Discrimination within the EU car rental industry
- and reverse discrimination in internal situations

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1 Introduction

Lately, there has been a big increase in consumer complaints on rental car services booked in another country. According to the European Consumer Center the cases increased from 1.050 in the year 2012 to 1.750 cases in 2014. This development has raised the awareness of the Commission of the European Union (EU), which has been pressing car rental companies to stop discriminatory practices against consumers.

Most people are aware of or have experienced some kind of a trouble when buying services online, such as from car rentals or airline companies, when all of a sudden prices can increase depending on the selection of the country of residence of the consumer, or depending on which national homesite from the company, the consumer is using.

Within the European Union (hereafter the EU) however, there are rules and regulations to protect the EU, its citizens and the internal market of the European Union to make sure citizens there within are not being discriminated against based on, for example, their nationality or residency within the EU.

This does still not always succeed as intended, and discrimination is still a reality today. Most often the discrimination is towards foreigners coming into a country and not against nationals, whereas States tend to rather privilege their citizens on the cost or in comparison to foreigners, often for political reasons. This is however not always the case as sometimes a reverse discrimination occurs where foreigners are privileged more than the nationals or residents of the State when it comes to pricing for a service.

This thesis aims to explore the legislation of the European Union, on how the citizens of the European Union can pursue their rights based on EU legislation and against whom, i.e. States or/and private parties, in case of such discrimination. It will further explore the differences the legislation in the Union provides for its citizens to pursue their rights, whether it is via regulations, directives or other instruments and demonstrate how EU citizens can in reality take action against the discrimination they might suffer as consumers of services.

Further, we will in particular, explore the rental car problem in the European Union, and the Commissions reaction to the problem of discriminatory pricing in that field, and see by providing spot checks in a few EU countries if, in the recent couple
of years, the rental car companies have changed their behavior, in the hope of shedding light on the reality some consumers face when booking a car online today.

Reverse, internal discrimination does occur in the EU and within the car rental industry as well. In Denmark for example, the national law indirectly allows car rentals to charge, national residents more than other EU/EEA residents who rent a car in Denmark. This is based on the Danish national tax law which gives foreigners, who are residents outside Denmark, the advantage of renting a so-called “non-tax car” while Danish residents have to rent tax-cars, or cars with registration taxes. The result is that Danish residents pay on average double or triple the amount foreigners are paying for a short-term rental car in Denmark, and thus experience internal reverse discrimination. The thesis will look for answers, such as the reason for this Danish legislation and if it is in accordance with Denmark’s obligations towards the EU or even the spirit of the EU internal market vision, where we are all supposed to be equal consumers in a single market, not being divided internally based on nationality within the EU.

The thesis will use the Danish rental car problem as an example of the internal reverse discrimination that occurs in the EU today and shed light on the reality consumers within the EU face once they experience internal discrimination and how they benefit from the internal market and the status of an EU citizen, if at all.

The thesis will cover where and when internal discrimination is considered to take place and look for answers as to where the limits of internal discrimination lie, in hope to answer how EU citizens can pursue the rights they expect to have from being a EU citizen.

Can all EU citizens pursue their equal rights within the EU as consumers or only once they walk over a Member State border drawn on a map? Is the internal market perhaps less of an internal market and a more suitable name would be the “cross-border market”? Is the Union citizen only a EU citizen once he crosses or wants to cross a border within the EU?
2 The European Union

The European Union (EU) is a multinational organization of law and policy-making with over 500 million inhabitants in, now, 28 Member States. Its complex system operates in 23 official languages with institutions and bodies based in a number of European cities and is the largest political and economic entity in Europe. The EU operates an internal market, a customs union, a nascent diplomatic service and common currency amongst other achievements. The Union is responsible for a significant percentage of the legislation that the Member States implement in certain areas and this legislation does not only affect the Member States but also, somewhat the rest of the world.¹

Although the Member States are all still sovereign, independent states, they have pooled together some of their sovereignty in order to gain strength, and the benefits of size which is one of the unique features of the EU, and conferred on the Union powers to act independently.² The EU is a community based on law and is created by law, which means every action that is taken by the EU is founded on the constituent Treaties that have been approved by all EU countries, democratically and voluntarily. The individuals become a main focus of the Union as the EU provides its institutions with means of approving legal mechanism that is binding on the Member States and its citizens, such as regulations and directives, meaning EU law is sui generis as a legal system.³

The EU has an institutional structure that aims to promote its values, serve its interests, advance its objectives, both of the citizens and the Member States, protect the consistency, efficacy and continuity of its policies and actions, according to Article 13 of the TEU (The Treaty of the European Union). The decision making at EU level involves various European institutions, in particular; the European Parliament, the European Council, the Council and the European Commission. The European Parliament represents the EU’s citizens and is directly elected by them. The European Council consists of the Heads of State or Government of the EU Member States. The Council represents the governments of the EU Member States and the European Commission represents the interest of the EU as a whole. The European

¹ Alan Hardacre: How the EU Institutions work and.. How to work with the EU Institutions, bls. 1
² Klaus-Dieter Borchardt: The ABC of European Union law, bls. 11
³ Klaus-Dieter Borchardt: The ABC of European Union law, bls. 79
Council does not exercise legislative functions but defines the general political direction and priorities of the EU. It is the European Parliament and the Council that adopt the secondary law that the European Commission proposes, called EU acts. The Commission and the Member States are then to implement them.\(^4\)

In terms of human resources and center of attention of the EU system, the European Commission (hereafter the Commission) is the largest institute of the EU, a managerial body of the European system of administration. The Commission is very important to the pace of the European unification as it is the institution of the EU that is responsible for acting, thinking and delivering solutions to cross-national policy problems. The Commission is nonetheless as important to the details of legislation.\(^5\)

The Commission acts as the guardian of the EU constituent Treaties, as it both draws up legislative proposals and is responsible for making sure that EU law is properly applied in all EU Member States.\(^6\) According to Article 17(1) of the Treaty on the European Union (TEU), it must ensure that the provisions of the Treaty are applied and that the measures that are taken by the institutions are pursuant thereof.

If the Commission finds that any EU Member State is not meeting its legal obligations by not applying Union law, the Commission takes steps to put the situation right. An infringement procedure is a legal process the Commission can launch that involves sending the government an official letter explaining why they consider this Member State is infringing EU law and gives the Member State a deadline for sending back a detailed reply. The Commission refers the issue to the Court of Justice of the EU if this procedure does not correct the matter, and the Court has the power to inflict penalties. Judgment made by the Court is binding on the EU institutions and the Member States.\(^7\)

Within the EU there are several types of legal acts that are applied in different ways.

\(^4\) Klaus-Dieter Borchardt: *The ABC of European Union law*, bls. 45-62

\(^5\) Alan Hardacre: *How the EU Institutions work and... How to work with the EU Institutions*, bls. 11

\(^6\) Andrew Evans: *A textbook on European Union law*, bls. 17

\(^7\) David Edward and Robert Lane: *Edwards and Lane on European Union Law*, bls. 110
2.1 Legal acts within the EU and how they are applied

The EU is a legal reality that is created by law and is a community based on law.\textsuperscript{8} The Treaty on the European Union (hereafter EU Treaty or TEU) and the Treaty on the Functioning of the European Union (hereafter TFEU) have formerly the same legal standing, both being primary law of the EU. The TFEU was developed from the EC Treaty (the Treaty establishing the European Community) but contains more or less the same structure. The new title of the EC Treaty (TFEU) and the levels of regulation in both Treaties might give the impression that the TFEU is intended as an implementing Treaty to the TEU being a basic Treaty but that is not the case. TFEU and TEU both have the same legal standing\textsuperscript{9} but there have been mixed opinions on whether or not they are constitutional in nature.

The Union works simply by means of law, not by means of force or subjugation. The insight underlying the Treaties that created the EU is that it should be a unity based on an openly made decision that is expected to last, a wholeness founded on the fundamental beliefs such as equality and freedom and protected and translated into reality by law. Member States must ensure fulfillment of the obligations arising from the Treaties or resulting from action taken by the institutions of the Union, and take appropriate measures. The Member States must also ease for the attainment of the EU’s tasks and restrain from taking any measure that could jeopardize the achievements of the objectives of the Treaties.\textsuperscript{10}

The founding Treaties provide the basis of other forms of Union law, although both EU and the European Court of Justice have used external sources for some of its laws, such as general principles and fundamental rights. The TEU and TFEU are the principal sources of law for the European Union but the Treaties and Union law have been amended from time to time as the Member States agree and are not static bodies of law.\textsuperscript{11}

The second important source of EU law, also known as secondary legislation, is law that is made by the Union institutions through exercising the powers bestowed on them, especially in the TFEU. It includes delegated acts, legislative acts, implementing acts and other legal acts called EU acts. Legislative acts are legitimate

\textsuperscript{8} Klaus-Dieter Borchardt: *The ABC of European Union law*, bls. 79
\textsuperscript{9} Klaus-Dieter Borchardt: *The ABC of European Union law*, bls. 15
\textsuperscript{10} Klaus-Dieter Borchardt: *The ABC of European Union law*, bls. 79-80
\textsuperscript{11} Nigel Foster: *EU law directions*. 3rd edition, bls. 97
acts usually adopted by normal or particular legislative procedure (Article 289 TFEU) via prescribed instruments called regulations, directives and decisions. Delegated acts are non-legislative acts of common and binding application to amplify or alter certain unnecessary elements of legislative acts. Implementing acts are also non-legislative acts but are an exception to the principle by which all the measures needed to execute binding EU legal acts are taken by the Member States in conformity with their own national provisions.

International agreements are another source of EU law that are connected with the EU at a worldwide level. The EU concludes agreements under international law with non-member countries, so called third-countries, and with other international organizations. The EEA Agreement would be an example of that type of an agreement. 12

EU legal instruments have different ranges concerning the persons whom they are addressed to and their practical effects in the Member states are not the same.

Regulations are the legal acts that enable the EU institutions to influence the most on the domestic legal systems. There are two features that especially mark them out; firstly, their Community nature, meaning that they apply in full for all in all Member States and lay down the same law throughout the Union, regardless of international frontiers. A Member State cannot select only those provisions of the regulation of which it agrees with or apply a regulation incompletely to make sure that an instrument, which runs counter to its perceived national interest or which is opposed at the tie of its adoption, is not given effect. It can neither cite practices or provisions of domestic law to prevent the obligatory application of the EU regulation in its domestic law. Secondly, the direct applicability of the regulations, meaning that the regulations do not have to be transferred into national law but grant rights or inflict duties on the Union citizen in the same way as Member State’s law. Member States and their institutes and courts are therefore in direct restraint of the Union law and have to obey with it in the same way as national legislation and in fact EU law takes presidency as a legal source. Regulations therefore address both natural and legal persons in all Member States, and are directly applicable and binding in their entirety. 13 This is also stated directly in the Treaty in Article 288 TFEU.

12 Klaus-Dieter Borchardt: The ABC of European Union law, bls. 81-83
13 Klaus-Dieter Borchardt: The ABC of European Union law, bls. 88-89
Directives are the most important legislative instruments next to the regulations. The purpose of directives is respecting the diversity of national structures and traditions but at the same time securing the necessary constancy of Union law. While the regulations purpose is the unification of the law, the directives aim is its harmonization. The idea is to remove contradictions and contrast between regulations and national laws or gradually remove instability, so the same material conditions subsist in all the Member States. Directives are one of the primary means utilized in building up the internal market, also leaving certain manoeuvre to individual Member States and their needs.

A directive leaves it to the State authorities to determine how the agreed Community aim with the directive is to be incorporated into their domestic legal systems but is still binding on the Member States as regards to the aim to be attained. Thus, the Directive obligates the Member States to adjust their national law in line with the Community provisions as framework. The Member States are in principle free to decide which methods and form they use to transpose their obligation, according to the directive, towards the EU into domestic law, according to Article 288 TFEU, but EU criteria is used to evaluate if it is done correctly in and in compliance with EU law. It must be done so that the obligations and rights arising from the directive can be acknowledged with enough clarity and certainty so that the Union citizen can invoke or, if appropriate, challenge them in national courts. This normally requires modifying or repealing existing rules if needed or enacting mandatory provisions of national law.

Directives do not as such impose obligations or confer rights to the Union citizen as they are only addressed to the Member States alone. The obligations and rights for the citizens therefore come only from the measures authorized by the authorities of the Member States to execute the directive. This can be of a disadvantage to the Union citizen but not as long as the Member States actually obey with their Union commitment. However, where a Member State does not take the required implementing measures to achieve the objective set in the directive that would benefit the citizen, that can be of a disadvantage to the citizen. The Court of Justice has however with a long line of cases determined that in such situations, Union citizens can claim that the recommendation or directive still has direct effect in the
domestic courts to obtain the rights conferred on them by it,\textsuperscript{14} that will be covered further here below.

Decisions are another category of EU legal acts. The Union institutes may, in some cases, be responsible themselves for executing the regulations and Treaties, which is only possible if they are in a position to take binding measures on Member States, special undertakings (i.e. companies etc) or individuals. With decisions, the Union institutions can order that an action is to be taken in an individual case, and can therefore require a Member State or an individual to abstain from or perform an action, or impose obligations or grant rights to them. The EU decisions are perceived from the regulation by being of individual applicability, that means the persons to whom it is addressed are the only ones bound by it.\textsuperscript{15} For this reason the addressee must be notified of any decision and named in it but most are addressed to Member States with only a few addressed to private parties, especially big companies in relation to the EU competition law. If decisions are not addressed to private parties however, they cannot impose obligations on them. The decisions are binding in its entirety and directly bind those to whom they are addressed to.\textsuperscript{16}

Opinions and recommendations are the final category of legal measures specially provided for in the EU Treaties. They enable the EU to communicate a view to the Member States and in some cases also to individuals in the EU. They are not binding upon the addressee, nor do they place on it any legal obligation. The real significance of the opinions and recommendations is moral and political.\textsuperscript{17} The Union institutions also have available other forms of action, alongside the legal acts mentioned above, for shaping and forming the EU legal order. Such as resolutions, declarations and action programmes, but these will not be covered further as they are not of much relevance to the topic of this thesis.

2.2 Enforcement of European law: Direct effect

The EU regulations address both natural and legal persons of all Member States and are directly applicable and binding in their entirety. The EU directives however,
address all or specific Member States and are binding with respect to the intended result prescribed in them. Directives have direct effect only under particular conditions.¹⁸

One of the most notable features of EU law is that the vision, that community law is enforced against Member States, has only infrequently been shared by the Court of Justice of the EU. From its earliest case law until today, the Court has participated in a continuing and thorough programme that has developed in the judicial creation of a series of ways in which domestic courts, rather than the Court of Justice of the EU, are expected to play a main role in the implementation of Community law against the Member States, domestic authorities and private parties within the EU. Three principal means have been recognized and in fact developed by the CJEU, being direct effect, indirect effect and the creation and following growth of the principle of state liability, which will be covered here.¹⁹ The Court of Justice of the EU also shaped the principle of EU law primacy, covered further below.

Direct effect gives persons the right to invoke provisions of the European Union law before a domestic court.²⁰ Direct effect was in fact the Court’s invention, made in the case no. 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen. The case concerns a firm of importers, Van Gend en Loos, which imported a quantity of chemicals from Germany to the Netherlands. Since the now TFEU Treaty came into force, an import duty which had allegedly been increased, contrary to then Article 12 of the EEC Treaty, was charged upon the company. That article was raised in argument on appeal against payment before the Dutch court and two questions were referred to the now Court of Justice of the EU, one of them being if the article in question, of the Treaty had direct effect within the region of a Member State, resulting in that nationals of such a state, could on the bases of the Article lay a claim to individual rights that the national courts must protect.²¹

Three, out of only six Member States which the Treaty comprised of at the time of the case, interceded in the proceedings. All of them submitted arguments against the importer. The Belgian and the Dutch governments argued that the Court of Justice had no jurisdiction to answer the questions passed to it. The Court however

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¹⁸ Klaus-Dieter Borchardt: *The ABC of European Union law*, bls. 88
¹⁹ Damian Chalmers and Adam Tomkins: *Eurpean Union Public law*, bls. 365
²⁰ Damian Chalmers: *European Union Law, volume one*, bls. 368
²¹ Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials, 5th edition*, bls. 583-584
dismissed the suggestion that it lacked jurisdiction and chose also not to follow the Advocate General’s advice who agreed with Belgium and the Netherlands on the jurisdiction. The Court stated that the arguments of the states had no legal foundation. For the argument that the article of the treaty mentioned should be enforced only through the machinery laid out in the Treaty, the Court dismissed the suggestions as misconceived and ruled that:

“The fact that these articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court.”

The Court ruled that even though the EC Treaty (now TFEU) contained no specific textual authority in support of the view that provisions of now EU law could be directly effective, authority from such a view would be,

“according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.”

The Court thereafter stated that the relevant Article of the Treaty was only capable of creating direct effect, because it satisfied a number of specific criteria; as a provision must be clear, unconditional and require no further action by Member States.

This has however been explained liberally in practice and the direct effect was further liberalized in the important, Case 43/75 Defrenne v Sabena where, under Belgian law, female stewards were required to retire at the age of forty, unlike their male peers. Gabrielle Defrenne had been forced to retire from the Belgian national carrier, Sabena, on this ground in 1968 but she claimed that the lower pension payments this involved breached the principle in the Article of the Treaty (now TFEU) that each Member State shall make sure and maintain the principle that women and men should receive equal pay for work of equivalent value. The case is important as it brought provisions of EU law that were less than clear and unconditional within the scope of the doctrine and therefore marked a noteworthy liberalization of the law of

22 Damian Chalmers and Adam Tomkins: Eurpean Union Public law, bls. 366-367
23 Damian Chalmers and Adam Tomkins: Eurpean Union Public law, bls. 367
direct effect. It is also important as it was taking action against a private company, the Belgian airline Sabena. The importance of the Court’s ruling in *Defrenne* was its recognition that Treaty provisions were also capable of bearing direct effect in the context of legal proceedings against a private party.24

Vertical effect is known as the direct effect against a Member State as in *Van Gend en Loos*, but the direct effect in the same context but against a private party is recognized as horizontal direct effect, as in *Defrenne*.25 The meaning of the direct effect however remains contested as in a broad sense it means a provision of binding EU law which are sufficiently precise, clear and unconditional to be regarded justiciable can be relied on and invoked by individuals before domestic courts,26 sending cases to the CJEU for preliminary ruling.

The cases mentioned above, *Van Gend en Loos* and *Defrenne*, were concerning the direct effect of Treaty provisions. The fundamental rights would be very hampered if its provisions could not be domestically imposed by those effected which was one of the key reasons given by the Court for the direct effect of Treaty provisions.27

Most of EU law is however not contained in the Treaties but in secondary legislation. In Case 92/71 *Leonesio v Italian Ministry of Agriculture*, regulations were held to be able of bearing direct effect as well. Given that Article 288 TFEU provides that a regulation shall have general application and is directly applicable and binding in its entirety in all Member States, this is neither surprising nor controversial. There is no reason why regulations should not be directly effective as Treaty provisions are.28 Since regulations will instantly become part of the domestic law of Member States, without needing transposition, there is no reason why they should not be able of being relied upon and applied by individuals before their courts, that is as long as their provisions are sufficiently precise, clear and relevant to the situation of an individual. The key issue is whether the provision of the regulation that the individual relies on is sufficiently precise, clear and certain for being capable of having direct effect.29

Therefore, in principle the direct effect possibly applies to all binding EU law including the Treaties, secondary legislation and also international agreements.

