

Enhanced Consumer Protection – the Services Directive 2006/123/EC

Analysis of Article 20.2 and Article 21 related consumer complaints reported to ECC-Net between 2010 and 2012



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About ECC-Net

ECC-Net is a network of centres present in thirty European countries which offers free information, advice and assistance to consumers on cross-border consumer transactions. ECC-Net is co-funded by the European Union and by the Member States, Norway and Iceland. From the time of its foundation in 2005 up to the end of 2012 ECC-Net handled almost half a million consumer contacts.¹ Given its focus on business-to-consumer problems when shopping cross-border, either in person or via distance purchases (mainly e-commerce), ECC-Net has unparalleled access to the problems which consumers experience when shopping for goods or services in the Internal Market. For this reason the Network provides input to the European Commission and policy makers at national level on consumer policy issues arising from the problems which ECC-Net receives. As part of our awareness raising initiatives on consumer rights, ECC-Net engages in joint network projects which assemble and analyse data derived from the complaints received throughout the network on specific areas of consumer detriment.²

The report on the Services Directive is an analysis of consumer complaints reported to ECC-Net between January 2010 and December 2012. The data in this respect was gathered through the questionnaires completed by the members of the Working Group integrated by ECC Ireland, Austria, Italy, Spain, the UK and the UK ECC for Services,³ and by participating ECCs: Bulgaria, Cyprus, Denmark, Estonia, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia and Sweden. The relevant data was also provided by the Finnish Competition Authority – non-ECC Article 21 Contact Point for consumers. The views and opinions expressed in this report are those of the Working Group and do not necessarily reflect the views of any contributor or co-financing organisations.

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¹ *Help and advice on your purchases abroad, the European Consumer Centres Network 2012 Annual Report*, available at: http://ec.europa.eu/consumers/ecc/docs/report_ecc-net_2012_en.pdf.

² *The European Online Marketplace, Consumer complaints 2010–2011*, September 2012 available at: http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf;
Online cross-border mystery shopping – state of the e-union, available at: http://ec.europa.eu/consumers/ecc/docs/mystery_shopping_report_en.pdf;
The cost of paying, ECC-Net Study on Airlines' Currency & Payment Card Fees, available at: [http://www.eccireland.ie/downloads/Study_on_currency_and_payment_card_fees_\(2\).pdf](http://www.eccireland.ie/downloads/Study_on_currency_and_payment_card_fees_(2).pdf).

³ The UK ECC and The UK Article 21 Body (The European Consumer Centre for Services) are two advice bodies totally independent of each other but are both hosted by The Trading Standards Institute. They operate from the same office but are staffed separately. They operate in effect as sister organisations.

Abbreviations

ADR	Alternative Dispute Resolution
CJEU	the Court of Justice of the European Union
DG SANCO	The European Commission's Directorate General Health and Consumers
IP	Intellectual Property
GDP	Gross Domestic Product
ESCP	European Small Claims Procedure
SME	Small and Medium Enterprise
TFEU	Treaty on the Functioning of the European Union

Executive Summary

The Single Market with its potential for creating growth, widening choice for consumers and opening opportunities for businesses, is “*a tool to improve European businesses’ and citizens’ daily life and welfare*”.⁴ Aimed in particular at removing barriers which create obstacles to the freedom of establishment and to the freedom to provide and receive services within the EU, so that both businesses and consumers can take full advantages of the opportunities the Internal Market offers, the adoption and subsequent implementation of the Services Directive has been an important step in improving the functioning of the Single Market for services. Consumers in particular expect that the removal of the legal and administrative barriers that can hinder businesses from offering their services cross-border shall guarantee them wider choice, better value and easier access to services across the EU. However, efforts to remove unjustified regulatory restrictions to the provision of services may not translate into benefits for service recipients if certain practices by service providers serve to create artificial borders within the Internal Market. Too often, consumers face restrictions when they try to avail of services cross-border and situations occur whereby consumers are confronted with a refusal to supply or unequal conditions because they come from or live in another EU country. While traders are free to determine the territorial scope of their offers, consumer complaints reported to ECC-Net show that certain business practices may be to the detriment of consumers and contrary to the principle of non-discrimination based on the nationality or place of residence of service recipients, as established by Article 20.2 of the Services Directive.

By examining typical situations in which consumers are confronted with different treatment or refusal to provide a service, the report seeks to analyse business practices observed and gather guidelines as to what may be deemed to be an objective justification for the application of different treatment. The main objectives of the report are threefold:

- Analyse work done by ECC-Net under Article 21 and the main problem areas under Article 20.2 of the Services Directive;
- Alert enforcement authorities about problems relating to the Services Directive, especially possible breaches of Article 20.2;
- Raise awareness of the protections offered to consumers under the Services Directive.

Between January 2010 and December 2012 ECC-Net received 222 Article 20.2 related complaints,⁵ but believes that many complaints pertaining to situations whereby consumers could not fully benefit from the Internal Market, by being able to access offers available on markets of other EU countries, went unreported. This may be attributed to the lack of awareness of the protection consumers enjoy under the Services Directive and their inability to recognise which business practices may constitute a breach of the principle of non-discrimination clause.

167 cases of different treatment out of 222 reported to ECC-Net, and 10 out of 14 reported to the Finnish Competition Authority, appeared to be related to consumers’ residence rather than nationality and took place mostly in relation to online transactions; with little evidence being gathered to suggest that consumers face similar difficulties in the offline world.

Situations whereby consumers were confronted with price or service differentiation occurred mostly in relation to the purchase of goods, such as electronic items, clothes, books or music or data downloads. Such complaints amounted to nearly 74% of all complaints received. Cases attracting the second largest number of consumer complaints, accounting for nearly 21% of cases dealt with, were complaints received in relation to the provision of services in the field of tourism and leisure, while the sector attracting the third largest number of consumer complaints, amounting to more than 5% of all cases received, was the rental and leasing services sector.

⁴ The Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive*, January 2011, p.2, available at http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/20110127_COM_en.pdf.

⁵ The Finnish Competition Authority received 14 Article 20.2 related complaints between January 2010 and December 2012.

Methods in which traders implement service and price differentiation are numerous and may differ depending on the sector involved. Restricting access to services by redirecting consumers to national websites may be more popular amongst online retailers whereas direction to services tailored to their country of residence may be faced by consumers booking a car rental or accommodation service online.

Refusal to supply was the most frequent cause for consumer complaints, followed by price differentiation and difference in other conditions of access, such as a requirement of having a bank account in a given country in order to be able to access the service in question.

More than 32% cases, that is 72 cases out of 222 received, required ECC-Net's active intervention on behalf of consumers with a successful outcome reached in nearly 50% of such cases. 8 service providers changed their business practice following an intervention by ECC-Net.

Contractual obligations preventing traders from distributing services in a particular territory (1), different market conditions (2), lack of intellectual property rights (3), additional costs incurred because of the distance involved or technical characteristics of a service (4), and difficulties in securing payment from customers resident in other Member States (5), were the main justifications for different treatment invoked by service providers. None of the traders however provided evidence supporting their claims.

Out of 72 cases in relation to which ECC contacted traders directly on behalf of consumers, 12 were reported to the relevant enforcement authorities, but only one of all these referrals resulted in a decision made by an enforcement authority. The fact that only very few cases result in an administrative enforcement action at national level, may be due to the authorities' inability to handle individual complaints or their failure to interpret the existing rules correctly.

ECC-Net calls for the urgent need to make the Services Directive work in practice and indicates that to the extent that impediments to its enforcement continue to exist, the Services Directive is yet to release its full potential. In this respect ECC-Net welcomes and supports in particular (1) the Commission's commitment to a zero-tolerance policy against breaches of the Services Directive, (2) the Commission's proposal to continue to work closely with competent enforcement authorities and businesses to ensure consumers are able to fully benefit from the Single Market, and (3) the Commission's engagement with awareness campaigns.⁶

⁶ The Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: On the Implementation of the Services Directive. A partnership for new growth in services 2012-2015, June 2012, p.8.

I. Introduction

"I believe it is unfair for a company that trades across Europe to charge a higher price on their web-site for Irish customers than for those based in Britain. I was looking to buy a camera for my daughter. The unit price on the British website is £130 while the price on the Irish website is €190.⁷ I believe that to be discriminating against me as a European citizen living in Ireland. I believe that I should be charged the same price as my British counterparts."

This is just one example of the type of queries received by the European Consumer Centres Network (ECC-Net) made by consumers who found out that they had suffered discrimination because of their country of residence or nationality with no objective reasons for it. Such discriminations, made by retailers, fall under the scope of Directive 2006/123/EC on Services in the Internal Market (hereafter the Services Directive).⁸

The provision of services is central for the growth and functioning of the Internal Market, accounting for 70% of GDP and employment in most Member States.⁹ Designed to fast-track and give fuller effect to the right to provide services, the aim of the Services Directive is to remove the legal and administrative barriers that can hinder businesses from offering their services in another country, and to encourage cross-border competition. It also seeks to strengthen the rights of recipients of services, which can be both consumers and businesses.

ECC-Net has a special role in relation to the Services Directive. To enhance the rights of service recipients and strengthen their confidence in the Internal Market, the Directive obliged Member States to remove obstacles for service recipients wanting to buy services supplied by providers established in other Member States. It also obliged Member States to make available to service recipients general information and assistance on the legal requirements, in particular consumer protection rules, and redress procedures applicable in other Member States. As a result, Member States were required to submit to the European Commission the names and contact details of the bodies designated to provide information falling under Article 21 of the Directive. In twenty-two countries the body assigned to provide information to consumers falling under Article 21 is ECC-Net.

However, ECC-Net's role under the Services Directive is not restricted to general information falling under Article 21 of the Directive. All ECCs, whether designated as contact points or not, handle consumer queries and complaints which come under Article 20.2 of the Directive, which obliges Member States to ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence. Article 20.2 states that Member States *"shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria."*

Examples of complaints which are included under Article 20.2 are refusal to supply or business practices applying different conditions of access based on the nationality or the place of residence of the service recipient. Typical examples of this would be not permitting a consumer from a particular country to shop directly from a trader's website and redirecting them to the trader's website in the country where the consumer is resident and where the goods are available at a price which can often be significantly higher than that available on the trader's main website. It is important to note that, as retail services are included in the scope of the Services Directive, such a refusal or application of different conditions of access will fall under the Directive even if the consumer is purchasing goods. Of equal importance is the fact that Article 20 does not preclude the trader from applying different conditions of access to the service in question, merely that the trader must be able to provide objective grounds for such differentiation.

Given the importance of these issues, ECC-Net decided to undertake a Joint Project to investigate the work of the Network under the Services Directive and the main problems encountered by consumers relating to the principle of non-discrimination by nationality and place of residence. ECC Ireland is the project leader, assisted by a working group made up of ECCs Austria, Italy, Spain, UK and the UK European Consumer Centre for Services.

⁷ £130 is approximately €153.30 <http://uk.reuters.com/business/currencies>.

⁸ Directive 2006/123/EC on Services in the Internal Market, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>.

⁹ Source: Preamble to the Services Directive 2006/123/EC, schedule 4.

II. Objectives and Methodology

Despite the general legal framework provided for by the Services Directive, complaints received by ECC-Net show that consumers cannot fully benefit from the Internal Market by being able to freely access offers available on markets of other EU countries. While ECCs' expertise and leverage may increase chances of resolving individual complaints, ECC-Net has no power to impose sanctions or penalties where consumer legislation is contravened. As such ECC-Net recognises the importance of awareness campaigns and the central role that proper enforcement plays in ensuring that the Services Directive works in practice.

In the light of that, one of the project's objectives is to raise awareness of the protection afforded to consumers under the Services Directive and to alert relevant enforcement authorities about problems relating to the Directive, especially possible breaches of the non-discrimination clause.

To facilitate this objective and given ECC-Net's unique ability to document consumer complaints based on data collected in the ECC-Net Case Handling Database, the IT Tool, the project analysed consumer queries and complaints pertaining to the Services Directive which were received by the Network between January 2010 and December 2012, namely:

- consumer requests for information falling within the scope of Article 21 of the Services Directive, which introduced the right of service recipients to obtain, in their home Member State, general information and assistance on the legal requirements, in particular consumer protection rules, and on redress procedures applicable in other Member States, and under which some ECCs act as Article 21 Contact Points; and,
- consumer complaints falling within the scope of Article 20.2 of the Services Directive, which established the principle of non-discrimination based on the nationality or place of residence of the service recipient.

Regarding consumer requests for information under Article 21, it is important to note that not all ECCs act as Article 21 Contact Points under the Services Directive, although queries of this nature are nonetheless received by all Centres. As a result of this, data provided by DG SANCO for the period between January 2010 and December 2012 forms the cornerstone of the analysis of complaints in this area and the report aims at presenting examples of typical Article 21-related information requests ECCs received from consumers.

With regards to those consumer complaints falling under Article 20.2, the relevant data was gathered through a questionnaire¹⁰ completed by the project participants, a copy of which can be found in Annex I. Respondents to the questionnaire were given four weeks to provide an overview of Article 20.2 related *Simple Complaints*, i.e. consumer complaints against traders based in another European country in relation to which the ECC provided orientation and advice to help consumers resolve their complaints, and *Normal Complaints*, i.e. consumer complaints which required the ECC's active intervention on behalf of consumers. Given that the initial research for the joint project has uncovered inconsistencies in how queries and complaints covered under the Services Directive are entered into the IT Tool, to ensure the uniformity and relevance of the responses and data arising from the questionnaire, participating ECCs were asked to familiarise themselves with the guidelines and instructions contained in the questionnaire.

In addition to gathering relevant data through the questionnaire, members of the Working Group carried out an online survey of consumers, via their home websites, on Article 20.2: "*Have you ever tried to buy something and been refused because of where you live or where you are from?*". The results of this survey are presented in this report and can be found at Annex II.

In the light of the findings, the Working Group drew conclusions and made recommendations.

Finally, the Services Directive applies to the provision of a wide range of services, including retail trade of goods. It is therefore crucial to clarify which services fall under the scope of the Directive and which are excluded. By doing so, the report aims at facilitating uniform encoding across the ECC network.

¹⁰ See Annex I of this report.

III.

The Scope of the Application of the Services Directive

1. The concept of ‘service’

The first legislative initiative concerning the adoption of the Services Directive appeared in 2004 and was drafted under the leadership of the former EU Commissioner for the Internal Market, Frits Bolkestein. The proposal to introduce full freedom to provide services proved to be too controversial and triggered strong opposition from European policy actors.¹¹ Some of the key contentious issues were the country of origin principle, according to which service providers were to be subject only to the national provisions of their Member State of origin, and the exclusion of services of general interest and sensitive sectors such as temporary work agencies. After three years of discussion a modified version of the Directive was adopted by the European Parliament and the Council on 12 December 2006¹² and the country of origin principle was replaced by the freedom to provide services principle.¹³ Some contentious service sectors, such as healthcare and financial services, were excluded from the scope of the Directive.¹⁴

Under Article 2.1 of the Services Directive, the Directive applies to services supplied by providers established in a Member State. The concept of “service” is, in line with the TFEU Treaty¹⁵ and the related case law of the Court of Justice of the European Union,¹⁶ and as such is defined in a broad manner under the Directive. It encompasses any self-employed economic activity which is normally provided for remuneration,¹⁷ i.e. it has to be of an economic nature and supplied by a provider (outside the ties of a contract of employment), and in particular includes activities of an industrial and commercial character, activities of craftsmen and the professions.

