Article 20 (2) of the Services Directive

A prohibition against consumer discrimination

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<td>Alternative Forms of Dispute Resolution</td>
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<td>CJEU</td>
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<td>GDP</td>
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<td>SNBT</td>
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Abstract

The EU has introduced a prohibition against consumer discrimination in Article 20 (2) of the Services Directive (SD). The provision obliges services providers not to discriminate against service recipients on grounds of nationality or place of residence. The EU argues that this provision is important in order to combat consumer frustration and promote cross-border trade in services.

The objectives of this thesis is to investigate the current scope of Article 20 (2) SD and to evaluate Article 20 (2) SD as a policy (strategy) for improving cross-border trade in services. In order to achieve these objectives I will not only consider conventional legal sources, but also consult empirical studies and economic theory.

My investigations reveal that there are large interpretative uncertainties regarding the scope of Article 20 (2) SD and that these uncertainties may explain why the Article is currently not being enforced. This enforcement failure is of course a significant set-back for the Article, but not an unrepairable problem.

What is worse is that my evaluation also indicates that the very idea (theory) behind the Article might be flawed. It is in fact questionable if combating consumer discrimination in the suggested manner will lead to an increase in cross-border trade. This finding leads to the conclusion that we should not enforce Article 20 (2) SD, even if we could. Focus should instead lie on creating positive incentives for cross-border trade.
1 Introduction

1.1 Background

At the heart of the European Union (EU) lies the objective of creating a Single Market: ensuring free movement of goods, services, capital, workers, persons and establishments within the union.¹

Today, the Single Market project is often considered as an economic success² and calculations by the European Commission (the Commission) indicate that the Single Market has generated an extra 2.77 million jobs and an additional 2.13% in GDP, since its “completion” in 1992.³

The development of the Single Market is however a never-ending enterprise,⁴ and barriers to trade still remain within the union. In particular, the market for services still seems to be divided along the national borders with only 20 % of the services being provided cross-border.⁵

The lack of cross-border trade in services has many causes: the most prominent being excessive and heterogenic service regulations in the member states.⁶ A less prominent obstacle to cross-border trade is the object of this paper; namely the issue of service providers who discriminate against service recipients on grounds of nationality or place of residence.

Despite the efforts made at union level to facilitate cross-border trade in services, cross-border service recipients are still often faced with unfavorable contract terms due to their nationality or place of residence, such as higher prices or supply restrictions.⁷ The Commission argues that this “consumer discrimination” is problematic since it causes frustration among service recipients who feel left out of the Single Market and since it enables businesses to create artificial barriers within the Single Market, impeding market integration and cross-border trade.⁸

In order to combat the discriminatory practices, the Services Directive (SD) introduces a prohibition against consumer discrimination. The Article 20 (2) of the directive (the Article) obliges services providers not to discriminate against service recipients on grounds of nationality or place of residence, unless the discrimination can be justified by objective criteria.

Article 20 (2) SD might seem like a step in the right direction to solve the identified problem of consumer discrimination, but the Article has received criticism. It is currently surrounded by large interpretative uncertainties and it has rarely been invoked in practice.

1.2 Purpose and method

This thesis has two objectives (purposes). The first objective is to investigate the current scope of Article 20 (2) SD, focusing on the question “what is the law”. Such an analysis is valuable since little has been written about the Article in legal doctrine. In fact, the Article is a novel legal creation surrounded by large interpretative uncertainties. Any clarification can therefore be of value for the member states, who are under an obligation to implement and enforce the Article, and the business operators who may find themselves under an obligation to comply with the Article, after implementation. An examination of the interpretative uncertainties is furthermore necessary in order to fully comprehend the enforcement problems that currently plague Article 20 (2) SD, as will be further explained in section 5.1.

When analyzing the scope of Article 20 (2) SD, I will use a legal dogmatic method, limiting my investigations to conventional legal sources such as primary and secondary EU-law, case law from the Court of Justice of the European Union (CJEU), documents from the Commission and doctrinal sources.

The second objective of this thesis is to evaluate Article 20 (2) SD as a policy (strategy) for improving cross-border trade in services, discussing the question “what ought the

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9Directive 2006/123/EC on services in the internal market.
10I will often refer to Article 20 (2) SD as “the Article”. I have chosen this form because writing out “the second paragraph of the Article” all the time would risk making the text hard to read. I nevertheless want to make clear that it is only the second paragraph of the Article that I am referring to, unless otherwise stated.
11See Zoll et al. (2013).
12Zoll et al. (2013) p. 27.
law be”. The process of evaluation can be defined as the process of investigating if a policy is functioning in accordance with its intentions and achieving its intended goal.\textsuperscript{14} As Suchman points out, a policy may fail to reach its intended goal if it is not enforced correctly (enforcement failure) or if the theory linking the policy to the desired goal is incorrect (theory failure).\textsuperscript{15}

When compared with Article 20 (2) SD, the distinction can be exemplified as follows. An enforcement failure would mean that the Article is not put into practical use. This would mean that no consumer discrimination is combated, and that the Article would have no chance of influencing cross-border trade. On the other hand, a theory failure would mean that the Article, even if enforced, would not lead to an increase in cross-border trade. The very idea that combating consumer discrimination could increase cross-border trade would be flawed. The distinction can further be explained as the difference between doing the wrong things (theory failure) and doing things wrong (enforcement failure).\textsuperscript{16} The distinction is important since a theory failure indicates that we should not try to enforce the policy, even if we could.

When evaluating Article 20 (2) SD, I will consider both the risk of an enforcement failure and the risk of a theory failure. In this process, I will not only consult the conventional legal sources. I will also consider empirical studies in order to assess the current enforcement of Article 20 (2) SD, thus adopting more of a legal-sociological method.\textsuperscript{17} I will furthermore consult economic theory in order to investigate the possible economic consequences of the Article, thus entering the field of law and economics.\textsuperscript{18}

\section*{1.3 Definitions}

In this thesis I will use some words that might need further explanation.

\textit{Discrimination:} The word discrimination will be used without passing judgment on the lawfulness of the discrimination. When discussing Article 20 (2) SD, the word will simply refer to a difference in treatment on grounds of nationality or place of residence,

\begin{flushleft}
\textsuperscript{14}See similarly Bell (1975) p. 7.
\textsuperscript{17}As defined in Timasheff (1937) p. 227. Timasheff explains that the objective of legal sociology is to study the relationship between law and human behavior in society, focusing on causal investigations.
\textsuperscript{18}See Schäfer & Ott (2004) pp. 3-4. As the authors explain, law and economics entails evaluating legal provisions with reference to their economic consequences.
\end{flushleft}
regardless of whether the discrimination can be justified. When discussing the lawfulness of the discrimination I will use the terms lawful and unlawful discrimination.

**Consumer:** The term consumer will be used to refer to the consumer of the service. The word will thus be used as a synonym to the word service recipient, including both natural and legal persons.

**Policy:** The word policy is defined in the Oxford Dictionaries as: “[a] course or principle of action adopted or proposed by an organization or an individual”.\(^1\) In this paper, the word policy will thus simply refer to *the course of action* adopted by the EU in Article 20 (2) SD to combat consumer discrimination.

**Enforcement:** The word enforcement will be used to signify *all the measures necessary to execute* the adopted course of action. It will mean all the measures necessary to put the policy into practical use. If the policy is not enforced it will be entitled an enforcement failure.

**Theory (rationale):** The word theory refers to *the underlying idea that the planned course of action, when adopted and enforced, will bring about some desired goal*. It is referring to the theory that the policy, when executed correctly, will achieve some greater goal. In the case of Article 20 (2) SD, the underlying theory is that the provision, when enforced, will bring about an increase in cross-border trade. If the policy would fail to reach its goal, even if enforced correctly, this would be entitled a theory failure.

**1.4 Disposition**

When writing this thesis I have tried to use a logical disposition. Put shortly, I will use the disposition goal, obstacle, solution, evaluation. In detail, the disposition of the thesis will be as follows.

I will in the next section, the second section, briefly describe the *goal* and purpose of the Single Market, thereby setting the scene for the rest of the paper and indicating what larger objectives the Services Directive, and Article 20 (2), are seeking to fulfill.

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\(^1\)Oxford Dictionaries (2014).
I will in the third section turn to describing the problem of discrimination against service recipients, as an *obstacle* to the completion of the Single Market. I will give concrete examples of what practices that the Commission is considering harmful.

I will then continue in the fourth section by analyzing the *solution* to the problem of consumer discrimination, as introduced in Article 20 (2) of the Services Directive. I will analyze the scope of the provision in detail, trying to shed some light on the interpretative uncertainties of Article 20 (2) SD (the first objective).

In the fifth section I will go on to *evaluating* the merits of Article 20 (2) SD as a policy (strategy) for improving cross-border trade in services. As mentioned above, I will consider both the risk of an enforcement failure and the risk of a theory failure (the second objective).

In the sixth and final section I will briefly summarize my findings and present some final thoughts on the subject.
2 Goal – the Single Market

One of the most important objectives of the EU has been the creation and completion of the Single Market. The member states have, ever since the creation of the union, sought to create a Single Market, establishing free movement for goods, services, capital, workers, persons and establishments within the union.

