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**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')**

*Accompanying the document*

**Communication from the Commission 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**

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This document is a European Commission staff working document for information purposes. It does not represent an official position of the Commission on this issue, nor does it anticipate such a position.

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## **1. DELIVERING AN INTERNAL MARKET FOR SERVICE RECIPIENTS**

The Single Market has delivered enormous advantages to European businesses. The implementation of the Services Directive has been a milestone in the removal of barriers to doing business, both at home and across the EU. However, facilitating the provision of services across national borders is not enough for the establishment of a genuine single market. It is equally important to ensure that recipients of services can easily enjoy the opportunities that the single market offers to them as indicated in the Communication from the Commission to the European Parliament and to the Council on the implementation of the Services Directive in accordance with Article 41 of the Services Directive — *A Partnership for New Growth in Services 2012-2015* (hereafter ‘Communication’).

Service recipients, in particular consumers, expect that the elimination of regulatory barriers to the provision of services in the internal market will make more services available to them. However, situations occur whereby recipients experience a refusal to supply or a higher price on grounds of their residence in another Member State. This document looks into the situation of the internal market for services for recipients and gives possible indications to further facilitate the availability of services to European citizens.

### **1.1. Can ‘service recipients’ benefit sufficiently from the single market?**

Too often, consumers are disappointed when they try to buy a service cross-border. Complaints received by the European Commission, by the European Consumer Centres and by other assistance bodies indicate that practices of different treatment on grounds of nationality or residence are a cause for concern in the internal market.

In order to assess the situation on the ground, two studies on geographical discrimination against consumers, with a particular emphasis on e-commerce, were commissioned and published in 2009: the ‘Mystery shopping evaluation of cross-border e-commerce in the EU’<sup>1</sup> conducted for the Commission by YouGov Psychonomics and the ‘Matrix Insight: Access to services in the Internal Market: 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 (hereafter referred to as ‘Matrix study’).<sup>2</sup>

Reported practices relate to a wide range of services such as the sale of electronic goods, textiles, sports equipment, Do-It-Yourself (‘DIY’) goods, music downloads, car rental and mobile phone contracts. Most cases of different treatment appear to be related to residence rather than to nationality as such, and they occur mostly in online transactions. For instance, consumers wishing to book a hire car online or book a hotel for a holiday in another Member State may find themselves redirected to the hire car firm or hotel chain’s website in his country of residence where considerably higher prices are offered. Transactions may also fail at the stage of inputting credit card details due to the address of the buyer.

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<sup>1</sup> See: [http://ec.europa.eu/consumers/strategy/docs/EC\\_e-commerce\\_Final\\_Report\\_201009\\_en.pdf](http://ec.europa.eu/consumers/strategy/docs/EC_e-commerce_Final_Report_201009_en.pdf).

<sup>2</sup> See: [http://ec.europa.eu/internal\\_market/services/docs/services-dir/studies/20091210\\_article20\\_2\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/studies/20091210_article20_2_en.pdf).

Although not as common, different treatment also occurs in offline transactions, particularly in the tourism sector. For instance, the Commission is aware of different tariffs being applied by certain theme parks and tourist attractions depending on the country of residence of the customer. The Commission is also aware of examples of would-be-holidaymakers living in border regions wishing to book cruises through travel agents just across the border, and where the travel agent is unable to sell the cruise as the cruise provider forbids him from selling to residents of other Member States in order to maintain their differentiated pricing policies.

## **1.2. Further facilitating access to the internal market for services**

To enhance the rights of recipients and strengthen their confidence in the internal market, Directive 2006/123/EC on services in the internal market ('the Services Directive') obliged Member States to remove obstacles for service recipients wanting to buy services supplied by providers established in other Member States, such as obligations to obtain a specific authorisation to receive services from another Member State. 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. Finally, it laid down an obligation on Member States to ensure that discriminatory requirements based on service recipients' nationality or place of residence were put at end.

In relation to this last point, **Article 20 of the Services Directive** prohibits discrimination against service recipients on the basis of their nationality or country of residence. The purpose of this provision is to help service recipients, especially consumers, access offers available on the markets of other Member States and make the most of the internal market.

Article 20(1) of the Services Directive 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(1) of the Services Directive includes therefore instances where the different treatment is applied by **public authorities**. According to information available to the Commission, a significant number of the cases which are perceived as blunt discrimination involve preferential access to services granted to residents in a given region or municipality by the respective regional or local authorities or by operators acting under the auspices of those authorities. The Court of Justice of the European Union has already condemned, under certain conditions, advantageous rates for admission to services granted by local or decentralised State authorities only in favour of nationals and persons resident within the territory of those authorities, and which exclude from such advantages recipients who are nationals of other Member States and non-residents, as being discriminatory.<sup>3</sup>

Article 20(2) covers, more specifically, instances where the different treatment is applied by **service providers**, that is, firms or professionals offering services in a market. It obliges Member States to 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.

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<sup>3</sup> See judgment of the Court of Justice of 16 January 2003, case C-388/01, Commission v. Italy.

## 2. NATIONAL IMPLEMENTATION OF THE NON-DISCRIMINATION OBLIGATION

Member States were obliged to implement Article 20 into their national laws. Article 20(2) of the Services Directive is implemented through national provisions that make the prohibition of discrimination on grounds of nationality or residence binding on service providers.

Most Member States have introduced in the horizontal laws transposing the Services Directive provisions reproducing in full or in part the Services Directive's provision on non-discrimination. Others have been able to rely on pre-existing legislation that achieves the same end (see **Annex I**).

It is for the relevant national competent authorities to ensure compliance with the relevant national provisions implementing Article 20(2) of the Services Directive into their national law. In order to perform this assessment, a **case-by-case analysis** is required in all instances.

Member States designate the authorities responsible for this enforcement in their territories. A list of competent authorities responsible for this supervision can be found in **Annex II** of this document. Most Member States have attributed the task of administrative enforcement of the national provisions implementing Article 20(2) to the authorities that are in charge of the administrative enforcement of consumer protection rules. In some instances, competition authorities have also been entrusted with the enforcement of this provision. In the event of judicial dispute, it will generally be for the courts in charge of commercial or consumer protection rules to adjudicate on these issues.

Enforcement of the provision shall be carried out in conformity with the powers of supervision provided for in national law, in particular through supervisory measures at the place of establishment of the provider. When it comes to administrative enforcement, the Member State of establishment is responsible for service providers established in its territory, also when they provide services in other Member States. In cases in which a provider is acting cross-border, Chapter VI of the Services Directive has laid down administrative cooperation requirements which oblige Member States to provide each other with mutual assistance in the supervision of providers.

## 3. PURPOSE OF THE DOCUMENT

National authorities assisting consumers and service recipients have received numerous complaints involving different treatment by businesses on grounds of nationality and residence since the adoption of the Services Directive. However, according to the information received by the Commission, it would appear that, to date, only a very limited number of the cases brought to the attention of these bodies have resulted in administrative or judicial enforcement action at national level. There seem to be a number of possible reasons for this lack of administrative and judicial enforcement: these provisions have not been in force for long in most Member States and the low value of the goods and services normally involved in this type of dispute may explain service recipients' lack of willingness to pursue action.

As reflected in Recital 95 of the Services Directive, different tariffs and conditions may apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country. Examples of possible objective reasons are given in the recital (such as market conditions, regulatory barriers or risks related to compliance with legislation applicable in other Member States). In light of this situation, it

would appear that the taking of full effects of Article 20(2) could be facilitated by further clarity on the interpretation to be given to the obligation it entails.

The importance of correct application of the national provisions implementing Article 20(2) of the Services Directive by national authorities has been stressed by European institutions. In particular, the European Parliament has made a call for an effective implementation of Article 20(2) of the Services Directive, as well as the proper enforcement by national authorities and courts of the national provisions implementing this non-discrimination rule in the legal systems of Member States.<sup>4</sup> In light of this, clarification by the Commission services appears useful to ensure consistency in the application of the non-discrimination clause of the Services Directive across Member States. This is all the more important in consideration of the specific ‘cross-border’ element of this provision which deals specifically with situations of business and consumers located in different countries.

In light of this, this paper seeks to throw light on the typical situations in which service recipients are confronted with different treatment or refusal to provide a service and on the circumstances invoked by businesses so that competent authorities at national level are in a better position to undertake the case-by-case analysis that is required of them. With the same aim, it also attempts to describe and explain when differences in treatment or refusals to provide a service may or may not be justified.

This document builds on and complements the Commission’s assistance to Member States on various aspects of the Services Directive since its adoption. It is an indicative document of the Commission services, which cannot be considered in any way binding on the Commission as an institution, and it is without prejudice to the interpretation of EU law by the Court of Justice of the European Union.

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<sup>4</sup> European Parliament resolution of 21 September 2010 on Completing the Internal Market for E-Commerce (2010/2012(INI)); points 31 and 32; Conclusions of Competitiveness Council on Digital Single Market and Governance of the Single Market of 30-31 May 2012, available at <http://www.consilium.europa.eu/press/council-meetings>.

#### 4. EXPLAINING ARTICLE 20(2) OF THE SERVICES DIRECTIVE

The Court of Justice has emphasised 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.<sup>5</sup> It has also underlined the need to sanction national measures or agreements between companies which partition national markets according to national borders and make the interpenetration of national markets more difficult.<sup>6</sup> Efforts to remove unjustified regulatory restrictions in the Single Market will not translate into benefits for service recipients if practices by service providers themselves serve to create artificial borders within the internal market.

Practices tackled by the non-discrimination obligation involve both public authorities and service providers. A significant number of the cases which are perceived as blunt discrimination involve preferential access to services granted to residents in a given region or municipality by **public authorities** (most commonly, the respective regional or local authorities) or by operators acting under the auspices of those authorities, for instance concession holders or recipients of regional or local funding. Examples of these services are for example access to facilities such as swimming pools, museums, public gardens or historical monuments. It is not uncommon for preferential rates to be offered to local residents and not to other users of the service although they seem to satisfy the same objective conditions (of age, etc.). For example, when trying to enter the premises of public thermal baths, citizens from other Member States learn that they are refused the reduced entrance fee offered to consumers exceeding a certain age on grounds of their nationality, despite the fact that they can show that they meet the age criterion.

