

Do Invisible Borders Still Restrict Consumer Access to Services in the EU?

Analysis of Article 20.2 of the Services Directive related consumer complaints reported to ECC-Net between 2013 and 2015



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About ECC-Net

ECC-Net is a network of centres present in thirty European countries which offers free information, advice and assistance to consumers on cross-border consumer transactions. ECC-Net is co-funded by the European Union and by the Member States, Norway and Iceland. From the time of its foundation in 2005 up to the end of 2014 ECC-Net handled more than 650,000 consumer contacts.¹ Given its focus on business-to-consumer problems when shopping cross-border, either in person or via distance purchases (mainly e-commerce), ECC-Net has unparalleled access to the problems which consumers experience when shopping for goods or services in the Internal Market. For this reason the Network provides input to the European Commission and policy makers at national level on consumer policy issues arising from the problems which ECC-Net receives. As part of our awareness raising initiatives on consumer rights, ECC-Net engages in joint network projects which assemble and analyse data derived from the complaints received throughout the network on specific areas of consumer detriment.²

The report on the Services Directive is an analysis of consumer complaints reported to ECC-Net between January 2013 and December 2015. The data in this respect was gathered through the questionnaires completed by the members of the working group integrated by ECC Ireland, Austria, Netherlands, Norway, Sweden and the UK and by participating ECCs: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. The views and opinions expressed in this report are those of the working group and do not necessarily reflect the views of any contributor or co-financing organisations.

Abbreviations

ADR	Alternative Dispute Resolution
CJEU	the Court of Justice of the European Union
ECC	European Consumer Centre
ESCP	European Small Claims Procedure
EU	European Union
IP	Intellectual Property
PSC	Point of Single Contact
SME	Small and Medium Enterprise
VAT	Value Added Tax
TFEU	Treaty on the Functioning of the European Union

¹ 10 years serving Europe's consumers, the European Consumer Centres Network Anniversary report 2005–2015, available at http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/docs/ecc_net_anniversary_report_2015_en.pdf

² ECC-Net reports available at http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/reports/index_en.htm

Executive Summary

“It’s not a dream. It’s not a vision. (...) It’s for real. And it’s only five years away”, with those words Margaret Thatcher referred to a Single Market during her speech opening “Europe Open for Business” campaign in 1988.³ Emphasising the role of business in meeting the challenge of the Single Market she stated *“It’s your job, the job of business, to gear yourselves up to take the opportunities which a single market of nearly 320 million people will offer. Just think for a moment what a prospect that is. A single market without barriers – visible or invisible – giving you direct and unhindered access to the purchasing power of over 300 million of the world’s wealthiest and most prosperous people. Bigger than Japan. Bigger than the United States. On your doorstep.”* This statement remains equally relevant today. The difference is today the EU Single Market accounts for 500 million consumers.

Launched in 1992, the Single Market is one of the greatest achievements of the EU. With its potential for creating growth, it has generated many opportunities for consumers and traders alike. Services alone account for over 70% of all economic activity in the EU.⁴ Companies enjoy the freedom of establishment and freedom to provide services anywhere in the EU. Why do they still serve a very limited number of Member States and miss out on opportunities the Single Market has created for them? Only 8% of EU companies sell cross-border and only 15% of consumers buy online from another EU country.⁵ Offering cross-border services and scaling up activities can be challenging, especially for small and medium-sized enterprises. Aimed in particular at removing barriers which create obstacles to the freedom of establishment and to the freedom to provide and receive services within the EU, the adoption and subsequent implementation of the Services Directive has been an important step in improving the functioning of the Single Market for services. It simplified the cross-border provision of services into other EU countries, strengthened the rights of service recipients and ensured easier access to a wide range of services. However, consumer complaints reported to ECC-Net show that efforts to remove unjustified regulatory restrictions to the provision of services may not necessarily translate into benefits for service recipients given certain business practices serve to create artificial borders within the Single Market and limit the ability of European consumers to shop across borders. Practices in question may run contrary to the principle of non-discrimination based on the nationality or place of residence of service recipients, as established by Article 20.2 of the Services Directive and may be contrary to the objectives of the Single Market.

By examining typical situations in which consumers are confronted with different treatment or refusal to provide a service, the report seeks to analyse business practices observed and reasons brought forward by traders for the application of different treatment. The main objectives of the report are threefold:

- Analyse work done by ECC-Net under Article 21 and the main problem areas under Article 20.2 of the Services Directive;
- Look into issues relating to enforcement of the non-discrimination principle of Article 20.2.;
- Raise awareness of the protections offered to consumers under the Services Directive and offer guidance on how to make a complaint and who to address a complaint to.

Between January 2013 and December 2015 ECC-Net received 532 Article 20.2-related complaints. Whilst more consumers seem to be aware of their rights and expect to use services from everywhere wherever they are in the EU, they still face restrictions and are regularly confronted with refusal to deliver or higher prices based on their nationality or place of residence.

The largest number of Article 20.2 related complaints originated from consumers based in Austria, Italy and Ireland.⁶ More than 82% of cases of different treatment reported to ECC-Net appeared to be related to consumers’ residence rather than nationality and took place mostly in relation to online transactions; with little evidence being gathered to suggest that consumers face similar difficulties in the offline world.

Situations whereby consumers were confronted with price or service differentiation occurred mostly in relation to the purchase of goods, such as electronic goods, household appliances, vehicles, clothes, books, music or data downloads. Such complaints amounted to nearly 68% of all complaints received. Cases attracting the second largest number of consumer complaints, accounting for nearly 25% of cases dealt with, were complaints received in relation to the provision of services in the field of tourism and leisure, including those provided by travel agencies, accommodation providers or amusement parks, while the sector attracting the third largest number of consumer complaints, amounting to more than 5% of all cases received, was the rental and leasing services sector.

³ <http://www.margaretthatcher.org/document/107219>

⁴ http://ec.europa.eu/growth/single-market/index_en.htm

⁵ European Commission – Fact Sheet Boosting e-commerce in the EU, available at [http://europa.eu/rapid/press-release MEMO-16-1896_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1896_en.htm)

⁶ 138, 68 and 66 complaints respectively.

Service providers used various methods to implement service and price differentiation based on consumers' nationality or place of residence, but mainly by (1) blocking access to websites, (2) automatic re-routing to another website, (3) refusing delivery or payment and (4) applying different prices or sale conditions. Service and price differentiation were implemented by traders either unilaterally or as a consequence of an agreement with their suppliers or distributors that did not allow them to sell to users outside of an allocated territory.

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

More than 45% cases, that is 243 cases out of 532 received, required ECC-Net's active intervention on behalf of consumers. 12 cases were still active at the time of writing. As regards the outcome of the remaining 231 complaints pursued on behalf of consumers, 84 cases were resolved successfully. In 31 cases service providers changed their business practice following ECC-Net's intervention.

Complaints received by ECC-Net confirm that the principle of non-discrimination of Article 20.2 has not been effective in combatting unjustified service differentiation and it has not reduced legal uncertainty. Whereas there may be objective justifications for differential treatment of consumers, it is unclear what constitutes discrimination according to Article 20.2, and what the consequences are for the parties involved if traders allegedly engage in practices that artificially partition markets within the EU to the detriment of consumers. Complaints reported to ECC-Net show that consumers too often face restrictions with no justification while the reasons invoked by traders are unconvincing and lack objective criteria.

Out of 243 cases which required ECC-Net's active intervention, 54 were reported to the relevant enforcement authorities, but only 16 of all these referrals resulted in a decision made by an enforcement authority. Obtaining redress on an individual basis proved extremely challenging for consumers. The report found there is little awareness of how to complain and who to address a complaint to. As the lack of effective enforcement of the non-discrimination principle of Article 20.2 constitutes one of the major barriers to making the Services Directive work in practice, the report looks at ways to facilitate better communication between consumers and relevant enforcement entities for Article 20.2. The establishment of a single enforcement network of relevant enforcement authorities (preferably one per country), and the development of a standardised complaint form are some of the suggestions made to improve complaint handling procedures.

Given that unjustified market fragmentation business practices cannot always be prevented on the grounds of a general principle set out by Article 20.2, ECC-Net welcomes the European Commission's acknowledgment that further action is necessary to give effect to this principle and develop rules against discrimination based on the nationality or place of residence of consumers. We also welcome initiatives of the Digital Single Market and Single Market Strategies and the Commission's forthcoming legislative proposals aimed at breaking down barriers to business cross-border activity and thus laying the groundwork for the creation of the right conditions for improved access to services for consumers across the EU. In this respect, the adoption of the e-commerce package⁷ is seen as a major step forward in tackling geo-blocking, making cross-border parcel delivery more affordable and efficient, and promoting customer trust through better protection and enforcement.

⁷ Part of the European Commission's strategy to establish the Digital Single Market, e-commerce package is composed of (1) a legislative proposal to address unjustified geo-blocking and other forms of discrimination on the grounds of nationality, residence or establishment, (2) a legislative proposal on cross-border parcel delivery services to increase the transparency of prices and improve regulatory oversight and (3) a legislative proposal to strengthen enforcement of consumers' rights and guidance to clarify, among others, what qualifies as an unfair commercial practice in the digital world. More information available at: <https://ec.europa.eu/digital-single-market/en/boosting-e-commerce-eu>

I. Introduction

The adoption and subsequent implementation of the Services Directive has been crucial in improving the functioning of the Single Market for services⁸. The Services Directive not only recognises the significance of the freedom of suppliers to provide services but gives equal importance to the freedom of recipients to receive them. By eliminating the legal obstacles preventing providers from offering their services in other Member States and fostering cross-border economic activity the Directive aims to provide better choice, improve quality and provide lower prices for service recipients, especially consumers. In this context, the principle of non-discrimination based on nationality or place of residence as established by Article 20.2 of the Directive is paramount to enhance the rights of service recipients and strengthen their confidence to consider business from anywhere in the EU. The non-discrimination clause of Article 20.2 of the Services Directive requires 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.”*

The primary role of ECC-Net is to enhance consumer confidence in the internal market by providing information and advice to the public on their rights as consumers, as well as assistance in the resolution of cross-border consumer disputes. Accordingly, our role under the Services Directive is not restricted to general information on consumer protection rules when engaging in cross-border transactions, ECC-Net also facilitates amicable dispute resolution by actively pursuing consumer complaints which come under Article 20.2 of the Directive.

While consumers should no longer be confronted with a refusal to supply, a higher price or a different contract term on the grounds of their nationality or place of residence, they still face unjustified restrictions when attempting to avail of services cross-border. ECC-Net continue to receive complaints from consumers feeling frustrated by certain business practices. An example of the case dealt with by ECC-Net just recently⁹ concerned a British consumer who needed

to cancel his order for tickets for an international TV song contest placed with a Swedish organiser. The consumer was advised that only consumer residents in Sweden could cancel their orders for a refund (subject to a cancellation fee). Following ECC Sweden's intervention, the organiser not only allowed the consumer to cancel his order but made relevant changes to their terms and conditions.

While the high volume of consumer complaints can be resolved with the assistance of ECC-Net, the outcome of any liaison with the disputing parties may ultimately depend on the trader's willingness to cooperate. As ECC-Net has no enforcement powers to impose any sanction where consumer legislation is contravened, or the resources to investigate complex cases, taking an active role by competent authorities in examining potential breaches of the non-discrimination clause is crucial for Article 20.2 to take its full effect. Legislation should not exist in a vacuum and therefore, it is axiomatic that consumers will not be able to enjoy the protection offered by the Services Directive if no further action is taken nor rules developed to effectively deal with potential infringements of the non-discrimination principle. Unfortunately, the lack of effective enforcement of the non-discrimination principle of Article 20.2 constitutes a major barrier to making the Services Directive work in practice.

Given the importance of these issues and ECC-Net's unique ability to document consumer complaints based on data collected in the ECC-Net Case Handling Database, the IT Tool, ECC-Net decided to undertake a Joint Project to investigate the work of the Network under the Services Directive and the main problems encountered by consumers relating to the principle of non-discrimination by nationality and place of residence. ECC Ireland is the project leader, assisted by a working group made up of ECCs Austria, Netherlands, Norway, Sweden and the UK.

⁸ Commission Communication on the implementation of the Services Directive: A Partnership for new growth in services 2012–2015, p.2, available at http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_148_en.pdf

⁹ Complaint in question was lodged with the UK ECC in 2016 and was then brought to the attention of ECC SE, who contacted the trader on behalf of the consumer.

II. Objectives and Methodology

The report is designed to update our previous ECC-Net report on the Services Directive.¹⁰ This report focused on Article 20.2 complaints in particular and assessed the objective reasoning claimed by traders which exempt them from breaches of the Services Directive based on the place of nationality or residence of a consumer. With uncertainty still being present in relation to the application of Article 20.2 of the Services Directive and the broad justifications allowed for different treatment by traders and the enforcement bodies that are in place, this report is necessary in order to shed some light on these areas of concern. The report analysed queries and complaints received by the network falling under Article 20.2 and Article 21 of the Services Directive between January 2013 and December 2015.

Similar to ECC-Net's previous report there are still issues with consumers' awareness of their protection and rights under the Services Directive. This report, therefore, is designed to continue to raise awareness of a consumer's rights both under Article 21 and Article 20.2 of the Services Directive.

At present there is still a lack of clarity in many Member States about enforcement bodies for Article 20.2.¹¹ The last report addressed issues relating to the lack of enforcement and this project attempts to raise awareness of the relevant enforcement bodies that are in place which consumers can raise their complaints with. To facilitate this objective an annex of enforcement bodies for the Services Directive has been compiled with information provided on the relevant sanctions which are in place in the various Member States.¹²

The project will focus mainly on the complaints falling under Article 20.2 of the Services Directive relating to the principle of non-discrimination by nationality and place of residence of the service recipient. The project will also offer a brief overview of contacts received by those members of ECC-Net who were designated by their Member State as Article 21 Contact Points under the Directive, with a role to provide general information and assistance on the legal requirements, in particular consumer protection rules, and redress procedures applicable in other Member States.

To facilitate the objectives of the report, the working group and participating ECCs as a starting point analysed all consumer queries and complaints pertaining to the Services Directive received by ECC-Net between January 2013 and December 2015:

- It compiled a brief review of consumer requests for information falling within the scope of Article 21 of the Services Directive;
- It also compiled an in-depth review of complaints handled by ECC-Net which fall within the scope of Article 20.2 of the Services Directive.

Data was then gathered through a number of questionnaires which were completed by the members of the working group and participating ECCs for the project. These questionnaires required members to carry out in-depth analysis of individual cases, in particular assessing traders' reasons for applying differential conditions of access to the service concerned on the grounds of the residence or nationality of the consumer. The questionnaires focused on Services Directive complaints handled by ECC-Net and on the competent authorities for enforcement which are in place in Member States, with particular focus on the cases which were reported to these enforcement authorities.

A survey for consumers was compiled asking them whether they had been subject to discrimination based on their nationality or place of residence in order to provide a brief overview of the dimension of discrimination throughout Europe. Similarly, an online mystery shopping survey was also completed regarding traders' compliance with Article 8.3 of the Consumer Rights Directive.¹³ Article 8.3 of the Consumer Rights Directive ensures that trading websites should state clearly whether any delivery restrictions apply at the beginning of the ordering process.

¹⁰ Published in 2013 as Enhanced Consumer Protection – the Services Directive 2006/123/EC. Analysis of Article 20.2 and Article 21 related consumer complaints reported to ECC-Net between 2010 and 2012, available at http://www.eccireland.ie/wp-content/uploads/2013/07/ServicesDirective_FINAL_VERSION.pdf

¹¹ Similar to the situation when the last report was produced.

¹² See Annex I of this report

¹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights

III.

Role of ECC-Net in the Application of Article 20.2 and 21 of the Services Directive

1. ECC-Net's role under Article 21.1

Article 21 established the right of service recipients to obtain, in their home Member State, general information and assistance on the legal requirements, in particular consumer protection rules, and on redress procedures applicable in other Member States so that service recipients could have enhanced confidence when engaging in cross-border transactions. In 22 countries, the body assigned to provide this information to consumers was ECC-Net.¹⁴

ECC-Net continues to put in place arrangements whereby consumers can obtain:

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

> *An Austrian consumer wanted to conclude a contract with a Hungarian trader for laying floor tiles, and needed to know what to look for before entering into a contract. The consumer was advised about the requirements the trader has to fulfil to provide a service, (what to expect from a service provider and what his consumer rights are if something happens to go wrong).*

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

> *An Irish consumer was planning on renting a car while on holiday in Spain. To avoid unexpected surprises the consumer was looking for car rental tips and wanted to know who he could turn to if he experienced problems with a car rental company abroad. The consumer was provided with advice on what to look out for before hiring a vehicle, on collection of the vehicle and after the vehicle is returned. He was also advised that ECC-Net may be in position to offer further assistance if the consumer happened to run into difficulties in connection with his car rental. Lodging a complaint with the European Car Rental Conciliation Service (ECRCS) would also be possible if the car rental company was subscribed to the ECRCS scheme.*

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

> *An Irish consumer purchased a property in France, but the consumer feared that it did not comply with the relevant fire safety regulations (the requirement to have a fire safety certificate, the requirement to have illuminated emergency/ fire exit signs, the requirement to have emergency lighting etc.). ECC Ireland provided the contact details of the relevant authority in France that could offer the consumer the required assistance (Association Française de Normalisation) and advised he contact the local town hall for further orientation.*

While Article 21 does not require the designated information bodies to have detailed knowledge of other Member States' legislation or to have at hand all the relevant information immediately, it does require them to provide information requested by service recipients within a reasonable time and to ensure that up-to-date information is provided. In order to comply with the above obligations and ensure that measures are put in place for effective cooperation, ECC-Net continues to establish good lines of communication with the bodies providing Article 21 services in other Member States.

¹⁴ Countries where body assigned for Article 21 was ECC-NET: Austria, Bulgaria, Croatia, Cyprus, Denmark, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Norway, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, UK. Countries where body assigned for Article 21 was not ECC-NET: Belgium, Bulgaria, Czech Republic, Finland, Germany, Greece, Iceland, Liechtenstein, Poland and The Netherlands.

2. ECC-Net's role under Article 20.2

Along with giving general information relating to rights of service recipients under Article 21, ECC-Net has a further role under Article 20.2 in providing assistance to consumers in the form of giving them more detailed information and advice on the legal rights and protection offered by the Services Directive and how these rights should be brought to the attention of service providers. ECC-Net also handles service recipients' complaints on their behalf contacting service providers where suitable.

> *An Irish consumer attempted to buy a bicycle online from a specialised bike shop based in the UK but the purchase was refused. The trader advised the consumer that some suppliers allow them to ship bikes internationally but others do not, and offered to ship the bike to an address in Northern Ireland instead. Upon contacting ECC-Net for further advice, the consumer was advised that refusal to provide a service based on the place of residence of the consumer is prohibited by Article 20.2 of Directive 2006/123/EC on Services in the Internal Market, unless differences are directly justified by objective criteria. The consumer was also advised that certain types of distribution agreements between manufacturers and retailers may be allowed under EU law if certain requirements are met and that this principle requires an individual assessment. The consumer was instructed to seek clarification from the trader and revert back to ECC if further assistance was required.*

Article 20.2 requires 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". In this regard, ECC-Net by virtue of advising service recipients on their rights and by handling recipients' cases ensures that service providers do not impose restrictions based on a recipient's nationality or place of residence in their terms of business unless this can be justified by objective criteria. ECC-Net's role is to bring the protection and rights offered by the Services Directive to the attention of service recipients and service providers alike and to remind traders of their obligations under the Service Directive by virtue of the cases received by our Network which helps contribute to the concept of the single market in the process. It goes without mentioning of course that traders must also be advised of any possible breaches of the Services

Directive that they could be incurring. Record is taken of any objective criteria claimed by service providers which allow for such discrimination based on a service recipient's nationality or place of residence.

> *An online purchase of clothing items by a consumer resident in Ireland was refused by a Germany based retailer. While it was possible for the consumer to buy from one of the retailer's shops located in Ireland, their online shop would not deliver to Ireland. Having contacted the trader for clarification, the consumer was advised that online orders could only be delivered to the UK or other European countries but then if the consumer placed an order for delivery to one of those countries his bank account details would not match the address to which the item would be delivered and the shop may refuse to accept the order. The consumer felt he had no other option but to seek assistance from ECC-Net. In turn the consumer was advised as per his entitlements under Article 20.2 of the Services Directive and asked to supply in the relevant documentation, in case further assistance could be offered and the trader contacted on his behalf.*

A key feature of ECC-Net's role under Article 20.2 of the Services Directive is to inform the enforcement authorities which are in place in various Member States of any possible breaches of the Services Directive for the purposes of possible enforcement against these service providers. As ECC-Net enjoys no powers of enforcement itself it must rely heavily on the relevant enforcement authorities in order to fulfil its role under Article 20.2 of the Services Directive.

