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MARMARA ÜNİVERSİTESİ

AVRUPA TOPLULUĞU ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

# THE LEGAL THEORY APPROACH TO THE COMPETENCE ISSUE BETWEEN THE EU AND MEMBER STATES

Ph.D Thesis

YILDIRAY SAK



İstanbul - 2006

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**Abstract**

The sharing of competence between the EU and Member States is one of the crucial issues of the EU legal order that it has ever dealt with. Developments of the concept of sovereignty throughout times in which European modern state occurred have shaped the legal order of the Member States and, at the same time, of the EU, starting from outlet.

The EU is not merely an international organization, like classical ones that States get together with the aim simply directed to international cooperation. The EU has a new legal order integrated with Member States legal order. On the one hand, the EU legal order, by virtue of establishing Treaties, has own legal capacity and its own personality. Moreover, by a clear reading of some Treaty articles, it can be understood that the EU was created by founders with a limitation of sovereignty or a transfer of powers stemming from the states to EU. On the other hand, beside this limitation of sovereignty or transfer of powers that may be found its base in public international law, the EU makes a different claim for its sovereignty and competence by way of original doctrines and principles created ECJ, which are direct effect, supremacy, supranationality.

With the deepening and diffusing of integration to all areas in which Member States act, the autonomy and validity of this new legal order have been gradually contravened by the Member States' courts, in especially Supreme and Constitutional Courts. The ECJ and Member States' courts have had different approaches to the EU competences stemming from limitation of sovereignty or transfer of sovereignty and their limits. The issue of conflict of competence and, more importantly, the issue of who will make a decision in a case of conflict created a crucial uncertainty which affected competence order between the EU and Member States and citizen's rights.

The competence issues will increase qualifiedly as the EU integration will not end and will go more deeply. Moreover, it will be extremely difficult to use the theory of law as a problem solver because of political nature of deepening process of integration. The approach that tries to solve the competence issues by law engineering will has to re-produce new solutions in each time, as political players, which they are also political engineer, will change the factors of the issue.

In this thesis, as possible as by holding time and factors constant, we try to make a detailed analysis of the issue of competence and to reach a sound and clear result.

## Abstract (Turkish)

AB ile Üye Devletleri arasındaki yetki paylaşımı sorunu, Avrupa bütünleşmesinin özellikle son yirmi yılında ağırlaşan bir sorun olmuştur. Ulus devlet egemenliğinin her iki görünümünde de -hem iç egemenlik ve hem de dış egemenlik- meydana gelen değişiklikler çok daha eskiye dayandığı için, AB üyesi devletler, egemenlik kavramındaki bu değişikliklerin hukuk düzenlerindeki yansımalarının etkisini, AB bütünleşme sürecinde kısmen olumlu kısmen de olumsuz yönde hissetmişlerdir.

Öte yandan klasik uluslararası örgütler ya da devletlerin bir araya gelerek oluşturdukları bölgesel işbirliğini içeren yapılardan çok açık bir şekilde ayrıldığı için AB, kendisinin ve Üye Devletlerin hukuklarının bütünleşmesinden oluşan yeni hukuk düzeninde, yasama, yürütme veya yargı yetkisini kullanma açısından, klasik anlamından oldukça uzaklaşan modern ulus devlet egemenliği kavramına ya da ulus devlet egemenliğinden yararlanan bir hukuk öğretisinin ortaya koyduğu bir normlar düzenine dayanması oldukça zor olan bir varlık şeklinde karşımıza çıkmaktadır. AB hukuk düzeni, egemenlik kavramına dayanarak yetki kullanan bir düzenden çok, egemenlik kavramı ile birlikte AD'nin doktrinleştirdiği ve başlıca unsurları uluslarüstülük, üstünlük, doğrudan etki, münhasır yetki ve *subsidiarity* ilkesi gibi kavram ve ilkeleri içeren anayasallaştırılmış yeni bir devletlerarası hukuk düzeni olarak karşımıza çıkar.

Bu yeni hukuk düzeninin otonom yapısı ve Üye Devletlerdeki geçerliliği, bütünleşmenin derinleşmesi ve ulus devletin faaliyet gösterdiği hemen her alana yayılmaya başlaması ile, özellikle Üye Devlet yüksek mahkemeleri ve anayasa mahkemeleri tarafından sorgulanmaya başlanmıştır. Egemenliğin veya kullanımının devri ve AB kurumlarının buna dayanan yetkileri ve yetkilerin sınırları, AD ve yüksek mahkemelerce farklı anlaşılmaya başlanmış ve bu durum hukuki kesinliğe ve özellikle de bireylerin AB hukuk düzenindeki pozisyonlarına zarar verir hale gelmiştir. Yetki çatışmaları ve bu çatışmaların önlenmesinde nihai otoritenin hangi kurumlar olduğu konusunda ortaya çıkan belirsizlik, çözümü çok zor bir sorunlar yumağını ortaya çıkarmıştır.

AB hukuk düzeninde bu sorunların çözümü anlamında detaylı normatif düzenlemeler yapılmış, ancak normatif düzenlemeler yetersiz kaldığı için, bir tarafta AD diğer tarafta da Üye Devlet mahkemeleri, hukuki muhakemenin tüm imkanlarını kullanmak ve kararlar arasında etkileşim yaratmak suretiyle yetki düzeni üzerinde içtihat yoluyla etkili olmuşlardır. Ancak bu yargısal aktivitenin (judicial activism), yetki çatışmalarının çözümüne yaptığı olumlu katkı, 'yetki konusunda karar vermeye kim yetkilidir' (Kompetenz-Kompetenz) sorunsalı yüzünden sınırlı kalmıştır; hatta söz konusu içtihat katkısının çözümün bir parçası olmasından daha fazla, sorunun bir parçası olduğu görülmüştür.

AB bütünleşmesinin derinleşmesi devam ettiği sürece yetki sorunları da nitelik değiştirerek çoğalacak, dahası, derinleşmenin siyasi doğası, bu sorunların çözümünde hukukun bir araç olarak kullanılmasını zorlaştıracaktır. Hukuk mühendisliği yaparak yetki denklemlerini çözmeye çabalayan doktriner yaklaşım, her seferinde, AB'nin siyaset mühendisliği ile hareket eden aktörlerinin, denklemin değişkenlerini yeni alan ve ortamları içerecek şekilde değiştirmesi nedeni ile yeni çözümler üretmek zorunda kalacaktır.

Bu tezde, çalışmanın yapıldığı zaman ve ortam mümkün olduğunca sabitlenerek, yetki konusunda detaylı bir analiz yapılmaya ve bir sonuca ulaşılmaya çalışılmıştır.

## Abbreviations

| | |
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| AETR | Agreement on European Trasport by Road |
| AJCL | American Journal of Comparative Law |
| CAP | Common Agricultural Policy |
| CDP | Common Defence Policy |
| CFI | Court of First Instance |
| CFSP | Common Foreign and Security policy |
| CJEL | Columbia Journal of European Law |
| CLR | Columbia Law Review |
| CMLR | Common Marekt Law Report |
| CMLRev | Common Market Law Review |
| COM | Communication |
| CPE | Constitutional Political Economy |
| CT | Constitutional Treaty |
| CWILJ | California Western International Law Journal |
| EEC | European Economic Community |
| EC | European Community |
| ECB | European Central Bank |
| ECJ | European Court of Justice |
| ECLR | European Constitutional Law Review |
| ECR | European Court Reports |
| ECSC | Euroepan Coal and Steel Community |
| ECT | European Community Treaty |
| ECtHR | European Court of Human Rights |
| ELJ | European Law Journal |
| EPL | European Public Law |
| ELRev | European Law Review |

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|---|---|
| EU | European Union |
| EURATOM | European Atomic Energy Community |
| GATT | General Agreement on Tariffs and Trade |
| GATS | General Agreement on Trade in Services |
| HILJ | Harvard International Law Journal |
| IJCL | International Journal of Constitutional Law |
| ILO | International Labor Organisation |
| JCMS | Journal of Common Market Studies |
| LIEI | Legal Issues of European Integration |
| LQR | Law Quarterly Review |
| MLR | Modern Law Review |
| NATO | North Atlantic Treaty Organization |
| OJ | Official Journal |
| OJLS | Oxford Journal of legal Studies |
| OUP | Oxford University Press |
| SEA | Single European Act |
| TEU | Treaty on European Union |
| TBA | Turkish Bar Association |
| TRIPs | Trade Related Aspects of Intellectual Property Rights |
| ToA | Treaty Of Amsterdam |
| TN | Treaty of Nice |
| UN | United Nations |
| WTO | World Trade Organization |
| YEURL | Yearbook of European Law |
| YKY | Yapı&Kredi Bankası Yayınları |
| YLJ | Yale Law Journal |
| YUP | Yale University Press |

## INTRODUCTION

How far the science of law, or as to some, the art of law, dates back? When does the man acquainted with the law? First legal concepts started to appear, in my opinion, when man denominate himself saying "I" for the first time and claim the possession by saying "mine!". In this way, more than being a fact deriving from the nature, but a man made character the law appears to have. Differently from the law of the nature like natural sciences that exist without a human interference, law acquired existence as men create laws and principles. But humanity, experienced the most complex and as much again a genuine law creation which has appeared through almost a "legal engineering", by the first time with the Community Law. The Community Law is a new legal order. Nonetheless, in some points it overlaps with international law and domestic laws of the sates, the Community Law is a different entity. For instance, the legal order, which is created by founding legal sources having the character of both an international treaty and a constitution, is compatible neither with the characteristics of international law or national law. Beside the differences of source, sovereignty and subjects between international legal order and the Community legal order, those two legal orders are also different ontologically from each other; while international legal order is a product of international cooperation; the Community Law owns its entity to a law of integration. Also the relations between the Community Law and national laws of the member states has a unique character, here the Community Law appears with its own creations: Supranationality, supremacy and direct effect.

Distinguishing feature of the Community Law, in this sense, must be sought within the Founding Treaties and the characteristics of the legal order which are based on the former. Whereas previously the Community Founding Treaties were alleged to have a character of an international agreement, they are accepted to be the documents of a Constitutional character. [1]

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[1] Trevor C. Hartley, *Constitutional Problems of the European Union*, Hart Publishing, 1999, p. 123-138; Grainne De Burca, *The Institutional Development of the EU: A Constitutional Analysis*, Paul Craig & Grainne De Burca (Ed.), *The Evolution of EU Law*, Oxford, 1999, p.55; J.H.H. Weiler, *The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movements of Goods*, Paul Craig & Grainne De Burca (ed.), *The Evolution of EU Law*, Oxford, 1999, p. 355

Firstly, the principle of separation of powers, which is the structural pillar of constitutional systems and the constitutions, took place within the Founding Treaties as the leading feature of the Community legal order. Even if the principle of separation of powers at the Community legal order does not overlap with its model in a state, legislative function is fulfilled by the European Parliament -even at some extent- with the Council of Ministers, executive function is fulfilled by the Commission and the Member States and the judiciary function is fulfilled by the Court of Justice (ECJ).

Secondly, the Community Founding Treaties are of a supra norm character and binds the Member States and their natural and legal persons. Thus, the Community Law is supreme over the laws of the Member States namely, it is *supranational*. Furthermore, there is, according to the principle of constitutional legality, hierarchy of norms between those Founding Treaties with the Community's secondary legislation and the member states' legal sources.[2] Likewise the fact that laws cannot be contrary to constitutions; *Regulations*, *Directives* and *Decisions* which are the secondary sources of Community Law and the sources of the law of the Member States cannot be contrary to the concerning supra norm.

Thirdly, the Founding Treaties set the Community institutions, their formation and powers in detail as a constitution of a classical state.

Fourthly, the Founding Treaties provide a protection of fundamental rights and freedoms to the individuals such as a constitutional protection. Like a constitutional court the ECJ protects the fundamental rights and freedoms of the individuals whatever their nationality are, and the scope of this protection is gradually enlarging. Again this protection is also against the Community institutions as well as the Member States.

As fifth, the Founding Treaties and the ones which amend the former, has

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[2] Armin Von Bogdandy & Jurgen Bast, *The EU's Vertical Order of Competences: The Current Law and Proposals for Its Reform*, CML Rew., Vol. 39, No 2, 2002, p. 229-235

described a union citizenship and provide an effective protection to those citizens.

And lastly the Founding Treaties, by delegation of authority regulated -even problematically- between the Community or the Union and the Member States which powers shall be used by whom in which areas.

The Founding Treaties and the above mentioned characteristics of the Community Law, differentiate them evidently from the former legal structure and orders by putting them in a *framework of constitutional treaty and a supranational constitutional legal order*. The difference is not a quantity/level based but a quality based one. This difference is so deep that it generally means a discontinuity from a traditional legal theory and practice. This discontinuity and differences is obvious in respect of the issues of citizenship, fundamental rights and freedoms and effective enforcement of the rights of the individuals. This character, naturally, put the Community through a grueling and also that much slow processes. Economic and monetary integration is an example of this fact. The most important indicator of nation states, national currencies, were abrogated by the Community order, however it had to climb a though period of nearly 30 years.

**Subject and Aim**

The subject, which this thesis will specially follow, is both detailed technical issues such as this constitutional treaty and competences issue, which is one of the most crucial issue that supranational constitutional order faced with, and the unclear borders of competences that brought the former issue as the most important problem of the EU, filling the gap of competence, exceeding competences, and self empowerment when lack of competence rises; also the constitutionalization process of the EU deriving from the difficulties to find equal answers in the EU legal order to the concepts of "sovereignty", "state", "constitution and constitutionality", "hierarchy of legal orders".

Difficulty in referring the above mentioned concepts such as sovereignty and constitutionality through the development of the EU today is the result of the EU's history. In order to establish the supremacy of the Union Law and to enjoy some

principles of the constitutionality, the Founding Treaties are qualified as constitutional documents and this determination is correct to some extent because of the above mentioned characteristics of the legal order that created by the Founding Treaties, however they are not constitutions in classical sense for that no state neither no people[3] appear to exist. [4] Again, since it is impossible to mention people or citizenship in the sense of a state nation[5], also it is getting difficult to mention a different sovereignty. So that while a state claims its public power, derived from the sovereignty, to its citizens in the sense of internal sovereignty and to other states in sense of external sovereignty, EU has become to claiming sovereignty not only to real and legal persons, but also to the states that constitute it. [6] Such a conflicting structure in the sense of constitutionality and legitimacy has appeared to substantially intervene the area of fundamental rights and freedoms, which are established both by the development of the classical states' constitutional systems and also by the obligations derived from international mechanisms.

Before making some determinations on competence sharing between the EU and the Member States, in order to deepen concerning this background, namely the above mentioned concepts' place in the EU process and to enlighten the issue of competence, the following question should be asked: Why the EU process has to face up to those concepts and why it is necessary to be inside the paradigm of those concepts? The answer of the question lies behind the huge importance granted to the concepts of "constitution and constitutionality" in the EU territory because of the nature of those concepts covering other above mentioned concepts. EU seeks to have a constitution and to be constitutionalised through a process

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[3] On the Preamble of the Constitutional Treaty concept of European People has not been expressed, instead, Peoples of Europe has been used. For this subject see: W.H. Roobol, *Federalism, Sovereignty etc.*, ECLR, Vol. 1, 2005, p. 88

[4] For views understanding the constitutionality of the EU legal order irrespective of the constitutionality of national member states, see: Patrick Birkinshaw, *Constitutions, Constitutionalism and State*, EPL, Vol. 11, No 1., 2005, p. 31-45; Paul Craig, *Constitution, Constitutionalism and the EU*, ELJ, Vol. 7, No 2, 2001, p. 125-150; Jacqueline Dutheil de la Rochere & Ingolf Pernice, *European Union Law and National Constitutions*, General Reports to FIDE XX Congress 2002 in London, p. 1-45.

[5] Klaus Von Beyme, *Fischer's Move Towards A European Constitution*, in Christian Joerges, Yves Meny & J.H.H. Weiler, *What kind of Constitution for What Kind of Polity*, The Robert Schuman Centre for Advanced Studies at The EUI-Florance & Harward Law School-Cambrigde, 2001 p.74-75

[6] Rainer Leipsus, *The EU as a Sovereignty Association of a Special Nature*, in Christian Joerges Yves Meny & J.H.H. Weiler, *What kind of Constitution for What Kind of Polity*, The Robert Schuman Centre for Advanced Studies at The EUI-Florance & Harward Law School-Cambrigde, 2001, p.214

from 14 February 1984, "Draft Treaty establishing the European Union" [7] of the European Parliament and "Draft Constitution fort he EU" [8] dated 10 February 1994, to The Treaties of Maastricht, Amsterdam, Nice and finally to the Treaty for a European Constitution (Constitutional Treaty). Two basic reasons (BR1 and BR2) forcing EU to have a constitution are ironically same as the two reason of Member States' having also constitutions and on which the member states wishes and efforts based, for shaping the EU through with or without a Constitution.

A (Member) state as a political unity, seeks a constitutional legitimacy for its constitutional system to lean on, and this legitimacy is the constitution. European Union also seeks a legitimacy for its legal order to be subjected, a constitution (BR1). [9] European constitutional discourse, under Kelsenian and Schimittian combination of thought for long years, pursues to describe and determine a basic rule, which is the source of the power of constitutional discipline or rules (Kelsenianism) and this search is for the ultimate solution of sovereignty conflict (Schimittianism). As a single (each) (Member) state accepts a basic rule within its own constitutional discourse and as it is referred for the ultimate solution, it is also necessary for the EU to accept a basic rule and to refer it for the ultimate solution (BR2). [10] However this necessity faces with a resistance, developing through the nationalist interpretations of the European positivist constitutionalism doctrine and/or through some of the rulings of constitutional and supreme courts of the EU member states. This resistance is realized sometimes by nationalism based on common history, origin, people and by a referral to an ultimate authority, and sometimes it is realized by veiling it with fundamental freedoms, rule of law and democratic state principles. Against those interpretations and jurisprudence, as a product of post-nationalist liberal constitutional doctrine, a concept of constitutional patriotism[11] has been developed which is not based on only a common history or origin but includes other common values for people. According to the concept of constitutional patriotism, those values are

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[7] *Bulletin of the European Communities*. February 1984, No 2, p. 8.
[8] OJ C 61, 10.02.1994
[9] J.H.H. Weiler, *Epilogue, Fischer: The Dark Side*, Yves Meny & J.H.H. Weiler, *What kind of Constitution for What Kind of Polity*, The Robert Schuman Centre for Advanced Studies at The EUI-Florance & Harward Law School-Cambrigde, 2001 p.241.
[10] ibid., p. 242
[11] Jürgen Habermas, *Why Europe Needs a Constitution*, New Left Review, Vol. 11, 2001, p. 5

corresponded to a civilised European society, to a European-scaled public order and to a political culture shared with whole European citizens. A basic rule which takes those values as a common denominator, will corresponded to the legitimate base of Europe. [12]

In effect of this background, initial legal envisagement form of the Founding Treaties of the EU, latter form of those treaties shaped by implementation and treaty, jurisprudence of the Member State supreme courts on competences and different position of inner actors of the EU concerning powers that EU should have, has created the issue of competences between EU and the member states. There has not been any provision concerning sovereignty or competence at the initial legal envisagement. The Community was *assigned* to act on certain *areas* with certain *aims*. According to the Treaty on European Economic Community, the *assignment* of the Community is to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, sustainable growth, solidarity among Member States and the raising of the standard of living by implementing common economic policies between member states and by establishing a common market. [13] Scope of this task of the community is determined by listing the Community's *aims*. According to that, the prohibition of customs duties, quantitative restrictions and of all other measures having equivalent effect, establishing a common customs tariff and a common commercial policy, abolishing, as between member states, of obstacles to the free movement of goods, persons, services and capital, enhancing employment opportunities and establishing a common agricultural policy, are some of the aims of the Community. [14] Treaty on European Economic Community has specially dealt with some *assignments* with those *purposes* and has defined some *areas* upon it. For instance, it defined in detail the rules for the establishing customs union and common customs tariff to third countries as a part of free movement of goods. [15]

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[12] Habermas, p. 10; Sionaidh Douglas- Scott, *A Constitution for Europe: In Defence of Public Reason*, Francisco Lucas Pires Working Papers, Vol: 4, 2001, p. 12
[13] European Economic Community Treaty, Article 2.
[14] European Economic Community Treaty, Article 3
[15] European Economic Community Treaty, Article 12 and Article 18.

These activities of the Union based on the definition of assignment, aim and area has continued seamlessly at first. However, as the aims has been expanded by consequent treaties and the tight link between the inter area subjects and as the Union institutions makes detailed regulations in a certain area and their tendency to organise other areas, where EEC Treaty and the other treaties amending latter do not have provisions those areas to be regulated in detail, as well as the interpretation of the ECJ on the treaties and its legal reasoning on the judgements concerning EU's competences, show that the EU cannot progress in such way and this dynamic of the progress causes problems while resulting in debates on sovereignty and competences.

Analyzing the design and its lacks which the EU once had – not dealing with sovereignty and competence concepts- namely task, aim and area concepts and the effect of the problems, born with the mechanism of institutional decision making, on distribution of competences – for clouding the legal acts' character, efficiency and scale - constitute the important part of this thesis, however at the same time this thesis, for the division of competences has an important constitutional character as mentioned above, consists of the conflict and the relation between the member states' constitutional orders and the EU's supranational constitutional order evolving through the former.

**Limiting the Subject, Method and Hypothesizes**

The main reason of the issue of EU' competences keep up to date especially during last fifteen years and the difficulty to solve it, is that the subjects of the issue, namely academicians, conviction leaders and the actors controlling EU, seek answers together with the questions of "what kind of a 'thing' that the EU or the European integration should be?", "to what the EU should be turn out to be carry leadership?", and lastly "what is this 'thing', which cannot be designated by any existing national or international legal subject?". Considering the fact that those questions direct the thesis from an acceptable distance, it is possible to say that the subject of the thesis is limited with what kind of the distribution of competence between EU and its Member States is seen and must seen. While the main subject

of the thesis is limited to distribution of powers, instead of including all the areas of the EU law or all the policies and actions of the EU, legal and political areas and instruments (for instance fundamental rights and obligations, commercial policy, principle of subsidiarity), which show the characteristic of distribution of powers and which are the leading ones within the issue of distribution powers, are dealt with. Also, since the issue of competence is directly related to the sovereignty concept, place, importance and the new form of the sovereignty concept in classical sense and in EU law, are given place.

The main method of the thesis will be analyzing legal texts, namely, EU founding treaties and the amending ones (Primary sources of the EU law), international agreements, the jurisprudence of the European Court of Justice and of the courts of the member states (especially supreme courts) and when necessary the legislative and executive legislation of the EU institutions (secondary legislations) and the constitutions of the member states. On the other hand, analyzing doctrine and decision and views of the EU institutions other than the legislative actions, which have effects on the subject, will be use as another method.

This thesis consists of two hypotheses: *i*) there is a direct link between the issue of distribution of powers between the EU and its member states and what kind of an international legal subject and/or what the political structure of the EU is. ii) Solution of the issue of distribution of powers between the EU and its member states, is related to the judicial control of the EU's powers as well as to organising a (gradual) catalog of competences.

**Plan of the Thesis**

The plan of the thesis is formed with the mentioned dimensions of the subject. Primarily at the Chapter 1, with approaching sovereignty and competence issues in general and in the classical meaning, an analyze of this concepts is tried to be done in the meaning of constitutional law and of international law. Again within this chapter, the changes in the course of time of these concepts, especially sovereignty

concept, are pointed out and the consequences of these changes especially the state powers and new conception of the sovereignty are emphasized. Whereas in Chapter 2, the sovereignty and competence concepts' corresponding ones at the EU side and the view at the EU scale of the alteration they are faced with are emphasized. The analyze at this chapter of the thesis is carried on at one side through the framework of the EU treaties and ECJ judgments and some constitutional principles that they have created, and on the other side, through international law but more importantly Member states' constitutions and supreme courts judgments. In this chapter EU's and especially the ECJ's conceptions concerning sovereignty and competences and member states and their supreme courts' points of views are comparatively analyzed and the differences and common points of these correlative positions are tried to be crystallized by analyzing with also giving place to the views of the doctrine. In Chapter 3, competence issue within the constitutional order is analyzed in detail by dealing with each problem. Especially in the judgments of the ECJ and in the doctrine, all the concepts, descriptions and principles concerning competence peculiar to the EU law or rising from international law or from the member states' constitutional principles are analyzed. Thus, the mechanism of the distribution of power between the EU and member states are tried to be figured by means of these concepts, descriptions and principles and faults of this mechanism are tried to be marked. As it is on the other chapters, also within this chapter –but more frequently in this one- even if it is not approved, Constitutional Treaty is given place when necessary. In chapter 4, necessary amendments that must be done in the Constitution of Republic of Turkey fort that Turkey, has started full membership negotiations with the EU, shall not look this issue as if it is postponed as EU Law's controversial concepts of sovereignty and powers have been postponed before. Finally at the conclusion, shared competence system is analyzed and views and solutions for its faults and the result that this study has reached, are given.

**Terminological Explanation**

As Nice Treaty has come into effect, Treaty on European Coal and Steel

Community being one of the three founding treaties, has been abolished. Thereby, the term of "Communities" in the terminology of the European integration has become to correspond to EC and EURATOM and the term of "Union" has become to correspond to the EU. However, as of EU Treaty the Communities has become to termed including Treaty on European Union terms of EU and EC are expressed in two ways to minimilize the confusion. Firstly, in chronologic context, "EC" for the period before 1992 and "EU" for the period after 1993 are used. Secondly; within the framework of competence concept, instead of the term of "EU", the term of "EC" in its traditional meaning, is preferred.

On the other hand, for that original article numbers have been amended by Amsterdam and Nice Treaties, those amended numbers of EU and EC Treaties are predicated. Former article numbers has been stated where necessary.

This thesis has written according to the law in force as of 1 December 2006.

# CHAPTER 1 SOVEREIGNTY AND COMPETENCE

## I. Sovereignty and Sovereign State Theory

While conceptualizing a law system, authors and occasionally the judges through case law, imply tranquil assumptions in between law and the state and especially the paradigm between sovereignty in its legal meaning and the state. Such a situation, most of the times, essentially -and when we consider the objectivity factor- occurs from the core concept of the assumption. However, reaching the result we would like to obtain, such lack of quality, has corrosive effects on scientific data. A solution for this problem is not the subject of this study however clarifying this paradigm or in other words intellectual framework, carries out a great importance over the analyses that take place in the following chapters of this study and finally over the conclusion.

Sovereignty, is a Latin word which stands for the meaning "superior" or "superiority" (Afterwards *souveranus*, is used for the word *souverain* in French and then the word *souverainete* is derived). Superiority occasionally is used for the concept of "not being a part of an authority" and sometimes for obliging others to be a part of its authority. This features of sovereignty, can be found as a concept which was firstly proposed by *Jean Bodin* in the 16th Century, towards the end of feudalism. According to Bodin; "The distinguishing feature of the sovereign is his state of not being a subject to any other person's orders. Because, sovereign is the one who creates the law, annuls the pre-created law and changes the desolated law for its citizens. Law expresses the power which is dressed up with the sovereign government in Latin."[1] Following *Bodin and till Hobbes, Locke, Rousseau and Austin, authors that are exercising on the concept of sovereignty, expressed its character of being absolute, exclusive, indivisible and non-transferable.*[2]

Exclusive superiority of institutionalized political power over all other social and political groups is formulized in the way that sovereignty bounds every person

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[1] Jean Bodin, *Six Books of the Commonwealth*, Book I, Chapter 8, quoted by: Aslan Gündüz, Government *and Its International Borders*, Istanbul Bar Journal, 1990, No 1, p. 16-17,

[2] Münci Kapani, *Politika Bilimine Giriş (Introduction to Political Science)*, Bilgi Yayınevi, 5. ed., 1989, p. 56

in a society. The concept state of being not bounded by other authorities stands for the institutionalized political government is not bounded by the acts of other political authorities but it is equal with them. This view of sovereignty is also described as "independency". However *Bodin* and other authors who share the same point of view with *Bodin,* while describing sovereignty as an absolute sovereignty, stated that in some cases sovereignty can also be limited. For instance; *Bodin* claimed that sovereignty can be limited by "natural law" whereas authors arguing the social contract like *Hobbes and Locke* claimed this could be with a social contract and Rousseau claimed that this can only be realized with the general will of the society. On the other hand some authors which carries out the effects of French Revolution like German philosophers –especially Hegel- claims that, state sovereignty does not recognize any other internal or external powers as sovereignty is "absolute" because it does not recognize any other powers inside the borders of the country and it has a free discretion capability in its movements outside its borders. [3] As a result of this, the main principle of public international law, 'pacta sund servanda' stays as a principle within the idealistic law perspective or *de lege feranda* situation and is beaten before the sovereignty theory within the framework of realist law perfective. This point of view, which survived during the whole 19th Century, was a big handicap before the public international law by causing World War II and it carried out its effects until this war.

Legal concept of sovereignty and sovereign state in the view of positive law is a development starting from 20th century which was initiated with the exorbitant sovereignty of states and its disputable effects on international relations that caused a war. After the end of feudality, however, supreme and fully sovereign central state was eroded with the influence of natural law, public or national sovereignty or the social contract but none of these were sufficient to frustrate the central sovereign state; hence the outcome was the limitation of the sovereignty or in other words legalization of sovereignty. This meaning of sovereignty, which corresponds to the constituent power, has been affected by four important factors. The first one was the

[3] On international law and sovereignty see also, D. Evans, *International Law*, OUP, 2003, p.315-360; Thomas Buergenthal, Harold G. Maier, *Public International Law*, Nutshell Series, 2. ed., 1990; Stephen Krasner, *Sovereignty: Organized Hypocrisy*, Princeton University Press, 1999.

Westphalia Peace Treaty and its outcomes which brought a change to the system between states and hence reformed the concept of sovereignty because of the relationship between state and sovereignty. The treaty adopted the principle of self-dependence and equality of states while establishing a balanced inter-state relations and preventing the states from violating international peace with the acts arising from the classical sovereignty theory of states.[4] Classical absolute sovereignty concept which defines the state as an unrestricted and uncontrolled entity in its both interior and exterior acts has acquired a different character with Westphalia Treaty. After this treaty, an understanding which compensates state sovereignty with another state's sovereignty and recognizes them equal was established. The second factor of the modern sovereignty concept is the rule of law theory. As the model of state established on the rule of law is built on to a limited state that is bounded with law, this model and the meaning of sovereignty within its classical meaning which is an unlimited and sole discretion, are not compatible with each other.[5] If the supremacy of law is accepted, then there shall be no absolute sovereignty. Third factor of the modern sovereignty theory is, the appearance of a divisible and multiple sovereignty concept as a result of the impossibility in clarifying the increasing varieties of states with a unique and supreme sovereignty theory. The changes in the forms of states and especially the born of federal states, caused classical sovereignty theory to fall in to a non-expository state while explaining this kind of political and legal orders.[6] The reason of this is that there can not be legal and political answer within the federal states in the classical sovereignty theory. Fourth factor of modern sovereignty theory is the constitutional separation of powers. The use of powers of legislation, execution and jurisdiction by different and separate bodies, that are totally the equivalent of the sovereignty within a state, is not a condition that can be easily explained with the classical sovereignty theory.[7]

Such changes in the sovereignty theory, between the 17th and 20th centuries, caused to qualitative changes on internal and external views of the sovereignty

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[4] Edip Çelik, *Milletlerarası Hukuk-Birinci Kitap (International Law – First Book)*, 2. ed., Filiz Kitabevi, 1986, p. 219.
[5] Kapani, p. 59
[6] İbid., p. 60
[7] İbid., p. 61

when compared with the initial classical sovereignty theory. Non-conditional character of the sovereignty has been bounded with the boundaries arising from international law and even "supranational" law. These boundaries shall be examined at first hand and then the eroding character of sovereignty within a political structure in which it bounds every single person or institution than itself shall be mentioned.

A) The Changes in the External Aspect of the Sovereignty

1. Restrictions on Sovereignty by Public International Law

Every manner of living within a society brings out the rules of order. As the relations between states constitute a society life, it also needs to have a law, which rules this relation. Otherwise, if the state is thought as the subject of law, some actions of states that are standing over the sovereign power shall breach the order between states and thus constitutes a chaotic atmosphere. The explicit example of this situation is the states' right to declare war. States that build their arguments on this right, use this right against law, as there are no limitations. One other example of this situation between states is the unlawful behaviors against a state agent by another state. Thus the increasingly presence of these kind of instances caused the first limitation of the state sovereignty.

This limitation which is brought to the "unconditional" character of sovereignty can be examined under the topic "limitations brought for the necessity of a peaceful manner of living together"[8]. The term "unconditional" referred to a meaning which prevented the delegation of the sovereignty to any other exterior authority.[9] Among these, states limited their sovereignty through international law, in order to not to create chaos and not to damage international public order, and discarded their enjoyment of sovereignty absolutely. Such a case was became definite with the highest participation of states by establishing United Nations (UN) and stated expressly in the UN Charter article 2/1: "The Organization is based on

[8] Aslan Gündüz, *İktidar ve Milletlerarası Sınırları (Power and Its International Boundaries)* , Istanbul Bar Journal, 1990, No 1, p. 16-17,
[9] Krasner, p. 16-37

the principle of the sovereign equality of all its Members." Fourth paragraph of the same article brought some limitations on the right of declaring war by states which was formerly used as a right arising on the sovereignty of the states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Regulation brought with the article 39 of the UN Charter, which is one of the exceptions of the prohibition of use of force in international law, has also become one of the instances of limitation to state sovereignty. According to this article, some measures can be taken in case of any threat to peace or breach of peace in order to maintain or restore international peace and security. This provision, prepares the way for humanitarian intervention and humanitarian law –by ignoring state sovereignty- in war or in the events that threatens security, for the purpose of securing fundamental rights that are subject to a breach or a possible breach.

Vienna Convention on Diplomatic Relations which was signed on 14 April 1961 and came in to effect on 24 April 1961, following the UN conference on Diplomatic Intercourse and Immunities, regulated the immunities and concluded with its Articles 29, 30 and 31 that a diplomatic agent shall have immunity from the jurisdiction of the receiving state. The convention brought some important limitations on state sovereignty.[10] As mentioned above, universal limitations on state sovereignty, brings minimum standards for states to live together. Such standards are not only the constitutional customary principals of international law but also they took place in UN Charter.

### 2. Sovereign State and Individuals and Effects of Human Rights Law on Sovereign State

Another limitation on state sovereignty is the change in the subjects of international law as individuals came in to the international scene in conjunction

[10] Aslan Gündüz, *Milletlerarası Hukuk ve Milletlerarası Teşkilatlar Hakkında Temel Metinler (Main Texts on International Law and International Organizations )*, Beta Yayınları, 1996, p. 592

with states and international organizations and are protected by international law. In the historical concept, subjects of international law were on principle states. Treaties that bring rights in favor of individuals did not give rights to individuals to claim their rights directly as the contracting parties are the states. Especially beginning from 20th century some exceptions were brought to this general principle of law and both states and individuals were merged to a written law system in which they have mutual rights and obligations. Not only the crimes of war, genocide and *apartheid* crimes brings out individual responsibilities, and thus makes individuals subject of international law, but also –especially in the era of limitation of state sovereignty- the most important development is the codification of human rights and the progress in protection of human rights. In this meaning, the first international document which brings out sanctions and defines human rights are the International Covenant on Civil and Political Rights and International covenant on Economic, Social and Cultural Rights that are generally known as twin treaties. In the regional basis, European Convention on Human Rights ("Convention") explicitly limits state sovereignty in favor of individuals. Sanctions brought by this convention and the protection system, while limiting state sovereignty, determines any breach to human rights and freedoms by jurisdiction of European Court of Human Rights ("Court"). We think that it will be appropriate to take a close look to this convention because of its system that brings and absolute limitation on state sovereignty.

The core consequence of the convention is its system that establishes a judicial review. However, the Court held that " The Convention, leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it ... become involved only through contentious proceedings and once all domestic remedies have been exhausted" and pointed out the core of the collective protection system of the Convention and puts its position to a subordinate manner with its Handyside judgment on 07.12.1976 [11]. This core is the fact that one of the outlooks of all contracting states' sovereignty, namely judicial review, is limited by the Convention.

[11] ECHR, Handyside v. UK, 5493/72, 07/12/1976, para. 48

What is the power of the Court which is an organ of the collective protection system brought by the Convention and how does it limit the sovereignty of the states? Individuals can claim their rights and the breach of the convention before the Court. Court reviews the compatibility of the claim to the convention and can take temporary measures (i.e. suspending the enforcement of a judgment taken by national courts) or convict relevant state who is in breach of its obligations arising from the Convention. Court examines the information and the documents handed over by parties as a supreme court, following the application procedure, and exercises an open session and if needed oral interview. In a case the event has not become clear, Court can held to extend the inquiry, search for new evidences, hear witnesses, make an on-site examine on the incident by using its own stuff and can examine the ones whom it held related with the incident and record their testimony; state on all stages of this procedure is obliged to satisfy Court's orders.

Court also has a sanction mechanism. State shall recompense its breach of the Convention in either compensating the damage or amending its domestic law in accordance with the Convention. Otherwise, contracting state may face a sanction that can vary to exclusion from the Convention system. The effect of the judgments to cause amendments within the domestic laws of the contracting states is a bare limitation on state sovereignty. The court held that existence of a martial-judge in the State Security Court is a breach of the article 6 of the Convention in *Incal*.[12] Whereupon, article 143 of Turkish Constitution was amended with the Law no. 4388 dated 18.06.1999 and martial-judges were removed from above mentioned courts where civil judges took their place.

The reason of our digression for the Convention is its deep impact on state sovereignty and the classical concept of sovereignty. Once a state is bounded with the Convention, it agrees to limit its sovereign rights on the subject of human rights; hence it can be argued, time to time, that "self dependent" character of its sovereignty is entirely lost. In *Belilos*, the Court went too far to review compatibility of a "reservation" or an "interpretation clause" with the Convention and held its decision by not giving the reservation the meaning construed by the state but construing an objective meaning in the light of the Convention.[13]

[12] ECHR, Incal v. Türkiye, 41/1997, 09/06/1998, para.71-73.
[13] ECHR, Belilos v. Switzerland, 10328/83, 29/04/1988, para. 16

## 3. New Supranational Institutionalism and Sovereign State

Another type of limitation which is brought to state sovereignty is the new types of institutionalism between states. One of the most important reasons that created this new types of institutions – as the states could not meet their own needs- is the effects of technologic development over economy, political life and law and thus the need for new institutions as the existing institutions in economy, politics and law can not meet the demands of the states. European Economic Community, European Free Trade Area, North American Free Trade Area are the bodies that came together with economic reasons. NATO is an example of the above mentioned institutionalism in the military scope.