For these instances, the case-law of the Court of Justice has already condemned, under certain conditions, advantageous rates for admission to services granted by authorities excluding recipients who are nationals of other Member States and non-residents, as being discriminatory.<sup>7</sup> At the same time, it cannot be ruled out that, exceptionally, in cases involving social benefits granted by a public authority which result in advantageous conditions of access to a service, local or regional authorities may be allowed, under certain conditions, to distinguish between citizens who have a connection with the society financing the advantage and those who do not.<sup>8</sup>

Article 20(2) however deals specifically with **businesses providing services in the market**. While businesses are free to determine the scope of the geographic area in which they provide their services, certain practices may restore the divisions between national markets and be liable to frustrate the TFEU's objective of achieving the integration of those markets through the establishment of a single market. These practices may be to the detriment of recipients trying to avail of their rights to buy services within the European Union. To fully realise the potential that the internal market offers to them, recipients need to be protected from unjustified restrictions on access to services which are applied to them by service providers.

<sup>5</sup> Cases 286/82 and 26/83, *Luisi and Carbone v. Ministero del Tesoro*, (1984) ECR 377.

<sup>6</sup> Cases C403/08 and C429/08, *Football Association Premier League*, 4 October 2011.

<sup>7</sup> See judgment of 16 January 2003, case C-388/01, *Commission v. Italy*.

<sup>8</sup> See judgment of 1 October 2009 in case C-103/08 *Arthur Gottwald*. In that judgment the Court of Justice ruled under former Article 12 EC Treaty [now Article 18 TFEU] and not under the freedom to receive services clause.



In this context, the principle of non-discrimination laid down in Article 20(2) of the Services Directive balances the interests of businesses, which are free to decide the way in which they avail of the 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 and residence when seeking to acquire services in the single market. This complex balance always requires a **case-by-case** analysis.

#### **4.1. The scope of application of the provision**

Further light on the scope of the non-discrimination obligation laid down in Article 20(2) of the Services Directive can be derived from the wording of this provision and from its rationale. Explanations below aim at providing further clarity on the scope of the obligation in light of existing EU law and case-law. Further information can be found in the Handbook on the implementation of the Services Directive.<sup>9</sup>

##### *4.1.1. To which services does the obligation apply?*

The concept of service encompasses any self-employed economic activity which is normally provided for remuneration.<sup>10</sup> Without being exhaustive, the following can be mentioned as **examples of services covered by the Directive**: distribution of goods and services (retail), services in the field of tourism such as travel agencies, leisure services such as services provided by sports centres and amusement parks, rental and leasing services (including car rental) the activities of most of the regulated professions, craftsmen, the organisation of events, advertising and recruitment services.

For instance, access to services that are popular with mobile EU citizens such as entrance to tourist attractions, car rental or travel agencies should be facilitated by the correct application of Article 20(2) of the Services Directive. The same applies to numerous business and leisure services such as mobile phone subscriptions or the online or offline retail sale of products and services including electronic goods, books, DIY products, and music downloads.

Services explicitly excluded from the Services Directive are for example non-economic services of general interest, audio-visual and radio broadcasting services, gambling activities, private security services, financial services and healthcare 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.<sup>11</sup>

##### *4.1.2. To whom does the obligation apply?*

Article 20(2) applies to ‘providers’ within the meaning of Article 4(2) of the Services Directive, namely any natural person who is a national of a Member State, or any legal person as referred to in Article 54 TFEU and established in a Member State, who offers or provides a service.

Where firms provide services in several Member States of the Union, they will need to understand which of the national provisions implementing Article 20(2) applies to them. For that purpose, the **determination of the Member State of establishment within the**

<sup>9</sup> Available at [http://ec.europa.eu/internal\\_market/services/services-dir/documents\\_en.htm](http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm).

<sup>10</sup> Article 57 TFEU.

<sup>11</sup> See Article 2 of the Services Directive.

**European Union** becomes essential. This determination must be done in accordance with the case law of the Court of Justice. According to this case law, the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period.

This definition therefore requires the actual pursuit of an economic activity at the place of establishment of the provider. An establishment does not always need to take the form of a subsidiary, branch or agency, but may consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency.

E-commerce businesses have the possibility to offer their services online or sell their goods through online platforms, thereby becoming 'accessible' in all Member States. It seems important to recall that the fact that a company has registered a website in a given Member State or is using top level domain names of a specific Member State is not always tantamount to that company being established in that Member State. The place of establishment of a company providing services via an Internet website is not the place in which the technology supporting its website is located or the place in which its website is accessible but rather the place where it pursues its economic activity. For instance, a small company selling electronic appliances could decide to acquire a domain name in a Member State neighbouring its Member State of establishment in order to be able to better market to recipients in that territory. However, the service provision would be carried out entirely through its Member State of establishment.

In cases in which it is difficult to determine from which of several places of establishment a given service is provided, the location of the provider's centre of activities relating to the particular service for which the different treatment applies should be assessed. For example, a retailer of clothes and garments could have establishments in all Member States. In these cases it may well be that each of these establishments has its country-specific website and each of them determines the conditions of access to the sale of its products in that site, including the price. When analysing a case, national authorities will have to identify the establishment responsible for the practice in question.

#### *4.1.3. Consumers as service recipients*

The definition of recipient laid down in Article 4(3) of the Services Directive refers to any natural person who is a national of a Member State or who benefits from rights conferred upon him by EU acts, or any legal person as referred to in Article 54 TFEU and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service.

Despite the fact that Article 20(2) of the Services Directive applies to service recipients in general, the wording of Recital 95 and the reference to general conditions made available to the public at large would appear to indicate that the purpose of the provision is to protect consumers in particular.<sup>12</sup>

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<sup>12</sup> In accordance with Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 ('Consumer Rights Directive'), the definition of consumer covers natural persons who are acting outside their trade, business, craft or profession.

#### 4.1.4. What are 'general conditions made available to the public at large'?

Article 20(2) of the Services Directive only applies to 'general conditions of access to a service made available to the public at large' and not to conditions of access that are negotiated on an individual basis with one service recipient.

There is no definition at EU level of 'general conditions of access made available to the public at large'. As such, general conditions of access can be understood as all the terms and conditions and all other information made available by the service provider through various means such as information published in advertisements, on websites or in (pre-) contractual documentation and which are understood to apply in the absence of an agreement to the contrary entered into directly with the service recipient. General conditions of access to a service could also be practices which apply generally without being laid down in published information or in documentation made available by the provider, such as information provided by way of e-mails or letters addressed to service recipients in response to requests for information.

Individually negotiated terms that may govern commercial relations between two or more traders are not part of the 'general conditions of access made available to the public at large'. Tailor-made terms negotiated with a particular service recipient are usually based on the specific characteristics of the recipient in question including such characteristics as his history of custom with the service provider, his ability to pay, or their special requests, and are not covered by Article 20(2) of the Services Directive. For instance, favourable rebates granted by a wholesale distributor of goods to one of its customers in view of the quantities purchased by that individual customer from the trader would not be deemed 'general conditions of access made available to the public at large' and would thus also not be deemed 'different treatment' as covered by Article 20(2) of the Services Directive.

#### 4.1.5. Nationality and residence as differentiating factors

By virtue of the Treaties, discrimination on grounds of nationality has always been banned throughout the EU.<sup>13</sup> In addition, many Member States have had long-standing provisions prohibiting discrimination on grounds of nationality which derive from obligations undertaken at international level or from the principles founding their constitutional orders. Discrimination based on residence has often been considered by the Court of Justice, under certain conditions, as indirect discrimination based on nationality.<sup>14</sup> Article 20(2) of the Services introduces however an explicit prohibition of discrimination on the grounds of residence in the territory of another Member State.<sup>15</sup>

Differences in treatment are often not established directly on the basis of nationality or residence but rather on proxy factors which may end up being tantamount to nationality or residence, such as the country of the driving licence, the country of credit card issuance, the place of delivery, the country of origin of specifically dedicated IP addresses, the lack of credit history in a particular Member State, the lack of registration in the population registry, etc.

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<sup>13</sup> See former Article 12 EC Treaty and now Article 18 of TFEU.

<sup>14</sup> Judgments of the Court of Justice in cases C-350/96 *Clean Car*, and C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I-225.

<sup>15</sup> Member States are in principle free to extend the non-discrimination obligation to unjustified differences based on residence in different parts of the territory of a single Member State (regions, towns).

#### 4.1.6. *What are 'differences in the conditions of access'?*

Different conditions of access may concern several aspects of the offer or of the provision of the service. They do not, by themselves, constitute discrimination. The first possible difference involves obtaining access to the service itself: refusing to supply a consumer resident in another Member State would be the clearest case of a difference in treatment on the grounds of residence. The question of whether it is justified or not would have to be assessed on a case-by-case basis.

For example, certain service providers, including providers of electronic downloads, do not deliver their services into certain territories for various reasons, which may or may not be justified. Consumers are often confronted with clauses in the terms and conditions indicating that the service they are intending to acquire is available only in a given Member State. Recipients are often asked to agree not to use or attempt to use the service from outside this location.

A second category of possible different treatment may involve, for example, setting a different price for the service or offering different terms and conditions such as making different delivery or payment options available to consumers resident in other Member States.

## 4.2. The need to undertake a case-by-case analysis

### 4.2.1. Identifying discrimination

As indicated above, a case-by-case analysis is required in all circumstances to determine whether different treatment is being applied to recipients and whether or not that treatment is justified for objective reasons.

According to the case law of the Court of Justice, the identification of discrimination requires: a difference in treatment and the presence of comparable situations of recipients to which the difference is applied. Differences do not amount to discrimination if, and in so far as, they reflect relevant and objective differences in the situation of recipients. In this context, a number of preliminary reflections can be made on the situations of service recipients that can help competent authorities better assess whether an objective reason can justify different treatment in a particular case.

#### 4.2.1.1. Different treatment on the basis of nationality

It would appear extremely difficult to find objective reasons to justify differences of access to a service in the European Union on the **basis of nationality**. For instance, promotional campaigns where favourable access to services such as mobile subscriptions or supermarket loyalty schemes are made conditional upon a consumer producing evidence of the nationality of the Member State where the service is provided would not appear to be acceptable under Article 20(2) of the Services Directive.

#### 4.2.1.2. Different treatment on the basis of residence when the recipient moves to acquire the service

Differences based **on the residence of the recipient** merit detailed analysis. These differences do not amount to discrimination if, and in so far as, they reflect relevant and objective differences in the situation of the recipients.