> *A French consumer complained to ECC-Net about a car rental company based in Belgium and their policy requiring consumer residents outside Belgium to take out an additional insurance in order to rent a car. The case was subsequently reported to the competent enforcement body in Belgium, who initiated proceedings against the trader resulting in the trader changing their terms and conditions.*

IV. The Scope of the Application of the Services Directive

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

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

1. Services included within and excluded from the scope of the Services Directive

As indicated above, the Services Directive covers the provision of a wide variety of sectors ranging from traditional activities to knowledge-based services, without prejudice to more specific provisions with regard to specific sectors or activities provided for in EU law, which shall prevail in the event of conflict with the Services Directive. Whilst not exhaustive the following can be mentioned as examples which are included in its scope:

- Distribution of goods and services, such as online and offline retail sale of products and services, e.g. electronic goods, DIY products, music downloads;
- Services in the field of tourism, such as services provided by travel agencies;
- Leisure services, such as services provided by sports centres and amusement parks;
- Rental and leasing services, such as car rental;
- Accommodation and food services, such as provided by hotels, restaurants and caterers;

- Activities of most regulated professions, such as legal and tax advisers, architects, engineers, accountants and surveyors;
- Construction services and crafts;
- Business-related services, such as office maintenance, management consultancy, event management, recovery of debts, advertising and recruitment services;
- Training and education services;
- Real estate services;
- Services in the area of installation and maintenance of equipment;
- Information services such as web portals, news agency activities, computer programming activities, publishing; and,
- Household support services, such as cleaning, gardening services and private nannies.

The Services Directive explicitly excludes a number of services from its scope¹⁸:

- Non-economical services of general interest;
- financial services;
- electronic communications services and networks with respect to matters covered by other EU instruments;¹⁹
- transport services falling within the scope of Title VI of the Treaty on the Functioning of the European Union (TFEU);
- healthcare and pharmaceutical services provided by health professionals to assess, maintain or restore the state of patients’ health where those activities are reserved to a regulated health profession;
- temporary work agencies’ services;
- private security services;
- audio-visual and radio broadcasting services;
- gambling activities;
- certain social services provided by the State, by providers mandated by the State or by charities recognised by the State;
- services provided by notaries and bailiffs appointed by an official act of government.

The Services Directive does not apply to the field of taxation, as per Article 2.3 of the Directive.

¹⁵ Article 57 of TFEU.

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

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

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

¹⁹ Namely Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC.

2. Retail sale of goods

Despite the fact that the Commission has already clarified²⁰ that under the Services Directive the concept of ‘service’ is to be interpreted broadly and has brought retail within the concept of a service, and thus within the scope of the Services Directive, many service providers as well as relevant enforcement authorities argue that the retail sector does not fall within the scope of the Directive.

In one of the cases handled by ECC-Net, where clarification as to the reasons for not supplying the goods was sought on behalf of the consumer, the trader responded stating “[the company] takes the view that Directive 2006/123/EC (the ‘Services Directive’) does not apply to goods sold on-line. It has been established at EU level that regulatory barriers in Europe affected trade in services more than trade in goods. As such, the objective of the Services Directive (...) was to facilitate trade by removing the barriers that exist due to differing regulatory requirements for service provision within Europe. The Services Directive specifically states that it is not applicable to the free movement of goods (...)”. The trader then quoted recital 76 of the Services Directive stating that [t]his Directive does not concern the application of Articles 28 to 30 of the Treaty relating to the free movement of goods. The restrictions prohibited pursuant to the provision on the freedom to provide services cover the requirements applicable to access to service activities or to the exercise thereof and not those applicable to goods as such. However, as pointed out in the *Handbook on the implementation of the Services Directive*, in the section on the relationship with the free movement of goods,²¹ “(...) whereas the manufacturing of goods is not a service activity, there are many activities ancillary to them (for example retail, installation and

maintenance, after-sale services) that do constitute a service activity and should therefore be covered by the implementing measures”. As the CJEU has remarked in Case C-420/13²² “the retail trade of goods includes, in addition to the sale itself of goods, other activities of the retail trader, such as selecting an assortment of goods offered for sale and a variety of services aimed at inducing the consumer to purchase those goods from the trader in question (...)”.

As indicated in ECC-Net’s previous report on the Services Directive, those who lack awareness of the existing provisions or fail to properly interpret the existing rules are not only service providers but often competent national authorities. The *Guidance for Business on the Provision of Services Regulations* published by the Department for Business, Innovation and Skills in the UK in 2009 may lead service providers to take the view that retail is not covered by the Services Directive.²³ Trading Standards in the UK, contacted by the UK ECC in connection with the case handled in 2013 concerning a potential breach of Article 20.2 of the Services Directive, was of the opinion that since the contract the case pertained to was a contract for the provision of goods, it was not covered by the Provision of Services Regulations.²⁴

One of the questions recently referred for a preliminary ruling to the CJEU by the Dutch Raad van State (Case C-31/16²⁵) reads: Should the term ‘service’ in Article 4, paragraph 1, of the Services Directive be interpreted as meaning that retail trade consisting of the sale of goods, such as shoes and clothing to consumers is a service to which the provisions of the Services Directive apply under Article 2(1) of that Directive? In light of the uncertainty surrounding the scope of the Services Directive and whether retail trade of goods falls within it, the CJEU’s ruling in this respect would be welcomed.

²⁰ Commission Staff Working Document *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, p.7, available at http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf; Commission Staff Working Document *Detailed information on the implementation of Directive 2006/123/EC on services in the internal market*, p.4, available at http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf; *Handbook on implementation of the Services Directive*, p. 10, available at http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf.

²¹ *Handbook on implementation of the Services Directive*, p. 13, available at

http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf

²² <http://curia.europa.eu/juris/document/document.jsf?docid=154830&doclang=EN> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=154830&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=659844>

²³ Paragraph 14 of the *Guidance for Business on the Provision of Services Regulations* states that *The Regulations do not affect the manufacture or sale of goods. There are, however, numerous ancillary services relating to goods, such as some aspects of retail, maintenance, or after-sales services to which these Regulations could apply. It is our view that retail premises will generally be providing a service where activity is not exclusively concerned with the sale of goods; for example, where they also provide after-sales service or customer advice*, p. 7. Available at <http://webarchive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/files/file53100.pdf>

²⁴ Implementing the Services Directive in the UK

²⁵ <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d51e58c79779c648aaac69b31f81616c04.e34KaxiLc3qMb40Rch0SaxuSc3n0?text=&docid=175926&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&cid=2713> <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d51fe2310a4ae644198b238cf376ab6b35.e34KaxiLc3eQc40LaxqMbN40chqSe0?text=&docid=175926&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&cid=651617>

3. Telecommunication and internet services

Article 2.2(c) explicitly excludes electronic communications services and networks, and associated facilities and services with respect to matters covered by the five directives included in the so-called “telecoms package”.²⁶ However, as indicated by the *Handbook on the implementation of the Services Directive*, these services are only excluded with respect to matters covered by the directives in question. As regards matters which are not covered by these five Directives, the Services Directive applies.²⁷

Given that none of the aforementioned five directives contain any provision concerning different treatment applied by service providers on the grounds of the nationality or place of residence of service recipients, services covered by the “telecoms package” directives should benefit from the non-discrimination clause of Article 20.2 of the Services Directive.

Complaints related to telecommunication and internet services reported to ECC-Net pertained to the denial of a service or the application of different treatment by services providers. Consumers complained they were not allowed to conclude mobile phone and broadband contracts or to purchase prepaid phone cards in other EU Member States. In the case of a Swedish consumer living in France and difficulties she encountered trying to avail of mobile broadband services provided by a trader in Sweden, ECC-Net has sought further assistance from a competent authority in Sweden only to be advised that the agency was not in a position to pursue the case as it concerned the contract for the provision of the electronic communication services and as such was excluded from the application of the Services Directive.

As no amendments of the specific legislation in the telecommunications sector have been proposed²⁸ and the matter has not been addressed in the horizontal framework legislation implementing the Services Directive, a clarification by the CJEU as to whether the relevant provisions of the Services Directive should apply to telecommunications-related services, would be welcomed.

²⁶ Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC.

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

²⁸ It needs to be noted that the recent adoption of a proposal for a Directive establishing the European Electronic Communications Code provides for a general non-discrimination clause in Article 92: “Providers of electronic communications networks or services shall not apply any discriminatory requirements or conditions of access or use to end-users based on the end-user’s nationality or place of residence unless such differences are objectively justified.” More information available at: <https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code>

V. The Importance of the principle of non-discrimination of Article 20.2 of the Service Directive for the Single Market

The primary aim of the Services Directive is not only to encourage cross-border trade and competition by removing the legal and administrative barriers that can hinder businesses from offering their services in another country, but also to increase consumers' confidence when availing of the services offered by businesses from anywhere within the EU by removing obstacles for service recipients wanting to buy services supplied by providers established in other Member States. By ensuring consumers have access to a minimum amount of information and to a complaint procedure no matter where in the EU a business is established, and most importantly by banning discriminatory practices based on the nationality or place of residence of consumers, the Services Directive aims at strengthening consumers' confidence to consider business from anywhere in the EU. This confidence can however be undermined by certain practices by service providers that serve to create artificial borders within the Single Market. Consumer complaints reported to ECC-Net show that service recipients continue to be subjected to discriminatory requirements based on their nationality or place of residence and are regularly confronted with refusal to deliver, different prices or other conditions of access to services without objective reasons which could justify differentiation.

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

Under the general concept of discrimination under EU law discrimination arises where different situations are treated in the same way and similar situations are treated differently.²⁹ *The Handbook on European non-discrimination law*³⁰ points out that non-discrimination law stipulates that *those individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of particular 'protected' characteristics that they possess (...) and those individuals who are in different situations should receive different treatment to the extent that this is needed to allow them to enjoy particular opportunities on the same basis as others.*

Article 18 TFEU, which contains a general prohibition on discrimination on the grounds of nationality, has grown to become one of the fundamental principles of EU law without which the functioning of the Internal Market would not be possible. In the context of European consumer legislation, certain price discrimination practices where varying costs are solely based on the residence or nationality of the buyer have been prohibited.³¹ Discrimination based on nationality and place of residence has been effectively eliminated in the transport sector.³²

Just as the aim of non-discrimination law is to allow all individuals an equal and fair prospect of accessing opportunities available in a society,³³ the essence of the principle of non-discrimination established by Article 20.2 of the Services Directive is to ensure service recipients can take full advantage of the opportunities the Single Market offers without being treated less favourably in relation to local beneficiaries simply because they come from another EU country.

Article 20.2 requires Member States to ensure service providers do not discriminate against service recipients on the grounds of their nationality or their country of residence by stating:

²⁹ Interpreting article 20(2) of the Services Directive. Swedish National Board of Trade 2013

³⁰ *The Handbook on European non-discrimination law*, p.21, available at http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf

³¹ e.g. Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community.

³² Article 23(2) of Regulation 1008/2008/EC (Air transport), Article 4(2) of Regulation 1177/2010/EU (sea and inland waterways), Article 4(2) of Regulation 181/2011 (bus and coach transport).

³³ *The Handbook on European non-discrimination law*, p. 21, available at http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf

Member States shall ensure that general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

Consumers can be affected by a discriminatory treatment related to their residence or nationality in relation to online transactions and face similar difficulties in the offline world. Traders can implement price differentiation based on the place consumers are making the reservation from or subject consumers to different conditions than those applicable to recipients resident in the Member State where the service is provided, e.g. upon arrival at the car rental location consumers coming from other Member States may be required to take out additional insurance not compulsory for local residents, or consumers resident in particular Member States may be asked to pay higher prices when making a hotel reservation or booking amusement park tickets online.

However, not all differentiations in treatment amount to discrimination and hence there may be situations in which different treatment is justified. Article 20.2 establishes that 'objective criteria' can justify differences in the conditions of access to services, but does not clarify what can be considered as such. Guidance is provided by Recital 95 of the Services Directive,³⁴ which outlines some examples of objective justification for the different treatment:

- 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,
- lack of the required intellectual property rights in a particular territory.

It needs to be noted that the above-mentioned list is non-exhaustive and traders can invoke other reasons for retaining different treatment of service recipients. In establishing whether certain business practices have crossed the line to prohibited discrimination and cannot be justified by objective reasons, a case-by-case analysis is required. What is essential to determine at this point is not whether price and service differentiation occurs but whether this differentiation is the result of discrimination based on the consumers' nationality or place of residence.

Article 20.2 does not impose an obligation on service providers to trade and sell cross-border at any cost. It balances the interests of businesses, which are free to decide the way in which they avail of opportunities offered to them by the Single Market for services, and the interests of recipients who have the right not to be discriminated against due to their nationality or place of residence when seeking to avail of offers across the EU. The interests of both consumers and business operators need to be considered in the process of interpreting Article 20.2 and examining potential breaches of the non-discrimination clause. The Commission's legislative proposal³⁵ aiming at identifying and banning specific forms of residence-based discrimination not grounded on objective and verifiable factors, is an important step in fighting unjustified different treatment of consumers on the basis of residence or nationality in terms of access, prices and other sales conditions.

³⁴ In addition, specific guidance is provided in the European Commission Communication COM (2012) 261 final on the implementation of the Services Directive. A partnership for new growth in services 2012-2015, and the European Commission Staff Working Document SWD (2012) 148 final Detailed information on the implementation of Directive 2006/123/EC on services in the internal market.

³⁵ Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on consumers' nationality, place of residence or place of establishment, available at <https://ec.europa.eu/digital-single-market/en/geo-blocking-digital-single-market>

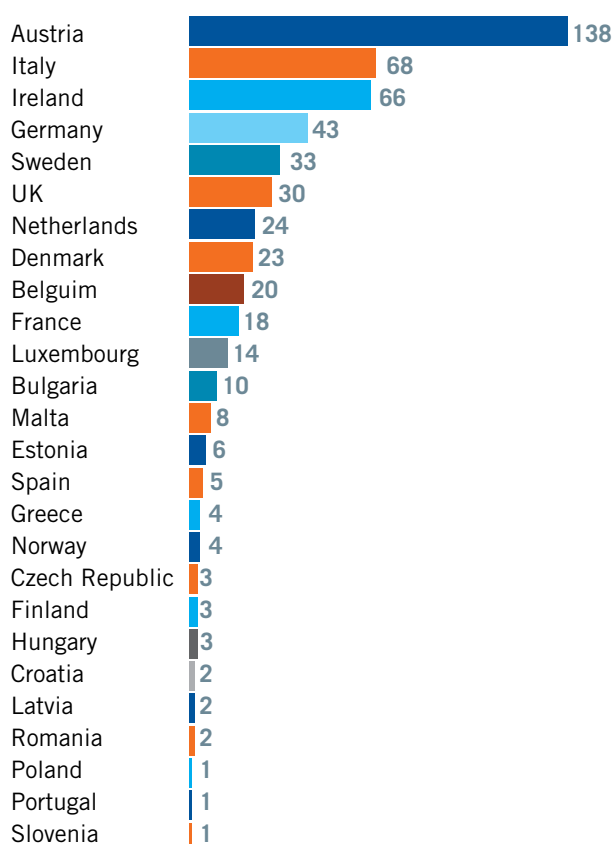
2. Restrictions faced by Consumers

2.1 Overview of complaints received

Between January 2013 and December 2015 ECC-Net received 532 consumer complaints pertaining to the issue of discrimination in the conditions of access to a service, which represents an increase of nearly 140% in respect of the 222 complaints of this nature reported to ECC-Net between 2010 and 2012. Among the complainants 289 sought advice, but no further assistance became necessary, whilst 243 complaints were actively pursued by ECC-Net.

The largest number of Article 20.2 related complaints originated from consumers based in Austria (138), Italy (68) and Ireland (66), followed by those made by consumers resident in Germany (43), Sweden (33), UK (30), Netherlands (24), Denmark (23), Belgium (20), France (18), Luxembourg (14), Bulgaria (10), Malta (8), Estonia (6), Spain (5), Greece (4), Norway (4), Czech Republic (3), Finland (3), Hungary (3), Croatia (2), Latvia (2), Romania (2), Poland (1), Portugal (1) and Slovenia (1).

TABLE 1:
Article 20.2-related complaints by Consumer ECC.



Most cases of different treatment appear to be related to residence, rather than to nationality as such and amount to more than 82%³⁶ of all complaints reported.

TABLE 2:
Difference applied to service recipients based on the grounds of nationality and place of residence.



- > While on holidays in an Austrian ski resort a German consumer discovered that the purchase price of tickets for lifts was much more expensive for tourists than for Austrian residents.
- > An Irish consumer participated in a half marathon organised by a trader based in the United Kingdom. The consumer was charged £85 as an overseas participant, as opposed to £50 for residents from the United Kingdom.
- > An Italian consumer booked a package holiday via a website of a trader based in Germany. Upon arrival at the holiday destination, the accommodation provider advised the consumer he had to pay more for the service because the trader's offer was limited to German tourists.

Different treatment in respect of the provision of services is not often established directly on the basis of nationality or place of residence, but rather on factors which may end up being tantamount to nationality or place of residence, such as the country of credit card issue or the place of delivery.³⁷

- > An Estonian consumer was unable to complete an online transaction to purchase clothes from a trader based in the UK as a result of the latter's refusal to deliver to Estonia.

³⁶ That is 436 complaints out of 532 received.

³⁷ Commission Staff Working Document: *With a view to establishing guidelines on the application of Article 20(2) of Directive 2006/123/EC on services in the Internal Market ('the Services Directive')*, June 2012, p.9.

Difficulties accessing a service reported by consumers resident in certain Member States often resulted not from unilateral business decisions by traders, but agreements with suppliers, which restricted the abilities of retailers to respond to consumer demand and serve users located in another Member States.

> A Swedish consumer wanted to buy a sewing machine from a British trader. The consumer visited the trader's website and went through with the purchase. She paid and received an order confirmation. After a couple of hours the consumer received an e-mail from the trader stating that they were not allowed to deliver sewing machines to Sweden, Norway and Denmark according to the manufacturer's general agent agreement.

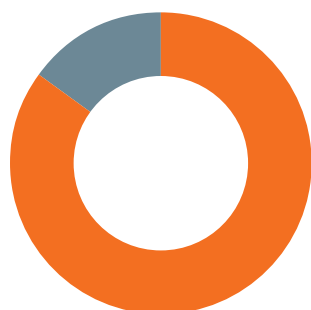
- > A British consumer was looking into purchasing a mountain bike from a trader based in Germany. The purchase price was 1,399 EUR; however the trader refused a payment in Euros as the bike would be dispatched to the UK and insisted that the consumer pay 1,200 GBP, i.e. approx. 100 EUR more in comparison to the Euro purchase price. The consumer felt he was being discriminated against based on his country of residence.
- > A German consumer living in the border region often used facilities offered by an Austrian leisure centre and noticed that prices of many activities offered by the centre were significantly higher for users resident outside Austria.

While a discriminatory treatment in the conditions of access to a service may be faced by consumers in relation to both online and offline transactions, based on complaints reported to ECC-Net access restrictions applied by service providers took place mostly in relation to online transactions; with little evidence being gathered to suggest that consumers face similar difficulties in the offline world.

Analysis of the complaints reported to ECC-Net revealed that situations in which consumers are confronted with different treatment or refusal to provide a service occur mostly in relation to the purchasing of goods, such as electronic goods, household appliances, vehicles, clothes, books, music or data downloads. Complaints received in this category amount to almost 68%³⁸ of all complaints received and occur mostly in online transactions.

TABLE 3:

Consumer complaints by type of transaction.



- Online: 85%
- Offline: 15%

- > A consumer living in Germany wanted to download books for his e-reader via a French trader's website. The trader refused this purchase referring to the customer's residence in Germany and advised they sell books only in France, Belgium, Luxembourg and Monaco.
- > A consumer resident in Norway was unable to purchase a car from a Danish car dealer as the latter refused to sell cars outside of Denmark.

Cases attracting the second largest number of consumer complaints, accounting for nearly 25%³⁹ of cases dealt with, were complaints received in relation to the provision of services in the field of tourism and leisure, including those provided by travel agencies, accommodation providers or amusement parks.

- > An Italian consumer attempted to book a holiday in Italy via a website operated by a trader based in Germany. The consumer was required to provide an address in Germany and hence was unable to complete the online booking.

³⁸ That is 362 complaints out of 532 received.

³⁹ That is 129 complaints out of 532 received.

The third largest category of complaints, at 5%,⁴⁰ related to the rental and leasing services sector.

> *A consumer resident in Ireland attempted to hire a car in France. The vehicle provider refused to provide a vehicle as the consumer was unable to provide a French driving license.*

In relation to online bookings in respect of car hire or hotel accommodation the level of consumer detriment is often substantial given that those transactions entail significant price differentiation in the cost of the service provision depending on the country of residence of a consumer. While obtaining redress in this area of complaint may prove challenging, consumers are often determined to pursue their claims as a matter of principle as they strongly feel their rights as consumers have been violated. From a consumer perspective, there is no justification for the incidence of cross-border price differentiation given that the cost of the car rental or hotel accommodation are the same regardless of the country of residence of a consumer.

> *A British consumer booked a holiday in France for his family but subsequently found that the UK site was charging much more than the French equivalent. The consumer paid 870 GBP with an offer for children under 7 to go free but the French site offered the same holiday for the equivalent of 737 GBP with an offer for children under 12 to go free.*

> *A consumer resident in Ireland was about to book a car on the website of a French car rental company. She typed in the details i.e. Collect and return - Toulouse Airport, dates 10/07/2013 to 24/07/2013. The price quoted was 266 GBP or Euro 310. She then clicked on the icon in the top left corner to change the price from GBP to Euros, as she is Irish. The price then rose from 266 GBP to 522 GBP or Euro 609, a difference of 256 GBP or Euro 299 for exactly the same car, at the same collection point and dates.*

TABLE 4:
Consumer complaints by economic sector.



