MYKOLAS ROMERIS UNIVERSITY

FACULTY OF LAW

INTERNATIONAL AND EUROPEAN UNION LAW INSTITUTE

RIČARD DZIKOVIČ

EUROPEAN UNION LAW AND GOVERNANCE JOINT PROGRAMME WITH UNIVERSITÉ MONTESQUIEU BORDEAUX IV

LEGAL DEFINITION OF A 'MEMBER STATE' IN ASSESSING THE RESTRICTIONS AND ENSURING THE EFFECTIVENESS OF THE INTERNAL MARKET

Master thesis

Supervisor: prof. dr. Ignas Vėgėlė

Vilnius, 2013

TABLE OF CONTENTS

ABBREVIATIONS, ACRONYMS AND LATIN TERMS USED

rationae personae – the person involved, the subject of the norm. Literally means by reason of his person or by reason of the person concerned. In international law, *ratione personae* expresses the rule of law that only a state is a party to an international treaty can take part in international dispute resolution process;

Effet utile – a form of interpretation of treaties and other instruments derived from French administrative law which looks to the object and purpose of a treaty, as well as the context, to make the treaty more effective[1];

lacunae - the term lacunae means gaps, the plural form of the word lacuna. In law, the term refers to the situation where there is no applicable law;

the Court, the Court of Justice, CJEU – European Union Court of Justice;

ICJ – International Court of Justice;

TFEU – The Treaty on Functioning of European Union;

TEU – The Treaty on European Union;

Treaty (Treaties) – TEU or TFEU, or both;

[1] *According to the Oxford Encyclopedic Dictionary of International Law; also useful to know that the use* of the concept has been most apparent in the interpretation of European Community law by the European Court of Justice: 'A concept also frequently used … is that of *effet utile*, whereby the [European] Court [of Justice] has held that the efficacy of Community law would be weakened if it did not interpret EC law in such a way as to fulfill the treaty's objectives': Douglas-Scott, *Constitutional Law of the European Union* (2002), 210. It is at least arguable that the International Court of Justice used the concept in its decision in the *Reparation for Injuries Case 1949 I.C.J. Rep. 174*.

INTRODUCTION

Actuality and practical significance of the topic

The early approach to the way of defining a 'Member State' is perhaps very limited and unsubstantial. According to the precocious observations, the definition of 'Member State' in assessing restrictions of the internal market law is based on the pure wording of Treaty provisions and most likely on the institutional way of understanding States as contracting parties to the Treaty of European Union and Treaty on Functioning of European Union.

Such a method of defining the 'Member State' fates a prevalent approach, which was dominant for a long time, that the rules of EU substantial law, particularly the internal market rules concerning the fundamental freedoms and assessment of the restrictions, are applicable to the State[2]. Similarly, certain vagueness on the raised topic might be highlighted in application of competition rules. However, as the case law of the Court of Justice of the European Union may prove, such a way in defining the 'Member State' notion and attribution of certain restrictions to it is not able to meet the expectations of free market aims and goals enough. The issue arisen before the Court was to ascertain what is behind the explicit wording of the Treaties, taking into an account the purpose to establish and maintain an effective market, based on free trade idea. A huge and significant work was done by the Court in interpretation of implicit meanings behind the provisions of the Treaties and the attempt to ensure the internal market efficiency.

In this Master thesis, the author has to admit that the early concept is not relevant anymore and for that purpose the main instrument will be the case law of the Court and the legal commentaries in the contemporary literature. Hence, in order to move further in arguing the changes, certain literature and authors will be critically reviewed, and the fresher prospects will be presented as contra-argumentation.

The relevance and practical significance of this thesis is weighty and purposeful. Since the effectiveness of an internal market and its rules is nearly the most significant determinant in the functioning of the whole European integration process and EU as it is. Without an effective internal market, the EU is like a system without practical functioning.

[2] Bogaert S. Van den, "Horizontality: The Court Attacks?" in Barnard C. and Scott J., "The Law of Single European Market, Unpacking the Premises", Hart 2002, chapter 5;

The problematic aspects raised in the research

The process of re-definition of the 'Member State' notion, which sometimes will be taken simply as the 'State' notion, means the list of certain substantial consequences. The crucial emphasis is the applicability of fundamental freedoms provision and other rules of an internal market, such as competition rules or either specific rules in different spheres of an internal market law. The applicability is closely related to the proper attainment of Treaty aims and goals. The latter are the main elements in the ensuring of the effectiveness, since the obstacles and restrictions, which may escape the wording formula of Treaty provisions, may have a danger of the efficiency recession. This is also closely related to the question on *rationae personae* in different Treaty provisions, concretely to the qualification of the addressees of the norms. On the scope of the list of addresses and the process of attributing the restrictions to certain subjects/entities depends the issue of responsibility for the impediments of the free market question. Ultimately this raises the question of Treaty provisions applicability to the private subjects as well as raises the question of broader horizontal and even vertical application of freedoms provisions. Contrary to "the traditional and still dominant position is that all instances of direct horizontal effect can be explained away as carefully circumscribed exceptions to the general rule that free movement law only binds Member States"[3], will be argued here, that horizontal effect also depends on the substance of notion of a 'Member State'.

Ultimately the significance of the topic is not limited only to the matters on the effectiveness (*effet utile* purpose) of an internal market law. Globally speaking, the interpretation of the 'State' notion raises the question of the supremacy of the EU law in general.

Lastly, according to the case law of the Court, which will be analyzed below, it seems that the "distinction between the public and private spheres of the economy is blurring".[4] Economic premises such as privatization of property and trade liberalization led the creation of internal market with the "retreat of the States"[5] role. The decrease of distinctions led the increase of the applicability and changed the personality of norms.

[3] Schepel H., "Constitutionalizing the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of Free Movement Provisions in EU Law" // European Law Journal, Vol. 18, No. 2, March 2012, p. 179;
[4] Sauter W., Schepel H., "State and Market in European Union Law. The public and private spheres of the Internal Market before EU Courts", Cambridge university press 2009, p. 19;
[5] *see particularly* Strange S., "The Retreat of the State – The Diffusion of Power in the World Economy", Cambridge university press, 1996;

The Object and the Subject of the research

The object of this Master thesis is to analyze precisely the legal concept of defining a 'Member State'. The thesis also seeks to analyze the functional approach and *effet utile* doctrine and their influence on the process of defining a 'Member State'. The subject matter of Master thesis is the analysis of the notion elements in the tying case law of the Court of Justice of the European Union. The author seeks to understand and clarify the criteria's of the broadened definition, in the frame of the assessment of restrictions and the need to ensure the effectiveness of the internal market law. Ultimately, the Master thesis attempts to clarify the impact of the broadened notion on the applicability of EU law and practical significance on ensuring the effectiveness of the functioning of the Internal market.

However, in this Master thesis, due to the limitations of the amount of paper and taking into account that certain tying aspect to be included in this paper must be analyzed comprehensively, the following aspects are not discussed separately: the understanding of the 'Member State' definition through the Article 106 TFEU related to the public undertakings and undertakings to which Member State grants special or exclusive rights, through the Article 110 TFEU related to the internal taxation, through 107 TFEU State aid issues.

The aim of the chapter number fourth is to point the relevance of the topic in frame of the systematic analysis of the EU law sources, either primary, or secondary. Therefore, only a few examples of the functional approach will be analyzed there.

The analysis of certain other aspects will be concentrated concretely on the topic, without comprehensive introduction to the general theory.

The aim and targets of the research

The aim of this thesis is to analyze and define the concept of defining the Member State in assessing restrictions of the Internal market. The present Master thesis has the following aims:

1. To analyze the concept of the broadening the notion of a 'Member State' in internal market law;
2. To identify the nature of the re-definition process in the internal market law;
3. To point out the irrelevance of the classic public-private distinction of law in regard to the matters;

4. To define and clarify the elements of the notion according to the functional approach taken by the Court of Justice of the European Union;
5. To clarify the impact of the necessity to ensure the effectiveness *(effet utile)* of the internal market on the concept of defining a 'Member State';
6. To compare the notion in different sources of EU law;

Defending statements (hypotheses)

1. The process of the re-definition the 'Member State' notion is inspired by the need to ensure the effectiveness of internal market – and as a consequence moved radically from the explicit wording in the Treaties, towards the broad concept, which is based on a functional approach taken by the Court of Justice of the European Union.
2. This process has significantly changed the scope of *norms-addressees* of the legal provisions in internal market law and broadened the horizontal and vertical application of EU norms.

Research methods

In order to achieve the aims of the Master thesis, following methods were used:

1. **Linguistic method.** Linguistic method is used in order to understand the explicit and implicit meanings of the notions in legal norms of the Treaties (particularly internal market law provisions) and to evaluate the significance of interpretative work done by the Court of Justice. It is also allowed to focus upon the analysis of the Courts statements. This method was mainly used in the analysis of different judiciary instrument: judgments, opinions and commentaries.
2. **Comparative method.** This method allowed to compare certain aspects and point out the differences and/or similarities. The method was used as a basis for arguing the differences and similarities, specifically, in comparative analysis of the following aspects: comparisons of international and EU law, EU primary and secondary law and, particularly, different branches of internal market law. The method was also used to assist the comparison of different scientific opinions and views of legal thinkers.
3. **Systematic analysis method.** This method allowed the analysis of the topic in the frame of the whole system of EU law. Firstly, the analysis of the concrete provisions of substantial law (internal market law provisions) was directly connected with the general norms and principles of EU law, such as Article 4(3) TEU, Article 26 TFEU. Secondly, the research has pointed the relevance of the topic through the systematic

analysis of either primary law sources, or secondary law sources and through the analysis of different branches of internal market law.

All methods were applied in complex in order to provide detailed analysis of the subject. However some of them were used more frequently than others.

Scientific significance and originality of the thesis, bibliography used

Perhaps, no particular and precise research has been done on the raised topic, neither in Lithuania, nor abroad. This provides a certain amount of the originality to the research. Nevertheless, H. Schepel and W. Sauter have analyzed certain aspects that relate to the raised topic. Their book „State and Market in European Union Law" was frequently used in this Master thesis.

Despite the fact, that in Lithuanian academic society no detailed and comprehensive analyses has been done on the raised topic, certain amount of attention to the related aspects has been paid by prof. dr. Ignas Vėgėlė, in the book *"Europos Sąjungos teisė. Vidaus rinkos laisvės, konkurencija ir teisės derinimas"* [EU Law. Fundamental freedoms, competition and harmonization][6] *(see particularly footnotes).*

Although the need to discuss on raised topic of the Master thesis and the related topics is pointed in many European legal literatures. The mere fact, that legal thinkers[7] worldwide are incited to point out the need to understand the notion of a 'Member State' in the frame of an interpretative work done by the Court, stresses the actuality of the topic.

The intention for the selection of bibliography was to use as many newest books and publications of the most leading law schools[8] as possible. The articles and publications were used from the leading and recognized law journals[9]. Besides, certain sources were used more frequently and have inspired the deeper analysis. Such authors as H. Schepel, W. Sauter, J. Snell, P. Oliver, L. Woods, O. Odudu have inspired the author for a deeper analysis of the

[6] Vėgėlė I., "Europos Sąjungos teisė. Vidaus rinkos laisvės, konkurencija ir teisės derinimas" [EU Law. Fundamental freedoms, competition and harmonization], VĮ Registrų centras, 2011; authors note: on the notion in free movement of goods see particularly p. 40; aspect related with broader understanding of State notion or precisely "broadening the vertical scope" in freedom to move see particularly p. 122, aspect on "broadening the horizontal scope" or assessment of measures taken by private subjects/entities see particularly p. 123; however no particular attention was pointed to freedom to provide services, establishment; on freedom for capital movement see particularly the "golden shares examples", p. 296-297;
[7] *See also* the list of bibliography;
[8] *such as* Oxford, Cambridge, Maasricht, Middlesex, Fordham, *see also* the list of bibliography;
[9] *such as* // European Law Review, Maastricht Journal of European and Comparative Law, Revue trimestrielle de droit européen, *see also* the list of bibliography;

tying aspects to the topic of the Master thesis. However, for certain comparison and for other purposes, several observations from older publications[10] were also used and helped to point out the problematic or critical nature of the question.

However, the topic of this Master thesis might be understood as interdisciplinary, since the tying problematic aspects are related to the economics discipline (effective functioning of free market economy in EU). The question on removal of barriers to trade, either of fiscal nature (taxes and other duties), or of non-fiscal nature (other restrictions such as quantitative limitations, discriminative treatment) is closely related to the theory of economic integration[11]. The effect of the removal of these barriers is directly connected to the comparative advantage theory, market liberalization questions, and competitive pressure on the market participants, economic convergence[12]. Despite, the main discipline under analysis is, undoubtedly, the European Union internal market law. Moreover, legal meanings and aspects are the main in this Master thesis.

Thesis structure

The thesis comprises introduction, four chapters with a compound or separate sub-chapters, conclusions and the list of references.

The introduction is presented as an academic overview of the research paper. The first chapter focuses on defining the nature of problems raised in the thesis, provides a theoretic basis for the further research and analyses. The second chapter contains the legal comparison of defining the 'State' in international and EU law, the differences and parallels are pointed. The third chapter focuses on the definition of a 'Member State' in primary law provisions. It has two main substantial parts: first, related to the broadening definition in fundamental freedoms provision, with several sub-chapters of separate analysis on free movement of goods and other freedoms, and other related aspects; second, related to the definition of the State and its acting role in competition rules. The final fourth chapter focuses on the definition in secondary law sources and created in order to provide a comparison with primary law and to note the substance and relevance of the topic even in the case of harmonized notions. Finally, the list of references is presented. It is structured in order to present the sources used separately: legal acts, books, case law, and other sources.

[10] see *list of references, for example* Bogaert S. Van den, "Horizontality: The Court Attacks?" in Barnard C. and Scott J., "The Law of Single European Market, Unpacking the Premises", Hart 2002, chapter 5; *P. Pescatore*;
[11] Artis M., Nixson F., "The Economics of the European Union" [Fourth Edition], Oxford university press, 2007, p. 55;
[12] Ibid, p. 55-56;

It is notable that in this paper for the clarity and certainty's sake the numbering of Treaties articles is always - actual, despite the fact that certain references, originally, were proving the older numbering system. In such cases the *italic* typing of the numbers is used. This way of typing was also used, when the quotation is not word for word.

1. THE NATURE OF PROBLEMATIC ASPECTS

The coordination and harmonization of policy making and legal adjustment processes between Member States have been crucial in putting the necessity to re-establish economic governance in Europe. It is evident that creation of Internal market fate higher degree of convergence in Europe's market. Despite the single (internal) market was created, there were and still are differences in national regulations, perhaps, because the States political and economic orientation of protecting domestic market foremost. Accordingly, the need to deal with the different national lawmaking policies in the frame of ensuring the effectiveness of internal market appears. On the one hand, the effectiveness of internal market depends on the Member States behavior in the compliance with Treaty provisions; on the other hand, an approach might be broader, by considering that in practice, certain restrictions are imposed by the subjects/entities, which cannot be qualified in a traditional understanding as a State. Consequently, the behavior of these subjects/entities must also be checked for compliance. To keep the effectiveness of functioning of an internal market and to promote the compliance with Treaty objectives, aims, goals, the notion 'State' should be analyzed in a precise way. Market discipline in a broader concept, introduced by the Court, also obliges other subjects/entities and even private parties to follow the code of behavior.

The definition of a 'Member State' in assessing the restrictions of free market, taking into an account the need of ensuring the effectiveness of internal market, raises the question whether a particular subject (further also - body, institution, entity etc.) may fall within the scope of an internal market law legal rules, or generally within the scope of the EU law. "To chart its course through this minefield, armed with doctrines of teleology and *effet utile*, the Court has long held on to 'functional' interpretation. The logical result of this approach was disregard for national legal and institutional categories"[13]. The main rationales underlying the functional approach of the interpretation of internal market law and the effect of that interpretation on fundamental freedoms, according to the "settled case law could be classified as arguments of general wording and a mandatory nature argument, *effet utile* and uniform application"[14].

1.1. Main assumptions on the matters of analysis

[13] Sauter W., Schepel H., *supra note*, p. 23;
[14] Karayigit M. T. "The Horizontal Effect of the Free Movement Provisions" // Maastricht Journal of European and Comparative law, 2011(3), p. 317;

1.1.1 The early approach to define a 'Member State': public and private divide of spheres

The "early approach"[15], which is based on the textual meaning of the Treaty, fate an interpretation according to which the rules have explicit addressees, and imposing obligations in the following way: the free movement rules (fundamental freedoms provisions Articles 34, 35, 36, 45, 49, 56 TFEU) are applied to Member State measures and Articles 101 and 102 TFEU applied to the activities and measures of private entities. In another words, there are "specific provisions to deal with restrictions caused by private parties and specific provisions to deal with restrictions caused by the Member States"[16]. However, if the Treaty is considered as a coherent system of legal rules, all measures against the aims of the Treaty must also fall under the provisions, and this is the embodiment of the need to preserve the effectiveness of the common trade.

Initially, the division between public and private rules of law was based on the textual meaning of the Treaties. Two fateful factors had an impact on the maintenance of the divide. First, the "public/private divide presupposed that those *operators* in each sphere could be identified, and identified *institutionally"*[17]. Under such an approach the State can be described in the borderlines of its authority scheme or structuring scheme. This also implies to take into account the constitutional and public law basics in the national laws. Such a way of classification is based on the institutional approach.

The second approach is based on the understanding of the fields where different subjects are functioning. *"*States are thought of as acting to safeguard *non-economic* interests and are the addressees of the free movement provisions; private parties are thought of as acting to safeguard *economic* interests and are the addressees of the competition provisions"[18]. However it must be stated in advance, that together with the rationalization of the internal market law certain realities have been crystallized. The distinction between the mentioned natures of activities "blurs when what can be seen as public functions (non-

[15] *see for example* Bogaert S. Van den, "Horizontality: The Court Attacks?" in Barnard C. and Scott J., "The Law of Single European Market, Unpacking the Premises, Hart 2002, p. 123; Mortelmans K. J. M., "Towards a Convergence of the Application of the Rules on Free Movement and Competition?" // Common Market Law Review, Nr. 38, 2001, p. 613-649 [also available as interactive source at http://igitur-archive.library.uu.nl/law/2005-0907-200816/article_print32.html, (overseen 2013 October 15);
[16] Odudu O., "The meaning of undertaking within 81 EC" // Cambridge yearbook of European legal studies, 2005(7), p. 233;
[17] Odudu O., supra note, p. 234;
[18] Ibid;

economic activities) are carried out by private entities"[19].

