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Non-discrimination of EU migrant workers on grounds of nationality in the context of equal access to social and tax advantages as defined in Article 7(2) of Regulation (EU) 492/2011

Master thesis in European Union law

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Supervisors:

Univ.-Ass. Dr. Günter Herzig
Salzburg Centre of European Union Studies

JUDr. Mag. iur. Michal Malacka, Ph.D., MBA
Faculty of Law at the University of Olomouc

Submitted by:

Mag. iur. Philippa Roberts
01320659

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Abstract

This master thesis examines the development of the principle of non-discrimination on grounds of nationality in the area of free movement of EU workers as regards equal access to social and tax advantages as defined in Article 7(2) of Regulation (EU) 492/2011. In order to understand the legal system that facilitates the right to equal access to these benefits, the research paper begins by explaining the concept of the principle of equality and the notion of non-discrimination, then moves on to the legal basis and analysis of the substantive scope of nationality discrimination in European Union law. The research provides a step-by-step application test on how to determine a case of direct or indirect discrimination and most importantly gives an overview of the entire case-law of the European Court of Justice on Article 7(2) of Regulation (EU) 492/2011.

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ECHR	European Charter of Human Rights
ECJ	European Court of Justice
EC	European Communities
EEC	European Economic Community
e.g.	example given
EU	European Union
i.a.	inter alia, including
i.e.	id est, that is
MS	Member State of the European Union
para.	Paragraph
Rn.	Reference number
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Treaty of Lisbon	Amendment of the TEU, TFEU and EURATOM; entered into force on 1 December 2009
Treaty of Maastricht	Founding Treaty of the EU (TEU); entered into force on 1 November 1993
Treaty of Rome	Founding Treaty of the European Economic Community (EEC); entered into force on 25 March 1957

Statutory declaration

I declare that I have authored this thesis independently, that I have not used other than the declared sources / resources, and that I have explicitly marked all material which has been quoted either literally or by content from the used sources.

Date, Signature

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1. Introduction

1.1. The right to equality and non-discrimination

Freedom from discrimination on grounds of nationality is a fundamental right conferred by the EU Treaties[1] and a basic ingredient of Union citizenship.[2] The principle of non-discrimination is the basis of the four freedoms of the internal market.[3] Its aim is to set all EU citizens equal and to create a functioning internal market which allows free movement of EU citizens. *Advocate General Jacobs*[4] described the significance of the right to equality and non-discrimination in following words:

> *'The prohibition of discrimination on the grounds of nationality demonstrates that the Union is not just a commercial arrangement between the governments of the Member States but is a common enterprise in which all the citizens of Europe are able to participate as individuals. No other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the "ever closer union among the peoples of Europe", **[...]** would be an empty slogan.'.*[5]

Discrimination on the ground of nationality is of special interest, since the EU makes use of the nationality condition in order to define the scope and the contents of several of its instruments[6] and the concept has been an essential instrument to the overall integration process.[7] To demonstrate the effect of the non-discrimination principle in practice, this master thesis examines the impact of the fundamental right of non-discrimination on grounds of nationality on EU migrant workers in the context of equal access to social and tax advantages. EU workers may rely on Article 18 TFEU, Article 45 (2) TFEU, as well as Article 7(2) of Regulation (EU) 492/2011[8] in order to make use of the non-discrimination rule and exercise free movement within the European Union.

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[1] Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU).
[2] Opinion of Advocate General *Jacobs*, C-274/96 *Bickel* [1998] 7637, para. 24.
[3] Free movement of persons, freedom to provide services and establishment, free movement of goods, free movement of capital.
[4] Francis Geoffrey Jacobs, former Advocate General of the European Court of Justice from 1988-2006.
[5] Opinion of Advocate General *Jacobs* in Joined Cases 92/92 and 326/9 *Phil Collins and Others* [19931] ECR 5145, para. 11.
[6] *Pennings*, Non-Discrimination on the Ground of Nationality in Social Security (2013) 119.
[7] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 63.
[8] Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, OJ L 141, 27 May 2011, p. 1–12, Current consolidated version: 31 July /2019.

1.2. Relevance

EU citizens residing in another Member State face a number of challenges in connection with residence, work and access to social security. This is due to persistent shortcomings in the transposition and implementation of EU law. A 2016 study for the European Parliament[9] found shortcomings with regard to restrictions to entry and residence on grounds of public policy, security and health, issues with the retention of the right of residence, bureaucratic hurdles, and lack of information. The study highlighted the difficulties EU citizens and their family members have in accessing social security, and instances of discrimination on grounds of nationality with regard to accessing employment, education and other services.[10] Even though the prohibition of discrimination on grounds of nationality is a long-established fundamental principle of EU law, the European Court of Justice still regularly has to deal with its interpretation, especially in the context of access to social and tax advantages of EU migrant workers.

1.3. Research question

The non-discrimination doctrine stipulates that those individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular 'protected' characteristic that they possess. In some situations, treatment based on a seemingly neutral rule can also amount to discrimination, if it disadvantages a person or a group of persons as a result of their particular characteristic. In sum, the non-discrimination principle prohibits settings where persons or groups of people in an identical situation are treated differently and where persons or groups of people in different situations are treated identically. It is therefore not surprising that the distinction between different forms of discrimination is of great relevance in its practical application. The most important distinction is that between direct and indirect discrimination. Thus, this master thesis focuses on how to determine a case of direct or indirect discrimination on grounds of nationality.

To understand how discrimination is determined in court proceedings in practical terms, the thesis gives an overview of all rulings of the European Court of Justice on Article 7 (2) of Regulation (EU) 492/2011.

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[9] *Directorate-General for Internal Policies* (Policy Department C - Citizens Rights and Constitutional Affairs), Obstacles to the right of free movement and residence for EU citizens and their families. Comparative Analysis. Study for the LIBE and PETI Committees (European Parliament, 2016) https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571375/IPOL_STU(2016)571375_EN.pdf.

[10] *Dumbrava*, Free movement within the EU. Briefing - Towards a more resilient EU (European Parliamentary Research Service, 2020), 7 https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652062/EPRS_BRI(2020)652062_EN.pdf.

2. Definitions

2.1. The concept of equality

'*Likes are to be treated alike and unlike are to be treated differently.*'[11]

Aristotle's time-honoured definition of equality that justice consists in '*treating like cases alike'* and dissimilar cases differently, proportional to their differences,[12] is the basic fundamental concept of what constitutes equality of treatment in the Western legal system.[13] **In EU law, equality of treatment means that situations which are the same should be treated the same, or equal situations should be treated equally**. However, of course, no two people are the same, or situations alike in all regards. The term 'same' or 'equal' are terms of art, i.e. equality has in itself no material meaning.[14] In the legal context, **equal situations are situations which are equal in all ways that are legally accepted to be legitimately relevant to the question whether discrimination has occurred**.[15]

The legal concept of equality distinguishes between formal and substantive equality of treatment:

- **Formal equality** is achieved by treating equal subjects of law the same way. It makes no difference whether the parties are treated equally well or equally badly. The focus lies on discrimination that can be identified based on the mere appearance or form of a measure, i.e. a distinction that is explicitly based on prohibited grounds of differentiation. Discrimination in that context can only take the form of direct discrimination.[16]
- **Substantive equality** of treatment is not sufficiently achieved if it is pursued without taking into account the actual outcome of the formal equality in practice. Substantive equality focuses on results and content rather than on the form of the measure.[17] This approach makes it possible to also identify indirect discrimination.

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[11] *Aristotle* (384-322 B.C.). Nicomachean Ethics, V.3. 1131 a10–b15, Politics, III.9.1280 a8–15, III.12.1282 b18–23.
[12] *Goodin*, Treating likes alike, intergenerationally and internationally, Policy Sciences Vol. 32 No. 2 (1999) 189.
[13] This includes both national and international law; see *Tobler*, Indirect discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law (2005) 19.
[14] *Sundberg-Weitman*, Discrimination on grounds of nationality: free movement of workers and freedom of establishment under the EEC treaty (1976) 21.
[15] *Davies*, Nationality Discrimination in the European Internal Market (2003) 9.
[16] *Tobler*, Indirect discrimination (2005) 25.
[17] *Wengdahl*, Indirect Discrimination and the European Court of Justice. A comparative analysis of European Court of Justice case-law relating to discrimination on the grounds of, respectively, sex and nationality (2001) 5.

The maxim of equality dictates the EU's anti-discrimination law as the two concepts are intertwined, i.e**. to discriminate is to violate the principle of equality**.[18] Thus, in the EU framework, equality is a necessary corollary of justice.[19] If situations are not analytically the same in all relevant ways, then they should not be treated the same legally or in other words, if there are relevant differences, then the situations require different handling. Meaningful equality cannot be reduced by treating everybody the same. Not taking account of the relevant difference will probably disadvantage some persons in such a situation, and advantage others, according to whether they have this characteristic.[20]

2.2. The concept of discrimination

The principle of equality is complemented by the *principle of non-discrimination*. **Discrimination takes place when two cases that are alike are treated differently without a sufficient justification, or when two different cases are treated as though they are alike without a sufficient justification being given.** In simpler terms, discrimination implicates **disadvantageous treatment of an individual based on a ground prohibited by law**.[21] Such a ground may be where a person is discriminated for example on grounds of his or her **nationality[22]**, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation[23].

Discrimination comprises three key elements:

1. disadvantageous treatment;
2. comparable situation;
3. no justification;

A group is disadvantaged, one asks if they are comparable with another advantaged group, and whether the disadvantaging treatment can be justified.[24] Hence, discrimination is connected with comparability and generally occurs when comparable situations are treated differently and different situations are treated in the same way, unless such treatment is objectively justified.[25]

[18] *Davies*, Nationality Discrimination in the European Internal Market (2003) 10.
[19] *Tobler*, Indirect discrimination (2005) 19.
[20] *Davies*, Nationality Discrimination in the European Internal Market (2003) 10.
[21] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 42.
[22] Article 18 TFEU.
[23] Article 19 TFEU.
[24] *Davies*, Nationality Discrimination in the European Internal Market (2003) 9.
[25] Case 106/83 *Sermide* [1984] ECR 4209, para. 28; *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 42.

In EU law, the concept of discrimination can be identified in a formal or substantive approach:

- **Formal discrimination** occurs where a rule explicitly divides by an illegitimate factor. It takes no account of effect or justification, but only of the form of the measure.
- Its correlate is **substantive discrimination**, which occurs when a measure has an unjustified disparate impact. Substantive discrimination is therefore determined largely by effect, and may be direct or indirect.[26]

2.3. Direct discrimination

Direct discrimination is unjustified formal discrimination. It occurs where **a person is treated less favourably on the basis of a 'protected ground'**, e.g. nationality,[27] **than another person is, has been or would be treated in a comparable situation**. Thus, it relates to the disadvantageous treatment based on the possession of specific characteristics which distinguish an individual from other people. It is therefore necessary to determine a **comparator** e.g. a person with a different nationality, and a **comparable situation**, which may be either past, present, or even hypothetical.[28] An example for direct discrimination would be if national legislation precludes an EU migrant worker access to the same social and tax advantages as national workers because of his nationality.

2.4. Indirect discrimination

Indirect discrimination may occur when a rule does not formally discriminate, but has a different effect on different groups. It occurs when **an apparently neutral rule disadvantages a person or a group sharing the same characteristics.** In other words, a group is disadvantaged by a decision when compared to a comparator group. It does not bear a division by e.g. nationality *prima facie*, but achieves the same result as if it did. However, the discriminatory measure can be objectively justified by a legitimate aim that is appropriate and necessary.

In a nutshell, the elements of indirect discrimination are as follows:

1. An apparently neutral rule, criterion or practice,
2. affects a group defined by a 'protected ground' in a significantly more negative way in comparison to others in a similar situation,

[26] *Davies*, Nationality Discrimination in the European Internal Market (2003) 15.
[27] Other grounds: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation etc., Article 19 TFEU.
[28] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 42; *Masselot*, The New Equal Treatment Directive: Plus Ça Change… (2004) 96.

3. and that apparently neutral rule, criterion or practice cannot be objectively justified by a legitimate aim.

An example case for indirect discrimination on grounds of nationality in the context of free movement of workers would be where a rule requires a particular qualification that is only available domestically. The measure has the same dividing effect as a rule excluding foreigners, although formally the rule contains no reference to the nationality of the applicants.[29] Another example for indirect discrimination on grounds of nationality is a residence condition for receiving a benefit. This usually affects foreigners more than nationals, since it will be more often the case that foreigners do not live in the state where they work, i. e. frontier workers[30] Hence, the rule divides by nationality. There is a disparate impact on different groups.[31]

The distinction between **direct and indirect discrimination** is important not only from a theoretical but also practical point of view. From the perspective of the victim of the alleged discrimination, a finding of its direct form will always be preferable because of the usually more limited justification possibilities and because of the difficulties involved in proving the disparate impact which is required in the case of indirect discrimination.[32] At the same time both forms of discrimination are complementary in the sense that if one cannot prove direct discrimination, e. g. due to incomparability of the situation, at least in some cases it is possible to allege an indirect form of disadvantageous treatment.