ECC-Net's findings are in line with the European Commission's *Consumer Conditions Scoreboard's* findings published in 2015⁴¹ in respect of difficulties encountered by consumers in relation to cross-border transactions. The online survey revealed that although a range of different barriers to purchasing online or from another EU country existed, the most prominent restriction to access mentioned by respondents concerned their place of residence.⁴²

⁴⁰ That is 26 complaints out of 532 received.

⁴¹ *Consumer Conditions Scoreboard. Consumers at home in the Single Market*. 2015 edition, available at http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf

⁴² "Among consumers whose most recent problem concerned (an attempted) purchase from another EU Member State, 7% (in the case of tangible goods) and 9% (in the case of digital content) reported that they could not access the foreign seller's website (or only limited content was displayed to them), 6% (in the case of tangible goods) and 4% (in the case of digital content) indicated that foreign sellers refused to sell to them because of their country of residence (116) and 6% (in both cases) reported that the foreign seller charged them a higher price than was available in the seller's country", *Consumer Conditions Scoreboard. Consumers at home in the Single Market*. 2015 edition, p. 83, available at http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf

2.2 Difference in condition of access to service

The freedom to receive services anywhere across the EU is one of the core principles of the Single Market.⁴³ However, as complaints reported to ECC-Net show, the right of recipients to access services does not necessarily translate into their ability to exercise this right and avail of services cross-border with no restrictions. Consumers face difficulties on a daily basis by not being able to purchase services under the same conditions as the inhabitants of other European countries.

Service providers use various methods to implement service and price differentiation based on consumers' nationality or place of residence, but mainly by:

- blocking access to websites
- automatic re-routing to another website
- refusing delivery or payment
- applying different prices or sale conditions⁴⁴

Such practices may hinder the transparency of cross-border online transactions and cause a consumer to make a transactional decision that he/she would not otherwise make.

Whilst the problems reported are often complex, it was observed, that the majority of the cases dealt with concern refusal to provide the service, followed by price differentiation and difference in other conditions of access.

Refusal to supply

Traders' refusal to provide a service to consumers resident in Member States other than their Member State of establishment was the most frequent cause for complaints and occurred mostly in relation to online transactions.

Blocking access to websites and redirecting to country-specific websites is the most rigid form of territorial differentiation applied by traders. Not allowing online shoppers to complete the ordering process due to the lack of delivery options or permitting them to complete the purchase only to be informed at a later stage that the transaction in question needs to be cancelled is another way of preventing consumers from purchasing goods, services or digital content online. The aforementioned practices are typically triggered by the location of the user which can be determined by the different pieces of information, e.g. the IP address used, the postal or delivery address, credit or debit card details.⁴⁵

- > *A Belgian consumer wanted to purchase an e-reader with built-in French dictionary through the French version of a website of a multi-national company based in Luxembourg, to no avail. The consumer was re-directed back to the international site, where the product with the requested features was not available.*
- > *During the ordering process with a German web-trader, an Austrian consumer was asked to indicate his country of residence. Having entered an address in Austria, the consumer was advised that the order would need to be placed via an Austrian version of the website, where the price of the exact same shirt was more expensive.*
- > *An Austrian consumer was unable to purchase a mobile phone online as the UK based web-trader would not deliver the goods to Austria.*
- > *Having attempted to shop online with the UK-based web-trader, an Irish consumer was advised she could shop from the Irish version of the site. The consumer could continue viewing the content of the UK site, but was asked to note the trader would not deliver to Ireland from the UK site.*

⁴³ Although the TFEU in Article 56 refers to the freedom to provide services, the Court of Justice has held that the freedom established by the Treaty includes the freedom, for the recipient of services such as tourists, to go to another Member State in order to receive the service there (Case 186/87 Cowan v Trésor Public [1989] ECR 195, paragraph 15).

⁴⁴ <https://ec.europa.eu/digital-single-market/en/geo-blocking-digital-single-market>

⁴⁵ Commission Staff Working Document *Geo-blocking practices in e-commerce. Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*, SWD (2016) 70 final, p. 21, available at http://ec.europa.eu/competition/antitrust/e-commerce_sw_d_en.pdf

While European and national policies are committed to removing government-made obstacles to the free movement of services, some traders re-enforce or re-establish national borders and limit the ability of users to access offers available in other Member States.⁴⁶ Geo-blocking measures may be implemented by traders either unilaterally or as a consequence of an agreement with their suppliers or distributors, that do not allow them to sell to users outside of an allocated territory.⁴⁷ In either case, by specifying which consumers can use the service and asking them to access country-specific websites, where usually considerably higher prices are offered, traders prevent consumers from obtaining products and services not destined for their country of residence, thereby distorting competition within the market. In this context, ECC-Net welcomes the Commission's proposal for a Regulation on addressing geo-blocking,⁴⁸ pursuant to which service providers shall not, through the use of technological measures or otherwise, block or limit customers' access to their online interface or redirect customers for reasons related to the nationality, place of residence or place of establishment of the customer; and in the event that the customer explicitly gives his consent prior to a redirection, the original version of the online interface shall remain easily accessible.

Price differentiation

The second highest category of Article 20.2 related complaints reported to ECC-Net pertained to price differentiation, which in relation to online transactions traders implement by: (1) automatically routing consumers to websites targeted at other Member States, where offers are usually displayed at higher prices or (2) via the usage of various techniques which enable the implementation of cross-border price differentiation, for instance by asking consumers to select their country of residence or home currency through a menu on the homepage, traders may prevent consumers from availing of offers targeted to specific countries.

- > *An Austrian consumer attempted to buy a spare part for her cooker at a price of €49 from a Germany based web-trader. The purchase was refused due to the place of residence of the consumer being outside of Germany. The consumer was re-directed to the Austrian version of the same website, where she was asked to pay €50 more for the same spare part displayed.*
- > *While on holidays in an Austrian ski resort a German consumer discovered that the purchase price of tickets for lifts was much more expensive for tourists than for Austrian residents.*
- > *During the ordering process with a Luxembourgish web-trader, a Slovenian consumer was asked to indicate his country of residence. Having selected Slovenia, the consumer noticed an increase in price of the PC game of €18.*
- > *While making a car rental reservation online for his holiday in France, an Italian consumer noticed that the price requested for the identical offer was much higher for consumers with place of residence in Finland whereas residents in Estonia were asked to pay less.*

Pricing is one of the essential elements of the marketing mix, along with product, place and promotion,⁴⁹ which can be used by companies to draw up a good marketing plan and improve operating results. Companies can use a variety of pricing strategies, depending on corporate objectives, to achieve sales and profits maximization.⁵⁰ Through price discrimination,⁵¹ traders are able to extract consumer surplus and hence increase profits. It needs to be noted, however, *the effects of price discrimination are multiple, complex and highly dependent on the competitive environment in which firms operate*,⁵² and while price discrimination can be a tool to raise rivals' costs and implement exclusionary strategies, it may also benefit price competitiveness,

⁴⁶ Nelberger N. «Access denied»: How some e-commerce businesses re-erect national borders for online consumers, and what European law has to say about this, European Journal of Consumer Law 4/2007-2008, available at http://www.ivir.nl/publicaties/download/Access_denied.pdf

⁴⁷ Commission Staff Working Document *Geo-blocking practices in e-commerce. Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*, SWD (2016) 70 final, p. 29, available at http://ec.europa.eu/competition/antitrust/e-commerce_sw_d_en.pdf

⁴⁸ Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (COM 2016 289 final), available at <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-geo-blocking>

⁴⁹ The concept of 4Ps was developed by Professor Edmund Jerome McCarthy, further information available at <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100143321>

⁵⁰ <http://www.learnmarketing.net/price.htm>

⁵¹ That is a pricing strategy by which traders place their customers in groups based on certain attributes and charge each group different prices for the same product or service; further information available at http://www.investopedia.com/terms/p/price_discrimination.asp

⁵² Papandropoulos P. "How should price discrimination be dealt with by competition authorities?" *Concurrences* N° 3-2007, p. 37, available at http://ec.europa.eu/dgs/competition/economist/concurrences_03_2007.pdf

and a ban on price discrimination would in many cases be harmful to consumers.⁵³ Different market conditions, such as different costs of marketing operations, distribution channels, commercial strategy, consumer preferences, level of competition, tax or salary rates, may explain price differentials, sometimes even within the same country, even if the service is provided via the internet. Not every price differentiation constitutes unlawful discrimination and traders are free to set their prices in a non-discriminatory manner, e.g. by adapting their offers over time, depending on a number of factors, such as competitor pricing and supply and demand that are not linked to consumers' residence or nationality.

Discriminatory practices by traders on the basis of customer location which lead to different prices being charged across Member States have been closely monitored. In 2015 several newspaper articles reported that the European Commission was targeting a theme park based in France for allegedly overcharging British and German consumers on the basis of where they live.⁵⁴ It was pointed out that in some cases, for the same premium package, French consumers would pay 1,346 EUR while British visitors were charged 1,870 EUR and Germans 2,447 EUR. Complaints of this nature were also reported to ECC-Net.⁵⁵ The previous ECC-Net report on the Services Directive mentioned the case handed by ECCs in Bulgaria and France pertaining to a complaint made by a Bulgarian consumer, who having attempted to book a vacation package with a theme park based in France, discovered she had been charged approximately 500 EUR more than her British counterparts.

Difference in other conditions of access

Even if consumers are not prevented from accessing services via cross-border sale restrictions or confronted with different prices based on their nationality or place of residence, consumers can still encounter difficulties finalising their cross-border purchases. For instance, consumers can be confronted with the requirement of having a residential address or a bank account in the country of the service provider in order to be able to complete the transaction and be able to access the service or avail of the desired promotions.

- > *A Belgian consumer bought a smart phone from a French web-shop. The phone was offered with a price rebate, i.e. a cash-back promotion of €30. When the consumer went to avail of the price rebate, the trader informed him that the price rebate could not be offered to him as he had no place of residence in France.*
- > *An Austrian consumer travelling to Italy on a regular basis was unable to subscribe and avail of a toll payment service, which would have offered him a substantial discount, as the service was available for Italian bank account holders only.*
- > *In order to shop online with a UK-based web-trader, an Irish consumer was required to register her details on the site. Without entering a UK telephone number, the consumer was unable to complete the registration process and continue shopping with the web-trader.*
- > *A Belgian consumer attempted to reload his Italian prepaid telephone card online using his Belgian credit card, to no avail as the Italian trader accepted payments from payment cards issued in Italy only.*

In light of the existing framework for payment services, there are no objective criteria for traders to use payment instruments to differentiate between consumers for reasons related to their nationality or place of residence.⁵⁶ In this context, ECC-Net welcomes the Commission's proposal for a regulation on addressing geo-blocking in respect of provisions prohibiting unjustified unequal treatment of consumers for reasons related to the location of the payment account, the place of the payment service provider or the place of issue of the payment instrument.

⁵³ Ibid., p. 37.

⁵⁴ <http://www.thelocal.fr/20150729/disneyland-paris-overcharge-british-german-visitors>
<http://www.belfasttelegraph.co.uk/news/uk/disneyland-paris-accused-over-higher-charges-for-uk-holidaymakers-31412097.html>
<https://next.ft.com/content/e472eec2-031b-11e6-af1d-c47326021344>

⁵⁵ With regard to this company there has been a communication from the European Commission saying that the company has modified its practices. <http://www.spiegel.de/reise/aktuell/eu-kommission-stellt-verfahren-gegen-disneyland-paris-ein-a-1087840.html>

⁵⁶ ECC France has received many cases in which Sepa direct debit from an account in another Member State is not accepted across various sectors. This was noted in a press release issued by ECC France in 2016, and the relevant enforcement authority and the Banque de France were contacted on this matter. See http://www.europe-consommateurs.eu/fileadmin/user_upload/SEPA_toujours_possible_de_payer_ses_factures_en_Europe.pdf.

3. Justification for different treatment

At present there is a lot of uncertainty surrounding the provision of Article 20.2 and what it means in practice for service recipients and providers. While traders are free to determine the territorial scope of their offers and should be allowed to freely choose to whom and under what terms they provide their services, their business practices cannot serve to create artificial borders within the Single Market and be to the detriment of consumers and contrary to the principle of non-discrimination based on the nationality or place of residence. Traders must ensure they have no provisions in their general conditions of service⁵⁷ that will result in differential treatment for consumers of different nationalities or place of residence, except where justifiable by objective criteria. It is however unclear what constitutes 'objective criteria' according to Article 20.2, and what the consequences are for the parties involved if traders allegedly engage in practices that artificially partition markets within the EU to the detriment of consumers. Do consumers have the right to seek clarification as to reasons for imposing different contract terms or refusing to provide a service and is there an obligation on traders to justify the differences in treatment? Complaints reported to ECC-Net show that consumers too often face restrictions with no justification or the ones invoked by traders are unconvincing and lack objective criteria. While service providers can be approached by national enforcement authorities, once it is established that given business practices are contrary to the principle of non-discrimination, and be requested to cease the practices in question, for consumers it might prove extremely challenging to seek redress on an individual basis.

Different conditions of access, that can pertain to any aspect of the offer or of the provision of the service, do not by themselves automatically constitute discrimination. Article 20.2 of the Services Directive states that service providers may apply differences of treatment to service recipients on grounds of nationality or place of residence when differences are motivated by objective criteria. While recital 95 of the Directive exemplifies the concept of 'justification by objective criteria' as: additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment, the list is non-exhaustive and gives extensive possibilities for traders to justify consumer discrimination. The lack of clarity as to what constitutes a direct justification by objective criteria, which allows for differences in the condition of access, gives rise to arbitrary justifications. In its report on *Discrimination of Consumers in the Digital Single Market* the European Parliament considered that *aside from infringements of the anti-racism legislation and of competition law, any economic reason for the refusal to accept orders from another Member State which has been formed autonomously by the decision-makers of a service provider may form a direct justification by objective criteria in the sense of Article 20.2 of Services Directive*.⁵⁸ This is not in line with the Commission's 2012 *Guidance on the implementation of Article 20.2*, which only mentioned that a difference in the willingness to pay can justify different pricing and marketing policies (e.g. presenting different prices on different websites). It did not go as far as saying that it would justify refusals to serve passive sales requests at a given price, which could contradict the very purpose of this article.

⁵⁷ This includes payment and delivery conditions, prices or other information set and applied by traders as a precondition for obtaining access to the goods or services.

⁵⁸ *Discrimination of Consumers in the Digital Single Market Study*, 2013, p. 27, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507456/IPOL-IMCO_ET\(2013\)507456_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507456/IPOL-IMCO_ET(2013)507456_EN.pdf).

3.1 Justifications invoked by traders for retaining different treatment

It is for traders to determine, based on their individual circumstances, what they consider to be objective reasons to justify different conditions or the outright refusal to provide services.

In 152 out of 243 cases requiring the direct intervention of ECC-Net, the following grounds for justification were invoked by traders:⁵⁹

- Additional costs incurred because of the distribution method or technical characteristics of the service, and additional costs incurred in the provision of the service in the consumer's country of residence (31%)
- Contractual obligations preventing the service provider from distributing the service in a particular territory (22%)
- Services provided fall outside the scope of the application of the Services Directive (21%)
- Different market conditions (13%)
- Freedom of contract (11%)
- Legal fragmentation (8%)
- Other justifications (16%)

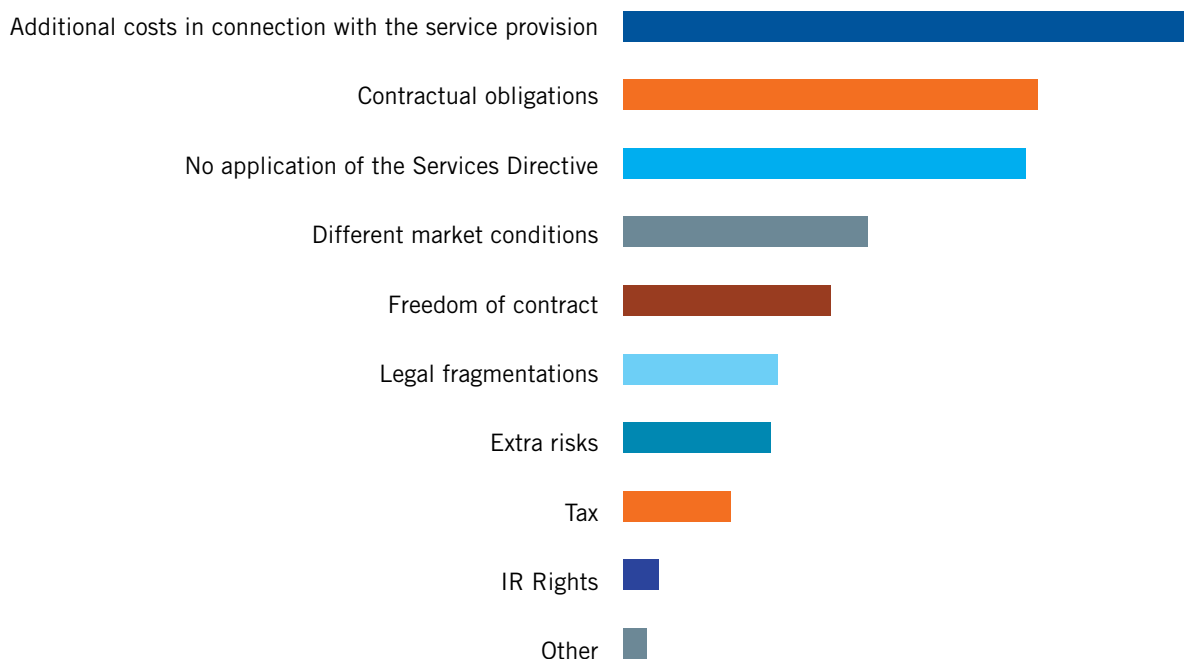
In 87 out of 243 cases traders either failed to respond to the correspondence issued by ECC-Net seeking clarification on behalf of consumers or did not justify the different treatment. Twelve cases were still active at the time of writing.

3.1.1 Additional costs incurred because of the distribution method or technical characteristics of the provision of the service and additional costs incurred in the provision of the service in the country of the consumer

One of the most frequently mentioned rationale for the denial of a service or a higher-priced service pertained to additional costs incurred by traders because of the distance involved or difficulties in delivery, or because of the technical characteristics of the service. The huge majority of responses received came from traders in the sector of online retail sale of products and services, such as clothing, books, beauty products, electronic goods, household appliances and garden products. Similarly, additional costs on the supply side resulting in the decision not to offer a service in the country of residence of the consumer were reported by traders in the retail sector. It was mainly traders established in Germany, followed by those based in the UK, who argued that for the above mentioned reasons providing the service to the relevant locations would put an excessive strain on their business. While the price charged for delivery is a decision made by the e-retailer (who may decide to charge the consumer

TABLE 5:

Justification invoked by traders.



⁵⁹ In more than 60 instances more than one reason for different treatment was invoked by traders.

more or less than they pay themselves), cross-border parcel delivery prices charged by (postal) universal service providers are on average almost five times higher than their domestic equivalent in all products. These higher prices often cannot be explained by obvious cost factors such as the price of delivery in the destination country.⁶⁰

- > *An Austrian consumer wanted to order garden equipment from a trader based in Germany, but to no avail. The consumer was the trader's regular customer and never had any problems placing orders with this trader. This time he was advised it had become too expensive for the trader to deliver bulky products outside Germany.*
- > *A consumer resident in Sweden was redirected to the Swedish version of the website after he attempted to place an order online with the UK based trader. According to the trader differences in prices between two websites were due to differences in the cost of delivery. Higher delivery charges were applied where the distance between the trader's warehouse and the delivery location was greater.*
- > *A trader based in Germany refused to deliver the product to an address in Belgium. The consumer was advised the product was highly flammable and as it can be considered environmentally hazardous it could not be transported cross-border.*

Various delivery options exist within the European Union and while the lack of alternatives for delivery can rarely be invoked by traders to refuse supply to a given Member State, the cost of delivering services in another Member State may significantly differ from the cost applicable to delivery services in the Member State where the trader is based. Since as a general rule, consumers bear the cost of delivery, additional delivery charges can help traders recover the additional cost in the service provision. Transparency in respect of additional delivery charges on the other hand can help consumers understand reasons behind the differences in the conditions of access.⁶¹ Additional costs incurred because of the distribution method or technical characteristics of the service invoked by

traders can hardly justify the denial of a service in the situation where the consumer is willing to collect the goods or cover additional expenses associated with the service provision.