However, the reasons of the supranational institutionalism is based on the above mentioned causes, it is hard to find a legal understanding on the theory of such institutionalism. Besides, it is easier to find an explanation on why these kinds of institutions are needed. The reason of this kind of institutionalism is the above mentioned aspect of states not meeting their own demands alone which ended after tragedy period that humankind does not wish to experience again. Because of this, studies on the theory of such institutionalism are mostly appeared just after the practice.

In fact, one does not need to look for any other concepts to find a legal explanation while studying on the theory of such institutionalism, -in other words- to understand what kind of bodies are these. When we leave aside the political theory of these institutions, [14] in the legal point of view, the key point is still sovereignty. For the purpose of our subject, what important to us is the limitations that are brought to the sovereignty of sovereign states that establishes these institutions. Above mentioned institutions and which are similar to the ones mentioned above can mainly be divided in to two sections. Institutions in the first section does not limit state sovereignty and can only act, on behalf of the states, if

[14] For these theories see; C. Petlant, *International Theory and European Integration*, New York, The Free Press, 1973; E.B. Haas, *Turbulent Fields and the Theory of Regional Integration*, International Organization, vol. 30, no. 2, 1976; B.F. Nelsen & A.C.G Stubb, *The EU: Readings on the Theory and Practice of European Integration*, Londra, Lynne Rienner Publishers, 1994.

there is a decision taken by the states that establish the institution unanimously. Main example for this section is NATO. Institutions, that bring limitations on state sovereignty such as European Community, World Bank constitutes the second section. EC will be examined in details in this study. However, there are some specialties that differ first section institutionalism from the second section institutionalism which is called as supranational bodies:

- Supranational organizations have an founding document like constitutions. There is a hierarchy between norms. There are organs like a constitutional state's organs. Fundamental rights and freedoms of individuals from different origins are secured within this system. These founding documents established their own autonomic "living" law system rather than the establishing documents of international organizations. *De Witte*, describes the nature of this system, in its article where he analyses the principals of *direct effect and supremacy* of EU law:

"The fact that provisions of an international treaty, and of decisions made by the institutions of an international organization, are enforceable by national courts is not exceptional. What is special is that the ECJ held that the EC Treaty itself contains directions, albeit unwritten, as to its domestic application. This is rather more unusual, but not incompatible with the nature of international treaties.....It is indisputable that the EEC Treaty was a treaty with some strongly innovative features, and one of them was the preliminary reference mechanism which allowed the ECJ courageously to articulate a duty for national courts which may have been (and still is) implicitly contained in other international treaties as well – but there is no court for saying so".[15]

- One or more of the organs mentioned above, if needed, can take binding orders with majority of the votes, that binds all contracting states of the supranational organization and this orders are enforceable.

- Orders mentioned above not only bind the contracting states of the supranational organization but also binds all individuals and legal persons within

[15] Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in Paul Craig & Grainne de Burca (der.), *The Evoluation of EU Law*, OUP, 1999 , p. 209

the contracting state.

- Finally, supranational organizations have a judicial system.

B) Eroding in the Internal Aspect of Sovereignty

Another aspect of sovereignty is its competence to use legal power as an actual, supreme and unconditional power on a determined land and society. This aspect of sovereignty is the most important instrument of political power. It gives the "legislation" and "enforcement" competence entirely to political power within a state. However this aspect of sovereignty does not grant a limitless power. So, what is the source of the internal aspect of sovereignty? Is it possible to talk about plural sovereignty or whether it can be restrictable or divisible?

It is impossible to talk about limitation of sovereignty in the times that power belongs to one person or to any kind of non-human in the name of that person which generally belongs to the term before XVII century. In the time being, the relationship between national sovereignty and state and the evolution of sovereignty from a sovereignty of one person (monarch) to a legal concept of nation, caused sovereignty to be represented with the term nation in the modern state which corresponds the term society.[16] This development, and unity in the source of political power and sovereignty, and determination of its extent in this sphere, brought out a new criterion in limitation of state sovereignty with which the reconciling idea of political power in its historical development belongs to individuals severally and collectively: Constitution. Thus, the principles of that sovereignty belong to nation (Constitution of Turkish Republic article 6) and that sovereignty shall be executed on behalf of the nation by political power (Constitution of Turkish Republic article 6/2) became the constant principles of constitutions. Sovereignty, earned its status of legitimacy by deriving its power and source from the constitution. This situation is referred as "Constitutional Sovereignty" in most of the literature of Continental Europe and some other parts of the world.[17]

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[16] Mehmet Ali Ağaoğulları, *Halk ya da Ulus Egemenliğinin Kuramsal Temelleri Üzerine Birkaç Düşünce ( A Few Thoughts About Theoretical Basis of National orPopular Sovereignty)* , Ankara University Political Sciences Faculty Journal, Vol. 4, No. 1/4, 1986, p. 137-140

[17] Erdoğan Teziç, *Anayasa Hukuku (Constitutional Law)*, Beta Yayınları, 1991, 2. bası, p. 117-120

The state of constitutions being the only source and the limitation of sovereignty provided sovereignty to be legalized, as mentioned above, explicitly. However, in its meaning of "forcing to bound"; some terms and wordings that are used to explain sovereignty – for instance; "nation", "territory" in its meaning of the land people live on it or "people (individuals)" that are referred as an homogeneous population- evolved in their legal and political meanings, in the history and they are still evolving. Then, to accept the concept of sovereignty valid that we defined through these above mentioned concepts, changes in both these concepts and the concept of sovereignty should be explained by analyzing together.

Norms, that are established by the public power arising from the sovereignty of the state, takes effect on a specific geographical region (territory) and the people living on that territory (nation, society). The relationship between a state and its territory and nation affects the character of its sovereignty and form of the state. To analyze this relationship we will use two concepts: Unitary States and Multi-central States.[18]

### 1. First Stroke to Internal Sovereignty: Dividing of the Using of Sovereignty on the Functional Basis and the Separation of Powers

States with one political center or with its familiar name unitary states has a simple relationship between its territory and nation. Unitary state which can be referred as the initial form of the modern states can be referred as an historical dialectic departure from the earlier social-political way of living. Before the initial states that were composed by a population (nation) living on a geographical region, concept of territory was used to define lands that were; divided between minor powers and in a disputable way –for instance; according to their religion or blood- and that had trade borders –which we now define them as customs- dividing lands nearly as large as a town. Naturally, in this divided structure, law and sovereignty were divided as well and they were far from their actual meaning.

[18] See also for the details of these concepts.; Atilla Nalbant, *Üniter Devlet (Unitary State)*, YKY, 1997, 1.bası, p. 25 and following pages.

Unitary state is a reaction to this history and constructed on the concept of "unitary". Politically a homogenous nation is constructed on a "unitary" organization. It consists of one nation and one government center in a definite territory. In the unitary state, there is only one law prevailing as similar as the sovereignty. There is logic of a unique and equal law that is applied uniformly for everyone. This law is made by a lawmaker that is stated in the government center. This lawmaker executes the sovereignty on behalf of the nation. The use of sovereignty that belongs to the nation inside the territory can not be transferred or shared with any institution. As this "common statute" is executed unilaterally within the territory, the characteristic of the state can be derived: A detailed government from the center to periphery. This center has a central organization that reaches the outermost parts of the state. Thus, government and the administration body has scheme that is managed from a unique center. Similarly, judicial authority belongs to the same center. A judicial system that tends from center to provinces, applies the law that is derived hierarchically from a sovereign center, in a linear manner. While explaining such kind of sovereignty that takes form within the unitary state, *Fowler&Bunck* defines this sovereignty as mass or chunk sovereignty (*The Chunk Approach to Sovereignty*) and stated that *this kind of sovereignty can belong to one totally or never* and *it has a character of being constant, irreducible and impossible to replace.*[19]

Peripheral organs of the center and local management bodies does not have a separate sovereignty, or in other words public power, according to local measures, subjects or personal measures. Peripheral organs of the central management are the branches of the central management according to the principal of span of authority; local management bodies, however they are the local organs, they enjoy the powers -to meet local demands- given, as a list or one by one, by the central management at the time of their establishment or given afterwards. Both two mechanisms does not have the authority to enjoy the sovereignty as they can not take decision by themselves. The actual owner of the rights is the central management.

To summarize, the legislation power in unitary states belongs to the

[19] Michael Ross Fowler & Julie Marie Bunck, *Law, Power and The Sovereign State -The Evolution and Application of the Concept of Sovereignty,* The Pennsylvania State University Press, 1995, p. 64-65

parliament that is located in the center, executive power belongs to the government and president that are located in the center; judicial power belongs to the courts in a hierarchic way that begins from the court of first instance to supreme courts that are organized from local to center.

This centralism in the unitary state takes its roots from the components of the state; in other words from the unity of the nation and territory. There is only one nation in a unitary state and sub-national groups do not have any legal meaning. The nation, which composes the State, is unique; like Turkish nation, French nation or Italian nation. On the other hand territory is unique as well. There is no sub-borders or sub-regions, which differ one region from other regions in political, social or any other way. Even islands and territories beyond overseas are adherent to central management as in the example of United Kingdom.

In this way, "the principle of divisible and unitary character of sovereignty causes the nation to be the only source of the sovereignty; and thus it means that no sub-national group has the attribute of being the source of sovereignty. In this meaning, nation provides the legitimacy of the existing unique political power/state as a legal definition. In the concrete case, when we examine the case in the framework of political competences, neither sub-national nor sub-state groups have political competence. In this context, sub-national groups can not use legislation, execution and jurisdiction powers that are derived from the sovereignty."[20]

### 2. Second Stroke to Internal Sovereignty: Another Type of Dividing of the Using of Sovereignty – Division by Community or Territorial (Geographical) Basis

Besides the unitary states, whose sovereignty is a public power that belongs to one nation on one definite territory and thus this sovereignty is enjoyed by the organs of this state under constitutional guarantees; there are some *multi-centralized* structures in which sovereignty appears, not only functionally but also taking into consideration of societies living in the territory and/or the geographical

[20] Nalbant, p. 65.

regions of the territory. However states, that appears to be in this character varies in different forms and complexity, they are both established on the same principle of sovereignty and that is; sovereignty belongs more than one political center. Components of more than one political center in a political structure, as well as the sovereignty, are the territory and population on which the sovereignty raised on. Naturally, the territory and the populations mentioned here, should be taken in to consideration with the sovereign and the *norm* and should be interpreted as a part of a definite normative order – not like as ordinary human populations and piece of lands. In this meaning, for unitary political structures in which sovereignty is functionally divided in between powers it is deemed to be right to talk about the theory of national sovereignty however, in multi-centralized political structures we can only talk about the theory of popular sovereignty.

a) The Theories of National Sovereignty and Popular Sovereignty

According to national sovereignty theory, nation is not a being that consists of the existing people in the time of its definition. It is more than the sum of individuals; it has a separate *legal* personality.[21] Because of this personality, sovereignty has no counterpart among individuals or populations; it belongs to the nation and the sovereignty that is personalized as unique and indivisible.

Nation that takes place in the theory of sovereignty enjoys it sovereignty through its representatives. In the theory of sovereignty in which nation is described as an abstract being, the enjoyment of sovereignty is provided through the existing representatives of the nation at the time being; but not by a population lived in a definite time. This is an important defect of the theory. I think that another big defect is to talk about abstract and political sovereign; conversely, it should be better to talk about a legal sovereign who constructed the fundamental norm; the constitution and law order.[22] In such a case, the founding body can not be described as an abstract nation legal personality; as above mentioned fundamental norm or constitution is constructed and affirmed by the population or

[21] İbrahim Ö. Kaboğlu, *Anayasa Hukuku Dersleri (Courses on Constitutional Law)*, 3. baskı, Legal Yayınları, 2006, p.167.
[22] Kapani, p. 62.

populations that exist at the time of such constitution or fundamental norm.

More importantly, according to the point of view we participate, sovereignty is the –at any time- legally sovereign and supreme constitution.[23] Existing power, in other words constitution and legal order, has the most superior legal power unless it is amended by the existing power. This amendment can be made whether by the principal constituent power or subordinate constituent power; in both cases the amending consent belongs to the population or populations. This situation leads us to the theory of popular sovereignty and its view in modern multi-centralized political structures. According to the theory of popular sovereignty, the actual owner of sovereignty is the public. Sovereignty can be shared in between citizens. Every citizen is a part of the constituent power and has the right to participate in legislative power.[24]

Popular sovereignty theory keeps it validity with the instruments like referendum for principal constituent power and with instruments for taking decision and participating in decision making process; it uses the procedure of dismissal/removal. Popular sovereignty theory is also compatible with the sovereignty being a legitimate superior power, in other words, its attribute of being constructed on a constitution. However, the theory is developed from its own attributes -by taking the compatibility for the quick change in social life and the needs for a clockwork political life in to consideration- in order to provide the benefits that are to be expected from multi-centralized political structures. In this meaning, the most exclusive example is the American revolution and its federalism; this example makes it easy to understand the sovereignty in multi-centralized political structures.

Before the Revolution, the population and the territory (British Colonies) were bounded to U.K which was a unitary state and was administered by a Parliamentary unitary system which consists of the King, Lords and the representatives. According to *Johnson*, "Englishmen, formalized abstract

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[23] Mehmet Turhan, *Anayasal Devlet (Constitutional State)*, 3. Ed., Naturel Yayınları, 2004, p. 43.
[24] Kaboğlu, p. 165.

sovereignty within the Parliament that consists of those three components".[25] Additionally, the consent of this Parliament, according to the author and general accepted idea, it binds the consent of the existing population retroactively and forth.

As a reaction to this, American colonies, grounding on Magna Carta, fundamental unwritten "*common*" law traditions and most importantly on their own population and their territory's popular sovereignty[26], deemed some of the laws legislated by the Parliament are invalid. They created a *constitutional legitimacy theory* standing on the above mentioned components. *Bailyn and Wood,* argued that "this constitutional context is not only related with the structure of the political bodies and the way of their composition but also, at the same time, it defines a serial of positive principles that limits the legitimate enjoyment of sovereignty".[27]

b) From the Popular Sovereignty Theory to Multi-Centerised Political Structure

There are quite important differences between unitary states that stand on national sovereignty and multi-centralized political bodies that stands on popular sovereignty. Firstly, there are big differences between the components that compose these two political structures. For example; while in federal state, population is divided in to two as; *federated state population* and *federal state population* in order to create multi-centric structure; in unitary state it is impossible to talk about any populations or sub-groups other than the unique nation and territory.

Secondly, the concept of sovereignty is quietly different between these political structures. In multi-centralized political bodies, for instance; sovereignty

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[25] Samuel Johnson, *Taxation No Tyranny*, D.Green (der.), *Political Writings*, in Yale of the Works of Samuel Johnson, Volume 10, 1977, p. 401-403 ve http://www.samueljohnson.com/tnt.html.

[26] For a satisfying analyses of this concept see; Neil MacCormick, *Questioning Sovereignty*, OUP, 1999, p. 128-131

[27] Bernard Bailyn, *The Ideological Origins of the American Revulation*, Harward College, 1990, p. 175 ; Gordon Wood, *The Creation of the American Republic*, the Omohundro Institute of Early American History and Culture, Williamsburg, Virginia, 1969.

belongs to the population of federated state and its territory and also it belongs to all population -as a whole- of federal state or federal central body. In different multi-centralized political bodies or in every multi-centralized political body at different times, it can be observed that sovereign public power belongs to for example; only the populations of federated states (as in the instance of; Southern Provinces left United States of America federation in 1861 claiming that sovereignty belongs only to the populations of provinces and United States federation has no sovereignty) or to central federal body (as in the instance of Federal Germany); however, this situation does not change the fact that sovereignty takes it places in two different forms in multi-centralized political bodies. Besides this difference from unitary political bodies, sovereignty has another difference in multi-centralized political bodies. That is the difference in the relationship between the actual owner of sovereignty; population and the ones that enjoy it on behalf of the population. This third difference between unitary political bodies and multi-centralized political bodies arises on two principles that can be found in the normative legal order of multi-centralized (federal) bodies: the principle of popular sovereignty and agency theory.

i) Popular Sovereignty

According to Buchanan[28], to replace sovereignty absolutely, according to the social contract theories of *Hobbes* and his followers *John Austin* or *A.V. Dicey,* with the authority of the institution of Kingdom or Parliament, is to change the actual owner of the sovereignty. Author, mostly argues that – following and developing the ideas of Locke and his followers- sovereign is the *individuals* who meets the wills and consents of constitutional institutions. As a matter of sovereignty, all institutions rather than the individuals are *extrinsic;* they obtain sovereignty only if it is provided by individuals. All this competence can be found in the consent of the ones who enjoy this competence. Such a situation can be found in two different forms. First of all, the existence of an established constitutional order in which the constitution is a document that is adopted *–at any time-* by all individuals and amended if necessary; secondly, the individuals to use the opportunity of creating themselves as a legal and political population instead of a

[28] Quoted by: Neil MacCormick, *Questioning Sovereignty*, OUP, 1999, p.130.

society based on religion, ethnicity or culture.[29] These two conditions of popular sovereignty are called as; being *autonomous* from the central political organs and *participation* in central political structure.[30] These principles of being *autonomous* and *participation* causes mechanisms that are based on the sovereignty of population as the population of federated state and the sovereignty of the population , as a whole, of the federal state, in multi-centralized political bodies. One of these mechanisms is; the first parliament in which the consent of the federals states population takes place and, according to the principle of participation, the second parliament in which federated states participate in according to the principle of equality. The core of this mechanism lies in the idea of preventing the majority of the population to succeed in the decision making process, and to look for the acceptance from the second parliament that consists of the representatives elected by the population of the federated states. In this way, two separate sovereignty process together. For example, in case of an amendment is required for the constitution, in the referendum held, not only the majority of the population but also the affirmative votes of the federated states is required. In a federation consisting of 50 federated states, such an amendment can only be made if the majority of the federated states used affirmative vote and this should be accompanied by the affirmative vote of the population of the federal state. On the other hand, federated states have a big role according to *participation* principle in not only the amendments to the constitution but also in legislation of new laws. In order to accept a decision Congress needs the ratification of the House of Representatives which consist of the representatives elected by the whole population and the ratification of second parliament which consists of the representatives of federated states.[31]

Another view of popular sovereignty is the *autonomy* of different centers (provinces or federated states) in multi-centralized structures. Autonomy from federal central government has another important character apart from our main subject which is the difference sense of sovereignty in multi-centralized bodies. This character is its structure of being a principle to differ unitary political bodies

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[29] İbid., p. 131
[30] For a detailed defition of the concepts see; İbrahim Ö. Kaboğlu, *Anayasa Hukuku Dersleri*, 3. baskı, Legal Yayınları, 2006, p.149-151
[31] Oktay Uygun, *Federal Devlet (Federal State)*, Çınar Yayınları, p. 132

from multi-centralized political bodies. This division, materialize itself in the subject of using the public power by whom, when and in which subject. If we call other centers except from the *main policy center* as *peripheral policy centers*, this peripheral centers has autonomous structures, functions and competences apart from the federal center. These are secured by the constitution of the federation. Austin, who has argued there is a limitless sovereign lawmaker to make and change the laws in every state; put forward the idea of *every peripheral* center[32]and the main policy center has sovereignty but this sovereignties are constructed as an integrated structure which is not an ordinary legislation intuitions, but arising on the entity that is constructed by the citizens as his idea of every state has a limitless sovereign lawmaker to make and change the laws was insufficient to explain peripheral policy centers in federal structures.[33] Dicey reached the same result by using *legal sovereignty* concept and stated that "legal sovereignty of federal state arises from a structure which consists of the separate sovereignties of federated states as a whole".[34] However, Madison describes the autonomous sovereignty of peripheral policy centers explicitly. According to the author; sovereignty of the Federal center, beside the sovereignty of the people of the States, composes the autonomous sovereignties of the states under the guarantee of the federal constitution. This consolidated sovereignty surrenders a part of its sovereignty for certain subjects. Sovereignty for residuary subjects remains the states".[35] Thus, federated states have autonomy in both main policy center decisions and their provinces.[36] To deal with this autonomy will explain this view of popular sovereignty.

The most crucial issue that separates multi-central political structures from the others due to the sovereign space descended to the peripheral centers are the referral of competence that is meeting this autonomous sovereignty of core centralized or

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[32] Ephasis is stressed by me.
[33] John Austin, *The Province of Jurisprudence Determined*, H.L.A. Hart (eds)., Weidenfeld and Nicholson, London, 1954, p. 251.
[34] Albert Venn Dicey, *Introduction to the Study of the Law of Constituion*, Macmillian and Co., 10. baskı, 1961, p.135
[35] James Madison, *Works*, IV, 420-421, cited: Drew R. Mc Coy, *The Last of the Fathers: James Madison and the Republican Legacy*, Cambridge, 1989, p. 149-150
[36] In the same opinion see, Akhil Reed Amar, *Sovereignty and Federalism*, YLJ, Volume 96, 1987, p. 113; C.E. Merriam, *A History of the Theory of Sovereignty Since Rousseau*, Columbia University Press, 1900, p. 164, quoted by: Jeffrey Goldsworthy, *The American Debate About Sovereignty: A Comparative and Historical Perspective*, N. Walker (edit.), in *Sovereignty in Transition* , Hart Publishing, Oxford, 2003 i, p. 423-446.

regional states within the constitutional texts during the foundation period, not by the parliaments or likewise assemblies.[37] Moreover, this competence can not be transferred unless there is a constitutional change. The effect of such a change on the peripheral policy centers has been referred above.

The spaces of competence remained within the sovereign spaces of peripheral policy centers and their allocation differs in every multi central political structure. For instance, while the system in the United States the competence conferred to States is provided as 'the competence remained outside the scope of numerous competence of federal state', the inverse situation is true for Austria.[38] Nevertheless, the crucial issue is not the scope of competence, but the obedience to the principles of autonomy that is an instrument of popular sovereignty. Contrary to the fact that Sovereignty has a constitutional standing, it is not derived from a political centre; nor can it be taken back by a political centre.

ii) Agency Theory

First factor that differs multi-centralized political bodies from unitary political bodies due to their sovereignty concept is the existence of main policy center and peripheral policy centers and their status as referred in the above section. Another distinguishing factor is the relationship between these centers and the individuals who are the owner of this sovereignty.

Representatives, who use the sovereignty on behalf of individuals –in a certain period of time and with a cooperation- and according to the principle of representational agent, in the unitary political bodies; in multi-centralized political bodies, according to the ideas and theories referred above in respect to the source and ownership of sovereignty, this relationship is not a representative agent but a more solid agent which can be recalled at any time.

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[37] For example. American Declaration of Independence, Art. 32, http://www.ushistory.org/declaration/document/index.htm ; The Constitution of Federal Republic of Germany, Art. 28-30., http://codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm; The Constitution of Belgium Art. 35., http://www.fed-parl.be/gwuk0003.htm#E11E3

[38] For constitutional competence in federal systems, see. Dicey p.72 anf following pages.

For the better understanding of such an agency relationship, it is rather to focus the subject on a different dimension that is sorting out the place of delegated sovereign powers within the multi central political system. Referring to the thoughts of authors such as Abraham Lincoln, John Adams, Daniel Webster standing among the signatories of American Declaration of Independence, Brandon claims that sovereignty can be used by the entire nation exclusively.[39] Thomas Jefferson who emphasized federation consists of separate peripheral centers and the ones who share his opinion argued that sovereign is the populations of separate peripheral centers.[40] Thus, peripheral center populations can even deem the constitution to be invalid. *John C. Calhoun,* followed this point of view and argued that sovereignty belongs to populations of peripheral centers explicitly and main central policy is entrusted with a limited subject and nominated its peripheral policy center for the remaining subjects.[41] This view of Calhoun initiated the very first steps of the agency theory. Thirdly, Dicey and his followers argued that populations of peripheral policy center are jointly sovereign.[42] However this idea of *Dicey* was criticized by Thayer and many other authors and its effect was limited. The point of the criticisms was the fact that in some of the cases majority is sufficient in order to make an amendment in the constitution.[43] Fourth group of point of view which was leaded by *James Mason* pointed out that sovereignty is divided in between main policy center and peripheral policy centers. *Madison, Calhoun and Webster*, argued that constitutional multi-centralized political structure was created by the sovereign populations of peripheral policy center and these populations nominated some of their competences arising from sovereignty to the agents of main policy center and some of them to the agents of peripheral policy center; so that they allocated their competences to a two graduated management.[44] Thus sovereignty was deemed to be divided in between the agents of peripheral policy center and main policy center.

Organs that are to solve the problem about the ownership and limits of sovereignty evaluated the theories we summarized above and their approach is to

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[39] Mark E. Brendon, *American Slavery and Constitutional Failure*, Princeton U.P., 1996, p. 164
[40] J.H. Reed, *Powers versus Liberty: Madison, Hamilton and Jefferson*, University Press of Virginia, 2000, p. 89-90.
[41] August O. Spain, *The Political Theory of John C. Calhoun*, Bookman Associates, 1951, p.188-89.
[42] Dicey, p. 137 and following pages.
[43] Quoted by Goldsworthy, p. 435, J.B. Thayer, *Legal Essays*, Boston book Co., 1908, p. 191
[44] Goldsworthy, p. 436-437

evaluate the second and the fourth theories. For example; United States Supreme Court; held that "sovereign power was retained by the citizens themselves and peripheral policy centers hold the sovereignty of population of peripheral policy centers"[45] also in one other jurisdiction court held that; "In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other."[46]

In multi-centralized political bodies which divides sovereignty in between peripheral policy centers (and its populations) and main policy center (and its whole nation) –rather than the unitary political bodies- ; the relationship between sovereign and representative caries out a sui generis character. The most important factor of this relationship is that the competence given to the agent is given under one condition; population has the right to dismiss the agent or change its competence at any time in its sole discretion. Thus, population does not share or transfer its sovereignty with the agent. *Hamilton, Madison, Marshall and Iredell* stated explicitly that they, necessarily, refer to a limited proxy of sovereign power when they use the term sovereign government (in both two levels).[47] The limitation of the proxy and avoiding to exceed its frame in the legal decision taking and enforcement process is secured with a binary security system. One of this is the structure of two existing parliaments which are separately organized from each other and the other one is the delegation of the agency in between independent (which also includes financial independency) national administrative and judicial functions.[48]

Finally, we should have a closer look at to how *Madison* - one of the most important theorist for agency theory- explained the theory. *Madison*, as he argued in his strongly influenced theory, standing on the two separate leveled management; stated that individuals limited the competences of the agencies that abides main policy center and thus conceptualized explicitly that any competences other than the said ones belongs to the peripheral policy center:[49]

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[45] Chisholm v. Georgia (1792) 2 Dallas 419, http://www.oyez.org/oyez/resource/case/72/ .
[46] McCulloch v. Maryland (1819) 4 Wheaton 316, http://www.oyez.org/oyez/resource/case/236/ .
[47] Akhil Reed Amar, *Sovereignty and Federalism*, YLJ, Vol. 96, 1987, p. 9-10
[48] İbid., p.11
[49] İbid., p.14

"State governments and Federal government are different agents of individuals; they have specific competences for specific goals. With the principle of separation of powers, the agents at both levels obtain the authority of the real owners of sovereignty by keeping under control of and struggling with the mistakes of each other".[50]

## II. The Concept of Competence

### A) General View to the Concept

The difficulty in defining the concept of competence is quietly the same with the difficulty that we experience in defining other legal concepts. For example; *Hart*, explains the concept of "justice" in his "*the Concept of Law*" as follows[51]:

"The concept of justice consists of two aspects: the unchanging aspect of the concept which is interpreted as 'treat similar situations similarly' and a changing criterion which states that two or more than two situations are similar. Therefore, what will prevent different interpretations of the concept of justice will be to make the unchanging aspect of the description a common ground for everyone."

Concepts like competence, the norm that delegates competence or the relationship between competence and legality can refer to different perceptions by different people in different conditions; however, I am in the opinion that we should find a "common denominator" for the concept of competence as well as the concept of justice. In other words, it is a must to find an equation that gives out the same result in different conditions. In this framework we get help from three *competent* law philosophers: *Hohfeld, Hart and Ross*.

According to *Hohfeld* who is an American lawyer stated the concept of competence as follows, where he analyzed eight fundamental law concepts:[52]

"Two things may cause a change in a legal relationship: fact or facts

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[50] İbid., p. 16
[51] H.L.A. Hart, *The Concept of Law*, Oxford, 1997, p. 156
[52] W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, YUP, 1964, p. 50

affecting the said legal relationship without any volitional intervention of a person, or fact or facts affecting the said legal relationship by volition of one or more than one persons. In the second situation, person/persons having a volitional control has/have an authority which affects and thus changes the said legal relationship."

With this explanation of *Hohfeld,* natural-physcical power and the power of making changes in a legal relationship with legal power is differed from each other. The second one is referred to as the competence that has legal power. Moreover, it differs such competence from the concept of permission according to the author, to having the permission for doing something does not necessarily includes creating legal effects. For such a competence, Hohfeld gives the examples of giving competence for; making a contract, transferring the rights on a certain object or remise, or sale of a movable due to a warrant by a public official.[53]

*Hart* emphasizes the relationship between competence and validity (invalidity). According to this, while validity changes a jural relation, in order to create a legal situation one thing must not be omitted; and that is the acts in the law.

"Rules that grant competence make possible to create rights and duties for persons, under the compulsory framework of law, by granting them a legal power under specific conditions and specific procedures."[54]

As it can easily be understood, according to *Hart*, competence is a mandatory condition for legal validity. Through the norm that delegates the competence, agent uses the legal power to change mentioned legal relations.[55] In my point of view, the norm that delegates the legal power is equal to competence or authority and related agents are furnished with the legal power in order to create or execute other legal norms.

Moreover, the norm that delegates the legal power and the transferred competence are fragmented with certain borders; the possession of the authority,

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[53] Ibid., p. 51-55
[54] Hart, p. 27
[55] Hart, p.29.

however, can create new norms but can not bring other norms beyond its authority. In other words, the norm that delegates power determines who, in what condition and how regulates rules.[56]

Ross; who had a closer look to the relation between the norm that delagates competence and the valid legal change or creation of a new norm made by the owner of the competence[57], stated that legal statute can only be constituted by a legal power.

"Competence is a power created legally or through enunciation in order to create legal rules (or legal impacts). These rules which embody competence are called acts-in-the-law or legal dispositions. For example a commitment, a testament, a decision, an administrative permission, etc... Such a legal act-in-the-law is a human activity different from working of the natural human faculties. Since a rule for competence includes conditions for creating another rule, it is only a repetition that there should be no attempt to use a rule for competence outside of its scope. In such a situation, the said competence is invalid; incompatibility with a rule for competence results in invalidity."[58]

Therefore, we can determine the following facts in relation with the concept of competence:[59]:

1- *The owner of the competence has the opportunity to make changes in legal relations.* In this meaning, *Hohfeld* and *Hart* uses the terms of changing and shaping legal relations while *Ross* uses the term of creating legal norms or legal effects.

2- *There is a close relation between competence and validity (or invalidity).* Competence which brings changes to legal relations is a mandatory precondition of validity. The situation of validity or invalidity, most of the times, causes the problem of if an agent has competence or not.

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[56] Torben Spaak, *The Concept of Legal Competence*, An Essay in Conceptual Analysis, Dartmouth, Aldershot, Brookfield USA, Singapore, Sydney, 1994, p. 166.
[57] Quoted by Spaak, p. 7
[58] Quoted by, Spaak, p.8
[59] Spaak, p. 9-10.

3- *Agent, changes legal relations with a specific type of legal principle.* These are called as act-in-the law or competence-exercising act.

In the light of these facts, the concept of competence, can be defined as follows according to lowest common denominator:

*The concept of competence, expresses the enjoyment of the competence-exercising act by the owner of competence, which delegates the opportunity of changing a legal relation to the owner of competence.*

B) The Competences Rising from Sovereignty

Being sovereign in a political system, in other words using the public power, confers ability to use institutionalized rules of law system to individuals (entities), organs or institutions within that system. This institutionalized law system's fundamental norm Constitution, regulates the competences and/or the rules of using such competences through individuals (entities) and institutions endowed with such competences in certain regulated situations including specified ways and methods. On the other hand, sovereign power in international relations, which also consists of multiple sovereign powers, enjoys its competences in accordance with the international law system.

The competence that is derived from state power in the meaning of external sovereignty has been effected from the change of classical understanding of sovereignty without any consideration to internal sovereignty, which is the outcome of an international institutionalization of individual subject to rights either within the meaning of international relations or within the meaning of international law. Because the relationship of external vision of sovereignty and the competence arising from sovereignty is shaped according to the legal order that takes its roots from classical understanding of sovereignty, the abovementioned elements that restrict external sovereignty, while there is an indirect determinism between the sovereignty of state and competence arising from sovereignty, have established an autonomous legal order between competence and external sovereignty. In this

context, the connection between competence, rule of competence, validity of competence and state sovereignty is broken. With special emphasis to the UN Charter, a restrictive international law, human rights law and the legal order constituted by supranational institutionalization has changed the scope of this competence, the rules and their validity; considerably. For instance, while in past , the states were free to establish its own external trade relations relying on national sovereignty, today these relations should be organized under the rules of World Trade Organization, which is an international organization established by states. The relationship between external sovereignty and competence is entirely changed on the platform of human rights protection as mentioned above.

On the other hand, within the meaning of internal aspect of sovereignty, competences are equal to public power arising from sovereignty, are affected from the evolution of sovereignty in such a manner. While, under the absolute sovereignty understanding within a political-social structure, the competences of the sovereign –king or emperor- that authorizes him to use public power, how this public power can be used, rules emanating from absolute sovereignty of a person or a small group of people, and validity of the authority create a simple order due to the absoluteness characteristic of sovereignty; the sovereignty-competence relation has become a complex relation since sovereignty has distanced itself from this absoluteness, transformed within a legal order, and since its own meaning has changed under various effects.

In this regard as indicated above (B.I), when sovereignty becomes an essential and superior legal power[60] and a constitutional sovereignty -far from absoluteness- on a specific country and human aggregate within a political structure, the competences within this political structure also differ. However, as the

[60] J. Lafferriere, *Manuel de Droit Constitutionnel*, 2. Baskı, Paris, 1947, p. 357-359, quoted by: Kaboğlu, p. 73. *Yazıcı* does not make any distinction between the sovereignty and the competences emanating from sovereignty; rather, she uses the concept of "the competence of sovereignty" (Serap Yazıcı, *Avrupa Birliği Süreci: Ulus Devletten Ulusüstü Devlete Geçişte Egemenlik Yetkisinin Devri [EU Process: Transfer of theCompetence of Sovereignty in Transition from National State to Supra-National State]*, Osman Can, Ülkü Azrak, Yavuz Sabuncu, Otto Depenheuer, Michael Sachs, *Özgürlükler Düzeni Olarak Anayasa [Constitution: The Order of Freedoms]*, Fazıl Sağlam 65. Yaş Armağanı-Türk Alman Kamu Hukukçular Forumu Armağanı, 2006, p. 447 and following pages). Since sovereignty constitutes a fundamental, supreme, constitutional and a legitimate power and competence constitutes a derivative of this sovereignty, we do not deem use of "the competence of sovereignty" concept as appropriate.

evolution does not stop at this stage, the problem becomes a more complex one. Except from the legality of state sovereignty, in other words, the boundation of sovereignty by a constitutional order, the concept of sovereignty in every constitutional order has evolved respectively.

If the said state has a one-centered political system, then sovereignty is shared by legislative, executive and judiciary powers where competences are horizontally distributed. Although centralism differs in degree, in this one-centered structures, in unitary states with their known name, for example legislative is used by assemblies and boundaries of this competence differs according to the separation of powers favored by the constitutional system. For example France is a unitary state; however, since its constitutional system is different from Turkey, the legislative competence, its boundaries and whether the competence is exceeded are different compared with Turkey or other traditional unitary states.[61] Furthermore regardless of the degree of centralism in unitary states, the state sovereignty is single, cannot be limited, changed and divided[62]; therefore the competences exercised are valid under legal and constitutional conditions of this single sovereignty, regardless of the legislative, executive or judiciary nature of said competences. Any body of the state, when using its competence, is obliged to comply with this horizontal division under the framework of rules imposed by the constitutional order, and any institution or person (having the competence) will use its/his/her competence emanating from law (rule granting the competence), which demands linear implementation of this single sovereignty, in any part of the country in line with this will. The body that uses the competence cannot use this competence for more *in line with the purpose* taking into account local or social needs, or more *efficiently* in terms of distribution of resources, which will render the competence invalid.

If the said state does not have a one-centered political system but a multi-centered one, -federalism with its more widely known name-, then not only sovereignty is shared by legislative, executive and judiciary powers where competences are horizontally divided, but also it is divided through vertical division

[61] Kaboğlu, p.121-124.
[62] Michael Ross Fowler & Julie Marie Bunck, p. 65

of competences. That means there are two separate sovereignties within a constitutional system. In light of the above explanations (B.2), these two sovereignties exist at two levels and side by side. Although principally there is the "primacy and superiority of federal law in two legal systems which imply a double constitutional system and a double legal system"[63], the sovereignty-competence relation and thus competence conflicts gain importance due to existence of two separate sovereignties. Although competences of state governments and federal government emanating from their distinct sovereignties are separated through various methods in constitutions or constitutional systems[64], conflicts of competence will be inevitable since distinct agents of state governments and federal government have distinct competences for distinct goals[65]. Since the general trend is to make distribution of competence on the basis of subject (area) and objective, conflicts of competence arise as it is difficult to identify the scope of objective and boundaries of areas. Settling of these conflicts by high courts cannot ensure a general solution and stable authority order since they decide on the basis of the case in question.

Another model where competence emanating from sovereignty is arranged differently from unitary and federal structures despite its one-centered political structure is the *regional state* model. Regional state is a different type of distribution of sovereignty and competence, which is a type between unitary state and federal state. Regional state has an original structure of its own, which is different from unitary state due to political autonomy granted to regions, and from federal state in terms of establishment and functions of regions, and constitutional guarantee of their competence.[66]

The *first* characteristic of the regional state is that regional statuses, which provide regions with autonomies, are prepared by local governments and councils. However, the establishment of autonomous regions by accepting these statuses depends on the approval of national parliaments. In Italy, which is a regional state,

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[63] Kaboğlu, p. 148
[64] İbid. p. 145-147
[65] Supra. p. 33.
[66] Naz Çavuşoğlu, *Bölgeli Devlet'de Egemenlik/Yetki Paylaşımı (Separation of Sovereignty/Competence in Regional State )*, www. e-akademi.org., 13 September 2006, para. 3 (Declaration delivered to *National Sovereignty and Integrating Europe* panel, 17 April 2002).

constitutional supervision of these statuses is also possible.[67] The *second* important characteristic is that the statuses are created as the constitutions of the regions. However, these statuses cannot be incompatible with the constitution which was prepared by the original founding power of the country. Autonomous regions do not have the founding power.[68] The *third* characteristic is that in the regional state model, exclusive competence and competences of regions and the state are clearly stated and listed in the constitution, which is different from the unitary state.[69] The *fourth* characteristic is that the regional state, which has similarities to the federal state in terms of sharing of competence has in effect a fundamental difference from the federal state, which is while representation of states is possible in central parliaments in federal systems, there is no such representations in regional states.