3. Equality and non-discrimination

Article 2 TEU:

> *'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'*

Pursuant to Article 2 of the TEU, the principle of equality and the prohibition of discrimination are one of the **fundamental principles of Union law** and the core values on which the Union

[29] *Davies*, Nationality Discrimination in the European Internal Market (2003) 11.
[30] *Pennings*, Non-Discrimination on the Ground of Nationality in Social Security (2013) 123.
[31] *Davies*, Nationality Discrimination in the European Internal Market (2003) 11.
[32] *Tobler*, Indirect discrimination (2005) 307.

rests. **Discrimination and equality go together as matching opposites**.[33] According to the European Court of Justice, the general principle of non-discrimination or equal treatment

> '*are simply two labels for a single general principle of Community law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment'*.[34]

The European Court of justice began defining and shaping the principle of non-discrimination in the 1950s. The Court confirmed that the **prohibition of discrimination laid down in certain provisions of the EEC Treaty is a particular expression of the general principle of equality.**[35] In the Court ruling of *Ruckdeschel*[36], the principle of non-discrimination was defined as requiring that *'similar situations must be treated equally unless the differentiation is objectively justified'*. Conversely, where the situations at issue are objectively different, to treat them differently does not breach the principle of equal treatment.[37]

The express statement of the general principle of equality is the source of several provisions in the TFEU prohibiting discrimination in certain treaty areas.[38] The fundamental principle runs through the whole TFEU, extending to all other provisions where there is no specific prohibition of discrimination.[39] The ECJ has consistently confirmed the principle of equality as regards to the **free movement of workers**,[40] establishment,[41] provision of services,[42] and competition.[43]

In EU law, the general principle of equality manifests itself foremost in the negative and multiple forms of prohibitions of discrimination on specific grounds, e.g. **nationality, sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation**.[44] The aim of non-discrimination law is to allow all individuals an equal and fair prospect to access

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[33] *Davies*, Nationality Discrimination in the European Internal Market (2003) 10.
[34] Case 422/02 P. *Europe Chemi-Con (Germany) GmbH v Council* [2005] ECR I-00791, para. 33.
[35] Case 115/08 *ČEZ* [2009] ECR I-10265, para. 91.
[36] Joined cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1-1769, para. 7.
[37] Case 315/93 *Flip and Verdegem* [1995] ECR I-913, para. 26.
[38] Articles 18, 19, 45, 49, 56 and 57 TFEU.
[39] Joined cases 185/78 and 204/78 *Van Dam* [1979] ECR 2345; *Klamert* in Klamert/Kellerbauer/Tomkin (eds.), EU Treaties and the Charter of Fundamental Rights (2019) 414.
[40] Case 10/90 *Masgio v Bundesknappschaft* [1991] ECR I-01119; C-213/90 *ASTI / Chambre des employés privé* [1991] ECR I-03507; C-332/90 *Steen v Deutsche Bundespost* [1992] ECR I-00341.
[41] Case 112/91 *Werner v Finanzamt Aachen-Innenstadt* [1993] ECR 1-00429; C-311/97 *Royal Bank of Scotland* [1999] ECR I-02651; C-251/98 *Baars* [2000] ECR I-02787.
[42] Case 41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-01979; C-177/94 Perfili [1996] ECR I-00161.
[43] T-158/99 *Thermenhotel Stoiser Franz Gesellschaft mbH & Co. KG v Commission of the European Community* [2004] ECR II-00001.
[44] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 62.

opportunities available in the EU society. This principle essentially means that individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular 'protected' characteristic that they possess. The objective of EU anti-discrimination law is therefore to enhance the effectiveness of the prohibition of discrimination. Hence, as the ECJ explained in the early landmark case *Sotgiu,*[45] the inclusion of indirect (or covert) discrimination *'is necessary to ensure the effective working of one of the fundamental principles of the Community'*.[46] The concept of indirect discrimination can be seen as a tool to make visible and challenge the underlying causes of discrimination, which are often of a structural nature, i. e. caused by prejudices, practices based on the idea of the inferiority or the superiority of particular groups of people and stereotyped roles, and measures which do not seem to discriminate on first appearance, but do so indeed. [47]

4. Prohibition of nationality discrimination of EU migrant workers in the context of equal access to social and tax advantages

4.1. The development of the principle of non-discrimination

The **general prohibition of discrimination on grounds of nationality** was first mentioned in EU law in the Treaty of Rome of 1957. The prohibition first only applied within the scope of the application of the EEC Treaty and was further reiterated in the context of the treaty freedoms. Today, **discrimination on grounds of nationality is prohibited in all areas of EU law**.

Art **14 ECHR**[48] also contains a prohibition of discrimination on the basis of national origin. This is a 'general principle of Union law' pursuant to Art 6 (3) TEU. However, the provision is accessory to other Convention rights and thus has only a very limited scope of application.[49]

Written EU non-discrimination law can be found in **primary and secondary Union law**. It should be noted, that every provision of EU law must be interpreted in the light of the general principle of equality. Article 18 TFEU sets out the general prohibition of discrimination on grounds of nationality as *lex generalis*, which is given concrete form in respect of specific situations by other provisions, in e.g. Articles 45, 49, or 56 and 57 TFEU. Although only

[45] Case 152/73, *Sotgiu v Deutsche Bundespost* [1974] ECR 153.
[46] Case 152/73, *Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 11.
[47] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 24.
[48] European Charter of Human Rights.
[49] *Kucsko-Stadlmayer* in Mayer/Stöger (Ed.), EUV/AEUV Art 18 AEUV (1 March 2013, rdb.at), Rn. 8.

Articles 18, 45 and 49 TFEU expressly prohibit nationality discrimination, the ECJ has recognised that also Articles 56 and 57 TFEU embody the prohibition of non-discrimination on grounds of nationality and extend beyond that prohibition, in that they may preclude any unjustified obstacles or restrictions to free movement.

4.2. Non-discrimination of EU migrant workers

Indirect discrimination in the area of free movement of workers was first brought to court in *Sotgiu*.[50] The ECJ held that

> *'conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to a particular detriment of migrant workers.'* [51]

In other words, a provision of national law has to be regarded as indirectly discriminatory *'if it is intrinsically able to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage'*:[52]

An 'obstacle' to the free movement of workers constitutes a wide array of indistinctly applicable measures that may potentially render it less attractive to take on work in other Member States. There are only two specific limitations to this concept:[53] The ECJ held in *Graf*[54] that an event capable of hindering the exercise of free movement that is too uncertain and indirect cannot be regarded as an obstacle to the free movement of workers.[55] Furthermore, the ECJ clarified that disadvantages merely resulting from the disparities between the Member States' social rules and tax legislation are immaterial for assessing a restriction of the free movement of workers. Workers cannot reasonably expect that transferring their activities to a Member State other than the one in which they previously resided will be neutral as regards taxation, or social rules.[56] In

[50] Case 152/73, *Sotgiu* [1974] ECR 153.
[51] Case 152/73, *Sotgiu* [1974] ECR 153, para. 11.
[52] Case 514/12 *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken* [2013] ECLI:EU:C:2013:799, para. 26.
[53] *Klamert* in EU Treaties and the Charter of Fundamental Rights (2019) 620 et seq.
[54] Case 190/98 *Graf* [2000] ECR I-00493.
[55] Case 190/98 Graf [2000] ECR I-00493, para. 24 et seq.
[56] Case 387/01 *Weigel* [2004] ECR I-04981, para 55; C-393/99 *Hervein*]2002] ECR I-02829, para 5; C-566/15 *Erzberger* [2017] ECLI:EU:C:2017:347, para. 34.

general, **restrictions to the free movement of workers are only allowed if these can be justified on the basis of public order, public safety or public health**.

In the context of equal access of EU migrant workers to social and tax advantages, Article 18 TFEU, Article 45 (2) TFEU, as well as in secondary legislation Article 7(2) of Regulation (EU) 492/2011, are relevant.

4.3. Article 18 TFEU

Article 18 TFEU:

> *'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.'*

Article 18 TFEU applies to all situations governed by EU law where no other European legal measures provide for more specific rights of non-discrimination.[57] This means that Article 18 TFEU only applies where a specific formulation of the same principle in another provision is not available. If a measure is permissible under one of the special prohibitions of discrimination, Art 18 TFEU cannot protect against the treatment either.[58]

Since the entire integration concept of the TFEU is based on the principle of non-discrimination between nationals of the Member States, Art 18 TFEU is also understood as a **principle of interpretation** for all other prohibitions of discrimination in the Treaty.[59] If the ECJ finds a violation of the prohibition of discrimination in a specific Treaty provision, Art 18 TFEU is often used as an **additional element of justification** in the Court's evaluation of the case.[60] The ECJ also uses Art 18 TFEU in determining the scope of the fundamental freedoms.[61]

Article 18, second subparagraph, has the objective of **enabling the European legislator to take the necessary measures**, having regard to the rights and interests involved, to effectively eliminate discrimination on grounds of nationality in areas where it would not otherwise be

[57] *Weiss /Kaupa*, European Union Internal Market Law, 98; Case 1/93 *Halliburton Services* [1994] ECR I-01137 para 12; C-397/98 *Metallgesellschaft Ltd* [2001] ECR I-01727, para 38.
[58] Case 8/77 *Sagulo* [1977] ECR 1-1495, para. 11.
[59] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 16.
[60] Case 59/85, *Reed* [1986] ECR-1283, para. 29; C-332/90 *Steen* [1992] ECR I-341 para. 8; C-45/93 *Commission v Spain* [1994] ECR I-911, para. 10.
[61] Case 186/87 *Cowan* [1989] ECR 195, para. 14 et seq; C-382/08 *Neukirchinger* [2008] ECR 139, para. 28 et seq.

empowered to act on the basis of the special provisions governing the different spheres of application of the Treaty. The ECJ has held that measures adopted pursuant to the provision do not necessarily have to be limited to regulating rights deriving from the first subparagraph or provide clarifications of its direct effect, but may also deal with matters which appear necessary for the effective exercise of those rights, e.g. discrimination ban in the area of direct taxation and access of workers to social benefits.[62]

The ECJ held that where a measure is indirectly discriminatory, it does not automatically mean that the measure is incompatible with Article 18 TFEU. For that, it would also be necessary for the rule in question to be incapable of being **justified by objective circumstances**.[63]

Article 18 TFEU is not concerned with any disparities in treatment or distortions which may result from divergences existing between the laws of the various Member States, so long as those laws affect all persons subject to them, on the basis of objective criteria and without regard to their nationality.[64] The application of national legislation cannot be held contrary to the principle of non-discrimination merely because other Member States allegedly apply rules which are less strict.[65]

It follows from the ECJ's jurisprudence that a national measure will fall within the scope of Article 18 TFEU and be subject to the general principle of non-discrimination, insofar as it has an effect, even if indirect, on the exercise of free movement rights.

4.4. Article 45 TFEU

Article 45 TFEU:

> *1.* ***Freedom of movement for workers*** *shall be secured within the Union.*
>
> *2.* ***Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment****.*
>
> *3. It shall entail the right,* ***subject to limitations justified on grounds of public policy, public security or public health****:*
>
> *(a) to accept offers of employment actually made;*

[62] Case 295/90 *Parliament v Council* [1992] ECR I-04193, para 18.
[63] Case 274/96 *Bickel and Franz* [1998] ECR I-07637
[64] Joined cases 185/78 and 204/78 *Van Dam* [1979] ECR 2345 para 11.
[65] Case 44/94 *National Federation of Fishermen's Organisations* [1995] ECR I-03115; C-379/92 *Peralta* [1994] ECR I-03453.

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 45 TFEU ensures **free movement of workers** and **non-discrimination in the area of working conditions**. This means that measures which might place Union citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State are prohibited.[66]

The European Court of Justice has given Article 45 TFEU a wide effect by interpreting the concept of '**EU worker**' broadly. According to the ECJ, certain groups other than workers may invoke Article 45 TFEU. Individuals may retain their status as worker after the termination of their employment. Job-seekers can invoke certain rights under Article 45 TFEU, as can employers.[67] Family members of workers, including third-country nationals, are 'indirect' beneficiaries. The right to be treated equally to nationals of the host Member State to which workers from other Member States are entitled in that regard is thus extended to their family members.[68]

The fundamental right of free movement of workers has been embodied in various regulations and directives since the 1960s. The founding regulation on freedom of movement of workers, Regulation (EEC) 1612/68, now **Regulation 492/2011**, and the complementing directive on the abolition of restrictions on movement and residence, Council Directive 68/360, have been amended several times. Currently, the key EU provisions are Directive 2004/38/EC on the right of movement and residence, Regulation 883/2004 on the coordination of social security systems and Regulation 492/2011 on free movement of workers.

[66] Case 464/02 *Commission v Denmark* [2005] I-07929, para 34.
[67] *Weiss/Kaupa*, European Union Internal Market Law (2014) 153.
[68] Case 131/85 *Gül* [1986] ECR 1573, para 20; *Klamert* in EU Treaties and the Charter of Fundamental Rights (2019) 610.

4.5. Regulation (EU) 492/2011

Regulation (EU) 492/2011 on freedom of movement for workers within the Union[69] aims at facilitating the principle of equal treatment as regards free movement of EU workers and thus **overlaps with Articles 18 and 45 TFEU**.[70] One of its objectives is to secure and guarantee for EU migrant workers, including frontier workers, equal treatment with national workers as regards access to social benefits and tax advantages.

Article 7 of Regulation (EU) 492/2011:

> *1. **A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality** in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.*
>
> ***2. He shall enjoy the same social and tax advantages as national workers.***
>
> *3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.*
>
> *4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.*

Pursuant to Article 7(2) of Regulation (EU) 492/2011, migrant workers enjoy the same social and tax benefits in the host country as nationals. The prerequisite is that the worker has already found access to the labour market in the host state. For job seekers, Article 2 and 5 of the Regulation are relevant.[71] Workers and their family members may also rely on EU citizenship in order to claim their rights.[72]

[69] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27 May 2011.
[70] *Hancox*, Resolving the Problematic Inter-Relationship between Overlapping Primary and Secondary Law in the EU Legal Order (2017) 1.
[71] Case 316/85 *Lebon* [1987] ECLI:EU:C:1987:302 para 26; C-278/94 Commission v Belgium [1996]ECLI:EU:C:1996:321.
[72] *Windisch-Graetz* in Jaeger/Stöger (eds.), EUV/AEUV Art 45 AEUV (1 July 2019, rdb.at) Rn. 82.

5. Equal access of EU workers to social and tax advantages

Free movement of persons would be without effect if EU migrant workers were to suffer disadvantages in terms of social security and tax benefits when moving to another Member State. Therefore, welfare state benefits and entitlements must benefit both domestic workers and workers from other EU countries. For this reason, **Article 48 TFEU** provides that the EU Parliament and the Council may adopt necessary legislative measures in the field of social security to guarantee free movement of workers, i. e. Regulation (EU) 492/2011. However, a right to participate in social benefits can be derived not only from the right to free movement under **Article 45 TFEU**, but also from the prohibition of discrimination on grounds of nationality under **Article 18 TFEU**.