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24 Damian Chalmers and Adam Tomkins: *European Union Public law*, bls. 368-370
25 Nigel Foster: *EU law directions*. 3rd edition, bls. 194
26 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials*, 5th edition, bls. 580
27 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials*, 5th edition, bls. 191
28 Damian Chalmers and Adam Tomkins: *European Union Public law*, bls. 371
29 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials*, 5th edition, bls. 190
International agreements and directives still raise the most problematic issues and for this thesis it is of relevance to explain this further regarding directives.

### 2.3 Directives: direct effect

The position of directives is more complicated since they are only binding as to the result that is to be achieved upon each Member State and as it is left to the national authorities to choose form and methods to achieve the goal of the directive. Because directives are in need of implementation and are not automatically law of the land, they are a bit similar to international treaties such as legislative treaties that attempt to harmonize segments of international law, but the main difference is however that directives most often have an obligatory and clear date of entry into force for all Member States.

Directives were not originally seen as being capable of creating direct effect as, in contrast to regulations, they are not described as having direct applicability. According to Article 288 TFEU a directive:

> *shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

As instrument a directive is used to coordinate Member States’ laws and is thus, one of the main EU harmonization instruments. Implementation does not need to be consistent in every Member State, although the actual aim of the directive must be properly secured in every single State. As the directive may leave some discretion to the Member States, it will always require further enabling measures and if it only sets out its aim in general terms, it may not be sufficiently precise to allow for proper national judicial application. The aims of the legal effectiveness and integration, which underpinned the Court’s original articulation of direct effect of Treaty provisions, may however be equally applicable to directives.

A number of objections were posited against the notion that directives could be capable of direct effect. Firstly, that the discretion given by, now, Article 288 TFEU, to Member States to implement directives resulted in individuals not being able to derive

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30 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials, 5th edition*, bls. 580
31 J.M. Prinssen and A. Schrauwen: *Direct Effect. Rethinking a Classic of EC Legal Doctrine*. bls. 261
33 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials, 5th edition*, bls. 191-192
rights from the directives themselves but only from the executor acts of national authorities. Secondly, it was argued that if directives were given direct effect it would blur the distinction, which was clearly spelt out in Article 288 (before Article 249 EC), between them and regulations. Thirdly, it was pointed out that the Treaty sometimes enjoys a competence to adopt directives but not regulations and that according to directives, full direct effect would amount to a blurring of the distinction between the two and therefore allowing the EU, in effect, to legislate through the back door in areas that the Treaty had not permitted through the front door.  

However, many important areas of the European Union policy rely on the proper implementation of EU directives, so even in the absence of the directives implementation the now Court of Justice of the EU sought to promote the legal effectiveness of directives and held that in principle the directives could have direct effect and gave three reasons for this.

The first two reasons were given in the Case no. 41/74 Van Duyn v Home Office, where the Court of Justice ruled that in certain circumstances directives could bear direct effect. As the United Kingdom government had in this case, imposed a ban on foreign scientologists entering the UK, the Dutch Ms. Van Duyn was refused permission to enter the United Kingdom to take up an offer of a secretarial post at the Church of Scientology. Ms Van Duyn among other things, challenged the ban on the ground, that it breached against Directive 64/221/EEC. The Directive required that any ban should be based on the personal conduct of the individual. The Court´s first reason for direct effect of the Directive is functional and that Directives are binding and will be more effectively enforced if individuals can rely on them, which exemplifies that private enforcement via direct effect complements public enforcement under Article 258, and strengthening the overall effectiveness of EU law. The second reason given was textual, that Article 177 (now Article 267b TFEU), allows national courts to refer questions concerning any EU measure to the Court of Justice of the EU, including Directives which implies that such acts can be invoked by individuals before national courts. This is the same reasoning as the Court had used in the Van Gend en Loos case.

The third reason for that in some circumstances Directives could bear direct effect was presented in Case no. 148/78 Pubblico Ministero v Tullio Ratti, where the

34 Damian Chalmers and Adam Tomkins: European Union Public law, bls. 372
35 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 192
36 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 192-193
“estoppel” argument was adopted by the Court to justify the extension of direct effect to Directives. The estoppel argument runs as follows:

Directives impose a duty upon Member States to adopt the appropriate implementing measures by a certain date; it would be wrong for Member States to be able to rely upon and gain advantage through their failure to carry out this obligation; they are thus estopped or prevented from denying the direct effect of Directives once the time limit for their implementation into national law has expired.37

In the Ratti case, a trader was prosecuted for not labeling his solvents in accordance with national Italian law and he sought to rely upon two Directives. The transitional period had expired for one of them but not the other, which one the Court held that he could rely upon. The Member State was therefore estopped by its failure to take the necessary implementing measures from denying this Directive’s direct effect. As the Member State was still in its period of grace with the other Directive however it was not considered directly effective. This means that directives will have direct effect only from the end of the transposition period and even then, will only be capable of direct effect if Member States have failed to implement them correctly or failed to implement them at all. Individual rights will flow from the national implementing provisions and not the directives themselves where the directives are correctly executed. One of the most important applications of the estoppel argument is that the direct effect of the directives is predicated on the fault of the Member State in failing to implement the directive, following that parties may cite and depend on the terms of such directives in national legal proceedings against the state.38

According to the above, the Court of Justice of the EU has expanded the direct effect to directives, but so far, as in the cases above, the direct effect was only claimed against the State and not private parties, as directives are only posing obligations on the states.

In Case no. 152/84 Marshall v Southampton and SW Hampshire Area Health Authority the Court held that the direct effect of a directive could only be claimed against the state or public authority but not against an individual, that is it could only have vertical effect and not horizontal. In the case, Helen Marshall was dismissed from her job on the ground that she had passed 60 years of age as the policy of the

37 Damian Chalmers and Adam Tomkins: Eurpean Union Public law, bls. 374
38 Damian Chalmers and Adam Tomkins: Eurpean Union Public law, bls. 374
employer required female employees to retire at 60 while male employees should retire at 65. National legislation did not prohibit employers from discriminating on grounds of sex in retirement matters nor did it impose obligation on women to retire at 60. Marshall asserted that her dismissal violated the 1976 Equal Treatment Directive and the national court therefore asked the CJEU whether she could depend on the Directive against the Health Authority, being the employer. The Court of Justice held that it must be emphasized that according to the Treaty (now TFEU), the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court exists only in relation to the Member State to which it is addressed. A provision of a directive may therefore not be relied upon as such against such a person (i.e. independent legal person) nor may the directive itself impose obligations on an individual. This reason the Court gave was textual and based on the wording of, now Article 288 TFEU. In this case, Marshall could depend on the Directive because she was employed by a public authority, being a part of the state bound by the Directive. If she had however been employed by a private hospital she would not have been able to depend on the Directive. This ruling creates a two-tier legal system in which parties have a greater protection against public bodies than against private ones, not withstanding that their practical relationship with the two may be the same. It is an interesting approach in the case how the argument on rule of evidence can justify reliance on a directive against a public health authority. Surely the State is responsible for implementing directives and public health authorities are an organ of the state but the public health authorities are in no sense responsible for transposing the terms of equal pay directives into national law, yet the Directive is held enforceable against the authority. The Court of Justice stood firm to its prior discussion in Marshall and reconfirmed the above mentioned in the case C-91/92 Faccini Dori v Recreb reasoning that the effect of granting a full, horizontal, direct effect to directives would be to blur the constitutionally important distinction between regulations and directives.

The impact described above from the effect that directives do not have a horizontal direct effect have been somewhat reduced later on by the Court of Justice by its jurisprudence developing a number of additional doctrinal devices.

39 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 195
40 Damian Chalmers and Adam Tomkins: Eurpean Union Public law, bls. 375-376
The principle of harmonious interpretation is usually called indirect effect, which is the obligation to interpret national law in conformity with Directives. Despite denying the possibility of direct horizontal effect the European Court of Justice encouraged the effectiveness of Directives by developing a principle of harmonious interpretation which requires national law to be interpreted “in the light of” Directives. 41 The Case 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen, was a leading authority of this device. Two female social workers, Von Colson and Kamann sought employment in a German prison, which was administered by the Land Nordrhein-Westfalen, that is the regional government. It appeared that Von Colson and Kamann were refused employment on the ground of their sex as the prison catered exclusively for male prisoners. They relied on the German law, which had purported to implement the terms of Directive 76/207/EC, the Equal Treatment Directive, and sued in the German labour court. The only compensation or damages for discrimination permitted under national law the court could order by way of remedy was that Von Colson and Kamann could be compensated only for such losses as they had suffered as a result of applying for the positions, which had been denied to them. The national court referred to the Court of Justice the question of whether such a restriction in the availability of compensation was compatible with EU law, although Van Colson and Kamann could not rely on the Directive itself before the national court as its terms were insufficiently clear and unconditional to satisfy the test for direct effect. The Court however pointed out that this did not mean necessarily that the Directive could be of no use and stated:

“Although … full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained…”

The Court followed by saying that the Member States’ obligation rising from a directive, to achieve a certain result and their duty from the Treaty to take all appropriate measures to ensure the fulfillment of that obligation, is binding on all authorities of the Member States, including, for matters within their jurisdiction, the

41 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 200
courts. The Court continued stating that in applying national law and in particular the provisions of a national law, specially introduced to implement a certain directive,

“national courts are required to interpret their national law in the light of the wording and the purpose of the Directive in order to achieve the result referred to in the third paragraph of Article 189”

The Court of Justice therefore identified the national courts as organs of the State that were responsible for fulfillment of European Union obligations. The Court encouraged the national court to supplement the domestic legislation that did not seem to provide adequate remedy if read in conformity with the Directive´s requirements to provide a real and effective remedy. This doctrine of indirect effect does not require the provisions of a directive effect to satisfy the specific criteria of clarity, precision and unconditionality for direct effect. The doctrine has been strengthened over time and the Court of Justice declared it to be inherent in the system of the Treaty. It also declared it to be an aspect of the requirement of full effectiveness of EU law that applies to all competent authorities called upon to interpret national law, and not only national courts. 43

The Van Colson case however, was brought against a state employer concerning a directive, which had been inadequately implemented. Later cases have established that the obligation requires a national court to interpret national law in the light of a non-implemented or inadequately implemented directive even in a case against an individual, therefore avoiding in a certain way the prohibition on horizontal direct effect.

The Marleasing Case C-106/89 (Marleasing SA v La Comercial Internacional de Alimentacion SA) concerned a horizontal situation involving two private parties before a domestic court. In order to have La Comercial´s articles of association declared void as having been created for the sole purpose of defrauding and evading creditors, Marleasing brought an action against La Comercial. According to a statement by the Spanish Civil Code the contracts, which were made with lack of cause, were void. The relevant Directive contained an exhaustive list of reasons under which companies contracts could be declared void but avoidance of creditors was not on that list. 44 The

42 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 200-201
43 According to Case C-218/01 Henkel KGaA
44 Damian Chalmers and Adam Tomkins: European Union Public law, bls. 383
case confirmed that an unimplemented directive could be relied on in a case between individuals to influence the interpretation of national law. According to the Marleseasing case, directives may have horizontal indirect effect even though they may not have horizontal direct effect. Also according to the case, all domestic law must be interpreted in line with European Union law, but only as far as is possible. The case therefore expanded the law of indirect effect in two ways: First by giving it a wider range by requiring all national law to be interpreted in line with EU law, irrespective of whether it as enacted prior or subsequent to the provision of EU law in question and irrespective of whether it is implementing legislation or not. Secondly, by strengthening the national courts´ interpretive duty.

In Marleseasing there was only domestic law, which pre-dated the Directive and was not intended therefore to implement it, and no domestic implementing legislation, which could be interpreted in the light of the Directive. It is therefore clear that the obligation of harmonious interpretation applies even where the national law predates the directive and has no specific connection with it. It was also clear from cases such as C-397-403/01 Pfeiffer and others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV that the interpretive obligation applies to the national legal system as a whole and not only to the national law that implements the directive and for the Court, Pfeiffer underscores what is the constitutional importance of the duty of consistent interpretation.

According to the Marleseasing case, all national law must be interpreted in line with EU law but only as far as possible. The Court of Justice showed that it may not always be possible in Case C-334/92 Wagner-Miret v Fondo de Garantia Salarial, so the principle has its limitations. In the Wagner-Miret case the Court recognized that the Spanish legislation in question could not be interpreted in such a way as to give effect to the result that was sought after by the applicants. The Court has therefore set the example that it is generally left to the national courts to decide whether an interpretation in conformity with a directive is possible or whether it would result in a contra legem reading. However on occasion and by way of contrast, even though the Court of Justice deferred the ultimate assessment of the national courts, the judgment

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45 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 201
46 Damian Chalmers and Adam Tomkins: European Union Public law, bls. 384
47 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 202
48 Damian Chalmers and Adam Tomkins: European Union Public law, bls. 387
Incidental horizontal effect is where a directive precludes reliance on national law, which is inconsistent with directive’s provisions, even between private parties.

The exclusionary effect of a directive is when it prevents conflicting national law from being enforced. It does not however amount to a substitution effect as it is the commercial contract and not the directive itself which imposes obligations on the parties. This effect can be found in the Case C-456/98 Controsteel, which was an Italian company that claimed for a payment under a commercial agency contract with the defendant, which was an Austrian company. The Austrian company argued that the contract was void because of Controsteel’s failure to comply with the Italian legal requirement of compulsory registration of commercial agents. The Court of Justice held that the national court must interpret national law in light of the Directive at hand so that the Austrian company would be under legal obligation to pay the amount due according to the contract with Controsteel. The result of the interpretive obligation changed the result in the case and altered the legal obligation of the respective parties to the contract. When directives do not directly impose legal obligations on individuals they can have limited form of horizontal effect. Individuals can accordingly claim a directive in an action against another individual which can affect the outcome of the case even though it does not directly impose commitment on the private defendant. This is the kind of exclusionary effect where a directive is invoked in a case between individuals to preclude the application of a conflicting provision of national law. The result is different than if the national law had been applied, so that one of the parties to the case is subject to a legal liability or disadvantage. Exclusionary effect is where a directive can be invoked in cases between individuals in order to have national law disapplied, just as long as the directive does not create new rights, new obligations or new law to be applied but rather leaves a void which is filled by other provisions of national law. The exclusionary effect is said to flow from the primacy of EU law.\textsuperscript{50}

\textsuperscript{49} Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 203-204
\textsuperscript{50} Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 207-210.
The common factor on the incidental or indirect effect of directives seems to be that the directive does not itself impose an obligation on another individual and the obligation is imposed by some other provision of national or private law.

In light of the above mentioned, the legal effect of directives is complex and they only have vertical direct effect but not horizontal. As already explained the Court of Justice has however crafted a number of qualifications to the proposition that directives do not have horizontal direct effect but can still have a legal effect for private parties in a variety of ways through the principle of indirect effect, incidental effect, general principles of law and where a regulation makes reference to a directive.

After the judgment in Marshall, where the Court refused to allow directives to be capable of horizontal direct effect, arguments were increasingly raised that effective judicial protection of EU law was only possible if individuals were given a right to sue the State before a national court for any damage suffered as a result of the State failing to comply with EU law, given that further obligations could not be placed on private parties. The principle of State liability allowed an action against those really at fault for the non-transposition, which were the central authorities, and in principle enjoyed more legitimacy than either direct or indirect effect. 51

Directives can as well have legal effect through the general principles of law, which was confirmed in Case C-144/04 Werner Mangold v Rüdiger Helm. The action of the case was between two private parties where the implementation time limit for the directive had not expired. The effect of the ruling was to render some of the obligations from the directive instantly applicable through the general principle of non-discrimination, in action between the parties, on grounds of age, following that the national court should set aside any provision of national law that clashed with this general principle of European Union law. 52

Directives can also have legal effect when they are referred to in a regulation since the regulations can have both horizontal and vertical direct effect, though it cannot impose obligations on private parties on its own. 53

In the Case C-6 and 9/90 Francovich and Bonifaci v Italy, the doctrine of state liability was established. Italy neglected to implement a directive that was meant to

51 Damian Chalmers: *European Union Law, volume one*, bls. 398
52 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials, 5th edition*, bls. 211-213
53 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials, 5th edition*, bls. 215
ensure workers a base level of assurance under EU law in the occasion of insolvency of their employer. The Directive accommodated particular guarantees of payment of unpaid wage claims. Yet the Court of Justice found that the terms of the Directive were not completely adequately exact and unconditional for it to be directly effective. As indicated by the judgment state liability might be established on EU law but is applied by domestic courts and on the premise of rules of national law on liability. State liability was therefore established where individuals can enforce a directive despite the prohibition on horizontal direct effect by suing a Member State in damages, for loss caused by the state’s failure to implement a directive. An individual can bring procedures for damages against the state as opposed to endeavoring to enforce the directive against a private party on whom the commitment would be forced if the directive were appropriately implemented.54

Directives can therefore have legal effects through indirect effect, incidental horizontal effects, general principles of law, regulations conditional on compliance with Directives and state liability in damages.

2.4 The concept of supremacy and preliminary ruling

The principle of supremacy of EU law means that EU law takes precedence over conflicting national law. Thus if there is a conflict between EU law and national Member State law, EU law prevails and the norms of national law have to be set aside.

The principle of supremacy has been established and developed by the Court of Justice of the EU in a series of cases. In the prior mentioned Van Gend en Loos case, the Court of Justice made a direct conflict between national law and European law possible, but did not answer the question as to which law should prevail.

In case no. 6/64 Costa v ENEL, the Court of Justice established the doctrine of supremacy of EU law over national law. The Court concluded that the law, stemming from the Treaty could not be overridden by domestic legal provisions. The Court also stated that the Treaty implied a permanent limitation of national sovereignty.55 The case concerned a company called Costa that was affected by the nationalisation of

54 Paul Craig and Gráinne De Búrca: EU Law text, cases and materials, 5th edition, bls. 215
55 Franz C. Mayer: Supremacy – Lost? – Comment on Roman Kwiecien, bls. 1497-1498
Italian law and held that it breached EU law. The Italian government however did not agree and held that as the Italian legislation post-dated the EU legislation, it should be held to be the applicable law. The Court of Justice ruled that the EU law had supremacy over national law, even if national law post-dated EU law.

In case C-106/77 *Simmenthal*, the Court of Justice stressed that supremacy of EU law affects both prior and future legislation. The case concerned that Simmenthal was made to pay a certain fee, according to Italian law from 1970, for a public health inspection when importing beef to Italy from France. This was in contrary to the, then European Community Treaty, and a couple of regulations passed in 1968. Eventually it was held that the domestic courts should comply to the EU provisions and not apply any conflicting provisions of national legislation, even if they entered into force after the EU provisions.