- > *A French consumer wanted to purchase a footstool from a web-trader based in Germany, but her order was not accepted. The consumer then contacted one of the company's shops near the French-German border with the view to establishing whether it would be possible to order the footstool and have it collected by the consumer at the store location, only to be told that for orders to be accepted an address in Germany needed to be provided.*
- > *An Austrian consumer attempted to order a pack of six bottles of olive oil from an Italian trader. The trader advised that, while they would be happy to sell each bottle separately, due to administration and packaging cost the six bottle pack could only be delivered to an address in Italy. It would have cost the consumer more to pay for six bottles separately than to pay for the pack of six bottles.*
- > *Arguing that it was more expensive to deliver goods cross-border, an Italian trader requested that a Danish consumer pay €133 more for a bag to have it delivered to Denmark.*

The aforementioned justifications by service providers can only be considered as 'objective criteria' as long as differences in treatment are proportional to the cost actually incurred. With respect to delivery costs, larger retailers enjoy the benefits of competitive markets and economies of scale; service providers who do not ship frequently or send low parcel volumes, have to pay more than large retailers.⁶² The handling of the processing of orders may also be expensive, in particular for lower-priced goods. As regards costs incurred when serving consumers in a Member State other than the one where the trader is established, they may include costs incurred when directing business activities abroad such as compliance costs or translation costs, or higher payment costs related to higher charges by payment service providers for cross-border transactions or the need to introduce alternative payment systems.⁶³

⁶⁰ Université Saint-Louis Bruxelles, *Econometric study on parcel list prices*, available at <http://ec.europa.eu/DocsRoom/documents/14647>

⁶¹ As the Consumer Rights Directive requires retailers to show on the website any additional freight, delivery or postage charges, research carried out by participants of the joint project on the Services Directive revealed that certain web-traders fail to comply with requirements laid down by Article 8.3. See Annex VII of this report for further information.

⁶² *Discrimination of Consumers in the Digital Single Market Study*, 2013, p. 22, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507456/IPOL-IMCO_ET\(2013\)507456_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507456/IPOL-IMCO_ET(2013)507456_EN.pdf)

⁶³ Commission Staff Working Document *Geo-blocking practices in e-commerce Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*, SWD (2016) 70 final, p.44, available at http://ec.europa.eu/competition/antitrust/e-commerce_swd_en.pdf

- > *An Austrian resident attempted to place an order online with a trader based in Germany, but was not successful as only orders for delivery within Germany were accepted. The trader explained they were a small enterprise and in order for them to sell cross-border within the EU they would have to register with the local national WEEE⁶⁴ registry and as a result be faced with additional bureaucratic and financial obligations.*
- > *A UK based web-trader refused to accept an order for a dress from a consumer resident in Sweden and argued they did not have the necessary infrastructure to be able to handle orders emanating from countries other than the UK.*
- > *A consumer resident in Austria was interested in purchasing a camera from a German web-trader. The latter however refused to deliver the camera. Having sought clarification, the consumer was advised that the trader was not prepared to engage in cross-border transactions due to higher costs for delivery and return handling. As electronic devices can easily be damaged in transit the trader would need to cover the cost of delivering replacement products, or cover original delivery charges should the consumer change his mind and return the product for a refund.*

3.1.2 Legal Fragmentation

For retail traders in Europe, higher logistics and distribution costs for cross-border sales of goods, as well as compliance costs with different legal frameworks in Member States may constitute trade barriers when considering selling their goods and services in other countries. Legal fragmentation within the EU, for instance differences in consumer contract law, was invoked by retailers⁶⁵ along with additional costs in the provision of the service for refraining from selling cross-border. Having to identify national rules in advance and alter the terms and conditions under which the service is provided, is considered by many traders an additional burden. As disputes may arise in the context of cross-border service provision, traders may fear being subject to court proceedings in the country of the consumer's domicile as the contracts they conclude with consumers are subject to the different rules in force in the countries in which consumers are resident.⁶⁶ For traders, who decide to direct their activity to other Member States, the costs of compliance with different national rules may give rise to differences in prices and conditions of services supplied across borders. "In extreme cases, some businesses may even refuse to sell across borders and thus potential consumers of that company may be locked in their national markets and be deprived of the enhanced choice and lower prices offered by the internal market".⁶⁷

- > *An Austrian consumer was redirected to an Austrian version of the website after attempting to buy a foot cream from a trader based in Germany. The trader argued he could decide on the territorial scope of his offers and set different versions of his website to be able to comply with a range of a country-specific legal requirements and the national laws applicable to the contract.*

Currently, under a set of EU rules, consumers enjoy a common level of protection against for instance unfair contract terms or faulty goods. However, Member States are free to adopt more restrictive rules and as a result the legal framework may differ as regards consumer protection among Member States. While the Consumer Rights Directive has brought about full harmonisation in selected areas of contract law, many important elements for the conclusion of contracts continue to be outside its scope. Proposals for a Directive on certain aspects concerning contracts for the supply of digital content⁶⁸ and a Directive on certain aspects

⁶⁴ As per Directive 2012/19/EU on waste electrical and electronic equipment (WEEE).

⁶⁵ In 13 out of 152 cases, legal fragmentation was invoked by traders as justification for different treatment.

⁶⁶ As per Article 15 of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁶⁷ *Green Paper on policy options for progress towards a European Contract Law for consumers and businesses*, Com (2010) 348 final, p. 5, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Aco0016>

⁶⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0635&from=EN>

concerning contracts for the online and other distance sales of goods⁶⁹ aim at establishing maximum harmonisation as regards the issues covered and should further reduce differences in the consumer protection legislation of Member States. Furthermore, the proposal for a Regulation on cross-border parcel delivery aims at enhancing price transparency and making regulatory oversight of cross-border parcel delivery services more effective, and should hence improve the availability and accessibility of cross-border parcel delivery services.⁷⁰

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

In 22% of cases the justification invoked by traders was that they were not able to provide the requested service due to contractual obligations, which stipulated that they were only allowed to deliver the service to consumers resident in their country of establishment and not to consumers resident in other EU Member States as these territories were reserved for other suppliers. It resulted in a refusal to supply in the following instances reported to ECC-Net:

Home products

- An Austrian consumer contacted a German trader after he was unable to complete the order on the trader's website. The trader later explained that pursuant to the agreement he had with the manufacturer of bath tubs, he was unable to take orders from consumers other than those resident in Germany. Austrian residents could purchase products from an authorised distributor in Austria.
- A Belgian consumer purchased a vacuum cleaner in a shop in Belgium, but contacted a French trader to buy vacuum bags as they were cheaper than the ones sold in Belgium. The trader refused to accept the order and advised about the possibility of ordering the bags in Belgium.

Pre-fabricated houses

- Interested in buying a prefabricated house, an Austrian consumer compared prices on the type of houses offered for sale by an Austrian manufacturer and a Slovenian retailer. The trader in Slovenia was selling prefabricated houses €32,000 cheaper than the Austrian manufacturer. However as the consumer had no place of residence in Slovenia, the Slovenian trader refused to proceed with the sale. The retailer among other things stated that due to an agreement with the Austrian manufacturer the purchase could not be concluded.

Vehicles

- An Austrian consumer wanted to buy a car from a German car dealer, but to no avail. According to the trader they were not allowed to sell outside Germany as per the agreement with the car company. The consumer was advised to contact the dealer in Austria, where the price for the same vehicle make and model was higher.
- An Irish consumer completed all the steps required by a car company in the UK to purchase a car. The consumer was about to collect the car, when he was advised that if the vehicle was to be taken to Ireland, the trader could not complete the sale as it would be classified as exporting it. The consumer then provided his address in the UK to avoid difficulties; however when the consumer travelled to the trader's premises to pick up the car, the trader refused to sell when the consumer presented an Irish passport.

Holiday bookings

- A Croatian consumer made a holiday booking via an Austrian travel agency, but the reservation was cancelled after seven days. The agent explained that, as per the agreement with the hotel, they could only accept bookings from Austrian and German residents. The consumer was advised to make a booking with the agent in Croatia.
- After attempting to book a holiday with an Austrian tour operator, a Czech consumer was advised that the trader was not allowed to accept bookings from consumers resident in the Czech Republic, Hungary, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Croatia, Bulgaria and Romania.

Footwear

- A UK-based trader refused to accept the order for a pair of shoes from a Swedish consumer and referred the consumer to a company in Sweden, which had exclusive rights to sell the product to consumers in Sweden. The consumer complained about the product range and prices in Sweden.

⁶⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0635&from=EN>

⁷⁰ <https://ec.europa.eu/digital-single-market/en/content/cheaper-cross-border-parcel-delivery-boost-e-commerce-eu>

Motor and bicycle parts

- A British consumer purchased a bike in the UK. He used to be able to buy bicycle parts directly from the distributor in the Netherlands; however when the consumer attempted to place the order he was advised that the manufacturer had appointed an exclusive distributor in the UK and the consumer could no longer buy parts from the trader in the Netherlands.
- A British consumer wished to purchase a restrictor kit for a motorbike from a German trader; however the latter kept referring him back to their 'sole UK distributor'.

Games and e-books

- An Irish consumer attempted to purchase a PC game online from a trader based in the UK, but was unable to complete the order. The consumer was initially advised that this was due to security reasons. The trader later explained that they source the downloads from a supplier who restricts them to sell the product in the UK only.
- A Danish consumer was unable to complete the order for an e-book with a trader based in France. The latter advised that some publishers did not allow them to sell certain titles to consumers resident outside France.

Sport and outdoor equipment

- A British consumer ordered a tent online from a trader based in the Netherlands. The order was then cancelled and the consumer advised that the trader would not ship the product to the UK as there was an authorised distributor of the product for this country. The same product in the UK was offered however at a much higher price.
- After a Finnish consumer placed the order with a web-trader in the UK for a number of items, he was advised that a particular brand of products could not be delivered to Finland given that there is a company with exclusive rights to sell this brand of products in Finland.

Agreements between independent undertakings which may affect trade between Member States and which have the object or effect of restricting competition in the EU are generally prohibited under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU),⁷¹ unless the economic benefits of the agreement outweigh its anticompetitive effects. Businesses are responsible for ensuring that their agreements and practices satisfy the requirements laid down in EU and national competition laws, and if needs be, will need to carry the burden of proof, unless agreements

are considered compatible with EU antitrust law under the block exemption regulations.⁷²

Distribution agreements between manufacturers and retailers are examples of vertical agreements, i.e. agreements for the sale and purchase of goods or services which are entered into between companies operating at different levels of the production and distribution chain. Vertical agreements which simply determine the price and quantity for a specific sale and purchase transaction do not normally restrict competition. But a competition restriction may be involved when the agreement contains restrictions on the distributor or buyer.⁷³ Restrictions of passive sales, i.e. sales to consumers who approached the distributor on their own initiative, in the territory of other Member States laid down in distribution agreements are generally in breach of competition law. It is therefore unlikely that traders who establish barriers to cross-border trade through contractual provisions that limit the ability of service providers to serve users located in another Member State, can validly invoke such clauses. Similarly, exclusive distribution agreements, where a supplier of goods intends to exclusively allocate territories within the EU to a single distributor, are likely to be considered an impediment to competition, and therefore cannot validly be invoked as objective justification for the outright refusal to provide the service.

ECC-Net also received cases where consumers attempted to place orders with traders via a popular online marketplace platform, but were advised that due to the agreement with the company operating the platform traders were unable to deliver products outside the country of their establishment. In all three cases refusal to provide the service was experienced by Austrian consumers when they tried to purchase products from different German traders via the platform operated by a company based in Luxembourg:

- > *An Austrian consumer was informed at the time of placing the order for a dustbin lock that a German trader was unable to accept the order for delivery in Austria.*
- > *An Austrian consumer attempted four times to place the order for a set of forceps with a German trader, but was advised each time that the item in question could not be shipped to an address in Austria.*
- > *An Austrian consumer wanted to buy an external hard drive from a trader based in Germany via a marketplace platform, but to no avail as the trader refused to deliver to Austria.*

⁷¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

⁷² Funke, Thomas G., *Territorial Restraints and Distribution in the European Union*, p.3, available at http://www.osborneclarke.com/media/filer_public/73/56/73569cbb-0450-40fe-9fc1-06112e5e049b/territorial-restraints.pdf

⁷³ <http://www.kkv.fi/en/facts-and-advice/competition-affairs/competition-restraints/supply-and-distribution-agreements/>

In the above mentioned cases clarification was sought by ECC-Net on behalf of consumers from traders in question and the marketplace platform operator. While in all three cases traders maintained that their decision not to supply the product was a result of their agreement with the platform operator, it did not seem to be an actual reason for their decision. In response to ECC-Net communication, the platform operator explained that traders selling via the platform could join the program whereby products sold by marketplace sellers were stored in the ready-to-ship inventory owned by the platform operator and shipped directly to customers by the latter. While it was the platform operator who fulfilled orders and provided customer service, it was at every sellers' discretion to decide on the territorial scope of their offers.

3.1.4 Service falls outside the scope of the application of the Services Directive

When justifying their refusal to provide the service or retaining different conditions, in 21% of cases, traders argued that the Services Directive was not applicable to given transactions and hence practices implemented by traders could not amount to a breach of the non-discrimination principle.

> *An Austrian consumer wanted to buy a car from a Danish car dealer, but was advised cars were available for purchase by residents in Denmark only. Having sought clarification on behalf of the consumer, ECC Denmark was informed by the trader that they do not consider the sale of goods as being applicable to the Services Directive.*

The scope of application of the Services Directive covers a wide variety of sectors, including distribution of goods and services, such as online and offline retail of products and services,⁷⁴ and as such the case mentioned above should come under the protection of the Services Directive.

The Services Directive explicitly excludes a number of services from its scope,⁷⁵ with activities such as numeric games (e.g. lotteries, betting or gambling services) being one of them. However, as indicated in the *Handbook on implementation of the Services Directive*⁷⁶ promotional games whose exclusive purpose is to encourage the sale of goods or services are not covered by the exclusion and thus benefit from the Services Directive. The Services Directive should therefore be applicable in the situations outlined below, despite the fact that traders argued in both cases to the contrary:

> *A German consumer wanted to take part in a lottery draw run by an Austrian supermarket. Participants were to collect bonus points and send them to the trader for a chance to win a prize. The consumer could not participate as only Austrian residents could enter the draw.*

> *An Austrian consumer purchased camera lenses from a German web shop. The reason the consumer was interested in this particular offer was because the lenses were offered with a price rebate, i.e. a cash-back promotion. When the consumer went to avail of the price rebate, he was advised that it could only be offered to customers with their place of residence in Germany.*

More than one third of traders, who indicated the Services Directive was not applicable to services they provide, were ski resorts.

> *A Portuguese consumer wanted to avail of a discounted price on ski passes, but was advised that an Austrian ski resort offers season tickets at a discounted price only to consumers resident in the region. The ski resort argued that they do not discriminate because they offer a transport service to which the Service Directive does not apply.*

As pointed out in the previous ECC-Net report on the Services Directive, it is difficult to envisage how such a service could fall outside of the scope of the Services Directive when one considers that with the season ticket a consumer pays not only for the transport service, but also to get access to a whole ski resort. Furthermore, the company also uses the earnings from the season tickets for the maintenance of the ski resort and thus does not offer a mere transport service. In Joined Cases C340/14 and C341/14 the Court of Justice stated that the scope of the exclusion in Article 2(2)(d) of the Service Directive, regarding the concept of services in the field of transport, must be interpreted by reference to its purpose and general structure.⁷⁷ It is therefore necessary to consider the main purpose of the service. If the main purpose of the given activity does not seem to be to provide a transport service, it must not automatically be classified as a transport and as falling outside of the scope of the Services Directive.

⁷⁴ Commission Staff Working Document: *With a view to establishing guidelines on the application of Article 20(2) of Directive 2006/123/EC on services in the Internal Market ('the Services Directive')*, June 2012, p. 7

⁷⁵ Article 2(2), Services Directive 2006/123/EC.

⁷⁶ *Handbook on the implementation of the Services Directive*, p. 12.

⁷⁷ Joined Cases C-340/14 *Trijber* and C-341/14 *Harmsen*

3.1.5 Different market conditions

In 13% of cases the reasons that were considered important by traders for limiting their activities to certain markets only or charging different prices when providing services cross-border, were different market conditions. It mainly concerned retailers selling consumer goods, car rental companies and traders providing leisure services or services in the field of tourism.

According to recital 95 of the Services Directive, different market conditions such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors may constitute objective justification for different treatment. This ground for justification however requires a complex analysis of all the conditions for supply and demand on the relevant market, given that market conditions are determined by a variety of such factors, as indicated by the Commission.⁷⁸ Accordingly, consumer preferences, level of competition, prices, tax and salary rates, different costs of marketing operations, distribution channels, commercial strategy, etc., may explain price differentials, sometimes even within the same country and even if the service is provided via the internet.

- > *An Austrian consumer filed a complaint with a German trader after he was prevented from purchasing a bathrobe via the trader's website by not being able to enter his address in Austria. The consumer was advised about the possibility of ordering the product via an Austrian version of the website. The trader explained that the price difference between the two websites was due to different market conditions, as well as the costs of marketing operations, transportation and labelling.*
- > *A Danish consumer bought a ski-pass, but was charged more than local residents. An Austrian trader explained that local residents were offered discounts as a way of encouraging locals, especially children, to use the service more often.*

Whereas high demand for service in one Member State, influenced by seasonality, can justify different prices, in other cases certain business practices, such as geo-blocking,⁷⁹ may be motivated by purely commercial reasons, such as traders' interest to charge different prices for the same product or service reflecting differences in the willingness of users to pay for those products or services. On the grounds that the demand of consumers from different Member States differs, any price differential practices would appear to be justified even if practices in question partition the market to the detriment of consumers by applying differences to the same service provision taking place in the same location and supplied by the same provider as the following examples illustrate.

- > *A consumer from the UK felt discriminated against as he was asked to pay a higher price for a car rental than his Italian counterparts. The consumer spoke Italian and so he used an Italian version of a website of a multi-national car rental company to book a car rental; however having entered his UK address he was automatically redirected to the UK website, where he was asked to pay approximately 150 EUR more for the exact same service. According to the trader their offers were based on their customers' residency, and since the consumer was a UK resident, he was subject to pricing in the UK.*
- > *A Bulgarian consumer attempted to book hotel accommodation online through a Romania-based booking site. The booking was not accepted and the consumer was advised that, as per the relevant terms and conditions, the rate in question was not applicable to Bulgarian residents, but residents in Romania only, and that the trader reserved the right to offer the service at different prices depending on the market they serve.*

This however goes against the objective pursued by Article 20.2 and as such the exception of different market conditions should be construed restrictively, as not precluding companies from targeting different markets with different prices, but not allowing them to prevent consumers from benefitting from the lowest price.

⁷⁸ Commission Staff Working Document: *With a view to establishing guidelines on the application of Article 20(2) of Directive 2006/123/EC on services in the Internal Market ('the Services Directive')*, June 2012, p. 17.

⁷⁹ As indicated in the Commission Staff Working Document *Geo-blocking practices in e-commerce Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition*, SWD (2016) 70 final, p.34.

3.1.6 Freedom of contract

In 11% of cases traders referred to the freedom of contract principle for their decision not to supply the goods or retain different conditions of access to the service.

As pointed out by the *Discrimination of Consumers in the Digital Single Market Study*, it is a longstanding rule of the CJEU case law that the freedom to pursue a trade or profession forms part of the general principles of EU law and includes, as a specific expression of that freedom, the freedom to choose whom to do business with.⁸⁰ The principle of freedom of contract, meaning a freedom to decide on a partner to the contract and terms of that contract, is a fundamental principle of European private law, but is not free from limitations,⁸¹ and cannot be utilised by unscrupulous traders who may wish to divide markets in order to maintain artificially higher prices in some markets and not let recipients choose where they receive the service. While traders cannot be obliged to extend their offers and policies uniformly across the Community, EU citizens, regardless of their place of residence or nationality, are entitled to receive goods and services in equal conditions in a given Member State.

While the majority of the traders quoted 'freedom of contract' along with other reasons to justify a different treatment or refusal to provide a service, like for example high compliance costs, some simply stated they were free to choose a partner to the contract and were under no obligation to provide the service.

- > *An Austrian consumer was in the process of placing the order online for a set of paper bags, when a message appeared on his computer screen that this particular product cannot be delivered to Austria. Having sought clarification, the consumer was advised that it was up to the German trader to choose the countries he wished to deliver to.*
- > *A Danish consumer attempted to order a jacket online from a Spanish web-trader, but was advised that the trader would not deliver the jacket to Denmark. The consumer was informed about the possibility of placing an order on an English version of the same website; however prices there were much higher. According to the trader they should be free to set prices as they wish and decide on the territorial scope of their offers.*

The traders' decision not to supply the goods or retain different conditions may be justified by objective business considerations and if the reason behind this decision is clearly communicated to the consumer, it is easier for the latter to accept it. However, if instead the consumer is advised that the trader is free to choose a partner to the contract, the trader's decision in this respect can cause frustration and leave the consumer feeling left out of the single market.

3.1.7 Other reasons invoked by traders

The following justifications were further invoked by traders (19%⁸²):

Extra risks linked to rules differing from those of the Member State of establishment

In 12 cases examined the justifications provided by traders pertained to the additional risks linked to doing business in a Member State other than their Member State of establishment. This category includes issues such as difficulties in securing payment from consumers resident in other Member States or verifying consumers' solvency before concluding a contract.

- > *A German web-trader applied 19% higher prices to customers who were not resident in Germany. An Austrian consumer was unable to avail of the same offers as his German counterparts. The trader argued that there was a high risk of non-payment and difficulties in debt-recovery in such cases.*

Consumers should, in principle, not be charged higher prices solely on the grounds that their accounts through which payment is made are located in Member States other than the Member State where a trader is established. While the cost of debt-recovery in case of non-payment may deter traders from providing services to consumers in other countries, if a trader can rely on advance payment in the event where a consumer is willing to pay the purchase price via bank transfer or to pay cash on delivery the risk of payment default is unlikely to be deemed to constitute 'objective justification' under the Services Directive.

