

Free Public Transport of Tallinn, Estonia: A Case to Justify (Reverse) Discrimination on the Basis of Residence

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🇺🇪 Estonia; EU law; Indirect discrimination; Public transport; Residence; Reverse discrimination

Abstract

Since 2013 Tallinn, the capital of Estonia, has provided free public transportation to its registered residents to promote additional registrations in order to increase its tax revenue indirectly. The system is not conditional on the resident having made any contribution to the budget or actually physically being resident in Tallinn. The Court has not indicated that it would accept the right of local self-management as legitimization of indirect discrimination against “moving” EU citizens. Cases that have accepted the requirement of a connection between the society of the Member State and the recipient of a benefit, or public policy, public security or public health as legitimate aims for justification of different treatment do not seem to fit the context of Tallinn. Accordingly, the system is likely to be illegal under EU law. National constitutional law, however, accepts local self-management as a justification. This difference between determining what may constitute a justification under EU law and under national constitutional law may be a key factor in preventing a spillover of EU law to residence-based discrimination against own nationals. Reverse discrimination against own nationals (residents and non-residents of a particular local government) may thus, in certain circumstances, be justified.

Introduction

Hundreds of thousands of EU citizens visited Estonia during its presidency of the EU Council in 2017. Certainly, some of them made use of the public transportation system of its capital Tallinn, a system which permits residents of Tallinn to travel for free, while our guests from the rest of the EU have to purchase a ticket. This is a classic case of indirect discrimination on the basis of residency.

According to the 2011 census, the Republic of Estonia has a population of 1,294,455, and approximately 30 per cent of the people live in the capital city, Tallinn.¹ In Estonia, as in many other countries, the organisation of public transport in local municipalities is within the competence of the municipalities.

As early as 2004 the centre-leftist local government of Tallinn initiated a system whereby discounted ticket prices were made available to persons who registered themselves in the Estonian Population Register²

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¹ A summary of the results is available online at <http://www.stat.ee/phc2011> [Accessed 12 October 2017].

² The Estonian population register is a general national register regulated by the Population Register Act (State Gazette I 2000, 50, 317), available in English at <https://www.riigiteataja.ee/en/eli/518062014012/consolide> [Accessed 12 October 2017].

as residents of the city.³ The system was abolished as of 1 January 2005. From 1 January 2013 the city introduced the right of free travel to such *registered residents*, conditional only on the presentation of a valid identity card and a Public Transport Card (*Ühiskaart*).⁴ The system is based on registered and not actual residence of the person. In practice, more people frequently live elsewhere than is notified to the registry.

Tax laws entitle the city to a proportion of the income tax revenue of registered residents. Hence, the more registered residents the greater is the revenue. On the basis of this system, still valid at the time of drafting this article, all those not registered as residents, independent of whether they are from other parts of Estonia or from other EU Member States, continue paying for their tickets for public transportation.

This article explores the legal implications arising out of this registered residence-based system. First, the article argues that the system is incompatible with the rules regulating the functioning of the internal market as currently interpreted by the Court of Justice of the European Union (ECJ). Although in principle in EU law the idea of the democratic right of local self-management of municipalities could be regarded as *a legitimate aim justifying a restriction*, this has not happened and would be difficult to fit into the framework of EU law as it stands. Thereafter, the article focuses on the practice of the ECJ, referring to a potential spillover effect to cases the facts of which are wholly constrained within the territory of one Member State. There are indications in the case law of Member States, such as the decision of the French Conseil constitutionnel in *Metro Holding France SA*, which show that an end to reverse discrimination may be near—Member States seem to be gradually starting to grant equality of treatment to their own nationals in purely internal situations.⁵ Despite these developments, reports of the death of the concept of reverse discrimination have been greatly exaggerated. There are cases where the nature of the national measure justifies the maintenance of reverse discrimination. This is rooted in the different structure of determining what constitutes a legitimation in national constitutional law. The article explores the example of the free public transportation of Tallinn to determine whether the democratic right of local self-management could be used to defend the maintenance of residence based discrimination.

Although addressing the example of Estonia, the analysis is relevant, *mutatis mutandis*, to other Member States sharing similar constitutional values.

A breach of the requirement of non-discrimination

The ECJ has repeatedly stated that requirements of residence lead to discrimination as,

“that requirement is liable to operate mainly to the detriment of nationals of other Member States, inasmuch as persons who are not resident or ordinarily resident in the national territory are in the majority of cases foreigners.”⁶

³ Regulation of Tallinn City Council No.57 (13 November 2003): “Regulation of the order of paying for travel with the Tallinn common ticket system public transportation and prices of tickets” (13 November 2003) [Tallinna ühtse piletisüsteemi ühistranspordis sõidu eest tasumise korra ja sõidupiletite hindade kehtestamine], available in Estonian at <https://www.riigiteataja.ee/akt/674225> [Accessed 12 October 2017].

⁴ Regulation of Tallinn City Council No.21 (21 March 2013): “The order of paying for travel with the Tallinn public transportation and prices of tickets” [Tallinna ühistranspordis sõidu eest tasumise kord ja sõidupiletite hinnad], available in Estonian at <https://www.riigiteataja.ee/akt/408022013089>. At the time of drafting the article, paying for travel is regulated by Regulation of Tallinn City Council No.29 (13 November 2014), available in Estonian at <https://www.riigiteataja.ee/akt/404022017036> [Both accessed 12 October 2017].

⁵ Decision in Case No.2015-520 QPC (*Metro Holding France SA*) of the Conseil constitutionnel (3 February 2016); available in French at <https://www.legifrance.gouv.fr/affichJuriConst.do?oldAction=rechJuriConst&idTexte=CONTEXT000031983830> [Accessed 12 October 2017].

⁶ See e.g. *Commission v Hellenic Republic* (C-155/09) EU:C:2011:22; [2011] 2 C.M.L.R. 31 at [46] (the case concerned exemption from transfer tax granted solely to persons residing in Greece and to persons of Greek origin not residing in Greece at the date of purchase); *Giersch v Luxembourg* (C-20/12) EU:C:2013:411; [2014] 1 C.M.L.R.