The most common way for cases to reach the Court of Justice of the EU is through the process of referral for a preliminary ruling. Article 267 TFEU gives the Court of Justice jurisdiction to give preliminary rulings concerning the interpretation of the European instrument, that is primary law and secondary law and the validity of a European instrument of secondary law. Lower faced national courts have the option of referring questions to the Court of Justice of the EU but are not obliged to do so. The national courts of last instance however are required to refer questions of EU law to the Court of Justice. This enforcement mechanism is very effective for the Court of Justice of the EU and is well demonstrated by the fact that member states have often complied with the Commissions order to rectify a violation to make sure the case would be withdrawn by the Commission before a negative verdict could be issued by the Court of Justice. This gives the Court of Justice enormous powers to influence rulings on a national domestic level and has produced a voluminous body of EU jurisprudence in member state’s national courts.  

The purpose with preliminary ruling is to guarantee uniformity in the application interpretation of EU law. It also gives the Court of Justice an ideal instrument to develop and define the law of the EU. When the Court interprets a provision of EU law, that interpretation must be applied and accepted by all national courts.

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56 Lenore Jones: *Opinions of the Court of the European Union in national courts*, bls. 278-281
57 Dr PSRF Mathijsen: *A guide to European Union Law. Ninth Edition*, bls. 129-130
3 The Internal Market

The internal market, also known as the single market or common market, is one of the European Union’s greatest achievements from 1993 but for most of the history of the Union, its central policy has been the creation of the internal market. The internal market is still its principal rationale and is central to the EU. The creation of it encouraged EU Member States to liberalize the monopolistic public utility markets that had been protected before and the Member States set about harmonizing standards and rules within the EU by aligning national legislation.

The internal market constitutes, according to Article 67(1) TFEU, an area of freedom, meaning the absence of internal border controls for a common policy and persons, and external border control in respect of third-country nationals. This has lead to an area of security and justice, where the justice element has especially concerned access to justice.

The internal market is one of the aims of the European integration and the reason the EU Treaty (now TFEU) sought from the outset to ensure the free movement of goods, persons and services within the European Union. As time passed the Treaty also included in its aims, the free movement of capital and some of its Member States now have a single currency, the Euro. The Maastricht Treaty, in 1992, introduced the Union citizenship, which was new and possibly revolutionary.

According to Article 3 of the TEU the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, where free movement of persons is ensured. The internal market is one of the aims of the EU, as is prescribed in Article 3 of the TEU. According to the article the internal market shall, amongst other things, work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy and combat social exclusion and discrimination.

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58 European Parliament: *Fact sheets on the European Union*, bls. 105
59 Damian Chalmers, Gareth Davies and Giorgie Monti: *European Union law*, bls. 675
60 Paul Craig and Gráinne De Búrca: *EU Law text, cases and materials, 5th edition*, bls. 581
61 European Parliament: *Fact sheets on the European Union*, bls. 105
63 Alan Dashwood, Michael Dougan, Barry Rodger and more: *Wyatt and Dashwood’s European Union Law, sixth edition*, Bls. 389
64 Klaus-Dieter Borchardt: *The ABC of European Union law*, bls. 19

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The EU Commission presented, on 28th October 2015, a new Single Market strategy to deliver a deeper and fairer Single Market that will benefit both businesses and consumers. In 2016, the EU Commission will take measures to modernize the standard system, reduce barriers in key sectors such as construction, retail and business services, strengthen the single market for goods, prevent discrimination against consumers based on their place of residence or nationality and more.  

According to Part 3 of the TFEU on the Union policies and internal actions, further in Article 26 and 27 on the internal market, the European Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market and the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

One of the four main freedoms of the internal market is the free movement of goods which is ensured through the elimination of custom duties and quotas between Member States, as well as through the prohibition of measures having equivalent effect to that of quantitative restrictions or custom duties. The legal bases of the free movement of goods is now in Article 26 and 28-37 TFEU.

Another of the four freedoms for the European citizens is the free movement of workers, which ensures the worker’s rights of movement and residence, right of entry and residence for family members as well as the right to work in another EU Member State. The legal bases of the free movement of workers is Article 3(2) TEU, Articles 4(2)(a), 20, 26 and 45-48 TFEU and developed by case law of the Court of Justice and secondary legislation. Free movement of workers has now inspired a development of free movement of people within the EU.

Third of the four freedoms of the internal market is the free movement of capital between the EU Member States. This freedom has legal basis in Articles 63 to 66 TFEU, supplemented by Article 75 and 215 TFEU for sanctions.

Fourth and last main freedom of the internal market is the single market for services which has legal basis in Article 49 and 56 TFEU.

The Court refers to the four freedoms as “foundations” and “fundamental” principles of the EU Treaty. These four freedoms play a central role in European

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65 According to the press release made by the European Commission in Brussels 28th October 2015.
66 Nigel Foster: EU Treaties & Legislation 2012-2013, bls. 27
67 European Parliament: Fact sheets on the European Union, bls. 110
integration and despite its limitations, they are seen as constitutional and political rights. The Member States are obliged to remove negative obstacles to the integration, which the four freedoms are a perfect example for, and are not to put in place any measures that will hinder the four freedoms.\textsuperscript{68}

A single market can be attained by using two principal techniques. The classic way, in which the four freedoms operate, is that EU law prohibits the national rules that hinder cross-border trade, because they render market access more difficult or because they discriminate against labour or goods, etc, from other member states. The approach is deregulatory and essentially negative. This approach is reinforced through what is known as mutual recognition, which requires Member States to accept, subject to certain exceptions, goods that have been made in accordance with the regulatory rules of another Member State. The creation of a single market however additionally requires a positive reconciliation. Positive integration is accomplished mainly through Articles 114 and 115 TFEU and other more sector-specific Treaty Articles. Positive integration is known as where obstruction to integration may flow from diversity in national legislation on matters such as technical specification, safety, health, consumer protection and the like. Many such hindrances may only truly be overcome through harmonization by EU directives and they through harmonization of various national laws accordingly.\textsuperscript{69}

3.1 Union citizenship

The Union citizenship is enshrined in the Treaties, in Article 20 TFEU and Article 9 TEU with legal basis in Articles 9-12 TEU and 18-25 TFEU. According to Article 20(1) TFEU:

\begin{quote}
Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
\end{quote}

With the Maastricht Treaty came the notion of Union citizenship, where citizens of the Union enjoy rights and are subject to duties provided for in the Treaties. According to Article 21 TFEU Union citizens have a right to move and reside freely within the

\textsuperscript{68} Karen Davies: \textit{Understanding European Union law}: bls. 105-106.
\textsuperscript{69} Paul Craig and Gráinne De Búrca: \textit{EU Law text, cases and materials, 5th edition}, bls. 582
territory of any of the Member States subject to the limitations and conditions contained in the Treaties and secondary legislation. The European Court of Justice later recognized the Union citizenship as a fundamental status of Union citizens. Originally the EEC Treaty granted a right to reside in another Member State together with a right to equal treatment with host-state nationals, only to those nationals of the Member States who migrated for the reasons to pursue an economic activity, that is as an employed or self-employed person or to receive a service. That was gradually changed and finally lead to the notion of Union Citizenship. In line with Article 21 TFEU the nationals of Member States that were previously excluded from the scope of Union law as non workers, have now gained directly enforceable rights and Directive 2004/38 now details further the right of Union citizens to migrate.

According to Article 20 TFEU every person holding the nationality of a Member State shall be a citizen of the Union. Article 18 TFEU provides that without any prejudice to any special provisions contained within the scope of the Treaties, any discrimination on ground of nationality shall be prohibited. 70

Articles 20 and 21 TFEU, read together with Article 18 TFEU even provide a more general right to equal treatment. This was confirmed in Case C-274/96 Bickel and Franz where an Austrian and German nationals undergoing trials in Italy claimed to have a right to have the trials conducted in German. Non-residents in the province did not have such a right though residents did and given that a residence requirement amounts to indirect discrimination, the issue for the Court preferred to find in Article 56 TFEU the trigger for Article 18 to apply, rather than relying on citizenship provisions, which it nevertheless mentioned in order to strengthen its reasoning. 71

The Union citizenship right gives citizens there within as well a right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State, according to Article 20(2) TFEU and more rights covered through Articles 18 to 25 TFEU.

71 Alan Dashwood, Michael Dougan, Barry Rodger and more: Wyatt and Dashwood’s European Union Law, sixth edition. Bls. 489
In case-law, the Court of Justice of the EU has given the citizenship a content going beyond the express of the Treaty provisions where the concept is more closely related to other basic concepts such as including the prohibition of discrimination on grounds of nationality, the protection of fundamental rights and free movement of persons.\(^ {72}\)

### 3.2 EEA and the EU

The Agreement on the European Economic Area (EEA) brings together the, now, three EFTA States (now, Iceland, Liechtenstein and Norway) and the EU Member States, besides the EU itself as members. The aim of the EEA Agreement is to establish a homogenous and dynamic EEA between these parties\(^ {73}\) and bring the EEA countries into the internal market.\(^ {74}\) In order to ensure homogeneity the EEA-relevant EU acts are incorporated into the EEA Agreement continuously but due to the particular features of the EEA Agreement there is a need to adapt the EU acts upon incorporation into the EEA Agreement. Regarding regulations, they can make a regulation part of their domestic law albeit without amending its contents, or directly referencing in the domestic law to the EU regulations. Regarding directives, it is left to the national authorities of the EEA countries as to the choice of form and method if implementation.\(^ {75}\) EEA law, is assured mostly by national courts in the EFTA-EEA countries and by the EFTA court. The jurisdiction of the EFTA court is in many ways similar to that of the European Court of Justice.\(^ {76}\)

The EEA was established by the EEA Agreement, that was signed in Porto on 2 May 1992, and entered into force on 1 January 1994. Liechtenstein then joined on 1 May 1995. The EEA Agreement enables the EFTA States to participate fully in the EU Single Market and covers the four freedoms of the internal market, that is the free movement of goods, capital, services and persons, plus state aid and competition rules and horizontal areas related to the four freedoms. The three EFTA countries go by the term EEA-EFTA States while Switzerland, which is a party of EFTA is not a party to the EEA Agreement. However, in the legal texts linked to the EEA

\(^{72}\) Francis G. Jacobs: *Citizenship of the European Union – A Legal Analysis*, bls. 591
\(^{73}\) The EEA Agreement, 4th recital.
\(^{74}\) Klaus-Dieter Borchardt: *The ABC of European Union law*, bls. 83
\(^{75}\) Steven Blockmans & Adam Lazowsk: *The European Union and it’s neighbours*, bls. 130-132
\(^{76}\) M. Elvira Méndez-Pinedo: *EC and EEA Law*, bls. 37
Agreement and the Agreement itself the term “EFTA” States only refers to the three States being members to the EEA and is understood to exclude Switzerland.

When a State becomes a member of the European Union it also has to apply to become a party to the EEA Agreement, according to Article 128 EEA, which then leads to enlargement of the EEA.

EU acts have to be incorporated into the EEA Agreement and adopted accordingly in order to be applicable in the EEA as so-called EEA-acts, but as mentioned above, the EEA enables the EFTA states to participate fully in the EU Single Market and covers the four freedoms. The EEA Agreement requires the EEA countries to absorb nearly two thirds of the EU’s legislation and lays a firm basis for ensuing increase. On the basis of the acquis communautaire (the body of primary and secondary Union legislation) in the EEA there is to be free movement of persons, goods and capital, services, uniform rules on state aid and competition, and closer collaboration on horizontal and flanking strategies (research, environment and development and education).  

Even though the sources of EEA law are closely related to the sources of EU law, there are some differences between them. EU law evolves over time but the EEA legal order is continuously being updated with new legislation. The divergence between the EEA and EU law is compensated by the homogeneity obligation. Meaning that for the EEA to be homogeneous the two legal systems must be enforced and developed in a uniform manner.

The EFTA court has insisted that EEA law has strong indirect effect that is reinforced by a strong liability in cases of breach of EEA law so even though it has weak direct effect and lacks automatic primacy, the indirect effect compensates for it. What makes EEA law very different from EU law, is that there is this tension between the sovereignty of the EFTA-EEA States and the homogeneity requirement that brings EEA law closer to EU law. The EFTA court however defined EEA law as a sui generis legal system in the case of Erla María Sveinbjörnsdóttir. The Court of Justice of the EU has on its side evolved in its approach towards EEA law, in case Open Austria in 1997, and declared that the EEA Agreement involves a high degree of integration and that provisions of the agreement are able to produce direct effect at

77 Klaus-Dieter Borchardt: The ABC of European Union law, bls. 83-85
the EU side. The Court of Justice also pointed out in that case how important role the homogeneity plays when developing these two legal orders in parallel.

The principles of supremacy, effect and applicability of EEA law must be bearing in mind the special legal nature of the EEA Agreement. However supremacy of EEA law versus conflicting domestic legislation must comply with Protocol 35 EEA Agreement. 78
4 Free movement of Services

Interstate trade is hindered by the high level of regulation applying to many service activities, even though trade in services comprises the largest part of a modern economy. EU law has taken an approach to breaking down these barriers, with the direct application of Article 56 TFEU by courts, is now being complemented by Directive 2006/123/EC on services in the internal market, and by sector specific regulation for many complex services of particular economic or social importance.79 Article 56 TFEU prohibits restrictions on freedom to provide services within the Union in respect to nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. Article 57 TFEU provides that services shall be considered as services within the meaning of the Treaties where they are normally provided for remuneration, as long as they do not fall under the other provisions relating to freedom of movement for capital, goods and persons.

Goods are things that one can feel, for example electricity is treated by the Court of Justice as goods. But when there is no tactile object being traded, for example, the sale of e-books, it would fall within the provision of services. Sometimes however the provision of a service is attached to the provision of a physical thing. In Case C-275/92 *HM Customs and Excise v. Schindler* the Court of Justice of the EU found that buying a lottery ticket did not fall within the free movement of goods but services, as the physical ticket was purely ancillary to the real substance of the transaction, which was winning a prize. The customer did not pay in order to own a piece of paper but to participate in the lottery, which is a service.80 Whenever the service recipient and service provider, are established in different Member States, Article 56 applies.

This covers several situations, for example where the service provider travels to another state or where the service itself moves, which is equally as important today. The Court of Justice of the EU has also extended Article 56 beyond its literal wording.81 In the case no. C-55/98 *Skatteministeriet v. Vestsergard*, a Danish company organized training courses on Greek islands for Danish workers. There was 79 Damian Chalmers, Gareth Davies and Giorgie Monti: *European Union law*, bls. 783 80 Damian Chalmers, Gareth Davies and Giorgie Monti: *European Union law*, bls. 787 81 Damian Chalmers, Gareth Davies and Giorgie Monti: *European Union law*, bls. 788-89
an international element to the service provision as the provider and recipients all travelled to another Member State. The transaction was however domestic as both the provider and the recipient were established in Denmark. Nevertheless the Court applied Article 56. For services to fall within the scope of Article 56, the Court stated in the case that:

“It is sufficient for them to be provided to nationals of a Member State on the territory of another Member State, irrespective of the place of establishment of the provider or recipient of the services. “

The Court also confirmed that Article 56 applies;

“Not only where a person providing a service and the recipient are established in different Member States, but also whenever a provider of services offers those services in a Member State other than the one in which he is established, wherever the recipient of those services may be established. “

A step further was taken in the Case C-208/05 Innovative Technology Center GmbH v Bundesagentur für Arbeit, where a German employment agency found a job in the Netherlands, for its German client who at the time lived in Germany. The Court found that Article 56 applied even though the provider, payment and client all took place in Germany. According to the Advocate General, whose opinion was the following, Article 56 applies;

“even where the provider and the recipient of the services are established in the same Member State, on condition that the services are being provided in another Member State.”

According to the last two above-mentioned cases it appears that even domestic service contracts fall within Article 56 if an important part of the work for which the service provider is paid for takes place abroad. 82

The question whether Article 56 is engaged simply whenever a measure may affect cross border services, without any kind of comparison being involved such as, if it has a greater effect on the foreign or the cross border than on the domestic, was partly answered in Case C-55/94 Gebhard. The Court found there that all national measures are to be seen as restrictions on movement when they are liable to hinder or make less attractive the exercise of fundamental freedoms. The case suggests a

82 Damian Chalmers, Gareth Davies and Giorgie Monti: European Union law, bls. 790

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broad scope of Article 56 in which the only question being whether some hindrance to service provision can be argued, and where comparison between the domestic or the foreign is irrelevant.  

Article 56 is primarily addressed to Member States but it may also be directly applied to private actors under certain circumstances. As summarized in the Gebhard case, mentioned above, it can be said that restrictions to services will be permitted if it is justified by some legitimate public interest objective, equally applicable to the foreign EU party and the national, and being proportionate to the objective.

### 4.1 The Service Directive 2006/123/EC

Commonly referred to as the “Bolkestein Directive”, the Service Directive 2006/123/EC (hereafter referred to as The Service Directive) was drafted under the leadership of the former European Commissioner for the Internal Market, Frits Bolkestein. The Directive aims to facilitate the freedom of provision of services between Member States as well as the freedom of establishment for providers in other Member States. The rules of the Service Directive apply if the national rule falls within the scope of the directive. If it falls outside, case law and provisions of the Treaty will apply.

According to Article 2(1), the directive applies to:

> Services supplied by providers established in a Member State.

The term services is intact defined by the model of the GATS definition where a service means any self-employed economic activity that is usually provided for remuneration as mentioned in Article 57 TFEU. The list has been updated by the Directive to include, amongst many other things, car rentals.

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83 Damian Chalmers, Gareth Davies and Giorgie Monti: *European Union law*, bls. 793
84 Damian Chalmers, Gareth Davies and Giorgie Monti: *European Union law*, bls. 797
85 Damian Chalmers, Gareth Davies and Giorgie Monti: *European Union law*, bls. 803
86 David Edwards and Robert Lane: *Edwards and Lane on European Union Law* bls. 579
87 Catherine Barnard: *The Substantive law of the EU. The four freedoms*. Fouth Edition. bls. 415-416
As covered above, in the Schindler case, sometimes the provision of a service is attached to the provision of a physical thing, as in the case of car rentals, where the service is attached to a physical thing, namely a car. The customer is only renting the service of the car but not buying the physical car.

If the activity is a service that falls within the definition of the directive then it can be used to challenge requirements that affect the exercise of, or the access to a service activity. Such requirement is broadly interpreted by Article 4(7) of the Directive, and is intended to give the Directive the widest possible reach that will catch regulation never meant to be covered by Union law.

The scope of the Service Directive is set in Article 2, as mentioned, but according to Article 2(3) it does not apply to the field of taxation.

The freedom to provide services is protected in Article 16 of the Directive, where it states, in Article 16(1), that Member States are to respect the right of providers to provide services in a Member State other than that in which they are established.

Article 20 of the Directive covers a rule about non-discrimination. According to Article 20(1) member states shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence. According to Article 16(1a), Member States shall not exercise of nor make access to a service activity in their territory subject to compliance with any requirements which they do not respect the principle of non-discrimination, neither directly nor indirectly discriminatory with regard to nationality or with regard to the Member State in which they are established.