5.1. EU worker

Regulation (EU) 492/2011 does not provide a definition of EU worker. However, the European Court of Justice found that an EU migrant worker in this context is to be understood within the **definition under Article 45 TFEU**. Consequently, a 'migrant worker' in the sense of Article 7 (2) of Regulation (EU) 492/2011 is defined as an individual who "*for a certain period of time performs services for and under the direction of another person, in exchange for which he receives a remuneration*."[73] The work performed, must be "*real and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary*."[74] This means that the worker must have a **genuine link with the employment market** of the host Member State, in order to be entitled to unconditional access to social benefits in the state of employment.[75] Furthermore, the ECJ held that de notion of 'worker' under Article 7 (2) of Regulation (EU) 492/2011 cannot be made conditional upon the fulfilment of certain additional durational employment criteria or residence requirements.[76]

According to the preamble of Regulation (EU) 492/2011[77] and ECJ jurisprudence, any discrimination on grounds of nationality is prohibited not only against permanent workers working in another Member State but also against **seasonal and frontier workers**, i.e. a worker

[73] Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* ECLI:EU:C:1986:284, para. 17.
[74] Case 53/81 *Levin v Staatssecretaris van Justitie* ECLI:EU:C:1982:105, para 17 et seq.
[75] Czekaj-Dancewicz, Analytical Note on social and tax advantages and benefits under EU law. Access to social benefits and advantages for EU migrant workers, members of their families and other categories of migrating EU citizens (2013) 2.
[76] Case 39/86 *Lair v Universität Hannover* ECLI:EU:C:1988:322, para. 40 et seq.
[77] 5th recital of the preamble of the Regulation expressly stipulates that the right of free movement must be enjoyed without discrimination by permanent, seasonal and frontier workers.

employed in one Member State but living in another State, may not be required to pay more tax than a national worker residing in the state of employment.[78]

5.2. Family members of the EU migrant worker

A second category of individuals enjoying specific rights of equal treatment under Regulation (EU) 492/2011 are the children and other family members (i.e. the spouse or registered partner) of the EU migrant worker. They are granted derived rights under Article 7(2) Regulation (EU) 492/2011 in order to prevent discrimination to the detriment of **dependants of the worker** to achieve a full integration into the host State's society. Therefore, dependent children and family members of Union workers are entitled to the same social and tax advantages as the family members of national workers, irrespective of their place of residence.[79] The **status of dependant family member results from a factual situation** which may be evidenced by objective factors such as a joint household or when the relative meets the definition of 'family member' written down in Article 2(2) of the Directive 2004/38/EC[80].[81]

5.3. Social advantage

The concept of "social advantages" is interpreted by the European Court of Justice very broadly. It covers not only all benefits **connected with contracts of employment** but also **all other advantages which are accessible to citizens of the host Member State** and consequently are also open for EU migrant workers because of their **objective status as workers** or **by virtue of the mere fact of their residence on the national territory**.[82] Social advantage is to be understood as:

> *'All advantages, whether or not linked to a contract of employment, that are generally granted to national workers primarily because of their objective status as workers, or by virtue of the mere fact of their residence on the national territory, and the extension of which to workers who are nationals of other Member States seems likely to facilitate their mobility within the EU. '*[83]

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[78] Case 57/96 *Meints v Minister van Landbouw* ECLI:EU:C:1997:564, para 50; C-213/05 *Geven* ECLI:EU:C:2007:438, para 15; C- 20/12 *Giersch* ECLI:EU:C:2013:411, para 37.
[79] Case 94/84 *ONEM v Deak* [1985] ECLI:EU:C:1985:264, para 22; C-337/97 *Meeusen* [1999] ECLI:EU:C:1999:284, para 22.
[80] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123.
[81] Case 401/15 *Depesme and Kerrou* ECLI:EU:C:2016:955, para 55 et seq.
[82] *Czekaj-Dancewicz Alexandra*, Analytical Note on social and tax advantages and benefits under EU law. Access to social benefits and advantages for EU migrant workers, members of their families and other categories of migrating EU citizens (2013) 1.
[83] Case 85/96 *Martinez Sala* ECLI:EU:C:1998:217.

Social advantage covers all **financial and non-financial advantages** even those which are not traditionally perceived as social advantages. The Court has decided, for example, that the right to require that legal proceedings take place in a specific language[84] and the possibility for a migrant worker to obtain permission for his unmarried partner to reside with him[85] are also to be regarded as falling within the concept of social advantage under Article 7(2) of Regulation (EU) 492/2011. Further, social advantages include **study grants** ever since *Casagrande*[86] where the ECJ held that even though education had not been transferred to the competence of the Union, the right to free movement of workers had a superseding functional nature, leading to the inclusion of study grants in the meaning of Article 7 (2) Regulation (EU) 492/2011.[87]

Social advantage within the meaning of Article 7(2) of Regulation (EU) 492/2011 includes e. g. **minimum subsistence benefits**[88]**, child-raising allowances**[89]**, study grants**[90]**, public transport fare reductions for large families**[91]**, the right to have legal proceedings in own language** and **funeral payments**[92]. If contributions to additional old-age and survivors' pensions are paid to a person doing his or her military service, this does not constitute a social advantage within the meaning of Article 7(2) of Regulation (EU) 492/2011, as this benefit is not based on an employment relationship, but is intended to compensate for the disadvantages resulting from compulsory military service.[93] Benefits based on national recognition for military service are also not considered social benefits under Regulation (EU) 492/2011.[94]

Depending on the nature of certain benefits, it is possible to require from EU citizens to have a **certain degree of integration** in the host Member State to be entitled to certain benefits, i. e. (self-)employment. **EU workers and frontier workers participate in the employment market of a Member State** which establishes a **sufficient link of integration** with the society of that Member State. According to the ECJ, the **link of integration** arises from the fact that the worker **pays taxes in the host Member State** by virtue of their employment, so the migrant worker in this way **contributes to the financing of the social policies of that State** and should

[84] Case 137/84 *Mutsch* ECLI:EU:C:1985:335.
[85] Case 59/85 *Netherlands v Reed* [1986] ECR 01283.
[86] Case 9/74 *Casagrande* ECLI:EU:C:1974:74.
[87] Case 9/74 Casagrande ECLI:EU:C:1974:74, para. 12 et seq; C-39/86 Lair ECLI:EU:C:1988:322, paras. 15, 21, 22, 27 and 28; C-3/90 Bernini ECLI:EU:C:1992:89, para 23.
[88] Case 249/83 *Hoeckx* [1985] ECR -00973.
[89] Case 85/96 *Martinez Sala* ECLI:EU:C:1998:217.
[90] Case 542/09 *Commission v Netherlands* [2012] ECLI:EU:C:2012:346.
[91] Case 32-75 *Cristini v SNCF* [1975] ECR 1085.
[92] Case 237/94 *O'Flynn v Adjudication Officer* [1996] ECR 2617.
[93] Case 315/94 *de Vos* ECLI:EU:C:1996:104.
[94] Case 207/78 *Even* ECLI:EU:C:1979:144; *Windisch-Graetz Michaela* in Jaeger/Stöger (Ed.), EUV/AEUV Art 45 AEUV (1 July 2019), Rn. 85.

profit from them under the same conditions as national workers. Consequently, EU migrant workers may make full use of the principle of equal treatment, as compared with national workers, as regards social and tax advantages.

5.4. Tax advantage

Although **direct taxation is an exclusive national competence**, Member States may not introduce tax legislation that discriminates directly or indirectly on the basis of nationality, i. e. tax benefits may not only be reserved to residents of a Member State. National tax rules deterring a national of a Member State from exercising his right to free movement constitutes an **obstacle to free movement** when not objectively justified.[95]

The European Court of Justice found that national taxation rules must be consistent with EU law. Member States may only make differentiations in treatment on the basis on the need to **preserve the cohesion of the national tax system** in very limited situations. For example, in *Wielockx*[96], the Court held that if a non-resident taxpayer is not given the same tax treatment as regards deductions from his taxable income as a resident, his personal situation is not taken into account, neither by the tax authorities of the State where he works because he is not resident there, nor by the State of residence because he receives no income there. Consequently, his overall tax burden will be greater and he will be at a disadvantage compared to a resident. Such a differentiation cannot be justified by the necessity to protect the fiscal cohesion of the given Member State.

The concept of tax advantage is not so broadly covered by the European Court of Justice as the concept of social advantages. The aim of Article 7(2) of Regulation (EU) 492/2011 is to provide EU migrant workers with i. a. the same tax benefits, such as tax deductions or tax reliefs, in comparison to national workers. Examples of tax advantages are t**ax deductions in relation to contributions for an occupational pension, private sickness and invalidity insurance**.[97]

5.6. Scope

- 'Within the application of the Treaties'

Initially, the principle of non-discrimination was only to be applied to areas where the matter falls '*within the application of the Treaties'*. In *Bartsch,*[98] the European Court of Justice clarified that where the allegedly discriminatory treatment contains no link with EU law, the

[95] Case 385/00 *F.W.L. de Groot v Staatssecretaris van Financiën* [2002] ECR I- 11819
[96] Case 80/94 *Wielockx* [1995] ECR I-02493.
[97] Case 204/90 Bachmann [1992] ECR I-00249; C-130/00 *Danner* [2002] ECR I – 8147.
[98] Case 427/06 *Bartsch* [2008] ECR I-07245.

application of the principle of non-discrimination is not mandatory. However, after decades of Treaty interpretation, the ECJ developed the approach that the **substantive scope of the prohibition of nationality discrimination is not limited to national competence areas**.

In *Casagrande*[99], the ECJ had to rule whether Article 12 of Regulation (EEC) 1612/68[100] which confers upon children of workers a right to equal access to education, also extends to financial aid for students. The German Government asserted that education was an exclusively national matter and that the Member States had not transferred the competence to regulate educational matters to the European Union. Thus, the German Government argued that the EU lacked the power to grant rights to workers' family members in the field of education. The German Government claimed that the scope of the right to equal treatment depended on whether and, if so, to what degree, the powers in a given policy area had been transferred to the Union.[101]

In its ruling, the ECJ held that although the powers in the field of education were legally in the hands of the Member States, this did not imply that the EU institutions did not have the power to **adopt measures aimed at realizing free movement of workers** in the field of education. The Court concluded that **the application of the prohibition of nationality discrimination is not conditional upon the transfer of powers in substantive policy areas as long as the matter falls within the scope of freedom of movement legislation.** Therefore the EU is permitted to extend the application of the prohibition of nationality discrimination to policy areas, such as education, that fall within the domain of the Member States' competence.[102]

The Court maintained this reasoning in the cases *Forcheri*[103] and *Gravier*[104], which both involved the spouse of a worker and a student respectively, who challenged the legality of a tuition fee they had to pay as a foreign student in Belgium. In explaining why Article 18 TFEU could be relied upon, the Court opined that even though the European institutions (still) had not (yet) been given genuine powers in the field of vocational training, access to such training was **'not unconnected' with Union law**. The ECJ held that the **common vocational training policy was thus gradually being established** through provisions on free movement of workers and a series of soft law measures concerning vocational training. From this, the Court concluded that

[99] Case 9/74 *Casagrande* [1974] ECR 773.
[100] Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community[1968] OJ L 257/2.
[101] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 65.
[102] *Weiler*, The Transformation of Europe (1991) 2439 et seq.
[103] Case 152/82 *Forcheri* [1983] ECR 2323.
[104] Case 293/83 *Gravier* [1985] ECR 293.

access to such training had been brought within the scope of the Treaty and that discriminatory tuition fees run counter to Article 18 TFEU.[105]

The Court decided so in the three education cases[106] because students, at that time, were not explicitly covered by the free movement regime. The EU institutions did not yet possess the power to realize **free movement of students**. This was because students were not considered economically active Member State nationals and could therefore not rely on the free movement of workers, i.e. students could not rely on the specific equal treatment rights of workers in the Treaty of Rome. Thus, in order to reach the desired conclusion, the Court had to fill a gap in the EU competence catalogue, and it did so by holding that access to vocational training and education had been brought within the scope of the Treaty.[107]

In subsequent cases, the ECJ applied the functional power of realizing freedom of movement[108] also to rights or benefits that derive from other policy areas reserved to the Member States, e.g. **social security**,[109] **taxation**, etc.[110]

It should be noted, that the law on free movement does not only prohibit discrimination on grounds of nationality, but also more importantly **discriminatory restrictions** in relation to goods, services and capital. In *Krauss*,[111] the ECJ held that any measure that, '*is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty'* is not to be applied.[112] For example, the Court held that providers or recipients of services may invoke the general prohibition on nationality discrimination to claim equal access to public museums and courts, and to use minority languages in court proceedings.[113]

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[105] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 66f.
[106] Case 9-74 *Cassagrande* [1974] ECR 773; Case 152/82 Forcheri [1983] ECR 2323; Case 293/83 *Gravier* [1985] ECR 293.
[107] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 67.
[108] *De Witte*, The Scope of Community Powers in Education and Culture in the Light of Subsequent Practice, in Bieber/Ress (eds.), Die Dynamik des Europäischen Gemeinschaftsrechts 1987), 261 et seq.
[109] Case 57/96 *Meints* [1998] ECR I-6689.
[110] Case 279/93 *Schumacker* [1995] ECR 1-225.
[111] Case 19/92 *Kraus* [1993] ECR I-1663.
[112] Case 19/92 *Kraus* [1993] ECR I-1663, para. 32.
[113] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 66.

As a result, the power to realize free movement of persons permits the Union to invade substantive national policy areas and to confer upon beneficiaries a right to equal treatment.[114] The Court held that **the ban on nationality discrimination applies to national rules providing rights that must be regarded as a 'corollary' of freedom of movement**.[115] Consequently, every EU citizen who exercises freedom of movement or free movement rights is covered by the prohibition of discrimination on the grounds of nationality.

- Outside the scope?

Article 18 TFEU specifically states that the prohibition of discrimination on grounds of nationality applies '*within the scope of application of the Treaties without prejudice to any special provisions contained therein*.' However, entire areas of law that are not affected by EU law, i.e. domestic (internal) matters, have become quite rare. A minimal connection of a situation to Union law is sufficient to consider Art 18 TFEU applicable.[116]

The 'special provisions' referred to in Article 18 TFEU concern Treaty derogations. They only seem to capture **Articles 45(4), 51 and 61 TFEU**, which state that the right to equal treatment as regards the right to take up employment, the right of establishment and the right to provide services do not apply to access to the public service and the exercise of official authority. The **public policy, public health and public security** exceptions, as contained in i.a. **Article 45(3) TFEU, cannot be regarded as special derogations for purposes of Article 18 TFEU**. This exception permits Member States to restrict Union citizens' free movement rights, but not the right to equal treatment.[117]

Article 45(4) TFEU provides that Article 45 and the prohibition of nationality discrimination **'shall not apply to employment in the public service'**. Yet, according to ECJ jurisprudence, the prohibition of nationality discrimination very well applies to the public service. The Court does not allow a Member State to simply state that a specific organ falls under its public service and is thus free to exclude non-nationals from it.[118] Instead, a non-national can invoke the non-discrimination rule and impose on the Member State concerned the duty to explain that the post in question involves the exercise of public powers or requires from the person occupying it a

[114] Case 9/74 *Casagrande* [1974] ECR 773.
[115] Case 186/87 *Cowan* (1989] ECR 195; *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 69.
[116] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 58 et seq.
[117] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 73.
[118] *Beenen*, Citizenship, Nationality and Access to Public Service Employment. The Impact of European Community Law (2001), 95 et seq.

