptions allowing restrictions to investment - with an emphasis on general interest justifications

nomenclature of capital movements. However, this directive is no longer valid[112].

In its judgment in Trummer and Mayer, the Court states on this subject:

> It observed in that regard that, since the Treaty does not contain any definition of the term `movement of capital, its meaning should be determined by reference to the nomenclature in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5)[113].

Despite the fact that directive 88/361 is no longer technically in force, it is settled law that the "nomenclature" in Annex I of the Directive, listing the transactions and activities which are to be regarded as movements of capital, is still the most important indicative reference.[114] As we discussed in economic integration theories, free movement of capital represent the one of the final stages therefore such a directive that is detailed is a good reference point for the court.

[112] "As is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), capital movements include investments in real estate on the territory of a Member State by non-residents. That nomenclature still has the same indicative value for the purposes of defining the notion of capital movements (see Case C-222/97 Trummer and Mayer [1999] ECR I-1661, paragraph 21; Case C-464/98 Stefan [2001] ECR I-173, paragraph 5; Reisch and Others , paragraph 30; and Case C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-0000, paragraph 22).". Case C-370/05 Festersen [2007] ECR I-1129.Para23.

[113] Case C-22/97 Trummer and Mayer [1999] ECR I-1661 Paras. 20-21.Para 7.

[114] Case C-22/97 Trummer and Mayer [1999] ECR I-1661 Paras. 21.

In addition to nomenclatura, on the substance of the freedom , in Luisi and Carbone[115], ECJ ruled that movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service.

1.2.5 Acquisition of Immovable Properties and the Free Movement of Capital

As we discussed above, acquisition of immovable properties are regulated firstly in the annexed nomenclatura of directive 88/361. More over, freedom of movement of capital is defined under Chapter 4 of the acquis communitaire. Main points are payments and transfers of money across borders, including transfers of ownership of assets and liabilities as well. In our thesis, we will discuss the right of EU residents to purchase real estate in Turkey and Turkey's obligations and possible legislating opportunities in this field.

Although acquisition of immovable properties can be related to the other rights, we will discuss the particular links of it with the free movement of capital due to the recent case –law and the place of the right in the negotiation chapters. In following sections Case law, other links established by ECJ to the other freedoms will be given. Our main concern will be the purchase of land by non-residents or non-nationals[116] or in "golden share" cases[117] limited to interpretation of article 295.

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[115] "The general scheme of the treaty shows , and a comparison between articles 67 and 106 confirms , that current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction , whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service . For that reason movements of capital may themselves give rise to current payments , as is implied by articles 67 (2) and 106 (1)." Joined cases C-286/82 and C-26/83 ECR [1984] Page 00377. Para 21.

116 Case 182/83 Fearon [1984] ECR 3677; 116 Case 305/87 Commission v Greece [1989] ECR 1461 ; Case C-302/97 Konle [1999] ECR I-3099; Case C-423/98 Albore ECR [2000] Page I-5965 ; Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157; Case C-300/01 Salzman ECR [2003] Page I-4899 ; Case C-452/01 Ospelt

1.3 Case Law under the Field of Acquisition of Immovable Properties in EU

As we have discussed in previous chapter, acquisition of immovable properties is mainly linked to the free movement of capital in latest judgments because of the clear wording of the nomenclatura. According to my opinion, the old attitude to link this cases with other freedoms, mainly caused by the compensation efforts of the court due to lower levels of integration achieved till that day.

ECJ usually refer to below mentioned(major) cases in its judgments and in some cases such as Case C-367/98 Commission of the European Communities v Portuguese Republic court as a secondary matter, court interprets article 295[118].

We should also add that that, if we leave the case Fearon aside, the ratio legis of the national legislations and mechanisms attached it are becoming more complex by each new case. Court while interpreting the freedoms as widest as possible, creating a long list of mandatory requirement(General interest/Imperative requirements).Moreover, ECJ sometimes made suggestions on the proportionate mechanisms due to strong rationales of the national legislation.

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and Schlössle Weissenberg [2003] ECR I-9743 ; Case C-370/05 Festersen [2007] ECR I-1129.

[117] The golden share usually confers on the Member State government special powers of management or control over formerly State-owned or allegedly strategic companies or sectors, but this category also refers to cases where legislative measures restrict investing a certain level in a company or sector.

[118] In such conditions ECJ refer to undue limitiation of fundemental freedoms. "However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (Konle, cited above, paragraph 38), that **article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty**." Case C-367/98. ECR 2002 Page I-04731. Para 48. Moreover, we will focus on article 295 as "general exception" defence in the development of the case law.

1.3.1 Major Cases Under the Field of Acquisition of Immovable Property in ECJ's Case Law

The major cases in the acquisition of immovable property in chronologic order are as follows:

i. Fearon[119] (1984)

ii. Greece[120] (1989)

iii. Kolne[121] (1999)

iv. Beck[122](1999)

v. Albore[123] (2000)

vi. Reish[124] (2002)

vii. Salzman[125] (2003)

viii. Ospelt[126] (2003)

ix. Festersen[127](2007)

It should be noted that, after the case Greece[128], the dramatic changes in the treaty under the field of free movement of capital, strongly felt in the case-law.ECJ's methodology to asses breach of the community law especially in the field of acquisition of ımmovable property

[119] Case 182/83 Fearon [1984] ECR 3677. Para 38.
[120] Case 305/87 Commission v Greece [1989] ECR 1461.
[121] Case C-302/97 Konle [1999] ECR I-3099.
[122] Case C-355/97 Beck
[123] Case C-423/98 Albore ECR [2000] Page I-5965
[124] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157.
[125] Case C-300/01 Salzman ECR [2003] Page I-4899
[126] Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743.
[127] Case C-370/05 Festersen [2007] ECR I-1129.
[128] Case Konle of 1999 represents the first example.

ECJ's practically uses its traditional three-step methodology to assess the national legislation's compatibility with EC law[129]. The methodology might be observed in the cases related to the acquisition of immovable property as well.

i. ECJ identifies the principles of the single market which apply to the alleged restrictive national measure falls

ECJ usually identifies one or more freedoms might potentially obstructed by the national legislation

ii. ECJ ascertains whether thenational measure is compatible or not with the relevant principles of the single market;

ECJ firsly checks out if the measure is compatible or not with the relevant principles of the single market by firstly examining the national legislation and its possible effects to the basic freedoms.

iii. ECJ considers whether the restrictive measure can be justified under EC law under exceptions of the chapter or the general exceptions.

[129] Smits J. M. (2006) Elgar encyclopedia of comparative law. Edward Elgar Publishing.Page 23.

The third and last step is to ascertain whether a restrictive national measure qualifies for EC justification. In this regard, first, restrictive national measures have to be based upon the reasons set by the EC Treaty, which laid down by Article 58 for measures restrictive of free movement of capital and payments.

Alternatively, restrictive measures can be also based on mandatory requirements, provided that there exist no EC harmonizing measures aimed at protecting the public interests considered by the national measures. Second, national measures apply in a not discriminatory manner to all persons and undertakings carrying out an economic activities in the host Member State and they have to accord with the principle of proportionality[130].

Let's assume a case where there is a national legislation with ratio legis preventing speculation and the mechanism set by the national legislation is prior authorization and the land type is agricultural lands.

Court under this circumstances, possibly, points out free movement of capital in the first step. In the second step, after examining the national legislation, may, according to the rationals, concludes that it is not in all cases, infringe the community law[131]. Lastly court will asses the exceptions strictly and limit them with principle of non discrimination and

[130] Any discrenatory power vested to the national authorities are examined to be creating legal uncertainity, especially connected to the principle of non-discrimiation.

[131] "Thirdly, so far as concerns the condition as to proportionality, it must be borne in mind that a system of prior authorisation may, in certain circumstances, be necessary and proportionate to the aims pursued, if the same objectives cannot be attained by less restrictive measures, in particular by a system of declarations (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821, paragraphs 23 to 28; Konle , cited above, paragraph 44; and Case C-483/99 Commission v France [2002] ECR I-4781, paragraph 46)". Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743. Para41.

proportionality. In our example, court, most likely, concludes that, prior authorisation as a restrictive measure that goes beyond the purpose that is attained for if residence requirement and non-ownership of the farmers attached to the mechanism as we will discuss under the case Ospelt.

It should also be added that, if the natioanal legislation is well formulated and aiming general interest of the society, court will likely to enlarge the field of mandatory requirements. Moreover, court sometimes suggests proportional measures if the ratio legis is reasonable such as tax rate according to the time interval that the purchaser holds the property ownership or prior notification instead of prior authorisation.

On the other hand on the general exceptions of the treaty such as article 295, court, most likely, concludes that if there is undue limitation of freedoms, article will not cover the case under the mechanism of prior authorisation set forth by the national legislation.

1.3.2 Development of Case Law

1.3.2.1 Fearon[132] (1984)

1.3.2.1.1 The Relevant Freedoms of the Single Market

ECJ decided that right of establishment is the related freedom of the single market.

> …. , the restrictions on the acquisition and use by a national of one member state of land and buildings situated in another member state are among those which

[132] Case 182/83 Fearon [1984] ECR 3677.

> are to be abolished with a view to the realization of freedom of establishment[133] .

It should be mentioned that free movement of capital was a weaker freedom on the date of judgement therefore the relevant freedom on those days was right of establishment[134].

1.3.2.1.2 National Measure's Compatibility Test

The ratio legis of the national legislation was preventing speculation, to ensure as far as possible that the land belongs to those who work it. The requirement as a mechanism, attached was the residence requirement within the 3 miles of the farm owned.

This measure might potentially form an obstacle to the exercise of fundamental freedoms guaranteed by the EC treaty.

The court firstly examined the ratio legis of the national measures. Court concluded that :

> The purpose of both the land act 1933 and the land act 1965 is to increase the size of holdings of land which , if that were not done , could not be exploited on an economic basis , to prevent land speculation[135] , and , finally , to ensure as far as possible that the land

[133] Case 182/83 Fearon [1984] ECR 3677. Para 6.
[134] 16 years later in the case Albore ECJ stated that: " Whatever the reasons for it, the purchase of immovable property in a Member State by a non-resident constitutes an investment in real estate which falls within the category of capital movements between Member States." Case C-423/98 Albore ECR [2000] Page I-5965.para 14.
[135] See chapter 4.2.1 for the discussion on the prevention of land speculation

> belongs to those who work it . To achieve the latter objective , section 32 (3) of the land act 1933 , as amended by section 35 of the land act 1965 , provides that the Irish land commission cannot exercise its powers of compulsory acquisition against persons who have resided for more than one year within three miles of the land or against bodies corporate all of whose shareholders meet the same residence requirement .[136] .

It must be mentioned that this was the first case before the court and interesingly the Irish Land Commission seems to be the most compenent authority in all case law related to acquisition of immovable properties[137].

The ratio legis of act is composed of sound arguments excluding relation between landowner and farmer[138]. Moreover, exercise of the freedoms, is not prevented in the beginning of the process which enables the Land Comission to check if the purchaser will act according to the "intented use".

1.3.2.1.3 The Restrictive Measure's Justification Test Under EC Law

[136] Case 182/83 Fearon [1984] ECR 3677.Para 3.

[137] The Irish Land Commission was created in 1881 as a rent fixing commission by the Land Law Act 1881, also known as the second Irish Land Act. For a century it was the body responsible for re-distributing farmland in Ireland. The commission was dissolved on March 31, 1999 by the Irish Land Commission (Dissolution) Act, 1992.

[138] ECJ held that "Articles 73b to 73d, 73f and 73g of the Treaty do not preclude the acquisition of agricultural land being made subject to the grant of prior authorisation such as that established by the VGVG. However, they do preclude such authorisation being refused in every case in which the acquirer does not himself farm the land concerned as part of a holding and on which he is not resident. " Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743.Para 54.

This test usually includes general exceptions of treaty, article 295, article 296 and general interests that has been created by case law.

This test is concurrently carried on with an other test which can be called as compatibility of non discrimination & proportianality principle.

As a matter of fact, ECJ's case law usually refers to article 295(ex 222). In case Fearon, the reference is not as sound as the following cases:

> Consequently , although article 222 of the treaty does not call in question the member states ' right to establish a system of compulsory acquisition by public bodies , such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the treaty relating to the right of establishment[139] .

As it can easily be observed, ECJ endaouverd to create links between the r,ght of establishment, rule of non-discrimination. In the final cases such efforts can not be observed.

> That question must be answered in the affirmative if the obligation to reside on or near land is imposed by a member state , within the framework of legislation concerning the ownership of rural land which is intended to achieve the objectives set out above , both on its own nationals and on those of the other member states and is applied to them equally . A residence

[139] Case 182/83 Fearon [1984] ECR 3677.Para 9.

> requirement so delimited does not in fact amount to discrimination which might be found to offend against article 52 of the treaty [140].

The aforementioned paragraph gets closer to the term "intented use" that will be adressed in the upcoming judgements more oftenly (in caselaw related to acquisition of immovable properties)."Intended use" can be described as using land in line with the regıonal plans. In case Fearon, ratio legis and the restrictive measure were found not to be infringing the EC law. The court did not detailed the connections, criterion or the general exceptions of treaty.

1.3.2.1.4 ECJ's Ruling and Evaluation

Fearon case is an exceptional case that ECJ ruled that national legislation is proportionate. The court as we stated above did not give detailed explanations[141].

Secondly it must be added that there is no any prior authorization regquirement. In other words, Irish Land Commission did not prevent purchaser in the beginning of the process. [142]It should be mentioned that, if we leave the residence requirement apart, from the point of preventention of speculation, under use, non use and fragmentation, in our opinion, such a regime is still an exception under article 295.

[140] Case 182/83 Fearon [1984] ECR 3677.Para 10.
[141] In the following cases, none of residence requirements are considered to be proportional.
[142] When the conditions laid by the national legislation for cumpolsary acquisition fulfilled, then the commission commencing the process.

Thirdly, it must be mentioned that neither directive 88/361 nor the nomenclatura has not been enacted yet in the date of ruling therefore free movement of capital has not mentioned in this decision.

Lastly, it should be added that Irish Land Comission is a local, efficient body that is aiming to prevent speculation, under use, non use of agrıcultural lands.

1.3.2.2 Greece[143] (1989)

1.3.2.2.1 The Relevant Freedoms of the Single Market

In the judgement Commission v. Greece, ECJ held that infringed freedoms as are follows:

i. Free movement of Services[144]
ii. Right of Establishment[145]
iii. Free movement of Workers [146]

Advocate general addressed the same provisions as well. It should be mentioned that he underlined freedom of establishment. [147]

[143] Case 305/87 Commission v. Greece [1989] ECR 1461.
[144] "Similarly, with regard to freedom to provide services, access to ownership and the use of immovable property is guaranteed by Article 59 of the Treaty in so far as such access is appropriate to enable that freedom to be exercised effectively ."Case 305/87 Commission v Greece [1989] ECR 1461. Para 24.
[145]" With regard to freedom of establishment, Article 52 of the Treaty guarantees the right of nationals of a Member State who wish to work as self-employed persons in another Member State to be treated in the same way as nationals of that Member State and prohibits all discrimination on grounds of nationality arising under the legislation of the Member States and hindering access to or exercise of such activities ." Case 305/87 Commission v Greece [1989] ECR 1461.Para 20.
[146]" Therefore, in so far as the Greek legislation makes the right of workers who are nationals of other Member States and who were lawfully employed in the Hellenic Republic before or after 1 January 1981 to conclude any legal act relating to immovable property subject to conditions not imposed on Greek nationals, it constitutes an obstacle to freedom of movement for workers and is for that reason contrary to Article 48 of the Treaty ." Case 305/87 Commission v Greece [1989] ECR 1461.Para 19.

1.3.2.2.2 National Measure's Compatibility Test

In the case two major national legislation seem to be the main problematic area:

First one was Presidential Decree of 22 to 24 June 1927 provides that the acquisition by foreign natural or legal persons of ownership of immovable property, or other real rights therein, with the exception of mortgages, situated in border regions of the country[148].

Second one was the Articles 1, 2, 3, 4 and 5 of Emergency Law No 1366 of 2 to 7 September 1938 prohibit, in respect of both Greek nationals and nationals of other Member States, the conclusion of legal acts relating to immovable property situated in the border regions or on an island or islet forming part of the Hellenic Republic, or in a coastal area or an area in the interior of the country designated a border region[149].

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[147] ."The Treaty provisions most clearly infringed by the two types of restriction imposed by the Greek legislation on dealings with immovable property are the provisions on freedom of establishment, in particular Article 52 . The right to own or rent immovable property in another Member State is plainly an indispensable adjunct to the right of establishment there if that right is to have any practical substance . Moreover the right to own or rent such property must also, if it is to be meaningful, comprise the right to use and deal freely with the property . That such is the purport of Article 52 is confirmed by the wording of Article 54(3)(e) of the Treaty, as well as by the terms of the 1961 General programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition, Second Series IX, p . 7). Accordingly I consider that both categories of Greek legislation impugned in this case are contrary to Article 52 of the Treaty ." Opinion of Advocate General Jacobs. Case 305/87 Commission v Greece [1989] ECR 1461.Para 8.

[148] Case 305/87 Commission v Greece [1989] ECR 1461.Para 2.

[149] "It should be said that in response to the Commission' s letter of enquiry in 1984 and its reasoned opinion in 1985, the Greek Government already stated that amending legislation was on the way . Indeed the hearing in the present case, originally fixed for 6 December 1988, was postponed to 14 March 1989 at the Greek Government' s request in order to allow time for the amending legislation to be adopted . However, such legislation still has not been adopted ." Opinion of Advocate General Jacobs. Case 305/87 Commission v Greece [1989] ECR 1461.Para 7.

The discrimination in practice was so clear , contrary to the case Fearon. The natural persons of Greek nationality or legal persons under the management of Greek nationals may validly conclude such a legal act if they produce an attestation from the Ministry of Agriculture certifying that there are no objections to the conclusion of the legal act on security grounds. On the other hand, persons other than those mentioned above are permitted to conclude such legal acts only if the decree designating the area as a border region is revoked .[150]

Moreover the sum of areas that fall under the scope of the legislation was covering %55 of the Greek territory[151].

1.3.2.2.3 The Restrictive Measure's Justification Test Under EC Law

ECJ's attitude, as expected, was underlying the principle of non - discrimation. In such a regime, principle of proportioanality was not even dıscussed. The discussion of the issue was indirectly made in the case Albore 11 years later[152].

The court, in fact, in this case, concentrated on the discrimination based on nationality[153].

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[150] Case 305/87 Commission v Greece [1989] ECR 1461.Para 2.

[151]" The Commission considers that in so far as the abovementioned provisions prohibit, restrict or make subject to conditions not imposed on Greek nationals the acquisition by foreigners, whether natural or legal persons, who are nationals of one of the other Member States of rights in immovable property situated in Greek frontier regions, they give rise to discrimination against such persons, contrary to Articles 7, 48, 52 and 59 of the Treaty ." Case 305/87 Commission v Greece [1989] ECR 1461.Para 4.

[152] In our opinion, article 296 has to be questioned in that case, rather than article 295. The national legislation such as "Emergency law", "Presendential decree conderning border regions" are in fact are linked to public security and defence.

[153] "With regard to freedom of establishment, Article 52 of the Treaty guarantees the right of nationals of a Member State who wish to work as self-employed persons in another Member State to be treated in the same way as nationals of that Member State and prohibits all discrimination on grounds of nationality arising under the legislation of the Member States and hindering access to or exercise of such activities ." Case 305/87 Commission v Greece [1989] ECR 1461.Para 20.

Accoriding to the advocate general, the discrimation was not that obvious and he refrained from stating that there is a infringement the principle of non discrimation.[154]

1.3.2.2.4 ECJ's Ruling and Evaluation

In the development of the case law , following Fearon case, 5 years later, the ECJ interpreted freedoms as widest possible.

The case is anyway very different from the Fearon from many aspects. The ratio legis for the Greek Legislation was mainly national security where in the case Fearon, optimization of agricultural land usage. Although court did not analyse the exceptions regime, 11 years later in case Albore, both advocate general and the court stated on the issue.

[154] "The Commission also asks for a declaration that the Greek legislation in question infringes Article 7 of the Treaty . That legislation plainly discriminates on grounds of nationality, but I doubt whether it is appropriate for the Court to find an infringement of Article 7 if, as I propose, it finds an infringement of Articles 48, 52 and 59 of the Treaty . As is well established, those articles are specific manifestations, in the areas they deal with, of the general principle of non-discrimination stated in Article 7 : see, e.g . paragraph 12 of the judgment in Case 63/86 Commission v Italy . If a declaration of infringement of the specific rules is granted, it would seem otiose to grant in addition a declaration of infringement of the general principle; all the more so as Article 7 is expressed to be "without prejudice to any special provisions" contained in the Treaty . A declaration of infringement of Article 7 appears to be appropriate where no more specific basis is available (as for example in Case 293/83 Gravier v Liège ((1985)) ECR 593) but serves no useful purpose where a more specific basis is available (see the judgment of 14 July 1988 in Case 38/87 Commission v Greece, where Article 7 was relied on in argument but the form of order sought and the declaration granted were confined to Articles 52 and 59). A declaration under Article 7 might be appropriate in the case of discrimination against persons not covered by a more specific provision of Community law . However, the Commission has expressly refrained from arguing that point in this case and has submitted only that Article 7 is infringed inasmuch as Articles 48, 52 and 59 are infringed . Therefore I would not consider it appropriate in the present case to grant a declaration of infringement of Article 7 ." Opinion of Advocate General Jacobs. Case 305/87 Commission v Greece [1989] ECR 1461.Para 14.

It should be added that free movement of workers has never mentioned as the fundamental right infringed in the development of case law on the field of acquisition of immovable properties[155].

1.3.2.3 Kolne[156] (1999)

1.3.2.3.1 The Relevant Freedoms of the Single Market

As we discussed under the section 2.2.1, in 1999, the integration level of EU was at higher levels compared to the 1989.

First of all, Directive 88/361 became an integral part of the treaty[157] in 1997. Therefore following the case Konle, ECJ commenced to interpret the cases under free movement of capital[158].

Moreover, the court, in its caselaw on the field of acquisition of immovable properties made reference to directive 88/361 and nomenclatura. This might be interpreted as ECJ's tendency to examine cases under the free movement of capital.

> First of all, it is common ground that national legislation on the acquisition of land must comply with the provisions of the Treaty on freedom of establishment for nationals of Member States and the free movement of capital. The Court has already held that, as is apparent from Article 54(3)(e) of the

[155] In practise, only few states are opposing the sale of secondary homes such as Malta, Austria, Denmark.
[156] Case C-302/97 Konle [1999] ECR I-3099.
[157] Although as explained before, annexed nomenclatura of directive 88/361 is not technically in force but has an important indicative value.
[158] As we stated in the section 2.1. under "economic integration levels", free movement of capital represents the 4.level.

> Treaty, the right to acquire, use or dispose of immovable property on the territory of another Member State is the corollary of freedom of establishment (Case 305/87 Commission v Greece [1989] ECR 1461, paragraph 22). As for capital movements, they include investments in real estate on the territory of a Member State by non-residents, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5)[159].

Acordingly, Advocat General made references the freedom of establishment and the free movement of capital.[160] The major differences from the earlier cases started to form when ECJ starts to intepret the infringement under free movement of capital.

1.3.2.3.2 National Measure's Compatibility Test

[159] Case C-302/97 Konle [1999] ECR I-3099. Para 22.

[160] "As regards the criteria that may be relevant to the aspect of the case we are considering, the Court has moreover given clear and useful guidance as to principle in its judgment in Bordessa. That judgment is of particular interest for the purposes of the present case, in that it concerns prior administrative control procedures that have the effect of restricting free movement guaranteed by the Treaty. The decision in that case concerns the free movement of capital and it distinguishes between the system of authorisation, which the Court criticised because it entails suspension of the legal transaction that is the subject of the authorisation and because the procedure is subject to the discretion of the administrative authorities, and the system of prior declaration, which allows the authorities to exercise control over the achievement of the aim in view that is equally effective but less restrictive of the freedom traders should enjoy. The Court has also pointed out, in its judgments in Sanz de Lera regarding the free movement of goods and Parodi with respect to the freedom to provide services, that the means used to achieve the aim the legislature has in view must not exceed what is necessary for that purpose. Similar considerations may therefore apply to freedom of establishment, as I shall now explain." Opinion of Mr Advocate General La Pergola. Case C-302/97**.** ECR [1999] Page I-03099. Para 18.

The main problematic issue at hand was the standstill principle. According to the Article 70 of the Act of Accession Republic of Austria had the right to maintain its existing legislation regarding secondary residences for five years from the date of accession.

Second problematic area was the " prior authorization[161]" regime introduced by TGVG[162]. After the case Konle, it should be noted that all cases somehow linked to the prior authorisation. As the advocat general, points out clearly, this regime might potentially obstruct the exercise of freedoms[163].

The main point made by ECJ on case Konle can be the justification grounds for "prior authorization" regime. ECJ started to detail the differences between land and capital, the nature of exceptions.

[161] These regimes may be created in such a manner to leave national regulators with an excessively wide degree of discretion that obstacles the legal certainty. It must be assumed that ECJ is well aware of this tendency.

[162] TGVG stands for "Tyrol Law on the Transfer of Land".

[163] " That being established, let us begin by considering whether the provisions in question unduly restrict the freedom of establishment. As the Commission has observed, the Court has stated that `as is apparent from Article 54(3)(e) of the Treaty and the general programme for the abolition of restrictions on freedom of establishment of 18 December 1961, the right to acquire, use or dispose of immovable property on the territory of a Member State is the corollary of freedom of establishment'. A system of prior authorisation for the acquisition, such as the system prescribed in the TGVG 1996, **may therefore constitute an obstacle to the exercise of freedom of establishment**. It is true that the rules in the present case make no reference to the nationality of those to whom they are addressed and may be regarded in that respect as applicable without distinction. However, they must also comply with the criteria established in the Community case-law, according to which measures of this kind, in addition to being applied in a non-discriminatory manner, must be justified by imperative requirements in the general interest, must be suitable for securing the attainment of the objective which they pursue, and must not go beyond what is necessary in order to attain it. " Opinion of Mr Advocate General La Pergola. Case C-302/97**.** ECR [1999] Page I-03099. Para 15.

The case is founded on the legislation replacement after the accession. In date of accesion, TTGV 1993 was in force and later in 1996, replaced[164] with TTGV 1996 after constitutional court descion on TTGV 1993[165].

The Austrian Constitutional Court recognised the importance of the requirements laid down by the Tirol legislature in its judgment on the Tirol Raumordnungsgesetz. These are essentially to do with land management and they are determined by the particular characteristics of the region concerned, namely,

i. the limited amount of space suitable for human habitation,
ii. need to make sparing use of it; the pressing need to guarantee adequate accommodation for the resident population, in a situation where any increase in the already high number of secondary residences may cause property prices to rise and make purchase more difficult;
iii. the advantage of avoiding further development and other costs that would have repercussions for local communities if the demand for secondary residences was not kept within reasonable limits.[166]

We focused on the reasoning of the court because these are essential in the definition on the mandatory requirement created by the case Konle.

TTGV 1996 introduced new obstacles to acquirers. These were as follows:

[164] "By judgment of 10 December 1996, when the TGVG 1993 was already no longer in force, the Verfassungsgerichtshof (Constitutional Court) held that the Law was unconstitutional in its entirety since it involved an excessive infringement of the fundamental right to property." Case C-302/97**.** ECR [1999] Page I-03099. Para 8.
[165] "The Tiroler Grundverkehrsgesetz 1993 (Tiroler LGBl. 82/1993; Tyrol Law on the Transfer of Land, `the TGVG 1993'), adopted by the Tyrol in respect of transfers of land there, entered into force on 1 January 1994 and was replaced, with effect from 1 October 1996, by the Tiroler Grundverkehrsgesetz 1996 (Tiroler LGBl. 61/1996; `the TGVG 1996')." Case C-302/97 Konle [1999] ECR I-3099. Para 3.
[166] Opinion of Mr Advocate General La Pergola. Case C-302/97**.** ECR [1999] Page I-03099. Para 16.

i. declaration procedure extended to all acquirers[167],
ii. maintain the obligation for the acquirer to show that the acquisition will not be used to create a secondary residence[168].
iii. the foreign acquirer has to prove that he is exercising one of the freedoms guaranteed by the EC Treaty or the Agreement on the European Economic Area[169].
iv. Introduced accelerated procedure allowing authorisation[170].

As the Commission points, in 1993 the very same legislature had considered prior declaration to be an effective means of control to prevent immovable property that was acquired from being used for a secondary residence[171]. The fact is that the declaration procedure was reserved for Austrian nationals. Acquisitions by foreigners, including Community

[167] "The TGVG 1996 abolished the declaration procedure which had previously been limited to Austrian nationals alone and thus extended to all acquirers, by Sections 9(1)(a) and 12(1), the obligation to apply for administrative authorisation prior to the acquisition of land." Case C-302/97 Konle [1999] ECR I-3099. Para 10.

[168] "Sections 11(1)(a) and 14(1) of that Law maintain the obligation for the acquirer to show that the acquisition will not be used to create a secondary residence." Case C-302/97 Konle [1999] ECR I-3099. Para 11.

[169] "Additional conditions are still imposed on foreigners by Section 13(1)(b) of the TGVG 1996 for the acquisition of land, although they are not applicable, pursuant to Section 3 of the TGVG 1996, where the foreign acquirer furnishes proof that he is exercising one of the freedoms guaranteed by the EC Treaty or the Agreement on the European Economic Area." ." Case C-302/97 Konle [1999] ECR I-3099. Para 12.

[170] "Finally, Section 25(2) of the TGVG 1996 provides for an accelerated procedure allowing authorisation for the acquisition of land which is built on to be granted within two weeks if the conditions for authorisation are clearly satisfied. " Case C-302/97 Konle [1999] ECR I-3099. Para 13.

[171] "(6)However, Section 10(2) of the TGVG 1993 states that authorisation `is not ... required where the right acquired relates to land which has been built on and the acquirer makes a written declaration to the authority responsible for land transactions that he has Austrian nationality and that the acquisition will not be used to establish a secondary residence. (7) Furthermore, under Section 13(1) of the TGVG 1993, authorisation may be granted to a foreigner only on condition that the intended purchase does not conflict with the policy interests of the State and there is an economic, cultural or social interest in acquisition by the foreigner. That rule is not, however, applicable where it is precluded by **obligations under international agreements** (Section 13(2) of the TGVG 1993). (8) Under Section 3 of the TGVG 1993, which, unlike the remainder of the Law, did not enter into force until 1 January 1996, the condition for granting authorisation laid down in Section 13(1) is also inapplicable where the foreign **acquirer furnishes proof that he is exercising one of the freedoms guaranteed by the Agreement on the European Economic Area**." Case C-302/97 Konle [1999] ECR I-3099. Para 6-8.

nationals, were still subject to compulsory authorisation. The 1996 law abolished that disparity, requiring authorisation to be obtained in all cases, irrespective of the nationality of the person acquiring the property. Although a simplified procedure was allowed in certain cases, the new system nevertheless made the conditions for the acquisition of immovable property and the exercise of the right of establishment by nationals of other Member States more onerous, as compared with the system of prior declaration which the very same legislature had considered to be entirely appropriate for the purpose of exercising the necessary control and which it could therefore have maintained in force, with the necessary adjustments to extend it to Community nationals. That option would have achieved the aim in view just as well as the one that was actually chosen and would have impinged less on the freedom of establishment guaranteed by the Treaty[172].

1.3.2.3.3 The Restrictive Measure's Justification Test under EC Law

ECJ stated that the system of property ownership continues to be a matter for each Member State under Article 295(ex 222) of the Treaty, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty .[173] This conclusion is not much different that the case Fearon or Greece.

Accordingly, ECJ stated that, a procedure of prior authorisation, such as that under the TGVG 1996, which entails, by its very purpose, a restriction on the free movement of capital, can be regarded as compatible with Article 73b of the Treaty only on certain conditions.

ECJ, after, stating the exception, commenced giving the formula:

[172] Opinion of Mr Advocate General La Pergola. Case C-302/97. ECR [1999] Page I-03099. Para 19.
[173] Case C-302/97 Konle [1999] ECR I-3099. Para 38.

> In that regard, to the extent that a Member State can justify its requirement of prior authorisation by relying on a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector in certain regions, the restrictive measure inherent in such a requirement can be accepted only if it is not applied in a discriminatory manner and if the same result cannot be achieved by other less restrictive procedures.

The court simply underlined the principles of non discrimination and proportionality. Moreover started to define a new "mandatory requirement"

> … the TGVG 1996, which were produced by the applicant in the main proceedings and the significance of which for the interpretation of the Law has been accepted by the Republic of Austria, reveal the intention of using the means of assessment offered by the authorisation procedure in order to subject applications from foreigners, including nationals of Member States of the Community, to a more thorough check than applications from Austrian nationals. In addition, the accelerated authorisation procedure laid down in Section 25(2) is presented in that document as designed to replace the declaration procedure laid down in Section 10(2) of the TGVG 1993 and reserved for Austrians alone[174].

[174] Case C-302/97 Konle [1999] ECR I-3099. Para 41.

The court, then, compared the prior authorisation in the currency exports and acquisition of real estate and concluded that they have major differences[175].

The Court has stated that the restriction on the free movement of capital resulting from the requirement of prior authorisation could be eliminated, by virtue of an adequate system of declaration, without thereby detracting from the effective pursuit of the aims of those rules[176].

> After giving explanation on curreny transfers, court stated that the reasoning of the case-law cannot be applied directly to a procedure prior to the acquisition of immoveable property, since the intervention of the administrative authorities does not, in that case, pursue the same objective. National administrative authorities cannot lawfully prevent a transfer of currency, with the result that their supervision, which reflects essentially a need for information, can also, in that field, take the form of a compulsory declaration. However, prior verification, in connection with the acquisition of property ownership, does not reflect merely a need for information, but can result in a refusal to grant authorisation, without necessarily being contrary to Community law[177].

The paragraphs from 46 to 49 of the judgement are in a way, summurize ECJ's approach to the prior authorization regimes and acquisition of ımmovanle property

[175] Case C-302/97 Konle [1999] ECR I-3099. Para 40.
[176] Case C-302/97 Konle [1999] ECR I-3099. Para 44.
[177] Case C-302/97 Konle [1999] ECR I-3099. Para 45.

> A procedure simply involving a declaration does not, therefore, in itself enable the aim pursued to be achieved in the context of a procedure for prior authorisation. In order to ensure that the land is used in accordance with its intended purpose, as it appears from the national legislation in force, Member States must also be able to take measures where a breach of the agreed declaration is duly established after the property has been acquired[178].

Court, first of all, accept that, Member States must also be able to take measures where a breach of the agreed declaration is duly established after the property has been acquired.

> It is sufficient to note in that regard that an infringement of national legislation on secondary residences such as that at issue in the main proceedings may be penalised by a fine, by a decision requiring the acquirer to terminate the unlawful use of the land forthwith under penalty of its compulsory sale, or by a declaration that the sale is void resulting in the reinstatement in the land register of the entries prior to the acquisition of the property. Moreover, it is clear from the Austrian Government's replies to the questions from the Court that Austrian law provides for mechanisms of that kind[179].

Court simply states that proceedings may be

[178] Case C-302/97 Konle [1999] ECR I-3099. Para 46.
[179] Case C-302/97 Konle [1999] ECR I-3099. Para 47.

i. penalised by a fine,
ii. a decision requiring the acquirer to terminate the unlawful use of the land forthwith under penalty of its compulsory sale,
iii. a declaration that the sale is void resulting in the reinstatement in the land register of the entries prior to the acquisition of the property.

Thus, court accepts that such mechanisms can be inline with the community law. The court was inline with Fearon case on this statement.

Court, then, started to examine the case via the pricinciples of non discrimination and proportionality.

> …….. by adopting the TGVG 1993, the legislature of the Tyrol had itself acknowledged that prior declaration, established for the benefit of Austrian nationals, constituted an effective means of supervision capable of preventing the property concerned from being acquired as a secondary residence[180].

Court states that the risk of dicrimination and the relation of it the mandatory requirement as:

> ….. those circumstances, given the risk of discrimination inherent in a system of prior authorisation for the acquisition of land as in this case and the other possibilities at the disposal of the Member State concerned for ensuring compliance with its town and country planning guidelines, the authorisation procedure at issue constitutes a restriction on capital movements which is not essential if infringements of the national

[180] Case C-302/97 Konle [1999] ECR I-3099. Para 48.

legislation on secondary residences are to be prevented[181].

1.3.2.3.4 ECJ's Ruling and Evaluation

Court held that TGVG 1996 cannot, in any event, be covered by the derogation laid down in Article 70 of the Act of Accession and must therefore be that Article 73b of the Treaty and Article 70 of the Act of Accession preclude a scheme such as that introduced by the TGVG 1996[182].

The case Konle is a major case, in which, free movement of capital is held to be the major freedom that is infringed by the national measure.

Secondly the standstill principle as a definition of "existing legislation" is explained by the court[183]. It can be argued that this definition is parallel to the article 56 , in the sense of entry of free movement of capital, to cases, under the field of acquisition of immovable property.

The court also made reference to practice and its relation to the discrimination[184]. In a way, indirect discrimation was concluded thru the practice as well.

[181] Case C-302/97 Konle [1999] ECR I-3099. Para 49.
[182] Case C-302/97 Konle [1999] ECR I-3099. Para 50.
[183]: "Any measure adopted after the date of accession is not, by that fact alone, automatically excluded from the derogation laid down in Article 70 of the Act of Accession. Thus, if it is, in substance, identical to the previous legislation or if it is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation." Case C-302/97 Konle [1999] ECR I-3099. Para 52.
[184] " On the other hand, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing at the time of accession. That is true of the TGVG 1996 which includes a number of significant

Basically the case prohibits o concrete schemes of prior authorization for real estate acquisition for the purpose to control the use of real property (if it is used for secondary residence), only prior declaration (as in financial transfers) is not however sufficient; leaves the door open for prior authorizations.

On the subject of mandatory requirement, after 6 years, Advocat General referenced this case as follows:

> In Konle the Court accepted that national legislation imposes restrictions on the possibilities to acquire real property on account of a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector. In Reisch and Others the Court added that protection of the environment may also be taken as a basis for those same measures. I place a board interpretation on this basis in keeping with the objectives of Article 174 EC. It can be the intention to restrict the emission of pollutants in a particular region but also the preservation of assets of nature or the countryside. 185

differences when compared with the TGVG 1993 and which, even if it brings to an end, in principle, the dual scheme of land acquisition which existed before, does not thereby improve the treatment reserved for nationals of Member States other than the Republic of Austria, since it also lays down detailed rules for examining applications for authorisation which are designed, in practice, as the Court stated at paragraph 41 above, to favour applications from Austrian nationals. " Para 53

[185] Opınıon of Advocate General Geelhoed. Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 127.

Advocat general emphasis the term "natural resources" by giving the ratio legis as the intention to restrict the emission of pollutants in a particular region but also the preservation of assets of nature or the countryside

> The objectives which the Court accepted in Konle and Reisch and Others are also relevant in the present case. As is clear from the observations submitted by the Austrian Government in these proceedings, the VGVG serves inter alia interests of regional planning, the maintenance of a permanent ─ in this case agricultural ─ population, the preservation of particular economic activities, and the protection of the environment in connection with the dangers posed to neighbouring plots in the event of improper use186.

It might be argued that the list of imprersative requirements has commenced with the case Konle and list is getting longer by rationels justifiable under EC law.

1.3.2.4 Beck[187](1999)

1.3.2.4.1 The Relevant Freedoms of the Single Market

The facts related to the case caused ECJ to refrain from giving details on the relevant freedom of the single market. Factual questions and the transaction's date[188](Earlier than the accession) are the major reasons for

[186] Opınıon of Advocate General Geelhoed. Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 128.
[187] Case C-355/97 Beck ECR [1999] Page I-04977.
[188] "First, Community law cannot be relied upon in that dispute, whether ratione temporis - because both the transaction at issue, concluded on 14 October 1983, and the proceedings for annulment, brought by the Landesgrundverkehrsreferent on 28 March 1994, predated Austria's accession - or ratione materiae - because the transaction, concluded between two Austrian companies and having no legal effects outside Austrian territory, did not fall

this outcome. It should be added that the commission[189], court[190] and advocate general were on the same opion on the subject[191].

1.3.2.4.2 National Measure's Compatibility Test

The court repeated its findings in the case Konle in other words, simply underlined the Standstill principle parallel to the advocate general[192].As we

within the scope of Community law." Case C-355/97 Beck ECR [1999] Page I-04977. Para 19.

[189] "The Commission and the Austrian Government both take the view that the Court of Justice should not answer the question submitted by the national court. In their view, the description of the factual and legislative context set out in the order for reference is incomplete and does not enable the Court to understand either the significance of the question or its relevance to the decision to be given in the main proceedings. In fact it would appear from the information provided by the national court that the question raised is merely hypothetical. First of all, the case does not fall within the scope of Community law, since the contested transaction dates back to 1983, that is to say before Austria's accession to the Community. Community law is therefore inapplicable ratione temporis. In addition, every aspect of the case falls within the same Member State, with the result that the case lies entirely outside the scope of the Community rules." Opinion of Advocate General La Pergola **.** Case C-355/97 Beck ECR [1999] Page I-04977. Para 11.

[190] "Against that factual and legislative background, so defined by the national court and the accuracy of which is not a matter for this Court to ascertain (see, to that effect, Case C-352/95 Phytheron International [1997] ECR I-1729, paragraphs 9 to 14), it does not appear that the interpretation of the concept of `existing legislation' within the meaning of Article 70 of the Act of Accession is wholly unrelated to the main action, or that the problem is hypothetical, or that the Court lacks the factual or legal material necessary to give a useful answer." Case C-355/97 Beck ECR [1999] Page I-04977. Para 24.

[191] " I therefore believe that the Court should not answer the question referred by the national court for a preliminary ruling: any ruling on interpretation by the Court would - according to the terms of the order for reference - concern a merely domestic situation, since the main proceedings do not appear in any way to involve interests which merit protection under the Community legal order. Bearing this in mind, the question of interpretation raised by the national court is not, it would appear, `objectively needed for the decision to be taken by the national court', as required by the case-law of the Court. Where there is no such need, the Court clearly tends to decline jurisdiction to answer the questions submitted to it by the national court for a preliminary ruling. " Opinion of Advocate General La Pergola **.** Case C-355/97 Beck ECR [1999] Page I-04977. Para 11.

[192] "The essential issue raised by the national court has already been brought to the attention of the Court of Justice in the Konle case. On that point, therefore, I will merely refer to the assessments which I made in that case. (20) The issue which arises essentially consists in ascertaining whether legislation introduced after Austria's accession to the Community, in so far as it makes a reference to legislative provisions introduced prior to accession, may be brought within the scope of the derogating provision laid down in Article 70 of the Act of Accession. That article provides that `[n]otwithstanding the obligations under the Treaties on which the EU is founded, the Republic of Austria may maintain its existing legislation regarding secondary residences for five years from the date of accession'. It is therefore necessary to assess whether legislation such as the TGVG

discussed earlier, according to this principle setting of new procedures or new obstacles after the accession and before transitional periods end date is contrary to community law.

1.3.2.4.3 The Restrictive Measure's Justification Test Under EC Law

This test is not made in the judgement. Factual questions and the transaction's date (Earlier than the accession) are the major reasons for this outcome. It should be added that the commission, court and advocate general were on the same opion on the subject.

1.3.2.4.4 ECJ's Ruling and Evaluation

As parallel to the case Konle, the existing legislation and the legişslation in force compared and deceide that if it is in substance identical to the

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1996 - which was clearly introduced after accession - may nevertheless be regarded as legislation which may, under Article 70, be maintained in force. In my view, the answer must be in the negative. As I stated in my Opinion in the Konle case, we are dealing with a derogation which, in accordance with the Court's case-law, must be given a strict interpretation. (21) That derogation is intended to grant the Austrian State exemption from liability if, during the prescribed period, it maintains its own legislation on secondary residences. The derogation is thus applicable to the provisions existing at the time of accession. This means that, from that date, any further law-making by the Tyrol legislature remains outside the scope of Article 70 and must therefore necessarily comply with all the Community obligations from the observance of which Austria would be exempted if the derogation could apply. Chronologically speaking, the TGVG 1996 was clearly introduced after Austria's accession to the Community. In addition, it cannot be claimed, in my view, that that Law provides for merely procedural amendments to the previous system and leaves its provisions essentially unchanged. The TGVG 1996 introduces the general obligation to obtain authorisation for the acquisition of land and also permits the competent administrative authority to grant authorisation to the purchasers of the land in question by a fast-track procedure; no provision was made for either at the time of accession. (22) Furthermore, the abolition of the declaration procedure - previously envisaged by the TGVG 1993 - and the introduction of the authorisation procedure for everyone, further restricted the transferability of land. Therefore, the TGVG 1996 cannot either chronologically or substantively be regarded as forming part of the national legislation in force at the time of accession which is covered by the derogation provided for in Article 70. "Opinion of Advocate General La Pergola **.** Case C-355/97 Beck ECR [1999] Page I-04977. Para 12.

previous legislation or limits existing obstacles on freedoms from the Treaty, it is against the standstill principle. In other words, Setting of new procedures or new obstacles cannot be treated as existing legislation.