The prohibition of discrimination on grounds of residence or nationality is binding on service providers as Article 20(2) of the Service Directive is implemented through national provisions. According to Article 20(2), member states shall ensure that the general conditions of access to a service, which are made available by the provider to the public, do not contain discriminatory provisions relating to place of residence or nationality of the consumer, except for in those instances where the different conditions in access are directly justified by objective criteria.

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88 Damian Chalmers, Gareth Davies and Giorgie Monti: European Union law, bls. 787
89 Catherine Barnard: The Substantive law of the EU. The four freedoms. Fouth Edition, bls. 416
90 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 4
Non-discriminatory rules are presumptively lawful if they apply to all individuals, regardless of their nationality. Much like a national requirement on driving on the right side is non-discriminatory as it applies to all individuals within a country, where such rule applies. 91

The Directive does not cover matters that are not contemplated as services. It does neither cover non-discriminatory rules or non-economic activity but the principal exclusions are in found Article 2(2)-(3).

It seems from reading the wording of the Articles of the Directive that some of its provisions cover only cross-border situations but some cover both internal and cross-border situations. This results in that while meeting the needs of the internal market it also improves the competitive position of market operators whose relevant transactions are entirely internal to a Member State. According to Wyatt and Dashwood’s European Union Law, Articles 16-20 of the Directive are however specifically concerned with cross-border situations. 92

Articles 16-19 of the Directive all mention in some way, a service supplied by a provider established in another Member State. But Article 20, about discrimination does however not. Article 20 states that:

(1) Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

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

Which makes it an interesting assumption that the provision would only cover cross-border cases, specially given that the scope of the Directive, set in Article 2(1) applies to services supplied by providers established in a Member State.

Article 20 of the Directive is one of its most important provisions, as being the rule for non-discrimination which is important for the internal market and here especially the free movement of services.

91 Catherine Barnard: The Substantive law of the EU. The four freedoms. Fouth Edition. bls. 417
92 Alan Dashwood, Michael Dougan, Barry Rodger and more: Wyatt and Dashwood’s European Union Law, sixth edition, bls. 621
4.2 Guidance on the application of Article 20(2) of the Service Directive

In 2012 the EU Commission published a guidance document on the application of Article 20(2) of the Service Directive concerning unjustified discrimination of consumers on the basis of nationality or residence. 93

The guidance sheds light to the information that service recipients, whom are most often consumers, expect that the elimination of regulatory barriers to the provision of services in the internal market, will make more services available to them. Despite that, according to the guidance, consumers have been experiencing a higher price or refusal to supply on grounds of their residence in another EU country. One of the grounds for the document was to give possible indications to further facilitate the availability of services to EU citizens.

According to the guideline document too many EU citizens become disappointed when trying to buy a cross-border service due to the different treatment they receive on grounds of nationality or residence. 94 Two studies on geographical discrimination against consumers, were commissioned and published in 2009. Namely, the “Mystery shopping evaluation of cross-border e-commerce in the EU”95 and the “Matrix Insight: i.e. Access to services in the Internal Market” (here after referred to as the Matrix Insight study). The latter is a study on business practices applying to different conditions of access based on the nationality or the place of residence of service recipients. Both relate to services that include car rentals and in most cases of the studies the different treatment seem to be more related to residence rather than nationality as such, especially in online transactions. Customers may, for example, find themselves redirected to a car hire firm’s or hotel chain’s website in his or her country of residence after wishing to book a car hire or hotel for a holiday online in another Member State. The redirection may often lead to a considerably higher price being offered. Transactions also may fail due to the address of the buyer once the credit card details are entered.96

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93 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 2
94 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 2
95 For further reading: Mystery Shopping Evaluation of Cross-Border E-Commerce in the EU. Conducted on behalf of the EU Commission, Health and Consumers Directorate General in 2009.
96 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 2
The Service Directive obliged Member States to remove obstacles supplied by providers established in other Member States for service recipients wanting to buy services and this was done in hope of strengthening the recipients’ confidence in the internal market. It also obliged Member States to ensure that discriminatory requirements based on consumer’s place of residence or nationality were put to an end and therefore the Service Directive prohibits discrimination against service recipients on the bases of their nationality or country of residence. The purpose was first and foremost to let consumers make the most of the internal market. Member States were as well obliged to make assistance and information on consumer protection rules available to consumers.

Article 20 (1) of the Service Directive also includes instances were different treatment, based on nationality or place of residence, is applied by the public authorities.97

In 2003, in the case of C-388/01 (Commission v. Italy) the Court of Justice of the European Union condemned advantageous rates for admission to services granted by State authorities only in favour of nationals and persons resident within the territory of those authorities, which excluded recipients that are nationals of other Member States and non-residents from such advantages, as being discriminatory.

On 10th October 2002 the Advocate General delivered his opinion on the case that concerned advantageous charges for admission to the monuments, public museums, galleries, archaeological digs and memorial parks and gardens in Italy granted to Italian residents and nationals within the territory of the administrative authority running the cultural site in question and who are over 60 and 65 years of age. The EU Commission considered this to infringe against Articles 12 EC and 49 EC (now Articles 18 and 56 TFEU).

According to Italian national law, the admission should be free to Italian nationals who are less than 17 years or being 61 years or more. This national law was from 1997 but two years later, or in 1999, the rule was amended into that the admission should be free to citizens of the EU who are less than 17 years of age or 61 years or more, but only for national sites but not for the regional or local ones.

97 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 3
The EU Commission was of the view that the provision for advantageous admission charges infringed Articles 12 EC and 49 EC (now Articles 18 and 56 TFEU) as the freedom of services included the freedom for tourists to travel to another country and enjoy services under the same conditions as the residents and held that the granting of the admission charges to only certain categories of visitors, on the basis of their residence constituted indirect discrimination on grounds of nationality as it affected mainly non-Italian tourists.

The Commission submitted that purely economic considerations could not provide grounds of general interest justifying the measure. In Case C-204/90 (Bachmann v. Belgium) the Court of Justice recognized the need to safeguard the cohesion of the tax system only where there was a direct link between the discriminatory tax rule and the compensating tax advantage. That means the Court insists on the defendant state establishing a link between justification and the steps taken by the State. On these notes the Commission, in the case against Italy, held that Italy had not submitted that granting advantageous admission charges to all consumers of the EU would impair the cohesion of the tax system.

According to Italy it had to be taken into account that cultural sites cannot be operated without financial resources and held that Italian nationals contributed to such public expenditure through taxes they paid, and that had to be taken into account. According to the Opinion of the Advocate General and possible justifications for the discrimination as regards to the Italian Government’s argument concerning the cohesion of the tax system, the Advocate General held that the link the Court’s case-law requires between the particular persons who receive the advantage and their contribution to the tax take is absent.

In the Court’s decision in 2003 in the case against Italy, the Court describes the necessity to preserve the cohesion of the tax system and refers to the Bachmann case, above, where there was a direct link between the deductibility of contributions and the taxation of sums payable by insurers under pension and life assurance contracts, and that link had to be maintained to preserve the cohesion of the tax system. The Court finds that there is no direct link, in the case against Italy, between the application of the rates for admission to the museums and public monuments and any taxation. It finds that the benefit of the advantageous rates at issue depends on the beneficiary’s residence within the territory of the authority running the public
monument or museum concerned, to the exclusions of other persons resident in Italy, who are also subject to tax in that Member State. The court therefore determined that:

In the light of the foregoing considerations, it must be declared that, by allowing discriminatory, advantageous rates for admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralised State authorities only in favour of Italian nationals and persons resident within the territory of those authorities running the cultural sites in question, who are aged over 60 or 65 years, and by excluding from such advantages tourists who are nationals of other Member States and non-residents who fulfill the same objective age requirements, the Italian Republic has failed to fulfill its obligations under Articles 12 EC and 49 EC (now Article 18 and 56 TFEU).

The above case demonstrates how different treatment can be applied by the public authorities. A significant number of cases, according to information available to the Commission, which are recognized as blunt discrimination, involve preferential access to services granted to consumers in a given region by the local or regional authorities or by operators acting under those authorities. The Court of Justice of the European Union has, under certain conditions, condemned advantageous rates granted by local State authorities only in favour of persons resident within the territory of those authorities and nationals, and exclude from such advantages consumers that are non-residents and nationals of other Member States, as being discriminatory.98

4.2.1 Member states make sure conditions do not contain discriminatory provisions

Different treatment that is applied by service providers, such as professionals or firms, that are offering services in a market is also covered by Article 20(2) of the Service Directive. Member States are obliged to make sure that general conditions of access to a service that is made available to the public at large by the provider, do not contain discriminatory provisions related to the place or residence or nationality of the recipient. There can be circumstances though where there is a possibility of

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98 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 3
providing for differences in the conditions of access where the differences are justified by an objective criteria.  

Article 20(2) of the Service Directive is implemented into the Member States national laws as they were obliged to do so. That makes the prohibition of discrimination based on residence or nationality binding on service providers.  

4.3 The scope of the application of the provision

The scope of the non-discrimination obligation in Article 20(2) can be derived from the rationale of the provision and its wording. The obligation applies to any self-employed economic activity which is normally provided for remuneration, for example distribution of goods and services, leisure services and rental and leasing services (including car rentals). The Article applies to service providers, that is, any legal person as referred to in Article 54 TFEU and established in a Member State, or any natural person who is a national of a Member State, who provides a service. An establishment may also consist of an office managed by a provider’s own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, for example an agency. As laid down in Article 4(3) of the Service Directive, the definition of recipient refers to any legal person as referred to in Article 54 TFEU and established in a Member State, who, for a professional or non-professional purpose, uses, or wishes to use a service, or any natural person who is a national of a Member State or who benefits from rights conferred upon him by EU acts. The reference to general conditions made available to the public at large would however appear to indicate that the purpose of the provision is to protect consumers in particular. Article 20(2) does not apply to conditions of access that are negotiated on an individual basis with one service recipient but only for general conditions of access to a service made available to the public at large. Individually negotiated terms are usually based on the specific characteristics of the recipient in question and are therefore not covered by Article 20(2). General conditions of access can be understood as all the terms and conditions made available by the service provider

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99 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 3
100 European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 4
through various means, such as on websites. Differences in conditions of access may concern several aspects regarding the providing of the service or the offer. They do not however, by themselves, constitute discrimination. A possible different treatment may involve, for example, offering different terms and conditions or setting a different price for the service to consumers resident in other Member States.\footnote{European Commission: Commission staff working document. With a view to establishing guidance to the application of Article 20(2) of Directive 2006/123/EC on services in the internal market, bls. 7-10}

A case-by-case analysis is required in all circumstances to determine whether different treatment is being applied to consumers and to find out if that treatment is justified for objective reasons, such as in the above mentioned \textit{Bachmann case} where the Court of Justice insisted on the state to establish a link between justification and the steps taken by the State for the matter, and recognised therefore the need to safeguard the cohesion of the tax system but only where there was a direct link between the discriminatory rule and the compensating advantage.
5 The Car Rental problem in EU countries due to discrimination practices against consumers

As the consumer complaints against car rental services have been increasing, especially where a rental car is booked in another country, more studies are being made and the EU Commission is more focused on putting pressure on car rental companies to stop discriminatory practices against consumers. Here below are introduced results from studies and the Commission’s reactions to the problems facing the car rental industry.

5.1 The Matrix Insight study on access to services in the Internal Market

The Matrix insight study on geographical discrimination against consumers was commissioned and published in 2009. It is a study on business practices applying different condition of access based on the nationality or the place or residence of service recipients, partly relating to services that include car rentals.

According to the Matrix Insight studies the European car rental sector is dominated by a small number of major international companies. Taking into account franchises and fully owned outlets those companies are, according to the study, Europcar, Avis Europe, Hertz and Sixt, which means the European car rental market is by two thirds being dominated by these four companies.102

In the study there was a distinction made between business-to-business wholesale transaction and businesses-to-consumer retail rentals. Within the later group a further distinction was made between rentals to individual consumers and corporate accounts where terms and conditions and rental rates are negotiated on a case by case basis.

Of great importance to the car rental market is the presence of intermediaries, for example booking websites such as Dohop, Momondo and others, to which companies rent cars wholesale to further distribution to retail costumers. With further development of such business it makes it much easier for consumers to compare prices between rental car companies as well as for the companies to target their offers to particular source markets.

102 The Matrix Insight Study by the European Commission on the Internal Market and Services DG, bls. 11
Around 40 percent of rentals are airport rentals which probably means there is a significant number of consumers who are renting cars in their non-resident country.  

With today’s technology the consumer has many different ways of ordering a rental car whether it is with direct walk-in bookings, indirect bookings such as through an agent, airline or hotel, or a direct source market booking (for example online or via phone). All these examples though have that in common that, the fleet provider, meaning the one that offers the service of the car, is the same both at the place of rental and final destination.

The Matrix Insight studied the evidence, in 2009, of price differentiation based on where the consumer had his or her place of residence. The study was conducted on a 24 hour rent of a medium rental car from Frankfurt airport. A random spot check of the prices and services being of offered by the above mentioned four companies to consumers, from different Member States, constitutes clear evidence of the differentiation based on the place of residence. Here below is the table made from the Matrix study:

<table>
<thead>
<tr>
<th>Country of Residence</th>
<th>Avis</th>
<th>Europcar*</th>
<th>Hertz</th>
<th>Sixt</th>
<th>easyCar</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK</td>
<td>GBP 52.62</td>
<td>GBP 99.96</td>
<td>Pre-pay online: EUR 83.83</td>
<td>On return: EUR 75.80</td>
<td>EUR 101.99</td>
</tr>
<tr>
<td>France</td>
<td>EUR 56.21</td>
<td>EUR 87.50</td>
<td>Pre-pay online: EUR 75.75</td>
<td>On return: EUR 79.53</td>
<td>EUR 101.99</td>
</tr>
<tr>
<td>Germany</td>
<td>EUR 66.63</td>
<td>EUR 77.99</td>
<td>Pre-pay online: EUR 85.50</td>
<td>On return: EUR 97.01</td>
<td>EUR 101.99</td>
</tr>
<tr>
<td>Poland</td>
<td>EUR 49.34</td>
<td>EUR 87.60</td>
<td>On return: EUR 75.74**</td>
<td></td>
<td>EUR 101.99</td>
</tr>
<tr>
<td>Italy</td>
<td>EUR 54.97</td>
<td>EUR 91.20</td>
<td>Pre-pay online: EUR 72.08</td>
<td>On return: EUR 75.74</td>
<td>EUR 101.99</td>
</tr>
<tr>
<td>Cheapest (online)</td>
<td>Poland</td>
<td>Germany</td>
<td>Italy</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Most expensive (online)</td>
<td>Germany</td>
<td>UK</td>
<td>Germany</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Maximum difference (% of highest price)</td>
<td>EUR 17.29 (26%)</td>
<td>EUR 21.97 (22%)</td>
<td>EUR 13.42 (16%)</td>
<td>n/a (n/a)</td>
<td>n/a (n/a)</td>
</tr>
</tbody>
</table>

103 The Matrix Insight Study by the European Commission on the Internal Market and Services DG bls 11-12
104 The Matrix Insight Study by the European Commission on the Internal Market and Services DG, bls 12
The check concluded that, the highest price for the car rental in Frankfurt was quoted, to the German residents, by Hertz and Avis, but the lowest by Europcar. Sixt and EasyCar were the only companies where the prices in Euros seemed to stay the same but all the other companies offered a different price depending on the consumer’s country of residence. The maximum percentage difference in price was 26% where Avis charged local consumers 26% more than consumers coming from Poland. Although the studies suggested a different price was given depending on residency, it also showed that the domestic customers were not always offered higher prices than cross-border customers. What the studies also showed was that there was also evidence of service differentiation as Hertz customers coming from Poland had to pay for their rental on return where as the residents of other member countries were able to pay online in advance, which usually comes with a discount. Europcar only offered their costumers from France and Italy to pay for their rental online, which also gave them the advantage of an offered online discount. It is also to be kept in mind that beyond pricing, promotions can also lead to differences in the services available to consumers from different Member States, for example having access to special mileage-inclusive promotions or access to special cars, which are not available on other national websites. 

For car rental companies to be able to differentiate on the prices and services they must be able to direct customers from different place of residence to targeted offers for their national markets. For that the major car rental companies restrict access to services destined to customers from other Member States. According to the studies in most cases there is no automatic IP address-based redirection and customers are directed to the service tailored to their country of residence based on information given, as part of the booking process. A default country is often automatically assigned based on the IP-address even though the customer’s country of residence can be changed. The only way of avoiding the targeted pricing, in most cases, where customers are asked for their country of residence is to provide false information. That could possibly lead to risks in terms of breaching contractual provisions.

105 The Matrix Insight Study by the European Commission on the Internal Market and Services DG bls. 12-14
5.2 European Union letters & press releases

On the 11th August 2014 the European Commission made a letter public, from 23rd July 2014,\(^\text{106}\) that was sent to the CEO’s of six international car rental companies, which offer their services to consumers in all Member States of the European Union. The letter was sent after several complaints from consumers concerning discriminatory practices for renting a car online. The letter urges rental car companies to stop their discriminatory practices that prevent consumers in different Member States from getting the best price offered online resulting in that they are in fact not benefiting from the opportunities set out for the single market. The six companies that were contacted were Sixt, Enterprise, Goldcar, Europcar, Hertz and Avis and according to the public letter only the three first mentioned replied in a satisfactory way.\(^\text{107}\)

The Commission pointed out the relevance, for the car rental industry in Europe, of the guidance document on the application of Article 20(2) of the Service Directive, mentioned above, especially since many consumers rent cars on a cross-border basis. It shed light on the fact that the Commission regularly receives complaints from consumers who are not able to access the most attractive price when booking online within the EU or a country belonging to the European Economic Area, based on their country of residence. With the letter the rental car companies were urged to change their current practices immediately.

In the letter the Commission was concerned that consumers were prevented from getting the best price online by for example, automatic rerouting following the identification of the consumer’s IP address. The IP address itself may also prevent the rental car customer from completing any booking online. In other cases the consumer is also prevented from getting the best price by being asked for his or her country of residence on the website of the car rental company which leads to a different price. The EU Commission ended the letter by requesting a response and confirmation from each car rental company within two weeks that they would review their practices in a comprehensive and effective way, and if the letter would not be

\(^{106}\) A letter sent out to car rental companies, by Mr Jonathan Faull on behalf of the European Commission. Brussels 23rd July 2014.

replied to within the deadline the Commission intended to make the letter public\textsuperscript{108}, which it later did.