Consequently, the legislative framework provided by the Services Directive applies to a wide variety of activities, whether provided to business or to consumers; and the only services that the Directive does not apply to are services explicitly excluded from its scope.

1.1 Services included within the scope of the Directive

As indicated above, the Services Directive covers the provision of a wide variety of sectors ranging from traditional activities to knowledge-based services. Whilst not exhaustive the following can be mentioned as examples which are included in its scope:

- Distribution of goods and services, such as online and offline retail sale of products and services, e.g. electronic goods, DIY products, music downloads;
- Services in the field of tourism, such as services provided by travel agencies;
- Leisure services, such as services provided by sports centers and amusement parks;
- Rental and leasing services, such as car rental;
- Accommodation and food services, such as provided by hotels, restaurants and caterers;
- Activities of most regulated professions, such as legal and tax advisers, architects, engineers, accountants and surveyors;
- Construction services and crafts;
- Business-related services, such as office maintenance, management consultancy, event management, recovery of debts, advertising and recruitment services;

¹¹ “Świadczenie usług w Unii Europejskiej” Polska Agencja Rozwoju Przedsiębiorczości, 2010, p.10, available at <http://www.parp.gov.pl/files/74/81/380/9893.pdf>; <http://euobserver.com/political/18709>; http://en.wikipedia.org/wiki/Directive_on_services_in_the_internal_market.

¹² The Directive was to be fully transposed by Member States into their national systems by 28 December 2009.

¹³ The country of origin principle applies only in the case of cross-border provision of services without establishment. When a service provider wants to provide his services into another Member States without a permanent presence there, he has to comply only with the administrative and legal requirements of his country of establishment. (http://ec.europa.eu/internal_market/services/docs/services-dir/guides/cop_en.pdf). The freedom to provide services principle, set out in Article 56 of TFEU, enables an economic operator (whether a person or a company) providing services in one Member State to offer services on a temporary basis in another Member State, without having to be established (http://ec.europa.eu/internal_market/services/principles_en.htm).

¹⁴ <http://www.eurofound.europa.eu/eiro/2006/12/articles/eu0612039i.htm>.

¹⁵ Article 57 of TFEU.

¹⁶ Joined Cases C-51/96 and C-191/97, Deliege and Case C-355/00, Fresskot AE v Elliniko Dimosio.

¹⁷ Article 4(1) of the Services Directive 2006/123/EC.

- Training and education services;
- Real estate services;
- Services in the area of installation and maintenance of equipment;
- Information services such as web portals, news agency activities, computer programming activities, publishing; and,
- Household support services, such as cleaning, gardening services and private nannies.

1.2 Services excluded from the scope of the Directive

The Services Directive explicitly excludes a number of services from its scope:¹⁸

- **Non-economic services of general interest**¹⁹

The exclusion of non-economic services of general interests is linked to the concept of “service” covered under the Directive. These activities of general interest which are not provided for remuneration do not constitute a service within the meaning of Article 50 TFEU of the Treaty and are thus not covered by the Services Directive, e.g. services in the field of national primary and secondary education.²⁰

- **Financial services**²¹

Excluded from the scope of application of the Directive are financial services such as banking, credit services, securities and investment funds, insurance and pension funds; and services including credit, mortgage credit services, financial leasing and issuing and administering of means of payment.²²

- **Electronic communication services and networks**²³

Electronic communication services and networks and associated facilities and services, pursuant to Article 2(2)(c), are excluded from the scope of the Directive with respect to matters covered by the five directives included in the so-called “telecoms package”, and include services such as voice telephony and electronic mail conveyance services. For instance, while the sale of a mobile phone is not covered by the exclusion, services in respect of mobile phone subscriptions and provided by telephone operators are not covered under the Services Directive.²⁴

- **Services in the field of transport**²⁵

The exclusion of transport services from the scope of the Directive includes those transport services falling within Title V of the EC Treaty, such as air transport, maritime and inland waterways transport, road and rail transport.²⁶ It needs to be noted that the exclusion of transport services does not cover services which are not transport services as such, e.g. driving school services, removal services, or car rental services. Similarly, the Directive does not cover commercial activities in ports or airports such as shops and restaurants.²⁷

¹⁸ Article 2(2), Services Directive 2006/123/EC.

¹⁹ Article 2(2)(a) of the Services Directive 2006/123/EC.

²⁰ Handbook on implementation of the Services Directive, p.11, available at http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf ; see also Case 263/86 Belgium v. Humbel [1988] ECR 5365.

²¹ Article 2(2)(b) of the Services Directive 2006/123/EC.

²² Services listed in Annex I to Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions.

²³ Article 2(2)(c) of the Services Directive 2006/123/EC.

²⁴ According to the information provided by participating ECCs, 20 complaints with regards to Telecommunication Services were received between 2010 and 2012. Consumers complained that they were not allowed to conclude mobile phone contracts or to purchase prepaid phone cards in other EU Member States. The Service Directive shall not apply to electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC (Art. 2 (2) c). It remains however unclear whether these cases fall under the Services Directive. A clarification by the European Commission or CJEU would be needed on this issue. If discrimination with regards to Telecommunication does not fall under the Services Directive, ECC-Net asks the competent stakeholders to include non-discrimination clauses in the relevant telecommunication legislation.

²⁵ Article 2(2)(d) of the Services Directive 2006/123/EC.

²⁶ It needs to be noted that under the Regulation (EU) 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway, and under the Regulation (EU) 181/2011 concerning the rights of passengers in bus and coach transport, passengers' rights include non-discrimination clause based on nationality regarding tariffs and other contract conditions.

²⁷ Handbook on implementation of the Services Directive, p.11.

- **Services of temporary work agencies²⁸**
Services of hiring out workers provided by temporary work agencies are excluded from the scope of the Directive.
- **Healthcare²⁹**
The exclusion under this heading covers health-care and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided. It needs to be noted that services which are not provided to a patient but to the health professional himself or to a hospital such as accounting services, cleaning services, secretarial and administrative services or maintenance of medical equipment are not covered by this exclusion. Furthermore, the exclusion does not cover activities designed to enhance wellness or to provide relaxation, such as sport or fitness clubs.³⁰
- **Audiovisual and radio broadcasting services³¹**
Radio broadcasting services, as well as activities the purpose of which is the provision of moving images with or without sound, including television and showing of films in cinemas, irrespective of the way they are produced, distributed or transmitted, are excluded from the scope of the Services Directive.³²
- **Gambling activities³³**
Activities such as numeric games, e.g. lotteries, gambling services offered in casinos or licensed premises, betting services, bingo services and gambling services operated by and for the benefit of charities or non-profit-making organisations, are excluded from the scope of the Services Directive.
- **Activities which are connected with the exercise of official authority³⁴**
The exclusion covers activities connected with the exercise of official authority as set out in Article 51 TFEU. Whether or not specific activities are directly or specifically connected with the exercise of official authority cannot be unilaterally determined by a Member State but has to be assessed on the basis of general criteria established by the Court of Justice, for instance the Court of Justice has ruled that Article 51 TFEU does not cover activities which are merely auxiliary and preparatory in relation to the exercise of the official authority³⁵ or activities having a merely technical nature.³⁶
- **Social services relating to social housing, childcare and support of families and persons permanently or temporarily in need³⁷**
- **Private security services³⁸**
Services such as the surveillance of property and premises, protection of persons, security patrols and supervision of buildings, as well as safekeeping, transport and distribution of cash and valuables are excluded from the scope of the Directive. However, the sale, delivery, installation and maintenance of technical security devices are not covered by the exclusion.
- **Services provided by notaries and bailiffs, who are appointed by an official act of government³⁹**
- **The Services Directive does not apply to the field of taxation.⁴⁰**
This includes substantive tax law, as well as administrative requirements necessary for the enforcement of tax laws.

²⁸ Article 2(2)(e) of the Services Directive 2006/123/EC.

²⁹ Article 2(2)(f) of the Services Directive 2006/123/EC.

³⁰ Handbook on implementation of the Services Directive, p.12.

³¹ Article 2(2)(g) of the Services Directive 2006/123/EC.

³² Handbook on implementation of the Services Directive, p.12.

³³ Article 2(2)(h) of the Services Directive 2006/123/EC.

³⁴ Article 2(2)(i) of the Services Directive 2006/123/EC.

³⁵ Judgment of 13 July 1993, Thijssen, Case 42/92.

³⁶ Judgment of 5 December 1989, Commission v Italy, Case 3/88.

³⁷ Article 2(2)(j) of the Services Directive 2006/123/EC.

³⁸ Article 2(2)(k) of the Services Directive 2006/123/EC.

³⁹ Article 2(2)(l) of the Services Directive 2006/123/EC.

⁴⁰ Article 2(3) of the Services Directive 2006/123/EC.

2. The rights of service recipients

For the establishment and the functioning of the Internal Market for services, the Services Directive not only recognises the significance of the freedom of suppliers to provide services but gives equal importance to the freedom of recipients to receive them. By eliminating the legal obstacles preventing providers from offering their services in other Member States and fostering cross-border economic activity the Directive aims to provide better choice, improve quality and lower prices for service recipients, especially consumers.

Recital 92 of the Preamble⁴¹ indicates that restrictions on the free movement of services, contrary to the Directive, may arise not only from measures applied to providers, but also from the many barriers to the use of services by recipients, especially consumers. The consumers' right to protection from barriers preventing them from availing of offers available on markets of other EU countries is, in particular, reflected by Section 2 of Chapter IV of the Directive⁴², which is devoted to strengthening the rights of recipients of services. This section aims to remove obstacles for recipients wishing to avail of services supplied by providers established in other Member States and to abolish discriminatory requirements based on the recipients' nationality or place of residence, as well as ensure that service recipients have access to general information about the requirements service providers from other Member States need to comply with.

2.1 Prohibited restrictions

In order to prevent consumers from being subject, in their home Member State, to measures which restrict the use of services cross-border or make the use of such services less attractive, Article 19 of the Services Directive prohibits Member States from imposing requirements on recipients which hinder the use of a service supplied by providers established in another Member State. In particular, it (1) prohibits Member States from imposing obligations on service recipients to make a declaration or to obtain an authorisation when wishing to use services of providers established in another EU country, and (2) requires Member States granting financial assistance for the use of a specific service to remove existing discriminatory limits on such financial assistance that are based on the fact that the provider is established in another EU country.

2.2 Principle of non-discrimination

Consumers receiving services provided in other Member States or at a distance often find that they have no access to a service or that access is made subject to discriminatory conditions, e.g. cross-border services are rendered more costly. Article 20.1 of the Services Directive prohibits any discrimination by the State or regional or local authorities that is based on nationality or the place of residence of recipients, e.g. discriminatory tariffs or the requirement to supply specific documents for the use of a service. Furthermore, pursuant to Article 20.2, service providers are no longer able to subject service recipients to discriminatory requirements based on their nationality or place of residence without objective reasons which could justify differences in prices or other conditions of access, e.g. additional costs incurred because of the distance involved.

2.3 Assistance to recipients

The lack of information about requirements that service providers in other Member States have to comply with, in particular consumer protection provisions and the means of redress in the event of a dispute between a provider and a recipient, may make it difficult for recipients to choose providers or to compare offers available in markets of other Member States. To enhance the confidence of service recipients, Article 21 introduces the right of recipients to obtain, in their home country, general information on requirements applicable to service providers, in particular consumer protection rules, on redress procedures available in other Member States and details of associations and organisations from which recipients may obtain practical assistance.

Chapter V of the Services Directive⁴³ contains a set of measures designed to increase consumers' confidence. Provisions concerning the information on providers and their services, as well as those concerning settlement of disputes aim at making consumers more confident when considering foreign offers and prepared should things go wrong.

⁴¹ Services Directive 2006/123/EC.

⁴² Section 2 of Chapter IV comprises of Article 19-21 of the Services Directive.

⁴³ Chapter V comprises Articles 22-27 of the Services Directive.

2.4 Information on providers and their services

Consumers may still hesitate to use services abroad mainly due to the fact that they do not have basic information about providers and their services. Article 22 of the Services Directive requires providers to make information on themselves, their services, prices and conditions under which services are being offered easily available to recipients. Information has to be provided in a clear and unambiguous manner and before the conclusion of a contract. Article 22 distinguishes between information which should be available to recipients in any case, e.g. name and contact details, and other information which only needs to be provided upon the recipient's request, e.g. information on relevant codes of conduct or the price of the specific service, where not pre-determined or the method of calculating it.

2.5 Settlement of disputes

In order to enhance trust and confidence in cross-border services, Article 27 requires Member States to ensure that providers supply a postal address, fax number or email address to which recipients can send a complaint or a request for information. It also requires Member States to take measures to ensure that service providers respond to complaints in the shortest possible time, use their best efforts to find a satisfactory solution and inform recipients of any possibility of recourse to a non-judicial means of dispute settlement.

IV. Role of ECC-Net in the Application of Article 21 of the Services Directive

What to check for before buying services? How to find out whether the trader has the appropriate qualifications or certificates to trade? What would legal rights be if there was a problem? Who can help if further assistance is needed? These are just examples of questions consumers may have when considering buying services in other EU countries; and needless to say, they may be reluctant to engage the services of professionals established in other Member States, if they cannot easily obtain information about consumer rights and the rules service providers have to comply with.

Article 21 aimed to overcome such difficulties by introducing the right of service recipients to obtain, in their home Member State, general information and assistance on the legal requirements, in particular consumer protection rules, and on redress procedures applicable in other Member States so that service recipients could have enhanced confidence when engaging in cross-border transactions. In twenty two countries the body assigned to provide this information to consumers is ECC-Net.⁴⁴

1. Assistance provided by ECC-Net under Article 21.1

ECC-Net has put in place appropriate arrangements whereby consumers can obtain:

- General information on the requirements applicable in other Member States in relation to accessing or exercising service activities, in particular those relating to consumer protection. In this regard, the ECC, with the assistance of Article 21 Contact Points in other Member States, provides general information about the rights of consumers in other Member States and requirements applicable to service providers established in other EU countries.

> *A consumer wanted to make a purchase from a web-trader based in Luxembourg. He knew he had rights to return goods within a certain time in the UK but would this still apply to his cross-border purchase? The consumer was advised that a great deal of consumer legislation was harmonised across the EU, including legislation concerning distance selling of goods and services. Accordingly, the consumer would have at least 7 working days to withdraw from the contract without penalty and without having to give any reason.*

> *An Austrian consumer wanted to conclude a contract with a Hungarian trader for the construction of a winter garden, and needed to know the requirements the trader had to fulfil for the construction of the winter garden under Hungarian law. In addition, the consumer wanted to know if the trader was obliged to take out professional liability insurance and whether the company could be considered reliable. As per the information provided by ECC Hungary, ECC Austria advised the consumer that the company must be licensed and registered in the Hungarian commercial registry, and that those requirements were met by the company in question. Furthermore, there was no obligation on the company to take out professional liability insurance, and according to the information obtained from the Hungarian Authority for Consumer Protection, no complaints against the company had been lodged with the latter.*

⁴⁴ Austria, Bulgaria, Cyprus, Croatia, Denmark, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Norway, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the UK

- General information on the means of redress available in the event of a dispute between a provider and a recipient. In this regard, the ECC aims to provide relevant information relating in particular to alternative dispute resolution (ADR) mechanisms, regulatory bodies, trade associations, ombudsman services available in other Member State

> *A UK consumer had a problem with her mother's house in France and needed to know if there was a Trading Standards equivalent in France that she can approach. Who would be the appropriate enforcement body? The consumer was advised that the body that is nearest to Trading Standards in France is Directorate General for Competition, Consumption and Fraud. She was also asked to send in further detail of the problem so that it could be assessed whether the UK ECC could help with the case.*

> *A UK consumer had a problem with electricity supply in his holiday home in Spain and wanted to find out if there was a regulatory body or Ombudsman service he can contact for assistance. The consumer was directed to Endesa's Customer Ombudsman in Spain and asked to send in more detail regarding the issue, in case the UK ECC could assist.*

- Contact details of associations or organisations from which consumers may obtain practical assistance in the event of a dispute with a trader established in other Member State.