⁸⁰ *The Discrimination of Consumers in the Digital Single Market Study*, p. 29.

⁸¹ Examples are anti-discrimination law, mandatory provisions or the provisions on invalid standard terms as indicated in the *Discrimination of Consumers in the Digital Single Market Study*, 2013, p. 30.

⁸² In 25 out of 152 cases, where justification was invoked by traders.

> *A consumer resident in Malta placed the order for a laptop with a UK-based trader and provided a UK address for delivery. After the payment was made using his credit card, the consumer received a message stating the transaction could not be completed "either due to us being unable to verify all of your information, or that there was an error in processing your order". The consumer attempted to pay for the order by bank transfer, but did not succeed. The company stated that in order to avoid cases of fraud they only accept credit cards issued by banks within the UK.*

In cases examined, instances have been reported whereby contracts could not be concluded on the ground that previous experience with consumers of particular Member States had been unpleasant. It is submitted that a blanket policy in this respect is in itself insufficient to constitute an objective justification, but rather may allow for further market fragmentation to the detriment of consumers. A general presumption of fraud against non-domestic customers cannot be considered to be based on objective criteria and is therefore discriminatory.

> *A British consumer purchased a tent from a trader based in the Netherlands. The latter refused to ship the product to the address in the UK provided by the consumer stating that previously they had bad experience with consumers from the UK and Ireland, whose expectations of services posed problems and for this reason they do not ship to those countries.*

Taxation

In 9 cases traders claimed that different tax regimes, among other reasons like costs and product demand, resulted in the decision not to offer a service or charge different prices when selling cross-border.

- > *A consumer in Austria, a regular reader of a German magazine, was unable to participate in a sweepstake organised by the magazine publisher. The company clarified that readers, who were resident in Austria, could no longer take part due to taxes on gambling winnings in Austria. No similar taxes were applied in Germany and as often prizes awarded to winners of sweepstakes were highly-priced goods like motor cars, the publisher decided to limit contest participants to residents in Germany only.*
- > *An Irish consumer attempted to buy a purse online from a trader based in the Netherlands via their UK site. The bag in question was on sale at a reduced price. The EU site had the same purses for sale but at a regular price. The consumer entered the address of her holiday home in the UK, but as her billing address was in Ireland, the trader refused to accept her order. The only explanation offered was that prices of items offered for sale online may differ due to VAT rates, which are 23% in Ireland and 20% in the UK.*

Differences in the VAT rates applied to different products and services in the different Member States can represent a real obstacle for companies trying to trade cross-border⁸³ and explain certain price differences visible to the consumer.⁸⁴ However, for the sale of goods, foreign Vat is only applicable above a specific turn-over threshold and only for goods delivered cross-border. If the trader delivers within his own country, different VAT rates cannot constitute objective criteria.

⁸³ A Digital Single Market Strategy for Europe, p. 8, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>

⁸⁴ Commission Staff Working Document *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, 2012, p. 22.

For electronically delivered services, such as software or online games, new VAT rules came into effect from 1 January 2015⁸⁵ whereby VAT is due based on where the customer is located and, since consumers cannot self-account for VAT, suppliers are liable to account for VAT in every EU country where they make supplies to private consumers. To ease the compliance burden a “Mini One-Stop-Shop” scheme has been introduced allowing businesses to register, declare and pay the VAT due in other Member States in their own Member State. In the context of the Digital Single Market Strategy,⁸⁶ the Commission is seeking to minimise burdens attached to cross-border e-commerce arising from the different VAT regimes within the EU to further simplify cross-border trading.

Lack of requisite intellectual property

In three cases that were examined, the objective justification invoked by traders concerned the lack of intellectual property rights (IP rights) or restrictions by publishers. In general, these cases regarded the cross-border purchase of digital content products, which can be downloaded to a computer or mobile device, e.g. books, games, music.

Intellectual property rights are the rights given to persons over the creations of their minds⁸⁷ (inventions, literary and artistic works, and symbols, names and images used in commerce⁸⁸). The creators of works protected by copyright hold the exclusive right to use or authorise others to use the work on agreed terms. Accordingly, in order to provide digital content services, the provider must obtain a licence from the holders of the copyrights to the content. Licenses for the use of a protected work are often issued for a particular territory. As indicated by the Commission, the lack of the required authorisation for a particular geographical area is an objective reason for the refusal to provide a service to consumers in the territory where the rights have not been cleared.⁸⁹ In contrast, when the rights have been cleared, copyright concerns cannot constitute objective criteria.

- > *A consumer from Austria wanted to download music from a media player store located in Germany, which belonged to a multinational corporation. The trader did not allow the attempted purchase and informed the consumer that they had not acquired the intellectual property rights for the country of residence of the consumer.*
- > *Consumers resident in the Netherlands wanted to buy e-books from a UK based trader's website. The company refused to allow the purchase and argued that the e-books were available on the country-specific websites for residents of these countries due to intellectual property reasons.*

⁸⁵ http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/telecom/index_en.htm

⁸⁶ *A Digital Single Market Strategy for Europe*, p. 8, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>

⁸⁷ https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm

⁸⁸ http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf

⁸⁹ Commission Staff Working Document *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, 2012, p.19.

3.2 Evidence

A service provider may have valid reasons for refusing to trade or for applying different conditions and, as shown by some of the case study examples above, are often willing to justify their decision in this respect. However, while many traders responding to requests from ECC-Net were prepared to discuss many aspects of their decision not to supply or to impose different conditions, only two instances were noted where traders attempted to provide evidence to support their stance: (1) a trader based in Germany referred to the legal provisions pertaining to the international carriage of dangerous goods to justify his decision not to supply the product given its characteristics and the risk involved in the transport of the product by air, and (2) a German web-trader referred to their previous dealings with relevant UK authorities in relation to product certification, in light of which they decided to introduce a policy that the online shop would supply restricted kits destined for the UK market via business customers only and not directly to end-users.

Being transparent and informing consumers about reasons preventing traders from supplying services or applying different conditions of access to those services can avoid consumer frustration and disappointment. While it may not always be possible to provide the information in this respect at the beginning of the ordering process⁹⁰ or in the pre-contract phase, service providers should be required to provide justification on requests from consumers. Instead, at present, consumers often have no other option but to use the services of relevant enforcement authorities or ECC-Net and request that the latter seek clarification on their behalf.

The Commission has proposed legislation⁹¹ so that service providers and recipients could benefit from more legal certainty about which practices are allowed and which ones are not. However, while clarifying in which situations there can be no justification for different treatment should certainly be beneficial to consumers, it is unclear whether the proposed Regulation would indeed boost consumers' confidence when shopping cross-border. One of three situations, under which discrimination of consumers based on residence is prohibited under the proposal, concerns the selling of physical goods when the trader is not involved in the delivery of the product to the Member State of the consumer. It is difficult to envisage how this provision would make consumers' shopping experience any easier. Picking up the goods in a Member State of the trader's establishment or in a different Member State to which the trader delivers or organising a courier collection may prove extremely expensive and cumbersome, especially for low-value goods. Furthermore, the proposal introduces the requirement for traders to provide justifications; however only where the website access restrictions or rerouting are required by law. Seeking justification from traders, where different treatment is applied for other reasons, may still prove challenging for consumers.

⁹⁰ Similar to the information requirements for traders regarding delivery or payment restrictions under Article 8.3 of Directive 2011/83/EU on consumer rights.

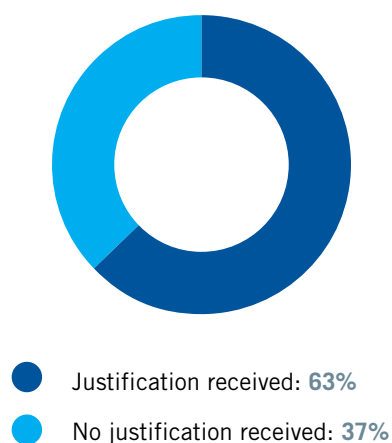
⁹¹ Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, available at <https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-geo-blocking>

4. Outcomes of ECC-Net's intervention

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

In 243 cases out of 532 reported to the ECC-Net, service providers were contacted by ECCs after receiving complaints from consumers with regards to discrimination based on nationality or place of residence. The traders were informed about the non-discrimination obligation of Article 20.2 of the Services Directive, as well as the respective national implementation laws, and were requested to either deliver the service to the consumer under equal conditions or to inform them about the objective reasons that would justify the difference in treatment.

TABLE 6:
Cases where justification/no justification for different treatment was provided.



4.1 Individual solutions

Twelve cases, which required ECC's active intervention on behalf of consumers,⁹² were still active at the time of writing. As regards the outcome of the remaining 231 complaints pursued on behalf of consumers, 84 cases were resolved satisfactory.

- > *An Estonian consumer placed an order with a French company selling coffee beans and coffee-related products. The order however was cancelled as the trader refused to accept payment made with a credit card issued in Estonia. The consumer sought assistance from ECC-Net and following the correspondence with ECC France the trader accepted the consumer's order.*
- > *A purchase made with a French supermarket entitled a British consumer to receive a voucher to use against his next purchase. The consumer was requested to provide a French address in order to receive the voucher in question. The consumer felt he should be able to benefit from the same promotional offers as French consumers and hence requested assistance from ECC-Net. On contacting the trader on behalf of the consumer, the case was successfully resolved.*

⁹² That is 243 cases handled by ECCs.

4.2 Policy change

In 31 cases service providers changed their business practice following an intervention by ECC-Net. The companies in general agreed to treat consumers equally irrespective of their place of residence or nationality and in most of the cases provided a solution to the individual consumer.⁹³

- > *A German consumer attempted to purchase a coin from a UK web-trader specialising in making crafted coins and medals, but was advised the coin in question was available for sale within the UK only. Following intervention of the UK ECC, the trader not only agreed to deliver the coin to the address in Germany but made the product available for purchase to consumers resident outside the UK.*
- > *A German consumer wanted to register online for a vehicle sharing service facilitated via an Italian web-company, to no avail as bookings from consumers with other than Italian driving licences were not accepted. Following correspondence from ECC Italy, the trader made the service available to holders of Italian and foreign driving licences.*
- > *A travel agent based in Austria cancelled the reservation for hotel accommodation made by a Croatian consumer arguing that, as per the agreement with the hotel, the trader was not allowed to accept bookings from residents in Croatia. After intervention by ECC Austria, the company responded to the effect that they never wanted to discriminate against consumers and that they would make relevant changes to their booking policy.*

The previous ECC-Net's report on the Services Directive, which examined Article 20.2-related complaints reported by consumers between 2010 and 2013, revealed that the majority of companies, which had changed their business practice following the ECC-Net's intervention, were large corporations.⁹⁴ An analysis of cases dealt with by ECCs between 2013 and 2015 with regards to company size revealed that the companies that changed their business practice and policy ranged from multinational corporations to small-scale market enterprises, and included a large Internet-based retailer based in Luxembourg, a British multinational retailer operating under a department store format, a German corporation specialising in optics and imaging products, a multinational travel company operating from Austria, a German electronic and software company, a French supermarket chain, a British upmarket department store, and a company selling a wide range of luxury coffee based in France.

While some of the companies reiterated in their responses to ECCs that they did not believe they violated any consumer protection law, they were willing to take on board arguments made by ECCs on behalf of consumers and make relevant changes to their policies. Business decisions in this respect were especially welcome by ECC-Net with regards to global multi-national companies, whose business practices contrary to the principle of non-discrimination can potentially harm thousands of consumers.

It is difficult to state whether it is easier for large companies and corporations, as opposed to small local traders or SMEs, to make relevant changes to their policies and adopt to relevant requirements of consumer law. Traders, regardless of the size of their business, are in general interested in maximising profits and increasing their market shares; however small and medium sized companies may find that offering their services on a wide scale basis within the Single Market and overcoming barriers to cross-border trade more challenging than large companies. Costs for logistics, costs to comply with different consumer protection and contract law rules, costs for debt recovery or costs with regards to a law suit in the consumer's state of residence are just a few examples that make it difficult for SMEs to sell cross-border.

For SMEs to take full advantage of the Single Market and for them to sell on a larger basis within the EU, it is important that solutions are found to tackle the barriers and obstacles that SMEs experience today.

⁹³ In some of the cases service providers were unable to provide a solution for individual consumers given products consumers had been looking for originally were purchased somewhere else or consumers were no longer interested in receiving the service.

⁹⁴ Enhanced Consumer Protection – the Services Directive 2006/123/EC. Analysis of Article 20.2 and Article 21 related consumer complaints reported to ECC-Net between 2010 and 2012, p.35, available at http://www.eccireland.ie/wp-content/uploads/2013/07/ServicesDirective_FINAL_VERSION.pdf

VI. Redress and Enforcement

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

1.1 Competent enforcement bodies

In accordance with Article 20.2 of the Services Directive, Member States have an obligation to ensure that the non-discrimination principle is implemented in their national legislation. The individual Member States are responsible for determining which body is most suitable for monitoring and enforcing the Directive. Most Member States have attributed the task of administrative enforcement of the national provisions implementing Article 20.2 to the authorities that are responsible for the administrative enforcement of consumer legislation, others entrusted their competition authorities with the enforcement of relevant provisions;⁹⁵ and in the event of legal disputes, it will be for the competent court to adjudicate on these issues.⁹⁶

While Annex II of the Commission's guidelines on the application of Article 20.2 contains the list of competent entities for both consumer and business enforcement, the Services Directive related cases handled by ECC-Net exposed the lack of certainty in many Member States about who is the enforcement body for Article 20.2. Given difficulties in identifying relevant enforcement authorities faced by consumers, the working group decided to carry out a survey to gain more clarity in this respect. However, as it transpired many ECCs found the task of identifying competent enforcement bodies equally challenging.

Despite the data not being readily available in some Member States, based on the information provided by the participating ECCs, the working group compiled the list of enforcement authorities in charge of ensuring compliance with the relevant national provisions implementing Article 20.2.⁹⁷ Accordingly, consumer protection boards/commissions, consumer protection authorities or consumer ombudsman were assigned as competent bodies in Bulgaria, Cyprus, Denmark, Hungary, Ireland, Lithuania, Malta, Norway, Romania,⁹⁸ Spain and Sweden. The Netherlands entrusted the Netherlands Institute for Human Rights with the task of enforcement.⁹⁹ In Austria and Germany the task of enforcement was attributed to regional administrative authorities, whereas in Belgium, the Czech Republic,¹⁰⁰

Slovenia, Slovakia and Portugal it was assigned to trade inspectorates. Trading Standards, local authority departments, are assigned as competent entities in the UK. France and Italy entrusted the competition authority with the enforcement of the national provisions implementing the non-discrimination clause. Croatia and Greece attributed the task of enforcement to the Ministry of Finance. As Estonia, Finland, Iceland, Latvia, Luxembourg and Poland do not have a public enforcement regime in place, infringements of the non-discrimination principle of Article 20.2 can only be enforced via national civil courts.

⁹⁵ See Annex II of the Commission Staff Working Document: *With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on Services in the Internal Market ('the Services Directive')*.

⁹⁶ See Annex II of the Commission Staff Working Document: *With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on Services in the Internal Market ('the Services Directive')*.

⁹⁷ List available in Annex I of this report.

⁹⁸ The National Protection Authority (NACP) conducts its activity in Romania through a three tiers bodies hierarchy: the lowest tier bodies are the County offices for consumers protection – Comisariate Judetene pentru Protectia Consumatorilor (41 plus the office for consumers protection in Bucharest), the middle tier are the Regional offices for consumers protection (8) and the highest tier is NACP.

⁹⁹ The Netherlands Institute for Human Rights provides an alternative to a normal court procedure. The Institute issues non-binding assessments to discrimination cases

¹⁰⁰ According to the Czech Act on Free Movement of Services the enforcement authority has to be an administrative body. The Czech Trade Inspection has general competence. In case an authority was established for a particular service, this authority shall be competent (Energy Regulatory office, Czech Telecommunication office).

> *A consumer resident in Austria wanted to use his German credit card to make purchases with an online music and video store operating from Luxembourg. The trader advised that only credit cards issued in Austria can be accepted for the purchase in question. After intervention by ECC-Net the trader informed that the store only holds the licence for music and videos for the territory of Austria and in order to ensure that the relevant content is sold to customers resident in Austria, the trader relies on the information in respect of the country of payment card issuance. As no resolution was reached, ECC Austria wanted to refer the case to the enforcement body for Article 20.2 in Luxembourg, but was advised by its Luxembourgish counterparts that there was no enforcement entity competent to deal with the case. The consumer had no other option but to consider seeking redress via the courts.*

ECC-Net have no enforcement powers and whilst expertise and leverage may increase the chances of resolving complaints, the outcome of any liaison with the disputing parties may ultimately depend on the trader's willingness to cooperate. If complaints are not resolved to consumers' satisfaction, consumers can consider, at their discretion, whether to take action through the courts. However, in relation to complaints involving different treatment by traders on grounds of nationality or residence, ECC-Net is not aware of any case resulted in judicial enforcement action instigated by the consumer. While the European Small Claims Procedure (ESCP) provides consumers with a uniform and speedy debt-recovery process across the EU, the uncertainty as to what may constitute the breach of the non-discrimination principle of Article 20.2, the cost associated with legal proceedings and the low value of goods and services normally involved in this type of disputes may explain consumers' lack of willingness to pursue action.

1.2 Sanctions

It is for the competent national authorities to ensure that general conditions of access to a service made available to the public by traders comply with the national provisions implementing Article 20.2. Enforcement of those provisions must be carried out in accordance with the powers of competent enforcement entities provided in national law.¹⁰¹

In 19 Member States relevant enforcement authorities have powers to impose sanctions or penalties where the provisions laid down by the Services Directive are contravened. Sanctions provided by national laws may vary from imposing a fine against a company acting in a manner that constitutes an infringement of the non-discrimination clause to an injunction prohibiting the use of terms and conditions which infringe provisions implementing Article 20.2.

In Ireland¹⁰² and in the UK a qualified entity responsible for the enforcement of the national provision implementing Article 20.2, that is of the opinion that a trader is acting in a manner that constitutes an infringement of the non-discrimination clause may, for the purpose of protecting the collective interests of consumers, seek a court order to require that trader to either cease acting in that manner or not to act in that manner.

In Cyprus, Lithuania and the Netherlands the competent enforcement bodies have no powers to impose sanctions on traders acting to the contrary to the principle of non-discrimination.

Out of all cases referred to the relevant enforcement authorities by ECC-Net, only one resulted in a fine being imposed against the trader.¹⁰³

¹⁰¹ 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')*, p. 4.

¹⁰² Annex I to Directive 2009/22/EC on injunctions for the protection of consumers' interests (the Injunctions Directive) includes the Directive 2006/123/EC on services in the internal market (the Services Directive). The Injunctions Directive was transposed in Ireland by S.I. 555/2010 – European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010. Include link to the SI.

¹⁰³ See Section 2.2: Decisions in favour of consumers of this report for more information

Austria	administrative fines up to 3,000 EUR; in case of a repeated offence, the enforcement body can increase the amount of the fine
Belgium	fines between 26 EUR and 10,000 EUR
Bulgaria	fines between 500 BGN and 5000 BGN (approx. 256 EUR – 2,565 EUR) as well as material sanctions, creating a public financial obligation on a legal entity. On a second violation, the amount of the fine or material sanction can be doubled.
Czech Republic	fines up to 3,000,000 CZK (approx. 110,000 EUR)
Croatia	fines between HRK 3 000 to HRK 50.000 (approx. 398 EUR – 6,633 EUR)
Denmark	fine to be determined by the Danish Consumer Ombudsman or courts unless the trader is found guilty of a more severe punishment under another Act (§17 Law on services in the internal market)
France	fines up to 300,000 EUR and/or imprisonment up to 2 years to be determined by national courts. The amount of fines can also be calculated in proportion to the company's profit. The French Enforcement Body DGCCRF can impose so-called "amendes administratives"
Germany	fines up to 1,000 EUR
Greece	administrative fines between 200 EUR and 3,000 EUR
Hungary	administrative fines between 15,000 HUF (approx. 48 EUR) and 500,000,000 HUF (approx. 1,600,000 EUR) imposed by the Government Offices according to the Consumer Protection Act
Italy	pecuniary sanctions between 5,000 EUR and 5,000,000 EUR and the publication of the enforcement body's ruling on the trader's website
Malta	fines between 470 EUR and 47,000 EUR
Norway	fines and/or a prison term for up to 6 months to be determined by the Consumer Ombudsman or national courts
Portugal	fines for individuals between 250 EUR and 3,000 EUR; for corporate bodies between 500 EUR and 25,000 EUR
Romania	fines between 1,000 RON and 5,000 RON (approx. between 223 EUR and 1,114 EUR)
Slovakia	administrative penalty up to 66,400 EUR
Slovenia	fines up to 1,200 EUR for legal entities and sole traders and up to 400 EUR for company employees
Spain	fines to be determined by consumer protection regional authorities
Sweden	Market a Disruption Fee (Marknadsstörningsavgift), imposition of penalty (Utdömande av vite) and damages/indemnity (Skadestånd).