According to the public letter from 2014 some car rental companies are already complying and not discriminating based on the consumer’s residency but not all companies are complying. The letter was made public after three out of six car rental companies being contacted did not follow the Commission’s letter with a comprehensive and effective review of the practices. It was mainly done in the interest of consumers as said by Michel Barnier, Vice-president of the European Commission, in charge of Internal Market and Services (at the time of the letter):

\textit{“The Single Market should be a daily reality not only for major international companies but also for consumers in Europe.”}\textsuperscript{109}

According to the public letter of 11\textsuperscript{th} August 2014, rental and leasing cars at that time accounted for 5.5\% of the complaints that the European Consumer Centers Network dealt with. The price differences can be significant between the country specific websites of the same car rental company, even though these price differences are often applied to the same service provision, taking place by the same provider in the same location.\textsuperscript{110}

On the 13\textsuperscript{th} July 2015 the European Commission released another press release on how they work with the European consumer authorities to better enforce consumer rights in the car rental sector. They announced that thanks to a joint action from the European Commission and national enforcement authorities, five major rental car companies have agreed to significantly review how they are dealing with consumers. The car rental companies have agreed to improve their information policies and make their terms and conditions fairer for customers.

Some of the main improvements pledged include better information at the booking stage about optional waiver and insurance products, including their exclusions and applicable excesses and their prices. It also includes improved transparency when booking online with clearer information about key rental terms and requirements, and

\textsuperscript{108} A letter sent out to car rental companies, by Mr Jonathan Faull on behalf of the European Commission. Brussels 23rd July 2014.
about all mandatory charges and optional extras. Improved and more transparent fuel policies and clearer and fairer vehicle inspection processes. Practices for taking additional charges from customers will also improve where consumers are given a reasonable opportunity to challenge any damage before any payment is taken. These proposals are estimated to be completed by the end of 2015, but according to the consumer authorities some outstanding issues will need to be further monitored and amongst those are the practices of brokers and intermediaries.

According to the press release car rental complaints had increased sharply in the past two years, received by the European Consumer Centers. There was a steady increase of consumer complaints on car rental services booked in another country from 1.050 cases in 2012 to more than 1.750 in 2014.\textsuperscript{111}

In case of complaints consumers within the EU can contact their national European Consumer Centre or the consumer authority of the country where the trader is established. The European Car rental Conciliation Service (ECRCS) is a sector-specific body where consumers can also turn to for complaints.

It seems the car rental companies were not complying until the letters were made public catching the attention of the consumers and thus forcing the car rental companies to comply. Since the Matrix study was concluded in 2009 and the EU Commission made the letters public, the car rentals have agreed to improve what was lacking on their behalf.

\textsuperscript{111} Press release by the European Commission regarding that the Commission works with European consumer authorities to better enforce consumer rights in the car rental sector. Brussels 13th July 2015.
6. The reality of the problem in Europe of discrimination based on country of residence

The above mentioned letters from the European Commission were made public not long ago for a reason, because the rental companies were not complying with the rules set out by the EU, and in order to press them to action. Here below are random spot checks made for the thesis to compare from when the Matrix Insight study was made before the letters were made public to see a hint of the reality of the problem that the car rental industry in Europe faces today in cross-border rentals.

6.1 Random spot checks for car rentals within EU

Prices for rental cars can be different from country to country. In the following information tables from one country to another providing evidence of price differentiation based on place of residence of four major car rental companies, that is Avis, Europcar, Hertz and Sixt, will be introduced and explained.

Random spot checks were made and following prices on tables quoted on 4th November, 2015 through booking site: dohop.is where all car rentals can be easily compared by currency and where it is easy to pick your own country of residence when booking. The currency of the tables below, are in Euro. The tables show a 24-hour rental, during 1 - 2nd December 2015, of an economy car from Denmark, Sweden, Germany (same as the Matrix spot check), Iceland and Norway. The estimated age of the rental car driver was over 27 years old. As the Avis and Budget car rentals are de facto the same company, the lowest price that came up, from either one, was used here. The lowest price given from each car rental was used here. There were some interesting factors that changed, and cars that came up during the research which will also be mentioned below, such as change of conditions considering the country and more. The tables are divided into countries.

6.1.1 From Copenhagen airport, Denmark

First spot check was made from Copenhagen airport in Denmark and concluded in the following table:
<table>
<thead>
<tr>
<th>Country of residence</th>
<th>Avis/Budget</th>
<th>Europcar</th>
<th>Hertz</th>
<th>Sixt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>117,42 EUR</td>
<td>N/A</td>
<td>131,14 EUR</td>
<td>93,98 EUR</td>
</tr>
<tr>
<td>Sweden</td>
<td>75,96 EUR*</td>
<td>26,38 EUR</td>
<td>75,78 EUR*</td>
<td>48,72 EUR*</td>
</tr>
<tr>
<td>Germany</td>
<td>72,37 EUR*</td>
<td>26,38 EUR</td>
<td>75,78 EUR*</td>
<td>N/A</td>
</tr>
<tr>
<td>Iceland</td>
<td>72,37 EUR*</td>
<td>26,38 EUR</td>
<td>75,78 EUR*</td>
<td>48,72 EUR*</td>
</tr>
<tr>
<td>Norway</td>
<td>75,96 EUR*</td>
<td>26,38 EUR</td>
<td>75,70 EUR*</td>
<td>48,72 EUR*</td>
</tr>
<tr>
<td><strong>Cheapest:</strong></td>
<td>Germany / Iceland</td>
<td>same</td>
<td>Norway</td>
<td>Sweden, Iceland, Norway</td>
</tr>
<tr>
<td><strong>Most expensive:</strong></td>
<td>Denmark</td>
<td>same</td>
<td>Denmark</td>
<td>Denmark</td>
</tr>
</tbody>
</table>

* = price includes unlimited mileage.

The random spot check of prices and services in Denmark offered by the same four companies to customers from different EU/EEA Member States gives clear evidence of the price difference, especially as offered to Danish customers (i.e. residing in Denmark) where the price difference is enormous compared to prices offered by the same car rentals to consumers from other EU/EEA countries. Danish customers were given the highest prices from all those car rentals, except from Europcar who did not quote a price to Danish residents but only to consumers from other countries. Danish consumers were quoted the highest price from Hertz and the lowest from Sixt but the highest price difference for a Danish consumer comparing to a consumer from another EU State was a total of 104,76 Euro, where Danish clients were offered a car from Hertz for 131,14 Euro and consumers from other countries were offered a car from Europcar for 26,38 Euro, both cars were not including unlimited mileage. The
table seems to offer similar prices to customers coming from the other EU/EEA countries than Denmark, from the same companies, but when searched, the Sixt car rental did not quote a price for Germans on the site and showed no car available when the only search term was switched to a residency location in Germany.

When it comes to the local Danish consumers however the prices seemed to “skyrocket” in comparison! What was interesting as well is that all companies that offered prices to EU/EEA residents outside of Denmark gave prices that included the unlimited mileage, but all companies had very limited mileage included for Danish resident clients.

6.1.2 From Stockholm airport, Sweden

Second spot check was made from Stockholm airport in Sweden and concluded in the following table:

<table>
<thead>
<tr>
<th>Country of residence</th>
<th>Avis/Budget</th>
<th>Europcar</th>
<th>Hertz</th>
<th>Sixt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>57,21 EUR*</td>
<td>79,11 EUR*</td>
<td>74,43 EUR*</td>
<td>67,32 EUR*</td>
</tr>
<tr>
<td>Sweden</td>
<td>92,21 EUR*</td>
<td>79,11 EUR*</td>
<td>74,43 EUR*</td>
<td>67,32 EUR*</td>
</tr>
<tr>
<td>Germany</td>
<td>57,42 EUR*</td>
<td>73,35 EUR*</td>
<td>76,58 EUR*</td>
<td>N/A</td>
</tr>
<tr>
<td>Iceland</td>
<td>73,35 EUR*</td>
<td>79,11 EUR*</td>
<td>74,43 EUR*</td>
<td>67,32 EUR*</td>
</tr>
<tr>
<td>Norway</td>
<td>70,20 EUR*</td>
<td>N/A</td>
<td>88,05 EUR*</td>
<td>67,32 EUR*</td>
</tr>
</tbody>
</table>

| Cheapest: | Denmark | Germany | Denmark, Sweden, Iceland | same |
| Most expensive: | Sweden | Denmark, Sweden, Iceland | Norway | same |

* = price includes unlimited mileage.
This random spot check above regarding Sweden, showed a difference from the one in Denmark where rental cars seemed to be the most expensive for residents within Denmark but here Swedish residents were not made to pay the highest price for the rental except for in one case and that was with Avis/Budget car rental where the price was higher than for other residents, as the table shows.

A random spot check made with the same preferences, for the same destination on the 9th November 2015, showed that the economy car, here Toyota Yaris or similar cost 61,74 Euro from Budget car rental for Danish residents, when the same search was made for Swedish residents the same car, Toyota Yaris came up for 95,52 Euro.

Europcar offered the same prices to each country excluding Germany, which got the lowest, quoted price and Norway which did not get a quote from the site from Europcar.

Hertz quoted similar prices for all residents excluding residents coming from Norway, who got by far the highest quoted price. A random spot check made again with the same preferences for the same destination on the 9th November 2015, showed a price quoted to Swedish residents from Hertz to be 70,83 Euro but Norwegians were quoted the same price with the information that included 15% discount from the original price – meaning that Norwegians in fact got a higher price without the mentioned discount.

All prices here however that came up in the random spot check included the unlimited mileage.

The preference set for the spot check was an economy car but it was noted in the check that sometimes when the country of residency of the consumer changed, the type of cars being offered changed as well within some rental car companies, even though the location of the rental was always the same, that is in Stockholm. That is some consumers were offered a different type of a car, possible a slightly bigger one. Therefore it might seem that the higher price quoted to some consumers might have been justifiable with that the car they got was slightly bigger, but then again they did not, in that case, have the option of renting a smaller or less expensive car like the other EU/EEA residents.
6.1.3 From Keflavik airport, Iceland

Third spot check was made from Keflavik airport in Iceland and the results are in the following table:

<table>
<thead>
<tr>
<th>Country of residence</th>
<th>Avis/Budget</th>
<th>Europcar</th>
<th>Hertz</th>
<th>Sixt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>58,44 EUR*</td>
<td>62 EUR*</td>
<td>45,88 EUR*</td>
<td>66,92 EUR*</td>
</tr>
<tr>
<td>Sweden</td>
<td>58,38 EUR*</td>
<td>62 EUR*</td>
<td>45,88 EUR*</td>
<td>66,92 EUR*</td>
</tr>
<tr>
<td>Germany</td>
<td>57 EUR*</td>
<td>62 EUR*</td>
<td>47,94 EUR*</td>
<td>N/A</td>
</tr>
<tr>
<td>Iceland</td>
<td>N/A</td>
<td>62 EUR*</td>
<td>45,88 EUR*</td>
<td>66,92 EUR*</td>
</tr>
<tr>
<td>Norway</td>
<td>58,41 EUR*</td>
<td>62 EUR*</td>
<td>45,88 EUR*</td>
<td>66,92 EUR*</td>
</tr>
</tbody>
</table>

* Cheapest: Germany | same | similar | same
* Most expensive: similar | same | similar | same

* = price includes unlimited mileage.

The random spot check for a car rental in Iceland from the various customers within Europe showed a similar price from the same car rental to the customers. All car rentals offered in the chart also included in their prices unlimited mileage. Again the Sixt car rental did not offer a price for German clients on the site and Avis/Budget did not offer a price for Icelandic consumers, that is the locals. The table does therefore in general not show differentiation based on residence other than that Icelanders were not quoted a price on the site from Avis/Budget car rental.
6.1.4 From Oslo airport, Norway

Next spot check was made from Oslo airport in Norway and concluded in the following table:

<table>
<thead>
<tr>
<th>Country of residence</th>
<th>Avis/Budget</th>
<th>Europcar</th>
<th>Hertz</th>
<th>Sixt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>75,56 EUR*</td>
<td>67,15 EUR*</td>
<td>81,59 EUR*</td>
<td>83,48 EUR*</td>
</tr>
<tr>
<td>Sweden</td>
<td>75,56 EUR*</td>
<td>67,15 EUR*</td>
<td>81,59 EUR*</td>
<td>83,48 EUR*</td>
</tr>
<tr>
<td>Germany</td>
<td>87,21 EUR*</td>
<td>69,21 EUR*</td>
<td>81,59 EUR*</td>
<td>N/A</td>
</tr>
<tr>
<td>Iceland</td>
<td>87,29 EUR*</td>
<td>67,15 EUR*</td>
<td>81,59 EUR*</td>
<td>83,48 EUR*</td>
</tr>
<tr>
<td>Norway</td>
<td>105,42 EUR*</td>
<td>67,15 EUR*</td>
<td>81,59 EUR*</td>
<td>83,48 EUR*</td>
</tr>
</tbody>
</table>

Cheapest: Denmark, Sweden  
Most expensive: Norway, Germany

* = price includes unlimited mileage.

The table above shows that overall the prices offered by the car rentals were similar and did not differentiate much based on the customer’s country of residence, in the cases for all four car rentals above except for Avis/Budget. Sixt car rental, did however not quote a price on the page for customers with a German residency. Avis/Budget quoted similar and lowest prices for the car rental in Norway for Danish and Swedish residents and a slightly higher price for Icelandic and German residents. The highest price by far though was quoted to the local Norwegian residents.
All the car rentals quoted prices with unlimited mileage included.

6.1.5 From Frankfurt airport, Germany

Last spot check was made from a car rented in Frankfurt airport in Germany and was concluded with the following information in the table here below:

<table>
<thead>
<tr>
<th>Country of residence</th>
<th>Avis/Budget</th>
<th>Europcar</th>
<th>Hertz</th>
<th>Sixt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>59,27 EUR</td>
<td>80,88 EUR</td>
<td>76,99 EUR*</td>
<td>79,25 EUR*</td>
</tr>
<tr>
<td>Sweden</td>
<td>59,27 EUR</td>
<td>80,88 EUR</td>
<td>77 EUR*</td>
<td>79,25 EUR*</td>
</tr>
<tr>
<td>Germany</td>
<td>65,77 EUR</td>
<td>80,88 EUR</td>
<td>75,98 EUR*</td>
<td>N/A</td>
</tr>
<tr>
<td>Iceland</td>
<td>59,27 EUR</td>
<td>80,88 EUR</td>
<td>N/A</td>
<td>79,25 EUR*</td>
</tr>
<tr>
<td>Norway</td>
<td>59,27 EUR</td>
<td>80,88 EUR</td>
<td>76,93 EUR*</td>
<td>79,25 EUR*</td>
</tr>
<tr>
<td>Cheapest:</td>
<td>Denmark,</td>
<td>same</td>
<td>similar</td>
<td>same</td>
</tr>
<tr>
<td></td>
<td>Sweden,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Iceland,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Norway</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Most expensive:</td>
<td>Germany</td>
<td>same</td>
<td>similar</td>
<td>same</td>
</tr>
</tbody>
</table>

* = price includes unlimited mileage.

The table above shows similar prices quoted by Hertz, Sixt and Europcar to their consumers and from the prices given there, a clear difference based on residency within the same car rental cannot be seen. Except for that Sixt car rental did once
again not quote a price for German residents. The Hertz car rental did not quote a price for Icelandic residents either and when searched again, on 10th November for a consumer with Icelandic residency on the site, again Hertz did not quote any price for those consumers on that day either.

It was interesting to see here, differing from the other tables before, that the price quoted for the rented car in Frankfurt, Germany, did not include unlimited mileage from Avis/Budget and Europcar, like they had been offering most of the time before, but this did however not differentiate for consumers based on their location as all consumers searched for were quoted a price not including the unlimited mileage.

Prices given were similar to each other and the highest price difference was given by Avis/Budget where German residents, i.e. the locals, were offered the highest price, or around 7 Euro more than the other customers coming from other EU/EEA countries.

6.2 Conclusion and further overall, comments regarding the spot checks:

First, the comparison in a similar spot check was made from a car rental in Frankfurt, Germany in the Matrix study. The countries that were used in the study, that is the countries of the consumers residence were different from this spot check, as the countries in the Matrix study were the United Kingdom, France, Germany, Poland and Italy but here above the countries were Denmark, Norway, Sweden, Iceland and Germany. Though the spot check here is mostly from different countries from the one in the Matrix studies it implies that when compared, a few things have changed since then while some seem to remain the same.

Avis/Budget still seems to quote a higher price for German, local residents when renting a car in Germany compared to consumers coming from other countries within Europe. At the time of the consumer spot check in the Matrix study, Europcar quoted different prices to consumers depending on their country of residence. That seems to have changed in the recent spot check made here where all countries checked were quoted the same price, including the local residents in Germany. In the Matrix study, Hertz quoted the German residents a higher price than other residents within Europe but in the recent study above Hertz had very similar prices for all residents and did therefore not quote the local Germans a higher price then others. In the Matrix study Sixt car rental quoted the same prices to their costumers, not differentiating depending on their residency. They still gave the same prices to all consumers in the
spot check above, despite not quoting a price for local, German residents on the site. In fact, the Sixt car rental never quoted a price for Germans on the site in all the different locations for renting the car.

The spot check was completed with the same conditions and the only variable that changed was the residency of the customer when searched. In all cases with Sixt Car rental, when searched for a car on the Dohop site for a customer with a residency in Germany, the car rental did not come up with a price, that is the car rental did not offer a car for German residents on the site, from all car pickup locations searched for.

This was more obvious with Sixt car rental than others as in all cases they did not quote a price for German residents. The other car rentals quoted a price for customers residing in all the countries searched for, that is in most cases but not all, as is further explained in the tables above.

What was also interesting with German consumers were the different possibilities they were given by the car rentals once the search changed to a German resident as a customer. In all other cases the rental cars just quoted a price but when it came to searching for German customers, most rental car companies offered different conditions for prices the Germans could choose themselves. There was a variety of possibilities to choose from, the German residents could for example choose from so-called “worry free”, “comfort” or “standard” car rental, all with different conditions. This was not offered as an option for customers residing in other countries. The standard price was used for the spot check to compare to other resident countries. The conditions changed between the three but mostly the “standard” was the standard price, a “worry free” often offered a reimbursement of the CDW and theft insurance and the “comfort” offered for example a third party liability insurance and the last two were therefore more expensive than the first. In some cases, the standard did not include unlimited mileage but in that case it is showed in the above tables for easier comparison of the prices.

The spot check also confirms that the differentiation based on residency is not only on prices as sometimes the car rentals offer different services included for their customers depending on their country of residence. Sixt car rental for example offered Swedish customers renting a car in Copenhagen a free additional driver but did not offer the same for their clients on the site residing in other European
countries, even though they were all renting a car from the same car rental in the same country, that is Copenhagen, Denmark. This was also very clear when renting a car in Copenhagen, were all the car rentals, except for Europcar, which did not quote a price for Danish residents, did not offer a price that included unlimited mileage to Danish residents. The prices were not only much higher for Danish residents but none of those prices included the unlimited mileage, and therefore the Danish residents were in a much poorer position than other residents within Europe looking for a rental car.

In most cases in the spot check concerning Budget/Avis car rental, they quoted a higher price to national residents of the country from where the car was rented, than residents coming from other EU/EEA countries.