> *A UK consumer was having an on-going problem with the gas supply in his flat in France and wanted to know how to complain and seek further assistance from a regulator/ ombudsman in France? The consumer was advised that firstly he would need to go through the company's complaint procedure, but if no resolution could be reached he could contact Association Études et Consommation ASSECO-CFDT in France or contact the UK ECC, in case further assistance could be offered.*

> *A UK citizen, resident in Bulgaria, made a purchase online of a TV from a trader based in Luxembourg. The TV set arrived damaged but the consumer was having difficulty getting the trader to do something. Who could he contact to get assistance? The consumer was advised about his rights under European consumer legislation and was advised to contact ECC Bulgaria for further assistance.*

While information in respect of all the above instances must be provided in simple and unambiguous language and should not merely take the form of a simple referral to the relevant legal text, Article 21 does not require the designated competent bodies to either supply legal advice or other detailed information tailored to the situation of specific recipients. Given, however, that ECC-Net's role under the Services Directive is not restricted to general information falling under Article 21, but also assistance to consumers in the event of a dispute with a service provider, ECC-Net actively engages in the resolution of cross-border consumer complaints.

> *A consumer sent motorbike parts to a trader in another Member State to have them modified. The consumer's credit card was charged for €1,256. However the modified parts were not shipped to the consumer. The consumer contacted the trader but received no response. The consumer then sought the assistance of their local ECC, which also acted as Article 21 portal under the Services Directive. ECC believed that the trader not only failed to fulfil his contractual obligations but also was in breach of Article 27 of the Services Directive requiring him to respond to complaints in the shortest possible way and use his best endeavour to bring the matter to a quick, amicable resolution. The complaint was sent to the ECC in the Member State where the trader was based. Following on from ECC-Net's intervention the consumer received the items ordered.*

2. Assistance provided by ECC-Net under Article 21.3

While Article 21 does not require the designated information bodies to have detailed knowledge on other Member States' legislation or to have at hand all the relevant information immediately, it does require them to provide information requested by service recipients within a reasonable time and to ensure that up-to-date information is provided.

In order to comply with the above obligations and ensure that measures are put in place for effective cooperation, ECC-Net established and maintained good lines of communication with the bodies providing Article 21 services in other Member States.

> *A UK consumer stayed in hotel on a package holiday in Italy and was dissatisfied with the hotel as he did not feel it met reasonable health and safety standards or that the room was suitable for the 4 star rating. The consumer also enquired about the fire regulations that apply to this hotel. The enquiry was sent to both the Italian article 21 portal and the Tourist Board in Italy. The tourism office in the appropriate area confirmed that this hotel is classified as a 4* hotel, as did the Italian Article 21 body. Moreover, the consumer was advised that the fire brigade in Venice checks the hotels and issues certification that the hotel respects the regulations. When the Municipal Police inspects hotels, they also check that the hotel is in possession of the certification of the fire brigade.*

3. The performance check

Article 21 portals assisting consumers in the manner envisaged by the Directive contribute to the completion of the Single Market given the information and support they provide to consumers. Conversely, if these portals perform poorly, this may further hamper the full realisation of the Single Market. While efforts to provide comprehensive and understandable information can contribute to enhancing consumers' confidence and strengthening their capacity to make informed decisions, if consumers are not even aware of the existence of Article 21 portals, it is axiomatic that the added value of these portals may be limited.

The European Commission has carried out an assessment of the state of play of the Point of Single Contacts for service providers.⁴⁵ Given however that similar performance checks have not been exercised in respect of the Article 21 portals for consumers, it is difficult to state whether work undertaken by them meets the needs of service recipients. Moreover, given the spectrum of bodies assigned to provide information and advice under Article 21, the degree of development probably differs substantially between different Contact Points (both within ECC-Net and between ECC and non-ECC portals). While some provide only basic information and do not engage in awareness-raising campaigns, others may go beyond the requirements of the Services Directive. As such it is submitted that the publication of annual reports or results of internal monitoring procedures may help to assess whether the Article 21 portals are fully operational or whether further work is required to improve their functioning.

⁴⁵ http://ec.europa.eu/internal_market/scoreboard/performance_overview/index_en.htm.

V.

The Importance of the Services Directive for the Internal Market

The creation of a Single Market for services, that is an area without internal frontiers in which the free movement of services is ensured, has been one of the cornerstones of the European project from its origin.⁴⁶ The adoption and subsequent implementation of the Services Directive has been crucial in improving the functioning of the Single Market for services.⁴⁷ The Directive regulates various aspects of economic activity and in varying degrees pertains to two fundamental freedoms of the TFEU Treaty so central to the effective functioning of the EU Internal Market, namely the freedom of establishment⁴⁸ and the freedom to provide cross-border services. Contrary to the literal wording of Article 56 TFEU⁴⁹, which explicitly provides for safeguards for service providers, the Court of Justice recognises the right of recipients to receive services from other Member States as an integral part of the principle of the freedom to provide services and underlines the need to protect service recipients from restrictions laid down by Member States to the freedom to receive services from a provider established in another Member State as being the necessary corollary of the freedom to provide services.⁵⁰

As well as facilitating the provision of services across borders, it is equally important to ensure that recipients of services, which can be both consumers and business, can easily enjoy the opportunities that the Single Market offers. Service recipients ought not to be treated less favourably in relation to local beneficiaries and in particular ought not to be faced with a refusal to supply or unequal conditions simply because they come from another EU country. For example, in Case C-45/93 *Commission v Spain*, involving the cost of tickets for entry to a museum, the Court of Justice condemned such treatment, stating that national legislation which entails discrimination affecting only foreign tourists,

that is nationals of other Member States, is prohibited under the Treaty.⁵¹

Consumers in particular expect that the elimination of regulatory barriers to the provision of services in the Internal Market, such as legal and administrative barriers that can hinder business from setting up or offering their services at home or in another EU country, will guarantee them wider choice, better value and easier access to services across the EU.

However, efforts to remove unjustified regulatory restrictions may not translate into benefits for service recipients, especially consumers, if certain practices by service providers serve to create artificial borders within the Internal Market. Too often consumers face restrictions when they try to purchase and avail of cross-border services. One of the most common examples of this is where consumers experience a refusal to supply or unequal conditions because they come from or live in another EU country.

⁴⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Region: *Towards a better functioning Single market for services – building on the results of the mutual evaluation process of the Services Directive*, p.2.

⁴⁷ Commission Communication on the implementation of the Services Directive: *A Partnership for new growth in services 2012–2015*, p.2.

⁴⁸ The principle of freedom of establishment, set out in Article 49 of TFEU, enables an economic operator (whether a person or a company) to carry on an economic activity in a stable and continuous way in one or more Member States (http://ec.europa.eu/internal_market/services/principles_en.htm).

⁴⁹ Article 56 TFEU “*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union”.

⁵⁰ Joined cases 286/82 and 26/83 <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61982J0286:EN:NOT>.

⁵¹ Case C-45/93 *Commission v Spain* [1994] ECR I-911.

1. Principle of non-discrimination based on nationality or place of residence

The principle of non-discrimination requires equal treatment of an individual or group irrespective of their particular characteristics, and is used to assess apparently neutral criteria that may produce effects which systematically disadvantage persons possessing those characteristics.⁵² Article 18 TFEU, which contains a general prohibition on discrimination on the grounds of nationality, has grown to become one of the fundamental principles of the EU law without which the functioning of the Internal Market would not be possible. As enunciated by the Court of Justice, discrimination can occur not merely in the application of different rules to comparable situations but also in the application of the same rule to different situations.⁵³

Article 20.2 of the Services Directive explicitly prohibits discrimination based on the grounds of both the nationality and place of residence of service recipients. It requires Member States to ensure that *“general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient”*. A tourist moving to the territory of another Member State, places himself in a situation very similar to that of recipients resident in the Member State where the service is provided, and therefore may feel discriminated if confronted with service or price differentiation. Similarly, a consumer does not expect to be faced with obstacles and geographic borders while trying to avail of services available online.

However, Article 20.2 also provides that differences in the conditions of access can be applied *“where those differences are directly justified by objective criteria”*. As such, it needs to be noted, that not every difference in treatment will therefore necessarily constitute discrimination. Indeed, businesses may have valid reasons for applying different conditions and traders charging different prices to different consumers or refusing to trade may not necessarily be in breach of EU consumer law – and this may come as a surprise to many consumers.

The question then arises as to what may be considered to constitute “objective justification”. Guidance is provided by Recital 95 of the Services Directive, which outlines some examples of objective justification for the different treatment. Accordingly, additional costs may be justified because of the distance involved, the technical characteristics of the provision of a service; different market conditions such as a higher or lower demand influenced by seasonal factors; pricing by different competitors, or extra risks linked to having to comply with rules different to those of the Member States of establishment. In any case, in order to determine whether different treatment is justified by objective reasons, a case-by-case analysis is required and what needs to be taken into account, in terms of a non-discrimination clause, is not whether price and service differentiation occurs but whether this differentiation is the result of discrimination based on the consumers’ nationality or place of residence.

Whilst appreciating that the Services Directive does not impose an obligation on service providers to trade and sell cross-border at any cost and that traders are free to determine the territorial scope of their offers, consumer complaints reported to ECC-Net indicate that certain business practices may be to the detriment of consumers and contrary to the principle of non-discrimination on the grounds of nationality or place of residence as laid down by Article 20.2 of the Services Directive.

⁵² <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/nondiscriminationprinciple.htm>.

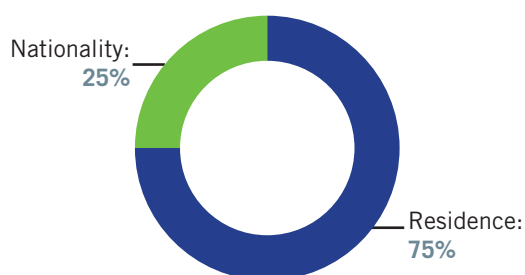
⁵³ Case C-311/97, Royal Bank of Scotland.

2. Restrictions faced by Consumers

2.1 General results

Based on the Article 20.2-related complaints received by ECC-Net and the Finnish Competition Authority, most cases of different treatment appear to be related to residence, rather than to nationality as such. Such cases amount to more than 75% of all complaints received: 167 complaints out of 222 which were received by ECC-Net and 10 complaints out of 14 which were received by the Finnish Competition Authority.

TABLE 1:
Difference applied to service recipients based on the grounds of nationality and place of residence.



> A Polish consumer was unable to complete an online transaction to purchase a book from a trader based in Luxembourg as a result of the latter's refusal to deliver to Poland.

> While on holidays in an Austrian ski resort a German consumer discovered that the purchase price of tickets for lifts was much more expensive for tourists than for Austrian residents.

> A Spanish consumer attempted to book hotel accommodation online through a UK-based travel agent. The booking was not accepted and the consumer was advised as per the relevant terms and conditions that the rate in question was not applicable to Spanish nationals and that the trader reserved the right to cancel the reservation or charge the difference in price.

It needs to be noted, however, that different treatment in respect of the provision of services is not often established directly on the basis of nationality or place of residence, but rather on factors which may end up being tantamount to nationality or place of residence such as the country of credit card issuance or the place of delivery.⁵⁴

> An Estonian consumer was unable to purchase goods online from a UK-based trader using her credit card as the trader would only accept payments with credit cards issued by British providers.

Mirroring ECC-Net's findings, a Eurobarometer survey published in 2011⁵⁵ revealed that although a range of different barriers to purchasing online or from another EU country existed, the most prominent restriction to access mentioned by respondents concerned their place of residence. Respondents from more than half of the Member States when asked if they had experienced any difficulties in accessing services because of their nationality or place of residence, had some experience of internet sites that would not deliver to their country. According to a Eurobarometer survey published in 2012,⁵⁶ 18% of consumers indicated being unable to buy goods from another EU country due to the seller's inability to sell or deliver the products to their country.

⁵⁴ Commission Staff Working Document: *With a view to establishing guidelines on the application of Article 20(2) of Directive 2006/123/EC on services in the Internal Market ('the Services Directive')*, June 2012, p.9.

⁵⁵ Eurobarometer Study *Obstacles citizens face in the Internal Market*, September 2011, p.9, available at http://ec.europa.eu/public_opinion/archives/quali/ql_obstacles_en.pdf.

⁵⁶ Eurobarometer Study *Consumers attitudes towards cross-border trade and consumer protection*, June 2012, p.25, available at http://ec.europa.eu/public_opinion/flash/fl_332_sum_en.pdf.

While the Services Directive applies to the provision of a wide range of services, the analysis of the complaints reported to ECC-Net and to the Finnish Competition Authority revealed that situations in which consumers are confronted with different treatment or refusal to provide a service occur mostly in relation to the purchasing of goods, such as electronic goods, clothes, books or music or data downloads. Complaints received in this category amount to almost 74% of all complaints received and occur mostly in online transactions.

The sale of goods online, as well as the provision of cross-border services, has developed together with the rapidly increasing use of the internet in recent years. Despite attempts to harmonise and thereby simplify European consumer legislation, such as the E-Commerce Directive and the Services Directive, barriers within the Internal Market still exist resulting in fragmentation. Most online traders still serve a very limited number of Member States and online buyers are regularly confronted with refusal to deliver if they are not residing in the same Member State, thus undermining consumers' confidence in the Internal Market.⁵⁷

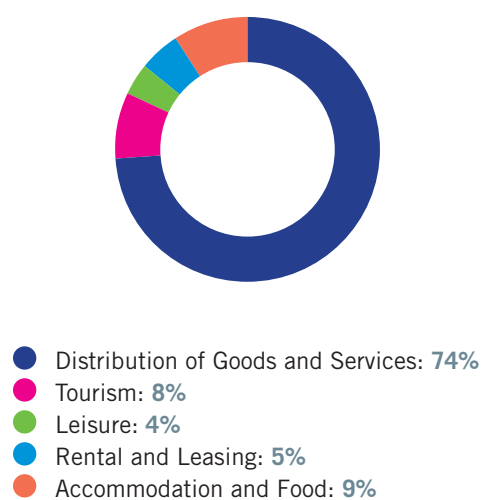
> *A Polish consumer was unable to purchase a pair of trainers online as the UK-based web-trader would not deliver the goods to Poland.*

Complaints received in relation to the provision of services in the field of tourism and leisure, including those provided by travel agencies, accommodation providers or amusement parks, account for nearly 21% of all complaints received, while the sector attracting the third largest number of consumer complaints, amounting to more than 5% of the total number of cases, was the rental and leasing services sector.