In *Commission v Spain* the ECJ decided upon national legislation on admission to museums.⁷ According to the Spanish rules, free admission to museums was granted only to nationals, resident foreigners and young persons less than 21 years of age. Nationals of other Member States more than 21 years of age who are not residents in Spain (e.g. tourists) were required to pay an entrance fee. The ECJ was very brief in its reasoning but decided that discrimination affecting only foreign tourists was prohibited by arts 7 and 59 of the EEC Treaty.

In addition to overt discrimination by reason of nationality, the principle of equal treatment prohibits “also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result”.⁸ The fact that the challenged national provisions may also constitute restrictions on the citizens of the same Member State is irrelevant. The ECJ made that clear, e.g. in *Angonese*, stating that:

“That is so notwithstanding that the requirement in question affects Italian nationals resident in other parts of Italy as well as nationals of other Member States. In order for a measure to be treated as being discriminatory on grounds of nationality under the rules relating to the free movement of workers, it is not necessary for the measure to have the effect of putting at an advantage all the workers of one nationality or of putting at a disadvantage only workers who are nationals of other Member States, but not workers of the nationality in question.”⁹

The criterion of residence was also the central issue in preliminary ruling case *Government of the French Community v Flemish Government*, where the autonomous Flemish community established a care insurance scheme for certain residents.¹⁰ The applicants argued that excluding persons who worked in the region, but were not its residents, from the benefits of the insurance scheme was a restrictive measure hindering the free movement of persons. As to residents of other Member States as well as Belgian nationals who had exercised their right of free movement within the EU the Court emphasised its well-known approach that,

“Articles 39 EC and 43 EC militate against any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty.”¹¹

The Court dismissed the argument that the benefits were so limited that they would have only a marginal effect and instead stated that,

2 at [44] (the case concerned refusal of the state to grant aid to students, who are EU citizens not residing in the Member State concerned, whose father or mother, a frontier worker, works in that Member State); *Bragança Linares Verruga v Ministre de l'Enseignement supérieur et de la recherche* (C-238/15) EU:C:2016:949 at [43].

⁷ *Commission v Spain* (C-45/93) EU:C:1994:101.

⁸ E.g. *Josemans v Burgemeester van Maastricht* (C-137/09) EU:C:2010:774; [2011] 2 C.M.L.R. 19 at [58] (the case concerned a measure adopted by a local public authority which restricts access to coffee-shops to Netherlands residents).

⁹ *Roman Angonese v Cassa di Risparmio di Bolzano SpA* (C-281/98) EU:C:2000:296; [2000] 2 C.M.L.R. 1120 at [41] (the case concerned requirement imposed by private undertaking to submit a certificate of bilingualism issued only by a concrete local authority for admission to a recruitment competition). A similar approach has been taken several times in later cases, e.g. *Giersch v Luxembourg* (C-20/12) EU:C:2013:411 at [45].

¹⁰ *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178; [2008] 2 C.M.L.R. 31. For a more detailed discussion of the implications of the case see P. van Elsuwege and S. Adam, “Belgium: the Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination” (2009) 5 E.C.L.R. 327.

¹¹ *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178 at [45].

“[T]he articles of the Treaty relating to the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited.”¹²

The ECJ emphasised that in the case of non-residents who have never exercised the freedom to move in the EU, the EU law “clearly cannot be applied to such purely internal situations”.¹³ Accordingly, the Belgian Constitutional Court accepted the requirement to provide equal benefits to residents of other Member States and Belgian residents who had exercised their rights of free movement within the EU.¹⁴

In *Commission v Italy*¹⁵ the ECJ cited several principles referred above and reached the conclusion that Italy had failed to fulfil its obligations under arts 12 EC and 49 EC by allowing advantageous rates for admission to public monuments (museums, monuments, galleries, archaeological digs, parks, gardens), granted by local or decentralised State authorities only in favour of nationals and persons resident within the territory of those authorities running the cultural sites in question who are aged over 60 or 65 years, and by excluding from such advantages tourists who are nationals of other Member States and non-residents who fulfil the same objective age requirements.

There is an obvious parallel between the case law cited above and the residence-based exemption from public transport fees in Tallinn. Estonian nationals are more likely to be registered residents of Tallinn than nationals of other Member States. Those travelling to Tallinn from Riga, Helsinki or Brussels (who are more likely nationals of other Member States), either to obtain or provide services, go shopping or to work for an employer located in Tallinn, are objectively worse off than residents of Tallinn (who are more likely nationals of Estonia), when using the service of public transportation.

From an employer’s perspective, when hiring an EU citizen who is a registered resident in Latvia or Belgium, the additional transportation expenses of the employee must be taken into account.¹⁶ Accordingly, the system constitutes indirect discrimination on grounds of nationality.

In order to assess whether such different treatment may be objectively justified, the applicability of exceptions must be analysed. In the Italian case, the Government argued that “in the light of the cost of managing cultural assets, free admission to the sites cannot be granted in disregard of economic considerations”.¹⁷ Secondly, the favourable treatment afforded only to Italian nationals and certain residents was, in the view of the Government,

¹² *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178 at [52]. Of course those Treaty provisions are still not absolute as prohibited is the restriction only in case it does not have legitimate aim and/or it is disproportional, i.e. “national measures capable of hindering the exercise of fundamental freedoms guaranteed by the Treaty or of making it less attractive may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued”: at [55]. In this case there was no legitimate aim.

¹³ *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178 at [37]–[38].

¹⁴ Cour constitutionnelle, 21 January 2009, No.11/2009, paras B.13.2-B.16 (<http://www.const-court.be/public/f/2009/2009-011f.pdf> [Accessed 13 October 2017]). At the same time the Court refused to extend the benefit to Belgian nationals who had never used their Community rights with the consequence of different treatment of Belgian nationals (as regards reverse discrimination see p.4).

¹⁵ *Commission v Italy* (C-388/01) ECLI:EU:C:2003:30; [2003] 1 C.M.L.R. 40.

¹⁶ See also e.g. *Criminal proceedings against Van Lent* (C-232/01) EU:C:2003:535; [2004] 3 C.M.L.R. 23 at [20]. According to art.7(2) of the Citizen of the European Union Act (State Gazette I 2006, 26, 191, available in English at <https://www.riigiteataja.ee/en/eli/516012017001/consolide> [Accessed 13 October 2017], not later than three months after his or her date of entry into Estonia, a citizen of the European Union must register his or her residence pursuant to the procedure provided in the Population Register Act.

¹⁷ *Van Lent* (C-232/01) EU:C:2003:535 at [18].