1.3.2.5 Albore[193] (2000)

1.3.2.5.1 The Relevant Freedoms of the Single Market

In case Albore, the relevant freedoms are found to be:

i. Freedom of Establishment
ii. Free movement of capital

In addition to that ECJ also added that the purchase of a property by non resident falls under the scope of free movement of capital neglecting the reasons:

> …. Whatever the reasons for it, the purchase of immovable property in a Member State by a non-resident constitutes an investment in real estate which falls within the category of capital movements between Member States. Freedom for such movements is guaranteed by Article 73b of the EC Treaty (now Article 56 EC) (see Case C-302/97 Konle v Austria [1999] ECR I-3099, paragraph 22)[194].

1.3.2.5.2 National Measure's Compatibility Test

[193] Case C-423/98 Albore ECR [2000] Page I-5965.
[194] Case C-423/98 Albore ECR [2000] Page I-5965.Para 14.

National measure was in a way was a barrier for non-nationals to acquire immovable properties in the military zones. As advocate general discussed its opinion, the barrier got stronger following the accession to community[195]. On the other hand, the issue was under the field of military interests therefore exceptions regimes has to be questioned under the third step.

1.3.2.5.3 The Restrictive Measure's Justification Test Under EC Law

Article 297 (in the development of the case law related to the acquisition of immovable properties) discussed in the case Albore. The case was in fact diretly related to the public security and defence[196].

> The position would be different only if it could be demonstrated to the competent national court that, in a particular area, non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.

The formulation for an exemption is given by ECJ as:

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[195] "....introduced by Law No 1095/1935, originally concerned all transactions without exception, irrespective of the purchaser's nationality. Law No 898/1976, which retained and enlarged the geographical scope of those provisions, stated that they were no longer to apply when the purchaser was an Italian national. That is to say, the discriminatory treatment of non-Italian nationals was introduced afterwards, at a time when Italy was already a member of the European Communities and under an obligation to observe the principles of the free movement of capital." Opinion of Advocate General Cosmas. Case C-423/98 Albore ECR [2000] Page I-5965.Para 74.

[196] Article 297(ex Article 224) reads as follows" Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."

i. real risks
ii. specific risks
iii. serious risks

It should be mentioned that while the court did not detailed the criterion, Advocate General endovoured to argue on the topic and concluded that from the point of view of Community law , the lack of satisfactory explanation as to the logic of the system of classifying Italian territory found to be discriminative.[197]

[197] " In short, Italian law provides no information explaining why and according to what criteria certain parts of national territory, as opposed to others, are of such military interest as to justify the application of special rules affecting foreign nationals with respect to the transfer of immovable property. That is to say there is no indication of the logical connection which specifically links the areas in question to the national military interest, or of the connection between the safeguarding of that interest and the application of a system of preventive authorisation to immovable property transactions where the purchaser is a non-Italian national. It should be pointed out that the lack of a statement of the reasons on which the contested legislation is based cannot be justified, as the Italian Government attempted to do at the hearing, by relying on a general and undefined concept of military secrecy. The latter might justify a refusal to disclose specific information regarding the particular military interest of a certain area. It is not, however, capable of remedying the designation, without any reasons, of extensive areas of Italian territory as areas of military importance. A distinction has to be made between the general system of designating certain areas as being of military importance, the logic of which the Italian authorities must be able to explain, and specific applications of that system, which may be covered by military secrecy.
While the Member States may have a wide degree of discretion in adopting the criteria whereby certain regions are subject to special rules for reasons of a military nature, they cannot refrain entirely from defining any such criteria, possibly effecting an arbitrary classification of the various parts of national territory. Otherwise, there would be nothing to prevent States from making the whole of their particular territory subject to special rules and thereby introducing a very extensive restriction on the free movement of capital, by relying, without any explanation, on the military importance of that territory. Such a practice is manifestly wrongful from the point of view of Community law. I consider it appropriate at this point to make two further observations which aggravate the position of the contested Italian legislation from the point of view of its compatibility with Community law. First, it is not without significance that the system of prior authorisation for transfers of immovable property in areas of military importance, as introduced by Law No 1095/1935, originally concerned all transactions without exception, irrespective of the purchaser's nationality. Law No 898/1976, which retained and enlarged the geographical scope of those provisions, stated that they were no longer to apply when the purchaser was an Italian national. That is to say, the discriminatory treatment of non-Italian nationals was introduced afterwards, at a time when Italy was already a member of the European Communities and under an obligation to observe the principles of the free movement of

The court also added that non discrimination and proportionality principle must be taken in to consideration while protecting military interests.

Court did not given detailed description of the real, specific and serious risks. It can be argued that, court implied that, article 297 is an article that has to be interpreted very strictly. On the other hand, it is arguable that the Advocates General's assumptions of actual risks might have formed the grounds for this decision.[198]

1.3.2.5.4 ECJ's Ruling and Evaluation

The court, started to weighs free movement of capital in cases related to acquisition of immovable properties.

Also, court directly commented on the military interests and their limitations. This could have been expected to happen in case Greece, but the court waited 11 years to give the new formula. Advocat's general

capital.." Opinion of Advocate General Cosmas. Case C-423/98 Albore ECR [2000] Page I-5965.Paras 70-75.

198 "To move on from the purely theoretical level, I shall now attempt to transpose the foregoing considerations into the context of the present case. I ask myself whether the disputed provisions prohibiting the acquisition of rights in rem in areas designated as being of military importance could fall within the scope of Article 224. If the prohibitions concerned were of a temporary and special nature it would not be impossible, in my view, to answer this question in the affirmative. I need only mention the state of anarchy which prevailed for a time in Albania, a country neighbouring on Italy, or, a fortiori, Italy's involvement in NATO operations in Bosnia and, more recently, Kosovo. Could anyone deny the Italian authorities the right to regard those occurrences as threats of war or as special circumstances arising from an international obligation accepted for the purpose of maintaining peace and international security? Having regard to the instability reigning in the Balkans for the past five years, could Italy be denied the possibility of also maintaining pre-emptive prohibitions such as that at issue here during periods when, although international order and security have been re-established, it is not clear that the problems are over once and for all? Could the Community judicature, in that case, subject the measures concerned, enacted to protect national military interests, to a full review of their proportionality and hold, for example, that the island of Ischia is not situated in an area which is at risk to a greater or lesser degree? Or could it maintain, as Mr Albore suggests, that military imperatives of that kind no longer exist?" Opinion of Advocate General Cosmas. Case C-423/98 Albore ECR [2000] Page I-5965.Para 33.

formulation and comparative wievs relating to the case should be taken in to consideration. [199] It must be mentioned that ın Greece case, protection of public security did not constitute a substantive element of the Court's review.

1.3.2.6 Reish[200] (2002)

1.3.2.6.1 The Relevant Freedoms of the Single Market

In the case Reish, ECJ defined the relation ship of free movement of capital and the freedom of establishment. Acording to the court, exercise of the latter generates a capital flow.

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[199] "Before analysing this particular point, I consider it essential to emphasise the differences distinguishing the present case from the case which the Court dealt with in Commission v Greece. The subject-matter of that judgment was similar to that of the present case, because it concerned the conformity with Community law of national legislation prescribing special rules for foreign natural or legal persons on the drawing up of legal instruments relating to immovable property situated in border regions. However, in Case 305/87 the Court did not address some of the questions that have been raised in the context of the present case. More specifically, the Greek Government did not contest the complaints made against it by the Commission alleging that the Greek legislation infringed Articles 48, 52 and 59 of the Treaty, but merely made reference during the written procedure to the existence of a draft law which was intended to amend the legislation complained of. Furthermore, when, at the hearing, the Greek Government argued for the first time that the measures at issue were justified under Article 224 of the Treaty, it did so without further elucidation, and the Court did not consider the substance of that submission. Lastly, the Court, given the subject-matter of the dispute before it, merely declared that the Greek legislation was contrary to Articles 48, 52 and 59 of the Treaty, without considering whether that legislation might be justified by imperatives relating to the defence of Greece's military interests; in other words, the question of the relationship between the national prohibitions in question and the protection of public security did not constitute a substantive element of the Court's review.. The Court has consistently held that Treaty provisions which permit the adoption of national measures derogating from generally applicable Community rules must, because they constitute exceptions, be interpreted narrowly. National measures which introduce or maintain obstacles to or restrictions on freedom of movement are subject to full review of their proportionality in order to determine whether or not they are compatible with the Member States' obligations under the provisions of primary Community law. No national derogating measure may be disproportionate to the intended objective and every such measure must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard." Opinion of Advocate General Cosmas. Case C-423/98 Albore ECR [2000] Page I-5965.Paras 48-49.

[200] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157.

> First, as is apparent from Article 44(2)(e) EC, the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment (Case 305/87 Commission v Greece [1989] ECR 1461, paragraph 22[201]), generates capital movements when it is exercised.[202]

It may be assumed that, to refine and detail the "Whatever the reasons for it, the purchase of immovable property in a Member State by a non-resident constitutes an investment in real estate which falls within the category of capital movements between Member States" conclusion reached in the case Albore, these detailed pragraphraphs are expressed in the judgement.

> Secondly, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), capital movements include investments in real estate on the territory of a Member State by non-residents. That nomenclature still has the same indicative value for

[201] " In particular, as is apparent from Article 54(3)(e) of the Treaty and the General programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p . 7), the right to acquire, use or dispose of immovable property on the territory of a Member State is the corollary of freedom of establishment ." Case 305/87 Commission v Greece. Para 22.

[202] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 29.

the purposes of defining the notion of capital movements [203].

1.3.2.6.2 National Measure's Compatibility Test

As we discussed the case Konle, we have argued that, prior authorization under some conditions might be justified unde EC law. The case Reish may be evaluated as the refinement of the case Konle, from this particular point of wiev. Furthermore, national legislation would not easily found out to be infringing the community law[204].

The ratio legis of national measure seems to be creating stable economic condition all the year. The mechanism attached to this very purpose is the prior authorisation. The main procedure established by SVSG was as follows:

i. The Salzburger Grundverkehrsgesetz of 1997 seeks, within the framework of regional planning policy, to prevent tourist activities from becoming dominant in certain regions. To this end, the Grundverkehrsgesetz provides for rules requiring the number of

[203] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 30.

[204] In this case, we will focus on the national measure therefore we will detail the national legislation. The cases before this one on the prior authorisation seems to be clearly contrary to community order. In this case, it is not easy to defend such a clear infringement. Also as the advocate general states(while comparing case with case Konle): "The cases here under discussion concern national legislation which, at first sight, entails a less severe restriction of free movement. In the case of this notification and authorisation procedure, the court requesting a preliminary ruling claims, it is normally enough for the acquirer of building land to make a declaration to the appropriate authority as to the future use of the land. The authority is obliged to accept the declaration unless it has good reason to doubt it. Only then is a procedure similar to the prior authorisation referred to in the Konle judgment set in motion. Such authorisation may, moreover, have conditions and requirements attached and may be subject to the lodging of security. Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 30.

secondary residences in the Land of Salzburg to be limited. It introduces both a notification and authorisation procedure before immovable property is acquired and a system of subsequent supervision and sanctions. In other words, it governs the use of immovable property for secondary residences. The point of departure for the legislature is the acquisition of immovable property.

ii. Under Austrian Law ownership of immovable property is acquired by means of a court-approved entry (acquisition of title) in the land register. In connection with the approval of an entry of property the Grundbuchsgericht (Land Registry Court) is required to consider whether an authorisation of transfer is necessary and, if so, whether this authorisation has been issued or whether ownership may be acquired without an authorisation of transfer. The applicable legislation is to be found both in federal law and in rules laid down by the Länder[205].

iii. Paragraph 12 of this Law states that legal transactions concerning building plots are permissible only where the acquirer of title submits a declaration[206].

iv. Paragraph 12(3) requires him first to declare that he is an Austrian national or a foreigner taking advantage of one of the freedoms

[205] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 2.
[206] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 4.

guaranteed by the EC Treaty or the Agreement on the European Economic Area[207].

v. He must further declare his intention to use the land as his principal residence or for professional purposes. He may declare that he intends to use the land for a secondary residence only if the land was used for a secondary residence prior to 1 March 1993 or is located in an area designated for secondary residences[208].

vi. On the basis of the user's declaration the Grundverkehrsbeauftragter (Land Transfer Agent) issues a confirmation. He may refuse to issue the confirmation only if he has good reason to fear that the acquirer will not use the land in accordance with the declaration or that the acquisition is inconsistent with the purpose of the law. In this event he refers the acquirer to the Grundverkehrslandeskommission (Land Transfer Commission of the Land), which may approve the transfer, but it too is bound by the substantive criteria governing transfers to which I have referred above (in principle, use of the land for a principal residence or for professional purposes) and which seek to limit the number of secondary residences[209].

vii. Without the confirmation of the Grundverkehrsbeauftragter or the approval of the Grundverkehrslandeskommission no building land may be acquired in the Land of Salzburg since, if neither of these

[207] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 5.
[208] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 6.
[209] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 7.

documents has been issued, the authorisation required by Austrian law for the transfer of ownership does not exist[210].

viii. Paragraph 19 of the Grundverkehrsgesetz requires the acquirer to use the land in accordance with the declaration which he has submitted pursuant to Paragraph 12 of that Law[211].

ix. Under Paragraph 19 conditions and requirements may also be attached to the approval granted by the Grundverkehrslandeskommission with a view to ensuring that the acquirer uses the land in accordance with his declaration. The acquirer may further be required to lodge a security. The competent authority can set the security at a reasonable sum, which may not exceed the purchase price or value of the land[212].

x. Under Paragraph 42 of the Grundverkehrsgesetz the Grundverkehrsbeauftragter may take legal action to have a land transaction declared void. The court may declare a land transaction void if it is fictitious or is intended to circumvent the law[213].

The court simply stated that national legislatiin restrict, by their very purpose, the free movement of capital:

[210] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 8.
[211] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 9.
[212] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 10.
[213] Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 11.

> It is not in dispute that those measures, by laying down a procedure of prior notification/authorisation for the acquisition of immovable property, restrict, by their
>
> very purpose, the free movement of capital (see, to that effect, Konle, cited above, paragraph 39)[214].

Then court move to the third step stating that justification will have to be inline with non discrimination and proportionality principles.

> Such restrictions may nevertheless be permitted if the national rules pursue, in a non-discriminatory way, an objective in the public interest and if they observe the principle of proportionality, that is if the same result could not be achieved by other less restrictive measures[215].

1.3.2.6.3 The restrictive measure's justification test under EC law

At first place, the court, citing case Konle, stated that, restrictions on the establishment of secondary residences in a specific geographical area, which a Member State imposes in order to maintain, for regional planning purposes, a permanent population and an economic activity independent of the tourist sector, may be regarded as contributing to an objective in the public interest. Thus under the filed of mandatory requirements public interest as a new mandatory requirement has been defined. Court then refined the exception and stated that, the finding can only be strengthened

[214] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 32.
[215] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 33.

by the other concerns which may underly those same measures, such as protection of the environment.

In addtion to that court stated that, it is apparent from the provisions of the SGVG that they do not discriminate between Austrian acquirers of title and persons resident in other Member States who exercise the freedoms guaranteed by the Treaty[216].

We should underline that, since case Fearon such statetements observed for the first time. It should be also added that 18 years later, the court concluded that at least, a part of legislation is inline with community.

Court stated that a requirement of declaration prior to the purchase of building plots, coupled with the possibility of penalties for breach of the agreed declaration, for regional planning purposes, did comply with Community law. The procedure laid down by the SGVG is essentially declaratory in principle.[217]

> As the Austrian Government points out, it is only where the Grundverkehrsbeauftragter considers that there are grounds for believing that the property is not being used lawfully that he must refer the acquirer of title to the Grundverkehrslandeskommission for the transaction to be submitted to the authorisation procedure. That minimum requirement of prior notification has the advantage, unlike supervision procedures which are applied only a posteriori, of providing the acquirer of title with an element of legal

[216] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 34.
[217] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 35.

> certainty. Furthermore, it may be thought that prior examination is better suited to preventing certain damage, which is reparable only with difficulty, caused by hastily completed building projects. Thus, the formality of prior notification may be regarded as a step which is additional to the criminal sanctions and the action for annulment of the sale which the administrative authorities may bring before the national court. In those circumstances, this first aspect of the procedure instituted by the SGVG may be regarded as compatible with Community law[218].

In the above mentioned finding of the court it must be underlined that prior notification procedure is important to start legal mechanisms attached to rationale legis that are compatible with EC law.

> As regards the procedure of prior authorisation before the Grundverkehrslandeskommission, by contrast, the Court has already held that restrictions on the free movement of capital resulting from the requirement of prior authorisation were able to be eliminated by means of an appropriate notification system without thereby detracting from the effective pursuit of the aims of those rules[219].

[218] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 36.
[219] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 37. Also see Joined Cases C-358/93 and C-416/93 Bordessa and Others [1995] ECR I-361, paragraph 27, and Joined Cases C-163/94, C-165/94 and C-250/94 Sanz de Lera and Others [1995] ECR I-4821, paragraphs 26 and 27).

Court after finding declatory regime comptaible with EC law for the aims to be achievd in national legislation, started to analyse the prior authorization regime.

> In the main proceedings, given the opportunity for supervision which the prior notification scheme affords to the public authority, the existence of criminal sanctions and a specific action for annulment which may be brought before the national court should the project carried out fail to comply with the initial declaration, the prior authorisation procedure, which the Grundverkehrsbeauftragter alone may initiate on the basis of mere presumptions, cannot be regarded as a measure which is strictly indispensable to prevent infringements of the legislation in issue in the main proceedings in respect of secondary residences. This is all the more so given that the competent authorities may make the grant of prior authorisation subject to requirements on which the SGVG does not impose any substantive restriction, and require the acquirer of title to provide security up to the value of the property[220].

The court on the prior authorisation procedure before the Grundverkehrslandeskommission, stated that, the go beyond both that

[220] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 38.

which is necessary to achieve the chosen regional planning objective[221] and the measures which Member States are entitled to take, as set out in Article 58.1.b EC, to prevent infringements of their laws and regulations[222].

We should underline that, according to court, prior notification give the opportunity for supervision to the public authority. Moreover there are criminal sanctions and a specific action for annulment which may be brought before the national court when the project carried out fail to comply with the initial declaration.

Accordingly, court decided that Articles 56 EC to 60 EC do not preclude a prior notification procedure such as that laid down by the scheme for the acquisition of land established by the SGVG and preclude a prior authorisation procedure such as that laid down by that scheme[223]. This conlusion differs from the advocate general's opinion on "not precluding the prior notification mechanism"[224].

1.3.2.6.4 ECJ's Ruling and Evaluation

[221] In line with advocate general and general principles of EC law, "The provisions of the Salzburger Grundverkehrsgesetz of 1997 should be assessed on the basis of the Court's settled case-law, as set out, for example, in its judgment in Gebhard: national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it." ." Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 123.

[222] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 39.

[223] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 60.

[224] "Community law, in particular the rules on the freedom to provide services and, in conjunction therewith, the rules on the free movement of capital, does not preclude a notification and authorisation procedure relating to the acquisition of immovable property which is necessary for regional planning reasons and which does not result in a disproportionate restriction. Unrestricted power to impose conditions and requirements must be regarded as constituting such a disproportionate restriction." Opinion of Mr Advocate General Geelhoed**.** Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157. Para 134.

Firstly, we should underline that, since case Fearon such statetements observed for the first time. It should be also added that 18 years later, the court concluded that at least, a part of legislation as compatible with community law.

Secondly, court confirmed (the mandatory requirement it discussed in the case Konle) that restrictions on the establishment of secondary residences in a specific geographical area, which a Member State imposes in order to maintain, for regional planning purposes, a permanent population and an economic activity independent of the tourist sector, may be regarded as contributing to an objective in the public interest

Lastly, court found prior notification procedures compatible with EC law. On the other hand, after the case KOnle, the court show that it will interpret exceptions strictly and the room left for prior authorization is very limited. As we discussed in case Konle, the court stated that, under some conditions prior authorisation might be justified under EC law.

1.3.2.7 Salzman[225] (2003)

1.3.2.7.1 The Relevant Freedoms of the Single Market

Court simply referenced the free movement of capital:

> Thus, national measures such as those at issue in the main proceedings, which regulate the acquisition of land for the purposes of prohibiting the establishment of secondary residences in certain areas, must comply

[225] Case C-300/01 Salzman ECR [2003] Page I-4899.

> with the provisions of the Treaty.[226] on the free movement of capital (Konle , paragraph 22, and Reisch , paragraph 28).

1.3.2.7.2 National Measure's Compatibility Test

Ratio legis was to ensure optimal use of the land and the mechanism attached to it was that prior authorisation, which entails an "obligation to build" for the acquirer of a building plot[227].

It should be added that, the case was founded on a different occasion than the case Kolne and case Reish. The major difference was the acquirer's arguments based on the EEA agreement in the derogation period.Court stated that:

> ….effects of the EEA Agreement, within the national legal system of which the referring court forms part, during the period prior to the accession of the Republic of Austria to the European Union, that is to say, in a situation which does not come within the Community legal order[228]

However, court , gave more explanations and criterion in assesing the rationales and mechanisms. As expected core of the case is discussed under the principle of non-discrimination and proportionality.

1.3.2.7.3 The Restrictive Measure's Justification Test Under EC Law

[226] Case C-300/01 Salzman ECR [2003] Page I-4899.Para 39.
[227] In this case, plot witout buildings is at hand. We should add that plots are non-agricultural plots.
[228] Case C-300/01 Salzman ECR [2003] Page I-4899.Para 70.

Court interpreted Article 222 of the EC Treaty (now Article 295 EC) firstly in line with the previous cases:

> As a preliminary point, it must be recalled that, although the legal regime applicable to property ownership is a field of competence reserved for the Member States under Article 222 of the EC Treaty (now Article 295 EC), it is not exempted from the fundamental rules of the Treaty (Konle , paragraph 38).[229]

Court, simply, underlined that undue limitation of fundamental freedoms could not be covered by article 295.

From the point of principle of non-discrimination court gave the formula defined in case Konle and Reish. Court firstly, pointed out the connection of discrimination and discretionary power vested in authorities. The reason for that is requirement of the acquirer to produce proof of the future use of the land he is acquiring[230].

It should be mentioned that Advocat General has reached to the parallel findings as the court[231]

[229] Case C-300/01 Salzman ECR [2003] Page I-4899.Para 39.
[230] "It must be observed, however, that, in so far as it requires the acquirer to produce proof of the future use of the land he is acquiring, a measure such as Paragraph 8(3) of the VGVG allows the competent administrative authority considerable latitude which may be akin to a discretionary power (see, to that effect, Konle , paragraph 41). . It is therefore possible that a prior authorisation procedure such as that at issue in the main proceedings could be applied in a discriminatory way" Case C-300/01 Salzman ECR [2003] Page I-4899.Paras 46-47.
[231] "On the discretionary power vested in the administrative authorities .....It should be remembered that Paragraph 8 of the VGVG attaches two conditions to authorisation of the

On the other hand, on this very case, discussions made on optimal use of land and the findings of the court is critical. Court firstly stated on the general interest and repeated its findings in case Konle and Reish[232].

Secondly, court analysed the rationale and its proper use. Firstly, court stated that prior authorisation lacked to guarantee the optimal use. Then added that procedure simply involving a declaration is not necessarily sufficient to enable the aim pursued by the public authority by recourse to a prior authorisation procedure to be achieved. Finally, concluded, inline with

acquisition of rights in unbuilt plots of land. The acquirer of title must demonstrate adequately that the land is not being purchased with a view to establishing a holiday residence thereon and that it will within a reasonable time be dedicated to a use in accordance with the land-use plan or is required for public interest, charitable or cultural purposes. As to the first condition, it is not, as the Court indicated very clearly in Konle , possible for the person seeking authorisation to provide incontrovertible proof of the future use of the land to be acquired. It follows that the administrative authorities have, in determining the probative value of the information received, considerable latitude which is closely related to a discretionary power. As to the second condition, it should be noted that several possible uses of the intended building are listed without any further guidance as to how the competent administrative authorities could give preference to one of those uses for a particular parcel of land. It is simply stated that the building project must be in accordance with the land-use plan or serve public interest, charitable or cultural purposes. The acquirer of title is, moreover, required to show adequately that the land will within a reasonable time be assigned to a use in accordance with these uses but without any indication as to what particulars would constitute the necessary proof. In the absence of clarification by the Austrian authorities of the criteria applied by the administrative authorities in assessing whether the second condition is met, it must be stated that this lack of clarity is, here again, such as to leave those authorities with very considerable latitude which is closely related to a discretionary power. It is settled case-law that a prior authorisation scheme such as that in the present case must be based on objective, non-discriminatory criteria which are known in advance to the persons concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Where, as in the present case, the specific, objective circumstances in which prior authorisation will be granted or refused cannot be determined, the Court has taken the view that such lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article 73b of the Treaty, so that such a scheme must be regarded as contrary to the principle of legal certainty." Opinion of advacat General. Case C-300/01 Salzman ECR [2003] Page I-4899.

[232] " In that regard, it is settled case-law that restrictions on the establishment of secondary residences in a specific geographical area, which a Member State imposes in order to maintain, for town and country planning purposes, a permanent population and an economic activity independent of the tourist sector, may be regarded as contributing to an objective in the public interest (see Konle , paragraph 40, and Reisch , paragraph 34)." Case C-300/01 Salzman ECR [2003] Page I-4899.Para 44.

the settled case, a procedure simply involving a declaration may in fact, if it is coupled with appropriate legal instruments, make it possible to eliminate the requirement of prior authorisation without undermining the effective pursuit of the aims of the public authority[233].

Court, after giving the summary of settled case law, pointed out the mechanisms that might be used to pursue the ratio legis:

i. specific action for annulment of the contract of sale, provided for in Paragraph 25(2) of the VGVG,

ii. a penalty consisting of the compulsory sale of the land in question, which may be ordered under Paragraph 28 of the VGVG.

Court on the principle of proportionality, concluded that, prior authorisation procedure cannot be regarded as a measure strictly necessary in order to achieve the town and country planning objective pursued by the national legislation at issue in the main proceedings[234].

[233] Case C-300/01 Salzman ECR [2003] Page I-4899.Paras 45-50.

[234] "In this case, in a situation characterised, on the one hand, by the fact that under the system of prior declaration the public authority can check that acquisition and building projects conform to the land use plan, and, on the other hand, by the availability of pecuniary sanctions, of a specific action for annulment of the contract of sale, provided for in Paragraph 25(2) of the VGVG, and of a penalty consisting of the compulsory sale of the land in question, which may be ordered under Paragraph 28 of the VGVG, the prior authorisation procedure cannot be regarded as a measure strictly necessary in order to achieve the town and country planning objective pursued by the national legislation at issue in the main proceedings (see, to that effect, Konle , paragraph 47, and Reisch , paragraph 38). In such a situation, the public interest does not demand that the examination by the administrative authorities of the proposed acquisition of a plot of building land have the effect of suspending the exercise of the freedom claimed." Case C-300/01 Salzman ECR [2003] Page I-4899.Para 51.

Lastly, court reached the decision that, the national measure is constitutes a restriction on the free movement of capital and could not be able to fullfill the principles of non-discrimination and proportionality[235].

1.3.2.7.4 ECJ's Ruling and Evaluation

Firstly , the court underlined the principle of stand-still, then confirmed that prior notification as a declatory and EC law compatible issue.Court also found out that optimal use of land can be listed under general interest but the mechanisms attached to that rationale has to be proportionate and non discriminatory. It must be added that the court repeated the case law and leave the matter to the national courts[236].

Secondly, both, the court and the advocate general, confirms that, a national of a member country, may invoke the his/her rights before the ECJ even in the period of derogations.

Lastly court did not answer the question that arises from EEA agreement, declaring that jurisdiction to interpret the EEA Agreement under Article 234

[235] "In view of the risk of discrimination inherent in a prior authorisation procedure such as that at issue in the main proceedings, and of the fact that it is not strictly necessary in order to achieve the town and country planning objective pursued by it, that procedure constitutes a restriction on the free movement of capital, which is incompatible with Article 73b(1) of the Treaty. "Case C-300/01 Salzman ECR [2003] Page I-4899.Para 52. "Having regard to all those points, I consider that the prior authorisation scheme provided for in Paragraph 8 of the VGVG is contrary to Article 73b of the Treaty." Opinion of Advocat General. Case C-300/01 Salzman ECR [2003] Page I-4899.Para 76

[236] " In this case, it is for the national court to determine whether Paragraph 8(3) of the VGVG has as its sole purpose the maintenance in force of the legislation on secondary residences which was applicable on 1 January 1995, or whether it includes significant differences which preclude its being covered by the derogation established by Article 70 of the Act of Accession (see, to that effect, Beck and Bergdorf , paragraph 36). 57. The answer to be given to the first two questions referred for a preliminary ruling must therefore be that Article 73b(1) of the Treaty precludes a prior authorisation procedure such as that established by the VGVG and that it is for the national court to determine whether such a procedure is covered by the derogation established by Article 70 of the Act of Accession." Case C-300/01 Salzman ECR [2003] Page I-4899.Paras 56-57.

EC applies solely with regard to the Communities. The Court therefore has no jurisdiction to rule on the interpretation of that agreement as regards its application in the EFTA States[237]

1.3.2.8 Ospelt[238] (2003)

1.3.2.8.1 The Relevant Freedoms of the Single Market

ECJ without referencing any other freedom pointed the free movement of capital (after discussion of EEA agreement annexes)[239]:

> First, it should be borne in mind that, although Article 222 of the EC Treaty (now Article 295 EC) does not call into question the Member States ' right to establish a system for the acquisition of immovable property which lays down measures specific to transactions relating to agricultural and forestry plots, such a system remains subject to the fundamental rules of Community law, including those of non-

[237] " In this case, the Court has been asked to interpret the concept of "existing legislation" within the meaning of point 1(e) of Annex XII to the EEA Agreement, for the purposes, for the national court, of determining whether or not the VGVG adopted on 23 September 1993 is more restrictive than the VGVG 1977 and whether, in 1993, the EEA Agreement precluded that amendment of legislation. The Court would thus be led to rule on the effects of the EEA Agreement, within the national legal system of which the referring court forms part, during the period prior to the accession of the Republic of Austria to the European Union, that is to say, in a situation which does not come within the Community legal order." Case C-300/01 Salzman ECR [2003] Page I-4899.Para 40.

[238] Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743.

[239] "Rules such as those of the Vorarlberger Grundverkehrsgesetz (Vorarlberg Land Transfer Law) of 23 September 1993, as amended, making transactions relating to agricultural and forestry plots subject to administrative controls must, where a transaction is in issue between nationals of States party to the Agreement on the European Economic Area of 2 May 1992, be assessed in the light of Article 40 of and Annex XII to the aforementioned Agreement, which are provisions possessing the same legal scope as that of Article 73b of the EC Treaty (now Article 56 EC), which is identical in substance." Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743.

> discrimination, freedom of establishment and free movement of capital. In particular, the Court has held that the scope of the national measures governing the acquisition of immovable property should be assessed in the light of those provisions of the Treaty which relate to the movement of capital.[240]

1.3.2.8.2 National Measure's Compatibility Test

The restrictive measure's ratio legis was to enable farmers to farm their farms, preserving agricultural communities, maintaining a distribution of land ownership which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters [241]. A prior authorization regime was attached to that very rationale[242].

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[240] Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743 Para 34. .See, to that effect, Case C-205/99 Analir and Others [2001] ECR I-1271, para 24. See, to that effect, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 Reisch and Others [2002] ECR I-2157, paras 28 -31. See, to that effect, Case 182/83 Fearon [1984] ECR 3677, para 7.

[241] "(1) Acquisition of title may be authorised only
(a) ─ in the case of agricultural plots ─ where it is consistent with the preservation of an effective farming community and the acquirer himself cultivates the plot as part of an agricultural establishment and also has his permanent place of residence in the establishment or, where that is not possible, it is not contrary to the preservation and creation of an economically healthy, medium and small─scale agricultural estate,
(b) ─ in the case of forestry plots - where it is not contrary to the interest of forestry in particular and to the general economic interest," Opınıon of Advocate General Geelhoed. Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 4.

[242] "(2) The conditions laid down in subparagraph (1) are not satisfied in particular where
(a) the plot would be withdrawn from agricultural or forestry use without sufficient reason,
(b) the consideration exceeds considerably the price of the plot customary in the location concerned,
(c) it must be concluded that the plot is being acquired solely to form or extend a large estate or hunting areas;
(d) it must be concluded that cultivation by the acquirer himself is not secured in the long term or the acquirer does not have the specialist knowledge necessary to cultivate the plot himself;

As to the proceedings 23. On 22 April 1998 the appellants sought authorisation for a land transfer within the meaning of Paragraph 4 of the VGVG[243]. By the decision of 19 October 1998 the competent authority, the refused authorisation. The reason stated for the refusal was that the requirements laid down in Paragraph 5(1)(a) and Paragraph 5(2)(a) and (d) of the VGVG had not been satisfied[244].

In its statement of grounds the competent authority examined further the facts and the legislation at issue. It noted that the overwhelming majority of the plots at issue are designated agricultural land and thus approval from the land transfer authority is required pursuant to Paragraph 4(1)(a) of the VGVG. The intention of the VGVG was that such land should be cultivated and acquired by farmers as part of an agricultural establishment[245].

According to the established case-law of the Federal Constitutional Court, it is in the public interest, which the VGVG seeks to protect, that plots of agricultural land acquired in connection with land transfers be cultivated by the acquirers themselves. The aquirer does not operate as a farmer, nor has it

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(e) the favourable land ownership arrangement arrived at in the course of agricultural proceedings would be destroyed again without compelling reason. (...)'

15. Paragraph 11 of the VGVG contains exceptions to the authorisation requirement in respect of a number of types of land acquisition, in particular between family members and in the event of succession or testamentary gift.

16. Under Paragraph 25 of the VGVG, a deed of transfer is to become invalid with retrospective effect if authorisation is refused." Opınıon of Advocate General Geelhoed. Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 4.

[243] Paragraph 4(1) of the VGVG provides: 'The transfer of agricultural or forestry plots shall require authorisation from the land transfer authority where it relates to one of the following rights:

(a) ownership,

(b) (...) rights which permit the erection of building structures on the land of third parties,

(c) the right of use or right of usufruct,

(d) the right of lien over agricultural establishments,

[244] Paragraph 5 of the VGVG provides as follows:

(2) The conditions laid down in subparagraph (1) are not satisfied in particular where

(a) the plot would be withdrawn from agricultural or forestry use without sufficient reason.

[245] Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743.Para 24.

any intention of engaging in agriculture. The acquisition of plots used for agricultural purposes with the intention of leasing them on is contrary to the public interest, protected by the VGVG, in preserving an effective farming community and preserving and creating economically healthy, medium and small-scale agricultural holdings. The requirement that authorisation be refused if the land is not cultivated by the acquirer himself in connection with an agricultural establishment also applies where the plot was not already cultivated by the previous owner himself. The appellants first lodged an appeal against this decision with the Constitutional Court. It declined to consider the appeal by decision of 26 September 2000 and subsequently remitted it to the higher administrative court. pursuant to Paragraph 144(3) of the Constitution. In the supplemented appeal it is argued inter alia that refusal of authorisation from the land transfer authority is contrary to the provisions of the EEA Agreement on the free movement of capital[246].

1.3.2.8.3 The Restrictive Measure's Justification Test Under EC Law

Firstly on the residence requirement ECJ held that measure is not, a priori, discriminatory in nature parallel to its conclusion on case Fearon[247].

Secondly,on the ratio legis, court concluded that there was no doubt that the VGVG pursues public-interest objectives which are such as to justify

[246] Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743.Para 25.

[247] "On the other hand, as regards the requirement as to residence laid down in Paragraph 5(1)(a) of the VGVG, it is not disputed that it was established within the framework of legislation concerning the ownership of agricultural land which is intended to achieve the specific objectives of preserving agricultural communities and viable farms. Contrary to the claims of Ms Ospelt and the Foundation, it does not make any distinction between its own nationals and nationals of other Member States of the Community or, more broadly, of States party to the EEA Agreement. It is therefore not, a priori, discriminatory in nature .Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 38.

restrictions on the free movement of capital to the aims of the national measure in issue.[248].

Then court examined the ratioanales:

First, preserving agricultural communities, maintaining a distribution of land ownership which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives. Moreover, as the Commission maintain, those objectives are consistent with the objectives of the common agricultural policy which, according to Article 39(1)(b) of the EC Treaty (now Article 33(1)(b) EC), aims " to ensure a fair standard of living for the agricultural community" in the working-out of which, according to Article 33(2)(a), account must be taken " of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions"[249] .

Thirdly court stated that that a system of prior authorisation may, in certain circumstances, be necessary and proportionate to the aims pursued, if the same objectives cannot be attained by less restrictive measures, in particular by a system of declarations[250] . This statement majorly underlines the proportionality principle.

Then court made a seperation between compenent authorities and national authorities on their prior supervision:

[248] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 39.
[249] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 40.
[250] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 41.

> Indeed, the objective of sustaining and developing viable agriculture on the basis of social and land planning considerations entails keeping land intended for agriculture in such use and continuing to make use of it under appropriate conditions. In that context, prior supervision by the competent authorities does not merely reflect a need for information but is intended to ensure that the transfer of agricultural land will not lead to their ceasing to be used as intended or to a use which might be incompatible with their long-term agricultural use[251].

Court held that any supervision by national authorities which was subsequent to transfer of such land would not provide the same guarantee. It could not prevent a transfer which ran counter to that function of continued agricultural use, and would thus not be appropriate to the objective.

Court also added that, action taken a posteriori, such as measures to annul the transfer, sanctions or evictions, could only be decided by the courts and would lead to delays inconsistent with the requirements of continuity of use and sound land management. Legal certainty, which is of fundamental importance for any system of land transfer, would thus be undermined.

Court, then stated that agricultural land and secondary residences are different [252]. Especially, VGVG can achieve their objectives only if the

[251] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 43.

[252] "…unlike supervision measures aimed at preventing construction of secondary residences after the transfer of building plots, which may be subsequent to the transaction without detracting from that objective (see, to that effect, Reisch and Others , cited above, paragraphs 37 to 39), national provisions such as the VGVG can achieve their objectives only if the agricultural use for which the plots were intended is not irretrievably impaired. In those circumstances, the very principle underlying a system of prior authorisation cannot be disputed. The Court has in any event previously held that such a system in connection

agricultural use for which the plots were intended is not irretrievably impaired. In those circumstances, the very principle underlying a system of prior authorisation cannot be disputed. The Court has in any event previously held that such a system in connection with the acquisition of property ownership is not necessarily contrary to Community law.

Court, after giving justification grounds for prior authorization on agricultural land, get back to the facts that Ms Ospelt and the Foundation was rejected, pursuant to Paragraph 5(1)(a) of the VGVG, on the ground that the Foundation did not pursue an agricultural activity, that furthermore it did not have the intention of so doing and that acquisition of agricultural land in order to lease it again to farmers was contrary to the objective of the VGVG aimed at ensuring that acquirers of agricultural land should be farmers themselves.[253]

Ironicaly, the land concerned by the transfer is, at the moment of sale, farmed by a tenant farmer rather than the landowner. Court stated that such a condition precludes a transfer to a new owner who would additionally not farm the property and who would not be resident on the land but who has undertaken to continue to have the land farmed by the same tenant.[254]

Court, also mentioned that there might be farmers who does not have the resources to own the land could not lease the land[255].

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with the acquisition of property ownership is not necessarily contrary to Community law." Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 45.

[253] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 48.
[254] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 51
[255] "By reserving the possibility of acquiring and farming property to farmers who have the resources to own the land concerned, that condition thus reduces the possibility of leasing the land to farmers who do not have such resources. It has the further effect of precluding legal persons, including those whose object is farming, from acquiring farmland. It therefore constitutes an obstacle to planned transactions which do not in themselves affect the agricultural use and the continued farming of the land by farmers or legal persons such

Court in this case repeated the Government of the Principality of Liechtenstein mechanism suggestions which are less restrictive of the free movement of capital could contribute towards achievement of the same objective of maintaining a viable farming community.These suggestions are as follows[256]:

i. Long lease term: The transfer of agricultural land to a legal person could, for instance, be made subject to particular obligations, such as that it be let on a long lease.

ii. First Refusal: Mechanisms could also be put in place giving a right of first refusal to tenants which would make it possible, where the latter did not acquire the property, for title to be acquired by non-farming owners who would undertake to keep the land in agricultural use.

Therefore court concluded that that Articles 73b to 73d, 73f and 73g of the Treaty do not preclude the acquisition of agricultural land being made subject to the grant of prior authorisation such as that established by the VGVG. However, court decided that they preclude such authorisation being refused in every case in which the acquirer does not himself farm the land concerned as part of a holding and on which he is not resident[257].

as farming associations. " Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 52.

[256] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 52.

[257] Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 54.

1.3.2.8.4 ECJ's Ruling and Evaluation

The case has similiarities with case Fearon, on the residence requirement, court repeated its judgement on this very case.

Secondly court decided that Treaty do not preclude the acquisition of agricultural land being made subject to the grant of prior authorisation such as that established by the VGVG.

Ratio legis of VGVG was in a way enlarged the mandatory requiements[258].

Court, found out that the mechanism to be inline with the EC law if authorisation being refused in every case in which the acquirer does not himself farm the land concerned as part of a holding and on which he is not resident

Moreover, court seperated between compenent authorities and national authorities on their prior supervision and assumed that compenent authorities are most likely to achieve thr objective than the latter.

Court as a mechanism suggestion, suggested, long lease term and first Refusal.

[258] The restrictive measure's ratio legis was to enable farmers to farm their farms, preserving agricultural communities, maintaining a distribution of land ownership which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a reasonable use of the available land by resisting pressure on land, and preventing natural disasters .

1.3.2.9 Festersen259(2007)

1.3.2.9.1 The Relevant Freedoms of the Single Market

ECJ as stated in case Reish, paragraph 29, repeated the relation ship of freedom of establishment and free movement of capital.

> It should be recalled at the outset that the right to acquire, use or dispose of immovable property on the territory of another Member State, which is the corollary of freedom of establishment, as is apparent from Article 44(2)(e) EC (Case 305/87 Commission v Greece [1989] ECR 1461, paragraph 22), generates capital movements when it is exercised (Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 Reisch and Others [2002] ECR I-2157, paragraph 29).[260]

As we discussed that nomenclatura is indicative and not technically in force in earlier chapters, in this judgement, court confirmed that approach once again[261].

> As is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5), capital movements include investments in real estate on the territory of a Member State by non-residents. That nomenclature still has the same indicative value for

[259] Case C-370/05 Festersen [2007] ECR I-1129.
[260] Case C-370/05 Festersen [2007] ECR I-1129. Para 22.
[261] C-222/97 Trummer and Mayer [1999] ECR I-1661, Para 21; Case C-464/98 Stefan [2001] ECR I-173, paragraph 5; Reisch and Other.Para 30; Case C-386/04 Centro di Musicologia Walter Stauffer [2006] ECR I-0000. Para 22.

the purposes of defining the notion of capital movements.[262]

1.3.2.9.2 National Measure's Compatibility Test

The national legislation that Mr.Festersen is dealing with based on the ratio legis aiming to:

i. preserve the farming of agricultural land by means of owner-occupancy, which constitutes one of the traditional forms of farming in Denmark, and to ensure that agricultural property be occupied and farmed predominantly by the owners,

ii. as a town and country planning measure, to preserve a permanent agricultural community and,

iii. to encourage a reasonable use of the available land by resisting pressure on land.(To prevent missuse, speculation)

The mechanism set by legislator is authorization of designation due to residence requirement. More clearly, the requirement that the acquirer take up fixed residence on that property. In the case Fearon, 3 miles rule was set by Irish Land Commission. In the case Ospelt, only residence requirement was discussed. In this case, "Fixed residence on that property for 8 years" makes it different.

Court somehow, referenced to Article 2(1) of Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[262] Case C-370/05 Festersen [2007] ECR I-1129.Para23.

Court , while examining a case under the free movenent of the capital referencing irrelevant points.
The facts and ratio legis was hard to analyse because there were similarities with the case Fearon, the only case, ECJ found national legislation to be proportional.

In the course of events, Mr Festersen, a German national, acquired, in 1998, a property in southern Jutland which, according to the land register, is designated an agricultural property. It consists of two plots: one of an area of 0.24 hectares situated in an urban zone with buildings on it and the other, a piece of meadow land, of an area of 3.29 hectares situated in an agricultural zone[263].

Since Mr Festersen did not satisfy the requirement that residence be taken up on that property, the Agricultural Committee for Southern Jutland gave him notice to put his situation in order by ordering him, on 8 September 2000, to dispose of the property within six months, unless he had placed the ownership on a legal footing beforehand by acquiring an exemption from the agricultural-use obligation or by fulfilling the residence requirement[264].

On 16 July 2001 that committee gave Mr Festersen a new period of six months within which to dispose of the property, unless he took the necessary measures before that period expired, either to reduce the area of the property to under 2 hectares and at the same time seek an exemption from the agricultural-use obligation or to take up residence on the property[265].

Mr Festersen, who took up residence at the property on 12 June 2003, has been listed in the population register of the municipality of Bov as resident

[263] Case C-370/05 Festersen [2007] ECR I-1129.Para13.
[264] Case C-370/05 Festersen [2007] ECR I-1129.Para14.
[265] Case C-370/05 Festersen [2007] ECR I-1129.Para15.

at that address since 12 September 2003[266]. He brought an appeal against his conviction before the Vestre Landsret (Western Regional Court) and claimed that it should be set aside. The prosecuting authorities contended that the judgment at first instance should be upheld.

Mr Festersen and the prosecuting authorities disagreed as to whether the residence requirement under the Law on agriculture was compatible with the principles of the freedom of establishment and the free movement of capital as enshrined in Articles 43 and 56 .

In such conditions, national legislation was not clearly contrary to EC law. Therefore the third step, especially in the field of principle of dicrimination and porportionality, forms the core of this case.