The Constitutional judiciary in the regional state model is different with some characteristics from the unitary state. While Constitutional Courts in the regional state model have a function of constitutional review in establishment of regions, they also have a function of review in case of conflicts of competence among regions or between regions and the state. They have a function of a kind of arbiter to prevent weakening of the characteristic of share of competence in the regional state model both by the center and by the regions.[70] The decision of the Italian Constitutional Court in this regard has been both to protect the decision-making power of the central government and to make possible of extension of competence of regional administrations on condition that it is not against the general interests of the state.[71]

The regional state structure is basically a one-centered unitary structure; however, taking into account the above-mentioned classical unitary state structure, in pure unitary states it is not possible to accept regional autonomy insofar as the constitutional system is amended by the original founder. For example, it is not possible to have such a federative system in Turkey since the Turkish Constitutional

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[67] İbid. para.12.
[68] Kaboğlu, p. 144
[69] **Having listed the issues under exclusive competence of the state, the Italian Constitution then specifies the common competence fields of the state and regions (Italian Constitution Art. 117), the Spanish Constitution lists both the exclusive competence fields of the autonomous regions and the exclusive competence fields of the state (Spanish Constitution Art. 148-149), Çavuşoğlu, para. 17-18.**
[70] Kaboğlu, p. 361,
[71] **The Spanish Constitutional Court decides to protect competence of central government. The Constitutional Court has decided that the competence to identify basic principles of local autonomy belongs to the national parliament, and that the duty of the regions is to form their own statuses accordingly (21 December 1989), Kaboğlu, 362.**

Court has stated in one of its decisions that "sovereignty necessitates a single state structure with national and territorial integrity". The Constitution of 1982 states that it is impossible to establish regional autonomies since sovereignty is single and cannot be divided in a pure unitary state with the statement that "it is also closed to forms which bring separation in the name of autonomy for regions and autonomous administrations".[72]

As a result, if we refer to the explanations above[73], while the one having the competence (state or state organ) runs the competence rule arising from sovereignty, that changes the legal relation, it fulfills the aim of the competence-exercising act. However, there are no problems in exercising competence in the unitary systems, in multi centralized bodies, serious conflicts of competences may occur. The aim of the competence exercising act, in some of the cases, realized with a diversion from the pre-supposed aim by the agent; in some of the cases, the act by the agent, falls completely out of the supposed aim. First situation is an example for *ultra vires* act; however the second situation is an example of non-competence/lack of competence. As a result, in both cases the change in the given legal relation is invalid. The limit of the competence is exceeded.

III. Conclusion

Today, the concept of sovereignty acquired a new character as it is wrapped in a different character than its original core.

As explained under this section, the concept of sovereignty had important changes in its character since *Jean Bodin*. Such a change occurred either in the external aspect of sovereignty which is also known as the character of being "self-dependent" or in the internal aspect of sovereignty which is also known as the character of "domination".

The external aspect of sovereignty, in other words its quality of being an

[72] E. 1993/3, K. 1994/2 no. and decision dated 16.06.1994 . The relationship between the sovereignty concept referred in Turkish constitution and referred by Turkish Constitutional Court and EU membership is analyzed under the fourth section of this study and is not analyzed in detail in this section.
[73] Supra. p 35-36.

absolute sovereignty against other states and not determining its acts depending on other states or international entities, has had vital modifications in its character. Not only the *international law* and developing security mechanisms and *fundamental rights and freedoms* had an important role over this modification of the external aspect of sovereignty but also supranational institutionalism had a determinant role respectively. In other words, sovereign state in the international era is not as sovereign as it used to be in its classical stage.

Another aspect of sovereignty which is the domination, in other words exercising an absolute, supreme, unconditional, legal power over a definite territory and population has also changed as well as the external aspect of sovereignty. Internal sovereignty in this regard has become different from its first conceptual and practical meaning and changed both in that it is distributed among state bodies, where this appearance of sovereignty is materialized, in terms of *usability* and the state is framed with rule of law and human rights, and in that it has been *fundamentally* distributed among the communities and/or territorial regions (state or land) within a state. Internal sovereignty has been transformed around the principle of separation of powers and rule of law-human rights, against the threat that the individual -i.e. the source of sovereignty- loses it by granting it to a single authority. Furthermore, internal sovereignty in multi-centered political systems has been distributed among communities and/or territorial regions/lands on which they live as legal and political communities: therefore, more than one sovereign institutions/areas/environments have been created which guarantee easier intervention –through the above-mentioned mechanisms- of the individuals, who are the real owners of sovereignty, in legal actions as a result of this sovereignty or in state activities in general.

Changes that occurred in the both aspects of sovereignty have caused sovereignty to be re-defined as a *threshold* concept while omitting it from being a relatively abstract concept.

This new definition stands on the explanation that sovereignty being an

equivocal threshold concept rather than a univocal concept.[74] According to *Lee*, who argues a new explanation concept in order to replace sovereignty, the postulate that points out an absolute sovereignty should not be understand as the sovereign holds an unlimited power. This postulate shows that sovereignty is a threshold concept. Threshold concepts, are applied to a situation all or nothing, under some certain variables and if they are at a certain intensity. For instance; "adulthood" and "autonomy" are the legal concepts that are applied as all or nothing. In this context children does not have autonomy but adults has. Autonomy stands for the threshold that has been reached by an adult whose behaviors are discretionary. Autonomy can describe a "partial autonomy" in some of the cases and does not stand for a threshold concept; however it has an important use as a threshold concept.[75] *Lee* goes ahead as follows:

"Sovereignty is a concept that has many usages; however, its primary use is that it is, to my personal view, used as a threshold concept such as 'autonomy'. Like discretion and maturity as background variables of the concept of autonomy, the concept of power (competence) is the background variable of sovereignty as a threshold concept. The most important characteristic of a state is that it has a rule-imposer group who holds relatively a more specific power than others within a society (*or in its relations with other states*). Sovereignty is a concept that we use to design the existence of this characteristic. Therefore, the sovereign state necessitates political mechanisms that have basic and superior power relative to other group and mechanisms. As a threshold concept sovereignty is all or nothing. A state either has a rule-imposer group (organization) that holds a basic and superior power or not. Whether a state is sovereign depends upon the degree of the relative power of the rule-imposer group it has; however, sovereignty of the state is not a function which is a linear counterpart of this relative power. Power (competence) can be divided; however, sovereignty cannot be divided."[76]

Main argument of this section is that sovereign state has had a notable change in its internal and external aspects of sovereignty. As a result of this

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[74] Steven Lee, *A Puzzle of Sovereignty*, CWILJ, Volume 27, 1997, pp.241, 251
[75] İbid. p. 242
[76] İbid. p. 243

changes, state as a political entity and the space of its sovereignty is narrowed. Anyhow, states neither in its internal relations nor in its external relations can use unlimited public power and are not independent as they used to be in the international era. However, in order to emphasize the aim of this section, it should be stated that state sovereignty has not been disappeared. The narrowing in the sphere of sovereignty, in other words; decrease of opportunity to use the public power and rights arising from the character of being a supreme constitutional power and acting independently in international platforms, does not cause sovereignty to disappear with a mere linear relation. State sovereignty still pursues its presence in this step of development both theoretically and practically; because the background of sovereignty which can be named as the public power and competences arising from sovereignty supports sovereign state with a sufficient density. However, the function of this density becomes a negative function as states lose their competences arising from sovereignty. This situation, while creating the conflict of competences within the multi-centralized political structures (i.e. federal systems), whether the political structure is multi-centralized or unitary, the loose of competences in the external aspect of sovereignty, creates complex national-supranational conflict of competences.

The nature of these conflicts includes the complex relation between the owner of the competence and competence-exercising act, and another crucial issue that makes answer more difficult to the problem is the new legal personality of the subject of this relation: EU, whose members are states and EU itself is a supranational entity, is a distinctive example of this complex structure.

# CHAPTER 2 SOVEREIGNTY AND COMPETENCE IN EUROPEAN UNION IN THE LIGHT OF THE JURISPRUDENCE OF ECJ AND MEMBER STATES' COURTS

EU is a structure that restricts the sovereignty of state, in clear word, some parts of Member States' power on public apart from sovereignty of Member States. On many field, internal and external sovereignty of Member States has been transferred to EU. However, should be declared that, on the view of separation of power of legislative, executive and judicial which rise from functional meaning of sovereignty, EU institutions do not have the executive competence (except some points); in this respect constitutional order of EU is a structure that executive competence is nearly absent.[1] Executive competence belongs to Member states.

In the perspective of sovereign legal order and the importance of the sovereignty holding place in the founding and positive legal sources, EU always is a field of the debates and developments. The crucial points are the judgments of ECJ and supreme courts of Member States and doctrinarian approaches to what character of the legal order and founding Treaties of the EU mean. However, initially it should be stated that, if some of definitions above for sovereignty construe restrictively, reaching the healthy and correct consequences will be difficult. In the other hand, some of the definition of the sovereignty mentioned above will assist to criticize the issues.

## I. A General View to Sovereignty from the EU Legal Order

Sovereignty issue in the EU on the base of the character 'being not bounded by other authorities' of sovereignty cannot resolve on the field of EU legal order, because of the meaning of the definitions and concepts used above to explain the sovereignty. The legal situation of a state citizen in foreign state can be an instance

[1] George Bermann and Kalypso Nicolaidis, *Basic Principles of Federal Allocation of Competence*, http://users.ox.ac.uk/~ssfc0041/FV-Bermann-Nicolaidis.pdf, 21.01.2005

for this issue. As a conclusion of the character 'being not bounded by other authorities' of sovereignty state of that citizen, the state has some rights such as protect its citizen on the criminal and civil law or request of extradition. Although, on the perspective of the legal order of the EU, can be seen that status of the citizens is defined so different. The relation between the citizen and his country – because of, the relation between the EU and the EU citizen is not based on the nationality status- never be same with the relation between the EU citizen and EU. Therefore, sovereignty can not be explained on the view of the character 'being not bounded by other authorities' of and the rights brought to the member state.[2] Same conclusion can be reached on the view of said character of the sovereign state and immunity of the state's delegates. ECJ also stated that EU citizens have different status from classic citizens, Member States are authorized to regulate the own citizens in case of the matters which are not under EU law and citizens can not claim the rights rises from the being EU citizen, against to the Member State.

Internal view of the sovereignty also cannot be used in the analysis of legal order and sovereignty of the EU due to the sui generis legal order and structure of the EU. Functional meaning of the seperation of the powers that finds its meaning in the internal character of the state sovereignty is different in the EU legal order from the classical political and legal state order. While the member of the EU Council of the Ministers which is one of the important institutes of legislation function, formed by the representatives of the member States' governments, though, unitary or federal states' legislation function is formed by direct general election, does not fit the relation between the sovereignty and separation of powers on the EU legal order.[3]

On the other hand, because of EU legal order and institutional structure which is reflecting some similar aspects with the federal government structure, division by community or territorial (geographical) basis which found the meaning in the different character of internal sovereignty of state can be used as a reference point

[2] For the provisions arranging the statuses of union citizens, see ECT art.17-22
[3] Case 64 and 65/96 Landesarbeitsgericht Hamm v. Germany [1997] E.C.R I- 3171

to analyze sovereignty in the EU legal order. In fact, by using some definitions such as "main center – peripheral center", 'restricting the main center competences by listed' and 'residual competences belongs to the peripheral center' in the Constitutional Treaty[4] which is constitutional document and accomplished and submitted to approval on 2004, the doctrine[5] and judgments of the ECJ and Member States supreme courts, the issue regarding the sovereignty between the EU and member States have tried to analyze.

Definitions which define legal order of the EU on the sovereignty perspective are more define then the classic definition cited, supranationality, law of integration[6], direct application / direct effect, supremacy. Those definitions set in the doctrines, ECJ awards, Supreme Court decisions and not approved Constitutional Treaty's articles and the relation regarding the sovereignty between the EU and member states has been tried to make clear.

## II. Transfer of Sovereignty in EU Legal Order and Founding Treaties

First level legal resources are founding treaties and amended treaties which are the top of the hierarchy of the EU legal order. Following that decisions directives and regulations of the institutions concerning the legislative function are coming secondly. Mentioned Treaties has two main features on the view of sovereignty. First feature is that all articles of those treaties are not legally binding as classical constitutions have that qualification from the first articles to last. Second property is also set in the classic norms and the documents called constitution by define the sovereignty clearly though, in those treaties which are on the top of EU legal order sovereignty is not formulated. In the first property, most of the articles set in the treaty establishing formulated clearly for binding effect though, some others are only programmatic, aim pursued or targeting articles. For

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[4] CT, Part I, Title III, art. I-11, 18;
[5] Franz Mayer, *Competence- Reloaded? The Vertical Division of Powers in the EU after New European Constitution*,http://www.jeanmonnetprogram.org/papers/04/040501-16.rtf.
[6] Pierre Pescatore, *International Law and Community Law- A Comparative Analysis*, CMLRev. Volume 7, 1970, p.167

instance, EC Treaties articles regulating the free movement of the goods ECT art. 23 and 24, ECT art. 25, 26, 27 abates the difficulties of duty and amount restriction, are clear and sure therefore they have direct effect and have legally binding force. On the other hand, articles 149 of EC treaty regulates the education, vocational education, subject of the youths, article 151 regulates cultural subjects, article 152 regulates public health security and as such articles are offer a program. These are the not direct application articles that aim at the cooperation between the member states or make the member states plans in their initiative. First group articles called direct effect or direct application articles and those articles has a place on articles of the constitution of the member states – supremacy. Second group articles have not the property as direct application, direct effect or supremacy.

On the close view of the second main property of the Treaties establishing the EU on the field of the sovereignty, no articles is set in these treaties regarding the sovereignty of EU or the relation between the EU and member states. Neither in the EEC Treaty nor in the following treaties which created by the important development includes such articles. Cited issue is tried to solve by the state Supreme Court decisions and ECJ decisions and harmonization of the decision and also by some EU Law disciplines' doctrines. Besides, the sovereignty sharing issue between the EU and The member states can only be solved in particular by setting the some articles – regulations are being criticized though[7] - in the Constitutional Treaty.[8]

In summary, sovereignty issue is partly and indirectly defined in the founding treaties. EU only can use the sovereignty in conjunction with direct effect articles set in the treaties. Regarding the sovereignty issue no normative regulation or mechanism set in the treaty establishing the EC.

Even though it is a general and normative regulation, ECT art. 10 which is

[7] Mayer, p. 20 vd; Grainne De Burca, *Limiting EU Powers*, ECLR, Volume 1, 2005, p. 94 vd.; W H Roobol, Federalism, Sovereignty, etc., ECLR, Volume 1,2005, p. 87 vd.
[8] Robool, p. 90-91

not including the sovereignty issue, may be deemed as auxiliary regulation due to include the aim the prevention of the Member States' actions prevents the EU acts. According to this article:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

Even though this article obligate the Member States to act under the aim of Community though, it should be deemed as explaining the further phase following the who has the sovereignty, in other word, in case the EU has the sovereignty, legal acts should not be prevented by Member States and put under cover the Member States' such behavior against the any behavior prevent the sovereignty of EU. In fact, doctrine called this article as solidarity clause[9] and defined as the restriction of the Member States' boundary of responsibility.[10] Minority of the doctrine that on the contrary of the ECJ case law accepted that the article 10 is the most important article of the principle of the constitutional law of the Union.[11]

ECJ also applies this article as an obligation in order to liable the member states which are not including this article in their own legal system or not administering. ECJ made a decision[12] in order to a referred issue which is concerning the violation of EEC Regulation numbered 120/67 that administrating the domestic

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[9] Sometimes referred to as the principles of *loyalty*.
[10] Dominic Lasok, *Law & Institutions of the European Union*, Sixth Edition, Butterworths, 1994, pp. 38-40, 125; Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, Third Eds., OUP, 2003, pp. 257-259
[11] Bronitt, Burns, Kinley, *Principles of European Community Law*, LBC Casebooks, 1995, pp. 106-109
[12] Case C- 34/73 Variola SPA v. Amministrazione Italiana della Finanze [1973] ECR 981, p.15

articles of the member states against the direct affective and predominate articles of the EU makes an obligation for the member states.[13]

Absence of a basic and general regulation and EU's acting based on the restricted sovereignty caused the debates and enable to solve the issues by doctrine, ECJ decisions, and member states supreme courts.

## III. Sovereignty in the ECJ Case Law

During the creating the Community legal system and its sovereignty and domination, as cited above, taking the treaty establishing the EC as a base by ECJ is being occurred as an ironic situation for the law theory. ECJ defined the legal concepts in some serial decision by commenting the treaties and create the legal system and sovereignty of this legal system.

### A) Van Gend en Loos

ECJ has used the concepts created by own decision besides the classic defined sovereignty concepts. First of these important decision is *Van Gend en Loos.* ECJ made important decision in this award which is concerning the defining the articles of EEC Treaty and criticizes the legal field created by this treaty.

"To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble

[13] Parallel decision, Case c-240/89, Commission v. Italy [1990] ECR 4853; Case C- 381-92, Commission v. Ireland [1994] ECR I-215

to the treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects member states and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the community are called upon to cooperate in the functioning of this community through the intermediary of the European parliament and the economic and social committee.

In addition the task assigned to the court of justice under article 177, the object of which is to secure uniform interpretation of the treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals . The conclusion to be drawn from this is that the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community."[14] Decision has some important points has to be examine.

First of all, ECJ points when declaring the EEC Treaty is more then a treaty regulates the obligations between the member states, legal order created by the treaties is deferent form the legal order of the Member States. Second point and also one of the reasons of the cited detection is, EEC treaty includes the Member states and their citizens as a part of the treaty. Third important point is, Community institutions authorized with sovereign power and their decisions affects and bind the member states and their citizens. Fourth and most important point is, restricting the sovereignty power of states on favor of the Union, even tough restrict for limited field which composed in the authorization of ECJ nomination regarding the

[14] Case C- 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1

providing the accord between the member states courts decisions and ECJ's decisions. At this last point, subject of the Union Law are the states and their citizens in this context, Community Law is a new legal formation.

This decision of ECJ describes that new legal formation is the dominant legal system. In fact ECJ make this unseen sovereignty by compose as article of Constitution with stressing the points cited in the treaties. Citizens one of the resources of the constitutions' articles also being the subject of Union Legal form was declared consciously in the ECJ's decision written above. With this conjunction, rights of the citizens arise up from the treaties, as can be predicted in the articles of the treaties, also in some situation, occurs as in the articles described obviously either for Member States and for Union's Institutes and for the individuals.

**B) Costa – Enel and Internationale Handelsgesellschaft**

Constitutional quality determined by the ECJ of Treaty founding the Community and the new legal order is declared clear and definitely in the next decision. According this decision called *Costa-Enel* referred to the ECJ, in the process creating the common market, by the member states due to conflicted the article 37 of the EEC Treaty abating the restriction of quantity between the member states and in this context regulating the non-discrimination principle through the international cartels which has commercial quality, article 53 regulates the freedom of establishment and article 93 regulates the examination power of the commissions for the States contributions with some local articles, pursuant to the article 234 of EEC Treaty:

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions,

its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord [...] precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."[15]

ECJ reached the limits of purposeful interpretation in this particular decision[16] and it approached the sovereignty of Community legal system by underlining the spirit, goal and objective of the treaty, rather than the text of the treaty itself. The first interesting point in the decision is that ECJ developed its

[15] Case C-6/64, Flaminio Costa v. ENEL [1964] ECR 585, 593
[16] For criticisms of the application of this method, see. Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, Third Eds., OUP, 2003, p. 278; Pierre Pescatore, *The Doctrine of Direct Effect: An Infant Disease of Community Law*, ELRev., Volume 8, 1993, p. 156 et al.;

interpretation concerning the *Van Gend en Loos* case and decided that the Community legal system was not a part of the international legal system and that the Community had an original legal system of its own. By separating EEC treaty from other treaties made by the Member States among each other on the basis of international rules of law, the ECJ stated that this particular treaty established a legal system of its own. Therefore ECJ gave the first sign that the Community legal system was different from and independent of the international legal system. Secondly, ECJ underlined transfer of sovereignty or the transfer of authority deriving from sovereignty; however, going further then, it emphasized that this limitation or transfer was *permanent*.

I am of the opinion that this limitation or transfer of sovereignty has two important aspects. One of these is, as can be observed clearly in ECJ decision, that, due to the limited or transferred sovereignty, rules of the Community legal system no more make possible the implementation of conflicting domestic legal rules and render further actions invalid. Secondly, even if not observed clearly, with this *superiority* principle implicitly agreed and established, it has posed a challenge to constitutional systems of the Member States. ECJ has established this superiority principle, which it founded on the basis of the mentioned limitation or transfer of sovereignty, without making any references to whether the Member States recognize this superiority with their constitutional rules. Therefore with the superiority principle, ECJ has limited the sovereignty of the Member States without any constitutional recognition of the Member States. ECJ made this implied interpretation in another decision of it, but explicitly this time.[17] In this case where a national court decided that one of the Community actions violated the German constitution, ECJ decided as follows:

> "Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure ."[18]

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[17] Case C-11/70, Internationale Handelsgesellschaft mbH v. Einfur-und Vorratsstelle für Getreide und Futtermittel, [1970] ECR 1125

[18] For reflection of the judgment in German jurisprudence see below IV.A.2.

### C) Simmenthal and Factortame

The sovereignty of the Community legal system has been strengthened by the *Simmenthal* decision, which has an important place in this chain of decisions of ECJ. The topic of this case is that a firm that imports meat from France to Italy demanded reimbursement of the fees charged during health control at the border from the local tax office (Pretore) arguing it was not compatible with the Community law. As a respond to the decision of Pretore in favor of reimbursement to the firm, the Italian superior tax office claimed that Pretore did not have any authority not to apply the national law which was in conflict with the Community law, and thus when it decided to pass the case to the Italian constitutional court which was authorized to resolve the case within the Italian law, Pretore sent the case to ECJ under article 234 of EUT instead of to the constitutional court. Pretore thus asked for consultation from ECJ whether it should, under these conditions of the case, take into account the national law without going into a constitutional process.

Some important sections of the decision of ECJ in response to this application must be indicated here.

"Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but -- in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States -- also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the

Community rule.

..., a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."[19]

I am of the opinion that the *Simmenthal* decision has constituted the most important step of the case-law so as to ensure sovereignty by *constitutionalization* of the founding treaties of ECJ and making the Community legal system a *supra-national constitutional system*. The important aspects of the decision for our case have been analyzed in details by *Karakaş* in his work that studies the Community legal system[20]: "...Simmenthal decision must be evaluated within the framework of the sovereignty rights of the Member States transferred to the Community and the constitutional systems becoming dependent on the community legal system. As a result of the transfer of sovereignty of the Member States in favor of the Community, the power to make normative operations in the mentioned fields has passed to the Community and these operations have superiority over domestic legal systems."[21]

"Therefore it becomes clear that domestic legal provisions in conflict with the directly applicable Community law provisions are not 'applicable'. In terms of the later domestic legal provisions in conflict with the Community law, they are not inapplicable, but non-existent."[22]

"As a result of the transfer of sovereignty rights from the state to the Community, which constitutes the basis for the superiority of the Community law, the states have lost their power of legislation in the fields transferred to the Community. ...[i]n other words they are in absolute incompetency."[23]

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[19] Case C-106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SPA [1978] ECR 629, 635-636
[20] Ayşe Işıl Karakaş, *Legal System of the European Community and National State Sovereignty*, Der Publications, 1993, p. 98
[21] İbid. p. 99-100.
[22] İbid. p. 100
[23] İbid. p. 101

"The important aspect of the strengthened superiority of the Community Law with Simmenthal is that it has been a preventive effect for the constitution of new legislation which may be in conflict with this law. In this regard, there is no significance of the principles of lex posterior and lex specialis[24] in terms of the Community law."[25]

One of the most important aspects of the Simmenthal decision is the principle, which has been analyzed above and emphasized in one of the former decisions, Costa, that national law provisions are inapplicable even if they have been adopted after the provisions of the Community law. This principle which is about the sovereignty and superiority of the Community law has been more clearly and explicitly expressed in this decision. Member State parliaments are not able to legislate in fields where sovereignty has been transferred.

"As a result of this decision, the Italian judge not only is freed from the obligation to follow the case-law of the Constitutional Court, it has also been instructed not to do so as an obligation."[26]

"The national judge who is responsible to secure superiority and the immediate effect of the Community law is expected to put aside the constitutional principles. He/she can no longer take the constitutional principles superior in cases where a constitutional rule is in conflict with the Community norm.

In other words the basis for the authority of the judge to provide direct remedies within his/her own legal system for conflicts with the Community law lies within the system established by the Community."[27]

This second important aspect of the judgment is that it is the role given by ECJ to local courts that do not have the authority to ignore or not to apply the

[24] Lex posterior derogat priori means later law rendering former inapplicable; lex specialis derogat generalis means special law rendering common law inapplicable.
[25] İbid. p. 102
[26] İbid. p. 104
[27] İbid. p. 104

national law in the domestic law in cases where the sovereign and superior Community law conflicts with the national law. The fact that the Italian court handling the case does not have the authority to solve conflicts between domestic law and the Community law and that this authority is in the hands of the Italian constitutional court have resulted in ECJ to emphasize an important aspect of its practice to secure sovereignty and superiority of the Community law. ECJ thus gave the national judge the responsibility to put aside the domestic conflict-resolving constitutional norms at times of conflict between the national law and the Community law even if it is not mandated to solve such a conflict, and to apply the Community law; and thus it turned the national court into the constitutional court and the national judge into the constitutional judge.

This superiority of the Community law has also affected jurisdiction principles of the Member States. *Factortame* (Factortame I) decision is the most concrete example of this situation.[28] While Factortame was a firm operating with its fishing ships registered as to the British Merchant Shipping Act of 1984, the UK adopted a new law declaring that former registrations had expired and that all commercial fishery ships would be registered again; this law also stipulated that owners or operators of these ships were to be British nationals. Along with other affected firms, Factortame also applied to British courts against this law. Factortame demanded that relevancy of the new arrangement to the Community law be asked to ECJ and requested interim relief including postponing the new arrangement until the case was resolved. The decision for interim relief of the regional court, which was decided as a demand, was brought by the government to the court of appeals, and the court lifted the decision for interim relief. In the second appeal, the House of Lords brought the case to ECJ in accordance with the principle of preliminary decision, and argued that it was not possible for British courts to take such measures against the government in accordance with the *common law* principles and that the British laws were in accordance with the Community law if there was no decision to the contrary; and the House then asked ECJ whether British courts could take such decisions for interim relief to secure the rights

[28] Case C- 213/89, R. V. Secretary of State for Transport, ex parte, Factortame Ltd. And Others [1990] ECR I 2433

emanating from the Community law against domestic legal arrangements in conflict with the Community law. In this judgment where ECJ made references to its prior judgment, ECJ stipulated that domestic legal actions which could possibly hinder the superiority of the Community law -even if temporarily- shall not be implemented: "The full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law . It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."[29]

As can be observed, if it is possible to ensure the superiority of the Community law during a domestic jurisdiction with an interim measure, the national judge is responsible not to apply the laws that impede this measure[30], and is obliged to leave aside the mandate granted by the sovereign state to judge in accordance with the domestic law and like a Community court to opt for the superiority and sovereignty of the Community law.

### D. The ECJ's Case Law Regarding the Infringement of Sovereign EU Legal Order by Member States

In the Article 226, 227 and 228 of the ECT the power to control the national institutions of the Member States whether infringe the norm of the Community law or not was given to the ECJ. The ECJ has been enriched case law which emphasizes its dominant and superior legal order by the decisions against the infringement of the Member States Community's legal order or several arguments of the Member States to defend their infringement.

#### 1. Case 77/69, Commission v. Belgium and Case 48/71, Commission v. Italy

[29] İbid. p. 2438
[30] İbid. p. 2438

The Commission bringing the case[31] for the infringement of the Treaty by the Belgium Government which could not made draft tax act become law to harmonize the national tax law with the Community law by the reason of dissolution of the parliament. The ECJ did not accepted the reasons of the Government claimed that in accordance with principle of 'separation of powers', the power to make become law possess to the parliament which had been dissolved, thus the situation is a force majeure. The ECJ gave the case against the Belgium Government by declaring reasons grow out of the national law do not bar superiority and implementation of the Community's legal order. In another case, the ECJ regarded forestall of the superiority and implementation of the Community law as infringement of the Treaty by internal arrangements while legislative activities of the Parliament. Furthermore, the ECJ declared 'for the Community law, limited sovereignty of Member States during the period of rule in favor of Community institutions, thus none of national legal principle overbalances the Community law'[32].

### 2. Case C- 301/81, Commission v. Belgium[33]

Belgium Government which had not been fulfill legal arrangements to provide coherence between provisions of Regulation 77/780 that considers harmonization of banking and financial institutions and the Community law, thus, infringed obligation grow out of the Community law objected to the case by asserting reasons of the Commission is irrelevant why had not balked the superiority and implementation of the Community law purposely. These arguments of the Belgium Government had not been adopted by the ECJ. The ECJ give the case against the Belgium Government implying whether breaking of norms of the Community law or not purposely; or apprehensible inaction of Member State does not effect the consequence for in this situation superiority of the Community law over law orders of national law come to harm in any event. In this context, infringement of norms of the Community law either inconsiderable or little is not important.[34]

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[31] Case C- 77/69, Commision v. Belgium [1970] ECR 237;
[32] Case C-48/71, Commission v. Italy [1972] ECR 529
[33] Case C-301/81, Commission v. Belgium [1983] 467
[34] Case C- 43/97, Commission v. Italy [1997] ECR 4671

### 3. Other Judgments

ECJ did not regarded admissible plea of the Member States which do not abide by the rule for the reason that the rule had been laid down by misapplication of the Community law. According to that, for authorities of national law orders do not have power to interrogate legality of the Community act, thus, could not bar superiority of the Community law.[35] Furthermore, a Member State can not abstain to implement the rule asserting that another Member State has not been implemented.[36]

## IV. The Reactions of Member States' Supreme and Constitutional Courts[37]

Feature of the European Union which has not been composed by express, definite, simply applicable rules[38] caused to extremely active and dynamic case law of the ECJ that build originality, sovereignty and superiority of this law order; although founder treaties has not involve norms which imply sovereignty and superiority of the European Union Law expressly and a group of states which every of them a national state has been acting according to powers of their sovereignty. However, high courts of the Member States had been experienced difficulty to accept understanding of the ECJ about the EU law for their interpretation of in some cases constitutional order and in some cases founder treaties. That situation caused to evaluation of sovereignty problem to problem of 'powers' occurred by the sovereignty especially and more and more. In this meaning, constitutional norms and decisions of high courts of the Member States which has most interactive with the ECJ and equally has effect on the problem become important. Since the goals and themes brought into the EU law following the TEU (Maastricht Treaty), which are considerably different from new and former treaties, deepen the practice of supreme courts of the Member States regarding transfer of sovereignty and authority in terms of quality, such a chronological classification will be made in studying these decisions.

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[35] Case C- 226/87, Commission v. Greece [1988] ECR 3611; Parallel to this decision, Case C- 70/72, Commission v. Germany [1973] ECR 813

[36] Case C- 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1

[37] Quotations from the constitutions of European countries have been taken from the address: www.ecln.net.

[38] Pierre Pescatore, *The Law of Integration: Emergence of a new Phenomenon in International Relations based on the experience of the European Communities*, Leiden, A.W.Suthoff, 1974, p. 20-24, 27 et al.

## A) The Period before TEU

### 1. France

In France which espouse monist system in acceptance of international law differently from the other Member States that espouse dualist system; transfer of sovereignty to the EU and 'power' issue shows discrepancy for this state and Constitutional Council. According to the Article 55 of the France Constitution dated 1958, the international agreements which accepted according to procedures, coming into effect after publishing without any national law process, are above acts. Thus, the matter is the conformity of the relevant treaty to the Constitution; this issue was regulated under the Article 54 of the Constitution and constitutional audit of the agreements will be made by the Constitutional Council was arranged (pre auditing). According to our subject, core of this pre auditing is transferring of sovereignty or curtailment of powers and powers issue appeared that.

The Constitution, dated 1958, even has not been touched on the issue expressly, envisaged that France may 'limited the sovereignty depending on reciprocity stipulation to provide and protect peace' dealing with the preliminary rules which cast back to the Constitution dated 1948.[39] According to that, in France the problem of transfer of sovereignty and 'power' is concerned with decision of the Constitutional Council which will reach a decision after audit of the agreement according to the Constitution. The agreement will not come into effect until amending of the Constitution whether the Council declares any norm of the agreement infringes the Constitution.

In that meaning, in the related decision, the Constitutional Council emphasized *limitation* more than the terms sovereignty and transfer of sovereignty by declaring EU law can not eliminate the powers which occur *fundamental conditions of national sovereignty.* The Council stressed that in such a situation

[39] Jean Victor Louis, *The Community Legal Order*, The European Perspectives Series, 1993, p.180

execution of powers occurring fundamental conditions of sovereignty by EU may be only provide by amending of the Constitution.

The decision of the Constitutional Council, dated 19.6.1970, about the limitation of sovereignty and powers against the Community which states firstly principle of powers occurring fundamental conditions of national sovereignty was given in the case bringing against the decision of Commission of the EC, dated 21.4.1970[40], which regulates Member States of the Community has own sources instead of their financial contribution. The Constitutional Council has been expressed that processes of the Community has not interfered the power of France institutions occurring sovereignty and not infringed the powers occurring fundamental conditions of national sovereignty.[41] In the case bringing by the president of France against the decision about election of members of European Parliament directly unconstitutional, in the decision dated 20.12.1076, the Constitutional Council had not declared that is unconstitutional. Per contra, the Council stated that important transferring of powers occurring fundamental conditions of national sovereignty to the institutions of the Community which has autonomy may be required the amending of the Constitution.[42]

The Constitutional Council takes into account the principle of powers occurring fundamental conditions of national sovereignty not only in the decisions related with EU, also in the case law related with ECHR. Essentially, the Council declared the conditions of that principle in the decision given against protocol that related with annulment of capital punishment of ECHR in 22.5.1985. According to that, these conditions are required respect of institutions of Republic, continuity of national existence and protection of rights and freedoms of citizens. [43]

### 2. Federal Republic of Germany

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[40] Paul Craig & Grainne de Burca, *EU Law*, p. 18
[41] Jean Victor Louis, 181
[42] İbid., 182
[43] Jacques Ziller, *Sovereignty in France: Getting Rid of the Mal de Bodin*, in Neil Walker, *Sovereignty in Transition*, Hart Publishing & OUP, 2003 , p. 275

According to Article 24 of the Constitution of Federal Republic of Germany, Germany may transfer sovereignty rights to the international institutions by legislation. In accordance with this rule of the constitution, Constitutional Court of Germany dealing with acceptance of transfer of sovereignty to the EU decided in some case before the ECJ that this is not an unlimited transfer of sovereignty. Even though the general principle is the transfer of sovereignty by legislation, in transferee institutions, the transfer of sovereignty should be limited to the extent where there exist aspects in contradiction with the principles of *inviolability and protection of human dignity*[44] and *democratic state*[45] which are identified in the non-changeable articles of the German constitution. German Constitutional Court had been given important judgment about the sovereignty and depending on powers on the ground protecting those two principles.

Above examined decision 11/70[46] of ECJ, had been brought before the Constitutional Court by the German Administrative Court which exercise preliminary ruling procedure for this decision. Subject of this decision is by-law of the Community which regulating import and export at agriculture envisaging whether the import or export can not come true, not giving back deposit putted into for import or export permits. Hereupon, Internationale Handelsgesellschaft mbH firm had been resorted to the Administrative Court asserting that this situation runs contrary to the economical and professional rights regulated in the constitution and the Administrative Court had been brought the by-law regarding validity before the ECJ by preliminary ruling. Although the decision of the ECJ, citied above, the Administrative Court had been taken the case to the Constitutional Court.

The Administrative Court had been brought the case before the Constitutional Court by objecting that sovereignty has been transferred to the Community more than permission of the Article 24 of the Constitution and general constitutional order and continuing integration process of the Community divesting some national powers of Germany and delegating to the some institutions which are

[44] Constitution of Germany art. 1
[45] Constitution of Germany art. 20
[46] Supra. p. 54

not under control of the Constitution. Part regarding transfer of sovereignty and competences of the judgment, as known commonly *Solange I,* take an important place in this judgment: "Article 24 of the Constitution is regarding with the transformation of sovereignty rights to the international institutions. But, this, unless the constitution is amended, does not give rise to changes in fundamental structure of the constitution. This road can not be opened by disposal of the international organizations. Authorized institutions of the Community may make a law which constitutional institution of Germany can not legislate and moreover accept it valid and implement directly. But, Article 24 limits this possibility by annulment of any article of agreement which will cause weakness of the constitutional structure of Federal Republic of Germany by changing this structure.

Part of fundamental rights of the Constitution is inalienable, *essential feature of this constitution*[47] and embodies the constitutional structure. Current integration stage of the Community is critically important. Community has not been possesses a democratic, legal parliament which has been elected directly and exercising legislative powers. Bodies of the Community exercising legislative power are strictly on political plane. The Community is devoid of a human rights catalogue confidential and explicitly and in the same degree with the German Constitution.

Therefore, putting under cover the fundamental rights guaranteed in the constitution have superiority whether a confliction between the fundamental rights guaranteed in the constitution and the Community law until the Community institutions cease the confliction according to mechanisms in the agreement."[48] The Court, in the *Solange II*[49], took different position with three justifications. The Constitutional Court declared "the German Courts and agencies, in their processes, could not exercise the power to control the validity of the Community acts" [50] considering evolution of protecting the fundamental rights by the ECJ, declarations about the protection of the fundamental rights by the institutions[51] and having regard ECHR as a part of the Member States law. Even though in that decision the

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[47] The emphasis was added.
[48] [1974] 2 CMLR 540, 549-550
[49] [1987] 3 CMLR 225
[50] [1987] 3 CMLR 265.
[51] For these declarations see, A. Cassese, A. Clapham & J H H. Weiler, *European Union: The Human Rights Challenge*, Baden-Baden, 1991; Lammy Betten & Nicholas Grief, *EU Law and Human Rights*, Longman, 1998.

Constitutional Court seems that it softened its previous decision, again *as long as*[52] in other words stated that it would not infringe as long as the Community law protected fundamental rights.