> *While booking a vacation package online with a theme park based in France, a Bulgarian consumer selected by mistake the UK as her country of residence. She soon spotted her mistake and selected Bulgaria instead. The consumer learned that there was nearly 40% price difference and she was asked to pay €500 more than her British counterparts.*

> *Having booked a car rental service online and subsequently arriving at the rental location an Irish consumer was requested by the UK vehicle provider to pay an additional £500 deposit on the grounds that he was a holder of a non-UK driving license.*

TABLE 2:
Consumer complaints by economic sectors.



⁵⁷ Commission Staff Working Document Online services, including e-commerce, in the Single Market, January 2012, p.67, available at http://ec.europa.eu/internal_market/ecommerce/docs/communication2012/SEC2011_1641_en.pdf.

2.2 Difference in condition of access to service

Methods in which traders implement service and price differentiation are numerous and may differ depending on the sector involved. Restricting access to services by redirecting consumers to national websites may be more popular amongst online retailers whereas direction to services tailored to their country of residence may be faced by consumers booking a car rental or accommodation service online.⁵⁸ Such practices may hinder the transparency of cross-border online transactions and cause a consumer to make a transactional decision that he/she would not otherwise make.

Indeed, complaints reported to ECC-Net show that refusal to supply is the most frequent cause for consumer complaints, followed by price differentiation and difference in other conditions of access.

2.2.1 Refusal to supply

Situations whereby consumers are confronted with a refusal to supply occur mostly in relation to online transactions; with little evidence being gathered to suggest that consumers face similar difficulties in the offline world. With respect to online transactions, the main method traders use to implement differentiation is redirection to country-specific websites.

The use of an automatic geo-location technique allows traders' websites to detect the consumer's place of residence, and automatically redirect consumers to websites destined for their country of residence, thereby simultaneously restricting access to those websites that are destined to consumers of a specific country. While the so-called "hard" redirection would not allow consumers to access services targeted to a specific country nor to check prices of the offers in question, a "softer" approach would allow consumers to view services targeted to a specific country but not access them.⁵⁹ By specifying which consumers can use the service and asking them to access country-specific websites, where usually considerably higher prices are offered, traders prevent consumers from obtaining products and services not destined for their country of residence, thereby distorting competition within the market. Such practices often leave consumers frustrated, particularly when they are unable to complete the ordering process due to the lack of

delivery options or are allowed to complete the transaction only to be informed at a later stage that the transaction in question needs to be cancelled.

> *Having attempted to place an order online with a German trader, a Danish consumer was redirected to a Danish version of the website, where the price of the product in question was approximately 150 DKK more expensive.*

> *A Latvian consumer placed an order for car parts with a German trader. The order was completed online, the order confirmation indicating Latvia as the place of delivery received and payment taken, only for the consumer to be subsequently advised that the trader was unable to deliver the parts to Latvia and that the order needed to be cancelled.*

> *An Austrian consumer attempted to make a car rental reservation for her holiday in Hawaii through the German version of a website of a multi-national car rental company, to no avail. The consumer was re-directed to an Austrian version of the website where the price requested for the identical offer was much higher.*

2.2.2 Price differentiation

It is not unusual for web-based traders to maintain different pricing policies based on national borders. As discussed, this may be achieved by automatically routing consumers to other websites corresponding to their country of residence or via the usage of different techniques which enable the implementation of cross-border price differentiation. By asking consumers to select their country of residence or home currency through a menu on the homepage, traders may prevent consumers from availing of offers targeted to specific countries. As opposed to online price differentiation, not many examples of offline price differentiation were identified.

A recent research carried out by ECC France on price differences in the car rental sector,⁶⁰ revealed that certain car rental companies

⁵⁸ Matrix Insight Study on business practices applying different condition of access based on the nationality or the place of residence of service recipients – *Implementation of Directive 2006/123/EC on Services in the Internal Market*, November 2009, available at http://ec.europa.eu/internal_market/services/docs/services-dir/studies/20091210_article20_2_en.pdf.

⁵⁹ Ibid. p.72.

implement price differentiation based on the place consumers are making the reservation from. Accordingly, the exact same service is offered online to consumers based in the Czech Republic at a significantly higher price than to their French or German counterparts who were asked to pay 20% or 3% less, respectively, for hiring a car of the same category (economy), at the same place (Malaga airport) and time (16-18 September 2013). Consumers based in Germany interested in hiring a car of an intermediate category at the airport in Nice during 16-18 September 2013 faced a similar situation. They were required to pay 17% or 4% more than their French or Czech counterparts, respectively.

In extremely economically challenging times, it is unsurprising that consumers left with no opportunity to avail of more attractive offers from an online shop operated by the same company in a different Member State, report frustration and annoyance at business practices which differentiate between consumers based on their country of residence or nationality. From a consumer perspective, there is no justification for the incidence of cross-border price differentiation given that the costs of the service provision are the same regardless of the country of residence of a consumer, for instance the cost of the car rental or hotel accommodation.

> *A German consumer and his family wanted to avail of a discounted price for ski passes which would result in a saving of more than €300. As the consumer and his family were not resident in Austria, however, they were refused tickets at the discounted price.*

> *During the ordering process with a German web-trader, a British consumer was asked to indicate his country of residence. Having selected the UK, the consumer noticed an increase in price of the software of 50 EUR. Out of curiosity, the consumer selected Germany and the price decreased from €499 to €449.*

2.2.3 Difference in other conditions of access

Even in situations where consumers can obtain information on prices and availability of services outside their country of residence and actually gain access to these services, they may be confronted with restrictions other than refusal to supply or price differentiation, for example, the requirement of having a bank account in a given country in order to be able to access the service in question, or avail of the desired promotions.

> *By way of celebrating the 50th anniversary of a special chocolate, a German-based chocolate company issued a special edition of chocolate boxes with 50 of them containing gold bags worth €1000 each. Luckily for an Austrian consumer, she found one in the chocolate box she bought. The consumer contacted the trader to claim the prize, but was told she would need to have a place of residence in Germany in order to avail of this promotion.*

> *A Luxemburgish consumer was unable to subscribe and avail of a toll payment service, which would have offered her a substantial discount, offered by a French motorway company, as the service was available for French bank account holders only.*

⁶⁰ Although the remit of this report concerns data from 2010 to the end of 2012 only, the research carried out by ECC France in September 2013 was included in the report for illustration purpose only. The results are available in Annex IV of this report.

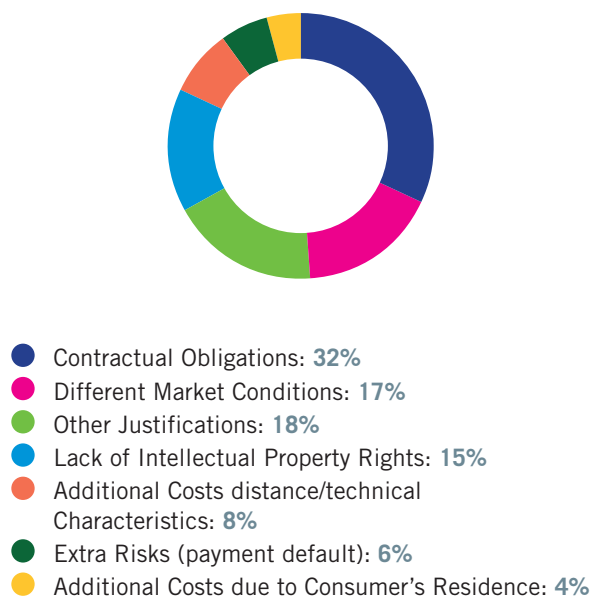
3. Objective justification for different treatments

Article 20.2 of the Services Directive specifies that different treatment based on nationality or residence is permissible if it is justified by objective reasons. A case-by-case analysis is required in order to determine whether the reason provided by a trader can be regarded as objective.

The following justifications were invoked by traders as a result of complaints by consumers⁶¹ or contact by ECC-Net:

- Contractual obligations preventing the service provider from distributing the service in a particular territory (32%);
- Different market conditions (17%);
- Lack of intellectual property rights (15%);
- Additional costs incurred because of the distance involved or because of the technical characteristics of the service (8%);
- Extra risks such as difficulties in securing payment from customers resident in other Member States (6%);
- Additional costs incurred by the service provider in the provision of the service on grounds of the residence of the consumer (4%); and
- Other justifications (18%).

TABLE 3:
Justifications invoked by traders.



3.1 Contractual obligations preventing the service provider from distributing the service in a particular territory

In 32% of cases the justification invoked by traders was that they were not able to distribute the requested service due to contractual obligations, which provided that they were only allowed to deliver the service to consumers resident in their country of establishment and not to consumers resident in other EU Member States as these territories were reserved for other distributors (so called “exclusive distribution agreements”).

The use of exclusive distribution agreements between the manufacturer/supplier and retailers is widespread across countries and sectors. It resulted in a refusal to supply in the following instances reported to ECC-Net:

⁶¹ Those complaints also include complaints reported to the Finnish Competition Authority. In total traders provided justification for different treatment in 110 cases out of 236 reported to ECC-Net and the Finnish Competition Authority.

Baby products

- > An online purchase of a baby carrier by a consumer resident in Sweden was refused by a UK-based retailer due to a contractual obligation with the US-based manufacturer, who stipulated that the retailer was not allowed to sell the product outside of the UK. The consumer had to contact the Swedish retailer where the identical product was more expensive.
- > A consumer resident in Finland was unable to proceed with an online purchase of special reusable nappies with a UK-based retailer, as the US-based manufacturer forbade the distributors in Europe from selling the nappies outside their country of establishment. The consumer was disappointed as the UK-based retailer offered the product 25% cheaper than the retailer based in Finland.

Cruise holiday

- > Consumers resident in Austria were unable to book a cruise from a German-based travel agent. The Italian-based cruise company did not allow the agents to sell the cruises outside of Germany.

Household appliance

- > An online purchase of a sewing machine by consumers resident in Sweden from a UK-based retailer was refused as the supplier did not allow the retailer to deliver to Denmark, Sweden and Norway. Subsequently, the consumers were forwarded to the Swedish retailer who sold the identical product for a higher price.
- > A consumer resident in Sweden sought to make an online purchase of a juice machine from a retailer based in the Czech Republic. The supplier did not allow the retailer to deliver to Sweden. The consumer was referred to the Swedish web-shop, which did not list the desired product.
- > Online-purchase of a boiler by a consumer resident in Italy from a retailer based in Ireland. The Italian manufacturer did not allow the retailer to sell the boiler to consumers resident in Italy.
- > A Swedish consumer was unable to partake in an online-purchase of wallpaper from a UK-based retailer as the supplier of the wallpaper did not allow the retailer to sell outside the UK.

Pre-fabricated houses

- > Purchase of a pre-fabricated house by a consumer resident in Austria from a distributor based in Slovenia. The Austrian manufacturer did not allow the distributor to sell outside Slovenia.

Software

- > After attempting to purchase a communication utility aid programme online from a UK-based distributor, a consumer was informed that he would have to buy the software from the Finnish distributor, with the result that the price for the identical product was higher.

Sports equipment:

- > Consumers resident in Denmark and Sweden were unable to purchase electric golf trolleys and golf carts online from UK-based retailers as the manufacturer, who was also based in the UK, did not allow the retailers to sell outside the UK.
- > Online-purchase of specialised bicycle components by a consumer resident in Finland from a UK-based retailer. The identical product was more expensive in Finland.
- > A consumer resident in Germany was unable to purchase a telescope online from a Polish-based retailer as the manufacturer did not allow the Polish retailer to sell the products to consumers resident in Germany.

Vehicles:

- > A consumer resident in the UK was unable to purchase a new car from a French retailer as the French manufacturer did not allow the retailer to sell cars outside of France.
- > Purchase of second hand cars by consumers resident in Malta from UK-based retailers. The German manufacturer did not allow the retailer to sell cars outside the UK for export.
- > A consumer resident in Austria was prevented from purchasing a new car from a Hungarian retailer due to an order from the general distributor which provided that the Hungarian trader was only allowed to sell the desired car model to consumers that had a place of residence

in Hungary during the last four months. The general distributor also gave the order to offer discounts only to consumers resident in Hungary so that consumers from other Member States, like Austria, would not show an interest in the car.

- > A consumer resident in Finland was unable to purchase a motorbike from retailers in Germany and Sweden as a result of the US-based manufacturer's refusal to allow the retailers to sell the motorbikes outside of their country of establishment.

The contractual obligations invoked by traders included vertical distribution agreements (agreements between manufacturers and retailers) and passive sales (consumers made the initial approach to the retailers by visiting their websites or shops and placing orders).

However, an exclusive distribution agreement can only be invoked as an objective reason for refusal to supply if it complies with competition law rules and therefore should not take place.

Restrictions on passive sales laid down in vertical distribution agreements may constitute a breach of Article 101 TFEU, and therefore it is unlikely that the contractual obligations mentioned in this section can be invoked as objective justification.

ECC-Net also received cases where consumers attempted to buy a service or product directly from the manufacturer/supplier. However, the purchase was denied and the consumers were re-directed to the retailer in their country of residence. The following are examples of the practice in question:

- > *A consumer resident in Denmark wanted to buy a mineral make-up from a UK-based manufacturer. However, the consumer was redirected to the Danish retailer where the make-up was more expensive.*

- > *Consumers resident in Bulgaria wanted to buy cosmetic products from a French manufacturer. The manufacturer did not accept their orders and advised the consumers to buy the products from the Bulgarian trade representative.*

- > *A consumer resident in Malta wanted to buy clothes from a UK-based web shop of a multi-national company specialised in clothing. The consumer's order was not accepted and he was re-directed to the company's retail stores in Malta. The company argued it does not allow the online sales channel for consumers from Malta via the UK website in order to protect its retail stores in Malta. Online ordering may compromise the commercial success of these stores.*

Unlike the previous cases, which were clearly in contravention with EU competition rules, it is the task of competition authorities to evaluate whether the retail geographical agreements mentioned above are in breach of competition law and, if not, can constitute objective justification within the meaning of Article 20.2 of the Services Directive. It is, therefore, of major importance that consumer protection bodies and the competent enforcement authorities enhance cooperation with competition law authorities.

3.2 Different market conditions

In 17% of cases the justifications received from traders regarded different market conditions.

- > *Italian consumers booked accommodation in Italian hotels via a German tour operator. On arrival, at the hotel, the consumers had to pay an additional fee as they were resident in Italy. The German tour operator claimed that the different pricing policy was due to different seasonal demands in the German and Italian markets. For instance, it was claimed that Austrian and German consumers would book the hotels in May, June, September and October, whereas Italian consumers would only book the hotels from mid-June to mid-September, with a significant focus during the first 3 weeks in August.*

- > *An Italian cruise company did not allow consumers resident in Austria to book cruises via its German website. Instead, consumers were redirected to the Austrian website where they had to pay significantly higher prices for an identical service. The cruise company stated that the price difference was due to the different market conditions, especially the different political and economic situation in Germany and Austria.*

As previously discussed, Recital 95 of the Services Directive aims to provide guidance as to what may constitute objective justification. In particular, it states that different market conditions such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors may justify different treatment.