1.3.2.9.3 The restrictive measure's justification test under EC law

As we stated court's main focus had to be principles of non-discrimination and proportioanality. Therefore court mainly intrepreted the EC law on those and concluded that Danish legislation on agriculture does not discriminate between Danish nationals and nationals of the other Member States of the European Union or the European Economic Area.[267] Court addedd that if the measure might permitted provided that it pursues an objective in the public interest, that it is applied in a non-discriminatory way

[266] Case C-370/05 Festersen [2007] ECR I-1129.Para17.

[267] "Although the Danish legislation on agriculture does not discriminate between Danish nationals and nationals of the other Member States of the European Union or the European Economic Area the fact nevertheless remains that the residence requirement which it imposes and which may be waived only with the authorisation of the minister responsible for agriculture restricts the free movement of capital." Case C-370/05 Festersen [2007] ECR I-1129.Para 25.

and that it respects the principle of proportionality[268]. Then court , under the field of public interest, stated that they might be justifiable by EC law[269].

Moreover, ECJ, commented on the "ratio legis" parallel to the Danish Government and Commission of the European Communities maintain, those objectives are consistent with those of the common agricultural policy aims to:

> …… 'to ensure a fair standard of living for the agricultural community' in the working-out of which, according to Article 33(2)(a), account must be taken 'of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions[270]

After giving the summary of the case-law on the discrimination, court commenced to analyse the principle of proportionality. As we can clearly see, ratio legis found to be consistent and justifiable under EC law. The

[268] "Such a measure may nevertheless be permitted provided that it pursues an objective in the public interest, that it is applied in a non-discriminatory way and that it respects the principle of proportionality, that is to say that it is appropriate for ensuring that the aim pursued is achieved and does not go beyond what is necessary for that purpose (Case C-302/97 Konle [1999] ECR I-3099, paragraph 40; Reisch and Others , paragraph 33; and Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743, paragraph 34). " Para 26.

[269] "As regards the condition relating to the pursuance of an objective in the public interest, the Danish Government submits that the national legislation seeks, first, to preserve the farming of agricultural land by means of owner-occupancy, which constitutes one of the traditional forms of farming in Denmark, and to ensure that agricultural property be occupied and farmed predominantly by the owners, second, as a town and country planning measure, to preserve a permanent agricultural community and, third, to encourage a reasonable use of the available land by resisting pressure on land. " Case C-370/05 Festersen [2007] ECR I-1129.Para 27.

[270] Case C-370/05 Festersen [2007] ECR I-1129.Para 28.

mechanism attached to that approach tested under the principle of proportionality.

First of ECJ held that requirement to farm the property personally as not proportionate to the aims.

> As regards whether the national measure at issue in the main proceedings is appropriate, it must be observed that it contains only a residence requirement and is not coupled, for an acquirer of an agricultural property of less than 30 hectares, with a requirement to farm the property personally. Such a measure thus does not appear, in itself, to ensure the attainment of the alleged objective seeking to preserve the traditional form of farming by owner-occupiers[271].

Then court assessed the residence requirement. ECJ simple stated that the residence requirement is likely to contribute, by definition, to preserving an agricultural community and it can be met even further by farmers who, in accordance with one of the general objectives of the Law on agriculture seeking to encourage the owner-occupancy form of farming, personally farm their own land[272].

After stating that ECJ held that the residence requirement does not guarantee the attainment of that objective, and thus it does not appear that

[271] Case C-370/05 Festersen [2007] ECR I-1129.Para 30.
[272] Case C-370/05 Festersen [2007] ECR I-1129.Para 31.

that requirement is, in actual fact, appropriate, in itself, for the purpose of attaining such an objective.

> ……the objective of preserving an agricultural community cannot be met where the acquisition is made by a farmer who is already resident on another farm. In such a situation[273]

Between the paragraphs 33-43, court analysis the prevention of speculation. Firrstly court accepted that "agricultural land is, a limited natural resource". Moreover court concluded that national legislation containing residence requirement, which seeks to avoid the acquisition of agricultural land for purely speculative reasons, and which is thus likely to facilitate the preferential appropriation of that land by persons wishing to farm it does pursue a public interest objective[274].However, court added that, the requirements had to be proportional[275].

On the propoprtionate mechanisms, Danish Government stated that the only solution remaining for maintaining prices at the desired level is State regulation of those prices.Court govermnet lacks to explain in what way such a measure would be more restrictive than the residence requirement adopted.

[273] Case C-370/05 Festersen [2007] ECR I-1129.Para 32.

[274] "In relation to the third aim which the Law on agriculture seeks to attain, it must be found that the residence requirement can reduce the number of potential acquirers of agricultural property and, consequently, it is capable of reducing the pressure on that land. It can therefore be accepted that national legislation containing such a requirement, which seeks to avoid the acquisition of agricultural land for purely speculative reasons, and which is thus likely to facilitate the preferential appropriation of that land by persons wishing to farm it does pursue a public interest objective in a Member State in which agricultural land is, and this is not challenged, a limited natural resource." Case C-370/05 Festersen [2007] ECR I-1129.Para 33.

[275] "It is thus necessary to ascertain whether the residence requirement constitutes a measure which does not go beyond what is necessary to attain such an objective." Case C-370/05 Festersen [2007] ECR I-1129.Para 34.

Court, parallel to the opion of advocat general stated that there was also no mention or evaluation of other measures capable, in some circumstances, of being less detrimental to the free movement of capital, such as provisions for :

i. higher tax on resale of land occurring shortly after acquisition,
ii. the requirement of a substantial minimum duration for leases of agricultural land[276].

This evaluation of the court seems to be defining a legitimate mechanism tied to imperative requirement we have discussed above. However when it comes to residence requirement, court held that none of the above enables the Court to find that the residence requirement is necessary to meet the objective sought[277].

As we have discussed, such a requirement has been found to be proportional in case Fearon. The main difference of this national measure was 8 yeas clause. According to our consideration, court lastly, compared two cases, indirectly:

> …. pointed out that "coupling residence requirement with a condition that residence be maintained for at least eight years, such an additional condition clearly goes beyond that which could be regarded as necessary, in particular as it implies a long-term suspension of the exercise of the fundamental freedom to choose one's place of residence. [278]

[276] ." Case C-370/05 Festersen [2007] ECR I-129.Para 39.
[277] Case C-370/05 Festersen [2007] ECR I-1129.Para 40.
[278] Case C-370/05 Festersen [2007] ECR I-1129.Para 41.

Then court simply critised the discrition powers held by ministry. It should be added that such interpretations are more common in golden share cases[279].

Court after assesing ratio legis and the mechanisms, held that proceedings did not appear to be a measure which is proportionate to the objective pursued and therefore constituted a restriction to the free movement of capital which is incompatible with Article 56 EC[280].

On the permanent derogation defence, the Danish Government claimed , court stated that the requirement to take up residence on the agricultural property acquired applies irrespective of whether the residence at issue is a principal or second home. Protocol No 16 could not, therefore, effectively be relied on to justify such a requirement[281].

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[279] "It is true that, as submitted by the Danish Government, Paragraph 18 of the Law on agriculture enables the Minister for Food, Agriculture and Fisheries to authorise the acquisition of agricultural land with an indefinite exemption from the residence requirement. However, according to Circular No 26, the exercise of that power is strictly limited to 'exceptional cases' and must be 'applied restrictively'. . In addition, in providing only one example of such cases, that circular does not inform potential acquirers about the specific and objective situations in which a derogation from the residence requirement will be granted or refused. Such vagueness does not enable individuals to become familiar with the extent of their rights and obligations resulting from Article 56 EC, so that a system of that nature must be regarded as being contrary to the principle of legal certainty (see, to that effect, Case C-483/99 Commission v France [2002] ECR I-4781, paragraph 50, and Case C-463/00 Commission v Spain [2003] ECR I-4581, paragraphs 74 and 75). In any event, it does not appear that that system has taken into account the situation of citizens of the Union who are not resident in Denmark in order to avoid discriminatory application. " Case C-370/05 Festersen [2007] ECR I-1129.Paras 42-43.

[280] "Accordingly, court stated that the residence requirement, particularly since it is coupled in this case with a condition that residence be maintained for eight years, to which the acquisition of agricultural properties of less than 30 hectares is made subject by the national legislation at issue in the main proceedings does not appear to be a measure which is proportionate to the objective pursued and therefore constitutes a restriction to the free movement of capital which is incompatible with Article 56 EC. " Case C-370/05 Festersen [2007] ECR I-1129.Para 44.

[281] " The Danish Government must be considered still to be claiming that the residence requirement at issue in the main proceedings must also fall within the derogation laid down in Protocol No 16 annexed to the Treaty, according to which 'notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes'.. It must however be found, in that regard, that the requirement to take up

1.3.2.9.4 ECJ's Ruling and Evaluation

ECJ once again while enlarging the imperative requirements, found national legislation to be infringing the community law.

Parallel to the advocat general's opinion court commenced to give a list of proportionate mechanisms such as higher tax on resale of land occurring shortly after acquisition, the requirement of a substantial minimum duration for leases of agricultural land[282]. Other mechanism suggested by the court till that day is prior declaration as discussed in Konle, long lease term and first refusal in case Ospelt.

residence on the agricultural property acquired applies irrespective of whether the residence at issue is a principal or second home. Protocol No 16 cannot, therefore, effectively be relied on to justify such a requirement. " Case C-370/05 Festersen [2007] ECR I-1129.Paras 45-46.

[282] Case C-370/05 Festersen [2007] ECR I-1129.Para 39.

1.4 The Importance of the Acquisition of Immovable Property in the Phase of Negotiations

As we discussed previous chapter, under the case law, negotiations especially related to the derogations and playing essential role in the cases. Therefore, in this section, we will focus on them and endeavour to place where the acquisition of immovable property placed and how derogations related to them formulized. In addition to that general structure of the negotiations and derogations will be given, for us to understand the basic dynamics of the nature of negotiations and derogations that are essential and effective in acquisition of immovable property by foreigners.

1.4.1 Nature of Negotiations

First of all, negotiations may mislead us to conclusion that "to confer with another so as to arrive at the settlement of some matter". Such a conclusion may drive us to the idea that candidates have somehow areas which they can derogate permanently.

However, the true nature of negotiations can be summarized as "nothing but the acquis[283]". The main reason for that is acquis in a way represents the spirit of EU and in such a supranational body, the derogations[284] kept very

[283] The acquis communautaire, which constitutes the common ground of all rights and obligations linking the Member States to the European Union and which evolves and changes constantly, is comprised of: the Treaty Establishing the European Community (Treaty of Rome) and all subsequent Treaties amending its dispositions (Single European Act, Treaties of Maastricht, Amsterdam and Nice), the case-law of the European Court of Justice, all declarations and statements adopted by the Union, common positions and actions enacted within the framework of the common foreign and security policy, international agreements ratified by the Community, as well as agreements enacted between the Member States in relation with their activities and all other documents. See Karluk Rıdvan(2005) AB ve Türkiye. Beta Basım Yayın. Pages 382-400.

[284] Derogation is the partial revocation of a law, as opposed to abrogation or the total abolition of a law. The term is used in both civil law and administive law. It is sometimes used, loosely, to mean abrogation, as in the legal maxim: Lex posterior derogat priori, i.e. a subsequent law imports the abolition of a previous one.Derogation differs from dispensation in that it applies to the law, where dispensations applies to specific people

strictly. In other words, more than content, time frame of adopting the content describes the "accession negotiations"[285] .

1.4.2 Negotiation Process and the major steps of the Process

1.4.2.1 Negotiating Framework

The first step of the process consists of the adoption of a negotiating framework for candidate countries[286].

Table 2: Negotiating Framework for Turkey [287]

Chapter[288]	Screening started	Screening completed
1. Free Movement of Goods	16.01.2006	24.02.2006
2. Freedom of Movement for Workers	19.07.2006	11.09.2006
3. Right of Establishment for companies & Freedom to provide Services	21.11.2005	20.12.2005

affected by the law.In terms of EC law, a derogation can also imply that a member state delays the implementation of an element of an EU Regulation into their legal system over a given timescale, such as 10 years; or that a member state has opted not to enforce a specific provision in a treaty due to internal circumstances namely safe guard clauses. The example of the safe guard clause used by Slovenia while accession reads as follows: "As regards the real estate market, Slovenia may resort to the general safeguard clause provided for in Article 37 of this Act for a period up to a maximum of seven years after the date of accession." See "ANNEX XIII List referred to in Article 24 of the Act of Accession: Slovenia" OJ 2003 L 236. 23.9.2003. Page 909.

[285] It should also be mentioned that transition periods may be given for couple reasons that we will examine in depth later. However, these are conditional upon the drafting of a detailed plan setting out all the different stages that would eventually lead to full implementation of the acquis. As we expressed, the nature of negotiations is "nothing but the acquis".

[286] With regards to the V. enlargement, a single framework defined the key principles pertaining to the negotiations for all the countries involved. In the V.enlargement there were 32 chapters.

[287] The negotiating framework drafted for Turkey was announced on 29 June 2005. On 3 October 2005 the Member States started negotiations with Turkey on its accession to the European Union. The progress of the negotiations will be guided by Turkey's progress in preparing for accession, which will be measured, *inter alia*, against the implementation of the Accession Partnership, as regularly revised. See Council decision (2008/157/EC) of 18.2.2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC. OJ 2008 L 51.Page 4.

[288] For the term based priorities for Turkey see Council decision (2008/157/EC) of 18.2.2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC. OJ 2008 L 51.Page 10-16.

4. Free Movement of Capital	25.11.2005	22.12.2005
5. Public Procurement	07.11.2005	28.11.2005
6. Company Law	21.06.2006	20.07.2006
7. Intellectual Property Law	06.02.2006	03.03.2006
8. Competition Policy	08.11.2005	02.12.2005
9. Financial Services	29.03.2006	03.05.2006
10. Information Society & Media	12.06.2006	14.07.2006
11. Agriculture & Rural Development	05.12.2005	26.01.2006
12. Food safety, Veterinary & Phytosanitary Policy	09.03.2006	28.04.2006
13. Fisheries	24.02.2006	31.03.2006
14. Transport Policy	26.06.2006	28.09.2006
15. Energy	15.05.2006	16.06.2006
16. Taxation	06.06.2006	12.07.2006
17. Economic & Monetary Policy	16.02.2006	23.03.2006
18. Statistics	19.06.2006	18.07.2006
19. Social Policy & Employment	08.02.2006	22.03.2006
20. Enterprise & Industrial Policy	27.03.2006	05.05.2006
21. Trans-European Networks	30.06.2006	29.09.2006
22. Regional Policy & Coordination of Structural Instruments	11.09.2006	10.10.2006
23. Judiciary & Fundamental Rights	07.09.2006	13.10.2006
24. Justice, Freedom & Security	23.01.2006	15.02.2006
25. Science & Research	20.10.2005	14.11.2005
26. Education & Culture	26.10.2005	16.11.2005
27. Environment	03.04.2006	02.06.2006
28. Consumer & Health Protection	08.06.2006	11.07.2006
29. Customs Union	31.01.2006	14.03.2006
30. External Relations	10.07.2006	13.09.2006
31. Foreign, Security & Defence Policy	14.09.2006	06.10.2006
32. Financial Control	18.05.2006	30.06.2006
33. Financial & Budgetary Provisions	06.09.2006	04.10.2006
34. Institutions	-	-
35. Other Issues	-	-

Source:EC, ABGS.

The principles determined by the negotiating framework enacted for the V. enlargement, all special legislative acts enacted within the fields of Association Agreements that are not conformity with the acquis, could not

in any way constitute precedent during the negotiation process. Moreover, it should be noted that, due to the importance of the European integration process, enlargements may not form obstacles to EU integration[289].

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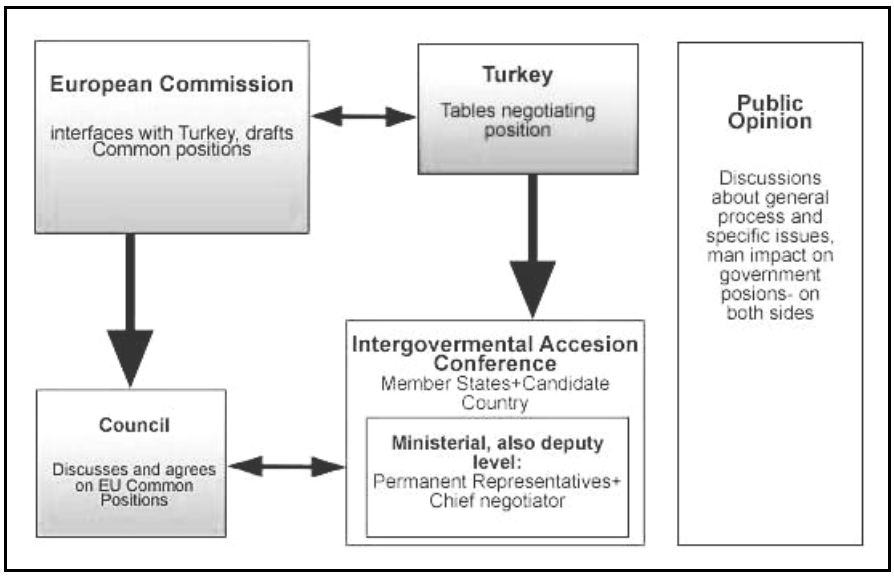
Negotiations are conducted on the basis of identical principles for each and every country, but their implementation varies according to each candidate country's performance. It is hard to tell that the process is identical for all of the candidates.

[289] "The priorities listed in this Accession Partnership have been selected on the basis that it is realistic to expect that the country can complete them or take them substantially forward over the next few years. A distinction is made between short-term priorities, which are expected to be accomplished within one to two years, and medium-term priorities, which are expected to be accomplished within three to four years. The priorities concern both legislation and the implementation thereof. The revised Accession Partnership indicates the priority areas for Turkey's membership preparations. Turkey will, nevertheless, ultimately have to address all the issues identified in the progress reports, including consolidating the political reform process in order to guarantee its irreversibility and ensure its uniform implementation throughout the country and at all levels of the administration. It is also important that Turkey fulfil the commitments of legislative approximation and implementation of the *acquis* in accordance with the commitments made under the Association Agreement, Customs Union and related" See Council decision (2008/157/EC) of 18.2.2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC. OJ 2008 L 51.Page 6.

Table 3: The Accession Negotiation Process[290]



Source: Delegation of the European Commission to Turkey

1.4.2.2 Screening process

The screening process is commenced by a decision of the Intergovernmental Conference, constitutes the first stage of the negotiations, and consists of a detailed analytical study of the acquis, and the compliance level of relevant national legislation.[291]

The screening process may be pursued in two layered structure: multilateral and bilateral screenings. The multilateral meetings are held by European

[290] Retrived 1.6.2009 from http://www.avrupa.info.tr/AB_ve_Turkiye/Muzakereler,Muzakereler_Sayfalar.html?pageindex=1

[291] In the current negotiations, as in previous enlargements, the only part of the process which has been multilateral is the early screening of legislation between the Commission and the negotiating countries. Mayhew Alan(2007) Enlargement Of The European Union: An Analysis of The Negotiations For Countries of The Western Balkans. Sigma Paper No. 37. OECD.Public Governance And Territorial Development Directorate.Page .

officials for authorities of all candidate countries in order to explain the acquis in related fields in detail. Bilateral screenings forms the one-o-one meetings for screening process[292].

Following the completion of all relevant screening processes, evaluations are by the European Commission drafts the "Screening Reports" [293], and send them to Council of Ministers. The Reports are essential for the pathway of negotiations[294].

1.4.2.3 Preparation of Negotiating Position by the Candidate State

Negotiating positions simple formed by the documents that represents candidate state's view on the compatibility of national legislation with the acquis in and include descriptions of the foreseen activities to ensure compliance and implementation, through legislative measures or by means of structural processes. These positions are simple a high concern to any candidate. The main reason for conclusion might be their function as to generate baseline for the Accession Agreement. Accession Agreement is drafted at the end of the negotiations[295]. Moreover, Negotiating positions

[292] The process also aims at facilitating the EU acquis' future transposition within the national legal order, as well as determining potential problems, which may arise during the course of negotiations together. See an example, EUGS of Turkey. Retrieved 5.5.2008 from http://www.abgs.gov.tr/tarama/tarama_files/18/sorular%20ve%20cevaplar_files/SC18_sorular.pdf

[293] However, it should be mentioned that acquis is far from being static, a very dynamic structure. Therefore new screening processes may be vital when acquis of the chapter evolves.

[294] When dates regarding the the start and end of the screening processes and those of the opening of negotiations with regards to the countries that took part in the V. enlargement, it appears that negotiations were opened and provisionally closed for certain chapters even before the screenings were finalised for all acquis chapters, when harmonisation was considered to be complete. Differences are evident with regards to the length of the process from one country to another: screenings were initiated on April 1998 both for Hungary and Slovakia, closing on July 1999 for the former, and February 2000 for the latter, even later than Malta, country for which the screening lasted from May 1999 to January 2000.

[295] No format has been established for such positions. In practice, some similarities do exist between negotiating positions prepared by candidates, but they do differ in scope and also with regards to the methods countries favour in the way to accession. Each negotiating

has to be based on sound arguments if transition periods and derogations are required. [296]

Regulatory impact assessments are important because they represent the future impacts of the effects of the regulatory changes. As the commission expresses the importance of regulatory impact assessments they have to be examined by policy developers. As long as they are properly examined, these assessments avoid unexpected consequences. In a limited number of cases the government can request transitional periods for implementation of the acquis. If the impact of a particular regulation is a strong one that a transition period is required the regulatory impact assessments will provide materials that might constitute justification for such a position during negotiations. In order to receive the transitional period the European Commission and EU Member States would need to be convinced that it is absolutely necessary. In such a case regulatory impact assessments will determine partly the length and the character of the transition period granted[297].

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position's structure varies according to the relevant chapter's content. However, they all need to include an introductory section, as well as a segment focusing on the basis upon which each argument is founded. The introduction generally focuses on the state of compliance at the time of drafting, the foreseen reform mechanisms and the country's compliance agenda, whereas the subsequent sections include further details these issues according to the subject they cover.

[296] In June 1999, in the first position paper on the chapter, free movement of capital, Poland requested 18 years transational period. See Sajdik Martin. Schwarzinger Michael (2007) European Union Enlargement: Background, Developments, Facts (Central & Eastern European Policy Studies). Transaction Publishers. Page 171. Also af we refereced earlier, Malta has provided sound argument to grant a permanent derogation on acquisition of real estate by EU citizens. See Protocol No 6 on the acquisition of secondary residences in Malta OJ L 236. 23.9.2003.

[297] We must add that The Commission believes that the most effective way of **improving the quality** of new policy proposals is by making those people who are responsible for policy development also responsible for assessing the impact of what they propose. Impact assessments, Retrived 1.1.2009 from http://ec.europa.eu/governance/impact/index_en.htm. In the negotiations this phase focuses on the optimal cost of the acquis' implementation. Main objectives are as follows(1)Determination of the most cost-effective way to implement the acquis, including the institutional reforms necessary to fulfil the goals pursued by the relevant regulations;(2)Determination of the cost of the acquis'

1.4.2.4 Presentation of position paper to the EU and Preparation of common position of EU

The negotiation position of the candidate is submitted to EU presidency. Following the delivery of candidate's position ,the circulation of documents to the commission and the member states will be achieved by the presidency. In this phase, EU, prepare its negotiation position. The Directorate General (for Enlargement) together with other concerned director generals reply the candidate's position. After this examination, the draft negotiating position of EU will be sent to the Council. The first phase of the examination of Council is pursued by ad hoc Enlargement Working Group. Following the examination, the member states examine the draft and the final negotiation position of EU is presented to Affairs and Foreign Relations Council. The common position is then submitted to the vote of the General Affairs and Foreign Relations Council. If the Council approves the text unanimously, the draft becomes the common position of the EU[298].

1.4.2.5 Opening of the Negotiations

As we mentioned above partial implementation of the acquis is against integration therefore margins are determined by the establishment of compliance agendas[299]. We should also add that in that phase of the process, 3 documents are used to monitor progress:

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implementation, which is to be taken into account within the medium-term budget planning;(3)Information of the business world and other relevant sectors on the changes and costs incurred following to the enactment and implementation of the acquis;(4)importance that negotiating positions are prepared within the framework of a wide. Retrieved 1.1.2009 from www.ikv.org.tr/en/muzakeresureci.php.

[298] Mayhew Alan(2007) Enlargement Of The European Union: An Analysis of The Negotiations For Countries of The Western Balkans. Sigma Paper No. 37. OECD: Public Governance And Territorial Development Directorate.Page 14.

[299] Such agendas are prepared having regard to the difficulties inherent to the subject-matter at hand, and differ from one chapter to another. It is however acknowledged that compliance follows three main stages:

i. Accession Partnership Agreement
ii. National Programme
iii. Progress Reports

After comparison of negotiating[300] positions, negotiations are usually first opened in relatively "easy" chapters[301].

1.4.2.6 Closing of the Negotiations

Negotiations usually provisionally closed in chapters where well defined road maps have been submitted to guarantee the adoption and implementation of the acquis relevant to the chapter[302]. The provisional

Transposition of the legislation: adoption of regulatory, and often binding legal and administrative rules without limiting the transposition to a mere translation of existing EU legislation, but rather the consideration of the national legislation as a whole, amending all existing national instruments in order to provide for the efficient implementation of the acquis,
Implementation of the legislation: establishment of the infrastructure and enactment of all regulations necessary to ensure that all rights, obligations and responsibilities recognised in the acquis are respected,
Enforcement: all measures to be adopted by competent authorities having regards to the implementation of the relevant .
Efficient implementation and enforcement of the acquis requires that administrative structures that perfectly master the content of the relevant regulations are established. The transposition shall unmistakably be completed at the time of accession to the EU, and be fully implemented afterwards, unless transition periods have been granted to that particular end.

[300] Negotiations with candidate countries are pursued at two different levels. Whereas the main positions, strategies and political issues are put forward and discussed before the Intergovernmental Conference, actual negotiations on technical issues regarding transposition and implementation are carried out between the EU Permanent Representatives Committee (COREPER) and the negotiating delegations of the candidate country, including the chief negotiator.

[301] We will discuss the complexity of chapters , one by one, later in this very section.

[302] The EUCP may include "closing benchmarks" which are concrete requirements that the Candidate Country needs to fulfil before a chapter can be provisionally closed. There may be outstanding issues that need further discussion and the candidate country and the 27 Member States may exchange several rounds of position papers until all issues are clarified. The acquis is not negotiable and the principle of the accession process is that the Candidate Country is expected to align fully with all of the *acquis*. Nonetheless, transitional arrangements may be envisaged in particular where considerable adaptations and financial outlays are necessary, taking into account the interests of the Union and of Turkey. In areas such as free movement of persons, structural policies or agriculture the Commission will include, as appropriate, long transition periods, derogations specific arrangements or

closure decision unanimously taken by the Intergovernmental Conference. However parties pertain to right to re-open negotiations on the provisionally closed chapters The closing of negotiations is done after the affirmative recommendation of the European Commission's Progress Reports and in accordance with roadmaps enacted for that chapter[303].

1.4.2.7 Ratification of Accession Treaty

When the negotiations are finished on all chapters, the results of the them will be transferred in to a draft accession treaty. The draft treaty is composed of conditions on the accession of the candidate country to the EU. Work on the draft usually starts as early as the start of the negotiation process itself, throughout the process of which an ad hoc working group composed of representatives of Member States, the candidate country, the Council and the European Commission discuss its content. The draft subsequently submitted to the assent of the European Parliament. Consensus can be achieved by the simple majority and also the Council of the EU, requiring the unanimity of votes[304]. The Treaty is then signed by all Member

permanent safeguard clauses. Retrived 1.6.2009 from http://www.avrupa.info.tr/AB_ve_Turkiye/Muzakereler,Muzakereler_Sayfalar.html?pageindex=1

[303] This practice derives from the principle according to which "nothing shall be agreed upon until everything is agreed upon", mainly established due to the evolving nature of the acquis, as well as a means of protection against candidates that do not fulfil their commitments. However, the re-opening of chapters that had been provisionally closed remains exceptional, and is usually only foreseen in cases where serious discrepancies exist between the candidate's commitments and the actual progress of the country.

[304] When the ratification process is concluded within each national order, whether by way of parliamentary assent or referendum, the Treaty shall take full effect and the candidate a Member State of the European Union in its own right. The process may last longer than expected, as witnessed for the 5th enlargement , whereby the Treaty was signed by all 25 States on 16 April 2003 but came into force on 1 May 2004.

States and by the acceding country, which shall all ratify the instrument in accordance with their national constitutional requirements[305].

1.4.3 Overview of the Chapters

The list of chapters, as we given above, consists of 35 headlines. It must be mentioned that some of them are relatively seem to be easy to adopt such as science and research, where as some are really hard to adopt such as free movement of capital. The understanding of the adoption difficulties with the chapters may help us to the understand the importance and complexity of acquisition of immovable property with in the context of negotiations, derogations and naturally acquis.

1.4.3.1 Chapters with Limited Negotiating Problems

Some of the chapters are relatively easy to negotiate. The main reason for that these chapters cover areas where there is hardly any Community regulation or where the acquis has little immediate impact on the acceding country.[306] The following group comes into this category:

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[305] Once agreement has been reached on all chapters of the acquis, a process that takes some years, the results are incorporated into an "Accession Treaty".
Prior to signing the Accession Treaty, the Commission delivers its final opinion on the Candidate Country's membership application. Additionally, the European Parliament needs to give its consent and, finally, the European Council must reach a unanimous decision on acceptance of the application.
To enter into force, the Accession Treaty needs to be ratified by the national parliaments of the EU Member States and the parliament of the acceding country. In some cases, this may require a national referendum to be held. The acceding country becomes a member of the EU once the Accession Treaty has entered into force.

[306] The categorization used in the V.Enlargement had three levels. 1.Chapters that did not demand further negotiations. 2.Chapters in which transational arrangements are negotiated. 3.Chapters in which other problems were unresolved or there are still questions to be answered. Sajdik Martin. Schwarzinger Michael (2007)European Union Enlargement: Background, Developments, Facts. Transaction Publishers. Pages 72-73.

i. Science and research[307]

ii. Education and training

iii. Industrial policy

iv. Statistics

v. EMU (economic and monetary policy)

vi. Trans-European networks

These six chapters can be closed relatively quickly, assuming that the screening reports have been agreed[308].

1.4.3.2 Chapters with negotiating problems of serious significance

The below mentioned chapters are with negotiating problems of serious significance[309]. It should be noted that these chapters are of great economic importance under customs union[310]

i. Company law

[307] Science and research chapter was closed temporarily at 16.6.2006.Retrieved 15.6.2009 from http://www.abgs.gov.tr/files/fasillar/muzakere_surecinde_mevcut_durum_tablo.doc

[308] The first chapter on science and research was closed with Croatia in June 2006 Like Turkey. Mayhew Alan(2007) Enlargement Of The European Union: An Analysis of The Negotiations For Countries of The Western Balkans. Sigma Paper No. 37. OECD: Public Governance And Territorial Development Directorate.Page 27.

[309] Some of these chapters include vital problems for successful integration with the EU, but these problems are not necessarily reflected ihe difficulty of the negotiations – the chapter on the judiciary and fundamental rights is a good example.

[310] In our opinion, customs union chapter will not pose major problems to Turkey becuse for approximatly for 15 years, Turkey is in the customs union. By the Association Council Decision of 6 March 1995, the Customs Union came into force on 31 December 1995. In 1996 a free trade area was established between Turkey and the European Union for products covered by the European Coal and Steel Community. Decision 1/98 of the Association Council covers trade in agricultural products. In addition to providing for a common external tariff for the products covered, the Customs Union foresees that Turkey is to align to the acquis communautaire in several essential internal market areas, notably with regard to industrial standards. Atak Ercan(2001) Harmonisation of Turkish Legislation and Practice with that of The European Union. Retrieved 1.5.2009 from http://www.tbmm.gov.tr/ul_kom/kpk/pre1.doc. For futher information and contrary wiev, see Karluk Rıdvan(2005) AB ve Türkiye. İstanbul.Beta Basım Yayın.Pages 697-711.

ii. Information society and the media

iii. Public procurement[311]

iv. Foreign, security and defence policy

v. Financial control

vi. Regional policy and the co-ordination of structural instruments (excluding decisions on financing)

vii. External relations

viii. Judiciary and fundamental rights

1.4.3.3 Problematic Chapters

Problematic Chapters contain serious sectoral policy concerns, which however should be resolved within the negotiating chapter. These chapters are the following:

i. Free movement of goods

ii. Intellectual property law

iii. Financial services

iv. Taxation

v. Competition policy and state aids

vi. Social policy and employment

vii. Establishment and freedom to provide services

viii. Energy

ix. Transport

x. Common fisheries policy

[311] For Turkey, public procurement may be more problematic than the categorization we submit. The screening results leads us to come to that conclusion. Screening report Retrieved 1.5.2009 from ttp://www.abgs.gov.tr/files/tarama/tarama_files/05/screening_report_05_tr_internet_en.pdf

The chapter of free movement of goods might be the centre of product-regulation in the internal market. The policy concerns and the major single market elements are placed in this category. Moreover, as the energy becomes more and more important each year may result the chapter to become more complex in following years. The scope for derogations from this type of regulation is obviously very restricted, as mentioned above. The negotiating positions from the previous enlargement show that the requests from candidate countries, although significant, were technical in nature and rather limited in extent[312].

1.4.3.4 Chapters of Highly Problematic Areas

The remaining chapters are those where the most difficult problems lie:

i. Agriculture and rural development
ii. Food safety, veterinary and phytosanitary policy
iii. Environment
iv. Justice, freedom and security
v. Free movement of workers
vi. Free movement of capital
vii. Finance and budget
viii. Institutional questions

These issues will probably not be resolved until the final round of negotiation, and they may be resolved as a package deal rather than within "chapter by chapter" negotiations[313].

[312] Mayhew Alan(2007) Enlargement Of The European Union: An Analysis of The Negotiations For Countries of The Western Balkans. Sigma Paper No. 37. OECD: Public Governance and Territorial Development Directorate.Page 31.
[313] Mayhew Alan(2007) Enlargement Of The European Union: An Analysis of The Negotiations For Countries of The Western Balkans. Sigma Paper No. 37. OECD. Public Governance and Territorial Development Directorate.Page 37.

1.4.4 Acquisition of immovable properties under the chapter of Free movement of capital

As we discussed above, Free movement of capital is a highly problematic chapter. Moreover when it comes to the Acquisition of immovable properties, the problematic situation increases more[314].

When the common concerns that have been reflected to the accession agreements, we can simply cover the rationales as:

i. Prevention of speculation[315], especially the agricultural lands,
ii. Ensuring affordable housing for the nationals
iii. Prevention of more complicated restructuring due to rising prices in agricultural lands[316].

In the upcoming enlargement a new concern is likely to be added: Tourism. For instance for the case of Croatia and Turkey, former has Adriatic coastline while the latter Aegean coastline. If we add list the Caribbean Sea, these three are the most popular spots of the yacht tourism in the world. Especially Turkey as global actor in the world tourism, listed in the top 10 of the tourism revenues, incomings, it must be expected that, land associated

[314] In V.enlargement, derogations regarding to Acquisition of immovable properties may be evaluated as the highest common concern of the all the accessing states. Malta, in particular, managed to derogate permanently on the acquisition of secondary residences.
[315] On the hand, when the foreign direct investment is the issue, states seem to be more welcoming. The main motive migt be the willingless of decveloping countries to attract FDI to solve many problems such as unemployment, lack of business models, lack of marketing…ect.
[316] The Hungarian Position Paper stated the argument briefly: "It (the price increase in land) would prevent Hungarian farmers from having access to land at affordable prices and interfere with the policy of the Hungarian Government aiming at the creation of a more viable ownership structure.The restructuring process relies on dynamic farmers buying or leasing the land from farmers who are giving up the profession. If prices rise considerably as a result of foreign buying, this process of restructuring will be made that much more difficult."

with tourism will be an important point in the negotiations, especially the land for summer houses. From the touristic point of view, summer houses are usually used in summer and left in winter. In such conditions, from the point of local development, especially from the sustainable development and local economic stability, some necessary measures may be taken. As we discussed in the case Konle, ECJ, is somehow, accepts this rationale, on the other hand, its proportional measure definition is strict[317]. In our opinion, if the standstill principle has not been breached by Austria, such derogations would have been valid and proportionality could not be assessed in the derogation period.

When it comes to the agricultural land, the issue becomes tenser. In parallel to ECJ, states evaluate them as "natural resources"[318]. As we stated earlier,

[317] For instance, if we compare the districts of Muğla and Antalya, while Antalya is becoming more stable in whole year, Mugla is still a seasonal spot. According to our consideration, residence requirement will not be adequate to achieve economic stability in whole year. More infrastructre investments, more incentives to tourism service providers, tax deductions and excemptions might be a more suitable way to achieve such an aim. On the other hand, hospitality sectors especially concentrating on extended stay might be supported such as villages for retired. Finally, destinations has to be promoted in such a way that long stay periods seem reasonable and sensible from the perspective of end users.

[318] Agriculture can be defined as the systematic and controlled use of living organisms and the environment to improve the human condition. 'Agricultural land' is the land base upon which agriculture is practiced. Typically occurring on farms, agricultural activities are undertaken upon agricultural land to produce agricultural products. Although agricultural land is primarily required for the production of food for human and animal consumption, agricultural activities also include the growing of plants for fibre and fuels (and for other organically derived products . Physical, chemical and biological inputs are essential to agricultural systems, and are ultimately supplied by the soil, moisture, the sun (in the forms of light and heat energy), plants, animals and biological agents. In productive agricultural systems these inputs are necessarily controlled, to the extent possible, through appropriate agricultural practices. The more capably the land base provides and sustains these inputs, the more capable and productive the land is as agricultural land. Not all agricultural land is capable or suitable for producing all agricultural products, regardless of the level of management applied. The main limiting factors may be climate, topography. Climate determines the heat energy and moisture inputs required for agricultural production. Topographic limitations mostly restrict the ability to use cultivation equipment. Soils with all their variability are also a key limiting factor. Depending upon their properties and characteristics they may be appropriate for sustaining the production of certain agricultural products, but not others. Therefore agricultural lands are rare to

one of the major rationales for states to prevent foreign ownership, is to ensure control over food production[319].

When the cases Fearon,Konle, Reish, Salzman, Ospelt and Festersen taken in to consideration, we all see, anti speculative measures are important and ratio legis behind the national measure aims to prevent speculation[320]. Such fears were shared by new members who joined EU in the V. enlargement. We should add that price gaps between EU averages in the average of the new member states are not comparable to former members, let's say, Austria and EU average in its derogation period. Practically, this resulted longer derogation periods.

found than expected. The Agricultural Land Reserve of Canada.Retrieved 1.6.2009 from http://www.alc.gov.bc.ca/alr/what_is_ag_land.htm

319 Agricultural land constitutes only a part of any country's territory, which in addition also includes areas not suitable for agriculture, such as forests, mountains, and inland water bodies. Agricultural land covers 38% of the world's land area, with arable land representing less than one-third of agricultural land (11% of the world's land area). [Arable lansd refers to lands under annual crops.]WDI, GDF & ADI Online Databases. Retrieved 1.6.2009 from http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20398986~menuPK:64133163~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html . Also UN's warning should be taken in to consideration. In an article published on Fİnancial times the warning by Jacques Diouf, director-general of the Food and Agriculture Organisation was underlined. "The race by food-importing countries to secure farmland overseas to improve their food security risks creating a "neo-colonial" system, the United Nations' top agriculture official has cautioned. The warning by Jacques Diouf, director-general of the Food and Agriculture Organisation, comes as countries from Saudi Arabia to China plan to lease vast tracts of land in Africa and Asia to grow crops and ship them back to their markets." Blas Javier(2008) UN warns of food 'neo-colonialism. Retrieved 5.5.2009 from http://www.ft.com/cms/s/0/3d3ede92-6e02-11dd-b5df-0000779fd18c.html?nclick_check=1

320 Case 182/83 Fearon [1984] ECR 3677; 320 Case 305/87 Commission v Greece [1989] ECR 1461 ; Case C-302/97 Konle [1999] ECR I-3099; Case C-423/98 Albore ECR [2000] Page I-5965 ; Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157; Case C-300/01 Salzman ECR [2003] Page I-4899 ; Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743 ; Case C-370/05 Festersen [2007] ECR I-1129.

1.4.5 Derogations under the Field of Acquisition of Immovable Properties

As we mentioned, the nature of negotiations can simply stated as "nothing but the acquis". Such conditionality inevitably has to be balanced with some flexibility. The tools for flexibility in such rigid approach are mainly formed by the transitional periods and derogations.

1.4.5.1 Nature of Derogations

Before examining the derogations under the acquisition of immovable properties, we should focus and the critical points related to derogations such as the reasons, types and mechanisms…ect. As is stated above the whole acquis has eventually to be adopted by the candidate country.

If the compliance with the acquis on the planned date of accession is not possible establishment of transition periods will be a part of negotiations[321]. These periods need to be limited in time and scope, and may neither aggravate with the EU law, policies or hinder competition at significant

[321] For instance EU's approach towards transitional periods in the Negotiating Framework with Croatia reads as follows:
"The Union may agree to requests from Croatia for transitional measures provided they are limited in time and scope, and accompanied by a plan with clearly defined stages for application of the acquis. For areas linked to the extension of the internal market, regulatory measures should be implemented quickly and transition periods should be short and few; where considerable adaptations are necessary requiring substantial effort including large financial outlays, appropriate transitional arrangements can be envisaged as part of an on going, detailed and budgeted plan for alignment. In any case, transitional arrangements must not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant distortions of competition. In this connection, account must be taken of the interests of the Union and of Croatia. Transitional measures and specific arrangements, in particular safeguard clauses, may also be agreed in the interest of the Union, in line with the second bullet point of paragraph 23 of the European Council conclusions of 16/17 December 2004."

levels. As we stated, partly delay of acquis is should be based on [322]. These grounds may pertain to the technical difficulties[323] related to compliance, or the need to abate the negative impacts of compliance, the necessity for candidate countries to maintain their current elevated standards, the protection of their fundamental national interests, the need to ensure smooth completion of social and economic transition, or important financial problems[324].

Permanent or temporary derogations may also be granted under certain conditions. Contrary to transition periods, candidate countries to which temporary derogations have been conceded may refrain from applying a section of the acquis for a certain period of time, without having to present compliance agendas. Permanent derogations, where no time limits ought to be set, have been granted in the past in very unusual circumstances, where proof was brought before authorities that the derogation would not affect the Internal Market and create serious problems for the candidate if not granted. Malta is the most recent country to have been granted a permanent derogation.

Negotiating countries may request transition periods in years from the date of accession. However the periods might be defined by end-dates. Technical problems dealt with within a certain period from the starting date and therefore set dates can be given for conformity. In cases where the problems of adjustment are financial or more complex, a date is usually

[322] Mayhew Alan(2007) Enlargement Of The European Union: An Analysis of The Negotiations For Countries of The Western Balkans. Sigma Paper No. 37. OECD: Public Governance And Territorial Development Directorate.Page 33.
[323] For instance,the need to revoke international agreements.
[324] As we stated repeatedly, EU usually prefers not to have recourse to techniques such as transition periods and derogations, and rather focuses on the development of specific creative solutions tailored to meet the candidate countries' needs. Therefore solid arguments are needed to be presented to EU to be granted such periods.

given as from the date of accession, because implementation of the measure is considered to have negative near-term impacts.

The major instrument in negotiations is delaying implementation of part of the acquis until after accession in other words, transitional periods. Transition periods can be requested by both parties. In Poland accession, the EU requested transition periods for the free movement of labour Poland requested transition periods for the free movement of capital . In the V. enlargement a considerable number of transition periods were granted[325].