The search was made on the search engine Dohop.com. The reason for that was that it was done at the same time and it made it easier to get comparable prices as the search was always the same and the only thing that was changed was the residency of the customer. Another reason for using a search engine instead of going individually to each site is that so many customers today use a search engine to try to guarantee the best price and compare prices between car rentals.

Another differentiation made that was noticed during the spot check was that sometimes the car rental prices were different due to different cars offered. What was interesting about that was that the location of the car rental stayed the same and the only thing that changed was the residency of the customer and in all cases the search made was for the same size of car at the same time. It would therefore be assumed that the car rental always had the same cars at their location and their fleet of cars should not change due to the residency of the customer.

As for conclusions one could at least say that this survey, despite of perhaps not being 100% accurate from the viewpoint of social science, still indicates very strongly the important fact that the rental car market in Europe is not entirely a single internal market for all EU/EEA customers and that is the core issue to be learned here.
7 The car rental problem in Denmark

According to the spot check above, it seemed that one car rental especially, in most cases being Avis car rental, charged the residents of the country, more than residents of the other EU/EEA countries renting a car in the prior mentioned country. This leads to that national residents end up paying in general more for their rental car than foreigners, but are otherwise in the same position renting a car. In Denmark this is a daily reality with all car rentals and is made possible with a good help from the Danish national legislation as it seems.

There is a rather well known problem within the rental car industry in Denmark that Danish residents who rent a car end up paying, in general, much more for the car than foreigners renting a car within Denmark. For example, a Norwegian resident on holiday in Denmark and renting a car is likely to pay a reasonably lower amount for the short term rental car than a Danish resident renting a short term car within Denmark. This results in a more advantageous position for residents within the EU/EEA, living outside of Denmark but renting a car in Denmark. This problem is therefore reversed compared to what is more common in the EU, that is discrimination towards foreigners residing outside the country who get worse treatment than nationals or residents residing in the country in question.

The reason for this disadvantage for the Danish residents is the result of a national tax law within Denmark that allows different taxation on rental cars depending on the nationality of the customer who rents the car. Dividing the market into so-called, tax and non-tax rental cars.

Here below the thesis will cover the reasons for this national legislation, how it works, it’s advantages and disadvantages, effect on residents of the EU/EEA States, if it withstands Denmark’s obligations to the European Union and how it operates against core norms within the EU that one could expect that Denmark has to be in accordance with.

7.1 A realistic example in Denmark

A couple of realistic cases, when explored in Denmark, gave similar conclusion of the car rental industry as the above survey did. Car rental customers, who ordered a car online, stated they lived outside Denmark but within the European Union as being
foreigners and got a certain price for the car rental including unlimited mileage. When they arrived to the car rental to collect the car, and it became evident to the car rental that they were temporarily Danish residents, they were told they could not longer rent the car according to their order, and had to get a new car which was more expensive and did not include unlimited mileage. They were also told that as being Danish residents, they did not fulfill the requirements for renting a non-tax car as they needed to have a permanent address outside of Denmark in order to do so, or not to have spent more than 185 days in Denmark in the past year nor can they be listed within the Danish National Register. The customers stated that on their voucher of the online booking and terms and conditions, there was no information about the so-called Danish non-tax rental nor that there might be a price change due to residency within the EU/EEA or other countries but that did not change anything to the car rental company, claiming it was not responsible for this difference.

This example is in accordance with the discovery made in recent years by the European Commission on the car rental industry regarding lack of information to consumers and discrimination based on residency and nationality within the sector.

It still seems to be considered common knowledge about the Danish rental vehicles that when searched online for tax-free Danish rental cars there is to be found information for example on the Europcar rental car site’s page for terms and conditions where it states:

*Please note that Danish customers renting in Denmark should ensure they declare their country of residency correctly when booking online. Due to special Danish Tax Regulations, non Danish residents may benefit from vehicle tax free rates, however Danish residents are legally obligated to pay rates with vehicle tax added. If the correct rate is not booked online, it will have to be applied at the rental location.*

It is however questionable if the car rental companies can expect it of their customers that they thoroughly check their homepage for information such as this (though not even found on all the car rental companies sites), especially if it is not on the voucher or terms and conditions for the rental car and also considering how many consumers book through intermediaries and never enter the actual homepage of the car rental company.

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112 This information is taken from the homepage of Europcar under terms and conditions, 12th April 2016.
7.2 The Danish tax and non-tax cars: “valutabil” and the reasoning behind them

According to the Danish law on registration tax of motor vehicles, number 221 from 26th February 2013, article 4 of the law states the registration tax is calculated of new and reconstructive cars and if the car is to be registered in Denmark there needs to be paid from 105-180 % registration tax of the car.

Article 2 of the same law covers those vehicles that are exempt from registration tax. According to article 2 (16), vehicles that are exempt from registration includes vehicles that are, under regulations made by the Minister of Taxation, used only for rental to non-residents of Denmark, including residents of the Faroe Islands or Greenland. This is one of 20 different exemptions of the article for different types of vehicles or for vehicles that are used for special purposes.

The Danish law exception does not make a distinction whether it is a Danish national resident in Denmark or not as it refers to all Danish residents, whether they are nationals of Denmark or not. Meaning as well that a Danish national who lives outside Denmark can also rent a non-tax car.

When deciding which tax exemptions should be put forward to the Danish parliament to accept or reject, there is a process where pros and cons of each exemption are considered. According to the statement with the law, the reason given for the exemption of registration for rental cars for foreigners is that it is assumed that access to purchase duty-free cars that are adequate for rental companies to compete with foreign landlords for renting to non-residents. That is the reason given for the scheme to be converted to.

Here the impression is given that the tax exemption for these rental vehicles is based on the fact that the vehicles are not used by Danish residents and as a guiding principle a vehicle used by a non-resident is not registered in Denmark and thus there is no registration tax to be paid. As these are rental cars that are not used by Danish residents, there is, in principle, no requirement for the vehicles to be registered in Denmark, and thus there is no loss of registration tax.

The rental cars used by Danish residents are not exempt from registration tax, according to the law, and if following the above, the reason for putting the registration

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113 Folketingstidende, 1992-93, tillæg A, spalte 9819ff.
tax on these vehicles seems to be due to the fact that the Danish resident is required to register his or her car in Denmark and therefore also to pay the relevant registration tax.

There are therefore different tax-costs for the rental car companies when registering a rental car either for foreigners or for Danish residents. It seems however to be up to the rental car companies how the operation costs of the companies should be covered by the income from the rental of vehicles, though remembering the reasoning behind the law being for rental car companies to be able to compete with foreign landlords for renting to non-residents, especially, next door Swedish and German rental car companies.

There was a judgment made by the Court of Justice of the EU in 1980 on registration duties on new and used cars in Denmark, although the case concerned the free movement of goods, rather than free movement of services. The Case C-47/88, concerned whether Denmark had failed to fulfill its obligations under Article 95 EEC (now Article 110 TFEU) Treaty by charging, according to their law, such a high registration fee on vehicles that the free movement of goods within the Union was impeded. Article 95 states that:

“No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.”

The case concerned both registration duties on used and new cars. Concerning the new cars the Court stated as there was no domestic production of cars to compete with foreign cars and therefore the registration duty on new cars did not infringe prohibitions laid down by the Treaty. Concerning the registration duty on imported used cars. The registration duty differed whether it was on used or new cars according to if they were imported or bought in Denmark. Whereas the registration duty on used cars imported into Denmark was calculated on a flat-rate taxable value that could never be less than 90% of the taxable value of the car when new, but there was no new registration duty on used cars that were sold in Denmark that had already been registered there. The result was that the taxation was higher for imported used vehicles than for vehicles bought on the Danish market. The Danish Government held, amongst other things, that there was no real discrimination in favour of Danish products since there were no cars manufactured in Denmark and all
used cars were therefore of foreign origin. The Court however noted that even though there was no Danish production of cars it would not signify that Denmark did not have a used-vehicle market and that a product would become a domestic product as soon as it has been imported and placed on the market. Accordingly it was concluded that imposing registration duties that resulted in that used cars from other member states are taxed more heavily than used cars which are sold on the domestic market after being registered in Denmark, meant that Denmark had failed to fulfil its obligations under the Treaty. As for conclusion this case indeed verifies that Denmark has had problems towards EU law with its taxation rules while the situation is not comparable to the discrimination we are analysing here.

7.3 Rules and regulations that apply to the matter in the EU

7.3.1 Taxes for rental cars within the EU

Taxation on vehicles is not harmonized at EU level, as the harmonization in the field of indirect taxes has been difficult to achieve due to the unanimity requirement under Article 113 TFEU. Article 113 especially provides for the Council to adopt provisions for the harmonisation of Member States’ legislation in the area of indirect taxation since indirect taxes may create an immediate obstacle to the free supply of services and free movement of goods in the Internal Market. Member States therefore enjoy a wide level of freedom to determine the level of taxation and also whether to apply registration taxes on vehicles that are intended to be used on their territory. Therefore there are very different tax bases and levels that are applied by Member States. Protectionist or discriminatory taxation is however prohibited by Article 110 TFEU. Article 110 TFEU is an indispensable foundation of the internal market and was held to be directly effective in Case C-57/65 Lüticine (which was at the time of the case Article 90 EC).114

According to the taxation and customs union of the EU there are four types of transactions as to where to tax. That is supply of goods, intra-community acquisition of goods, supply of services and importation of goods. Different rules apply to determine the place of taxation depending on the nature of the transaction.

114 Nigel Foster: Foster on EU Law. Fourth Edition. bls. 251
Rules were introduced on 1st January 2010 to make sure that VAT on services will amount gradually to the country of consumption.

The place of taxation for services is determined from where the services are supplied. It both depends on the status of the customer receiving the service as well as on the nature of the service being supplied. A difference must be made between a private individual who is the final consumer (non-taxable person) and a business acting in its business capacity (a taxable person acting as such). A taxable person is anyone who independently carries out an economic activity, even if that person is not identified for VAT purposes, but it also covers a non-taxable legal person identified for VAT purposes according to Article 43 of Directive 2006/112/EC, hereafter known as the VAT Directive. When the status of the consumer and nature of the service are known, the place where the services are supplied can be determined.

In general the supply of services between businesses is taxed at the customer’s place of establishment (Article 44 of the VAT Directive) while the services between private individuals are taxed at the supplier’s place of establishment (Article 45 of the VAT Directive). To make sure that VAT receipts accrue to the Member State of consumption some exceptions have been made to the above main rule. For example when using an intermediary when booking, then the services provided by that intermediary are taxed at the location where the main transaction, in which the intermediary intervenes, is taxable, according to Article 46 of the VAT Directive.

Short-term hiring of means of transport is taxed at the place where the means of transport is actually put at the disposal of the customer according to Article 56 of the VAT Directive. Short term covers the use or continuous possession of a means of transport throughout a period of not more than 30 days or not more than 90 days in the case of vessels. Meaning that for an Icelandic person, on business or holiday in Denmark, that arrives at the Copenhagen airport and picks up a car hired for two weeks, Danish VAT will be charged on the hire.

Long-term means of transportation however will be taxed at the place where the private customer is established, usually resides or has his permanent address, according to Article 56 of the VAT Directive. For example a Danish VAT must be paid on a rental car hired from anywhere within the EU when a private person residing in Copenhagen hires it for six months.
According to the EU VAT directive the short term of transportation as with rental cars in Denmark, the place of taxation is within Denmark, meaning that both Danish residents and residents outside Denmark but within the EU are paying taxes of the rental car in Denmark.

According to the Court of Justice cases, especially C-365/02 Marie Lindfors and C-387/01 Harald Weigel, Ingrid Weigel v. Finanzlandesdirektion für Vorarlberg, when a citizen or worker transfers his residence the Treaty does not offer any guarantee to that it will be tax neutral as regards to taxation. It could both be to the citizen’s advantage or disadvantage when it comes to taxation. Any disadvantage suffered as compared to the pre-transfer situation would not be contrary to EU law, that is, if the individual is not treated less favourably than residents of the respective Member State subject to the same tax.

In the Opinion of Advocate General Stix-Hackl on Case C-365/02 Marie Lindfors, the Advocate General makes a rough distinction between three different types of tax and duty, which are levied by the Member States in respect of private cars. First of those taxes, the Advocate General covers the registration taxes and calls them one-off taxes that are payable on the purchase of a car or as a condition for bringing it into use on the territory of a Member State. Secondly the Advocate General covers that almost all Member States levy taxes calculated according to differing criteria, payable periodically or annually. Then finally this covers duties that may be levied in connection with the registration of a vehicle in a Member State to cover the administration costs (registration fees).

It is an interesting comparison to the Danish tax law allowing foreigners, not living within Denmark, but still within the EU/EEA to rent these so called non-tax cars, which are without registration. Especially as the Advocate General mentions taxes that cover registration taxes for cars used in the territory of a Member state, as the rental cars used by both foreigners and Danes, are used on the territory of Denmark. Furthermore it is questionable in the sense that the Advocate General lastly mentions tax levied in connection with the registration to cover administration costs – firstly, if this tax is in comparison with the different prices offered to nationals and residents outside Denmark but within EU, and also if it is justified taxing only the national residents and not the foreigners using the rental car for short term within Denmark.

There are nevertheless some limits to the Member State´s freedom.
Registration taxes are applied to vehicles bought both on the domestic market new and as well those who are brought into the Member State, and only once when the vehicle is put in circulation for the first time in the country. Therefore they fall under the category of internal taxes that are as such subject to the principle of non-discrimination contained in Article 110 TFEU.

The freedom to provide services does not however preclude a Member State from imposing a car registration tax on leased motor vehicles according to the Court of Justice’s case C-451/99 Cura Anlagen, where the Court found that such a tax is contrary to the principle of proportionality in so far as the aim which it pursues might be achieved by introducing a tax proportionate to the duration of the registration of the vehicle in the State where it is used, which would ensure there was no discrimination with respect to harmonisation of the tax against vehicle leasing undertakings established in other Member States.

The amount of tax has to however, to be proportionate to the duration of the registration of the vehicle in the Member State where it is used. Concerning the VAT treatment of leasing vehicles, introduced by Directive 2008/8/EC then long term leasing of vehicles is taxable in the country where the customer is established in a business-to-business relation, or in the country where the supplier is established in a business-to-consumer relation. When it comes to short term leasing (less than 90 days for vessels or 30 days for any other transport), it is however taxable where the means of transport is put at the disposal of the customer in a business-to-business or business-to-consumer relation.

7.3.2 The principle of non-discrimination

The negative term “discrimination” describes a situation that arises when different situations are treated identically without sufficient justification or when similar situations are treated differently, unless being justified by objective reasons.

General principles in the EU are both written and unwritten principles that supplement the Treaties and guide their interpretation. They place obligations on Member States when they are acting within the scope of Union obligations and when

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115 Case C-148/02 Garcia Avello
116 Case C-279/93 Schumacker
117 Case C-106/83 Sermide
they are implementing Union legislation through the adoption of national administrative acts or rules. They also limit and define the scope of the competences of the Union Institutions to adopt binding acts.\footnote{Alan Dashwood, Michael Dougan, Barry Rodger and more: Wyatt and Dashwood’s European Union Law, sixth edition. Bls. 321}

The principle of non-discrimination in particular includes the prohibition of discrimination on grounds of nationality within the EU/EEA, which is laid down in first paragraph of Article 18 TFEU and states that:

“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”

The Court of Justice of the EU confirmed this understanding in Case C-309/89 Codorniu SA v EU Council.\footnote{Alan Dashwood, Michael Dougan, Barry Rodger and more: Wyatt and Dashwood’s European Union Law, sixth edition. Bls. 332-334}

It is likely that all areas in which the EU can act to fight discrimination according to Article 19 TFEU now constitute general principles of EU law and such general principles are of horizontal applications and therefore can be invoked, at least to a certain extent, against a private party regardless of whether or not there is a national legislation in place.\footnote{Alan Dashwood, Michael Dougan, Barry Rodger and more: Wyatt and Dashwood’s European Union Law, sixth edition. Bls. 332-334}

### 7.4 Is the Danish tax law exemption on rental cars for foreigners, in accordance with its obligations towards the legislation of the EU?

Though the Danish legislation allows different VAT costs, or registration fees, to be paid for the rental car companies in Denmark depending on who rents the car, i.e. a foreigner or Danish resident, it seems to be up to the rental car companies how the operation costs of the companies should be covered by the income from the rental of vehicles. Thus the Danish law on registration tax of motor vehicles does not directly state that Danish residents must pay more than foreigners for rental cars. That is however the result of the law and there seems to be nothing stopping the procedure that Danish residents pay more for rental cars than foreigners within the EU, hence the statement with the law as it was put forward to give Danish car rental companies a chance to compete with foreign landlords for renting to non-residents. The law
results in that the Danish law in question, indirectly discriminates against Danish residents compared to EU/EEA foreigners in Denmark.

The Danish law exemption also seems to put both Danish and foreign nationals, who are residents in Denmark temporarily or permanently, under the same roof. Danish nationals however that are living outside Denmark are treated like other residents or nationals outside Denmark and thus benefit in this way from not living in Denmark.

Article 56 TFEU, on free movement of providers and recipients of services, is directly effective and according to Case C-275/92 Schindler, that was covered above the short term rental car falls under service and not goods. It is therefore rather clear that the rental car service falls under the freedom of service and thereby under Article 56 TFEU and under the Service Directive as well.

Article 56 TFEU applies whenever the recipient and service provider are established in different countries, but as covered with many cases above in the thesis, this covers many situations. However, according to the Case C-97/98 Peter Jägerskiöld V Torolf Gustafsson, it will not apply in a totally internal situation. The case concerned a Finnish man, Mr Gustafsson, who fished with a spinning rod in waters in Finland belonging to another Finnish man, Mr Jägerskiöld. That type of fishing was allowed by Finnish national law, but Mr Jägerskiöld based his claim on that to fish with that kind of a rod was contrary to the Union rules concerning free movement of goods or freedom to provide services. The Court held that the provisions relating to the free movement of services did apply to the case but continued saying:

“the legal proceedings pending before the Tingsratt are between two Finnish nationals, both established in Finland, concerning the right of one of them to fish in waters belonging to the other situated in Finland”

And thereby the Court confirmed that these provisions at stake were not applicable to activities which were confined in all respects within a single Member State.

The Court however, in the case of the Finnish nationals, states that the matters are between two Finnish nationals, within the same country and also mentions that all aspects of the case are within a single Member State. It therefore raises the

120 See Case C-33/74 Van Binsbergen
question if it would matter, regarding article 56 TFEU and the Danish law exemption if the car rental consumer is of a nationality outside Denmark but resides in Denmark temporarily?

According to the VAT directive, covered above, the VAT of the service should be paid where the service takes place, i.e. in Denmark. It seems the VAT is undoubtedly paid in Denmark but the problem being that it is only Danish residents who are paying the VAT and not foreigners renting a car in Denmark, even foreigners from within the EU/EEA.

Thus there is discrimination based on residency as to who is paying VAT of the service. It is nowhere justified why the Danish residents are paying VAT and not foreigners coming from the other EU/EEA states. In this context it should not matter if the Danish government decides to call it registration fee or something else as it by no means seems justifiable why they should pay it and the others should not.