The rationale of “different market conditions” constituting objective justification for otherwise different treatment is a conceptually complex area. Primarily, an examination of the market is required and this involves an analysis of a variety of factors on the supply and demand side which need to be taken into account in order to determine the relevant market conditions.⁶² Secondly, an evaluation is then needed to ascertain whether the relevant market conditions are sufficient to justify different treatment.

ECC-Net does not have the resources to investigate whether the market conditions invoked by traders do exist and whether these conditions justify different pricing or marketing policies, as well as a partitioning of the market. Rather, it is the task of the competent authorities or courts to investigate this issue by demanding objective evidence and by conducting an analysis of the market in question.

3.3 Lack of requisite intellectual property

In 15% of cases the objective justification invoked by traders concerned the lack of intellectual property rights (IP rights) or restrictions by publishers.

IP rights are the rights given to persons over intangible property (i.e. the creations of their minds). According to Barrett, most IP doctrines are crafted to balance two potentially conflicting policy goals: (1) to provide an incentive to create by giving creators property rights in the products of their creativity for a certain period of time,⁶³ and (2) to provide the greatest possible public access to products of creativity in order to promote a competitive marketplace.⁶⁴ The lack thereof of IP rights can be regarded as an objective justification by traders.

In general, these cases regarded the cross-border purchase of e-books, music downloads and computer games. Below are some case studies on the matter:

> *Consumers resident in the Netherlands and Finland wanted to buy e-books from a UK-based trader's website. The trader rejected their attempted purchases and informed the consumers that he was bound by the legal demands and restrictions of publishers due to intellectual property rights and as such could not offer the possibility of purchasing such items to consumers outside the UK.*

> *Consumers from Lithuania, Sweden and the UK wanted to download music from media player stores located in other EU Member States. The stores belong to a multinational corporation. The trader involved did not allow the attempted purchases and informed the consumers that he had not bought the intellectual property rights for the countries of residence of the consumers.*

> *Consumers resident in the Netherlands and the UK wanted to purchase e-books from the German, Italian, French or Spanish specific website of a multinational e-commerce company. The consumers wanted to read the books in languages other than their first language. The company refused to allow the purchases and argued that the e-books were only available on the country-specific websites for residents of these countries due to intellectual property reasons.*

The cases mentioned above left consumers frustrated as the requested song or e-book was not available in any other store or was more expensive in other stores.

In the cases ECC-Net received, consumers were only informed of the grounds for refusal after they complained to the companies involved. Clear information prior to the commencement of the ordering process to the effect that the purchase of an e-book or song is not possible due to copyright restrictions by publishers can help consumers to better understand why the requested service cannot be purchased, thereby avoiding frustration and disappointment. Traders are, therefore, recommended to provide better information to consumers about the issue of intellectual property rights at the beginning of the ordering process.

⁶² Commission Staff Working Document *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, June 2012, p.17, available at http://ec.europa.eu/internal_market/services/docs/servicesdir/implementation/report/SWD_2012_146_en.pdf

⁶³ Barrett, M. *Intellectual Property*, (2004) Aspen Publishers, New York, p.1. See also: http://www.wto.org/english/tratop_e/trips_e/intell_e.htm.

⁶⁴ Ibid.

Furthermore, traders did not provide evidence with regards to the lack of intellectual property rights. Thus, ECC-Net could not verify whether traders did not possess the requisite IP rights or whether they had acquired the necessary rights, but continued to restrict consumers' access to certain services due to commercial decisions unrelated to IP issues, even if there was no legal obstacle to provide the relevant service without discrimination. This latter scenario may not only amount to bad faith but also, in certain cases, should give raise to investigation by the European Commission in cooperation with the relevant competition authorities in the Member States concerned if suspected that the trader in question is in breach of competition law (e.g. illegal vertical agreements).

3.4 Additional costs incurred because of the distance involved or because of the technical characteristics of the service

In 8% of cases the justification provided for the denial of a service or a higher-priced service pertained to additional costs incurred because of distance involved or because of the technical characteristics of the service.

Distance

There are, generally, cost differences for service providers when operating outside of the Member State of their establishment. Thus, different treatment that is due to higher delivery costs or the distance involved can be regarded as justified.

> *A Slovenian consumer ordered concert tickets from an Italian ticket sales company. The consumer felt discriminated against as he had to pay a higher price than consumers resident in Italy. The company informed the consumer that the higher price was due to higher costs of delivery to Slovenia.*

ECC-Net, however, also received cases where it is submitted that the argument of delivery costs is unlikely to justify different treatment.

> *A consumer from Malta wanted to buy toys from a UK-based web shop of a world-famous children's entertainment company. The purchase was refused on the grounds that Malta was excluded as a shipping destination*

due to additional costs incurred because of the distance involved. The web shop, however, delivered to practically all other EU countries.

> *A consumer from the Czech Republic wanted to buy a mobile phone from a German web trader. The trader rejected the attempted purchase and informed the consumer that the contract with the transport company did not include delivery to the Czech Republic.*

> *A consumer from Poland wanted to buy a book from the UK website of an e-commerce company based in Luxembourg. The company rejected the attempted purchase and informed the consumer that there was no possibility of shipping the book to Poland.*

It is submitted that the aforementioned reasons given by the traders involved in the above cases, are unlikely to be accepted as objective reasons, if subjected to scrutiny, on the grounds that postal services are available for the Czech Republic, Malta and Poland⁶⁵ and importantly the consumers in question agreed to pay a higher rate of delivery than consumers based in the UK or Germany.

Technical characteristics

> *Interested in buying a prefabricated house, an Austrian consumer contacted a Slovenian trader who at the time was selling prefabricated houses for less than €154,225. However as the consumer had no place of residence in Slovenia, the trader refused to sell the house, but encouraged the consumer to enquire about the possibility of buying the house directly from an Austrian manufacturer. The latter offered the exact same houses for sale for more than €185,000. The retailer among other things stated that the purchase could not be concluded as the documentation was only available in Slovenian and thus the granting of a building permit for the construction of the house in Austria would not be possible. The Austrian building authority informed the consumer that the granting of the permit could be possible if he provided a translation of the documents and a confirmation from an architect that the house fulfilled the requirements needed under Austrian building laws. The*

⁶⁵ For parcel deliveries up to 20 kg the Postal Services Directive imposes an obligation on Member States to ensure the provision of universal postal services; Commission Staff Working Document *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, p.15.

consumer was willing to pay for these costs as he would still be able to purchase the house at a cheaper price than in Austria. The Slovenian company, however, still did not allow the purchase. Furthermore, the Austrian manufacturer informed the consumer that he produces a specific model for Slovenia that does not meet the requirements of Austrian building laws.

ECC Austria did some initial research into the matter and found that the Austrian manufacturer produces an identical type of house for the Austrian, German and Swiss market. The sales territory of Austria-Germany-Switzerland has 98 million inhabitants with a GDP per capita between \$43,900 and \$38,400 per year. For this sales territory the manufacturer produces a totally identical version of the house. The sales territory of Slovenia has 2 million inhabitants with a GDP per capita of \$29,000 per year.⁶⁶

It is submitted that, from a business point of view, it is not credible that the manufacturer produces a specific house type for the Slovenian market. Furthermore, the houses were identical on both the Austrian and the Slovenian website.

ECC-Net was concerned that the Austrian manufacturer partitioned the market on national grounds, i.e. Austrian consumers have to buy the house in Austria; Slovenian consumers have to buy the house in Slovenia and as a result, ECC Austria forwarded the case to the Austrian Competition Authority who is currently investigating the case.

> A consumer resident in Italy wanted to buy a boiler manufactured in Italy from an Irish retailer as it was cheaper for the consumer to buy the boiler in Ireland than directly from the manufacturer in Italy. The purchase was refused, however, and the consumer was redirected to the Italian manufacturer. Both companies justified the denial of purchase on the grounds that the boiler only had instructions in English and thus the sale in Italy cannot be authorised.

Pursuant to Articles 6 and 9 of the Italian Consumer Protection Act,⁶⁷ the consumer needs to be provided

with the documentation, including relevant instructions, in Italian; however, the requirement in question is mandatory only when products are marketed or sold in Italy. As the boiler was marketed and sold in Ireland, there was no obligation on the seller to provide instructions in Italian. Therefore invoking same as a reason not to supply, may hardly be considered as an objective justification.

3.5 Extra risks linked to rules differing from those of the Member States of establishment, such as difficulties in securing payment from customers resident in other Member States

In 6% of cases examined the justifications provided by traders pertained to the additional risks linked to doing business in a Member State other than their Member State of establishment. This category includes issues such as difficulties in securing payment from consumers resident in other Member States.

> A consumer resident in Spain wanted to conclude a contract with an Austrian car sharing company which allowed its customers access to a dispersed network of shared vehicles 24-hours a day at unattended self-service locations. The Austrian company, however, refused to conclude the contract as the consumer could not provide a residence registration form from Austria, as well as an Austrian bank account or credit card issued in Austria. The company stated that they ask for these requirements in order to avoid cases of fraud and to be able to check the consumer's solvency before concluding a contract.

> A consumer resident in Estonia wanted to buy a TV bracket from a UK-based web shop. The consumer wanted to pay with his credit card which was issued by the bank of Estonia. The trader refused the purchase and informed the consumer payments by credit card were only accepted if the card was issued by a bank within the UK.

⁶⁶ GDP per capita based on purchasing power parity (PPP). PPP GDP is gross domestic product converted to international dollars using purchasing power parity rates. An international dollar has the same purchasing power over GDP as the U.S. dollar has in the United States. GDP at purchaser's prices is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products. It is calculated without making deductions for depreciation of fabricated assets or for depletion and degradation of natural resources. Data are in current international dollars.

⁶⁷ <http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD/countries/1W?display=default>.
<http://www.sviluppoeconomico.gov.it/images/stories/impresa/consumatori/CdConsumo2012.pdf>.

> *A group of consumers were unable to re-fuel their cars at stand-alone gas stations in Finland as the gas companies did not accept their credit cards on the grounds that the cards were not issued in Finland. They stated that due to a technical barrier they could not ascertain the consumer's solvency.*

An analysis of the individual case facts is required in order to ascertain whether difficulties in securing payment could justify the denial of a contract. If a consumer, for example, is willing to pay in advance via bank transfer or if he is willing to pay cash on delivery the risk of payment default is unlikely to be regarded as an “objective reason” by a competent enforcement authority.

The aforementioned cases should also be investigated with regards to potential breaches of competition law. Agreements between a manufacturer/supplier and a distributor, stating distributors shall terminate a transaction over the internet once credit card data reveals that the consumer is not residing in the territory of the distributor are regarded to be in breach of competition law rules.

> *A consumer resident in Austria wanted to buy a product from the largest German-based mail order and e-commerce company. The purchase was refused as the consumer had no place of residence in Germany. The consumer afterwards purchased membership of a German company that provides consumers with a collective postal address in Germany enabling them to order goods that are only sold with a place of residence in Germany. The company did not accept that the consumer orders with a collective address in Germany and re-directed the consumer to the Austrian website where the price for the same product was €200 higher. It was argued on behalf of the trader that there was a high risk of non-payment in cases such as this, and that therefore they only accept payment on delivery in cash. However, this option was obviously not possible for the consumer in this instance as the consumer did not reside at the collective address.*

As the consumer was willing to pay the purchase price in advance via bank transfer in this instance, it is submitted that there was no risk of payment default. As such, it is difficult to envisage how the rationale provided by the trader could be deemed to constitute “objective justification” under the Services Directive. Rather, it appears that such practices allow for

continued market fragmentation to the detriment of consumers.

> *Consumers resident in Poland wanted to buy products from traders based in Germany. The traders refused the purchases stating that previously they had bad experiences with consumers from Poland.*

It is submitted that a blanket policy refusing consumers of a particular Member State access to particular services on the grounds that previous experience with some consumers from that Member State had been unpleasant is in itself insufficient as an objective justification. For instance, if the experience was payment default, the trader could rely on advance payment or cash on delivery.

3.6 Additional costs incurred by the service provider in the provision of the service on grounds of the residence of the consumer

In 4% cases traders claimed that additional costs on the supply side resulted in the decision not to offer a service in the country of residence of the consumer.

> *A consumer from Finland wanted to book a package holiday from a travel company based in the UK. The company refused to accept the purchase due to the fact that the company would have to acquire licensing/bonding schemes and a business place in Finland.*

Additional costs on the supply side may also result in higher prices.

> *A consumer from the UK felt discriminated against as he had to pay a higher rental fee than Finnish consumers for a holiday home in Finland. The rental company explained that the higher fee was as a result of the translation costs involved in translating their website from Finnish to English.*

ECC-Net, however, also received complaints where it was unlikely that the additional costs on the supply side could be invoked to justify the higher price.

> *An Austrian consumer wanted to buy a baby crib from a German website. The trader refused to accept the purchase and re-directed*

the consumer to the Austrian web shop that was operated by the same trader. The price for the identical crib was € 80 higher. It was argued on behalf of the trader involved that the higher price was due to high marketing costs for the Austrian website, as well as high costs for legal advice on the Court of Justice ruling on Google AdWords.⁶⁸

Such explanations may be dubious grounds for refusal to supply a service given that (1) the consumer wanted to buy the baby crib on the German website where these marketing costs would not have arisen and (2) the legal costs pertaining to the Court of Justice's ruling on Google AdWords are costs for general legal advice, costs which would also be required for the German website.

As a result, ECC Austria forwarded the case to the competent enforcement authority in Germany. It is for the authority to decide whether the arguments put forward by the trader may be considered to objectively justify the different treatment in this case.

3.7 Other reasons invoked by traders

The following justifications were further invoked by traders (18%):

Environmental protection

> A German-based web trader refused to allow a consumer resident in Austria to purchase a crib on the grounds that "due to environmental protection he does not deliver furniture to Austria", referring to the long distance the courier company would need to cover in order to deliver the goods to Austrian consumers.

The above justification cannot be considered objective and seems to serve as an excuse for refusal to supply the goods, especially since the distance the courier company would need to cover to deliver the goods to consumers based in Germany may in some instances be greater than the distance involved in reaching consumers based in Austria.⁶⁹

No application of the Services Directive

> An Austrian ski resort offers season tickets at a discounted price only to consumers resident in the region. The ski resort argued that they do not discriminate because they offer a transport service to which the Service Directive does not apply.

It is difficult to envisage how such a service could fall outside of the scope of the Services Directive when one considers that with the season ticket a consumer pays not only for the transport service, but also to get access to a whole ski resort. Furthermore, the company also uses the earnings from the season tickets for the maintenance of the ski resort and thus does not offer a mere transport service.

> A consumer from Malta wanted to buy toys from a UK-based web shop of a world-famous children's entertainment company. The purchase was refused with the argument that the Service Directive does not cover the sale of goods.

However, as per the Commission Staff Working Document on the Application of the Services Directive, the Directive also covers distributive trades, including retail and wholesale products, and as such is applicable in the case mentioned above.⁷⁰

Taxation

> A consumer resident in Ireland was refused the purchase of an e-book from a UK-based e-book store. The trader stated that due to a new VAT law within the UK the consumer can only purchase an e-book with a credit card issued in the UK.

As the ECC which handled the complaint was not sure to which regulation the trader was referring to, the trader was contacted for clarification. Despite numerous items of correspondence sent to the trader the latter failed to offer clarification regarding their position.