When the Single Market was originally envisioned in the 1950ths, the ambition was not only to create economic growth, but also to prevent further armed conflicts in the war-torn Europe. The intention was that the Single Market would create such far-reaching economic ties between the countries that they simply could not afford to wage war against each other. This idea has so far proven successful and the EU has become a symbol of peace, as recognized when the union won the Nobel Peace Prize in 2012.

As the years of peace have gone by, focus has shifted towards the aim of creating economic growth within the EU. The economic rationale behind the Single Market is that the free movement will allow for a better allocation of resources within the union, thus boosting economic growth. This rationale can be exemplified with the free movement of workers. If workers can move freely within the union it will enable them to move to the places where they are most valuable. If there is a surplus of workers in Italy and a shortage of workers in Germany, the Italian workers will move to Germany in order to find work, thus creating a more efficient allocation of workers within the union and improving economic growth. The underlying assumption being that the market forces, rather than state regulations, are the best means for achieving economic efficiency.

From a theoretical point of view, the economic rationale behind the Single Market is similar to classical free-market theories, such as the theory of the “invisible hand” created by Adam Smith. The free-market theories predict that resources will find their most valuable use when they can move freely on the market: i.e. that free movement of

21 Schuman (1950).
22 Schuman (1950) para. 5.
23 Craig & de Búrca (2011) p. 582.
25 Craig & de Búrca (2011) p. 582.
27 Also Adam Smith saw the benefits of free competition across the national borders. Smith (1776) p. 131.
production factors will facilitate economic growth (as the example with the Italian workers shows).\textsuperscript{28} This entails that governmental regulation is kept to a minimum and only occur when it can be motivated in the general interest.\textsuperscript{29}

The Single Market has proven to be an economic success, not only in theory, but also in practice. As mentioned in the introduction, there are calculations that indicate that the Single Market over the last 20 years has generated an extra 2.77 million jobs in the EU and an additional 2.13\% in GDP.\textsuperscript{30}

The Single Market is however by no means a completed project and there are yet today obstacles to cross-border trade in the union, as will be further discussed in the next section.

\textsuperscript{28}Hildebrand (2009) p. 102.
3 Obstacle – discrimination of service recipients

Estimates by the Commission indicate that the benefits from the Single Market could be doubled if all of the remaining barriers to cross-border trade where to be removed. These figures indicate that there is still much to be done in order to unlock the full capacity of the Single Market.

The service sector is a good example that there is still is room for improving the Single Market. The service sector today accounts for about 70% of EU GDP and 70% of total employment, with 9 out of 10 new jobs being created in this sector. Yet, cross-border services only account for 5% of EU GDP, compared with 17% for cross-border goods. Cross-border trades in services are thus severely underrepresented.

According to the Commission, one reason for the national division of the services market is the fact that many service providers discriminate against consumers because of their nationality or place of residence. This problem has been identified by the Commission through multiple surveys, which will now be summarized.

Discrimination in the fields of tourism, leisure activities, sport, distribution, transport and mobile telephony were highlighted when the Commission presented its report on the state of the internal market in 2002. Cross-border consumers complained that they were subject to additional conditions and guarantees when contracting with mobile telephony operators, prevented from receiving pay-tv channels broadcasted from other member states and had to pay higher fees when participating in cultural or sporting events (such as marathons), visiting museums or tourist sites, buying ferry tickets, taking out insurance contracts, using sports facilities and hiring cars. The Commission concluded that, not only service providers, but also service recipients are the “direct victims of obstacles to the distribution of services”.

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33 Lobrano (2012) p. 10. See however Damien who argues that legal barriers to cross-border trade are not the foremost explanation to the low trade in cross-border services. He instead concludes that the low trade in cross-border services can be explained by technical and statistical biases in the current measuring systems. Damien p. 51. He also argues that some services simply are not suited for cross-border trade, such as hair dressing, minor repairs etc. This argumentation is suggesting that the low share of cross-border trade in services is in fact natural. See Damien pp. 51-57.
The *Matrix Study*, published in December 2009 by British think tank Matrix Insights, provided further evidence of price and service discrimination in the sectors of car rentals, digital downloads, online sales of electronic goods and tourism. Cross-border consumers were faced with price differentiations when trying to rent a car, download music, buying electronics and booking a hotel. The prices varied, in all of the four sectors, depending on where the consumer was resident. A complete refusal to supply was moreover not uncommon in the sector for digital downloads. The service providers often explained the refusal to supply with reference to lacking the intellectual property rights necessary to supply digital content to the country in question.

Furthermore, the *ECC-report* published by the European Consumer Center-network in 2013, reveals that the organization has received 222 complaints on consumer discrimination across Europe between January 2010 and December 2012. This might not seem like much, but the organization argues that many of the complaints indicate structural problems that effects thousands of consumers. Discrimination occurs most commonly in the sales of electronic items, clothes, books and music or data downloads, with 74% of all complaints relating to these sectors. Complaints regarding tourism and leisure represents 21% of the total number of complaints and 5% of all the cases received involves the rental and leasing sector.

That the issue of consumer discrimination is a structural problem was also indicated by the *mystery shopping evaluation of cross-border e-commerce* conducted in 2008 by the market research institute YouGov. Their evaluation showed that a staggering 50% of the shoppers were, at some point, denied delivery due to their country of residence when trying to order an item cross-border. The study also showed that the conditions for cross-border payment and delivery varied greatly, depending on the place of residence of the consumer. Cross-border deliveries were more costly, took longer time and were often claimed to be impossible to the destination specified by the consumer.

As these studies indicate, discriminatory practices are common place among service providers on the Single Market. The Commission claims that this discrimination is

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harmful since it causes frustration among consumers who feel left out of the Single market and since it enables businesses to create artificial barriers within the Single Market, impeding market integration and cross-border trade.46

As mentioned in the introduction, Article 20 (2) SD is intended to combat this problem by obliging services providers not to discriminate against consumers on grounds of nationality or residence, unless the discrimination is justified by objective criteria. This Article has however come off to a bad start. It has, ever since its adoption, been surrounded by uncertainties and it has almost never been used in practice.47 In the next section I will examine the scope of the Article in detail, trying to clarify some of the interpretative uncertainties surrounding it.

4 Solution – Article 20 (2) SD

Article 20 (2) SD states that the:

“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” (emphasis added).

The provision contains six elements. The situation targeted is when:

- service providers sell
- services to
- service recipients by introducing
- discriminatory provisions relating to the nationality or place of residence of the recipient,
- in the general conditions of access to a service, which are made available to the public at large by the provider,
- where the difference in treatment is not justified by objective criteria.

Before discussing each of the six elements listed above, I will try to makes some clarifications as to the basic question of “who is the addressee of Article 20 (2) SD?” It is in fact uncertain whether it is the service providers or the member states that are under an obligation to provide objective criteria for justifying a discrimination.

4.1 Who is the addressee?

Under EU-law, directives are addressed to the member states and it is the member states who are under an obligation to implement the directives. The directives are binding as to the result to be achieved, but leaves it to the national authorities to choose the form and method for implementation.\(^{48}\) This is basic EU-law and would seem to indicate that Article 20 (2) SD is obliging the member states to keep the general conditions of services free from discriminatory provisions unless the member states can provide objective criteria to justify discriminatory conditions.

Article 20 (2) SD does however contain some features that may cause some confusion as to who are the de facto addressees of the Article. The wording of recital 95 of the

\(^{48}\)Article 288 TFEU.
Services Directive may for example suggest that it is in fact the service providers who are the indented addressees of the Article. Recital 95 exemplifies the concept of “justification by objective criteria” as:

“additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment”.

These grounds for justification do not seem to be addressed to the member states. They rather seem to be something that a business operator would have access to.

Furthermore much of the guidelines published by the Commission in 2012 also seem to be directed directly to the business operators. The Commission states for example that “Article 20(2), of the Services Directive clarifies that if the service provider can provide objectively justified reasons for a difference in treatment, it will not be considered discrimination” (emphasis added).49 Similar statements can be found in other parts of the guidelines, where the Commission discusses “reasons put forward by service providers to justify different treatment”50 and “circumstances invoked by businesses” (emphasis added).51

We thus seem to have an Article that is formally addressed to the member states but where it seems like it is materially addressed directly to the business operators.52

These features have been interpreted by Barnard as suggesting that Article 20 (2) could be invoked directly against an individual service provider.53 Such a conclusion is however questionable given that it follows from well-established case law that directives do not have horizontal direct effect, meaning that they cannot be relied upon to impose an obligation directly on an individual.54

A more balanced conclusion is, according to this author, that we are dealing with a provision that is formally addressed to the member states, but where the intention from the legislators has been that the Article should be implemented as it stands (verbatim

51SWD(2012) 146 p. 5.
52As de Waele points out, this is not uncommon in EU-law. De Waele (2009) p. 526.
54Case 152/84, Marshall v Southampton and South-West Hampshire Area Health Authority, para. 48. See however incidental direct effect etc. De Waele (2009) pp. 527-528.
transposition\(^{55}\), thus directly obliging the service providers to produce the “objective criteria” necessary to justify a discrimination. This interpretation would explain why the guidance is addressed directly to the business operators, even though the Article does not have horizontal direct effect.