In determining the addressee of the particular rules, the Court has made a huge interpretative work on the defining the State and assessing restrictions, which fall under different specific provisions mentioned before. The determinative consideration on the defining the notions became functional approach.

This means that sometimes the activities of a private entity will be considered under the rules applicable to the public sphere because the nature of the activity is seen as public[20]. Similarly, sometimes the activities of the state will be considered under the rules applicable to the private sphere because the nature of the activity is seen as private[21].

It might be argued that there are gaps in the Treaty. At least it is permissible to say so in the analysis of certain legal researches[22]. To deal with *lacunae* of the text, the argument to remove the divide between the specific provisions and ensure the wider applicability and effectiveness of the EU law must be taken into an account.

1.1.2 The functional approach to define a 'Member State': pragmatic nature, aims of the norms and necessity to ensure effectiveness

According to French legal researchers, the conception of 'State' is quite polymorphic[23] in case law of the Court. Although the main purpose of defining a 'Member State' is to "serve the correct application of EU law"[24]. Moreover it is argued that in the context of case law, the 'State' is seen as organic and functional body, whose definition has a direct impact on the balance of Treaties (institutional balance) and the full effectiveness of the EU law[25]. The assimilation of certain public authorities or even private subjects/entities with State appears according to the purpose of broadening the obligatory nature of Treaty provisions, by precluding the State using the autonomic institutions and bodies in order to escape from

[19] Odudu O., *supra note*, p. 234;
[20] *Authors note: see* chapter concerning the fundamental freedoms, *see also* particularly the case C-249/81, para 15;
[21] *Authors note: see* chapter concerning competition rules, *see also* particularly the cases concerning State measures restricting competition in Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, para 69-72;
[22] Pescatore P., "Public and Private Aspects of European Community Competition Law" // Fordham International Law Journal, Vol. 10(3), 1986;
[23] Noreau A., "L'Union Europeenne et les collectives locales" / thèse puor le doctorat, Université de La Rochelle, 2011, available at [http://tel.archives-ouvertes.fr/docs/00/59/09/66/PDF/TheseNoureau.pdf], overlooked [2013 oct. 3], p. 192; *see also* in Gaudin H., reference 23;
[24] Ibid;
[25] Gaudin H. "L'Etat vu de la Communauté et de l'Union européene" // Annuaire de Droit européen, vol. II, 2004, p. 247;

liability[26]. For those reasons, jurisprudence of the Court operates in a pragmatic manner[27]. As will be explained further, this also implies the flexibility in interpretation of the notion in jurisprudence. Many different elements are established for the identification of 'State' in face of other entities, which do not belong institutionally to the public authority.

According to J. Snell, the concept of a 'Member State', in general, "does not have a fixed content in *EU law"*[28]. The pragmatic nature presupposes the difficulties in the fixing the substance of the notion. Withal the interpretation of the notion 'Member State' must be done "in the light of purpose and the context of the provision in which it appears"[29]. This kind of reasoning is based on the precondition, that meaning of the concept must be given in extent, which will enable a Treaty provision to achieve its aims effectively.

Taking the statements mentioned before, the notion of a 'Member State' may probably be defined in different ways according to the aims of certain provisions. For example, if we take Article 263 TFEU, the notion 'Member State' refers "only to the governmental authorities of the country"[30]. Such a narrow definition is based on the general understanding of international Treaties nature and the need to preserve institutional balance. The Court on this matter has been stated that the "number of Member States in this context cannot be higher than the number of parties to the Treaty"[31].

The same content of definition is in the context of Articles 258-259 TFEU, with the meaning of central government as the aims of mentioned articles are clearly on preserving institutional balance and other obligations taken by State.

In contrast, Article 291 TFEU aims to ensure the effectiveness of the transposition of Union law into national legislation, in general, to ensure the effectiveness of the EU law. Straightaway the Court defined the notion in a broader manner, by including a wide range of competent governmental institutions[32] and local or regional authorities[33]. The wider aim and the higher need of effectiveness – the many more subjects/entities are obliged on compliance with legal rules.

From the systematic analysis of case law, it is visible that determinant on the extent of notion is the purpose or aim of the provision. Even more, as it is argued in this research, the

[26] Hecquard-Theron M., "La notion d'État en droit communautaire" // RTDE Nr. 26(4) oct-dec 1990, p. 693;
[27] Noreau A. , supra note, p. 193;
[28] Snell J., "Goods and Services in EC Law: A Study of the Relationship Between the Freedoms", Oxford university press, 2002, p. 135;
[29] Ibid, p. 136;
[30] Ibid;
[31] Judgment 21 March 1997 in case C-95/97 *Région wallonne v Commission of the European Communities., ECR-1787*, para 6;
[32] *see for example* Case C-152/84 *Marshall* v. *Southampton and South-West Hampshire Area Health Authority* (the Court emphasized the need to prevent the State from escaping the responsibility in case of failure of it's institutions)
[33] *see for example* Case C-211/91 *Commission* v. *Belgium*;

purpose is dramatically related to the effectiveness of the EU law, particularly to the effectiveness of internal market. Since the effectiveness in this master thesis is not a pure economic concept. It is more about the attainment of the aims and goals enshrined in the Treaties and to operate effective application of legal rules. Hence, the Advocate General Mr. Van Gerven opined, "an interpretation is sought of each measure which is most keeping with purpose of the concept of public authority which is used"[34]. He also emphasized, that there should be recognized "a desire to ensure that the concept of 'State' is given full and proper effect, that is to say a meaning which achieves the goals of the measure in question"[35]. The pragmatism is noticeable, and the effectiveness is on the top.

The same functional approach has been taken in defining the 'Member State' concept in internal market law, with certain peculiarity of course. It is clear, first of all, that the provisions of fundamental freedoms apply either to central, or to regional and local authorities[36]. That is to say, "not only central government but also regional and local government: it is irrelevant <…> federal, provincial or parish authorities"[37] falls under the notion of a 'Member State'. The Member States, however, are also responsible for the acts of regional or local authorities, for the acts of national courts and for the acts of public bodies of varying kinds, thus, the concept of what constitutes a state measures is „extremely wide and extends to include acts of bodies which are not part of the state machinery when those acts may be attributed to the State"[38].

In the huge variety of different bodies, capable to restrict the freedoms of the Internal market, the Court uses functional approach, which, perhaps, might be called as a peculiar method of interpretation. The pragmatic nature of this approach occurs, while elements and application of the approach in practise must be precisely analysed.

[34] Opinion of Advocate General Mr. Van Gerven delivered on 8 May 1990 in Case C-188/89, para 11;
[35] Ibid;
[36] *see examples in cases:* Judgment 25 July 1991 in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, ECR I-4151 (legislation adopted by an autonomous community of a Member State), Judgment 22 September 1988 in Case C-45/87 Commission v. Ireland, ECR I-4929 (a body under authority of ministry); *see also* Vėgėlė I., "Europos Sąjungos teisė. Vidaus rinka, konkurencija ir teisės derinimas" [EU Law. Internal market fundamental freedoms, competition and harmonization], VĮ Registrų centras, 2011, p. 40;
[37] Oliver P. J. "Oliver on Free Movement of Goods in the European Union", Oxford and Portland, Oregon, Hart Publishing, 2010, p. 56; *see also* Vėgėlė I., supra note, p. 40;
[38] Gormley L. W., "EU Law of Free Movement of Goods and Customs Union", Oxford university press, 2009, p. 397;

2. PARALLEL BETWEEN THE DEFINITIONS OF A 'STATE' IN INTERNATIONAL LAW AND EU LAW: THE ATTRIBUTION OF CERTAIN CONDUCT TO THE STATE

The main aim of this chapter is the comparative analysis of the institutional approach (normative approach), which is current in International law, and functional approach, which has recently been developed in the law of European Union, particularly in the internal market law (substantive). It will be argued that, in the frame of internal market legal rules, the method of application Treaties provisions moved from the traditional normative towards the functional approach. At the same time, certain parallels are drawn in order to point out the impact of functional approach to the whole understanding of the international agreements.

It is evidently true that in the rise of globalization the "increasing range of actors and participants in the international legal system"[39] is unavoidable. The observation, that "the orthodox positivist doctrine has been explicit in the affirmation that only States are subjects of international law" [40] is surviving a modern impetus. Legal relationships in the area of international law, and also in EU law as will be argued bellow, are of the changing nature, since the factual realities and legal rules are changing.

Nowadays the modern and deliberate sources of the international law are international treaties[41]. The subjects/parties of international treaties might be the ones, having international legal personality, for example, states and international organizations[42].

Probably the main trait of the international treaties is "the customary international law principle *which means that the* agreements are binding (*pacta sunt servanda*)"[43]. The creation of legally binding relationships is crucial for international treaties, since certain rights and duties are arising from the assumed obligations. The same is crucial in analyzing the obligations that arise from the European Union Treaties. By fulfilling their legal personality the 'Member States' have signed the Treaty of European Union and Treaty on Functioning of the European Union. The legal consequences of these international agreements are not only the purpose to create an international organization, but also an intention to create legally binding relationship between the Member States. Another aspect is that Member States are obliged themselves to comply with the legal provisions in these Treaties and as a consequence, the question of liability may arise if certain measures are contrary to the adopted legal rules. Meanwhile with the questions on compliance and liability, another

[39] Shaw M. N., "International Law" [Sixth Edition], Cambridge university press 2008, p. 197;
[40] Lauterpacht, (p. 494-500) *in* Shaw M. N., "International Law" [Sixth Edition], Cambridge university press 2008, p. 197;
[41] Shaw M. N., supra note, p. 93;
[42] Jakulevičienė L., "Tarptautinių sutarčių teisė" [Law of International Treaties], VĮ Registrų centras, Vilnius, 2011, p. 63;
[43] Shaw M. N., supra note, p. 94;

question is relevant: who is responsible for the compliance with Treaties provisions, and whose actions are liable to breach the norms?

Since an international agreement entered into a force, the question of contractual liability of the State might arise. However despite the explicit wording of the agreements, where traditionally the contracting parties are defined as States, there are certain rules on attributing the wrongful acts or acts of breach of contractual commitments to the State measures. In other words, the measures breaching the obligations taken under the treaties must, firstly, be qualified as attributable to the State, explicitly mentioned as direct contracting party.

While traditionally the parties of international agreements are contracting States, as it is described in *1969 Vienna Convention on the Law of Treaties*[44], the responsibility under the obligations within the treaties also lies on the State. It seems that a State in the frame of international law is defined in institutional manner. There are certain elements describing what a State is, in a sense of international law, which are enshrined in the *1933 Montevideo convention on the rights and duties of the states*. In Article 1*c* there is a requirement to have a government. This actually means that the State is a subject of international law if the authority is organized. On the one hand, this implies that an institutional approach is taken in attributing the conduct to the State. In this way of thinking, in international law, the governmental authority is responsible in all cases. On the other hand, as will be pointed bellow, the attribution to the State, might be based on another basis even in international law.

In international law, while defining the term State and attributing certain measures to the State "it is the domestic law of the State which plays decisive role"[45]. It must be considered then, that State in determining its internal institutional organization, by its own legislation may delineate the institutional *rationae personae*. This means that the State itself grants the status of the public authority to different bodies. So, the approach on defining the scope of the meaning of the 'State' notion is generally based on *de jure* indication, alias on the legal basis of domestic law sources[46]. That is to say, the institutional approach is dominant.

Another process "of attribution operates in essentially the same manner in relation to persons and entities authorizes by domestic law to exercise elements of governmental

[44] *Authors note:* The Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980, ratified by 113 states as of January 2013. The Convention is recognized as a source of international law and is of binding nature to all States.
[45] Crawford J., Pellet A., Olleson S., Parlet K., "The Law of International Responsibility. Oxford Commentaries on International Law", Oxford university press, 2010, p. 229;
[46] Ibid;

authority"[47]. In such a case the relevant factor "is not the status under domestic law, but the authorization to exercise elements of governmental authority"[48]. However the authorization is still under the matter of the domestic law, since only the State and the authorities of *de jure* nature are of the discretion to grant such an authorization. In summary, as Crawford has stated: "international law has to accept, by and large, the actual system adopted by States, and the notion of attribution thus consists primarily of a *renvoi* to the public institutions or organs in place in the different States"[49].

Meanwhile, there is also an additional approach on attribution of conduct to a State. The conduct of *de jure* organs acting *ultra vires* might be analyzed as well, when the "person or entity does not have that status under the domestic law of the State"[50].

Notwithstanding the most interesting concept, in frame of Master thesis research, is the following. The International Court of Justice has pointed the concept of 'complete dependence' to the State. This concept requires "looking beyond the formal legal status in order to grasp the reality of the relationship so as to avoid the possibility that States may escape from the responsibility"[51]. However it might be argued, that this is an important development of institutional approach on defining the State in international law, made by the judicial instruments of the ICJ. This extension of definition in legal literature was also called as 'expansionist tendency'[52]. Probably such reasoning may produce an impression that the process of defining the State is moving towards functional approach. The parallel with the functional approach, established by the Court of Justice of European Union, must be immediately drawn.

Another step, towards the impression of functional approach in the international law, concerning attribution of conduct to the State, might be done by analyzing the 'agents of necessity' concept. Taking into an account that this kind of subjects/entities does not explicitly attribute to the governmental apparatus by the domestic law, another determinants are directing the attribution process. However, the relevant control still exists, since the individuals or entities, as agents of necessity are still acting "on behalf of State under its direction or control, or upon its instructions"[53].

[47] Crawford J., Pellet A., Olleson S., Parlet K., supra note, p. 229;
[48] Ibid;
[49] Crawford J. "First Report on State liability, by Mr. James Crawford, Special Rapporteur" // in Yearbook of the International Law Commission, Vol. II (Part One), 1998, p. 34;
[50] Crawford J., Pellet A., Olleson S., Parlet K., supra note, p. 230;
[51] Judgment of International Court of Justice delivered on 26 February 2007, in case *Bosnia and Herzegovina* v. *Serbia and Montenegro*, para 392;
[52] Crawford J., Pellet A., Olleson S., Parlet K., supra note, p. 230;
[53] Ibid, p. 230;

In international law, it is also recognized, that the State is responsible in respect of omission with respect to the conduct of the individuals concerned on the basis that State organs have not prevented that conduct from occurring and failed to do so despite the fact that the wrong conduct cannot be directly attributed to the State and its organs[54]. This is another parallel that might be done in the comparison with the EU law.

The institutional approach or as it is recalled by Crawford J., Pellet A., Olleson S., Parlet K. as the normative approach[55] is dominant in international law, since the main element on attribution of certain subjects to alike-State is based on the domestic law – the normative attribution. However, this is not the sole concept and this implies the idea that even in international law the definition of State is the question of a high relevance.

The analyses made before implies the following conclusion. It's evidently true that the definition of State in assessing certain conduct of different bodies is closely related with the prime aim of every legal system – to ensure the binding nature and the effective application of the law. It is also true that the process of attribution certain bodies to the State implies the discussion on the approach employed in defining the notion of 'State'. In such a discussion the traditional approach, which is the institutional one, is based on the idea, that State is a system of its governmental apparatus defined by domestic law, is slowly changing. To ensure the purposes of certain commitments the institutional approach is not enough anymore. In certain circumstances the normative understanding may also attract additional elements to attribute the conduct and ask for the responsibility.

Despite, for the present, the normative approach is still dominant in international law. However, certain parallels with EU law are visible. First, the explicit way of defining a 'Member State' in EU law is also normative. At the same time, as will be described in the further chapters, the Court of Justice of the European Union established another approach, based on a pragmatic nature and moving from traditional understanding of a contracting Member State towards the functional way of defining. Perhaps this might be the second parallel, since either in international law, or in EU law, the methods of defining and attribution are changing. Notwithstanding, the functional approach in EU law evolved in greater amounts, since "Court disregards the formal legal status of various bodies for purposes of the application of *certain Treaty provisions* in favor of a functional approach that attributes

[54] Crawford J., Pellet A., Olleson S., Parlet K., supra note, p. 232;
[55] *Authors note: see* the arguing on the normative approach to attribution in Crawford J., Pellet A., Olleson S., Parlet K., p. 225;

measures taken by these bodies to the State upon a finding of sufficient State involvement"[56]. That is, probably, the main difference, which is under the great attention in this Master thesis.

[56] Schepel H., "Constitutionalizing the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law" // European Law Journal, Vol. 18, No 2, March 2012, p. 182;

3. THE DEFINITION OF A 'MEMBER STATE' IN ASSESSING THE RESTRICTIONS AS DEFINED IN THE PRIMARY LAW OF EUROPEAN UNION

In this chapter the analysis on the re-definition of a 'Member State' will be focused on the assessing restrictions, which are directly prohibited by the primary law of the European Union, particularly the Treaties. As it was pointed in the introduction, the main problematic aspect is, perhaps, the wording of the Treaty articles, which explicitly has a very limited approach on defining the addressees of the norms *(rationae persone).* However the implicit meanings are established and maintained in the Court case law. Accordingly, with the purpose of the effective functioning of the internal market, the Court, in a pragmatic manner, has developed the functional approach. This approach, as will be argued bellow, forms a substantial basis in the interpretation of the notion 'Member State'.

The re-definition process and the development of functional approach in this chapter will be analyzed in the following methodology: 1) in the framework of fundamental freedoms rules; 2) in the framework of competition rules. It is crucial to understand the effect of re-definition in both spheres, to point out the impact of the *effet utile* purpose, and finally to understand the correlations between both sets of rules. Since, as will be argued in this Master thesis, the co-relation between the competition rules and fundamental freedoms is the compensatory mechanism for the effective functioning of internal market.

3.1 FUNDAMENTAL FREEDOMS

The first subchapter is regarded to the analysis of the definition of 'Member State' in fundamental freedoms provisions. Taking into account the substantial differences on the application of functional approach in different freedoms, methodologically the author separated the enquiry into: 1) the analysis of *rationae personae* 'norm-addressees' in free movement of goods provisions; 2) the analysis of *rationae personae* 'norm-addressees' in other fundamental freedoms.

Despite the mentioned methodology, certain additional sub-subchapters are added, in order to make the enquiry more comprehensive and detailed. Certain questions, raised in the alphabetic subchapters, are also of the substantial nature and created in order to fulfill the argumentation of the correlated problematic aspects. All detailed explanations and the reasoning on the liaisons are also explained at the beginning of each alphabetic sub-chapter.