2. Decisions concerning business practices implementing a price or service differentiation

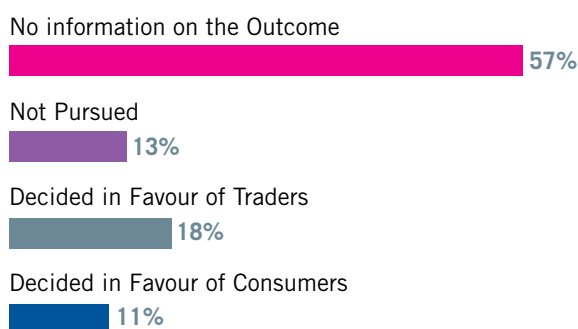
Reaching an amicable resolution in cases in which ECC-Net intervened on behalf of consumers was not always possible. Out of 243 cases which required ECC-Net's active intervention, 54 were reported to the relevant enforcement authorities. The traders' failure to cooperate with ECCs and the lack of a satisfactory explanation offered by traders in respect of their business practices implementing a price or service differentiation were the main causes for ECCs' decisions to seek further assistance from competent entities.

In the process of handling Article 20.2 related consumer complaints the following authorities were contacted by ECC-Net:

Austria	Regional Administrative Authorities
Belgium	SPF Economie, P.M.E. Classes moyennes et Energie Direction générale de l'Inspection économique
Denmark	Danish Consumer Ombudsman
France	Direction générale de la concurrence, de la consommation et de la répression des frauds (DGCCRF)
Germany	Regional Trade Authorities
Hungary	Equal Treatment Authority Hungary
Italy	Italian Competition Authority
Romania	Local Consumer Protection office (Comisariatul Regional pentru Protectia Consumatorilor)
Slovenia	Market Inspectorate of the Slovenian Ministry of Economic Development and Technology
Spain	Local Consumer Protection Authorities
Sweden	Swedish Consumer Agency SCA
United Kingdom	Local Trading Standards Authorities

In a number of cases, in relation to which no satisfactory resolution was reached or reasons brought forward by traders could not be regarded in the ECCs' opinions as an objective reason to justify a discrimination based on nationality or place of residence, no further assistance of competent enforcement bodies could have been sought as there was no existing entity competent to handle Article 20.2 related cases in the Member States where given traders were based.

TABLE 7:
Cases referred to enforcement authorities.



2.1 Case-by-case analysis

In order to determine whether different treatment is justified by objective reasons (e.g. additional costs incurred because of the distance involved or the lack of the required intellectual property rights in a particular territory), the relevant national enforcement authorities are required to perform a case-by-case analysis, taking into account all the circumstances surrounding the service provision, such as the characteristics of the market concerned and the size of the service provider, and demanding objective evidence.

As pointed out in the previous ECC-Net report on the Services Directive, there is no exhaustive list of accepted and unaccepted business practices; however while enforcement authorities may hardly find acceptable incidences where traders justify price or service differentiation with higher charges for cross-border payments or the lack of delivery options, enforcement authorities will need to perform detailed analysis of each individual case where reasons for discriminatory practices are justified, for instance, by different market conditions or the lack of the required intellectual property rights.¹⁰⁴

¹⁰⁴ As indicated by Ms Florance Francois-Poncet, the Head of Unit of DG Markt Business-to-Consumer Services Unit; Minutes of the Second Meeting of the Third Period of Sessions of the IMCO Working Group on the Digital Single Market, 7.03.2013, Brussels, available at <http://www.europarl.europa.eu/document/activities/cont/201303/20130314ATT63203/20130314ATT63203EN.pdf>

2.2 Cases decided in favour of consumers

In six cases referred to the relevant enforcement entities by ECCs, it was determined that different treatment on the grounds of nationality or place of residence of the service recipient could not be justified by objective criteria. The enforcement authorities did not find the explanations offered by traders sufficient to justify the price or service differentiations and found in favour of the consumer. In some instances the enforcement action resulted not only in securing a positive outcome for individual consumers, but also led service providers to change their business practice or policy:

- **Consumer complaint resolved successfully**

> A UK national resident in the Netherlands wanted to buy a tablet from a UK-based e-commerce trader using the click and collect service to pick up the laptop at a local shop in the UK when returning for Christmas Holidays. The trader refused the purchase as the consumer's UK credit card was registered to a Dutch billing address. ECC UK reported the case to the competent enforcement body in the UK. The local trading standards authority initiated a proceeding against the trader resulting in a clarification from the trader and a solution of the complaint of the consumer. The order of the consumer and the pick up at a local shop in the UK were accepted.

- **Changes to terms and conditions**

> A French consumer rented a car from a Belgian trader online. Upon collection of the rental car, the car rental provider in Belgium asked the consumer to subscribe to their optional insurance. According to the terms and conditions of the car rental provider, subscription of their optional insurance was obligatory when a consumer does not live in Belgium. Because of this, the consumer refused to rent the car. The case was reported to the competent enforcement body in Belgium, who initiated proceedings against the trader resulting in the trader changing their terms and conditions. The requirement that optional insurances are mandatory for renters who are not resident in Belgium was removed. The requirement for optional insurances was no longer connected to the place of residence of the consumer, but depends on whether a consumer uses the rental car abroad or not.

- **Changes to business practice**

> A Swedish citizen living in France often travels back to Sweden to see her grandchildren and for summer holidays. The consumer wanted to buy books online from a Swedish book seller. The purchase was refused as the consumer could not provide a Swedish "personnummer".¹⁰⁵ The consumer's personnummer had become invalid as she was not living in Sweden any further. The case was reported to the Swedish Consumer Agency which acts as the competent enforcement body for Service Directive complaints. The Swedish Consumer Agency initiated proceedings against the trader resulting in the trader changing their business practices. The trader removed the requirement of having a Swedish personal identity number to buy books online.

In one case, a business practice in breach of the non-discrimination principle of Article 20.2 triggered sanctions of national law:

> A Bulgarian consumer wanted to book a hotel in Bulgaria via the website of a Romanian tour operator. The Romanian tour operator did not accept the booking on the basis that only Romanian residents can book hotels for the prices offered on their website. The case was reported to the competent enforcement authority in Romania which is the local consumer protection office where the trader was established. The enforcement authority initiated proceedings against the tour operator and imposed a fine against the trader.¹⁰⁶

¹⁰⁵ Swedish personnummer is similar to a social security number or national tax number.

¹⁰⁶ ECC Romania received an official answer from the consumer protection office informing them that a fine was imposed against the trader. ECC Romania was not informed about the amount of the fine or the findings of the enforcement body regarding the case.

2.3 Cases decided in favour of traders

In ten cases, in relation to which further assistance of the competent enforcement bodies was sought by ECC-Net on behalf of consumers, it was determined that different treatment of consumers on grounds of their nationality or place of residence was directly justified by objective criteria and consumers' rights were not disregarded.

In relation to a number of cases dealt with by the competent entities, ECC-Net was concerned that not all the circumstances of the situation consumers found themselves in were examined and no evidence to support traders' claims was demanded or that findings presented were not based on a detailed case analysis. While ECC-Net appreciates that not all competent authorities may have the resources or expertise to perform in-depth assessment of complaints referred to them, it is the task of the competent authorities to investigate the issue by demanding evidence and conducting an analysis of all important aspects surrounding the case, especially when an analysis of practices observed may be crucial in gathering guidance as to what may be deemed to be an objective justification for the application of different treatment.

> *ECC Austria received a number of complaints from Austrian consumers who wanted to place orders with a German web-trader, but were re-directed to an Austrian website where the base prices for the same products were considerably higher (between 14% to 20%). It was argued on behalf of the company that they should be free to alter their offers depending on the market involved. In addition the German shop would not have the facilities to manage product return and exchange.*

As it was possible for consumers resident in other Member States to shop with the trader, ECC Germany did not find the explanation offered by the trader satisfactory and requested the competent German authority to investigate. The trader supervisory authority, that handled the case, agreed with arguments brought forward by the trader to justify different treatment. From ECC-Net's perspective the authority failed to take into account all aspects of the case, especially the fact that the web-trader offered delivery to other Member States.

> *A consumer resident in Austria wanted to buy an oven from the largest German-based mail order and e-commerce company. The consumer purchased membership from a German company that provides consumers with a collective postal address in Germany enabling them to order goods that are only sold with a place of residence in Germany. The company did not permit the consumer to order with a collective address in*

Germany and re-directed the consumer to the Austrian website where the price for the same product was €200 higher. It was argued on behalf of the trader that there was a high risk of non-payment in cases such as this, and because of this they only accept payment on delivery in cash. As the consumer was willing to pay the purchase price in advance via bank transfer there was no risk of payment default in this instance and ECC-Net came to the conclusion that such a difference in treatment constituted discrimination based on nationality/residence.

In relation to the case above, the German authority indicated that as long as low-priced dispute resolution systems in respect of cross-border cases were not established throughout the EU, the national sale laws were not harmonised and different market conditions existed in different Member States, service providers should be able to limit their offers to certain countries and be free to refuse delivery to others. While ECCs handling the case in question agreed that a lack of effective means of resolving cross-border disputes, legal fragmentation and different market conditions may constitute barriers to cross-border online trade, they noted that these were not reasons invoked by the trader, whose concerns pertained to a risk of non-payment and costs of debt-recovery. Since the consumer was willing to pay up front, arguments brought forward by the trader to justify his refusal to provide the service were not well-founded.

> *Consumers resident in Germany, Portugal and the Netherlands could not avail of season tickets at a discounted price as an Austrian ski resort offered discounted ski passes only to consumers resident in the region. In relation to some of the consumer complaints, the ski resort argued that they do not discriminate because they offer a transport service to which the Services Directive does not apply.*

Instances of different treatment described above were reported to the district administration office competent to handle those cases in Austria. When presenting its findings, the authority decided that promotion of sport at municipal level would constitute the objective reason for the refusal to offer season tickets at a discounted price to consumers resident outside the region, despite the fact the trader in question never indicated that this was the reason for the application of different treatment. When ECC Austria sought clarification as to whether there was any evidence to substantiate this claim, the authority did not respond with regard to this issue.

2.4 Cases not pursued by the enforcement entities

In four cases, referred to the competent enforcement entities, the authority in question was not prepared to issue a decision concerning a business practice implementing a price or service differentiation or handle an individual consumer complaint.

> *A case of a consumer resident in the Czech Republic being refused the purchase of clothes from a UK web shop and being re-directed to the shop of the Czech Franchise partner where the prices for the clothes were substantially higher was reported to the competent enforcement body in the UK.*

The Trading Standards office dealing with the case described above was not in a position to pursue the case on behalf of the consumer and stated that in order for them to handle the case detriment would need to be suffered by more than one consumer. Considering that a business practice implementing price or service differentiation can potentially harm thousands of consumers, the fact that no decision can be made in an individual case should not serve as an excuse for the lack of action.

> *An Austrian consumer attempted to buy an email domain from the trader based in Germany unsuccessfully as he had no place of residence in Germany.*

A German regulatory authority, to which the case had been referred, proceeded to close the case with no decision arguing the case in question was more suitable for a court to deal with.

> *An Austrian consumer attempted to order a satellite receiver online from a German web-trader. The latter refused to accept the order and advised the consumer he would need an address in Germany if he wanted to shop with the trader.*

The competent entity dealing with the case contacted the trader and requested that they provide their position in writing. The company justified the refusal to sell to other EU Member States with the absence of an obligation to sell cross-border and the absence of a single market for postal delivery.¹⁰⁷ The trader further stated that the authority failed to analyse the case properly and requested reimbursement of expenses incurred in preparing a response for the body. The case was closed as unresolved. It was explained that no previous experience with the handling of Article

20.2 related complaints and the lack of expertise in this area precluded the regulatory authority from making a decision in this respect.

> *An Austrian consumer was unable to purchase canned drinks at a German supermarket, situated near the border with Denmark. While Danish consumers had no problem making such purchases with the trader, the consumer resident in Austria was advised the purchase could not be completed.*

After referring the case to the relevant district administration office in Germany, ECC Austria was advised that it was not possible to identify the company employee who refused to sell the drinks to the consumer and since no similar complaints had previously been reported, the competent body decided not to pursue the case. The rationale behind the decision to terminate the proceedings against the trader presented by the authority handling the case is difficult to accept.

In a number of cases, in relation to which further assistance on behalf of consumers was sought from the relevant enforcement entities, ECC-Net was advised that the Services Directive was not applicable and alleged breaches of the non-discrimination principle could not be examined.

Sale of goods

> *An Irish consumer placed an order for a dress with a UK-based web-trader. The same dress was available on the Irish version of the web-site but at a higher price (€155 as opposed to €95). The consumer indicated the UK as the place of delivery, but was advised she would need to pay €155 as she was using an Irish credit card and clearly was residing in Ireland. The case was referred to the competent Trading Standards office in the UK. The latter refused to look into the matter arguing the Services Directive was not applicable in a case of online purchase of goods.*

Transport services

> *Instances of different treatment applied by an Austrian ski resort were reported to the competent district administration office in Austria.¹⁰⁸ The latter decided not to pursue cases referred to them on the basis that the Services Directive was not applicable. In their view services in respect of selling ski tickets and passes were regarded as transport services and hence fell outside the scope of the Services Directive.*

¹⁰⁷ The company argued that as long as the costs for sending products are not the same to every European country compared to the United States of America, it will not deliver cross-border.

¹⁰⁸ The issue has also been examined by the Commission under the EU Pilot, a procedure designed to deal with enquiries and complaints from citizens and business raising a question of the correct application of EU law with the view to reducing the number of formal infringement procedures. Further information available at https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_03405/fnameorig_394108.html

Communication services

> *A Swedish citizen living in France wanted to access the My Pages service on the website of a Swedish provider of telecommunication-related services. As she was unable to provide the Swedish personnummer,¹⁰⁹ she was unable to access the service. According to the competent authority dealing with the case in Sweden, electronic communication services, such as the ones provided by the trader, were covered by the Swedish electronic communication legislation and hence did not fall within the scope of the Services Directive.*

2.5 Lack of information regarding the outcome of enforcement proceedings

In the majority of cases referred to the relevant enforcement authorities, which amount to 31 out of 54 cases, no information about the outcome could be obtained. While some of the cases remained active at the time of writing, in relation to others there was no further information available to ECC-Net as to whether the matter was pursued or not.

Some enforcement entities competent to examine infringements of the non-discrimination principle of Article 20.2 were not in a position to pursue the matter on behalf of individual consumers. As their activity is an administrative one, any investigations carried out by them are at their own discretion and therefore outside the consumer's entitlements, as demonstrated by the following example:

> *Interested in purchasing clothing items from a web-trader based in Germany, a Dutch consumer was unable to complete her order online. It transpired that the trader did not deliver to the Netherlands. The consumer sought further assistance from ECC-Net. As no satisfactory explanation was offered by the trader, the case was referred to the competent authority in Germany. It was not possible however to obtain any information on the outcome given that neither ECC Germany nor the consumer was a party to the proceeding.¹¹⁰*

Lack of information regarding the outcome of enforcement proceedings can cause consumer frustration. Consumers prevented from availing of desired services,

are often not offered any explanation by traders as to reasons service differentiations have been implemented. When their concerns are raised with relevant authorities in charge of ensuring compliance with the relevant national provisions, lack of information on the outcome of such reports, can cause further consumer disappointment, and may even lead consumers to believe traders are free to implement differentiation with no consequences.

> *An Austrian consumer visited the thermal baths in Savar. As a retired person he asked for a discount. The trader informed him that he has to pay the full price as the discount will only be given to retired persons with Hungarian citizenship. After intervention from ECC-Net, the trader answered that no discrimination occurred as the reduced tariff can be asked from persons who have a confirmation document of the Hungarian Central Administration of National Pension Insurance (ONYF). As consumers that do not receive a pension from Hungary will not receive a confirmation document of the Central Administration of National Pension Insurance (ONYF), ECC-Net came to the conclusion that the trader is discriminating against consumers due to their nationality or place of residence. The case was reported to the relevant enforcement body in Hungary, but ECC Hungary was unable to obtain any information regarding the outcome of the proceedings.*

¹⁰⁹ The Swedish "personnummer" is similar to a social security number or national tax number.

¹¹⁰ Information in respect of the authority's findings on the case was obtained by ECC Germany a few months after the case referral. It was decided that the trader should be free to determine the geographical scope of their commercial activity.

3. Difficulties in obtaining redress

ECC-Net appreciates that the administrative enforcement of the non-discrimination clause may not necessarily entail individual consumer redress and not all competent authorities may be in a position to handle complaints on behalf of individual consumers. Out of all cases referred by ECC-Net to relevant enforcement entities less than 30% resulted in a decision made in respect of an individual consumer complaint. Yet, in relation to a number of cases dealt with, ECC-Net was concerned that not all circumstances of the situation consumers found themselves in were examined and no evidence to support traders' claims was demanded or that findings presented were not based on a detailed case analysis. The handling of Article 20.2 ECC referrals by some of the enforcement authorities exposed lack of awareness of the existing rules and their lack of competence in this area.

The view that the existing rules are perceived as ambiguous and complicated to enforce by national authorities has been expressed by a number of relevant entities and appears to be shared by the Commission, which has already underlined¹¹¹ the need to clarify the application of the non-discrimination principle of Article 20.2 and strengthen its enforcement by means of a new legal instrument.

3.1 Handling of Article 20.2 complaints

The identification of the relevant enforcement authority in a given Member State may prove difficult where the task of ensuring compliance with the relevant rules was assigned to more than one enforcement body. Article 20.2 related cases dealt with by ECC-Net show that the process of communicating with relevant enforcement bodies may prove particularly challenging in cases of a cross-border nature.

Obtaining information and contact details for an enforcement body equipped to deal with potential breaches of the principle of non-discrimination of Article 20.2 may turn to be problematic for consumers. Results of the online survey of consumers¹¹² carried out by the members of the working group and some participating ECCs on Article 20.2 revealed that 67% of respondents, who experienced difficulties availing of the services due to their nationality or place of residence, indicated that they did not know where to complain in such situations.

Even if the information in this respect is readily available to consumers, dealing with the body competent to handle Article 20.2 related cases may prove challenging, especially if the communication is conducted in a foreign language. Gathering relevant documentary evidence to support consumers' claims or complying with national procedural rules, may in addition turn to be problematic. However, these problems are only minor issues in comparison with the difficulties in initiating the procedure if those who are supposed to facilitate the service lack awareness of the existing rules or declare themselves not competent to deal with service differentiation complaints. It is not uncommon for national authorities to advise consumers that the matter is better to be dealt with by a civil court or signpost consumers from one body to another, as demonstrated by the following example.

¹¹¹ European Commission – Fact Sheet, Boosting e-commerce in the EU, available at http://europa.eu/rapid/press-release_MEMO-16-1896_en.htm

¹¹² See Annex VIII of this report.

> *Given difficulties in reaching an amicable resolution in the case of an Austrian consumer, who unsuccessfully attempted to buy an email domain from a German trader, ECC Germany sought further assistance from the competent regulatory authority in Germany. According to the latter the matter should better be dealt with by a court. ECC Germany then turned to the county administration office. The case was further referred to the relevant Point of Single Contact (PSC) under the Services Directive. Eventually, the Ministry of Economy responded to ECC Germany advising that in their opinion the Services Directive was not applicable to the case in question. In this particular case it took nearly a year for the relevant authority to arrive at the decision.¹¹³*

As already indicated in this report, consumers are rather reluctant to pursue legal action where the value of goods and services is relatively low, and instead of investing their time and efforts in pursuing the matter via relevant enforcement authorities, consumers may simply give up and decide to purchase a given product or service elsewhere or pay a higher price.

3.2 Steps to improve the handling of Article 20.2 complaints

While the high volume of consumer complaints can be resolved with the assistance of ECC-Net, the outcome of any liaison with the disputing parties may ultimately depend on the trader's willingness to cooperate. As ECC-Net have no enforcement powers to impose any sanction where consumer legislation is contravened, or the resources to investigate complex cases, taking an active role by competent authorities in examining potential breaches of the non-discrimination clause is crucial for Article 20.2 to take its full effect. In this context, ECC-Net welcomes the Commission's proposal to extend the application of the Regulation on consumer protection cooperation to the provisions of Article 20 of the Services Directive.¹¹⁴

As indicated in the previous ECC-Net report on the Services Directive, the establishment of a single enforcement network of relevant enforcement authorities (preferably one per country), instead of the multiplicity of different enforcement bodies, would make it easier for consumers to know who the competent body for breaches of Article 20.2 is. Furthermore, it was suggested that a standardised complaint form could be designed and made available for consumers in the official languages of the EU. In order to facilitate better communication and improve complaint handling procedures, an annex to the complaint form could contain a list and contact details of the enforcement bodies competent to deal with breaches of Article 20.2. The model complaint form has been developed by the Working Group and can be found in Annex I to this report.

An electronic filing system could be developed to allow consumers to check the complaint status and monitor progress. Findings of cases already dealt with could also be available via the electronic system. While the name of the parties and commercially sensitive information could remain confidential, the publication of the main findings in respect of the analysis of practices observed may be crucial in gathering guidance as to what may be deemed to be an objective justification for the application of different treatment.

¹¹³ The case study in question is not the only example of a complaint being referred from one body to another. Here is another example of the case reported to ECC-Net in late 2012: Article 20.2 related complaint received from an Austrian consumer against a trader based in Germany was referred to the competent Trade Supervisory Board in early 2014 after no amicable resolution could be reached with the assistance of ECC-Net. The Trade Supervisory Board forwarded the case to the relevant consumer protection authority for a resolution. However, after the latter stated they were not competent to deal with the matter, the case was referred to another authority the Trade Supervisory Board believed was competent to deal with the case. The authority dealing with the case last provided its findings in early 2015 and decided in favour of the trader.