In a context in which the **recipient moves to the territory of another Member State** (for example, as a tourist or as a student), the recipient places himself in a situation very similar if not identical to that of recipients resident in the Member States where the service is provided. To the extent that the service is to be provided within the territory of the Member State of the provider, objective reasons linked to the regulatory framework or to market conditions prevailing in the country where the recipient is resident would not appear to be relevant in justifying different treatment.

For instance, citizens who reside in one Member State but spend a considerable amount of time in the territory of another may want to benefit from favourable terms for mobile telephone subscription offers provided by operators established in the other Member State. It appears that sometimes these favourable terms are conditional upon evidence of residence in the Member State where the mobile phone operator is established. Similarly, students who intend to move to other Member States would appear to experience difficulties in hiring the services of real estate agencies to find suitable accommodation in the Member State where they will be pursuing their studies. It appears that in certain instances the provision of these services is made conditional on residence in the territory of the Member State where the service is to be provided. To the extent that the mobile customers or the students are able to

provide the evidence of the required security for the provision of these services, they should not suffer discrimination due to their permanent residence in another Member State. In principle, service providers should not refuse access to those recipients solely based on the fact that they are not permanently resident in the national territory. It cannot be excluded though that different conditions could be applied in certain cases where justified by objective criteria, such as for example the requirement to provide a proof of security to ensure payment of services where residence in other Member State would increase risk or cost of recovery of debts.

#### 4.2.1.3. Different treatment on grounds of residence when the service provider moves to provide the service

In a context in which the provider needs to move to the place of residence of the recipient in order to provide the service, it becomes evident that the situation of the recipient is not comparable to that of recipients who are resident in the Member State of establishment of the provider. Objective reasons linked to the regulatory framework applicable to the provision of services in the other Member State or to the market conditions that prevail there (such as costs of the supply of the service in that territory or higher or lower demand or pricing by competitors in that market) become relevant. Thus, for example, additional costs due to the fact that the provider is moving to the territory of the recipient to perform the services are normally to be borne by the recipient who wishes to receive the service. These additional costs may be due, amongst others, to the provider not having storage infrastructure at his disposal under favourable conditions, to the provider having to comply with procedures linked to the service provision in another territory (such as the posting of workers or the need to give a notification) or to loss of revenue incurred in the area where they normally provide services while attending a request to supply in another territory.

For example, if called upon to perform a service in the territory of another Member State, the director of a small carpentry firm could take into account the fact that the cost of moving his professionals to another Member State to provide a single service may well exceed the expected gains from that service provision and perhaps not even cover the loss of revenue derived from the inability to serve regular customers in its territory during that period. Although businesses are encouraged to ‘think European’ and to avail of opportunities that the internal market may offer to them, the non-discrimination provision does not impose a general obligation on companies to supply their services in circumstances in which such a supply would involve them travelling to the territory of Member States that do not belong to the area in which they have freely decided to target their activities.

#### 4.2.1.4. Different treatment on grounds of residence in online transactions

In instances in which **neither the provider nor the recipient moves to another territory**, the analysis becomes more complex. This is particularly the case in an online context. Service recipients do not expect to be confronted with geographic frontiers in the online world. The internet has made service offerings much more available and transparent, with online comparison websites, money saving tools and subscription-based discount sites all making consumers much more aware of the different offers available. Different treatment becomes much more obvious in the online world and undermines citizens’ confidence in the internal market.

When trying to buy online, customers sometimes learn only at the end of the ordering process that the desired product or service cannot be delivered into their territory. Customers also

sometimes note a sudden increase in the advertised price at the moment at which they indicate the country of residence or the place of delivery of the service. Unless delivery restrictions or the higher price can be duly justified by objective reasons, customers should not be discriminated against in this way due to their place of residence.

As in the offline world, the non-discrimination obligation does not prevent service providers from actively targeting their advertising to certain territories only or from carrying out campaigns directed at selected recipients. Businesses are free to determine the geographic scope to which they target their activities within the European Union, even when selling online. Despite the removal of barriers for the provision of services that the single market has delivered, in particular with the implementation of the Services Directive, companies may still, for a number of reasons decide to target their offer only to their local market or to neighbouring markets.<sup>16</sup>

Recipients face a variety of situations when they go online. In certain cases, recipients will not be able to obtain information on the conditions of access applicable to a service for recipients resident in other Member States. In other cases, consumers will be able to access information on the conditions of access applicable to recipients resident in other Member States but will not be able to acquire those services under the same conditions because delivery restrictions apply. Finally, in other cases recipients may also be able — if they actively seek for it — to access information on conditions applicable to recipients resident in other Member States and to avail of those conditions.

National authorities should take into account the way in which differentiation is implemented when carrying out the assessment of the objectivity of the reasons put forward by service providers to justify different treatment. Techniques allowing service providers to identify the location of the recipient and thus to direct the consumer to the offer adapted to the territory where he is resident are not per se indicators of discrimination. However, when service providers target their activities to many Member States and recipients in each of these countries are completely barred from accessing information on the conditions of access offered to recipients resident in other Member States, this could be an indication of the fact that different treatment is being applied. Competent authorities will then have to assess whether or not such a different treatment is objectively justified.

#### **Technical means of different treatment online**

Different treatment becomes visible to the consumer through online transactions. The internet is a powerful tool that enables businesses to reach a greater number and variety of customers than by more traditional sales methods. Service providers however often use a variety of techniques, sometimes in combination with each other, to better delimit the area to which they target their offers on the internet. Examples of these techniques are territory-based banners on third party websites, paying for search engine optimisers in order to be found by consumers specifically in certain territories or investing in online advertisements that are displayed to users in a particular territory.

Where service providers target their offers to several Member States, certain techniques allow them to adapt their advertising to each of the territories. It is important to stress that some of

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<sup>16</sup> According to the Commission Staff Working Paper 'Bringing e-commerce benefits to consumers' published on 12 January 2012, in 2010, nearly three out of four (74%) EU retailers did not actively target their sales across borders into other EU countries.

these techniques that are used to identify the place of residence of the service recipient do not always constitute a discriminatory condition of access to a service.

Examples of these techniques are **automatic geolocation tools**, which identify the location of the customer's computer or device used to access the service online. A common way to geolocate the recipient is the IP look-up using the whois database.<sup>17</sup> The result of this technique can be varied: sometimes recipients are technically barred from accessing domains addressed to other Member States. Sometimes recipients are automatically redirected to the domain names of other Member States but can circumvent the redirection manually.

Geolocation can also be used in other ways, for instance by automatically selecting the country of residence from a list in a drop-down menu, based on the IP address.

Another example is that of **country-specific websites** that adapt their language and design to the different target audiences and that may or may not feature different terms and conditions. When a company has subsidiaries or branches in different Member States, country-specific websites may be individually managed by each of those subsidiaries or branches, which will deliver the services for orders placed in their respective country-specific website.

Accessing a country-specific website does not automatically imply that users are considered residents of that country and that it is possible for them to gain access to the prices and products and services offered on the website. Recipients may be able to access information but be denied later on, through the use of self-identification techniques, the possibility to acquire services, for example when entering credit card details or the delivery address.

**Self-identification** includes asking customers about their place of residence through menus on the homepage. Self-identification can also be carried out through questions asked when registering for an account (necessary to make most online transactions) or when completing the purchase, which in most cases involves asking the customer to specify their place of residence.

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<sup>17</sup> WHOIS is a query and response protocol that is widely used for querying databases that store the registered users or assignees of an Internet resource, such as a domain name, an IP address block, or an autonomous system.



## 5. SOME EXAMPLES: AN IN-DEPTH LOOK AT CASES OF DIFFERENT TREATMENT

The provision of a service under different conditions is not allowed in the absence of a direct justification by objective criteria. Recital 95 of the Services Directive lists some examples of objective criteria that can be invoked by service providers for different treatment. It refers to additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, extra risks linked to rules differing from those of the Member State of establishment and the lack of the required intellectual property rights in a particular territory. The Matrix study published in November 2009 identified drivers for differentiation in three categories: legal/regulatory drivers, including taxation and compliance costs, information costs, and legal uncertainty; supply-related drivers including cost of sales, and firm-related characteristics, such as corporate structure; and demand-related drivers including the nature of competition, the willingness to pay of different customer groups, and seasonality.<sup>18</sup>

The task of competent authorities will be to undertake a **case-by-case analysis** with a view to determining whether any of the reasons quoted above are relevant for the service provision in question for which the different treatment is being applied.

The examples below aim to provide some general indications to competent authorities on how the assessment of whether or not these objective reasons apply could be undertaken in each individual case.<sup>19</sup>

### *Example 1: Refusal to supply due to a lack of delivery options*

*Consumers resident on islands are sometimes refused supply when they seek to purchase goods from a provider in another Member State, due to difficulties in delivery. In principle, these consumers should be granted access to the delivery of goods to the extent that delivery options exist within the European Union. Additional delivery and freight charges can help businesses recover the additional cost incurred in these service provisions.*

The lack of alternatives for delivery can rarely be invoked by a service provider to refuse supply to a given Member State. 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, including cross-border.<sup>20</sup> This obligation means that at least one delivery option in a cross-border context should be available in all Member States.<sup>21</sup>

<sup>18</sup> [http://ec.europa.eu/internal\\_market/services/docs/services-dir/studies/20091210\\_article20\\_2\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/studies/20091210_article20_2_en.pdf), See Section 4.

<sup>19</sup> The examples provided in this section draw inspiration on real cases of which the Commission has been made aware but they do not necessarily reflect existing practices in the sectors mentioned.

<sup>20</sup> Despite this clear obligation on Member States, it would seem that in certain exceptional cases, refusal to supply by universal service providers in specific circumstances (e.g. force majeure) and/or specific geographical conditions (e.g. isolated islands) occurs. This refusal may result in service recipients resident in those areas having difficulties in accessing certain services.

<sup>21</sup> Service providers may however have concerns that they cannot achieve an appropriate level of service related to the delivery of their products; for instance with regard to the display of the product or taking back

Although delivery services should be available cross-border, the cost of the delivery service (be it the parcel delivery service or other alternative methods) chosen to supply services in another Member State may significantly differ from the cost applicable to deliveries in the Member State of establishment thus resulting in different conditions of access being offered to recipients resident in other territories.<sup>22</sup>

The difference in delivery costs or in estimates of returning items to be borne by consumers may appear initially as discrimination. However, service providers are obliged to specify additional freight, delivery or postal charges in their transactions to consumers.<sup>23</sup> This transparency should provide clarity to service recipients as to the reasons behind the difference in the conditions of access.