“justified by reasons of cohesion of the tax system, in that those advantages constitute consideration for the payment of the taxes by which those nationals and residents contribute to the running of the sites concerned.”¹⁸

The ECJ emphasised that potential exceptions to principle of equal treatment of nationals of different Member States can be based on public policy, public security or public health. The Court emphasised that economic aims are not considered as part of public policy within the meaning of art.46 EC.¹⁹ Hence, the primary aim of Tallinn to increase its income by raising the number of its residents does not in itself constitute a legitimate objective able in principle to justify the discrimination against non-resident citizens of other Member States.

The second justification promoted by the City of Tallinn relates to the fact that public transportation is financed by the taxes of the local residents and thus public transportation is not “free” but is in fact maintained indirectly on the basis of contributions of the persons registered as residents of Tallinn.²⁰ In the Italian case, the ECJ repeated the criteria from its case law regarding the condition of a “direct link” when relying on the argument of the need to preserve the cohesion of the tax system. The court referred to its earlier cases of *Bachmann*²¹ and *Commission v Belgium*,²² where it had decided that rules liable to restrict both free movement of workers and freedom to provide services could be justified by the need to maintain the integrity of the fiscal regime. Here the Court reiterated that in the referred cases,

“there was a direct link between the deductibility of contributions and the taxation of sums payable by insurers under pension and life assurance contracts, and that link had to be maintained to preserve the cohesion of the tax system in question.”²³

In the case of Italy, this direct link was considered as absent.

The case law regarding what does and what does not constitute a “direct link” is relatively clear. The ECJ is looking for a mathematical formula linking the advantage received with a measurable tax obligation of the particular person receiving the benefit. According to the ECJ:

“For an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy.”²⁴

¹⁸ *Van Lent* (C-232/01) EU:C:2003:535 at [18].

¹⁹ *Van Lent* (C-232/01) at [20]. In *Giersch v Luxembourg* (C-20/12) EU:C:2013:411 at [51]–[52] the ECJ emphasised that: “As regards the justification based on the additional burden which would result from non-application of the residence requirement, it should be borne in mind that, although budgetary considerations may underlie a Member State’s choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers ... To accept that budgetary considerations may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of European Union law as fundamental as the principle of non-discrimination on grounds of nationality might vary in time and place according to the state of the public finances of the Member States.” (EU:C:2013:411 at [51]–[52]). The same has been confirmed in *Rüffer v Pokorná* (C-322/13) EU:C:2014:189; [2014] 3 C.M.L.R. 30 at [25].

²⁰ According to §5(1)(1) of the Income Tax Act (State Gazette I 1999, 101, 903, available in English at <https://www.riigiteataja.ee/en/eli/ee/518062015017/consolide/current> [Accessed 13 October 2017], 11.6 per cent of the taxable income of a resident natural person is received by the local government of the taxpayer’s residence. The residence is in turn determined on the basis of Population Register.

²¹ *Bachmann v Belgium* (C-204/90) EU:C:1992:35; [1993] 1 C.M.L.R. 785.

²² *Commission v Belgium* (C-300/90) EU:C:1992:37; [1995] Pens. L.R. 245.

²³ *Commission v Belgium* (C-300/90) at [23].

²⁴ E.g. *DI. VI. Finanziaria di Diego della Valle & C SapA v Administration des contributions en matière d’impôts* (C-380/11) EU:C:2012:552; [2013] 1 C.M.L.R. 3 at [47].

The Court has made it clear that it is looking for a strict correlation between the obtained benefit with the taxable element.²⁵

In the case of Tallinn it is most likely not possible to provide evidence of a direct link between “input” of residents and the advantage received. The fact that a person is a registered resident does not per se permit a conclusion that they have income or have ever paid taxes. Accordingly a person may be enjoying the right of free transport without paying or having ever paid any taxes in that municipality (e.g. minors, unemployed, university students, etc.). In those cases the benefit is provided without any contribution from its recipient. The reality is that the system has provided a convenient place for the homeless to keep themselves warm during the cold winters of Estonia.

In addition, the taxes paid by the residents are in practice counted as general revenue of the municipality. No mechanisms exist to create a strict correlation between the taxes paid by the person and the transport services used by the particular taxpayer.

It cannot be said that indirect discrimination on the basis of residence could never be justified. If a Member State demonstrates that the system relies on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions, a difference in treatment can be justified.²⁶ This notion allows Member States inter alia to restrict certain benefits only to those who manifest a certain degree of integration,²⁷ a real and genuine link²⁸ or a connection to the society²⁹ of that Member State.

Such an exception, if interpreted widely, would be difficult to fit into the example of advantageous rates of tickets discussed above and could lead to the rethinking of the case law of indirect discrimination on the basis of residence as a whole. The differentiating factor, e.g. in *Gottwald*,³⁰ seemed to be the need to promote the mobility and integration of disabled persons. It would be hard to justify extending such argumentation to the whole population of a municipality and still consider the measure in line with the test of proportionality. In case of Tallinn, the fact that there exist no guarantees that the declared residence is in fact the person’s real residence is probably also an element to be taken into account.

²⁵ E.g. *Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg* (C-293/06) EU:C:2008:129; [2009] 2 C.M.L.R. 26 at [39]. In her Opinion delivered on 8 September 2011 in *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* (C-371/10) EU:C:2011:563, AG Kokott points out that although the Court has in settled case law recognised the need to preserve the coherence of the national tax system as an overriding reason in the public interest, it has allowed it to prevail in only two cases: first *Bachmann* (C-204/90) EU:C:1992:35 and *Commission v Belgium* (C-300/90) EU:C:1992:37, which both relate to the same Belgian provisions concerning the deductibility of insurance contributions, and, secondly, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07) EU:C:2008:588; [2009] S.T.C. 138.

²⁶ *Commission v Italy* (C-388/01) EU:C:2003:30; [2003] 1 C.M.L.R. 40 at [21]; *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178; [2008] 2 C.M.L.R. 31 at [55]; *Arthur Gottwald v Bezirkshauptmannschaft Bregenz* (C-103/08) EU:C:2009:597; [2010] 1 C.M.L.R. 25 at [30].