3.1.1 THE RE-DEFINITION OF *RATIONE PERSONAE 'NORM-ADDRESSEES'* IN THE FREE MOVEMENT OF GOODS PROVISIONS

The starting point in the raised problem of defining a 'Member State' and assessing its measures, is to define the restrictions, which may be caught as contrary to the internal market rules, particularly, free movement of goods. The assessment of these restrictions is unavoidably connected with the way of defining the addressees of the rules. Accordingly, the starting point is the definition of measures having the equivalent effect to quantitative restrictions, introduced in *Dassonville*[57] case. The Court has stated, that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions"[58]. This is a clear implication from the Court that only the measures enacted by the State are restricting intra-community trade. Besides, the Court in its case law has also considered that Article 34 and 35 TFEU concern only public measures[59]. However the way of defining the State is quite complicated, because, according to the further case law, a variety of entities might be attributed to the State.

The next observation must be made immediately as well. Remembering the judgment in *Dansk Supermarked*[60], where the Court ruled, that "it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of Treaty on the free movement of goods. It follows that an agreement involving a prohibition on the importation into a Member State of goods lawfully marketed in another Member State may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice"[61]. While this approach has never been directly approved. As it will be analyzed further, even private entities/subjects might be understood as addressees of the Articles 34 to 36 of TFEU. Several actualities must be analyzed in the contradiction to the statings' made in *Dansk Supermarked*. While this ruling is actually limiting the possibility to catch private actions under the free movement of goods rules, and as a consequence to broaden the *Dassonville* rule in the part 'enacted by Member States', the researchers have been repeatedly pointing out, that "it has never been confirmed by any subsequent judgments"[62]. In other words, the Court has never complied with that

[57] Judgment of 11 July 1974 Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, ECR I-0837;
[58] Ibid, para 5;
[59] *see* Judgment 1 October 1987 in Case C-311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, ECR I-3801, para 30;
[60] Judgment 22 January 1981 in Case C-58/80 *Dansk Supermarked A/S v A/S Imerco*, ECR I-0181;
[61] Case C-58/80, Dansk Supermarked, para 17;
[62] Baquero C. J., "Free Movement and Private Autonomy" // European Law Review Vol. 24, No. 6, December 1999, p. 608;

position in the future. Moreover, as will be analyzed in this paper as well, the Court has adopted a compensatory mechanism to deal with private measures. So, in this Master thesis it will be argued that private entities might be the addressees of the free movement of goods provisions. Due to this point, the relations between free movement of goods and competition provisions must be regarded in the next sub-chapter. However, it must be pointed in advance that in this Master thesis there is no intention to argue on the full horizontal applicability of the Articles 34-35 TFEU, since the topic is related only with the practice when the entities are related somehow with the Member State.

Taking into an account the observations made before, a series of problematic questions must be raised in this chapter, based on the interpretative practice of case law of the Court of Justice. These are related to the definition of the *ratione personae* (scope of norm-addressees) of free movement of goods provisions. The basic statement is that *the scope of addressees* of the Articles 34 to 36 TFEU is not limited by the wording. To argue on the broadening of the 'State' notion and the substantial change in understanding the addressees of the free movement of goods provisions, the following aspects must be clarified: 1) functional approach in defining 'Member State' and the measures that fall under its responsibility; 2) the responsibility of Member State for the observance of free movement of goods, when the measures are adopted by private entities.

3.1.1. A. The re-definition of a 'Member State' in Articles 34, 35 TFEU: the pragmatism of the Court of Justice of European Union and functional approach

In assessing the State measures, which have an impact on internal market trade and may be caught by free movement of goods provisions, we are on the way of assessing the definition of body, which is capable to fall under the notion of 'Member State'. According to the objective of the free movement of goods provisions, Member States are the primary addressees[63] whereas Articles 34-36 TFEU concerning free movement of goods provisions "are addressed to measures taken by Member States, the expression has been interpreted widely to cover the activities *of other subjects/entities*"[64]. It's evidently clear that according to the case law, we are witnessing the process of "re-definition of public and private spheres"[65]. The consequence of re-definition of 'Members States' is of legal nature. Since the question is about wider Treaty rules applicability and ensuring the efficiency of the Internal market.

[63] Oppermann T., Classen C. D., Nettesheim M., "Europarecht", Verlag C. H. Beck München, 2009, p. 417, para 10;
[64] Kent P., "Law of the European Union" [Third Edition], Middlesex university, Longman press, 2001, p. 127;
[65] Sauter W., Schepel H., „State and Market in European Union Law", Cambridge university press, 2009, p. 43;

The Court has "repeatedly been called on to decide whether semi-public or semi-private organizations are capable of taking measures that have the equivalent effect to quantitative restrictions as prohibited by Article 34 TFEU"[66]. In different sources such organizations have also been called as *quasi-public* bodies or *quasi-State*[67], *non-State* or *"quangos" (quais-autonomous)*[68]. The list of such bodies is "interpreted in the widest way"[69]. Despite the manner of calling them, the main point is still identical. As will be described below, the crucial point is not the entitlement, but rather content, based on the certain elements. Through the case law, the Court takes an approach of *functionalism*. That is to say, the subject/entity can be qualified as acting in the same manner as State, with the same legal consequences derived from the Treaty, if the nature and functions include certain elements of attribution to the public authority or alike-acting. "This concept is to be interpreted widely to cover the public authorities of a Member State in general"[70]. The establishment of functional approach determines the irrelevance of constitutional and administrative structuring of the State apparatus, according to the domestic law.

However, as will be argued bellow, these elements are variable and the Court in different cases is unsteady. Straightway must be pointed, that this does not mean that there are no clear elements of functional approach. It is reasonable to argue that they are. But it is not clear whether they are cumulative. It seems that in practice the functional approach operates on case-by-case mode. Nevertheless, these elements are repetitive, so it is already possible to argue that the list exists. Further they must be presented and described.

In *Buy Irish*[71] case, a programme was introduced to support domestic manufacturing industry and services through the increased support for Irish goods. Moreover, this programme aimed to switch consumers' spending from imports to domestic products. The *Irish Goods Council* played the decisive role; a company of limited guarantees and without a share capital, arising out of the amalgamations, which were set up by the Irish Government. Besides, the government appointed the chairman and the members of Management Committee. It was also noted, that the organization was supported by the aid from public finances.

[66] Ibid, p. 44;
[67] Barnard C. "The Substantive Law of the EU. The Four Freedoms" [Second Edition], Oxford university press, 2007, p. 94;
[68] Oliver P. J. "Oliver on Free Movement of Goods in the European Union", Oxford and Portland, Oregon, Hart Publishing, 2010, p. 57;
[69] Woods L., Twigg-Flesner C., "Textbook on EC Law" [Eighth Edition], Oxford university press, 2003, p. 217;
[70] Hecquard-Theron M., "La notion d'État en droit communautaire" // RTDE Nr. 26(4) oct-dec 1990, p. 693;
[71] Judgment 24 November 1982 in Case C-249/81 *Commission of the European Communities v Ireland*, ECR I-4005;

Irish government in this case was arguing that these "measures of equivalent effect" in the judgments of the Court imply the existence of regulatory intervention emanating from the public authority. According to the Irish government *Dassonville* rule refers only to trading rules enacted by Member States, which are of the imperative or binding mean, such as laws, decrees, rules, administrative practices, etc. So, the arguments actually pointed that there must be direct interference from public authority. The Courts position was although quite different. Firstly, the Court "rebutted the Irish argument that only formally binding measures are caught by what is now Article 34 TFEU"[72]. This means that measures of non-binding nature may be assessed in case of the compliance with Article 34. The measures of non-binding nature are out of public authority discretion and despite that those must be in the compliance with provisions of Article 34 TFEU.

Secondly, the Court took into account the following factors: 1) government participation in organization members' appointment; 2) grant of public subsidies; 3) participation in defining aims of the activities. In such circumstances the Court has stated "Government cannot rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty"[73]. The chosen position is a vivid acknowledgement of broader reading of Treaty provisions. Despite the explicit applicability of the free movement rules to the 'Member States' actions only, Irish Goods Council was attributed to the 'State', despite the legal form of it. The main argument however, in the present case is ensuring the effective application of Treaty provisions, since the aims and goals of free trade might not be reached if the legal form allows escaping. However this means that otherwise the Court saw the risk of jeopardizing EU internal market aims. In practice, the Member States can impose certain prohibited restrictions through the subjects, who are far from the traditional understanding of a State.

Notwithstanding, it is also important to append, that in qualifying different subjects as 'State measures', the Court is highly precise in assessing different elements of functional approach. The analysis as done in *Buy Irish* will be used again and again in each case arising before the Court of Justice.

On the other hand, the substantiation (the elements) used in *Buy Irish*, as will be presented bellow, are not an exhaustive list. The functional approach as itself was used many times after *Buy Irish*, but the determinants of assigning different bodies to the State notion were diverse.

[72] Fairhurst J., "Law of the European Union", Ninth Edition, Pearson Education Limited, 2012, p. 591; *see also directly* Case C-249/81, at paras 22, 23;
[73] Case C-249/81 *Commission* v. *Ireland*, para 15;

Thus, in *Apple and Pear Development Council*[74] case the Court also emphasized the fact, in addition to government participation in the establishment of organization, that organization is financed by a charge imposed by the State on growers. Moreover, the body was entrusted to impose the compliance with the quality of goods rules and was able to use penalties in the case of deviation from them. The last might be called as the function of regulatory nature. What is important is that the regulatory functions - is the element added in this case, considering the *Apple and Pear Development Council* as acting in a same manner as a State.

The last determinant was the compulsory membership, imposed on growers of apple and pear, whose potential production capacity exceeds certain limits. The Court estimated all these elements and by taking into account the fact, that functions entrusted to *Apple and Pear Development Council* were concerned essentially with promotion of goods produced by the domestic market, decided that "it would be contrary to Article 34 of the Treaty for such a body to engage in publicity intended to discourage the purchase of products from other Member States or to disparage those products in the eyes of consumers, or to advise consumers to purchase domestic products solely by reason of their national origin"[75]. According to this statement of the Court, it is possible to assert that the *functional approach* is of pragmatic nature, intended to secure the efficiency on an internal market.

The pragmatic nature is experienced in a way, how the Court "accumulates as much evidence as possible concerning State's involvement in the creation, financing and regulation of organizations in question"[76] and how fickle the Court is, trying to find the hooks. On the contrary, supposedly, the Court's pragmatic functionalism is thorough and meticulous in catching the measures, imposed by different bodies, but with the same consequences as measures adopted directly by the Member State.

In practice, there might be possible situations when the Member States use different schemes to escape the prohibition of domestic goods protection. In case *Commission v. Germany*[77] government empowered *Absatzförderungsfonds der deutschen Land- und Ernärungswirtschaft* for awarding quality label to the domestic goods of certain quality. The German Government has been arguing that the CMA's activities do not fall within the competence of the public authorities and are therefore outside the scope of Article 34 TFEU. But the Court in this case found that the attribution of the CMA to the public authority

[74] Judgment of 13 December 1983 in Case C-222/82 *Apple and Pear Development Council v K.J. Lewis Ltd and others,* ECR 4083;
[75] Ibid, para 33(b);
[76] Sauter W., Schepel H., supra note, p. 44;
[77] Judgment of 5 November 2002 in Case C-325/00 *Commission of the European Communities v Federal Republic of Germany,* ECR I-9977;

derivates from the guidelines and supervision (from governmental body), as well as indirect financiering. Even more, the Court explicitly stated, that: "In those circumstances, it must be held that the Commission could rightly take the view that the contested scheme is ascribable to the State"[78]. It follows, that the contested body must be interpreted as acting in the same manner as public authority and ascribable to the Member State definition. Moreover, it means that by equating the aforementioned body's actions to the State measures, the Court stressed the need to consider such free trade restriction as infringing free movement of goods rules.

The existence of practice, when certain bodies do not formally belong to the public administration or State public authority system, encouraged the Court to adopt the qualification test, based on case by case method, with only a few basic trends. For example, Advocate General Capotorti in the case *Buys Irish*, "offered the following definition"[79]: "<...> *the body* has the same appearance as a public institution, *when* it constitutes an instrument which: (a) pursues objectives which correspond or are parallel to certain objectives of *government* <...>; (b) may be used or influenced by that government"[80]. Besides, the Court in *Hennen Olie* has indicated, "It must be held that the acts of a body subject to such State control may, irrespective of its legal form, constitute "measures" within the meaning of Article 34 of the Treaty if they are capable of affecting trade between Member States" [81].

What is certainly clear from the analyzed case law is that despite the legal form of a subject, other functional circumstances must be taken into account. In the aforementioned case the measures adopted by a body, were established in order to carry out the tasks conferred on it by the national law, namely to manage stock of petroleum products on behalf of its members, came within the prohibition contained in Article 34 TFEU. The verdict was made, basically on two main arguments, as Sauter W., Schepel H. have pointed[82]: 1) the control from the State by means of binding instructions to the body in question; and, as the Advocate General Capotorti have pointed[83]: 2) the objective of that body functions is parallel to the government's purposes. Hence, in each case, the Court has been using different criteria in concluding functional attribution to the State notion.

Even more determinants can be noticed through the analysis of Court practice. In 1989, the Court[84] "held the *Royal Pharmaceutical Society of Great Britain*, a private body,

[78] C-325/00, Commission v. Germany, para. 20;
[79] Sauter W., Schepel H., supra note, p. 44;
[80] Opinion of Advocate General Mr. Capotorti delivered on 15 September 1982 in Case C-249/81, p. 4027;
[81] Judgment of 12 December 1990 in Case C-302/88 *Hennen Olie BV v Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten and State of the Netherlands*, ECR I-4625, para 16;
[82] Sauter W., Schepel H, supra note, p. 44;
[83] Opinion of AG Mr. Capotorti, in Case C-249/81, p. 4027;
[84] Judgment of 18 May 1989 in Joined Cases C-266/87 and C-267/87 *The Queen v Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers and others*, ECR 1295;

capable of taking measures in the sense of Article 34 TFEU, especially by virtue of its broad disciplinary powers"[85]. Contesting body, in this case, was an organization which maintained a register on which pharmacist must be entered in order to be able to practice. The discretionary power of that body was also to bring certain disciplinary proceeding, which may result in the fines suspension or the removal from register. All actions and decisions of this professional body could be disputed in national courts. It seems evidently, that "when the power to pass binding acts of legislative or administrative nature is delegated by the State to a public or private body, those acts would seem to be attributable to the State for the purposes of *Articles 34 to 36 TFEU*"[86].

Similarly, "a central issue was whether the rules of the contested body could be imputed to the government"[87]. In such circumstances Advocate General Mr. Darmond in his opinion emphasized, despite all other determinants mentioned in previous case law, the element of "the exercise of disciplinary powers to ensure <…> *the observance of rules adopted by a professional body*"[88]. Respectively, certain discretionary power was granted by the State with the purpose of performing public interest. The grant of a discretion powers was "radically different from those of ordinary private bodies"[89]. In the opinion of Advocate General, the body, even "legally distinct from the State <…> and even the conduct of a body constituted under private law, supported by the State, may be attributed to the State for the purposes of the application of *free movement of goods rules*"[90]. Thus, according to him, "the form of a body is not conclusive for determining whether its actions may be imputed to the government"[91]. The Court has supported the view of Advocate General, and took the position of analyzing the nature of discretionary powers exercised by and have stated, that "measures adopted by a professional body on which national legislation has conferred powers of that nature may, if they are capable of affecting trade between member States, constitute measures within the meaning of *Article 34 TFEU*"[92]. After all, one more element has been added to the functional approach, which led the Court practice to assess professional bodies as 'acting likewise State'.

[85] Sauter W., Schepel H, supra note, p. 45;
[86] Oliver P. J. "Oliver on Free Movement of Goods in the European Union", Oxford and Portland, Oregon, Hart Publishing, 2010, p. 57;
[87] Woods L., "Free Movement of Goods and services within the European Community", University of Essex, Ashgate, 2004, p. 37;
[88] Opinion of Advocate General Mr. Darmond delivered on 10 March 1989 in Joined cases C-266/87, C-267/87, p. 1313;
[89] Ibid, p. 1314;
[90] Ibid;
[91] Woods L., supra note p. 37;
[92] Joined Cases C-266/87 and C-267/87 *Royal Pharmaceutical Society of Great Britain,* para 15*;*

Generally speaking about the Court position as to the regulatory functions, the binding nature of regulations and discretionary, it must be admitted that the Court "treats self-regulatory associations in exactly the same way as authorities of 'public' <…>"[93]. Even so, sometimes the conclusions might be different. For instance, the professional association in case *Hünermund*[94] had no discretion for securing the observance of its regulations. Despite that fact, the Court stated, that such a body falls under the State notion, because, as Advocate General Mr. Tesauro[95] has pointed, it was governed by public law. Actually there were no doubts on assigning it to the 'State' definition. Even after the establishment of regulatory element the Court has not required it as a cumulative element. Simply say, there was nothing in the Court words that all elements, established for that moment in case law, in assessing the functional approach must be founded together.

In *Jongeneel Kaas* case[96] the Court dealt with a the body established on the private law basics, to whom, despite that, certain amount of State authority was granted. All undertakings in the commercial productions of certain goods were the participants of that body, called as 'agency' and were supervised by agency on compliance of their production with the rules on quality, established by laws. The agency also introduced the obligatory system of marking the production. Moreover, the agency was collecting the levies from all its members. The Court in this case has not analyzed explicitly the functional approach elements on attributing the measures to certain bodies acting alike-State. Instead the Court simply referred[97] to the *Buys Irish* and *Apple and Pear Development Council* cases and remembered that the form of the body by which the restrictive measures were introduced is irrelevant, since certain amount of State functioning might be identified.

The analogy made in this case with the mentioned *Buys Irish* and *Apple and Pear Development Council* cases led to the following ruling of the Court: "it is contrary to Community law for a Member State, either directly or through the intermediary of bodies established or approved by official authority, to reserve exclusively to persons affiliated to such bodies the right to market, re-sell, import, export and offer for export domestic cheese production". The mentioned agency as a result of this reasoning has fallen under the definition of 'Member State'[98].

[93] Sauter W., Schepel H, supra note p. 45;
[94] Judgment of 15 December 1993 in Case C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg,* ECR I-6787;
[95] Opinion of Advocate General Mr. Tesauro delivere on 27 October 1993 in Case C-292/92, p. I-6802;
[96] Judgment of 7 February 1984 in Case C-237/82 *Jongeneel Kaas BV and others v State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole,* ECR 0483;
[97] Case C-237/82, para 19;
[98] Case C-237/82, para 36;

Generally, the flexibility of Courts approach let us to submit that "the concept of Member State encompasses all bodies through which the State is able to achieve a protectionist effect"[99], despite the practical existence of different regulatory structures on defining public authorities in the Member States. It has never been stated that certain elements of functional approach are more essential, or vice versa, neither of all elements established by the Court must be found together as cumulative.