This conclusion is moreover strengthened by the Handbook on the implementation of the Services Directive published by the Commission.\(^{56}\) The Handbook states that:

> “in order to implement [Article 20 (2)] Member States may need to include in their horizontal framework legislation implementing the Directive a general provision embodying Article 20(2). *This is important to allow recipients to rely on the principle of non-discrimination vis-à-vis service providers*” (emphasis added).\(^{57}\)

The conclusion is thus that (i) the obligation to implement Article 20 (2) SD lies undoubtedly on the member states and that (ii) the intention from the legislators has been that Article 20 (2) SD should preferably be implemented as it stands (verbatim transposition), directly obliging the service providers to comply with the provision.

This conclusion does not mean that Article 20 (2) SD can be invoked directly against a business operator. As mentioned above, it follows from well-established case law that directives do not have horizontal direct effect.\(^{58}\) Consequently the member states must implement the Article before it can be relied upon against a business operator.

Neither, does the conclusion mean that the member states must implement the Article in the way that the Commission suggests. Article 288 TFEU clearly states that the member states are free to choose the forms and methods for implementing directives. The conclusion does however suggest that it may be easier for the member states to follow the directions given by the Commission. Most member states also seem to have followed the directions, and implemented Article 20 (2) SD as it stands.\(^{59}\)

I will now continue with examining the six different elements of Article 20 (2) SD and the interpretative uncertainties surrounding them.

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\(^{56}\)The Commission (2007).


\(^{58}\)Case 152/84, Marshall v Southampton and South-West Hampshire Area Health Authority, para. 48. See de Waele (2009) p. 526.

\(^{59}\)ECC-net (2013) p. 35. Only Bulgaria, Finland and France seem to have refrained from implementing the Article as it stands. Instead they have declared that their legal order is in conformity with the directive by referring to general prohibitions against discrimination and prohibitions against anti-competitive behavior and unfair commercial practices. See SWD(2012) 146 annex 1 for a list of the implementations.
4.2 The definition of a “service”, a “service provider” and a “service recipient”

The scope of Article 20 (2) is limited to “services” provided by “service providers” to “service recipients”. These three concepts are general to the free movement of services and have been examined in detail in other contexts. I will therefore not make an in-depth investigation of these concepts. Some brief remarks can however be made.

The notion of a service is defined in Article 4 (1) of the Services Directive as:

“any self-employed economic activity, normally provided for remuneration, as referred to in [Article 57 TFEU].”

The concept of a service in EU-law is, according to St Clair Renard, best described as:

- an intangible economic activity (i.e. not a good)
- that is conducted for a temporary period of time (i.e. not an establishment)
- outside of an employment relationship (i.e. not by a worker).

The definition of a service has been subject to lots of litigation in front of the CJEU, especially as to the question of what constitutes remuneration (an economic activity). The scope of the Services Directive, and Article 20 (2), is further limited by the fact that many services are exempted from the directive such as financial services, transport services, healthcare services, private security services, audiovisual services and gambling. As Delgado points out, many of these exemptions do not have a settled definition in EU-law and may therefore cause divergences in the implementation of the directive, leading to legal uncertainties that will inhibit cross-border trade.

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62 The CJEU has indicated a borderline between services that are financed essentially from the public funds of the state and, on the other hand, services financed essentially through private funds. Case C-109/92, Wirth v Landeshauptstadt Hannover para. 17. The CJEU has however blurred this borderline between publicly and privately funded services in subsequent case law. The CJEU has in several cases applied article 56 TFEU to systems for health care and education funded by the state with reference to that the service was provided for remuneration in the member state to where the service recipient had travelled in order to receive the service. See case C-372/04, Watts v Bedford Primary Care Trust and Secretary of State for Health, para. 90-91 and case C-76/05, Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach, para. 44-47.
63 See Article 2 (2) of the Services Directive.
64 For example, “non-economic services of general interest” are exempted from the directive. A non-economic service of general interest is defined by the Commission as a “non-market service … which the public authorities class as being of general interest and subject to specific public service obligations” (emphasis added). As Delgado points out, such a vague definition gives member states discretion to decide which services to exclude from the scope of the directive. Delgado (2007) pp. 968-969.
The concept of a *service provider* is defined in Article 4 (2) of the Services Directive as:

“any natural person who is a national of a Member State, or any legal person as referred to in [Article 54 TFEU] and established in a Member State, who offers or provides a service”.

A service provider is thus simply defined as someone who offers or provides a service. Exempted from the Service Directive are however service providers who are nationals of a non-member state and providers who are not established within the union (*third country providers*).65 This kind of limitation might seem rational given the fact that the directive primarily confers rights upon the services providers, and that the union therefore only seeks to benefit businesses that are “members” of the union. Article 20 (2) of the directive merits however special attention in this regard, given the fact that it imposes, not a right, but an obligation on the service provider. This means that *the exemption will actually create a competitive advantage for third country providers*.66 Zoll et al. therefore argues that a teleological interpretation of Article 20 (2) SD indicates that the notion of a service provider should be given an autonomous interpretation, including third country providers in its scope.67

Article 4 (3) of the Services Directive defines a *service recipient* as:

“any natural person who is a national of Member State or who benefits from rights conferred upon him by Community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service”.

As is indicated by Article 4 (3), EU-law defines the service recipient as the mirror image of the service provider.68 A service recipient is someone who uses or wishes to use a service. This definition includes typically both natural and legal persons.69

Article 20 (2) SD does however create some uncertainties as to the protection of legal persons as service recipients. This arises out of the fact that Article 20 (2) only protects recipients from discrimination on grounds of *nationality* or *place of residence*. Taken literally, this means that legal persons are not protected by the Article since, in legal terms, only natural persons can be said to have a nationality and a place of residence.70

66Zoll et al. (2013) p. 44.
67Zoll et al. (2013) p. 44.
68See also joined cases 286/82 and 26/83, Luisi and Carbone v Ministero dello Tesoro, para. 10. Zoll et al. (2013) p. 44.
69Article 4 (3) of the Services Directive.
70Zoll et al. (2013) p. 44.
Article 20 (2) SD would therefore have to be applied by analogy to legal persons, who are being discriminated on ground of their place of establishment or country of registration.\footnote{Zoll et al. (2013) p. 44. This exemption of legal persons from the protection under Article 20 (2) seems to be accidental. This author have not found any argumentation in the preparatory works to the directive that is suggesting an exemption of legal persons from Article 20 (2) SD. It is therefore very plausible that the Article nevertheless should be applied to legal persons as service recipients, albeit by analogy. Also the Commission seems to think that legal persons are to be protected. See SWD(2012) 146 p. 8.}

4.3 The definition of “general conditions of access”

In contrast to the notions of a service, a service provider and a service recipient, the concept of “general conditions of access” is completely new to EU-law and it is consequently shrouded in mystery.\footnote{SNBT (2013b) p. 2.}

“Access conditions” are normally defined in EU-law as conditions regarding the entry to the market or the taking up of an economic activity,\footnote{Opinion of Advocate General Fennelly, case C-190/98, Volker Graf v Filzmoser Maschinenbau GmbH, para. 30.} such as rules governing the recognition of professional qualifications.\footnote{Opinion of Advocate General Gulmann, case C-275/92, Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, para. 36.} Further guidance can be found in the Directive on Access to Electronic Communication Networks\footnote{Directive 2002/19/EC.} which defines “access” as “the making available of … services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services” (emphasis added).

These observations suggest that the word “access” indicates that Article 20 (2) SD is indented to protect the availability of the service to the service recipient. The observations do however not reveal the whole meaning of the term “general conditions of access”.

The Commission has in this regard explained that:

“[general conditions of access] can be understood as all the terms and conditions and all other information made available by the service provider through various means such as information published in advertisements, on websites or in (pre-) contractual documentation and which are understood to apply in the absence of an agreement on the contrary entered into directly with the service recipient” (emphasis added).\footnote{SWD(2012) 146 p. 9.}
From the latter segment we can first of all conclude that the concept of general conditions of access is not strictly formalistic. It does not seem to matter which of the “various means” that are used to express the conditions. The important thing is that the conditions have been made available to the public at large. A second conclusion that can be drawn is that individually negotiated terms and conditions are excluded from the scope of the Article. Rebates given to an individual client will thus not be subject to the prohibition against discrimination.

The two conclusions presented above may seem fairly straightforward. The Swedish National Board of Trade (SNBT) has however gone one step further. According to the board, the term “access” indicates that the Article only covers terms regarding the access to the service, such as “refusal to supply (no access) or higher tariffs (restricted access)”. Excluded are differences in terms which relates to the execution of the service such as delivery times or after-sales support.

Despite lacking explicit support in the preparatory works to the Article, this division appears to be in line with the observation that Article 20 (2) SD is indented to protect the availability of the service.

On the other hand, conditions relating to the execution of the service may also de facto restrict the availability of the service. Many would, for instance, be dissuaded from purchasing a book online if forced to wait 6 years for the delivery. The access would de facto be restricted by the long delivery time. These kinds of situations make it hard to maintain a strict division between conditions relating to the access of the service and conditions relating to the execution of the service. The SNBT also recognizes this difficulty, holding that an “execution condition” can be qualified as an “access condition” if the “execution condition is of paramount importance to the service”.