²⁷ *R. (on the application of Bidar) v Ealing LBC* (C-209/03) EU:C:2005:169; [2005] 2 C.M.L.R. 3 at [59]; *Förster v Hoofddirectie van de Informatie Beheer Groep* (C-158/07) EU:C:2008:630; [2009] 1 C.M.L.R. 32 at [50]; *Gottwald* (C-103/08) EU:C:2009:597 at [31]; and *Prinz v Region Hannover* (C-523/11) EU:C:2013:524; [2014] 1 C.M.L.R. 16 at [34]; *Martens v Minister van Onderwijs, Cultuur en Wetenschap* (C-359/13) EU:C:2015:118; [2015] 3 C.M.L.R. 3 at [36].

²⁸ *D’Hoop v Office national de l’emploi* (C-224/98) EU:C:2002:432; [2002] 3 C.M.L.R. 1 at [38].

²⁹ *Tas-Hagen v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* (C-192/05) EU:C:2006:676; [2007] 1 C.M.L.R. 23 at [34] and [38]; *Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* (C-499/06) EU:C:2008:300; [2008] 3 C.M.L.R. 8 at [37].

³⁰ *Gottwald* (C-103/08) EU:C:2009:597.

This leads to the conclusion that denying access to free public transportation to residents of other Member States and to Estonians not residing in Tallinn who have used their right to free movement,³¹ is very likely to be contrary to EU law.

Application of internal market provisions to cases strictly internal to a single Member State

With due respect to the right of the courts to come to a different conclusion from what was argued above, the following reasoning is presented on the basis of the assumption that EU law would require that a national of other Member States as well as Estonians not residing in Tallinn but having used their right to free movement must be granted a right to free transport equivalent to that of residents of Tallinn. This inevitably leads to a question of whether such a conclusion would have any impact on “permanent” or “static” Estonian nationals who are registered residents in municipalities other than Tallinn.

One may argue that, with minor exceptions, settled case law excludes the applicability of the rules on free movement in cases with no cross-border effects, i.e. which are confined within a single Member State.³² Neither is such applicability triggered by the mere fact of being a citizen of the EU³³ or by the principles and rights enacted in the Charter of Fundamental Rights of the European Union (e.g. human dignity, equality, etc.).³⁴

Equally well known are the references of the ECJ to a potential spillover effect of the internal market rules to situations wholly internal to a single Member State. All the while the ECJ has maintained full respect for the division of competences between itself and the national judiciary. Such references can be found in cases in which the ECJ has chosen to make a judgment in substance in matters where one could argue that there is no relation between the interpretation of EU law sought and the actual facts of the main action. As a rule in such cases the Court refrains from making decisions just as it would refrain from doing so in cases where the question is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.³⁵ There is, however, a line of case law where the ECJ has decided to provide its interpretations in situations where the facts of the case indicate that one is dealing with a matter wholly internal to a single Member State and where the applicability and relevance of the internal market rules is not obvious.

In the above-discussed Flemish case the ECJ stated that an,

³¹ A separate question is how to determine whether an Estonian has used his/her EU right to free movement, how long he/she has to spend in another Member State, is it enough to travel as a tourist, when the movement should have taken place, etc. See e.g. Van Elsuwege and Adam, “Belgium: the Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination” (2009) 5 E.C.L.R. 327, 334; C. Dautricourt and S. Thomas, “Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?” (2009) 34 E.L. Rev. 433, 445.

³² *Ministerio Fiscal v Brea* (C330/90) EU:C:1992:39; [1992] 2 C.M.L.R. 397 at [7]–[9]; and *Steen v Deutsche Bundespost* (C332/90) EU:C:1992:40; [1992] 2 C.M.L.R. 406 at [9].

³³ E.g. *Government of the French Community v Flemish Government* (C-212/06) EU:C:2008:178 at [39]: “citizenship of the Union is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law”. See a (moderate) critique concerning the case law: e.g. Dautricourt and Thomas, “Reverse Discrimination and Free Movement of Persons under Community Law” (2009) 34 E.L. Rev. 433, 447 (the authors conclude that according to the ECJ, citizenship provisions of the Treaty are applicable only to those who have used their fundamental freedoms and there is no freedom, but rather an obligation to move).

³⁴ Article 6(1) TEU; Charter art.51(2). See also e.g. *Dano v Jobcenter Leipzig* (C-333/13) EU:C:2014:2358; [2015] 1 C.M.L.R. 48 at [88].

³⁵ See e.g. *Sommer Antriebs- und Funktechnik GmbH v Rademacher Geräte-Elektronik GmbH & Co KG* (C-369/14) EU:C:2015:491 at [32].

“interpretation of provisions of Community law might possibly be of use to the national court, having regard too to situations classed as purely internal, in particular if the law of the Member State concerned were to require every national of that State to be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in a situation considered to be comparable by that court.”³⁶

Elsuwege and Adam appropriately point out that this “can be regarded as a hint to encourage the avoidance of reverse discrimination at the national level”.³⁷ Ritter, on the other hand, insinuates that this policy is simply wrong and considers that “the Court of Justice should say so, instead of responding to the question on the substance”.³⁸

This line of authority referred to above stems from the case *Guimont*,³⁹ which dealt with a French citizen who was facing criminal charges for having breached the set of rules defining the characteristics of the Emmenthal cheese. Inter alia, the rules contained a requirement that the cheese must have a “hard, dry rind, of a colour between golden yellow and light brown”. The French and Danish governments argued that there was no hindrance to intra-EU trade as the facts of the case referred to a purely internal situation. The accused was a French national and the product in question was manufactured in France. The ECJ was able to overcome this obstacle by referring to the presumed right of the national court to decide over the need for a preliminary ruling. According to the Court:

“Such a reply might be useful to it if its national law were to require, in proceedings such as those in this case, that a national producer must be allowed to enjoy the same rights as those which a producer of another Member State would derive from Community law in the same situation.”⁴⁰

In *Duomo Gpa* the ECJ, when faced with a similar test of competence stated,

“in the present case it is far from inconceivable that companies established in Member States other than the Italian Republic have been or are interested in pursuing, in Italy, activities such as those covered by the contracts at issue in the main proceedings.”⁴¹

In the following paragraph the court referred to the already well-known assumption that the law of the Member State might be required to grant equal treatment to its own enterprises to those of other Member States.