The conclusion might be drawn, that the Court intentionally left the question open, since the pragmatic nature of functional approach explains everything. The functionalism of limited nature, by strict rules on the conditions and elements would lose its main purpose on the *effet utile* of free market. This also explains why at the beginning the author has noticed that the Court was unsteady on the way defining the elements of the functional approach. However, the limits of the approach will probably create the limits to the EU law applicability as well, while the open nature and the code of certain elements leaves the doors open. And every time on case-by-case reasoning the Court is ready for the analysis.

3.1.1 B. The qualification of public officials as acting on behalf of 'State'

In *AGM-COS.MET v. Finland and Lehtinen*[100] the Court "was called upon to decide for the first time whether statements made by an official (in *casu* a civil servant in the Finish Ministry of Social Affairs and Health) might be attributable to his Member State"[101]. It was directly asked whether Mr Lehtinen's public statements might be regarded as restrictions on free movement of goods. According to the secondary law source, the Member States were not allowed to restrict or impede the placing on the market the certain goods, which were mentioned in a directive. Though, one of the officials "conducted a campaign in the media to alert the public to the fact that in his view the plaintiff's *goods* were unsafe"[102]. The litigation concerned the question of "liability of the State for non-authorized statements of its officials, which may interfere the free *movement of goods* within the internal market"[103].

Advocate General Mrs. Kokott has stated "There must therefore be considered whether public warnings about a product by an official are to be regarded as conduct of the

[99] Snell J. "Goods and Services in EC Law. A Study of the Relationship Between the Freedoms", Oxford university press, p. 138;
[100] Judgment of 17 April 2007 Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen*, ECR I-2749;
[101] Oliver P. J. "Oliver on Free Movement of Goods in the European Union", Oxford and Portland, Oregon, Hart Publishing, 2010, p. 59;
[102] Oliver P. J., supra nore, p. 59;
[103] Reich N. "AGM-COS.MET or: who is protected by EC safety regulation?" // European Law Review, Volume 33 No. 1, February 2008, p. 93, *see also* Bouhier V. "Responsabilité des Etats membres pur violation du droit communautaire de fait d'un fonctionnaire" // Revue trimestrielle de droit européen, 43(4), oct.-déc. 2007, p. 708;

Member State. In other words, can statements such as Mr Lehtinen's be attributed to the Member State?"[104] The Court has provided the following answer, which is established on different methodology than in regard of private entities, as mentioned in sub-chapter before. It stated, "The decisive factor for attributing the statements of an official to the State is whether the persons to whom the statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office"[105]. Once again, the Court has broadened the concept of Member State definition, by including under it the officials as well.

Legal argumentation in this case is different from the case law, where the functional approach was operated. Despite, the argumentation is based on understanding of the society, the nature of actions of such persons. This is the uncontested implication to the analysis of the amount of granted functions to these persons, plus, it is the intimation of the States inaction, because it was mentioned, that State was required to take an immediate measures of "appropriate announcement"[106].

However the Court has accepted the legal comparison with international law practice issued by Advocate General. He pointed that, "the criteria which had been developed <…> emphasizing not so much the internal competence structure of State but the perception of the public, probably conform with general principles of international law which the Advocate General mentions expressly"[107]. As Mrs. Kokott pointed out, "the effects of public statements depend exclusively on how their addressees perceive them" [108] she took the comparison from the international law sources. According to the European Commission of Human Rights and the European Court of Human Rights, public officials at any, even the lowest, level can infringe the European Convention for the Protection of Human Rights and Fundamental Freedoms. That also applies where those public officials act without authorization and even where they act without or indeed against instructions[109].

The Advocate General also tried to evaluate the legal comparison with the provisions of Draft articles on responsibility of States for internationally wrongful acts, issued by the International Law Commission. She mentioned the Article 7 and its commentary that "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if

[104] Opinion of Advocate General Mrs. Kokott delivered on 17 November 2005 in Case C-470/03, para 77;
[105] Case C-470/03, para 57;
[106] Reich N., supra note, p. 94;
[107] Reich N., supra note, p. 93;
[108] Opinion of Advocate General Mrs. Kokott in Case C-470/03, para 83;
[109] See the report by the European Commission of Human Rights of 25 January 1976 in application No 5310/71 *Ireland* v *United Kingdom* (1976) // 19th Yearbook of the European Convention on Human Rights, p. 758;

the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions"[110].

The parallel between international legal arguing and EU law was drawn, while the Court has not taken direct argumentation of such a kind. Instead it has been analyzing the actions and functions of the public servant and has also pointed the duty of State to take all necessary actions in order to prevent or stop the actions of its officials, which are contrary to the free movement of goods provisions and impeding internal market trade. Still the reasoning of the Court has certain amount of functionalism. Since the link with public authorities was the prime object on attribution matters.

3.1.1. C. The definition of a 'Member State' in Articles 28 and 30

Since customs duties and charges, which have the equivalent effect, are the restriction of fiscal nature, the first impression might be made, that the question on the qualification of the addressees of Articles 28 and 30 TFEU is not relevant. Perhaps, this is so, because most likely, the fiscal measures fall under the competence of the State. Moreover in early case law of the Court, it was also pointed, that "Treaty prohibits the collection in dealings between Member States of any customs duty and of any charge having an equivalent effect"[111]. Despite that, in practice, there were examples, when certain barriers to trade, which were of fiscal nature, weren't directly imposed by the 'Member State'.

The analysis of a 'Member State' notion in Articles 28 to 30 TFEU on the prohibition of customs duties and charges having equivalent effect quite resemble from the previous analysis[112]. In the case *Dubois*[113] the private company operating international road station imposed the transit charge to cover the costs of building and maintaining a TIR vehicle park used by the customs authorities. Since the customs authorities had agreed to carry out customs clearance operations on the private premises of the forwarding agents, in the view of applicants there was no longer any basis for the transit charge. The Court decided, that "Article 28 and 30 require the Member States to bear the costs of the controls and formalities out in connection with the movement of goods across frontiers and therefore prohibit, in intra-Community trade, the charging to economic agents, whether by virtue of a unilateral measure

[110] Draft Article by the International Law Commission on Responsibility of States for Internationally Wrongful Acts and commentary are available on: [http://untreaty.un.org/ilc/texts/9_6.htm], overlooked [2013 oct 4];
[111] Judgment of 10 December 1968 in Case C-7/68 *Commission of the European Communities v Italian Republic*, ECR 0617, p. 429;
[112] Snell J. "Goods and Services in EC Law. A Study of the Relationship Between the Freedoms", Oxford university press, p. 138;
[113] Judgment of 11 August 1995 in Case C-16/94 *Édouard Dubois et Fils SA and Général Cargo Services SA* v. *Garonor Exploitation SA*, ECR I-2421;

adopted by the authorities or as a result of series of private contracts, of the costs of inspections and administrative formalities carried out by customs offices, <…>"[114].

Actually, in this case the delegation of an activity by the State to private parties is visible. The particularity of this case "lies in the fact that this delegation also entailed a tacit transfer of financial burden to a private party"[115]. The decision here was made in accordance with the transfer of burden of acting certain customs formalities, including the costs and custom duties, from State to the private company.

The way the Court attributed customs charge managing private body to the State measure is probably different from the functionalism approach. On the other hand, the Court has identified a delegation of certain functions to the private body. Accordingly, we have certain premises to talk about functional approach even here, taking as a point the fact that private body is entrusted acting in a manner of State. Further, the findings may be argued by appearing from the State inaction. As Advocate General Mr. La Pergola pointed "even if the charge imposed as a result of a private contract, it stems from the failure of the Member State to fulfill its financial obligation"[116]. Nevertheless, the analyzed view, that the 'State' notion is to be interpreted according to the purpose of the provisions is maintained here as well. And, ultimately, the traits of functional approach might be recognized.

While in case *Commission* v. *Italy*[117], according to the Sauter W. and Schepel H.[118], the clear functional approach can be found in assessing the charges which have the equivalent effect to customs duties imposed by the private parties. The Court defined the charge which has the equivalent effect to custom duties as following: "any pecuniary charge, however small and whatever its designations and mode of application, which is imposed unilaterally on goods by reason that they cross a frontier, even if it is not levied by the State"[119]. By conducting a pragmatic way of thinking, such a broad definition was created to interpret the obligation in Article 28 TFEU in a broad sense. The purpose was to include other subjects responsible for levying procedures at customs under the notion of 'State'.

However the ruling in the last mentioned case, finally dispelled the mist, and the functional approach became visible in formulating the prohibition enshrined in Article 28 TFEU. Since the Court recognized the possibility to catch, under the Article 28 TFEU, the restrictions imposed by others than 'State'. The reasons for such conclusions are also obvious.

---

[114] Ibid, para 14 ;
[115] Oliver P. J. "Oliver on Free Movement of Goods in the European Union", Oxford and Portland, Oregon, Hart Publishing, 2010, p. 58;
[116] Opinion of Advocate General Mr. La Pergola delivered on 18 May 1995 in case C-16/94, p. I-2425, para 5;
[117] Judgment 9 February 1992 in Case C-119/92 *Commission of the European Communities v Italian Republic*, ECR I-0393;
[118] Sauter W., Schepel H, supra note p. 98;
[119] C-119/92, para 44;

The Court emphasized its attention to the aims of the norm; consequently, the primary intention was the effectiveness.

3.1.1. D. The Member State responsibility for private restrictions: cases on omission to act

The question on the top, when we are defining the 'State' as the addressee of Articles 34 and 35 TFEU is whether private parties, individuals or another private bodies (non-State), may be bound and responsible under free movement of goods provisions. It is universally acknowledged, "restrictions on interstate trade resulting from the actions of private parties will fall under Article 101 and 102 TFEU relating to competition"[120]. But these provisions are only applicable to the undertaking and not the States. So, the questions whether private subjects are bound by free movement provisions is accompanied by the next one, can Articles 34 and 35 TFEU be used in another legal schemes against restrictions imposed by private parties?

According to J. Snell, "an alternative method of dealing with the problem of obstacles to the free movement of goods and services created by private individuals is to hold a Member State responsible for private conduct in its territory"[121]. Withal "the related principle of Member State responsibility for private conduct does not remove the need for the interpretation of the free movement of goods and services that acknowledges their binding force toward private non-undertakings"[122]. Accordingly, the Member States are under the duty to ensure the compliance of private bodies with fundamental freedoms provisions. "The State will also be held responsible for the actions of private bodies, if it has either failed to take adequate and appropriate measures to police and stop barriers to trade being imposed by these bodies, or where, even though it has no formal control of these private bodies, it is in a position to exercise considerable influence over them"[123].

However, the Court takes a "very limited"[124] approach to the measures of private parties by restricting the free movement of goods. Undoubtedly in practice, private parties can restrict the free movement of goods. Moreover, they can do it as effectively as the 'Member States' can do. But, for the Article 34 TFEU violation only the Member State will appear responsible. The Court "has shown some willingness to extend the personal scope of the *free*

[120] Oliver P. J., supra note, p. 67;
[121] Snell J., supra note, p. 153;
[122] Ibid, p.154;
[123] Chalmers D., Hadjiemmanuil C., Monti G., Tomkins A. "European Union Law. Text and materials", Cambridge university press, 2006, p. 659;
[124] Sauter W., Schepel H, supra note p. 98;

movement of goods regime by means of an extensive interpretation of 'the State' for these purposes"[125].

In that sense, "the State may have to take responsibility for the actions of individuals who have been disrupting the application of *Article 34"*[126]. Thus, the Court in its case law, related on State inaction, "has provided another possible way of avoiding the problematic situation of the horizontal effect of *Articles 34-36* <…>"[127] trying to compensate the fact, that these provisions are not applicable to the actions of private subjects. Also, this may cause the question of widening the scope of actions imputed to the State. The case law on Member State inaction will not broaden the understanding of the notion of State as it is. The crucial moment is that despite the fact that private persons are not assigned to the notion of 'Member State' the latter must observe the actions of private persons. And this is the point that changes the way of reading the free movement of goods provisions.

The question can be raised here, whether the Court established the preconditions to private parties to comply with free movement of goods provisions, by pointing the States obligation to ensure that the private individuals do not create obstacles to free trade and they do must these actions be prevented and punished? It's an indirect reference to the private individuals that the State is on the guarding positions and all the actions contrary to the fundamental freedoms will be prosecuted. "In effect the Court is creating an indirect obligation to private parties after failing to create direct obligation in its earlier case law"[128]. That, beyond any doubts, introduces a certain weight and shades to the implicit reading of free movement of goods provisions.

In *Angry Framers* [129] case, French farmers committed violent actions against agricultural products from other Member States. Those actions included: "*inter alia*, in the interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other Member States and the damaging of those goods when on display in shops in France"[130]. The Court in that case decided: "<...> by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Government

[125] Sauter W., Schepel H, supra note p. 98;
[126] Barnard C., "The Substantive Law of the EU. The Four Freedoms", Oxford university press, 2005, p. 90;
[127] Woods L., supra note, p. 40;
[128] Woods L., supra note, p.154;
[129] Judgment of 9 December 1997 in Case C-265/95 *Commission of the European Communities v French Republic*, ECR I- 6959;
[130] Ibid, para 2;

has failed to fulfill its obligations under Article 30, <…>"[131]. Actually, in this case the Court pointed State duty to act in order to protect the aims of the internal market and to ensure the effective free trade. The omission to act led for a Member States responsibility for their citizens' actions.

The Advocate General Mr. Lenz [132] took the sequences of argumentation in the following order (in a manner the analysis was started in this Master thesis): firstly, he pointed the fact, that general rule on Treaty obligation is related exclusively to Member States; secondly, he remanded the functional approach on the attribution of subjects to the notion of State. But the present case dealt with an infringement of the principle of the free movement of goods by private individuals (particularly 'angry' farmers).

The problematic questions here are whether all actions of private subjects, which impede the free trade and restrict the free movement of goods, could fall under the Article 34 TFEU and, as a consequence, whether the State will be obliged to take necessary measures to combat them? It must be pointed, that according to the *Dassonville* formula actions, which are contrary to the free movement of goods provisions, must have a protective effect to fall within those provisions. Consequently, this "can be used to weed out absolutely insignificant acts of private individuals"[133]. So, not all measures may be regarded as contrary to the internal market law and the State will not be regarded as responsible. Moreover, according to the analyzed *Angry Farmers* case, it is clear that the actions of the farmers were qualified as having criminal nature according to the national laws.

The case *Schmidberger*[134] concerned the blocking of motorway by protesters on the issue of the road traffic impact on environment. With respect to the facts, that the blockage was the sole measure, which lasted for only a few days and was performed in accordance with the national law requirements, plus without any concrete target to discriminate certain goods, the Court have decided, that measures can be justified on the basis of freedom to assembly and right to protest. According to the Advocate General Mr. Jacobs[135], the assessment of whether there is a restriction of trade must be based on the objective, while the level of impact and motives of both - individuals and the government are irrelevant at this stage of the enquiry. Lorna Woods in her book "Free movement of Goods and Services within European Community", before the judgment to the case was concluded, has stated: "If the ECJ adopts a

[131] Ibid, para 66;
[132] Opinion of Advocate General Mr. Lenz delivered on 9 July 1997 in Case C-265/95;
[133] Snell J., supra note, p. 155;
[134] Judgment 12 June 2003 in Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECR I-5659;
[135] Opinion of Advocate General Mr. Jacobs delivered on 11 July 2002 in the case C-112/00;

similar approach in its judgment in this case, and particularly accepts that any potential restriction arising from the actions of private parties deserves Governmental response, it could make the jurisprudence in the goods area unworkable in practice"[136]. It seems that the scholars were frightened how the Member States will deal at practice with the restrictions coming from private persons. Despite the Court has supported the view of Mr. Jacobs[137], because even the blockage of road without any intention to disregard the free movement of goods rules was acknowledged as the measure contrary to Article 34 TFEU (the measure was justified later). Since, the absence of an intention to block inter-community trade cannot justify the real market constraints. The Member State in such situation is the only, who has the real power in preserving the aims of the fundamental freedoms and ensuring the effectiveness of the Internal market functioning.

Another issue limiting the horizontal effect of free movement of goods provisions and instead creates the duty of 'Member States' to act in the case of private restrictions, is the fundamental rights doctrine. Restrictions enacted by private persons, might result from the exercise of fundamental rights. As a result the question of the balance of values arises. But this aspect is not under the analysis of this master thesis.

To sum up, several observations might be made. First, there are weighty reasons why the Court is limiting the horizontal effect of free movement of goods provisions in the cases where the private entities are not related to the State and this is compensated by the duty of 'Member State' to act when the private restrictions impede the free trade. Second, it is irrelevant what are the purposes of the private restrictions; in every case, the 'Member State' must ensure the effectiveness of free trade functioning. Third, the State is fully responsible for the private restrictions if it fails to act, while such an obligation to act is evidently based on the public functions of the State. It acts where the intervention is necessary, but only if there is a real hazard of EU law breach; the amount of actions is based on the proportionality principle; State actions must not jeopardize the human rights. Fourth, such a concept might be understood as a compensatory mechanism, which changes the concept of attribution of certain conduct to the 'Member State'. Fifth, the notion of 'Member State' in this context might be understood broadly, since the explicit meaning of Article 34-36 TFEU is rather limited.

[136] Woods L., supra note p. 41;
[137] *see* Case C-112/00, para 64, 66;

3.1.2 THE RE-DEFINITION OF *RATIONE PERSONAE 'NORM-ADDRESSEES'* IN THE FREE MOVEMENT OF PERSONS AND ESTABLISHMENT, FREEDOM TO PROVIDE SERVICES PROVISIONS

The main distinctions between the free movement of goods provisions and the provisions on freedom of movement for workers, the freedom to provide services and the freedom of establishment must be pointed immediately.

Firstly, the articles of aforementioned freedoms are not exclusively addressed to the Member States in explicit wording of the provisions. Instead, "it is phrased in term of a general prohibition on discrimination"[138]. But the need to define the 'Member State' is still relevant, since traditionally, as it was argued through this Master thesis, international treaties are of nature to bind the signatories parties, in our case it is Member States. Therefore, as with provisions on free movement of goods, the substantial question is whether Articles 45, 49 and 56 may be applied to the actions and measures of bodies, previously defined as semi-public and private? Or in a manner of our research topic, does it determine to the broader concept of understanding the notion of a Member State? For example, Advocate General Mr. Warner has been arguing: "I can find nothing in the terms of the Treaty that compels the conclusion that *Article 56* is binding only on Member States and on public authorities in Member States"[139]. This was also an intimation of a broader reading of Article 56 and defining 'Member State'. Similarly, the Advocate General Mr. Fennelly haven't expressly identified any particular addressee of the obligation arising from Article 45 TFEU[140]. So, the difference from the analysis in free movement of goods is that here the explicit wording of the treaty does not provide the norm-addressees.