Discriminatory taxation is prohibited by Article 110 TFEU, but it seems that so far, it does not protect reverse discrimination, and it has been held that it does not prohibit the imposition on national products of internal taxation in excess of that on imported products, as such disparities result from the special features of national laws which have not been harmonised in spheres for which Member States are responsible.\(^\text{121}\) According to Case C-86/78 *SA des Grands Distilleries Peureux*, internal reverse discrimination of taxes is not prohibited and the Court of Justice concluded:

> Whether or not a domestic product – in particular certain potable spirits – is subject to a commercial monopoly, neither Article 37 nor Article 95 of the EEC Treaty prohibits a Member State from imposing on that domestic product internal taxation in excess of that imposed on similar products imported from other Member States.

Rental car services are covered by the Service Directive as was stated above, and one goal of the directive is to abolish discriminatory requirements based on the recipient’s nationality or place of residence. There are definitely discriminatory measures relating from the Danish national VAT law as they allow non-residents a more advantageous position when renting Danish rental cars.

The Service Directive only allows discrimination under certain conditions clarified above, such as for reasons of public security, public policy, public health or protection.

\(^\text{121}\) Andrew Evans: *A textbook on European Union law*, bls. 457
of the environment and only in relation to what is necessary to achieve the legitimate objective. Also remembering that discrimination arises when similar situations are treated differently as in this case as both Danish residents and non-residents are in similar situations – renting a short-term rental car in Denmark, and should be paying VAT of the services in Denmark. According to Article 20(1) of the Service Directive discrimination on grounds of the nationality of the recipient or national or local residence is prohibited. According to Article 20(2), the principle of non-discrimination within the internal market means that a consumer of a service, that is offered to the public, may not be restricted or denied by application of a criterion, included in general conditions made available to the public, relating to the recipient’s place of residence or nationality.

It is however questionable if the Service Directive protects as well in internal situations, and not only in cross border situations as seems so common. Some articles of the Directive explicitly link to cross-border services whereas other chapters do not contain such informative reference which leaves room for interpretation, specially whether it also applies to purely internal situations.

Case C-340/14 Trijber, sheds some light on that situation. The case concerned license for sailing on Amsterdam’s waters. Before boats could sail Amsterdam’s canals they needed a license from a local authority but a Dutch company’s application was turned down as the local authority had handed out its boat licenses a while back. The Dutch company alleged that this was contrary to EU Treaty law and EU Services Directive as the licenses were for an unlimited duration and therefore the system was disproportionate and showed that the authority acted arbitrarily. The authority disagreed and additionaly added that even if that was the case, then this was a purely internal situation to which EU law does not apply. This case concerned parties that agreed that the commercial activity was only going to take place in Amsterdam and that there was no cross-border element in the provision of the service. Any link therefore with the EU only arose as regarding the recipients of the service might as well be people or companies coming from other Member States. The legal significance of that possibility had however priorly been given rise to a problem in Cases C-159/12 – C-161/12 Venturini, where the Court stated:

*In that regard, the Court has consistently held that, while national legislation such as that at issue in the main proceedings – which applies indiscriminately to Italian nationals and to nationals of other Member States – is, generally, capable of falling*
within the scope of the provisions relating to the fundamental freedoms established by the Treaty only to the extent that it applies to situations connected with trade between the Member States, it is far from inconceivable that nationals established in Member States other than the Italian Republic have been or are interested in operating para-pharmacies in that latter Member State (see, to that effect, Joined Cases C-570/07 and C-571/07 Blanco Pérez and Chao Gómez [2010] ECR I-4629, paragraph 40 and the case-law cited).

Admittedly, although it is apparent from the orders for reference that the applicants in the main proceedings are of Italian nationality and that all the factual aspects of the main proceedings are limited to one Member State, nevertheless the legislation at issue in the main proceedings is capable of producing effects which are not confined to that Member State.

The Court therefore concluded that where there is a possibility that the application of the national rules might have consequences outside of the Member State concerned, that might be enough to possibly rely on the Treaty provisions governing the freedom to provide services, even if all circumstances took place in one Member State.

Back to the Trijber case, the Court noted that even though the service provided by Mr Trijber was intended for residents of the Netherlands, it was still a fact that it might also be enjoyed by nationals of other Member States and this could impede access to the market for all service providers, including those from other Member States who wish to establish themselves in the Netherlands to provide such a service.

It seems from the cases that it matters, even concerning the Service Directive, to exercise the right of the Directive, if there is some cross-border element, that might be connected to the situation in mind. Even though it seems sometimes a far-fetched connection such as in the Trijber case, where the Court points out that there might possibly be a situation where it could concern other Member States’ nationals.

As covered above the scope of the Service Directive is where, according to Article 2(1), a service is supplied by providers, that are established in a Member State. Also as covered above there seems to be nothing in Article 20 of the Directive that suggest it is only applicable to cross-border situations. It is therefore not impossible that a Union citizen and a Danish resident can obtain rights from the Service Directive, even though the case in question is between two private parties. According to exclusionary effect, a directive can be invoked in a case between two individuals to preclude the application of a conflicting provision of national law, which would be the Danish law on registration tax of motor vehicles, number 221 from 26th February 2013. The result of this could be different than if it had been subject to if the Danish
law had been applied so that the individual would be subject to a disadvantage. Exclusionary effect could therefore be invoked in order to have the national law set aside, as the Service Directive does not create new obligations or rights to be applied but rather leaves a gap that is filled by other provisions of domestic law. The exclusionary effect was covered further above and was also judged in the Controsteel case, also covered above.

As for conclusion, the articles relevant, that were covered above, of the TFEU do not seem to protect the EU citizen against this wholly internal discrimination, even though he might consider himself being protected as being a EU citizen and daily participant of the internal market. Although the Service Directive only allows discrimination under certain conditions, some provisions of it indicate that it only covers cross-border situations while there seems to be uncertainty as to if it covers wholly internal situations in some cases. It seems not to be uncommon that, when there is discrimination in an internal situation, it is not certain that a EU citizen can exercise his rights given to him as a national of a EU/EEA Member State. Resulting in legal uncertainty for the Union citizen.
8 Is reverse discrimination with no cross-border effect justifiable within the EU?

As covered above, legal uncertainty seems to arise by the internal situation when a Danish resident is renting a rental vehicle within Denmark and if and how the EU rules and regulations apply. It is therefore a question as to whether the rules of the EU may in general apply in wholly internal situations and how the Union citizen can protect his or her rights.

Another question is, in the case that it would be considered justifiable to the Court of Justice to charge the Danish residents more for rental cars, whether it makes a difference if the customer is a Danish resident but a national of another Member State, temporarily residing in Denmark and renting a car there. Would that be considered as being a wholly internal situation or perhaps having that cross border effect that might be needed for the EU rules and regulations to interfere?

Reverse discrimination is where persons, in a purely internal situation, suffer by less favorable treatment and as a result of that cannot enjoy the protection of the European Union in their own Member State. Discrimination is reversed when Member States give their own citizens poorer treatment than the treatment of citizens from other Member States provided for in EU law. It is called reverse as it is typically not the case and States tend to rather privilege their citizens in comparison to foreigners and this is then often for political reasons. The reason that reverse discrimination exists in the EU is the direct applicability of EU law that also leads to its primacy over Member States domestic law and at least inactivity of the national legislator in acknowledging equivalent freedoms or rights to persons subject to the national legal order.

Traditionally, this type of treatment has been considered to fall outside the scope of EU law as it does not impede with the achievement of the EU’s economic claims and therefore citizens in internal situations have not been able to use their rights in practise, otherwise given to all EU citizens. It is however questionable how long the reverse discrimination can continue to be ignored at the same time the status of the Union citizen has now developed into the “fundamental status of nationals of the

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122 Alina Tryfonidou: Purely internal situations and reverse discrimination in a citizens’Europe: Time to "reverse" reverse discrimination? Bls. 11
123 Thomas Müller: Reverse discrimination (discrimination against own nationals) in Austria, bls 310
Member States” and contribution to the economic aims of the Union is no longer the sole prerequisite for enjoyment of rights under EU legislation since the 1990s when the right was extended and non-economically active nationals of the Member State who could prove that they would not become a burden on the host Member State could also enjoy the rights of the EU.

It is a question as well if it could be considered as violation of the Union’s principle of equality when it comes to unjustified instances of reverse discrimination and if the Union itself should provide its own solutions. The EU legislation prohibits difference in treatment on a range of grounds such as nationality, race, sex and gender and in the context of the EU’s internal market policy, nationality has always been considered a ground that turns differential treatment into discrimination and thus falls within the scope of EU law and is therefore prohibited since it is capable of impeding the achievement of the aim of that policy, that is the creation of the internal market for all EU residents. It is important to the internal market to stay exactly that, internal and not to be divided along national lines. For example, if goods that are produced in one Member State and imported into another where they are treated less beneficially, by the latter host state (for example with higher taxes), than goods that are produced within the territory of the host state, the former goods will be less popular with consumers and thus traders will not have an incentive to import them and that leads to the division of markets along national lines. It would have a similar effect if economic actors moving from one Member State to the other, would be treated worse than national economic actors, that would lead to the former being more reluctant in moving to the host state for economic activities and thus the aim of creating an internal market in labour will be jeopardized. Article 45 TFEU, the freedom of establishment and to provide services, has been interpreted, as other market freedoms, as prohibiting direct and indirect discrimination on the grounds of

124 Alina Tryfonidou: Purely internal situations and reverse discrimination in a citizens’ Europe: Time to “reverse” reverse discrimination? Bls. 11
125 Helen Oosterom-Staples: To What Extent Has Reverse Discrimination Been Reversed? Bls. 151
126 Alina Tryfonidou: Purely internal situations and reverse discrimination in a citizens’ Europe: Time to “reverse” reverse discrimination? Bls. 11
127 Paul Craig and Gráinne De Búrca: EU law: text, cases and materials. 6th edition. bls. 892
129 Alina Tryfonidou: Purely internal situations and reverse discrimination in a citizens’ Europe: Time to “reverse” reverse discrimination? Bls. 13
nationality. Discrimination on the grounds of nationality has been held to amount to a violation of article 21 TFEU, in cases involving the exercise of free movement, or Article 20 TFEU in cases involving a Union citizen lawfully resident in the territory of another Member State when read in conjunction with Article 18 TFEU, after coming into force of the Maastricht Treaty and thereby setting up the status of the Union citizenship. This was confirmed by the Court of Justice, for example, in the Case C-85/96 *Martinez Sala*.

*Martinez Sala* concerned a Spanish national who had lived in Germany for a long time and had various jobs there. She wanted to get German child-raising allowance which was only granted under certain conditions and a non-national wishing to receive it had to be either in possession of a residence entitlement or a residence permit which Mrs Sala was not in possession of. The Court of Justice found that a benefit such as the child-raising allowance which was automatically granted to persons fulfilling certain objective criteria, without any discretionary and individual assessment of personal needs, and that is meant to meet family expenses, falls within the scope of EU law. The Court judged that Mrs Sala, being a lawful resident in the territory of a host Member State could rely on the Treaty in all situations that fall within the scope *ratione materiae* of EU law, including when a Member State delays or refuses to grant the benefit provided to all persons lawfully resident in the territory of the State on the grounds that the claimant is not in possession of a document which nationals of the same State are not required to have.

The “purely internal rule” is a construct of the Court of Justice and has been used since late 1970s as a filtering mechanism for excluding from the scope of the free movement provision situations, which are unrelated to their objectives. This is for example the situation when a person holds the nationality of a Member State and works and resides within that Member State and is therefore governed by the law of that State and thus cannot rely on EU law to derive any rights, which is in fact a reflection of the principle of mutual recognition. This situation is a direct corollary of the system of multi-level governance and the limited scope of the application of EU

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130 Case C-167/73 Commission v France (Code de Travail Maritime) for direct discrimination and Case C-281/98 Angonese regarding indirect discrimination
131 Alina Tryfonidou: *Purely internal situations and reverse discrimination in a citizens'Europe: Time to "reverse" reverse discrimination?* Bls. 13
law. This rule was applied in Case C175/78 Saunders, where the court announced that:

"the provisions of the Treaty on freedom of movement for workers cannot … be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law".

Since the above case, this reasoning has been repeated for a very long time and the rule provides that in order for a situation to fall within the scope of one of the fundamental freedoms, there needs to be a sufficient link with it being affected. That is, a sufficient cross-border element, which has traditionally been found in the exercise of free movement from one Member State to the other, which contributes to the construction of the internal market. In 1982 the Court ruled, in joined cases C-35/82 and C-36/82, that nationals who had remained in their home Member State could not rely on rules regulating free movement of persons. The case concerned two Dutch ladies who had always lived within the Netherlands. They wanted admission for their third-country national mothers but the Court ordered that there was no link here with the European legal order so that it would justify the application of EU law.

This purely internal rule has for a long time been considered as a necessary solution to protect the sovereignty of the Member States but it sometimes gives rise to reverse discrimination. The application of the internal rule can also have the effect that persons who remain within their Member State of origin, and do not have a sufficient link therefore with the cross-border element, have to comply with the sometimes more restrictive laws of that State, while persons coming from another Member State to the territory of that State, or other nationals of that State that fall within the scope of EU law by virtue of their ability to point to a relevant cross-border element, may as a result of the fact that they fall within the scope of EU law be subject to less restrictive rules.132

Reverse discrimination can emerge in a number of ways but is especially relevant regarding more restrictive rules to nationals than visitors from other Member States would be as exhibited in Case C-29/92 Aubertin.133 French national hairdressers who

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132 Alina Tryfonidou: Purely internal situations and reverse discrimination in a citizens’ Europe: Time to “reverse” reverse discrimination? Bls. 13-14
were living within territory of France had to possess specific diplomas whereas nationals of other Member States and French nationals who could point to a link with EU law did not have to do so, as long as they had lawfully practiced the activity in their State of origin for a certain period of time. France therefore treated French hairdressers, who were in a purely internal situation, less favourably than nationals of other Member States and those French nationals who could point to a certain link with EU law. The accused before the Court, had opened a hairdressing salon without these specific diplomas and argued before the court that the national law was contrary to the Treaty and discriminates French nationals. The question for the Court of Justice was therefore if whether the national law adopted in implementation of Directive 82/489, leads to discrimination between EU nationals and French nationals contrary to EU law.

The Court held that the criminal proceedings before the national court concerned French nationals working as hairdressers in France who did not claim to have obtained in another Member State the occupational qualifications required to pursue those activities. Thereafter the Court stated:

“There is thus no connecting factor between such situations and any of those contemplated by Community law, so that the Treaty rules on freedom of establishment are inapplicable.”

The Court stated that the relevant Directive here no. 82/489, did not aim to harmonize the conditions laid down by national rules for access to the occupation of hairdresser and the pursuit of that occupation, and on those grounds ruled that:

*Community law, in particular Council Directive 82/489/EEC of 19th July 1982 laying down measures to facilitate the effective exercise of the right of establishment and freedom to provide services in hairdressing, must be interpreted as not precluding national rules which require that nationals of that Member State hold a diploma in order to operate a hairdressing salon, while permitting hairdressers who are nationals of other Member States to operate a hairdressing salon without holding such diploma and without being obliged to entrust its operation to a manager holding that diploma.*

The Opinion of the Advocate General in this case was in accordance with the judgment from the Court and the advocate general supported his decision that the Court of Justice had consistently held that EU law, in particular the principle of equal
treatment,¹³⁴ did not apply to purely internal situations. The Advocate General continued stating that the indifference of EU law prevents reliance on EU law in cases of reverse discrimination towards purely internal situations and that generally, EU law only gives rise to reverse discrimination where it grants rights to EU nationals that go beyond the requirement that they be treated the same as nationals of the host State.

As stated above, the Maastricht Treaty came into force in 1992 where it established the Union Citizenship, now in Article 20 TFEU. The introduction of the Union citizenship brought with it many unanswered questions, such as whether there was with it a change of approach towards reverse discrimination and if it was possibly no longer permitted by the EU? The question first arose in 1997¹³⁵ where the Court confirmed that its internal situations-rule in joint cases C-64/96 and C-65/96 Uecker and Jacquet, where the Court was asked whether the right to take up employment as a family member of a Union citizen, can be relied on in the Member state of which the Union citizen is national. The Court of Justice was clear and observed that:

*it must be noted that citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law. Furthermore, Article M of the Treaty on European Union provides that nothing in that Treaty is to affect the Treaties establishing the European Communities, subject to the provisions expressly amending those treaties. Any discrimination which nationals of a Member State may suffer under the law of that State fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State.*

The judgment sorted out some speculations towards that the introduction of the Union citizen with the Maastricht Treaty, and stated towards that it was not there to grant rights to internal situations such as reverse discrimination, and it did not mean that EU law takes precedence over national law in all circumstances.

In Case C-184/99 Grzelczyk, hopes got a little higher when the Court established that

*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.*

¹³⁴ See for example Case C-204/87 Bekaert, paragraph 12
¹³⁵ Alina Tryfonidou: *Purely internal situations and reverse discrimination in a citizens’Europe: Time to “reverse” reverse discrimination?* Bls. 18
The reality was however that the Court of Justice seemed to express no intention of extending the scope *ratione materiae* of the Treaty to cover situations that have no link with EU law\(^\text{136}\), meaning no cross-border element.

In the Case C-148/02 *Garcia Avello*, the right to equal treatment of all Union citizens with even a remote connection with the cross-border element was more clearly established than before, in cases such as the above mentioned *Bickel and Franz*. Mr Garcia Avello was a Spanish national who was married to a Belgian national but the couple resided in Belgium where their children were born and they had dual nationality (Belgian and Spanish). According to Belgian national law, children bear their father’s last name and therefore Belgian authorities declined the couples’ request to have their children bear both their names, as was allowed and is traditional under Spanish national law. Mr Garcia Avello, the Spanish father and acting as a legal representative for the children, brought the matter to court and the court directed questions to the Court of Justice as to whether Articles 20 and 21 TFEU prevented the Belgian authorities from rejecting the requested change of name. The preliminary question whether the Treaty had been triggered as to which the Belgian government argued it was purely an internal situation since the children were born and always resided in Belgium. The Court of Justice however focused on that the children were also Spanish nationals residing in Belgium. The Court then concluded that the cross-border element had been triggered and that the strict Belgian national practice concerning authorisation to change names was unnecessary to protect risks of confusion as to parentage, as well as being disproportionate. The Court therefore found that the refusal to allow them to register their children with both last names, as allowed by Spanish law, constituted discrimination caught by Article 18 TFEU. When the Court brought the national rule of names within the scope of the Treaty, the Court relied on the fact that it might have affected the children’s right to move in the future, specifically return to Spain, by not allowing them to register both names as was allowed by Spanish national law and is traditional in that Member State.