¹¹⁴ Proposal for a regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, available at http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal_en.pdf

VII. Conclusions and Recommendations

“Growth in the European Union needs both competitive supply and strong demand. Consumers therefore must be as much centre stage of EU policies as businesses. We need confident consumers to drive forward the European economy” stated Viviane Reding, the then Commission Vice-President and the EU’s Justice Commissioner, emphasising the role of empowered and confident consumers for the exploitation of the potential of the Single Market, when the main objectives of the European Consumer Agenda were introduced back in 2012. Consumer confidence is a key indicator for the overall shape of the economy and continues to be a crucial factor in sustaining the recovery and boosting economic growth.

Increasing consumers’ confidence to consider business from anywhere in the EU is a key part of the Services Directive. It is axiomatic that it will not be possible without promoting transparency in cross-border transactions. Whether Article 20.2 is the key tool to this end is unclear since there is no definite duty on the supplier of the service to disclose and to motivate any different treatment of consumers from other Member States under the non-discrimination clause. **Too often consumers are confronted with obstacles that cause frustration and disappointment when attempting to place an order, whereby they are refused a service, rerouted automatically to a national version of the website or offered a different price.** It takes place at various stages of the ordering process with no clear indication of any geographical restriction of access to the service. Complementary to Article 20.2 of the Services Directive, Article 8.3 of the Consumer Rights Directive imposes transparency obligations towards consumers. It provides,

for contracts concluded after 13 June 2015, that trading websites must indicate clearly and legibly at the latest at the beginning of the ordering process whether any payment or delivery restrictions apply. However, recent research carried out by participants of the joint project on the Services Directive¹¹⁵ revealed that certain web-traders continue to restrict access to services offered online and fail to comply with requirements laid down by Article 8.3. Allowing consumers to invest their time and energy into the ordering process only to realise they would not be able to complete the order,¹¹⁶ causes consumers frustration and leaves them with the impression of being discriminated against on the basis of their country of residence.

Despite the implementation of the non-discrimination principle in Article 20.2 of the Services Directive, consumers still face unjustified restrictions and diversifying of terms of sale on the grounds of their nationality or place of residence when they try to avail of services cross-border. **This is mainly due to uncertainty on what constitutes objective criteria, justifying differences in treatment by service providers.** Efforts to remedy these problems, such as the Commission’s Guidance¹¹⁷ as to what may constitute objective justification and how to interpret objective criteria in practice, have not sufficiently reduced legal uncertainty. Given that it can always be argued that there are extra risks and costs associated with the provision of services abroad, nearly every case of discrimination can be justified. Therefore, unjustified market fragmentation business practices cannot always be prevented on the grounds of a general principle set by Article 20.2.¹¹⁸ In this respect ECC-Net welcomes the Commission’s acknowledgment that further action is necessary to give effect to this principle and develop rules against discrimination based on the nationality or place of residence of consumers,¹¹⁹ however we do not necessarily agree that the legislative

¹¹⁵ A mystery shopping exercise was conducted by participants of the Services Directive Joint Project in March 2016 to examine whether web-traders comply with Article 8.3 of Directive 2011/83/EU on consumer rights. Project participants were required to check information available during the ordering process as well as relevant terms and conditions of web-traders, against whom the Services Directive-related complaints were lodged with ECC-Net between 2013 and 2015. The mystery shopping exercise was conducted in relation to relevant Services Directive related cases that required ECC-Net active intervention on behalf of consumers (i.e. normal complaints). It was not possible to check the relevant information in relation to all cases examined as due to, inter alia, language barriers or a requirement to create an account it was not possible to conduct the ordering process. See Annex VII of this report.

¹¹⁶ Information in respect of delivery restrictions was often provided during or at the end of the ordering process. In several cases it was not possible to select a country of consumers’ residence for delivery purposes.

¹¹⁷ Commission Staff Working Document *With a view to establishing guidance on the application of Article 20.2 of Directive 2006/123/EC*, 2012.

¹¹⁸ EU competition law can tackle certain restrictions to cross-border trade established through contractual provisions that limit the ability of service providers to serve online users located in another Member State (e.g. requirement on a distributor to prevent customers located in another territory from viewing its website or to re-route such customers to another distributor’s website can be considered unlawful restrictions); however competition law does not address restrictions stemming from the unilateral business decisions of a non-dominant company. Further information available at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_cnect_002_geo-blocking_en.pdf

¹¹⁹ Single Market Strategy p.11, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-550-EN-F1-1.PDF>

proposal on tackling unjustified geo-blocking and other forms of discrimination based on place of residence or establishment, or nationality within the Single Market¹²⁰ will achieve certainty for consumers and traders as to what can be regarded as objective criteria to justify different treatment, other than reasons such as VAT or certain public interest legal provisions.¹²¹

In the previous report on the Services Directive, ECC-Net voiced its concern about the growing number of consumer complaints pertaining to price and service differentiation on the basis of the nationality or country of residence of service recipients and reiterated that the lack of awareness of the protection consumers enjoy under the Services Directive may be the reason for many complaints of this nature going unreported. This does not seem to be the case now. **More consumers seem to be well aware of their rights and anticipate that the elimination of barriers to the provision of services in the Single Market will guarantee them wider choice and better value when availing of services cross-border.** This is especially visible in the context of the rapid take up of online content services and increasing use of portable devices. Consumers today expect to use services from everywhere, wherever they are in the EU. However, while the Services Directive bans business practices that unjustifiably hamper access to their services and ensures that consumers can make informed choices, to the extent that impediments to its enforcement continue to exist, the Services Directive has yet to release its full potential.

Continuing a trend indicated by the previous ECC-Net report, the lack of effective enforcement of the non-discrimination principle of Article 20.2 constitutes a major barrier to making the Services Directive work in practice. The current report shows not only little evidence of effective enforcement but exposes an equally serious problem: a lack of clarity, even among policy makers, in many Member States about who is the enforcement body for Article 20.2. **Consumers may be aware of the protection offered by the Services Directive but find reporting potential infringements extremely challenging. There is little awareness of how to complain and who to address a complaint to.**

There is an urgent need for a rapid and consistent enforcement of the non-discrimination clause. As indicated by the Commission, effective Union-wide cross-border enforcement cooperation among public authorities is crucial to prevent non-compliant traders from exploiting gaps, territorial and other limitations in the enforcement capacity of each Member State.¹²² In this respect, ECC-Net welcomes the Commission's proposal¹²³ whereby the mechanisms to ensure cross-border cooperation among competent authorities provided for in the Consumer Protection Cooperation Regulation¹²⁴ should be available in relation to rules laid down by Article 20.2 of the Services Directive and by the proposed Regulation on addressing geo-blocking and other forms of discrimination based on place of residence or establishment, or nationality within Single Market. The proposal to strengthen cooperation between national authorities within the CPC-Net¹²⁵ should in turn ensure faster and more efficient tackling of unlawful business practices.

¹²⁰ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2016/0152 (COD).

¹²¹ http://europa.eu/rapid/press-release_IP-16-1887_en.htm

¹²² http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal_en.pdf

¹²³ http://ec.europa.eu/consumers/consumer_rights/unfair-trade/docs/cpc-revision-proposal_en.pdf
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0289&from=EN>

¹²⁴ REGULATION (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

¹²⁵ Consumer Protection Cooperation Network

However, in order to ensure that consumers can fully benefit from the Single Market by being able to access offers available on the markets of other Member States, effective enforcement of the existing rules may not be sufficient and will need to be facilitated by further improvement of the regulatory environment for service providers who want to supply their services across borders.

According to the Commission¹²⁶ small and medium-sized enterprises are the backbone of the European economy, and yet many of them “cater for a local or regional market”¹²⁷ and only a few “consider the EU their home market or set out with pan-European ambition”.¹²⁸ Difficulties in understanding and complying with regulatory requirements, uncertainty over the application of rules on consumer protection and the complexity of VAT regulations are just some of the areas traders complain about when looking to operate cross-border. In addition, fragmented market conditions and unlawful restrictions in agreements between suppliers and distributors further prevent traders from selling in other markets, as initial findings from the Commission’s e-commerce sector inquiry revealed.¹²⁹ In this context, ECC-Net welcomes the initiatives of the Digital Single Market and Single Market Strategies¹³⁰ and forthcoming legislative proposals aiming at breaking down barriers to business cross-border activity and thus laying the groundwork for the creation of the right conditions for improved access to services for consumers across the EU.¹³¹

¹²⁶ Communication from the Commission: Upgrading the Single Market: more opportunities for people and business, COM(2015) 550 final, p. 4, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0550&from=EN>

¹²⁷ Ibid. p.4.

¹²⁸ Ibid. p.4.

¹²⁹ Commission Staff Working Document Geo-blocking practices in e-commerce. Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition, SWD (2016) 70 final, p. 38.

¹³⁰ A Digital Single Market Strategy for Europe, COM(2015) 192 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN> and Upgrading the Single Market: more opportunities for people and business, COM(2015) 550 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0550&from=EN>

¹³¹ Including proposals for tackling differences in contract and copyright law between Member States, reducing the VAT-related burden and dealing with the high prices and inconvenience of cross-border parcel delivery.

ANNEX I:

Model Complaint Form and list of national enforcement bodies under Article 20.2

Service Recipients Complaint Form

This form can be used to lodge a complaint regarding discrimination on the ground of nationality or place of residence faced by consumers seeking to purchase goods and services across the EU

Article 20.2 of Directive 2006/123/EC on Services in the Internal Market ('Services Directive') prohibits discrimination against service recipients on the basis of their nationality or country of residence, unless differences implemented by service providers are directly justified by objective criteria.

INSTRUCTIONS

Consumers with a complaint against a service provider regarding different treatment or refusal to provide a service based on their nationality or place of residence should first seek to address the matter with the service provider concerned.

If you have not received a reply, or if you are not satisfied with the reply, you can contact the European Consumer Centre in your home country for further advice and assistance. A list of European Consumer Centres may be found at: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm

This complaint form is to be used to submit a complaint to the national enforcement body for Article 20.2 of the Services Directive in the country where the service provider is established, if your efforts to resolve a problem directly with the service provider have been exhausted. A list of competent bodies can be found in Annex to this form.

Please fill in the form in black capital letters and keep a copy of this form for your records.

Information about the Service Recipient (Consumer):

Name:

Address:

Post code:

County/State:

City:

Country:

Telephone number:

Email address:

Information about the Service Provider (Trader):

Name:

Company registration number:

Address:

Post code:

County/State:

City:

Country:

Website:

Telephone number:

Email address:

Information about the Transaction:

Product/service involved:

Date of purchase/attempted purchase:

Price:

Method of payment:

Transaction concluded:

- On-premises
- Online
- By telephone
- By other means

Type of service involved:

- Distribution of goods and services (incl. online and offline retail sale of product and services, e.g. electronic goods, DIY products, music downloads)
- Services in the field of tourism (incl. travel agencies)
- Leisure services (incl. sports centres and amusement parks)
- Rental and leasing services (incl. car rental)
- Accommodation and food services (incl. hotels, restaurants, caterers)
- Activities of most regulated professions (such as legal and tax advisers, architects, engineers, accountants, surveyors)
- Construction services and crafts
- business-related services (such as office maintenance, management consultancy, event organisation, debt recovery, advertising and recruitment services)
- training and education services
- real estate services
- household support services (e.g. cleaning, gardening and private nannies)
- Other

Please specify:

Complaint:

Discriminatory treatment implemented by the service provider based on grounds of:

- Nationality
- Residence

Describe your complaint:

Briefly describe what you would consider a reasonable resolution to your complaint:

Communication between the consumer and the trader:

Have you contacted the trader in relation to your complaint?

- Yes:
 - Email
 - Letter
 - Phone call
 - Other (please specify)
- No

Is there a copy record of your complaint (e.g. copies of correspondence sent or details of telephone calls)?

- Yes
- No

Have you received a response to your complaint?

- Yes
- No

If yes, has the trader provided reasons to justify different treatment or refusal to provide a service?

- Yes

Details:

- No

Is there a copy record of the response received?

- Yes
- No

Please enclose copies of relevant supporting documents.

National Enforcement Bodies

under Article 20.2 of Directive 2006/123/EC on Services in the Internal Market

Austria	<p>118 Regional administrative authorities (competent according to the place of residence of the trader or where the breach of Art. 23 of the Services Act happened)</p> <p>Contacts according to the region: http://www.bmi.gv.at/cms/zivildienst/kontakt/bvb.aspx</p>
Belgium	<p>SPF Economie, P.M.E. Classes moyennes et Energie Direction générale de l'Inspection économique NG III, 3ème étage Boulevard Roi Albert II 16 1000 Bruxelles Belgium Phone: +32 2 277 54 85</p> <p>Contact Center: SPF Economie, P.M.E., Classes moyennes et Energie Contact Center Rue du Progrès, 50 1210 Brussels Belgium Phone (free number): +32 800 120 33 From abroad: +32 800 120 33 Fax (free number): +32 800 120 57 From abroad: +32 800 120 57 Email: info.eco@economie.fgov.be Website: http://economie.fgov.be/en/</p>
Bulgaria	<p>Commission for Consumer Protection (CCP) 4A Slaveykov Sqr., fl. 3,4,6 Sofia 1000 Bulgaria Phone: +359 2 9330565 Email: info@kzp.bg Web: https://kzp.bg/</p>
Croatia	<p>Ministry of Finance, Customs Directorate Alexandera von Humboldta 4a, 10 000 Zagreb Croatia Phone: +385 1 6211 300 Email: ured-ravnatelj@carina.hr javnost@carina.hr Web: www.carina.gov.hr</p>
Cyprus	<p>Consumer and Competition Protection Service (CCP) Ministry of Energy, Commerce, Industry and Tourism 6, Andreas Araouzos street 1421 Nicosia Cyprus</p> <p>Contact Person: Katerina Solomou Commerce & Industry Officer Phone: +357 22867193 Fax: +357 22375120 Email: ksolomou@mcit.gov.cy Web: www.mcit.gov.cy</p>

Czech Republic Czech Trade Inspection (General Competence)

Štěpánská 567/15
 120 00 Praha 2
 Czech Republic
 Phone: +420 296 366 360
 Fax: +420 296 366 236
 Email: podatelna@coi.cz
 Website: www.coi.cz

Regional Inspectorates can be found via the following website:
www.coi.cz/en/about-ctia/contacts-inspectorates/

Authorities with special competence for example:

Energy Regulatory Office

Masarykovo náměstí 5, 586 01 Jihlava
 Phone: +420 564 578 666 - switchboard
 Fax: +420 564 578 640 - central fax (mailroom)
 E-mail: podatelna@eru.cz, eru@eru.cz
 Website: www.eru.cz/en/kontakty

Czech Telecommunication Office

Central Office in Prague
 Sokolovská 219
 Prague 9
 Czech Republic

 P.O. Box 02
 225 02 Prague
 Czech Republic
 Phone: +420 224 004 688 (Department of Inspection and Consumer Protection)
 Fax: +420 224 004 826 (Department of Inspection and Consumer Protection)
 Email: podatelna@ctu.cz
 Website: www.ctu.eu/contacts

Denmark Danish Consumer Ombudsman (Forbrugerombudsmanden)

Carl Jacobsens Vej 35
 2500 Valby
 Denmark
 Consumer Hotline: +45 41 71 51 51 (daily betw 9-12)
 Email: forbrugerombudsmanden@kfst.dk
 Web: www.forbrugerombudsmanden.dk
www.consumerombudsman.dk

Estonia **NA**¹³⁰

Finland **NA**¹³¹

Cases can be taken to the competent district courts in Finland. For contact details of competent courts: www.oikeus.fi/tuomioistuimet/karajaoikeudet/en/index.html

France Direction générale de la concurrence, de la consommation et de la répression des frauds (DGCCRF)

59, bvd Vincent Auriol Télédock 042
 75013-Paris Cedex 13
 France
 Phone: +33 1 44 87 17 17
 Email: webmestre@dgccrf.finances.gouv.fr
 Web: <http://www.economie.gouv.fr/dgccrf>

¹³⁰ Estonian national law does not explicitly state the competent authority. However the subject is under discussion with the Estonian Consumer Protection Board and the Ministry of Economic Affairs.

¹³¹ No competent enforcement body has been designated.

Germany	<p>Trade supervisory board of every region, city or community Information about the competent trade supervisory board can be obtained by contacting the municipality in whose territory the trader has a place of establishment.</p>
Greece	<p>Ministry of Finance Karagiorgi Servias 10 105 62 Athens Greece Phone: +30 210 3375000 Fax: +30 210 3332608 Email: minister@minfin.gr Web: www.minfin.gr/?q=en</p>
Hungary	<p>Hungarian Authority for Consumer Protection (HACP) József krt. 6. 1088 Budapest Hungary Central phone number: +36 1 4594812 Central e-mail address: nfh@nfh.hu Website: http://www.nfh.hu/en/node/4367</p> <p>The contact details of the authority acting at first instance: Consumer Protection Department of the Technical Authorisation and Consumer Protection Division of the local Capital Government Offices: http://www.nfh.hu/teruleti</p> <p>Equal Treatment Authority Krisztina krt. 39/B 1013 Budapest Hungary Post-office box: 1539 Budapest, Pf. 672 Phone: +36 1 795-2975 Fax: +36 1 795-0760 E-mail: ebh@egyenlobanasmod.hu Web: http://www.egyenlobanasmod.hu/eng</p>
Iceland	NA ¹³²
Ireland	<p>Competition and Consumer Protection Commission (CCPC) PO Box 12585, Dublin 1 Ireland Phone: + 353 1 402 5500 Fax: + 353 1 402 5501 Consumer helpline: 1890 432 432 Contact form: www.consumerhelp.ie/contact-form Website: www.consumerhelp.ie www.ccpc.ie/about/what-we-do</p>
Italy	<p>Autorità Garante della Concorrenza e del Mercato Piazza G. Verdi, 6/a 00198 Rome Italy Phone: +39 06858211 Email: protocollo.agcm@pec.agcm.it Website: www.agcm.it</p>

¹³² No competent enforcement body has been designated

- Latvia** **Civil Courts**
The competent courts can be found via the following website:
<https://www.tiesas.lv/>
- Lithuania** **State Consumer rights protection authority**
Vilniaus g. 25
01402 Vilnius
Lithuania
Phone: +370 (8 5) 262 67 51
Email: tarnyba@vvtat.lt
Website: www.vvtat.lt/index.php?225846438
- Luxembourg** **National Courts**
Collective and single legal actions in front of courts in the scope of articles L.121-1 à 122-8, L.313-1 and L.313-2 of the Code de la consommation

The competent courts can be found via the following website:
<http://www.justice.public.lu/fr/aides-informations/accueil-info-juridique/>
- Malta** **Director General for Consumer Affairs**
Office for Consumer Affairs
Malta Competition and Consumer Affairs Authority
Mizzi House, National Road
Blata l-Bajda,
Hamrun HMR 9010
Malta
Phone: +356 2395 2000, +356 2394 2200,
Email: info@mccaa.org.mt, joyce.a.borg@mccaa.org.mt
Website: www.mccaa.org.mt
- The Netherlands** **Het College voor de Rechten van de Mens**
Postbus 16001
3500 DA Utrecht
Phone: +31 30 888 38 88
Email: info@mensenrechten.nl
Website: www.mensenrechten.nl
- Norway** **Consumer Ombudsman**
Sandakerveien 138
0484 Oslo
Norway
Phone: +47 23 400 600
Email: post@forbrukerombudet.no
Website: www.forbrukerombudet.no

National courts; for contact details of competent courts: www.domstol.no/en/
- Poland** **Civil Courts**

- Portugal**
- ASAE – Autoridade de Segurança Alimentar e Económica (with general competence)**
 Rua Rodrigo da Fonseca, n.º 73
 1269-274 Lisboa,
 Phone: +351 217 983 600
 Fax: +351 217 983 654
 Email: correio.asae@asae.pt
 Website: <http://www.asae.pt/IRAE>
- Governo dos Açores (Azores Government)**
 Rua Margarida de Chaves, n.º 103 – 1.º 9.500 – 088, Ponta Delgada
 Phone: +351 296 302 270
 Fax: +351 296 284 395
 Email: irae@azores.gov.pt
 Website: <http://www.azores.gov.pt/Gra/vp-irae/>
- Região Autónoma da Madeira (Madeira Region)**
 Rua Direita, n.º 27, 3.º - 9050-450 FUNCHAL
 Phone: +351 291 215 040
 Fax: +351 291 215 060
 Email: srrh.irae@netmadeira.com
 Website: <http://www.madeira.gov.pt/sretc/Estrutura/Dire%C3%A7%C3%B5es-Regionais>
- The decree law 92/2010 also gives competence to the sectorial authorities such as professional orders, market surveillance authorities for the economic sectors, regulators with inspection competences or any other authority with specific competence on services providers activities, for instance:
- Travel agencies – Turismo de Portugal, IP**
 Rua Ivone Silva, Lote 6, 1050-124 Lisboa
 Phone: +351 211 140 200
 Fax: +351 211 140 830
 Email: info@turismodeportugal.pt
 Website: <http://www.turismodeportugal.pt/Portugu%C3%AAs/Pages/Homepage.aspx>
- Romania**
- Autoritatea Nationala pentru Protectia Consumatorilor (National Authority for Consumers' Protection)**
 72 Aviatorilor Bvd., Sector 1,
 Bucharest
 Romania
 Phone: +40 213076784 (for administrative matters, not for individual complaints)
 Email: office@anpc.ro (for administrative matters, not for individual complaints)
 Website: www.anpc.gov.ro
- According to Romanian legislation complaints can only be made in writing (letter, fax, e-mail or online form).
- Consumers can complain using the following online complaint forms:
- Romanian: <http://reclamatii.anpc.ro/>
 English: <http://reclamatii.anpc.ro/complaint.aspx>
- Slovakia**
- Slovak Trade Inspection**
 P.O. Box 29
 Prievozká 32
 827 99 Bratislava 27
 Slovakia
 Phone: +421 2 58272 132
 Email: info@soi.sk
 Website: www.soi.sk/en/Contact.soi

Slovenia**Market inspectorate (Tržni inšpektorat Republike Slovenije)**

Ministry of Economic Development and Technology Market Inspectorate

Dunajska cesta 160

SI-1000 Ljubljana

Slovenia

Phone: +386 1 280 8700

Fax: +386 1 280 8740

Email: gp.tirs@gov.si

Website: www.ti.gov.si/en/

Spain**Regional authorities (Comunidades Autónomas)**

Competent regional authority to be found at:

<http://aplicaciones.consumo-inc.es/cidoc/Consultas/dirMapas.aspx?tabla=dirconsum>

Sweden**Swedish Consumer Agency**

PO. Box 48

Tage Erlandergatan 8 A

651 02 Karlstad

Sweden

Phone: +46 771 42 33 00

Email: konsumentverket@konsumentverket.se

Website: <http://www.konsumentverket.se/Om-oss/Kontakt/Kontakta-registraturen/>

United Kingdom**200 Local Trading Standards Authorities throughout the United Kingdom**

The competent enforcement body is located in the same geographical area as the trader.