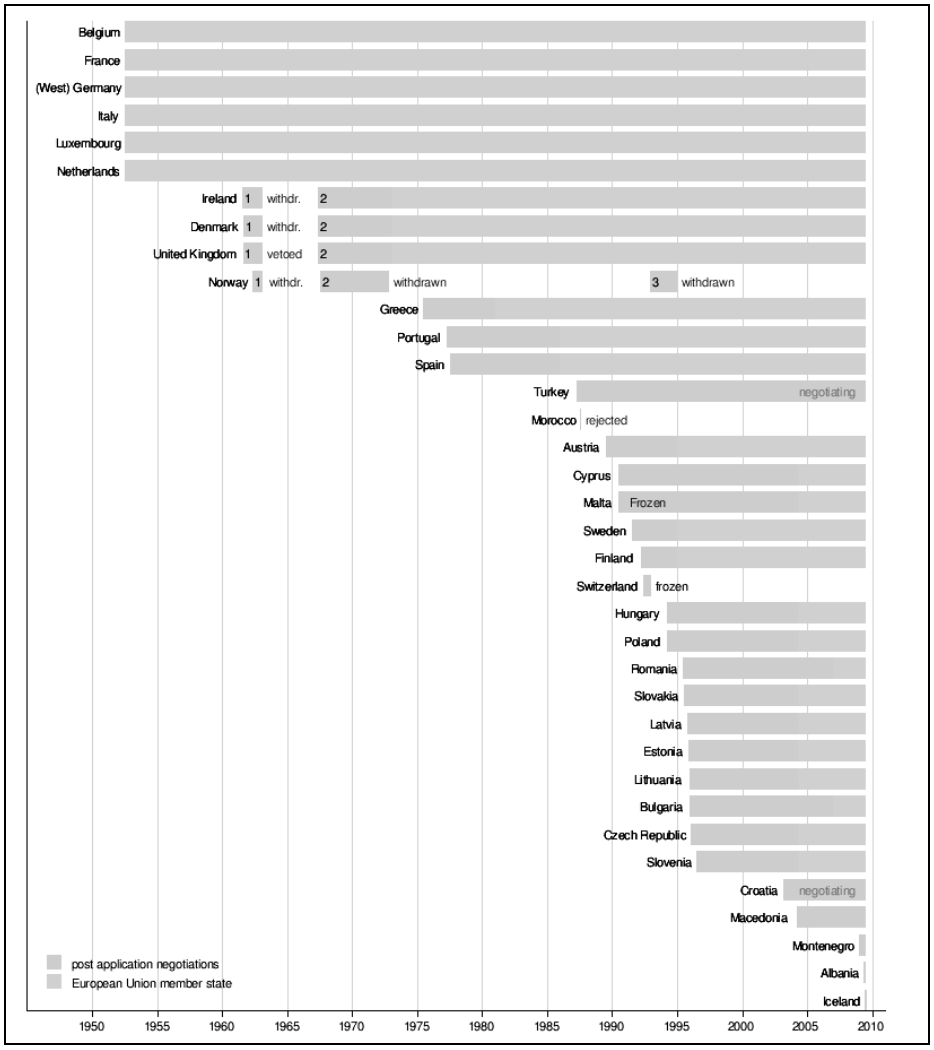
Transition periods for the candidate countries, from the EU point of view, should be kept as short as possible. They should be accompanied by a timetable for the progressive achievement of full compliance with the acquis, and their application should be monitored. Obviously, the candidates, on the other hand, are sometimes interested in obtaining long transitions in order to reduce the financial strain of accession. EU usually is not very strict under such conditions if the transition period does not lead to distortions of competition,. Derogations can be requested in negotiations. In the past, permanent derogations have been agreed in rare cases. The most famous is perhaps the permanent derogation for "chewing tobacco" negotiated with Sweden.

1.4.5.2 Country Examples on the Field of Derogations Related to the Acquisition of Immovable Property in the V.Enlargement

EU is enlarging till it is founded. The one of the biggest enlargement has been finalized on 2003. The table regarding to the time line of the enlargement process is given below.

[325] Temporary derogations may be given on a similar basis to transition periods, the only difference being that a candidate country would be allowed to set aside the implementation of Community law for a set period without having to present a plan for the transition.

Table 4: Time Line for the Enlargement[326]



If we leave the four enlargements aside, V.Enlargement has been the most peculiar one from many views. For instance in the IV.enlargement, Austria, Finland and Sweden has joined EU. These states were in many ways above EU12 standards. When it comes to V.Enlargement, many of the states were, from the point of development figures and especially GDP/head were below

[326] Retrieved on 1.5.2009 from http://en.wikipedia.org/wiki/Enlargement_of_the_European_Union .The table is indicative. Ankara Agreement between Turkey and EEC was signed on september 12, 1963 at Ankara.The Agreement initiated a three-step process toward creating a Customs Union which would help secure Turkey's full membership in the EEC.

the EU 15 standards. Therefore the tougher enlargement is the latest one and we will focus on that process.

In the V.Enlargement , except Slovenia, every candidate focused and granted transitional periods. We must add that Bulgaria and Romania followed suit. As we will consider later, the price differences between EU15 and the candidates were dramatic. In addition to that, Malta, as we explained later, was granted a permanent(like) derogation regarding the sales of secondary residences to EU citizens.

1.4.5.2.1 Permanent Derogations

The permanent Derogations when the nature of negotiations and derogations taken in to consideration are the ones that are granted in exceptional cases. Malta and Denmark represents examples for this type of derogations in EU.

In Malta, the prior authorization is the basic mechanism. Only secondary residence of limited size could be acquired by non-residents, and the value of property had to be above a certain limit. The rationale for these restrictions was to retain a measure of control on land use and to prevent speculation[327].

Protocol No 6 on the acquisition of secondary residences in Malta reads as follows[328]:

[327] Foreigners could acquire additional property in Malta beyond the secondary residence only if they obtained Maltese nationality.During negotiations, Malta requested to be able to keep these restrictions on a permanent basis. The authorities were in particular concerned that if EU residents had unrestricted access to the real estate in their small island country, this could lead to more widespread economic and social problems. They supported their case by several arguments. First, they argued that, with population of 395,000 and territory of just 316 km2 Malta was by far the most densely populated country in the EU-25.As a result, land available for construction could only cover the basic needs of the local population.

[328] OJ L 236. 23.9.2003.

Bearing in mind the very limited number of residences in Malta and the very limited land available for construction purposes, which can only cover the basic needs created by the demographic development of the present residents, Malta may on a non-discriminatory basis maintain in force the rules on the acquisition and holding of immovable property for secondary residence purposes by nationals of the Member States who have not legally resided in Malta for at least five years laid down in the Immovable Property (Acquisition by Non-Residents) Act (Chapter 246).

Malta shall apply authorization procedures for the acquisition of immovable property for secondary residence purposes in Malta, which shall be based on published, objective, stable and transparent criteria. These criteria shall be applied in a non-discriminatory manner and shall not differentiate between nationals of Malta and of other Member States. Malta shall ensure that in no instance shall a national of a Member State be treated in a more restrictive way than a national of a third country.

In the event that the value of one such property bought by a national of a Member State exceeds the thresholds provided for in Malta's legislation, namely 30000 Maltese lira for apartments and 50000 Maltese lira for any type of property other than apartments and property of historical importance, authorization shall be granted. Malta may revise the thresholds established by such legislation to reflect changes in prices in the property market in Malta.

The previous example was Denmark. Unlike the Protocol VI with Malta, second homes, the protocol lacks the rationale for derogation. However, the reason for the derogation is the desire of the Danish government to keep the price of land at a level affordable for its own citizens. Protocol reads as follows[329]:

> THE HIGH CONTRACTING PARTIES,
>
> DESIRING to settle certain particular problems relating to Denmark,
>
> HAVE AGREED UPON the following provision, which shall be annexed to the Treaty establishing the European Community:
>
> Notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes.

[329] Denmark conducts the most consistent policy of controlling the acquisition of real estate by foreigners. This right was guaranteed to Denmark in a Masstricht protocol. Citizens and enterprises from the EU states may receive permission of the Danish government for the purchase of real estate if it is intended as a place of permanent resident or investment. The authorities refrain from granting permission for the purchase of summer homes by foreigners who does not have a permanent residence permit. The reason for these actions is the desire of the Danish government to keep the price of land at a level affordable for its own citizens.See, Protocol no 16: Protocol on the Acquisition of Property in Denmark. It should also be added that in case Festersen, this derogation has been discussed." The Danish Government must be considered still to be claiming that the residence requirement at issue in the main proceedings must also fall within the derogation laid down in Protocol No 16 annexed to the Treaty, according to which 'notwithstanding the provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes. It must however be found, in that regard, that the requirement to take up residence on the agricultural property acquired applies irrespective of whether the residence at issue is a principal or second home. Protocol No 16 cannot, therefore, effectively be relied on to justify such a requirement. "Case C-370/05 Festersen [2007] ECR I-1129. Paras 45-46.

1.4.5.2.2 Transitional Periods

The transitional periods are more commonly used than the permanent ones. In the V.th Enlargement, transitional periods under the field of acquisition of immovable property was a hard negotiation field for each and every candidate[330]. The complexity of clauses related to those exceptions might justify our argument.

When the general classification taken in to account, the basic qualification based on secondary homes and agricultural lands/Forestry .For instance, Poland[331]. was granted twelve years for acquisition of agricultural land and forests, excluding EU citizens who wish to establish themselves as self employed farmers, who have been legally resident and leasing land in Poland. as a natural or legal person for three or seven years continuously, depending on the region, who are to be subject to the same restrictions as Polish nationals. For the secondary houses, the first EU offer, 5 years has been granted. [332]

[330] The offer made to canditates in 2001, was a transitional period on the period for the acquisition of secondary residences, excluding EU citizens that reside in the future member state from this transition period, and a seven year transition period for the acquisition of agricultural land and forestry land, excluding self employed farmers.

[331] The Transitional Arrangements for Poland is as follows :

Chapter	Transitional Arrangements
Free movement of goods	To 31.12.2008 for introduction of Community procedures on registration of pharmaceuticals
Free movement of persons	Seven-year transition (2+3+2) for freedom of movement of workers to EU-15 (reciprocal)
Freedom to provide services	To 31.12.2007 for the rules on minimum capital requirement of certain co-operative banks
Free movement of capital	12 years for farmland and forests; excludes self-employed farmers having leased and worked land for three or seven years minimum (depending on region); five years for secondary residences

[332] The whole text regarding the transitional periods Poland granted under Annex XII reads as follows:
Poland may maintain in force for five years from the date of accession the rules regarding the acquisition of secondary residences laid down in the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Dz.U. 1996, Nr 54, poz. 245 with amendments), as amended.

Latvia, Estonia, Czech Republic and Lithuania on the acquisition of immovable property by EU nationals and companies used the wording in their annexes that "EU nationals and companies not established or registered or having a local branch" . If we consider the recent conditions, in Latvia, Poland, Czech Republic, EU companies that registered in country may acquire agricultural land if the minority share is foreign, in Slovakia,

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Nationals of the Member States and nationals of the States which are a party to the European Economic Area Agreement and who have been legally resident in Poland for four years continuously shall not, as regards the acquisition of secondary residences, be subject to the provisions of the preceding subparagraph or to any procedures other than those to which nationals of Poland are subject.

Poland may maintain in force for twelve years from the date of accession the rules laid down in the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Dz.U. 1996, Nr 54, poz. 245 with amendments) as amended, regarding the acquisition of agricultural land and forests. In no instance may nationals of the Member States or legal persons formed in accordance with the laws of another Member State be treated less favourably in respect of the acquisition of agricultural land and forests than at the date of signature of the Accession Treaty.

Nationals of another Member State or of a State which is a party to the European Economic Area Agreement who want to establish themselves as self-employed farmers and who have been legally resident and leasing land in Poland as a natural or legal person for at least three years continuously, shall not be subject to the provisions of the preceding subparagraph or to any procedures other than those to which nationals of Poland are subject as regards the purchase of agricultural land and forests from the date of accession. In the Warmińsko-Mazurskie, Pomorskie, Kujawsko-Pomorskie, Zachodniopomorskie, Lubuskie, Dolnośląskie, Opolskie and Wielkopolskie voivodships, the residence and leasing period indicated in the preceding sentence shall extend to seven years. The lease period preceding the purchase of land shall be calculated individually for each national of a Member State who has been leasing land in Poland from the certified date of the original lease agreement. Self-employed farmers who have been leasing land not as natural but as legal persons can transfer the rights of the legal person under the lease agreement to themselves as natural persons. For calculating the lease period preceding the right to purchase, the lease period of the contracts as legal persons shall be counted. Lease agreements by natural persons can be provided with a certified date retroactively and the entire lease period of the certified contracts will be counted. There shall be no deadlines for self-employed farmers to transform their current lease contracts into contracts as natural persons or into written contracts with a certified date. The procedure to transform lease contracts shall be transparent and shall under no circumstances form a new obstacle.

During the transitional period, Poland shall apply an authorisation procedure laid down by law which will ensure that the grant of authorisations for the acquisition of real estate in Poland is based on transparent, objective, stable and public criteria. These criteria shall be applied in a non-discriminatory manner and shall not differentiate between nationals of the Member States residing in Poland. Annex XII.The Treaty of Accession 2003 of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia Signed in Athens on 16 April, 2003 (2003). Retrived 1.6.2009 from http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/treaty_2003/content/index_en.htm

Lithuania, minority conditionality does not exist. In Hungary, legal persons can not agricultural land[333].

Table 5: Transitional Periods(I)

Country	Section	Transitional arrangements for the exclusion of the right of EU nationals and EU companies to acquire real estate
Bulgaria	Annex VI 2005	Five years for acquisition of land for secondary residences, excluding EU citizens residing in the country, who are subject to the same restrictions as Bulgarian citizens.
		Seven years for acquisition of agricultural and forestry land, excluding EU citizens who are self-employed farmers and who wish to establish themselves and reside in the country, who are subject to the same restrictions as Bulgarian nationals.
Czech Republic	Annex V 2003	Five years for acquisition of secondary residences, excluding EU citizens residing in the country and EU companies established in the country or with a branch or representative agency, who are subject to same restrictions as Czech persons.
		Seven years for acquisition of agricultural and forestry land by EU nationals and companies not established or registered in the Czech Republic, excluding EU citizens who are self-employed farmers and who wish to establish themselves and reside in the country, who are to be subject to the same restrictions as Czech nationals.
Estonia	Annex VI 2003	Seven years for acquisition of agricultural and forestry land by EU nationals and companies not established or registered or having a local branch in Estonia, excluding EU citizens who wish to establish themselves as self-employed farmers and who have been resident in the country for at least three years continuously, who are to be subject to the same restrictions as Estonian nationals.
Hungary	Annex X 2003	Five years for acquisition of secondary residences, excluding EU citizens who have resided in the country for at least four years continuously, who shall be subject to the same restrictions as Hungarian nationals.
		Seven years for acquisition of agricultural and forestry land by non-nationals and by legal persons, excluding EU citizens who wish to establish themselves as self-employed farmers and who have been resident and active in farming in Hungary for at least three years, who are to be subject to the same restrictions as Hungarian nationals.

[333] COM(2008) 461 final of 16.7.2008.Report From the Commission to the Council:Review of the transitional measures for the acquisition of agricultural real estate set out"in the 2003 Accession Treaty. Page 9.

Table 6: Transitional Periods(II)

Country	Section	Transitional arrangements for the exclusion of the right of EU nationals and EU companies to acquire real estate
Latvia	Annex VIII 2003	Seven years for acquisition of agricultural and forestry land by EU nationals and companies not established or registered or having a local branch in Latvia, excluding EU citizens who wish to establish themselves as self-employed farmers and who have been resident in the country for at least three years continuously, who are to be subject to the same restrictions as Latvian nationals.
Lithuania	Annex IX 2003	Seven years for acquisition of agricultural and forestry land by EU nationals and companies not established or registered or having a local branch in Lithuania, excluding EU citizens who wish to establish themselves as self-employed farmers and who have been resident in the country for at least three years continuously, who are to be subject to the same restrictions as Lithuanian nationals.
Poland	Annex XII 2003	Five years for acquisition of secondary residences, excluding EU citizens who have resided in the country for four years continuously, who shall be subject to the same restrictions as Polish nationals.
		Twelve years for acquisition of agricultural land and forests, excluding EU citizens who wish to establish themselves as self employed farmers, who have been legally resident and leasing land in Poland as a natural or legal person for three or seven years continuously, depending on the region, who are to be subject to the same restrictions as Polish nationals.

Slovenia has taken different approach in the transitional periods by only using the “safeguard clause”. The safeguard clause granted for Slovenia may resort to the general safeguard clause provided for in Article 37 of the Act concerning the conditions of accession of and the adjustments to the Treaties on which the European Union is founded for a period of up to a maximum of seven years after the date of accession. According to the article 37, In the case of serious disturbances that could last longer or that would aggravate the conditions in Slovene real estate market during the seven-year

period, Slovenia may require of the European Commission to approve safeguard measures necessary for eliminating such disturbances[334].

Table 7: Transitional Periods(III)

Country	Section	Transitional arrangements for the exclusion of the right of EU nationals and EU companies to acquire real estate
Romania	Annex VII 2005	Five years for acquisition of secondary residences, excluding EU citizens residing in the country and EU companies established in the country or with a branch or representative agency, who are subject to the same restrictions as Romanian persons.
		Seven years for acquisition of agricultural and forestry land by EU nationals and companies not established or registered in the Czech Republic, excluding EU citizens who are self-employed farmers and who wish to establish themselves and reside in the country, who are to be subject to the same restrictions as Romanian nationals.
Slovakia	Annex XV 2003	Seven years for acquisition of agricultural land and forests by non-residents, excluding EU citizens who wish to establish themselves as self-employed farmers and who have been resident and active in farming in the country for at least three years continuously, who are to be subject to the same restrictions as Slovakian nationals.
Slovenia	Annex XIII 2003	Right to resort to general safeguard clause (Article 37) for the real estate market for up to seven years.

[334] Annex XIII, Retrieved 1.5.2009 from http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/treaty_2003/content/index_en.htm

1.4.5.3 Principles Governing the Transitional Periods

In the chapter relating to the case-law[335], we examine some parts of the derogations regime and ECJ's attitude towards the derogations. In this chapter we have examined especially the V. enlargement and the how the candidate states acquired derogations on the acquisition of immovable properties. Therefore we can define the very essential principles relating to the derogations.

1.4.5.3.1 Standstill Principle

The standstill principle as a definition of "existing legislation" is explained by the court[336]. It can be argued that this definition is parallel to the article 56 , in the sense of entry of free movement of capital, to cases, under the field of acquisition of immovable property:

> Any measure adopted after the date of accession is not, by that fact alone, automatically excluded from the derogation laid down in Article 70 of the Act of Accession. Thus, if it is, in substance, identical to the previous legislation or if it is limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, it will be covered by the derogation.

Thus, after the date of accession, any measures that forms an obstacle to the exercise of community rights might breach the EC law.

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[335] See Case C-302/97 Konle [1999] ECR I-3099. Also see Case C-355/97 Beck ECR [1999] Page I-04977.

[336] Case C-302/97 Konle [1999] ECR I-3099. Para 52. Also see, Opinion of Advocate General La Pergola . Case C-355/97 Beck ECR [1999] Page I-04977. Para 12.

1.4.5.3.2 Most Favoured Nation Clause

As we have discussed, non discrimination principle is a fundamental principle of single market and EU therefore in the transitional periods, EU brings new dimension to non-discrimination by stating that Nationals of other Member States may not, under any circumstances, be given treatment less favorable than that granted to third-country nationals[337].

> Notwithstanding the obligations under the Treaties on which the European Union is founded, Poland may maintain in force for twelve years from the date of accession the rules laid down in the Act of 24 March 1920 on the Acquisition of Real Estate by Foreigners (Dz.U. 1996, Nr 54, poz. 245 with amendments) as amended, regarding the acquisition of agricultural land and forests. In no instance may nationals of the Member States or legal persons formed in accordance with the laws of another Member State be treated less favourably in respect of the acquisition of agricultural land and forests than at the date of signature of the Accession Treaty[338].

[337] Most favoured nation relationships contrast with reciprocal relationships, since in reciprocal relationships a particular privilege granted by one party only extends to other parties who reciprocate that privilege, rather than to all parties with which it has a most favoured nation agreement. Retrieved 1.5.2009 from http://www.statemaster.com/encyclopedia/Most-favored-nation

[338] Annex VII.The Treaty of Accession 2003 of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia Signed in Athens on 16 April, 2003 (2003). Retrived 1.6.2009 from http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/treaty_2003/content/index_en.htm

1.4.5.3.3 Objective Stable Transparent Authorisation Procedures

In the V.th enlargement, in the annexes, it has been declared that authorization procedures will be based on objective, stable, transparent and public criteria.

As we have indicated in the development of case-law regarding the acquisition of immovable property, many cases after 1997, has been related to prior authorisation schemes.

Basically, ECJ in its third step, conducts the non-discrimination test. This test is closely linked to the discretion powers of the local authorities. According to our view, many cases arising of authorisation procedures caused such clauses to exist similar wordings in the annexes.

> During the transitional period, Poland shall apply an authorisation procedure laid down by law which will ensure that the grant of authorisations for the acquisition of real estate in Poland is based on transparent, objective, stable and public criteria. These criteria shall be applied in a non-discriminatory manner and shall not differentiate between nationals of the Member States residing in Poland[339].

[339]In addition to that lease agreements are governed by this principles:" In the Warmińsko-Mazurskie, Pomorskie, Kujawsko-Pomorskie, Zachodniopomorskie, Lubuskie, Dolnośląskie, Opolskie and Wielkopolskie voivodships, the residence and leasing period indicated in the preceding sentence shall extend to seven years. The lease period preceding the purchase of land shall be calculated individually for each national of a Member State who has been leasing land in Poland from the certified date of the original lease agreement. Self-employed farmers who have been leasing land not as natural but as legal persons can transfer the rights of the legal person under the lease agreement to themselves as natural persons. For calculating the lease period preceding the right to purchase, the lease period of the contracts as legal persons shall be counted. Lease agreements by natural persons can be

1.4.5.3.4 The Extension of Transitional Periods

A safeguard clause that may be revoked by member states, at the end of the transitional period has been used by states such as Latvia, Hungary, Slovakia. However, the extension time limits has been also notified in these clauses. The clauses preclude agricultural land markets.

> If there is sufficient evidence that, upon expiry of the transitional period, there will be serious disturbances or a threat of serious disturbances on the agricultural land market of Slovakia, the Commission, at the request of Slovakia, shall decide upon the extension of the transitional period for up to a maximum of three years[340].

However, when the ECJ's and commission's strict interpretation on the limitation of community rights, in our option, the exercise of these clauses represents a low probability.

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provided with a certified date retroactively and the entire lease period of the certified contracts will be counted. There shall be no deadlines for self-employed farmers to transform their current lease contracts into contracts as natural persons or into written contracts with a certified date. The procedure to transform lease contracts shall be transparent and shall under no circumstances form a new obstacle.
" Annex VII.The Treaty of Accession 2003 of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia Signed in Athens on 16 April, 2003 (2003). Retrived 1.6.2009 from http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/treaty_2003/content/index_en.htm

[340] Annex VIII.The Treaty of Accession 2003 of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia Signed in Athens on 16 April, 2003 (2003). Retrived 1.6.2009 from http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/treaty_2003/content/index_en.htm

CHAPTER II

The Acquisition of Immovable Property By Foreigners in Turkey and a Proposal For Legislative Acts And Policy Considerations in the Accession Process to EU

2.1 The Acquisition of Immovable Properties by Foreigners In Turkey

Acquisition of Immovable Properties by Foreigners has always been one of the most and problematic and significant issues of the law of aliens[341]. The real estate acquisition by foreign real and legal persons in Turkey has been regulated under the Land Registry Law[342].In recent years many provisions regarding to the acquisition of immovable properties by foreigners has been annuled by the Turkish Constitutional Court[343] and new legislation enacted due to this procedure[344]. Important revisions took place on the article 35 of land registry law, article 3 of law on Direct Foreign Investments . In addition to that, a regulation regarding acquisition of immovable properties by companies with foreign investment is drafted in compliance with the fourth sub-clause of 36th article of the law no. 2644. Our examination will

[341] Özel Sibel(2004)Yabancıların Türkiye'de Taşınmaz Edinme Hakkı ile ilgili Tapu Kanunu Mad.35'te Yapılan Son değişiklerin Değerlendirilmesi. İ.Ü. Hukuk Fakültesi Mecmuası. C.LXII. Vol(1-2) Page 436. See also, Özel Sibel(1998) Yabancıların Türkiye'de Taşınmaz Edinmesi gerekli Karşılılık Şartının Yargıtay Kararları Işığında Değerlendirilmesi. İstanbul Üniversity. Milletlerarası Özel hukuk ve Milletler Arası Münasabetler Araştırma ve Uygulama Merkezi.Vol(1-2).Page 305.Erdem Bahadır (2004) Right of Foreigners to Acquire Immovable in Accordance with Amended Article 35 of Land Registry Law. Annales XXXVI. Vol(53). Page 384.

[342] TOJ 29.11.1934-2892.

[343] The Constitutional Court has a tendency to take a conservative approach towards the rights to be granted to foreigners in this regard.

[344] The Land Registry Law and the Law on Direct Foreign Investments which used to compose provisions with regards to the real estate acquisition by foreign real and legal persons in Turkey were undergoing significant restructuring due to the annulments by the Constitutional Court of certain provisions in the relevant pieces of the legislations. The annulments were due to the Constitutional Court's broad assessments about whether the limits of these rights provide a balance between the risks and benefits of allowing foreigners to purchase real estate property in Turkey.

be based on the current status of may 2009. We will examine the acquisition of immovable properties under two major sections:

i. Acquisition of immovable properties by real persons
ii. Acquisition of immovable properties by legal persons

It should also be noted that foreign legal persons such as associations and foundations that are not formed as companies cannot acquire real estate and limited rights in rem in Turkey.

2.1.1 Acquisition Of immovable property by foreign real persons

The the right to acquire immovable property by foreign real persons is regulated with land registry law[345]. Article 35 is dealing directly with acquisition of immovable property by foreign real persons. Land Registry law numbered 2644 is still in force although different amendments are made from time to time. Article 35 of the Land Registry Law No. 2644 was revoked and got its final shape by the Law no. 5782 on July 3, 2008. The new form of the article 35 reads as follows:

> Real persons of foreign nationality may, on condition of reciprocity and compliance with legal restrictions, acquire for use as business premises or a residence immovable property in Turkey that is registered as having been designated for such purposes in a land-use development plan or locality development plan. The granting of limited rights in rem shall be subject

[345] TOJ 29/12/1934 - 2892. Acquisition Of immovable property for foreigners is granted firstly by the law numbered 1284. Within the article of the mentioned code Acquisition Of immovable property is granted to foreigners as same as ottoman citizens.

> to the same conditions. The total land area of immovable property along with limited rights in rem of an independent and permanent nature that may be acquired on a nationwide basis by one natural person with foreign nationality shall not exceed two and a half hectares.

2.1.1.1 Reciprocity Principle and the Exceptions of the Principle

2.1.1.1.1 The Reciprocity Principle

The principle of reciprocity involves permitting the application of the legal effects of specific relationships in law when these same effects are accepted equally by foreign countries[346]. In international law, reciprocity means the right to equality and mutual respect between states[347].

In Turkey, according to Article 35 of the land registry law, such a regime, is in force. According to the paragraph 1, real persons of foreign nationality may, on condition of reciprocity and compliance with legal restrictions, acquire immovable property[348].

The de facto approach is underlined within the paragraph 6 of Article 35 of the land registry law as:

> The decision as to whether reciprocity applies shall be based on the legal and de facto situation. The crucial factor

[346] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık. Page 239. See Also:Tekinalp Gülören(2003)Türk Yabancılar Hukuku. İstanbul:Beta.Pages 20-21. See Also: Özel Sibel(2004)Yabancıların Türkiye'de Taşınmaz Edinme Hakkı ile ilgili Tapu Kanunu Mad.35'te Yapılan Son değişiklerin Değerlendirilmesi. İ.Ü. Hukuk Fakültesi Mecmuası. C.LXII. Vol(1-2) Page 436.

[347] Retrieved: 5.5.2009 from http://www.duhaime.org/LegalDictionary/R/Reciprocity.aspx

[348] Such reciprocity requirements might be observed in special laws such as article 14 of Privitization Law numbered 4046 under current legislation. TOJ 22124-27.11.1994.

> in determining whether this principle applies to citizens of countries in which land ownership rights are not granted to individuals shall be whether the foreign country grants the same property acquisition rights to citizens of the Republic of Turkey as it does to its own citizens.

In addition to that, it must be mentioned that the principle is a political choice. Reciprocity is requested at the time of acquisition. So the restrictions regime in the foreigner's country for Turkish citizens may differ from time to time. Turkish Republic Ministry of foreign affairs representatives in foreigner's country can provide information that is needed to evaluate the reciprocity principle. [349]

2.1.1.1.2 Exceptions of Reciprocity Principle

Although the first condition is reciprocity for real estate acquisition of foreign real persons , reciprocity principle has some exceptions in terms of real persons. These exceptions are as follows:

2.1.1.1.2.1 Heimatlos Persons

Heimatlos person lacks of citizenship, so there will be no host state to consider the reciprocity principle. Eventually, Heimatlos persons are exempted from reciprocity principle[350].

[349] Özel Sibel(1998) Yabancıların Türkiye'de Taşınmaz Edinmesi gerekli Karşılılık Şartının Yargıtay Kararları Işığında Değerlendirilmesi. İstanbul Üniversity. Milletlerarası Özel hukuk ve Milletler Arası Münasabetler Araştırma ve Uygulama Merkezi.Vol(1-2).Page 314.

[350] Statelessness (Heimatlos) most commonly affects refugees although not all refugees are stateless, and not all stateless persons may be able to qualify as refugees. Refugee status entails the extra requirements that the refugee is outside their country of nationality (or country of habitual residence if stateless), and is deserving of asylum based upon a well-founded fear of persecution for categorized reasons which make him/her unwilling or unable to avail the protection of that country. According to Turkish Law, only the ones mentioned in Lausanne Treaty are accepted as refugees. Besides Turkey puts this reservation to the Conevntion Relating to the Statutes of Refugees as well.

2.1.1.1.2.2 Article 28 of the Nationality Law

According to article 28 of the Nationality Law(5901)[351], if the person who has acquired Turkish nationality by birth and their children that are treated with him/her renounces from the Turkish Nationality with the permission, except for the legislation regarding to national security and public order, he/she may acquire immovable property within the same conditions as Turkish Nationals.

2.1.1.1.2.3 Convention Relating to the Statutes of Refugees

According to the article 7/2 of "Convention Relating to the Statutes of Refugees " dated July 28, 1951, ratified by Turkey with the law dated August 26, 1961 and numbered 359, the refugees are exempted from reciprocity principle in a country after three years of residence. Due to Convention, Turkey considers refugees within the events occurring in Europe before 1 January 1951[352].

[351] TOJ 12.6.2009 – 27256.

[352] The Turkish Government will, at the time of ratification, enter reservations which it could make under article 42 of the Convention.
As to the Reservation and declaration made upon ratification
No provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey;
The Government of the Republic of Turkey is not a party to the Arrangements of 12 May 1926 and of 30 June 1928 mentioned in article 1, paragraph A, of this Convention. Furthermore, the 150 persons affected by the Arrangement of 30 June 1928 having been amnestied under Act No.3527, the provisions laid down in this Arrangement are no longer valid in the case of Turkey. Consequently, the Government of the Republic of Turkey considers the Convention of 28 July 1951 independently of the aforementioned Arrangements.
The Government of the Republic understands that the action of "re-availment" or "reacquisition" as referred to in article 1, paragraph C, of the Convention–that is to say: "If (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily reacquired it"–does not depend only on the request of the person concerned but also on the consent of the State in question.
Convention relating to the Status of Refugees.Geneva. 28.7.1951 .Entry into force : 22 April 1954, in accordance with article 43 .Registration : 22 April 1954, No. 2545. United Nations.Treaty Series . Vol. 189. Page 137.

The refugees in Turkey are also subjected to the same provision. The refugees are able to to indicate their status with an official document for exemption.

2.1.1.1.2.4 Article 8 of the Law for Encouragement of Tourism

According to the article 8 of the Law for Encouragement of Tourism numbered 2634, foreign real and legal persons who want to make investment for tourism objective in Turkey, can acquire real estate by the decision of the Council of Ministers in tourism areas and centers being exempted from reciprocity principle and restrictions formulated for foreigners. According to the Law , the real estate within tourism areas and tourism centres for which land use plans have been designated can be allocated to the Ministry of Culture and Tourism by the public agency having ownership. The Ministry is authorized to allocate such real estates to real persons and legal entities of Turkish and foreign nationality.

2.1.1.2 Legal Restrictive Provisions

The second condition for real estate acquisition of foreign real persons in our country is to comply with restrictive provisions involved in law. The legal restrictions regulated by law restrictions are are as follows:

2.1.1.2.1 Restrictions Arising of Military Forbidden Zones and Security Zones Law

According to regulations involved in the Military Forbidden Zones and Security Zones Law numbered 2565[353] which restricts geographically real estate acquisition of foreigners in our country, it is not possible to sell, transfer and rent real estate located within military forbidden zones and security zones, to foreign real and legal persons.

From the perspective of acquisition immovable properties by foreigners "Ground" Military Forbidden areas have the importance. Such zones are categorized under two sections, first degree and second degree.

First Degree Military Security Zones are areas, Land or Naval Military Forbidden Zones and are formed by connecting the points within up to 100 to 400 meters from the external boundaries of certain military facilities, in case of need, in the shores, the distance may be increased to 600 meters[354]. Second Degree Military Security Zones are formed by connecting the points that has been selected within up to 5-10 kilometers from the external boundaries of first degree military facilities.

Turkish citizens are allowed (if not restricted) to settle, conduct agricultural activities and perform their work and professions

[353] TOJ 18.12.1981-2565. TOJ 22.12.1981-17552.
[354] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık. Page 239. See Also:Tekinalp Gülören(2003)Türk Yabancılar Hukuku. İstanbul:Beta.Page 243.

Foreigners can not acquire immovable properties in these zones. The council of ministers is authorized to dispose and determine the conditions of the process for acquired immovable properties in these zones[355].

Unexpropriated real estates can not be sold, transferred and hired out to foreign real and legal persons.

Special Security Zones, include all areas surrounding all kinds of settlements and facilities of strategic importance belonging to public or private institutions. According to articles 28 of the Military Forbidden Zones and Safety Areas Law No. 2565, by taking in to consideration the closeness to the military forbidden zones and strategic importance the General Staff of Turkish Army may submit a proposal to prohibit the acquisition and the lease of immovable properties to Council of Ministers in the selected areas

Moreover, according to article 21/a, all the properties belong to real and legal persons may become subject to cumpolsary acquisition.

It should also by the amendments took place in Land registry law these procedures added to the legislation[356]. Paragraph 8 reads as follows:

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[355] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık. Page 239. See Also:Tekinalp Gülören(2003)Türk Yabancılar Hukuku. İstanbul:Beta.Page 244.

[356] Accodingly in the regulation concerning legal persons such articles are observed.
Article 7 regardinng to acquisition of real estate property located at forbidden military zones, restricted military security zones and strategic zones reads as follows:
(1) If the real estate is located within forbidden military zones, restricted military security zones and strategic zones, General Staff of Turkish Army or its authorized Local Command evaluates the application for acquiring real estate property subject to the national security principles and notifies the Governorship of the outcome. If the evaluation is affirmative, Governorship finalizes the application subject to the opinion of City Directorate of the Ministry of Industry and Commerce regarding the company's field of activity determined in its Articles of Association.

> The maps and coordinate values relating to areas or decisions are taken to alter such areas that designated as prohibited military zones, military and strategic areas, without delay be furnished by the Ministry of Defence and maps and coordinate values relating to areas or decisions are taken to alter such areas that designated as special strategic areas, without delay be furnished by the Ministry of Internal Affairs, to the Ministry to which the Directorate General of Land Registry and Cadastre is affiliated.

Paragraph 9 reads as follows:

> Notification to land registry offices shall be made by the appropriate administrative authority with respect to plots that, due to their inclusion within the areas stated in the above paragraphs, require to be made subject to

(2) General Staff of Turkish Army or its authorized Local Command may request additional information or documents regarding the purchase of real estate property from the related authorities and/or the company if necessary.
(3) If the evaluation resolves to approve such inquiry, the decision of the Commission is notified in writing to the inquiring company and to the relevant title registry; if the evaluation resolves to reject the inquiry, only the company is notified accordingly.
Article 8 concerning private security zone reads as follows:
If the real estate is within the private security zone, the Commission finalizes the purchase of real estate application subject to the national security principles, company's field of activity determined in its Articles of Association and written opinions provided from the related authorities. The main source of the evaluation is the opinion obtained from the City Directorate of the Ministry of Industry and Commerce which is in compliance with the first sub-paragraph of the 5th Article of this Regulation whether the acquisition of the real estate is in conformity subject to the company's field of activity determined in its Articles of Association.

compulsory purchase orders or in respect of which it is felt that a special annotation requires to be made in the land register.

2.1.1.2.2 Quantity Restrictions

According to the article 35 of the Land Registry Law numbered 2644, foreign real persons can not acquire real estate- nationwide- more than 2,5 hectares[357]. Moreover The total area regarding the acquisition of immovable property and limited rights in rem by real persons of foreign nationality that are in the central districts and other disctricts may amount to %10 of the total area.

The Council of Ministers is authorized to determine percentages that differs, without exceeding, from the percentage of %10 for to take precautions by considering the infrastructure, economy, energy envoirenment, agriculture and security concerns in central district and other districts.

Legal inheritance is exception of this rule however, as paragraph 5 of article 35 of land registry law indicates that the rules and restrictions of the above paragraphs shall be applied in the case of testamentary disposition. Moreover, in the case of immovable property and limited rights in rem that are legally inherited by citizens of countries with which reciprocity with the Republic of Turkey does not apply, these shall be disposed of once transfer procedures have been completed.

2.1.1.2.3 Sensitive areas that require special protection and strategic locations

The paragraph 7 of Article 35 of the land registry law reads as follows:

[357] First paragraph of Article 35. Also , 2.5 hectares is equivalent to 25000 m^2 or 25 decars.

> The Council of Ministers is authorised, in response to appeals lodged by the appropriate public establishments or institutions accompanied by plans and coordinate maps that have been registered with competent authorities, in areas that require special protection due to their significance for irrigation, energy, agricultural or mining purposes or for reasons of conservation, faith or culture; areas under special protection along with sensitive areas that require protection due to their flora and fauna, and strategic locations; to designate areas in which for reasons of national security or the public good, real persons of foreign nationality and commercial companies that have the status of legal persons and that have been established in foreign countries under the domestic legislation of their own countries may not acquire immovable property and limited rights in rem.

The paragraph, based on the qualities of land enables instutions to regulate more restrictive regimes. Three basic categories as follows:

i. Areas that require special protection due to their significance for irrigation, energy, agricultural or mining purposes or for reasons of conservation, faith or culture;
ii. Areas under special protection along with sensitive areas that require protection due to their flora and fauna, and strategic locations;
iii. Areas in which for reasons of national security or the public good[358].

[358] In later sections we will discuss the importance of irrigation, agriculture, flora and fauna, and their importace for the human beings.

In the later chapters we will examine, Regulatory Satute on Preservation of Agricultural Lands and Land Consolidation (2009/15154)[359], especially Article 8 of the (Law no:5503) "Law on Soil Conservation and Land Use[360]" (as amended by Law 5578)[361] which aims to stop fragmentation of land and preservation of soil and land. The afore mentioned legislation, have a great importance in examining the limitations arising of irrigation, agriculture, flora and fauna according to our consideration.

2.1.1.2.4 Law on Retaliation Measures[362] against the Property Rights of Citizens of Host State in Turkish Borders due to the retaliation measures on the Property Rights of Turkish Citizens in the Borders of Host state

This approach can be interpreted as a special form of reciprocity that based on retaliation of the partial or total limitations on property rights of Tukish citizens in the host states. According to law under such circumstances, partial or total limitations of the property rights of thecitizens of host state in Turkey and expropriation of those will be determined by the Council of ministers[363].

Such measures has been applied to citizens of Syria. The first regulation is dated back to 1963[364]. Following this regulation a desicion concerning the payments of the blocked assets in TRCB has been legislated[365]. Eventually in 1972, a land commission has been established to resolve problems and

[359] TOJ 24.7.2009- 27298,
[360] TOJ 19.7.2005-25880.
[361] TOJ 9.2.2007-26429.
[362] Infiction by one state upon the citizens of another state. Ovacık Mustafa, (2003) Hukuk Sözlüğü Türkçe-İngilizce,Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara,page 179.
[363] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık. Page 245.
[364] TOJ 6.11.1967-12743.
[365] TOJ 22.9.1967-12706.

reach a comprimise[366]. In the history, such measures has been used in a limited way. Yugoslavia, Romania and Greece are the examples[367].

[366] TOJ 21.7.1972-14252

[367] Çelikel Aysel.Gelgel Günseli Öztekin(2009)Yabancılar Hukuku.İstanbul:Beta Yayıncılık. Page 239. See Also:Tekinalp Gülören(2003)Türk Yabancılar Hukuku. İstanbul:Beta.Pages 246-248.

2.1.2 Acquisition of Immovable property by Foreign Legal Persons

The Acquisition of Immvable property in Turkey by Foreign Legal Persons can be categorized under two sections[368]

i. The acquisition of immovable property by commercial companies that have the status of legal persons that have been established in foreign countries under the domestic legislation of their own countries (Article 35)

ii. The acquisition of immovable property in Turkey by a Turkish company with a foreign capital (Article 36)

2.1.2.1 The Acquisition of Immovable Property by Commercial Companies that have the Status of Legal persons and Established in Foreign Countries under the Domestic Legislation of their own Countries (Article 35)

In accordance with Law No 2644, as as general rule, companies established in foreign countries can not acquire real estate and limited rights in rem in Turkey except as permitted under special laws[369].
Legislation permitting foreign companies to acquire real estate in Turkey is as follows:

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[368] It should also be noted that foreign legal persons that are not formed as companies (such as associations and foundations) cannot acquire real estate and limited rights in rem in Turkey.

[369] Real Estate acquisitions by foreign capital companies, i.e. companies that are incorporated with foreign capital in Turkey in accordance with Turkish Law, or Turkish companies participated in by foreign investors, were previously governed by Article 3(d) of the FDI Law . According to Article 3(d) of the FDI Law, foreign capital companies were allowed to acquire real estate and limited rights *in rem* under the same conditions as those applied to Turkish citizens.However, on April 16, 2008 the Constitutional Court annulled Article 3(d) of the FDI Law. On July 3, 2008 the legislature promulgated a new law to amend Article 36 of the Land Registry Law to address foreign capital companies wishing to acquire real estate or limited rights *in rem* in Turkey.

2.1.2.1.1 Law regarding the Encouragement of Tourism No 2634

The foreign companies can acquire and hold title to real estate within tourism districts and tourism centres with the Council of Ministers' permission.

According to Article 8 of the Law for Encouragement of Tourism the real estate within tourism areas and tourism centres for which land use plans have been prepared can be allocated to the Ministry of Culture and Tourism by the public agency having ownership. The Ministry is authorized to allocate such real estates to real persons and legal entities of Turkish and foreign nationality[370].

2.1.2.1.2 Petroleum Law No 6326

According to the Petroleum Law[371] (Article No: 87[372]), a holder of a petroleum right (either a Turkish or foreign company) is entitled to acquire a surface lease of such land in or in the vicinity of his license, lease or certificate area as required for his operation, by agreement or by cumpolsary acquisition if the land is privately owned or by recording it on his license, lease or certificate if the land is not owned by anybody373.

[370] TOJ 12.3.1982-2634.

[371] TOJ 16/3/1954 -8659

[372] According to article 87 of the Petroleum Law, if the surface operation license acquired by agreement run for a period of more than three years, then the owner of the privately owned land may also ask the holder of the petroleum right to have the land in question to be cupsolsary acquired.In case of cumpolsary acquisition the land shall be owned by the Treasury along with a surface operation license thereon held by the holder of the petroleum right by whom the cost of cumpolsary acquisition will be covered. However, provided no provision to the contrary exists in other laws, the title to privately owned land may also be acquired by the holder of a petroleum right through agreement with the owner

[373] Article 12 of Petroleum Law reads as follows:
" No person existing by virtue of law in which a foreign state holds a financial or beneficial interst of such extent or in such form as directly or indirectly to influence his actions, and no person acting for or on behalf of a foreign state may (a) hold a petroleum

2.1.2.1.3 Industrial Zones Law No 4737:

According the article 3 of the Industrial Zones Law the foreign companies can hold limited rights in rem in industrial zones if they have obtained investment permits for the real estate concerned from the Ministry of Industry and Commerce. Moreover cumpolsary acquisition of land procedures behalf of companies has been established by the law[374].

right or conduct a petroleum operation, or (c) establish or operate instatallations incidental or to forming part of a petroleum operation. .
2. By a decision of the Council of Ministers, an exception to this article may be provided. Such a decision may not be appealed by those persons mentioned in (1) above, to the judical or administrative courts. "

[374] According to article 3 of the İndustrial Zones Law, with a view to allocating privately owned lands and plots, of lands within the industrial zones for investment activities, urgent cumpolsary acquisitions may be made in accordance with the provisions of the Cumpolsary acquisitionLaw No. 2942. Properties so expropriated shall be registered in the land register in the name of the Treasury.If costs of such properties that has been subject to cumpolsary acquisition are met by the budget of the Ministry of Industry and Trade, easement may be established on such properties for a period that is specified under the contract in favour of the investors, in return for its price; and if the cumpolsary acquisition costs were met by the investors, then an easement in favour of investors free of charge may be established. All procedures regarding easement shall be performed by the Ministry of Finance

2.1.3 The Acquisition of Immovable Property in Turkey by a Turkish Company with a Foreign Capital (Article 36& The Regulation)

2.1.3.1 The Article 36 of the Land Registry Law and the The Acquisition of Immovable property in Turkey by a Turkish company with a foreign capital

The article 36 of the Land Registry Law[375] regulates the acquisition of immovable property and limited rights in rem in Turkey by a Turkish Company with a Foreign Capital. Article 36 reads as follows[376]:

> The commercial companies that is formed as legal persons, which foreign investors have established or participated into in Turkey, may acquire and use immovable property or limited rights in rem in order to pursue the activities stipulated in their articles of associations. The same principle shall be applied in case of transfer of the immovable property acquired in this manner to another company with foreign capital established in Turkey and if a company with domestic capital holding immovable converted in to a company with foreign capital by means of share transfer. The provisions of Article 35 shall be applied in case of liquidation of companies with foreign capital established in Turkey, shareholders who are foreign real persons or foreign commercial companies established in foreign countries under their domestic law wish to acquire the immovable held by the company.

[375] TOJ 15.7.2008-26937.
[376] Ammended by Law no:5782.