***Example 2: Refusals to supply due to contractual obligations***

***Residents in one Member State have complained about being refused delivery of baby prams manufactured and sold through an exclusive distributor in another Member State where prices are much lower. The reason invoked by the exclusive distributor in that Member state was that the territory of the customer who wanted to acquire the pram had been reserved to another exclusive distributor and that they were bound by contractual agreements to sell prams only to customers resident in that territory. This clause however is likely to be in breach of competition law and thus it is unlikely that it can justify such a restriction of supply.***

When customers try to buy services in another Member State, they are sometimes told by distributors that the service cannot be delivered to them as the distributor is bound by contractual arrangements preventing him from serving territories reserved by their suppliers for other distributors.

Service providers cannot be obliged to breach the contracts they have validly entered. However, these contractual obligations between independent undertakings can be invoked only to the extent that they do not breach competition law, and businesses are responsible for ensuring that their agreements and practices satisfy the requirements laid down in EU and national competition rules.

For agreements considered in this context, the competition rules applicable to vertical agreements seem the most relevant.<sup>24</sup> Vertical agreements are agreements for the sale and

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returns in time for the products to be resold, or if return policies are comparably more difficult for their customers to manage.

<sup>22</sup> The difference could be due to different cost structures of postal operators, higher costs of cross-border delivery (e.g. longer logistical chain; additional administrative costs), type of delivery agreements made between operators), different levels of competition in the domestic and cross-border settings, or insufficient quantities (volume of items) sent into the territory of other Member States which would mean that service providers would not be able to avail of preferential rates for delivery services in those Member States. The internal handling of the procedures involved in shipping to another Member State may also be expensive for the trader, in particular concerning when selling lower-value goods.

<sup>23</sup> Article 6 of Consumer Rights Directive mentioned above in footnote 12.

<sup>24</sup> Whether a vertical agreement actually restricts competition and whether in that case the benefits outweigh the anti-competitive effects will often depend on the market structure. In principle, this requires an individual assessment. However, the Commission has adopted Regulation (EU) No 330/2010, the Block Exemption Regulation ('BER'), which provides a safe harbour for most vertical agreements. Regulation (EU) No 330/2010 renders, by block exemption, the prohibition of Article 101(1) TFUE inapplicable to vertical agreements which fulfil certain requirements.

purchase of goods or services which are entered into between companies operating at different levels of the production or distribution chain, such as distribution agreements between manufacturers and wholesalers or retailers. For vertical agreements that cannot benefit from a block exemption, the Commission has provided guidance on how to assess its pro- and anti-competitive effects in its Vertical Restraints Guidelines, which were revised in 2010.<sup>25</sup>

To start with, for the present purposes, there is a need to differentiate between active and passive sales. Passive sales are those that have not been actively sought by the seller. Having a website and receiving and processing orders by a customer following a visit to the website, for example, constitutes passive selling. Active sales are sales that a distributor solicits, through marketing, sales visits etc. Online advertisement addressed to specific customers is explicitly recognised as a form of active selling.

Restrictions of passive sales in the territory of other Member States laid down in distribution agreements are generally in breach of Article 101 TFEU. It is thus unlikely that service providers who have entered into exclusive distribution agreements with their suppliers can validly invoke clauses in their contracts containing restrictions of passive sales to cross-border service recipients resident in other Member States whose territory has been reserved for another exclusive distributor.

***Example 3: Higher prices imposed due to market conditions in the country of residence of the recipient***

***Car rental companies renting motor vehicles with subsidiaries in all Member States set up country-specific websites for the delivery of their services, which do not allow for the circumvention of automatic geolocation techniques used to display different prices according to the Member State of residence of the recipient. Price differences in the various country-specific websites are significant, despite the fact that the differences are applied to the same service provision taking place in the same location and by the same provider and that costs of the supply of the service then would not appear to differ significantly on grounds of the place of residence of the customer. In this event, cost considerations alone would not appear to justify the partitioning of the market to the detriment of consumers.***

Market conditions are determined by a variety of factors which relate to both supply and demand in the market. On the supply side, businesses need to take into account costs such as the cost of providing the service (rental of necessary premises when there is a physical establishment, cost of labour), the cost of delivery, the cost of payment methods and customer support and advertising costs. Factors affecting demand include brand penetration, different preferences or requirements with regard to the level of service to recipients, for certain services such as tourism and car rental seasonality and different vacation periods and the presence and strength and marketing policies of competitors in each of the different territories. These different market conditions shape the geographic scope and the conditions under which service providers decide to actively offer their services in the various Member States.

There are differences between customer groups in terms of how much demand the group has for a service at a given price and the way in which the group's demand changes in response to price changes. The wording of Article 20 of the Services Directive, read in conjunction with

<sup>25</sup> SEC(2010) 411, see [http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf).

its Recital 95, indicates that a difference in willingness to pay could be invoked by businesses to justify the existence of different pricing and marketing policies by a service provider towards the various Member States.

The use of the internet has made it much easier for consumers to make comparisons between service providers, even those located in other Member States. It is therefore to be expected that consumers will become more active in seeking out such favourable conditions offered online by service providers established in other Member States. The facilitation of price comparison means more transparent markets which increases competition and ultimately leads to price convergence. This is one of the sought-after benefits of the introduction of the euro. Practices that deliberately prevent customers from accessing information on the conditions of access applicable to recipients resident in other Member States should be subject to particular scrutiny by national authorities. Furthermore, price information provided on the web-site of the trader should be clear and comprehensible, informing the consumer prior to any purchase of the total price, including taxes and also information on freight or delivery charges.<sup>26</sup>

***Example 4: Higher charges for cross-border payments***

***Drivers who use motorways in other Member States on a regular basis may wish to avail of the possibility to purchase toll-payment devices through which the driver can pay the applicable charges for the use of the road network by means of direct debit. Where this possibility is offered to subscribers in the Member State where the motorway is located, residents of other Member States should not be charged, in principle, a higher price solely on grounds that the account through which payment shall be made is located in another Member State.***

Regulation (EC) No 924/2009 on cross-border payments in the Community eliminates differences in charges for cross-border and national payments in euro, up to a maximum value of EUR 50 000, in all EU Member States.<sup>27</sup> Thus, charges for payment transactions offered by a payment service provider (e.g. the bank) have to be the same whether the euro payment is national or cross-border. The Regulation applies to all electronically processed payments, including credit transfers, direct debits and payments by means of debit and credit cards.

***Example 5: Refusal to supply because of intellectual property rights concerns***

***A music download provider has acquired rights on the music it offers for all Member States, which it sells through country-specific websites offering slightly different repertoire in each Member State at different prices. When customers attempt to have access to certain tracks sold in Member States other than their Member State of residence they are denied access at the beginning of the ordering process.***

***When the trader holds the required copyright and related rights necessary to deliver the service in other territories, the absence of required intellectual property rights will normally not justify a refusal to supply. The refusal to supply customers***

<sup>26</sup> See Article 8 of the Consumer Rights Directive mentioned above in footnote 12.

<sup>27</sup> The IBAN and in some cases the BIC may need to be supplied.

*resident in other Member States will thus need to be objectively justified on other grounds.*

Holders of copyright and related rights have protection by virtue of the existence of their work, so copyright and related rights do not require registration. The exercise of copyright and related rights is territorial in nature: a right holder exercises his/her rights on the basis of a bundle of independent, national rights which have been harmonised in the EU under a series of directives adopted between 1991 and 2011. Notably, and for purposes of the delivery of online services, authors and other right holders have the exclusive right to authorise or prohibit the reproduction of their works or other protected subject matter; and to authorise or prohibit the communication of their works or other protected subject matter, including via the internet.<sup>28</sup> While copyright and related rights are in principle limited to the territory of the state granting such rights, copyright holders can also grant multi territorial or pan European licences. The choice rests with the rights holder.

A service provider may often need to acquire licences from more than one party.<sup>29</sup> The costs associated with procuring licences include both the purchase price and a series of transaction costs. Music licensing is particularly complex, not least because of the split of rights within any given track. As far as the rights of authors are concerned, their licensing is largely based on collecting societies (the bodies responsible for the management of copyright and the collecting of royalties) which traditionally hold licence rights on a national basis.

Within the boundaries of competition law, a rightholder may choose whether or not to grant authorisation at all, or for a particular territory, so the actual acquisition of licences depends on the successful conclusion of negotiations. Lack of the required authorisation for a particular territory is an objective reason that would justify the refusal of a service to consumers in the territory where the rights have not been cleared.<sup>30</sup>

When a service provider has acquired the relevant rights for music download services. only in, say, three Member States, the service provider will not be able to make its services available to residents in the other Member States. In this situation, the provider could include a disclaimer at the beginning of the ordering process indicating that the music service can only be delivered in certain territories. This could help to alleviate negative consumer experience.

However, it seems that even where service providers have acquired authorisation to provide access to copyright content across multiple territories, they sometimes choose not to do so. Indeed, in the last years some service providers have rolled out their services across the 27 EU Member States but still maintained restrictions on consumer access to services outside their Member State of residence. The limiting of offers of digital content to specific Member States represents an obstacle for consumers in other Member States who may wish to access that content. Traders, even when having cleared the necessary copyright and related rights to deliver a service, sometimes elect to restrict the service territorially, taking into account factors which are unrelated to copyright. In particular, commercial decision-making implies

<sup>28</sup> Articles 2 and 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>29</sup> [http://ec.europa.eu/internal\\_market/services/docs/services-dir/studies/20091210\\_article20\\_2\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/studies/20091210_article20_2_en.pdf), see Section 4.3.

<sup>30</sup> The Commission will table a legislative proposals on Collective Rights Management in 2012 with the aim to help simplify the complex system of licensing music online and to improve the governance and transparency of collecting societies.

the balancing of the costs of providing a given service against the projected income that services can deliver. These costs may include: costs of providing access in terms of IT infrastructure and network; expected take-up taking into account local factors such as availability of high-speed broadband, pricing of content, competing services; language versioning; content rating, marketing and promotion etc. While an absolute lack of the required licences will normally constitute an objective refusal to supply a service, other reasons, in particular those not related to copyright, will have to be justified on a case-by-case basis. As indicated above, audio-visual broadcast services do not fall within the scope of the Services Directive.