### 3. Italy

Case law the Italian Constitutional Courts about limitation of sovereignty and transfer of powers have been grounded on three important points. First one is Article 11 of the Constitution and the limits of transfer of powers according to that article that states sovereignty of Italy may be limited for reached the aim in favor of organizations which are formed to provide peace between the states and justice. Second one is emphasis to that the EU Law and the Italian national law having different and autonomous law orders. And the third one is reserving the right to having the last word belongs to the Italian Constitutional Court where a confliction between these different and autonomous law orders.

In the *Frontini*[53] case, the Constitutional Court accepted the direct effect of the Community law and declared that to affirm the Union agreements under the constitutional power of the Italy. Even though the Court decided depending on the article 11 of the Constitution, it also declared that this acceptance and approval is not unconditional and absolute. The Court may analyze whether the fundamental rights and freedoms of the Italian citizens and fundamental principles of the Constitutional order of the Italy has been infringed or not while the Community institutions exercise the powers. In the *Granital* case, the Constitutional Court expressed simply that whether a confliction between the Community by-law which is appropriate to the article 11 of the Constitution and the principles mentioned above, and an act which passed after a date of this by-law; latter act may not eliminate the by-law. As a reason of that situation the Court emphasized that the Union law and the national law are two different and autonomous legal orders, when the Article 11 of the constitution and article 249 of the ECT[54] was analyzed together delegation of power between the Community institutions and national legislation has a constitutional ground, thus, it is impossible to talking about the

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[52] English equivalent of the word *solange*.
[53] Frontini v. Ministero delle Finanze, [1974] 2 CMLR 372
[54] EUT art. 249: Rules have a general scope. They are binding with all their components and applied directly in all Member States.

invalidity of the latter act, but for related conflicting legislation area under the authority of the Community institutions related act of the national law can not be implemented, however, out of the administration of the Community institutions it is still valid.[55]

According to the Italian Constitutional Court when fundamental rights and freedoms is discussed asking validity of a Community measure by preliminary ruling has a special importance. In that meaning in the Fragd judgment the Court declared that in the event that a conflict between a Community act and a national law and the Italian Court asked for an opinion to the ECJ by preliminary ruling whether the decision of the ECJ provided the validity effect of the Community administration, consequently invalidity of national law rule, would not accepted such kind of judgment which caused infringement of fundamental rights and freedoms.[56] Thereby, whether these pointed two legal orders conflicted on issues that mentioned above the Constitutional Court implied that reserving having the last word about the dissolving the confliction and confirming that who has the power in related areas as much as the ECJ or the other institutions of the Community by the reason of limitation of sovereignty and transfers of power accepted in principle.

### B) The Period after TEU

#### 1. France

Maastricht Treaty introducing essential provisions to the EU and EC Teaties in several areas such as monetary union, local elections, and participation to the European Parliament elections and security has given an opportunity to the Constitutional Council hardening previous caselaw. In the application of the President for determination of unconstitutional provisions of the Maastricht Treaty the Constitutional Council by Maastricht I decision dated on 9.4.1992 determined

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[55] R. Petriccione, *Italy: Supremacy of Community Law over National Law*, Paul Craig & Grainne de Burca, *EU Law*, OUP, 2003 within, p. 299

[56] G. Gaja, New *Developments in a Continuing Story: The Relationship between EEC Law and Italian Law*, Paul Craig & Grainne de Burca, *EU Law*, OUP, 2003 within, p. 300

that[57],

- carrying voting right of Member State citizens in local elections is unconstitutional
- carrying voting right of Member State citizens being at another Member State in European Parliament elections –for the European Parliament has been authorized by the Treaties, not by the France Constitution and by that reason this does not abrogate the fundamental conditions of national sovereignty- is not unconstitutional
- monetary union is unconstitutional for would caused to forfeit power of France in this area and would deemed abrogation of the fundamental conditions of national sovereignty
- abolishment of the unanimity quorum in the taking decision process under the article 100c of the ECT which regulates visa conditions of the third states citizens while crossing boarder of the EU.

By this judgment it was determined by adding a new article to the France Constitution is named 'European Communities and European Union' (article 88) that some powers of the Republic would be shared with the other Member States of the EU (article 88/1); consenting to the transfer of powers necessary for establishing the monetary union and designating the rules relating with accession from the external boarder of the Community (article 88/2) and having rights to voting and elective European citizens in France. [58] Constitutional Council has been continued its case law by the same token in the Amsterdam Treaty which provides changes in the EU law order.[59] Dealing article 88/1 added to the France Constitution with the case law of the Constitutional Council founded to the fundamental conditions of the national sovereignty it might be ascertained that France allows transfer of powers to the EU; however this was transferring of power which uses together to a states community. In consequence it might be stated that for what are the powers using together becoming importance, this is not a transferring of national sovereignty as a

[57] Jens Plotner, *Report on France*, Anne-Marie Slaughter, Alec Stone Sweet, Joseph H. H. Weiler (eds), *The European Courts and National Courts –Doctrine and Jurisprudence*, Hart Publishing, 1998 within, p.51
[58] Haluk Günuğur, European Community Law, EKO, third edition, 1996, p. 86-87
[59] Paul Craig & Grainne de Burca, *EU Law*, p. 288

whole but limitation.

According to article 54 of the France Constitution the last application to the Constitutional Council is application of the President on 29 October 2004 when the EU Constitutional Treaty was signed by France. In that application the President ask to the Constitutional Council whether is the Constitutional Treaty appropriate to the France Constitution or not. The Council about the fundamental conditions of the national sovereignty had been determined unless points mentioned below do not change, Constitutional Treaty is contrary to the France Constitution[60]:

- Council, considering procedure of article I-34 of the Constitution which regulates the "European Acts" and "European Framework Acts", article I-25 regulating qualified majority, article III-396 regulating simple legislation procedure and implementation of field of activities of those procedures are regulated in the third chapter of the Constitutional Treaty such as security, justice and freedom had been declared that all provisions are contrary to the France Constitution confirming in issues which could effect using of the fundamental conditions of the national sovereignty and without approval Council, considering procedure of article I-34 of the Constitution which regulates the "European Acts" and "European Framework Acts", article I-25 regulating qualified majority, article III-396 regulating simple legislation procedure and implementation of field of activities of those procedures are regulated in the third chapter of the Constitutional Treaty such as security, justice and freedom had been declared that all provisions are contrary to the France Constitution confirming in issues which could effect using of the fundamental conditions of the national sovereignty and -without approval- could cause to transfer of power. [61]

- Before the Constitutional Treaty, in some provinces of the EU (judicial cooperation in criminal matters, processes of Eurojust and

[60] Decision of the French Constitutional Court dated November 19, 2004 and numbered 2004-505. http://www.conseil-constitutionnel.fr/decision/2004/2004505/eng.htm , May 10, 2005
[61] Parag. 26

Europol and close cooperation related with freedom, security and justice matters) the Council had also been declared that articles III-270-271, III-273, III-276, III-191 and III-419 of the of the Constitutional Treaty which are regulated taking decision by qualified majority, unconstitutional to the France Constitution.[62]

- Enabling articles III-269 and I-40 of the Constitutional Treaty a possibility to the EU European Council or Council of the Ministers passing from the unanimity to the majority that could cause to change of taking decision with unanimity, especially related with the common foreign and security policy and family law matters had been stated unconstitutional to the France Constitution.[63]

- At last, the Council had been declared that general purpose conversional norms regulated in the article IV-444 of the Constitutional Treaty are unconstitutional. According to that article, EU European Council could be authorized for taking decision by qualified majority in all areas except defense or could be selected simple legislation procedure at any matter that envisaged special legislation procedure. The Council had found it unconstitutional that France was left ineffective at decisions in such a wide field and that supervision of the national constitutional approval principles were disposed of.[64]

## 2. Federal Republic of Germany

The German Constitutional Court, in its Banana decision[65], expressed that in assessing transfer of sovereignty and authority in terms of fundamental rights, the justifications of *Solange I* and *Solange II* decisions –insofar as fundamental rights are secured sufficiently in the Community, not to examine such operations of the Union in terms of transfer of sovereignty and authority- were still valid by its

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[62] Parag. 29-30
[63] Parag. 34
[64] Parag. 35-36
[65] U. Elbers ve N. Urban, *The Order of the German Federal Constitutional of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System'*, EPL, Volume 7, 2001, p. 21

assessment that certain provisions of the Maastricht Treaty[66] increased securing fundamental rights to the level of the German constitution. When one of the Community Provisions[67] stipulated that origins of banana imports to and exports from the Community be classified as to a certain classification, the situation became a case between German administrative and tax courts and ECJ[68] as a result of the application of German nationals damaged by this provision; and the Frankfurt administrative court brought this case to the Constitutional Court due to the justification that it was a disproportionate intervention to property rights and the right to trade and that this intervention was not compatible with the level of securing fundamental rights of the German constitution.[69] The Constitutional Court stated that protection of fundamental rights in the EU got closer to that in the German constitution, that this was secured by ECJ especially as of *Solange II* decision, therefore that it would reject processing cases on protection of fundamental rights brought by other German courts, unless it was not argued that the level of protection of fundamental rights remained below the level of the German constitution.[70] The German Constitutional Court maintained its case-law in the Solange decision and accepted that this was done by ECJ unless any violation to these rights was claimed.[71]

However, the situation is different in terms of the principle of democratic state. The Maastricht judgment of the Constitutional Court[72] was the most effective and interesting one in terms of the problem of sovereignty and competence. The case was filed by a group of German citizens claiming contradiction of the provisions of the Maastricht Treaty with the constitution. The basic argument was the principle of democratic state in article 20 of the constitution.[73] The principle of democratic state stipulates that every issue about Germany will be decided by the parliament elected by the German voters and which legislates under their mandate.[74] Thus, to the applicants, the Maastricht Treaty is inconsistent with the constitution.

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[66] TEU Art. 6 and 7 .
[67] Council Provision no 404/93,
[68] Case 280/93 Germany v. Commission [1994] ECR I-4873; Case C 465&466/93 [1995] ECR I 3761
[69] M.Aziz, *Sovereignty Lost, Sovereignty Regained: European Integration Project and the BverfG*, Robert Schuman Centre Working Paper, EUI 2001/31, p. 7. http://www.iue.it/RSCAS/WP-Texts/01_31.pdf
[70] İbid., 9
[71] For analysis of this decision, U. Everling, *Will Europe Slip on Bananas? Bananas Judgment of the ECJ and National Courts*, CMLRev, Volume 33, 1996, p. 401
[72] Brunner v. European Union Treaty, *Bundesverfassungsgericht*, October 13.1993, [1994] 1 CMLR 57
[73] [1994] 1 CMLR 57, A.II.1
[74] İbid., A.II.1. (a) and (b)

The Constitutional Court *partially* rejects this argument based on the justification that the authority delegated to the Community is limited and this is explicit in the treaties approved by the German parliaments. The reason for validity of the Community law in Germany is the fact that the treaties of this order has been approved by the German law.[75] Any increase in the authority of the Community is only possible by an amendment to the Treaty which requires approval of the German parliament.[76] According to the court, the Community is not authorized to gather more power to itself. The Community does not possess *Kompetenz-Kompetenz*. If the Community acts to gather more authority, all the actions based on these later-gathered authorities shall be rendered invalid in Germany. The constitution prohibits German public authorities to grant any legal value to such actions; the investigation as to whether the legal actions of the Community have transcended the authority of the Community shall be made by the Constitutional Court.[77]

With all these facts, the Constitutional Court decided that transfer of more authority to the Community was under the control of the Member States and their parliaments, and that the Community could itself check whether there had been any ultra vires, thus that the principle of democratic state was not violated by the Maastricht Treaty.

### 3. Denmark

The decision taken by the Danish Supreme Court during the approval process of the Maastricht Treaty was an important one in terms of sovereignty of the EU and the authorities transferred thereto. Transfer of authority in Denmark was stated in article 20 of the constitution which says 'state authority can be transferred to supra-national bodies on condition that it is clearly specified with a law' and the Supreme Court gave its decision dated April 6, 1998 by interpreting this provision; however, it is necessary to state that the decision makes clear that any explicitly-

[75] İbid., para. 55.
[76] İbid., para. 33.
[77] İbid. para. 49

defined and non-limited transfer of authority could not be accepted.[78]

The Supreme Court did not accept the claims of the claimant and stated that the approval law of the Maastricht Treaty was in accordance with article 20 of the constitution. Furthermore two important points are interesting considering the aspects of the decision regarding transfer of sovereignty and authority. First of these is the article 308 of EUT which is a method of using the authority of legislation by the EU through the Council of Ministers.[79] Article 308 of the EUT says that "if an initiative is obligatory to realize one of the goals of the Community regarding the operation of the common market and if no authority is envisaged in the Treaty for this initiative, the Council makes the necessary arrangement unanimously following the advice of the Commission and after having consulted the European Parliament." The Danish Supreme Court made a limited interpretation for this provision which guarantees authorization of the EC unless there is no authority provision in the EUT.[80] In the decision, the Supreme Court stated that any transfer of authority that would emanate from any liaison of common market and its operations with the goals of the Community in other fields could not be accepted by Denmark.

The second and more important point emphasized in the decision is the assessment regarding the decision of the ECJ on the validity of the primary law and legislative actions of the EU. The Supreme Court stated that decisions of ECJ regarding validity of actions of the Community were valid for Danish courts and other institutions; however, though this was the general principle, considering the special provision of article 20 of the constitution, it was explicitly stated that the authority of Danish courts to decide whether the EU actions went beyond the authorities delegated to the EU did not disappear.[81] By this last, the Court clearly expressed that it did not accept the authority of ECJ to resolve conflicts of authority.

### 4. New Member States

The place of the new member states to the EU during the last enlargement is

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[78] Trevor C. Hartley, *Constitutional Problems of the European Union*, Hart Publishing, 1999, p.158
[79] Article 308 is an article of authority and will be investigated below in details.
[80] Trevor C. Hartley, p.158
[81] İbid., 159-160

different in the EU legal system regarding the debates on transfer of sovereignty and authority. First of all, making the constitutional arrangements about their membership, these countries had the opportunity to make arrangements according to the EU treaties, Member State constitutional systems and ECJ and decisions of supreme courts which are the results of a long experience, and the arrangements they made were relatively clearer and more absolute. The second difference is that all of these countries –except for "the Greek Administration of Southern Cyprus"- adopted communist regimes for a long time which had a different approach to sovereignty from capitalist-liberal regimes. The third difference is that since their membership is new, there has yet been no practice to give any idea on conflicts between their constitutions and constitutional system and the EU law, and the view of ECJ or supreme courts of these states to these conflicts. Some of these countries arranged transfer of sovereignty and authority to the EU in ways that separate them from the others.[82] In this regard, four countries will be discussed here.

**a) Czech Republic**

The aspect of EU membership in terms of transfer of sovereignty and authority was dealt with by adding a new article to the Czech constitution in 2001. This new article 10a of the constitution has brought the provision that 'some of the authorities of institutions of the Czech Republic can be transferred to an international organization or institution by an international treaty'.[83] The article 87/2 as a complementary provision stipulates that the Czech Constitutional Court carries out a preliminary investigation as to whether the transfer of authority is in accordance with the constitution; transfer of authority is not possible unless the Constitutional Court decides in favor or the constitution is amended in response to

[82] Albi has defined this difference in her work as 'big, medium and small scale EU arrangements'. Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge University Press, 2005, p. 67. Also, A. Kellerman, J. De Zwaaan, J. Czuczai (der.), *EU Enlargement: The Constitutional Impact at EU and National Level*, Asser Press, 2001; Neil Walker, *Sovereignty in Transition*, Hart Publishing & OUP, 2003; Sibel İnceoğlu, *Turkey: What Sort of Sovereignty Understanding Against the Authority of the EU*, Constitutional Jurisprudence 22, 2005, p. 231; Bertil Emrah Oder, Structural Problems of Multi-Centered Constitutionalism in the EU*: Comparative Observations for Turkey under the Light of Conflicts of Authority and the Principle of Subsidiarity*, Constitutional Jurisprudence 22, 2005, p. 168.

[83] Albi., p. 240

the decision of contradiction.[84] This principle is the same as that in France.

**b) Slovenia**

Acting with the principle that all authority emanating from sovereignty belongs to the nation and that these are used by institutions of the state, the Slovenian parliament added the provision to the constitution in 2003 that 'with two thirds majority of the national parliament, Slovenia can transfer some of its sovereign power to institutions based on rule of law, democracy, human rights and fundamental freedoms and can join defense alliances with states based on these same principles'. It is interesting that this provision was developed by inspiration from the expression in article 6 of the EU treaty that the EU is based on 'rule of law, democracy, human rights and fundamental freedoms'.

The article 160/2 of the constitution stipulates that international treaties must be preliminarily investigated as to relevancy to the constitution, and the article 153/2 stipulates that laws must be in accordance with the international treaties that have been approved. This second situation has the potential to make possible any investigation as to relevancy of actions of the EU institutions to some international treaties.[85]

**c) Poland**

Among the new member states in the last enlargement, Poland is the first country to arrange constitutional provisions regarding transfer of sovereignty and authority. As to the first paragraph of article 90 of the new constitution prepared in 1997, Poland can delegate authorities of the state institutions on certain issues by an international treaty.[86] It is interesting that in the text of the article not the term of *transfer*, but *delegate* is used.[87] Another interesting point is that delegation is limited with certain themes. What is important is not what these themes are, but that

[84] İbid., p. 240
[85] İnceoğlu, p. 244
[86] Albi, p. 242
[87] The concept of delegation is used in some works in connection with share of sovereignty with supra-state bodies (Bülent Yücel, from Westphalia Treaty to Nice Treaty: Historical Course of the Concept of Sovereignty and EU as a Prototype, AÜEHFD, Volume 10, pp. 1-2, 2006, p. 177). I believe that such a use of the concept of delegation is not correct. For the same view, İnceoğlu, p. 246.

they have in-advance been identified; there can be no delegation in general.

### d) Hungary

The article 2A that was added to the Hungarian constitution in 2002 was a controversial article because of the expression of 'joint use of authority' and with its 'minimalist approach'.[88] As to the first paragraph of the article which directly names the EU, 'Having the goal to become a full member to the EU by approving an international treaty, the Republic of Hungary can use *some of its constitutional powers* jointly with the other Member States *at a level that is required by*[89] the rights and liabilities from the EU and EC treaties. This joint use can be performed individually through the institutions of the EU.'[90]

The joint use of authority in this article added to the Hungarian constitution is one that is observed neither in the 'former' Member States nor in the new Members to the organization during the last enlargement. The principles of joint use of authority and incorporation of the use of rights and liabilities from the treaties as required and the use of some of the constitutional authorities within this scope may be said to result in new problems in terms of sovereignty and authority of the EU when interpreted with the practice of ECJ on the issue.

## C) Jurisprudence of the ECJ and Member States Courts and The Conflicting Constitutional Orders

It can be observed that the rapprochement of Constitutional Courts of Member States about sovereignty of EU and Member States is bilateral. As cited in above decisions of ECJ, while ECJ expresses the legal order of EU and its sovereignty in the form of monist in the light of the principles of supremacy, intergovernmental and direct applicability/direct effect; almost all Member States[91] express sovereignty and its legality in the light of not only the said principles of Union law but also their own constitutional order and principles by seating the matter of sovereignty between EU

[88] Albi, 117 et al; Oder, 180.;
[89] The emphasis has been added by me.
[90] Albi, p.243
[91] Just only one different example, for Holland see, B. De Witte, *Do Not Mention the Word: Sovereignty in two Europhile Countries*, Neil Walker, *Sovereignty in Transition*, Hart Publishing & OUP, 2003 within, p.351.

and Member States to the axle of EU law order and their constitutional order. Throughout that axle, for the subject of the possession of sovereignty, the courts of Member States put some restrictions based on their own constitutional orders against the said principles of ECJ –and within the interaction of them-.

According to the case- law of ECJ, the courts of Member States must imply EU law irrespective of whether or not first court or superior court. But especially, the procedures of national ratification of EU treaties can not take guarantee for compatibility of all provisions of treaty to the constitutions; Constitutional Courts which has monopoly for interpretation of constitution provisions in Member States and constitutional order include the procedure. These courts shall be invited to examine constitutional validity of a provision of treaty and even sometimes the legal acts of Union institutions or national laws which imply the EU law. [92] By sometimes that examination of Constitutional Courts shall be the same with the ECJ case- law, the supremacy of EU law, so that its sovereignty was adopted and it was declared that its legislative and judicial power pass into EU. But Constitutional Courts either didn't accept that supremacy when some competences emerging from sovereignty were existed or beside Constitutional Courts accepted some competences emerging from sovereignty, made different conclusion about the scope of that or made principle decision relating to not to override the border of authority.

Constitutional Court whose decisions were examined above decided that Member States' sovereignty keep to continue when relating to the protection of fundamental rights and freedom, the principle of democratic state and some unchangeable articles of their own constitutions and Constitutional Court didn't accept the devolution of authority. In those points, they held that authority belongs to Member States with the legal ground of being inadequate of law order of EU, in other words its treaties and connecting with that, legal disposals of EU institutions. EU institutions and ECJ shall take into account of Member States' Constitutional Courts' decisions in legislative and judicial acts and especially the concerned articles of

[92] Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the ECJ*, CMLRev, Volume 36, 1999, p. 350, 354

Constitutional Treaty which prepared and is being the ratification progress carry on the doubts about whether or not EU has sovereignty in classical meaning.

Other point of emphasized by Constitutional Courts is relating with dynamic natural of integration of Europe. The competences of EU which is not being subject to any of constitutional conflicts during coming into force and ratification progress of Member States is available to encroachment the constitutional values of Member States unpredictable through the acts of secondary Community law by Union institutions. By virtue of that the legislative acts of Council of Ministers and ECJ's case- law made amendments in the original meaning of founding treaties and material scope of Union law caused to be developed of treaties more than predictable of founding wills of parties and national parliaments which ratifies the treaties[93]. Sometimes, that development got together Constitutional Courts in the aspect of sovereignty and competence with ECJ in common solutions and sometimes while Constitutional Courts determinate to override the borders of authority or being incompetence, ECJ held that said development falls within the scope of competence area of EU law.

Opinions about EU law order, that order's legal definition and the matter of sovereignty and competence was began to express before examined the case- law of Courts above – in the years of starting development of that law order, including the especially political structure; however, that has been worked up intensively more than the years of 90's which the decisions of Courts have been started to be intensively and qualify. Approaching the various conceptualizing and legal reasoning, that matter was tried to evaluate within two main interpretative approaches and with the third way reconciling these two interpretative approaches. These opinions developing during progress, as having to cite, have appeared within the norms of law disciplines by filtering; otherwise, scientists who approaches to the European integrity by the norms of economic and political laid down different basics to the European integrity.[94]

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[93] Bruno de Witte, *Community Law and National Constitutional Values*, LIEI, 1991/2, p.3.

[94] G. Schineider & M. Aspinwall, *The Rules of Integration: Institutionalist* Approaches, Manchester University Press, 2001; A. Moravcsik, *Preferences and Power int he EC: A Liberal Intergovernmental* Approaches, 31, JCMS, 1993. For those rapproachments' well- organized summary, see, Paul Craig, *The Nature of the Community: Integration, Democracy and Legitimacy,* Paul Craig & Grainne de Burca (eds), *The Evolution of EU Law,* Oxford, 1999 within, p. 1-50 and above footnote 10.

The main approach used when resolving any law system take a main basic by scientist resolving EU law order too. The said main approach relating with what is that law system and how is identified is an approach which is known and voting upon this. [95] According to this, any law system, any law hypotheses are the whole of rules with the wider using form than the technical meaning of word.[96] Those rules are compatible or consistent with each others and these are not contrary with each other. Momentarily, even if those rules are contrary with each others, any law system includes 'primarily or super rule' which terminates that confliction. [97] Again any law system shall be reasonable for understanding and shall be tangible for being a 'system'. Lastly, any law system shall possess institutions which will determine what does the law, how it can be enforced and how it can be changed since it has been applied from starting with its founding.[98]

In accordance with that main rapprochement, EU law order is different and distinct from Member States' law systems creating itself and also international law. Because Union law order is a whole rules; those rules are consistent and are never contradict each other. Upon that said rules, there exists a 'primary and super rule' (founding treaties). That whole rules are comprehensive and tangible that can be understood enough for any law system. Union law order has institutions which are enforcing legislative, executive and judicial functions. The Union institutions' functions are not same in all aspects with the functions of institutions of declared other law systems; although this caused to be subject in some critics about whether or not the Union has a law system[99], the reason of differentiate from other law system, for instance, from Member States' law system or international law systems during performing the institutions their own functions is, not Union to have law system; the reason for this is, to have different law system from other law systems[100].

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[95] Neil MacCormick, *Questioning Sovereignty- Law, State and Nation in the European Commenwealth*, OUP, 1999.
[96] Ibid., p.4-7
[97] Ibid., p.102
[98] Hartley, p. 126
[99] Ibid., p. 127
[100] F.E Dorwick, *A Model Of the European Communities' Legal System*, 3 YEURL 169, 1983, indoser: Theodor Schilling, *The Autonomy of the Community Legal Order*, HILJ, Volume 37, No 2, 1996, p. 392

ECJ introduced since its first decisions that Community's law order is different in similar reasons. [101] That law order possesses its own institutions, so ECJ saw that an outstanding proof for the devolution of authority making from Member States and for being independence law order. [102] Moreover, ECT article 249/2 supports the ECJ case-law precisely. According to that, "a regulation shall have general application. It shall be binding in its entirety and *directly applicable* in all Member States." [103] That article distinguishes EU law from international law; because, passing over EU law to internal law does not depend on any internal arrangement.

The next step for analysis is, EU law order exists independence from said law systems besides being different and distinct from other law systems; in clear expression, like stressing ECJ's decisions, whether or not its entity emerge from itself or from other law systems. In that point too, it has claimed that the Union law order emerged from law systems which created the Union, in other words, Member States' law systems and international law systems but after creating the Union law order, it became independence from the said other systems. Weiler who is an important defender of that opinion held that in his article about analysis EU' legal development: "The treaties (which founded the Community) have been constitutinalized by (ECJ) itself and the Community has become an entity which is no longer close to a supra-national organization, but very close to a more intense, not unitary, but federal state structure. Different from an international organization, the 'operation system' of the Community is based not on international public law principles, but on an inter-state administrative structure specifically designed and defined by a constitutional Charter[104] and a set of constitutional principles". [105]

After those steps, two main rapprochements which are expressed the matter of sovereignty in EU legal order departed from each other – within the interaction of

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[101] Especially, Case C-13/61, De Geus en Uitdenbogerd v. Bosch and others [1962] ECR 45, 49 ve Supra. III
[102] Case C- 17/67, Company Max Neumann v Hauptzollamt Hof/Saale [1968] 441, 452-453
[103] Accent was added.
[104] The concept of Constitutional Charter has also been used by ECJ, Case 294/83, Parti ecologiste 'Les Verts' v. European Parliament, [1986] E.C.R. 1339
[105] J.H.H Weiler, *The Transformation of Europe*, YLJ, Volume 100, 1991, p. 2403, 2407. For a work which not only studies constitutionalization process, sharing of sovereignty and authority in the EU, but also studies the process as a more comprehensive conceptual development, see Bertil Emrah Oder, Constitution and Constitutionalism in the European Union, Anahtar Kitaplar Publishing, 2004.

different position of ECJ and Member States' Constitutional Courts-. The departed point is relating that EU law order interprets and creates itself again. In clear expression, the matter is when Union law order which is different, distinct and independence from other law systems is contrary with the law orders of Member States or international law order, whether or not EU law order could solve that confliction in its own legal order and by its own bodies' decisions as a sovereign law order. The decision which conferred EU a constitutional autonomous order and ECJ' decisions implied that it could be possible while the other decisions which made that depend on national constitutional systems and decisions of Constitutional Courts and which claimed that Member States possess an unique legal constitutional sovereignty implied that it is not possible. According to the reconciling decision, the matter is how different, distinct and independence constitutional orders exist together in the platform of sovereignty and competence.

*i. The EU Constitutional Order*

ECJ whose case- laws' some important part examined above, some of them examined in Part 3 below put forward a sovereignty hypothesis whose basic signed the last authority in the legal meaning with developed the principles of supremacy and direct effect by ECJ. Becoming basic to the sovereignty, *Lindhal* expressed in his article which examined the ECJ decisions and their reasons mainly Costa v. Enel decision that "the doctrine of superiority developed is a claim of sovereignty, that ECJ claims the EU legal order as an independent and new legal system, and that ECJ rejects any external origin of action in terms of capability of imposing rules in this new legal system and in terms of constitutionalizing the treaties that render the EU a sovereign entity".[106] Moreover, ECJ's that kind of decision took some criticisms; according to those criticisms, ECJ's decisions are not more important than the importance of avoiding the contradiction which happened practically in EU law and giving the precedence to EU law; besides that [107], the stress made by ECJ to EU law's autonomy and sovereignty caused to be defended more strongly that that stress improved a doctrine and that doctrine seemed like a normative thesis more than a

[106] Hans Lindahl, *Sovereignty and Representation in the European Union*, Neil Walker, *Sovereignty in Transition*, (ed)., Hart Publishing & OUP, 2003 within, p. 107

[107] Trevor C Hartley, p. 136-137, 167-168; Dieter Grimm, *Does Europe Need a Constitution?*, ELJ, Volume 1, 1995, p. 289-291;

practical function tool: "By virtue of the special and original natural, any law emerging from Treaty being an independence law source shall never be invalid by internal law provision in the form of causing to lose the Community law character and remove the legal basis of that law." [108]

In that paragraph, a stress relating with original and independence character of EU law put forth the non- derivative legal entity thesis which possesses autonomy. ECJ pointed out that devolution of authority from Member States to EU law order brought permanent restriction to the sovereignty rights of Member States; an important conclusion of this, that competences having an autonomous and original structure don't depend on any restrictions and derogation by Member States except some competences which put into enter by EU itself.[109]

There exist other arguments to support ECJ's thesis about the supremacy and direct effect doctrines which are conclusion of EU's sovereignty are normative sovereignty autonomous orders more than a functional tool. When chains of decisions of ECJ which its doctrines were improved are looked, these arguments can be seemed obviously. Firstly, in almost all concerned decisions, aims or activities which were organized in its founding treaties are emphasized. These exist sometimes about creating and improving a common market; sometimes about fundamental rights and sometimes about taxation or education. To implement substantive subject or aim, EU's sovereignty and supremacy were stressed and this was determined that Member States lost their sovereignty rights. Secondly, the institutions which EU's law orders grant sovereignty rights were stressed. Thirdly and also most important one is article 234 (ex. 177) of ECT: "The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

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[108] Costa v Enel, 593

[109] Grainne De Burca, *Sovereignty and the Supremacy Doctrine*, Neil Walker, *Sovereignty in Transition*, Hart Publishing & OUP, 2003 within, p. 452

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice." This article was stated expressly that Member States have adopted that their citizens can apply the Community law authority before national courts.

By the way of that article, ECJ underlined the reason of added that article and made important determination about both that article and the validity and sovereignty of EU law upon applying of German Court to ECJ. [110] German taxation authorities fell into doubts about whether or not the imports making by Foto- Frost Company were compatible with the relevant 1572/80 EC Regulation's conditions about the procedure for paying back of charges; upon applied before EC Commission, Commission issued a decision to Federal Republic of German that all conditions were implemented and charges for imports were gave back to the company. Upon that that decision wasn't fulfilled by German administrative authority, Foto- Frost Company referred before national courts; these courts agreed that the decision of the Commission was invalid. So, company referred that case before Federal Taxation Court and requested to refer that case before the ECJ by preliminary ruling procedure about the validity of that decision. That court accepted that request and referred many questions before ECJ. The most important question was whether of not the national court can review the validity of a decision adopted by the Commission on pursuant to Community Regulation. The ECJ answered that question like that: "the national courts have no jurisdiction themselves to declare that acts of Community institutions are invalid; Community institutions have jurisdiction to review the validity of the acts of Community." [111] Thus, ECJ declared expressly that ECJ is the final authority when the subject about the EU itself is at issue.

When third arguments were evaluated together, it could be defended to have EU new, independent and sovereign legal order. In that meaning, EU has developed

[110] Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199
[111] Ibid. para. 15

the spectrum of said aim and subject during that step and has strengthened with various instruments. At least the procedure of article 234 is accepted and used more than previous time by national courts.[112]

Beside the supremacy of Union law is a conclusion of the sovereignty of the final and self defining authority[113], another argument on that sovereignty relied on the rule of law which is general law concept. EU is created to integrity Member States and more important individuals within a new order:

"Such integration faces two challenges that have been experienced historically in nation states. The first of these is the propensity to dangerous and bloody conflicts emanating from conflicts of interest among the nation states. Within a consistent autonomous system based on the rule of law, the possibility of such conflicts is considerably low since negotiating and identifying national interests and identifying common points and points of difference are under an international legal protection. The second is about guaranteeing democracy and protection of fundamental rights within the nation state. Supra-national integration as a mechanism and access to supra-national rule of law from the classical-liberal rule of law have the capability to provide immunity to movements organized under ambitious political conflicts which lead to autocratic or totalitarian administrations that do not respect minority rights."[114]

One of the sharp decisions of ECJ's decision relating with EU's sovereignty and the situation of Member States is relating with EURATOM which is one of the Europe Communities. ECJ accepted a reason for that decision about whether or not a draft treaty for nuclear energy complies with the EURATOM. In its reason for that decision, just only the Community's autonomy is not a derivative entity and also stressed the sovereignty of the Community; at the same time accepted that Member States have lost their sovereign rights: "To the extent to which jurisdiction and powers have been conferred on the community under the EURATOM treaty it must be in a position to exercise them with unfettered freedom. The member states, whether acting

[112] For that subject, see, Damian Chalmers, *Judicial Authority and Constitutional Treaty*, IJCL, Volume 3, No. 2, 2005, p. 448 ; Thomas De La Mare, *Article 177 in Social and Political Context*, Paul Craig & Grainne de Burca (eds), *The Evolution of EU Law,* Oxford, 1999 within, p. 215.
[113] Grainne De Burca, *Sovereignty and the Supremacy Doctrine*, p. 454
[114] Mattias Kumm, p.335

individually or collectively , are no longer able to impose on the community obligations which impose conditions on the exercise of prerogatives which thenceforth belong to the community and which therefore no longer *fall within the field of national sovereignty* [115]." [116]

On the contrary of arguments about EU'S sovereignty, before evaluating the Member States sovereignty and Member States' constitutional courts' decisions which mentioned above, important point can be close examined more on arguments demonstrating the EU's sovereignty. That is which has existed in both ECJ decision and also doctrines, the EU has sovereignty in only specific spheres and Member States lose their sovereignty in only specific areas. Really, that argument which claimed sometimes expressly and sometimes implicitly in ECJ decisions was indicated clearly by Weiler: "The Community is an 'attributed', 'assumed' and 'limited' system of authority. Therefore the will of the Community is superior only when under its own authority. A Community action that is ultra vires cannot and should not be superior."[117] With to that specific matter, to the steps about resolving more than one sovereignty matter between mostly EU and Member States will be evaluated after indicating the competence matter. For now, that can be said enough, the hypothesis about EU has limited and accounted authority can not change the reality of having the sovereignty in intensity threshold and depending on that the sovereignty areas of Member States is got narrow. In that meaning, this quotation is taken account for now:

"First of all, authorities and fields regarding political action have comprehensively and rapidly developed since the first decision of *Van Gend* decision and the legal reflection of this can be seen in ECJ decisions, then 1/19 numbered ECJ view on European Economic Zone Treaty. In this view, ECJ reiterated that the Member States have limited their sovereignty and transferred their sovereign rights, but reiterated its expression of *'even though in limited fields'*[118]. Secondly, it is

[115] Stress was added by me.
[116] Case 1/78 International Atomic Energy Agency on the Physical Protection of Nuclear Materials [1978] ECR 2151, 2153
[117] Weiler & Haltern, p. 413 at the same direction, Trevor C. Hartley, *The Foundations of European Community Law*, OUP, 2003 p. 110; Mattias Kumm, p. 355; Koen Lenaerts, *Constitutionalism and Many Faces of Federalism*, AJ CL, Volume 38, 1990, p. 205
[118] Stress was added by me.

gradually getting more difficult to clearly and absolutely argue that the mentioned actions –mentioned in the EURATOM case- are under the 'field of national sovereignty' which belongs finally to the state authority. Now there exist mostly recognized 'horizontal' EU legal liabilities and principles which lead to the argument that there is no place for autonomy of national actions and that there is no national action that is not included in EU legal actions. Tax policy, health policy, cultural policy and education policy are ostensibly under the control of the Member State and its final legal authority. However, these national activity fields are under direct and strong influence of the principles of EU, which absolutely refer to sectoral and thematic fields. This surrounding from all angles is not totally a matter of legal principles. Sovereignty of the Community law is claimed regardless of conflicting laws and policies[119] and in this regard, any incident where a European action is directly –even though there are sometimes incidents of partial, unwilling and problematic harmonization- a matter of national rejection is very rare. If the concept of national sovereignty is to preserve its important and potentially broad and comprehensively delimiting meaning, our understanding of sovereignty will imperatively change and dilute."[120]

*ii. Member States Constitutional Orders.*

Standing ECJ and Constitutional Courts to different arguments about EU's sovereignty and the sharing competence with its Members - in other words, ECJ explained law order and its sovereignty in the form of monist and Constitutional Courts explained sovereignty and sharing authority by laying down to the axle of EU law order and its constitutional order with not only Union law but also its own constitutional order and principle and international law- emanated from the content of the concept of sovereignty organizing Member States' constitutions and law orders.

All Member States' constitutional systems except United Kingdom belong to

[119] Case 11/70 [1970] ECR 1125

[120] Grainne De Burca, *Sovereignty and the Supremacy Doctrine*, p. 457-458; at that direction, Stephen Weatherill, *Law and Integration in the European Union*, OUP, Oxford, 1995, p.106

demos in a whole. Bu virtue of that, the doctrines of Member States' Constitutional Courts makes the claim of having EU's sovereignty difficult. The popular sovereignty concept which bases to belonging sovereignty to demos was made conclusion until the polyarchic democratic sovereignty expression organizing with the metaphysics expression of participating and representing[121], Constitutional Court's decisions about the certain expression of sovereignty understanding basing to demos in Constitution are contrary to ECJ decisions and EU law order creating by ECJ. As seen above, the sovereignty has laid down to the demos by the Europe integrity of Member States and the provisions of constitution joining to that law order; that conferred the attribute of impartibly and inalienable. While German constitution and alike states constitutions implement the formula of "conferred competences" or "devoting the sovereignty rights", French- Italian and alike states constitutions implement the formula of "restriction of sovereignty". On the contrary of these articles of Constitutions, the constitutional courts organizing by judges[122] who are loyalty to the apprehension that the final arbiter depends on the *pouvoir constituent* and the majority of members devote to classical meaning of sovereignty protect the Member States sovereignty strictly.