It seemed from the Court’s judgment in *Garcia Avello* that it suggests that dual nationality is per se, enough to trigger the Treaty, regardless of actual movement. The

\(^{136}\) Helen Oosterom-Staples: *To What Extent Has Reverse Discrimination Been Reversed?* Bls. 152
judgement therefore seems to further restrict the scope of the “purely internal situation”, as that Treaty provisions only apply when there is a cross-border element. It also seems that the Court suggests that the effect of the introduction of Union citizenship is subject to an increasing number of national rules to the proportionality assessment, even in circumstances where it seems the rules only remotely affect their Treaty rights. As was the case here, where the link to the material scope of the Treaty was rather remote, as it was based on purely potential factors such as the children’s willingness to move in the future or cultural reasons, as it would have prevented the children from using their Belgian name so as to avoid future confusion.  

8.1 The genuine enjoyment-test

The so-called genuine enjoyment test was first established in Case C-34/09 Ruiz Zambrano and put to use as well in cases C-434/09 McCarthy and C-256/11 Dereci. The Court of Justice held that the Directive in play, Directive 2004/38/EC, prevented its application in references made to the Court in these cases. In all cases the Court argued that the provisions in Articles 20 or 21 TFEU, prevented the Member States from adopting

National measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.  

The Court therefore upheld that the genuine enjoyment of the provisions is at stake if the citizen of the Union, due to a national measure, is made to leave the territory of the Union. The genuine enjoyment tests, which is generally worded, focuses on the contents of the right more than on the individual that is provoking it.

In Ruiz Zambrano, the Court applied Treaty provisions to a situation that traditionally would have been considered purely internal. The case involved two Columbian people that applied for an asylum in Belgium, which was refused. They however remained whereas Mr Zambrano found employment and they had two children. The children were granted Belgian nationalities as they were born there.

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137 Alan Dashwood, Michael Dougan, Barry Rodger and more: Wyatt and Dashwood’s European Union Law, sixth edition. Bls. 389-490
138 European Union Court of Justice Cases C-34/09, C-434/09 and C-256/11
139 Helen Oosterom-Staples: To What Extent Has Reverse Discrimination Been Reversed? Bls. 167
The couple argued that they should gain a right of residence from EU law, since their children were Belgian nationals and therefore Union citizens. In this case, their children had never moved and had the nationality of the state of residence. The Court ruled that Belgium was prevented, by Article 20 TFEU, to refuse the parents a work and residence permit. The Court supported its decision by that the minor children, who were European Union citizens, were dependent on their parents and a decision refusing the parents to stay within the country might deprive the children of their rights as Union citizens.

The Court further concluded:

\[
\text{Citizenship of the Union is intended to be the fundamental status of nationals of the Member States. Such a refusal would lead to a situation in which those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.}
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In Ruiz Zambrano, the genuine enjoyment test only seems to result in an obligation to restrain from adopting national measures. It seems somewhat from the facts of the case that the Court of Justice wanted to solve this particular situation, where the parents had lived in a country for 10 years and had young children, who were nationals there and due to the overall situation in their non-Member State home country, the Court did not want to require them to return to their original State of nationality. The reading of the judgment still does not seem to restrict its application to cases involving young children.

The first step to reduce the influence of the genuine enjoyment test on national proficiency was made in McCarthy. The case concerned a third-country national family member, who was a Jamaican spouse of a UK national, and was refused by the UK to reside there. The Court addressed that the result of this measure was not that Mrs McCarthy would have to leave the territory of the EU whereas she enjoys an unconditional right of residency in the UK where she is a national. The Court of Justice stated:

\[140\] different from Case-C200/02 Chen, as there was no obvious intra-European Union link

141 Alan Dashwood, Michael Dougan, Barry Rodger and more: Wyatt and Dashwood’s European Union Law, sixth edition. Bls. 491

142 Helen Oosterom-Staples: To What Extent Has Reverse Discrimination Been Reversed? Bls. 167
Article 3(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 79/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that that directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State.

And that:

Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.

In the above mentioned Zambrano case the Court also held that the Directive would not apply but the Court addressed the judgment in that case to Article 20 TFEU and not Article 21 as here in McCarthy. The Court in McCarthy goes on to distinguish the facts of McCarthy from the facts in Zambrano and the reasoning seems to be that the refusal to grant residence to Mr McCarthy did not deprive Mrs McCarthy of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen. In reality it is however easy to understand that in fact it could deprive Mrs McCarthy of the genuine enjoyment the Court mentioned if she was not capable of living in the same country as her spouse. It can also be argued that it might be another level whereas this was a grownup person compared to children in Zambrano, though it is questionable whether it is justifiable as a ground in this context.

The prior mentioned, Garcia Avello case also involved dual nationals as the McCarthy case. Alike in both cases, it was concerning citizens with dual nationals of two Member States who had still never exercised free movement rights. In the Garcia Avello case however it seemed to be the key for the Court of determining “same and different” cases for the purpose of establishing discrimination. In the case it was the inter-State link was the dual nationality as the Court held that in the future they might want to experience living in their other national Member-State country, Spain, and therewith exercise their free movement rights and might then run into troubles if they
were registered under more than one name in different Member States. Even if it has been argued that this is a far fetched solution to think ahead as to if they will ever exercise their free movement rights and as to what might happen then or what inconvenience they might experience, the Court confirmed its findings in this decision in Case C-353/06 Grunkin and Paul. It seems so far from the Court’s cases that when it concerns dual nationality and children, they pass the genuine enjoyment tests whereas with comparison with the McCarthy case that was not the same understanding. The Court also supported its findings in McCarthy by stating that Mrs McCarthy would not have to leave the territory of the European Union, which is interesting come to think of the Ruiz Zambrano children, whereas some have argued that they were in the same position and overall being citizens in Europe, thus, the conclusion should be the same. It is however questionable as to whether it is the same position in reality when it comes to young children, as it might be a question as to whether they would really, and even could, be left behind and reside on their own, without their parents, in their national, and their parents non-residential nor national, Member State. Thus, they might not, when all comes down to it, be in the same position to enjoy their rights fully as they might not be capable of staying within the EU as opposed to the to grownup persons could do in the McCarthy case.

The Case C-256/11 Dereci, concerned five separate applications whereas three of them concerned an adult woman and two adult men who were all married to Austrian nationals but were third country nationals themselves, their Austrian spouses had however never exercised their rights of free movement within the EU as they had always lived in Austria. The other two applications were concerning two adult third country nationals who were seeking to remain with or to join one of their parents who were also Austrians nationals that had always lived in Austria. The Court of Justice noted that none of the applicants were dependent on their third country national family members and stated:

*unlike the situation in Ruiz Zambrano, there is no risk here that the Union citizens concerned may be deprived of their means of subsistence.*

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143 Case C-148/02 Garcia Avello and Helen Oosterom-Staples: To What Extent Has Reverse Discrimination Been Reversed? Bls. 165
144 Helen Oosterom-Staples: To What Extent Has Reverse Discrimination Been Reversed? Bls. 167, where she suggested that the Zambrano children and more generally, all Union citizens were in the same position as Mrs McCarty, not having to leave the territory of the EU.
Even though the Court did not answer in its judgment explicitly whether the national measures entail an obligation to leave the territory of the Union, it still has intention to clarify when a national measure has “the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status.”¹⁴⁵ In doing so it designated the genuine enjoyment test as a touchstone that is:

That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.¹⁴⁶

It remains central to test as it seems whether the national measure obliges the Union citizen to leave the territory of the Union. The Court’s findings in the case were, amongst other things, that Article 20 does not prevent a Member State from refusing to allow a Union citizen’s family member from a third country to reside in its territory, when that family member has never exercised free movement rights. It just needs to be sure that such a refusal would not lead to denial, for the concerned Union citizen, of the genuine enjoyment of the matter of the rights conferred by virtue of his status as a Union citizen. It is then up to the national Court to determine whether it leads to such a denial. In the Dereci case the Court does not seem to consider serious inconveniences emerging from the national measure, which it used to distinguish the McCarthy case from Garcia Avello and Grunkin-Paul.¹⁴⁷

8.2 What about another Member States national living temporarily within the host Member State where internal discrimination takes place.

As covered above the EU legislation prohibits different treatment that is based on nationality and in the context of the internal market it has always been considered discrimination that falls within the scope of EU law as it is capable of impeding the achievement of the aim of the internal market.

¹⁴⁵ Case C-256/11 Dereci and Helen Oosterom-Staples: To What Extent Has Reverse Discrimination Been Reversed? Bls. 168
¹⁴⁶ Case C-256/11 Dereci
¹⁴⁷ Helen Oosterom-Staples: To What Extent Has Reverse Discrimination Been Reversed? Bls. 168
Discrimination on grounds of nationality has been held to amount to violation of Article 21 TFEU when involving the exercise of free movement as mentioned above or Article 20 TFEU in cases involving a Union citizen lawfully resident in the territory of another Member State when read in conjunction with Article 18 TFEU, as in the above mentioned *Martinez Sala* case.

That case granted to Mrs Sala from Spain while living in Germany, the same rights as nationals of Germany as it would have been unfair to give her different treatment being in the same position as the Germans. Here a national of another Member State, resident in the host State was given the same status as the host States´nationals. This might hint that another Member States national that is living in the host State where the internal discrimination takes place would also be considered in the same position as the national of the host State and thus allowing the internal discrimination. It must however be put in context that, such a conclusion would put that citizen in a worse position whereas in the *Martinez Sala* case, that conclusion of considering her in the same position as nationals of the host State, granted her rights.

Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State, according to Article 20(2) TFEU and even further rights covered through Articles 18 to 25 TFEU. This is important to consider, as the national of another Member State residing temporarily in a host State will never be in exactly the same position as host State´s nationals. The temporary resident does for example not have a right to vote for national congress such as nationals, and therefore can not have a chance to influence the parliament who might set law permitting internal reverse discrimination directly influencing that resident. The Union citizen, residing in another Member State of which he is not a national, is only entitled to vote and stand as candidate at municipal elections and the elections to the European Parliament according to Articles 20(2)(b) and 22 TFEU. There are many possible rights the temporary resident might not be entitled to on the same grounds as nationals as it could also be relevant for getting a loan, school scholarships or grants from the government.
It could therefore be argued that rights of a temporary resident would never be on exactly the same level as nationals of the host State. For example, in the prior mentioned case *Garcia Avello*, where it was recognized that even though the children were born and always resided in Belgium, they were also Spanish nationals residing in Belgium and the Court concluded that a cross border element had therefore been triggered and that the case concerned discrimination caught by Article 18 TFEU. Here the opposite conclusion would have given the *Garcia Avello* children a outcome which would have put them on the same ground as Belgium nationals that would be, in this case, a worse position for them.

This conclusion might suggest the possibility that it is enough to trigger the cross border element when another Member States’ national is residing temporarily in the host Member State where the internal discrimination takes place. Thus making the position for that citizen not purely internal and therefore paving the way to use rights granted by EU law and Article 18 TFEU against such discrimination.

After the genuine enjoyment test was established it seems it focuses more on the contents of the right rather than on the individual provoking it, hence it is not always according to the cases above, an enough cross-border element to have dual nationality. The genuine enjoyment test makes sure that the Union citizens are not deprived of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. It therefore seems that it is a question in the context, whether the nationals of another Member State, residing temporarily in the host State, are being deprived of rights they should be entitled to by virtue of their status as Union citizens. As Union citizens they are entitled to free movement within the Union but it is questionable if they are treated worse by moving within the Union, whereas they are treated as nationals, if that would be depriving them of the benefits the right of moving should give them, as they were being put in a worse position than if they were only nationals of the Member State and would not move and only visit the host State and not reside there.

For example, with the car rental in Denmark, if they were Norwegians only visiting they would pay a certain amount for renting the car, but if these Norwegians were residing in Denmark they might be paying the same amount as Danish nationals for the short term car rental and thus around double or triple the amount they would otherwise be paying as visitors. The result is that it would be better for them, in this
case, not to exercise their right to free movement within the Union, or in this case within the EEA.

It is important for a citizen to know if such situation is considered as internal discrimination and if it is enough to invoke the cross border element that seems to be needed to exercise the rights granted by EU/EEA law. There seem to be no formal guidelines other than what is given by the Court of Justice through case law, that still does not always seem to be going in the same direction depending on the circumstances. This is confusing for European Consumer Centers, expected to assist EU citizens with their rights as in Denmark for example, they only assist EU citizens resident outside the EU country were the discrimination takes place, meaning that EU citizens within Denmark, both residents and nationals cannot exercise their rights and examine them as easily as others.

8.3 Where lies the line to have that cross-border element that seems to be needed?

It does not seem to be clear, not even from case law, where the line lies as to when that cross-border element needed is sufficiently fulfilled, resulting in legal uncertainty for the Union citizen. There are no straight forward directions as on how much the cross border element is needed for the situation to be covered by European Union legislation.

For example with the Danish rental cars, what if it is a Danish national renting the car but drives it into Sweden for a couple of days, is that enough to create a link with EU law? Or what if the person renting the car is residing in Denmark but is a national of another Member State as covered above? What if a group of people rent a car in Denmark for a couple of weeks together and split the cost for it, one being a Danish resident and the others all nationals and residents of another Member State, is that then enough to be covered by EU law, even if it is the Danish resident who is registered for the rental car? All those situations reflect how absurd it is to allow such a split in the single market.

According to the Trijber case, there was a possibility that the application of the national rules might have had consequences outside the Member State concerned. That was enough to possibly rely on the Treaty provisions governing the freedom to provide services, even if all circumstances took place within one Member State.
The purely internal rule has however been used by the Court of Justice of the EU since 1970 as a filtering mechanism and is yet unclear as to when and how it applies. As stated above the rule provides that in order to fall within the scope of one of the fundamental freedoms there needs to be a sufficient link with it. There always therefore needs to be a link with the European legal order so it would justify the application of EU law. It seems as a necessary solution made by the Court of Justice, to protect the sovereignty of the Member States.

In some cases however the Court of Justice seems to rather refer to the EU legislation in question to the situation, more than generally referring to if there is a link to EU law with the nationals in mind, as for example in the Aubertin case. Meaning, if the EU legislation in question gives rise to that it might be suitable to open up doors to connect the nationals with EU law so that they can derive their rights from the EU. That is finding out if there is for example a connecting factor in the situation to Treaty rules that might be applicable.

The genuine enjoyment test was established after the status of the Union citizen was presented, but the test does not seem to provide straight answers here. It revolves around if national measures have the effect of depriving citizens of the Union of the genuine enjoyment of their rights conferred on them as citizens of the Union. It seems however that this measure needs to be seriously depriving the citizens of their genuine enjoyment, so much, so that it would possibly result in them having to leave the territory of the Union.

**8.4 A twist to the plot?**

It seems that not too many articles or chapters in books have been written on internal reverse discrimination within the EU and the Court of Justice is slowly making case law as it goes.

The Court of Justice of the EU has judged many cases through the years, from taking a big step in the Van Gend en Loos case to, it seems, smaller and slower steps in the recent years. Despite Van Gend en Loos case concerned a cross-border situation the Court did not seem to cover that element especially or mention it was an important element for the individual to be able to obtain rights from the Treaty but rather emphasised a development of a new legal order.

The Court of Justice’s ruling in Defrenne v Sabena, covered above, however covered an internal situation in Belgium, the same can be said about the Van Colson...
and *Kamann* cases covered above. In those cases nowhere is it mentioned that it concerns an internal dispute and on those grounds it could not be covered by EU law, on the contrary it was caught by EU law.

It is an interesting twist, why in those cases it did not seem to matter that they were concerning an internal dispute where persons wanted to gain rights from EU legislation.

The *Defrenne v Sabena* case concerned a Belgian national legislation that made it possible for male stewards to retire later than female stewards. The Danish law on registration tax of motor vehicles, for example, makes it possible for foreigners, also within the EU, not to pay registration taxes on rental cars, while Danish residents have to do that. Thus there is discrimination, just as in the *Defrenne v Sabena* case, but instead of it coming down to sex discrimination it is based on residency, that the average Union citizen would think would be covered by the European Union legal regime. Both cases concern internal situations but the discrimination in the *Defrenne v Sabena* case is made at a national level but the discrimination on the Danish tax legislation becomes feasible despite internal market’s free movement, and is therefore made possible on the grounds that it should not be prohibited to discriminate if it is done internally while national residents are bearing the cost of such a market failure.

It is also interesting in the light of that the purely internal rule has been considered a necessary solution in order to protect the sovereignty of the Member States, that the Court of Justice did not seem to mind evading the space of the sovereignty of the Belgium State in *Defrenne v Sabena*.

Perhaps the two cases are not altogether comparable while the reasons laying behind them seem alarming in both cases which at the end of the day have to do with the question of a Single European Market and equality for all in participants whenever in the EU or the EEA if that is the case.
9 Conclusions

As for final conclusions regarding the Danish car rental services, it seems the relevant provisions in the TFEU do not seem to protect the EU citizen residing in Denmark against the wholly internal discrimination justified by Danish law when it comes to renting a car. Although the Service Directive only allows discrimination under certain conditions, some of its provisions indicate that it only covers cross-border situations while there seems to be uncertainty as to if it may still cover a wholly internal situations in some cases. There is a possibility that Danish residents could be covered by the Service Directive, especially by Article 20, although that is not likely in a wholly internal situation like this.

There might however be a different conclusion if the above mentioned situation involved residents of Denmark whom are nationals of other EU/EEA Member States while only temporarily residing in Denmark. As so many of the cases addressed here indicate, there is sometimes even a far fetched connection, as is in the Trijber case where the Court of Justice of the EU pointed out that there might possibly be a situation where it could concern other Member State’s nationals. Thus, there is a fair possibility that the Court of Justice would find these circumstances as having sufficient cross-border element needed for the Service Directive, i.e. some of it’s provisions, to apply. In that case however, it is to be remembered that such a case still involves two private parties, that is the consumer and the rental car company, and therefore it is not certain that the consumer could exercise his rights based on a Directive against a private party, as Directives do not always have direct effect and never in the horizontal connection as it seems. There is still a possibility that the Service Directive might have indirect effect on the domestic legislation or even exclusionary effect and could as such prevent the conflicting national law, here the Danish registration tax law, from being enforced.

Most importantly this internal situation that has been the main focus here, that is concerning reverse discrimination and separation of the market in the Danish car rental industry, can easily be transferred to other important service industries within the EU/EEA, such as the airline companies offering flights across the globe to name one example. It therefore demonstrates a real problematic practice within the EU that actually takes place on the internal market but within a single country.
A serious concern is also that when internal, reverse discrimination takes place, it jeopardizes the core aim of the internal market. That is to have a single market without borders and equality for all citizens and consumers affiliated with the EU/EEA and its member states. At the end of the day, the average citizen of the EU has his expectations as a citizen in the EU and rightly expects to have both obligations and rights conferred on him by the internal market, as was already declared as early as in the Van Gend en Loos ruling in the 1960s, emphasizing the still ongoing development of the EU as a legal system providing rights for individuals. In light of harmonization and solidarity the average EU citizen does not expect to only be able to exercise his rights once he crosses a Member States border. The cross-border element needed to exercise the rights of EU law is also blurred in the way that it is not easy for the average EU citizen to know his rights or if he has any, creating legal uncertainty, and the development in most fields of EU law, including services, indicates this element will gradually diminish despite we are not there yet in the development of EU/EEA law as has been explained in this thesis.
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