'special relationship or allegiance to the state'.[119] The ECJ applies in Article 45(4) TFEU a justification test.[120]

As a result, **in cross-border situations the substantive scope of the prohibition on grounds of nationality can be regarded as unlimited**.[121] The non-discrimination rule extends to, or can be invoked for, any right or benefit, regardless of the policy areas they stem from and their positive or negative impact on freedom of movement. **Every discriminatory national rule is subject to the 'discrimination test'**.[122]

In conclusion, it is not important whether or not competences in substantive policy areas have been transferred to the Union in the context of nationality discrimination in order to benefit from the equality doctrine. There is no reason why the EU, in addition to the power to realize freedom of movement, would also need a specific power in the substantive policy area concerned. Requiring a double competence would reduce the scope of the right to equal treatment significantly and thus undermine the achievement of free movement of persons. The ECJ held that the ban on nationality discrimination applies to national rules providing rights that must be regarded as a 'corollary' of freedom of movement.[123]

The ECJ has consistently held that the expression '*within the scope of the Treaty*' must be read in conjunction with the provisions of the Treaty on **Citizenship of the Union**. This is because Union Citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to receive the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[124] The substantive scope of the right to equal treatment has been expanded as to have become unlimited. Discriminatory measures can only be accepted if they can pass the (non-) discrimination test.[125]

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[119] Case 149/79 *Commission v Belgium* [1980] ECR 3881; C-47/02 *Anker* [2003] ECR 1-10447.
[120] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 74.
[121] *Wollenschliiger*, A New Fundamental Freedom Beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration (2011) 21.
[122] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 74.
[123] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 67f.
[124] Case 403/03 *Schempp* [2005] ECR I-06421.
[125] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 69.

5.5. Horizontal effect

The ECJ has acknowledged the **application of the principle of non-discrimination based on nationality in private disputes**.

In *Angonese*,[126] the ECJ recognised the **'full' horizontal effect of the prohibition of nationality discrimination in respect to employment**, **remuneration and other employment related conditions.** Mr Angonese brought a cause of action against a private bank concerning a requirement imposed by the bank for admission to a recruitment competition. The ECJ held that this requirement amounted to discrimination in the sense of ex-Article 48 EC, now Article 45 TFEU. Considering the fact that the case involved a private dispute, the Court declared unequivocally that '*the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be regarded as applying to private persons as well*'.[127] As a result, Article 45 TFEU applies directly and fully (unconditionally) in private relations.

'Full' horizontal direct effect means that a non-discrimination clause can be invoked unconditionally against all types of discrimination falling within its scope of application, regardless of whether the discrimination at issue appears in a vertical or a horizontal setting. Hence, private parties are bound by the principle of non-discrimination in the same situations as public parties.

The **horizontal direct effect of the non-discrimination principle based on nationality applies in all cases falling within the scope of EU law**, e.g. the Court affirmed the horizontal direct effect of anti-discrimination secondary law. [128]

6. Non-discrimination test

6.1. General approach

The Court's procedure when examining if a measure (individual action or general rule) is discriminatory, can be determined in three stages:

[126] Case 218/98 *Angonese* [2002] ECR 4139
[127] Case 218/98 *Angonese* [2002] ECR 4139, para. 36, 39 et seq; C-94/07 *Raccanelli* [2008] ECR I-05939, para. 44–48.
[128] *De Mol*, The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (unbridled) expansion of EU law? (2011) 109.

1. **Does the case fall within the field of application of non-discrimination law** that is to be applied in the relevant EU Member State, i.e. national law as seen against the background of EU law? - Yes. →
2. **Does the measure amount to apparent (direct or indirect) discrimination** on a particular ground? - Yes. →
3. **Can the measure be justified** based on statutory derogation or objective justification? - No.[129]

When the first two questions are answered with a "yes" and the third with a "no", the measure is discriminatory. The prohibition of discrimination does not apply absolutely; the non-discrimination ban only prohibits 'discrimination', i.e. differentiations that are not objectively justified.[130]

6.2. Finding the applicable law

The right to equal treatment and non-discrimination is given expression in several sources of EU law - the Treaties,[131] the Charter of Fundamental Rights, the general principles of EU law[132] and EU secondary legislation.[133] When more than one provision is *prima facie* applicable, the ECJ, and national courts must determine which expression of the right to equal treatment is to be relied upon.[134]

In general, the prohibition of discrimination on grounds of nationality is the only type of discrimination that is prohibited in all areas of EU law, i.e. comprehensive application of Article 18 TFEU. Even so, it is necessary to find the relevant applicable special provision. Treaty provisions and secondary law may overlap.[135] For instance, Article 45 TFEU entails the abolition of any discrimination based on nationality between workers of the Member States. Articles 46 and 48 TFEU furthermore empower the Council respectively to '*issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers'* and to *'adopt such measures in the field of social security*

[129] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 38, 83.
[130] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 12; C-117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, para. 7.
[131] Articles 8, 18, 153 and 157 TFEU.
[132] Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753; C-144/04 *Mangold* [2005] ECR 9981.
[133] E.g. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/1.
[134] *Hancox*, Resolving the Problematic Inter-Relationship between Overlapping Primary and Secondary Law in the EU Legal Order (2017) 1.
[135] *Hancox*, Resolving the Problematic Inter-Relationship between Overlapping Primary and Secondary Law in the EU Legal Order (2017) 1f.

as are necessary to provide freedom of movement for workers'. The question arises what provision is the most suitable to rely upon, because the ECJ recognised the direct effect of the free movement provisions,[136] there are several secondary measures (designed to give the same effect) which overlap with these Treaty provisions.

National courts are called upon to judge on the applicability of non-discrimination law. Where a term is not defined in EU law or where it raises questions of EU law the European Court of Justice provides authoritative interpretations. According to ECJ jurisprudence, elements that describe the scope in a positive way have to be interpreted in a broad manner, and elements that limit the scope of EU law have to be interpreted in a narrow manner.[137]

6.3. Direct or indirect discrimination?

In order to be able to identify a case of direct or indirect discrimination, the ECJ has developed the direct/indirect discrimination test, which is presented below.

7. Direct discrimination test

7.1. The notion of direct discrimination

Direct discrimination is to be said to exist when

- an individual is **treated less favourably**,
- **by comparison to** how **others**, who are **in a similar situation**, have been or would be treated, and
- the reason for this is a particular characteristic they hold, which falls under a '**protected ground**', and
- **cannot be objectively justified**. [138]

The disadvantageous treatment is based on the possession of **specific characteristics** which distinguish an individual from other people. The **comparability of situations** determines the presence of discrimination. Hence, the finding of direct discrimination is based upon an assessment of the victim's treatment with a (potential) **comparator**. It is premised on the notion that the complainant was treated in a different way from a similarly situated hypothetical

[136] Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1405.
[137] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 38.
[138] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 41.

comparator, and that the basis for the differential treatment was the p**rohibited ground of discrimination**.[139] The compared situation may be either past, present, or even hypothetical.[140]

Direct discrimination on grounds of nationality was identified in following situations where nationals received more favourable treatment:[141]

- the right to register a watercraft;[142]
- the right of authors to prohibit the domestic distribution of a phonogram produced without their consent;[143]
- the term of protection of copyright;[144]
- the right to confer legal personality to an association;[145]
- right of residence;[146]
- facilitated litigation in the enforcement of fundamental freedoms;[147]
- entitlement to social assistance;[148]
- entitlement to compensation for crime victims;[149]
- the right not to execute a European arrest warrant;[150]
- the right to stay without being included in a database;[151]
- the exemption from certain payment obligations (e.g. free admission to state museums);[152]
- the exemption from tuition fees.[153]

7.2. Ground of discrimination

The **identification of the correct criterion** on which the distinction is made is the first step taken by the court in discrimination cases. Sometimes it can be a difficult task and it may happen

[139] *Craig/de Burca*, EU Law: Text, Cases, and Materials (2015), 896.
[140] *Masselot*, The New Equal Treatment Directive: Plus Ça Change… (2004) 96.
[141] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 42.
[142] Case 151/96 *Commission v Ireland* [1997] ECR I-3321 para. 15; Case 62/96 Commission v Greece [1997] ECR I-6725, para. 17.
[143] Joined Cases 92/92 und 326/92 *Collins* [1993] ECR I-5145 para. 33.
[144] Case 360/00 Ricordi [2002] ECR I-5089 para. 34.
[145] Case 172/98 *Commission v Belgium* [1999] ECR I3999, para. 14.
[146] Case 36/75 *Rutili*, [1975] ECR 1219, para. 50.
[147] Case 122/96 *Saldanha* [1997] ECR I-5325, para. 17, 19.
[148] Case 456/02 *Trojani* [2004] ECR I7573, para. 42 et seq.
[149] Case 164/07 *Wood* [2008] ECR I-4143 para. 15.
[150] Case 123/08 *Wolzenburg* [2009] ECR I-9621, para. 70.
[151] Case 524/06 *Huber* [2008] ECR I-9705, para. 73.
[152] Case 45/93 *Commission v Spain* [1994] ECR I-911, para 10; C-388/01 *Commission v Italy* [2003] ECR I-721, para 14.
[153] Case 47/93 *Commission v. Belgium* [1994] ECR I-1593, para. 19; Case 293/83 *Gravier* [1985] ECR 0593, para. 26.

that one ground is treated as a basis of either direct or indirect discrimination. For instance, in *Vera Hoeckx*[154], the Advocate General treated residence as a ground leading to indirect nationality discrimination. The European Court of Justice, however, held that if the residence requirement is imposed exclusively on nationals of other Member States, then the discrimination is directly based on nationality.[155]

The motivation for the application of a directly discriminatory measure is less important and it is not necessary that the discrimination has an intentional character.[156] The ECJ has given a broad interpretation of the scope of the 'protected ground.' It can include 'discrimination by association', where the victim of the discrimination is not themselves the person with the protected characteristic. It can also involve the particular ground being interpreted in an abstract manner. This makes it imperative that practitioners embark on detailed analysis of the reasoning behind the less favourable treatment, looking for evidence that the protected ground is causative of such treatment, whether directly or indirectly. This means, under EU law, direct discrimination can be established, even if there is no identifiable complainant claiming to have been a victim of such discrimination.

In *Commission v Italian Republic*[157], the ECJ prohibited the municipality of Florence, and a number of other Italian municipalities, from giving certain selective discounts on entrance to museums, monuments, and attractions only to residents of the area. In Florence and Padua, residents of certain ages of the area, i.e. children and pensioners, irrespective of their nationality, obtained free entry to the sight-seeing places, while non-residents of those age classes did not.

The ECJ ruled that the restricting measure was a residence condition; a term that allows benefits only to those resident in a particular area. The core of the objection was that the terms of these selective discounts discriminated on grounds of nationality, contrary to Articles 12 and 49 TEC, now Articles 18 and 56 TFEU. The ECJ stated:

> '*It is common ground that the free admission to museums, monuments, galleries, archaeological digs, parks and gardens classified as public monuments, granted by local or decentralised authorities, is only in favour of Italian nationals and persons resident within the territory of the authorities running the museum or public authority*

[154] Case 249/83 *Vera Hoeckx* [1985] ECR 973.
[155] Case 249/83 *Vera Hoeckx* [1985] ECR 973, para. 24.
[156] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 42.
[157] Case 388/01 *Commission v Italy* [2001] ECR I-721.

in question, in particular where they are aged over 60 or 65 years, so that the benefit of free admission is denied to tourists who are nationals of other Member States, and non-residents who fulfil the same objective age requirement'.[158]

The ECJ noted that the residency condition is '*liable to operate mainly to the detriment of nationals of other states*', since most non-residents are foreigners. In consequence, the Court of Justice found that, even insofar as the schemes operated on the basis of residence, they amounted to nationality discrimination and were contrary to EU law.[159]

7.3. Less favourable treatment

The prohibition of discrimination on grounds of nationality means in principle that, within the scope of application of the Treaties, all nationals of the Member States who are in the same situation are **entitled to equal treatment under the law**, irrespective of their nationality, subject to express exceptions.[160]

Examples for less favourable treatment are:[161]

- the person concerned is excluded from certain services; for example, the provision of a service against payment is denied or an obligation to pay is imposed on the person concerned, which does not apply or applies to a lesser extent to a national in a comparable situation;[162]
- a more burdensome procedure for foreigners;[163] However, the exclusion of orders for payment denominated in foreign currencies is permissible insofar as the normal action procedure is fully open.[164]

Less favourable treatment can be relatively easy to identify in the case of direct discrimination because statistical evidence is usually not a requirement in nationality discrimination cases. To show a case of less favorable treatment, you make a comparison to someone in a similar situation who is treated more favorable than you.

[158] Case 388/01 *Commission v Italy* [2001] ECR I-721, para. 15.
[159] Case 388/01 *Commission v Italy* [2001] ECR I-721, para. 28.
[160] Case 184/99 *Grzelczyk* [2001] ECR I-06193, para. 31; C-224/98 *D'Hoop* [2002] ECR I-6191, para. 28; C-148/02 *Garcia Avello* [2003} ECR I-11613, para. 23; *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 31
[161] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 31.
[162] Case 293/83 *Gravier* [1985] ECR 593, para. 26.
[163] Case 22/80 *Boussac* [1980] ECR 3427, para. 10.
[164] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 31.

7.4. Comparable situation

Comparability is a precondition for finding direct or indirect discrimination. Less favourable treatment can be established by making a comparison to someone in a similar situation. In order to make a comparison, the complainant has to identify a group of persons, not an individual[165], and show that the reason for the less favourable treatment is a protected characteristic of the victim. It is therefore necessary to identify a suitable '**comparator'**, i.e. a person in materially similar circumstances, or to construct helpful hypothetical comparators,[166] so as to assess if other persons or groups in a similar situation would have not or have not suffered the same negative effects. Comparators are similar to the complainant in all relevant respects but for the protected characteristic.

The **comparison** is made in order determine whether an accused discriminator has acted because of a protected characteristic and to show causation, i.e. that the adverse treatment at issue occurred because of the protected trait of the claimant and would not have occurred absent impermissible reliance on that trait.[167] The comparator is examined or constructed against which the claimant's treatment can be assessed. [168]

The finding of comparability can be quite difficult: It inevitably leads to the questions: 'What cases are alike?' and 'What situations are different from each other?': The element *same situation* translates into 'similarly situated' or 'comparability of situations'. This is determined by assessing the sameness and difference, and by a value judgement concerning the relevance of the sameness or the difference found in the specific context at issue. The difficulty here lies in the capacity of human judgement to ignore, to recognize or to introduce inequalities on whatever grounds.[169]

A **hypothetical comparator** is used where it is not possible to find a real person, i.e. an actual comparator, who is in the same or similar enough situation as the claimant, because the situation for instance has never happened before. This means, the comparator does not have to 'exist'; establishment of the probability of better treatment is sufficient. In this context, the European Court of Justice held:[170]

[165] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 43.
[166] *Epstein/Masters*, Direct discrimination: A practical guide to comparators (2011) 3.
[167] *Goldberg*, Discrimination by Comparison (2011) 731.
[168] *Epstein/Masters*, Direct discrimination: A practical guide to comparators (2011) 3.
[169] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 20.
[170] *Holzleithner*, Mainstreaming Equality: Dis/Entangling Grounds of Discrimination (2005) 14.