According to the view[123] which made a conclusion that EU's sovereignty is derivative sovereignty with supporting of the relevant articles of Member States' constitutions and the decisions of courts, EU's sovereignty is recognized by Member States by the way of delegation. Connecting Member States with the supremacy of Union under undertaking to commit their selves was carried through a conclusion that those undertakings are sovereignty claims which are contrary to its own constitutional sovereignty. [124]

"Such structures involving a circumscribed state sovereignty or envisaging a shared use of sovereignty –since the derivated sovereignty they possess has been

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[121] Lindahl, p. 92

[122] Julianne Kokott, *Report on Germany*, Anne-Marie Slaughter, Alec Stone Sweet, Joseph H. H. Weiler (eds), *The European Courts and National Courts –Doctrine and Jurisprudence*, Hart Publishing, 1998 within, p. 119

[123] Bruno de Witte, *Direct Effect, Supremacy and the Nature of Legal Order*, Paul Craig & Grainne de Burca (eds), *The Evolution of EU Law,* Oxford, 1999 within, p. 181.;

[124] Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, Neil Walker, *Sovereignty in Transition*, Hart Publishing & OUP, 2003 within, p. 500, 503

created through a close delegation by states – do not harm state sovereignty."[125] With gaining the EU sovereignty by delegation, in naturally, EU can restrict states' sovereignty; "however, the EU cannot claim against the states which delegated the sovereignty that it is its own original sovereignty."[126]

Hence, the sovereignty of EU and competences emerging from this are valid until the bounders putting by interpretation the relevant constitution by national courts and putting national constitutional systems. In clear expression, EU has sovereignty and their bounders are just only determined in the light of the doctrines which Constitutional Courts interprets states constitutions articles and principles. Because, the legal power which can make that just only exists in national Constitutional Courts; EU can show some constitutional qualifications but hasn't got the final constitutional authority putting forward against national constitutional authority, because there is not any original constitutional *pouvouir constituent* at the level of EU. [127]

As seen the decisions of Constitutional Courts of Member States above, the argument that the last authority belong to Member State constitutional orders is for protection of the *constitutional identity* of relevant state more than covering exclusive and all constitution articles. Moreover, that identity is composed of the constituents of fundamental rights, unchanging principles of constitutions and the principle of democratic state which are taken into account of Constitutional Courts sensitively. The resultant of these constituents shows the sovereignty in Member States: *Pouvouir Constituant.*

*iii. Constitutional Pluralism*

However, these said two rapprochements and the positions of ECJ and Constitutional Courts hasn't contribute to solve the matter of the last authority and EU's sovereignty and moreover, these caused to the discursiveness that can not

[125] İbid., 503
[126] İbid., 505
[127] İbid., 506

adopted legally and is far away from the legal certainty; in other words these caused to disorder and incoherence.

Some European jurists[128] who are dealt with the said *discursiveness* identified that discursiveness firstly and then tried to solve the sovereignty matter with the concept of constitutional pluralism creating by that discursiveness. I will try to explain that rapprochement by benefiting from Madura who is the leader writer of that subject and advocate general- by taking into account other arguments in doctrines-.

The first attractive point of author's articles which examined that subject is the accent making to the weakness of the objection which is about not existing the pouvoir *constituant* in the level of EU which is the connection between state and constitutional sovereignty that is the most important basic of the objection against the sovereignty of EU by predicated on the constitutional orders of Member State. Adapt from the fact the inadaptable of that objection by ECJ, the size and nature of the claiming about the last authority of EU law and the European political society explode that objection. ECJ decided in decisions which were examined above and starting with Van Gend decision that the direct effect and supremacy of Community law has been established firmly within the direct relationship between Community rules and Europe demos. As both determined in these decisions and also adopted voting in Europe, the Founding Treaties mean more than ordinary agreement between states: "They are treaties signed among the peoples of Europe, which

[128] For the working which is especially dealt with that concept see. Ingolf Pernice, *Rethinking the Methods of Dividing and Controlling the Competencies of the Union*, Europe 2004 The Great Debate, with the contribution of J.H.H Weiler and Michel Petite, the declaration preparing by European Commission and submitting to Conference, Brussels, 15-18 October, 2001; Neil Walker, *Sovereignty and Differentiated Integration in the European Union*, ELJ, Volume 4, Number 4, 1998, p.355; Neil MacCormick, *Questioning Sovereignty, Law, State and Nation in the European Commonwealth*, Oxford, 1999; Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the ECJ*, CMLRev, Volume 36, 1999,p. 350; Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, Neil Walker, *Sovereignty in Transition*, Hart Publishing & OUP, 2003 within, p. 500; Neil Walker, *Late Sovereignty in the European Union*, Neil Walker, (Eds), *Sovereignty in Transition*, Hart Publishing & OUP, 2003 within, p. 3; Neil Walker, *White Paper in Constitutional Context*, Christian Hoerges, Yves Meny & J.H.H Weiler (eds), *Response to the European Commission's White Paper on Governance*, European University Institute, 2002 within; J.H.H Weiler, *Epilogue: The European Court of Justice: Beyond "Beyond Doctrine" or Legitimacy Crisis of European Constitutionlism*, Anne-Marie Slaughter, Alec Stone Sweet, Joseph H. H. Weiler (eds), *The European Courts and National Courts –Doctrine and Jurisprudence*, Hart Publishing, 1998 within, p. 365

make a direct relation between the people and the EU law."[129] That is a directly legality source and has created a political connection permitting a claim about sovereign normative authority. By virtue of that the legal authority is composed of a concept of an autonomous Europe legal order. This claim on political and legal authority is correspond to granting sovereign rights to EU. [130]

The second point is the criticisms on the claim that the sovereignty and last authority belong to EU constitutional order. According to this, beside the direct connection between EU and Europe demos is real, Member States are representative of their rights severally and the founding treaties which EU constitutional order based on were created by these states. States authorities and courts have legitimized and implemented the national law according to their own constitutions or norms granting power; moreover, the validity and applying the law emerging from sovereign EU authority making constitutional by ECJ are recognized in the light of the conditions adopting only by national constitutions. [131] According to this, Member States Constitutional Courts have competence to solve the confliction between EU and Member State national orders. "National constitutions are interpreted in a way that guarantees the superiority and authority of the EU law, and at the same time, they condition this superiority and authority to certain national constitutional requirements and keep the final authority. The superiority and supra-national value of an EU action can only be recognized if it has been derived from an EU Treaty which passes through national approval procedures."[132] Italian Constitutional Court which put that situation clearly in the aspect of constitutional law theory awarded of entering the multiple constitutional order at more previously years; Italian Constitutional Court showed that decision in Fragd decision. Court accepted that state institutions have to obey constitutional principles and fundamental values when using competence emerging from sovereignty and continued expressly that EC conferred sovereign rights to itself and its institutions have to respect the same principles and values too and they have power to control the conflict disposals against these principles and values (even if they have never

[129] Maduro, p. 504
[130] Ibid., p. 505
[131] Marta Cartabia, *The Legacy of Sovereignty in Italian Constitutional Debate*, Neil Walker, *Sovereignty in Transition*, Hart Publishing & OUP, 2003 within, p. 305, 315-317
[132] Maduro, p. 507

used it). [133] Thus, "The idea that the superiority of EC law on national legal systems is based on its own authority is as illogical as the claim of Baron von Munchhausen that he escaped from the marsh he fell into by pulling himself up with the shoelaces of his boots."[134]

The third point which stressed by the rapprochement of constitutional pluralism is the mandatory validity criteria and their interpretation by courts when any confliction situation exists – include sovereignty and last authority confliction- in any legal order are the specific qualifications of EU legal order. On the one side the difficulties creating between the validity criteria of the EC and EU treaties and the validity criteria of Member State law rules[135], on the other side to interpret these criteria, in other words, to make a legal reasoning on what does 'law' mean, the law speech[136] which a large law area of judicial activity play a role and which is composed of individual applicants, first court, appeal court and Constitutional Courts with ECJ make difficult to solve sovereignty confliction.[137] The alterability of validity criteria and the effect of factors influencing reciprocal legal reasoning of courts over the matter of the last authority and sovereignty are seemed clearly in the cases *Sunday Trading*[138], *Keck & Mithouard*[139]. In these cases, national applicants claimed that the restrictions of free movement of goods and free trade by national measures were contrary to article 30 and 36 of ECT and they referred before ECJ. Dispense with the details of cases, the relevant articles have arranged that the national restrictions can only be adopted if adopting restrictions are mandatory and proportion for public benefits. ECJ decided that 'mandatory and proportionality' criteria which are validity criteria for that subject a necessity analyses shall be made

[133] Gaja, p. 94
[134] Supra. footnote 123, p. 199
[135] Maduro, p. 513
[136] İbid., p.514
[137] For opinions of Weiler which i agreed with about the difficulties to get over the matters, which creating by interpretation the validity criteria stemming from more than one law system and more importantly interpretation by huge speech consisting a large law area of them, by law theories and about the importance of role of other social sciences, see , J.H.H Weiler, *Prologue- The European Court of Justice*, Anne-Marie Slaughter, Alec Stone Sweet, Joseph H. H. Weiler (eds), *The European Courts and National Courts –Doctrine and Jurisprudence*, Hart Publishing, 1998 within, s. x- xiv; J.H.H Weiler, *Epilogue: The European Court of Justice: Beyond "Beyond Doctrine" or Legitimacy Crisis of European Constitutionlism*, Anne-Marie Slaughter, Alec Stone Sweet, Joseph H. H. Weiler (eds), *The European Courts and National Courts –Doctrine and Jurisprudence*, Hart Publishing, 1998 within, p. 384-388.
[138] Case C 169/91, Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc, [1992] ECR I 6635
[139] Case C 267 ve 268/ 91 Keck and Mithouard [1993] ECR I 6097

by national courts in the light of reasoning of individuals about abolishing the restrictions and not implementing these criteria on case facts and on the other side reasoning of national courts about the compatibility of these criteria to case facts and about justificability of these restrictions and in the light of their interpretation. However, especially in *Sunday Trading* case, courts include national high courts required with insistence that these validity criteria are interpreted by ECJ. [140] Validity criteria and legal speech which judicial activities comprising a large law area make a role cause to be inconsistency and disorder.

## V. Conclusion

In spite of increasing activities area, increasing external authority by time and legal personality recognized by treaties, EU treaties do not include any clear expression about the sovereignty of EU. That lacking point was tried to overcome by ECJ decisions that – as seen above- granted supervision power in accordance with article 220 ECT (ex.164) "shall ensure in the interpretation and application of this Treaty the law is observed" and in accordance with article 230 ECT (ex. 173) "shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties" and by Member States constitutional order and usually by doctrine and principle arranging in the light of these countries' Constitutional Courts. Thus, the matter of sovereignty of EU and competence matter have caused to the confliction between the principles and courts2 decisions of two concurrent constitutional order – constitutional order (s) of Member States and EU constitutional order-.

The rapprochement of constitutional pluralism claimed that the law speeches including the inconsistency and disorder defining determination can answer the matter of sovereignty by the way of pluralism. "The question of 'who will decide as

[140] For detail analyses of cases, Maduro, p.516; Anthony Arnull, *What Shall We Do On Sunday*, ELRev, Volume 16, 1991, p. 112; Paul Craig & Grainne De Burca, *EU Law*, p. 646-650

to who will decide' faces different responses in the EU and Member State constitutional systems. Looking from a perspective outside of both EU and national legal systems, the response to the question is *an understanding of law which is not dependent upon a hierarchical structure and a single and indivisible concept of sovereignty.*"[141] Some author in doctrine has shared this approach.[142]

Constitutional pluralism approach improves the concept of '*competing sovereignty*' [143] more than the sovereignty approach which creates by common used and alienated. That approach defines three necessities, which guarantee consistency law order relied on the equal participation of law actors and guarantee the reciprocal accord, and defines the principles ensuring the implementation of these necessities.

These necessities: *a)* universalize or generalize of the institutions of reasoning and negotiation which national and Europe courts have relied for all applicants of legal order, *b)* setting every theory for harmonizing by other competing theories, *c)* theories become to make possible to conclude over particular and specific solution. [144] For competing sovereignty not to cause to erosion the Europe legal order can be possible only by implementing the necessities.

The most important principle to ensure the implementation of these necessities is *pluralism*. This principle can be summarized as respecting the identity of national law order and EU law order for each other. [145] Every law order has their view points on the same rules chains and every law order has responsibilities to take into account all amendments occurring in other law orders' chains. [146] When the ambiguous causing amendment is in question, what happened to the constant of the principle of pluralism? The situation of legal ambiguous just only is decisive; in

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[141] Maduro, p. 520. The accent was added by me.
[142] Furthermore, Bruno De Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, Anne-Marie Slaughter, Alec Stone Sweet, Joseph H. H. Weiler (eds), *The European Courts and National Courts – Doctrine and Jurisprudence*, Hart Publishing, 1998 within, p. 277, 302-304.
[143] Maduro, p. 521
[144] Maduro, p. 525; Lindahl, p. 112
[145] Maduro, p. 526
[146] Catherine Richmond, *Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law*, 1998, Law and Philosphy 16, p. 377

other word, is permanent if not to perform the normative resistance against the political bases of adopted mental model. The second model is horizontal and vertical *consistency*. Every decision must to be consistency with previous decision. The direct effect of EU law and ECJ leave a wide discretion area to national courts when implementing EU law. The role of adaptation EU law principle to national law belongs to national court.[147] When courts apply EU law, they take into account EU law and national constitutional orders and on the other side, during taking a decision like that, they ensure to be consistency with ECJ decisions. Horizontal consistency means that national courts' decisions are consistency with previously decision. The third principle is to generalize the national and Europe courts' judgments; in other words, *making terms common.* National courts must aware of granting decisions being a part of EU law which is interpreted by many actors and must render to be internalize the conclusions of decisions for forthcoming events to systems as a whole and before other courts. [148]

The rapprochement of constitutional pluralism of each two law orders against sovereignty claims put appear the competing sovereignty concept and the principles and necessities of how this can be implemented.

Does EU have legal sovereignty? In the conclusion of that Chapter and evaluating that, I believe that some determination can be made. Firstly, in present time polycentric political structures, for our example in EU, there is no place to classical sovereignty approach. The legitimate bases of classical sovereignty approach; in other words the acceptance of metaphysics relying on directly demos can not be gone on. In *Bruner*-Maastricht decision of Federal German Constitutional Court about determination of not existing demos in EU doesn't reach a conclusion that Member States' sovereignty go on. Because EU is not a state and doesn't have a relationship with Europe demos and Europe citizens on the basis of being a state; as indicated in Maastricht Treaty, the aim of EU is create 'a Union between Europe demos'[149]. Setting this Union, as seen said ECJ decisions above, is ensured with directly interaction with

[147] Maduro, p. 528
[148] Ibid. p. 530
[149] The preamble of EEC and EU Treaty.

Europe citizens and with giving mutual to this by wide law area and citizens by gaining constitutional character of EU law order. Moreover, in the meaning of the said agency theory[150], there exists client- attorney relationship between Europe citizens with national/ Europe institutions and/or agents. On the other hand and secondly, acceptance the relationship with EU law order and its supremacy by Member States law orders abolish the classical meaning of sovereignty; however this doesn't cause to make impossible to use public power by Member States. Because, as put appear the decisions of Member States which were examined above, the constitutional principles and constitutional identity of Member States are kept on and also ECJ keep its silence. Thirdly, it can be said that EU law order's actors accept that there doesn't exist and classical meaning of sovereignty, the division of sovereignty. However, losing sovereignty against Member States is not exclusive; the division of sovereignty in that meaning is not a situation to deprive Member States from legal sovereignty. The variable of sovereignty or consistent emerging from public power and competences shows the sovereignty of Member States as becoming a threshold concept[151] in the level of adequate intensity (national constitutional values and constitutional identity). However, the function of intensity level is a down function (in other word, negative sign) by virtue of keeping losing sovereignty of Member States. Fourthly and lastly, the remain question is who has sovereignty and who decides this when the said confliction situations occur above in the structure of compelling competence or dividing, using common, alienating sovereignty between EU and Member States. This bring us to the competence matter in EU and the question of 'who decides that who decides' (*kompetenz-kompetenz).*

Consequently, the sovereignty shall not be questioned more in an internal function of constitutional system, but when internal law order is related with the external relations or international law's effect is at issue, the sovereignty become a matter of international constitution law. These are new facts for international constitution law that EU treaties which is one of the international document relying on a organization among member states is a law source in the aspect of the function, activities and qualification of this organization and is supreme from law sources of

[150] Supra. p. 30
[151] Supra. p. 43-44

Member States which created EU – in the meaning of rules staging-. Founding treaties has not give an answer comprehensively and certain about sovereignty and competence matter; by virtue of that ECJ fill the lacking point of founders, however this activity of ECJ on the basis of facts and doesn't introduce a general solution and competence theory in real meaning[152], together this with the reflection of the Member States Supreme Courts, EC's first competence has been tried to express with teleological *competence*; in other words, this exists through reaching an aim (like Common Customs Tariff) [153], however the towards aim interferes other area of public life (like Environment and Competition laws) by enlarging mandatory and enlarging its concept by virtue of the direct relationship with other some *competence areas.* Together with these, the matter of sovereignty – even if it has been solved partly as above-brings the competence matter together and this must evaluate together with that.

The above picture of belonging to sovereignty between EU and Member States cause to necessitate taking into account the competence sharing between EU and Member States and making the sensible analyze over the review mechanism of the competence sharing.

In summary, the matters relating with sovereignty and competence become to be crystallization. These matters can be classified like that:

i. What is the concept of devolution of power which is accepted by EU law order and ECJ on the one side, on the other side by Member States and Supreme Courts?

ii. How can these powers be determinated?

iii. What does ultra vires mean? How shall the competences be restricted?

iv. Which institutions shall make the legal supervision in the light of the concept of *Kompetenz-Kompetenz*?

[152] Jean Paul Jacque, Competence Sharing between EU and its Members, Constitution Reforms and Constitution of Europe, TBB, 2002, p. 31
[153] Pescatore, *The Law of Integration*, p. 19-24

## CHAPTER 3 THE SYSTEM OF COMPETENCE IN THE EUROPEAN UNION

The competence, which is ascertained above[1], means that the execution of a competence using provision which gives possibility to change the legal relation by who holds it. The norm giving the legal power and delegated authority are bounded to specific limits; the owner of a competence make a specific rule but can't create a new one out of that rule. In other words, the authorizing norm determines to be able to make with whom, in which situation, at which subjects and how it works. So, the first analyzing subject of this chapter is to introduce the competence rules in European Union and legal analyzing of which things in which limitation, European Union create the competence rules. The second subject is to analyze the structure of competence of EU's Constitutional Treaty and try to define the legal and political framework which the Constitutional Treaty draws and lastly, the lacking points will be evaluated.

### I. The Legal Analysis of EU Competences

I believe that starting the legal analyzing of the competence of European Union by some general- ancillary determination is available.

European Union's aims and activities are enumerated in article 3 ECT and EUT Title I article 2, Title V, VI and VII. These aims and activities are arranged generally; when these became the competence rules having legal qualifications in the text of Treaty, these were arranged in two different types. The functional competence arising directly from the aims, for instance, ECT article 95 and article 308 and competence of area, in other words, material competence arising from the sphere of activities in treaties together with the aims.[2] The true statement of the last competence rules are formulated in ECT article 5 but these competences of sphere spread into the texts of treaty individually.

Not all that competence rules of European Union do not grant itself exclusive powers, as seen in below, these rules grant powers to Member States at the same time. Because of that

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[1] Supra. p. 35

[2] Christian Kirchner, *Competence Catalogues and the Principle of Subsidiarity in a European Constitution*, CPE, Volume 8/1, 1997, p. 73

reason, European Union has a typical dual competence order.[3]

The contrary of the construction of American dual federalism, the competence rules of European Union are only the functions of legitimatize and judicial functions which mean the controlling of the competence rules.[4] The implementation of the laws and performing of the policies are left to the Member States.

And finally, the procedural article, article 5/2 ECT which indicates the using method of the competence was added into the order of the European Union's competences by European Union Treaty. This article contains the principle of the subsidiary; this principle is rather disputable which has a function of the rule about the using of the competence in the non- exclusive competence area.

### A) The Competence Principles of EU Legal Order

The competence whether is functional or is specific special competence should depend on the competence determining by the founding treaties. The foundation of the situation that indicate the using of the competence granted just by the EU treaties and called 'the principle of conferred competence' comes from on the positive constitutional validity principle.[5] The requirement of this principle, all disposals of the EU must be equivalent to competence rule in either treaties or subsequent law emerging from the treaties. This was accepted by the doctrine and ECJ stressed the positive constitutional legality principle clearly too.[6] This situation changed under the influence of the ECJ's decisions with the developing way of the tasks of EU's by the founder treaties and with the disposals of the legislative institutions and with the way of the interpretation.

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[3] Ibid, p. 74

[4] Ingolf Pernice, *Rethinking the Methods of Dividing and Controlling the Competencies of the Union*, Europe 2004 The Great Debate, the announcement offered to the Conference arranged by the Commission and the contribution of J.H.H Weiler and Michel Petite, Brussel, 15-18 October, 2001, p. 3

[5] Armin Von Bogdandy & Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, CMLRev., Volume 39, Number 2, 2002, p. 230, 232

[6] Case 294/83, Parti ecologiste 'Les Verts' v. European Parliament, [1986] E.C.R. 1339, para. 23

### 1. Express Competence

The express competence rule occurs when any article in EU treaties or subsequent law authorize EU expressly to realize any activities and EU can implement this authorization in order to concerning article. Most articles in treaties and subsequent law have such competence. For instance, ECT article 47 arranged that self-employed persons can performance their activities in all Member States easily and directives can be issued for the mutual recognition of diplomas to provide the social rights. Despite this, the Commission made an arrangement about the pension fund of self- employed person by declaration and ECJ annulled this disposal owing to be incompatible with the competence rules.[7] In another instance, although the Directive 91/156 which is about abolishing the harmful wastes to environment in EU granted the responsibility to the Member States to set the organizations to clear away and abolish those wastes, Italian government infringed this responsibilities for the reason of the implementation partly concerned articles in Directive and partly own domestic law.[8] ECJ stated that this Directive authorized EU clearly for that subject and Member States had no competence; so ECJ decided that Italian government infringed this Directive's articles.[9]

Sometimes, the content of the competence rules may not be determined but this is not evaluated into the implied competence doctrine. The competence was clearly expressed too, but it was described by Member States wrongly.[10] The basic sample for this subject is the confliction for the Directive 93/104 which is about the arrangement of the working times would be issued on which articles of the treaty. United Kingdom objected to issue this Directive by the Council according to the articles about worker's health and safety under the title of the social policy; so articles 136-138 of the treaty establishing European Community (these articles gave the possibility to act any acts by majority votes). According to the statement of UK's objection, this act should be issued according to article 94 which is about the approximation of laws. During the action for annulment, ECJ stated that article 94 ECT authorized in the area of setting and performing the internal market; working hours shall not be directly related with the internal market and ECJ said that the competence rule for the acts

[7] Case C 57/95 France v. Commission [1997] ECR I- 1627
[8] Case C 365/97 Commission v. Italy [1999] ECR I-7773
[9] Ibid., 7785
[10] Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, Third Eds., OUP, 2003, s. 122

about working hours which is related with workers' health and safety is regulated in article 136 and 138. For those reasons, ECJ rejected this case.[11]

The most important sample for express competence principle in term of external competence of EU can be showed article 133 (ex. 113) ECT. This article giving the authorization to conclude agreements with one or more States or international organizations to execute common commercial policy became more effective article to give 'express external competence' by Amsterdam and Nice Treaties. This article before changing in Nice Treaty was:

" **Article 133** (ex. 113) : 1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of trade and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The relevant provisions of Article 228 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority."

Upon the Commission asked ECJ whether or not it has competence to conclude international treaties including the foundation of WTO, GATS which is the general treaty

[11] Case 84/94 UK v. Council [1996] ECR I-5755

about the services and TRIPs about intellectual property laid down article 133, ECJ gave the opinion which was became easy to understand the express competence principle in the aspect of external competence.[12] The part about exclusive and shared competence of this opinion will be examined below. But, ECJ stressed an important point in the aspect of the principle of express competence the subjects of these two treaties does not fall within the scope of common commercial policies which organized by article 133 and by virtue of that there is no competence for concluding treaties

ECJ held that the acceptance of GATS provisions which organized to provide service from a provider in non- Member States of EU to a receiver in EU Member States – by virtue of similarity to commercial of goods- falls within the scope of EU's competence by considering the article 133 is only accepted for the commercial of goods.[13]

ECT article 133 (ex.113) is an outstanding example how to extend the competence of EU by treaties. After 1/94 Opinion, the fifth paragraph was added with Amsterdam Treaty:

"Article 133/5 : , the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by these paragraphs."

The other side, EU can use the competence when any competence is not granted expressly in both the articles of treaty and within the subsequent law disposals. At first sight this is incompatible with the principle of conferred competence, but ECJ declared that EU can have the implied competence with some ways and reasons. The implied competence is used

[12] Opinion 1/94 WTO Agreement [1994] ECR I-5267
[13] Alan Daswood, *Limits of European Community Powers*, ELRev., Volume 12, Number 2, 1996, p. 119

by the organs of legislative. The principle of this competence is used mostly by the doctrine[14]; but some authors depend on the 'principle of conferred competence' strictly and they claimed that the principle of express competence can't be infringed by the way of interpretation.[15]

## 2. Implied Competence

The principle of implied competence gives the authority to use a competence implicitly by EU institute, especially ECJ when there is no express competence, a) either to interprete the aims determining within the EU's treaties (broader meaning of implied competence) b) or to obtain another competence which does not exist in the treaty but it's mandatory to realize the express competence (narrow meaning of implied competence).[16] This principle is not determined in the treaties; it is emerged completely from the institutional practice

### a) Broader Meaning of Implied Competence

Broader meaning of implied competence can be defined within the clearest definition:

An article or articles of EU treaties entrust a concrete task to institutions or make a ruling for specific activities of institutions and but, if treaties do not include the express competence for these, the relevant institutions can use the implied competence as necessary of its function and activity.[17] When ECJ grants this competence, the ancillary theory is created by the way of interpretation. According to this new theory, called effet utile, the treaties shall be interpreted as enriching its applicability in practice.[18] The concrete examples of the broader meaning of implied competence are the decisions of the Commission by using the articles 136 and 140 of ECT. To state the implied competence expressly, I believe the necessity of introducing these articles.

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[14] J.H.H Weiler, *The Transformation of Europe*, 100 YLJ 2403, 2405; Armin Von Bogdandy & Jürgen Bast, p.233; Antonio Goucha Soares, *Pre-Emption, Conflicts of Power and Subsidiarity*, ELRev., Volume 23, Number 2, 1998 p.132

[15] T. C. Hartley, *The Foundations of European Community Law*, (5.ed), OUP, 1998, p. 87,150; D.Z Cass, *The Word That Saves Maastricht? The Principle of Subsidiarity and Division of Powers within the European Community*, CMLRev., Volume 29, 1992, p. 1107; George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, CLR., Volume 94, 1994, p. 331

[16] Armin Von Bogdandy & Jürgen Bast, p. 235

[17] Alan Daswood, *Limits of European Community Powers*, ELRev., Volume 12, Number 2, 1996, p. 113, 125

[18] Trevor C. Hartley, *Constitutional Problems of the European Union*, Hart Publishing, 1999, p.156

"**Article 136** ( ex.117): The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."

"**Article 140** (ex.118): With a view to achieving the objectives of Article 136 and without prejudice to the other provisions of this Treaty, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to:

— employment,
— labour law and working conditions,
— basic and advanced vocational training,
— social security,
— prevention of occupational accidents and diseases,
— occupational hygiene,
— the right of association and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organizations.

Before delivering the opinions provided for in this article, the Commission shall consult the Economic and Social Committee."

The Commission took a decision to provide the coordination of common measure for consistency between Member States on behalf of adjusting the objectives which are mentioned above by using these articles in Member States that the workers of third countries exist and took a decision about arranging the declaration of these measures to the Commission. Some Member States brought the case for annulment of the decision against the Commission for the reason of ultra vires of the Commission and also the EU and claimed that these relevant articles did not entrust any competence to take this kind of binding decision.[19] ECJ rejected and made a conclusion that these relevant articles granted this kind of competence to the Commission.

"The essence of the arguments put forward by the applicant Member States is that migration policy in relation to non- member countries are not part of the social field envisaged by article 118 or, alternatively, that it falls only partly within that field.

Since the contested decision falls only partly outside the social field covered by article 118, it must be considered whether the second paragraph of article 118, which provides that the Commission is to act, inter alia, by arranging consultations, gives it the power to adopt a binding decision with a view to the arrangement of such consultations.

In that connection it must be emphasized that where an article of the EEC Treaty – in this case article 118 – confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task.

[19] Case 281, 283-285, 287/85, Germany, France, Netherlands, Denmark and UK v. Commission, [1987] ECR 3203

Accordingly, the second paragraph of article 118 must be interpreted as conferring on the Commission all the powers which are necessary in order to arrange the consultation."[20]

ECJ applied its doctrine very carefully that some articles of treaty granted implied competence; sometimes ECJ made restrictive decisions for broader meaning of implied competence. The relevant case was brought for annulment of article 3 of Council Directive 98/43 about banning the advertising and sponsorship of tobacco products in EU and banning delivering of these products without charge; the ECJ rejected the implied competence.[21] The matter in dispute in that case was which articles granted the competence to be able to forbid for protecting the consumers' health during receiving the tobacco products within the territory of EU. Articles 49-55 ECT (ex 59-66) are about achieving the liberalization of services but these articles are not competence articles to be able to bring the measures for protecting the consumers' health. In spite of that, the Council created the implied competence by moving on the aims determined in article 95 ECT. The interested part of this article with this case:

"Article 95 (ex. 100a): The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

The Council claimed that the competence about the relevant measures for protection of consumer could emerge implicitly from the sentence of article 95 "adopting for the establishing and functioning of the internal market."[22] However, ECJ stressed the strict connection setting with the free movement of internal market with article 3 /1 (c) ECT "an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital." At the same time, ECJ reminded that there should be no restriction within the internal market with the article 14 ECT (ex. 7a): "The internal market shall comprise an area without internal frontiers in which the free movement

[20] İbid., para. 15, 27-28
[21] Case 376/98, Germany v. Parliament and Council, [2000] ECR I-8419
[22] İbid., para. 45-50

of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

"Those provisions[23], read together, make it clear that the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it."[24]

The relevant part of Article 5 ECT (ex.3b) which ECJ mentioned in its decision is like that:

**"Article 5**(ex.3b): The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."

As seen, ECJ does not form the broader meaning of implied competence as a constant implementation of general authorization.

### b) Narrow Meaning of Implied Competence

Narrow meaning of implied competence is relatively clearer. When granting the express competence by any articles to EU, the institutions act according to that competence and make the relevant arrangement. But sometimes, when using the express competence, in other word realization the legislative activity, some mandatory necessity competence is not arranged within the relevant competence ruling, in that time using the implied competence is necessary for using the main competence. ECJ draw attention implementation of only one condition. That is, the aim of the main express competence rule shall not incline negatively with using the implied competence which is emerged from this competence

[23] ECJ points out Articles 3 (1)c, 14 and 95
[24] Case 376/98, Germany v. Parliament and Council, [2000] ECR I-8419, para. 83

rule.[25]

"Even if any resource of acts of High Authority is unfair, this act does not mean the misuse of powers for that reason without endangering the main aim of relevant acts."[26]

Narrow meaning of implied competence in the meaning of the internal competence of EU has been accepted from the initial years so by virtue of that this competence principle is not controversial. [27] However, EU's international act was discussed; narrow meaning of implied competence would be used intensively by the ECJ.[28] This progress which is called the external competence of Union would shape the amendment of Treaty.

### 3. Implied Competence and External Competence

EU has competence to conclude international agreement and commit international undertakings by the way of some articles which were arranged in accordance with the express competence principle within the founding treaties. Except those articles[29], can the EU use external (implied) competence?

ECJ declared that "with regard to the implementation of the provisions of the Treaty, the system of internal community measures may not be separated from that of external relations."[30] From evaluating of this expression with making the accent to EC's own legal personality, own legal capacity and the capacity of representation in international level in Costa Enel decision reached a conclusion that the capacity of external acts of EC's covered all the objectives defined in the Treaty and the external competence shall not be limited with the scope of articles defined expressly in the Treaty.[31] The implied external competence was implied expressly in the ECJ's that decision:

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[25] Case 8/55, Fedechar v. High Authority, [1956] ECR 245; Case 8/57, Hauts v. High Authority, [1958] ECR 256

[26] Case 8/55, Fedechar v. High Authority, [1956] ECR 245, 301

[27] T. C. Hartley, *The Foundations of European Community Law*, p. 150; Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, p.123

[28] Marise Cremona, *External Relations and External Competence: The Emergence of An Integrated Policy*, Paul Craig & Grainne de Burca (eds), *The Evolution of EU Law,* Oxford, in 1999 , p. 137

[29] ATA Article 133 (ex 113), ATA article 300 (ex 228) and ATA article 310 (ex. 238)

[30] Case 22/70, Commission v. Council, (AETR), [1971] ECR 263

[31] Ibid, para. 14

"Such authority arises not only from an express conferment by the treaty – as is the case with articles 113 and 114 for tariff and trade agreements and with articles 238 for association agreements- but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the community institutions.

In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules."[32]

The common policy expressed in the decision was common transport policy and especially, the road transport is social rights of workers. The matters in that case whether or not EC has competence to enter into AETR which all third countries are party in the sphere of common transport policy. The relevant articles for that case, articles 74 and 75 ECT do not grant any competence to conclude international agreement directly to the EC in the sphere of transport. The Council enacted Regulation 543/69 laid down these articles; this Regulation was about the social rights of workers of road transport and issued to harmonize this Regulation in Member States. ECJ accepted that this internal competence confers competence implicitly on the Community authority mandatory to enter into international agreements on the subjects of Regulation.[33] Thus this Regulation realized "the decisive changing in the allocation of powers between the Community and the Member States on the subject- matter of the negotiations"[34] laid down the express international competence and with creating an implicit external competence. ECJ stipulated the disclosure with characterizing of Community disposals of express internal competence or any common policy for creating an implied external competence. In this connection, ECJ declared that "an earlier version of the AETR had been drawn up in 1962, at a period when, because the common transport policy was not yet sufficiently developed, power to conclude this agreement was vested in the Member States."[35]

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[32] Ibid., para. 16-18
[33] Ibid., para. 28
[34] Ibid., para. 66
[35] Ibid., para. 82

ECJ developed the implied external competence more years ahead. ECJ held in 1976 Kramer Decision[36] that never using the express competence rule doesn't constitute a barrier for formation of implied external competence. Member States shall not have authority to enter into international commitments to affect the order and function – in spite of not using their competence yet[37]- about the fishing restrictions for the conservation of the resources of the sea which are envisaged by Regulations 214/70 and 2142/ 70.[38] ECJ held that the external competence existed implicitly when participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community even before appearing the internal competence with secondary legislation.[39]

It can say true that the principle of implied competence improving by the ECJ is not unlimited. This limitation places in starting point of being authorized itself, which will examined below. ECJ explained in its judgment about accessing to ECHR of EC the limitation of implied competence and when the implied competence does not exist:

"That principle of conferred powers must be respected in both the internal action and the international action of the Community.

The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.

The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect.

No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field."[40]

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[36] Case 3,4, 6/76, Kramer and others, [1976] ECR 1279

[37] Enforcement date of these regulations was the date which is a few months after the publishing date.

[38] Case 3,4 and 6/76, para. 30-34

[39] Opinion 1/76, Rhine Navigation Agreement, [1977] ECR 741, para. 4; ECJ used the same expression in its decision about being EC a party into the ILO agreement. Opinion 2/91, ILO Convention, [1993] ECR I-1061, para.7; this situation is called *implied exclusive competence*, infra. B.1.

[40]Opinion 2/94, Accession of the European Communities to the European Human Rights Convention, [1996] ECR 1759, para. 24-27

ECJ stipulated the compliance of causing to emerge the implied competence of EC and its aim which plans to reach with that competence with the aim which implements the express competence rules envisaged Treaty. If this condition did not exist, the ECJ held that "in the absence of express or implied powers for this purpose, it is necessary to consider whether Article 308 (ex.235) of the Treaty – for competence- [41]may constitute a legal basis for accession."[42]

### 4. Taking Competence by Itself: Article 308

EU institutions and sometimes ECJ make the delegation itself by the way of interpretation laying down a kind of filling the gaps with using the article of treaty which given the functional meaning competence[43] when material meaning of competence does not exist. This conflicting authorization principle causes to some questions that whether EU can authorize itself or whether EU can decide what are its own competences. It is one of complicated issues of EU's competence order. Some authors in doctrine accepted two articles of ECT, articles 95 and 308 are based delegation of EU institution themselves.[44] But in my opinion, article 95 doesn't constitute a delegation article. First of all, article 95 ECT is used to pass the acts aiming the harmonization of Member States' legislations in accordance with its structure as taking into account the aim of the foundation and functioning of internal market and relatively this is less controversial. Secondly, delegation of institutions by itself is not permitted by reason of arranging the measure of harmonization, delegation, divergences and how this article authorize the institutions by detailed. EU institutions prefer this article for existing a competence gaps in treaty and prefer to provide the vote quorum easier to take a decision with that article. Article 95 of ECT creates just only the broder meaning of implied competence if the conditions become.[45]

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[41] Added by myself.
[42] Opinion 2/94, para. 28
[43] Armin Von Bogdandy & Jürgen Bast, p. 240
[44] Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, p.125-126
[45] ECJ rejected the implied competence relied upon article 95 of ECT in Case 376/98 for another reason. The reason of rejection is, not convenient for the implied authorization of article 95 ECT. The reason is that the concept of "objective" in Treaties which is stipulated for authorization of broder meaning of implied competence, is not convenient for the using of that article for the aim of protection the consumers in that case.

The only article allowing the authorization of EU by itself in Treaty of EU is article 308 (ex. 235) dispense with article 48 of ECT which is arranging the amendments of treaty.

"**Article 308** (ex. 235)**:** If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

This article brings some conditions to authorize EU's itself. Firstly, the significance procedural restrictions exist. The possibility of acting single transaction which some articles of ECT grant to the Council of Minister doesn't take a place in that article. Council shall act upon the proposal from the Commission and after consult the European Parliament. In addition, this act shall be unanimously.