According to this author, the difficulty in maintaining a strict separation between the two terms makes the division unnecessary altogether. The test must always be whether the condition, de facto, is hindering the consumer from accessing the service, regardless of whether the condition formally is a condition regarding the access or the execution of

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79 SNBT (2013b) p. 2.
80 SNBT (2013b) p. 2.
81 See SWD 2012(146).
82 SNBT (2013b) p. 2.
the service. A formal distinction thus seems to be unnecessary. As Professor Snell has put it “the impact of a measure on cross-border [trade] is a function of its restrictiveness, and does not depend on the stage it operates at”. 83

Another interesting feature of the concept of public access conditions is that it seems to permit discrimination that is not publicly announced. 84 This would create an incentive for the companies to “hide” their discrimination in individual conditions (rebates etc.). As Zoll et al. points out, “hiding” discriminatory provision might however be unlawful according to other legislation such as the Unfair Commercial Practices Directive. 85 If the provider, in an individual case, tries to make deviations from their non-discriminatory public access conditions, this would by all probability be regarded as misleading information according to the Unfair Commercial Practices Directive and may trigger sanctions as a violation of pre-contractual information. 86 Article 20 (2) SD thus indirectly, with assistance from the Unfair Commercial Practices Directive, combat discrimination even in the individually negotiated contract.

4.4 The definition of “discriminatory provisions”

As explained above, Article 20 (2) SD seeks to prohibit service providers from discriminating against consumers on grounds of nationality or place of residence. 87

Prohibitions on nationality discrimination are by no means new to EU-law. At the very foundation of the treaties lies Article 18 TFEU which prohibits the member states from discriminating against EU-citizens on grounds of nationality. This Article is frequently referred to as the “leitmotiv” of the EU and the it resonates in all the other fundamental freedoms of the treaties. 88

The prohibition on nationality discrimination in Article 20 (2) SD is however different from its counterpart in Article 18 TFEU since it does not target the situation when a member state is discriminating. 89 The discrimination targeted is instead when a service provider is treating a service recipient differently on grounds of nationality or residence.

84Zoll et al. (2013) p. 45.
86Zoll et al. (2013) p. 45.
88See Zoll et al. (2013) p. 45.
89Zoll et al. (2013) p. 50.
The prohibition against the latter kind of discrimination is new to EU-law and there is no prior case law from the CJEU on the subject.\textsuperscript{90} Guidance on what practices that are targeted must instead be gathered from the preparatory works to Article 20 (2) SD.

The surveys conducted prior to the introduction of Article 20 (2) SD (summarized in section 3) indicate that the discriminatory practices targeted are, for example, refusals to supply pay-TV channels or digital downloads to other member states, higher fees for participating in cultural or sporting events (such as a marathon), visiting museums or tourist sites, buying ferry tickets, taking out insurance contracts, using sports facilities and hiring cars.\textsuperscript{91}

In order to further clarify the scope, the targeted practices can be categorized into four kinds of discrimination.\textsuperscript{92} Firstly a complete refusal to supply (no access), secondly refusing to supply, but redirecting the consumer to a local partner company (redirection), thirdly offering the same service but at a different price (price discrimination) and fourthly offering the same service at the same price but imposing some other restriction on access to the service, such as demanding a national ID-number (other discriminations).

The first kind of discrimination entails a complete refusal to supply, i.e. the company refuses to sell the product to the consumer because of his or hers nationality or place of residence. A good example can be found in a complaint to the ECC where a polish consumer wanted to buy a book from a company in Luxembourg. The company refused to supply, claiming that it was impossible to ship the book to Poland.\textsuperscript{93}

The second kind of discrimination occurs when a refusal to supply is used to redirect the consumer to a local partner company, which offers the same service at different terms (e.g. higher prices). The partner might be a branch or a sister company. It can also be a partner through a distribution agreement. A good example can be found in a complaint to the ECC where a Swedish consumer was denied to buy a baby carrier from a UK-based retailer. The retailer refused to supply and referred the consumer to a more expensive Swedish retailer.\textsuperscript{94}

\textsuperscript{90}Zoll et al. (2013) p. 50.
\textsuperscript{91}COM(2002) 441 p. 35, fn. 122-123.
\textsuperscript{92}The division is suggested by the author of this essay. A different categorization can be found at ECC-net (2013) pp. 22-23, where the network divides the practices into three categories, omitting the category of redirection.
\textsuperscript{93}ECC-net (2013) p. 28.
\textsuperscript{94}See ECC-net (2013) p. 25.
The third kind of discrimination occurs when the same service is offered by the same company but where the price varies depending on the nationality or place of residence of the consumer. There are many methods for implementing this kind of price discrimination. Companies are for example frequently using different websites for different countries, in order to uphold different prices.\textsuperscript{95}

The fourth kind of discrimination is a residual category which covers all other kinds of discriminations. The main component is “restrictions by proxy” which covers restrictions that are not directly based on the nationality or residence of the consumer, but rather some other condition that \textit{indirectly} restricts access for foreigners and non-resident.\textsuperscript{96} Examples of these kinds of restrictions are conditions regarding the country of the driving license, the country of the credit card, the lack of credit history in a particular Member State, the lack of registration in the population registry and the lack of a national ID-number.\textsuperscript{97}

In enforcing Article 20 (2) SD the national authorities must take in to account \textit{which kind} of discrimination that is implemented. The increased cost incurred when delivering to another country may for example justify a higher price, but not a complete refusal to supply, according to the Guidelines from the Commission on Article 20 (2) SD.\textsuperscript{98}

The national authorities will also have to take into account \textit{how} the discrimination is implemented. A price discrimination may be justified if the company provides information about the different tariffs applied in different countries, but it may not be justified if the company seeks to keep the consumer unaware of the price discrimination.\textsuperscript{99} The Commission is of the opinion that the discrimination should be implemented in a clear and comprehensible manner.\textsuperscript{100}

When it comes to justifying discriminatory practices, another central question is \textit{why} the provider has implemented the discrimination. In this regard, recital 95 of the Services Directive contains a non-exhaustive list of reasons that may justify a difference in treatment. These grounds for justification will be discussed in the following section.

\textsuperscript{95}Matrix Insights (2009) p. 71.
\textsuperscript{96}ECC-net (2013) p. 23.
\textsuperscript{97}SWD(2012) 146 p. 9.
\textsuperscript{98}SWD(2012) 146 pp. 15-16.
\textsuperscript{100}SWD(2012) 146 p. 18.
4.5 What is a justification by “objective criteria”?

According to Article 20 (2) SD companies may discriminate between service recipients on grounds of nationality or place of residence if it is justified by objective criteria.

The concept of justification by objective criteria is new to EU-law and guidance on what can be considered “objective criteria” can be found in recital 95 SD. The recital defines “objective criteria” as:

"objective reasons that can vary from country to country such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the member states and pricing by different competitors, or extra risks linked to rules differing from those of the member state of establishment. Neither does it follow that the non-provision of a service to a consumer for lack of the required intellectual property rights in a particular territory would constitute unlawful discrimination” (emphasis added).

As is indicated by the words “such as”, the list of exemptions is not intended to be exhaustive. The text should rather be read as an exemplification of the possible grounds for justification.

The scope of the exemptions can be further clarified by dividing the available grounds of justification into four categories:

- Justification by invoking that it is legally or factually “impossible” to deliver to the consumer in question due to e.g. lack of delivery options or lack of the required intellectual property rights.
- Justification by invoking the additional costs or the additional risks attached to selling products to another country such as: additional delivery costs, additional compliance costs and additional risks of payment default.
- Justification by invoking differences in the market conditions between the member states such as: higher or lower demand influenced by seasonality, different vacation periods in the member states and pricing by different competitors.
- Other grounds for justification not explicitly mentioned in the recital.

101SNBT (2013a) p. 10. Previous case law from the CJEU has offered a possibility to justify an obstacle to trade with reference to an “overriding reason of public interest” such as consumer protection, environmental protection and protection of public health. Case C-55/94, Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, para. 37. Recital 95 SD does however make it clear that the concept of justification by “objective criteria” differ substantially from the concept of justification by “overriding reason of public interest”.
I will discuss each ground for justification in the following, before making some general remarks.

4.5.1 Justification by invoking legal or factual impossibility

A good example of justification by invoking legal or factual impossibility is invoking the lack of the necessary intellectual property rights for delivering to the consumer in question. This is accepted, by the Commission, as an “objective criteria” since Article 20 (2) SD does not require the companies to break laws in order to supply consumers from different member states.103

A similar justification is invoking a contractual obligation not to deliver to the country in question (an exclusive distribution agreement). An exclusive distribution agreement can also be accepted as an “objective criteria” since Article 20 (2) SD does not require the companies to breach contractual obligations.104 The exclusive distribution agreement must however be permitted under competition law in order to constitute a valid ground for justification.105

A third situation falling within the category of legal or factual impossibility is invoking an absence of delivery options in order to justify a refusal to supply. A lack of delivery options can however not be invoked as a ground for justification if there is an available delivery option and the consumer is willing to pay for the additional delivery cost.106

The Commission argues that service providers rarely can invoke this ground for justification since the Postal Services Directive107 imposes a delivery obligation for parcel deliveries up to 20 kg throughout the union.108

4.5.2 Justification by invoking additional costs or additional risks

Examples of justifications due to additional costs or risks include, for instance, additional costs for long distance deliveries or additional risks for payment default. It

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103 SWD(2012) 146 p. 19
105 SWD(2012) 146 p. 16.
107 Directive 97/677EC.
can also include additional costs incurred when directing business abroad such as compliance costs, translation costs and costs for acquiring a business place.\textsuperscript{109}

The list of examples seems \textit{endless} and all of the additional costs and risks must be considered as “objective criteria” as long as the difference in treatment is reasonably proportional to the costs and risks incurred.\textsuperscript{110} The risk of payment default may, for example, not be invoked if the consumer is willing to pay in advance.\textsuperscript{111}

\textbf{4.5.3 Justification by invoking disparities in the market conditions}

According to recital 95 SD, examples of differences in market conditions are higher or lower demand influenced by seasonality, different vacation periods in the member states and different pricing by competitors.