In *Fernand Ullens de Schooten* the ECJ confirmed that the above is still valid law.⁴² The ECJ added that, in order for it to consider that a preliminary ruling is necessary, the referring court should indicate in what way the preliminary ruling enables that court to give judgment in the case pending before it, despite the purely domestic character of the facts.⁴³

³⁶ *Government of the French Community* (C-212/06) EU:C:2008:178 at [40].

³⁷ Van Elsuwege and Adam, “Belgium: the Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination” (2009) 5 E.C.L.R. 334.

³⁸ C. Ritter, “Purely Internal Situations, Reverse Discrimination, Guimont, Dzodzi and Article 234” (2006) 31 E.L. Rev. 690, 698.

³⁹ *Criminal Proceedings against Guimont* (C-448/98) EU:C:2000:663; [2003] 1 C.M.L.R. 3 at [21]–[23]. See also e.g. *Cipolla v Fazari* (C-94/04) EU:C:2006:758; [2007] 4 C.M.L.R. 8 at [30] and [31].

⁴⁰ *Guimont* (C-448/98) EU:C:2000:663 at [23]. As a comparison, in *Re Nino* (C-54/88) EU:C:1990:340; [1992] 1 C.M.L.R. 83 at [11] the ECJ refused to apply similar logic, and instead concluded that “the absence of any element going beyond a purely national setting in a given case means, in matters of freedom of establishment, that the provisions of Community law are not applicable to such a situation”. The same was confirmed in *Criminal proceedings against Gervais* (C-17/94) EU:C:1995:422 at [24]–[26].

⁴¹ *Duomo Gpa Srl v Comune di Baranzate* (C-357/10) EU:C:2012:283; [2012] 3 C.M.L.R. 10 at [27].

⁴² *Ullens de Schooten v État belge* (C-268/15) EU:C:2016:874; [2017] 4 W.L.R. 47 at [50]–[53].

⁴³ *Ullens de Schooten* (C-268/15) EU:C:2016:874 at [54]–[55].

AG Kokott has argued that the “Court seems to have begun to resolve the tension between the ‘hypothetical’ and ‘far from inconceivable’ in its recent case-law”.⁴⁴ The latter refers to specific factors (not general, unsupported and unsubstantiated statements) that prove the “interest” of nationals of other Member States in the activity in question in the main proceedings, on the basis of which a cross-border element exists and art.49 TFEU therefore becomes applicable.⁴⁵ The exact understanding of the concept of “far from inconceivable” remains to be clarified by future case law. For the purposes of the current analysis it is sufficient to conclude that the ECJ refers in its case law directly to the possibility that national legal systems might contain provisions requiring equality of treatment of own nationals with the nationals of other Member States.⁴⁶ As AG Kokott stated:

“In its case-law, the Court has sometimes conducted an examination of fundamental freedoms even in situations which do not contain a cross-border element solely on the basis of the not further substantiated possibility that the respective national law might contain a prohibition on discrimination against nationals and in consideration of the referring court’s prerogative to determine the relevance of the referred questions to the decision in the main proceedings.”⁴⁷

A wider list of justifications for residence-based discrimination

Although this ought to be an issue strictly subject to the laws of individual Member States, the potential spillover of the internal market rules into purely internal situations is hard to miss. Even more so, if one takes into account the *Metro Holding France SA* decision of the Conseil constitutionnel, where the court relied inter alia on the principle of equality in order to extend the protection of an EU measure to a situation wholly internal to the territory of a single Member State. Thus the question of whether the constitutional principle of equal treatment would result in a “free ride” for all Estonians not resident in Tallinn (despite the fact whether they are “permanent” or “static” or they have used their Community freedoms), or whether a situation of reverse discrimination would be the proper result, must be addressed.⁴⁸

⁴⁴ Opinion of AG Kokott in *Airport Shuttle Express v Comune di Grottaferrata* (C-162/12) EU:C:2013:617 at [32].

⁴⁵ Opinion of AG Kokott in *Airport Shuttle Express* (C-162/12) at [32] (AG Kokott also referred to *Blanco Pérez v Consejería de Salud y Servicios Sanitarios* (C-570/07) EU:C:2010:300; [2010] 3 C.M.L.R. 37 at [40], and *Attanasio Group Srl v Comune di Carbognano* (C-384/08) EU:C:2010:133; [2010] 3 C.M.L.R. 6 at [24]). AG Wahl understands “far from inconceivable” as “meaning that, despite the facts all being confined to [one Member State], the potentially restrictive effects on cross-border situations of the legislation at issue in that case were so manifest that the Court could, immediately and without difficulty, assert jurisdiction”. See Opinion of AG Wahl in *Venturini v ASL Varese* (C-159/12) EU:C:2013:529 at [67].

⁴⁶ E.g. *Susisalo* (C-84/11) EU:C:2012:374 at [21]:

“At the hearing, the representative of the applicants in the main proceedings argued that in Finnish administrative law there are rules which ensure that Finnish nationals do not suffer reverse discrimination. In those circumstances, it is not obvious that the interpretation of European Union law sought would be of no use to the referring court.”

As has been pointed out above, in the Flemish care insurance scheme case the Belgian Constitutional Court legitimised reverse discrimination. In comparison, in the Italian case the Italian Constitutional Court opted for equal treatment of Italy’s own nationals and condemned reverse discrimination (see Van Elsuwege and Adam, “Belgium: the Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination” (2009) 5 E.C.L.R. 327, 335; Dautricourt and Thomas, “Reverse Discrimination and Free Movement of Persons under Community law” (2009) 34 E.L. Rev. 433, 437).

⁴⁷ See Opinion of AG Kokott in *Airport Shuttle Express* (C-162/12) EU:C:2013:617 at [46]. The Advocate General cited in reference the following cases: on the free movement of goods, *Guimont* (C-448/98) EU:C:2000:663 at [21]–[23]; on the freedom to provide services, *Cipolla* (C-94/04) EU:C:2006:758 at [30] and [31]; on the freedom of establishment and the freedom to provide services, *Servizi Ausiliari Dottori Commercialisti Srl v Calafiori* (C-451/03) EU:C:2006:208; [2006] 2 C.M.L.R. 45 at [29] and [30]; and on the freedom of establishment, and *Blanco Pérez* (C-570/07) EU:C:2010:300 at [36].

⁴⁸ For a discussion about the concept of reverse discrimination, see e.g. Dautricourt and Thomas, “Reverse Discrimination and Free Movement of Persons under Community Law” (2009) 34 E.L. Rev. 433.