Secondly, the focus must be brought into the "sharp contrast between two sets of provisions in the Court approach to the actions of private parties"[141].

Thirdly, in this chapter, it will be argued that the inclusion of different private entities into the scope of norm-addressees of Articles 45, 49, 56 TFEU is directly connected with the legal definition of a 'Member State'. The Court introduced a legal rule, according to which the assessment of the restrictions imposed by the different private entities depends on the nature of functions of these bodies. The Court will qualify different bodies as the norm-addressees only if they operate in the same manner as State.

[138] Woods L., supra note, p. 185;
[139] Opinion of Advocate General Mr. Warner delivered on 24 October 1974 in Case C-36/74, p. 1424
[140] Opinion of Advocate General Mr. Fennelly delivered on 25 November 1999 in Case C-281/98, para 40;
[141] Woods L., supra note, p. 185;

3.1.2 A. The Re-definition of a 'Member State' in Articles 45, 49, 56 TFEU: even broader functional approach

Despite the absence of norm-addressees in explicit wording of Articles 45, 49, 56 TFEU, it is clearly acknowledged that a 'Member State' is primarily bound by these provisions, while the relevant issue is the way of defining 'Member State' in context of these Articles. It must be pointed that the move toward a broader understanding of a 'Member State' in the frame of Articles 45, 49, 56 TFEU came also from case law. Accordingly, the attention must be immediately directed to the analysis of case law.

In *Walrave and Koch* case[142], the Court imposed an obligation to comply with the Article 56 TFEU on the non-state actors. The regulation, as it was in the aforementioned case, according to which the person of the same nationality must provide the service, was at a dispute. In accordance with the practice established by the act of sports organization 'pacemaker', who provides their service to cycle in the lee of 'stayer' motorcycle, at a medium distance cycle races must be of the same nationality. Hence, the plaintiffs, who were 'stayers', considered that kind of practice incompatible with the freedom of services rules, as it prevents a 'pacemaker' of one nationality from offering his services to a 'stayer' of another nationality.

Basically, the main question in that context was, whether the rules of the international sporting federation can be regarded as incompatible with the freedom of services rules? The Commission in that case took the view that Article 56 TFEU did not apply to private measures. The Commission argued that the freedom to provide services deals with the abolition of "discrimination arising from provisions laid down by law, regulation or administrative action of the Member State"[143] only. While, the Advocate General Mr. Warner was of the opinion that the freedom to provide services, as well as the freedom for establishment, "apt to relate to restrictions imposed by anyone"[144]. Hence, two competing and completely opposite opinions were originally on the top.

The Court, however, sympathized one direction only and decided, that "prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services"[145]. Probably such an extension made by the Court confirms the Advocate General reasoning and Master thesis reasoning. The Court

[142] Judgment 12 December 1974 in Case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*, ECR 1405;
[143] Case C- 36/74, p. 1410;
[144] Opinion of Advocate General Mr. Warner in Case C-36/74, p. 1424;
[145] C-36/74, para 17;

went to a broader reading of the Treaty provisions. However the scope of the subject remained open, taking into account such an interesting point, that " the Court did not go quite so far as to make Article 56 TFEU binding on all private measures, although it did not rule this out either"[146].

Withal the re-definition of the State and the intention to extend the applicability to the expansive list of subjects had more relevant reasons. Three arguments may be identified in that judgment: "*effet utile*, uniform application and general wording"[147] of Treaty provisions.

Firstly, as it was pointed at the beginning of the chapter and supported by the opinion of Advocate General Mr. Warner, the general wording of the Treaty led the Court to the interpretation that has resulted in the application of free movement of persons and services to the actions of private parties. Secondly, "the private party involved in the proceedings, the International Cycling association, is an association of a quasi-governmental status, as it acts as the ultimate regulatory body within its field of competence and perform State-like functions"[148], so the Court "referred to the need to avoid private parties neutralizing the removal of governmentally imposed barriers to the free movement of person"[149]. The crucial moment here, is that the comparison with State functions is drawn. So, the Court decided to operate the functional approach in other freedoms as well. The application of the freedoms provisions depends on the subject/entity functional nature in comparison with the State. If the body is acting as State it might be recognized as the norm-addressee. If not, the functional approach prevents such a possibility.

Furthermore, according to the Court the *effet utile* or the effectiveness of the internal market "would be compromised if the abolition of barriers of national origin could be neutralized resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law"[150]. And again, the Court emphasized, that despite the legal form of certain entities, the necessity of the effectiveness encourages to assess all the restrictions, which of the nature resembling to the State.

Thirdly, the Court emphasizes the need to ensure the uniformity of the binding nature of internal market rules, by stating that "since, <…> working conditions in the various Member States are governed sometimes <…> by law or regulations and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions <…> to acts of a public authority would risk creating inequality in their application"[151]. So

[146] Woods L., supra note p. 141;
[147] Bogaert S. Van den, in Barnard C., "The Law of Single European Market", p. 125;
[148] Bogaert S. Van den, in Barnard C., supra note, p. 125-126;
[149] Woods L., supra note, p. 186;
[150] C-36/74, para 18;
[151] *see particularly Walrave and Koch*, para 19; *Bosman*, para 84; and *Angonese*, para 33, Viking, para 34;

the purpose of ensuring the uniform applications of internal market and its legal provisions was emphasized. This is the third pragmatic reason to extend Member State definition, in the frame of internal market law to a wider list of different bodies, even the private ones. Since, the Court recognizes that the variety of domestic law systems creates the practical situations when private entities acting and regulating the matter tying with the freedoms in the same way as the Member States and its formal institutions do.

En passant, the approach placed in *Walrave and Koch*, was confirmed two years later in *Donà v. Mantero*[152] case. Advocate General Mr. Trabucchi in his reasoned opinion[153] repeated the *Walrave and Koch* judgment and the Court supported the position by deciding once again "that rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as <…> player solely to the nationals of the State in question, <…> as the case may be *incompatible* with Articles *56, 49 TFEU"*[154].

What is necessary to extract from the mentioned case is that the Court dealt with the private subject who was regulating the legal relations in a collective manner[155]. The element of functional approach, such as the regulatory competence, was explicitly pointed in the case. This is uncontested proof of the Courts application of functional approach in every case related to fundamental freedoms. Since, the qualification of a subject/entity as norm-addressee depends on it functions comparison with functions of a State.

Hence, with regard to freedom of establishment[156], in *Van Ameyede* case[157] the Court concluded, "for discriminations to fall under the prohibitions contained in those articles it suffices that such discrimination results from rules of whatever kind which seek to govern collectively the carrying on of the business in question" and pointed directly: "<…> it is not relevant whether discrimination originated in measures of a public authority or, on the contrary, in measures attributable to the national insurers' bureau"[158]. This was, perhaps, the ultimately broad observation, which has maintained an approach that functionalism is palpable in the application fundamental freedoms provisions.

The analyzed case law dealt with associations and organizations that had legal autonomy from the State. Despite, in the reasoning of the Court certain alike-State

---

[152] Judgment of 14 July 1974 in Case C-13/76 Gaetano Donà v. Mario Mantero, ECR 1333;
[153] Opinion of Advocate General Mr. Trabucchi delivered on 6 July 1976 in case C-13/76, p. 1345;
[154] Case C-13/76 *Gaetano Donà* v. *Mario Mantero*, para 19;
[155] *see also* Judgment 11 April 2000 in Joined Cases C-51/96, C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée,* ECR I-2549, para 47;
[156] see also Judgment of 19 February 2002 in Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseur BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECR I-1577 para 120;
[157] Judgment of 9 June 1977 in Case C-90/76 *Srl Ufficio Henry van Ameyde* v. *Srl Ufficio Centrale Italiano di Assistenza Assicurativa in Circulazione Internazionale (UCI), ECR 1091;*
[158] Case C-90/76, para 28;

characteristics can be noted, such as "quasi-legislative powers, exercise of a regulatory task, enacting compulsory and collective regulations"[159], which in their nature may have a negative impact on the fundamental freedoms efficiency. Several of them were also used for qualifications in the free movement of goods case law.

Certain observations were made in *Viking* case, where the Court dealt with the litigation between two private commercial parties. In that case the Court has summarized the case law mentioned before[160] and stated that Articles 45 and 56 TFEU "extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services"[161]. Moreover in this case the Court has made it clear, that private collective actions restricting the freedom of establishment fall under the scope of Article 49 TFEU in the same way as in other fundamental freedoms.

A few problematic questions may be raised even before the analysis of the expansive ruling in *Walrave and Koch*. Namely, do all of the measures adopted by the subjects, other than State, may be qualified as contrary to the Article 56 TFEU (or/and in establishment and free movement of persons)? In the aforementioned case the Court assessed the direct discrimination. If we consider, that the main purposes of the Court interpretation were the effectiveness and the uniformity of the internal market rules, even broader view may be delineated.

It is doubtful, that after the ruling in *Walrave and Koch* there was still any place for disputing, whether all measures of private subjects may fall under the internal market provisions. For example, in *Angonese*[162] case, the Court "accepted that the rules in issues constituted indirect discrimination, thereby refuting the suggestion that horizontal direct effect would be limited to cases of direct discrimination"[163]. The form of discrimination of the restrictions becomes irrelevant.

Even further, the Court went in *Haug-Adrion*[164] case, "by hinting for the first time that it just might be prepared to go beyond *Walrave and Koch* case *(including other case law analyzed before)* and extend the applicability of the Community provisions on freedoms of

[159] Karayigit M. T., "The Horizontal Effect of the Free Movement Provisions" // Maastricht Journal of European and Comparative Law, 2011(3), p. 311;
[160] *see particularly* Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C‑51/96 and C‑191/97 *Deliège* [2000] ECR I‑2549, paragraph 47; Case C‑281/98 *Angonese* [2000] ECR I‑4139, paragraph 31; and Case C‑309/99 *Wouters and Others* [2002] ECR I‑1577, paragraph 120;
[161] Judgment of 11 September 2007 in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti,* ECR-10779, para 33;
[162] Judgment of 6 June 2000 in Case C-281/98 *Angonese* v. *Cassa di Rispamio di Bolzano SpA,* ECR I-4139;
[163] Woods L., supra note, p. 187;
[164] Judgment of 13 December 1984 in Case C-251/83 *Ebethard Haug-Adrion* v. *Frankfurter Verischerungs-AG, ECR-4287*;

movement of workers and services to private parties"[165]. This judgment "had the potential of opening up a wide array of private measures to challenge"[166] because the conditions which were adopted, in regard of the bonus receiving were introduced by a single insurance firm, and not an association or another body of collective regulatory powers. Literally, the Court has stated that the free movement of persons and services provisions "are intended to eliminate all measures which, in the fields of free movement of workers and freedom to provide services, treat national of another Member State more severely or place him in a situation less advantageous, from legal or factual point of view, than that of one the Member State's own nationals in the same circumstances"[167].

On the one hand, this might be understood as the total re-definition of the subjects/entities falling under fundamental freedoms provisions. While at the same time, the Court uses the functional approach and elements concerning. This might not let us to conclude, that the horizontal application of the mentioned provisions is of absolute nature. The functional elements will still be analyzed in further case law. That is an implication that only body of certain functional resembles to the State might be understood as a subject. However, there is no consensus in legal literature yet on the question posed.

In *Bosman*[168], the Court took the step forward by stating that all measures of private body, such as in the case the UEFA, capable to restrict the proper application of freedoms rules, are caught by the internal market law. The Court not only repeated the reasoning from *Walrave* case, but even stated, that the rules of any nature, even non-discriminatory[169], aimed to regulate employment in a collective manner must not violate the free movement of persons. Such statements were so courageous, that there were some objections, claiming "the interpretation of Article 45 TFEU more restrictive in relation to individuals than in relation to Member States"[170]. Though the Court rejected this argument by stating, that even other subjects, such as private associations are able to use the justifications clauses in the Treaty. Moreover, as we saw, the private subjects will be qualified as responsible only if they acting like/as State and have the functional similarities.

Literally, the *Bosman* case was really bold. According to Snell "crucially, that the Court has not even considered it necessary to examine the potential affiliation between the

[165] Bogaert S., in Barnard C., supra note, p. 126;
[166] Ibid;
[167] Case C-251/83, *para* 14;
[168] Judgment od 15 December 1995 in Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECR I-4921;
[169] *see also* Judgment of 13 April 2000 in Case C-176/96 *Juriy Lehtonen and Castors Canada Dry Namur-Braine* v. *Fédération Rpyale Belge des Sociétés de Basketball*, ECR-2681, para 49;
[170] Ibid, para 85;

author of restriction and the State, as it always does in the cases concerning the free movement of goods"[171]. Despite, the author has to admit, that the Court, even without the direct comparison with the State, still has used the terms 'rules', 'regulating', which "have a quasi-statal ring"[172]. This is also an implication to the use of functional approach. The effect of the measure must be above the formal form of the subject/entity acting.

Another implication to the use of functional approach is the arguments in *Walrave* case, which are very the same as in *Royal Pharmaceutical Society* case (as was described in the chapter relating to the free movement of goods). Taking analogy from this case and suiting the ruling to the *Walrave*, and probably the tying cases on other freedoms, it may be argued that in *Walrave* "the State had tacitly accepted the exercise by the body in question of the power to regulate the sport and this tacit acceptance might be seen as *de facto* delegation of this power by the State to the sporting body"[173]. Again, taking an analogy the functional approach might be identified correctly.

Certain observations might be made systematically. Firstly, the idea palpable in the reasoning of mentioned case law is that the abolition of obstacles to free trade and effect of fundamental freedoms in Internal market would be compromised if the abolition of Member States barriers could be neutralized by obstacles resulting from exercise, by association or organizations not governed by public law"[174] or other subjects of private nature with certain element of functional attribution to the State. The tendentious interpretation in the mentioned cases, such as *Viking, Walrave and Koch, Bosman, Deliege, Angonese and Wouters*, was actually based on the necessity to ensure the effectiveness of the fundamental freedoms. The broader concept of defining the State meant that even the obstacles introduced by the private subject/entity would not escape the assessment under the fundamental freedoms provisions. The functional approach has been served as a basis in assessing restrictions, which are of the private nature, but with the regulatory effect.

Such reasoning however can be supported by the Court observations made in *Deffrene* case[175], where the Court ruled: "the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent right from being conferred at the same time on any individual"[176]. Through the analogy, perhaps might be adapted to the

[171] Snell J., supra note, p. 143;
[172] Ibid;
[173] Oliver P. J., supra note, p. 71;
[174] Wyatt D., "Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold , and the Implications for Community Competence" // Oxford Legal research paper series, No 20/2008, cited as further published in Croatian Yearbook of European Law & Policy, Vol. 4, 2008, pp. 1-48, p. 6;
[175] Judgment of 8 April 1976 in Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena,* ECR 0455;
[176] Ibid, para 31;

obligations arising from the Treaty. The obligations coming from the need to ensure the effectiveness of free market and its freedoms must not be avoided by the acts of private entities. The Court through the instrument of functional approach might evaluate the effect of the restrictions and decide whether they might be understood of the same effect as the ones imposed by the 'Member States'.

3.2 THE DEFINITION OF A 'MEMBER STATE' IN COMPETITION RULES

The concept of defining a 'Member State' in European Union competition law might be analyzed: 1) in the frame of Articles 101 and 102 TFEU; and 2) in the frame of Article 106 TFEU. While in this Master thesis an attention will be pointed at the definition of a 'Member State' in the frame of Articles 101 and 102 TFEU, since they are directly related to the aims of the research and allow to figure out the impact of functional approach on the vertical application of EU norms and broadening *norm-addressees* of these provisions. The prohibition enshrined in Article 106(1) is directly addressed to Member States and the definition, in the frame of this provision, is sufficiently clear. This is so because the provision is addressed to regulate the relations between Member State and its entities (public undertakings and undertakings to which Member State grant special or exclusive rights). Same, with the Article 106(2), since the undertakings providing operation of services of general economic interest are the objects for separate analysis on the immunity from the Treaties rules. Despite, taking into account that "Article 106 TFEU is normally applied in conjunction with another Article, since its function is to limit the ways in which State measures protecting certain undertakings hinder the operation of Treaties" [177] several examples of either application of Article 106, in the frame of defining 'Member State' as addressee of Articles 101 and 102 TFEU, will be analyzed.

Let the standing point be that the Court has consistently held that "bodies that exercise an activity typical of a public authority <…> do not constitute undertakings and are not therefore subject to the Community rules on competition"[178]. Despite, the reality is that "competition may be distorted by both governmental measures and the behavior of enterprises" [179]. The Court likewise has followed "a similar expansive approach to the jurisdictional reach of *Article 101,* in cases involving public bodies, or other entities operating under State aegis"[180].

The need to analyze the re-definition of the 'Member State' process, both in fundamental freedoms and in competition rules, is directly determined by the need to ensure the effectiveness of the internal market. According to Vėgėlė I., the Internal market is a system of rules, where the fundamental rights are created mainly to deal with the Member

[177] Jones A., Sufrin B., "EU Competition Law" [Fourth Edition], Oxford university press, 2011, p. 572;
[178] Opinion of Advocate General Mr. Cosmas delivered on 10 December 1996 in Case C-343/95; see also Judgment of 17 February 1993 in Joined Cases C-159/91 and C-160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon, ECR I-0637; Judgment of 19 January 1994 in* Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol,* ECR I-0043;
[179] Ritter L., Braun D. W., "European Competition Law. A Practioner's Guide" [Third Edition], Kluwer Law publishing, 2004, p. 951;
[180] Faul J., Nikpay A., "The EC Law of Competition", Oxford university press, 2007, p. 192;

States measures affecting free trade, while competition rules are intended to protect the trade from private measures[181]. It is undoubtedly so. But also certain compensatory mechanisms on the basis of public-private divide between legal rules can be analyzed.

Even in the early Commission reports it was already acknowledged, that the objective of the competitions rules also deals with the efficiency and uniformity of an internal market[182]. So, actually, the idea was to point, "Competition rules are to assist in establishing and maintaining a single market in the Community and preventing the rebuilding of economic barriers by private arrangements"[183].

Taking such motives for the purposes of our research, certain aspects must be analyzed further: 1) the assessment of competition distortions made by the 'Member States' and bodies attributable to it; 2) the application of functional approach; 3) the competition rules as compensatory mechanism for the *effet utile* (the effectiveness of the Internal market) purpose.