As the Commission points out, markets conditions are however generally “determined by a variety of factors which relate to \textit{both} supply and demand”.\textsuperscript{112} This ground for justification thus requires a complex analysis of all of the conditions for supply and demand on the relevant market.\textsuperscript{113}

According to the Commission this analysis includes, on the supply side, costs of labour, business premises, deliveries, payment methods, customer support and advertising.\textsuperscript{114} On the demand side it includes brand penetration, different preferences with regards to quality, different seasonality/vacation periods and the marketing periods of competitors.\textsuperscript{115} Even differences in the consumers’ willingness to pay can be invoked as an objective criterion, according to the Commission.\textsuperscript{116} Yet again, it feels like the list of examples is endless.

\textsuperscript{110}Zoll et al. (2013) p. 47.
\textsuperscript{111}ECC-net (2013) p. 30.
\textsuperscript{112}SWD(2012) 146 p. 17.
\textsuperscript{113}ECC-net (2013) p. 27.
\textsuperscript{114}SWD(2012) 146 p. 17. According to me, these grounds are a better fit under the header of additional costs and risks, but the Commission chooses to address them as part of the market conditions.
\textsuperscript{115}SWD(2012) 146 p. 17.
\textsuperscript{116}SWD(2012) 146 p. 18.
4.5.4 Other grounds for justification

As mentioned above, the list of justification grounds in recital 95 of the Services Directive is non-exhaustive.\textsuperscript{117} This means that there can be other grounds for justification not mentioned in the recital.

The European Consumer Center-network (the ECC) has recognized environmental protection as a potential ground for justification.\textsuperscript{118} This is reasonable since the environment is an important societal interest that needs to be protected by both businesses and authorities. Environmental concerns could in fact prove an omnipotent ground for justifying supply restrictions, since a supply restriction always benefits the environment. A company could simply argue that “we do not sell to other countries because long transports are bad for the environment”. According to this author, such an argumentation must be accepted since any company that expresses environmental concerns must be taken seriously.

As to other potential justifications certain answers will have to wait until the CJEU has interpreted the concept.

4.5.5 General remarks

Given the novelty of the concept of “justification by objective criteria”, we will have to wait on case law from the CJEU until we know its outer boundaries. The analysis above seems however to indicate that the concept will have a large scope of application and that a variety of justifications will be available to the companies. The exemplifications of “objective criteria” often seem endless, which would render Article 20 (2) SD somewhat toothless.

A different view is however presented in a report published by the ECC in 2013.\textsuperscript{119} In the report, the ECC seems to identify a variety of practices that will constitute unlawful discrimination. The ECC does however omit analyzing the possibilities for justification due to “market conditions”, arguing that the ECC lacks the resources necessary for such an investigation.\textsuperscript{120} The end result is a report filled with statements that this or that discrimination probably will be seen as an unlawful discrimination, without any

\textsuperscript{117}ECC-net (2013) p. 37.
\textsuperscript{118}ECC-net (2013) p. 31.
\textsuperscript{119}ECC-net (2013).
\textsuperscript{120}ECC-net (2013) p. 27.
discussion as to the possibilities for justifying said discrimination on grounds of market conditions. Given the fact that the ECC does not discuss all the possibilities for justification, this author believes that the report paints a false picture of Article 20 (2) SD. As has been discussed above, both the text of the directive and the guidelines from the Commission seem to indicate that the concept of justifications due to “objective criteria” is going have a vast scope of application.

Other institutions have come to similar conclusions when analyzing the Article.

The SNBT has also interpreted the notion of “objective criteria” as giving extensive possibilities for companies to justify consumer discrimination. The SNBT argues that the only thing that is not allowed under the Article is when companies impose discriminatory conditions “by mistake, due to human errors or to routines that are not thought through or at least not adapted to modern society”. 121

A similar view is offered in the report by Zoll et al. on discrimination of consumers on the internal market. According to the authors “any economic reason for the refusal to accept orders from another member state which has been formed autonomously by the decision-makers of a service provider may form a direct justification by objective criteria”: the only exceptions being infringements of anti-racism legislation and competition law. 122 The authors conclude that Article 20 (2) has a mainly symbolic function since “almost every case of discrimination will be justified, because there are always additional risk and costs connected with providing services abroad”. 123

4.6 Summary

The objective of this section has been to investigate the current scope of Article 20 (2) SD, focusing on the question “what is the law”. Given the novel construction of the Article, this has not been an easy exercise. Some remarks have however been made, based on the guidance available today.

It has been concluded that the Article is formally addressed to the member states, but that the intention from the legislature seems to have been that it should be implemented

121 SNBT (2013b) p. 5.
122 Zoll et al. (2013) p. 27.
as it stands (verbatim implementation), directly obliging the service provider to justify a
difference in treatment with reference to objective criteria.

Some remarks have also been made as to the definition of a “service”, a “service
provider” and a “service recipient”. It has been argued that a teleological interpretation
of Article 20 (2) SD indicates that third country providers are to be included in its
scope. A different interpretation would risk creating a competitive advantage for third
country providers. A seemingly accidental exclusion of legal service recipients has also
been found. It has been suggested that Article 20 (2) SD must be applied by analogy if
legal persons are to benefit from the protection under the article.

As to the concept of *general conditions of access*, it has been concluded that it does not
seem to be a formalistic concept. A formal distinction between conditions relating to the
“access” of the service and conditions relating to the “execution” of the service seems
unnecessary. The test must always be weather a condition, *de facto*, is hindering
consumers from accessing the service, regardless of its form.

It has moreover been suggested that the *discriminatory practices* targeted by Article 20
(2) SD may be categorized into four kinds: refusals to supply, redirections to a partner
company, price discriminations and other discriminations (such as discrimination by
proxy). When enforcing Article 20 (2) SD, the national authority will have to take into
which kind of discrimination that is implemented, and how it is implemented.

It has also been noted that the examples of justifications by “*objective criteria*” often
seem endless, and that almost every case of discrimination seems possible to justify,
because there are always additional risk and costs connected with cross-border trade.\footnote{Zoll et al. (2013) p. 48.}
5 Evaluation

The process of evaluation can be defined as the process of investigating if a policy is functioning in accordance with its intentions and achieving its intended goal.\textsuperscript{125} A policy (strategy) may fail to achieve its intended goal if:

- the policy is not enforced correctly (enforcement failure) or
- the theory linking the policy to the intended goal is incorrect (theory failure).\textsuperscript{126}

If the theory behind the policy is incorrect it will not reach its desired goal even if it is enforced correctly. If a policy is not enforced correctly it will not reach its desired goal even if the theory behind the policy is correct.

As mentioned in the introduction, the distinction can be explained as the difference between doing the wrong things (theory failure) and doing things wrong (enforcement failure).\textsuperscript{127} The situation can also be compared with the shooting of a gun. To hit the target the gun must a) be functioning in practice and b) directed in the right direction.

The distinction is meaningful since a theory failure indicates that we should not enforce the policy. If the gun is directed in the wrong direction, you should not fire it, even if it is functioning.

In the following I will investigate both of these dimensions with regards to Article 20 (2) SD, starting with the risk for enforcement failure.

5.1 Evaluation – enforcement failure

As has been explained above, Article 20 (2) SD must be enforced correctly if it is to have any chance of reaching its indented goal. This means that the Article must be enforced with such rigour that it effectively deters companies from discriminating against consumers. The Article needs to be perceived by the companies as “effective and truly applicable to each and every firm”.\textsuperscript{128} The intention from the Commission is that such a deterring effect will be achieved through individual consumer complaints.\textsuperscript{129}
Studies made by the ECC do however show that only a very limited number of cases relating to Article 20 (2) SD has been subject to administrative or judicial enforcement at national level between January 2010 and December 2012. This lack of enforcement action has also been confirmed by the Commission.\textsuperscript{130}

Such a lack of litigation is not uncommon in Consumer law. The low value involved in consumer disputes often serves to deter consumers from pursuing legal action.\textsuperscript{132} Studies conducted by the German think tank Civic Consulting indicate that the four most important obstacles against low value consumer claims are:

- high litigation costs,
- excessive formalities and complexities in judicial procedures,
- long judicial proceedings and
- lack of awareness and information on consumer rights.\textsuperscript{133}

These findings can in fact be explained through economic theory. Economic theory instructs us that a rational consumer will only pursue litigation \textit{if the cost of legal action is outweighed by the likely benefits from pursuing litigation}.\textsuperscript{134} The situation can be explained by the following simple formula, where C is the costs of legal action, L is the likelihood of success and B is the benefits gained from a successful outcome:

\[ C \leq L \times B \]

A rational consumer only pursues legal action if C is less than L \times B. This formula resonates in real life, where high litigation costs frequently outweigh the likely benefits of winning a smaller consumer dispute. Excessive formalities increase the litigation costs and make the outcome uncertain, thus instructing a rational consumer not to bother with low value claims. Lengthy judicial proceedings lead to high non-monetary costs (such as time and inconvenience) which serve to outweigh the possible benefits of pursuing legal action. Lack of awareness of consumer rights makes the calculation of the likely benefits of litigation a pure guess-work and the rational consumer will therefore abstain from taking legal action.