Secondly, this article is used when existing one of the objectives of Community connected with the operation of common market and in the compulsory of realizing that objective. That aspect of that article observed in the Opinion which the Commission required from ECJ about being EC a party of ECHR.[46]

Thirdly and the most important point is that there is no competence rule in the treaty – express or implicit- about authorization of EU itself by that article.

In ECJ decision and doctrine, article 308 ECT became an article coming up constantly with the expression about only using the conferred competence in article 5/1 ECT. ECJ grants the special significance to two points from three points which drew attention in above: existing one of the objectives of Community and obliging of realizing and existing no competence in treaty.[47]

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[46] Opinion 2/94, [1996] ECR I-1759

[47] Case 45/86, Commission v. Council, [1987] ECR 1493; Case 9/74, Casagrande, [ 1974] ECR 773

ECJ emphasizes the point that there shall be no competence in the Treaty in the Erasmus[48] decision stating the scope of article in detail. The case was brought before ECJ with the objection of the Commission to the Council that Council showed article 235 as a legal basis when taking 327/87 Decision by virtue of that the subject of vocational training arranged by article 128 of EEC contains the scientific research. Article 128 is as follow:

" The Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market"

However, the Council indicated the necessity of authorization of EC according to article of 308 ECT (ex.235) and act the disposal by using that competence according to that article as showing the reasons in the preamble of Decision 327/87 that realizing the scientific research fall within the common vocational training policy and by virtue of that article 128 ECT does not grant that like of competence.

The ECJ point out that "scientific research is characteristically one of the proper functions of a university . Not only does a proportion of university staff devote its time exclusively to research but research constitutes in principle an essential element in the work of most university teachers and of some students."[49] So, the ECJ held that executing the scientific research is a mandatory aim of Community. "Article 128 of the Treaty was an insufficient legal basis with regard to the sphere covered by the measure in question and, in consequence, that the Treaty had not provided the necessary powers within the meaning of Article 235. The objection against the authorization according to article 235 must be rejected."[50]

On the other hand, the ECJ rejected using of article 308 ECT, if there exists the competence ruling in treaty, irrespective of their reason.[51]

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[48] Case 242/87, Commission v. Council, [1989] ECR 1425
[49] Ibid, para. 34
[50] Ibid, para.39
[51] Case 271/94, Parliament v.Counsil, [1996] ECR I-1689; Case 377/98, Netherland v. Parliament and Council, [2001] ECR 7149

The decision upon requirement the Opinion from the ECJ by the Commission about accession by the EC to the ECHR is an interesting decision because of containing the conditions that having to be one of the objectives of treaty envisaged by article 308 ECT and the mandatory of implementing one of the objectives.[52] ECJ held that "Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty."[53] ECJ used an expression meaning that the protection of human rights is not one of the objectives of EC in rights after paragraph of that decision:

"That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose."[54]

In the light of those considerations, ECJ stressed the importance of respect for human rights and indicated that respect for human rights is a condition of the lawfulness of Community acts.[55]

"Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of

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[52] Opinion 2/94, [1996] ECR I-1759
[53] Ibid, para. 29
[54] Ibid, para.30
[55] Ibid, para. 31, 34

constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment."[56]

As seen, on the one hand the ECJ saw the protection of human rights as a lawfulness control and stated that the protection of human rights does not constitute a mandatory aim of EC, on the other hand the ECJ does not uphold the authorization for the reason of not being that aim so that authorization shall be made just only by the way of the modification of Treaty.

**B) Types of Competence of EU Legal Order**

Competence principles in EU law appears the division with the qualification of competence rules and with the natural of competence rules while types of competence put forth the formal view of competence rules between EU and Member States.

Article 5 ECT is a basic article within the competence order:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this."

Article 5 ECT has two important roles. One of them is, to divide the EC's competence into 2 groups, exclusive and non- exclusive competence and other is the conception of determining the using form of non- exclusive competence[57]. Article 5 ECT, giving a ruling about types of competence that the most important part of EC constitutional law, brings the important openness between exclusive and non- exclusive competence, albeit not enumerate the exclusive competence- however article 5 ECT become a subject in the problem area of EU constitutional law as not determining the qualification and type of non- exclusive competence.

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[56] Ibid, para. 34- 35
[57] Infra. C.

The last situation in ECJ and doctrine gives rise to appear the qualifications and types of non-exclusive competence and gives rise to increase the decisions and works determining the using of borders.

### 1. Exclusive Competence

The exclusive competence means that when the exclusive competence points at issue, Member States do not have their disposals. [58] When this kind of competence in Treaty exists, the legislative activity of Member States in concerned area is prohibited. Determination the exclusive competence of EC in treaties and separating this from other types of competence, can be possible by the way of observing the articles severally, the number of more than 160 in the third part of treaty but this requires – taking into consideration of changing the treaty often- the inquiry almost through the whole of life. Instead of that, I put forth the competence with some exclusive competence articles by determination the qualification granting the distinctive character to exclusive competence for consideration.

There are two important criteria for becoming an exclusive competence. If any act of Member States in any field damages to the acts of EU's in that field and creating a common legal framework is absolutely necessary[59] in every situation, this field is exclusive competence of EC. In such meaning, some articles which cover these criteria can be observed more closely.

The article which arranging the monetary policy is an exclusive competence article:

"**Article 106**: 1. The ECB shall have the exclusive right to authorise the issue of banknotes within the Community. The ECB and the national central banks may issue such notes. The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Community.

2. Member States may issue coins subject to approval by the ECB of the volume of the issue. The Council may, acting in accordance with the procedure referred to in Article 252 and after consulting the ECB, adopt measures to harmonise the

[58]Case 3,4 and 6/76, Kramer and others, para. 30-33
[59]Armin Von Bogdandy & Jürgen Bast, p. 241

denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Community."

The legislative competence granting EC institutions in any field to realize a common policy and the provisions of act arranging this competence relating this field grant the exclusive competence to the EC.

"**Article 32/1** (ex. 38/1): 1. The common market shall extend to agriculture and trade in agricultural products. 'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products."

**"Article 37/2** (ex. 43/2): The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make."

In that aspect, ECJ indicated that articles 32/1 and 37/2 of ECT grants exclusive competence to EC and Council has power to act relied on these exclusive competences and Member States shall not perform contrary to that acts.[60]

On the other hand, other examples for exclusive competence are in the area of competition, such as, not implementing the some circumstances of article 81(1) (ex. 85/1) ECT about prohibiting the competition to Commission, thereby to EC and power of disposal toward recognition the block restrictions granting by article 81(3) (ex.85/3). EC has exclusive competence according to article 83 (1-2/b) (ex.86): "Within three years beginning from the entry into force of treaty, the appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament. The regulations or directives referred to in paragraph 1 shall be designed in particular to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the

[60] Case 3,4 and 6/76, Kramer and others, para. 25-26

greatest possible extent on the other." So that article grants exclusive competence to the EC when the above criteria are implemented.

Other treaty provisions granting exclusive competence are article 23 (ex.9) ECT relating the prohibition the all customs duties to provide the free movement of goods between Member States and the adoption of a common customs tariff in their relations with third countries and article 26 (ex.28) granting the legislative power to the Council. To transgress the law which is accepted on the basis of those provisions can not be treated.

On the other hand, article 133 of ECT arranging the Common Commercial Policy which becomes subject to the express external competence gives the exclusive competence to the EC. 1/94 Opinion reached a conclusion from evaluating together with implementing the common commercial policy and the competence of the EC especially in the area of free movement of goods that it is not possible that Member States have competence to act in the area of common commercial policy.[61]

But one thing should be indicated just now, if it is not possible to reach any objectives envisaged in treaty by the way of accepting the internal competence rule with secondary legislation without being an external competence, EC can have implied exclusive external competence concluding an international agreement. This is different from the express exclusive external competence.[62]

Except all these, some institutional arrangement spheres which Member States do not have competence, are included the exclusive competence area of EC like proceedings rules of ECJ and EC Court of First Instance.[63]

When article 5 ECT is taken account, it is possible to reach two conclusions in the aspect of exclusive competence. First of all no need to discuss, the existence of EC's exclusive competences does not depend on whether or not using these competences of the EC;

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[61] Opinion 1/94, [1994] ECR I-5267; evaluating this Opinion in that aspect, Marise Cremona, *External Relations and External Competence: The Emergence of An Integrated Policy*, Paul Craig & Grainne de Burca (eds), *The Evolution of EU Law,* Oxford, 1999 within, p.154

[62] Opinion 1/76, Rhine Navigation Agreement, [1977] ECR 741, para. 4

[63] Armin Von Bogdandy & Jürgen Bast, p. 241-242

exclusive competences exist without using.[64] The other important conclusion, *subsidiarity* principle shall not be implemented in that sphere.

## 2. Non-Exclusive Competence: Concurring, Sharing (Parallel) and Complementary Competences

ECJ in its decision and some authors divided the types of competence into two groups: exclusive and non- exclusive competence. This division is far away from being explanatory and is so weak in the aspect of legal certainty. By virtue of these, it obliges to introduce the distinguishing qualifications of non- exclusive competence. In other words, the only difference between exclusive and non- exclusive competence is that Member States have competence to perform national legislative activity in the sphere of non- exclusive competence but its concept changes within the said non- exclusive competence.

### a) Concurring Competence

On the contrary of the spheres which the EC has exclusive competence, in the sphere of concurrent competence, Member States can use their legislative power if the EC does not use its competence in concerned field.[65] But, if the EC use its legislative power, concurrent competence provides that the EC arranges all concerned field so Member States do not have competence in that concerned field. The EC prevents the legislative power of Member States in the sphere of concurrent competence, this is called pre-emption principle.[66]

ECJ explained under which conditions concurred competence prevents the legislative activity in its AETR decision which ECJ determined the qualifications of principle of implied competence, fifteen years ago from the decision about the place of that subject within the internal competence of EC:

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[64] A.G. Toth, *A Legal Analysis of Subsidiarity*, Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, 1999 içinde, p. 133

[65] Dashwood, 126.

[66] E.D. Cross, *Pre-emption of Member State Law in the EEC: A Framework for Analysis*, CMLRev., Volume 29, 1992, p. 447

"It follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States can not, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope."[67]

ECJ explained the principle of pre- emption in the sphere of concurrent competence in its Cerafel[68] case.[69] The case is about determining the scope and qualification of decisions about agricultural policy, especially, the decisions of 'the common organizations of the market in the fruit and vegetable sector' which was set on the basis of Regulation 1035/72. French agricultural marketing committee (Cerafel) established by that Regulation claimed that the competence granted by that Regulation extended to all products of fruit and vegetable agricultural. An applicant, a cauliflower producer, objected that claim. National court referred for preliminary ruling procedure and asked Court for the validity of that Regulation and how this Regulation was interpreted.[70]

ECJ explained the scope of concurred competence of EU when making its decision about that case. According to that, the pre- emption of concurrent competence of EC depends on the obligations of arranging to overall spheres of field concerned that the competence of Member States shall not be allowed. So, Member States do not have any competence anyhow. Otherwise, if there is no obligation to extend to all spheres, Member State can use its own legislative power.

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[67] Case 22/70, Commission v. Council, (AETR), [1971] ECR 263, para.22

[68] Case 218/85, Cerafel v. Le Campion, [1986] ECR 3513.

[69] In doctrine, the pre-emption principle was observed under three different situations. Except said in above, a)obstacle conflict pre- emption. It's function is that obstacle of Member States competences avoiding the attainment of the objectives allowed by EC disposals and b) when there exists a functional confliction between the content of any national provision and any article about EC disposal, solving the competence of Member States in favour of eliminating this direct confliction is called direct conflict pre- emption, for this see Antonia Goucha Soares, Pre- emption, Conflicts of Powers and Subsidiarity, EL Rev. Volume 23/2, 1998, p.32.
But it can not said ECJ and other authors who study on that subjects understand the pre- emption principle like that. Moreover, I believe that both two situations ( a and b) fall into the framework of subsidiarity which means using competence in optimum level.

[70] Ibid. para. 5-7

ECJ indicated that the provisions of Regulation about arrangement power covering all agricultural fields removed the concurrent competence of Member States moving from the teleological interpretation as a condition for proper functioning of Regulation.[71]

Hence, in Community law, the pre- emption of concurrent competence of Community in every situation necessity covering all activity spheres is accepted to implement the function of the competence rules properly.

Bogdany/Bast defend the guidance of EC's legislative instruments about how this can be decided for every situation and if EC uses competence with Directive, the competing competence is not terminated while if EC uses competence with Regulation, the national competence is terminated.[72]

The subjects about whether or not free movements of single market ( workers, services and freedom of establishment) arranging between articles 39- 60 of ECT authorize EU with the pre- emption principle in concurrent competence discussed in doctrine.[73] But ECJ held in one of its decisions about article 95 of ECT that articles relating the free movements can not be provided without contribution of Member States so there is no concurrent competence of Community in there and these fields are organized just only on the legal basis of article 95 ECT granting competence for proportion of Member States' laws to EU.[74]

**b) Sharing (Parallel) Competence**

The difference between sharing competence and concurrent competence is that the EC and Member States can use the competence together in the same sphere. If the EC uses the competence, Member States' legislative activity in that sphere goes on. The reason to allow

[71] Ibid. para. 13,
[72] Armin Von Bogdandy & Jürgen Bast, p. 245

[73] Dashwood, p. 126-127; Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, p.701
[74] Case 376/98, Germany v. Council, [2000] ECR I-8419, para. 83-84

using these parallel competences in some spheres in ECT is the reinforcement effect of each Member States acts in using the same sphere.[75]

The examples of that competence are article 157 ECT arranging the industry policy, article 158 of ECT about economic and social cohesion and article 163 ECT arranging research and technological development.

In the spheres in which the EC uses this like of competence, the EC allow Member States to take more restrictive measures as making generally minimal level arrangement. Article 63, paragraphs 3 and 4 about immigrant and replaced person envisages the minimal level arrangement in accordance with the parallel competence principle and allows Member States use their legislative power.

"**Article 63/2**: Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements."

When Member States using the parallel competence with the EC use their competences without considering the minimal standards, ECJ takes into account article 10 ECT.

"**Article 10** (ex.5): Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

ECJ decided in the Francovich case[76] which was brought against Italy for the infringement of the provisions of Directive 80/987 on the protection of employees in the event of the insolvency of the employer that "a further basis for the obligation of Member States in Article 5 of the Treaty is, under which the Member States are required to take all appropriate

[75] Armin Von Bogdandy & Jürgen Bast, p. 247
[76] Case 6&9/90 Francovich and Bonifaci v. Italy [1991] ECR I- 5357

measures, whether general or particular, to ensure fulfilment of their obligations under Community law."[77] Hence, ECJ avoided individuals to get harm upon making minimal arrangement of EC when the parallel competences exist.[78]

### c) Complementary Competence

As the articles granting that kind of competence include programme, recommendation and opinion, using those competences by the EC does not generally constitute a matter. Member States have legislative power in these fields. Outstanding examples are article 151 and 152 ECT arranging culture and public health. These articles generally are arranged the contribution of EU base on project and programme. Moreover, fields arranged by some articles of ECT are divided into exclusive or non- exclusive competence but also these articles includes the complementary competences to ensure the coordination to put into effect of some soft mechanisms at relevant spheres. The examples for complementary competence providing the coordination are article 99 ECT ensuring the closer coordination of economic policies and article 125 ECT developing the coordination for employment.[79]

## C) Using Competence in the Most Appropriate Level: Subsidiarity

According to article 5 ECT, "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of *subsidiarity*, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." There are two facets for observing the article in the aspect of using the competence appropriately: determination the legal character (1) and feasibility of judicial review of using the competence appropriately (2), by taking into account of the relationship between the complex and discussable part of the provision and the acts and competence of EC.

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[77] Ibid. para. 36.
[78] ECJ decisions for the same aspect see, Case 334/92, Wagner Miret v. Fondo de Garantia salarial [1993] ECR I-6911; Case 131/97, Carbonari v. Universita Bologna, [1999}] ECR I-1103
[79] Ingolf Pernice, *Rethinking the Methods of Dividing and Controlling the Competencies of the Union*, p.4-5

## 1. Legal Character

The using competence in the most appropriate level intends to control whether or not acting appropriately to some criteria when taking a decision according to the relevant competences at the time of legislative activity of institutions in the non- exclusive type of competence of the EC. The main reason of that control is to be faced with the claims of ultra vires constantly within the framework of the non- exclusive competence areas of the EC institutions.[80]

The most controversial point is that the type of exclusive competence is a criterion for *subsidiarity* principle, which it shall be applied outside of exclusive competence. Although the exclusive competence can be determined by ECJ decisions and legislations in force, the openness which is necessary for implementing that criterion, in other words, the division of competences that exclusive and non- exclusive competence shall not exist in treaties.[81] The more important point is, some common or complementary types of competence are evaluated within the exclusive competence of Member States by them when the secondary legislations of the EC are issued or in many cases; by this evaluating, education, public security and health etc. fall within the power of disposition. So, in that spheres, *subsidiarity* principle shall not be implemented as understanding from the aim of organizing the article. Consequently, *subsidiarity* principle is organized only for the non-exclusive competence of the EC as a legal principle.

According to the view which understand from *subsidiarity* principle to be deemed as determining which attendance rate and which level the process of making decision materialize, that democracy principle necessitate to provide the enough attendance of people affected by the decision. Hence the using competence in the most appropriate level can be ensured.[82] However, the conclusion of the workings of the Commission[83] about why this principle has been accepted and how this principle is understood, is, *subsidiarity* principle shall not provide to become the process of making decisions as a democratic and

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[80] N Bernard, *The Future of European Economic Law in the light of the Principle of Subsidiarity*, CMLRev., 1996, Volume 33, p. 633.
[81] A. G. Toth, *A Legal Analysis of Subsidiairty*, Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, p. 133; J. Steiner, *Subsidiarity under the Maastricht Treaty*, Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, p.134
[82] Grainne De Burca, *Reappraising Subsidiarity's Significance After Amsterdam*, Harvard Jean Monnet Working Paper, No: 7/99, 1999, p.3
[83] Commission, *Better Law Making 1998: A Shared Responsibility*, COM (98) 715.

also the provision of article does not support that view. *Subsidiarity* means to determine whether or not a decision taking a specific level address effectively to the relevant matter.[84] Whether or not using the competence in the most appropriate level depends on whether or not to be provided that effectiveness.

In that meaning the provision brings first and minimal condition for using the competence in most appropriate level. This condition is, whether or not Member States can implement the proposed action solitary, effectively and sufficiently. If this condition is implemented, in other words the matter can be solved effectively and sufficiently by the acts of Member States, the competence belongs to Member States. If this condition is not implemented, the second criterion steps in. The activities of Member States shall not be sufficiently and effectively, if the proposed action can be better achieved by the Community by virtue of its scale and effectiveness, so using of that competence by the Community is appropriate. As seen, the provision of article has not almost never referenced to the political origin of *subsidiarity* principle[85] and both has not accepted as a presumption for using this competence firstly by lower level and has not had a function to be became a process of making a decision as a democratically.[86]

The controversial concept to ensure the using a competence in the most appropriate level of that article was tried to demystify – by virtue of the critics about 'appropriateness' [87] and especially it has not possessed the certainty which the judicial control needs- by the *Subsidiarity* Protocol addition to Amsterdam Treaty.[88]

This enlightened three important points. Article 5 of that Protocol demystified these three points and the appropriateness criterion.

"**Article 5**: For Community action to be justified, both aspects of the *subsidiarity* principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

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[84] Grainne De Burca, *Reappraising Subsidiarity's Significance After Amsterdam*, p.4
[85] For these references see, Joshua P. Hochschild, *The Principle of Subsidiarity and the Agrarian Ideal*, http://www.nd.edu/~ndphilo/papers/Subsidiarity.html, p. 3-6, 10 February 2004
[86] Ibid. p. 8-9
[87] Trevor C. Hartley, *Constitutional Problems of the European Union*, s. 86-87
[88] The additional C. 2 protocol of Amsterdam Treaty amending the founding treaties

The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

— the issue under consideration has *transnational* aspects which cannot be satisfactorily regulated by action by Member States;
— actions by Member States alone or lack of Community action would *conflict with* the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise *significantly damage* Member States' interests;
— action at Community level would produce clear *benefits* by reason of its scale or effects compared with action at the level of the Member States[89]

To sum up, the most important legal character of *subsidiarity* which constitutes a procedure for using the competence is, to press the EU institutions to show their legal ground for appropriateness. This is not a competence principle explaining which competence EU can use.

**2. The ECJ and Judicial Control**[90]

Article 3 of Additional Protocol of Amsterdam Treaty explained the relationship between the principle of *subsidiarity* and the interpretation of ECJ about the competences of EC.

"**Article 3**: The principle of *subsidiarity* does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice."

According to this, ECJ keeps on its interpretation activity on EC' competences after that article and shall not take into account the principle of *subsidiarity* in that meaning.

Article 3 of Protocol exempts ECJ from the principle of *subsidiarity at* the time of the activity of interpretation on EC's competences. This shows the open differentiation

[89] These accents were added by myself
[90] For political review of principle, infra. p. 147-148.

between the judicial activity of ECJ and the legislative activity of institutions.[91] This conclusion is emerged from the interpretation of that article with article 1 of Protocol; article 1 said that "in exercising the powers conferred on it, each institution shall ensure that the principle of *subsidiarity* is complied with."

It does not affect to control of ECJ on institutions for two aspects of *subsidiarity;* in other words according to the division of exclusive and non- exclusive competence, *subsidiarity* principle is just only valid for non –exclusive competence so this conclusion shall not affect to control both the aspect of this border and also the aspect of implementation of proportionality criterion. The ancillary mechanism was tried to create for improving the weak role of ECJ controlling the principle of *subsidiarity.*

This control is made in two aspects. Firstly, the ECJ must determine whether or not concrete circumstance in cases falls within the scope of principle of *subsidiarity.*[92] The cases before ECJ related with the control of division of exclusive or non- exclusive fields and the concrete circumstances either fall within the scope of the non- exclusive competence of both making the disposition of the EC and Member States potentially or just only fall within the scope of Member States' competence. The second control making by the ECJ concerns with the criterion of appropriateness. The main element of that control is, whether or not the EC institutions comply with the proportionality criterion of principle of *subsidiarity* when making the legislative acts and which degree the institutions comply with.

The principle of *subsidiarity* has no activity on types of competences but it is rejected to implement the principle of *subsidiarity* for some competence areas in cases before the ECJ. The basic of this objection is that Member States claimed the principle of *subsidiarity* can not be applied to them by virtue of some areas fall within the exclusive competence of them and they objected the determination about that areas falling within the non- exclusive competence of the EC which uses together with the EC and Member States. In spite of not claimed the principle of *subsidiarity* in Grogan[93] case, this case shows the

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[91] Alan Dashwood, *Human Rights Opinion of the ECJ and its Constitutional Implications*, Cambridge Center for European Legal Studies, No.1, 1996, p.1

[92] Grainne De Burca, *Subsidiarity and The Court of Justice as Institutional Actor*, JCMS, Volume 36/2, 1998, p. 220

[93] Case 159/90 SPUC v. Grogan [1991] ECR I-4685

difficulties for the division of the competences spheres from each other and shows difficulties for the implementation of the principle of *subsidiarity* up to this division. The ECJ rejected the claims about the relevant acts of persons who brought the advertisement brochures from UK to Ireland where the medical termination of pregnancy was forbidden and distributed some specific information relating to the identity and location of clinics in UK, falling within the scope of the free movement of services. However, the EC law does not recognize concurred, parallel and complementary competence of EC in free movement of services but the reason of incompetent of EC law is not this. ECJ held that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 50 of the Treaty but it is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out; distributing the information doesn't constitute a service within the meaning of articles 49- 54 ECT"[94] and the ECJ determined that the activity which is deemed to be a expression is not compatible with the competences and objectives of the EC. According to that decision of ECJ, if the relevant brochures in case illustrated the details of clinics, gave the phone number and gave expressly the date of appointment for inspection, and stated the commercial characters of service, this act would deem to be a service and also, life of unborn child which arranged in the constitution of Member States and claimed in case that this area falls within the national competence of Member State, is deemed to be non- exclusive competence sphere of EC.

Another case which is concerned the relationship between the types and a scope of competence with the principle of *subsidiarity* is *Bosman*[95] case. The German Government stressed that "in most cases a sport such as football is not an economic activity. It further submitted that sport in general has points of similarity with culture and pointed out that, under Article 128[96] of the EC Treaty, the Community must respect the national and regional diversity of the cultures of the Member States"[97] and claimed – even implicitly- the competence of the EC is complementary in that spheres. ECJ objected that argument and held that "the argument based on points of alleged similarity between sport and culture

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[94] Ibid. para. 21, 32
[95] Case 415/93 UEFA v. Jean-Marc Bosman [1995] ECR I-4921
[96] ATA p.151 (new)
[97] Case 415/93 UEFA v. Jean-Marc Bosman [1995] ECR I-4921, para. 72

cannot be accepted, since the question submitted by the national court does not relate to the conditions under which Community powers of limited extent, such as those based on Article 128(1), may be exercised but on the scope of the freedom of movement of workers guaranteed by Article 48[98], which is a fundamental freedom in the Community system."[99] Any restrictions which are brought to the legislative power of EC in treaty and restrictions concerning the powers of law- makers of EC especially in the area of culture and sports in that case by referencing the principle of *subsidiarity* can not abolished its own interpretation about the broader of the scope of economic rules of treaty.

ECJ giving decision in other cases did not take into account the objections that education policy, demographic policy etc. fall outside the scope of the EC competences so principle of *subsidiarity* shall not be implemented; the ECJ rejected that objections by interpretation the restrictions of competences in treaty and the qualifications of objectives and competences envisaged by treaty broader.[100] This case law is compatible with the article 3 – indicated above- of Protocol too.

On the other hand, besides controlling whether or not the principle of *subsidiarity* implements in the aspect of types of competence, as indicated above, the principle of *subsidiarity* is checked in the aspects of appropriateness criterion. The intensive judicial activity of ECJ which showed generally for competence issue – in other words, legal reasoning concerning the broader interpretation of competences and objections in treaties- was observed that replaced to the decreasing criteria of appropriateness almost the level of superficial control when the criteria of appropriateness far away from the objectivism. However, criteria of proportionality became well-qualified after article 5 of additional protocol of Amsterdam Treaty entries into force.[101]

There are three case examples for the judicial control of ECJ making according to the effectiveness criterion of appropriateness envisaged by article 5/2 of ECT and extended content of effectiveness indicated in article 5 of Protocol. Directive 19/94 of Council brought the compulsory participation of all credit institutions in deposit- guarantee

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[98] ATA m. 39 (new)
[99] Case 415/93 UEFA v. Jean-Marc Bosman [1995] ECR I-4921, para. 78
[100] Case 9/74 Casagrande v. Landeshauptstadt München [1974] ECR 773; Case 65/81 Reina v. Landeskredit Bank Baden Württemberg [1982] ECR 33
[101] T. C. Hartley, *The Foundations of European Community Law*, p. 87

schemes; plaintiff Federal Republic of Germany brought an annulment case against that Directive and claimed that this participation rate remained under the participation rate introducing by the deposit- guarantee schemes of branch office in other Member State which set up by credit institutions authorized in other Member State.[102] Plaintiff claimed that the Directive must be annulled because it fails to state the reasons, on which it is based, the activity like that – the compulsory participation of all credit institutions in deposit-guarantee and determining the participation rate by EC Directive- is insufficient to perform how can be more effectively in the level of the EC; it does not explain how it is compatible with the principle of *subsidiarity*"[103]

ECJ rejected that case as founding sufficient to express in the preamble that acting Member States on their own for that subject is insufficient – without researching why the determination of participation rate in deposit- guarantee schemes is not an activity by implementation of Member States on their own effectively and why this activity best achieve in Community level.[104] "An express reference to principle of *subsidiarity* cannot be required."[105]

It attracted attention that even before being into force of article 5 of additional protocol of Amsterdam Treaty, whether or not implementing the proportionality criterion of principle of *subsidiarity* had not be checked out by ECJ in the reason of relevant acts.

One case which brought before ECJ after entering into force of amendments of Amsterdam Treaty and Protocol, ECJ did not observe the appropriateness criterion in depth.[106] Biotechnological Directive 44/98 of Council was adopted in the area of protection of biotechnological inventions to guarantee the function of internal market and its purpose is to remove the differences between the Member States' practices and their legislations.[107] Plaintiff Holland government required the annulment of Directive and claimed "The applicant submits that the Directive breaches the principle of *subsidiarity* laid down by Article 5/2 of the EC Treaty and, in the alternative, that it does not state sufficient reasons

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[102] Case 233/94 Germany v. Parliament and Council [1997] ECR I-2405
[103] Ibid, para. 22
[104] Ibid., para. 26
[105] Ibid, para.28
[106] Case 377/98 Netherlands v. Council [2001] ECR I-2079
[107] Ibid, para. 2-3

to establish that this requirement was taken into account."[108] ECJ's reason for rejection:

"The objective pursued by the Directive, to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone. As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.

Compliance with the principle of *subsidiarity* is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market. It thus appears that the Directive states sufficient reasons on that point."[109]

In the newest case about appropriateness criterion of the principle of *subsidiarity,* the ECJ, on the contrary of other cases, include all relevant reasons paragraphs of 37/01 Directive of Parliament and Council to the text of the decision. This Directive is a proportion acts based on article 95 ECT and became a subject to previous case[110] concerned manufacture, presentation and sale of tobacco products.[111]ECJ noted that before coming as a preliminary ruling procedure before ECJ in main proceedings in national court, the claimants said that the principle of *subsidiarity* was failed to take account in the reason of Directive and the subject why the activity for that subject was not effective in Member States level was not discussable in the reason of Directive.[112] Moreover, four Member States (Belgium, Holland, France and Sweden) with Commission joined the case during preliminary ruling procedure and said that the principle of *subsidiarity* was taken into account.[113]

The first striking issue relating with controlling the proportionality principle of the principle of *subsidiarity* is, although the relevant reasons of Directive was included within the

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[108] Ibid, para.30
[109] Ibid., para. 32-33
[110] Supra, dipnot, 21
[111] Case 491/01 The Queen v.Secretary of the State for Health and British American Tobacco [2002] ECR 137, para. 1
[112] İbid., para. 174
[113] İbid., para. 175-176

decision, effectiveness in the Member States level or whether or not the best achieve for reaching the relevant objectives in Community level wasn't investigated.[114] However, ECJ in that case used new and unusual argument relating with the criterion about not implementing proposed action – in other words, eliminating manufacture, presentation and sale of tobacco products which impede the functioning of the internal market- effectively by Member States. The ECJ concluded not to address the aims of eliminating all barriers effectively in Member States level against each harmonization Directive aiming to eliminate all barriers for performing internal market properly – especially tobacco products- ; ECJ reached its conclusion by stressing the opening annulment cases by Member States (Case C-350/92 Spain v Council [1995] ECR I-1985, para. 35; Case 376/98 Germany v. Parliament and Council [200] ECR I-8419, para.86; Case C-377/98 Netherlands v Parliament and Council [2001] ECR I-7079, para.15), because this constituted an evidence of multifarious developments of national laws and practices individually.[115] ECJ made a decision moving from this, the proposed action could be better achieve at Community level.

## II. The EU Competence in Constitutional Treaty

Treaty establishing Constitution for Europe[116] signed on 29 October 2004 by Head of State and Government of Member States and candidate countries (include Turkey), President of the Commission and President of the European Council is still in the process of ratification. Constitutional Treaty which includes competence article is composed Preamble, four Parts [ Part I ( nine titles), Part II (seven titles), Part III (seven titles) and Part IV ( general and last provisions)], Protocols, Annexes and Last Act annexed Declaration. There exists different structure for competence articles from previously treaties in the aspect of taking place of techniques in the text. The first article relating with the strict relationship between EU and competences and this Constitutions establishes EU on which the Member States confer competence. Articles of Constitutional Treaty arranging the characters of competence order are in Part I Title 3 and bring some amendments to the current competence order. The place of human rights in competence order organizes in Part II, Title VII called Fundamental Rights Charter.

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[114] İbid., para. 181
[115] İbid., para. 182 and this paragraph referred to para. 61
[116] Constitutional Treaty published on 16 December 2004 and number C 130 EU Official Journal (*Official Journal C 310 of 16 December 2004*).

All others Constitution articles which grant competence for each activity or policy to EC compose Part III and include the objectives, activities and policies of ECT and EUT and rearranging some of them by Constitutions. Constitutional Treaty will be observed in that part only in the aspect of the characteristic qualifications, by virtue of above reasons, so the last said part will not be observed.

An article determining the existence of constitutional- legal relationship between Member States and EU for competence concept, not exist in the ECT and EUT treaties, was became a part of EU competence order with Constitutional Treaty. According to that article "Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it."[117] The reason to use "Community basis" in the article is, to correspond to the concept of "integration" during the EU history. The first article of title 3 of Part I of Constitutional Treaty called 'Union Competence' determines the fundamental principle of competence.[118] The first innovation brought by this fundamental principle is conferred competence principle became a constitutional article with the means of the principle of conferral: "The limits of Union competences are governed by the principle of conferral"[119]

To ensure the openness, the second part of article includes an expression which is similar to article 5/1 of CT and in the name of the principle of conferral that "the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution."[120] The most significant provision bringing with that paragraph, different from the ECT, is "Competences not conferred upon the Union in the Constitution remain with the Member States."[121]

The principle of *subsidiarity* reorganizes differences at three points from article 5/2 of ECT within the same article.

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[117] Constitutional Treaty, article. I-1
[118] CT, article I-11
[119] CT, article I-11/1
[120] CT, article I-11/2, s.1
[121] CT, article I-11/2, s.2

First of all, instead of ex article which organized the using the appropriate competence in two levels, Member States and EU, possible appropriate level is divided into two in the aspect of Member States and proposed action whether or not sufficiently achieve by not just only Member States but also at central level or at regional and local level alternatively.[122] Second difference is, the principle of *subsidiarity* shall be implemented by EC institutions in accordance with the annexed protocol of Constitution[123] that this protocol shows how this principle shall be applied. Lastly, "National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol."[124] Any article about judicial review of the principle of *subsidiarity* has not been existed in the Constitutional Treaty.

The most comprehensive amendment for competence order of EU is that Constitutional Treaty includes categories of competence. In the relevant article under the title of 'categories of competence', when the Constitution confers on the Union exclusive competence in a specific area, just only adopting legally binding acts of EU constitutes a constitutional article; Member States have no competence in that fields except empowered Member States by the Union or the implementation of Union acts. [125]

After Constitutional Treaty has explained Member States and EU may legislate and adopt legally binding acts in any area when conferred competence shared with the Member States to the Union, Constitutional Treaty shows how this sharing may become. "When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area."[126]

Right after that article, Constitutional Treaty organize that the Member States shall coordinate their economic and employment policies within arrangements as determined by

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[122] CT, article I-11/3, p.1
[123] This protocol is amendement version of Protocol, which examined in (C) above, in the aspect of respecting the principle of *subsidiarity*
[124] CT, article I-11/3, p.2
[125] CT, article I-12/1
[126] CT, article. I-12/2

Part III, which the Union shall have competence to provide in accordance with the principle of pre- emption.[127]

In certain areas and under the conditions laid down in the Constitutional Treaty, Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.[128]

Moreover, constitution demystified action to support, coordinate or supplement by bringing that article " Legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail *harmonisation*[129] of Member States' laws or regulations."[130] In last paragraph of that article held that "The scope of and arrangements for exercising the Union's competences shall be determined by the provisions relating to each area in Part III."[131]

Constitution organizes the categories of competence and the competence rules of those categories, lists the scope of areas of those categories.

The exclusive competence areas of EU are *customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy.*[132] Moreover, "the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."[133]

The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.[134] Shared competence areas: *internal market; social policy,* for the aspects defined in Part III*; economic, social and territorial cohesion; agriculture and fisheries, excluding the*

[127] CT, article. I-12/3
[128] CT, article I-12/5
[129] This accent was added by myself
[130] CT, article I-12/5, p.2
[131] CT, article I-12/6
[132] CT, article I-13/1
[133] CT, article I-13/2
[134] CT, article I-14/1

*conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters,* for the aspects defined in Part III.[135] The last part of article held that in defined some areas the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.[136] These areas are *research, technological development, space, development cooperation and humanitarian aid.*

The last part for categories of competence of EU is areas of supporting, coordinating or complementary action; *protection and improvement of human health, industry, culture, tourism, education, youth, sport and vocational training, civil protection, administrative cooperation.*[137]

Constitutional Treaty change the empowerment procedure in article 308 of ECT. First part of relevant article is like that:

"If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures."[138]

The most important amendment making in that part of that article is, instead of previous expression of 'functioning of common market', the expression of 'within the framework of the policies defined in Part III' is used. Moreover, a task is entrusted to Commission related with that article; using the procedure for monitoring the *subsidiarity* principle referred to in Article I-11(3), the European Commission shall draw national Parliaments' attention to proposals based on this Article.[139]

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[135] CT, article I-14/2
[136] CT, article I-14/3-4
[137] CT, article I-17
[138] CT, article I-18/1
[139] CT, article I-18/2

Other amendment making for that article is, to organize the effect of decisions adopting in accordance with that article, on Member States laws. According to this, measures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Constitution excludes such harmonization.[140] Members representative participation of Parliament to Convention which prepared the Constitutional Treaty proposed even the amendment of unanimity rate to qualified majority, these proposals were not be accepted.[141]

In the area for protecting fundamental rights and freedoms, 'the Charter of Fundamental rights of the Union' - adopted by EU but has not yet entered into force- composed the part II of Constitutional Treaty. If Constitutional Treaty ratifies, ECJ will determine the legal value and the content of right and freedoms listed in the part.[142] By virtue of that, articles about the basic structure of Charter will be observed.