The principle of equal treatment emanates from Aristotle's understanding that "equals should be treated equally and unequals unequally". The principle, being recognised at EU level as well in every Member State, is not absolute in nature: it can be restricted if there is a legitimate aim and the restriction is proportional with that aim. However, what can be accepted as a legitimate aim and how proportionality is tested, differs from one legal system to another.

Article 12 of the Constitution of the Republic of Estonia (Eesti Vabariigi põhiseadus—the Constitution)⁴⁹ establishes *expressis verbis* the constitutional principle of non-discrimination on the basis of nationality. The requirement of residence must also be considered as protected ground under art.12 of Estonian Constitution. Namely, the European Court of Human Rights has confirmed that the "place of residence constitutes an aspect of personal status for the purposes of Article 14" of the European Convention for the Protection of Fundamental Rights and Freedoms.⁵⁰

The Supreme Court of Estonia has explained that:

"The fundamental right to equality in § 12(1) of the Constitution can be restricted for any reason which is in conformity with the Constitution. It constitutes a fundamental right with a simple reservation by law."⁵¹

By comparison, EU law permits, subject to certain preconditions, direct discrimination against nationals on the basis of legitimate objectives of public policy, public security and public health, and indirect discrimination upon overriding grounds of a legitimate public interests. In practice the list of potential justifications under national law is wider and allows for whatever proportionate legitimate purpose (i.e. the variety of legitimate aims is almost without limits) to be taken into account. This indicates that an automatic exclusion of reverse discrimination cannot be deducted from the Estonian constitution.

In the case of free public transport in Tallinn, one of these justifications could be the need to protect the democratic right of local self-management.

⁴⁹ Constitution of the Republic of Estonia [Eesti Vabariigi põhiseadus] (State Gazette 1992, 26, 349), available in English at <https://www.riigiteataja.ee/en/eli/ee/521052015001/consolide/current> [Accessed 13 October 2017]. Article 12(1) stipulates: "Everyone is equal before the law. No one may be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other views, property or social status, or on other grounds."

⁵⁰ *Carson v UK* (2010) 51 E.H.R.R. 13 at [71]. However, according to the case law of the ECtHR, art.14 has no independent existence—it only complements the other substantive provisions and has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by the Convention. "Nationality" is also protected ground under art.14 of the Convention: see e.g. *Luczak v Poland* (77782/01) 27 November 2007 ECtHR; *Andrejeva v Latvia* (2010) 51 E.H.R.R. 28; *Gaygusuz v Austria* (1997) 23 E.H.R.R. 364; *Koua Poirrez v France* (2005) 40 E.H.R.R. 2.

⁵¹ In addition, a three-level test of proportionality is used which is inherent in, e.g., the German law tradition: "Conformity with the principle of proportionality is verified on three consecutive levels—first the appropriateness of the measures, then the necessity and, if necessary, also the proportionality in a narrower sense, i.e. the reasonableness." See Supreme Court en banc judgment of 7 June 2011 No.3-4-1-12-10 at [31] and [43]. However, in the case law of ECJ it is important that restriction is "suitable for securing the attainment of that objective and do not go beyond what is necessary in order to attain it". Suitability refers that "restrictive measure can be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner." In addition, the scope of restrictions and the possibility of using less restrictive means are analysed; hereby administrative difficulties can also be used as an argument: "Member States cannot be denied the possibility of pursuing the objective ... the introduction of general rules which are easily managed and supervised by the national authorities." See e.g. *Josemans v Burgermeester van Maastricht* (C-137/09) EU:C:2010:774 at [69], [70], [79], [80], [82].

The right to local self-management

General principles of the organisation of local self-management have been enacted in the Charter of Local Self-Government (the Charter)⁵² elaborated by the Council of Europe. The Preamble to the Charter emphasises that “local authorities are one of the main foundations of any democratic regime” and they must possess,

“a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment.”

The principles and rights of local governments enacted in the Charter must be protected also through judicial remedies (at least against the state) (art.11).

There might be several reasons why local governments would like, while deciding local issues and exercising their right to self-management, to provide preferential treatment (e.g. allowances, benefits and services) only to those who have been registered in the population register as the residents of that particular local government.

First, according to the principle of subsidiarity and democracy, public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen (art.4.(3) of the Charter of Local Self-Government), i.e. by local authorities. Knowing the (real) number of residents is necessary for local governments to plan the performance of their duties. There is an understandable need to be able to assess the potential number of users of the public transport, social services, etc.

Secondly, local governments want to invest in a better living environment in order to attract more residents. An increase in the number of registered residents triggers an increase in the income of the municipality. As it has been pointed out above, in Estonia 11.6 per cent of the taxable income of resident natural persons is received by the local government of the registered residence of the taxpayer. This enables the local government to provide more competitive (social, transport, etc.) services for its own residents.

Last, but not least, members of councils of local governments are usually legitimised through local elections by registered residents and thus have, at least in political theory, responsibility for the municipality.⁵³

As a logical consequence of this “circle of life”, there are fundamental and in principle legitimate financial incentives of the municipality to provide motivators to trigger an increase in the number of registered residents. Article 9(1) of the Charter acknowledges the right of local authorities to their own adequate financial resources, of which they may dispose freely within the framework of their powers, and art.9(3) foresees the right to determine (within the limits of statute) the rate of local taxes and charges.⁵⁴

⁵² Available with *Explanatory Report* at <http://conventions.coe.int/Treaty/en/Treaties/html/122.htm> [Accessed 13 October 2017].

⁵³ In many Member States also foreign residents can participate in local elections—see Convention on the Participation of Foreigners in Public Life at Local Level (adopted by the Council of Europe), <http://conventions.coe.int/Treaty/en/Treaties/Html/144.htm> [Accessed 13 October 2017].