\textsuperscript{130}Only twelve cases were reported to an enforcement authority during the time period, and only one resulted in a decision. ECC-net (2013) p. 39.
\textsuperscript{131}SWD(2012) 146 p. 4.
\textsuperscript{132}SWD(2012) 146 p. 4.
\textsuperscript{133}Civic Consulting (2008) pp. 76-77.
\textsuperscript{134}Civic Consulting (2008) p. 45.
All of the four reasons identified by Civic Consulting have also been invoked as explanations to the lack of enforcement of Article 20 (2) SD.

*High litigation costs* and *lengthy proceeding with excessive formalities* have been used by the Commission as explanations to the lack of enforcement of Article 20 (2) SD.\(^{135}\) As explained above, these three issues frequently arise in low value consumer disputes.

In order to combat these three problems, named by Jacob as the “three headed hydra”\(^ {136}\), alternative litigation procedures are often introduced for consumer claims such as Collective Consumer Redress (CCR), Small Claims Procedures (SCP) and Alternative Forms of Dispute Resolution (ADR).

The execution of these procedures varies,\(^ {137}\) but they all share a common goal of improving access to justice for consumers, by solving consumer disputes more swiftly and cheaply with a minimum of formalities.\(^ {138}\)

The EU has in this regard introduced the European Small Claims Procedure.\(^ {139}\) For small claims, not exceeding € 2000, the EU has obliged the member states to offer an optional set of procedural rules that is intended to “simplify and speed up litigation concerning small claims in cross-border cases, whilst reducing costs”.\(^ {140}\)

The EU has furthermore introduced the Directive on Consumer ADR which seeks to ensure that ADR procedures are available for consumers in all of the member states\(^ {141}\) and the Regulation on Consumer Online Dispute Resolution (ODR) which provides for the establishment of a platform for solving consumer disputes online.\(^ {142}\)

All of these measures may serve to facilitate the enforcement of Article 20 (2) SD by decreasing litigation costs, lengthy proceedings and formalities and increasing

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\(^ {135}\) SWD(2012) 146 p. 4.
\(^ {137}\) Collective Consumer Redress (CCR) entails letting consumers form a collective and litigate mass claims in court. This is frequently used when many consumers have been harmed by the same or a similar practice of a trader. COM(2008) 794 p. 3. Small Claims Procedures (SCP) entails designing a special set of procedural rules that apply to small claims before a court, simplifying the procedures. COM(2002) 746 p. 52. Alternative Forms of Dispute Resolution (ADR) are different methods of dispute resolution that takes place out of court such as mediation, arbitration and negotiation. Cappelletti (1993) p. 282.
\(^ {141}\) Article 1 of Directive 2013/11/EU. In Sweden we have “The National Board for Consumer Disputes” which enables the consumer to submit a complaint for free. The board gives a recommendation on how the dispute should be solved. The recommendation is not legally binding but the companies often obey it.
\(^ {142}\) Article 1 of Regulation (EU) No 524/2013.
consumer litigation. However, if an increase in Article 20 (2) litigation does not occur, the “three headed hydra” may also be sidestepped by entrusting enforcement to the enforcement authorities. As Cappelletti points out, individual consumer complaints are often insufficient to protect the interests of the consumer collective, and enforcement must instead be entrusted to governmental bodies.\textsuperscript{143}

The fourth, and perhaps most important, obstacle to the enforcement of Article 20 (2) SD does however remain to be discussed. That is the lack of information on the consumer rights under Article 20 (2). There are, as has been discussed at length in section 4, many uncertainties surrounding Article 20 (2) SD at present. The uncertainties are primarily caused by the fact that the Article introduces many new concepts, previously unknown to EU law. The novelties will dissuade rational consumers from pursuing enforcement under the Article since not even their lawyers can give them a prediction of the likely benefits of litigation. This problem has been highlighted by the ECC,\textsuperscript{144} and this author believes that it is currently the biggest obstacle to the enforcement of Article 20 (2) SD.

A definite solution to this problem will have to wait until an Article 20 (2)-case reaches the CJEU. The CJEU will then try to interpret Article 20 (2), establishing a clear and appropriate interpretation. If the CJEU succeeds, the uncertainties will gradually disappear.

There is however by no means a guarantee for immediate success. As mentioned many times now, the concepts introduced in Article 20 (2) SD are completely novel and it will probably take some time for the CJEU to shape them: all the more so since interpreting the Article requires a delicate balancing of the interest of consumers and the interest of business operators. It can thus be expected that the legal uncertainties surrounding Article 20 (2) SD will prevail for many years to come.

This is a significant set-back, but it is not a definitive argument against the Article. If the rationale behind the Article is sufficiently strong, it may be worth to wait until legal clarity has been achieved by the CJEU. If it is correct that combating consumer discrimination in the suggested manner will bring about cross-border trade and economic growth, it may be worth to wait until the CJEU has clarified the scope of Article 20 (2).

\textsuperscript{144}ECC-net (2013) p. 37.
But is the theory behind Article 20 (2) SD really thought through correctly? Is the targeted consumer discrimination really an obstacle to the creation of growth or some other desirable aim? If these questions are answered in the negative, the Article will never reach its goal, and it should in fact not be enforced. I will in the following section turn to discussing the theory behind Article 20 (2) SD.

5.2 Evaluation – theory failure

As has been explained above, it is not sufficient that a policy is enforced correctly for it to reach its intended goal. The underlying theory linking the policy to the intended goal must also be valid.

Above it has been argued that the aim of the Single Market, the Service Directive and ultimately Article 20 (2) is to increase cross-border trade and create economic growth in the EU. The Commission believes that Article 20 (2) SD is necessary since consumer discrimination enables businesses to create *artificial barriers* within the Single Market, which hinder market integration and cross-border trade. In section 5.2.2 I will discuss whether or not Article 20 (2) SD is a good policy (strategy) for increasing cross-border trade.

Before doing so, I will however consider an alternative motivation to the article (an alternative rationale). The Commission has also argued that the prohibition against consumer discrimination is necessary since the discrimination *causes frustration among consumers* who feel left out of the Single Market. This may be seen as an appeal that *combating discrimination is a goal in itself*. Such an argumentation is common in the EU anti-discrimination law.

5.2.1 Anti-discrimination rationale

Everyone has a fundamental human right to be protected against unlawful discrimination, irrespective of economic aims. The EU has in this regard adopted measures for combating employment discrimination, race discrimination and
The purpose of the EU anti-discrimination law is not to create economic growth, but instead serve to protect the fundamental rights and dignity of the individuals.\textsuperscript{151}

The prohibition against discrimination in Article 20 (2) SD must be considered justified if it is protecting the fundamental rights of the EU-citizens. It is however questionable if Article 20 (2) SD can be motivated in this manner.

The following is one of the complaints received by the ECC:

“I believe it is unfair for a company that trades across Europe to charge a higher price on their web-site for Irish customers than for those based in Britain. I was looking to buy a camera for my daughter. The unit price on the British website is £130 while the price on the Irish website is €190. I believe that to be discriminating against me as a European citizen living in Ireland. I believe that I should be charged the same price as my British counterparts”.\textsuperscript{152}

The plaintiff refers to feelings of unfairness and discrimination. Inconvenient as a higher price may be, it is however very unlikely that any human rights have been infringed in these kinds of cases.\textsuperscript{153}

As Feldman points out, discrimination is only considered as unlawful (infringing human rights) when we treat a person differently due to a “\textit{morally irrelevant characteristic}”, such as if we refuse to employ persons because they have red hair or black skin etc.\textsuperscript{154}

The aim of protecting human rights has motivated the introduction of a directive against gender discrimination in the access to, and supply of, goods and services.\textsuperscript{155} The directive imposes an obligation against providers of goods and service not to discriminate on grounds of sex. This is recognized as an intrusion into the free market, but the intrusion is considered justified in order to combat unlawful gender discrimination.\textsuperscript{156} The intrusion is justified since the gender of the consumer, as good as always, is a \textit{morally irrelevant characteristic} that business operators should not take into account when deciding on the terms of the contract.

\textsuperscript{150}Directive 2004/113/EC.
\textsuperscript{152}ECC-net (2013) p. 8.
\textsuperscript{153}Zoll et al. (2013) p. 28.
\textsuperscript{154}Feldman (1993) p. 858.
\textsuperscript{155}Directive 2004/113/EC.
On the other hand we have the prohibition against consumer discrimination in Article 20 (2) SD which have a different character. Differentiations against service recipients due to their nationality or place of residence are normally not considered as unlawful discrimination, infringing the human rights of the consumer.\(^{157}\) This is due to the fact that the nationality and residence of the consumer very often is a relevant characteristic to take into account when agreeing on the terms of the contract. For instance, no fundamental rights are violated when an English business operator charges higher fees for delivering to Sweden due to the additional delivery costs.\(^{158}\) In this regard, Article 20 (2) SD seems to have little in common with directive 2004/113, and most other anti-discrimination provisions.