The main limitation is the acquiring ımmovable property compatible with company's Articles of Association (Ultra vires principle)[377] . The second major limitation is the location of land, especially from the national security concerns. A permission mechanism is attached to very purposes. Article 36 defines the requirement for the Turkish companies with foreign capital wishing to acquire real estate and limited real rights in rem if located in a forbidden military zone, security zone or strategic zone must obtain Turkish General Staff or Commandership permits ,if located in a private security zone must obtain permission from the governorship[378].In addition to that, transfer of shares to the foreigners is regulated under this article, besides the same mechanism is regulated by article 35(if conditions occur) [379]. Lastly, if a foreign capital company having real estate is subject to liquidation that the real estate is intended to be acquired by the foreign real or legal persons co-owning the said company, Article 35 of the Land Registry Law shall be applied[380].It should be added that, in case of non-compliance with the articles of association of the company, the immovable propert or the limited rights in rem shall be liquidated according to the instructions given by the Ministry of Finance. If there is no any, it will be liquidated and the proceeds shall be given to the owners.

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[377] Ultra vires is a Latin phrase that means "beyond the powers". The principle describes acts attempted by a corporation that are beyond the scope of powers granted by the corporation's Articles of Incorporation or in a clause in its Bylaws; in the laws authorizing its formation, or similar founding documents.

[378] The detailed process is defined in the regulation.

[379] The conditions set forth by article 35 of Land Registry Law for the real persons and foreign companies estabslished unde their own domestic legislation shall be applied under those circumstances.

[380] "The commercial companies that is formed as legal persons, which foreign investors have established or participated into in Turkey, may acquire and use immovable or *limited rights in rem* in order to pursue the activities stipulated in their articles of associations. The same principle applies to transfer of the immovable acquired in this manner to another company with foreign capital established in Turkey and during a company with domestic capital holding immovable becoming a company with foreign capital by means of share transfer. Provisions of Article 35 apply in case of liquidation of companies with foreign capital established in Turkey, shareholders who are foreign real persons or foreign commercial companies established in abroad wish to acquire the immovable held by the company."

2.1.3.2 The Regulation Regarding Acquisition of Immovable Properties by Companies with Foreign Capital

2.1.3.2.1 The Scope of the Regulation

The regulation basically regulates the acquisition of immovable properties by Turkish Companies with Foreign Capital[381]. The regulation is is drafted in compliance with the fourth sub-clause of 36th Article of the Law No. 2644 dated December 12, 1934.[382] The regulation aims to define and refine the processes regarding the acquisition of immovable properties by Turkish Companies with Foreign Capital[383]. The scope of the regulation is defined in Article 1.Article 1 reads as follows[384]:

> The purpose of this regulation is to determine the procedures and principles for acquiring immovable

[381] TOJ 12.11.2008- 27052.
[382] See Article 2.
[383] According to the article 16 of the regulation the provisions of this Regulation are executed by the Ministry of Public Works and Rural Affairs.
[384] It should be mentioned that Article 3 contains main definitions of terms in regulation. Article 3 reads as follows:
"1) The referrals in this Regulation means the following;
a) Forbidden military zone and restricted military security zone: Forbidden military zone and restricted security zone that are designated at the Law of Forbidden Military Zones and Restricted Military Security Zones no. 2565 dated December 18, 1981,
b) Law: Title Law No. 2644,
c) Commission: The Commissions constituted within the Governorships,
ç) Private security zone: Private security zones that are designated in the Law of Forbidden Military Zones and Restricted Military Security Zones No. 2565,
d) Limited rights in rem: The limited real property rights (such as mortgage) that are rights registered to the title registry other than the ones that are registered as independent and permanent rights to separate registration pages (ownership rights),
e) Strategic Zone: The strategic zones designated at the 28th Article of the Law of Forbidden Military Zones and Restricted Military Security Zones No. 2565,
f) Company : Incorporated companies with legal entities that are established or participated by foreign investments in Turkey,
g) Real property ownership: Independent and permanent rights which are registered to separate pages in the title and land registries and property of independent parts that are registered in condominium ownership registries"

property and registering limited rights in rem by companies with foreign capital incorporated in Turkey.

According to the Regulation, Turkish Companies with foreign capital will only be permitted to acquire immovable property and limited rights in rem by getting permission from the governorships. The procedure will basically aim to examine if the acquisition is necessary to pursue the activities of the company as defined in their articles of association and if the immovable property to be acquired is located in any of the specific zones in which further examination has to be carried out.

2.1.3.2.2 The Documents Required for the Application

It is stated in Article 4 of the Regulation that applications for permission to acquire real estate and/or limited rights in rem shall be made by the foreign capital company together with the documents such as purpose of inquiry and with the details of the real estate property , a certificate of authority proving that the company is authorized to transact for the purposes of real estate and showing the authorized representatives of the company. [385]

[385] Article 4 reads as follows:
(1) Companies that intend to acquire real estate property ownership and/or limited real property rights in Turkey shall apply to the City Planning and Coordination Department of the Governorships of the region that the property is located at along with the information and documents below:
a) An application petition regarding the purpose of inquiry and with the details of the real estate property,
b) A certificate of authority proving that the company is authorized to transact for the purposes of real estate and showing the authorized representatives of the company,
c) The name of the tax office that the company is registered to and the tax number of the company,
ç) A certificate to be obtained from the Chamber of Commerce that the company's headquarters is registered to showing the field of activity of the company stated in its Articles of Association and the names, titles, citizenships and shareholding ratios of the shareholders,
d) The notarized translations of the identification certificates of the foreign private individual shareholders and Certificate of Activities of the foreign legal entity shareholders that are approved by apostile procedure subject to Hague Convention October 5, 1961 or by Turkish Consulates,
e) The names, identification certificates and addresses of companies directors,

However, according to article 10 the Commission may request additional information or documents regarding the inquiries of immovable property rights from the related authorities and/or the company

2.1.3.2.3 The Evaluation of the Application for Acquisition of Immovable Property

According to regulation, the commission operates under the chairmanship of the Governor or an authorized deputy of the Governor by the authorized representatives of the related Land Registry, Tax Revenue Office, City Directorate of the Ministry of Industry and Commerce, City Police Directorate, Local Military Command [386]. The chairman of the Commission may call authorized individuals from other government agencies to Commission meetings if deems necessary[387].

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f) The balance sheets of the company for the last three years (if existing),
(2) If the application of the company is for limited rights in rem then documents stated in sub-paragraphs d), e) and f) items are not required to be submitted."

[386] Article 10 reads as follows: (1) The Commission operates under the chairmanship of the Governor or an authorized deputy of the Governor.
(2) The Commission is formed by the authorized representatives of the related Land Registry, Tax Revenue Office, City Directorate of the Ministry of Industry and Commerce, City Police Directorate, Local Military Command. The chairman of the Commission may call authorized individuals from other government agencies to Commission meetings if deems necessary.
(3) Secretary services of the Commission are operated by the City Planning and Coordination Department of the Governorship.
(4) The Commission summons at least twice a month if an application is submitted.
(5) The Commission may request additional information or documents regarding the inquiries of real estate property rights from the related authorities and/or the company.
(6) Unanimity of permanent members of the Commission is required for the approval of acquisition of the real estate property.
(7) Commission resolutions are informed to the Governorship after they are signed by the Commission members and all resolutions are registered in the resolution ledger.
(8) Following the evaluation of the information received, the affirmative decision is notified to the inquiring company and to the relevant title registry and if rejected only to the inquiring company in writing by the Governorship."

[387] Article 5 reads as follows:
"Following the application for acquiring real estate property, Governor's office requests written evaluations; from City Directorate of the Ministry of Industry and Commerce whether the real estate property acquisition inquiry is confirming with the field of activities of the company, the directorate shall answer to this inquiry by the Commission within 7 days; from General Staff of Turkish Army or its authorized Local Command whether the

According to the regulation, 3 types of areas and procedures related those regulated. These are:

i. Immovable property located inside the forbidden military zone, security zone or strategic zones,
ii. Immovable property located inside the private security zone [388],
iii. Immovable property located outside forbidden military zones, restricted military security zones and strategic zones.

The Article 5 of the Regulation, states accordingly to the aforementioned zone types, defines time periods that governmental institutions must reply to the Commission's request following application by a foreign capital company:

i. within 7 days from the Provincial Directorate of Trade and Industry as to whether the scope of activities of the applicant requires such real estate acquisitions;

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real estate in subject is located at forbidden military zones, or restricted military security zones and/or in strategic zones and if so, whether such inquiry could be allowed for or not, the General Staff or the Local Command shall answer to this inquiry by the Commission within 30 days; from General Directorate of Police whether the real estate in subject is located at private security zones, the Police Directorate shall answer to this inquiry by the Commission within 20 days, however if the real estate is located in the private security zones, the determination of whether such inquiry could be allowed for or not remains on the discretion of the Commission.
(2) The notification dates determined in the first sub-paragraph commences as of the date when the written notifications are received by the related authorities."

[388] Article 8 reads as follows:
" (1) If the real estate is within the private security zone, the Commission finalizes the purchase of real estate application subject to the national security principles, company's field of activity determined in its Articles of Association and written opinions provided from the related authorities. The main source of the evaluation is the opinion obtained from the City Directorate of the Ministry of Industry and Commerce which is in compliance with the first sub-paragraph of the 5th Article of this Regulation whether the acquisition of the real estate is in conformity subject to the company's field of activity determined in its Articles of Association."

ii. within 30 days from the Turkish General Staff or Commandership as to whether the real estate is located in a military prohibition zone, security zone or strategic zone and if so, whether such transaction is permissible; and

iii. within 20 days from the General Directorate of Security as to whether the real estate is located within a private security zone.

After evaluation is finalized , the Commission shall inform the applicant caompany. If the immovable property is located within a forbidden military zone, security zone or strategic zone any disapproving opinions made by the General Staff or Commandership will be final. If the real estate is located in a private security zone, the Commission will make its own evaluation and in its decision the opinions of the relevant authorities will be taken in to consideration.

If the commission grants a permmission to the company, it informs the company and the land registry office. If the commission declines the applicant's petition, it only informs the applicant company[389].

2.1.3.2.4 The Transfer of Shares to the Foreigners

The Regulation also sets forth the principles regarding implementation of Article 36 in cases where domestic companies (formed with domestic capital) that own real estate are transformed into foreign capital companies

[389] Article 6 reads as follows:
"If it is confirmed by the related authorities that the property in question is located outside the forbidden military zones, or restricted military security zones and strategic zones, the application for acquiring real estate property procedure is finalized by the Governorship subject to the opinion of the City Directorate of the Ministry of Industry and Commerce regarding the company's field of activity determined in its Articles of Association.
If the evaluation resolves to approve such inquiry, the decision of the Commission is notified in writing to the inquiring company and to the relevant title registry.
If the decision is negative (to reject) the inquiry then it is notified in writing only to the inquiring company."

by way of share transfer and in cases involving any kind of new foreign participation in existing foreign capital companies.

According to article 11[390] of the Regulation, the Undersecretariat of Treasury informs the General Directorate of Land Registry on a monthly basis of any domestic companies (formed with domestic capital) owning a real estate that are transformed into foreign capital companies by way of share transfer. The General Directorate of the Land Registry shall then inform the governorship of the real estate owned by such companies and consequently, the Commission will assess whether those companies are able to hold the title to the real estate according to same procedures stated above.According to the article 12[391]any new foreign participation into an

[390] Article 11 of the regulation reads as follows:
"(1)If foreign investors obtain shares from existing Turkish companies, these investments are notified to the General Directorate of Title Registration and Cadastral Affairs by the Undersecretary of Treasury every month.
(2) The General Directorate of Title Registration and Cadastral Affairs notifies the Governorships of the information regarding the immovable properties that such companies possess.
(3) Following the notification of such real estate property rights acquisition, Governor's office requests written evaluations; from City Directorate of the Ministry of Industry and Commerce whether the real estate property acquisition inquiry is confirming with the field of activities of the company, the directorate shall answer to this inquiry by the Commission within 7 days; from General Staff of Turkish Army or its authorized Local Command whether the real estate in subject is located at forbidden military zones, or restricted military security zones and/or in strategic zones and if so, whether such inquiry could be allowed for or not, the General Staff or the Local Command shall answer to this inquiry by the Commission within 30 days; from General Directorate of Police whether the real estate in subject is located at private security zones, the Police Directorate shall answer to this inquiry by the Commission within 20 days, however if the real estate is located in the private security zones, the determination of whether such inquiry could be allowed for or not remains on the discretion of the Commission.
(4) The application is finalized by the related government agencies subject to the 6th, 7th, 8th and 10th Articles of this regulation.
(5) Following the negative evaluation of the information by the General Staff of the Turkish Army or its authorized Local Command, the Commission and the City Directorate of the Ministry of Industry, these authorities notify their opinion to the Governorship in order for the Governorship to execute the procedure stated in the 14th Article of this Regulation."

[391] Article 12 of the regulation reads as follows:
(1) If new foreign investors obtains shares from existing Turkish companies with already invested foreign shareholders, these investments are notified to the Undersecretary of Treasury, then the Treasury notifies these changes to the General Directorate of Title Registration and Cadastral Affairs monthly.

existing foreign capital company shall be subject to the above mentioned process. If non-conformity is detected, liquidation process defined in the article 14 will be executed.

(2) The General Directorate of Title Registration and Cadastral Affairs notifies the Governorships of the information regarding the immovable properties that such companies possess.
(3) Governor's office requests written evaluations; from General Staff of Turkish Army or its authorized Local Command whether the real estate in subject is located at forbidden military zones, or restricted military security zones and/or in strategic zones and if so, whether such inquiry could be allowed for or not, the General Staff or the Local Command shall answer to this inquiry by the Commission within 30 days; from General Directorate of Police whether the real estate in subject is located at private security zones, the Police Directorate shall answer to this inquiry by the Commission within 20 days, however if the real estate is located in the private security zones, the determination of whether such inquiry could be allowed for or not remains on the discretion of the Commission.
(4) The application is finalized by the related government agencies subject to the 7th, 8th and 10th Articles of this regulation.
(5) Following the negative evaluation of the information by the General Staff of the Turkish Army or its authorized Local Command and the Commission, these authorities notify their opinion to the Governorship in order for the Governorship to execute the procedure stated in the 14th Article of this Regulation..

2.1.3.2.5 The Compatibility of Intended Use and the Current Use: The Acts Againts the Regulation and Sanctions(Articles 13 and 14)

According to article 13[392] of the Regulation, the Commission is also entitled to evaluate whether the immovable or limited rights in rem acquired by a foreign capital company is being used in accordance with the scope of its activities as designated in its articles of association. The Commission may make such an assessment at its sole discretion or upon written application by real or legal persons.If it is confirmed that the use of acquired real estate and/or limited real property rights is not in conformity with the company's field of activity, the company may be granted a reasonable time period to fix such situation by the Commission. If the breach carried out, procedure defined in article 14 is executed.

[392] Article 13 reads as follows:
"(1) The use of real estate ownership and limited real estate property rights obtained is subject to evaluation by the Commission to determine if such rights are used in conformity with the company's field of activity determined in its Articles of Association. The evaluation process could be initiated by the Commission's own discretion or upon written applications of individuals or entities.
(2) Commission evaluates whether the company is still active in conformity with the purposes determined in its Articles of Association and the Commission may request information and document from the related authorities if necessary.
(3) If it is evaluated that the use of acquired real estate and/or limited real property rights is not in conformity with the company's field of activity, an investigation shall be initiated on the file. On-site inspection could also be initiated if necessary.
(4) If it is confirmed that the use of acquired real estate and/or limited real property rights is not in conformity with the company's field of activity, the acquiring company and the complaining parties if existent, are notified in writing. It is mandatory for the company to respond to the notification in writing within 10 days. Otherwise, the company will be deemed to admit the content of the notification. The Commission may call a meeting with the company representatives.
(5) If it is confirmed that the use of acquired real estate and/or limited real property rights is not in conformity with the company's field of activity, the company may be granted a reasonable time period to fix such situation by the Commission.
(6) Outcomes of the investigation are notified in writing to the inspected company by Governorship.
(7) Following the negative evaluation the Commission notifies its opinion to the Governorship in order for the Governorship to execute the procedure stated in the 14th Article of this Regulation."

According to the article 14 if the use or acquisition of real estate and/or limited real property rights is not in conformity with the Law, Governorship notifies the Ministry of Finance for the liquidation of the acquired real estate and limited real property rights and submits the documents regarding the confirmation of such violations, certified details of the relevant title registry records, notification addresses of real property owners and/or limited real property right holders to the Ministry of Finance accordingly. The Ministry of Finance notifies the company that owns such real property or holds such limited real property rights in writing ordering them to liquidate these rights within six months. This period can be extended for a secondary six months time for once only. [393]

If the company fails to liquidate such rights within the designated time period, then the Ministry of Finance liquidates such rights subject to general applicable rules and reimburses the accrued value back to an account established under the name of the company following the deduction of liquidation expenses. The outcomes of such transactions are notified to the company and to the related Governorship in writing.

[393] Article 14 of regulation and above mentioned Article 36 of the Land registry law are parallel. Article 14 of the regulation reads as follows:
"If it is confirmed that the use or acquisition of real estate and/or limited real property rights is not in conformity with the Law, Governorship notifies the Ministry of Finance for the liquidation of the acquired real estate and limited real property rights and submits the documents regarding the confirmation of such violations, certified details of the relevant title registry records, notification addresses of real property owners and/or limited real property right holders to the Ministry of Finance accordingly.
(2) The Ministry of Finance notifies the company that owns such real property or holds such limited real property rights in writing ordering them to liquidate these rights within six (6) months. This period can be extended for a secondary six (6) months time for once only. If the company fails to liquidate such rights within the designated time period, then the Ministry of Finance liquidates such rights subject to general applicable rules and reimburses the accrued value back to an account established under the name of the company following the deduction of liquidation expenses. The outcomes of such transactions are notified to the company and to the related Governorship in writing."

2.2 A Proposal For Legislative Acts and Policy Considerations In the Accession Process to EU

2.2.1 Assessment of the System and Analysis of the Priorities

Many actors of today's world has different attitudes and approaches in many issues related to the acquisition of immovable properties. For instance, in our very discussion, it is easy to put forward this voices:

i. EU commission and Court of Justice will defend supremacy of EU Law and community freedoms by interpreting them in the widest form possible,
ii. ECHR will asses the State's intervention in private property ownership due to protocol no 1[394],
iii. UNDP and FAO will underline sustainable development[395], especially protection of land quality,
iv. WTO will promote liberal, liquid and attractive markets[396],

394 Article 1 of the additional protocol provides for the rights to the peaceful enjoyment of one's possessions reads as follows:" Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

395 Sustainable development is a pattern of resource use that aims to meet human needs while preserving the environment so that these needs can be met not only in the present, but also for future generations to come. The term was used by the Brundtland Commission which coined what has become the most often-quoted definition of sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs. See United Nations General Assembly Resolution 42/187, 11 December 1987. Report of the World Commission on Environment and Development. Retrieved 01.1.2008 from http://www.un.org/documents/ga/res/42/ares42-187.htm

396 Market liquidity is a business, economics or investment term that refers to an asset's ability to be easily converted through an act of buying or selling without causing a significant movement in the price and with minimum loss of value. Money, or cash on

v. Constitutional Courts[397] will underline national interests and perception in the acquisition of immovable properties by foreigners,

vi. Average citizens will mainly concentrate on their benefits and losses and the perception of their community.

2.2.2 Defining Principles for a Compatible System

A system which is compatible with future should Endeavour to balance all of these and many more in a flexible and pragmatic way. In our thesis, we focused on EU integration, therefore especially the case law on the subject is a guiding light that will be followed.

As we have discussed above "discrimination" is the source key point to all cases. In addition to that the limits and the nature of free movement of capital is critical in our consideration. Any member is free to legislate and create its own system without violating these. Therefore, in order to protect some of our interests and necessities, in our consideration, below mentioned approaches in our legislation will be helpful.

1. Rationales of legislation should refrain from protection thus any means of discrimination based on nationality,

2. Non speculative areas should be defined and pragmatic approach should be developed

hand, is the most liquid asset. An act of exchange of a less liquid asset with a more liquid asset is called liquidation. Liquidity also refers both to that quality of a business which enables it to meet its payment obligations, in terms of possessing sufficient liquid assets, and to such assets themselves. Retrieved 01.1.2008 from http://www.merriam-webster.com/,

[397] See Case C-302/97 Konle [1999] ECR I-3099.

3. Level of speculation of land should be adjusted in a balancing approach where sustainable development and attractive market approach is taken in to consideration.

4. Global competitiveness should be taken in consideration in planning

5. Sustainable ecological and economical development must be given special emphasis on agricultural land forestry.

These should be done without hidden, arbitrary or any means of discrimination which means a modification of laws compatible with EU and protecting some of our interests and necessities is possible.

In recent years, many politicians, academicians and reporters advocated that Copenhagen Criterion[398] is an ideal[399] that we have to put up with, not a to do list which we have to accomplish to satisfy EU side[400]. We agree with that assumption. In this thesis, to convert negotiations to a challenge, we propose a system of approaches, that might, in each case, optimize our

[398] Günuğur Haluk(2005).Turkish Legal System in the context of Copengahen Political Criteria. Europeanisation of South Eastern Europe. İstanbul. Marmara University EU Enstitute. 185-192.

[399] The Copenhagen criteria are the rules that define whether a country is eligible to join the European Union. The criteria require that a state have the institutions to preserve democratic governance and human rights, have a functioning market economy, and accept the obligations and intent of the EU. These membership criteria were laid down at the June 1993 European Council in Copenhagen, Denmark, from which they take their name. Excerpt from the Copenhagen Presidency conclusions read as follows:“ Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

[400] Akçay Belgin(2008). Avrupa Birliği’nin Ekonomik Kriterleri ve Türkiye. Maliye Dergisi. Vol(155). 11-38.

interests and compatible with the globalization and liberalization trends and the criteria established by ECJ.

In other words, in a more liberal and more global world, direct or hidden protective measures are deemed to be abolished[401]. Therefore what is needed today is to integrate the different actors priorities and design a system accordingly that optimizes our interests in a positive way.

According to our consideration 3 main issues should be clearly understood to achieve a system like that:

i. Prevention of speculation
ii. Prevention of non use- underuse of land
iii. Prevention of fragmentation

These concepts must be supported by global competiveness and sustainable development.

[401] We believe that, globalisation so the liberisation trend will become more stronger in the upcoming decades.

2.2.2.1 Prevention of Speculation

2.2.2.1.1 Speculation

Speculation in a financial context is the acquisition of an asset on the assumption that it will be more valuable in the future[402]. The activity is based on expectancy.

Speculation usually aims short term gains. The speculator basically trades and usually the speculator and speculated asset are detached, in other words, speculator usually does not intend to exploit the speculated asset. For example, buying a currency (long) in the expectation of selling it in a better price is a speculative activity. Another example can be, buying land on the expectancy of plan changes.

2.2.2.1.2 Manipulation

Manipulation is simply deceitful activities that aims to create artificial market conditions[403]. Market manipulation describes a deliberate attempt to interfere with the free and fair operation of the market and create artificial, false or misleading appearances with respect to the price of, or market for, stock Exchange, ect. [404]

Markets manipulation can occur in multiple ways. The one of the most popular method is the "runs" . This method is basically based on rumors supported by manipulator group's trades. This activity will eventually carry

[402] Retrieved 12.1.2008 from http://www.merriam-webster.com/,

[403] Communiqué Serial: V, No: 54, Additional article 1. TOJ 4.4. 2002 , 24716.
[404] Directive 2003/6/Ec Of The European Parliament and of The Council, OJL 96.28.1.2003.

prices to high levels. Also, manipulators usually use "pools" where they assign a manager and transfer their funds under manager's portfolio to carry on the activities.

Churning is another type of manipulation. In this activity, when a trader places both buy and sell orders at about the same price. The increase in activity is intended to attract additional investors, and increase the price. The usual consequence of this activity is called "Ramping ". These can be Actions designed to artificially raise the market price of listed securities and to give the impression of voluminous trading, in order to make a quick profit.

Bear raid is simply pushing the price by selling the security. Usually short trades will be used for this kind of manipulation.

Market manipulation is prohibited in many developed countries US.&EU legislation)[405] and Turkey[406] as well.

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[405] Section 9(Manipulation of Security Prices) of the Securities Exchange Act of 1934 Transactions relating to purchase or sale of security is read as follows:
It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange--
For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.
To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange or in connection with any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security creating actual or apparent active trading in such security, **or raising or**

Although these type of activities prohibited, these activities still observed in many areas of economy and finance.

As we discussed, manipulation is not based on some expectations, in manipulation artificial conditions that distracts potential buyer's perception will be observed. The real estate sectors can be the target of manipulators.

It must be noted that, manipulation of stocks, commodities, real estate...ect has no good sides in any case. From this point of view, speculation and

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depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.
If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange or any security based swap agreement (as defined in section 206B of the Gramm-Leach Bliley Act) with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.
If a dealer or broker, or the person selling or offering for sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to make, regarding any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, for the purpose of inducing the purchase or sale of such security or such security-based swap agreement, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.
For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to induce the purchase of any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.
To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
[406] See footnote 10.

manipulation are completely two different kind of activities. There fore prohibition of manipulation is an essential target that has to be achieved. Especially real estate transactions should be in the scope of this act.

It must be mentioned that ECJ's attitude towards such a legislation is not tested in Case Law. Our assumption is that, when taken in to consideration of ECJ's approach to speculation, anti-manipulative legislation will not be criticized[407].

2.2.2.1.3 Financial Bubbles

Financial bubbles can be either caused by speculation or manipulation. Some economists believe that they are natural formations.

Bubbles may occur in from arts market, tulip seeds, antique furniture, sports cards, comic books to high tech stocks, real estate market.

These present hope to risk taker speculators. On the other hand, if the bubble occurs in a major market such as real estate market, it shall have some consequences such as higher rents, in some cases low occupancy thus under-use…ect.

The historical evidence provides with us the data balloons will always be forming. The main purpose for legislator, in our opinion, to prevent instability that will be caused by the balloon, is to prevent speculation of certain types of land, from the beginning of the balloon.

[407] See Case 182/83 Fearon [1984] ECR 3677; Case C-452/01 Ospelt and Schlössle Weissenberg [2003] ECR I-9743.

Bubbles in certain markets are under pressure of some regulating bodies. For instance, TRCB has, as a declared mission, is to protect price stability in the markets. For example, when a currency is increasing sharply or when it is under or over priced against TL, it intervenes the currency by buying or selling to protect stability. Therefore, bubbles may not occur.

2.2.2.1.4 The Disadvantages of Speculation

Instability is one the basic consequence of the speculative activity[408].

More importantly, from the humanistic point of view, when the speculative bubble end in a major market, it usually has negative impacts on the other markets. The domino effect will cause instability in other markets. In many cases, consumers begin to fear of the future and stop spending. Therefore a speculative bubble in a particular market may cause a major collapse of non-correlated and vital markets[409].

2.2.2.1.5 The Advantages of Speculation

It may be argued that any form or size of speculation is a harmful activity which in our consideration is a completely wrong statement. There are many good sides of the speculation. Especially the speculation of stocks

[408] See section 1.1.2.1.5.

[409] Nearest example is the credit crisis of U.S. 2008. The financial bubble was created of the high gains in real estate prices. When the financia bubble ended in the mids of 2007, the instability has effected the price of high tech stocks, indeed, THAT were close to the lowest prices for the last decade. See Balkan Ali Harun(2003)The legal structure of risk capital in EU and Turkey. Unpublished LLM thesis. Marmara University.EU Enstitute. İstanbul.Pages 20-27. Also see, http://www.nasdaq.com for historical prices.

create liquid and attractive market that is essential for new companies, new venture capital companies, new jobs[410].

2.2.2.1.6 Speculation of Real Estate

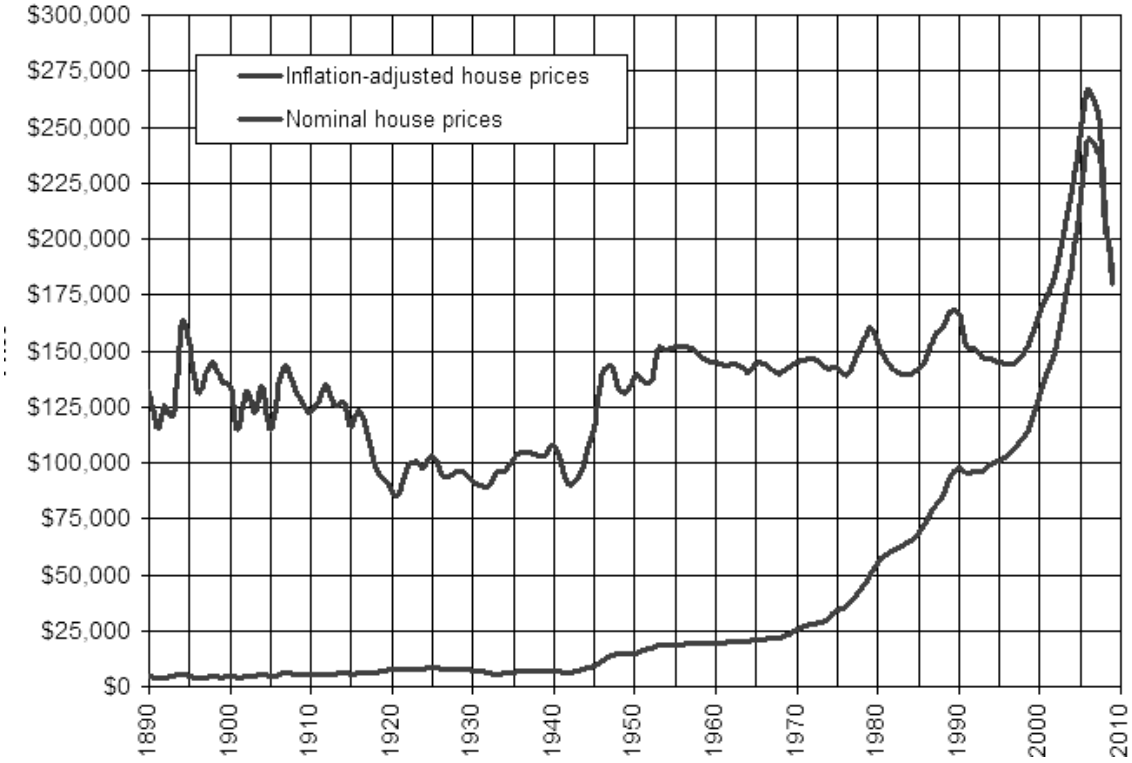
Speculation of real estate is a well known phenomenon. Some addresses this issue as market cycles[411]. As we stated earlier, fluctuations are main motives of the trades of speculators. In fact, especially between 2005-20060period speculation formed a bubble. Former U.S. Federal Reserve Board Chairman Alan Greenspan said "We had a bubble in housing"[412].

[410] Balkan Ali Harun(2003)The legal structure of risk capital in EU and Turkey. Unpublished LLM thesis. Marmara University.EU Enstitute. İstanbul.17-19.

[411] The 2 chart below, especially the marjin between cost and price implies that there is spceulation.

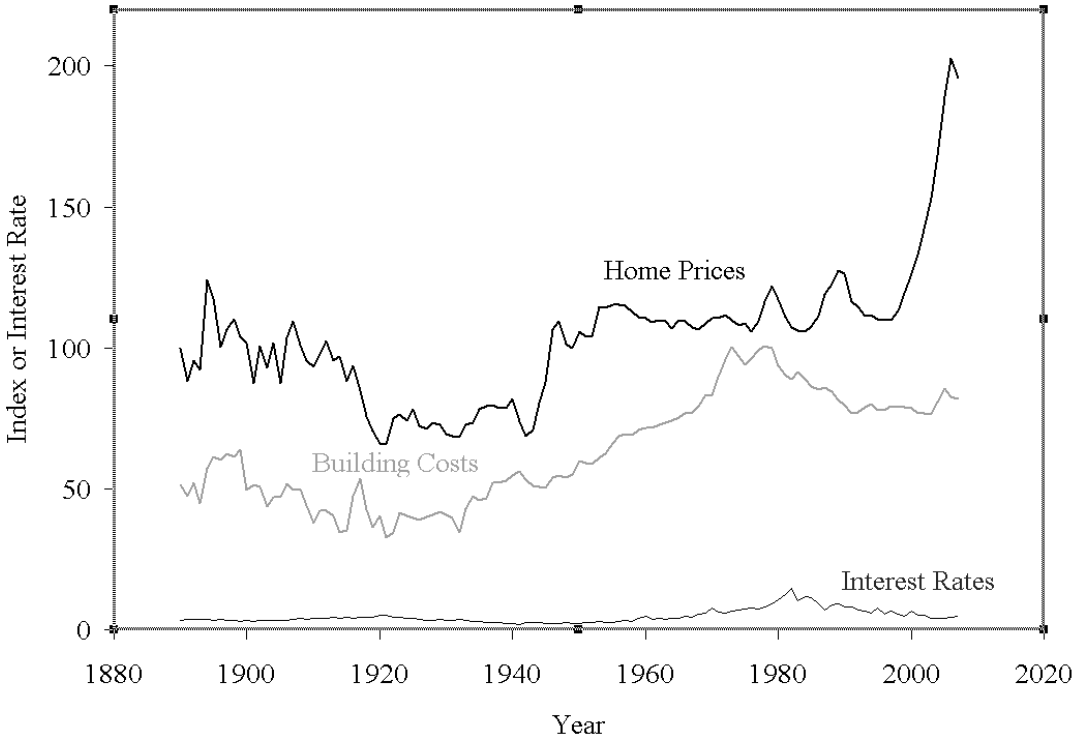
[412]Salmon, Felix(2007) Retrieved: Sep 14, 2007, from http://www.reuters.com/article/bankingfinancial-SP/idUSL1426151220070914 ?sp=true , it should be mentioned that following the similar comment of his on NASDAQ, NASDAQ crashed and after 9 years, it is still close to the bottom formed in 2001.

Table 8: U.S. Home Prices 1890-2008[413](Schindller US Home Index)



[413] Schindller Home Index The indices are calculated from data on repeat sales of single family homes, an approach, developed by economists Karl Case, Robert Shiller and Allan Weiss. The indices are normalized to have a value of 100 in the first quarter of 2000.
A popular and widely used subset of the Case Shiller Index is the 20 MSA view used by Standard and Poors in the S&P/Case Shiller Home Price Index.
The indices are calculated monthly by Fiserv, Inc.- the company that owns and maintains the index and is published with a two month lag on the last Tuesday of every month. Fiserv can provide a deeper view of home prices, at the zip code level beyond the 10 or 20 MSA view used by S&P.
This index family includes 20 regional indices and two composite indices as aggregates of the regions. The MSA indices are three month moving averages. Consequently, so are the composite indices.
The S&P/Case-Shiller U.S. National Home Price Index is a composite of single-family home price indices for the nine U.S. Census divisions, calculated quarterly. See, S&P/Case-Shiller Home Price Indices Methodology. Retrieved: 1.1.2009, from http://www2.standardandpoors.com/spf/pdf/index/SPCS_MetroArea_HomePrices_Methodology.pdf

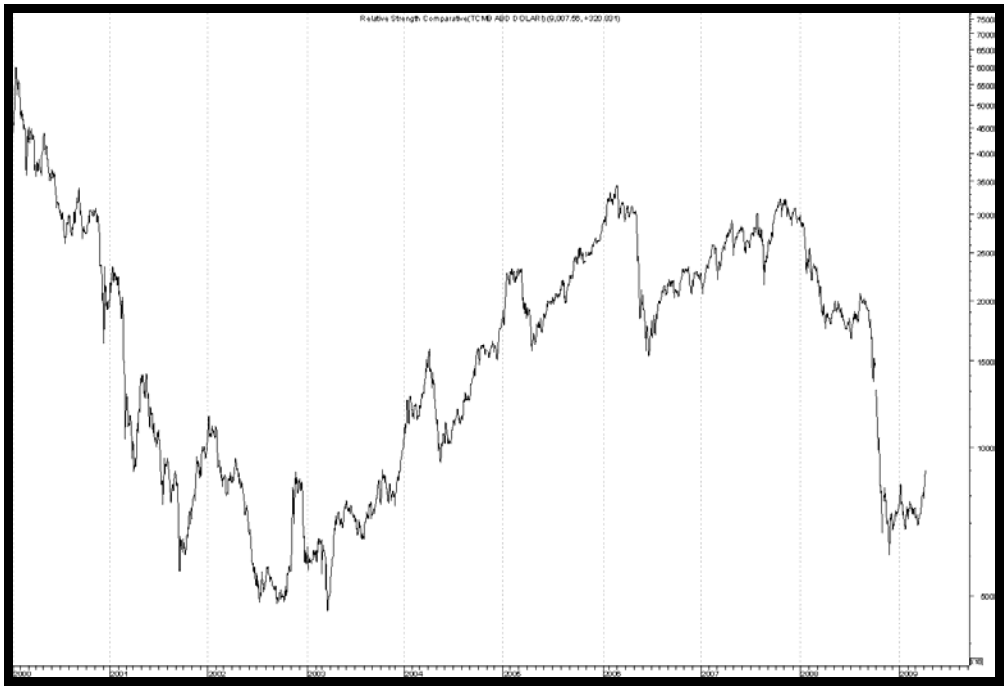
Table 9: U.S. Home Prices 1890-2008[414]



As we indicated above, any bubble, will cause negative impacts on the markets which in some cases may be the markets that are negatively correlated.

[414] Schiller Robert(2000) Irrational Exuberance. Excel file with the data set (used and described in the book) on home prices, building costs, population and interest rates since 1890, updated. Retrieved 5.2.2009, from
http://www.econ.yale.edu/~shiller/data/Fig2-1.xls

Table 10: REIT Prices in Turkey 1997-2009



Source: ISE Database

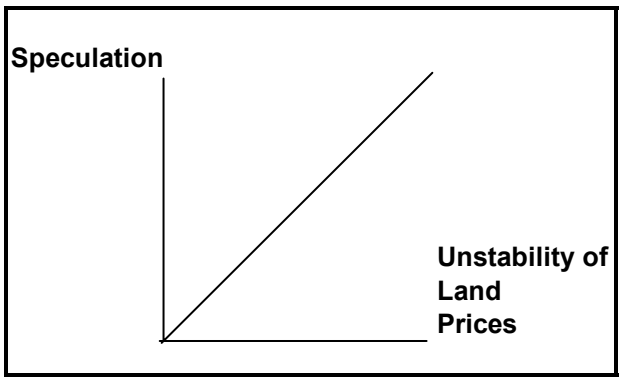
All the charts submitted above when the range of the bands taken in to consideration, the level of speculation is very high in housing sectors. It must be mentioned that housing sector can be a good indicator for agricultural and industrial lands as well.

2.2.2.1.7 Preventing Speculation of Some Types of Land

Speculation will always exist in any liberal system. Moreover, it may be easily argued that speculation is an integral part of human nature. Therefore, what is needed to adjust is not the activity but the level of

activity and its consequences. For instance, speculation of tulips[415], flowers, art work or antique furniture can be evaluated an area where consequences are rarely impacting major markets, production and service activities. If any, these are in a very limited way. The high level of speculation on those, therefore, can be tolerated by the market. Land is different in many ways. Functions of land may be associated with agriculture, producing goods and services, housing…ect. These are vital human needs due to the Maslow's chart of needs and constitutional rights as well.

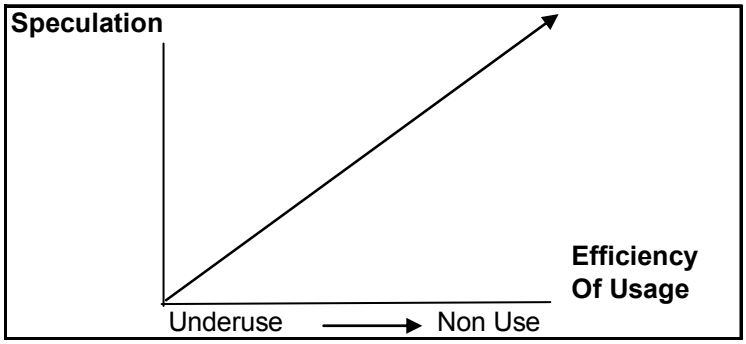
Table 11:Level of speculation and stability of land price



When the level of level of speculation increases, price will eventually increase and in some rare cases will decrease but stability of prices will be effected in either way.

[415] Tulip mania can be evaluated as a baloon that has historaical importance. Tulip mania or tulipomania was a period in the Dutch Golden Age during which contract prices for bulbs of the recently introduced tulip reached extraordinarily high levels and then suddenly collapsed. At the peak of tulip mania in February 1637, tulip contracts sold for more than 10 times the annual income of a skilled craftsman. It is generally considered the first recorded speculative bubble. The term "tulip mania" is often used metaphorically to refer to any large economic bubble.

Table 12:Level of prices and efficiency of land use



As we mentioned above, generally speculation will cause prices to increase. Moreover, it may rarely form "bubbles." When the prices increase, the land use levels can not cope with the existing[416] functions. As we state repeatedly, speculation is based on expectations. Therefore the existing undertakings economical value will decrease or new undertakings can not be established due to high prices of land[417]. A negative effect of land use is imminent. In each and either case, the stability can not be continued.

Antithesis is that, especially, in the 2000-2007 real estate bubble, many buildings constructed as luxury residences, condo –hotels and ect. due to unexpected and giant money flow to real estate. In our consideration, it was a part of the bubble. Speculation occurred in the markets that are not fall under the scope of fundamental needs. Furthermore, vacancy rates are getting lower which implies that the bubble was not, in fact, as expected, inline with the demand side. Finally, it is hard to state that the buildings - that are not occupied or not creating sustainable development, and on the

[416] ECJ prefer to use "intended" imstead of "existing".
[417] A good example is lands for residence projects. When the price rises in a way that any commercial Project become non feasible, the intented use will be postponed till it become feasible.

other hand, the one of the major reason of the global credit crises of the last ten decades- somehow is the optimized use of land.

When the needs of human beings considered, there are fundamental needs such as air, water, food, shelter. According to the hierarchy of needs formulated by Maslow, these are mainly the bottom of the pyramid and referred as biological, fundamental needs[418].

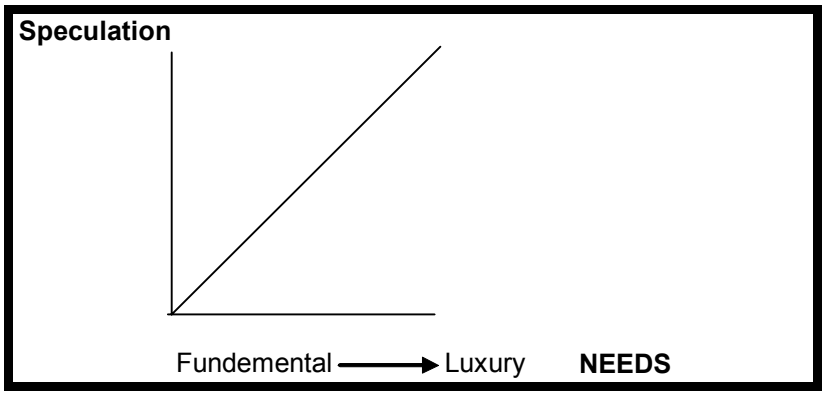
Table 13: Fundamental needs and related types of land

Fundamental Needs	Type of the land(Examples)
Air	Forests
Water	Water catchment area
Food	Agricultural land
Shelter	Affordable housing[419]

Therefore any side effects of the speculation in some of the areas that are related with these fundamental needs should be eliminated by setting the level of speculation at low value.

[418] Abraham, Maslow(1987). Motivation and Personality.Third Edition, Longman.
[419] Afordable housing or social housing and lands associated with these, should never be under high level of sepeculation. On the other hand, financially to attract the attention of targetted customers(with low income) and to persuade them to invest, intermediate level might be chosen. Therefore sustainability might be achieved.

Table 14: The proposed adjustment of speculation according to the hierarchy of needs



However, as we discussed above, speculation has good sides as well. Real estate speculators are essential for many reasons. These can be either private, or public bodies. As long as construction is a key segment in creating jobs, in this context, for instance, luxury housing or Office buildings and transaction of land allocated for those kind of projects should not be under such a strict non speculative regime.

In our opinion, ECJ has to establish its case law on this template. For instance such a template, gives us the comparison of, let's say, a secondary home and a farm. As long as the major needs of humans concerned, proportionality of national legislation should not be assessed strictly. Controversially, when the less fundamental needs are concerned, more strict interpretations might be done.

After examining the relation of speculation and basic human needs, the next step has to be defining or modeling an avoidance mechanism.

2.2.2.1.8 An Example on the Prevention of Speculation from Turkish Legislation: Organized Industrial Zones Law & Implementing Regulation

In a more liberal world, we believe that, intentions[420] of foreign or local investors must be questioned, tested without discrimination and a system design should not allow higher level of speculation than adjusted by legislation in related land types.

It is arguable that intentions are subjective . Legislators can overcome of this obstacle in many ways. In Turkish legislation, technology development zones and organized industrial zones law[421] and regulations [422] are, in our opinion, seem to adjust the level of speculation in any very modern way. The legislation is prepared by the T. R. Ministry of Industry and Commerce (General Directorate of Small Business and Industrial Zones and Sites) with the assistance of OIZ's.

2.2.2.1.8.1 Prohibition of Speculation : Article 18 of Organized Industrial Zones Law

Under part IV titled Miscellaneous provision and land allocations of the OIZ law is as follows[423]:

[420] "Intentions" is used to describe, purchaser or investors intention to act accordingly with the intended use of the land in line with the regional planning.
[421] TOJ.04.15.2000.24025.
[422] TOJ. 04.01.2002 - 24713.
[423] Article 18 of OIZ law reads as follow: "Article 18 - Land allocation to the participants is made by the enterprising committee as per provisions of the regulation to be issued by the Ministry.