> *In deciding upon the characteristics of a hypothetical comparator, it is necessary to determine the reason why the complainant received the treatment of which complaint is made. The relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision of which complaint is made.*[171]

Hypothetical comparators are therefore used as a heuristic device to help discern whether discrimination has occurred.[172] Even so, it is not always easy to find an appropriate comparator. The court has to find a comparator to determine whether the effect of a particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation. The right choice of the comparator itself requires a complex value judgement as to which of the myriad differences between any two individuals are relevant and which are irrelevant. To determine which factual matters are relevant is to assess whether the reason for the claimant's treatment is a protected characteristic. If the comparator would have been treated differently, the only explanation for that differential treatment must be the protected characteristic.[173] The choice of the relevant characteristics is often itself determinative of the outcome.

Sometimes it is possible to find discrimination only by concentrating on the reason for the less favourable treatment. If it is clear that a person was treated differently because of a protected characteristic, the court can find that the claimant has been discriminated against without having to look at evidence about a comparator.[174]

7.5. Causation

The alleged directly discriminatory measure must be **substantially connected** with the prohibited ground. The link with the ground on which the discrimination is based must be strong both in form and in substance. Regarding the form, the link is straightforward inasmuch as the prohibited ground is explicitly and obviously relied on.[175] In order to determine the causation, it may help to ask the following question: would the person have been treated less favourably had they been of the same or different Member State nationality? If the answer is yes, then the less favourable treatment is clearly caused by the grounds in question.

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[171] ICR C-1279 *Stockton on Tees BC v Aylott* [2011] EWCA Civ 910, para. 44.
[172] *Goldberg*, Discrimination by Comparison (2011) 728.
[173] *Epstein/Masters*, Direct discrimination: A practical guide to comparators (2011) 3.
[174] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 45.
[175] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 48.

The rule or practice that is being applied does not necessarily need to refer explicitly to the 'protected ground', as long as it refers to another factor that is in-dissociable from the protected ground. Essentially, when considering whether direct discrimination has taken place, one is assessing whether the less favourable treatment is due to a 'protected ground' that cannot be separated from the particular factor being complained about. This means, direct discrimination may also occur where a criterion which appears to be neutral is in reality inextricably linked to the ground prohibited in the European Union law.[176]

7.6. Objective justification

In general, **direct discrimination can be justified only by particular reasons clearly set out in legislation**, this means, only by a closed list of justification grounds. In contrast, indirect discrimination can be excused by reasons which are not further defined in the legislation.

Generally, the rules on freedom of movement for persons are subject to limitations justified on grounds of *public policy, public security or public health*. The concept of these justification clauses is very vague, but subject to the jurisdiction of the ECJ which interprets the terms very narrowly.[177] Their scope may not be determined unilaterally by the individual Member States, but must be determined autonomously on the basis of Union law and is subject to review by the European Court of Justice. However, the ECJ grants the national authorities a margin of appreciation. Measures taken on grounds of public policy or public security are to be based exclusively on the personal conduct of the individual concerned. Restrictive measures may include entry bans, expulsions, or restrictions on movement to certain areas of the state's territory.[178]

In certain cases, the ECJ took into account the possibility to justify direct nationality dincrimination although it was not predicted in the provisions of the TFEU. Article 18 TFEU which relates to discrimination on grounds of nationality, does **not refer to the possibility of justification**. Even so, in the case *Sermide*[179], the Court referred to objective justification in a general way and did not provide that it could apply only in the context of indirect discrimination. The case was connected with the specific nature of the EU Common Agricultural Policy (CAP). In this specific area, the EU institutions have a discretionary power

[176] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 46.
[177] Case 41/74 *Van Duyn* [1974] ECR 1337; C-139/85 *Kempf* [1986] ECR 1741.
[178] Case 100/01 *Oteiza Olazabal* [2002] ECR I-10981.
[179]Case 106/83 *Sermide* [1984] ECR 4209.

which corresponds to the political responsibilities imposed on them by the Treaty[180]. This power allows to take into account different interests and factors such as political, economic, social and monetary. On the whole, the ECJ does not always take the traditional approach according to which direct discrimination can be justified only by particular reasons clearly set out in legislation.

In academic writing, opinions differ whether the **prohibition of direct discrimination on grounds of nationality has an absolute character and as such cannot be justified**.[181] The difference in the initial situation resulting from the different citizenship may even make **differentiations necessary**. In this case, however, it is not nationality as such, but rather other related facts, from which the factual justification of a differentiating regulation arises. The majority of legal theorists say that unequal treatment which is explicitly based on the criterion of nationality may be **justified under exceptional circumstances**.[182] In this context, the question arises which aspects justify direct nationality discrimination. The academia concluded that **compelling public interests** may justify restrictions on fundamental rights in accordance with the legal reservations of the ECHR after a thorough weighing of interests in the light of the Treaty objectives.[183] In any case, the assessment of this balancing test involves a valuation in each individual case. According to unanimous opinion, **Art 18 TFEU contains a prohibition of discrimination, but not also a prohibition of restrictions**.[184] As a result, the prevailing view is that **Art 18 TFEU does not contain an absolute prohibition of differentiation**; unequal treatment that is explicitly based on the criterion of nationality is thus also accessible to an objective justification.[185]

However, the European Court of Justice leaves it up to the national court in question to determine the legitimacy of the justification relied upon.[186] This is because the ECJ is confined

[180] Case 265/87 *Schräder v Hauptzollamt Gronau* [1989] ECR 2237, C-8/89 *Zardi v Consorzio agrario provinciale di Ferrara* [1990] ECR I-2515, C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and Others* [1990] ECR I-4023.
[181] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 52.
[182] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 35.
[183] *Zuleeg*, Art 12 EGV, in Groeben/Schwarzer (eds.), Europäisches Unionsrecht, Rn. 3; *Kucsko-Stadlmayer*, Art 18 AEUV, Rn. 36
[184] *Bogdandy*, Art 18 AEUV, in *Grabitz/Hilf/Nettesheim* (eds.), Das Recht der Europäischen Union, Rn 12, 19; *Kucsko-Stadlmayer*, Art 18 AEUV, Rf. 37.
[185] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 35.
[186] *Davies*, Nationality Discrimination in the European Internal Market (2003) 37; Note: Every so often, however, the ECJ does intervene to a greater degree in actual outcomes of cases by more specific answers to preliminary questions, leaving the national court with no real discretion in what they decide.

to questions of law and interpretation of the Treaty, but the application of those principles to a specific measure is exclusively for the national judge.[187]

The European Court of Justice, for example, not accepted the argument that nationals are bound to the state in 'national solidarity' as a justification for exclusion from compensation for victims of crime.[188] Furthermore, the fact that non-Belgians do not pay taxes in Belgium is not a justification for higher tuition fees.[189] However, the requirement of five years' residence in the Member State for the granting of a maintenance grant was justified because it only required a certain degree of integration.[190] The idea that the acquisition of housing should be made easier for emigrated nationals and that they should be offered an incentive to return in order to prevent population decline was not considered a valid argument for the exemption of the real estate transfer tax.[191] Nor was the argument accepted that foreigners pose a greater threat to the public order than nationals for the creation of a central register of foreigners to fight against crime and for prosecution.[192]

As mentioned previously, a regulation that does not directly or indirectly discriminate against foreign nationals may not violate Art 18 TFEU even if it distorts the conditions of competition or impairs the competitiveness of the economic operators concerned.[193]

8. Indirect discrimination test

8.1. The notion of indirect discrimination

In 1969, the European Court of Justice referred for the first time to indirect discrimination in a case relating to discrimination on grounds of nationality. [194] The ECJ developed the concept of indirect discrimination by pointing out that the use of criteria other than nationality may also lead to discriminatory treatment and that the use of these criteria is prohibited unless there exists an objective justification.[195] The ECJ started to elaborate a test for indirect discrimination in the

[187] *Davies*, Nationality Discrimination in the European Internal Market (2003) 36.
[188] Case 186/87 Cowan (1989] ECR 195, para. 17.
[189] Case 293/83 *Gravier* [1985] ECR 593,, para. 14 f.
[190] Case 158/07 *Förster* [2008] ECR I-8507, para. 60.
[191] Case 155/09 *Commission v. Greece* [2011] ECR I-65, para. 70 et seq.
[192] Case 524/06 *Huber* [2008] ECR I-9705, para. 78 et seq; *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 36.
[193] Case 155/80 *Oebel* [1981] ECR 1-1993, para. 7 et seq; *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 37.
[194] Case 15/69, *Württenbergische Milchverwertung Südmilch AG v Salvatore Ugliola* [1969] ECR 363, para. 6.
[195] Case 152/73, *Sotgiu* [1974] ECR 153.

1990s. This test was first applied in the landmark case *Mr O'Flynn*[196] regarding financial support for funeral costs if the funeral takes place in a different Member State. The ECJ stated that:

> *'**Unless objectively justified and proportionate to its aim**, **a provision of national law** must be regarded as **indirectly discriminatory** if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a **particular disadvantage**'.*[197]

It follows from this that indirect discrimination takes place where

- an **apparently neutral provision, criterion or practice** that does not obviously rely on a protected ground
- would put persons protected by the general prohibition of discrimination **at a particular disadvantage**
- **compared** with other persons
- unless that provision, criterion or practice is **objectively justified by a legitimate aim** and the means of achieving that aim are **appropriate and necessary**.[198]

Indirect discrimination may occur where a rule or practice that is apparently neutral, has a different effect on different groups. The effect of such a measure is similar to direct discrimination: A considerably higher percentage of persons sharing the protected characteristics is disadvantaged. The less favourable treatment of a person or a group of persons is based in substance (though not in form) on a prohibited discrimination ground. In contrast to direct discrimination, **indirect discrimination is only indirectly based on the prohibited ground**.[199]

Indirect discrimination on grounds of nationality have been identified in situations concerning:

- residence;[200]
- residence of the family members;[201]

[196] Case 237/94 *O'Flynn v Adjudication Officer* [1996] ECR 2617.
[197] Case 237/94 *O'Flynn v Adjudication Officer* [1996] ECR 2617, para. 20.
[198] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 43.
[199] *Makkonen*, European handbook on equality data (2007) 19.
[200] Case 152/73 *Sotgiu* [1974] ECR 153, para.11; C-111/91 Commission v. Luxemburg [1993] ECR I-817, para. 10; C-29/95 *Pastoors* [1997] ECR I-285, para. 17.
[201] Case 41/84 *Pinna* [1986] ECR 1, para. 23 et seq.

- school attendance in domestic schools;[202]
- place of acquisition of a secondary school leaving certificate;[203]
- place of receipt of family allowance;[204]
- receival of a formal residence permit;[205]
- residence period of five years;[206]
- membership to a national health insurance scheme;[207]

Differentiations according to place of birth, location of a company, mother tongue, language skills, place of training and place of taking examinations are characteristics that are also 'suspected to be discriminatory.[208]

8.2. Formally neutral rule, criterion or practice

The first identifiable requirement of indirect discrimination is a **formally neutral rule, criterion or practice** which applies to everyone and is formally not prohibited but whose application puts members of a **particular group in a disadvantageous position in relation to other people**. A criterion or practice that leads to indirect discrimination is where the ground relied on is formally different from the ground mentioned in the law. [209]

Indirect discrimination does not bear a division by, e.g. nationality, on *ius face*, but achieves (almost) the same result as if it did. The measures appear to be unproblematic on first sight but due to the circumstances in which they apply, they nevertheless have a discriminatory effect on a particular group of people. In other words, such measures appear acceptable on an abstract level but are problematic on a concrete level.

For instance, a rule requiring a particular qualification, only available domestically, will have, to a very large extent, the same dividing effects as a rule excluding foreigners, although formally the rule contains no reference to the nationality of applicants. Another example might be a rule benefiting workers who live in the country, and thus disadvantaging those who may live just across the border. The latter are more likely to be foreign, and so there will be a tendency for

[202] Case 278/94 *Commission v. Belgium* [1996] ECR 4307, para. 42; C-258/04 *Ioannidis* [2005] ECR I-8275 para. 27; C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849 para. 66, 91; C-11/06 and 12/06 *Morgan and Bucher* [2007] ECR I-9161 para. 18 , 30.
[203] Case 278/94 *Commission v Belgium* [1996] ECR 4307, para. 29; C-147/03 *Commission v Austria* [2005] ECR I-5969 para. 43,
[204] Case 75/11 Commission v Austria [2012] ECLI:EU:C:2012:605, para. 11, 50 (indexation of child benefits).
[205] Case 85/96 *Martínez Sala* [1998] ECR I-2691 para. 65; Case 456/02 *Trojani* [2004] ECR I-7573, para. 43.
[206] Case 158/07 *Förster* [2008] ECR I-8507, para. 51 et seq; C-503/09 *Stewart* [2011] ECR I-06497 para.104, 109.
[207] Case 411/98 *Ferlini* [2000] ECR I-8081, para. 60.
[208] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 43.
[209] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 30.

the rule to divide by nationality. In such situations there is said to be a disparate impact on different groups.[210]

The plaintiff has to show that the formally neutral measure is in practice not neutral and puts the group to which the plaintiff belongs at a particular disadvantage.[211] The defendant has to show that the measure in question is objectively justified based on a legitimate aim and is proportional.