3.2.1. The Re-definition of *norm-addressees* in competition rules: the assessment of Member State restrictions in the frame of competition law

According to Sauter W. and Schepel H., the competition rules can also be understood as legal instrument to "prevent the four freedoms from being circumvented by market parties"[184]. Ergo, the purpose might be highlighted as to ensure the efficiency of market aims and to increase the number of cases on application of the internal market law. Accordingly, the *effet utile* doctrine, analyzed in the frame of fundamental freedoms, can similarly be analyzed in the competition law. The functional approach in the competitions law, perhaps, has developed to prevent Member States "from stripping the competition rules of their effect by imposing anti-competitive behavior on private parties"[185].

The explicit wording of Articles 101 and 102 TFEU is that the competition rules bound undertakings. Simply say, the competition provisions are not addressed to Member States. While the term undertaking is not defined in the Treaty, the Court did a significant interpretative work. Despite, "the notion of undertaking focuses on the nature of the activity

[181] Vėgėlė I., supra note, p. 312;
[182] *see* an introduction to the Commission Ninth Report on Competition Policy (1979), available on [http://ec.europa.eu/competition/publications/annual_report/index.html], overseen [at 24.10.2013];
[183] Pescatore P., "Public and Private Aspects of European Community Competition Law", Fordham International Law Journal, Vol. 10(3), 1986, p. 383;
[184] Sauter W., Schepel H., supra note, p. 104;
[185] Ibid;

carried out by the entity concerned (a functional approach is adopted)"[186]. Moreover "the focus on the activities or functions of the entity also means that its legal personality is irrelevant so that natural person, legal person and State bodies are potentially caught"[187]. Taking such a position, it is evidently true, that the *effet utile* purpose created the need for a broader interpretation of *norm-addressees* of competitions provisions as well. Moreover, as will be argued bellow, the functional approach is also in use.

The conclusion that certain entities, according to the type of activities, can be understood as an undertaking, raises the question, whether the 'Member State' might be defined as the addressee of competition rules? Also, whether different public authority bodies or private bodies can be understood as completing the legal definition of a 'Member State'. According to the case law, an entity can be understood as undertaking even if it forms the part of the State's general administration[188]. While, "an entity, public or private, which performs task of public nature, connected with the exercise of public powers or in the exercise of official authority will not be an undertaking and will be immune from the application of rules"[189]. Accordingly, when entities perform an economic activity in a commercial context they are bound by the competition rules despite the form of body acting in the market.

The functional approach, however, must be applied in defining the State in the context of competition rules and assigning certain entities as alike-State acting. "The *effet utile* doctrine holds that Member States can infringe the good faith provision of Article 4(3) of the Treaty if they frustrate the functioning of the internal market indirectly, by favoring or even imposing infringement of the competitions rules"[190]. It seems so, and will also be argued in this research, that functional approach might be, if not the only, then one of the most useful arms in qualification of certain competition distortions and market impediments performed by the State and entities attributable to it, to fall under the provisions of EU competition rules. Again, such a premise inspires us to talk about the broader way of defining the notion 'Member State', as the issues are that the formal explicit reading of the Treaty cannot ensure the full application of competition rules. Since, to ensure the effectiveness of the internal market law, the broader concept is unavoidable.

[186] Jones A., Sufrin B., "EC Competition Law. Text, cases, and materials" [Third Edition], Oxford university press 2008, p. 129;
[187] Jones A., Sufrin B., supra note, p. 130;
[188] *see for example* Judgment of 16 June 1987 in Case C-118/85 *Commission of the European Communities v Italian Republic*, ECR 2599;
[189] Jones A., Sufrin B., supra note, p. 131;
[190] Sauter W., Schepel H., supra note, p. 104;

Methodologically, legal thinkers[191] distinguish two different types of State role in competition legal framework. The first may be described as concerning "government measures which require undertaking to behave anti-competitively" and, the second, concerns "government measures or a framework of measures which themselves restrict competition"[192]. In assessing this two kind of measures taken by the State and bodies attributed to it, two issues, in the frame of this chapter, will be analyzed: 1) when the anti-competitive conduct, resulting from undertakings conduct compliance with government measures and regulations[193]; and 2) state measures which in essence are of the restrictive nature. Lastly, the most relevant question in the framework of the aspects raised before is on the possibility to apply competition provisions to State or the absence of such possibility.

It is also interesting to point that different authors have different understanding of the problematic nature on the topics mentioned before. For example, there can be a tight view that if the restrictions of competition are not caused by the undertakings autonomous behavior, so there is no space to talk about the application of competition rules to State measures[194]. While, other authors[195], as the author of Master thesis as well, take a broader view on problematical nature and argue that, in conjunction with the aim mentioned in Article 4(3) TEU and the need to ensure the effectiveness of the Internal market, particularly to ensure the efficiency of the aims enshrined in Treaties, certain anti-competitive measures performed by the State might be understood as infringement of competition rules, what is ditto related with Treaty provision application.

In the *INNO v. ATAB* case[196] the Court stated, despite that "*Article 101 TFEU* is directed at undertakings, nonetheless it is also true that the Treaty imposed a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness"[197]. The duty to Member State to refrain from the measures contrary to competition rules is obvious in this reasoning. Moreover, the Court has added, "likewise, Member State may not enact measures enabling private undertakings to escape from the constraints imposed by *Articles 101 and 102* of the Treaty"[198]. Thus the Court introduced the use of *effet utile* in competition law and pointed that the Member States are of the duty to

[191] *see for example* Bael I. V., Bellis J.-F., "Competition Law of the European Community" [Fifth Edition], Wolters Kluwer publishing, 2010, p. 47;
[192] Ibid, p. 47;
[193] Ibid;
[194] *see for example* Bael I. V., Bellis J.-F., "Competition Law of the European Community" [Fifth Edition], Wolters Kluwer publishing, 2010, p. 47;
[195] *see for example* Ezrachi A., "EU Competition Law. An analytical Guide to the Leading Cases" [Third Edition], Oxford and Portland, Oregon, Hart Publishing, 2012, p. 284;
[196] Judgment of 16 November 1977 in Case C-13/77 *SA GB-INNO-BM* v. *Association des détaillants en tabac (ATAB)*, ECR 2115;
[197] case C-13/77, para 31;
[198] Ibid, para 33;

abstain either from acting contrary to competition rules, either to act contrary through the subjects/entities attributable to the State.

The case *BNIC v. Clair*[199] is, however, a vivid example of how Member States try to use the explicit wording of the Treaty and impose the measures contrary to the competition rules in practice. The Court dealt with national cognac trade union body, which unified the win-growers and dealers. The body has introduced a price-fixing binding policy and have been arguing that the agreement of such kind is not covered by Article 101 TFEU, because it wasn't made on the initiative of undertakings "but under aegis of, according to the <…> *body*, which according to *national public law,* constitutes an institution of public law in the view of the manner in which it was created, the rules concerning its financing organization, functioning and the appointment of its members and the public service mission entrusted to it"[200]. The reasoning of the party of this case was based on the functional approach, which was the main argument of the reasoning in all cases analyzed in this research. The Court made argumentation based on even broader functional approach. The Court has moved from regarding the institutional system of State, established in domestic law by stating that "the legal framework within which such agreements are made and such decisions are taken and the classification given to framework by various national legal systems irrelevant as far as the applicability of the Community rules on competition and particular Article 101 of the Treaty concerned"[201].

The conclusion from this case "seemed fairly straightforward: the demands of uniformity of application and effectiveness of the competition rules override institutional deference to Member States to the extent that no amount of State involvement could save an anti-competitive agreement"[202].

Still the question from the reasoning of the Court on the application of functional approach is relevant. The first impression might be made, that the functional manner on arguing that certain measures imposed is not operating here, because the Court denied the analysis of elements on attribution of entity to the State. Secondly, this implies a radical way of thinking that no amount of State participation in an anti-competitive practice may save it. Thirdly, it becomes unclear then, how the Court is going to attribute certain measures to the State. Even more it is complicated if we take into account the reasoning of Sauter W., Schepel H. that the Court in *BNIC v. Clair* used a familiar 'functional' language[203].

[199] Judgment of 30 January 1985 in Case C-123/83 *Bureau national interprofessionnel du cognac v Guy Clair*, ECR 0391;
[200] Case C-123/83, para 16;
[201] Ibid, para 17;
[202] Sauter W., Schepel H., supra note, p. 105-106;
[203] Sauter W., Schepel H., supra note, p. 105;

However the answer to the questions raised, is that the functional approach, still matters. To decide whether they might be attributed to the State or private undertaking, of course, the Court will tend to use all the signs of public nature of the body. The principal rule, established in this field, is also based on of the general principle of *effet utile*. Moreover, the functional approach in EU competition law has been used twice, to define the notion of 1) undertaking (a functional definition of term undertaking)[204], and to define 2) the relations with State functions.

Taking into an account, that Articles 101 and 102 TFEU apply to anti-competitive conduct of undertakings, which is of the nature of their own initiative, the same anti-competitive conduct, which is of the nature of state compulsion will eliminate the responsibility of the undertaking under competition rules. Logically, the question is - who is responsible then for the breach of EU law provisions? Could we say that anti-competitive conduct of mentioned nature will fall under the responsibility of the State, despite the explicit wording of the Treaty provisions, which does not mention the State as an addressee of the competition rules? However this kind of responsibility might be called as indirect based on the States obligation coming from the Article 4(3) TEU, in conjunction with Article 101 TFEU.

In the assessment of the State measures restricting competition it must be determined, "whether the anti-competitive effects are attributable directly and solely to State measures, or at least partially, to autonomous conduct on the part of undertakings"[205]. If there were no space left to an autonomous actions of the undertakings, they may escape the responsibilities under the Article 101, while the State must take the consequences on its own burden. Next, it's necessary to determine how the State is acting in the frame of competition law. In other words, what are the examples of the bodies/entities, which may be attributed to the State and broaden the definition of 'Member State'. Such understanding may be relevant when taking into account that the institutional approach, which is the classic divide of public-private spheres, may not be the only one, or even may not grant the effectiveness, in catching anti-competitive measures. Whereas the functional approach on defining the State and assessing its measures may let to attain aims.

For instance, in *British Telecom* case[206], the delegation of public authority was on the issue and the public body in the case engaged the autonomous regulatory powers concerning

[204] Odudu O., "The meaning of undertaking within 81 EC" // Cambridge yearbook of European legal studies, 2005(7), p. 209;
[205] Bael I. V., Bellis J.-F., "Competition Law of the European Community" [Fifth Edition], Wolters Kluwer publishing, 2010, p. 53;
[206] Judgment of 20 March 1985 in Case C-41/83 *Italian Republic v Commission of the European Communities*, ECR 0873;

price fixing rules. The body was considered as an undertaking in the frame of competition rules. Despite the Court has implicitly formulated the rule, that "even a regulatory task can have a commercial dimension and therefore be subject to anti-trust scrutiny"[207].

While in competition law it is essential to analyze the nature of the measures contrary to competition rules, the question is also may be formulated in a manner "does the *measure* form part of the essential functions of the State"[208]? This is also an implication to functional way of assessment. Several examples must be analyzed. In *Höfner* case,[209] the Court was under the evaluation of the Federal German Employment Agency. The Court has recognized this body as undertaking in the sense of competition rules. In the reasoning, it is pointed that the employment procurement was economic activity. The public law body Bundesanstalt was empowered on the attainment of the aims of the law on the employment matters (an exclusive right of employment procurement). At the same time the Bundesanstalt was also empowered to authorize other bodies to assist the attainment of the aims on the employment. The Court, on the basis of that the applicability of competition rules must be ensured "regardless of the legal status of the entity and the way in which it is financed"[210], has stated, that "an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules"[211]. Consequently, "any measure adopted by a Member State which maintains in force a statutory provision that creates a situation in which a public employment agency cannot avoid infringing *Article 106 TFEU* is incompatible with the rules of the Treaty"[212]. The mentioned body: 1) fall under the notion of 'Member State'; 2) the attribution was based in the functional approach; 3) such a practice was recognized as incompatible with competition rules, despite the fact, that States are not the direct addressees of the competition provisions.

As it is visible from the argumentation of the Court, he also used functional approach not only while deciding the nature of the measures, but also while assessing the public body as it is. Several elements from the functionalism were used: the body established by the law, the body entrusted on the governmental activities, the body is financed from the budget (it was pointed that the body functions without a support (fees or charges) of private subjects).

In *Firma Ambulanz*[213] case, the Court found that "medical aid organizations entrusted under the relevant legislation with the task providing ambulance services were undertakings

[207] Sauter W., Schepel H., supra note, p. 94;
[208] Faul J., Nikpay A., "The EC Law of Competition", Oxford university press, 2007, p. 192;
[209] Judgment of 23 April 1991 in Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, ECR I-0147;
[210] Ibid, para 21;
[211] Ibid, para 22;
[212] Ibid, para 23;
[213] Judgment of 21 October 2001 in Case C-475/99 *Ambulanz Glöckner v. Landkreis Südwestpfalz*, ECR I-8089;

within the meaning of *EU* competition law, even though the organizations were specifically named in the legislation and were subject to public service obligations"[214]. Again, the Court has been analyzing the functional approach elements on the attribution of subject to the Member State. Despite, the one element was quite different from the *Höfner* case, which, however, was crucial in the final decision. The Court pointed that the services provided were subject "for remuneration from users"[215] and this let the Court to qualify such services as the economic activity for the purposes of the application of the competition rules laid down by the Treaty.

To summarize the stating done in the main part of the analysis, certain conclusions must be drawn. Firstly, the fact, that State might use private subjects and undertakings for the purposes contrary to the free market principles is obvious. Accordingly, under the competition rules, despite the explicit wording of the Treaty provisions, the State measures might be supervised as well. The scrutiny under Articles 101, 102, 106 TFEU in the cases of granting special rights, setting binding rules on private subjects, acting through the private entities was operated in case law. Secondly, taking into account the statement, that competition rules are a kind of peculiar mechanism, to compensate the absence of horizontal application of fundamental freedoms rules, the factual situation might even be more controversial. Since the legal personality can be used as a mask for State measures in the frame of competition distortions. The *effet utile* purpose and the instruments of functional approach create the mechanism in which the assessment of certain restrictions in internal market is based on the more substantial matter. Legal definition of a 'Member State' is based on the analysis of the functions of different entities.

3.2.2 The Relations between competition rules and fundamental freedoms rules: can State measure restrict both?

According to the manner of argumentation taken in this Master thesis, the blurring distinction between public/private divide of legal rules and the functional approach of defining the State, it is appropriate to point the question on the relations between the competition rules and fundamental freedoms rules. If it is considered that the application of fundamental freedoms rules and competition rules can be applied to the subject explicitly not mentioned in the wording of the Treaty, the question in a price formulation is about what to do if both rules are, in fact, competing in application. If certain measures are in breach with,

[214] Faul J., Nikpay A., supra note, p. 193;
[215] C-475/99, para 20;

for example, free movement of goods, and competition rules, as several examples were analyzed before.

Initially, the Court in *Van de Haar*[216] case held, that "*Article 34* of the Treaty, which seeks to eliminate national measures capable of hindering trade between Member States, pursues an aim different from the *Article 101,* which seeks to maintain effective competition between undertakings"[217]. Even a decade before, the Court was of the position that "Any national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles 30 and 34, which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect"[218]. Accordingly, the main reflection from such reasoning might be done, that initially the Court took the position that the fundamental freedoms rules and competition rules are of entirely different nature and cannot be applied together.

Hereafter, in its later case law, the Court, however, changed the way of thinking and "appeared to start with the *effet utile* test"[219]. In other words, the Court step by step moved towards the functional approach with the aim to ensure the efficiency of the internal market. This led to the combination in the use of different rules.

In *Bosman,* Advocate General Mr. Lenz has argued that the competition and free movement rules could be applied 'simultaneously'. He pointed, that "no reason can be seen why the rules at issue in this case should not be subject both to *Article 39* and to EC competition law <…> so that in principle both sets of rules may be applicable to a single factual situation"[220]. This is why in the analysis of legal definition of a 'Member State' it is important in both sets of rules, either in the context of fundamental freedoms rules, or in the context of competition rules. In assessing the restrictions of internal market it is crucial how the legal definition 'Member State' will be defined, since upon this the effectiveness of the internal market depends.

Conversely Advocate General Mr. Capotorti has once noted "there is a distinction between Articles 34 and 35 on the one hand and Articles 101 and 102 on the other, not only with regard to those subject to the prohibitions but also with regard to the nature of the behavior which is prohibited"[221]. This undoubtedly so, while the formal division of Treaty provisions on the application is blurring and the Court has introduced a wide and functional

[216] Judgment of 5 April 1994 in Joined Cases C-177/82 C-178/82 *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV*. ECR 1797;
[217] Joined cases C-177/82 C-178/82, para 14;
[218] Case C-13/77 GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak (ATAB), para 35;
[219] Sauter W., Schepel H., supra note, p. 124, 125;
[220] Opinion of Advocate General Mr. Lenz delivered on 20 September 1995 in Case C-415/93, p. I-5026;
[221] Opinion of Advocate General Mr. Capotori delivered on 13 December 1977 in case C-82/77, para 44;

definition of a ‘Member State. This allows attaining the effect similar to, as it would if the application of both sets of rules (fundamental freedoms and competition) were applied.

4. THE DEFINITION OF A 'MEMBER STATE' IN ASSESSING THE RESTRICTIONS AS DEFINED IN THE SECONDARY LAW OF EUROPEAN UNION

It must be pointed in advance, that the aim of this chapter is to show the potential of the problematic issues and questions that might be raised under the topic of this Master thesis. The next aim is to point the relevance of the topic in the frame of the systematic analysis of the EU law sources, either primary, or secondary. Therefore, only a few examples of the functional approach application, in assessing the restrictions as they are defined in the secondary legislation, will be analyzed furtherer. However the examples, which are analyzed in this chapter, could be a basis for a more comprehensive analysis in future.

In defining the notion 'Member State' and attributing certain restrictions of the free movement provisions to it, the issue is related to the broader application of fundamental freedoms provisions. It can be stated in regard to the competition rules as well. Generally, the functional approach in defining the 'State' has introduced a new pragmatic approach, based on the idea and purpose to ensure the effectiveness of different internal market law provisions. The question of the same relevance is whether, there is any place for practical use of functional approach in the sources of secondary law. The fact that the approximation instruments playing significant role in the secondary law legislation, the first impression might be is that these sources include only precise and harmonized notions, which are already clear and evident.