ANNEX II:

Buying goods and services from another EU Country – Checklist for Consumers

Buying goods and services from another EU Country – what you should know

It is now easy and very common for consumers to buy goods and services in other member states whether this is through distance purchasing, online, e-mail, mail order etc. or in persons whilst in that country. All EU citizens seeking to purchase goods and services should be treated the same. You should not be restricted from purchasing due to your nationality or country of residence.

The implementation of the **Services Directive 2006/123/EC** in 2009 should now prevent the following situations from occurring:

- You attempt to order an item from a website in another member state and they refuse as they do not deliver to your country.
- You attempt to order an item from a website in another member state and they refuse as the credit card you enter for payment is not issued in the country where the seller is based.
- You are on holiday and you visit a supermarket to buy some wine. You are asked for ID and supply your EU approved country ID card. You are told you cannot purchase the wine as your ID card is not considered a valid proof of ID in the country that you are in.
- You have booked car rental for when you arrive at your EU holiday destination. When you collect the car you are charged an extra fee as you do not hold that country's driving licence.
- You hire a car over the Internet in another EU country and find you have to pay higher rates just because you are not a resident in the country of hire.
- You are trying to book a room in a major chain hotel in another EU country online. You are automatically redirected to the hotel website in your country of residence and put in the details of what you require and get a price. You decide to look at the hotel website of the country where the hotel is located and find the price is much cheaper but find you cannot book as it requires you to have a residential address in that country.

There are certain reasons (**objective criteria**) when a trader may be within their rights to discriminate against you or even refuse to sell you goods and services, for what appears to be, based on your nationality or country of residence. These might be:

- Additional costs incurred by the trader due to the distance involved.
- Absence of intellectual property rights in a particular country. This can be the case with books/e-books/music etc.
- Higher prices due to exchange rates.

What should you do if you are faced with a situation similar to the examples above?

- Firstly seek to resolve the matter with the trader involved. Ask for the reason that your attempt to purchase goods and services is being treated differently to others.
- Keep copies of the correspondence between you and the trader.
- If you have exhausted your efforts to resolve the issue with the trader directly, you should contact The European Consumer Centre Network (ECC-Net)

You need to contact your local European Consumer Centre in the country where you normally reside.¹³³ For more information: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm

¹³³ The European Consumer Centre Network "ECC-Net" is a network of 30 offices in the 28 EU Member States, Norway and Iceland. ECC's are co-financed by the European Commission and national governments, as part of the European policy to assist every citizen in Europe to take advantage of the single market. The aim of the network is to provide free of charge help and advice to consumers on their cross-border purchases, whether online or on the spot within these 30 countries.

ANNEX III:

Selling goods and services in other EU Countries – Checklist for Traders

Selling goods and services in other EU Countries –

Making discrimination against consumers due to nationality and country of residence, a thing of the past

Many consumers now shop on line from countries all over the EU as well as accessing goods and services whilst travelling. This provides great opportunities for traders to access new markets and brings growth both to their business and to economies in the EU. Consumers seeking to purchase goods and services should be treated the same. Traders should not restrict consumers from purchasing due to their nationality or country of residence.

The implementation of the **Services Directive 2006/123/EC** in 2009 has been instrumental in removing regulatory barriers, giving traders easier access to this growing market as a result. An equally important part has also been to remove obstacles for consumers who want to purchase those goods and services supplied by traders in other member states. The removing of regulatory barriers for traders and the removal of obstacles for consumers are both equally important to ensure economic growth in the EU.

- Businesses practices that hamper or restrict access to goods and services based on the nationality or place of residence of consumers include:
- Offering less favourable conditions of purchase for some EU countries.
- Refusing to sell goods to one EU member state and not another
- Charging consumers from one EU country more for an identical product than another.

There can, of course, be certain legitimate reasons (**objective criteria**) why access to goods and services can vary or be restricted. Some examples include:

- Additional costs incurred by the trader due to the distance.
- Absence of intellectual property rights in a particular country. This can be the case with books/e books/music etc.
- Higher prices due to exchange rates or VAT
- These legitimate reasons, they would need to be proved, if challenged.

There are many examples of situations where potential discrimination could take place, and some are given below:

- A consumer orders an item from a website in another EU country and the order is refused as the trader says they do not deliver to the consumer's country.
- A consumer orders an item from a website in another EU country and the order is refused as the trader says the consumer's credit card is not issued in the country where the trader is based.
- A consumer on holiday visits a supermarket to buy some wine. They are asked for ID and supply their country's ID card. They are told they cannot purchase the wine as the ID card is not considered a valid proof of ID in the trader's country.
- A consumer books a car rental for when they arrive at their EU holiday destination. When they collect the car they are charged an extra fee as they do not hold that country's driving licence.
- A consumer hires a car over the Internet in another EU country and finds they have to pay higher rates just because they are not resident in the country of hire.
- A consumer is looking to book a major chain hotel in another EU country online. They are automatically redirected to the hotel site in their country of residence and put in the details of what they require and get a price. They decide to look at the hotel website of the country where the hotel is and find the price is much cheaper but cannot book as it requires them to have a residential address in that country.

Make sure, as a trader, you are informed of the situations in which you should not refuse access to goods and services and also the benefits that are open to you to trade in the EU. Further information can be found in 'The Quick guide to the Services Directive':

http://ec.europa.eu/growth/single-market/services/services-directive/in-practice/quick-guide_en

ANNEX IV:

Joint ECC-Net Services Directive Project Questionnaire 2016 – Normal Complaints

I Overview

Based on Normal Complaints falling under Article 20(2) of the Services Directive received between January 2013 and December 2015 please provide the following:

- 1 ECC
- 2 Reference Number of Normal Complaint
- 3 Trader's name and website address, if any.
- 4 Type of service involved:

Please note that, as some Normal Complaints may be encoded under the Services Directive but relate to services falling outside the Directive' scope, the drop down menu contains services that fall both within and outside the scope of the Services Directive.

- **Distribution of goods and services** (incl. online and offline retail sale of product and services, e.g. electronic goods, DIY products, music downloads)
 - Services in the field of **tourism** (incl. travel agencies)
 - **Leisure** services (incl. sports centres and amusement parks)
 - **Rental and leasing** services (incl. car rental)
 - **Accommodation and food** services (incl. hotels, restaurants, caterers)
 - Activities of most **regulated professions** (such as legal and tax advisers, architects, engineers, accountants, surveyors)
 - **Construction** services and **crafts**
 - **business-related services** (such as office maintenance, management consultancy, event organisation, debt recovery, advertising and recruitment services)
 - **training** and **education** services
 - **real estate** services
 - **household support** services (e.g. cleaning, gardening and private nannies)
 - **financial services**
 - **telecommunication** and internet services with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC
 - **transport** services falling into Title V of the EC Treaty
 - **healthcare** 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
 - **temporary work agencies'** services
 - **private security** services,
 - **audio-visual** services
 - certain **social** services provided by the State
 - services provided by **notaries and bailiffs**.
 - Other.
- 5 Type of transaction
 - Online
 - Offline

6 Case description – please copy and paste from the IT Tool

7 Was this query encoded under Directive 2006/123/EC on services in the internal market on the IT Tool?

- Yes
- No

II Discriminatory treatment

8 Was the difference applied to the service recipient based on grounds of:

- Residence
- Nationality

Please provide as much detail as possible, including details of discriminatory treatment and the national applicable law:

III Conditions of access

9 Was the difference in the conditions of access to the service:

- Refusal to provide the service to the recipient
- Difference in the price applied to the service recipient
- Difference in other conditions of access
- Additional guarantees requested to the service recipient
- Redirection to another website
- Other (please specify)?

9A. *If the service provider refused to provide the service to the service recipient please specify which one of the following best describes the reason:*

- *Delivery-related (e.g. additional costs incurred because of the distance involved)*
- *Payment method (e.g. credit cards not accepted if issued outside the Member State)*

9B. *If the service provider refused to provide the service or the price difference was applied, was the service recipient redirected to a different website?*

- Yes
- No

9C. *If the price difference was applied to the service recipient, please quantify the price difference, if possible.*

IV Communication between the ECC and the trader

10 Was the service provider contacted by ECC Net

- Yes
- No
- Other (please specify)

10A. If you answered no to the above question was the consumer referred to another organisation or agency for assistance or was the matter resolved before the ECC-Net's intervention?

- Yes
- No
- Resolved without ECC-Net's intervention
- Other (please specify)

IV Outcome

11 Did the consumer get the outcome they were looking for?

- Yes
- No
- Partial
- Awaiting response from trader
- Other (please specify)

12 If a response was obtained, what was the justification invoked by the trader?

- Contractual obligations preventing the service provider to distribute the service in a particular territory (e.g. agreements between manufacturers/suppliers and retailers)
- Additional costs incurred because of the distribution method (e.g. difficulties in delivery)
- Additional costs incurred because of the technical characteristics of the provision of the service (e.g. due to technical issues or legal requirement service cannot be performed in a given Member State)
- Additional costs incurred by the service provider in the provision of the service on grounds of the residence of the service recipient (such as for example having to acquire additional intellectual property rights in order to provide the same service in another territory)
- Lack of the required intellectual property rights
- Different market conditions (such as higher or lower demand influenced by seasonality, different vacation periods in the Member State and pricing by different competitors)
- Extra risks linked to rules differing from those of the Member State of establishment (such as difficulties securing payment from customers resident in other Member States)
- Higher costs being incurred by the service provider due to the existence of public financing granted to service providers for the delivery of services to recipient resident in Member State of establishment but not to those resident in other Member States
- Legal fragmentation in the area of consumer contract law and e.g. resulting high cost of adapting to contract law rules in a given Member States
- Service falls outside the scope of the application of the Services Directive
- Contractual freedom to choose a partner to a contract
- Taxation (e.g. differences in the VAT rates applied to different products and services in the different Member States)
- Other

13 Was any evidence provided to prove the existence of objective justification?

- Yes
- No

13A. If yes, please provide as much detail as possible including a brief case description, reference number and type of evidence provided:

14 Are you aware of any instances where the trader changed their business practices (e.g. changed their terms and conditions to allow access)?

- Yes
- No

14A. If yes, please provide as much detail as possible incl. policy in question, and clarify whether the policy was changed by the trader following intervention by the ECC.

15 Was the case notified to an enforcement authority?

- Yes
- No

15A. If yes, please provide (1) the name of the enforcement authority and (2) a brief case description:

15B. If no, please clarify the reason why you did not notify the enforcement authority:

16 Are you aware of any decision made in respect to the case notified to an enforcement authority?

- Yes
- No

16A. If yes, please explain the content of the decision and sanctions imposed on the service provider:

16B. If no, please clarify if the consumer or the ECC followed the matter up with the enforcement authority:

IV Outcome

Under Article 8.3 of the Consumer Rights Directive 2011/83/EU trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted. Please log on to the trader's website, check terms and conditions and information supplied during the ordering process (without actual purchase) to verify whether the trader complies with the abovementioned provisions.

17 Does the website indicate at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted?

- Yes
- No
- Other (please specify)

18 Date of the search carried out:

Please take screenshots of T&Cs and the information supplied during the ordering process and email them to Anna Heryan on aheryan@eccireland.ie with the case reference number.

ANNEX V:

Joint ECC-Net Services Directive Project Questionnaire 2016 – Simple Complaints

VII Overview

Based on SC falling under Article 20(2) of the Services Directive received from January 2013 - December 2015 please provide the following:

- 19 ECC
 20 Reference Number of Simple Complaint
 21 Trader's name and website address
 22 Type of service involved:

Please note that, as some Simple Complaints may be encoded under the Services Directive but relate to services falling outside the Directive' scope, the drop down menu contains services that fall both within and outside the scope of the Services Directive.

- Distribution of goods and services (incl. online and offline retail sale of product and services, e.g. electronic goods, DIY products, music downloads)
 - Services in the field of **tourism** (incl. travel agencies)
 - **Leisure** services (incl. sports centres and amusement parks)
 - **Rental and leasing** services (incl. car rental)
 - **Accommodation and food** services (incl. hotels, restaurants, caterers)
 - Activities of most **regulated professions** (such as legal and tax advisers, architects, engineers, accountants, surveyors)
 - **Construction** services and **crafts**
 - **business-related services** (such as office maintenance, management consultancy, event organisation, debt recovery, advertising and recruitment services)
 - **training** and **education** services
 - **real estate** services
 - **household support** services (e.g. cleaning, gardening and private nannies)
 - **financial** services
 - **telecommunication** and internet services with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC
 - **transport** services falling into Title V of the EC Treaty
 - **healthcare** 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
 - **temporary work agencies'** services
 - **private security** services,
 - audio-visual services
 - certain **social** services provided by the State
 - services provided by **notaries and bailiffs**.
 - Other.
- 23 Type of transaction
- Online
 - Offline
- 24 Case description – please copy and paste from the IT Tool

- 25 Was this query encoded under Directive 2006/123/EC on services in the internal market on the IT Tool?
- Yes
 - No

VII Discriminatory treatment

- 26 Was the difference applied to the service recipient based on grounds of:
- Residence
 - Nationality

Please provide as much detail as possible, including details of discriminatory treatment and the national applicable law:

IX Conditions of access

- 27 Was the difference in the conditions of access to the service:
- Refusal to provide the service to the recipient
 - Difference in the price applied to the service recipient
 - Difference in other conditions of access
 - Additional guarantees requested to the service recipient
 - Redirection to another website
 - Other (please specify)?
- 9A. *If the service provider refused to provide the service to the service recipient please specify which one of the following best describes the reason:*
- *Delivery-related (e.g. additional costs incurred because of the distance involved)*
 - *Payment method (e.g. credit cards not accepted if issued outside the Member State)*
- 9B. *If the service provider refused to provide the service or the price difference was applied, was the service recipient redirected to a different website?*
- Yes
 - No
- 9C. *If the price difference was applied to the service recipient, please quantify the price difference, if possible.*

X Communication between the trader and the consumer

Using supplementary documentation, if available please answer the following:

- 28 Was the trader contacted by the consumer?
- Yes
 - No
 - Information not available

If yes please see next page.

- 29 If a response was obtained, what was the justification invoked by the trader?

XI Outcome

- 30 Did the consumer get the outcome they were looking for?
- Yes
 - No
 - Partial
 - Awaiting response from trader
 - Other (please specify)

ANNEX VI:

Joint ECC-Net Services Directive Project Questionnaire – Competent Enforcement Bodies

Services Directive 2006/123 Competent Authorities/Enforcement Bodies

ECC-NET Services Directive 2006/123 Project

Provisions Implementing Art.20 (2) of Services Directive into National Law

Please name in full and name the provision in English and the original Language

Enforcement body competent to enforce Service Directive Art 2(2)

Provide Name, address, tel no, e mail & website

If more than one how can enforcement body be found (e.g. website directory etc)

If more than one please explain why.

oLaw or provision that regulates what body/bodies are responsible for the enforcement of Art.20 (2) of the Services Directive/national implementation law.

Sanctions

Indicate if sanctions can be applied Y/N and if yes what sanctions can be applied.

Please name the sanction and provision regulating the sanction in your national law in English and the original language

ANNEX VII:

Research on Article 8.3 of the Consumer Rights Directive 2011/83/EU results

Does the website indicate at the beginning of the ordering process whether any delivery restrictions apply and which means of payment are accepted?



*It is not possible to check the relevant information in relation to all cases examined as due to, inter alia, language barriers or a requirement to create an account conducting the ordering process was not always possible.

ANNEX VIII:

Online Consumer Survey Results

TABLE 1: Survey results per country

Geoblocking Questionnaire

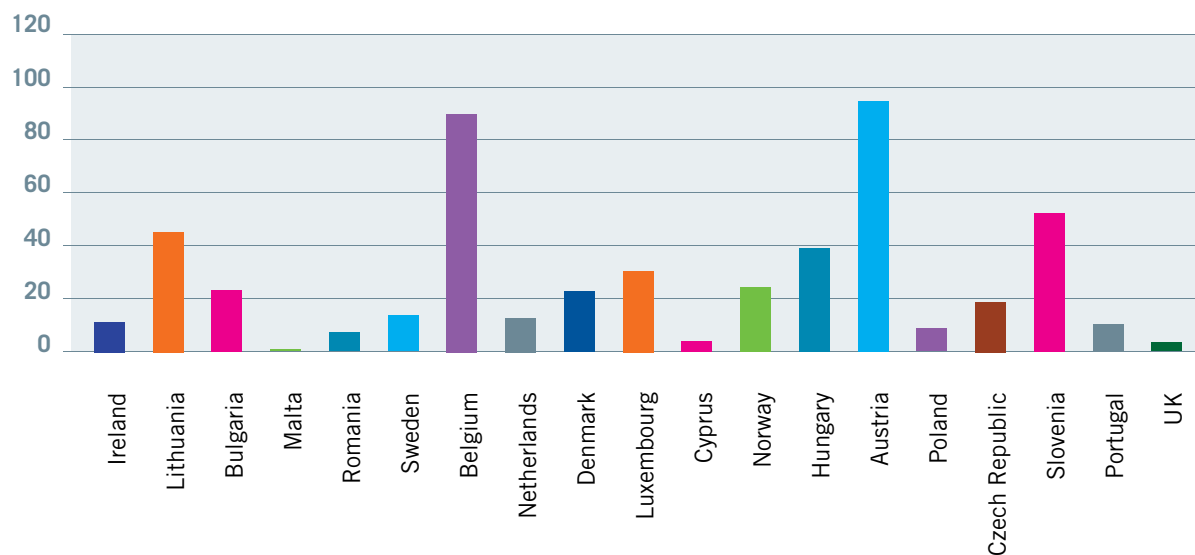


TABLE 2: Survey results

Have you ever tried to buy something online, but been refused because of your nationality or place of residence



TABLE 3: Survey results

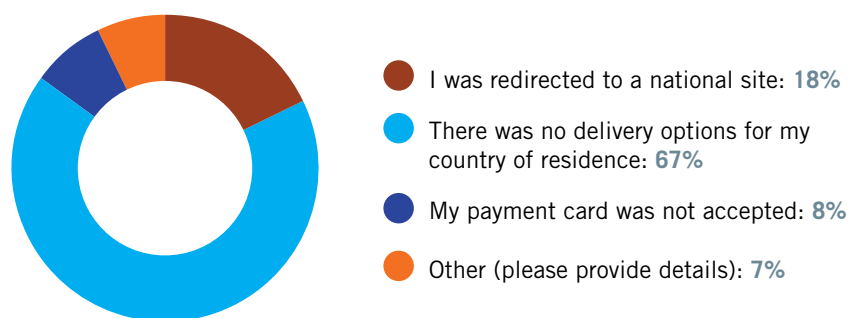


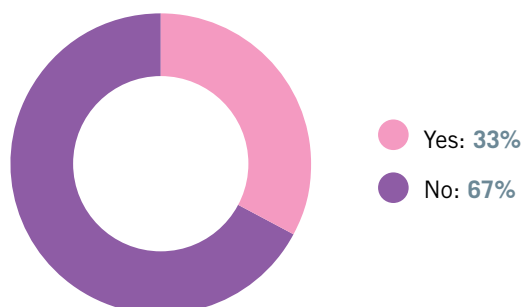
TABLE 4: Survey results

While shopping online, have you experienced any product/service price increase during the ordering process because of your nationality or place of residence?



TABLE 5: Survey results

Do you know where to complain if you find yourself in the situation described above?



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Help and advice for consumers in Europe



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