A particularly important aspect of the effects-based nature of the concept of indirect discrimination lies in the fact that it is **irrelevant whether or not the person deciding on the measure that causes the discrimination in any way intended such an effect.** As *AG Miguel Poiares Maduro*[212] explained in his opinion on the *Coleman*[213] case:

> *'In indirect discrimination cases, the intentions of the employer and the reasons he has to act or not to act are irrelevant. In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons. It is this 'disparate impact' of such measures on certain people that is the target of indirect discrimination legislation.'*[214]

This means that the intention on the side of the discriminator is not a precondition for a finding of indirect discrimination; what is decisive is only the effect of the measure in question.[215]

8.3. Ground of discrimination

The identification of the ground of discrimination is important in determining whether the alleged discrimination at hand is direct or indirect. Particularly in the case in national discrimination cases about residency requirements, this can be a difficult task. In *Vera Hoeckx*[216], the Advocates General held that residency requirements may lead to indirect nationality discrimination. The European Court of Justice, however, clarified that if the residency requirement is imposed exclusively on nationals of other Member States, then the

[210] *Davies*, Nationality Discrimination in the European Internal Market (2003) 11.
[211] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 85.
[212] *Maduro* in The Future of Remedies in Europe (2000) 117-140.
[213] Case 303/06 *Coleman* [2008] ECR I-05603.
[214] Case 303/06 *Coleman* [2008] ECR I-05603, para. 19.
[215] *Tobler*, Indirect discrimination: A case Study into the Development of the Legak Concept of indirect Discrimination under EC Law (2005) 235; Loenen, Indirect Discrimination: Oscillating Between Containment and Revolution, in Loenen/Rodrigues (1999) 201.
[216] Case 249/83 *Vera Hoeckx* [1985] ECR 973.

discrimination is directly based on nationality.[217] This means that where a criterion which appears to be neutral is in reality inextricably/naturally linked to ground explicitly prohibited by EU law, the situation may be considered to be directly discriminatory.[218]

8.4. Particular disadvantage

The third identifiable requirement is that the apparently neutral provision, criterion or practice places a protected group at '**a particular disadvantage', i.e. both groups are disadvantaged, but only persons from one group are at a particular disadvantage**.[219] Accordingly, indirect discrimination differs from direct discrimination in that it moves the focus away from differential treatment to **differential effects**.

The detrimental effect must reach a certain level to qualify as a 'particular disadvantage'. A precise limit has not been identified in case law. In practice, however, an identification of a precise level of disparate impact will not be necessary where no **statistical proof** of such an effect is required. In general, such proof will not be necessary because it is sufficient under the definition of indirect discrimination that the measure in question '***would*** *put persons […] at a particular disadvantage'*. It is sufficient that the measure is liable to have such an effect. What is considered 'liable' to occur must be assessed in the light of actual characteristics, i.e. the actual world as it is.[220]

8.5. Comparable situation

As in the case of direct discrimination, also indirect discrimination relies on comparability of situations. The comparison is made between groups of people relevant in the context of the type of discrimination at issue. In the case of indirect discrimination, the effect is not so far-reaching: Not all, but a disproportionately greater number of persons protected are at a disadvantage. In order to establish indirect discrimination a complainant has to identify a group of persons in order to make a comparison, not an individual.[221]

8.6. Causation

In indirect discrimination situations, the link with the discrimination criterion is weaker both in form and in substance in comparison to the causation requirement in direct discrimination cases.

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[217] Case 249/83 *Vera Hoeckx* [1985] ECR 973, para. 24); *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 45.
[218] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 47.
[219] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 87.
[220] Case 237/94 *O'Flynn* [1996] ECR 2617; C-152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153.
[221] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 43.

Regarding the form, there is a reliance on an apparently neutral criterion. Regarding substance, it is characteristic for indirect discrimination that the division between the groups that are differently affected, i.e. those disadvantaged by the measure in question, is not quite the same as in the case of direct discrimination. Typically, the group of the disadvantaged is consisting, not exclusively, but only disproportionately, of persons that are protected by the discrimination ground in question.[222]

8.7. Objective justification

According to prevailing legal opinion, direct discrimination can be justified only in situations listed in the legal provisions, while indirect discrimination can be objectively justified with reference to a legitimate aim not even mentioned in the provisions.

This means, in certain circumstances, the courts may accept that differential treatment has been carried out. Some measures may hinder a particular group but are nevertheless, on balance, very sensible rules. Consequently, in some cases disparate impacts on different groups should be accepted because the discrimination is considered 'justified' or in more accurate words, the justified rule is non-discriminatory.[223]

The perpetrator of the measure leading to apparent indirect discrimination must be able to prove that the measure has a **legitimate aim**, and that the means chosen to achieve that aim are **appropriate** and **necessary**, in other words proportional.[224]

In a nutshell, the measure will not be considered indirectly discriminating if..: [225]

1. the measure relies on a legitimate aim which is independent of the prohibited criterion, i.e. the measure must have a legitimate, non-discriminatory aim; and
2. the measure is proportional, in that context i.e.
   a. The measure is appropriate (suitable) in the context of the legitimate aim;
   b. The measure is necessary (requisite) in that context.

[222] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 43.
[223] *Davies*, Nationality Discrimination in the European Internal Market (2003) 11 et seq.
[224] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 41.
[225] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 6, 38.

The possible justifications for indirect discrimination are framed in very general terms. According to the case-law of the Court of Justice, this concept allows to take into account any of potentially acceptable, legitimate aims which are not related to a discrimination ground.[226]

- Legitimate aim

Objective justification requires first of all a legitimate aim, which is a concept that is open in nature and not limited to a closed list of grounds.[227] The fact that objective justification is an open-ended concept means that there is a very broad range of potentially acceptable grounds of justification. Any good reason, and potentially acceptable legitimate aim, which is not related to a discrimination ground, may be put forward, subject to two important limitations:[228]

- **Nationalistic or protectionist aims**, while they may be good in the eyes of some, are clearly contrary to the policy of free movement, and so cannot be put forward as justification for measures restricting it.[229] The aim in question must be unrelated to discrimination, which means that it is not possible to rely on the very fact that causes the disparate impact. The objective justification must relate to a different factor or aim.
- **Purely budgetary considerations** can never serve as an objective justification. 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.

Further, the European Court of Justice will not accept an allegedly objective reason if it is no more than a mere generalisation, insufficient to show that the aim of the measure at issue is indeed unrelated to any discrimination.[230] Finding a legitimate aim for a measure of disparate impact is not usually difficult. It is far more often that a measure falls on proportionality grounds.[231] The ECJ has acknowledged following legitimate aims, e.g.

- ensuring coherence of the tax system;

[226] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line? (2014) 44.
[227] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 32.
[228] *Davies*, Nationality Discrimination in the European Internal Market (2003) 38f.
[229] Case 8/74 *Dassonville* [1974] ECR 837, para. 7.
[230] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 33; *Schiek,* Indirect discrimination, in Schiek/Waddington/Bell (Eds.) Cases, Materials and Text on National, Supranational and International Non-Discrimination law (2007) 444, 475; Case C-167/97, *Seymour-Smith and Perez* [1999] ECR 623 para. 72.
[231] *Davies*, Nationality Discrimination in the European Internal Market (2003) 39.

- the safety of navigation, national transport policy and environmental protection in the transport sector;
- protection of ethnic and cultural minorities living in particular region;
- ensuring sound management of public expenditure on specialised medical care;
- encouragement of employment and recruitment by the Member States;
- guaranteeing a minimum replacement income;
- the need to fight unlawful employment.[232]

The list of legitimate aims has an open character. It is up to the national courts to establish whether objective reasons exist in a particular case. The Court of Justice is called on to provide answers of use to the national court and provides guidelines in order to enable the national court to give an answer (preliminary ruling procedure).[233]

- Proportionality

Measures taken in view of legitimate aims are objectively justified if they are '**appropriate and necessary**'.[234] The Court of Justice stated in *Mangold*[235]:

> '*observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as it is possible, the requirements of equal treatment with those of the aim pursued'*.[236]

The disproportionality of a measure with regard to the objective it pursues constitutes discrimination. The Court leaves great discretion to Member States in determining an appropriate measure suitable for achieving the aim.[237] Proportionality requires three elements:[238]

1. **the measure must be appropriate, i.e. effective in pursuing the aim it is dedicated to**

[232] *Tobler*, Limits and potential of the concept of indirect discrimination (2008) 34; *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 44f.
[233] *Ivanus*, Justification for indirect discrimination in EU (2014) 156.
[234] Definition in the Racial Equality and Employment Equality Directives.
[235] Case 144/04, *Mangold* [2005] ECR 9981.
[236] Case 144/04, *Mangold* [2005] ECR 9981, para. 65.
[237] *Ivanus*, Justification for indirect discrimination in EU (2014) 158.
[238] *Craig*/*de Burca*, EU Law: Text, Cases, and Materials (2015) 350-351.

It is not sufficient that a measure is merely convenient or desirable. Rather, it must be appropriate, that is, suitable for achieving the aim in question. [239] A legitimate aim cannot be used to justify useless actions.

2. **the measure may not go further than is necessary to achieve that aim**

A national measure of disparate impact may not just pursue a legitimate aim, but do so in a proportionate manner, being no more restrictive than necessary. The measure must be necessary for that aim, that is, another measure with a lesser or no disparate effect would not be sufficient. In other words, the disadvantage suffered must be minimum possible level of harm needed to achieve the aim sought.[240]

3. **the positive effects of the measure are balanced against the negative aspects of the disparate impact, thereby taking into account the magnitude of each**

The measure must be 'proportional' to its aim, which means that if the aim is legitimate, but marginal, the social and legal costs associated with the measure should not be extreme, while if the measure is of great importance, they may be higher. All in all, this means, if a measure has a disparate impact, but pursues a legitimate aim, in an effective way, going no further than necessary, there is still room for a court to balance the divisive effect of the measure against its benefits.[241]

On the level of justification, the Court's case law shows that finding a **legitimate aim** for the purposes of objective justification is much less difficult than showing that the means chosen to achieve this aim are appropriate and necessary. Similarly, as regards proportionality, the Court has explained in the context of indirect discrimination, now under Article 18 TFEU that

> '*the reasons which may be invoked by a Member State by way of derogation must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments'*.[242]

Accordingly, national courts do well to take these strict requirements very seriously and to refrain from accepting objective justifications too easily. A successful claim of indirect

[239] Case C-167/97, *Seymour-Smith and Perez* [1999] ECR 623 para. 76.
[240] *Ivanus*, Justification for indirect discrimination in EU (2014) 158.
[241] *Davies*, Nationality Discrimination in the European Internal Market (2003) 35;, Note: This balancing seems never to be explicit in judgements on nationality discrimination, but it is inconceivable that judges do not in fact bear in mind the extent of the disparate impact created.
[242] Case C-147/03 *Commission v Austria* [2005] ECR I-5969, para. 63

discrimination made by an individual applies to all persons sharing the same protected characteristics and, therefore, to the group as a whole.[243]

Court cases where an allegedly discriminatory treatment was identified to be objectively justified, are for example:[244]

- A residence condition is justified in the case of free provision of an annual vignette to disabled persons, because this facilitates regular journeys and aims at integration into society.[245]
- The requirement of five years of continuous residence for a maintenance grant was considered justified because it is linked to integration into the country.[246]
- Quota systems for medical studies for non-nationals may be justified for the protection of public health in the domestic state in order to ensure sufficient medical personnel in the country.[247]

9. The distinction between direct and indirect discrimination

Direct and indirect discrimination have different consequences to their application in practice by courts. Direct discrimination is based on the forbidden ground, e.g. nationality, while indirect discrimination refers to neutral criteria whose application puts members of a particular group in a disadvantageous position in relation to other people. Thus, in the context of direct discrimination, causation is a decisive element, whereas indirect discrimination is an effect-related concept.[248]

When analysing the facts, the court should always identify whose treatment is at issue. In some cases there may be more than just one possible approach.[249] For example, in the case *Schmid*[250], the plaintiff represented his daughter, demanding to grant her disability allowance which was denied in Belgium because of her German citizenship. Therefore, the assessment of the Belgian regulations depended on whom the ECJ would focus its analysis: on the daughter or the

[243] *Whittle Richard*, The framework Directive for equal treatment in employment and occupation, an analysis from a disability perspective, European Law Review Vol. 27, issue 3 (2002) 311.
[244] *Kucsko-Stadlmayer* in Art 18 AEUV (1 March 2013, rdb.at), Rn. 44.
[245] Case 103/08 *Gottwald* [2009] ECR I-9117, para. 36.
[246] Case 158/07 *Förster* [2008] ECR I-8507, para. 51.
[247] Case 73/08 *Bressol* [2010] ECR I-2735, para. 82.
[248] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 41 et seq.
[249] *Tobler*, Indirect discrimination (2005) 341.
[250] Case 310/91 *Schmid v Belgian State* [1993] ECR I-3011.

claimant, who was also a German citizen. In the first case, there would be direct discrimination on grounds of nationality, while in the second indirect discrimination. The ECJ concentrated on the situation of the plaintiff and consequently, concluded that:

> '*any provision such as that in Belgian law making entitlement to that social advantage conditional upon nationality is incompatible with Article 7, even if it also applies to the offspring of national workers. It is sufficient to point out that the condition of possessing the nationality of the country of residence would be more easily fulfilled by the offspring of national workers than by the offspring of migrant workers*.'[251]

Thus, the Belgian regulation was treated as indirectly discriminatory and the Court did not analyse if it could be justified.

The distinction between direct and indirect discrimination is also important on the level of proof and the level of justification. Direct discrimination can be justified only in situations predicted in the legal provisions, while indirect discrimination only with reference to a legitimate aim, in other words proportional. From the perspective of the victim of the alleged discrimination a finding of its direct form will always be preferable because of the usually more limited justification possibilities and because of the difficulties involved in proving disparate impact which is required in the case of indirect discrimination. At the same time both forms of discrimination are complementary in the sense that if one cannot prove direct discrimination e.g. due to incomparability of the situation, at least in some cases it is possible to allege an indirect form of disadvantageous treatment.

However, the scope of justification in the context of both forms of discrimination is not always clear. The ECJ has in the past taken the possibility to justify direct nationality discrimination into account, although this is not predicted in Article 18 TFEU. The Court referred to objective justification in direct discrimination cases which is a characteristic of indirect discrimination. Such case-law raises doubt about the importance of justification in distinguishing direct from indirect discrimination.

This shows how much discretion the ECJ has in interpreting the facts of the case in different ways. For the sake of the victims, the courts should try to establish direct discrimination as it may not be justified as widely as indirect discrimination.[252]

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[251] Case 310/91 *Schmid v Belgian State* [1993] ECR I-3011, para. 24 et seq.
[252] *Maliszewska-Nienartowicz*, Direct and Indirect Discrimination in European Union Law - How to Draw a Dividing Line? (2014) 42 et seq.

In summary, it can be concluded that although the EU law contains separate definitions of direct and indirect discrimination, in practice it is not always so clear what form occurs in a particular case.