Fifth paragraph of Preamble which come before the articles of Charter held that 'this Charter respect of the competences of EU'[143] so this article shows that Charter protect the EU's competences granted by Constitution. However, the article organizing the competence of the EU in the area of human rights more detailed and certain is title 7 of Charter, 'field of application.' According to this, Charter addresses to institutions of the EU with due regard for the principle of *subsidiarity*; this binds Member States legally when they are implementing Union law.[144] In this framework, institutions of EU and Member States respect the rights of Charter within the limits of the powers in accordance with their powers and as conferred on it (the principle of conferral) in the other Parts of the Constitution.[145] The second part of that article organized the applicability of Charter in the framework of Union law and the effects of Charter within the competence of EU by stressing clearly not to be created the new competence area and category:

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[140] CT, article I-18/3
[141] Kimmo Kiljunen, *The EU Constitution*, Publications of the Parliamentary Office, Helsinki, 2004, p. 72
[142] For the criticism of the content of Charter and principle, freedoms and right organizing by Charter, see. Koen Lenaerts & Eddy de Smitter, *A 'Bill of Rights' for the EU*, CMLRev., Volume 38, 2001, p. 273; Peter Goldsmith, *A Charter of Rights, Freedoms and Principles*, CMLRev., Volume 38, 2001, p. 1201.; Jacqueline Dutheil de la Rochere, *The EU and individual: Fundamental Rights in the Draft Constitutional Treaty*, CMLRev., Volume 41, 2004, p. 345
[143] CT, Part II, Preamble, para.5
[144] CT, article II-111/1, s.1
[145] CT, article II-111/1, s.2

"This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."[146]

The relevant article arranging how that Charter can be interpreted during the application may have the effect possibly on the competence order of EU. Firstly, insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.[147] Moreover, fundamental rights of Charter shall be interpreted in harmony with the constitutional traditions common to the Member States.[148] Rights recognized by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.[149]

Besides bringing the articles about competence articles of Constitutional Treaty in the aspect of the division of vertical power, innovations in the aspect of the division of horizontal power[150] brought by other some articles of Constitution Treaty give the evidences for reshaping the EU in constitutional aspect.

The background of that shaping started to create by various approaches, especially since Amsterdam Treaty. One of the approaches which accepted EU as a confederation is really hard to be accepted when taking into account the principles of direct applicability or direct effect and supremacy of EU law. Moreover, decisions taking with qualified majority by EU Council of Minister which is a supranational institution exclude the confederation approach.[151] On the other hand, for previous situation from Constitutional Treaty, a rapprochement which defines EU as a federal structure has lacking points. Founding treaties, as understanding from above analyzed of doctrines or disciplines put by ECJ is deemed to be

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[146] CT, articleII-111/2
[147] CT, article II-112/3
[148] CT, article II-112/4
[149] CT, article II-112/2
[150] The most important of innovations are to create the President of European Union in accordance with I-22 of Constitutional Treaty and to create the Union Minister for Foreign.
[151] For opposite view see, Oktay Uygun, *Avrupa ve Türk Anayasası: Temel İlkeler Yönünden Genel Bir Değerlendirme*, Anayasa Yargısı 22, 2005, p. 385. Author thinks EU as a confederation but in somehow, EU carries federalism character in some aspects.

a material constitution but these treaties is not deemed to be a formal constitution. Because those treaties are not superior norms of political structure relied on the sovereign will of citizens.[152] Founding treaties have not constitutional character so Member States are in the position of fundamental element; all these situations undermine the federalism rapprochement. On the other hand, it is fact that EU is not a unitary structure.

Furthermore, some different and original approaches were put forward. Mains of them are a la carte Europe rapprochement, variable geometry Europe rapprochement, flexible integration rapprochement, functionalist rapprochement and dependence rapprochement.[153] But these are not rapprochements as looking to EU in the perspective from platform of division of horizontal and vertical powers.

Has Constitutional Treaty become EU in a federal structure?

When taking into account the vertical power division of sharing the competence which was explained in above and taking into consideration of horizontal power division, it can be said that EU approaches the federal structure. Other qualifications of federative structure are also deducted from both the current situation and from the arrangement in Constitution Treaty:

- EC has legal personality both international arena and during the relationship with Member States (article 281ECT). The Union shall have legal personality according to Constitutional Treaty (CT. article I-7).
- Legislative power of EU binds on both Member States and natural person and legal persons.
- ECJ has competence to interpret law like supreme courts of federal states. (ECT, article 220, 234).
- As seen generally in federal states, competences not conferred upon the Union (residual competences) in the Constitution remain with the Member States. (CT, article I-11/2)

However, there exist other barriers for defining EU as a federal structure. The barriers are,

[152] İbrahim Ö. Kaboğlu, *Anayasa Hukuku Dersleri*, Legal Publishing , 2006, p. 160
[153] Supra. p. 18, footnote 14.

Member States or treaties has not grant competence for setting central army and security force to EU, EU does not have authority for taxes and also the more important example is, the question of whether or not Constitutional Treaty is a product of European citizen; in other words, the primary founders has not answered affirmative. All these show that it is so hard to determine EU as a federal structure. Member States are seemed to be a 'master' of Constitutional Treaty, like master of founder treaties. More claiming EU' political structure as a confederal or federal or regional, sui generis character is claimed. One the one hand, supranational character of EU and devolution of power to EU[154], and lacking federative structure which Constitutional Treaty brings – its qualifications were listed above- on the other, caused to be claimed that EU has sui generis new political community/entity or claimed that EU is a dynamic organization which has definition effort of itself.[155]

## III. Conclusion

In conclusion of legal review on competence order of EU, it is seem that competence order has some lacking points. EU institutions and Member States tried to solve these lacking points which come across the integration progress and gradually increase and sometimes encounter ECJ and Member States courts. However, by virtue of devolution of power concerned sovereignty problem, it encounters difficulties to set up competences order which includes exactly full and integration consequence. The last example of that effort is Constitutional Treaty created after working of Europe Convention between 2002- 2004 years. Notwithstanding, in France and Holland, Constitutional Treaty has not been ratified in their referendum so it's caused to be ambiguous whether or not entry into force of constitution. In this conclusion part, mainly EU competence orders' lacking points will be determined and Constitution Treaty will be explained – by virtue of the reason explained above- but in the limits of whether or not the amendments relating with the competence order solve the lacking points which examined above or in some how solve the lacking points.

### *a) The shortcomings of the EU competence order*

[154] Haluk Günuğur, *Avrupa Topluluğu Hukuku*, 3. press, Avrupa Ekonomik Danışma Merkezi, 1996, p. 13-44
[155] Kaboğlu, p. 159-161; Ayşe Işıl Karakaş, *Avrupa Birliği Hukukunda Anayasal İlkeler*, Yenilik Press, 2003, p. 135.

By following the queue of reviewing, the *first* lacking point of current EU competence order is related with the determination the scope of implied competence which used and developed by the way of interpretation method using in ECJ's case- law. In that meaning, it can be true to make a division between implied competence types. When ECJ interprets the implied competence narrowly, competence order shall not be affected from that interpretation by virtue of this interpretation relies on directly a competence article. Because, in this situation, there envisages a competence for reaching specific Community aim. During the existence of an obstacle when reaching that objective, that objective of competence article can not be achieved without removing that obstacle so, implied competence shall be used. However, ECJ relied on one of the objectives of the EC treaties and provide the broader implied competence to EC by that way; that situation became controversial to principle of clear and conferred competence according to following aim in some cases. The objectives adopted in the ECT are open- ended; not taking into account of literal interpretation and forcing the borders of teleological interpretation may be caused to envisaged EC competent in every subject. [156] By virtue of that borders of broader meaning implied competence constitutes a problem.

The *second* important point is the effects on EC competence order by granting a clear external competence to EC by some amended articles of ECT. In the presence of the opinion of the ECJ[157] which indicated article 133 does not grant the competence in the aspects international commitments of EC in intellectual property, a subject which EC does not have legislative power in internal competence rules, giving the EC external competence by new article 133 ECT gives rise to the situation that the EC has no internal competence but external competence. This conclusion emerged from granting the competence to conclude treaty and international negotiations about intellectual property which decided in treaty and goes beyond the scope of article. ECJ indicated in that opinion that although ECT granted clear internal competence for free movement of service, recognizing external competence to EC – in spite of recognized the external competence partly-[158] is not emerged from the objectives of ECT easily.

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[156] Grainne De Burca, *Sovereignty and the Supremacy Doctrine*, p. 457-458
[157] Supra. p. 100-101
[158] Opinion 1/94, [1994] ECR I-5267

The empowerment mechanism of EC with article 308 of ECT can be seen *third* problem. It is not clear how ECJ interprets this part of article, 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community.'

ECJ held in its 2/94 Opinion that protection of human rights does not constitute one of the necessary objectives[159]; this caused to a problem with two reasons. Firstly, when ECJ interprets the principle of implied competence by using the way of broader and teleological interpretation as laid down the interpretation competence of treaty[160] ECJ has not determined fundamental rights and freedoms as a objection of Treaty by taking into account of the linkage with internal market and especially, taking into account the arrangements in articles 6[161] and 7[162] of ECT. We believe that this case- law of ECJ is not compatible with this expression of article 308 of ECT that 'objective and the necessity to attain this objective.' Secondly, the ECJ indicated in its Opinion 2/94 that respecting to fundamental rights and freedoms is a general principle of law.

However, it is seen when reviewing the cases related with the respect of fundamental rights and freedoms that ECJ protects some fundamental rights and freedoms which has never placed in treaties for the reason of internal market and the linkage with the objectives of EC directly or indirectly. The case law about the protection of rights and freedoms is different

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[159] Opinion 2/94, [1996] ECR I-1759, para. 30

[160] Article 220 of ECT: The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

[161] Article 6 of EUT: 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as
they result from the constitutional traditions common to the Member States, as general principles of Community law.

[162] Article 7.1.of EUT: On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before
making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

subject of ECJ.[163] However, , ECJ held expressly that the ECJ has competence to review whether Member States acts comply with ECHR since the existence of the linkage between article 10 of ECHR with the television broadcasting and free movement of service in *Elliniki Radiophonia Tileorassi*[164]. So why not EC has competence to provide that protection wide-ranging in the ambit of article 308 of ECT? Consequently, the question of how article 308 function as a competence article – in the meaning of necessity of attaining EC objectives- constitutes a lacking point of competence order.

The *fourth* lacking point is the negatice effect of the division of exclusive and non- exclusive competence over EC competence order in accordance with article 5 ECT. Although that article makes that division, not determination in that article and treaty which area falls within the exclusive and non- exclusive competence; in other words, in which area EC has exclusive competence, in which area EC has competence together with Member States and in which area EC has not competence, cause to a problem of competence limit between the EC institutions and Member States. Besides ECJ decisions, this division took into account lots of time in doctrine and some Commission declaration which is not legal binding.[165]

However, not making the division in treaties which is a primary law led to two vitiating factors. Firstly, the ECJ creates the exclusive competence sphere which enlarges against non- exclusive competence by interpretation of treaty articles, 'principle of pre- emption' and 'effet utile'. The competences which EC uses together with Member States become exclusive by the way of interpretation.[166] This constitutes the objection of Member States and creates competence order beyond transparency in the meaning of individual's rights. In concurrent competence sphere by applying the principle of pre- emption, using competence of EC individually and losing Member

[163] The cases for that subject, see, Case 29/69 [1969] ECR 419; Case 11/70 [1970]ECR 1134; Case 4/73 [1974] ECR 491; Case 374/87 [1989] ECR 3283; Case 5/88 [1989] ECR 2633; Case 36/75 [1975] ECR 1219; Case 222/84 [1986] 1651. See furthermore, Yıldıray Sak, *Human Rights Law and European Integration*, 2001, LL.M thesis, M.U. European Community Institute, M.U Library, no. T07271

[164] Case 260/89 Elliniki Radiophonia Tileorassi AE [1991] ECR 2925

[165] Ingolf Pernice, p. 4-5; Pierre Pescatore, *The Law of Integration: Emergence of a new Phenomenon in International Relations based on the experience of the European Communities*, p. 37-49; Anna Verges Bausch, *Rethinking the Methods of Dividing and Exercising Power in the EU*, Jean Monnet Working Paper, No 9/2, NYU, NY, 2003; Thedor Schilling, *Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously*, http://jeanmonnetprogram.org/papers/95/9510ind.html., 3 Nisan 2005, p. 6-12

[166] Armin Von Bogdandy & Jürgen Bast, p. 246

States their competence became with implementing the relevant common policy envisaged by Treaty.[167] "As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system." [168] The natural conclusion is to remove the concurrent competence of Member States.[169] The division within the exclusive competence is ambiguous gradually, as seen in the example that some complementary competence was fell within the scope of EC competence by ECJ by virtue of the linkage with internal market.[170] Secondly, that judicial activism which developed by the reason of not being the division of exclusive and non- exclusive competence in treaties causes to occur the problem about what is the field of application of the principle of *subsidiarity*.

The *fifth* lacking point is the problematic structure and function of the principle of *subsidiarity* within the EU competence order. Material content of principle and the insufficient of legal review indicated above led to the problem of ultra vires between EC and Member States. The structure of appropriateness criteria of the principle of *subsidiarity* which opens to political discretion creates matter about application of that principle. However, more important point is that ECJ has not control over the appropriateness criterion or could not have control sufficiently probably for the reason of broader political discretion of the appropriateness criteria although article 220 ECT and articles 1 and 3 of Protocol indicated that this principle open to judicial review. Article 5 ECT does not ensure the objective criterion and the practicable standard for determination of appropriate level of decision- making competence; determination of which area belong to EC and which area falls within the Member States competence get hard in the matters which the principle of *subsidiarity* address.[171] Thus, this causes to not implementing 'the capacity of solving the competence matters' which is expects from the principle of *subsidiarity* as including to the competence order.[172]

The problems of competence order of EU emerging from the treaties, in other

[167] Case 22/70 Commission v. Council (AETR) [1971] ECR 263, para. 17
[168] İbid., para. 18
[169] İbid., para. 31
[170] Supra. C.2
[171] Grainne De Burca, *Reappraising Subsidiarity's Significance After Amsterdam*, p.22
[172] Armin Von Bogdandy & Jürgen Bast, p. 251-253

words, primary competence, secondary competences of institutions laid down the treaties and decisions and transactions of national institutions which organized by attributing the constitutional principle and identity deducts that the parties within the competence orders, in other words, Member States, individuals and EU institutions encounter with the ultra vires and the limits of competence which are deemed to be the fundamental lacking points. Because and however, as indicated above, the owner of competence (EU or institutions) realizes the objective of authorizing the legal norms when the owner of competence changes the legal relationship; deviation of that aim or completely deviation create to conflict with the basis will [Member States] of authorizing legal norms.[173] The decisions of Constitutional Courts of Member States, especially, Germany Federal Constitutional Court, France Constitution Council and Denmark Supreme Court, examining above, disclosure the conflic related with the legislative and judicial acts which deducted the infringement of ultra vires and limitation of EC competences (what does ultra vires means and where the competence restriction of EC institutions finishes).[174] Moreover, these decisions expressly or implicitly claimed in some cases that the competence of solving the conflict belongs to Member States, in fact, to national constitution courts. The ambiguity about which institution solve that conflict, in other words, whether or not EU, actually ECJ has competence to determine for its own competence (*kompetenz-kompetenz*), constitutes the *sixth* lacking point of EU competence order.

*b) Solutions of Constitutional Treaty*

Constitutional Treaty includes provision to solve some lacking points of EU competence order, for others, constitution does not accept the solving provision. On the other hand, Constitutional Treaty will cause to new matters.

*i) General solutions*

Constitutional Treaty organizes that EU can act in accordance with the principle of conferred competence and EU shall not act outside of the bounders of competence granting by Constitutional Treaty in the light of that principle. Moreover, it is indicated that all competences which does not grant to EU remain to Member States in accordance with that principle. The most important conclusion of being categories of competence in

[173] Supra. p. 41
[174] Supra. p. 61-76

Constitutional Treaty together with that article is, to decrease the possibility of using the broader meaning of implied competence doctrine by EU institutions and especially ECJ. Constitutional Treaty includes provisions about category of competence and infers that EU just only has competence in exclusive competence sphere and Member States have no competence in that spheres. Furthermore, Constitutional Treaty ensures the bounders of competence between that spheres and other spheres expressly.

Which spheres fall within the shared competence is determined by adopting the category of shared competence. It is determined to act EU and Member States together with in the sphere of shared competence but the more important point is, one of the important matters was solved by adopting the rule how that sharing occurs. Enacting the principle of pre- emption as a constitutional provision and enacting the rule that when shared competence is at issue, Member States can use competence if EU hasn't used the relevant competence in that category or if EU gives up using that article will remove partly the disadvantages of using that kind of competence. Moreover, we believe that that provision will be subject to judicial decisions and will be discussed. After enacting the rules expressly about shared competence and the principle of pre- emption, Constitution organized that, albeit in some areas (research, technological development, space, development cooperation and humanitarian aid), EU has competence by the way of general arrangement of shared competence that competence shall not result to remove the competence of Member States. This constitutes an exception for 'the principle of pre-emption.'[175] However, ECJ take those areas into the scope of competence by using the way of teleological interpretation.[176] On the other hand, it shall not overlook that the EU institutions try to frame the areas of shared competence constantly and intensively in accordance with treating of EU institutions since founding of EC.

In that meaning, the relevant provision which says that the Member States shall coordinate their economic and employment policies within the arrangements as determined by Part III, which the Union shall have competence to provide[177] narrows the scope of Member States.

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[175] CT, article I-14/3-4
[176] Supra. p.111, Case 242/87 Commission v. Council, [1989] ECR 1425
[177] CT, article I-12/3

However, the areas which are outside from exclusive and shared competence fall within the supporting, coordinating and complementary competence category envisaged by Constitution and EU can not affect the Member States competence in these areas but it is clear that EU institutions can not act the complementary activity in some areas like, improvement of human health, industry, culture, tourism, education, youth, sport and vocational training, civil protection, administrative cooperation.[178]

We believe that the provision which is adopted for external exclusive competence of EU in Constitution constitutes a problematic area. The conditions for using the external exclusive competence of article are not clear. The article determines conditions for the exclusive competence of EU about the conclusion of an international agreement that when its conclusion is provided for in a legislative act of the Union or is *necessary* to enable the Union to exercise its internal competence, or insofar as its conclusion may *affect* common rules or *alter* their scope. The meaning and the determination of affecting, altering and necessity may be interpreted differently by Member States, EU institutions and ECJ.

The flexibility article which the Constitution rearranged article 308 of ECT was expanded the scope of current provision. The application area of the article 308 of EC which was restricted with 'common market' comprises Part III of Constitution totally in that article. The conclusion of that it is obvious to find EU possibility for empowerment itself in more areas. Moreover, the expression of "necessary to attain objectives of Community" which existed in ex version of article is protected in new version; therefore the current problematic area goes on increasing by virtue of expanding the scope of provision.

However, according to last paragraph of article which was adopted for the aim of restriction of possibility of expanding the EU's competences by relying on the said wide scope, disposals which are issued accordance with the flexibility article have not harmonization character in situation which Constitution forbid Member States to harmonize laws and regulations. We believe that in such a wide area like this, forestalling to use EU's functional empowerment possibility in a limitless way is accepted in the aspect

[178] This conclusion appears from this article that: "Legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail harmonization of Member States' laws or regulations. (CT, article I-12/5, p.2).

of proper functioning of competence order; besides that connecting that restriction to harmonizing is contrary to the transparency of legislative and administrative activities. Individuals can perceive the III Part of the Constitution as a whole and they have a right to be an owner of a legal expectation. However, it is not expected from natural and legal persons and sometimes some bodies of Member States to differentiate any criterion about technical- law like harmonization and acts in accordance with this.

Institutional resolution was chosen to sort out the two main problem related with the principle of *subsidiarity* (appropriateness criteria and judicial review of the principle). The protocol on the *Subsidiarity* principle was annexed to the Constitution. The institutional resolution related with this issue was conferred a role to the national parliament for observing the principle of *subsidiarity* in a way of consultation. When any draft of European legislative act is prepared in relevant institutions, that institutions will send that draft to all national parliaments for protecting the compatibility between the drafts and the aims of protocol related with the principle of *subsidiarity.* [179] National courts send its opinion whether or not that draft complies with the principle of *subsidiarity* to the Commission and the Council.[180] In that level, the draft can be altered or withdrew or enacted in first version. After six weeks from reaching to Parliament, draft can be became a law.[181] Constitution has not brought provisions for legal reviewing of the principle of *subsidiarity* and feasibility of that reviewing. This has not contributed affirmatively to the solutions about infringement of ultra vires of that principle and infringement of competence limitation. On the contrary, developing the supervision procedure will cause to new competence arguments. Before all else, the competence for blocking the legislative process has not been granted to national parliaments. The time which get decision from national parliament about drafts is so short. Moreover and the most important point is that the political character of supervision procedure cause to be ineffective.

By taking into consideration that Member States governments which are most active element of legislative activities in the EU, it is expected so hard these parliaments to take a different position from their governments. In article arranging the principle of *subsidiarity* in Constitution, when joining the regional and local level parliaments to supervision

[179] Protocol about the role of national parliaments in EU, article 2
[180] Protocol about the role of national parliaments in EU, article 3
[181] Protocol about the role of national parliament in EU, article 4

procedure is taken into consideration, it is clear that internal political contention is brought to EU level. The only affirmative arrangement for the principle of *subsidiarity* is to adopt Constitution provisions which divide certainly the exclusive competence area from the shared competence areas .

*ii) Fundamental rights and freedoms*

The effect of the Fundamental Rights Charter which is a part of Constitutional Treaty on the competence order depends on how the picture of the relationship between Fundamental Rights Charter which defined in article of II-111 of Constitutional Treaty with the EU's competences can be interpreted by institutions and especially ECJ. Because institutions but mostly ECJ have undertaken the effective protection of fundamental rights against the acts of Member States and their institutions. ECJ has provided that protection on the unwritten fundamental rights category by invoking the reason of fundamental rights as one of the general principle of law.[182] Therefore, ECJ will evaluate the article II- 111 of Constitution within the framework of previous effective protection of fundamental rights case law. Article II- 111 illustrated that *Member States shall respect the rights when they are implementing Union law so, 'internal law' has autonomy for that meaning and this Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.* EU institutions used discretion for some articles concerned guaranteeing the protection of fundamental rights in the term of relying on unwritten fundamental rights category and then EU institutions now will certainly use that kind of discretion when that kind of category is covered within any constitutional document. In that case, it shall be expected that Member States bring their objections based on the article II- 111 before the ECJ. So then, can ECJ go on its previous judicial activist conduct in spite of article II- 111?

The main point in the case law of ECJ about the protection of fundamental rights in the aspect of competence depends on reviewing in relevant decisions whether or not the fundamental rights which is infringed by Member States can be evaluated within the scope of EU law or whether or not there exist a relationship between the fundamental rights which is infringed by Member States with the internal market directly or whether or not

[182] Supra. Dipnot 163. Ayrıca, Rodriguez Iglesias, *The Protection of Fundamental Rights in the case law of the Court of Justice*, CJEL, Volume 1, 1995, p. 169

there exist a real relationship with the internal market.

If there is an issue on the competence baseline of the EU competence provision on the protection of the right which was infringed, in other words, if it is claimed that they are not in the boundaries of the competence provision of the Treaty or not in the limits of the based competence which was adopted by a secondary disposal; under these circumstances, it shall be researched that the right claimed by way of that disposal whether or not is fall within the scope of the EU law or is there a direct linkage or a real connection with the internal market.[183]

On the other hand, when infringement of a fundamental right by Member States is claimed, if there is no argument in the aspect of legal competence basis for the provision of the EU rule which protected the right in concern or the provision of acts of EU, claiming rights shall be protected without researching the scope, direct connection or a real relationship.[184] Directive 46/95 held that Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and *there shall no argument on the legal competence rule organized in that directive*. It is claimed that Austrian Court of Auditors infringed the relevant Directive by disclosure of data on the income of employees of bodies to public and by virtue of that that court infringed the fundamental right. ECJ rejected the allegation by Advocate General and plaintiff about the connection between relevant right which was claimed to infringe and internal market and also rejected another argument about there should be a real relationship and ECJ decided that Directive should be applied and by virtue of that the privacy of private life of plaintiff was infringed.[185] Because, there is no confliction on the Directive's competence basis. Moreover, ECJ denied the allegation that the Member State's –institution concerned (Court of Auditors)- did not implement the EU legislation, also concerned Directive when making the relevant transaction so it could not claim the infringement of fundamental rights.[186]

If we take into account the ECJ's established case-law and the judgments mentioned

[183] Case 376/98, Germany v. Parliament and Council, [2000] ECR I-8419, para 83
[184] Case 465/00, Österreichischer Rundfunk [2003] ECR I-4989; Case 101/01 Bodil Lindqvist [2003] ECR I-12971
[185] Case 465/00, 138/01 &139/01 Österreichischer Rundfunk [2003] ECR I-4989, para. 41-43
[186] Ibid. para. 93

above, it is clear that the effect is restricted on the article II-111 of the Constitution which stipulated that the rights composed in the Constitutional Treaty cannot extend the Community's competences and that the Member states are bound only when they are application a EU law, thus this article aimed to prevent the amendment by the way of fundamental rights in EU competence order which examined above. In another word, Charter of Fundamental Rights which was planned not to affect on the competence order just so was included into Constitutional Treaty, will be intensively affect on the competence order upon that case- law of ECJ. Because, when institutions find out the correct baseline in the aspect of competence[187], ECJ will protect the fundamental rights without researching another criterion. In that situation, the subject of fundamental rights will become a conflict of competence by especially plea for competence of Constitutional Courts of Member States.

*In conclusion*, the provisions of Constitutional Treaty bring the certain solution for six lacking points which enumerated at the beginning of that Conclusion part and caused to problems about competence. The most clear one is to restrain EU expressly and certainly in complementary competence category. Conferred competence principle caused to competence division basis on area between Member States and EU and the field of application of the principle of *subsidiarity* came into light by making category of competence. However, it can not said to neutralize the implied competence principle completely by that way and also, it can not said to preclude to admit of interpretation in application of pre- emption principle in the shared competence area and it can not thought to preclude of restriction tendency of shared competence area of EU institutions (by the way of CT, article I-12/3).

Moreover, it is inevitable to differentiate the decisions of EU institutions – especially ECJ- with institutions and courts of Member States about,

i. External competence shall be granted to EU without express internal competence (even target)
ii. The conditions connecting to external exclusive competence of EU.
iii. The boundaries of the extended scope of CT, article I- 18 ( ECT article 308) and the concept of ' attaining the necessary objective' which covered in that

[187] Grainne De Burca, *Human Rights: The Charter and Beyond,* Jean Monnet Working Paper, No 10/01 http://jeanmonnetprogram.org/papers/papers001.html, 11.02.2003.

article.

iv. Whether or not II- 111 give rise to an extending of competence in the area of fundamental rights ( by virtue of judicial interpretation),

The role of the principle of *subsidiarity* which envisaged at current time and in Constitutional Treaty shows the potential of creating the competence confliction, instead of the solving the capacity of competence confliction

The reason of why the amendments adopted by the Constitutional Treaty have not brought the solution on the competence order is same with the reason of why other amendments or proposals which will be brought by following the way and procedure of Constitutional Treaty will not bring the perfect solution for competence order, sharing competence and the boundaries: Trying to solve the lacking points of competence order by adopting the principles which admit the several interpretation when the judicial review at issue, solving just only with the normative solutions, by adopting competence boundaries, by making category of competence, to sum up with, by depending on creating the static texts for the sharing competence between EU and Member States; however, besides there has not been created any institution solving the confliction of competence order, which EU undergoes to change certainly by virtue of the development economically, politically and legally and because of that changes, the boundaries overlaps, – as a reason to encounter the Member States' courts and ECJ- .

This determination signed that the most important matter of EU competence order, so signed to the ambiguous of which institution will take decision in competence matters. The way of solving the enumerated default is to ensure the judicial review for competence issue absolutely. The most important evidence for taking seriously of judicial review is the uselessness of the principle of *subsidiarity* which is seemed clearly in enumerated defaults. ECJ makes that review in particularly but that reviewing is insufficient. There is no arrangement to ensure the function of ECJ as a competence court in Treaties and other laws and regulations. Moreover, it has not qualification to function as a competence court and it has no clear situation over against the Constitutional Courts of Member States in the meaning of conflict of competence.

# CHAPTER 4 THE CONSTITUTION OF REPUBLIC OF TURKEY AND THE EUROPEAN UNION LEGAL ORDER: SOVEREIGNTY PROBLEM.

Relations between EU and Turkey started through Ankara Agreement, which is signed in 12th September 1963. [1] Since this date, compatibility of Turkish legal system with of the EU's has never fallen out from the agenda and in this context when membership to the EU is discussed, national sovereignty problem has turned out to be the most important controversial subject. According to the provided analysis herein this thesis; EU is faced with the sovereignty problem on the one hand, sharing of competences on the other. However, this does not change the fact that EU legal system depends on transfer of sovereignty, deriving from the member states or from the states wiling to become a member. Therefore, Turkey shall review the legal provisions of 1982 Constitution concerning sovereignty. Because these provisions definitely does not allow the transfer of sovereignty or shared exercise of sovereignty with the EU. We are of the opinion that for a country that has started the membership negotiations, it is a necessity, which cannot be postponed, to make a study on the amendments of these provisions to provide transfer of sovereignty and on providing supremacy of EU Law by 1982 Constitution and also on the control of exceeding disposals of the EU while these amendments are issued. On the other hand, we believe that the basis, on which the relations between EU and Turkey has been build, is substantially controversial in respect of Turkish constitutional system as far as sovereignty is concerned. Evidently, some of them are invalid; while some are even equivalent to non-existence.

For two reasons we shall divide our study into two separate headings. The term from the signing of the Association Agreement to the decision for the beginning of the full membership negotiations shall be dealt at the former, while at the latter, the term from the decision of the beginning of the full membership negotiations to concluding the Constitutional Treaty shall be discussed. The first reason for this distinction, as stated above, is to throw a light on the crucial points of the initial periods of the relations. The second reason is the difficulty raised by the relations which has long time intervals. Relations between EU and Turkey based on such a long time that while Association Agreement and as its annex,

[1] For legal texts on which Turkey - EU relations based, see: Engin Nomer & Özer Eskiyurt, *Avrupa Sözleşmeleri*, Fakülteler Matbaası, 1975; Haluk Günuğur, *Türkiye AB İlişkileri-Antlaşmalar, Kararlar, Belgeler, Uyum Yasaları*, Avrupa Ekonomik Danışma Merkezi Yayını, 2003.

Additional Protocol were concluded, Turkey's respondent was the EEC's legal personality whereas it is the legal personality of the EC when the Customs Union was established and finally it is the EU's legal personality when the full membership decision was taken. Yet when Constitutional Treaty or new Treaty amendment comes into effect, Turkey will sign the full-membership agreement with a different legal personality.

It would be correct to focus on the EU – Turkey Association Agreement and its output, the Turkey-EC Association Council Decision since it may enlighten 1982 Constitution necessary amendments concerning sovereignty and other related subjects when full membership is present. Therefore we find it appropriate that the first heading to begin with this study.

*a) From the Association Agreement to Membership Negotiations*

Since 1961 and 1982 Constitutions have same provisions regarding delegation of sovereignty to international associations namely they have no provisions on this head, we are of the opinion that the legal value of the Association Agreement is controversial in respect of Turkish constitutional system. The Association Agreement was ratified by the Turkish Parliament and come into force in our legal system according to the Article 65 of 1961 Constitution under the heading of "Approval of International Agreements", which is similar to the Article 90 of 1982 Constitution. However, when the aim, effect and content of the Association Agreement is taken into account it is obvious that it requires a delegation of sovereignty. Articles 2,3,4,5 and 10 of the Agreement determined as the goal of the Agreement that the progressive elimination of customs duties, quantity restrictions on imports and exports (quotas) or measures having equivalent effect between Turkey and EEC countries. Moreover, according to the Agreement, Turkey shall apply to the third countries the EEC Common Customs Tariff, which she has not contributed in constituting. Levying taxes is doubtless one of the most important indicators of the sovereignty. For this reason, without a constitutional provision, such an agreement, which includes a transfer of a power deriving from the sovereignty, should not have been concluded. Such transfer of sovereignty was not determined in 1961 Constitution. Moreover it is possible to mention a "prohibition of transfer" [2], which is also effective regarding the Constitution in force.

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[2] İzzettin Doğan, *Türk Anayasa Düzeninin Avrupa Toplulukları Hukuk Düzeniyle Bütünleşmesi Sorunu*, Fakülteler Matbaası, 1979, p. 226

On the other hand, the Association Agreement's some articles, which regulate institutional relations and course of association, are lack of fulfilling their functions unless a transfer of sovereignty. One and the most important of these articles, the 22/3 Article of the Association Agreement is another indicator of the fact that this agreement depends on the transfer of sovereignty, which is not accepted by Turkish constitutional system. Same as ECT's Article 308, which creates the foremost conflict of competence between EU and the member states regarding sovereignty and competence, Article 22/3 conferred powers, which can be counted as transfer of legislative power, to the Association Council, which has established by the Association Agreement.[3] When it is considered that even member states has made objections to such an authorization in the sense of Article 308 of ECT, it is obvious that the Association Agreement, which includes a provision as Article 22, which may result in transfer of legislative powers, is not compatible with Turkish constitutional order.

Turkey paid a heavy economic price by the Association Council's decision of 1/95, taken under a legally invalid basis, as if her sovereign power had been transferred, which cannot be done due to her recent constitutional order even if today it becomes a member of the EU. By above mentioned decision namely Customs Union Decision, as from 1 January 1996, Turkey has eliminated customs duties to the EU member states and has started to implement EC Common Customs Tariff to the third countries. The decision 1/95 and its basis the Association Agreement's concerning provisions has not only breached the prohibition of transfer of sovereignty, but also, if it has substantially altered Turkish legislation, has neither submitted to the Parliament for approval due to Article 90/4 of the 1982 Constitution, or not even promulgated due to Article 90/3. It is wrong to reach a conviction that it is not necessary to apply foregoing constitutional provisions since the decision in concern is neither an agreement nor an implementation agreement.[4]

Whilst it is apparent that the Association Council is on the international legal ground composed of Turkey at one side, and on the other, all member states of the EU representing

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[3] Association Agreement Art. 22/3: Once the transitional stage has been embarked on, the Council of Association shall adopt appropriate decisions where, in the course of implementation of the Association arrangements, attainment of an objective of this Agreement calls for joint action by the Contracting Parties but the requisite powers are not granted in this Agreement.

[4] Harun Gümrükçü, *Küreselleşme ve Türkiye*, Avrupa Türkiye Araştırmaları Enstitüsü, Konrad Adenauer, Hamburg-İstanbul, 2003, p. 57; Ünal Tekinalp, *Gümrük Birliği'nin Türk Hukuku Üzerinde Etkileri*, İ.Ü. Hukuk Faültesi Mecmuası, Vol. 55, No 1-2, 1996, p. 27

themselves, naming the Association Council's act by itself or by others as a "decision", does not effect the fact that this act is an international written agreement concluded between states.[5] Since the Article 90 of the Constitution determines how agreements enter into force and how they become binding, in this sence, the Decision 1/95 of the Association Council is not even in force. [6]

If one of two crucial reasons causing this awkwardness, is the approval of the Association Agreement and signing the decision of 1/95, though it is a blatant provision in both 1961 and 1982 Constitutions that transfer of sovereignty is not allowed; the other reason is the lack of both Constitutions: Lack of provisions providing constitutional review of the international agreements and inability to plea of unconstitutionality of international agreements.

These experiences between EU and Turkey are able to show which path to follow in order to solve the problems of sovereignty and competence which EU legal system and Turkish constitutional system will face in the event of Turkey's possible membership to the EU. When supranational character of the EU legal system is considered, the questions of whether and how sovereignty will be transferred are the ones that demand answers. However, settling these points by constitutional arrangement to provide the integration of EU and Turkish legal system will not eliminate the problem regarding Turkish legal order and other member states' legal orders, contrarily cause this problem itself. This problem related to the question of that once transfer of sovereignty and supremacy of EU Law is provided, whether or not EU legal order will be unconditionally supreme, or whether or not a domestic judicial control will be allowed under some conditions

Provisions of 1982 Constitution regarding sovereignty, has the nature to hinder Turkey's participation into EU legal system. When national and popular sovereignty is

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[5] This is also regulated by the Article 2/1 of 1969Vienna Convention on the Law of Treaties.

[6] We would like to indicate that, it can be rightfully claimed that the Customs Union document is an application of the provisions of the Additional Protocol came into force in 1 January 1973 and for that reason it is subjected to the 3rd paragragh of the Article 90 of the Constitution which does not necessitate the parliaments ratification. However even in this case, the result we have reached on the Association Council's disposal number 1/95, which constituted the customs Union between Turkey and EEC does not changes in legal sense. Because, the Article 90/3's provision of "shall not be put into effect unless promulgated" was not fulfilled. (For a detailed analyze, Sevin Toluner, *6 Mart 1995 Tarihli Ortaklık Konseyi Kararı: Milletlerarası Hukuk Açısından bir Değerlendirme*, Istanbul University Law Faculty Journal, Vol: 55/1-2, 1995-1996, p.3).

considered, Republic of Turkey belongs to the former group of national sovereignty. [7] Under the heading of "Sovereignty", Article 6 of the Constitution does not describe the meaning of the term, but states to whom it belongs: "Sovereignty is vested fully and unconditionally to the nation." Thus, the nation is the derivation of sovereignty. Relation between the nation and sovereignty is direct and sharp. [8]

According to the second paragraph of the article, "Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution." The consequence is that sovereignty itself is not even transferred to the authorised organs. Only the "exercise" delivered to the organs, prescribed by the Constitution. Principal founder's jealousy while establishing provisions regarding sovereignty and referring only to national bodies are the most distinctive reflections of a national state model.

Under the blatant wording of these provisions, organs cannot transfer the sovereignty to the EU. Because, organs are not the owners of sovereignty, they exercise it on behalf of the nation within constitutional bounds. It is a general principle of law that no one can transmit powers more than he has. (*Nemo plus iuris ad allium transferre potest quam ipse habet*). Consequently, necessary transfer of sovereignty is not possible under our recent constitutional order.

Also Articles 7, 8 and 9 of the Constitution regulating the organs and their competences, which exercise legislative, executive and judiciary powers are obstacles to the EU membership. Yet, it is baseless to argue Articles 7, 8 and 9 , namely the articles regulating legislative, executive and judiciary powers in view of Article 6 of the Constitution, which states the inability of transfer of sovereignty, while sovereignty cannot be transferred, the powers, exercised on the basis of sovereignty, cannot be transferred at all. [9] However I must emphasize that, donating national organs as sole bodies especially on legislative and judicial

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[7] Bülent Tanör&Necmi Yüzbaşıoğlu, *1982 Anayasasına göre Türk Anayasa Hukuku*, YKY, 2. Edition, 2001, p. 109

[8] Doğan, p. 192

[9] On this head, different views are put forward in the doctrine. *Yüzbaşıoğlu*, claims reformation of the articles 6 and 7. (Necmi Yüzbaşıoğlu, *Türk Anayasasının Avrupa Anayasasına Uyum Sorunu Üzerine Bir Değerlendirme*, Anayasa Yargısı, Vol 22, 2005, p.349). *İnceoğlu* is of the same view ( Sibel İnceoğlu, *Türkiye: AB'nin Yetkileri Karşısında Nasıl Bir Egemenlik Anlayışı*, Anayasa Yargısı, Vol 22, 2005, p. 247 and 250). On the other hand, *Karakaş* has claimed that Articles 8, 9 and 138. shall also be amended. (Ayşe Işıl Karakaş, *Avrupa Topluluğu Hukuk Düzeni ve Ulus Devlet Egemenliği*, Der Yayınları, 1993, p. 223-226).

powers by that explicit wording is fully contrary to EU's system of exercising competences, which based on shared competence and limited sovereignty transfer.