⁵⁴ There are several recommendations and resolutions adopted by the Council of Europe which emphasise the importance of sufficient financial resources of local governments, the relationship between public services and funding, and the autonomous financial and budgetary management of local governments. See e.g. Recommendation CM/Rec(2011)11 of the Committee of Ministers to Member States on the funding by higher-level authorities of new competences for local authorities (adopted by the Committee of Ministers on 12 October 2011 at the 1123rd meeting of the Ministers’ Deputies); Recommendation CM/Rec(2007)4E of the Committee of Ministers to Member States on local and regional public services (adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies); Recommendation Rec(2005)1E of the Committee of Ministers to Member States on the financial resources of local and regional authorities (adopted by the Committee of Ministers on 19 January 2005 at the 912th meeting of the Ministers’ Deputies); Recommendation Rec(2004)1E of the Committee of Ministers to Member States on financial and budgetary management at local and regional levels (adopted by the Committee of Ministers on 8 January 2004 at the 867th meeting of the Ministers’ Deputies); Resolution 372 (2014) Adequate

The Supreme Court of Estonia has also acknowledged that constitutional principle of local self-management gives rise to local governments' rights related to the financial guarantee, i.e. the right to sufficient financial resources, allowing the local government to resolve and manage both mandatory and voluntary local government issues.⁵⁵ Although the rights relating to the financial guarantee are of a secondary nature, they remain relevant, as they are targeted at the creation of necessary conditions for the exercise of the right of self-management.⁵⁶ The right also includes, within the limits of national legislation, budgetary decisions and the right to decide on best options of how to secure the biggest possible number of taxpayers (related to the right to an independent budget).⁵⁷

Against this background it is understandable that the Supreme Court of Estonia has considered legitimate the aim of a local government to provide certain benefits only to local residents in order to ensure receipt of income tax to the budget, justifying a difference in treatment of residents and non-residents.⁵⁸ In the referred case, the local government voluntarily began paying childbirth allowances from the local budget, and the payment was made conditional on a residency requirement. The Supreme Court decided that the local government had found a proper balance: the difference in treatment of residents and non-residents had a legitimate aim and passed the test of proportionality. According to the court:

“Although the local government does not provide services directly as compensation for the persons' contribution, including receipt of income tax, it can be considered justified that the relationship between the local government and the persons is mutual. The balance is off if a person refuses to assume obligations before the local government but still gets the right to demand *benefits*.”⁵⁹

This reasoning seems to align with the above-discussed cases of the ECJ referring to a connection between the society of the Member State concerned and the recipient of a benefit. At the same time it is equally a good example of residence-based indirect discrimination against citizens of other Member States.

Reverse discrimination justified

As argued above, the discriminatory ticket pricing system of Tallinn is likely to be contrary to EU law. Accordingly, taking among other things into account, such as the above-discussed decision about childbirth allowance, it is likely that “permanent” and “static” Estonians who are not residents of Tallinn would be subjects to reverse discrimination.

financial resources for local authorities (debated and approved by the Chamber of Local Authorities on 14 October 2014 and adopted by the Congress on 15 October 2014), 2nd sitting (see Document CPL(27)2FINAL explanatory memorandum), Rapporteur: Gilbert Roger, France (L, SOC).) etc.

⁵⁵ Constitutional Review Chamber of the Supreme Court judgment of 9 June 2009 No.3-4-1-2-09 at [42].

⁵⁶ Constitutional Review Chamber of the Supreme Court judgment of 9 June 2009 No.3-4-1-2-09 at [43].

⁵⁷ Constitutional Review Chamber of the Supreme Court judgment of 8 March 2011 No.3-4-1-11-10 at [60].

⁵⁸ Constitutional Review Chamber of the Supreme Court judgment of 8 March 2011 No.3-4-1-11-10 at [56]. The Constitution does not expressly provide grounds for restricting its core principles, nevertheless, it considered it to be possible that other important constitutional values could outweigh the impact of the interference. C. Ginter, “Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty” (2013) 9 *European Constitutional Law Review* 345.

⁵⁹ Constitutional Review Chamber of the Supreme Court judgment of 8 March 2011 No.3-4-1-11-10 at [64]. The Court emphasised that in case local government decides on a voluntary basis (in addition to obligatory allowances and services arising from the Constitution and the law, e.g. for needy persons) to provide allowances, benefits and services, it has much freedom. Local government must also in this case consider the equal treatment requirement, but has still the right to treat persons differently (incl. based on residence) if there is a legitimate objective and it is proportional (at [62]).

Andreas Voßkuhle has said that “each constitutional court is competent for safeguarding ‘its’ Constitution”.⁶⁰ Every Member State has its own constitutional values and (at least in theory) every Member State can consider these values to be higher than EU law.⁶¹ Consequently, the question of whether the EU law illegality of the ticket system spills over to illegality of the resulting reverse discrimination under national constitutional law is within the competence of the Estonian Supreme Court. Owing to the substantive difference of the potential list of justifications under national constitutional law, it is likely that the resulting inequality in treatment could be merited.

Tallinn has claimed that introduction of the system “brought with it” 15,000 new residents, which increased the revenue from income tax to the annual budget of Tallinn approximately by €10 million (every 1,000 new residents adds approximately €1 million).⁶² This increase has compensated for the drop in income resulting from the introduction of the free ticket system and the “loss” in prior administrative fines to free-riders.⁶³ Accordingly, the system is currently based on the logic that the cost of free transportation is set off indirectly by additional revenues from the new residents. Although not all of them pay taxes or have a job, on average an increase in income to the city budget still occurs.

It is likely that in absolute terms the extension of the right of free travel to EU citizens residing in other Member States or municipalities would not significantly upset this bottom-line balance and could be introduced without jeopardising the viability of the system as a whole. However, if the Supreme Court were to prohibit reverse discrimination and follow the lead of the ECJ provided in *Guimont* and that of the Conseil constitutionnel, the outcome (even if legally justified) could be to the detriment of all involved.

As other EU capitals, Tallinn has several “satellite” local governments, the residents of which work in Tallinn and/or use services there. Should the same treatment (i.e. free tickets) be forcefully extended to all riders from other parts of Estonia, the number of potential riders would increase significantly. In addition, the motivation of people to register themselves as residents of Tallinn would drop and so would the potential tax income of the capital related to those potential residents. The system would become a significant financial burden without any increase in income to balance it. As a result, the main incentives of the system and thereby the system itself would disappear. For an ordinary resident of Tallinn such a result would certainly be a puzzling outcome of the interplay of European and national rules.

Without a further shift in the case law of the ECJ, it is unlikely that the right to local self-management would be accepted as an overriding reason of public interest and a legitimisation of discrimination on the basis of residence. The ECJ justifiably declines to consider economic reasons as a legitimate justification for indirect discrimination on the basis of residence.⁶⁴ This does not mean that it should be changed, even if it could be argued that economic considerations relied on by local governments should be viewed as a part of a larger picture. In the case of public transport in particular, one could argue that the local government is driven by considerations the attainment of which could be unachievable without indirect discrimination inherent in the formula.