10. Judicial assessment

10.1. Actual impact on free movement

The European Court of Justice has frequently been confronted with the question whether a national rule denying a given right must be *'capable of hindering or rendering less attractive the exercise of free movement rights'*.[253] In other words, whether the measure has a negative effect on those rights[254] and therefore deter Union citizens from moving.[255]

The Court decided that it does **not attach relevance to the significance for, or the actual impact of the discriminatory measure on free movement**. It is not important how many Union citizens would actually decide not to visit another Member State because of a rule favouring its own nationals. The Court only looks at the actual impact of national rules that cannot be classified as direct or indirect nationality discrimination.[256]

For instance, in *Even*,[257] the ECJ interpreted the concept of 'social advantages' contained in Article 7(2) of Regulation (EEC) 1612/68. The Court did not consider whether or not denial of a given right or benefit must actually obstruct the integration of a worker in the host state and thus hamper free movement of workers. Instead, the Court held that any right or benefit granted to workers or by virtue of mere residence is covered by the non-discrimination clause of Article 7(2) of Regulation (EEC) 1612/68.

10.2. Marginal effect

The *Flemish Care Insurance case*[258] concerned the compatibility of a residence requirement for care insurance with EU law. The Flemish government asserted that because of the limited nature of the amount of the benefits involved, the contested rule had only a marginal effect on the free movement of persons and thus was not caught by the non-discrimination rule. The Court,

[253] Case 379/09 *Casteels* [2011] ECR I-01379, para. 22.
[254] Case 211/08 *Commission v Spain* [2010] ECR I-05267, para. 65.
[255] Case 544/07 *Riiffier* (2009] 1ECR I-3389.
[256] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 69.
[257] Case 207/78 *Ministère public v Even* (1979) ECR 02019.
[258] Case 212/06 *Walloon Government v. Flemish Government* [2008] ECR I-01683.

however, rejected the argument and ruled that *'any restriction, even minor, of that freedom is prohibited*'.[259]

The Court occasionally upholds national rules when their effects on free movement are **'too uncertain or indirect'**,[260] but the Court has never accepted the legality of a discriminatory rule because its effect on mobility would be too remote or only marginal. The ECJ held that it is the **discriminatory nature** rather than the deterrent effect on mobility of discriminatory national rules that determines their compatibility with EU law. The mere exercise of free movement rights suffices for the application of the non-discrimination rule, i.e. the non-discrimination rule applies regardless of the benefit or right claimed. [261]

10.3. Burden of proof

Where an alleged victim of discrimination brings a case to court, they must show that they have been treated less favourably or suffered a particular disadvantage compared to other persons. How difficult this will be to assess in practical terms depends largely on the required level of proof.

For a person who considers himself or herself to be subject to discrimination, the requirements that the Court makes of the plaintiff in proving the existence of discrimination are of decisive importance. Formally speaking, the European Court of Justice has no competence to express opinions about questions of evidence, or to decide what evidential requirements shall be applied by national Courts. Its task, as laid down in Art. 234 TFEU, is to give rulings on the interpretation of EU law. In practice, however, the ECJ has built substantial evidential requirements into its definition of direct and indirect discrimination.

Indirect discrimination on grounds of nationality can be shown at the individual level. [262] It suffices merely to establish that a measure constitutes a **risk that disadvantages may arise** for a particular group of people compared to nationals of the member State concerned, or if a condition may be thought easier for nationals to meet.[263] It is unnecessary to establish that a provision in practice affects a significantly higher proportion of foreigners. It can therefore

[259] Case 212/06 *Walloon Government v. Flemish Government* [2008] ECR I-01683, para. 52.
[260] Case 190/98 *Graf* [2000] ECR I-493; See further *Spaventa*, The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of Keck, Remoteness and Deliitge, in Barnard et al. (Eds.), The Outer Limits of EU Law (2008), 245-272.
[261] *Pieter van der Mei*, The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality (2011) 70 et seq.
[262] *Wengdahl*, Indirect Discrimination and the European Court of Justice. A comparative analysis of European Court of Justice case-law relating to discrimination on the grounds of, respectively, sex and nationality (2001) 5.
[263] Case C-237/94 *O'Flynn* [1996] ECR 2617.

suffice for just one individual to be wronged in practice, for the prohibited discrimination to be shown to exist.

The **disparate impact does not actually have to be proven**. Rather, it is sufficient that the measure in question '*would'* put certain persons at a particular disadvantage, i.e. if it is liable to have the required disparate effect (so-called '**liability approach'**). Depending on the circumstances, this may be an easier test than a test based on statistics, since the Court will be able to make what has been called a common sense assessment, by relying on common knowledge, on obvious facts, or on its conviction. However, this does not mean that statistical proof (so called '*de minimis'* test) of a particular disadvantage is irrelevant.

To obtain **statistical proof** may pose a number of challenges:

1. At the centre of this issue is the comparison to be made, i.e. the comparison between the effect of the contested measure on two groups, namely on the group to whom the victim of the alleged discrimination belongs, on the one hand, and on a comparator group on the other. Accordingly, this comparator group has to be identified. As *Ellis* rightly notes, defining the comparator is an issue over which the national courts possess an important element of discretion, and the extent to which they take a sensitive approach it bears upon the capacity of the concept of indirect discrimination to be used to produce effective equality.
2. Furthermore, the appropriate moment or time period for the comparison must be identified. As the ECJ explained in *Seymour-Smith*,[264] this may depend on the nature of the breach of EU non-discrimination law at issue. The Court mentions two examples relating to Member State legislation. Firstly, the effect of the consistent application of a national law to individuals should be shown over a certain time. It would seem logical to apply the same approach where the alleged discrimination is based on a series of actions by private persons such as employers or service providers, rather than by the State. Secondly, where the legality of the adoption of a national law as such is at issue, the situation at the time of the adoption of the act will be relevant. Again, it would seem logical that the same will apply where a single act by a private person is at issue.

[264] *Wengdahl*, Indirect Discrimination and the European Court of Justice. A comparative analysis of European Court of Justice case-law relating to discrimination on the grounds of, respectively, sex and nationality (2001) 5 et seq; Case C-167/97, *Seymour-Smith and Perez* [1999] ECR 623 para. 42f.

3. Statistical material concerning the relevant groups must be found, which in practice may be difficult. Statistics may even not be helpful or feasible means to prove apparent indirect discrimination.
4. Fourth, the statistical material relied on in a discrimination case must be relevant or significant. This means that it must cover enough individuals and, in cases that do not concern a single action, that it should not illustrate purely fortuitous or short-term phenomena. Again, these are factors that have to be assessed by the national courts.[265]

However, even where relevant and significant statistical material is available, it may be difficult to determine which figures must be taken into account in order to establish the required disparity of effect.[266] As *AG Léger* noted in his opinion on the *Nolte* case[267], the requirement of statistical proof can lead to a veritable battle with numbers.[268] The national courts should, therefore, wherever possible under national law apply the **liability test** which is easier to meet, without, however, excluding the possibility of statistical proof where it may help the victims of alleged discrimination to show the existence of a disparate impact. It is recommended that Member State legislators do not make statistical proof compulsory. At the same time, where statistics are available they may be an easy means of showing disparate impact. Accordingly, the effectiveness of the prohibition of indirect discrimination under EU law demands that statistical proof is admissible.

As regards the prohibition of discrimination on the grounds of nationality the Court has, however, interpreted it in accordance with the intention behind the legislation so as to bring within its scope discrimination which does not relate precisely to nationality. The means has been adapted to serve the end, and the Court has progressed from rhetoric about discrimination to rhetoric about obstacles.

In conclusion, the burden of proof does not depend on the production of statistical data. The negative impact may also be proved by other means, and the standard of proof is considerably low.[269]

[265] Case C-167/97, *Seymour-Smith and Perez* [1999] ECR 623 para. 62.
[266] Case C-167/97, *Seymour-Smith and Perez* [1999] ECR 623 para. 59.
[267] Case 317/93 *Nolte* [1995] ECR I-04625.
[268] Case 317/93 *Nolte* [1995] ECR I-04625, para. 53.
[269] *Wengdahl*, Indirect Discrimination and the European Court of Justice. A comparative analysis of European Court of Justice case-law relating to discrimination on the grounds of, respectively, sex and nationality (2001) 3 (quote: "It has thereby become irrelevant whether or not discrimination can be shown to exist").

11. Case law on equal access of EU migrant workers to social and tax advantages

11.1. Case law on Article 7(2) of Regulation (EEC) 1612/68

The European Court of Justice is very consequent in interpreting the broadest possible meaning of the Article 7(2) of Regulation (EU) 492/2011 (former Regulation (EEC) 1612/68). So far the ECJ has dealt in 43 cases with the meaning of equal access of EU workers to social and tax advantages.

- **Case 32-75 *Cristini v SNCF* [1975] ECR 1085** (social advantages extent / right to railway fares reductions for large families after the death of the EU migrant worker)

The ECJ found that Article 7(2) of Regulation (EEC) 1612/68 includes all **social and tax advantages, whether or not attached to the contract of employment.** These advantages include fares reductions for large families and applies even if the advantage is sought after the worker's death, to the benefit of his family remaining in the same Member State. It would be contrary to the purpose and the spirit of the Community rules on freedom of movement for workers to deprive the family of the diseased worker from benefits whilst granting the same benefit to the survivors of a national.

- **Case 65/81 *Reina v Landeskreditbank* [1982] ECR -00033** (social and tax advantages extent / loans granted on childbirth)

Article 7(2) of Regulation (EEC) 1612/68 includes **all social and tax advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and** whose extension to workers who are nationals of other Member States therefore seems likely to **facilitate the mobility of such workers within the Community**.

The concept of 'social advantage' encompasses not only the benefits accorded by virtue of a right but also those granted on a discretionary basis, i. e. interest-free loans granted on childbirth by a credit institution incorporated under public law, on the basis of guidelines and with financial assistance from the state, to families with a low income with a view to stimulating the birth rate. Such loans must therefore be granted to workers of other Member States on the same conditions as those which apply to national workers.

- **Case 249/83 *Hoeckx* [1985] ECR -00973** (residence requirement / minimum means of subsistence)

A social benefit guaranteeing a minimum means of subsistence in a general manner constitutes a social advantage within the meaning of Regulation (EEC) 1612/68. The grant of such a social advantage may not be made subject to the requirement that the claimant should have actually **resided within the territory of a Member State for a prescribed period** where that requirement is not imposed on nationals of that Member State.

- **Case 261/83 *Castelli v ONPTS)* [1984] ECR -03199** (worker's family members / guaranteed income for old persons)

The equality of treatment provided for in Article 7 of Regulation (EEC) 1612/68 is also intended to prevent discrimination against a **worker ' s dependent relatives** in the ascending line.
The grant of a social advantage, such as the income guaranteed to old people by the legislation of a Member State, to dependent relatives in the ascending line of a worker cannot be conditional on the existence of a reciprocal agreement between that Member State and the Member State of which such a relative is a national.

- **Case 94/84 *ONEM v Deak* [1985] ECR -01873** (family members / unemployment benefits)

Unemployment benefits provided under the legislation of a member state for young **persons seeking work** constitute a social advantage within the meaning of Article 7(2) of Regulation (EEC) 1612/68. A Member State may not refuse to grant such benefits to the **dependent children of a worker** who is a national of another Member State on the grounds of the children' s nationality, whether they are nationals of a Member State or of a non-member country.

- **Case 122/84 *Scrivner* [1985] ECR 1027** (minimum subsistence payments)

A social benefit guaranteeing a minimum means of subsistence in a general manner constitutes a social advantage within the meaning of Regulation (EEC) 1612/68.

- **Case 137/84 *Criminal proceedings against Mutsch* [1985] ECR 02681** (right to require that legal proceedings take place in a specific language)

The principle of free movement of workers, as laid down in article 45 TFEU and more particularly in Regulation (EEC) 1612/68, requires that a worker who is a national of one Member State and habitually resides in another Member State, is entitled, under the same conditions as a worker who is a national of the host Member State, to require that **criminal proceedings against him take place in a language other than the language normally used in proceedings before the court** which tries him. Such an entitlement falls within the meaning of the term ' social advantage ' as used in Article 7 (2) of Regulation (EEC) 1612/68.

- **Case 157/84 *Frascogna v Caisse des dépôts et consignations* [1985] ECR -01739** (residence requirement / pecial old-age pension)

The grant of a special old-age allowance which guarantees a minimum income to old persons constitutes a social advantage within the meaning of Regulation (EEC) 1612/68. Article 7 (2) of that regulation must be interpreted to the effect that the grant of such a social advantage may not be made subject to a **condition requiring actual residence** in the territory of a Member State **for a specified number of years** if such a condition is not laid down in respect of nationals of that Member State.

- **Case 59/85 *Netherlands v Ann Florence Reed* [1986] ECR 1283** (right of residence of the unmarried companion of an EU migrant worker)

The possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him, where that companion is not a national of the host Member State, can assist his **integration in the host state** and thus **contribute to the achievement of freedom of movement for workers**. Thus, that possibility must be regarded as falling within the concept of a social advantage for the purposes of Article 7 (2) of Regulation (EEC) 1612/68.

A member state which grants such an advantage to its own nationals cannot refuse to grant it to workers who are nationals of other Member States without being guilty of discrimination on grounds of nationality.

- **Case 316/85 *CPAS de Courcelles v Lebon* [1987] ECR -02811** (minimum means of subsistence for family members of the EU migrant worker)

The descendants of a worker who is employed within the territory of a Member State he or she is not a national of, have no longer the right to claim minimum means of subsistence when they have reached the age of 21 and are no longer dependent on their working relative. That benefit does not constitute for workers a social advantage within the meaning of Article 7 (2) of Regulation (EEC) 1612/68, inasmuch as they no longer support their descendant. The equal treatment with regard to social and tax advantages operates only for the benefit of workers and does not apply to nationals of Member States who move in search of employment. However, the Court has upheld that **children of migrant workers can rely on social benefit provisions themselves**, **if under national law it is granted directly to the descendants of national workers.**

- **Case 39/86 *Lair v Universität Hannover* [1988] ECR-03161** (training grants for workers)

A national of another Member State who undertakes university studies in the host State leading to a professional qualification, after having engaged in occupational activity in that State, must

be regarded as having retained his status as a worker and is entitled as such to the benefit of Article 7(2) of Regulation (EEC) 1612/68, provided that there is a link between the previous occupational activity and the studies in question. The host Member State may not make the right to social advantages **conditional upon a minimum period of prior occupational activity** within the territory of that State.

- **Case 197/86 *Brown v The Secretary of State for Scotland* [1988] ECR -03205** (training grants / worker)

A national of a Member State who enters into an employment relationship in another Member State for a period of eight months with a view to subsequently undertaking university studies there in the same field of activity and who would not have been employed by his employer if he had not already been accepted for admission to university is to be regarded as a worker within the meaning of Article 7 (2) of Regulation (EEC) 1612/68.

Member States may not unilaterally make the grant of the social advantages contemplated in Article 7(2) of Regulation (EEC) 1612/68 conditional upon the completion of a given **period of employment**.