According to H. Schepel and W. Sauter the redefinition process of Member State notion has influenced the "process of rebalancing the horizontal and vertical reach of free movement rules"[222], which is also highlighted by functional approach. The increase of the situations where the obstacles to free trade come from atypical-State bodies, such as those analyzed before, and even from the private subjects, the Court was encouraged to introduce a wider understanding on the horizontal effect. At the same time, taking into account the *Keck* formula on selling arrangements, the Court was encouraged to limit the general effect of provisions (hereby the vertical effect). The process of rebalancing the application of EU law, particularly internal market law, with the use of functional approach partially increased the role of national legislations and factual circumstances, partially minimized by granting priority to EU law and functional understanding of the notions.

[222] Sauter W., Schepel H., "State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts", Cambridge university press, 2009, p. 45;

In other words, the Court is always balancing between EU law and national law competences. This balance might be described as "horizontal advance is partially compensated by a vertical retreat – and vice versa"[223]. Sometimes in order to prove certain functional elements, such as those mentioned (governmental appointment, supervisions, financial aid, the activities regulation, binding nature of bodies decisions, etc.), the Court was on the way of deepening into national laws, while in other occasions the Court was on the way to ignore them. The functional approach and the elements of it were established on the very thorough and versatile analyses.

On balance this involves a "rationalization of case law along the cross-cutting lines of functionalism and subsidiarity"[224]. The functional approach increase the efficiency of internal market law (allows the Court to ignore certain formal national provisions on the qualification of certain bodies as private ones or on the matter of dependence to the State), while the subsidiary may be pointed as limiting Court from too much expansive interpretation (certain amount of attention to the national laws was still paid).

What is really interesting, taking into account the motives described just before, whether the harmonized EU law sources, where actually the national law on defining the notions becomes irrelevant, might also have a potential for a process of functional interpretation.

4.1. Does functionalist teleology append anything to the harmonized notions?

In the absence of harmonized understanding of public bodies, which may fall under notion of 'Member State' (that is particularly might be done by the secondary law sources) the Court "will tend to opt for judicial restraint"[225]. The judicial instrument was used often and radically in regard to the fundamental freedoms provisions and competition provisions. Basically, it was used in regard to primary sources – Treaties.

Notwithstanding, functional approach might be used even in the situations where the harmonization process is in force and the notions are defined in a common sense. In such situations, the Court even less obliged to regard any national law qualifications and may interpret boldly, strengthening the effectiveness of the internal market. But the questions may be raised here as well, is about the elements concerning the substance of the definition 'Member State'. Furthermore the premises for investigation, concerning the idea of prevail of

[223] Ibid;
[224] Ibid;
[225] Ibid, p. 46;

functionalism against the subsidiarity, as it was argued in the introduction to the chapter on the balancing, might also be done.

According to Sauter W., Schepel H.[226], in the interpretation of definition of Member State and public bodies attributable to it, a variable element must be added: the *pre-emption* rule. The significance of pre-emption is not limited by direct effect of EU law. For the purpose of this research, it might also be useful to "address the distinction between the public and private spheres *in specific categories* <…>"[227]. In this context, the pre-emption presupposes the influence of harmonization on the judicial interpretation.

The first impression is that judicial powers become more limited when the certain notions are defined in a harmonized manner. At the same time, the judicial powers may nearly ignore the national way of defining public authority. So, formally the harmonized notions introduce certain level of mutuality, while the Court is exempted from the analysis of national legislation in 'puzzling' the elements of public authority. After that, the question must be posed in this chapter, whether the Court is limited on the textual expression of the certain provisions when the pre-emption mechanism is in force (the EU has actually acted) and the harmonization (which the EU has actually defined) is done? Is there any place left for functional teleology?

Since the internal market matters fall under the shared competence, the pre-emption rule, according to the Article 2(2) TFEU stipulates, that the Member State can exercise competence only to the extent that the Union has not exercised or has decided to cease to exercise its competence within any such area. The EU, accordingly, "may choose to make uniform regulation, may harmonize national laws <…>" [228] and introduce the common notions. However, as the degrees and types of harmonization vary widely, the applicable judicial standard is likewise differentiated"[229].

The concept of public bodies under the secondary law, as it will be argued in this research, is also based on the functional approach. The Court has been ruled in *Foster*, that "a body, whatever its legal form, which has been made responsible, to a measure adopted by the State, for providing a publics service under the control of State and has for that purpose special powers"[230] may be responsible for 'as a State'. In different areas managed by the secondary legislation the Court has frequently applied functional approach.

[226] In Sauter W., Schepel H., "State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts", Cambridge university press, 2009;
[227] Sauter W., Schepel H., supra note, p. 46;
[228] Craig P., Burca G. de, "Text, cases, and materials" [Fifth Edition], Oxford university press, 2008, p. 84;
[229] Sauter W., Schepel H., supra note, p. 47;
[230] Judgment of 12 July 1990 in case C-188/89 *A. Foster and others v. British Gas plc*., Rep. I-03313, para 20;

For example, the public procurement rules were always crucial in establishing the internal market[231], since they are of purpose to prevent the discrimination and distortion of competition rules. However, the public procurement may also be overlooked as an instrument to prevent the government from impeding the market rules using the huge financial sources of the apparatus. For example, under the analysis of Council Directive 71/305/ECC[232] the Article 1(b) must be picked out. According to the provision "the State, regional and local authorities and the legal persons governed by public law shall be regarded as authorities awarding contracts". On the one hand the notion is already harmonized and according to the pre-emption mechanism there is no place for the national law activation, on the other hand, the provisions make a reference to the national public law. The Court in the interpretation faced the choice whether to limit itself because the notion is harmonized, or whether, despite the pre-emption, to enforce the functional approach. The Court in the situation has been "bullish in casting its net as wide as possible"[233].

For instance, in *Beentjes*[234] case, the Court, to the public authority of 'Member State', attributed the body without legal personality. The crucial elements on the substance of qualification were the following. The Court has analyzed the "local land consolidation committee" in a functional manner, by pointing the fact that the tasks of that body were set out by law. Besides the local authorities were participating in the appointment of the members. On the strength of these factors the Court considered, that such a body could fall under the notion of State in the frame of Public Works Directive. The Court pointed directly, that "<…> the term 'State' must be interpreted in functional terms"[235]. Moreover, it must be noted, that the Court explicitly mentioned the need of the interpretation of a term 'State'. This is like the direct recognition of the need to understand the 'Member State' in the frame of internal market law as substantive definition, which is not limited to formal sense. The Court reaffirms the position that in reading and explanation of the term the functional approach must be employed. As follows, we can conclude that, the process of the re-definition of term 'Member State' even in the sources of the secondary law (related to the internal market legal regulation) is in force and, what is mostly important, that the same manner of functional approach is palpable.

[231] Bovis C. H., „EU Puvblic Procurement Law" [Second Editon] published by Elgar European Law, p. 3;
[232] Council Direcive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts OJ L 185, 16.8.1971, P. 5-14;
[233] Sauter W., Schepel H., supra note, p. 49;
[234] Judgment of 20 September 1988 in Case C-31/87 Gebroeders Beentjes BV v State of the Netherlands, Rep. I-04635;
[235] Case C-31/87 Beentjes, para 11;

The pragmatic nature is still dominating in the functional approach. The question why the Court has decided to uphold the 'broader meaning'[236] of Member State, thus, remains relevant. But the answer to the raised question should not come as a surprise, seeing that the purpose of such a broad definition lies in the need to ensure the effectiveness of the internal market law. This can be confirmed by the Courts' own words: "the aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts, would be jeopardized if the provisions <…> were held inapplicable solely because <…> a body <…> is not formally part of the State administration"[237].

The observations must be made, is that the Court used the functional approach even where the harmonization was done, even where the pre-emption excluded the distortions in defining the notions. Even in the case of harmonized notions, enshrined in the secondary law sources, there is a place to operate functional approach.

4.2. The concept of 'close dependence to State': generalization the functional elements or an additional element?

However, the same elements, as were used in every reasoning of the Court, relating to the functional approach in assessing restrictions of fundamental freedoms (such as public financing, participation of government in management and supervision, etc.) were used in case law of interpreting the meaning of 'Member State' in the secondary law sources. While in the latter case law practice an "alternative indicator *was emphasized* - condition of 'close dependence' on the State"[238]. In this research the condition of close dependence will be described as a generalization of functional manner in reasoning's of the Court.

The element that is 'closely dependent on the State' was described in *Mannesmann Anglagenbau* [239]case. The Court was called to take into account that the body, performing certain activities of general interest, was doing that in smaller amount, than economic activities, which were of private economic interest. Here the Court was quite radical by stating, that "it is immaterial that such an entity is free to carry out other activities in addition to that task [of general interest], <...>, the fact, <...> that meeting needs in the general interest constitutes only a relatively small proportion of the activities <...> is also

[236] Judgment of 27 February 2003 in case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH*., ECR I-1931, para 43;
[237] Case C-31/87 Beentjes, para 11;
[238] Sauter W., Schepel H., supra note, p. 51;
[239] Judgment of 15 January 1998 in case C-44/96 *Mannesmann Anlagenbau Austria AG* and *Others v. Strohal Rotationsdruck GesmbH*, ECR I-0073;

irrelevant“ [240] . The Court stated that the elements, such as financing, participation in establishment and management are links to public order and the institutional operation of the State. At the same time, the Court generalized these elements into a close dependence to State concept.

The Advocate General Léger acted even straightforward pragmatism in encouraging the Court to define State in a broader manner and inspiring to use the functional approach. He directly denoted: “Public authorities have a natural tendency, which is difficult to reconcile with the objective of completing the internal market, to favor national undertakings in order to maintain employment and to support economic development in their own Member State”[241]. While public procurement rules were initially developed in order to preserve respect for the principles of free competition, freedom of establishment and freedom to provide services, which had long been influenced and distorted by such a behavior of Member States, the need to combat the market impediments assessed by such a behavior presupposed the redefinition of public authority concept in functional manner.

What is also notable, in author’s opinion, the amount of functional elements, with the generalization of dependence on State became less relevant. For example, the governmental financing was slightly narrowed by the reasoning in *University of Cambridge case*[242]. In the mentioned case, while assessing the condition of ‘close dependence on the State’ the Court has held that “the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State”[243]. Simply, the Court has once again repeated the need to avoid certain subjects, who are formally not under the control of the State, to be guided by considerations other than the economic ones. Thus, the Court has found that the element of governmental financing is not the absolute one. It took an argumentation in the direction that not all governmental financial instruments are creating the specific relationship of subordination or dependency. Accordingly the Court has fleshed: “Only payments which go to finance or support the activities of the body concerned without any specific consideration therefore may be described as 'public financing“[244]. In other words, the purpose of the funding should also be taken into account.

[240] Ibid, para 25;
[241] Opinion of Advocate General Mr. Léger delivered on 18 September 1997 in case C-44/96, p. I-88 ;
[242] Judgment 3 October 2000 in case C-380/98 *The Queen v. H. M. Treasury, ex parte University of Cambridge*, ECR I-8035;
[243] Ibid, para 16;
[244] Ibid, para 21;

Interestingly, that the *Government of the United Kingdom* have been arguing in that case that all funds provided by contracting authorities, which serve to fulfil tasks in the sphere of education and, thus, to meet a need in the general interest, must fall within the concept of financing by a contracting authority. On the opinion of Advocate General Mr. Alber[245] the directives are based on a functional approach[246] and, accordingly, require a broad interpretation. In determining that the governmental financial support is falling under the concept of dependency on State, the Advocate General offered and the Court has accepted the necessity to analyse the purpose of paying.

The conclusion, which must be done, is that the Court even in the cases, dealing with the secondary law sources, enforced the functional approach. It is irrelevant that the pre-emption mechanism minimized the interaction of national legislations, that the EU has already harmonized the notions. The purpose of catching the market impediments and to ensuring the effectiveness is of higher priority. This is why the Court tends to use functional approach in the interpretation of 'Member State' definition in the secondary legislation. The assessment of restrictions is not limited by the formal explicit wording, but substantially broadened.

It is also noticeable, that secondary legislation acts are intended to accomplish in detail Treaties articles. Therefore, the notion of a 'Member State' enshrined in secondary law source is unavoidably connected with the substance of the notion enshrined in particular Treaties articles. It is logical, that the enforcement of functional approach in interpretation of a 'Member State' notion in primary law expands to the secondary law sources.

Lastly, the Court dealing with the secondary legislation sources made an observation of the elements of functional approach, by stating that the crucial moment in the qualification of certain bodies as falling under the definition of 'Member State' is to ascertain the close dependence on State. This might be considered as a generalization of the elements of functional approach.

[245] Opinion of Advocate General Mr. Alber on 11 May 2000 in case C-380/98;
[246] Ibid, para 39;

CONCLUSIONS

1. The legal definition of a ‘Member State’ in the European Union internal market law has been adopted and developed through the case law of the Court of Justice of the European Union. The concept of defining a ‘Member State’ has moved from the explicit wording in the Treaties towards the broad re-definition concept, which is based on a functional approach.
2. The functional approach is based on the idea that every entity, despite the legal form, might be attributed to the State or, acknowledged acting as a State or, because of certain functional elements, a close dependency between such entity and State might be identified. This approach encouraged the following observations on the application of internal market law in practice:
    2.1 The irrelevance of traditional public-private distinctions of activities, spheres and qualifications, in order to crystallize the real protectionist effect;
    2.2 The movement from the traditional institutional-normative approach and disregard of national institutional categories;
3. The process of re-definition of the ‘Member State’ notion is inspired by *effet utile* doctrine, particularly, the necessity to ensure the effectiveness of the Internal market and to assess the restrictions imposed by the entities that are, because of their legal status, trying to escape from the application of Internal market legal rules. The restrictions of every entity must be assessed in the light of purpose and the context of the provision. The main determinant of the extent of the notion is the purpose and aim of the provision.
4. The effectiveness of the Internal market is determined by the need to attain the common social-economic integration aims and goals enshrined in the Treaties. Ultimately the attainment of the efficiency depends on the scope of a “Member State” definition and the attribution of the restrictions process.
5. The process of defining a ‘Member State’ in a functional manner has significantly changed the scope of *norms-addressees* of the legal provisions in internal market law and encouraged the greater application of the EU law and consistent observance of the Internal market rules and free market behavior. This process has also had a significant impact on the both vertical and horizontal scope of the internal market law rules:
    5.1 The functional approach allows expanding the vertical application of the prohibitions on restrictions enshrined in EU law, by including into a ‘Member State’ notion and into the extent of different Treaties provision different entities;

5.2 The functional approach might also be understood as expanding the horizontal application of the prohibitions on restrictions enshrined in EU law, since the tendency of the case-law of the CJEU shows that, there is a growing number of the restrictions imposed by private entities. However, even in the assessment of private restrictions, the functional approach requires to seek for the interfaces with a 'Member State' or its typical functions. Furthermore the expanding of horizontal application process is still under the discussions between legal thinkers and the opinions differ.

6. As the secondary law sources are usually intended to accomplish Treaties articles in detail as well as to give the effect to the case law of CJEU, in the delineation of what is to be regarded as a 'Member State', the functional approach is also used. The broader definition of a 'Member State' increased the reach and the effect of the secondary law sources horizontally and vertically.

REFERENCES

EU Legal Acts

1. Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012;
2. Treaty on European Union (Consolidated version 2012), OJ C 326, 26.10.2012;
3. Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts OJ L 185, 16.8.1971, P. 5-14;
4. Council Regulation 2679/98 of 7 December 1998 on the functioning of the internal market in relation to free movement of goods among the member States, OJ L 337/8, 12. 12. 98;

Other Legal Acts

1. The Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980;
2. 1933 Montevideo convention on the rights and duties of the states;
3. Draft Articles by the International Law Commission on Responsibility of States for Internationally Wrongful Acts and commentary are available at: [http://untreaty.un.org/ilc/texts/9_6.htm], overlooked [2013 oct 4];

Bibliography

in alphabetic sequence[×]

1. **Andenas M., Roth W. H.,** "Services and Free Movement in EU Law", Oxford university press, 2004;
2. **Artis M., Nixson F.,** "The Economics of the European Union" [Fourth Edition], Oxford university press, 2007;
3. **Bael I. V., Bellis J.-F.**, "Competition Law of the European Community" [Fifth Edition], Wolters Kluwer publishing, 2010;
4. **Barnard C.** "The Substantive Law of the EU. The Four Freedoms", Oxford university press, 2005;

[×] **note:** the periodical sources are pointed with '//' double italic dashes before the name of the journal, the doctoral works with '/' one italic dash, all other sources are the books;

5. **Barnard C., Scott J.,** "The Law of the Single European Market. Unpacking the Premises", Oxford and Portland, Oregon, Hart Publishing, 2002;
6. **Baquero C. J.**, "Free Movement and Private Autonomy" // European Law Review Vol. 24, No. 6, December 1999;
7. **Bouhier V.**, "Responsabilité des Etats membres pur violation du droit communautaire de fait d'un fonctionnaire" // Revue trimestrielle de droit européen, Vol. 43(4), oct.-déc. 2007;
8. **Bovis C. H.,** „EU Puvblic Procurement Law" [Second Editon], published by Elgar European Law, 2012;
9. **Chalmers D., Hadjiemmanuil C., Monti G., Tomkins A.,** "European Union Law. Text and materials", Cambridge university press, 2006;
10. **Craig P., Burca G. de**, "Text, cases, and materials" [Fifth Edition], Oxford university press, 2008;
11. **Ezrachi A.**, "EU Competition Law. An analytical Guide to the Leading Cases" [Third Edition], Oxford and Portland, Oregon, Hart Publishing, 2012;
12. **Fairhurst J.,** "Law of the European Union" [Ninth Edition], Pearson Education Limited, 2012;
13. **Faul J.**, **Nikpay A.**, "The EC Law of Competition", Oxford university press, 2007;
14. **Gaudin H.**, "L'Etat vu de la Communauté et de l'Union européene" // Annuaire de Droit européen, Vol. II, 2004;
15. **Gormley L. W**., "EU Law of Free Movement of Goods and Customs Union", Oxford university press, 2009;
16. **Hecquard-Theron M.**, "La notion d'État en droit communautaire" // Revue trimestrielle de droit européen, Nr. 26(4) oct-dec 1990;
17. **Jakulevičienė L.**, "Tarptautinių sutarčių teisė" [Law of International Treaties], VĮ Registrų centras, Vilnius, 2011;
18. **Jones A., Sufrin B.**, "EC Competition Law. Text, cases, and materials" [Third Edition], Oxford university press 2008;
19. **Jones A., Sufrin B.**, "EU Competition Law" [Fourth Edition], Oxford university press, 2011, p. 572;
20. **Karayigit M. T.**, "The Horizontal Effect of the Free Movement Provisions" // Maastricht Journal of European and Comparative Law, 2011(3);
21. **Kent P.**, "Law of the European Union" [Third Edition], Middlesex university, Longman press, 2001;