## **6. FURTHER ROOM FOR IMPROVEMENT: REMOVING REMAINING OBSTACLES TO THE INTERNAL MARKET**

Service recipients should generally not be confronted with differences of treatment due to their nationality or residence. However, Article 20(2), of the Services Directive clarifies that if the service provider can provide objectively justified reasons for different treatment, it will not be considered discrimination. This Section briefly refers to a number of factors that are often invoked by businesses as possible reasons to establish different treatment and that have to be taken into account by competent authorities in their case-by-case analysis of a given conduct, as they may, in some instances justify different treatment given the current degree of completion of the internal market.

Certain obstacles to the completion of the single market, particularly in the digital arena, have been identified by the Commission in recent years, including in the E-Commerce Communication.<sup>31</sup> These areas are being prioritised in order for the obstacles to be eliminated as quickly as possible, to make life easier for businesses and consumers.

It will be for competent authorities, in their case by case analysis, to take due account of the factors mentioned in this Section to determine whether in the case in question these elements could justify certain practices or not. The size of the provider is an additional element that might need to be taken into account in the analysis. Competent authorities are also encouraged to take due account of any legislative developments or case-law on the new possibilities offered by the internal market to business to avail of the internal market including the mandatory or voluntary character of those measures and any remaining obstacles.

### **6.1. Payments**

With regard to **payments**, when a customer wishes to pay for his purchase using a credit card issued in another Member State, instances have been reported whereby the transaction has been blocked or higher charges applied. Member States, in line with Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on Payment Services in the Internal Market, may allow for the imposition of charges for the use of specific means of payment such as credit or debit cards. However, when Member States provide for this possibility, they may not discriminate against cards issued outside that Member State so that such foreign cards would attract surcharges while cards issued within the Member State in question would not. Enforcement of this rule has resulted in discriminatory practices being ended in certain Member States.

Concerning charges for the use of certain types of payment instruments, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights ('the Consumer Rights Directive'), when implemented, will prohibit retailers from charging fees for the use of individual payment instruments that exceed the cost borne by the retailer for their use. In addition and as indicated above Article 8, paragraph 3, of the Consumer Rights Directive obliges, for contracts concluded after 13 June 2014, retailer websites to indicate clearly and legibly at the latest at the beginning of the ordering process whether any payment restrictions apply. Furthermore, the Commission's follow up to the

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<sup>31</sup> Available at: [http://ec.europa.eu/internal\\_market/e-commerce/communication\\_2012\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/communication_2012_en.htm).

January 2012 Green Paper ‘**Towards an integrated European market for card, internet and mobile payments**’ will address specific barriers to a more integrated payments market for card, internet and mobile payments, thereby leading to broader choice of and better access to payments means by consumers.

## **6.2. Taxation**

With regard to national **taxation**, in particular VAT, when sales in other Member States make a service provider subject to a registration obligation in those Member States, the costs of the supply can increase, being proportionally higher for SME businesses. These may then be passed on to the customer or justify a refusal to supply. Furthermore, differences in the VAT rates applied to different products and services in the different Member States can explain certain price differences visible to the consumer.

Some services that are commonly purchased cross-border include electronic services, for example software and ringtone downloads or access to online games. From 1 January 2015, operators established in the EU providing these services in the EU will charge VAT at the rate applicable in the Member State where the customer resides. While these new rules aim to reduce, even remove, the effect of competition between Member States’ VAT rates, they may generate costs due to additional complexity. A ‘mini One Stop Shop’ will be introduced as of the same date allowing businesses to register, declare and pay the VAT due in other Member States in their own Member State, reducing administrative burden and facilitating cross-border provision of telecommunication, broadcasting and electronic services.

## **6.3. Divergences in consumer protection and contract law rules**

One of the reasons businesses commonly give to explain difficulties in engaging in cross-border trade is the cost of determining and complying with the applicable **national consumer protection and contract law rules**. When considering whether to offer their services in another Member State, service providers must consider what would happen if something went wrong and if they were to be taken to court by the customer. This was highlighted in the Matrix study.

Thanks to a robust set of EU rules, consumers enjoy a common level of protection across the single market against, for example, unfair contract terms, faulty goods, contracts concluded online or outside the business’s premises.<sup>32</sup> However, most of such EU *acquis* leaves Member States free to adopt more stringent rules, if duly justified by consumer protection reasons. As a result, Member States’ legal frameworks differ as regards consumer protection and contract law, which makes the determination of the applicable law very important for businesses.

The determination of the competent court, the applicable law as well as the recognition and enforcement of judgments are regulated under private international law rules relating to cross-border dispute resolution. These rules have been harmonised to a great extent at Union level.

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<sup>32</sup> See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (‘Unfair Contract Terms’), Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (‘Consumer Sales Directive’). Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (‘Distance Selling Directive’) and Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (‘the Doorstep Selling Directive’), which currently provide for minimum harmonisation, will be replaced by the Consumer Rights Directive mentioned above.



Council Regulation (EC) No 44/2001 of 22 December 2000 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') is the most important legal instrument to determine which court is competent to handle a dispute.<sup>33</sup> The Rome I Regulation<sup>34</sup> (for contractual obligations) and the Rome II Regulation<sup>35</sup> (for non-contractual relations) determine the applicable law. In the case of consumer contracts, private international law rules dictate that when the business is directing its activities to the country of the consumer, then the consumer protection rules in the consumer's country apply in the same way as they apply to national service providers unless, in the case of services, the supply of services to the consumer takes place exclusively in a country other than that in which the consumer has his habitual residence.<sup>36</sup> A case-by-case basis analysis is required to determine whether an activity is being directed to a given Member State.

The costs of compliance with differing national rules might give rise to differences in prices and conditions of services supplied across borders. Similarly, service providers may be discouraged from directing their activities to other Member States to avoid having to alter terms and conditions under which the services are provided. Service providers may sometimes perceive the difficulties in complying with a range of different requirements as disproportionate to the revenue they could hope to earn by actively directing their activity to other Member States. Such costs due to the regulatory environment may then be passed on to the customer or justify a refusal to supply. However, such concerns generally do not come into play when the provider is not directing its activity to consumers in other Member States but when it is approached by a consumer in another Member State wishing to purchase its services.

The EU has partially reduced these differences by harmonising certain areas of contract law. The current rules on EU consumer protection contain minimum requirements for unfair contract terms and sales and guarantees. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 ('E-Commerce Directive') contains basic provisions on online contracting. Finally, the Consumer Rights Directive improves the level of harmonisation of consumer protection legislation across the EU and achieves common rules in some important domains.<sup>37</sup> The new rules set out in the Consumer Rights Directive will have to be transposed into national laws by the end of 2013.<sup>38</sup>

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<sup>33</sup> The Brussels I Regulation provides that actions against a person domiciled in a Member State can, as a general rule, be brought in the courts of that State. It also provides that cases resulting from a contractual relationship may be decided by the courts of the place of performance of the contractual obligation. In the case of consumer contracts, however, rules protecting the consumer apply. In order for those protective rules to apply, the Brussels I Regulation requires that the trader 'directs its activities' to the Member State in which the consumer is domiciled. (Article 15 (1) (c)).

<sup>34</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 04.07.2008.

<sup>35</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 199/40, 31.07.2007 .

<sup>36</sup> See the Rome I Regulation, Article 6(4)(a).

<sup>37</sup> For distance and off-premises contracts, the information requirements for traders, the consumer's right of withdrawal from the contract and the obligations for traders and consumers in case of withdrawal will be fully harmonised. Both consumers and traders will benefit from standard forms for the rights of withdrawal. Additionally, the Directive entails new harmonised rules on the passing of risk in sales contracts and the default time-limit for the delivery of goods as well as a ban on hidden charges, on pre-ticked boxes which impose surcharges higher than the trader's actual costs for the use of a certain payment means (e.g. credit cards) and on charges for telephone hotlines higher than the standard telephone rate for calls. As to the

Furthermore, on 11 October 2011 the Commission proposed an optional Common European Sales Law.<sup>39</sup> It aims to facilitate trade by offering a voluntary set of rules for cross-border contracts in all 27 EU countries which the parties can choose as the applicable law to cross-border contracts for the sales of goods, digital content and limited number of related services. Thereby the proposal will contribute to the elimination of some of the internal market barriers stemming from diverging national contract law. This proposal is currently under negotiation in the European Parliament and in the Council.

However even with the adoption of the Consumer Rights Directive and of the proposed Common European Sales Law, considerable barriers stemming from **national contract laws** in the EU remain. This is particularly relevant for the contracts falling completely outside the existing and proposed legislative measures. For instance, services contracts are almost entirely excluded from the scope of the Common European Sales Law and some contract law areas are not covered (e.g. legal capacity to contract or legal representation). Furthermore, considering the optional character of the proposed Common European Sales Law and its scope, once adopted the proposal will provide an optional tool to overcome the obstacles created by different contract laws. As it will not per se eliminate all barriers related to diverging contract laws, enforcement authorities may wish to take this into account in their case-by-case analysis.

It is possible for disputes to arise in the context of a cross-border service provision. For instance, a consumer may want to take legal action if he had bought a product over the internet from another EU Member State but it never arrived; if a computer that he had bought while visiting another EU country did not work properly when he got it home, or if the construction company renovating his holiday home in another EU country did not do its work properly. When selling services, traders may fear being subject to such court proceedings if a dispute arises with a consumer who bought their services.

Service providers may be unaware of how to resolve cross-border disputes in a simple, efficient and low-cost way through **Alternative Dispute Resolution** procedures. Settling disputes out of court through alternative dispute resolution (ADR) is faster, cheaper and easier than court proceedings. Actions proposed to enhance universal access to quality ADR across the EU will help businesses delivering services into other Member States better manage their customer relations and it can also save them some costs of potential court cases.<sup>40</sup> Thus they will remove disincentives for providers to deliver into the territory of other Member States. The creation of an EU-wide online platform ('ODR platform') providing consumers and

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scope, contracts on the provision of utilities (water, gas, electricity) and contracts concerning digital content will also be covered by the new rules, but certain areas such as healthcare services, passenger transport and gambling will be excluded.

<sup>38</sup> It should be noted that the application of the Consumer Rights Directive to digital content (data produced and supplied in digital form such as computer programs, applications, games or music). Contracts for the supply of digital content are within the scope of the Directive, but the right of withdrawal is limited to situations where the performance of the contract has not yet begun or begun without the consumer's prior consent or, if the digital content is provided on a tangible medium such as a CD, where the consumer has not yet unsealed it. The Consumer Rights Directive improves and clarifies the information rights for consumers when purchasing digital content. In particular, traders will have to inform (consumer) buyers of digital content not only about its compatibility with hardware and software, but also about the application of any technical protection measures or digital rights management, for example about a limitation on the right of the consumers to make copies of the content.