⁶⁸ Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), Die BergSpechte Outdoor Reisen und Apinschule Edi Koblmüller GmbH v Günther Guni and trekking.at Reisen GmbH (C-278/08).

⁶⁹ e.g. regions bordering Germany like Salzburg.

⁷⁰ Handbook on the Implementation of the Services Directive, p.10; Commission Staff Working Document *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, p.7.

Club card

> A group of Italian consumers booked hotel accommodation from a German tour operator. Despite the hotel costs being paid in advance to the tour operator, at check-in the consumers were required to pay an additional fee, due to their residency in Italy. Subsequently, it was explained that the additional fee was due to the need for Italian consumers to buy a Club Card (so called “Tessera Card”)⁷¹ enabling them to make use of the hotel’s amenities services.

The Italian Antitrust agency ruled that a tour operator cannot force consumers to buy travel insurance when booking a package holiday.⁷² Such obligation may constitute an unfair commercial practice. Similarly, the tour operator or hotel cannot force consumers to buy a club card.

Freedom of contract

> A consumer resident in Sweden wanted to buy a product from a German web-trader. However, the trader refused to accept the purchase and informed the consumer that according to the principle of freedom of contract, he can decide himself with whom he wants to conclude a contract.

As noted by Advocate General Jacobs in *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-und Zeitschrift-enverlag GmbH & Others*, “The laws of the Member States generally regard freedom of contract as an essential element of free trade.”⁷³ However, it is axiomatic that there is a constant interplay between contract law and competition law, such that an unjustified refusal to deal could amount to a breach of local competition law. Whilst the *Oscar Bronner* case dealt with Article 86 and the abuse of a dominant position, the principles have broader application and as such enforcement authorities should be careful to ensure that the freedom to contract principle is not utilised as a block exemption by some unscrupulous traders who may wish to continue in practices which may lead to market distortion.

> The purchase of a baby crib by an Austrian consumer from a German web-trader was refused. The consumer was re-directed to the Austrian web-shop of the same trader where the price for the identical baby crib was higher. The trader failed to offer satisfactory explanation as to why they could not supply the product in question and the consumer turned to ECC-net for further assistance. Following an intervention by ECC-Net the lawyer of the trader simply quoted the principle of freedom of contract and stated that the trader can decide with whom he wants to conclude a contract and thus can reject the attempted purchase in this case.

ECC-Net believes that if a trader refuses to conclude a contract with a consumer quoting the freedom of contract principle, there are always reasons behind this decision. These reasons could be objective business considerations, like for example high compliance costs, but they could also be unlawful practices such as violations of competition law rules.

ECC-Net therefore claims that in cases that regard different treatment based on residence or nationality traders should not only quote the freedom of contract principle, but always inform about the reasons why they refuse the conclusion of a contract. In this way it can be assessed whether the reasons are objective or not.

If the freedom of contract principle can be quoted without being obliged to give further reasons, the non-discrimination principle of Art. 20.2 of the Services Directive can be considered not enforceable.

Therefore it has to be clarified by the competent enforcement authorities, as well as the CJEU, whether the freedom of contract principle can be regarded as objective reason as such or whether companies are subsequently obliged to inform on the reasons why they refuse the contract conclusion.

Private copying levies

> A consumer resident in Austria wanted to buy blank CDs from a multinational e-commerce company based in Luxembourg. The trader refused to accept the purchase due to a lawsuit with the Austrian collecting company on the collection of private copying levies.

⁷¹ http://en.wikipedia.org/wiki/Tessera_del_tifoso.

⁷² PS853 Blu Vacanze – Pacchetti Viaggio Provvedimento Nr. 21175
http://www.agcm.it/trasp-statistiche/doc_download/2025-22-10.html.

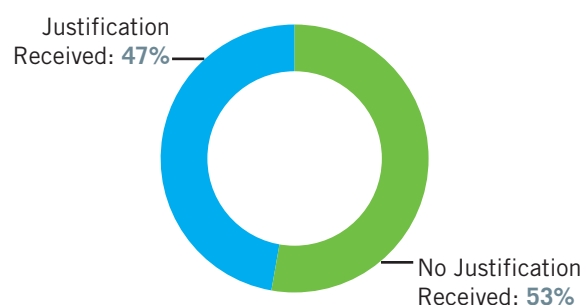
⁷³ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-7/97>.

The Court of Justice recently decided in favour of the Austrian collecting company.⁷⁴ If a trader delivers blank recording-media in the form of CDs, DVDs, memory cards and MP3 players to Austria, he has to pay private copying levies to the collecting company.

3.8 No justification

Traders did not justify the different treatment in 53% of the cases received.⁷⁵

TABLE 4:
Number of cases where justification/no justification for different treatment was provided.



In 53% of complaints, service providers either did not justify the different treatment at all or gave explanations like “*business secrets*”, “*that’s what the prices are*”, “*decision by the management*”. For statistical purposes the latter are also considered in the category “No justifications received”.

ECC-Net urges traders to inform consumers already in the pre-shopping or pre-contract phase about the reasons why there may be a refusal to supply a product/service or a higher price. Being transparent and informing consumers beforehand about objective reasons can avoid frustration and disappointment.

3.9 No evidence

Not in a single complaint received by ECC-Net, nor by the Finnish Competition Authority, did traders provide evidence to prove the existence of the justification invoked.

> *An Austrian ski resort stated to the Austrian enforcement body that residents of the region received reduced tariffs due to funding provided by the communities of the ski region.*

ECC Austria asked the enforcement body if the ski resort provided evidence of the objective justification of community-funded sport promotion like, for example, the submission of the community resolution about the sport promotion, as well as evidence on number of promotions carried out. Unfortunately, the enforcement body did not respond with regards to this issue, whereas it would be its task to obtain appropriate evidence in order to be able to verify whether the justifications invoked by traders can be regarded as objective.

⁷⁴ C-521/11 Amazon.com International Sales and Others.

⁷⁵ That is 125 cases out of 236 received (222 reported to ECC-Net and 14 to the Finnish Competition Authority).

4. Outcome of ECC-Net's intervention

ECC-Net not only provides advice to consumers on their rights with regards to Article 20.2 of the Services Directive, but also facilitates amicable dispute resolution. The ECC where the consumer is resident can liaise directly with a trader via its sister centre in the trader's country of establishment.

In 72 cases out of 222 reported to ECC-Net, service providers were contacted by ECCs after receiving complaints from consumers with regards to discrimination based on nationality or place of residence. The traders were informed about the non-discrimination obligation of Article 20.2 of the Services Directive, as well as the respective national implementation laws, and were requested to either deliver the service to the consumer under equal conditions or to inform them about objective reasons that would justify the difference in treatment.

4.1 Individual solutions

In nearly 50% cases,⁷⁶ which required ECC's active intervention on behalf of consumers, ECCs were able to achieve a positive solution for the individual consumers.

> *Two families resident in Italy booked a stay in an Italian hotel via an Austrian tour operator as it was cheaper than booking the accommodation directly in Italy. Upon arrival at the hotel, the families were asked to pay an additional fee of €400. When queried, the hotel and tour operator informed the consumers that Italians are obliged to pay an additional fee for a club card ("Tessera card") enabling them to use amenities services. The Italian antitrust authority already decided in a similar case that Italian consumers cannot be obliged to purchase additional services, such as travel insurance.⁷⁷ After an intervention by ECC Austria the tour operator refunded the additional fee of €400.*

> *An Austrian consumer bought a car navigation system from a German-based web shop of a Dutch manufacturer of in-car location and navigation systems. The navigation system was promoted with a cost-free map-update for a period of three years. The manufacturer refused to provide the consumer with the update informing him that he needed a place of residence in Germany in order to avail of the promotion. The consumer did not understand and was frustrated as he bought the navigation system from a web shop located in Germany. After an intervention by ECC Netherlands the manufacturer offered the map-update to the consumer.*

> *An Austrian consumer bought a mobile phone from a German web shop. The reason the consumer availed of this particular offer was because the phone was offered with a price rebate, i.e. a cash-back promotion. When the consumer went to avail of the price rebate, the manufacturer of the phone informed him that the price rebate could not be offered to them as they had no place of residence and no bank account in Germany. Frustrated and disappointed the consumer asked ECC-Net for help. After an intervention by ECC Germany the manufacturer agreed to reimburse the price rebate to the consumer to the sum of €256.*

⁷⁶ That is in 38 out of 72 cases dealt with.

⁷⁷ PS853 Blu Vacanze – Pacchetti Viaggio Provvedimento Nr. 21175, available at: http://www.agcm.it/trasp-statistiche/doc_download/2025-22-10.html.

4.2 Policy change

Eight service providers changed their business practice following an intervention by ECC-Net. The companies not only provided a solution to the individual consumer, but in general agreed to treat consumers equally irrespective of their place of residence or nationality.

> *An Austrian family wanted to book a cruise via the German website of an Italian-based cruise company. The price for a classic cabin for the family was €849. The company refused the booking as the family had no place of residence in Germany and instead re-directed the family to the Austrian website. The price for an identical cabin was €2,499, a price difference of €1,650. After intervention by ECC Italy, the company responded to the effect that they never wanted to discriminate against consumers and that from November 2012 onwards Austrian consumers could also book their cruises on the German market and thus benefit from cheaper offers.⁷⁸*

> *A consumer from Malta wanted to buy sport shoes from a German manufacturer. The website of the trader stated that shipping is free to all EU countries except Malta where the shipping would amount to €50. Following correspondence from ECC Germany, the manufacturer changed its policy and now also ships to Malta for free, if the consumers pay the purchase price in advance.*

An analysis with regards to company size revealed that the majority of companies that changed their business practice were large companies and corporations (6 companies).

The corporations included a German car manufacturer, a German computer software security company, an Italian cruise operator, a multinational amusement park operator, a Swedish supermarket chain and a Swedish bank.

Two service providers were medium-sized enterprises: a German web shop provider selling sneakers and a Slovakian car dealership.

These figures show that it is easier for large companies and corporations to sell their goods or provide their services on a wide scale basis within the Internal Market. For small and medium sized enterprises it is more difficult to sell to other EU Member States.

Costs for logistics, costs to comply with different consumer protection and contract law rules, costs for debt recovery or costs with regards to a law suit in the consumer's state of residence are just a few examples that make it difficult for SMEs to sell cross-border.

For larger companies it is easier to cope with these obstacles as they have sufficient financial means. They often have subsidiaries in the Member States and/or legal departments/lawyers which may be able to assist with establishment and/or compliance issues.

It is, therefore, important to start a dialogue with small and medium sized enterprises so as to help them to tackle these obstacles and enable them to more effectively avail of the benefits of the Internal Market by selling on a more widespread basis within the EU.

⁷⁸ Since 18th December 2012 Regulation 1177/2010 on Maritime Passenger Rights is applicable to cruise cases. Article 4, paragraph 2 explicitly states that, "without prejudice to social tariffs, the contract conditions and tariffs applied by carriers or ticket vendors shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of carriers or ticket vendors within the Union." This provision forbids any discrimination and does not contain an objective reasons clause.

VI. Redress and Enforcement

Legislation should not exist in a vacuum and, therefore, it is axiomatic that the Single Market rules must be properly implemented and enforced if the Single Market is to serve as a key driver for economic growth. Whilst the European Commission has been working in partnership with Member States to this end, there is still much room for improvement.⁷⁹ As indicated by the Commission Communication ‘Better Governance for the Single Market’ the average transposition deficit has risen from 0.7 in 2009 to 1.2% in February 2012, and Member States are taking longer to transpose Directives after the transposition deadline has lapsed. Even where rules are correctly transposed, businesses and citizens often do not understand their rights and encounter many difficulties when trying to exercise them. This appears to be the case with the Services Directive. Economic analysis has shown that the EU could gain an average 2.6% of GDP over the next five years, three times more than has been achieved so far, if Member States were to abolish the remaining restrictions and the Services Directive was to be properly enforced.⁸⁰ While the implementation of the Directive has been a milestone in terms of removing barriers to trade in services and obstacles for service recipients and while hundreds of national laws have been modernised and discriminatory or unjustified requirements have been eliminated throughout the EU, service providers still face obstacles when they want to operate at a cross-border level and consumers are still not always able to access offers available on markets of other EU countries.⁸¹

In accordance with Article 20.2 of the Services Directive, Member States have an obligation to ensure that the non-discrimination principle is implemented in their national legislation. The individual Member States are responsible for determining which body is most suitable for monitoring and enforcing the Directive. Most Member States have introduced in the horizontal laws transposing the Services Directive provisions reproducing in full or in part the non-discrimination clause; others have relied on pre-existing

legislation.⁸² Further to this implementation, it is for the competent national authorities to ensure that general conditions of access to a service made available to the public by online traders comply with the national provisions implementing Article 20.2. The Member State of establishment is responsible for service providers established in its territory and where a service provider is acting at a cross-border level, the Services Directive has laid down administrative cooperation requirements obliging Member States to provide each other with mutual assistance in the supervision of providers, in particular to reply to information requests and to carry out, if necessary, factual checks, inspections and investigations.

1. Case-by-case analysis

The principle of non-discrimination balances the interests of businesses, which are free to decide the way in which they avail of opportunities offered to them by the Internal Market for services, and the interests of recipients who have the right not to be discriminated against due to their nationality or place of residence when seeking to avail of offers across the EU. In order to determine whether different treatment is justified by objective reasons (e.g. additional costs incurred because of the distance involved or the lack of the required intellectual property rights in a particular territory), the relevant national enforcement authorities are required to perform a case-by-case analysis, taking into account all the circumstances surrounding the service provision, such as the characteristics of the market concerned and the size of the service provider. The Matrix Insight study⁸³ suggests that an assessment of price and service differentiation based on the country of residence or nationality of the consumer is to be performed using two criteria, namely objectivity and proportionality. Accordingly, the competent enforcement authority should take into account (1) whether the different treatment of consumers based on their nationality or country of residence mirror objective economic or legal incentives, such as compliance cost or copyright levies, and (2) whether the responses to the drivers of differentiation are proportional.⁸⁴ The

⁷⁹ Commission Communication *Better Governance for the Single Market*, p.9, available at http://ec.europa.eu/internal_market/top_layer/monitoring/governance_en.htm.

⁸⁰ Ibid., p.1.

⁸¹ The Commission Communication on the implementation of the Services Directive: *A partnership for new growth in services 2012-2015*, June 2012, p.3.

⁸² Commission Staff Working Document: *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, p.4.

⁸³ Matrix Insight Study on business practices applying different condition of access based on the nationality or the place of residence of service recipients – *Implementation of Directive 2006/123/EC on Services in the Internal Market*, p.82.

study proposes a set of questions in order to assess the objectivity and proportionality of company practices that differentiate prices or services on the basis of the country of residence or the nationality of consumer.⁸⁵

While the Commission Staff Working Document “*With a view to establishing guidance on the application of Article 20.2 of the Services Directive*” provides initial clarification on the non-discrimination clause, the list of identified criteria that may justify different conditions, such as the cost of compliance with differing national consumer protection and contract law rules or difference in the VAT rates applied to different products and services, is not exhaustive. Other valid criteria, which competent authorities may take into account to assess whether or not different treatment is objectively justified, include language barriers or strategic promotional reasons.