As clearly stated, legislator's intention is to prevent speculative transactions and therefore to avoid these, ministry is authorized to take necessary measures. The following part of the article in our opinion defines the set of rules that is line with ECJ's proportionality test . And it should be mentioned that ratio legis behind that is ensuring the intended use in the future.

The following part of the article describes the mechanisms.

> However, if the company to whom land has been sold or allocated is liquidated, right of allocation may be transferred to the participant partner or partners of the company. The Ministry is authorized to inspect whether the transactions related to this issue are simulated or not and take the necessary measures according to the result.
>
> If violation of prohibitions related to this issue is determined, the land is retrieved back for its price on its sales or allocation date and it is allocated or sold to another participant notwithstanding the authority in possession.

The Ministry may set basic qualifications and fields of activities of the private or legal entities to whom land is to be allocated in OIZ in the incorporation protocol when it deems necessary.
The lands allocated or sold to the participants may not be used in no way for the purposes other than purpose of allocation. These lands may not be sold, transferred and assigned by the participants and inheritors before all the debt has been paid or the facility has started production. This issue is attached as annotation to the title deed. If the land allocation and sales have been made to the participants in the status of company, the Ministry is authorized to take measures for preventing sales of the land before the debt has been paid and facility has started production and preventing property right with the speculative transactions." TOJ.04.15.2000.24025.

The legislator, in these articles, caustically, describes the consequences of "simulated transactions", that, in our opinion, to close the doors to the speculators who may act credulous to maintain the investor position for speculative intentions.

2.2.2.1.9 OIZ Implementing Regulation

2.2.2.1.9.1 Restrictions Regime the Dynamics of the Mechanism

In the implementation regulation ant speculative measures and mechanisms mainly described between article 96-103.

According to article 96(c) of the implementing regulation is designed to prevent speculators to purchase land that resolve judicially. Although it is not mentioned directly, it is obvious that, any new purchaser, without qualifications stated in incorporation protocol of OIZ will aim to sell the land in a better price in a speculative manner[424].

> 96(e) OIZ takes necessary measures for preventing those who purchase land from OIZ, from speculation and ensuring that they establish the industrial facilities they have declared in a convenient time and has the "Right of Redemption" annotation annexed to the title deed registries of the parcels it has sold. "Right

[424]" ARTICLE 96(c) reads as follows:" If the immovable asset presented as guarantee by OIZ and therefore resolved to be sold judicially, it may be sold to the purchasers with the qualifications stated in incorporation protocol of OIZ. These qualifications are stated in the sales announcements." TOJ. 04.01.2002 - 24713

> of Redemption" annotation may not be removed from the title deed registry unless the facility declared in advance to be established on the land by the participant is put into operation.

From the ECJ's point of view, we observe a similar approach. ECJ's basic

> A procedure simply involving a declaration does not, therefore, in itself enable the aim pursued to be achieved in the context of a procedure for prior authorization. In order to ensure that the land is used in accordance with its intended purpose, as it appears from the national legislation in force, Member States must also be able to take measures where a breach of the agreed declaration is duly established after the property has been acquired.
>
> It is sufficient to note in that regard that an infringement of national legislation on secondary residences such as that at issue in the main proceedings may be penalized by a fine, by a decision requiring the acquirer to terminate the unlawful use of the land forthwith under penalty of its compulsory sale, or by a declaration that the sale is void resulting in the reinstatement in the land register of the entries prior to the acquisition of the property. Moreover, it is clear from the Austrian Government's replies to the questions from the

> Court that Austrian law provides for mechanisms of that kind. 425

Article 97[426] of OIZ implementation regulation read as follows:

> ARTICLE 97- The participants are granted with their title deeds as per following conditions in the OIZs credited by the Ministry.
>
> ....

[425] Case C-302/97 Konle [1999] ECR I-3099. Paragraphs. 46 & 47.

[426] OIZ implementation regulation is an evolving legislation and amended according to the feedback of the implementation, amendments are as follows:
20 articles (Articles 7, 10, 13, 14, 18, 22, 25, 34, 43, 48, 54, 56,66, 74, 83, 93, 133, 134, 193 and provisional article 7) have been amended with publication in the Officical Journal dated and numbered 01.08.2003 – 24987.
9 articles (articles 10, 14, 19, 20, 146, 155, 157, 188, 210) have been amended with publication in the Official Journal dated and numbered 10.05.2004 – 25604.
14 articles (articles 9, 14, 19, 27, 55, 60, 76, 93/a, 93/b, 97,136, 161,167, 174)haved been amended with publication in the Official Jorunal dated and numbered 08.13.2005 – 25905.
First paragraph of article 60 has been amended with publication in the Official Journal dated and numbered 09.15.2005 – 25937.
4 articles (articles 55, 56, 58, 66)have been amended with publication in the Official Journal dated and numbered 10.17.2005 – 25969.
The expression "or operation certificate" in the first and second paragraphs of article 13 and the first and second paragraphs of articles 14 and 135 has been cancelled upon resolution of Council of State number E.2002/3429, K.2004/5402.
Sub-paragraph (v) of article 22 of this regulation it has been resolved that execution is sustained with resolution of the 10th Department of Council of State article 2002/3689 and number 2004/5405 (or operating certificate).
23 articles (4, 6, 7, 13, 14, 18, 22, 48, 51, 55, 67, 75, 83, 93, 129, 135, 136, 140, 144, 154, 182, 186, 210) have been amended with publication in the Official Journal dated and numbered 02.22.2006 – 26088.
Articles 12., 30., 156., 163., 200 have been amended with publication in the Official Journal dated and numbered 07.05.2006 – 26219.
Sub-paragraph (e) of Clause 1 of Article 31 has been amended with publication in the Official Journal dated and numbered 01.25.2008-26767.
Articles 61, 67, 72, 93 and 99 have been amended with publication in the Official Journal dated and numbered 02.01.2008-26774 and the covenant in Annex-1 has been inserted in the Regulation.

b) In the OIZs whose infrastructure has been completed; among from the participants to whom land has been sold:

- Those who have paid the sales price in full or delivered the inner limit full guarantee letter for the debt remaining from sales price,

- and notarized covenant stating that they shall participate without objection in other investments to be made for OIZ to the OIZ;

shall be granted with their unencumbered title deeds following presentation of the covenant and guarantee letter if remaining debt is concerned in the following manners;

In the implementation from the beginning of the process, zone authority it self is far from being speculative[427]. The zone authority is committed it self with the candidate enterprises eligibility, admissibility in the field of pursuing of the intended purpose of the land rather than the price.

- Without attaching "Right of Redemption" Annotation if they start production after constructing the facility

[427] For example in the implementation, especially in sector specialized OIZ's , a landwith high level of infrasturcture could d be sold, at a lower price than any ordinary industrial land with less infrastucture

- Attaching "Right of Redemption" annotation if the facility has not started production. [428]

Right of Redemption

c) (TOJ-08.13.2005-25905) If title deed is granted to the participants by removing the right of redemption annotation, the annotation that "Compliance condition shall be sought from OIZ for transfer of the immovable asset to the third people including judicial sales" is annexed. If title deed transfer is not made despite this annotation, the commitments made by the previous participant are deemed to have been accepted by the new purchaser.

According to article 98(c) of the implementing regulation , without conditions set forth in the regulation, there might be some transactions and in the absence of annotation some title deed, the new purchaser The main reason for this article is that the legislation as we stated is a evolving one.

a) The allocation made to the following participants is cancelled by OIZ enterprising committee: failing to have the projects of the building, to be constructed in one year as of

[428] ECJ concluded from a procedure simply involving a declaration cannot in itself ensure that the land is used in accordance with the national legislation, but that that did not mean that a prior authorisation procedure is nevertheless always necessary. It took the view that the State may take other measures to ensure compliance with its policies concerning land-use within its territory, such as fines, a decision requiring the acquirer of title to terminate the unlawful use of the land forthwith under penalty of its compulsory sale or a declaration that the sale is void. The article fullfills that approach. See case Konle.

> Allocation date, approved by OIZ and to receive construction license,

According to article 99(a) of the implementing regulation basically describes the time line and consequences of failure to achieve the objectives in line with the time line. In our opinion, the mechanism and the implementing authority is capable of testing the candidate's intentions.

> b) failing to receive Environmental Impact Assessment(EIA) Positive Resolution" resolution certificate upon EIA report result to be prepared by those included in the activities list mentioned in the Environmental Impact Assessment Regulation or "Environmental Impacts are Unimportant" resolution certificate as a result of the ÇED pre-research,

According to article 99(b) is the test of enterprises compatibility with the Environmental regulations. It is obvious that, if the enterprise is not compatible, the purpose or the intended use of the land can not be carried on. On the other hand, it must be mentioned that, such an enterprise will not cope with the purposes targeted by "sustainable development". It should be noted that, this two paragraphs is not a major obstacle for speculators. In the investment procedure, the costs according to these are low. For example, a speculator can claim that, plant established will be under the list, receive a EIA report and submit preliminary projects.

> c) According to the state of infrastructure construction, as of the date announcement by OIZ;

> 1) Failing to start construction in one year after receiving the construction license (Amended: TOJ-02.01.2008/26774),
>
> 2) Failing to start production in two years as of Construction License date (Amended: TOJ-02.01.2008/26774). OIZ enterprising committee may extend these terms with reasonable causes.

Legislator, to prevent speculation and to ensure intended use, describes more conditions. The timeline commences from the date of obtaining construction license. If the investor can not start production or start building in due time, then the allocation of the land will be cancelled. Article(99), briefly, describes the test of the intentions in line with a timeline.

It should also be mentioned that, zone authority has executive powers and grants the construction license.

Article 100 reads as follows:

> The necessary "Right of Redemption Annotation" shall be annexed to title deed registry of the parcels purchased by the participants.
>
> a) The lands allocated or sold to the participants may not be used for any purpose other than allocation purpose.

b) These lands may not be sold, transferred and assigned by the participants before all the debt has been paid by the participants or their heirs and the plant has started production. This issue is annexed to the title deed. If the lands are allocated and sold to the participants in the status of company, the Ministry is authorized to prevent sales of the land before the debt has been paid and the plant has started production and transfer of the right of possession for the purpose of the speculative transactions.

c) If the company to which land allocated or sold, it is possible to transfer the right of allocation to the participant partner or partners. The Ministry is authorized to take necessary measures according to result of inspection whether the transactions about this issue are simulated or not.

Article 100, regulates the commitments of the investors –mainly- after the production activity commenced. Zone authority, simply, holds the authorization powers for ensuring the intended use. Moreover, as stated in article 18 of the OIZ law, prevention of speculation is inserted in the article 100.

d) If the immovable assets resolved to be sold due to debt of the participants are sold judicially, sales may be made to the purchasers having the

> qualities stipulated in incorporation protocol of OIZ. Participant qualities of the incorporation protocol are included in the sales announcement, as well.
>
> e) If it is determined by the courts that the prohibitions related to this issue, the land is retrieved with its price on the allocation or sales date and it is allocated and sold to another participant notwithstanding the authority having disposition over the land.

Article 100(e) regulates that if the speculation prohibition and is determined by the courts

> f) If transfer or sales is concerned after the purchaser has received its title deed and completed its plant, the OIZ is entitled to remove the provisions of the contract, it has executed with the first purchaser, from the contract it is to execute with the new purchaser and to insert new provisions.

Article 100(F) regulates the transfer or sale of the land. In any transactions after completion of plant and commencing of production, zone authority, still, has powers to amend the contract and insert new provisions. The main reason for this issue can be ensuring the intended use and related to that coping with the future conditions that can not be foreseen in the date of purchase or allocation .

Article 101 reads as follows:

> Despite depositing the advance payment and paying the annual installments, the participant may quit purchase of parcel at any time it desires till the end of period for starting construction or after starting the construction and claim the money it has invested back. OIZ refunds all the money paid by the participant till that date. The respective amount is paid by adding to the budget in the first financial year as of retrieval date of the land. The participant may not claim any interest and compensation except for this. The participants who quit purchasing the land in such a manner and receiving their money back may not have any rights of privilege if they apply again.

Article 101, provides fair exit conditions for the investor. The balance between zone authority and investor is well biased.

Article 102 reads as follows:

> a) The rights and obligations of the participants have been set as follows:
>
> ...
>
> b) The participant has to complete its construction on the allocated land in compliance with the license granted by OIZ. If it is

> determined that the construction on the allocated land does not comply with the OIZ legislation or the license granted, the participant is liable to recover the inconveniences in the time granted by OIZ and it accepts the sanctions to be implemented by the regional directorate upon resolution of the board of directors.

Article 102(b) regulates the conditions where participant fail to comply with the time line. The zone authority may grant additional time to applicant for recovering the inconveniences.

> c) If the participant fails to complete construction in due time or in the additional time granted, OIZ is authorized to cancel the allocation by refunding the sales price even if the base has been laid or foundation construction has been completed. If the participant has received the title deed previously, OIZ may use the right of purchase.

The sanction put forward by this article is to use the right of repurchase[429] .

> This right of purchase shall be provided by being registered in the land register. If the construction has exceeded the level of foundation, the land is allocated and sold to the new participant on condition that payment of the

[429] In Turkish,"iştira hakkı"."Turkish Civil Code, Article 736.

> amount to be determined by the old and new participants voluntarily for the constructed section is documented to the board of directors.

In the last paragraphs of the article, another mechanism is described. In this mechanism, under two conditions, sale of the land by participant is permitted.

-If the construction has exceeded the level of foundation
-If purchase is done by new participant

Although intentions of investors are valid, investment dependents on capital flow. In the case, mentioned in article, investors act accordingly with the regulation. Many phases of investment process has been achieved. In other words, investor's intentions are tested. Investments may not be carried on by many reasons that are not related to speculative intentions but mainly arising of business environment. Secondly, purchase of the land has to be done by a new participant, which means, the investor who will carry on the project must be eligible and admissible by the OIZ regulation.

Article 101 on the recovery of inconveniences reads as follows:

> If the participant acts against the principles and undertakings determined in its enterprise and insists on such acts despite the written notices to be made by OIZ on the basis of time determination; OIZ administration is obliged to take any measures for preventing these conditions.

Article 103, far from being direct, underlines the executive powers of the zone authority. In our opinion, this article, strengthen the "competent authority" criteria of ECJ.
Moreover, this article is, basically, an indirect warning to, investors with hidden speculative intentions.

2.2.2.1.9.1.1 Assessment of Procedure established by OIZ legislation

In this example, the intention associated with purchasing a land or request of allocation of land, should be, establishment of an industrial plant or a building that has function compatible with the organized zone's objectives.

Legislator, in fact, without discriminating, gives plenty of time to investors to, act accordingly with their intentions. On the other hand, legislator, states that level of speculation of land is very limited. The goal is achieved by the time line of activities, constraining legal rights to insure intended use in the authorization phase.

If we closely inspect the system, we will conclude that:

There is a zone in which only one type of activity can be pursued, in our example, industrial production.

There is a competent and expert authority with executive powers that manages the zone[430]

430 As explained by ECJ briefly "Indeed, the objective of sustaining and developing viable agriculture on the basis of social and land planning considerations entails keeping land intended for agriculture in such use and continuing to make use of it under appropriate conditions. In that context, prior supervision by the competent authorities does not merely reflect a need for information but is intended to ensure that the transfer of agricultural land will not lead to their ceasing to be used as intended or to a use which might be incompatible

In addition to that, Legislator is well aware that the zone is very attractive to the speculators, because of the high infra structure investments.
And we must add that, there is no room for expectations arising from regional plan changes such as from industrial to residential.

Then legislator, defined set of rules which automatically eliminate short term speculators.

1. The first mechanism is investor's eligibility. Is the investor really have the adequate sources to establish the plant.

2. The second important mechanism is candidate plant's eligibility with environmental legislation.

3. Moreover, candidate is committed to establish the factory and obtain necessary production licenses to accomplish the transfer of the land.

In addition to that, the OIZ have legal instruments such as, right of repurchase, right of redemption and the right of approving the new owner who purchase thru judicially sales.

with their long-term agricultural use." See more Case C-370/05 Festersen [2007] ECR I-1129 , paragraph 41-42.

2.2.2.1.9.1.2 The Proposed Way of Disseminating the OIZ System

This system can be enlarged to other authorities in various authorities that are authorized in land management such as municipalities, Province Agriculture Directories and ect.

Our proposal is in line with ECJ's case law. As we stated from the point of ECJ, the measures taken proportionally and in a nondiscriminatory manner by the local and expert bodies that are capable of ensuring the intended use of the land. will fall under the scope of Article 295 of the EC treaty.

The pragmatic approach can be as follows:

First of all, to strengthen the administration, a fund must be established, to purchase the lands in case of need. Such a fund will be an very important instrument to use the rights of purchase, repurchase and redemption.

Secondly, zoning is essential. This need is not a part of the case law but in practice, without zones, it will be difficult to exercise the powers granted to the zone authority.

Thirdly, any zone administration must be able to approve the purchase agreements between parties. The mechanism to overcome this obstacle, can be zone authority's approval and surveillance of transactions inline with article 100(f) of the OIZ implementing regulation. The same limitations in the title deeds can be issued for behalf of the related authority.

Lastly the model developed for the organized industrial zones can be taken as a template and can be adapted to the other uses with the consultancy of OIZ administration and ministry of trade and commerce.

Moreover, lands that are not allowed to be subject to speculation[431], such as lands associated with social and affordable housing, agricultural lands must governed by local authorities with expertise, preferably zone authorities and this authorities should have mechanisms such as prior supervision to ensure that the transfer of land will not lead to their ceasing to be used as intended or to a use which might be incompatible with their long-term use. Thus, the prices, in the absence of speculation, will not become a barrier to establish enterprises compatible with the intended use and therefore production capacity hence the jobs creation will not be affected by real estate speculators.

However, as we discussed above, speculation has good sides as well. Real estate speculators are essential for many reasons. These can be either private, or public bodies. As long as construction is a key segment in creating jobs, in this context, foe instance, luxury housing or office buildings and transaction of land allocated for those kind of projects should not be under such a strict non speculative regime.

In a way, speculation of land associated with exquisite needs, comfort, social or human needs which can be classified as luxurious needs, high levels of speculation can be tolerated, but when it comes to the industrial, agricultural or affordable(social housing) the level should be minimized. Retail, hotels and resorts, secondary homes, summer houses and many commercial types of real estate and lands associated with those may be

[431] The level of speculation on each type of land should be evaluated by NGO's, Public and private sector. Each may have difffent attitudes. In our thesis, we propose to set the levels according to Maslow's hierarchy of human needs. This assumption is open to discussion and we believe that this discussion is not only important for EU accession but for integrating our economy with global economy successfully and preserving our necessities.
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covered under an intermediate levels to high levels of speculation due to the needs, vision of society, government and the institutions.

It should be added that, rather than any protectionist measure, we should focus on guarantees of intended use taking in to consideration that the criterion is solely based on the intention.

2.2.2.2 Prevention of Under-Use and Non-Use of the Land

Under-use or non-use of land can be defined through the definition of optimal use of land. However, the definitions below can not suffice the optimal use, especially from the agri- environmental and eco-system perspectives. The main reason for that is our limited knowledge of the earth, science, biology. On spite of that, we will consider the high-end concepts put forwarded by UN,FAO, OECD, WB and EU Commission.

On the otherhand, from more convential point of wiev, ECJ's ruling on the case Reish[432] may help us the understand the terms's broader application, regarding economic, single market aspects[433].However, before focusing in depth, we should define the terms at first place[434].

2.2.2.2.1 Definition of Optimal Use of the land

Optimum can be defined as the point at which the condition, degree, or amount of something is the most favorable where as in biology, it defines the most favorable condition for growth and reproduction[435]. For instance,we have, in the example of OIZ legislation, stated that optimal use of the land is industrial production. First of all, there is a strict regulation of how the land will be selected for such development[436]. The regulation is very sensetive to the natural resources and agricultural lands therefore, before the industial zone is established, the land selection is made very

[432] Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157
[433] As we have stated earlier, the national legislation was seeking residence requirment for potential purchasers for creating stability in the local economy
[434] We must admit that the topic discussed is a really complicated one. The topic is related to global warming to the extinction of species. Therefore we should endavour to anlayse the issue from "convential" to "complicated".
[435]Retrieved 1.4.2009 from www.merriam-webster.com/dictionary
436 Article 13. (p) of Land selection Regulation for Industrial zones reads as follows: If any, special envoirmental protection zones, protection zones, wetlands, natural parks, natural statues and lands that has to be protected according to the international agreements will be shown. TOJ 26759-17.1.2008.

precisely. The protection of nature and the agricultural land is achieved long before the establishment of any industrial zone. Therefore we can conclude that legislator is againts the miss-use[437] of natural resources at first place. Secondly, legislator aims to find the most suitable area for this kind of development, thus the under-use risk is eliminated at the beginning of the process. Lastly, as we explained above, the management of the zone also prevents under use especially by preventing speculation in the zone.

2.2.2.2.2 Definifion of Under-Use of the land

After defining optimal use, under use can be defined as a usage pattern that can not reach the optimal use, in other words, less than optimal use[438].For instance, if occupation levels are low, let's say, in the commercial real estate- office buildings, under-use occurs. Another example might be from agriculture. If the farmer lack othe adequate materials or essential know-how, under-use may occur.

2.2.2.2.3 Definition of None-Use of the land

Non-use of land defines the situation where a marginal or no effort is made to use the land. Examples includes a farm that is not operated, an empty location for residential development…ect. However, non-use of particular area might form the optimal use from the perspective of the agri-envoiremental, while economically it may be categorized as the non-use. We will discuss this topica later in this section.

[437] In our wiev, paralel to the legislation, establishment of industrial zones on productive agricultural lands or land important for functioning of ecological cycles is a missuse pattern. As we have ealier stated, %11 of total lands of the world is placed under arable land category.

[438] In practice,the evaluation of optimal use and under-use is more complex and more subjective than the non-use of the land.

2.2.2.2.4 The Possible Reasons of Under-use or Non-use

Accoring to our opinion, the main reasons for under-use is as follows[439]:

i. Lack of information, skills [440]
ii. Residing at a distanced location[441]
iii. No intention of using it,
iv. Speculative expectations[442]
v. Seasonal Use[443]

Lack of information or skills(sometimes combined with lack of appropriate vehicles and machines) required to operate the land is a common situation. Other important reason is the long distances between the owner's residence and the land. However owner may, under this conditions lease the land to an operater to avoid under-use of land if possible.

In some conditions, owner may simply, igrone his/her land, and shows no efforts to achieve the optimal use of the land. Such examples are generally

[439] The list given is not meant to be exhaustive. We have considered main reasons for under-use of the land.
[440] In Romanian Law, limiting restriction is that a lessee who is a physical person must have agricultural education, agricultural experience, or hold a certificate issued by the Ministry of Agriculture that testifies the lessee's knowledge. This requirement adds a level of complexity to the lease transaction process, since the lessor must somehow determine that the lessee meets the standard.This requirement also manifests a lack of confidence in the workings of the market, which is premised upon private actors undertaking endeavors in which they believe they will be successful See Giovarelli Renee.Bledsoe David.(2001) Land Reform in Eastern Europe Western CIS, Transcaucuses, Balkans, and EU Accession Countries. Washington:RDI.Page 7
[441] For ECJ's interpretation see :Case 182/83 Fearon [1984] ECR 3677. See also, Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743.Case C-370/05 Festersen [2007] ECR I-1129.
[442]For ECJ's interpretation see: Case 182/83 Fearon [1984] ECR 3677.Case C-370/05 Festersen [2007] ECR I-1129. Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157
[443] For ECJ's interpretation see: Case C-302/97 Konle [1999] ECR I-3099. and Joined Cases C-515/99 and C-527/99 to C-540/99 Reisch and Others [2002] ECR I-2157

occur, if the land's economical value is low and the possible purcharhers are reluctant to the land.

As we discussed above, speculation is generally ends up with under-use or non-use of the land. The main reason for that is the owner's focus is selling the land for a good price rather than operating it[444].

Seasonality is an other important reason for under-use of land. Summer houses , as d,scussedin in case Kolne, usully are subject to the seasonal use. If the season is short, then the houses will not be used in the rest of the year. Therefore underuse levels are correlated to the seasons length[445].

In addtion to that underuse or non use of land, may be resulted by high level of speculation.In the example from TR OIZ regulation, legislator gives opportunity to investor to obtain a construction licence in 2 years[446]. The rationale behind these is to optimising the resources in a efficient way. Therefore none use of the land is eliminated from the begünnning of the process. Underuse, in this example, assusmed to be the problem of the company hence the assumption is that the company will endavour to maximise its profits and will purchase the land not more than necessary. Moreover, expentacy of speculative gains for the land not used is eliminated as well.

[444] ECJ clearly discussed the issue in case Festersen and conluded that prior authorisation is not a proportionate mechanism.

[445] "In Konle the Court accepted that national legislation imposes restrictions on the possibilities to acquire real property on account of a town and country planning objective such as maintaining, in the general interest, a permanent population and an economic activity independent of the tourist sector. In Reisch and Others the Court added that protection of the environment may also be taken as a basis for those same measures." Opınıon of Advocate General Geelhoed. Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743 Para 128.

[446] See section on prevention of speculation for details.

2.2.2.2.5 The Possible Avoidance Mechanisms andMechanism suggestions:

i. Cumpolsary lease[447],
ii. Right of Redemption,
iii. Cumpolsary Acquisition

The first mechanism, cumpolsary lease seems to be the most favorable option. The main reason for our assumption is administation will play the role of catalyst, leasing expenses will be covered by the lesse. Secondly, owner's property rights will not be breached seriously, at least, permanently. However, such mechanisms, should be pursued by objective, competant authorities. In our opinion, OIZ like structures represents the best solution for such a structring.

On the other hand, such rights are vested to municipalities in U.K. on the housing sector. It is the first time anywhere in the country a local authority has issued a Final Empty Dwelling Management Order(EDMO) to bring a property back into public use under the Housing Act 2004 in 2007. Housing enforcement officers at the city council were authorised to make an Interim EDMO for the three bedroom semi-detached house in Woodston by the Residential Property Tribunal in May 2007[448].Acording to the article 132 of

[447] We did not include this headline in the section avoidance mechanisms. This mechanism does not avoid acquisition of immmovable property. However, when the none-use of the land is discussed, the mechanism has to be adressed.

[448] The mechanism functioned as follows:" Having received estimates for this work in October 2007, a letter was sent to the owner advising him that the works were about to commence and offering him the opportunity to take up an empty homes grant tied with the property being in the private sector leasing scheme for five years. This would then pay for

the Hosing Act 2004 such procedure can be in voked only if the house is not occupied[449]. This approach underlines that mechanism is aiming to stop non-use rather than under-use[450].

On the other side of the ocean, in U.S. The New Jersey State Supreme Court stated that the land could not be be taken against the owner's wishes it must be "blighted" and not merely "not fully productive." The ruling is a victory for private property rights but could make it more difficult to redevelop some communities[451].

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50 per cent of the repairs with the remainder being collected from the rental income over the five year period in equal instalments, with the remainder going to the owner as an income. The owner was given 14 days in which to take up this voluntary option and advised if he did not then a Final Empty Dwelling Management Order would be served. The owner did not take up this option and the order was served in January 2008." Retrieved 1.6.2009 from http://www.peterborough.gov.uk/page-14151.

449 Article 132 is reads as follows:" (1) A local housing authority may make an interim EDMO in respect of a dwelling if—

(a) it is a dwelling to which this section applies, and (b) on an application by the authority to a residential property tribunal, the tribunal by order authorises them under section 134 to make such an order, either in the terms of a draft order submitted by them or in those terms as varied by the tribunal.

(2) This section applies to a dwelling if— (a) the dwelling is wholly unoccupied, and

(b) the relevant proprietor is not a public sector body. "Wholly unoccupied" means that no part is occupied, whether lawfully or unlawfully." Retrieved 1.5.2009 from http://www.opsi.gov.uk/acts/acts2004/ukpga_20040034_en_12#pt4-ch2-pb1-l1g132

450 We must add that ratio legis of the act can be summurised by the following speech made by a local authority:" "Whatever the reason, this action has brought the property back into use providing vital accommodation in the city. In addition, it will also protect neighbourhoods from the negative impact of long-term empty properties, such as the danger of squatters, vandals and arsonists." Retrieved 1.6.2009 from http://www.peterborough.gov.uk/page-14151.

451 The case centers on a 63-acre tract in Paulsboro made up mostly of wetlands just across the Delaware River from Philadelphia International Airport. The Gallenthin family started using the land more than 100 years ago as a place to dock boats carrying produce from southern New Jersey to Philadelphia. The family has owned the land since the early 1950s. Over the last decade, the small industrial town has been courting redevelopment.In 2003, it included the Gallenthin site on a redevelopment plan, which would make it eligible to be taken. At the time, the town planner, George Stevenson, told the planning board that there was no activity on the land and the community would be better served by having something there. The Gallethins sued to keep the land from being taken but an appeals court sided with the town. Wednesday's ruling, written by Chief Justice James R. Zazzali, overturned the earlier decision, saying that for land to be condemned it has to be truly blighted.The New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner," Zazzali wrote. The ruling gives judicial validation to an argument that watchdogs have been expressing: that towns in

These two examples from UK and U.S.A. might help us to understand the difference of non-use and under-use. Also may help us to understand why the article 132 of 2004 Housing Act, underlines the conditionality of "wholly unoccupied". According to our wiev, evaluation of under-use is more complicated than the none-use. However, non-use of the land, from the perspective of the objectivity, is a more clear situation and "wholly unoccupied" expresses this objective criterion.

The cumpolsary lease mechanism may more efficiently can be used in agricultural lands. We must admit that affordable housing as we mentioned is related to the need of shelter from the point of Maslow's hierarchy of human needs. The need for food is a more fundemental need for humans therefore the property right limitations on these grounds (especially when none use occurs) is more justifiable according to the hiyerarci of Maslow. On the other hand,when comparing with housing, in the agricultural lands the objectivity can be established more easily[452].

The right of redemption seems to be another solution for non-use of the land. As we discussed above under OIZ regulation, if the purchaser does not fulfill his/her comitments under the timeline given by the OIZ regulation, the zone authority is entiled to use the right of redemption. Moreover this right is issued in the land registry.

New Jersey and elsewhere, which use eminent domain as a key tool in revitalization efforts, have been using the power too liberally. The backlash has grown since the U.S. Supreme Court ruled two years ago that New London, Conn., could take over privately owned homes on behalf of a real estate developer. In New Jersey, the state public advocate, Ron Chen, has released two reports since 2006 calling for restrictions on how eminent domain can be used. The state Assembly has also advanced a bill aimed at creating restrictions for eminent domain use; the bill is stalled in the senate. Retrieved 1.5.2009 from http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=167x4021

[452] From Satallite or air wiev of a region, it is relatively easy to monitor the non-use of agricultural lands.

Lastly, the most expensive avoidance mechanism is cumpolsary acquisition. If this method is choosen, the admintration has to pay the current market value of the land then it has grant the land to an operator or user, that can achieve the optimal use. On the other hand, residence requirement and cumpolsary acquisition might be as uesd as a part of the regime as ECJ concluded not to be precluded by EU law[453].

As we pointed out when it comes to under-use, things become tenser. According to our opinion, under such conditions rather than legal mechanisms, fiscal policies such as investment incentives, state supports, subsidies should be used to avoid the negative impacts of under-use.

Also administrative fines can be exercised if the under-use of certain types of land that are crucial for human needs, occurs, especially, that may be categorized as a missuse of the land in a broder interpretation. Especially forests, water catchment areas may fall under this scope.

The mechanisms can only be implemented if the monitoring mechanisms are well designed and there are zones with objective and component authority, expert staff and funds available to use the rights as we mentioned above under the prevention of speculation[454].

[453] "That question must be answered in the affirmative if the obligation to reside on or near land is imposed by a member state , within the framework of legislation concerning the ownership of rural land which is intended to achieve the objectives set out above , both on its own nationals and on those of the other member states and is applied to them equally . A residence requirement so delimited does not in fact amount to discrimination which might be found to offend against article 52 of the treaty" Case 182/83 Fearon [1984] ECR 3677.Para 10.

[454] Such authorities must be objective and competant. In our opinion, if the the politic considerations are given priority, then the objectivity may not be achieved. Secondly wihout enough funding, monitoring and exercise of the rights can not be achieved.

On the other hand, we should also underline the education of owner operators and operators and the labor force is an important cornerstone to avoid under-use.

When it comes to the comercial real estate, as long as, they are related to less fundemental needs, avoidance mechanisms for non-use and under-use concern should be used in a more toleranced attitude[455]. However, it should kept in the mind that, these types of lands are important for higher employment rates, local economic development and economic stability. Therefore, in our opinion, key sectors have to be selected and supported to achieve these goals[456].

2.2.2.2.6 The Eco Systems and Non use -Under use

When the fundamental needs of humans considered, an industrial land or an agricultural land that is not operated mainly falls under the scope of under-use and such use of land is not for the benefit of humans. From a short term point of wiew, a wetland that is not dried may be indicated as a none-use or under-use of natural sources. Therefore any wetland might be dried and used for several agricultural purposes. Some short term advantages of chemical fertilizers might be taken in to consideration and by using them as much as possible, productivity might be achived. If there is no water

[455] In our opinion, underuse and non-use of land might be linked with fundemental human needs. For instance, a plot for luxury apartment, may not be used for decades. In fact, this is related to the real estate cycles, demand and many other factors.However the concerns reflected in Housing Act 2004 of UK are reasoble. If we adapt it to our example, the plot has to serve the community or must not in any condition constitute a threat. On the other hand, an agricultural enterprise could not be left to its destiny, as long as they serve to fundamental human needs while functining a part of the eco system. (The term "converted eco-systems" might be more appropriate.)

[456] For instance, if the tourism is selected as a key sector, encouregment of certain commercial real estate projects such as condo-hotels, extended stay hotels might achieve the optimal use in a log run, in some types of lands. These types of developments will support the employment in a very efficient way.

resources available in the area, a long range drill might be used to reach the fossil water and water might be used for irrigation. However, all the suggestions are short term solutions and they are not sustainable. Moreover, the longterm impacts to the eco-systems[457] are either destructive or unknown[458]. We believe that, fundamental human needs and a regularly functioning eco system needs are linked. For instance, if all the rain forests converted to farms, this will have many negative conseguences on the needs of humans, especially, the need of air.

In order to understand the future impacts of agricultural use especially the dangers the eco-system will be facing, FAO's projections of 2030 will be usefull. According to FAO's projections of 2030:

i. Agricultural land use will have to increase by 10% to meet expected demands for food, and even further if biomass for energy production is included[459];
ii. agricultural area will grow by only 4% within the OECD area[460], but by as much as 18% in Africa;
iii. agricultural production will become more land- intensive with growth in agricultural productivity per hectare of around 40%;
iv. global emissions of greenhouse gases will increase by 2% due to land use changes, with large variations by region;

[457] Eco system is defined as a natural unit consisting of all plants, animals and micro-organisms (biotic factors) in an area functioning together with all of the physical (abiotic) factors of the environment. An ecosystem is a unit of interdependent organisms which share the same habitat. Ecosystems usually form a number of food webs which show the interdependence of the organisms within the ecosystem.

[458] OECD(2008)OECD Contribution to the United Nations Commission on Sustainable Development 16: Towards Sustainable Agriculture. OECD Publishing. Page 9.

[459] According to the FAO usage level is currently at 40% of total available land.

[460] The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

v. the availability and quality of global water resources will be under increasing pressure owing to the projected growth in agricultural production.[461]

When these assumptions taken in to consideration, more effient use of land (optimal use) will at least have negative impacts on water and atmosphere.In reality, the forecasted figures enabls us to conlude that under-use in terms of financial context might be equal to optimal use in ecological context, at least when the water and air quality is taken in to consideration.

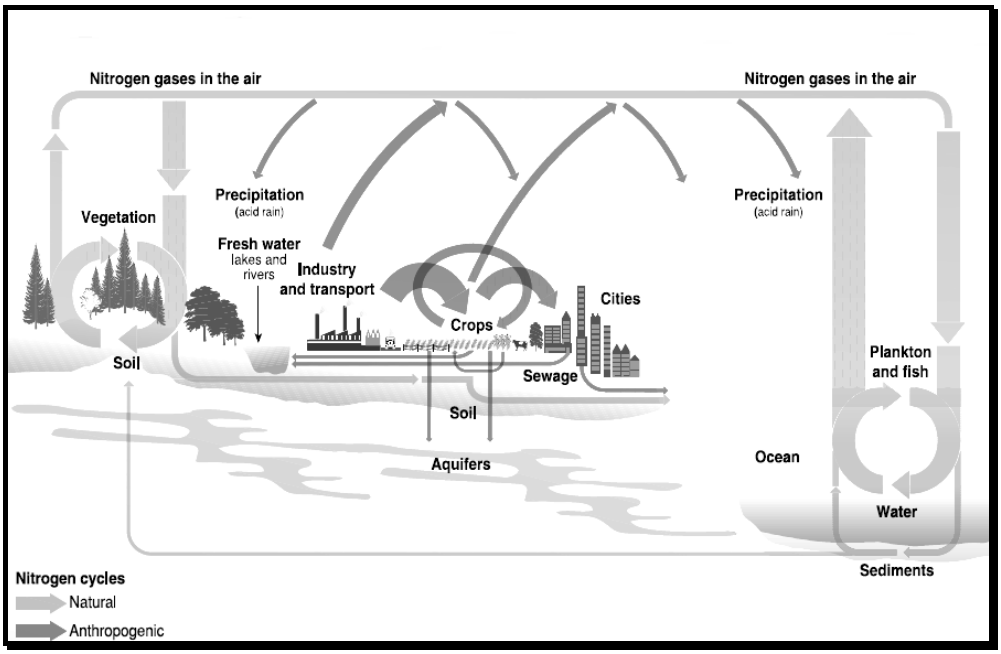
The FAO's projections might become visible more with the chart illustrating the nitrogen cycle[462] pusblished in the the Millennium Assessment Reports[463]

[461] According to OECD, Rising food prices, ecosystem damage, water scarcities and more undernourished people are the signs of a world agriculture system facing significant challenges. Increases in world food production are being achieved through unsustainable demands on natural resources with negative environmental and social consequences. Public and private investment in agriculture and rural infrastructure has stagnated. Climate change is increasing pressure on fragile agricultural systems which are the mainstay of rural livelihoods in many developing countries. Providing adequate food for growing populations is problematic. OECD(2008)OECD Contribution to the United Nations Commission on Sustainable Development 16: Towards Sustainable Agriculture. OECD Publishing.

[462] Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press. Page 9.

[463] The Millennium Ecosystem Assessment(MA) is a research program that focuses on ecosystem changes over the course of decades, and projecting those changes into the future. It was launched in 2001 with support from the United Nations by the UN Secretary-General Kofi Annan. From 2001 to 2005, the MA involved the work of more than 1,360 experts worldwide. Their findings provide a state-of-the-art scientific appraisal of the condition and trends in the world's ecosystems and the services they provide, as well as the scientific basis for action to conserve and use them sustainably.

Table 15: The Nitrogen Cycle



Source:Millenium Ecosystem Assesment

Human activities, including farming and industry, have greatly increased the cycle of nitrogen through soils, water courses, and the atmosphere. Therefore quality of air, water and soil is decreasing rapidly[464].

The fundemental human needs are dependant to the well functioning eco-systems. If the carbon emission levels becomes higher or if the temperture rise or drops severel degrees, this will have negative impacts on eco-systems eventually for the needs of the human beings. Therefore while speculative, unsustainable, unstable agricultural, industrial, residentential developments seem to achieve the optimal use in economic context, the figures may just

[464] FAO, UN, OECD, EU are all sharing the same worries. The reports that are discussed in this section are all underlines the similar projections.

be opposite when the overall balance taken in to consideration[465].The Millennium Ecosystem Assessmentt Board's warnings take the consedierations one step further.[466] They basically discuss the value of the services that consumers(humans) do not pay.

Our first example was a wetland which may be evaluated as a worthless piece of land, especially from the economic context. On the contrary, from the eco-system perspective, wetlands perform a wide range of functions of great value to people—from acting as a natural pollution filter and preventing floods by storing water during heavy rains to supporting wildlife and recreation[467].

Forests regulates the air quality, the flow of water, and the climate itself[468]. Natural systems provide protection from a range of catastrophic events[469]

[465] Long term projections must be taken in to basis as indicative studies. However, the findings of the studies, at least, histrorical values shows that over use and miss use has occured.

[466] We agree with the statement of board on the price of the services nature provide for humans: "In attempting to assess the importance of nature to our lives, we should not lose sight of the value placed on the variety of life on Earth for its own sake: this is even more difficult to put a price on, but nonetheless of deep concern to people of all cultures. Whether it is the uplifting sound of birdsong in a city park, the reverence for local species in many indigenous belief systems, or the wonder of a child watching wildlife in a zoo or even on television, appreciation of the natural world is an important part of what makes us human.Even if our material needs could be met with a much narrower range of species and landscapes, many people would regard this loss as a significant threat to their overall well-being." Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press.Page 9. On the other hand, Erich Fromm's comparison of the animals that are in zoo's and their natural habitats should be taken in to consideration seriously. As long as humans lose the contact with nature, the health of the humans will be endangered. In our opinion, the health of the humans are linked to a properly functioning eco-system.

[467] In the eco-system cycles chart, the importance of forests are shown. Approximetly a similar task is pursued by planktons. Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press.Page 9.

[468] Although their relationship with the atmosphere is more complex than the common description as "lungs of the earth," forests store large quantities of carbon that would add to the greenhouse effect if released into the air.

that can devastate human communities—vegetation helps prevent soil erosion and reduce the likelihood of landslides, while coral reefs and mangrove forests act as barriers against coastal storms and even tidal waves[470].

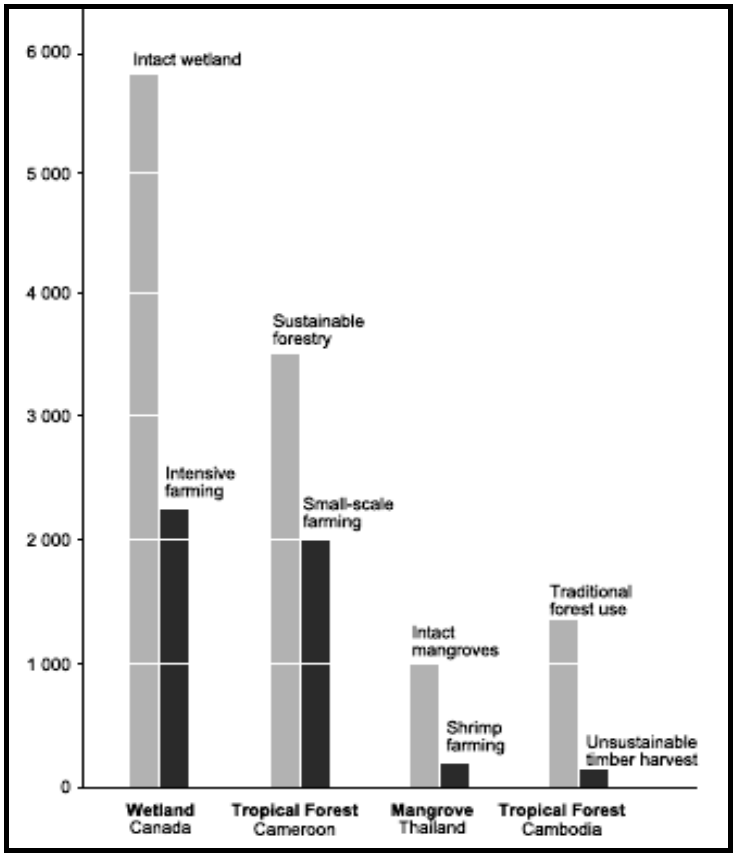
The "market value" of a forest is often in the price that can be obtained for its wood, even though the standing forest may be worth much more for its contribution to water control, climate regulation, and tourism.[471].

[469] Interference with living systems can also promote the sudden emergence of human diseases and crop pests, causing great suffering and economic damage. Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press.Page 10.

[470] Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press.Page 10.

[471] In a major study reviewed in this assessment, the timber and fuel from Mediterranean forests were found to account for less than a third of the total economic value of the whole natural system .This distortion is compounded by measures of economic wealth that fail to "count" natural capital—a significant number of countries judged to be growing in wealth according to conventional indicators actually became poorer in 2001 when loss of natural resources was factored inStatement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press.Page 21.