An infringement of fundamental rights may however be found in exceptional cases under Article 20 (2) SD, where the service provider is openly discriminating against a certain nationality. This may be the case if a service provider states that “we do not sell to Swedes, irrespective of where they live”.\(^{159}\)

EU-citizens are however already protected against the latter kind of discrimination under the Race Equality Directive\(^{160}\) thus making Article 20 (2) SD seem somewhat superfluous as a measure for protecting fundamental rights.

Bearing these remarks in mind, it seems like Article 20 (2) SD cannot be justified by its merits as an anti-discrimination law measure. The motivation behind Article 20 (2) must instead be to combat the targeted practices, not because they are infringing the fundamental rights of the recipients, but because they are impeding economic growth. I will in the following discuss the latter rationale.

### 5.2.2 Competition rationale

The EU Single Market is designed as a free-market policy. The idea is that the free movement of production factors will create a better allocation of resources within the union and lead to economic growth.\(^{161}\) As mentioned in section 2, this rationale is based on the underlying assumption that the market forces, rather than state interventions, are

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\(^{157}\) Zoll et al. (2013) p. 28.
\(^{159}\) Zoll et al. (2013) p. 28.
the best means for achieving economic efficiency.\textsuperscript{162} This entails that \textit{governmental regulation of business operator is kept to a minimum and only occur when it can be motivated in the general interest}.\textsuperscript{163}

The EU also recognizes an individual freedom to conduct a business without unlawful interference (Article 16 of the Charter on Fundamental Rights of the EU). This is interesting since most other international conventions do not recognize such a right.\textsuperscript{164} As Spielmann points out, the freedom to conduct a business can however be derived from the free market rationale and the right to property.\textsuperscript{165} This derivation was originally performed by the CJEU in the Nold-case where the CJEU recognized the freedom to conduct a business for the first time.\textsuperscript{166}

The freedom to conduct a business is however not an absolute right and the CJEU has held that:

\begin{quote}
“restrictions may be imposed … provided that the restrictions correspond to objectives of general interest and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed”\textsuperscript{167}
\end{quote}

Governmental interventions into the free market and the freedom to conduct a business are in fact not uncommon. A governmental intervention can for example be motivated, in order to promote growth, if there is a market failure.\textsuperscript{168} A market failure occurs when the free interplay of market forces, for some reason, fails to produce an efficient allocation of resources.\textsuperscript{169} A market failure may for example occur when a business operator or a group of business operators gains enough market power to distort the competition on the market, establishing a monopoly or an anti-competitive agreement.\textsuperscript{170}

\begin{itemize}
  \item Usai (2013) p. 1868.
  \item Spielmann (2006) p. 158.
  \item Case 4/73, Nold KG v Commission, para. 14.
  \item Joined cases C-184/02 and C-223/02, Spain and Finland v Parliament and Council, para. 52. See also Article 52 of the Charter on Fundamental Rights of the EU which declares that “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.
  \item Taylor (2006) p. 29.
  \item Bator (1958) p. 351.
  \item Hildebrand (2009) p. 13.
\end{itemize}
The basic aim of the EU competition law is to avoid such market failures and promote competition in order to foster economic growth and create consumer welfare. This entails striving for a market with many competitors, low entry barriers and fully informed consumers (“perfect competition”). To achieve this goal it is, inter alia, important to combat practices by companies that serve to create artificial barriers to trade, which interfere with the optimal allocation of resources.

The Commission argues that providers who discriminate against consumers on grounds of nationality or residence are creating such artificial barriers to trade, preventing economic growth. If they are correct, Article 20 (2) SD may be a justifiable intrusion in to the free-market, in line with the rest of the EU competition law.

This author has however found four points where the competition rationale behind Article 20 (2) SD can be questioned.

Does it need to target small and medium sized providers?

Market failures normally occur when a company, or a group of companies, has gained enough market power (“monopoly power”) to put the normal competitive processes out of function. This is why competition law is normally only concerned with companies who, individually or as a collective, have a large market share. In principle, Article 101 TFEU is only applied if the parties to the contract have a combined market share of more than 10 percent, Article 102 TFEU is only applied to companies who have a market share of more than 40 percent and the Merger Regulation is only applied if the merging companies have a combined market share of more than 25 percent.

Article 20 (2) SD is different in this regard. Article 20 (2) SD strikes at all service providers, regardless of market share. From a competition law perspective, this is questionable since a low market share indicates that there are other options available to the consumer and that the market therefore can heal itself. For example, if an English retailer with a small market share is demanding too much money for delivering to

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177 Notice (2001/C 368/07) para. 7.
Sweden, there are probably other operators, who are willing to undercut the delivery costs. In this regard, Article 20 (2) SD can be considered as overbroad as a competition policy. It is questionable if the discriminatory practices by smaller companies will create such “artificial barriers to trade” that the Commission is targeting.\(^{181}\)

*Does it need to target price discrimination?*

As explained above, the discriminatory practices targeted by Article 20 (2) SD may be categorized into four kinds: refusals to supply, redirections to partner companies, price discriminations and other kinds of discriminations (such as discrimination by proxy).

It can be questioned if price discrimination\(^{182}\) on ground of nationality and residence is a behavior that is harmful to competition. In economics, it is regarded as an open question whether price discrimination should be regarded as unlawful.\(^{183}\)

It is not self-evident that price discrimination is bad for economic efficiency: the key question being whether economic efficiency is promoted under a regime that allows for price discriminations or under a regime that requires the operator to charge a single price from consumers in all countries (all other costs being equal).

Many economic theorists believe that allowing for price discrimination, in total, would be more efficient.\(^{184}\) It is argued that total outputs may in fact be increased if companies are allowed to tailor the prices to different consumer groups.\(^{185}\) A case-by-case analysis is however required to determine whether a single case of price discrimination leads to efficiencies, or is harming competition.\(^{186}\) Such an analysis is very hard to perform since the facts of any real case of price discrimination are extremely hard to assess in practices.\(^{187}\)

The analytical difficulties have caused some to argue that legal intervention against price discrimination will in fact be *worse than the disease*.\(^{188}\) The risk is that a legal intervention against price discrimination will be imprecise and also strike at price discrimination that is good for competition. Legal intervention may in fact, in itself,

\(^{182}\)Defined by Bishop as "the charging of different prices to different customers for similar goods where these prices are not based on different costs to the firm in supplying those customer". See Bishop (1981) p. 282.
\(^{183}\)Hildebrand (2009) p. 113.
have an adverse effect on competition since it may dissuade companies from engaging in lawful price competition due to the imprecision of the prohibition and the risk of legal proceedings.\textsuperscript{189} In this manner, the legal intervention against price discrimination in Article 20 (2) SD may actually do more harm than good, and will not contribute to the aim of creating growth on the Single Market.\textsuperscript{190}

It can furthermore be argued that prohibiting price discrimination is undesirable since it would force business operator to charge a single price in both high and low income member states.\textsuperscript{191} This price would probably lie somewhere in between the current prices in high and low income states. This would result in a price drop in the high income states and a price increase in the low income states, thus “making the rich richer and the poor poorer”.\textsuperscript{192} From an ethical point of view, this is not a desirable outcome.

\textit{Is there even a problem? (Chicagoan objection)}

Given the objections noted above one could begin to wonder if any of the practices targeted by Article 20 (2) SD constitute real threats to competition. Article 20 (2) SD may be considered unnecessary altogether.

An economist influenced by the Chicago School would argue that there is no need for Article 20 (2) SD, as long as there are low barriers to entry for new competitors.\textsuperscript{193} For example, a Chicagoan would argue that a dominating provider in England, who charges too much money for delivering to Sweden, is no competitive problem as long as it is possible for new competitors to establish themselves and undercut the dominating operator. The belief is that the market will heal itself, if there are low barriers to entry.\textsuperscript{194}

The Chicago School has however come under criticism, and a \textit{post-Chicago school of economics} has arisen.\textsuperscript{195} This new approach argues that the Chicago School may have placed too much confidence in the ability of the market to heal itself.\textsuperscript{196} Post-Chicago economics argues that market failures are not necessarily self-correcting.\textsuperscript{197} This conclusion is supported by subsequent empirical research that has shown that Chicago

\begin{itemize}
\item \textsuperscript{189}Hildebrand (2009) p. 112.
\item \textsuperscript{190}Bishop (1981) p. 289.
\item \textsuperscript{191}Bishop (1981) pp. 288-289.
\item \textsuperscript{192}Bishop (1981) pp. 288-289.
\item \textsuperscript{193}Barriers to entry are primarily caused by national legislation. Chalmers, Davies & Monti (2010) p. 913.
\item \textsuperscript{194}Chalmers, Davies & Monti (2010) p. 913.
\item \textsuperscript{195}Jacobs (1995) p. 222
\item \textsuperscript{197}Jacobs (1995) p. 225.
\end{itemize}
theorist may have underestimated the possibilities for a dominating operator to “keep a
good competitor down”. 198

As to the market for cross-border services in the EU, there are indications that
competition is weak. Studies by the Commission indicate that consumers often are
unable to find domestic offers online 199 and are being denied access to cross border
offers 200. These figures indicate that there in fact might be an untapped potential, with
consumers who are willing to spend money, but lacking a provider to contract with. If
consumer choice would be greater this would lead to lower prices and increased
welfare. 201 The studies by the Commission thus indicate that profitable sales are wasted
because service providers are imposing delivery restrictions etc. 202 In other words, the
discriminatory practices targeted by Article 20 (2) SD do in fact lead to inefficient
results. Such an analysis is strengthened by calculations which indicate that the EU
service sector is underperforming, when compared with the American service sector. 203

Empirical data thus seem to suggest that even a Chicagoan theorist would have to
acknowledge that there is a market failure and that a governmental intervention may be
motivated. Profitable sales seem to be wasted, and the market seems unable to heal
itself at its current state of competiveness. This finding does however leave us with the
question of how to solve the problem.