⁶⁰ A. Voßkuhle, “The Cooperation Between European Courts: The Verbund of European Courts and its Legal Toolbox” in A. Rosas, E. Levits and Y. Bot (eds), *La cour de justice et la construction de l’Europe: Analyses et perspectives de 60 ans de jurisprudence/The Court of Justice and the construction of Europe: Analyses and perspectives on 60 years of case-law* (The Hague: TMC Asser, 2013), pp.81–98 at p.85.

⁶¹ See e.g. case law of the BVerfG on EU matters, e.g. Judgment of 30 June 2009 (2 BvE 2/08).

⁶² “Free Public Transportation is Popular also Elsewhere” (18 June 2015), *Capital*, <http://www.pealinn.ee/newset/tasuta-uhistransport-on-mujalgi-menukas-n146563> [Accessed 13 October 2017].

⁶³ Explanatory Memorandum to the Budget of Tallinn 2014, p.33, available in Estonian at <http://www.tallinn.ee/est/Tallinna-linna-eelarve-2014> [Accessed 13 October 2017].

⁶⁴ About the relationship and balancing (fundamental) free movement rights, general principles of EU and fundamental rights (in traditional meaning), see e.g. A. Rosas, “Balancing Fundamental Rights in EU Law” (2013–14) 16 *Cambridge Yearbook of European Legal Studies* 347; T. Tridimas, “Fundamental Rights, General Principles of EU Law and the Charter” (2013–14) 16 *Cambridge Yearbook of European Legal Studies* 361; S. de Vries, “Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice” (2013) 9 *Utrecht Law Review* 169.

Considering the fact that the list of exceptions to the principle of equal treatment permitted in the national constitutional law is much less restrictive in nature, the right to local self-management is likely to find its way into the test of proportionality as a constitutional principle capable of justifying certain limitations to the constitutional right of equal treatment on national level. Thus, if the Tallinn city government could prove that free public transportation would not be physically possible without indirect discrimination, this could be taken into consideration when performing the proportionality test justifying the upholding of the reverse discrimination.

Conclusion

The ECJ has considered the problem of reverse discrimination as a riddle to be resolved by the Member States. There have been initiatives to address the issue on EU level.⁶⁵ Some go as far as to call for a reform of the concept owing to the unjust inequalities caused by it.⁶⁶

The ECJ proceeds from the understanding that:

“Even if legislation is within the exclusive competence of the regions, the State alone is responsible for compliance with its [EU] obligations.”⁶⁷

In *Government of the French Community v Flemish Government*, the ECJ dismissed the counter-argument that the competence of the Flemish community was limited to its territory (the argument was brought out as the aim to justify different treatment) by referring to the long line of case law stating that,

“a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under Community law.”⁶⁸

It could be argued that the case law concerning residence-based benefits has blurred lines as to what is and what is not permissible. For example, it is not immediately clear that the aim of promoting the integration of the mobility and social integration of disabled persons is in substance so different between those disabled persons resident in a Member State and those disabled persons who have come for shopping or for a haircut as to make discrimination against the latter necessary.

Member States with a strong tradition of autonomy of local government might find that currently the impact of EU law goes further than strictly needed. They would prefer the further development of the case

⁶⁵ E.g. Van Elsuwege and Adam put forward the need to revise the classical approach of “purely internal situations” and accept regional/local entities as ultimate regulatory authorities; briefly they mention also the possibility of accepting the federal organisation of a Member State as a potential justification for infringing free movement rights under EU law. See Van Elsuwege and Adam, “Belgium: the Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination” (2009) 5 E.C.L.R. 327, 337. Dautricourt and Thomas also see the assessment of a cross-border element at regional/local level as a solution (similarly to the Court’s case law in the field of internal tariff barriers); in addition, EU citizenship could be invoked to abolish the requirement of a cross-border link (they consider it, however, a “premature step at the present state of development of Community law”): see Dautricourt and Thomas, “Reverse Discrimination and Free Movement of Persons under Community Law” (2009) 34 E.L. Rev. 433.

⁶⁶ See for example D. Dagan, “EU citizenship and reverse discrimination in one’s own country: a time for reform?”, <http://www.lawproject.eu/dagan-post/> [Accessed 13 October 2017].

⁶⁷ ECJ Press Release No.04/03 (16 January 2003), <http://curia.europa.eu/en/actu/communiqués/cp03/aff/cp0304en.htm> [Accessed 13 October 2017].

⁶⁸ ECJ Press Release No.04/03 (16 January 2003), p.58, <http://curia.europa.eu/en/actu/communiqués/cp03/aff/cp0304en.htm> [Accessed 13 October 2017]. The same was emphasised in the Italian public monuments case referred to above (*Commission v Italy* (C-388/01) EU:C:2003:30 at [27]). The same principle is applied by the ECtHR: see e.g. *Rafailović and Stevanović v Serbia* (38629/07 and 23718/08) 16 June 2015 ECtHR at [61].

law so that democratic self-management would be taken into account in the test of the proportionality of local measures in assessing the legitimacy of unequal treatment.⁶⁹

Owing to the differences in how the legality of restrictions to the fundamental rights is assessed under national constitutional law, it seems that the anomaly whereby an EU citizen may have fewer rights in his home Member State than citizens from other Member States is inherent in the system and cannot, at least in some cases, be simply eliminated. The right to local self-management contains the necessary elements in order to be taken into account in the test of proportionality under national constitutional law and to be capable of preventing the abolition of reverse discrimination. The residence-based pricing rules applied by Tallinn have aims which can be traced back to the right of local self-management. It is not evident that the system could exist without an element of indirect discrimination.

Thus the outcome is likely to be justified reverse discrimination, i.e. Tallinn provides free rides also to residents of other Member States in addition to its residents and “moving” Estonians, but “static” or “permanent” residents of Estonia must pay for using public transportation. The saying “there are no free rides” remains partially valid under Estonian constitutional law.

⁶⁹ Cf. e.g. the State aid case *Unión General de Trabajadores de La Rioja (UGT-Rioja) v Juntas Generales del Territorio Histórico de Vizcaya* (C-428/06) EU:C:2008:488; [2008] 3 C.M.L.R. 46.