<sup>39</sup> See [http://ec.europa.eu/justice/newsroom/news/20111011\\_en.htm](http://ec.europa.eu/justice/newsroom/news/20111011_en.htm).

<sup>40</sup> See [http://ec.europa.eu/consumers/redress\\_cons/adr\\_policy\\_work\\_en.htm](http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm).

businesses with a single point of entry for resolving on-line the disputes concerning purchases made on-line in another EU-country should serve to that purpose.

#### 6.4. Debt recovery

For service providers who cannot rely on advance payment, the cost of **debt recovery** in case of non-payment may deter them from providing services or selling their goods to customers in other countries. Some 2.7% of all business transactions in Europe were written off due to bad debts in 2010,<sup>41</sup> albeit mostly at national level. EU law on civil and commercial litigation can be used in cases which have a cross-border element to claim money owed. For instance, the European Payment Order offers a simplified procedure for cross-border monetary claims which are uncontested by the defendant. The European Small Claims Procedure is a simplified procedure which speeds up the processing of cross-border claims that do not exceed EUR 2000. The Commission has published practical guides on using these procedures.<sup>42</sup> While both of these initiatives offer substantial assistance to providers wishing to claim payment for services rendered to a client in another Member States and the resulting judgment will circulate in the EU without any need for intermediate proceedings for recognition and enforcement, the judgment, would still need to be enforced in accordance with the national rules and procedures of the Member State where enforcement is sought.

In this context, the Commission is currently undertaking a pilot project to support SMEs in facilitating cross-border debt recovery. Its main objective is to increase awareness, understanding and use of the legal instruments available for claims management, through financial support for a series of seminars and training sessions in EU Member States to inform SMEs about debt recovery management and the legal instruments available in this field.

#### 6.5. Private copying levies

Rightholders have an exclusive right to authorise or prohibit the reproduction of their works (e.g. books, music, films) and other protected subject matter (e.g. phonograms, broadcasts). Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society gives the Member States a possibility to provide for exceptions to this right. When protected content is copied by virtue of '**private copying and reprography exceptions**',<sup>43</sup> rightholders' harm must be compensated by means of a fair compensation. Member States often provide for fair compensation by imposing **levies on goods that are typically used to produce copies** (such as blank CDs, recording equipment, MP3 players, computers, printers, scanners, etc.) Important differences however exist between Member States' levy systems as to the equipment which bears a levy or the methodology according to which the tariffs are set. These differences affect the smooth functioning of the Single Market.

The Commission has launched a mediation process which brings key stakeholders together in order to identify key elements on which a workable agreement could be found.<sup>44</sup> The

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<sup>41</sup> Source: Intrum Justitia 2011 European Payment Index, see <http://www.intrum.com/About-Us/European-Payment-Index/>.

<sup>42</sup> Available at: [http://ec.europa.eu/civiljustice/publications/publications\\_en.htm](http://ec.europa.eu/civiljustice/publications/publications_en.htm).

<sup>43</sup> Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>44</sup> [http://ec.europa.eu/commission\\_2010-2014/barnier/headlines/speeches/2012/04/20120402\\_en.htm](http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/04/20120402_en.htm).

mediation touches in particular upon issues such as the devices subject to a levy, the methodology for tariff-setting and cross-border sales. At the same time, private copying and reprography is being analysed in the context of new digital forms of distribution of copyright-protected content and its implications for levy systems.

On the basis of this mediation process, the mediator will formulate recommendations which could serve as a framework for possible legislative action.

## **7. CONCLUSIONS**

Article 20 of the Services Directive prohibits discrimination against service recipients on the basis of their nationality or country of residence. This applies to refusals to supply, to limitations of access to offers, or to offers subject to inferior conditions. Yet too often, consumers are disappointed. There are instances of refusal to provide a service or unequal conditions available for consumers from another Member State. Full implementation of Article 20(2) in the Member States should put an end to discriminatory practices in so far as they are not objectively justified. The following actions should help to ensure that this purpose is achieved.

### **7.1. Enforcement of Article 20(2) by Member State authorities**

Reported complaints of different treatment have as yet very rarely translated into enforcement decisions by competent authorities in the Member States, not the least because it appears that in a good number of instances the problem was resolved amicably after involvement of enforcement authorities or consumer protection bodies. These authorities should ensure thorough follow-up of such cases where necessary. In instances of dispute with regard to service recipients' rights, and where consumers and service providers have been unable to reach an amicable solution, including through the intervention of the relevant assistance bodies, Member State authorities should enforce the national provisions setting out service recipients' rights under the Services Directive in accordance with the applicable national procedures.

When assessing whether there is an objectively justified reason for a refusal to provide a service or to do so under different conditions, Member State authorities are encouraged to take into account progress made in the completion of the internal market and the further elimination of barriers. When action at EU level makes it possible for businesses to overcome certain current regulatory barriers to the provision of cross-border services, those businesses' decision not to make use of those possibilities (resulting in a refusal to supply or in different treatment) should be normally supported by other objective justifications. Examples of such actions could include the completion of the Single Euro Payments Area or the legislative developments in the area of copyright.

The Commission will coordinate the exchange of information and good practices between authorities with regard to their enforcement actions.

### **7.2. The Commission's role: Information and support to Member States, businesses and consumers**

The Commission services will follow up closely on the way in which the non-discrimination provision is enforced in the Member States and will coordinate a structured exchange of information and good practices between authorities with regard to their enforcement actions. The Commission services will also come forward with further specific guidance on the basis of experience with the national implementation of this provision and in order to take into account regulatory developments that will eliminate remaining barriers for cross-border trade.

The Commission services will continue to liaise with the business community, including through business representative organisations, chambers of commerce and other bodies, in order to educate them on their rights and responsibilities under Article 20(2) of the Services Directive. In this regard, the Commission will work with Member States to encourage providers in specific sectors to take action in order to ensure the quality of their service provision through quality charters for the application of this provision.

It will also work with businesses to improve transparency and support efforts by businesses to ensure their customers can shop cross-border in the single market.

### **7.3. Making the single market more tangible: steps businesses could undertake in applying the rights granted by Article 20(2)**

The Commission is working to ensure businesses can take advantage of the possibilities presented by use of the internet. Businesses may choose to focus on building a customer base in their local or national market. They may also pursue marketing campaigns in the Member States of their choosing. However, in order to prevent erecting artificial borders within the EU single market, an effort should be made to make it possible for consumers in other Member States to gain access to the services proposed in those target countries, especially those offered online.

In order for Article 20(2) to take full effect, business providers are called upon to facilitate access to service recipients who want to benefit from the internal market. Discrimination based directly on grounds of nationality should no longer occur, as a rule. In addition, recipients who move to other territories and try to acquire services therein should not be faced, in principle, with discriminatory treatment on grounds of their place of residence as their situation will generally be comparable to that of recipients resident in the Member State where the service is provided.

Businesses selling online should be encouraged to indicate in advance in a prominent place on their websites any possible delivery restrictions applying to their services. This practice will become an obligation further to the implementation of the recently adopted Consumer Rights Directive.<sup>45</sup>

When businesses selling services online are approached by customers that are not resident in the Member States to which those businesses directly (implicitly or explicitly) target their online offers, refusals to supply or different treatment of consumers resident in other territories should only occur when it is justified by objective reasons. In the case-by-case assessment of these reasons, competent authorities may need to take due account of the size of the company providing the service.

The non-discrimination clause requires a case-by-case assessment. However, particular attention should be given to cases where consumers face higher charges than would be imposed for a domestic transaction when they wish to pay for a service provided in another Member State by credit transfer or direct debit in euro. Consumers should, in principle, no longer be refused supply on the grounds that it is impossible to physically deliver goods in another Member State. Similarly, service providers should not rely on mere geographic factors to apply different conditions of access to their service, where there are no objective criteria to justify such differences.

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<sup>45</sup> Article 8(3) of the Consumer Rights Directive.

Transparency helps recipients to comprehend better the reasons behind a possible refusal to supply or a higher price in those cases in which these may be justified. Businesses are encouraged to provide reasons for the different treatment upon the request of the recipients. In those instances in which the business had already given clear indications in advance of the delivery restrictions applying to its offer, it will probably be easier for it to provide information to customers on the reasons for those delivery restrictions. When determining in advance the delivery restrictions that they apply, businesses will have identified the reasons that underpin their policy.

A number of obstacles still make the provision of cross-border services difficult and hamper businesses from ‘thinking European’, both online and offline. These obstacles must be tackled so that businesses can fully exploit the opportunities that the internal market places at their disposal. Initiatives are underway at EU level to eliminate the remaining impediments to cross-border service provision.

## ANNEX I

### Implementing Provisions



Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
AT	Art. 1, § 23 of the Dienstleistungsgesetz	Die allgemeinen Geschäftsbedingungen eines Dienstleistungserbringers für den Zugang zu einer Dienstleistung dürfen keine auf der Staatsangehörigkeit oder dem Wohnsitz des Dienstleistungsempfängers beruhenden diskriminierenden Bestimmungen enthalten. Unterschiede bei den Zugangsbedingungen sind nicht diskriminierend, wenn sie durch objektive Kriterien gerechtfertigt sind.	21/11/2011
BE	Article 24(1) de la Loi sur les services du 26 mars 2010, (M.B. du 30 avril 2010, p. 24437)	<p><u>NL</u>: De afnemers worden niet onderworpen aan discriminerende eisen op grond van nationaliteit of verblijfplaats. De algemene voorwaarden voor toegang tot een dienst, die door de dienstverrichter voor het publiek toegankelijk worden gemaakt, bevatten geen discriminerende bepalingen in verband met de nationaliteit of verblijfplaats van de afnemer, zonder evenwel de mogelijkheid uit te sluiten om verschillende toegangsvoorwaarden te stellen wanneer die verschillen rechtstreeks door objectieve criteria worden gerechtvaardigd.</p> <p><u>FR</u>: Les destinataires ne sont pas soumis à des exigences discriminatoires fondées sur la nationalité ou le lieu de résidence. Les conditions générales d'accès à un service, qui sont mises à la disposition du public par le prestataire, ne contiennent pas de conditions discriminatoires en raison de la nationalité ou du lieu de résidence du destinataire, sans que cela ne porte atteinte à la possibilité de prévoir des différences dans les conditions d'accès lorsque.</p>	28/12/2009
BG	Art. 1 and 2 of the Protection Against Discrimination Act	Art. 1: This Act shall regulate the protection against all forms of discrimination and shall contribute to its prevention. Art. 2: The purpose of this Act shall be to ensure to every person the right to: 1. equality before the act; 2. equal treatment and opportunities for participation in public life; 3. effective protection against discrimination.	

Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
CY	Section 20(2) of the Freedom of Establishment of Service Providers and the Freedom of Movement of Services Law of 2010, Law 76(I)/2010.	Providers shall ensure that the general conditions of access to a service made available to the public 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.	16/07/2010
CZ	Pre-existing provision: Antidiscrimination Act No 198/2009 Coll., § 1/1 j), § 2 Consumer Protection Act No 634/1992 Coll., § 6	<p>§ 6 Zákaz diskriminace příjemců služeb</p> <p>(1) Poskytovatel služby je povinen zajistit, aby podmínky přístupu k poskytovaným službám nebyly diskriminační, zejména co se týče státní příslušnosti příjemců služeb nebo jejich místa bydliště.</p> <p>(2) Diskriminací není stanovení rozdílných podmínek přístupu ke službám na základě objektivních kritérií, zejména účtování dodatečných nákladů vzniklých v důsledku vzdálenosti nebo v důsledku technické povahy poskytování služby. Jednotná kontaktní místa</p>	Antidiscrimination Act: 01/12/2009 Consumer Protection Act/ 12/02/2008
DE	§ 5 <i>DL-InfoV</i> (Service Information Requirements Regulation)	The service provider shall not make public any conditions of access to a service that contain discriminatory provisions relating to the nationality or place of residence of the recipient. This shall not apply to differences in the conditions of access where those difference are directly justified by objective criteria.	17/03/2010
DK	Kap 4, §5 Lov om tjenesteydelser i det indre marked nr. 384 of 25 May 2009	<p>§ 5. A service provider may not subject a service recipient to discriminatory treatment based on the nationality, place of registered office or place of residence of the service recipient.</p> <p>Para. 2. Para. 1 does not preclude the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria</p>	28/12/2009

Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
EE	§ 15(2) of the European Union Services Directive Implementation Act	§15. Prohibition on discrimination of recipients (2) Also, the conditions of access to a service, which are made available to the public by the provider, shall not be discriminating on grounds of the nationality or place of residence of the recipient unless they are directly justified by objective criteria	28/12/2009
EL	Art. 21 of Law 3844/2010	2. The general conditions of access to a service made available to the public at large by a provider shall 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.	03/05/2010
ES	Article 16 (3) of Law 17/2009, of 23 November, governing the free access to and exercise of service activities (horizontal law implementing Services Directive),and  Article 4, paragraph 2, of Law 25/2009, of 22 December, that modifies 48 laws for its adaptation to Law 17/2009	Los prestadores de servicios no podrán imponer a los destinatarios requisitos ni condiciones generales de acceso a los servicios que sean discriminatorios por razón de su nacionalidad o lugar de residencia, sin que ello menoscabe la posibilidad de establecer diferencias en las condiciones de acceso directamente justificadas por criterios objetivos.	24/12/2009

<b>FI</b>	<p>Legal order was deemed to be in conformity with Article 20, paragraph 2, by virtue of the following provisions Constitution, 731/1999, (6 § equality);</p> <p>Non-discrimination Act, 21/2004, (6 § prohibition of discrimination);</p> <p>Administrative procedure act, 434/2003, (6 § Legal principles of administration);</p> <p>Criminal Act, 39/1889, (Chapter 11, 11 § Discrimination)</p>		
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Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
<b>FR</b>	<p>Article L. 420-1 Code de commerce prohibant les ententes anticoncurrentielles</p> <p>Article L. 420-2 Code de commerce relatif aux abus de position dominante</p> <p>Article L. 442-6 Code de commerce sur les pratiques restrictives de concurrence. For consumer transactions Article L. 122-1 Code consommation, Article R. 121-13 Code de consommation (sanctions).</p>		<p>10/12/1986 for provisions on competition law</p> <p>1/12/1986 for provisions on Code de la Consommation.</p>
<b>HU</b>	<p>Act LXXVI of 2009 on the general rules regarding access to and exercise of service activities, Article 11(1) and (2)</p>	<p>(1) In respect of the use of services provided in the framework of service activities, all kinds of discrimination based on the nationality, place of residence or registered office shall be prohibited, unless there are other, reasonably justified conditions based on objective consideration related to the nature of the service.</p> <p>(2) The general terms of contracts applied by the service provider for the use of the service constituting discrimination provided for under paragraph (1) shall be null and void.</p>	<p>01/10/2009</p>
<b>IE</b>	<p>Regulation 10 of the European Union (Provision of Services) regulations 2010 (S.I. No. 533 of 2010)</p>	<p>10. (1) A competent authority in the State shall not impose on a recipient a discriminatory requirement that is based on the recipient's nationality or place of residence.</p> <p>(2) Subject to paragraph (3), a provider who provides a service to the general public shall not discriminate in the conditions on which the service is provided to a recipient on the basis of the recipient's nationality or place of residence.</p> <p>(3) A provider may provide for differences in the conditions of access where those differences are directly justified by objective criteria.</p> <p>(4) A requirement or condition imposed in contravention of this Regulation has no effect.</p>	<p>16/11/2010</p>

Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
IT	Article 29(1) del Decreto Legislativo n. 59/2010, 'Attuazione della direttiva 2006/123/CE relativa ai servizi nel mercato interno' (horizontal law implementing the Services Directive)	<p>Art. 29 (Divieto di discriminazioni)</p> <p>1. Al destinatario non possono essere imposti requisiti discriminatori fondati sulla sua nazionalità o sul suo luogo di residenza.</p> <p>2. E' fatto divieto ai prestatori di prevedere condizioni generali di accesso al servizio offerto che contengano condizioni discriminatorie basate sulla nazionalità o sul luogo di residenza del destinatario, ferma restando la possibilità di prevedere condizioni d'accesso differenti allorché queste sono direttamente giustificate da criteri oggettivi.</p> <p>3. A decorrere dalla data di entrata in vigore del presente decreto sono abrogate le disposizioni legislative e regolamentari statali incompatibili con le disposizioni di cui al comma 1</p>	26/03/2010
LT	Article 11(3) of the Law on Services of the Republic of Lithuania	When establishing the general conditions for receiving services that are made available to the public, it shall be prohibited to impose requirements discriminating the recipients on grounds of nationality, permanent residence or Member State of the establishment, except when such requirements can be objectively justified	28/12/2009
LV	Law on the Free Provision of Services, Section 10	<p>Section 10. Rights of the service recipient</p> <p>(1) The service recipient's rights to receive a service shall not be restricted:</p> <p>1) by obliging him to obtain a permit in order to receive or use a particular service;</p> <p>2) by imposing a prohibition or restriction on him regarding the receipt of financial aid, if this right or scope of aid is dependent on the status of the service recipient concerned in Latvia or in those locations where the service is provided.</p> <p>(2) A service recipient has the right to receive a service which is not discriminative regarding his/her citizenship (nationality) or residence, except the cases, when the application of such conditions is clearly and distinctly formulated, objectively justified, is fair and honest.</p>	04/05/2010

Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
LU	Article 11 of Loi 24 mai 2011 relative aux services dans le marché intérieur (Horizontal law implementing the Services Directive)	Les exigences discriminatoires fondées sur la nationalité ou le lieu de résidence des destinataires sont interdites, y compris dans les conditions générales mises à disposition par les prestataires. Toutefois, les prestataires ont la possibilité de prévoir des différences dans les conditions d'accès lorsqu'elles sont directement justifiées par des critères objectifs.	24/05/2011
MT	Article 9 of ACT No. XXIII of 2009 to establish general provisions facilitating the exercise of freedom of establishment for service providers and the free movement of services in the internal market	9. Recipients and potential recipients of a service shall not be subjected to discriminatory requirements, including:(a) limitations to access to services in Malta through a provider's general conditions that contain discriminatory provisions relating to the nationality or place of residence of the recipient, provided that this does not preclude the possibility for a provider to provide for differences in the conditions of access where those differences are directly justified by objective criteria.	
NL	<p>Article 1 of the Dutch Constitution; •</p> <p>Article 1, paragraph 1, of the General Equal Treatment Act(definitions);</p> <p>Article 2, paragraph 1, of the General Equal Treatment Act;</p> <p>Article 7, paragraph 1, of the General Equal Treatment Act;</p> <p>Article 9 of the General Equal Treatment Act</p>	<p>• Article 1 of the Dutch Constitution: All which are present in The Netherlands, shall be treated equally in equal cases. Discrimination due to religion, affiliation, political opinion, race, sex or on any ground whatsoever, is prohibited.</p> <p>• Article 1, paragraph 1, (definitions) of the General Equal Treatment Act: 1. In this Act and the articles based thereupon the following applies: a. discrimination (in Dutch: onderscheid): direct and indirect discrimination as well as an order to that end; b. direct discrimination: discrimination between persons on the basis of religion, philosophy of life, political persuasion, race, sex, nationality, hetero- or homosexual inclination or civil state; c. indirect discrimination: discrimination based on other qualities or behaviour as referred to under b, which have a direct discriminatory effect.'</p> <p>• Article 2, paragraph 1, of the General Equal Treatment Act: '1. The prohibition of discrimination as provided for in this Act does not apply with regard to indirect discrimination if that discrimination can be objectively justified by a legitimate goal and the means to attain that goal are proportionate and necessary.'</p> <p>• Article 7, paragraph 1, of the General Equal Treatment Act:</p>	<p>Article 1 of the Dutch Constitution (current wording): 2/03/1983</p> <p>Article 1, paragraph 1, General Equal Treatment Act (current wording): 1st of September 1994 as last modified by Act applicable from 1/04/2004</p> <p>Article 2, paragraph 1, of the General Equal Treatment Act (current wording): 1/09/1994 as last modified by Act applicable from 1/04/2004</p> <p>Article 7, paragraph 1, of the General Equal Treatment Act (current</p>