22. **Mortelmans K. J. M.**, “Towards a Convergence of the Application of the Rules on Free Movement and Competition?” // Common Market Law Review, Nr. 38, 2001;
23. **Noreau A.**, “L’Union Europeenne et les collectives locales” / thèse puor le doctorat, Univetsite de La Rochelle, 2011, available on [http://tel.archives-ouvertes.fr/docs/00/59/09/66/PDF/TheseNoureau.pdf];
24. **Odudu O.**, “The meaning of undertaking within 81 EC” // Cambridge yearbook of European legal studies, 2005(7), 2009;
25. **Odudu O.**, “The public/private distinction in EU Internal Market Law” // Revue trimestrielle de droit européen, 46(4), oct.-déc. 2010;
26. **Oliver P.**, “Oliver on Free Movement of Goods in the European Union” [Fifth Edition], Oxford and Portland, Oregon, Hart Publishing, 2010;
27. **Oppermann T., Classen C. D., Nettesheim M.**, “Europarecht”, Verlag C. H. Beck München, 2009;
28. **Pescatore P.**, “Public and Private Aspects of European Community Competition Law” // Fordham International Law Journal, Vol. 10(3), 1986;
29. **Reich N.**, “AGM-COS.MET or: who is protected by EC safety regulation?” // European Law Review, Volume 33, No. 1, February 2008;
30. **Ritter L.**, **Braun D. W.**, “European Competition Law. A Practioner’s Guide” [Third Edition], Kluwer Law publishing, 2004;
31. **Sauter W., Schepel H.,** “State and Market in European Union Law. The Public and Private Spheres of the Internal Market before EU Courts”, Cambridge university press, 2009;
32. **Shaw M. N.**, “International Law” [Sixth Edition], Cambridge university press 2008;
33. **Schepel H.**, “Constitutionalizing the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law” // European Law Journal, Vol. 18, No 2, March 2012;
34. **Snell J.**, “Goods and Services in EC Law. A study of the Relationship Between Freedoms”, Oxford university press, 2002;
35. **Strange S.,** “The Retreat of the State – The Diffusion of Power in the World Economy”, Cambridge university press, 1996;
36. **Vėgėlė I.,** “Europos Sąjungos teisė. Vidaus rinka, konkurencija ir teisės derinimas” [EU Law. Internal market fundamental freedoms, competition and harmonization], VĮ Registrų centras, 2011;
37. **Woods L.**, “Free Movement of Goods and Services within the European Community”, University of Essex, Ashgate Publishing, 2004;

38. **Wyatt D.**, "Horizontal Effect of Fundamental Freedoms and the Right to Equality after Viking and Mangold, and the Implications for Community Competence" // Oxford Legal research paper series, No 20/2008, cited as further published in Croatian Yearbook of European Law & Policy, Vol. 4, 2008;

List of Judgments of the Court of Justice of the European Union
in sequence of referencing

1. Judgment of 12 July 1990 in case C-188/89 *A. Foster and others v. British Gas plc*., ECR I-3313;
2. Judgment of 20 September 1988 in case C-31/87 Gebroeders Beentjes BV v State of the Netherlands, ECR I-4635;
3. Judgment of 27 February 2003 in case C-373/00 *Adolf Truley GmbH v Bestattung Wien GmbH*., ECR I-1931;
4. Judgment of 15 January 1998 in case C-44/96 *Mannesmann Anlagenbau Austria AG* and *Others v. Strohal Rotationsdruck GesmbH*, ECR I-0073;
5. Judgment 3 October 2000 in case C-380/98 *The Queen v. H. M. Treasury, ex parte University of Cambridge*, ECR I-8035;
6. Judgment 21 March 1997 in case C-95/97 *Région wallonne v Commission of the European Communities, ECR-1787;*
7. Judgment 25 July 1991 in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, ECR I-4151;
8. Judgment 22 September 1988 in Case C-45/87 *Commission v. Ireland*, ECR I-4929;
9. Judgment of 11 July 1974 Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, ECR I-0837;
10. Judgment 1 October 1987 in Case C-311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, ECR I-3801;
11. Judgment 22 January 1981 in Case C-58/80 *Dansk Supermarked A/S v A/S Imerco*, ECR I-0181;
12. Judgment 24 November 1982 in Case C-249/81 *Commission of the European Communities v Ireland*, ECR I-4005;
13. Judgment of 13 December 1983 in Case C-222/82 *Apple and Pear Development Council v K.J. Lewis Ltd and others*, ECR 4083;

14. Judgment of 5 November 2002 in Case C-325/00 *Commission of the European Communities v Federal Republic of Germany*, ECR I-9977;
15. Judgment of 12 December 1990 in Case C-302/88 *Hennen Olie BV v Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten and State of the Netherlands*, ECR I-4625;
16. Judgment of 18 May 1989 in Joined Cases C-266/87 and C-267/87 *The Queen v Royal Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers and others*, ECR 1295;
17. Judgment of 15 December 1993 in Case C-292/92 *Ruth Hünermund and others v Landesapothekerkammer Baden-Württemberg,* ECR I-6787;
18. Judgment of 7 February 1984 in Case C-237/82 *Jongeneel Kaas BV and others v State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole*, ECR 0483;
19. Judgment of 17 April 2007 Case C-470/03 *A.G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen*, ECR I-2749;
20. Judgment of 10 December 1968 in Case C-7/68 *Commission of the European Communities v Italian Republic,* ECR 0617;
21. Judgment of 11 August 1995 in Case C-16/94 Édouard Dubois et Fils SA and Général Cargo Services SA v. Garonor Exploitation SA, ECR I-2421;
22. Judgment 9 February 1992 in Case C-119/92 *Commission of the European Communities v Italian Republic*, ECR I-0393;
23. Judgment of 9 December 1997 in Case C-265/95 *Commission of the European Communities v French Republic*, ECR I- 6959;
24. Judgment 12 June 2003 in Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECR I-5659;
25. Judgment 12 December 1974 in Case C-36/74 *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo,* ECR 1405;
26. Judgment of 14 July 1974 in Case C-13/76 Gaetano Donà v. Mario Mantero, ECR 1333;
27. Judgment 11 April 2000 in Joined Cases C-51/96, C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée,* ECR I-2549;
28. Judgment of 19 February 2002 in Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseur BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, ECR I-1577;

29. Judgment of 11 September 2007 in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, ECR-10779, para 33;
30. Judgment of 6 June 2000 in Case C-281/98 *Angonese* v. *Cassa di Rispamio di Bolzano SpA*, ECR I-4139;
31. Judgment of 13 December 1984 in Case C-251/83 *Ebethard Haug-Adrion* v. *Frankfurter Verischerungs-AG, ECR-4287*;
32. Judgment od 15 December 1995 in Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, ECR I-4921;
33. *see also* Judgment of 13 April 2000 in Case C-176/96 *Juriy Lehtonen and Castors Canada Dry Namur-Braine* v. *Fédération Rpyale Belge des Sociétés de Basketball*, ECR-2681 ;
34. Judgment of 8 April 1976 in Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena,* ECR 0455;
35. Judgment of 17 February 1993 in Joined Cases C-159/91 and C-160/91 *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon, ECR I-0637;*
36. *Judgment of 19 January 1994 in* Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol*, ECR I-0043;
37. Judgment of 16 June 1987 in Case C-118/85 *Commission of the European Communities v Italian Republic*, ECR 2599;
38. Judgment of 16 November 1977 in Case C-13/77 *SA GB-INNO-BM* v. *Association des détaillants en tabac (ATAB)*, ECR 2115;
39. Judgment of 30 January 1985 in Case C-123/83 *Bureau national interprofessionnel du cognac v Guy Clair*, ECR 0391;
40. Judgment of 20 March 1985 in Case C-41/83 *Italian Republic v Commission of the European Communities*, ECR 0873;
41. Judgment of 23 April 1991 in Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron GmbH*, ECR I-0147;
42. Judgment of 21 October 2001 in Case C-475/99 *Ambulanz Glöckner v. Landkreis Südwestpfalz*, ECR I-8089;
43. Judgment of 5 April 1994 in Joined Cases C-177/82 C-178/82 *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV*., ECR 1797;

NOTE: Before 1990, all case-law was published in a single volume of the European Court Reports. Court Reports are now published in three volumes: particularly Volume I for judgments and opinions of the Court of Justice, together with opinions of the Advocates-General.

List of the Opinions delivered by Advocates General of the Court of Justice of the European Union
in sequence of referencing

1. Opinion of Advocate General Mr. Van Gerven delivered on 8 May 1990 in Case C-188/89;
2. Opinion of Advocate General Mr. Capotorti delivered on 15 September 1982 in Case C-249/81;
3. Opinion of Advocate General Mr. Darmond delivered on 10 March 1989 in Joined cases C-266/87, C-267/87;
4. Opinion of Advocate General Mr. Tesauro delivere on 27 October 1993 in Case C-292/92;
5. Opinion of Advocate General Mrs. Kokott delivered on 17 November 2005 in Case C-470/03;
6. Opinion of Advocate General Mr. La Pergola delivered on 18 May 1995 in case C-16/94;
7. Opinion of Advocate General Mr. Lenz delivered on 9 July 1997 in Case C-265/95;
8. Opinion of Advocate General Mr. Jacobs delivered on 11 July 2002 in the case C-112/00;
9. Opinion of Advocate General Mr. Warner delivered on 24 October 1974 in Case C-36/74;
10. Opinion of Advocate General Mr. Fennelly delivered on 25 November 1999 in Case C-281/98;
11. Opinion of Advocate General Mr. Trabucchi delivered on 6 July 1976 in case C-13/76;
12. Opinion of Advocate General Mr. Cosmas delivered on 10 December 1996 in Case C-343/95;
13. Opinion of Advocate General Mr. Lenz delivered on 20 September 1995 in Case C-415/93;
14. Opinion of Advocate General Mr. Capotori delivered on 13 December 1977 in case

C-82/77;
15. Opinion of Advocate General Mr. Léger delivered on 18 September 1997 in case C-44/96;
16. Opinion of Advocate General Mr. Alber on 11 May 2000 in case C-380/98;

List of Judgments of the International Court of Justice

1. Judgment of International Court of Justice delivered on 26 February 2007, in case *Bosnia and Herzegovina* v. *Serbia and Montenegro*;

Other Sources

1. Report by the European Commission of Human Rights of 25 January 1976 in application No 5310/71 *Ireland* v *United Kingdom* (1976) 19th Yearbook of the European Convention on Human Rights;
2. EU Commission Ninth Report on Competition Policy (1979), available on [http://ec.europa.eu/competition/publications/annual_report/index.html], overseen [at 24.10.2013];

SUMMARY

LEGAL DEFINITION OF A 'MEMBER STATE' IN ASSESSING THE RESTRICTIONS AND ENSURING THE EFFECTIVENESS OF THE INTERNAL MARKET

Keywords: internal market, Member State, definition, restrictions, effectiveness, functional approach, and interpretation.

This Master thesis focuses on the re-interpretation process of a 'Member State' notion in the European Union internal market law. According to the increasing case law of the Court of Justice of the European Union on a matter, the meaning of 'Member State' is rather substantial and not limited by the institutional scheme of public authority in different States. The need to ensure the effectiveness of the internal market, in attaining the aims and goals of free market economy and legal regulation, encouraged the Court to establish and maintain functional approach. The Court has been active in the use of functional approach in assessing restrictions of free market. The functional approach allowed the Court 1) to attribute certain restrictions to the Member States responsibility, despite the legal form of the entities who were acting; 2) to move from the explicit wording of the Treaties towards broader way of defining the 'Member State' and, as a consequence, broader application of internal market rules.

The author in this paper argues that the functional approach is of a practical significance in attaining the purposes of the internal market and defining the 'Member State' notion. According to the functional approach, the domestic scheme of public authority and even the traditional way on the public/private divide of law are irrelevant. Since the approach introduce the series of elements, which are of functional nature and maintained to identify the real nature and effect of the restrictions, imposed by different entities. The obstacles and restrictions of free market, which may escape the explicit wording of the Treaty provisions, might be caught, if an entity or the restriction by its nature, are functionally attributable to the "Member States' notion. The legal definition of a 'Member State' must be understood in a broad manner.

It's pointed that the reality is that the effective functioning of the Internal market, primarily, depends on the behavior of 'Member States', while the practice shows that the level of a political will of the States on European integration is still variable. Functional definition of a 'Member State' prevents States from acting through the private entities.

SANTRAUKA

TEISINIS ‘VALSTYBĖS NARĖS’ APIBRĖŽIMAS VERTINANT VIDAUS RINKOS APRIBOJIMUS IR UŽTIKRINANT JOS EFEKTYVUMĄ

Raktiniai žodžiai: vidaus rinka, valstybė narė, apibrėžimas, apribojimai, efektyvumas, funkcinis požiūris, interpretacija.

Šiame darbe dėmesys koncentruojamas į teisinį apibrėžimą ‘Valstybė narė’ ir apibrėžimo raidą Europos Sąjungos vidaus rinkos teisės kontekste. Pažymima, kad ‘valstybės narės’ apibrėžimas Teisingumo Teismo praktikoje formuluojamas remiantis tam tikrais sąvokos turinio elementais, nepaisant to, kaip sąvoka galėtų būti suprantama remiantis instituciniu požiūriu ar nacionalinėje teisėje. Siekis sukurti ir plėtoti efektyvią vidaus rinką ir pasiekti Sąjungos tikslus ir prioritetus nulėmė funkcinio požiūrio taikymą, aiškinant ‘valstybės narės’ sąvoką. Teisingumo Teismas savo praktikoje, vertindamas vidaus rinkos apribojimus, funkcionalizmo teorijos dėka sąvoką aiškina plečiamai. Šios teorijos pagrindiniai laimėjimai: 1) kad į valstybės narės sąvoką patenka įvairūs subjektai nepaisant jų teisinės formos ar aplinkybės, kad jie formaliai nepriklauso valstybės institucinei sąrangai; 2) platesnė valstybės narės sąvoka sukuria prielaidas platesniam vidaus rinkos normų taikymui ir jų veikimui tiek vertikaliai, tiek horizontaliai, nepaisant tam tikrais atvejais ribotos Sutarčių nuostatų formuluotės.

Praktinė funkcinio požiūrio reikšmė pasižymi platesniu vidaus rinkos taisyklių ir normų taikymu, tokiu būdu užtikrinant, kad vidaus rinkoje draudžiami visi apribojimai, kurie pagal savo tikslą priešingi vidaus rinkos uždaviniams. Funkcinio požiūrio dėka Teisingumo Teismas sukūrė eilę požymių, kuriais remiantis atitinkami subjektai kvalifikuojami kaip patenkantis į valstybės narės sąvokos apimtis, o nacionalinėje teisėje egzistuojantis viešosios-privačiosios kategorijų skirstymas netenka savo aktualumo. Be to, pažymima, kad Sutarčių straipsniai gali būti eksplicitiškai adresuojami tik valstybei narei. Tuo tarpu, funkcinis požiūris, leidžia taikyti minėtas nuostatas ir kitų subjektų atžvilgiu, jeigu jų taikomi apribojimai, iš esmės prieštarauja vidaus rinkos teisei, o tokių subjektų veikla (funkcijos) pripažįstama kaip artima valstybės funkcijoms.

Pažymima, kad praktikoje dažnai pasitaiko atvejai, kuomet valstybės narės, vedamos nacionalinių politinių ar ekonominių tikslų bei siekdamos išvengti atsakomybės, rinką ribojančias priemones taiko paslėptai - kitų, privačių ar valstybės institucinei sąrangai nepriklausančių, subjektų pagalba. Todėl kaip teigiama šiame darbe, būtent funkcinis požiūris į valstybės narės apibrėžimą leidžia sąvoką aiškinti plačiau, efektyviau taikyti Sutarčių nuostatas, vertinant vidaus rinką ribojančias priemones, bei užtikrinti vidaus rinkos efektyvumą.

SOMMAIRE

LA DEFINITION JURIDIQUE D'UN «ÉTAT MEMBRE» A L'EVALUATION DES RESTRICTIONS ET A L'ASSURANCE DE L'EFFICACITE DU MARCHE INTERIEUR

Mots-clés : marché intérieur, les États membres, la définition, les restrictions, l'efficacité, l'approche fonctionnelle, l'interprétation.

Cette thèse se concentre principalement sur le processus de réinterprétation de la notion d'un «État membre» dans le droit de l'Union sur le marché intérieur européen. Conformément à la loi croissant de cas de la Cour de Justice de l'Union européenne sur une question, la notion d'«État membre » est assez importante et non limitée par le système institutionnel de l'autorité publique dans les différents États. La nécessité d'assurer l'efficacité du marché intérieur, dans la réalisation des buts et objectifs de l'économie de marché et la réglementation juridique, encourage la Cour à établir et à maintenir une approche fonctionnelle. La Cour a été active dans l'utilisation de l'approche fonctionnelle dans l'évaluation des restrictions de marché libre. L'approche fonctionnelle a permis à la Cour 1) d'attribuer certaines restrictions à la responsabilité des États membres, en dépit de la forme juridique des entités qui agissaient; 2) de déplacer le libellé explicite des traités vers une définition plus large d'un « État membre» et, en conséquence, une plus large application des règles du marché intérieur.

L'auteur de cet article soutient que l'approche fonctionnelle est d'une importance pratique dans la réalisation des objectifs du marché intérieur et joue également un rôle prépondérant dans la définition de la notion d'un «État membre ». Selon l'approche fonctionnelle du système interne de l'autorité publique, l'approche traditionnelle sur le clivage public/privé du droit ne sont pas pertinents. Puisque l'approche d'introduire la série d'éléments qui sont de nature fonctionnelle et maintenu à identifier la nature et l'effet réel des restrictions, imposées par différentes entités. Les obstacles et les restrictions du marché libre, qui peuvent échapper à la formulation explicite des dispositions du traité, pourraient être pris, si une entité ou la restriction de par sa nature, sont fonctionnellement attribuable à la notion des «États membres ». La définition juridique d'un « État membre», selon les arguments affichés dans cette thèse, pourrait être comprise dans un sens large.

La thèse de master se concentre, en particulier, sur l'analyse de l'impact de l'approche fonctionnelle sur un élargissement de la notion. Il a fait valoir que l'appréciation des restrictions aux libertés fondamentales et des règles de la concurrence ne doit pas être limitée par l'approche institutionnelle ou le libellé explicite du traité. De plus, la réalité est que le fonctionnement efficace du marché intérieur dépend principalement du comportement des «États membres», tandis que la pratique montre que le niveau de la volonté politique des États en matière d'intégration européenne est encore variable.