A constitutional amendment is necessary to eliminate the obstacle, concerning sovereignty, to the EU membership. But, during this amendment, it must not be disregarded that there is no uniform action taken by EU member states while they were implementing concerning constitutional amendments. [10] While some member states used the wording of sovereignty transfer, some preferred expression of "shared exercise" and some others used the expression of "delegation". On the other hand in the wording of provisions concerning sovereignty, some states referred explicitly to EC-EU whereas some states referred only to international organisations. And lastly, while some member states submit these amendments to the referendum, some does not.

It would not be correct to use the word of "transfer" during the amendments, as the constitutional tradition has developed towards the idea of national sovereignty since 1921, and for it is also stated explicitly in constitutions as seen above. It would not be quite right to use the word "transfer", with a view to some other member states' wording such as "delegation of sovereignty", which means in constitutional law that revocable authorization of a sub institution by a supreme institution.

It would be appropriate to refer to the EU within the text of the article concerning sovereignty. If not aimed so, referring international organisations in general would cause the constitutional order to be vulnerable to unpredictable interferences, which is contrary to national sovereignty,

In my personal view, submission of the amendments concerning sovereignty to the referendum is one of the most sensitive issues. It is argued by the doctrine that amendment in concern does not necessitate a referendum because 1982 Constitution does not include a prohibition regarding this issue and the principle of generality of the Parliament's powers would allow it. [11] It is not possible to share this view. On the basis of 1982 Constitution's

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[10] Ayşe Saadet Arıkan, *Avrupa İçin Anayasa Andlaşması ve Türkiye: Avrupa Birliği Hukuku ve Ulusal Hukuk İlişkisi*, Anayasa Yargısı, Vol 22, 2005, p. 102-105.
[11] Kemal Başlar, *Avrupa Birliği'ne Katılım Sürecinde Türk Anayasası'nın Uyumlaştırılması Sorunu*, http://www.turkishweekly.net/turkce/makale., 12 February 2006.

blatant wording[12], which states that sovereignty directly belongs to the nation and organs are representatives merely in the sense of the exercising of the sovereignty, such an important disposal of the representative on sovereignty without the consent of the true possessor of sovereignty, is not compatible with principle-agent relation nor with the concept of the principal power.

In light of the forgoing facts, a special provision must be appended to Article 6 of the Constitution:

"Turkish nation may exercise its sovereignty jointly with the other member states and through the authorised organs of the EU with the condition of reciprocity. In order to provide this exercise, requiring Membership Agreement or any other agreement after membership which will amend the EU primary legislation, may come into force only after they are ratified through referendum."

Through the second sentence of the provision, by referendum, the nation will be involved with decisions, which will be taken concerning the effect of the EU's future on Turkish nation's sovereignty and consequently on Turkish constitutional order.

Such an amendment is also parallel to the EU member states' tendencies of perpetuating their determining political roles on constituting EU primary law and decision taking through EU institutions concerning crucial issues, despite all limitation of sovereignty and transfer of powers.

The nature of the EU Law, which is analyzed in this thesis, and its effect on the member states' sovereignty and the powers it exercises, make it inadequate for a state that such a constitutional amendment, submitting it to the referendum and even recognition the supremacy of EU Law on its domestic law through subjecting each primary legislation amendment to the condition of referendum. By the EU Law's nature, it is necessary to provide

[12] Also the Constitutional Court refers the conception of sovereignty in this sense: "At the third paragragh of the article headed 'Sovereinty' it is stated that no person or agency shall exercise any state authority which does not emanate from the Constitution. Unless the constitution itself regulates, blatantly accepts or states that it can be exercised through this way and can be regulated by law, an agency or a person cannot exercise a state authority. Since a state authority which does not depend on and is not derived from the Constitution does not exist, exercise of such an authority cannot be discussed either. Constitutional basis is a condition of validity. (Judgement dated 30.5.1990 No: 1990/2, Decision No:1990/10).

supremacy to the EU Law as whole including secondary law and Court of Justice decisions besides the primary law. For this reason, a provision is needed in order to provide supremacy to all the EU legislation in case of conflict with domestic laws and to determine its place in hierarchy of domestic laws.

Article 90/5 of 1982 Constitution headed "Ratification of International Treaties" regulates the relationship between domestic and international law, whereas it is apparent that this provision is not adequate at the time of Turkey's membership to the EU. This provision is inadequate for three reasons.

Firstly, the provision does not have a rule of conflict character. Yet, relevant constitutional provisions of the EU member states have a conflict resolving character, which provides supremacy to the EU Law. Secondly, though EU agreements in force are seem as if they are international agreements from the national constitutional framework, this may be misleading since the EU legal order is not only composed of agreements and yet, even the agreements are possible to turn out to be a Constitution. Therefore the term of "international agreements" of the provision, is another problem. Thirdly, the provision is understood as resulting in the fact that international agreements are equal to the laws in the hierarchy of domestic law. [13] Also Constitutional Court qualifies international agreements as equal to the law. [14] However, as it can be understood by the judgements of the ECJ, under certain circumstances, EU law is also supreme over the constitutions.

Thus, a new provision must be enacted provided that Article 90/5 is not disturbed. This will provide to prevent a distorting effect to the aim of the Constitutional Article 90/5 as well as bring consistency with the provision concerning the preference of enacting not general but peculiar provisions to the EU.

A new provision concerning not only EU related agreements but all international agreements came up with the constitutional amendments package in 2001. Through a provision of legislative proposal regarding above mentioned constitutional amendments, an

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[13] It is wrong to interpret the provision in this way. For a detailed and bare explanation with respect to this provision is not related with the place of the international agreements within the hierarchy of the international law, see: The Paper of Mesut Gülmez at p.38 in *İnsan Hakları Uluslararası Sözleşmelerinin İç Hukukta Doğrudan Uygulanması*, Türkiye Barolar Birliği Yayınları, issue 75, 2004, (page 44-50).

[14] E. 1996/55, K. 1997/33, dated 27.02.1997.

article as "in the case of a conflict between international agreements and the laws, the provisions of international agreements shall prevail" proposed to be annexed to the last paragraph of Article 90. [15] But this provision was detached from the legislative proposal. During the Constitutional amendments through the Legislation Number 5170, on 22nd May 2004, a rule of conflict regarding only international agreements related fundamental rights and freedoms annexed at the end of the Article 90. According to it, "in the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

This amendment is not adequate to provide supremacy of the EU Law. As it is insufficient regarding its subject, which includes merely fundamental rights and freedoms, it is neither compatible with the characteristic of the EU Law which prevails – if certain conditions are provided- member states' constitutional provisions. Within the framework of *"internationalization of constitutions"* [16] the constitutional provision regulating relations with the EU Law shall be more sufficient.

Now, current form of Article 90 is inadequate to provide legal supremacy to the supranational structures, which exercise powers deriving from sovereignty, and it cannot solve the problem of the legislative hierarchy between EU Law and Turkish Law. [17]

Last amendment on Article 90 may not be accounted as a direct and express transfer of sovereignty from Turkey to the organs of ECHR. However concerning amendment is "a limitation of sovereignty even implicitly" [18] Therefore, to the supremacy of the EU Law Turkey must show the sensibility, which she had shown to ECHR.

In this sense, the provision to be annexed to Article 90 may be as follow:

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[15] Gülmez, p. 58
[16] İbrahim Ö. Kaboğlu, *Anayasa Hukuku Dersleri*, Legal Yayınları, 2006, p. 400
[17] For different suggestions see, Necmi Yüzbaşıoğlu, *Türk Anayasası'nın Avrupa Anayasası'na Uyumu Üzerine Bir Değerlendirme*, Anayasa Yargısı, Vol. 22, 2005, p. 341,348
[18] Sibel İnceoğlu, *Türkiye: AB'nin Yetkileri Karşısında Nasıl Bir Egemenlik Anlayışı*, Anayasa Yargısı, Vol. 22, 2005, p. 231, 251

"The EU Law has a constitutional value at the hierarchy of domestic laws. In the case of a conflict between the EU Law and domestic law, the conflicting domestic provisions shall not be prevailed."

Regarding supremacy of EU Law, *Arıkan* suggest amendments for two constitutional provisions. The first one is to annex a provision to Article 90 as "EU legislation is supreme over the national legislation". The second one is to add an expression of "including EU legislation", to the Article 138, which is as follows "judges, ....., in conformity with the Constitution, legislation and the law, verdict according to their own consciences". [19] The second suggestion points out an important lack and eliminates it appropriately. However we do not find the suggestion that EU Law is supreme over national legislation appropriate. It is a fact that ECJ, through its judgements, challenges the member states' constitutions. Though, none of the member states, within their constitutions, value EU legislation over all national legislation.

The last but the most crucial point regarding constitutional sovereignty and supremacy for Turkey's membership to the EU, is that after all those amendments are done and the membership is fulfilled, what will be the position of above mentioned provisions, which suggest amendments in the Constitution, in view of EU acts. For instance, what the limitations of sovereignty transfer or joint exercise of the sovereignty will be, and controlling of the limitations is an important issue. Though the constitutions has been amended in respect of transfer of sovereignty to the EU or regarding shared exercise of sovereignty, Constitutional Courts of the Member States review the limitations of sovereignty transfer and if the powers, based on the concerning transfer, are exceeded or not.

On the other hand, another issue is that once the supremacy of the EU Law is provided, whether the supremacy in any case – for instance, the review of the EU institutions if they exceed their powers (*ultra vires*) - shall be conceded or not. Some disposals of the EU institutions breach the limits of their powers or result in excess exercise of powers. It must be determined that if the supremacy of such disposals will be reviewed and if supremacy is to be conceded or not according to this review.

[19] Arıkan, p. 74, 107-108

Though, such a review is not possible in view of the second sentence of the Article 90/5 of the Constitution which hinders the constitutional challenge of international agreements. This provision hinders the review of legality of either the Membership Agreement as well as subsequent agreements.

On the other hand, there is a lack of review regarding the EU legislation besides the primary law. Bestowing EU Law a constitutional value in domestic law, in order to provide the supremacy the EU Law, rules out the possibility of the abstract or concrete review of the EU dispositions' constitutionality by the Constitutional Court. Such a case leaves the domestic law unprotected to the extend of some EU dispositions are related a non-transferable sovereignty basis, or results in disability to control of a possibility of exceeding powers even it is within the limits of sovereignty transfer.

We are of the opinion that, a constitutional review is a must for either case.

The first and the most important reason for that, even though sovereignty transfer is allowed in the constitution, is the need of constitutional review to determine the limits of the above mentioned transfer of sovereignty, and the limits of the exercise of the powers, which is based on the concerning transfer, and which shall be exercised by the EU institutions. Turkey's political atmosphere, which is convenient to allow a sovereignty transfer before her membership to the EU, necessitates such a constitutional review. The political atmosphere in concern does not belong to a distant past but it is apparent that such a tendency still appears in recent years through the "harmonization packages". Within the harmonization packages, instead of observing national sovereignty and the Constitution; a strict loyalty is given to the Accession Partnership Documents as if they are mandatory provisions and if they duly put into effect according to our constitutional system.[20]

Secondly, each EU member states have a constitutional mechanism, even in different forms, in order to provide this control. Besides such a control is not provided by 1982 Constitution, the second sentence of the Article 90/5 evidently hinders such a control.

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[20] İbrahim Ö. Kaboğlu, *2001 Anayasa Değişiklikleri: Ulusal-Üstü Etkiden Ulusal Tepkiye*, Anayasa Yargısı, Vol. 19, 2002, p. 105, 110

As third, such a control shall serve the aim of dialog and of providing mutual interaction between the ECJ and the supreme courts of the Member States. Providing this dialog and mutual interaction through the judiciary, will provide the EU Law to be effective in Turkey properly as well as this judicial activity will contribute development of the EU Law.

The provision, which will provide this control, may be inserted to the Constitution as Article 6a or may be annexed to the Article 90, 148 or 150 of the Constitution and may be as follows:

"The President, parliamentary groups of the governing and the opposition parties and their members equal at least to one to five of the full numbers of the members, may demand a judgement from the Constitutional Court to verdict on whether the sovereignty transfer, which is on the basis of Membership agreement or will be on the basis of future agreements, is contrary to Article 1, on the form of the state which is Republic, to Article 2, on characteristics of the Republic and to Article 3 of the Constitution, within 30 subsequent days from the signing of the agreement. The agreement shall not be ratified until the Constitutional Court verdicts on the absence of contradiction or the contradiction which is determined by its verdict is resolved.

A claim of unconstitutionally, based on above mentioned provisions of the Constitution, may be brought forward by the court or by the parties if such a claim of them found serious by the court, in case of a disposition, which belongs to a binding EU legislation is subject to a case before the court. Also, every Turkish citizen may apply to the Constitutional Court claiming that he is directly affected by such a disposal since it is contrary to the related provisions."

It is apparent that Turkey's membership to the EU needs a constitutional harmonization. However, I would like to underline that this harmonization cannot be limited by providing a constitutional legitimating to the EU membership or determining the place of the EU Founding Treaties or EU legislation within our domestic law. It must not be disregarded that the conflict raising atmosphere of the dynamic supranational legal order, which is sometimes deliberately and sometimes necessarily produced by this order, may be vacuumed as absorbing also the national legal orders into turbulence by the supranational

legal order, which they constituted. For Turkey, this turbulence area is under control of two different constitutional reviews but when the EU membership is fulfilled this will become the "Bermuda Triangle Turbulence Area". [21] Turkish constitutional order and the constitutional Court shall not be let indefensible in this area.

*b) Membership Negotiations and Constitutional Treaty*

EU is a living and continuously developing legal order, which threatens the limits of sovereignty and its dispositions of exceeding power become trouble for domestic legal orders. For that reason, it could not be possible to preclude member states to accept shared exercise of the powers or to limit their sovereignty so that donate EU with important competences and to maintain their determining role as nation states on EU's future; last Constitutional Treaty process evidently showed that how the EU's future depends on the national will of Member States.

This vivid and continuously developing legal order, has reached a new phase in 2004, when the decision taken for negotiations with Turkey to begin. In this phase, when negotiation headlines are taken into consideration, Turkey shall make amendments which cannot be compared with the former harmonization packages, more importantly; these amendments cannot be predicted now.

On the other hand, as mentioned above Chapters 3, Title II and III, EU is on its way through the Constitutional Treaty, to become a political entity with overbalancing federative character. In the case of ratification of the Constitutional Treaty as it is now or with little amendments, EU, which Turkey will be a full member in the future, will be a Union of federative character or a Union with overbalancing federative respects.

In this case, regarding sovereignty and competence, Turkey's membership to such a Union may be open to discussion even if above mentioned amendments are fulfilled. Especially our suggestion for the article concerning sovereignty, by reason of "indivisible" sovereignty conception of our constitutional system and of the Constitutional Court, it does not include a transfer of sovereignty instead, it regulates a shared exercise of the sovereignty

[21] Bakır Çağlar, *Farklı Bir Zamanda Farklı Bir Mekanda Anayasa Yargısı*, Anayasa Yargısı, Vol. 12, 1995, p. 311, 317

through the authorised organs of the EU, will not be able to adequate for full membership to the EU with overbalancing federative character under a constitutional agreement, which strictly divides the exercise of the powers. Serious and fundamental amendments have to be needed, in accordance with the Constitutional Court's sovereignty concept in above mentioned judgement:[22]

"The principle of "indivisible integrity" in the state's structure necessitates the sovereignty to be united with a single state structure constituted by the unity of the nation and of the territory. The principle of national state does not allow a conception of multinational state, there is no possibility of a federative structure in such an order. In federative systems, sovereignty is exercised by federated states. Whereas in respect of the conception of singular state more fundamental amendment on the constitution is raised when one takes into consideration of the sovereignty conception on its decision, in which states that 'there is no sovereignty more that one' ".

According to Soysal, "the legal result of the indivisibility principle with respect to structure of the state is that the sovereignty which is unique, to be United with a single state structure constituted by the unity of the nation and of the territory...(In federal states) there are different 'sovereignties', which can be either exercised by separate federated states or the federal state. He indicates that our constitution's current conception of sovereignty is not suitable for participation in a federal structure, by stating that "the indivisibility principle makes it impossible such a multi sovereignty to exist side by side within the internal structure of a state, it also hinders a state to be situated within a federative structure above than itself namely becoming a federated state of a federal state."[23]

For these reasons, Turkey shall both alter its sovereignty conception and adopt a more appropriate and modern sovereignty conception in order to be a member to the EU, which goes forward to a federative structure. Turkey, like the other member states, shall harmonize her constitution on a basis enabling the exercise of the powers by the EU, but she, in the name of the harmonization of the domestic law, shall avoid to construct a constitutional order,

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[22] Chapter 1, footnote 72.

[23] Mümtaz Sosyal, *Anayasanın Anlamı*, Gerçek Yayınevi, 1986, p. 181-182, narrated by: Naz Çavuşoğlu, *Bölgeli Devlet'de Egemenlik/Yetki Paylaşımı*, Maltepe Üniversitesi Hukuk Fakültesi, Paper submitted for the Panel of National Sovereignty and Integrating EU, 17 April 2002, footnote 1.

which is open to and unprotected from the effects of the dispositions –no matter in which legal formality and framework- of the EU, which goes beyond its competences.

## CONCLUSION

It is observed that search for an internationalizing and globalizing governance which is mostly dominated as of mid-1980s by developed states with liberal economies is dominant in today's world in parallel with the increasing authority problems of international and supra-national institutions. This tendency is mostly based on the argument that the nation state can no longer respond to certain efficiency based economic activities and other activities (regardless of being economic or not) with large-scale effects which transcend the boundaries of nation states.

Furthermore, it is also observed that a tendency towards decentralization and regionalization also develops within almost the same timeline, with the influences of the theories of direct democratic participation and subsidiarity.

While one of these vectors goes in the direction opposite to the other and while the focus is not on the fact that both of these vectors are actually opposite to each other, it is interesting to see a high number of arguments and political theories developed on the basis of their common point, which is their 'position against the nation state'. The philosophical activities on this counter-position are focused on two points: (i) the counter argument against the fixed belief that the most appropriate level of decision-making is the nation state, and (ii) the emphasis on bad experiences resulting from the dissolution of national democratic processes and dissolution of political power within the nation state.

Not only the structure of sovereignty among the member states to the EU differs from the unitary state to the federal state, and for some countries it extends to the regional state which includes regions vertically under the nation state and which is a form between the unitary state and the federal state[1], but also these said states change the structure of sovereignty and transfer the authority of decision-making vertically to a supranational body above the nation state, which is the EU.

[1] Italy and Spain are examples of this type of a state; for sovereignty in regional states; See, Naz Çavuşoğlu, *Bölgeli Devlet'de Egemenlik/Yetki Paylaşımı*, www. e-akademi.org., 13 Eylül 2006.

EU problems regarding sovereignty and the competence system based on the transfer of sovereignty are based on the one of the points that the trends for globalization and regionalization focus, which is that the most appropriate level of decision-making is not the nation state, and that the authority which is based on transfer of sovereignty in certain areas belong to a supranational body and its institutions. Before the 80s, these areas were the areas where these states had no fundamental opposition to the argument that sovereignty and the competence to transfer sovereignty would belong to the EU. Therefore, when there had been no opposition, the problem of legal identification and the origin of the legal legitimacy of this transfer of sovereignty and the order of authority accordingly were delayed to times when there appeared areas where these points began to result in problems, to times when Single European Act, Maastricht Treaty, Amsterdam Treaty and Nice Treaty respectively became effective. However, the transfer of sovereignty has been neither arranged in these treaties not in the founding treaties, namely EEC, ECSC and EURATOM.

The fact that the transfer of sovereignty has not been clearly arranged in the treaties could not prevent not only interpretation of certain articles of the treaties (e.g. ECT 95, 249/2, 251 and 308) that this transfer has been made, but also the judgement of the ECJ that this transfer of sovereignty has been made based on doctrines such as superiority of the EU Law by emphasizing the supranational character of these treaties and by interpreting certain provisions of some of the articles of the treaties (ECT 249/3).

Arriving at these conclusions from the treaties has caused the EU integration to enter into a critical phase: a phase that the quality of transfer of sovereignty between the EU and the Member States and whether this competence system accordingly is legal and legitimate are discussed. The integrationist activity of the EU institutions, which attempt to justify their actions on non-economic areas or on areas by using economic causes based on the transfer of sovereignty has resulted in the reaction of the Member States.

The courts of the Member States, especially Constitutional Courts, have claimed that the transfer of sovereignty deducted clearly or by interpretation from

the treaties are not legal and legitimate in terms of national constitutional identity and national constitutional principles regarding some sensitive areas, and created a constitutional safeguard which prevents the EU to have an uncontrollable competence based on an illegal and illegitimate transfer of sovereignty.[2]

We will assess the conclusion of our study on sovereignty and competence sharing in the EU and the control of this sharing on the basis of four arguments:

*i) As for the first argument it may be claimed that the sovereignty of the EU is a limited one and it has a competence system based on this limited sovereignty.*

Constitutional orders of Member States and case laws of Member State Constitutional Courts based on national constitutional identity and national constitutional principles sometimes cause blurring of transfer of sovereignty and the legal legitimacy of the competence system of the EU accordingly. The lack of an absolute, agreed and smoothly functioning competence system causes the damages of this situation to impose itself on the individuals, which the constitutional courts do not permit. In this regard, the actions of the EU exceeding the limits of its exclusive competence based on its limited sovereignty and all its actions outside of its limits of exclusive competence have been decided to be illegal and illegitimate uses of competence by the Member State Constitutional Courts since they are incompatible with national constitutional identities and principles and since they do not accept any transfer of sovereignty, insofar as they are about protection of human rights, democratic state principle and about unchanging principles of their own constitutions.

*ii) Therefore as the second argument, it may be claimed that the Member States draw the boundaries of the limited sovereignty of the EU by making references to certain sensitive issues and do not accept use of competence outside of these boundaries.*

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[2] Christian Kirchner, *Competence Catalogues and the Principle of Subsidiarity in a European Constitution*, CPE, Volume 8/1, 1997, p. 71

Responses have been made to these sensitivities of the Member State Constitutional Courts by making amendments to the founding treaties and ECJ judgments at the EU level, and thus it has been attempted to prevent conflicts of competence and to ensure legal legitimacy. Leaving the political scope of the responses given and the political influences upon the legal amendments made, there are two important legal instruments so as to ensure the legal legitimacy of the EU competence system: the arrangement of competences of the EU normatively and judicial review of the ECJ upon this competence system through amendments in the treaties which clearly requires the will of the Member States.

In order to ensure the legal legitimacy of the EU competence system against the Member State competences and to settle conflicts of competence, it has been tried to arrange various competence rules in the treaties, which will be used by the EU institutions as the competence holders. As can be seen in the analysis made, the quality of these rules pertaining to the use of competence varies.[3] In the previous version of the EEC treaty, before it was amended by the Single European Act, competence had been used under the objectives and through the functional competence rules in the Treaty. After this period when there had been no problem regarding the competence system, with the following sets of amendments the EU competence system has become a set of rules of competence consisting of various competence *principles* and *types,* including limited competence, exclusive competence, non-exclusive competence, field competence, subsidiarity principle, new and amended functional competence and principle of attributed competence and categorized competence. However, this intensive arrangement could not prevent competence sharing with the Member States to come to agenda following each amendment in the treaties.

The reasons for institutions of the Member States and especially Constitutional Courts not to abandon their sensitivities regarding the use of legal and legitimate competence on the mentioned issues in spite of constant development of the competence system can, in my personal opinion, be assessed under three headings.

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[3] Supra. p. 97-138

*a)* The *first* reason for the EU competence system not to ensure the legal legitimacy despite detailed arrangements through rules of using competence is that the arrangement of certain rules of using competence in a problematic way causes conflicts of competence. As result of such problematic arrangements, courts decide differently on competence sharing between the EU and the Member States and there arise conflicts between the judgments.

The principle of subsidiarity, which is expected to take on an important function within the authority system, can be given as an example for such arrangements. In the analysis of the principle, it has been seen that the criterion of appropriateness for the principle of subsidiarity in areas outside of exclusive competence areas is to identify whether decisions can be made in a degree to address the *issue* at hand effectively and efficiently. The interpretation of the arrangement as "problematic" begins at this point. For the criterion of appropriateness to be implementable legally, it is necessary to specify the *issue* to be decided absolutely and clearly; it becomes difficult to find the relevant level and the criterion becomes considerably open to interpretation if the issue is described in a broad and general manner as the shared competences, namely non exclusive competence areas.

Another example is the expression of "objectives that must be realized" in ECT 308. This article which arranges that the EU can take on competence by its own if it has to realize one of its objectives emanating from the treaties and if there is no competence in the treaties causes the EU institutions and institutions of the Member States to make different interpretations as what the objectives in the treaties are and whether the relevant objective has indeed to be realized, and these different interpretations cause conflicts of competence.

Finally, the principle of implied competence in the broader meaning is another example for conflict of competence resulting from the way the rules of using competence have been arranged. In this regard, the fact that the ECJ, moving from the objectives of ECT, grants permission to EC to use implied competence causes objection for exclusive and attributes competence by the Member States. The

courts of the Member States make the interpretation that the objectives the ECJ makes references to for implied competence are not sufficient for implied competence and call this situation an exceeding competence.

*b)* The *second* reason for the EU competence system not to ensure legal legitimacy despite detailed arrangements through rules of using competence is that EU activities with no transfer of sovereignty and rules of competence based thereon have been realized making liaisons through *exceptional bridge provisions* developed for these activities and the rules of competence. The most important example for these activities with no transfer of sovereignty and a rule of authority based thereon is the Common Foreign and Security Policy (CFSP) based on inter-governmental dialog and unanimity, which has been introduced with EUT and which is definitely within the framework of normal foreign relations of the Member States. The EU, under absolute domination and control of the Member States, takes some common position and joint actions to implement CFSP in the areas where the supremacy, direct effect and supranational characteristic of the Community law is not valid.[4] However, implementing these positions and actions, the EU makes acts of use of competence based not on the transfer of sovereignty, but acts based on principle that the Member States have an absolute sovereignty and on the principle of unanimity. Furthermore, when the EU adopts a common position and action under the CFSP, and if this position and action include an act of absolute or partial suspension or mitigation of economic relations with one or more than one third countries, it has been decided that the EU takes this decision as a Community action with the medium of a *bridge provision,* since the mentioned action is an economic one.[5] According to this, the Council in such a situation takes the necessary urgent measures based on unanimity voting upon the proposal of the Commission.

However, it has been a point of discussion in a case whether these measures are within the scope of the competence system and whether they are legally legitimate in this regard.[6] The most important aspect of this discussion has been that

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[4] EUT Art. 13-15, 23
[5] ECT Art. 301
[6] The case was previously decided at the CFI (judgment dated 21 September, 2005 and No T 306/01) and then appealed to the ECJ. Currently, it is pending at the ECJ, Case 415/05, Yusuf and Al Barakaat International Foundation v. Council &Commission.

the scope of the measure to be taken, based on ECT 301 which envisages that any common position and action adopted under the CFSP must be arranged with a disposition at the Community level, has been connected with ECT 308.

Upon the Resolution of the UN Security Council which included the provision to put sanctions on property holdings and assets of persons having direct or indirect relations with Taliban, Usame Bin Laden inhabiting the lands under their control and his organization[7], the EU Member States, under the CFSP and in line with the Resolution of the UN Security Council, took a common position describing the provision to put sanction on property and assets of Usame Bin Laden, Al-Qaida terrorist organization, Taliban and all real and legal persons having relations with them.[8] Upon specific limiting measures were taken by the Council of Ministers on property and assets of identified persons following this common position based on ECT 301 and 308[9], the persons whose property were sanctioned went to courts claiming their property rights and non-competence of the EU.

The most important aspect of the pending case –leaving the other aspects aside – is that in an area which is absolutely within the competence of the Member States, by using the bridge provision ECT 301, the free movement of capital, which is the area of competence of the EU, was used through ECT 308, and the effect of this situation on the legal legitimacy of the EU competence system.[10] This effect of issues, which are definitely outside of the limited sovereignty of the EU and of the competence rules based thereon, on the competence system is just one indicator that any detailed arrangement of the EU competence system through rules of using competence cannot ensure the legal legitimacy. I must also say that the CFSP is an example; the same problems are experienced in other issues.[11]

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[7] Resolution of the UN Security Council dated 15 October, 1999 and No 1267.
[8] Common Position 2002/402/CFSP.
[9] Council Regulation dated 27 May, 2002 and No 467/2001.
[10] Due to the nature of the issue, there has been no objection from the Member States on the use of ECT 308, which is an competence rule, for this purpose, not to impair the balance of working of the internal market based on requirements of the CFSP. However, when this channel is opened, it must be expected that EU institutions adopt an active stance using ECT 301 and 308, and one day there may not be such an agreement among the Member States on the *quality* of the issue.
[11] It is clear that the EU has no competence regarding penal law. For a case where there is a similar situation see., Case 176/03 Commission v. Council [2005] ECR-I 7879.

*c)* The *third* reason for the EU competence system not to ensure legal legitimacy despite detailed arrangements through rules of competence is that in such multi-centered political systems as the EU it is a necessary but not a sufficient condition that the competence system is arranged in detail through rules of using competence to ensure legal legitimacy of competence system.[12] Since existence of a rule which grants authority is an indispensable condition for legislative, review of a court is an obligation. In such multi-centered political systems as the EU, the arrangement of competence rules normatively is not sufficient to ensure legal legitimacy both due to conflicting characteristic of multi-centrality[13] and since such detailed arrangements cause the above-mentioned problems. The sufficient condition is that normative arrangements also have legal review.

*iii) Therefore, as a third argument, it can be claimed that the limited sovereignty and the EU competence system based thereon cannot ensure legal legitimacy on its own by normative arrangements through amendments in the treaties where the will of the Member States is required besides the EU institutions.*

This finding leads to the second instrument necessary to ensure the legal legitimacy of the EU authority system, legal review of this competence system by the courts.

As to ECT 220/1, the judicial review in interpretation and application of the Treaty is done by the ECJ. According to and following this provision, a set of arrangement has also been included in the treaties such as how the review will be made, types of cases, reasons of files and who can be the parties. [14]

It is clear that the ECJ can carry out legal review generally in the legal system of the EU; while some scholars including also *Bogdandy* claim that the general legal review grants authority to the ECJ also in the area of conflict of

[12] Paul Craig & Grainne de Burca, *EU Law, Text, Cases and Materials*, Third Eds., OUP, 2003, p. 138, para. 2
[13] Supra. p. 43-44 and 95-96
[14] ECT Art. 226-244

competence[15], and since solving of conflicts of competence emanating from the competence system requires a special judicial review, I am of the opinion that it is not possible for the ECJ to carry out this review for the below reasons.

*a)* First of all, it is the most important indicator that the ECJ cannot carry out judicial review in conflicts of competence because of the very fact that although the treaties arrange some of the legal arrangements, which grant individuals rights and duties that can legally be claimed effectively, in a way binding for the sovereign states,[16] they make no arrangements including provisions which tell that conflicts of competence will be settled by the ECJ.

*b)* Secondly, all analysis so far show that the founding treaties and the following treaties amending them arrange the competence system of the EU in an intensive and detailed manner. However, there is no provision for conflict of competence in any treaty that says the judicial review of conflicts due to the competence system will be carried out by the ECJ.[17] It is clear that the limited provisions brought by some additional protocols to the treaties are not in that quality.

*c)* Thirdly and in terms of case law, the judgments of Member State Constitutional Courts that designate themselves to be authorized to identify competent in conflicts of competence on some of the sensitive issues mentioned above also prevents ECJ to carry out a judicial review in conflicts of competence. Especially it is clear by the decision of German Constitutional Court and Danish Supreme Court regarding Maastricht, and by the decisions of French Constitutional Council on Maastricht and EU Constitutional Treaty that these courts regard themselves as authorized to settle conflicts of competence based on valid justifications. The fact that they are states with constitutional sovereignty is the

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[15] Armin Von Bogdandy & Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform*, CMLRev., Volume 39, Issue 2, 2002, p. 256

[16] Alec Stone Sweet, *Constitutional Dialogues in the European Community*, Anne-Marie Slaughter, Alec Stone Sweet, Joseph H. H. Weiler (eds), *The European Courts and National Courts –Doctrine and Jurisprudence*, Hart Publishing, 1998, p. 306

[17] It is not possible for provision of ECT Art. 230, which makes possible to annul acts of EU institutions due to lack of competence, to carry out this function. The mentioned provision makes possible for ECJ to annul the act if institutions are not based on any or a right competence provision of the treaty; the competence to settle a conflict between ECJ and Member State courts on conflict of competence cannot be granted by the ECJ.

most valid justification of Member State courts to claim that this competence belongs to them alone. It can be claimed that only this case law alone of Member State courts will not take ECJ outside of judicial review in conflicts of competence. However, evaluating together with the two reasons listed, the difference between *Kompetenz- Kompetenz* case laws of ECJ and Member State courts[18] prevents legal legitimacy of the competence system between the EU and the Member States.

*iv) Therefore, as the fourth finding, it can be alleged that the judicial review necessary to ensure legal legitimacy of the EU competence system cannot be made by the ECJ taking into consideration the EU law in effect*

There has been some suggestions in doctrine as to how this review can be made[19]; –especially during the Convention assembled for the Constitutional Treaty - however, none of these were agreed on.

The suggestions to preserve the status quo and for ECJ to make the judicial review in conflicts of competence with its current position –in support of some procedural and institutional arrangements –[21] cannot be accepted due to the above-mentioned reasons. A different version of this suggestion also focuses on qualifications of the ECJ on legal discretion and justification.[22] It has been suggested accordingly that the ECJ must "ensure better legitimacy and authority of decisions with a legal discretion, which will include maximum degree of various interests, during identification of legal conflicts; and must include and justify the option it chooses for interpretation more clearly in its decisions, taking into account how this will affect persons and institutions at other levels"[23]. I am of the opinion that it is in effect not right to expect ECJ to use discretion like an institution of legislative. Furthermore this propensity is also present in the ECJ to some extent;

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[18] Supra. p. 76-92.
[19] Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization*, IJCL, Volume 2, No 1, 2004, p. 461; Damian Chalmers, *Judicial Authority and the Constitutional Treaty*, IJCL, Volume 3, No 2-3, special volume, 2005, p. 448; Armin Von Bogdandy & Jürgen Bast, p. 257-263
[21] For content of these suggestions; See, Armin Von Bogdandy & Jürgen Bast, p.258-259
[22] Grainne de Burca, *The principle of Subsidiarity and the Court of Justice as Institutional Actor*, JCMS, Volume 36/2, 1998, p. 217
[23] İbid. p. 233

however, this has turned it into not a court settling conflicts of competence, but one which is a party to conflicts of competence.

Another suggestion is to develop a new legal or semi-legal institution as an alternative to the ECJ. The most important argument of this suggestion is that granting the ECJ the authority to give the last decision in conflicts of competence will gradually emphasize the political quality of the competence system between the EU and the Member States.[24] It has been claimed that the interpretive discretion, logical reduction and strict legal formalism used by the ECJ will not contribute to settlement of conflicts of competence which are open to political discussions.[25] Therefore the problem of conflict of competence will gradually enter into the sphere of politics. However, it is not clear how the acceptance of development of an institution like the French Constitutional Council[26] consisting of judges from ECJ and national courts, instead of only those from ECJ, will prevent this politicizing problem.[27]

***As a conclusion***, I am of the opinion that it is up to the Member States to decide how to provide a legal and legitimate ground for the competence system between the EU and Member States and the conflicts of competence accordingly, in the light of the analysis and the *four* findings crystallized hereby.

If the Member States decide to continue influencing the legal supervision on conflicts of competence –in an competence system created in a political arena with national parliaments and governments at the front - , i.e. if they decide to sustain the status quo, the question of who will decide in terms of competence will continue to be discussed legally and its legitimacy will be questioned –since the variables of the problem are in the hands of political actors-. So long as the Member States opt for this decision, the constant discussion at the political level on the judgment of the ECJ judges that "their interpretations that a flying boat can be used as life boat which includes their legal discretion –in interpreting a regulative rule on ships and

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[24] J.H.H. Weiler, *The European Union Belongs to its Citizens: Three Immodest Proposal*, ELR, Volume 22, 1997, p. 150
[25] İbid. p. 155
[26] J.H.H. Weiler, *The Reformation of European Constitutionalism*, JCMS, Volume 35, No 1, 1997, p. 97
[27] Armin Von Bogdandy & Jürgen Bast, p. 257

tankships-, will gradually turn into a legally extreme interpretation that says an automobile can be used as life boat"[28] will cause ambiguity on the legal legitimacy.

Furthermore, Member States may also decide to make the competence system and judicial review legally legitimate by ending its being an issue of political arena under their control. This option can happen by two amendments in the competence system currently in effect.

First of all, a provision may be introduced that says "EU can act within the limits of competence granted to itself in this Constitution hereby" by omitting the expression of "Member States" from the provision which regulates the principles of attributed competence saying "EU can act within the limits of competence granted to itself by the Member States in this Constitution hereby", which was accepted well before the Constitutional Treaty and which has secured its place in the Constitution. Therefore, the EU competence system will become independent of political and legal systems of Member States and will take the legal legitimacy only from its own *basic* law.[29]

In order to ensure that the legal legitimacy of the EU is based not on the constitutions of the Member States but on a normative competence system ratified by them in line with their national constitutional procedures, secondly the provision that says "ECJ is entitled the jurisdiction to make judicial review in conflicts of competence emanating from the competence system created in this Constitution hereby" may be introduced. With the first amendment, this amendment also will provide the ECJ with the qualifications necessary for legitimacy of a court, which are autonomy, impartiality and entitlement.

Such a decision may turn the EU into a federal state whose legality and legitimacy cannot be questioned, and the Member States into 'states' of a

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[28] Glanville Williams, *Language and the Law*, LQR, Volume 61, 1945, p. 303, edited: Gunnar Beck, *The Problem of Kompetenz-Kompetenz: A Conflict Between Right And Right In Which There Is No Praetor*, ELR, Volume 30/1, 2005, p.9.

[29] The original proposal agreed of the Convention, which prepared the Constitutional Treaty, also included similar expressions; however, serious objections of representatives of Member States, especially those of the UK, to the Convention prevented the article to pass in this way. On this issue see., Kimmo Kiljunen, *The EU Constitution*, Publications of the Parliamentary Office, Helsinki, 2004, p. 70

federation; otherwise, each Member State will continue to be a state, the EU a 'thing', the legal legitimacy of the competence system of which is a matter of discussion.

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