		<p>1. Discrimination is prohibited when offering or providing access to goods or services and when closing, excuting or terminating such a contract, as well as when giving career advice and advice on school choice or choice of a profession, when this occurs:</p> <p>a. in the exercise of a profession or a business,  b. by public authorities  c. by organisations active in the field of social housing, welfare, health, culture or education, and  d. by natural persons which do not act in the exercise of a profession or a business, when offering occurs in public.</p> <p>Note: Paragraphs 2 and 3 of Article 7 of the General Act contain some exceptions in the fields of education by private schools which are based on religious principles and when dealing with purely private relationships where no economic activity is concerned.</p> <ul style="list-style-type: none"> <li>• Article 9 of the General Equal Treatment Act:  ‘Contractual provisions in breach of this Act are null and void.’</li> </ul>	<p>wording): 1/09/1994 as last modified by Act applicable from 1/04/2004  Article 9 of the General Equal Treatment Act (current wording):  1/09/1994</p>
<b>PL</b>	Article 9 of the Act on providing services on the territory of the Republic of Poland	A provider shall ensure that general conditions of access to a service do not discriminate a recipient on the grounds of citizenship or place of residence.	10/04/2010
<b>PT</b>	Article 19 of Decree-Law 92/2010, of 26 July 2010 (horizontal law implementing Services Directive)	<p>Article 19  Non-discrimination of recipients</p> <p>1 — Service recipients shall not be made subject to discriminatory requirements based on their nationality, place of residence or location of the registered office.</p> <p>2 — The general conditions of service provision defined by the service provider shall not contain discriminatory provisions relating to the nationality, place of residence or location of the registered office of the service recipient, except where those differences are directly justified by objective criteria.</p> <p>3 — The law shall not make recipients subject to any conditions, limitations, prohibitions or other requirements which restrict the use of a service supplied by a provider established in another Member State.</p> <p>4 — “Recipient” shall be deemed to mean any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts, or any legal person established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service.</p>	01/10/2010



Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
<b>RO</b>	Government Emergency Ordinance no. 49/2009, Art. 20(2) (Section IV — Rights of the services' beneficiaries, Chapter IV — Freedom to provide services)	(1) The providers may not include discriminatory requirements based on his citizenship or nationality, or the place of residence or the registered office of the recipient under the general conditions of access to a service, which are made available to the public. (2) Providers may provide for different conditions of access where they are justified by objective criteria. (3) The clauses or declarations containing discriminatory conditions are automatically void.	05/06/2009
<b>SE</b>	Article 20, Act (2009:1079) on services in the Internal Market	En tjänsteleverantör får inte för tillhandahållandet av tjänster ställa upp allmänna villkor som diskriminerar tjänstemottagare på grund av nationalitet eller bosättningsort, om detta inte kan motiveras på objektiva grunder.	27/12/2009
<b>SI</b>	Article 17 of Decree Promulgating the Services in the Internal Market Act (ZSNT)	Contractual and general conditions for access to services which are made available to the public at large by a service provider may not contain discriminatory provisions relating to the nationality or place of residence of the service recipient.	30/03/2010
<b>SK</b>	Act No 136/2010 Coll. on services in the internal market and amending and supplementing certain acts — Art. 1 Section 10	A service provider shall be obliged to ensure that the same conditions of access to services provided apply to all recipients of services regardless of the nationality, place of permanent residence or registered office of the recipient of the service.	01/06/2010

Member State	Implementing Provision in national legal order	Wording of implementing provision (or, where available, English translation)	Date of entry into force
UK	Regulations 30(2) and 30 (3) of the Provision of Services Regulations 2009	(1) A competent authority may not subject recipients of a service who are individuals to discriminatory requirements based on their nationality or place of residence. (2) The provider of a service may not, in the general conditions of access to a service which the provider makes available to the public at large, include discriminatory provisions relating to the place of residence of recipients who are individuals. (3) Paragraph (2) does not apply to differences in conditions of access which are directly justified by objective criteria	28/12/2009
<b>EEA-EFTA countries</b>			
IS	Art 15, Act 76/2011 on services in the internal market of the European Economic Area	The recipients of services shall not be made subject to discriminatory requirements based on their nationality or place of residence, and providers are prohibited from including in their terms of service discriminatory provisions relating to the nationality or place of residence of recipients. In exceptional circumstances, different conditions of access to a service may be established, provided that the differences are justified by objective criteria.	29/06/2011
LI	Article 21 of the Services Act (Bericht und Antrag der Regierung betreffend die Schaffung eines Gesetzes über die Erbringung von Dienstleistungen (Dienstleistungsgesetz))	Der Dienstleistungserbringer darf den Zugang zu einer Dienstleistung nicht in diskriminierender Weise von der Staatsangehörigkeit oder dem Wohnsitz des Dienstleistungsempfängers abhängig machen. Unterschiede bei den Zugangsbedingungen sind nicht diskriminierend, wenn sie durch objektive Kriterien gerechtfertigt sind.	

<p><b>NO</b></p>	<p>§ 19 (2), second and third sentence of Lov 2009-06-19 nr. 103 om tjenestevirksomhet (Norwegian Services Act)</p>	<p>Service recipients cannot be subject to requirements that limit their right to receive services from a provider established in another EEA State. Service recipients from other EEA States cannot be subject to discriminatory requirements on grounds of their nationality, residence or establishment state. Similar discrimination must not occur in a service providers' general conditions of access to a service. The first and second sentences do not prevent the application of special conditions for the receipt of the service when they are justified by objective factors.</p>	<p>28/12/2009</p>
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## ANNEX II

### Competent Authorities

<b>Member State</b>	<b>Competent authority — Consumer enforcement</b>	<b>Competent authority — Business enforcement</b>
<b>AT</b>	Bezirksverwaltungsbehörde	Bezirksverwaltungsbehörde
<b>BE</b>	SPF Economie, P.M.E., Classes moyennes et Energie — Direction générale du Contrôle et de la Médiation	SPF Economie, P.M.E., Classes moyennes et Energie — Direction générale du Contrôle et de la Médiation
<b>BG</b>	Commission on Consumer Protection	Commission on Consumer Protection
<b>CY</b>	Consumer and Competition Protection Service (CCP)	National courts
<b>CZ</b>	Courts, Ombudsman, Czech Trades Inspectorate, ECC	National courts
<b>DE</b>	7 000 trade and business authorities, chambers of auditors, lawyers and tax consultants	
<b>DK</b>	Forbrugerombudsmanden (Danish Consumer Ombudsman)	Forbrugerombudsmanden (Danish Consumer Ombudsman)

<b>Member State</b>	<b>Competent authority — Consumer enforcement</b>	<b>Competent authority — Business enforcement</b>
<b>EE</b>	Estonian Consumer Protection Board (although no specific tasks under Art 20 have been delegated to it by law)	National courts
<b>EL</b>	Consumers Ombudsman	Enterprise Europe Network in Greece
<b>ES</b>	Consumer protection regional authorities to be found at  <a href="http://aplicaciones.consumo-inc.es/cidoc/Consultas/dirMapas.aspx?tabla=dirconsum">http://aplicaciones.consumo-inc.es/cidoc/Consultas/dirMapas.aspx?tabla=dirconsum</a>	Sectoral competent authorities responsible at national or regional level
<b>FI</b>	Civil or criminal courts depending on the nature of the case. In some circumstances the Chancellor of Justice, Parliamentary Ombudsman, Ombudsman for equality or Ombudsman for minorities may also be competent.	Civil or criminal courts depending on the nature of the case. In some circumstances the Chancellor of Justice, Parliamentary Ombudsman, Ombudsman for equality or Ombudsman for minorities may also be competent.
<b>FR</b>	Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF), Ministère de l'économie, des finances et de l'industrie	National courts

<b>Member State</b>	<b>Competent authority — Consumer enforcement</b>	<b>Competent authority — Business enforcement</b>
<b>HU</b>	Equal Treatment Authority (Egyenlő Bánásmód Hatóság-EBH), Judicial authority	Hungarian Competition Authority (Gazdasági Versenyhivatal — GVH), Equal Treatment Authority, Judicial authority
<b>IE</b>	Sectoral competent authorities responsible for the enforcement of all provisions pertaining to the implementation of the Services Directive for that sector	Sectoral competent authorities responsible for the enforcement of all provisions pertaining to the implementation of the Services Directive for that sector
<b>IT</b>	ANTITRUST (autorità garante della concorrenza e del mercato)  Civil courts	ANTITRUST (autorità garante della concorrenza e del mercato)  Civil courts
<b>LT</b>	State Non Food Products Inspectorate (consumer rights protection authority)	National courts
<b>LV</b>	Ombudsman  Civil courts	National courts
<b>LU</b>	Collective and single legal actions in front of Courts in the scope of articles L.121-1 à 122-8 and L.313-1 and L.313-2 du Code de la consommation	Conseil de la concurrence

<b>Member State</b>	<b>Competent authority — Consumer enforcement</b>	<b>Competent authority — Business enforcement</b>
<b>MT</b>	Office for Consumer Affairs, Malta Competition and Consumer Affairs Authority	Office for Consumer Affairs, Malta Competition and Consumer Affairs Authority
<b>NL</b>	Equal Treatment Commission	Equal Treatment Commission
<b>PL</b>	Civil courts	Civil courts
<b>PT</b>	<p>ASAE — Autoridade para a Segurança Alimentar e Económica</p> <p>IRAE — Inspeções Regionais de Actividades Económicas for the Azores and Madeira Regions.</p> <p>For professional services under a public professional association, the relevant public professional association</p>	<p>ASAE — Autoridade para a Segurança Alimentar e Económica, IRAE</p> <p>Inspeções Regionais de Actividades Económicas for the Azores and Madeira Regions</p> <p>For professional services under a public professional association, the relevant public professional association.</p>
<b>RO</b>	National Authority for Consumers Protection	National courts
<b>SE</b>	Sectoral competent authorities responsible for the enforcement of all provisions pertaining to the implementation of the Services Directive for that sector	Sectoral competent authorities responsible for the enforcement of all provisions pertaining to the implementation of the Services Directive for that sector
<b>SI</b>	Market Inspectorate of the Republic of Slovenia	National courts
<b>SK</b>	Slovak Trade Inspection	Slovak Trade Inspection



<b>Member State</b>	<b>Competent authority — Consumer enforcement</b>	<b>Competent authority — Business enforcement</b>
<b>UK</b>	Office of Fair Trading, Local Authority Trading Standards Authorities and the Department of Enterprise, Trade and Investment in Northern Ireland	National courts
<b>EEA-EFTA countries</b>		
<b>IS</b>	Consumer Agency	National courts
<b>LI</b>	Office of Trade and Transport	Office of Trade and Transport
<b>NO</b>	Consumer Ombudsman	National courts