There is no exhaustive list of accepted and unaccepted business practices; however while enforcement authorities may hardly find acceptable incidences where traders justify price or service differentiation with higher charges for cross-border payments or the lack of delivery options, enforcement authorities will need to perform detailed analysis of each individual case where reasons for discriminatory practices are justified, for instance, by different market conditions or the lack of the required intellectual property rights.⁸⁶ However, there is still a risk that Article 20.2 will not take its full effect without further clarity as to what may constitute the breach of the principle of non-discrimination, as demonstrated by the following example:

> A Czech consumer attempted to purchase a mobile phone from a web-trader based in Germany. It was not possible to select the Czech Republic as a country of delivery and consequently the consumer was unable to place an order. According to the information available on the website, the trader only executed orders within Germany and cross-border deliveries were possible on request. The consumer contacted the web-shop directly only to be refused supply. He then turned to ECC-Net for assistance. Having sought clarification from the trader, ECC Germany was advised that the trader's contract with the courier company did not permit delivery to all EU countries, one of them being the Czech Republic. As ECC Germany did not consider this explanation satisfactory, the case was referred to the competent German authority in the area where the trader was based, i.e. the Gewerbeaufsichtamt. The latter refused to look into the matter arguing the Services Directive was not applicable in case of online purchase of goods.

⁸⁴ Ibid, p.83.

⁸⁵ Examples of question to assess objectivity of drivers of differentiation: Is differentiation applied only to some cross-border customers or to all cross-border customers? Does competition in the markets where the service is supplied vary along country borders (e.g. market share, use of different distribution channels)? Examples of questions to assess proportionality of drivers of differentiation: are differentiation practices proportional to costs of service provision? Are differentiation practices proportional to regulatory costs/risks?

⁸⁶ As indicated by Ms Florance Francois-Poncet the Head of Unit of DG Markt Business-to-Consumer Services Unit; Minutes of the Second Meeting of the Third Period of Sessions of the IMCO Working Group on the Digital Single Market, 7.03.2013, Brussels, available at <http://www.europarl.europa.eu/document/activities/cont/201303/20130314ATT63203/20130314ATT63203EN.pdf>.

⁸⁷ See Annex II of the Commission Staff Working Document: *With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on Services in the Internal Market* ('the Services Directive'). For instance, In Bulgaria, Cyprus, Denmark, Estonia, Greece, Spain and Romania consumer protection commissions/services/boards/ombudsman were considered most appropriate for fulfilling the task set out in Article 20(2), whereas in Portugal, Slovenia and Slovakia this task was attributed to trade inspectorates.

⁸⁸ See Annex II of the Commission Staff Working Document: *With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on Services in the Internal Market* ('the Services Directive').

2. The administrative and legal application of national provisions implementing Article 20.2.

Most Member States have attributed the task of administrative enforcement of the national provisions implementing Article 20.2 to the authorities that are responsible for the administrative enforcement of consumer legislation, others entrusted their competition authorities with the enforcement of relevant provisions;⁸⁷ and in the event of legal disputes, it will be for the competent court to adjudicate on these issues.⁸⁸

While Annex II of the Commission's guidelines on the application of Article 20.2 contains the list of competent entities for both consumer and business enforcement, the identification of the relevant enforcement authority in a given Member State may prove difficult where the task of ensuring compliance with the relevant national provisions implementing the non-discrimination clause was assigned to more than one enforcement body. For instance, 7,000 trade and business authorities, chambers of auditors, lawyers and tax consultants are considered most appropriate in the field of consumer enforcement in Germany.⁸⁹ Methods of identifying and communicating with relevant enforcement bodies may prove particularly challenging in cases of a cross-border nature. In order to facilitate better communication and improve complaint handling procedures, a standardised complaint form could be designed and made available for consumers in the official languages of the EU.⁹⁰ Furthermore, instead of the multiplicity of different enforcement bodies a single enforcement network of relevant enforcement authorities (preferably one per country) could be established making it easier for consumers to know who the competent body for breaches of Article 20.2 is.

However, even if detecting or communicating with a relevant enforcement body does not pose any major difficulties, there is no guarantee that the body in question will be in a position to handle individual consumer complaints or be prepared to issue a decision concerning a business practice implementing a price or service differentiation.

> *A Norwegian consumer, having already undertaken a series of purchases with a Swedish online shop through their Norwegian branch, attempted to purchase some books through the Swedish branch of the web shop. The consumer registered online, but as he did not have a Swedish personal number and a Swedish address he was unable to place any order and as a result was prevented from availing of offers available to Swedish consumers. Having contacted the web trader, he was informed that only residents in Sweden are permitted to access offers through the Swedish branch. The consumer sought the assistance of ECC Norway. The case was subsequently brought to the attention of ECC Sweden, which contacted the trader on behalf of the consumer. As the trader failed to agree with ECC Sweden that the practice in question may constitute a breach of the provisions laid down by the Services Directive, ECC Sweden reported the matter to the Swedish Consumer Agency. Given, however, that the Swedish Consumer Agency does not handle individual consumer complaints, it was up to them to decide whether to carry out any investigation or take any further action in relation to the matter.*

⁸⁹ Paragraph 6 of the German law that implemented the Service Directive refers to paragraph 146 of the Gewerbeordnung (GewO), the German factories act: this act foresees that infringements of the law are prosecuted by the Gewerbeaufsicht. In Germany, this is the competent authority for the enforcement of the law in the area of labour, environmental and consumer law. The Gewerbeaufsicht is organised in a different way in every Bundesland and, therefore, the authority does not have the same name everywhere in Germany. The local authority can impose administrative sanctions on traders that infringe the Services Directive but it could be that at the end of the process the consumer is not even informed about the outcome as he is not part of the proceedings. The situation is even more complicated in Italy, where the authority on the list is the competition and market authority (Autorità Garante della Concorrenza e del Mercato – AGCM). ECC Italy has contacted the AGCM in order to submit cases in relation to package holidays. The Authority has – informally – claimed not to be the competent Italian authority in the matter as they have not formally been appointed as such. At present, therefore, in Italy it is unclear who should deal and enforce this Directive as no formal legal act has named the authority.

⁹⁰ Similar to the one already available for consumers wishing to lodge a complaint against an airline with the national body responsible for the enforcement of Regulation (EC) 2004/261.

⁹¹ Commission Staff Working Document: *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, p.4.

Out of 72 cases which required ECC-Net's active intervention, 12 were reported to the relevant enforcement authorities. To ECC-Net's knowledge, of all these referrals only one resulted in a decision made by an enforcement authority. Similarly, according to the information received by the Commission, despite numerous consumer complaints concerning different treatment by service providers on the grounds of nationality and residence reported to national authorities assisting service recipients, there have been very few cases which resulted in administrative or judicial enforcement action at national level.⁹¹ While ECC-Net appreciates that not all competent authorities may be in a position to handle individual consumer complaints, the current situation in respect of the administrative application of the national provisions implementing Article 20.2 of the Services Directive is simply not acceptable. Considering that a business practice implementing price or service differentiation can potentially harm thousands of consumers, the fact that no decision can be made in an individual case should not serve as an excuse for the lack of action, especially when an analysis of practices observed may be crucial in gathering guidance as to what may be deemed to be an objective justification for the application of different treatment. In this respect ECC-Net welcomes the Commission's proposal to continue to work closely with the national bodies responsible for dealing with consumers' complaints and enforcing the non-discrimination clause, as well as with business representatives, to ensure that consumers can fully benefit from the Single Market by being able to access offers available in other Member States.⁹²

While recognising the importance of the correct application of national provisions implementing Article 20.2 of the Services Directive, ECC-Net appreciates that the administrative enforcement of the non-discrimination clause may not necessarily entail individual consumer redress. From a consumer perspective the enforcement of national provisions implementing Article 20.2 of the Services Directive, as well as alternative means of obtaining redress out-of-court, play an equally important role.

While reaching an amicable resolution was not possible in all cases in which ECC-Net intervened on behalf of consumers, mainly due to the traders' failure to cooperate, ECC-Net is not aware of any instances of enforcement of the non-discrimination clause nor of any instances of settling disputes concerning a price or service differentiation through ADR mechanisms. The latter offers a simple, and usually faster and cheaper means of resolving cross-border disputes as opposed to court proceedings. However ADR may not always be available in a given Member State. While the European Small Claims Procedure (ESCP) provides consumers and business with a uniform and speedy debt-recovery process across the EU, ECC-Net agrees with the Commission that the low value of goods and services normally involved in this type of disputes may explain consumers' lack of willingness to pursue action.⁹³

> *ECC Austria contacted an Austrian ski resort on behalf of a German consumer who was prevented from availing of lower prices for ski passes available only to residents in Austria. As ECC Austria did not consider the explanation offered by the trader satisfactory, the matter was referred to a competent authority in Austria with power to impose sanctions where consumer legislation was contravened. The latter decided that the evidence presented was not sufficient to instigate sanctioning procedures and referred the case to the relevant Single Point of Contact for businesses. ECC Austria was informed that even if sanctioning proceedings were instigated, the authority would not be able to disclose their findings.*

⁹² The Commission Communication on the implementation of the Services Directive: *A partnership for new growth in services 2012–2015*, p.8.

⁹³ Commission Staff Working Document: *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, p.4.

VII.

Conclusions and Recommendations

“Effective governance of the Single Market is not about reinventing the wheel; it is about getting the wheel rolling”, as stated by Ms Anna Maria Corazza Bildt, Parliament’s Rapporteur on the *Internal Market for Services: State of Play and Next Steps*, when highlighting the importance of proper enforcement of the existing rules and mechanisms as a way of overcoming unjustified restrictions that hamper the free movement of services. The services sector is a significant driver of growth in the EU and a pillar of the EU economy.⁹⁴ As highlighted by the Europe 2020 Strategy,⁹⁵ a well-functioning Single Market for services, where competition and consumer access serve to create growth and stimulate innovation, must be created on the basis of the Services Directive. However, to the extent that impediments to its full implementation and enforcement continue to exist, the Services Directive is yet to release its full potential.

The Services Directive obliges Member States to remove regulatory barriers for service recipients wanting to buy a service supplied by traders established in other Member States. It ensures that consumers can make informed choices when availing of services at a cross-border level by means of information obligations that apply to both providers and Member States authorities, and ultimately it bans business practices that unjustifiably hamper access to their services. Consumers should no longer be confronted with a refusal to supply or a higher price on the grounds of their nationality or place of residence if Article 20.2 is being fully implemented and enforced in the Member States. Unfortunately, situations still occur whereby consumers face difficulties accessing offers supplied by providers established in other EU countries.

ECC-Net is concerned about the growing number of consumer complaints pertaining to price and service differentiation on the basis of the nationality or country of residence of service recipients. Since the adoption of the Services Directive, ECC-Net has recorded more than 220 Article 20.2 related complaints,⁹⁶

but believes that many complaints of this nature go unreported. Complaints reported to ECC-Net show that the business practices consumers complain about are not only those by small local traders or SMEs, but very often involve global multi-national companies. In the case of the latter, business practices contrary to the principle of non-discrimination can potentially harm thousands of consumers. Results of the online survey of consumers carried out by the members of the Working Group and some participating ECCs on Article 20.2 *“Have you ever tried to buy something online and been refused because of where you live or where you are from?”* show that 881 respondents, more than 20% of those who participated in the online poll, experienced difficulties availing of the services due to their nationality or place of residence.⁹⁷

The lack of awareness of the protection consumers enjoy under the Services Directive may be a possible reason that many complaints are never brought to the attention of relevant consumer organisations. Unfortunately, as it turns out and as the report shows, those who lack awareness of the existing provisions or fail to properly interpret the existing rules, are often service providers and competent enforcement authorities.

ECC-Net stresses the urgent need to make the Services Directive work in practice and believes that awareness campaigns addressed at service recipients and providers, as well as full and correct enforcement of existing rules, are the key tools to this end. In this respect ECC-Net welcomes and supports in particular (1) the Commission’s commitment to a zero-tolerance policy against breaches of the Services Directive, (2) the Commission’s cooperation with competent enforcement authorities and businesses to ensure consumers are able to fully benefit from the Single Market, and (3) the Commission’s engagement with awareness campaigns.⁹⁸ At the same time ECC-Net appreciates that the taking of full effect of the Services Directive must be facilitated by further improvement of the regulatory environment for service providers who want to supply their services across borders. In this respect, the most important obstacles from a business perspective are legal fragmentation and traders’ uncertainty concerning the applicable law in their target markets⁹⁹.

⁹⁴ <http://www.theparliament.com/latest-news/article/newsarticle/internal-market-anna-maria-corazza-bildt/>.

⁹⁵ Communication from the Commission: Europe 2020 *A strategy for smart, sustainable and inclusive growth*, p.20, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

⁹⁶ The Finnish Competition Authority received 14 complaints concerning Article 20.2.

⁹⁷ See survey results in Annex II of this report.

⁹⁸ The Commission Communication on the Implementation of the Services Directive: *A partnership for new growth in services 2012–2015*, p.8.

While the Consumer Rights Directive will bring about full harmonisation in selected areas of contract law, some important elements for the conclusion of contracts continue to be outside its scope. The performance checks provided in the Commission Staff Working Document *“Results of the performance checks of the Internal Market for Services (construction, business services and tourism)”*¹⁰⁰ revealed that barriers faced by service providers often result from the lack of full and compliant implementation of internal market directives, e.g. the Services Directive. Given that both consumers and traders are service recipients, the need to make the Services Directive work in practice is in their common interest and equally crucial for both.

⁹⁹ Implementation of the Services Directive: *A partnership for new growth in services 2012–2015 – Frequently Asked Questions*. Further challenges arise due to issues going beyond the implementation of existing directives: the heterogeneity of the regulation of professional qualifications, requirements limiting the choice of corporate structures for certain professional activities, difficulties in obtaining insurance for cross-border providers or challenges emerging from the lack of sufficient harmonization of consumer protection rules which render selling throughout Europe more difficult; available at http://europa.eu/rapid/press-release_MEMO-12-429_en.htm.

¹⁰⁰ Commission Staff Working Document *On the results on the performance checks of the internal market for services (construction, business services and tourism) accompanying the document On the implementation of the Services Directive. A partnership for new growth in services 2012–2015*, June 2012.