Table 16: The value of services the nature provides, net present value(US Dollars)

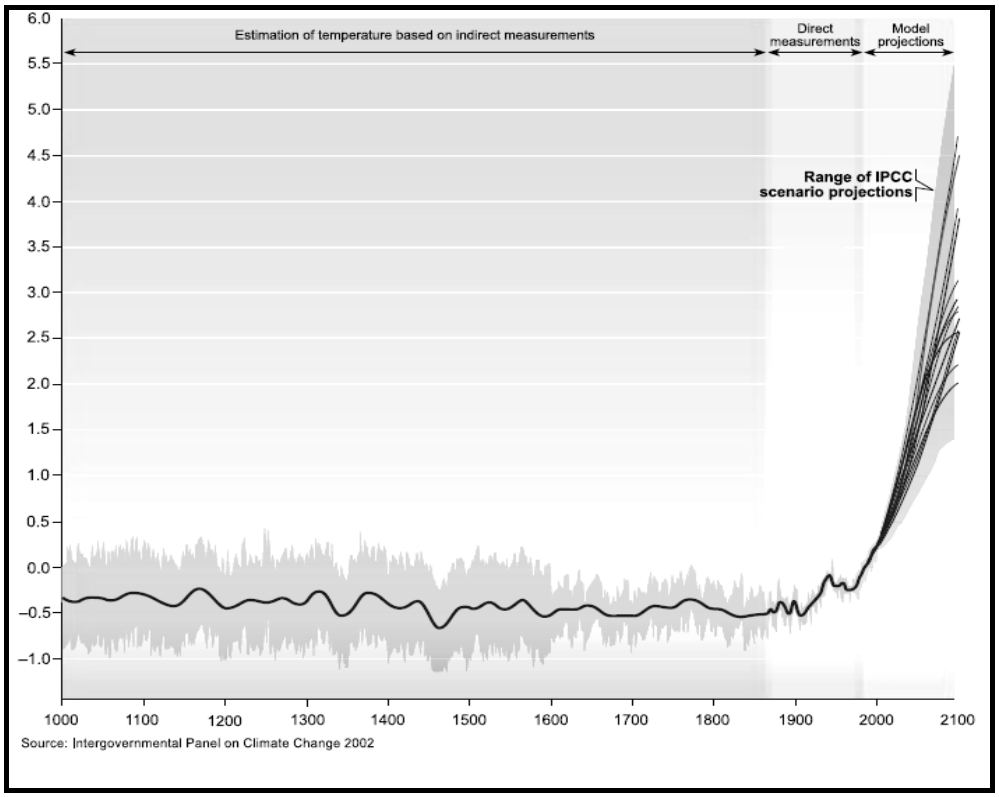


Source:Millenium Ecosystem Assesment[472]

In each case, the net benefits from the more sustainably managed ecosystem are greater than those from the converted ecosystem when measurements include both marketed and nonmarketed services, even though the private (market) benefits would be greater from the converted ecosystem.

[472] An example might be given from the marine natural parks(protection zones). As long as an area is commenced to be protected , eco-system starts to functioning. In practice, such protection produces lucrative results fort he fisherman neat these zones and touristic facilities that regained their relative advantage, natural wonders.

Table 17: Differences in Temperature[473](Celcius)



Source:Millenium Ecosystem Assesment

The data and projection regarding to the global temperature highly corelates with the industrial era. The temperatures are rising. 2-4 degres increase is forecasted. This data is, according to our consideration might be interpreted as more than optimal use, over-use(can be intrerpreted as miss-use in

[473] Nature has always adapted to changes in climate, but this shift is likely to pose unprecedented challenges to its resilience for two main reasons.First, the anticipated speed of climate change is greater than anything seen for at least 10,000 years, making it far more difficult for species to move to more suitable areas or adapt to the new conditions by evolving new survival mechanisms. Coral reefs, for example, have already become barren in some areas through relatively modest increases in sea temperatures, combined with other pressures such as nutrient pollution and overfishing. Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press. Page 13.

ecological context) has occured[474]. Forecasted data is showing that global climate change has just began.

After saving the whales, pandas and elephants[475], the time for the earth might have come eventually. The focused studies and policy renevals by international organisations might be taken as serious steps. Therefore from eco-system wise, the definition of miss-use, over-use, under-use or non-use are in the phase of refinement and re-constructioning.

The avoidance mechanisms suggested by the board of Millenium assetment Project should be placed first because their focus is to "save the eco-system":

According to the report policies that acknowledge the true cost of obtaining natural services can steer consumers or businesses into more-efficient behavior. For example, water charges that reflect the actual environmental impact of an individual user will tend to make people think more carefully before opening the tap. A tax on excessive fertilizer applications or on pesticides may encourage farmers to put fewer nutrients and chemicals into the soil[476].

State subsidies have often directly encouraged degradation of natural systems, especially in agriculture, where farmers have benefited financially from putting unnecessary pressure on the land, stripping out valuable features such as wetlands or field borders important to wildlife. In Europe, a

[474] Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press. Page 14. However, our knowledge on earth is limited, such cycles migt be semi-natural, semi man-made.

[475] We believe that, if the awareness could not be developed in commercial whaling era, today whales would be listed as an excinted animal especially blue whales. Also, if the illegal hunting of elephants has not been prevented in practice, the same faith will be shared by them.

[476] In EU, agri-envoiremental measures are optional.

start has been made in shifting these incentives away from producing ever-greater quantities of food and toward methods that bring wider benefits to society, such as a more vibrant and diverse rural environment[477].

Although still a rare technique, attempts are increasingly being made to recognize the specific services nature provides by paying landowners to provide them. In Costa Rica, for instance, conservation of forests is partly ensured through payments reflecting their importance in regulating water supply, stabilizing the climate, and harboring the diverse wildlife that brings in ecotourism and provides potential opportunities for genetic research[478].

In planning the Millenium assestment report advises the following attitudes:

i. Integrate decision-making between different departments and sectors, as well as international institutions, to ensure that policies are focused on protection of ecosystems.
ii. Include sound management of ecosystem services in all regional planning decisions and in the poverty reduction strategies being prepared by many developing countries.
iii. Establish additional protected areas, particularly in marine systems, and provide greater financial and management support to those that already exist[479].

[477] Especially the "land management and environment" axis, providing for measures to protect and enhance natural resources and high-nature value farming and forestry systems and the traditional landscapes of Europe's rural areas is the second axis of community strategic guidelines for rural development (programming period 2007 to 2013) . Council Decision 2006/144 of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007 to 2013) OJ L 55 of 25.2.2006. Page 28.
[478] In BBC documentary "The Earth(2006)" detailed information has been given on the issue. The model is based on abondance of land (part of former rain forests) by the landowner while supported by a very low price increase reflected to water -bills.
[479] Such an attitude is vital. Moreover, as long fish stocks decrase, the commercial fishers, fishing in the deep seas. This usually ends up with the destruction of whole sea basement.

iv. Use all relevant forms of knowledge and information about eco-systems in decision-making, including the knowledge of local and indigenous groups[480].

After examing the Millenium Assestment, , OECD's expertise in the rural development , especiallt the shift from its old paradigm should be evaluated.

Table 18: New Rural Paradigm for OECD Countries

	Old approach	New approach
Objectives	Equalisation, farm income, farm competitiveness	Competitiveness of rural areas, valorisation of local assets, exploitation of unused resources
Key target sector	Agriculture	Various sectors of rural economies, *e.g.* rural tourism, manufacturing, information technologies
Main tools	Subsidies	Investments
Key actors	National governments, farmers	All levels of government (supranational, national, regional and local), various local stakeholders (public, private, NGOs)

Source: OECD (2006)New Rural Paradigm for OECD Countries.

In OECD's approach, there are three related priorities: 1) enhancement of agricultural productivity and market opportunities, 2) promotion of diversified livelihoods on and off the farm, and 3) reduction of risk and

[480] Statement from the Board (2005) Living Beyond Our Means: Natural Assets and Human Well-being. Washington, DC : Island Press. Page 21.

vulnerability. Under the first priority, governments need to create a supportive policy environment that will provide incentives and remove constraints for agricultural productivity and efficiency increases, while creating safeguards and incentives to prevent unsustainable resource use in the environmental and social sense[481].

The second priority recognises that a more diversified exploitation of household-owned assets (towards post-harvest activities and nonagricultural enterprises, including providing labour services in urban areas) is key to a sustainable rural economy. There is evidence from sub-Saharan Africa that household income increases with the degree of diversity of the income portfolio. There is mixed evidence on whether migration to cities reduces rural poverty (through remittances) rather than increasing urban deprivation (by increasing unemployment). Coherent policy planning at national level will couple rural development with industrialisation and urban job opportunities[482].In our opinion, OECD is well aware that, as long as the agriculture is the only option for rural development, miss-use and over-use is imminent therefore alternatives should be created.

After Millenium and OECD , EU as an implementer of highly advanced agricultural policies (especially after the adaption of Göteborg objectives) should be examined. EU declared a sustainable development strategy and it was adopted at the Göteborg European Council. In addition, an

[481] OECD(2008)OECD Contribution to the United Nations Commission on Sustainable Development 16: Towards Sustainable Agriculture. OECD Publishing. Page 46.
[482] The third priority has a double rationale: first, it is based on a simple humanitarian logic, addressing the extreme vulnerability of the rural poor to external shocks like illness, weather events and rapid structural changes. Second, it relies on the idea that, when they become less vulnerable, many of the rural poor will be able to turn to new livelihoods that will increase their participation in markets and generate economic growth. OECD(2008)OECD Contribution to the United Nations Commission on Sustainable Development 16: Towards Sustainable Agriculture. OECD Publishing. Page 47.

environmental pillar was added to the Lisbon strategy[483]. Moreover it should be underlined that rural regions account for 92% of the territory of the EU with 19% of its population living in predominantly rural regions and 37% in significantly rural regions. These regions generate 45% of the EU's value added and provide 53% of employment.

Agriculture is one of the largest users of rural land, playing a multifunctional, innovative role as a key determinant for the quality of food products, the countryside and the environment. The two pillars of the CAP (market and rural development policies) provide support for a large number of rural areas in Europe. The future rural development policy focuses on three key areas: the agri-food economy, the environment and the rural population. The future strategies and programmes will be built around four axes as follows[484]:

i. the "competitiveness for agriculture, food and forestry" axis, targeting human and physical capital;
ii. the "land management and environment" axis, providing for measures to protect and enhance natural resources and high-nature value farming and forestry systems and the traditional landscapes of Europe's rural areas;
iii. the "quality of life and diversification of the rural economy" axis, which helps to develop rural areas by promoting services for the public, micro-enterprises, rural tourism, and development of the cultural heritage to improve the conditions for growth and job creation in all sectors;

[483] Lisbon objectives: at the Lisbon European Council (March 2000) the EU set itself the objective for 2010: "to become the most competitive and most dynamic knowledge-based economy in the world capable of sustained economic growth and providing more and better jobs and greater social cohesion". This strategy underwent a mid-term review in March 2005. The new Lisbon strategy is centred on the dual objective of growth and job creation. The Member States will be more closely involved in the process by drawing up national action plans.

[484] Council Decision 2006/144/EC of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007 to 2013) OJ L 55 of 25.2.2006. Page 4.

iv. the "Leader" axis, which introduces possibilities for innovative governance through local action strategies with a bottom-up approach to rural development[485].

Especially the second axis, improving the environment and countryside(Also known as Agri-environmental meausures) is a relection of growing concerns till 1980's. [486] This area covers mainly the sustainable eco-system concerns.

[485] Community priority 4, for building local capacity for employment and diversification **reads as** follows"The resources allocated to the Leader axis should contribute to improving governance and mobilising the endogenous development potential of rural areas, combining all three objectives - competitiveness, environment and quality of life/diversification. Integrated approaches involving farmers, foresters and other rural actors can safeguard and enhance local natural and cultural heritage, raise environmental awareness and promote typical products, tourism and renewable resources and energy. Key actions in this area could include:building local partnership capacity, animation and promoting skills acquisition, which can help to mobilise local potential; promoting private-public partnership; promoting cooperation and innovation, encouraging entrepreneurship and promoting inclusiveness and the provision of local services; improving local governance by developing links between agriculture, forestry and the local economy. "Council Decision 2006/144 of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007 to 2013) OJ L 55 of 25.2.2006. Page 28. See Also, "Council Regulation 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) .OJ L 277 of 21.10.2005.

[486] Agri-environment measures began in a few Member States in the 1980s on their own initiative, and was taken up by the European Community in 1985 in Article 19 of the Agricultural Structures Regulation, but remained optional for Member States. In 1992 it was introduced for all Member States as an "accompanying measure" to the Common Agricultural Policy (CAP) reform. It became the subject of a dedicated Regulation, and Member States were required to introduce agri-environment measures "throughout their territory". In 1999, the provisions of the Agri-environment Regulation were incorporated into the Rural Development Regulation5 as part of the "Agenda 2000" CAP reform. The aim of their incorporation was to help achieve coherence within Rural Development Plans. Spending on agri-environment has progressed rapidly..In addition, some Member States also choose to pay for state-aided agri-environment measures. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture, Studies. Page 4-5. See also, Council Regulation 797/85 of 12 March 1985 on improving the efficiency of agricultural structures, OJ L 093- 30.3.1985. Pages 1-18. Council Regulation 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and maintenance of the countryside. OJ L 215/85 -30.6.1992. Also see Council Decision 2006/144/EC of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007 to 2013) OJ L 55 of 25.2.2006. Page 23.

This axis focuses on protection and enhancing the EU's natural resources and landscapes in rural areas. The resources allocated to axis 2[487] has to contribute to three EU-level priority areas:

i. biodiversity[488];
ii. preservation and development of high-nature value farming and forestry systems and traditional agricultural landscapes;
iii. water and climate change.

The key actions selected to achive the desired outcome is follows:

i. Promoting environmental services and animal-friendly farming practices;
ii. preserving the farmed landscape and forests;
iii. combating climate change, agriculture and forestry having a major role to play in the development of renewable energy and material sources for bio-energy installations;
iv. consolidating the contribution of organic farming as part of a holistic approach to sustainable agriculture;

[487] Community strategic guideline is to protect and enhance the EU's natural resources and landscapes in rural areas, the resources devoted to axis 2 should contribute to three EU-level priority areas: biodiversity and the preservation and development of high nature value farming and forestry systems and traditional agricultural landscapes; water; and climate change. The measures available under axis 2 should be used to integrate these environmental objectives and contribute to the implementation of the agricultural and forestry Natura 2000 network, to the Göteborg commitment to reverse biodiversity decline by 2010, to the objectives laid down in Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (1), and to the Kyoto Protocol targets for climate change mitigation. Council Decision 2006/144 of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007 to 2013) OJ L 55 of 25.2.2006. Page 25.

[488] The diversity of measures and environmental situations, and the long lead-in time for some of the environmental effects to be perceivable, requires a structured and longterm approach to monitoring and evaluation. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 13.

v. encouraging environmental/economic initiatives such as the provision of environmental goods, particularly when linked to diversification into tourism, crafts, training or the non-food sector;
vi. promoting territorial balance to maintain a sustainable equilibrium between urban and rural areas and make a positive contribution to the spatial distribution of economic activity and territorial cohesion.

We should also add that parallel to OECD's new paradigm, EU's well aware that, in rural development, other sectors than agriculture has to be supported[489].

In EU, agri-environment measures are designed to encourage farmers to protect and enhance the environment on their farmland. It provides for payments to farmers in return for a service – that of carrying out agri-environmental commitments that involve more than the application of usual good farming practice[490]. The farmers sign a contract with the

[489] Community priority 3 is as follows:"The resources allocated to the fields of diversification of the rural economy and quality of life in rural areas should contribute to the overarching priority of the creation of employment opportunities and conditions for growth. Key actions in this field could include:raising economic activity and employment rates in the wider rural economy and creating a better territorial balance, both in economic and social terms (tourism, crafts and the provision of rural amenities); encouraging the entry of women into the labour market by creating child-care infrastructure; putting the heart back into villages by means of integrated initiatives combining diversification, business creation, investment in cultural heritage, infrastructure for local services and renovation; developing micro-business and crafts, which can build on traditional skills or introduce new competencies, helping to promote entrepreneurship and develop the economic fabric; training young people in skills needed for the diversification of the local economy; encouraging the take-up and diffusion of ICT, the use of which will also enable economies of scale to be achieved, facilitating IT take-up by local farms and rural businesses and the adoption of e-business and e-commerce; developing the provision and innovative use of renewable energy sources, which can contribute to creating new outlets for agricultural and forestry products, the provision of local services and the diversification of the rural economy; encouraging the development of tourism; upgrading local infrastructure (major telecommunications, transport, energy and water infrastructure), particularly in the new Member States. "Council Decision 2006/144 of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007 to 2013) OJ L 55 of 25.2.2006. Page 27.

[490] Agri-environment commitments have to go beyond usual Good Farming Practice (GFP). Usual Good Farming Practice is defined as encompassing mandatory legal requirements

administration and are paid for the additional cost of implementing such commitments and for any losses of income (e.g. due to reduced production) which the commitments entail. Agri-environment payments are co-financed by the EU and the Member States with a contribution from the Community budget. Agri-environment measures may be designed at national, regional or local level so that they can be adapted to the particular farming systems and environmental conditions, which vary greatly throughout the EU. This makes agri-environment a potentially precise tool for achieving environmental goals.

Agri-environmental measures are diverse, however, in general each measure has at least one of two broad objectives: reducing environmental risks associated with modern farming on the one hand, and preserving nature and cultivatedlandscapes on the other hand[491].

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and a level of environmental care that a reasonable farmer is expected to apply anyway. They are compiled in Codes which Regions draw up and submit to the Commission with their Rural Development Plans. This means that a farmer can only be paid, for instance, for environmental commitments that go beyond statutory requirements defined in his regional Code of GFP. More broadly, in application of the Polluter Pays Principle a farmer may not normally be paid to conform with environmental legislation in place. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 1.

[491] How these two objectives are expressed in measures depends on the area in question. For instance, in areas with intensive agricultural production measures are often focused on reducing environmental risks (e.g. reducing fertiliser or pesticide inputs, planting winter cover to reduce nitrate leaching etc), but there may also be measures designed to protect nature (e.g. the leaving of winter stubbles in intensive arable areas to provide food for birds). By contrast, in more extensive farming areas, the main environmental risk is generally linked to land abandonment, resulting from the abandonment of labour-intensive traditional farming practices important for the preservation of nature. In such areas measures tend to focus on continuing or re-introducing traditional farming practices with a view to nature protection (e.g. mowing grass rather than grazing it; maintaining hedgerows, etc). But in extensive areas there may also be measures designed to reduce environmental risks e.g. limits on fertiliser applications to grassland. Irrespective of area, there are clearly many measures which will have positive impacts both in reducing environmental risks with respect to soil and water and in protecting nature e.g. maintenance of hedges. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 5.

Agri-environment measures follow a number of basic principles in EU. Many of these principles are essential to the policy achieving its environmental objectives:

First of all it is optinal for farmers[492], who may choose to sign a contract to carry out one or more measures designed to provide an environmental service[493]. This optional nature tends to promote constructive cooperation and a positive attitude to the environment on the part of farmers, in which respect it has an advantage over statutory environmental obligations.

Secondly it is a site-specific policy, measures can be tailored to different agronomic and environmental circumstances, which allows for a wide variation in both these parameters throughout the EU and within each Member State[494]. In reflection of their diverse environmental needs,

[492] Agri-environment payments may only be made for actions farmers undertake above the reference level of mandatory requirements as currently defined by codes of "good farming practice" This ensures the respect of the Polluter Pays Principle which requires that private actors have to bear the costs of rectifying or avoiding damage to the environment. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 13.

[493] Agri-environmental contracts compete economically with the most profitable land use, so payment levels have to be set sufficiently high to attract farmers to join schemes while avoiding over-compensation. This requires a calculation of appropriate payment levels by Member States. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 5.Page 12.

[494] Member States have a wide degree of discretion in how to implement agri-environment measures. This means that wider **contextual and institutional issues** as well as **attitudes** have a great influence on agri-environment measures' uptake and their environmental effectiveness. For instance, **uptake** can be affected by the historical levels of agri-environment in the Member State, the attitude to agri-environment at every level, the knowledge base on agri-environment, the budget available and the payment levels for farmers selected by the Member State in drawing up its measures10. The **environmental effectiveness** of the measures is affected by contextual and institutional factors such as the quality of the scientific basis chosen for the measures, the extent to which the measures are suited to the area in which they are applied, the professional advice farmers receive on how to apply the measures, and the care with which farmers follow this advice. European

Member States and Regions have chosen to implement the policy in very diverse ways. This site-specificity enables agri-environment to be, at best, a highly refined tool for environmental integration, able to achieve certain environmental results which are not possible for other instruments. For example, Less Favoured Area payments can help avoid environmentally damaging land abandonment, but their requirements are generally defined on a wider geographical scale than those in agri-environmental schemes and their primary objective is not environmental, so their environmental impact is less focused. Similarly, the respect by farmers of Codes of Good Farming Practice certainly has a positive environmental effect, but the environmental requirements, by definition, do not go as far as those for agri-environment measures[495].

Lastly, agri-environment is notified to the World Trade Organisation (WTO) under Annex 2 of the Uruguay Agreement which allows agri-environment payments if they are "limited to the extra costs or loss of income involved". As agri-environment payments are calculated that way, their "Green Box" status of agri-environment is preserved, which implies that agri-environment payments are not considered to be trade-distorting subsidies[496].

Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 5.Page 13.

[495] European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 5.Page 14.

[496] According to the WTO Agreement on Agriculture (AoA), there are four different categories of domestic support measures: the so-called Amber Box (covering classical trade- distorting subsidies such as price interventions and coupled payments); the Blue Box (partly de-coupled payments under production-limiting programmes); the Special and Differential Treatment (S&D) Box (certain input and investment subsidies for developing countries only); and the Green Box (de-coupled payments which are at most minimally trade-distorting). It is the Green Box that expressly allows Members, for example, to pay their farmers compensation for income loss for producers located in disadvantaged regions,

The agri-environment measures related to productive land management in EU is paralel to the Milenium Assetment reports findings. The first set of measures deals with input reduction.These measures includes reductions in fertilisers and plant protection products[497]. When it is part of an "integrated farming" approach, it can also be combined with crop rotation measuresThe expected impacts include securing water quality[498]; enhanced biodiversity and soil quality.

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or for producers implementing environmental programs. Although it is commonly perceived that support provided through the trade-distorting Boxes (Amber, Blue, and S&D) can also serve environmental and rural development objectives, the Green Box is the tool provided in the AoA which can be used to address agri-environmental and rural development aspects in an only minimally trade- distorting manner. With respect to the accessibility to the Box, principally the same rules apply to both developed and developing countries. Werth Alexander(2003) Agri-Environment and Rural Development in the Doha Round. International Institute for Sustainable Development. Page2.

[497] All EU Member States also have input reduction measures for pesticides and chemical fertilisers, which have a positive impact on soil contamination. In Piemonte (IT), a combination of soil analysis and modeling have been used to calculate the impact of farming on soil on farms with agri-environment measures and control farms using only Good Farming Practice. This showed considerable reductions of polluting substances in soil for the main crop types analysed. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 15.

[498] There are many agri-environmental measures whose objective is, wholly or partly, to improve or protect water quality such as measures to reduce the use of pesticides and fertilisers. Some other measures also have a positive impact on water quality, e.g. measures to reduce soil erosion. To date, there are no studies based on the period from 2000 which show actual environmental impacts of such measures. It must be borne in mind that impacts on water quality can take a long time to show: in the case of some underground aquifers impacts can take up to 40 years to be visible. However, a number of regions have carried out well-founded extrapolations. For instance, Umbria (Italy) has based calculations of the impact of N reduction measures on the evaluation of the programme in the period 1994-98. On this basis, it calculates that, with an average reduction of 54 kg/N/ha/a, the present N-reduction measure has an annual impact for the period 2000-03 of between 2,6 million and 3,1 million kg/N/a. Austria has figures from 1992 to the present day which show an increase in waters with almost no contamination (from 81% to 87% - 1998-2001). Some of the studies on soil erosion and contamination mentioned above would also indicate expected positive effects on water quality. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 16.

The organic farming, from the perspective of input reduction seems to be the one of the most suitable solution. This type of farming is a clearly defined and controlled approach to farming which incorporates a wider range of measures such as input reduction, rotation, extensification of livestock. The expected impacts are enhanced soil quality, preserving water quality, and biodiversity enhancement[499].

The conversion of arable land to grassland and rotation measures are really important measures that has similarities with the Costarica example given above. The conversion of arable land to grassland can have positive effects on water quality, water quantity, soil quality, biodiversity and landscape. The impacts of rotation measures are very varied, but if drawn up with clear environmental objectives they can have positive effects on soil quality, water quantity, water quality, biodiversity and landscapes[500].

Undersowing and cover crops, strips especially the farmed buffer strips can have positive impacts on water quality, soil quality and biodiversity. The field strips can be positive for biodiversity, and water quality; they can also help prevent soil erosion. Various other measures can be used to prevent erosion and help prevent forest fires[501].

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[499] When it comes to water quality, results may take longer that expected as shown in the eco-system table submitted above, the cyle of water is a long one.

[500] It must be noted that changes in biodiversity can be observed through well designed monitoring mechanisms.

[501] In Umbria (IT), organic farming techniques have been found to reduce soil erosion on average by 6,8 ton/ha/a. Conversion of arable to grassland is estimated to have resulted in a reduction of 30/ton/ha/a. Many of the measures in Niedersachsen (Denmark) are designed to have positive impacts on soil quality and erosion, particularly the use of green cover, arable set-aside, and reversion of arable land to grassland (nearly 30,000 has under these measures). Improved soil quality has also been noted on arable land farmed organically. In Bavaria (DE), the vast majority of farmed land is under the agri-environment programme, many of whose measures are designed to prevent soil erosion. In Flanders (Belgium), calculations based on detailed scientific knowledge indicate that green cover of the soil reduces soil erosion by at least 50%. Extrapolating from detailed figures for two communes, the mid-term report estimates that, during the period 1999-2002, green cover measures in Flanders will have prevented the erosion of 1 million tonnes of soil. European

The Actions in areas of special biodiversity/nature interest are mainly the measures to promote biodiversity in rural areas. These are many and diverse such as postponing mowing dates to protect nests, the establishment of buffer strips, and input reduction. There may be secondary positive effects on water quality and quantity.On the other hand genetic diversity is another measure. This measure type concerns the rearing of rare local breeds indigenous to the area and in danger of being lost to farming and the preservation of plant genetic resources naturally adapted to the local and regional conditions and under threat of genetic erosion. The intended impact is on genetic diversity but there can be positive impacts on landscape[502] as well.

The farmed landscape measure refers to maintaining farming systems which lead, as a side effect, to characteristic landscapes. Such measures generally have positive impacts on biodiversity. This reflects the fact that

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Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 14.

[502] There are many agri-environmental measures that refer to the objective of protecting and enhance landscapes. There are close links between landscape measures and habitats as features promoted under the landscape header, such as hedge rows, terraces, isolated trees, ponds etc. are valuable habitats for many species. Measures to do with linear or point features (such as hedges, terraces, isolated trees, ponds etc) are relatively easy to monitor in that they can be readily quantified. For instance, in the Netherlands in 2002, agri-environment contracts included numerous traditional features such as 16 ha of duck ponds, 448 other ponds, woodland for cover, reed beds on water margins, 22,000 pollarded trees, nearly 10,000 tall trees, rings of trees etc. In Luxembourg a methodology for assessing habitat diversity by measuring the number and length of landscape elements using photography is mentioned in the mid-term evaluation.Compared to such linear or point landscape features, many other types of measure to preserve or enhance landscapes are more complex to monitor and evaluate. Some regions, however, have answered the landscape questions with by quoting uptake figures rather than attempting any more complex measurement of impact. The report of Bolzano (IT) explains how a long network of footpaths allows the public to enjoy the landscape. It enumerates the measures which contribute to the coherence of the landscape (e.g. permanent pastures, vines often with terraces on steep slopes), and those which contribute to differentiation (e.g. local varieties of cereal, and specific habitat measures) European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 20.

much farmland biodiversity is dependent on features which are essential to the particular style of farming in that area, which features also give rise to the traditional landscape[503].

Water use reduction measures[504] these are designed to preserve water resources by reducing irrigation and/or reducing water loss from the soil e.g. by growing ground cover[505].

[503] This concern has been discussed in the case Reish.

[504] Especially the modern drip irrigation has arguably become the world's most valued innovation in agriculture since the invention of the impact sprinkler in the 1930s, which replaced flood irrigation. Drip irrigation may also use devices called micro-spray heads, which spray water in a small area, instead of dripping emitters. These are generally used on tree and vine crops with wider root zones. Subsurface drip irrigation (SDI) uses permanently or temporarily buried dripperline or drip tape located at or below the plant roots. It is becoming popular for row crop irrigation, especially in areas where water supplies are limited or recycled water is used for irrigation. Careful study of all the relevant factors like land topography, soil, water, crop and agro-climatic conditions are needed to determine the most suitable drip irrigation system and components to be used in a specific installation. Especially from the eco-system wise, if properly designed, installed, and managed, drip irrigation may help achieve water conservation by reducing evaporation and deep drainage when compared to other types of irrigation such as flood or overhead sprinklers since water can be more precisely applied to the plant roots. In addition, drip can eliminate many diseases that are spread through water contact with the foliage. Finally, in regions where water supplies are severely limited, there may be no actual water savings, but rather simply an increase in production while using the same amount of water as before. In very arid regions or on sandy soils, the preferred method is to apply the irrigation water as slowly as possible. Retrieved 1.7.2009 from http://en.wikipedia.org/wiki/Drip_irrigation. In our opinion one of most efficient way of preserving water quantitiy depends on this method.

[505] There is a number of agri-environmental measures whose objective is to preserve water resources e.g. in France, Spain and Italy.Uptake figures are a useful proxy for environmental impacts in the case of water quantity measures, provided compliance is controlled and measures are applied in areas where water quantity is a priority issue. Uptake figures from the mid-term reports, however, suggest relatively low farmer interest to date. This would indicate a rather limited overall environmental impact for these schemes, despite the real need for such measures and the availability of contracts for farmers. Low farmer interest might be explained by the fact that many of the measures designed to save water call for substantial changes in farming practices.For instance, in Umbria (Italy), there was very little uptake of measures involving conversion of arable to grassland, with a view to reducing water use. However, there was rather more success with a measure that required reduced water use on existing crops. The earlier Spanish measures were revised in the RDR to be more exacting on water use. Themeasures involve a change in crop type and a maximum amount of water use per hectare (verified by water meters). So far, the new measure has only been implemented in Castilla La Mancha, and only in 2003, so data is limited. However, the mid-term evaluation mentions findings from a similar measure under the Agri-environment Regulation: attitudes of farmers were slow to change

The EU's agri-envorinmental measures related to non-productive land management mainly based on set aside, upkeep of abandoned farm and Maintenance of the countryside and landscape features. These can be evaluated as a major change in the history: A gift of humans to the eco-systems[506].

Turkey is sharing much of the worries especially in the land and soil protection.Such laws enacted recently[507] , Especially law on soil conservation and land use is paralel to the OECD, EU and UN policies. It should also be noted that drip irrigation investmest supports following 2006, might be avaluated as an outcome of these concerns.

– many persisted to regard water as a private rather than a public good, and had no clear notion of the value of the environment; the positive impact of the measure on water levels and the related environment was reported to be reduced by the continuing use of illegal boreholes. The evaluators call for a more strategic approach to protecting water resources, of which agri-environment would be a part. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 16

[506] The set-aside managed for environmental purposes could be expected to have positive impacts on biodiversity, water quality and soil erosion. Measures include both large areas of set-aside and small ones such as uncultivated field strips. It is worth noting that set-aside, in order to have positive environmental effects, must be implemented according to site-specific circumstances and often needs to be combined with appropriate management (simple abandonment can cause environmental problems.)Upkeep of abandoned farm land and woodland can be expected to be positive for biodiversity by continuing to provide habitats for farming-dependent species of plants and animals, and it will be positive for the landscape. It may also help avoid fires, and this in turn is positive for biodiversity and soil erosion.Maintenance of the countryside and landscape category seeks to protect landscape features such as linear features (hedges, stone walls) and point features (isolated trees, ponds etc.) These measures will very often have positive impacts not only on landscape, but also on biodiversity. European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture Studies. Page 19.

[507] "Law on soil conservation and land use" (No. 5403), "Agricultural insurance law" (No. 5363), "Law on agricultural credit cooperatives" (No.1581), "Law on agricultural sales cooperatives" (No. 4572), "Law on producer unions" (No. 5200), "Law on chambers of agriculture" (No.6964), "Law on registration, control and certification of seeds" (No. 308), "Law on organic farming" (No. 5262), "Law on production, consumption and control of foodstuffs" (No. 5179), "Law on animal breeding" (No. 4631). A new Law on agriculture (No.5488) was adopted on 25 April 2006 by the Parliament.

When we combine all the policies and measures, it is not hard to state that eco-system's relation with agriculture is re-defining by international, supranational and national institutions.

The concrete evidences, paradigm changes implies that "the optional" chareastrics of the measures may be converted to "the mandatory" in near future. Such an advice has been addressed by the Millenium Assestment Board. If this particular shift occurs in future, this will have many consequences on land ownership.

The avoidance mechanisms as we repeatly stated usally activated by the miss-use and none-use of the land. If the agri-envoiremental measures become mandotary measures, starting from the high priority areas for the functioning eco-systems, the limitations of the right of property will be used more often.

Especially, from the sustainability perspective, as we have indicated in Millenium Assessment Report, EU's programmes and OECD paradigm, the more diversified and stable rural economies will gain importance[508]. As OECD puts as a second priority , a more diversified exploitation of household-owned assets (towards post-harvest activities and nonagricultural enterprises, including providing labour services in urban areas) is key to a sustainable rural economy[509]. The tourism and ICT seems to be the most favorable ones acording to OECD. Under such attitude, ECJ's srtict interpretation of "proportionality" on the acquistition of immovable properties by non-national EU citizens might be softened. As we discussed

[508] As long as agriculture is the only key sector for rural areas, it is less likely to prevent the over-use and miss-use of the land. Alternative economic sectors must be encouraged to achieve such an outcome.

[509] OECD(2008)OECD Contribution to the United Nations Commission on Sustainable Development 16: Towards Sustainable Agriculture. OECD Publishing. Page 46.

ECJ, on the case Reish and Kolne, while creating mandatory reasons on the issue, concluded that prior authorisation is not proportional. The ratio legis of the national legislation was in fact creating more stable economies in rural areas. ECJ's way of interpration is based on EC's fundemental freedoms, mainly economic, especially in connection with the free movement of capital. The issue at hand seems to be related to the sustain the well functioning eco-systems. Therefore such policy shifts in international organisations and EU may cause ECJ to refrain strict interpretations of fundemental community freedoms in future judgements with similar facts.

2.2.2.3 Prevention of Fragmentation of Land(Especially The Farmland)

The effiecieny of agricultural enterprises[510] is highly dependant to the size of land, on they operate. The question about optimal farm size has a long history in agricultural economics. Numerous authors have been analysing the relationship between farm size and efficiency.

In general, an increase in firm size first leads to higher marginal returns and lower marginal costs. However, beyond a certain size, marginal returns will decrease and marginal costs will rise . Optimal size is reached when marginal returns equal marginal costs. Scale economies are usually a consequence of the better and more efficient use of production factors. As firm size increases, labour and machinery can be better adjusted. Economies of scale, in microeconomics[511], are the cost advantages that a business obtains due to expansion. They are factors that cause a producer's average cost per unit to fall as scale is increased. Economies of scale is a long run concept and refers to reductions in unit cost as the size of a facility, or scale, increases.[512] When this approach taken as a basis in agricultural lands, when the optimal size have to be reached for optimal revenues.

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[510] In this section, we will mainly focus on agricultural lands. Article 18 of public works law, enables, administations , at least, consolidate land. As a matter of fact, in city planning, smaller plot of lands can be sufficient for many kinds of developments.. For instance, a land sufficient for an city hotel might as small as 2 decars, while a local family farm may require at leat 20 decars.

[511] Microeconomics is a branch of economics that studies how households and firms make decisions to allocate limited resources, typically in markets where goods or services are being bought and sold. Microeconomics examines how these decisions and behaviours affect the supply and demand for goods and services, which determines prices; and how prices, in turn, determine the supply and demand of goods and services. This is a contrast to macroeconomics, which involves the "sum total of economic activity, dealing with the issues of growth, inflation and unemployment, and with national economic policies relating to these issues".Macroeconomics also deals with the effects of government actions (such as changing taxation levels) on them. Retrieved 1.8.2009 from http://en.wikipedia.org/wiki/Microeconomics

[512] Sullivan, Arthur. Sheffrin Steven M. (2003) Economics: Principles in Action. New Jersey. Page 157.

Table 19: Gross Magrin-Sensetivity Analysis(Kivi-Fruit Production)[513]

PRICE	Yield lbs. per Acre			
$/lb.	15,000	20,000	25,000	30,000
.50	(5,112)	(6,047)	(6,983)	(7,919)
.75	(1,362)	(1,047)	(733)	(419)
1.00	2,388	3,953	5,517	7,081
1.25	6,138	8,953	11,767	14,581

Source: Ministry of Agriculture, Fisheries and Food / Province of British Columbia

As the above mentioned table clearly suggest, the efficieny of land increase when the size of the land increases. If we examine the table, when the price of kiwi is 1 $/lb, 15000 Acres of land generates 2.388 $ where as two times of this land(30.000 Acres) genarates, 7,081 $, approximetly 3 times of half sized land514.

2.2.2.3.1 Definition of land fragmentation of the Farmland

The fragmentation of land might be defined in several ways. Some studies divided the various definitions in to two distinct senses: the subdivision of farm property into undersized units too small for rational exploitation; and the excessive separation and dispersion of the parcels forming parts of single farm. Fragmentation thus relates into two problems: farm size and concentration of parcels[515]. Therefore firstly reasonsof fragmentation and then the size of the average farmlands has to be examined.

[513] Retrieved 1.2.2007 from www.agf.gov.bc.ca/busmgmt/budgets/budget_pdf/berry/BV8.PDF . On the other hand, this table does not suggest outcomes for the local develolopment. The contrary wievs, studies and policies will be discussed below in this section.

[514] However, increase in the efficency will end when reached to particular point.

[515] As a fragmented farm, i.e. a farm that comprises a number of parcels located some distance from one another. As fragmented ownership, i.e. a farmer's holding that includes land owned by the farmer as well as land leased from others. The leased land may be owned by a neighbouring farmer or it may involve a case of "absentee ownership" with the

2.2.2.3.2 Reasons of Farmland Fragmentation

The causes of farmland fragmentation can be divided into two broad categories. Partial inheritance system and significant imperfections in the land market forms the suuply side reasons.[516].

On the other hand it may ocur as a result of rational economic decision[517]. It assumed that private benefits of fragmentation exceeded its private costs, and the benefits mainly came from the risk reduction of fragmentation[518].

2.2.2.3.3 The Data on Farmland Sizes in the World, EU and Turkey

The average farmland size changes fom region to region. According to FAO's statistics the North America has the less fragmented of farmland with the average of 121 hectars. South America with the average of 67 hectars follows America. Europe with 27 hectars if followed by Africa and Asia with 1.6 hectar. However according to EU, current value for EU15 is 21.4 hectares.

owner living in a distant city. Retrieved 5.8.2009 from http://www.fao.org/DOCREP/006/Y4954E/y4954e04.htm#TopOfPage

[516] While the land fragmentation in the case of existing incentive for consolidation was explained as imperfection of the land market. We will discuss land consolidation and inheritance mechanisms below under adoidance mechanisms.

517 Small farmlands anf their importance and productivity figures will be given below. Rosset Peter(1999) Benefits of Small Farm Agriculture In the Context of Global Trade Negotiations. Retrived 1.8.2009 from http://www.mindfully.org/Farm/Small-Farm-Benefits-Rosset.htm

[518] Firstly, land fragmentation is essential for diversification. Also, it may be usefull to spread the risk. They have also great ecological importabce such as,decreasing the damage of soil erosion .We will discuss those below.. Blarel Benoit. Hazell Peter. Place Frank. Quiggin John. (1992)The Economics of Farm Fragmentation: Evidence from Ghana and Rwanda. World Bank Econ. Rev.,6 (20) Pages 233-254.

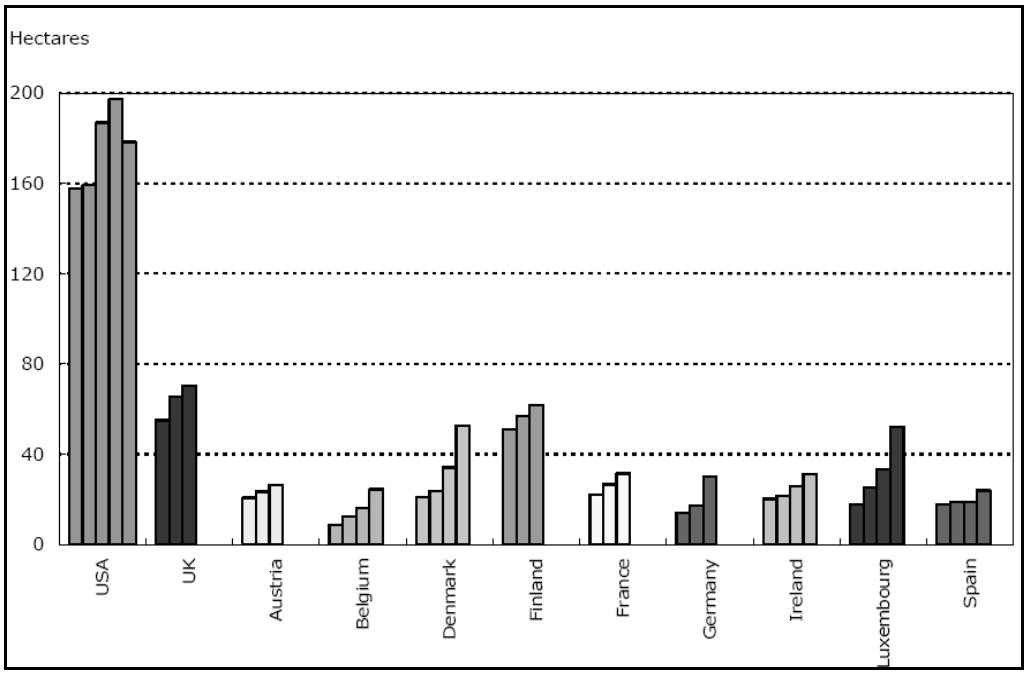
Table 20: Average farm size(World)

World region	Average farm size, hectares
Africa	1.6
Asia	1.6
Latin America and Caribbean	67.0
Europe[a]	27.0
North America	121.0

Source:FAO[519]

[519] According to EU's databases, current figure for EU27 is 11.9 hectares. EU Comission/DG Agriculture and Rural Development (2007) Rural Development in the European Unıon Statıstıcal And Economıc Information.Page 100.

Table 21: Trends in Average Farm Size, Selected Developed Countries



Source: FAO 2001, 2004.

When the trends in developed in countries examined, it is a fact that the average sizes are increasing. U.S.A. average after topping near 200 hectars. has slightly declined. This value is approximetly as we examined previously is close to the North America average. The developed countries in EU is far below North America's values.

Table 22: Average Farmland Size and Disturbition of Farms in EU

Unit	ha		% of farms		
Subdivisions			% farms < 5 ha	% farms >= 5 - < 50 ha	% farms >= 50 ha
Country					
Belgium	26.9		26.6	56.9	16.5
Bulgaria	5.1		95.6	3.4	1.0
Czech Republic	84.2		53.0	31.9	15.2
Denmark	53.7		3.1	63.7	33.2
Germany	43.7		22.6	55.7	21.7
Estonia	29.9		45.3	46.6	8.2
Ireland	31.8		7.0	75.2	17.8
Greece	4.8		76.3	22.8	0.8
Spain	23.0		53.5	37.3	9.2
France	48.7		26.0	38.7	35.2
Italy	7.4		73.6	24.2	2.2
Cyprus	3.4		87.3	11.9	0.8
Latvia	13.2		47.3	49.3	3.4
Lithuania	11.0		51.4	46.3	2.3
Luxembourg	52.7		20.9	33.6	45.5
Hungary	6.0		89.7	8.7	1.6
Malta	0.9		97.9	2.1	0.0
Netherlands	23.9		28.9	58.1	13.1
Austria	19.1		32.2	61.5	6.4
Poland	6.0		70.7	28.5	0.8
Portugal	11.4		74.8	22.0	3.2
Romania	3.3		90.9	8.7	0.3
Slovenia	6.3		59.4	40.2	0.4
Slovakia	27.4		90.0	6.2	3.8
Finland	32.1		9.3	72.0	18.8
Sweden	42.1		14.8	60.4	24.8
United Kingdom	55.7		37.3	36.7	26.0
EU27	11.9		71.5	23.7	4.8
EU15	21.4		54.6	34.8	10.6
EU12	5.5		82.9	16.3	0.9
EU25	16.0		61.6	31.5	6.9

Source: Eurostat, EU Commission Directorate-General for Agriculture and Rural Development[520]

In EU-15 the average farm size is 21.4 hectares. Considered country by country, the EU-15 shows considerable variability in average farm sizes. In two of the 15 countries (Greece and Italy) the average farm size is less than 10 hectares; in six other countries the average size is between 10 and 30

[520] For futher details see, EU Comission/DG Agriculture and Rural Development (2007) Rural Development in the European Unıon Statıstıcal And Economıc Information.Pages98-99.

hectares; in four countries it is between 30 and 50 hectares, while in other three countries the average farm size exceeds not significantly 50 hectares.

Table 23: Agricultural Holdings and Parcel by Size of Holdings and Parcels

Number of parcels	of	Total	Size of Holdings							
			<5	5-9	10-19	20-49	50-99	100-199	200-499	500<
Percentage of holdings	of	100	5,9	9,6	17,9	31,4	18,5	10,1	5,1	0,1
Percentage of parcels	of	100	2,4	5,4	13,4	31,1	23,0	15,3	8,1	1,4

The average size of farmland in Turkey is 5.9 hectares[521]. This value is smaller than EU average. One of the most important problem in Turkish agriculture is about size of parcels and their holdings. The averages might be considered low, however, for the Mediterranean side of Turkey, climate conditions and thus, production in greenhouses might compansate this factor[522]. We should also add that except for Spain, Portugal, Italy and Greece the mediterranian members are mainly have lower values.