Proportionate solution?

If we thus accept that the Commission is correct in its investigations (that the full
potential of the market for cross borders services is untapped and that service providers,
rather than taking action to enter the market, are making inefficient differentiations
among consumers: creating artificial barriers to trade) we are left with the question of
how to solve the problem. The problem of the untapped market for cross-border
services can be solved in two different ways:

199 On average in the EU, about 50% of the studied products where only available in another member
200 On average in the EU, it was only possible in 39% of the cases to place a cross border order, without
201 In fact, studies indicate that possible “welfare gains for EU consumers, resulting from lower online
prices and increased online choice under a hypothetical situation of a 15% share of Internet retailing
(currently 3.5%) and a Single EU consumer Market in the e-commerce of goods, amount to 204.5 billion
Euro per year (equivalent to 1.7% of EU GDP)”. Civic Consulting (2009) p. 8.
Creating positive incentives for service providers to enter the market for cross-border services by reducing barriers to entry and making cross-border trade more profitable (positive action approach).

Forcing new service providers to enter the market unless they can produce reasons for not doing so and forcing the service providers that are already established to use competitive contractual terms. The Commission has, in Article 20 (2) SD, chosen to use this option.

The second option has the implication that it amounts to a rather large intrusion into the free market and the fundamental freedom to conduct a business, and that it therefore must be motivated by rather extraordinary reasons. As mentioned in the beginning of this section, any governmental intervention must be proportional to the aim pursued. This indicates that the Article will only be enforceable in very severe cases of consumer discrimination.

The Commission also seems to have realized this, making Article 20 (2) subject to a massive amount of exemption in order to avoid a disproportional interference. As mentioned above, the exemption under the concept of “objective criteria” seems to indicate that almost every case of discrimination will be justified.

Regardless of the massive amount of exemption, the service providers will however always be under the obligation to justify the differentiations they make, possibly even before a court. This burden will impose costs on the service providers. These costs will not only arise in the case of legal proceedings but also entail costs for precautionary measures. A business may, for example, even consider supplying more countries than is profitable, just to avoid the risk of being sued in court. Such a development would entail substantial costs. These costs could even, according to Zoll et al., deter citizens from starting a business in the EU, thus indicating that Article 20 (2) SD could even be harmful to growth in the EU.

Put shortly, the second option will result in a provision (Article 20 (2) SD) that has a very limited scope of application, but which imposes rather large costs on businesses. The article may successfully combat a limited number of anti-competitive practices, but will force all business operators to justify their local price schemes. This cannot be considered a proportional interference into the free market and the freedom to conduct a

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204Zoll et al. (2013) p. 39.
205Zoll et al. (2013) p. 88.
206See section 4.5.
207Zoll et al. argues that state intervention should be limited to “extreme cases of total market failure and the unbearable exclusion of customers from accessing foreign markets. Zoll et al. (2013) p. 89.
business. The method can rather be compared to *shooting mosquitoes with a canon*. As Zoll et al. points out, this could even be harmful to growth in the EU.\(^{209}\)

On the other hand we have the option to use a *positive action approach*, focusing on creating incentives for businesses to enter the Single Market and unleashing the market forces. This would entail combating well-known obstacles to cross-border trade such as *legal heterogeneity* with regards to consumer protection law, intellectual property law, contract law and administrative law and *excessive regulations* with regards to demands for establishment, registration and notification.\(^{210}\) Studies also indicate that the pricing of cross-border parcel deliveries is hindering cross-border trade.\(^{211}\)

A positive action approach could furthermore entail increasing market transparency as to the different prices applied across the EU.\(^{212}\) Such measures is already in place in the forthcoming Consumer Rights Directive\(^{213}\) which obliges the distance sellers to inform the consumers in advance of the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal and *any delivery restrictions, additional freight, delivery or postal charges*.\(^{214}\)

This positive action approach entails letting the market decide where it is profitable to do business. It would be based on the basic assumption that, when the obstacles to cross border trade are sufficiently small, it will come naturally for companies to enter the Single Market. After all they are generally profit driven enterprises that would not turn down a good deal. Perhaps there still would remain some “xenophobic” companies, or some companies that seeks to uphold the market division since it serves their purposes, but these exceptions, that are currently targeted by Article 20 (2) SD, would probably be drowned in the stream of companies seeking to make use of the profitable market for

\(^{209}\) Zoll et al. (2013) p. 39.

\(^{210}\) Zoll et al. (2013) p. 10. See also SNBT (2011) p. 2. Delgado (2007) p. 961. Studies conducted on behalf of the Commission indicate that 34% of the business operators are very concerned about extra compliance costs linked to national fiscal regulations and that 29% are very worried about the costs of compliance with different national laws on consumer transactions. See Flash Eurobarometer 224 p. 21. In fact, almost 50% of the business operators that are not trading cross-border said that they would be interested in doing so, if consumer regulations were to be harmonized. Flash Eurobarometer 224 p. 35.

\(^{211}\) Studies indicate a two-tier delivery market in cross-border parcels delivery, where small retailers are paying higher prices, which they may not be able to pass on to their consumers, thus lowering the market participation of small retailers. See FTI consulting (2011) p. 220.

\(^{212}\) Ecorys (2011) p. 16.

\(^{213}\) Directive 2011/83/EU.

\(^{214}\) Article 8 of directive 2011/83/EU.
cross-border trade. For sure, this approach seems a better solution than trying to force operators out on to a Single Market for services that yet seems to be unprofitable.215

5.3 Conclusion

The purpose of this section has been to evaluate Article 20 (2) SD, discussing the question “what ought the law be”.

The evaluation performed has first of all indicated that the enforcement of Article 20 (2) seems to be below par. The lack of enforcement action can be explained with reference to the low value involved in consumer disputes which deters consumers from pursuing legal action. It can also be explained with reference to the legal uncertainties that currently plague Article 20 (2) SD. This author has argued that these enforcement issues are serious problems, but that they might be solved in the future.

The evaluation has also indicated that the theory behind Article 20 (2) might be flawed and there seem to be a risk for a theory failure.

As far as anti-discrimination policy goes, differentiations against service recipients due to their nationality or place of residence are normally not considered as unlawful discrimination, infringing the human rights of the consumer. A violation may be found in exceptional cases (“we do not sell to Swedes regardless of where they live”) but these situations are already covered by other provisions.216

With regards to competition law, Article 20 (2) seems overbroad in targeting the practices of firms without monopoly power as well as targeting price discrimination. Assuming that the Article is at least targeting some anti-competitive practices, a governmental intervention nevertheless seems disproportional and it seems more reasonable to focus on creating incentives for businesses to enter the Single Market. A rigorous enforcement of Article 20 (2) SD could in fact create large cost for businesses which could even deter citizens from starting a business in the EU.217

215Please note that this conclusion is not motivated by a general belief in the Chicago School of Economics. I do not say that the market forces are capable of solving all market failures, as long as entry barriers are kept to a minimum. I have simply argued that a prohibitive governmental intervention in this case seems to be disproportional and that a positive approach may be better for solving this problem.

216Directive 2000/43/EC.

217Similarly see Zoll et al. (2013) p. 89. See also Civic Consulting (2009) p. 16, where it is argued that EU should take positive action to encourage cross-border trade such as providing information about the legal regimes in place in different countries, creating a one-size-fits all template for cross border trade and perhaps even create a virtual marketplace for online businesses who wish to operate across the EU.
6 Summary and final thoughts

The EU has introduced a prohibition against consumer discrimination in Article 20 (2) of the Services Directive. The provision obliges services providers not to discriminate against service recipients on grounds of nationality or residence. The EU argues that this provision is important in order to combat consumer frustration and promote cross-border trade in services by removing artificial barriers to trade.

The two objectives of this thesis has been to investigate the current scope of Article 20 (2) SD (“what is the law”) and to evaluate Article 20 (2) SD as a policy (strategy) for improving cross-border trade in services (“what ought the law be”).

My investigations reveals that there are large interpretative uncertainties regarding the scope of Article 20 (2) SD and that these uncertainties may explain why the Article currently is not being enforced. I have argued that this enforcement failure is of course a serious problem, but that it might be solved in the future.

Discussing the theory behind Article 20 (2) SD, I have argued that it does not seem like a good strategy for improving cross-border trade.

The Article will only be enforceable in a few cases of anti-competitive consumer discrimination and could, quite the contrary, be harmful to economic growth by imposing large costs on many companies. The situation has been compared with shooting mosquitoes with a canon.

I have instead argued for an approach based on creating positive incentives for companies to enter the market for cross-border services (offering them a carrot rather than a whip).

Please note that this conclusion is not motivated by a general belief in the market forces to solve the problems of our society. I believe that there are many good reasons for intervening in the market and to clash with the companies (environmental protection, consumer protection etc.). It is however, as Sun Tzu pointed out, important to choose your battles wisely.
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