ANNEX I

Joint ECC Net Services Directive Project Questionnaire 2013

Joint ECC Net Services Directive Project Questionnaire 2013		
ECC Name		<i>Case number 1</i>
1	Based on complaints SC/cases NC falling under Article 20 (2) of the Services Directive received from January 2010 - December 2012 please provide the following information:	
A:	Reference Number of SC/ NC	
B:	Please specify if the case is a simple complaint (SC) or a normal complaint (NC)	
C:	Traders name	
D:	Traders website address	
E:	Type of service involved (e.g retail, car rental, tourism)	
F:	Case description	
	SC/NC opened between 1.01.2010 and 31.12.2012; Applicable EU law: Directive 2006/123/EC on services in the internal market	
2	Difference applied to service recipient was based on grounds of:	
	Residence	<input type="checkbox"/> Yes
	Nationality	<input type="checkbox"/> Yes
	Description of treatment	
	<i>Please provide as much detail as possible including the appropriate national applicable law</i>	
	<i>Please provide as much detail as possible including the appropriate national applicable law</i>	
3	Difference in conditions of access to service:	
A:	Refusal to provide the service to a recipient	<input type="checkbox"/> Yes
B:	Difference in price applied to service recipient. If possible please quantify difference	<input type="checkbox"/> Yes
C:	Difference in other conditions of access	<input type="checkbox"/> Yes
D:	Additional guarantees requested to service recipient	<input type="checkbox"/> Yes
E:	Redirection to another website	<input type="checkbox"/> Yes
F:	Comments	
4	Was the service provider contacted by ECC-Net	<input type="checkbox"/> Yes
		<input type="checkbox"/> No
5	Did the consumer get the outcome they were looking for?	<input type="checkbox"/> Yes
		<input type="checkbox"/> No

5	Did the consumer get the outcome they were looking for?	<input type="checkbox"/> Yes
		<input type="checkbox"/> No
6	If a response was obtained, what was the justification invoked by the service provider?	
A:	Contractual obligations preventing the service provider to distribute the service in a particular territory	<input type="checkbox"/> Yes
B:	Additional costs incurred because of the distance involved or because of the technical characteristics of the service	<input type="checkbox"/> Yes
C:	Additional costs incurred by the service provider in the provision of the service on grounds of the residence of the service recipient (such as for example having to acquire additional intellectual property rights in order to provide the same service in another territory)	<input type="checkbox"/> Yes
D:	Higher costs being incurred by the service provider due to the existence of public financing granted to service providers for the delivery of services to recipient resident in Member State of establishment but not to those resident in other member States	<input type="checkbox"/> Yes
E:	Different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member State and pricing by different competitors	<input type="checkbox"/> Yes
F:	Extra risks linked to rules differing from those of the Member State of establishment, such as difficulties securing payment from customers resident in other Member States	<input type="checkbox"/> Yes
G:	Lack of the required intellectual property rights	<input type="checkbox"/> Yes
7	Was any evidence provided to prove the existence of objective justification	<input type="checkbox"/> Yes
		<input type="checkbox"/> No
If yes, please provide as much detail as possible incl. brief case description, reference number and type of evidence provided		
8	Are you aware of any instances where there was a policy change?	<input type="checkbox"/> Yes
		<input type="checkbox"/> No
If yes, please provide as much detail as possible incl. policy in question, and clarify whether the policy was changed by the trader following intervention by the ECC.		
9	Was any case notified to an enforcement authority?	<input type="checkbox"/> Yes
		<input type="checkbox"/> No
10	Are you aware of any decision made in respect of the case notified to an enforcement authority?	<input type="checkbox"/> Yes
		<input type="checkbox"/> No
If yes, please explain content of decision and sanctions imposed on the service provider, if any.		

ANNEX II

Online survey of consumers:
“Have you ever tried to buy something online and been refused because of where you live or where you are from?”

TABLE 1: Survey results per country.

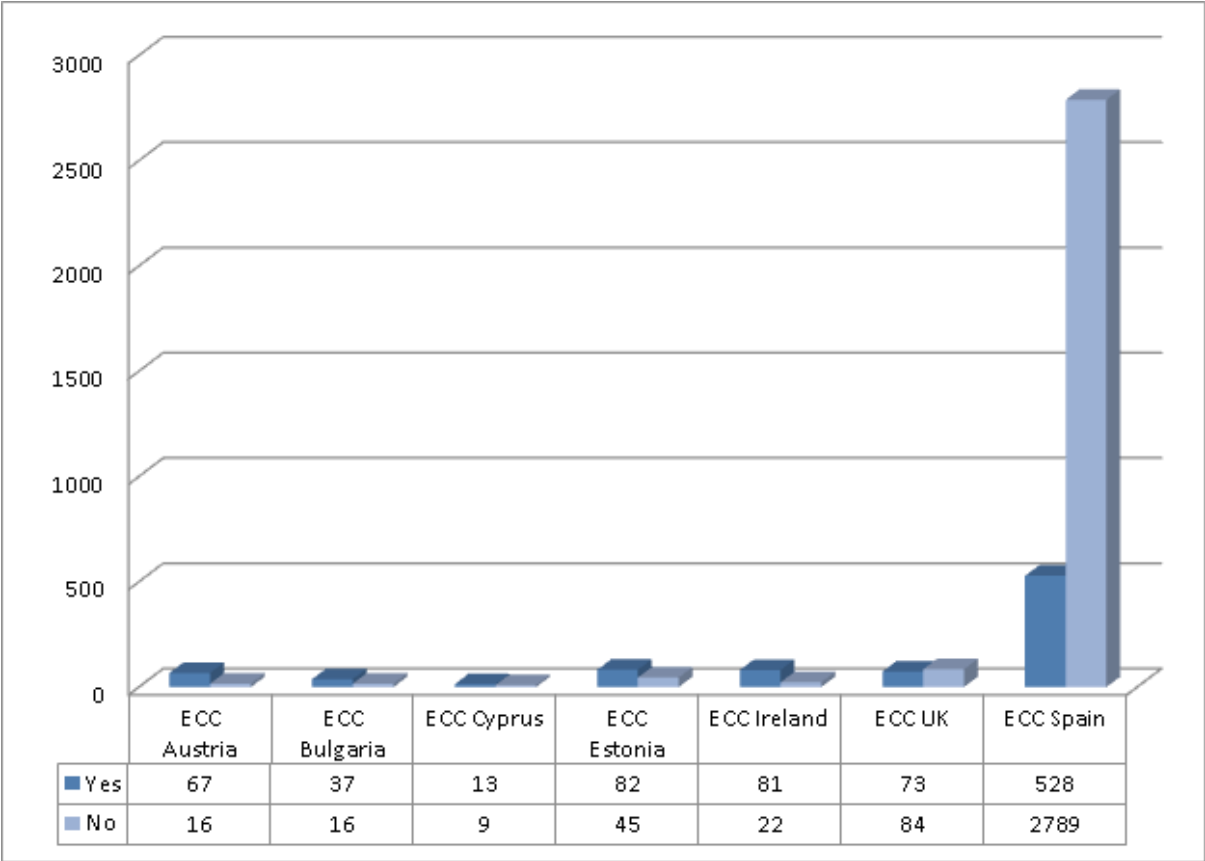
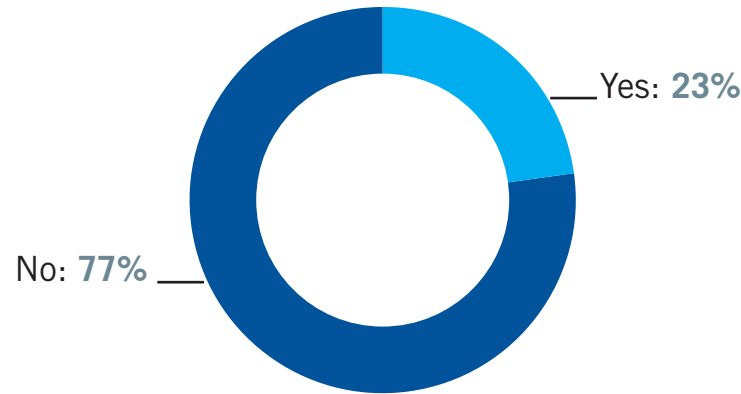


TABLE 2: Survey results.



72	Traders contacted by ECC-Net (No of cases)			
34	Successful outcome reached (no of cases), where T was contacted by ECC			
0	Evidence provided to prove the existance of objective justification			

ANNEX IV

Research carried out by ECC France in September 2013

Simulation: Date and location: 16 September 2013 (10:00) to 18 September 2013 (10:00) – Malaga Airport (Spain) – Consumer based in the Czech Republic
Price: from € 92.24 (Economy) to € 159.73 (Intermediate).

Advanced Search

MALAGA AIRPORT 09/16/2013 - 10:00 AM

MALAGA AIRPORT 09/18/2013 - 10:00 AM

Small to Large

Family

Eco-Friendly

Luxury & Specialty

Automatic


We have found 16 vehicles. Sort results by Price | Size

Limited Offer!


Late summer sale! We've slashed our prices. Book now to benefit from this great offer.

[Full conditions](#)


Choose one of these...



Economy >
EUR 92.24



Compact >
EUR 137.82



Intermediate >
EUR 159.73

YOUR QUOTE INCLUDES


✓ Collision Damage Waiver (See T&Cs for excess charge details)(CDW)

✓ Theft Waiver (THW) (See T&Cs for excess charge details)

✓ Airport/Railway Station Surcharge

✓ VAT (See full T&Cs)

NISSAN MICRA or similar



Economy

5

1

2

M

A

Mileage unlimited

Minimum Age 21 years

Manual Transmission

Air Conditioning

CO₂ Emission: 10 g/km

More details >

Options

Choose my options >

No options are chosen yet

Best price
EUR 92.24

aligner

Respecter la casse

Simulation: Date and location: 16 September 2013 (10:00) to 18 September 2013 (10:00) – Malaga Airport (Spain) – Consumer based in France
Price: from €71.49 (Economy) to €123.76 (Intermediate).

Advanced Search

MALAGA AIRPORT 09/16/2013 - 10:00 AM

MALAGA AIRPORT 09/18/2013 - 10:00 AM

Small to Large

Family

Eco-Friendly

Luxury & Specialty

Automatic

We have found 17 vehicles.


Sort results by Price | Size

Limited Offer!


Late summer sale! We've slashed our prices.
Book now to benefit from this great offer.

[Full conditions](#)


Choose one of these...




[Mini >](#)
EUR 70.05



[Economy >](#)
EUR 71.49



[Compact >](#)
EUR 106.78



[Intermediate >](#)
EUR 123.76

YOUR QUOTE INCLUDES


✓ Collision Damage Waiver (See T&Cs for excess charge details)(CDW)

✓ Theft Waiver (THW) (See T&Cs for excess charge details)

✓ Airport/Railway Station Surcharge

✓ VAT (See full T&Cs)

HYUNDAI I10 1.1 CLASSIC or similar



Mini

Mileage unlimited

Minimum Age 21 years

5

M

Manual Transmission

n/a

Air Conditioning

Options

[Choose my options >](#)

No options are chosen yet

Sign in

☐ Respecter la casse

Simulation: Date and location: 16 September 2013 (10:00) to 18 September 2013 (10:00) –
 Malaga Airport (Spain) – Consumer based in Germany
 Price: from €89.43 (Economy) to €154.83 (Intermediate).

Advanced Search

MALAGA AIRPORT 09/16/2013 - 10:00 AM

MALAGA AIRPORT 09/18/2013 - 10:00 AM

Small to Large

Family

Eco-Friendly

Luxury & Specialty

Automatic


We have found 17 vehicles. Sort results by Price | Size

Limited Offer!


Late summer sale! We've slashed our prices.
Book now to benefit from this great offer.

[Full conditions](#)


Choose one of these...




Mini >
EUR 87.64



Economy >
EUR 89.43



Compact >
EUR 133.62



Intermediate >
EUR 154.83

YOUR QUOTE INCLUDES

✓ Collision Damage Waiver (See T&Cs for excess charge details)(CDW)

✓ Super Loss Damage Waiver (only available when CDW, THW and/or LDW are also included in your booking) (SLDW)

✓ Theft Waiver (THW) (See T&Cs for excess charge details)

✓ Airport/Railway Station Surcharge

✓ VAT (See full T&Cs)

HYUNDAI I10 1.1 CLASSIC or similar

★

✉

Mini

Mileage unlimited

Minimum Age 21 years

5

M Manual Transmission

Options

Choose my options >

No options are chosen yet

igner

☐ Respecter la casse

Simulation: Date and location: 16 September 2013 (10:00) to 18 September 2013 (10:00) – Nice Airport (France) – Consumer based in the Czech Republic
Price: from €122.41 (Economy) to €214.20 (Intermediate).

Advanced Search

NICE COTE D'AZUR AIRPORT 09/16/2013 - 10:00 AM

NICE COTE D'AZUR AIRPORT 09/18/2013 - 10:00 AM

Small to Large

Family

Luxury & Specialty

Automatic

Vans & Trucks

We have found 10 vehicles.


Sort results by Price | Size

Limited Offer!

Late summer sale! We've slashed our prices. Book now to benefit from this great offer.


Full conditions

Choose one of these...




Mini >

EUR 122.41




Economy >

EUR 122.41




Compact >

EUR 194.40



Standard >

EUR 214.20



Intermediate >

EUR 214.20

YOUR QUOTE INCLUDES

✓ Licenses & Fees (LAF)

✓ Collision Damage Waiver (See T&Cs for excess charge details)(CDW)

✓ Theft Waiver (THW) (See T&Cs for excess charge details)

✓ Airport/Railway Station Surcharge


✓ VAT (See full T&Cs)

FIAT 500 or similar

★

✉

Mini



Mileage unlimited

Minimum Age 18 years

4

1

M

Manual Transmission

Air Conditioning

Options

Choose my options >

No options are chosen yet

gner

Respecter la casse

Simulation: Date and location: 16 September 2013 (10:00) to 18 September 2013 (10:00) –
Nice Airport (France) – Consumer based in France
Price: from €134 (Economy) to €185 (Intermediate).

Advanced Search

NICE COTE D'AZUR AIRPORT 09/16/2013 - 10:00 AM

NICE COTE D'AZUR AIRPORT 09/18/2013 - 10:00 AM

Small to Large

Family

Luxury & Specialty

Automatic

Vans & Trucks

We have found 10 vehicles.


Sort results by Price | Size

Limited Offer!


Late summer sale! We've slashed our prices.
Book now to benefit from this great offer.

[Full conditions](#)


Choose one of these...




Mini >
EUR 134.00




Economy >
EUR 134.00



Compact >
EUR 168.00



Intermediate >
EUR 185.00



Standard >
EUR 202.00

YOUR QUOTE INCLUDES

✓ Licenses & Fees (LAF)


✓ Collision Damage Waiver (See T&Cs for excess charge details)(CDW)

✓ Theft Waiver (THW) (See T&Cs for excess charge details)

✓ VAT (See full T&Cs)

FIAT 500 or similar

Mini



Mileage 500 km per rental

Minimum Age 18 years

4

1

M Manual Transmission

Air Conditioning

Options

Choose my options >

No options are chosen yet

321f7a7b7c0b24

gner

Respecter la casse

Simulation: Date and location: 16 September 2013 (10:00) to 18 September 2013 (10:00) –
Nice Airport (France) – Consumer based in Germany
Price: from €125.10 (Economy) to €224.11 (Intermediate).

Advanced Search

NICE COTE D'AZUR AIRPORT 09/16/2013 - 10:00 AM

NICE COTE D'AZUR AIRPORT 09/18/2013 - 10:00 AM

Small to Large

Family

Luxury & Specialty

Automatic

Vans & Trucks


We have found 10 vehicles. Sort results by Price | Size

Limited Offer!


Late summer sale! We've slashed our prices.
Book now to benefit from this great offer.

[Full conditions](#)


Choose one of these...




Mini >
EUR 125.10




Economy >
EUR 125.10



Compact >
EUR 157.50



Standard >
EUR 197.11



Intermediate >
EUR 224.11

YOUR QUOTE INCLUDES

✓ Licenses & Fees (LAF)

✓ Collision Damage Waiver (See T&Cs for excess charge details)(CDW)

✓ Theft Waiver (THW) (See T&Cs for excess charge details)

✓ Airport/Railway Station Surcharge


✓ VAT (See full T&Cs)

FIAT 500 or similar

★

✉

Mini



Mileage unlimited

Minimum Age 18 years

4

1

M

Air Conditioning

Options

Choose my options >

No options are chosen yet

ligner

Respecter la casse



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