[521] Ucak Harun(2007) Monitoring Agriculture of Turkey Before Accession Process for EU Membership.Central European Journal. Vol(7).Page 549. The fundemental statistics for Turkey's Agriculture is as follows**:"**Turkey has 27 million hectares of agriculture land (excluding pastures and meadows), which represents about 20 % of the EU-25 agriculture land. The agricultural sector can be summarised by the following key figures (2004): the sector represents 11´% of the Gross Domestic Production; employment in agriculture is 33 % of total employment; average farm size – 6 hectares; number of farms - 3 million (according to the 2001 census); rural population - 39 %. In 2004 the total value of the Turkish agricultural output reached 29 billion €, hence 9 % of total output in the EU-25 . Turkey is a net exporter in agricultural products with a 2.35 € billion surplus in 2004, the EU-25 being the first destination. The agriculture budget reached in 2004 approximately 2.3 € billion. EU Comission/DG Enlargement(2007) Screening report Turkey: Chapter 11 – Agriculture and Rural Development.Page2.

[522] In Turkey, central, East and, South East anatolian regions have much larger farms with 161, 132, and 122 decares per household. However, land per person is not the highest in any of these regions. Marmara region that holds theleast crowded households, also has the most farm land per person, 20 decares. The Black Sea region has the lowest land per person at 11 decares. Farm sizes in the Black Sea region are almost half of the country's average with 50 decares. Farms are fragmented: on the average each farm has 7.5 separate plots of land. The highest fragmentation is in Central Anatolia with 11.1, followed by South East

Table 24: Average Farmland Size Spain, Portugal, Italy, Greece and Turkey

Country	Hectars
Greece	4,8
Portugal	11,4
Italy	7,4
Spain	23
Turkey	5,9

Source: Eurostat, TUIK.

When the EU members in the South examined, the value for average size of farmlands is close to the Turkey. Greece, Italy and Turkey has closer values. Spain with the value close to the EU15, has the largest average farm size in the South of Europe.

2.2.2.3.4 The Literature Supporting Small Farmlands: Critism of the Economies of Scale Suggestions

After stating the general approach extracted from the principle of economies of scale, we should also mention that there is a growing literature that the principle is not covering all types of agricultural production thus the farmlands used for production[523].

Anatolia with 9. The lowest fragmentation occurs in Marmara with 3.9, followed by Mediterranean with 5.2 separate plots per farm. Ünal Fatma Gül (2006) Small Is Beautiful: Evidence Of Inverse Size YieldRelationship In Rural Turkey. Policy Innovations. http://www.policyinnovations.org/ideas/policy_library/data/01382. Page 16.

[523] In our opinion, this studies must be taken in to consideration especially from the perspective of local development. USDA from U.S. where the average size of farmlands is nearly 200 hectares, is examining small farmds and supporting these farms. In the previous section we have examined many advantages of small farms under especially agri-envoiremental aspects namely diversification and landscape.However, in our opinion, small farmlands should not be fragmented after a particular size. Moreover, they must be planned in way that, water, energy,transportation, labour needs are well fit.

When the main factors are examined, the main suggestions of the literature bacisally depends on the following[524]:

i. Small farmers[525] are usually the owner's of the farms and organised as a family business. The possibility of the success of the farm at least their commitment to that goal is higher than hired labour[526] .

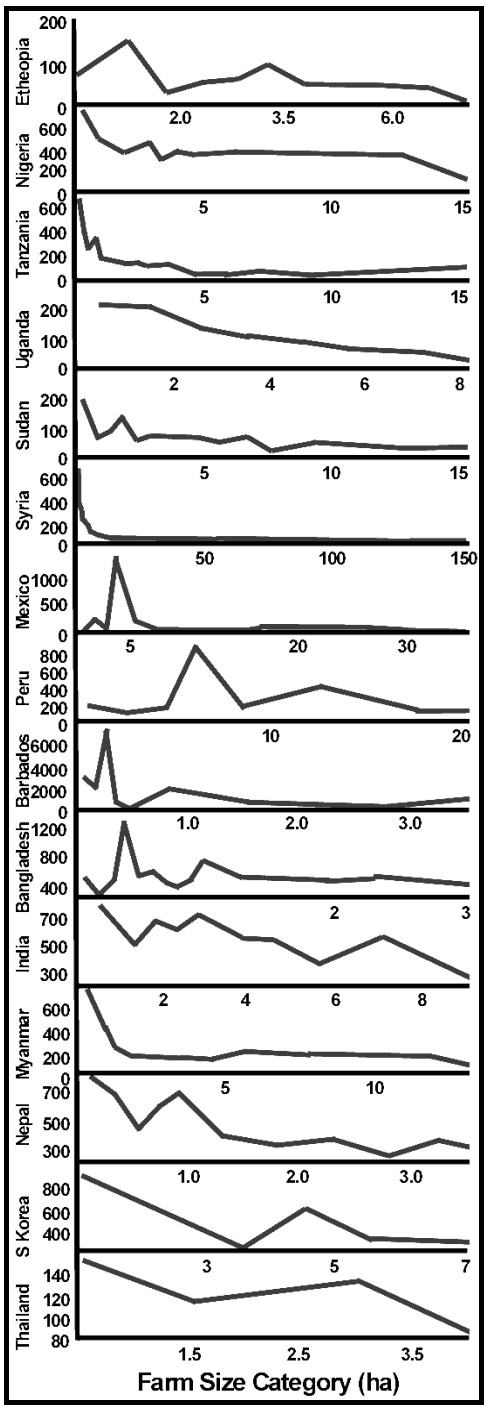
ii. Smal farmers utilise their resources in a way that a large farm can not achieve. Small farms usually use non-purchased mainly recycled inputs like manure and compost, while large farms tend to use purchased inputs like agrochemicals.

iii. Small farms are committed to management of other resources which combine with the land to produce a greater quantity and better quality of production such as forest and aquatic resources[527]

iv. Small farmers usually cultivate various crops in their farms in different seasons of the year that may not be feasible for commercial and industrial farmers[528].

[524] The list is not meant to be exhaustive. The major suggestions are listed.
[525] Lipton defines family farms as "operated units in which most labor and enterprise come from the farm family, which puts much of its working time into the farm; The World Bank's Rural Strategy defines smallholders as those with a low asset base,operating less than 2 hectares of cropland ;A recent FAO study defines smallholders as farmers with "limited resource endowments, relative to other farmers in the sector. Nagayets Oksana (2005)Small farms: Current Status and Key Trends Information Brief. Pare 355.
[526] Small farms often apply more labour per unit area. Remember OECD's focus shift from agriculture to rural economy.
[527] They have a more balanced relationship with the envorinment. For instance **I**n the U.S.A., small farmers devote 17 per cent of their area to woodlands, compared with only five per cent on large farms. Small farms maintain nearly twice as much of their land in "soil-improving uses", including cover crops and green manures. Rosset Peter(1999) Benefits of Small Farm Agriculture In the Context of Global Trade Negotiations. Retrived 1.8.2009 from http://www.mindfully.org/Farm/Small-Farm-Benefits-Rosset.htm
[528] This advantage mainly depends on labour cost structure.

Table 25: Total production per unit area versus farm size in 15 countries[529]



[529] Rosset Peter(1999) Benefits of Small Farm Agriculture In the Context of Global Trade Negotiations. Retrived 1.8.2009 from http://www.mindfully.org/Farm/Small-Farm-Benefits-Rosset.htm

The table above consist of developing country's patterns seem to providing evidence on the efficiency of small farms in the developing countries.[530].

In a study conducted on Turkey, similar results have been reached[531]. According to the study farms size of the farm and yields are negatively corraleted[532]. This outcome should not be suprising, in our opinion, farms in all regions are operated mostly with family labor. As indicated by the report, on the average 77% of all labor input is obtained from family members where as the remainder is obtained through labor markets, communal labor, institutional labor such as government help or a mixture of family and hired labor.

Although their efficiency may not be the at the utmost level in the developed countries, the tremendous importance of small farms begins to appear when their role in rural economic development and their support for the eco-systems taken in to consideration.

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[530] In industrial countries, the pattern is not that clear The consensus position is probably that very small farms are inefficient because they can't make full use of expensive equipment, while very large farms are also inefficient because of management and labour problems inherent in large operationsWe have in the previous section, given the example of swamp to make clear the definition of under-use. The definition of 'efficiency' most widely accepted by conventional economists is that of 'total factor productivity' - a sort of averaging of the efficiency of use of all the different factors that go into production, including land, labour, inputs, capital. That approach may work in some examples sustainably. But when it comes to agriculture, as we examined in detail, the system is a complicated one. Rosset Peter(1999) Benefits of Small Farm Agriculture In the Context of Global Trade Negotiations. Retrived 1.8.2009 from http://www.mindfully.org/Farm/Small-Farm-Benefits-Rosset.htm

[531] Ünal Fatma Gül (2006) Small Is Beautiful: Evidence Of Inverse Size YieldRelationship In Rural Turkey. Policy Innovations. http://www.policyinnovations.org/ideas/policy_library/data/01382. Page 26.

[532] For Turkey in general, one percent of increase in farm size results in 1.28 percent of decrease in productivity per decare. The IR is most pronounced in the Black Sea Region with -1.37 elasticity, and least pronounced in the Mediterranean with -1.09. Ünal Fatma Gül (2006) Small Is Beautiful: Evidence Of Inverse Size YieldRelationship In Rural Turkey. Policy Innovations.
http://www.policyinnovations.org/ideas/policy_library/data/01382. Page 20.

We have in the previous chapter, underlined the European Commission Directorate General for Agriculture and Rural Development's findings and policies[533] that are paralel to FAO, OECD and UN. In this section we will also examine USDA's perspective of small farms. In our opinion, the most competent authoriries of the world seems to share the same concerns. This comprimise might be taken as the biggest evidence of the crucial role of the small farms on economic development.FAO, OECD, USDA and EU is well aware that their role is critical in the economic development. However, aproximetly 70 years ago, Walter Goldschmidt compared areas dominated by large corporate farms with smaller family farms and reached a similar conlusion.

In rural communities dominated by large industrialized farms, economic cycles can not work and therefore a stabil local economy can not be achieved. More mechanisation and industrilization results lower levels of employment. On the other hand, in such local economy, the local farm owner families will disappear. When the low employment level and lack of local farm owner families, it is not likely to achieve local development. In these industrialised farm towns, the income earned in agriculture was drained off into larger cities to support distant enterprises, while in towns surrounded by family farms, the income circulated among local business establishments[534], generating jobs and creating prosperity[535]. In today's

[533] See, European Commission Directorate General for Agriculture and Rural Development(2005) Agri-environment Measures Overview on General Principles, Types of Measures, and Application . Unit G-4 - Evaluation of Measures applied to Agriculture, Studies. See also, Council Regulation 797/85 of 12 March 1985 on improving the efficiency of agricultural structures, OJ L 093- 30.3.1985,.Council Regulation 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and maintenance of the countryside. OJ L 215/85 -30.6.1992. See Also Council Decision 2006/144/EC of 20 February 2006 on Community strategic guidelines for rural development (programming period 2007 to 2013) OJ L 55 of 25.2.2006.

[534] We should also add that OECD's new paradigm is supporting other businesses especially ICT and tourism.

[535] In his study W. Goldschmidt examined two districts in California. In 1944, the differences in scale between the median sized Arvin and Dinuba farm, taking into account

world, with a 70 years delay, at last, international policy makers has reached his conclusions[536].

When the support of these farms to the eco-systems taken in to consideration, they are invaluable as we have discussed this issue in the previous chapter. The industialized farms are more profit based than the small farms. The chemical fertilizers, pestideces are used extensively and more ımportantly they are structured as a monoculture that does not support biodiversity and natural life[537]. Small farmers utilise a broad array of resources and have a vested interest in their sustainability. At the same time, their farming systems are diverse, incorporating and preserving significant biodiversity within the farm. Eventually, small farms provide valuable 'ecosystem services' to society at large[538].

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productivity and value of crops grown, were more than 3 to 1; median farm revenue was even more skewed: $18,096 for Arvin and $3,384 for Dinuba . However, major social advantages accrued to small-farm town Dinuba, including: twice the local commerce; 20 percent higher median incomes; more than twice as much self-employment; more advanced community infrastructure; more and better schools; more than twice the number of civic organizations; and, more democratic local institutions . Goldschmidt Walter (1978).As You Sow: Three Studies in the Social Consequences of Agribusiness New Jersey: Allanheld. Introduction Pages xxiii–liv.Pages 282-311

[536] It might be argued that, Goldschmidt was underlying the importance of sustainableeonomic development of rural areas. In other words, he was underlying the economical eco-system of rural communities.

[537] We should also add that OECD's tourism advice is not compatible with industrialised farms. The landscape they provide is industrialised and they are detached from nature. In our opinion they don't cope with the eco-tourism needs.

[538] In the Third World, local farmers show a tremendous ability to prevent and even reverse land degradation, including soil erosion. In many areas, traditional farmers have developed and/or inherited complex farming systems, which are highly adapted to local conditions. This allows them to sustainably manage production in harsh environments while meeting their subsistence needs, without depending on mechanisation, chemical fertilisers, pesticides or other technologies of modem agricultural science. Compared with the ecological wasteland of a modern export plantation, the small farm landscape contains a myriad of biodiversity: the forested areas from which wild foods and leaf litter are extracted; the wood lot; the farm itself, with intercropping, agroforestry, and large and small livestock; the fish pond; the back garden, allow for the preservation of hundreds if not thousands of wild and cultivated species. Rosset Peter(1999) Benefits of Small Farm Agriculture In the Context of Global Trade Negotiations. Retrived 1.8.2009 from http://www.mindfully.org/Farm/Small-Farm-Benefits-Rosset.htm

Table 26: Top Five Countries with the Largest Number of Small Farms, by Region

Country	Census year	Number of farms under 2 hectares	Share of farms under 2 hectares, percent
Asia			
China	1997	189,394,000	98
India	1995–96	92,822,000	80
Indonesia	1993	17,268,123	88
Bangladesh	1996	16,991,032	96
Viet Nam	2001	9,690,506	95
Africa			
Ethiopia	2001–02	9,374,455	87
Nigeria	2000	6,252,235	74
DR Congo	1990	4,351,000	97
Tanzania	1994–95	2,904,241	75
Egypt	1990	2,616,991	90
Americas			
Mexico	1991	2,174,931	49
Peru	1994	1,004,668	58
Brazil	1996	983,330	21
Ecuador	1999–2000	366,058	43
Venezuela	1996–97	113,421	23
Europe			
Russia[a]	2002	16,000,000	98
Ukraine	2003	6,214,800	99
Romania	1998	2,279,297	58
Bulgaria	1998	1,691,696	95
Poland	2002	1,494,100	51

Source: Nagayets Oksana (2005)Small farms: Current Status and Key Trends Information Brief.

The table above suggests that the utilisation of small farms producrtion is a critical agenda when the FAO's estimation on farming trends are taken in to consideration[539].

[539] According to FAO's projections of 2030:Agricultural land use will have to increase by 10% to meet expected demands for food, and even further if biomass for energy production is included;agricultural area will grow by only 4% within the OECD area , but by as much as 18% in Africa;agricultural production will become more land- intensive with growth in agricultural productivity per hectare of around 40%.OECD(2008)OECD Contribution to the United Nations Commission on Sustainable Development 16: Towards Sustainable Agriculture. OECD Publishing

2.2.2.3.5 USDA Example on Utilising Small Farms:

The United States Department of Agriculture (USDA) while categorising the size of farms, rather than land size, concentrates on gross revenue of the farmland. 250000 USD/gross revenue for year is taken as a limit. According to our calculation, this value is equivalent to 110.000 TL[540]. According to our consideration, U.S. categorisation fits well to the OECD's paradigm. In order to create more jobs gross revenue should be taken as a base.

According to USDA, in 2004, small farms accounted for 92 percent of all farms and ranches, owned 71 percent of the total productive assets in agriculture, operated 60 percent of all land used in agricultural production, and accounted for 26 percent of all agricultural receipts from crops and livestock[541]. Small farms took leadership in the development of organic production systems in the United States[542].

[540] This calculation is indicative. TRCB's Exchange rate is taken as 1.5. USA's GDP per head is taken as USD 46.859 TR's GDP per head is taken as USD 13.920. The GDp cooficient is 3.36 (46859/13920) .Retrived 1.8.2009 from http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(PPP)_per_capita. Also for the Exchange rates see, www.tcmb.gov.tr.

[541] As of 2004, the Economic Research Service (ERS) identified four primary groups of small family farms, each with different resources, goals, and contributions to the Nation's agricultural production. These groups are: 1) Primary occupation farms, which account for 25 percent of all U.S. farms and are operated by farmers who farm as their primary occupation; 2) Limited resource farms, which make up 9 percent of farms and have low household income and gross sales less than $100,000; 3) Retirement farms, which account for 16 percent of farms and are operated by individuals who identify themselves as retired; and 4) Residential or lifestyle farms, which constitute 40 percent of farms and are operated by people whose primary occupation is something other than farming. Limited resource, retirement, and residential or lifestyle farms accounted for about 8 percent of the value of U.S. agricultural production. Small farms where farming is the primary occupation accounted for almost one fifth of production. USDA -Departmental Regulatıon on Small Farms and Beginning Farmers and Ranchers Policy 3.8.2006- 9700-001.Page 4.

[542] In the late 1990s, the organic and natural foods market became the fastest growing sector of the U.S. food market. See also United States Department of Agriculture. (1998) A Time to Act: A Report of the USDA National Commission on Small Farms. USDA.

USDA's policy for Small Farms and Beginning Farmers and Ranchers is based on the principles for Federal farm policy as recommended by the Secretary of Agriculture's National Commission on Small Farms and the Advisory Committee on Beginning Farmers and Ranchers[543].

i. Encourage farming systems that produce safe, healthy, and diverse food, fiber and wood products, and create greater opportunities to connect farmers with consumers.
ii. Encourage and support an agricultural system that sustains and strengthens rural communities, cultural diversity, and encourages and rewards responsible stewardship of natural resources.
iii. Enable farmers, farm workers and ranchers to live and work in a safe and responsible environment, own and operate farms and ranches as a livelihood, and enhance opportunities for them to generate farm and ranch incomes comparable to other economic sectors where feasible.
iv. Establish and foster marketing, development, credit, and outreach programs that improve the competitiveness of small and beginning farmers and ranchers and give priority to farmer-owned and farm-based businesses, especially those that foster local and regional competition in production, processing, and distribution of food, fiber, and wood products that connect small farms and beginning farmers and ranchers and consumers at the local and regional levels.

[543] USDA -Departmental Regulatıon on Small Farms and Beginning Farmers and Ranchers Policy 3.8.2006- 9700-001.Page 2.Purpose of the regulation is adressed in article 1, reads as follows:" This regulation sets forth the policy of the United States Department of Agriculture (USDA) with regard to the importance and role of small farms, ranches, woodlots, and beginning farmers and ranchers (hereafter referred to as small farms and beginning farmers and ranchers) to U.S. agriculture and the establishment of strategies, systems, and a Departmental framework for achieving and maintaining the viability of small farms and beginning farmers and ranchers. " USDA -Departmental Regulatıon on Small Farms and Beginning Farmers and Ranchers Policy 3.8.2006- 9700-001.Page 3.

v. Establish and support research, development, marketing, incentive, regulatory, and outreach programs and initiatives that focus on the special needs of small farms and beginning farmers and ranchers, especially those programs that help small farms and beginning farmers and ranchers develop alternative enterprises, value-added products, and collaborative marketing efforts, including cooperatives that enhance stewardship of biological, natural, human, and community resources.

vi. Make special efforts to meet the credit needs of small farms and underserved, minority, women, and beginning farmers and ranchers[544].

vii. Encourage and emphasize educational, outreach, marketing, regulatory, credit, and other programs that will help ensure new generations of small farmers and ranchers can gain access to the resources they need.

viii. Foster collaboration among public and private sector agencies, programs, and institutions, including farm and community-based organizations, to meet the financial, educational, and technological needs of small farms and beginning farmers and ranchers, including developing small farms and beginning farmer and rancher networks, joint enterprises, and mentoring systems.

ix. Encourage all USDA agencies, the land grant institutions, and collaborating public and private sector institutions to emphasize sustainable agriculture, sustainable forestry, and agroforestry as profitable, environmentally sound, and socially desirable strategies for small farms and beginning farmers and ranchers[545].

[544] According to our consideration credit usage of small farms should be taken as a fragile matter. If the credits are used in a risky way, a collapse of a family business may ocur. Such outcomes are not compatible to OECD's new paradigm.

[545] USDA -Departmental Regulatıon on Small Farms and Beginning Farmers and Ranchers Policy 3.8.2006- 9700-001.Page 1.

When the basic outputs are considered these are to recognize the importance and cultivate the strengths of small farms, create a framework of support and responsibility for small farms, promote, develop, and enforce fair, competitive, and open markets for small farms, conduct appropriate outreach through partnerships to serve small farm and ranch operators, emphasize sustainable agriculture as a profitable, ecological, and socially sound strategy for small farms, dedicate budget resources to strengthen the competitive position of small farms in American agriculture,provide just and humane working conditions for all people engaged in production agriculture and more importantly establish future generations of farmers.

2.2.2.3.6 Possible Avoidance Mechanisms and Policy Recommendations

2.2.2.3.6.1 Elimination of Partial Inheretance

There are mainly three types of inheritance system regarding to the farmlands that exists within the EU: These are equal shares and break-up of the farm; equal shares and maintenance of the holding as a single unit; and unequal shares and maintenance of the holding as a single unit[546].

Equal Shares and break-up of the farm system is commonly found around theaoth of the EU. Greece, Italy and Spain, and Portugal can be categorised under this system. In both Greece and Italy, this system has resulted fragmentation of holdings. In the last 3 decades it aggrevates rural depopulation among younger people. The main reason for them to believe that they have been unlikely to be able to assemble a viable farming unit upon inheritance[547].

[546] Ravenscroft Neil. Gibbard Roger. Markvell Susan.(1999)Private Sector Agricultural Tenancy Arrangements in Europe: A current Review of Current Literature. Land Tenure Center. University of Wisconsin. Madison. Page 20.

[547]However, to some extent this trend has been reversed in recent years in Italy, by the growth of informal lettings and a shift from the 'peasant-style' existence of the past, to one

Equal shares and preservation of the holding system is used by France, Denmark and Belgium. In this system where forms of 'preferential allotment' have modified the Civil Code to allow inheritance of the holding by one heir, with a cash settlement to the others. This has often happened in conjunction with compulsory land consolidation, such as the 'Remembrement[548]' system in France .This system ensures the continuity of family farming. However new farmer is left with with high levels of debt for compensate non-inheriting heirs[549].

Unequal shares and preservation of the holding sytem is adopted by common law countries such as England. In this system, the capital is not divided between heirs. This form of inequality in the treatment of heirs is also found in Ireland, the Netherlands and Germany. However, only under common law does the inheriting heir take free of legal obligation to others. In Ireland, the commitment is to care for the remaining parents, while in

based increasingly on pluriactivity . In Portugal, fragmentation of holdings on death has been responsible for a major shift in the social fabric of rural areas, with nearly half the farmers in the Serra do Alvao region having purchased rather than inherited their farms. A similar fate has been avoided on the other farms, either by devising family 'arrangements' to blur the identity of the owner or through continued collective ownership and management In Spain, the opportunities created by the fragmentation of holdings on death have been used by other farmers to restructure their holdings into larger units. This effectively means that, in a large country such as Spain, fragmentation and consolidation occur simultaneously . Ravenscroft Neil. Gibbard Roger. Markvell Susan.(1999)Private Sector Agricultural Tenancy Arrangements in Europe: A current Review of Current Literature. Land Tenure Center. University of Wisconsin. Madison. Page 21.

[548] The French way of land management the most used is "remembrement" (regrouping of lands). In other words it refers to land consolidation The French way of land management the most used is "remembrement" (regrouping oflands). procedure sorts in land management in France, but the classical one is "remembrement".

[549] In Denmark, for example, the inheriting heir will be expected to pay approximately 80 per cent of the full market value of the farm to the remaining family members. Despite preferential loans, the debt burdens of young farmers tend to be high, necessitating off-farm employment to earn additional income. Ravenscroft Neil. Gibbard Roger. Markvell Susan.(1999)Private Sector Agricultural Tenancy Arrangements in Europe: A current Review of Current Literature. Land Tenure Center. University of Wisconsin. Madison. Page 22.

Germany and the Netherlands, the co-heirs become entitled to a share of the capital if the holding is sold[550].

In Turkish Legislation Article 8 of the (Law no:5503) "Law on Soil Conservation and Land Use[551]" (as amended by Law 5578)[552] , a general limit of 2 hectares is taken as the limit of fragmentation[553]. When this limit is reached through the process of fragmention, the land is entilted as "impartible property" in terms of inheritence law. The shares of the land can not be sold to the third persons or they can not be fragmented. Therefore equal share and preservation of the holding from a particular size forms the Turkish system.

Table 27: The Fragmentation limits for land types

Types of the lands	Limit(ha)
Absulute Agricultural Lands and Special Product Lands	2
Greenhouses	0,3
Cropped Agricultural Lands	0,5
Marginal Agricultural lands	2

[550] In cases where the holding is to be maintained as a single unit(equal or unequal shares), there is usually a need for it to be able to support two families during the period of transition between generations and, in the case of retirements, to continue to do so until the eventual deaths of the outgoing farmers . This certainly puts the larger northern European holdings in a better position than the smaller southern ones, particularly where they follow formalised retirement procedures. Ravenscroft Neil. Gibbard Roger. Markvell Susan.(1999)Private Sector Agricultural Tenancy Arrangements in Europe: A current Review of Current Literature. Land Tenure Center. University of Wisconsin. Madison. Page 23.

[551] TOJ 19.7.2005-25880.

[552] TOJ 9.2.2007-26429.

553 Paragraph 2Article 8 reads as follows: Ministy shall determine the minunum scale of land that should not be fragmented and suitable for agricultural production economically by taking in to consideration the suffient land size and the social, economical, ecolojical and technical properties of region. When this limit is reached through the process of fragmention, the land is entilted as "impartible property" in terms of inheritence law. The legal status of the agricultural land will be annexed in land registry."

While the above given limits forms the general rule, special limits can be developed according to law, if the climate, soil and topography needs of agricultural production requires smaller parcels.

Turkish legislation seems to be capable of stopping land fragmentation. The exceptions defined, in our opinion, fit to the small farming practices[554]. In addition to that, preservation of holding must be regulated more clearly.

2.2.2.3.6.2 Land Consolidation

Land consolidation[555] generally refers to consolidating some fragmented agricultural parcels or consolidating parcels an re-disturbuting them in a way that supports best-use. For instance, a farmer may have 3 parcels in the area, another farm may not be linked to irrigation or road. When the land consolidated in area, all the farms will be given coeficients, the optimal land use plan will be made and according to the cooficients lands will be re-disturbuted. A land consolidation[556] Project in Bolatlar Village is given below. As it can be seen, the farmlands they are better shaped and their access to irrigation channels and roads are well designed.

Although ,land consolidation can assist farmers to unify their fragmented parcels[557], the farm size remains the same, a larger and better shaped parcel

[554] In our opinion, while calculating or creating the limit values of fragmentation, gross revenue criterion might be taken as a base as we have discussed above, under the small farms contribution to local economic development and USDA example.
[555] Land consolidation on its core is not an avoidance mechanism. However, it is a remedy mechanism to utilise land use.
[556] "Arazi topluluştırma" refers to land consolidation in Tukish.
[557] A number of conditions should be in place before a land consolidation project can be undertaken. Stakeholders should be willing to participate actively in the decision-making process of a project. The process should be demand-driven and a project site must be identified where local citizens and community authorities are interested in land consolidation. For the project to be most effective, reallocation of land parcels will need to be consistent with the rural development and agricultural sector strategy, and the protection

may allow the farmer to introduce better farming techniques. However, such microfarms are not suitable for most competitive agricultural practices and land consolidation can also provide farmers with opportunities to increase the size of their farms, for example by acquiring land from state land reserves and land banks, or by having access to land of others through sales or improved leasing arrangements[558]. According to FAO land consolidation sholud also include other appropriate measures to establish an improved tenure structure that supports rural development. When the OECD's new paradigm and USDA's small farms considerations taken in the account, the emphasis of such projects should be on providing practical and needed solutions to problems faced by farmers and other residents of rural areas.

Land consolidation projects should support attempts to make agriculture more competitive, for example through the promotion of commercially viable family farms[559]. However, achieving the goal may take more time than expected but the relationship of small farms and rural development as we discussed in detail above, makes it a vital goal for rural development and eco-system necesseties.

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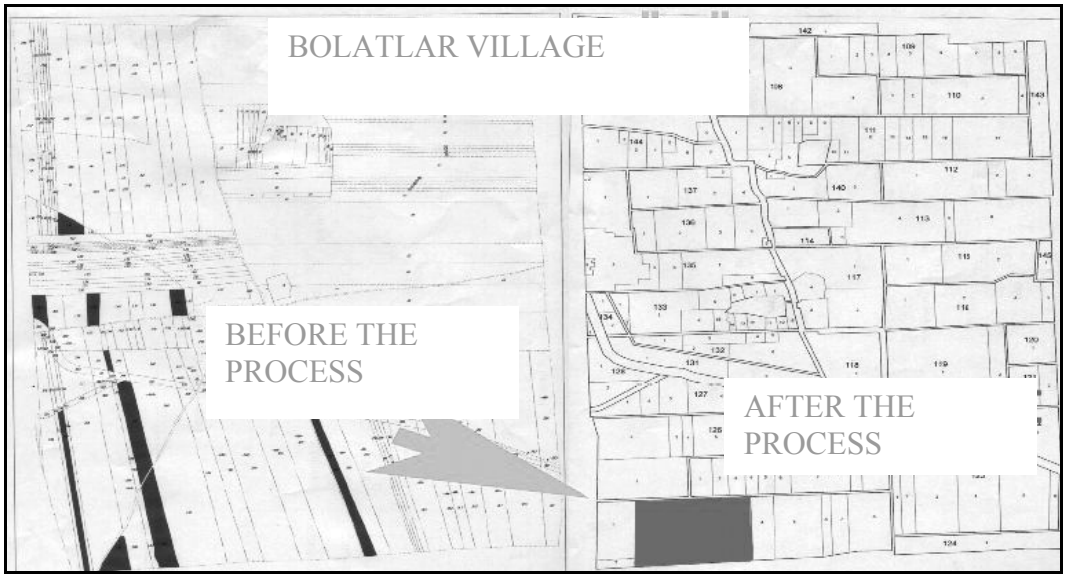
of natural resources. A land bank is very important in a comprehensive land consolidation programme but it should not be considered to be a prerequisite for a pilot project. However, the site selected for the pilot project should have adequate supplies of land owned by the state or local government that can be used for exchanges, to enlarge holdings and to locate public facilities. While specific land consolidation legislation may not be needed for a pilot project, appropriate legislation must exist to provide a legal basis for the project. These conditions may not exist and so may have to be developed. Retrieved 1.7.2009 from http://www.fao.org/DOCREP/006/Y4954E/y4954e06.htm#TopOfPage

[558] See article 46 of 2009/15154 Regulatory Satute on Preservation of Agricultural Lands and Land Consolidation.TOJ 24.7.2009- 27298.

[559] See Article 1 of 2009/15154 Regulatory Satute on Preservation of Agricultural Lands and Land Consolidation.TOJ 24.7.2009- 27298.

Table 28:Land Consolidation Example: Bolatlar Village[560]



Source: Turkish Republic.General Directorate for Agricultural Reform.

In Turkish legislation, land consolidation is regulated by regulatory Satute on Preservation of Agricultural Lands and Land Consolidation561. The legislation is mainly parallel to the FAO's guidelines except for cumpolsary consolidation mechanism put forward by article 16(1). However, the legislation underlines that voluntary consolidation projects will have the priority.

Land consolidation may concurrently implemented with land reform. If this is the case and if the reform[562] has political priorities, . it self usually causes

[560]2008 Annual report (2009) TR Ministry of Agriculture and Rural Affairs. General Directorate for Agricultural Reform. Page 98.
[561] 2009/15154 Regulatory Satute on Preservation of Agricultural Lands and Land Consolidation.TOJ 24.7.2009- 27298.
[562] Land reforms (also agrarian reform, though that can have a broader meaning) is an often-controversial alteration in the societal arrangements whereby government administers possession and use of land. Land reform may consist of a government-initiated or government-backed real estate property redistribution, generally of agricultural land, or be part of an even more revolutionary program that may include forcible removal of an existing government that is seen to oppose such reforms. Retrieved 1.9.2009 from http://en.wikipedia.org/wiki/Land_reform.

fragmentation of land. AS we examined earlier, while small farms are not be refrained from, the USDA's gross revenue based approach and FAO's guidelines of land consolidation should be taken in to consideration[563]. If those are missed, rural development will become harder to be reached[564].

In Turkey, for alloacting land for the farmers who does not have adequate land is carried out by DG on agricultural reform. From the beginning of the process to the en of annual year 2008, in 11 Provinces, 32 distrixts and 158 villages, 79.393 hectares of land is distrubuted to 11.929 right owners. The total distubuted area for 2008 is 539 hectars[565].

2.2.2.3.6.3 Policy Recommendations

Firstly, DG on agriculture reform must be streghten. According to annual report, the weaknesses of the DG is listed as follows[566]:

[563] The importance of agrarian reform was recognized early in FAO's existence .The 1945 FAO Conference noted that "recourse to land reform may be necessary to remove impediments to economic and social progress resulting from an inadequate system of land tenure." The 1951 Conference agreed that the reform of agrarian structures was important for FAO to consider while endeavouring to fulfil its general aims. The Conference stressed that "the improvement of agrarian structures was not only essential to economic progress, but would contribute to human freedom, dignity and consequently would secure social stability and further peaceful democratic development." Early experiences emphasized the need to go beyond land redistribution. The 1966 World Land Reform Conference convened by FAO recognized "the provision of support services as essential for the success of any land tenure reform." In 1969, the Special Committee on Agrarian Reform, appointed by the Director-General of FAO, broadened the concept of agrarian reform to embrace "all aspects of the progress of rural institutions and covering mainly changes in: tenure, production and supporting service". This concept included measures to improve access to land through settlement and leasing arrangement.

[564] However, the study of those is beyond the scope of our thesis.

[565] 2008 Annual report (2009) TR Ministry of Agriculture and Rural Affairs. General Directorate for Agricultural Reform. Page 25.

[566] 2008 Annual report (2009) TR Ministry of Agriculture and Rural Affairs. General Directorate for Agricultural Reform. Page 56.

i. Lack of dissemination
ii. Lack of administrative structre in general, in Turkey
iii. Lack of personnel
iv. Lack of vehicles, tecnical equipment
v. Lack of social and financial resources
vi. Lack of budget assigned to RND

Secondly fragmentation of farmland and OECD's paradigm shift should be evaluated together. Moreover,USDA's revenue based studies will be helpful to determine the limits of fragmentation on inheritance and land distirbution.

Lastly, farmers social status, especially the perception of them by whole community should be re-evaluated. The founder of Turkish Republic, (approximetly 90 years before the OECD shifts its paradigm),M.Kemal Atatürk said in 1924, "Farmers are the masters of the nation". In practice, being a farmer, is not an appealing social status for candidate young farmer generations. As long as, being a farmer is not appealing, OECD's paradigm shift can not be achieved[567].

When we consider all above, in case Fearon, a residence requirement that thas to be met is line with today's world and the policies of policy makers. Therefore we believe that, ECJ has to be more tolerant while discussing proportionality. Especially, in our opinion, local development is far more important than free movement of capital.If we generalize the concept, ın our wiev, in case Reish, ECJ has once again, prevailed free movement of capital

[567] As we discussed, USDA's one of the priorities is creating new generation of farmers. See, USDA -Departmental Regulatıon on Small Farms and Beginning Farmers and Ranchers Policy 3.8.2006- 9700-001.

on the local development and employment concerns and that conclusion is, in our consideration, is not inline with EU's or OECD's guidelines.

We believe that if the prevention of speculation, fragmentation , missuse, nonuse and underuse of lands suceeds in line with land's importance in the hierarchy of human needs, stability and global competiveness objectives will be achieved.

Conclusion

We admit that the legislations on acquisition of immovable properties by foreigners consist many limitations based on different priorities and approaches in the world on the introduction section. Then we have also examined the rationales, ratio legis and mechanisms attached to them.

We have indicated major main policy concerns(Ratio Legis) as follows:

i. National Security Concerns
ii. Prevent general foreign economic domination
iii. Prevent speculation in land
iv. Ensure an adequate supply of affordable housing
v. Control the direction of foreign investment
vi. Prevent non-use of the land
vii. Preserve the village life

Then we have discussed the mechanisms for restricting or limiting the acquisition of immovable properties by foreigners and indicated major mechanisms following:

i. Restrictions arising of national security concerns
ii. Land quantity restrictions
iii. Permit or prior authorization requirement
iv. The principle of reciprocity
v. Pre-emption and right of first refusal
vi. Residence requirement as a part of the restriction regime

Afterwards, we assessed ECJ's approach under the light of EU integration. We have concluded that when the EC law and ECJ's attitude is taken in the consideration on acquisition of immovable properties by citizens of member states, ECJ is basically evaluate the cases under free movement of

capital. We have noted that the Directive 88/361 , its nomenclatura and articles 56-60 EC treaty under the chapter of free movement of capital and more importantly the level of integration achieved is the major factor

The development of case-law is examined by using 3 step methodology as a template.

i. The relevant freedoms of the single market
ii. National measure's compatibility test
iii. The restrictive measure's justification test under EC law

We observed that in the third step, evaluation of general exceptions of treaty, mandatory reasons and accordingly the proportionality and discrimination tests are the major tests. Then we have examined the case law on the subject matter. We observed that in the development of the case law, member states are by each case got more well prepared for passing the discrimination test. The proportionality test is a harder test because of ECJ's wording " a measure go beyond what is necessary". The term is not as clear as, whether there is discrimination or not.

Under the section negotiations , we have underlined that in the transitional period on acquisition of immovable properties, the main principles will be standstill, not less treatment than the most favored nation clauses and transparent objective and stable authorization procedures

In the second chapter, we have firstly examined Turkish Legislation on the acquisition of immovable properties by foreigners. Afterwards, we have examined policies of international organizations such as OECD, UN, FAO,

EU...ect. Then we have concluded that many actors of today's world has different attitudes and approaches in many issues related to the acquisition of immovable properties. In our thesis, we focused on EU integration. However, many policy papers are similar, such as rural development policies OECD's , FAO's and EU is alike. Following that, we propose a set of principles that might balance supranational and national concerns:

i. Rationales of legislation should refrain from protection thus any means of discrimination based on nationality,
ii. Non speculative areas should be defined and pragmatic approach should be developed,
iii. Level of speculation of land should be adjusted in a balancing approach where sustainable development and attractive market approach is taken in to consideration,
iv. The prevention of non-use and fragmentation of land has to conducted inline with the preservation of environment, well functioning eco-systems and rural devilment,
v. Global competitiveness should be taken in consideration in planning,
vi. Sustainable development must be given special emphasis on agricultural land and forestry.

When we combined these principles with ECJ's case-law, national legislation should be legislated proportionately and without hidden, arbitrary or any means of discrimination based on nationality.

After addressing the main approaches of international organizations, EU and the fundamental human needs by using Maslow's template, we have selected mentioned below three issues, that are closely linked to the human

needs. These issues are the major arguments either discussed by ECJ or the policy concerns of international organizations.

iv. Prevention of speculation of land
v. Prevention of non use- underuse of land
vi. Prevention of fragmentation of land

Under the section, speculation of land, we combined land types with the human needs underlining that stability and speculation is in reverse correlation. The more fundamental the human need and land linked with it, the less the speculation should be allowed is our main suggestion. Afterwards, we have examined Turkish Legislation on Organized Industrial Zones and found it to be inline with EU law even under the condition of Turkey's accession to EU and the expiration of transitional periods. Accordingly we modeled the system and propose a pragmatic method for disseminating the procedure. Basically, we propose, strengthening of the administrations, establishment of a fund to purchase the lands in case of need, strengthening zoning approaches, approval and surveillance of transactions by the zone administrations or consultancy of OIZ administrations.

Under the section, prevention of non use- underuse of land, we endeavored to examine the subject from two different perspectives. These are economic perspective and agri- environmental and eco-system perspectives. After giving the definitions, for avoidance mechanisms, we have indicated that, Compulsory lease and acquisition and right of redemption might be used. From the agri- environmental and eco-system perspectives, we have referenced FAO's projections of 2030 and concluded that more efficient use of land (optimal use) will at least have negative impacts on water and atmosphere. In reality, the forecasted figures enables us to conclude that

under-use in terms of financial context might be equal to optimal use in ecological context. Next step was to examine the Millennium Assessment of UN. The policy recommendations in the report were as follows:

v. Integrate decision-making between different departments and sectors, as well as international institutions, to ensure that policies are focused on protection of ecosystems.
vi. Include sound management of ecosystem services in all regional planning decisions and in the poverty reduction strategies being prepared by many developing countries.
vii. Establish additional protected areas, particularly in marine systems, and provide greater financial and management support to those that already exist.
viii. Use all relevant forms of knowledge and information about eco-systems in decision-making, including the knowledge of local and indigenous groups.

OECD's rural development paradigm shift has formed the next step of examination. In OECD's approach, there were three related priorities:

i. enhancement of agricultural productivity and market opportunities,
ii. promotion of diversified livelihoods on and off the farm, and
iii. reduction of risk and vulnerability.

Accordingly we examined EU policies, mainly the communication on Community strategic guidelines for rural development. The policy recommendations were as follows:

vii. Promoting environmental services and animal-friendly farming practices;
viii. preserving the farmed landscape and forests;

ix. combating climate change, agriculture and forestry having a major role to play in the development of renewable energy and material sources for bio-energy installations;
x. consolidating the contribution of organic farming as part of a holistic approach to sustainable agriculture;
xi. encouraging environmental/economic initiatives such as the provision of environmental goods, particularly when linked to diversification into tourism, crafts, training or the non-food sector;
xii. promoting territorial balance to maintain a sustainable equilibrium between urban and rural areas and make a positive contribution to the spatial distribution of economic activity and territorial cohesion.

Lastly we have added that, "the law on soil conservation and land use" enacted by Turkey is a reflection of the aforementioned concerns.

Under the section, prevention of fragmentation, we endeavored to examine fragmentation of farmlands in the world and EU under the economies of scale approach. It should be mentioned that most surprising studies we have come a cross was the ones that defend small farmlands especially in developing countries. For instance a recent study that has been conducted in Turkey concluded that there is reverse correlation of land size and yields. More interestingly, Walter Goldschmidt 's studies belong to 1945's and the similarities between the OECD's paradigm shift was apparent. Following his examination of 3 cities in US, he argued that rural communities dominated by large industrialized farms, economic cycles can not work and therefore a stabile local economy can not be achieved. More mechanization and industrialization results lower levels of employment. On the other hand, in such local economy, the local farm owner families will disappear. When the employment level gets lower and lack of local farm owner families, it is not likely to achieve local development. In these industrialized farm towns,

the income earned in agriculture was drained off into larger cities to support distant enterprises, while in towns surrounded by family farms, the income circulated among local business establishments, generating jobs and creating prosperity.

After addressing the importance of small farms in the form of family business, we have examined USDA example. We underlined the importance of gross revenue of a farm independent of its size. Lastly, as avoidance mechanisms we indicated elimination of partial inheritance and land consolidation. As to the policy recommendations, strengthening of DG on agriculture reform , adopting USDA's revenue based classification, development of the social status of farmers was the major ones.

Eventually, we have concluded that, as to the proportionality test of ECJ, very strict interpretation of article 56 of EC treaty and the hard tests on proportionality, especially on the farmlands and lands that are vital for fundamental human needs is contrary to article 2 of the EC Treaty that is stating that the community shall have as its task, a harmonious, balanced and sustainable development of economic activities, and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States. At least, ECJ, while assessing proportionality might adjust the level of the strictness of interpretation in correlated with the type of the land and its link with the fundamental human needs. For instance, proportionality test for an agricultural land should be less strict than the test for a plot for luxury condo. In addition to that, in our opinion, ECJ has to be informed by ILO on the employment figures and expectancies for at least two or more decades and informed by the Commission , OECD, FAO and UN in depth on the local development, recent and future prospects of eco-systems due to complexity of the issues.

As to the discrimination test, more than ECJ's attitude, national legislator's point of view is important. The national legislation should (ratio legis included) refrain from discriminating EU citizens and nationals. However, discriminating between residents and non-residents or investors and speculators without infringing additional protocol 1 of the ECHR, without distorting competion and functioning of economy behalf of environment, well functioning eco-systems and rural development based on the principles we have stated above, in our view is not contrary to the EC Law. It should be added that the discretionary powers if defined should be assigned to expert and competent authorities. Moreover, procedures must be transparent, stable and objective.

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ix. Case C 452/01 Ospelt and Schlössle Weissenberg [2003] ECR I 9743.

x. Case C-370/05 Festersen [2007] ECR I-1129.

xi. Case C-367/98. ECR 2002 Page I-04731

DATABASES:

i. TRCB(TR)

www.tcmb.gov.tr (EVDS)

ii. TUİİ(TR)

www.tuik.gov.tr

iii. TCGD(TR)

www.tkgm.gov.tr/

iv. ISE(TR)

www.imkb.gov.tr

v. FAO(UN)

http://faostat.fao.org/

vi. EUROSTAT(EU)

http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/

vii. WDI, GDF & ADI Online Databases(Worlbank)

http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS

viii. S&P/Case-Shiller Home Price Indices(U.S – Home Price Index)

www.econ.yale.edu/~shiller/data/Fig2-1.xls

Could also be found at
www2.standardandpoors.com/portal/site/sp/en/us/page.topic/indices_csmahp/2,3,4,0,0,0,0,0,0,0,0,0,0,0,0,0.html