It cannot, however, be inferred that a national of a Member State is entitled to a grant for studies by virtue of his status as a worker where it is established that he acquired that status exclusively as a result of his being accepted for admission to university to undertake the studies in question. The **employment relationship**, which is the only basis for the rights deriving from Regulation (EEC) 1612/68, is in such circumstances **merely ancillary to the studies to be financed by the grant**.

- **Case 235/87 *Matteucci* [1988] ECR -05589** (vocational training)

Where **portability of students grants and loans** is created for the State's own nationals, a same opportunity must be granted to EU migrant workers. A grant awarded for maintenance and training with a view to the pursuit of studies in the field of further vocational training constitutes an advantage within the meaning of Article 7(2) Regulation (EEC) 1612/68. It follows that the authorities of a Member State may not refuse to award a scholarship to study in another Member State to an EU migrant worker on the ground that he or she is not a national of the Member State.

- **Case 3/90 M. *J. E. Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-01071** (meaning of 'worker'/study grants)

A person is to be regarded a worker if he carries on genuine and effective activities, to the exclusion of activities which are on such a small scale as to be purely marginal and ancillary.

The **essential characteristic of the employment relationship** is the fact that a **person performs services for a given period of time for the benefit and under the direction of another person in return for which he receives remuneration**. The fact that the productivity of a trainee is low, that he works only a small number of hours per week and, consequently, receives only a limited remuneration does not preclude the **status of worker**, from being conferred on a national of a Member State who completes a training period as part of his occupational training in another Member State, where that training period is completed under the conditions of a **genuine and effective activity** as an employed person.

A migrant worker who voluntarily ceases employment in the host country in order to devote himself, after the lapse of a certain period of time, to full-time studies in the country of which he is a national. must be regarded as having retained his **status as a worker**, thus enabling him to benefit from Article 7(2) of Regulation (EEC) 1612/68, provided, however, that there is a **relationship between his previous occupational activity and the studies**.

Study finance granted by a Member State to the children of workers constitutes for a migrant worker a social advantage within the meaning of Article 7(2) of Regulation (EEC) 1612/68 where the worker continues to support the child. In such a case the child may rely on that provision in order to obtain that finance if, under national law, it is granted directly to the student. The grant of the finance must be subject to the same conditions as are applicable to the children of national workers, and in particular no residence requirement which need not be satisfied by nationals may be laid down.

- **Case 300/90 *Commission v Belgium* [1992] ECR I-00305** (Deduction of insurance contributions)

Legislation of a Member State which makes the **deductibility of pension and life assurance contributions** conditional on those contributions being paid in that State, is contrary to EU law. However, that condition may be justified by the need to **safeguard the cohesion of the applicable tax system**. That need may exist, for example, where the tax system of a Member State is such that the deductibility of the contributions is offset by the taxation of payments made by insurers pursuant to the contracts, and vice versa, and where it would be impossible to ensure that the deductions were offset by subsequent taxation of payments because payments arising from the deductible contributions were made by a foreign insurer established in another country where there would be no certainty of subjecting them to tax.

- **Case 326/90 *Commission v Belgium* [1992] I-05517** (grant of the allowances for handicapped persons; guaranteed income for old people; minimum means of subsistence)

The requirement by a Member State of a prior **period of residence** on its territory for EU migrant workers to qualify for the **grant of allowances for handicapped persons, the guaranteed income for old people and the minimum means of subsistence** is contrary to Article 7(2) of Regulation (EEC) 1612/68.

- **Case 27/91 *URSSAF v Hostellerie Le Manoir SARL* [1991] ECR I-05531** (indirect discrimination)

The prohibition of any discrimination based on nationality as regards remuneration and social advantages, as laid down in Article 45 TFEU and Article 7(2) of Regulation (EEC) 1612/68, covers not only **covert discrimination** based on nationality but **all over forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result**. Accordingly, it precludes national rules that require a body responsible for recovering social security contributions to use a basis for calculating employers' social security contributions which is more unfavourable for a trainee worker who does not come under the national education system, in respect of a trainee worker who comes under the national system, since this may discourage employers from offering possibilities of traineeship to EU migrants.

- **Case 111/91 *Commission v Luxembourg* [1993] ECR I-00817** (Childbirth and maternity allowances)

A Member State discriminates against nationals of other Member States if it makes the payment of childbirth and maternity allowances conditional upon **requirements of prior residence for a long period** on its territory because such requirements are more easily met by its own nationals. When granting allowances which, for employed workers, constitute social advantages, such discrimination is in breach of Article 7(2) of Regulation (EEC) 1612/68. It is also in breach of Article 52 TFEU because, in the case of self-employed workers, even if not practised in the context of specific rules on the pursuit of occupational activities, it nevertheless hinders the pursuit of such activities by nationals of other Member States.

Regarding childbirth allowance, **public health considerations** do not justify the residence requirement, because the obligation to undergo various medical examinations (which is also a condition for the grant of the allowance) must be dissociated from those considerations.

- **Case 310/91 *Schmid v Belgiand State* [1993] ECR I-03011** (Disability allowances)

A national of a Member State who was formerly an official of an international organization may rely on the right to equal treatment guaranteed by Article 7(2) of Regulation (EEC) 1612/68 in order to obtain an adult disability allowance provided for under the legislation of the Member State in which he resides, where that is not his country of origin, for the benefit of

that person' s dependent offspring. No condition as to the possession by the beneficiary of the nationality of the State of residence may be raised to defeat that claim since such a condition, even if it applies equally to the offspring of national workers, is incompatible with the requirement of equal treatment, inasmuch as it is **more easily satisfied by the offspring of national workers than by the offspring of migrant workers**.

- **Case C-151/94 *Commission v Luxembourg* [1995] ECR I-03685** (Taxation of income of temporary residents; repayment of excess tax; discriminatory administrative practices)

A Member State which maintains in force provisions under which excess amounts of tax deducted from the wages or salaries of nationals of a Member State who resided in that State or occupied a salaried position there for only part of the tax year are to remain the property of the Treasury and are not repayable, fails to fulfil its obligations under Article 48(2) TFEU and Article 7(2) of Regulation (EEC) 1612/68.

Although the special situation of temporary residents may objectively justify the adoption of specific procedural arrangements to enable the competent tax authorities to determine the tax rate applicable to national income, it cannot justify the exclusion of that category of tax payer from entitlement, other than by means of a non-contentious procedure, to repayment of tax, where excess amounts of tax deducted are repayable as of right to permanent residents.

The incompatibility of national provisions with provisions of the Treaty, even those directly applicable, can be definitively eliminated only by means of binding domestic provisions having the same legal force as those which require to be amended.

Mere administrative practices, which by their nature are alterable at will by the authorities and are not given appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty, since they maintain, for the persons concerned, a **state of uncertainty as regards the extent of their rights** as guaranteed by the Treaty.

- **Case C-237/94 *O'Flynn* [1996] ECR I-02617** (Funeral payment)

The grant of a payment to cover funeral expenses incurred by an EU migrant worker may not be subject to the condition that the burial or cremation takes place within the territory of that Member State.

Unless objectively justified and proportionate to the aim pursued, a provision of national law, even if applicable irrespective of nationality, must be regarded as indirectly discriminatory, and hence not complying with the equality of treatment prescribed by Article 7(2) Regulation (EEC) 1612/68, if it is simply **intrinsically liable to affect migrant workers more than national**

workers and if there is a consequent **risk that it will place the former at a particular disadvantage**.

The funeral costs are of the same type as and of comparable amount to those incurred by a national worker. It is above all the migrant worker who may, on the death of a member of the family, arrange for burial in another Member State, in view of the links which the members of such a family generally maintain with their State of origin. **The refusal to grant the payment** if the funeral takes place in another Member State **cannot be justified by considerations of public health**, **or by considerations relating to the cost of funerals**, since the cost of transporting the coffin to a place distant from the deceased' s home is not covered in any event, or by the difficulty of checking the expenses incurred.

- **Case 315/94 *de Vos v Stadt Bielefeld* [1996] ECR I-01417** (continued payment of supplementary retirement contributions during a period of suspension of the employment contract)

Article 7(1) and (2) of Regulation (EEC) 1612/68 must be interpreted as meaning that a worker who is a national of a Member State and performs military service in that State and whose contract of employment in the public sector of another Member State is thus suspended, is **not entitled, during such suspension, to have payment continued on his behalf**, under the same conditions as if he were working, of the employer's and employee's contributions to the supplementary retirement scheme of which he is a member in the Member State of employment, even if the latter grants such a right to its nationals in the same circumstances. The **continued payment of supplementary retirement contributions during a period of suspension of the employment contract** which is granted to nationals of the Member State in question constitutes an advantage established by the legislature to compensate partially those nationals called up to perform military service for the consequences of that obligation. It is **not made by virtue of a statutory or contractual obligation** incumbent on the employer as conditions of employment and work, within the meaning of Article 7(1) of Regulation (EEC)1612/68 and **cannot be considered to be an advantage granted to national workers**.

- **Case 57/96 *Meints v Minister van Landbouw, Natuurbeheer en Visserij* [1997] ECR I-06689** (Residence condition)

A benefit which takes the form of a single payment to agricultural workers whose contract of employment has been terminated as a result of the setting aside of land belonging to their former employer is to be classified as a social advantage within the meaning of Article 7(2) of Regulation (EEC) 1612/68.

A Member State may not make payment of a social advantage within the meaning of Article 7(2) of Regulation (EEC) 1612/68 dependent on the condition that recipients be resident within its territory. **Unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage**. This is true of a **residence condition which can be more easily met by national workers than by those from other Member States**.

- **Case 85/96 *María Martínez Sala* [1998] I-02691** (child raising allowance)

The **concept of social advantage** covers all the **advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community**

A **benefit such as the child-raising allowance**, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, falls within the scope ratione materiae of Community law as a **social advantage within the meaning of Article 7(2)** of Regulation (EEC) 1612/68.

Union law precludes a Member State from requiring nationals of other Member States authorised to reside in its territory to produce a **formal residence permit** issued by the national authorities **in order to receive a child-raising allowance**, whereas that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State.

- **Case 337/97 *C.P.M. Meeusen v Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-03289** (Study grants; dependant descendant of the EU migrant worker)

While a Member State may not make the grant of a social advantage within the meaning of Article 7 of Regulation (EEC) 1612/68 dependent on the condition that the beneficiaries be resident within its territory, the principle of equal treatment laid down in that provision is also intended to prevent **discrimination to the detriment of descendants dependent on the worker**. In a situation where national legislation does not impose any residence requirement on the children of national workers for the financing of their studies, such a requirement is discriminatory if imposed on the children of workers who are nationals of other Member States.

Accordingly, the **dependent child of a national of a Member State who pursues an activity as an employed person in another Member State while maintaining his residence in the State of which he is a national can rely on Article 7(2) of Regulation (EEC) 1612/68** in order to obtain study finance under the same conditions as are applicable to children of nationals of the State of employment, and in particular without any further requirement as to the child's place of residence.

- **Case 356/98 *Kaba* [2000] ECR I-02623** (application requirements for indefinite leave to remain)

Legislation of a Member State which r**equires spouses of migrant workers who are nationals of other Member States to have resided in the territory of that Member State for four years before they become entitled to apply for indefinite leave to remain** and to have their applications considered, but which requires r**esidence of only 12 months for the spouses of persons who are settled in that territory** and are not subject under the immigration laws to any restriction on the period for which they may remain **does not constitute discrimination** contrary to Article 7(2) of Regulation (EEC) 1612/68. Member States are entitled to rely on any objective difference there may be between their own nationals and those of other Member States when they lay down the **conditions under which leave to remain indefinitely in their territory is to be granted to the spouses of such persons**.

- **Case 33/99 *Fahmi and Esmoris Cerdeiro-Pinedo Amado v Bestuur van de Sociale Verzekeringsbank* [2001] ECR I-02415**

Regulations 1612/68 may not be interpreted as meaning that it prevents a Member State from gradually abolishing an allowance for dependent children aged between 18 and 27 years pursuing studies provided that its abolition does not involve discrimination based on nationality. A national of a Member State who has exercised the right to freedom of movement and has ceased to exercise his occupational activity in the host Member State and returned to his Member State of origin, in which his children also reside, **cannot rely on Article 45 or on Article 7(2) of Regulation 1612/68** in order to obtain from the Member State in which he was employed a right to have his children's studies financed in the same conditions as those applied by that State to its own nationals.

- **Case 87/99 *Zurstrassen* [2000] ECR I-03337** (income tax; separate residence of spouses; joint assessment to tax for married couples)

Article 7(2) of Regulation 1612/68 precludes the application of national rules under which, as regards income tax, the **joint assessment to tax of spouses is conditional on their both being**

resident on national territory and that tax advantage is denied to a worker who is resident in that State, where he/she receives almost the entire income of the household, and whose spouse is resident in another Member State.

Rules which make it more beneficial to be taxed as a couple than as a single person must apply to **frontier workers** in the same way as for couples in a similar situation in the Member State of employment and may not be conditional upon both spouses being resident in the State of employment.

- **Case 466/00 *Kaba* [2003] ECR I-02219** (Right of the spouse of a migrant worker to obtain leave to remain indefinitely in the territory of a Member State)

Legislation of a Member State which requires spouses of migrant workers who are nationals of other Member States to have **resided in the territory of that Member State for four years before they become entitled to apply for indefinite leave to remain** and to have their applications considered, but which requires **residence of only 12 months for the spouses of persons who are present** and settled in that territory and are not subject to any restriction on the period for which they may remain there, **does not constitute discrimination** contrary to Article 7(2) of Regulation (EEC) 1612/68.

The answer would not be different if account were to be taken of the fact that the respective situations of those two categories of persons under national law are, according to the referring tribunal, **comparable in all respects except with regard to the period of prior residence** which is required for the purpose of being granted indefinite leave to remain in the Member State in question. In so far as the right of residence of a migrant worker who is a national of another Member State is subject to the condition that the person remains a worker or, where relevant, a person seeking employment, unless he or she derives that right from other provisions of Community law, his or her situation is **not comparable** to that of a person who is, under the national legislation of a Member State, not subject to any restriction regarding the period for which he or she may reside within the territory of that Member State and need not, during his or her stay, satisfy any condition comparable to those laid down by the provisions of Community law which confer on nationals of a Member State a right to reside in another Member State. As the **rights of residence of those two categories of persons are not in all respects comparable, the same holds true with regard to the situation of their spouses**, particularly so far as concerns the question of the duration of the residence period on completion of which they may be given indefinite leave to remain in the Member State in question. In view of the fact that the situations are not comparable under Community law, the question whether

a difference in treatment in regard to the duration of that period may be justified has no relevance in this regard.

- **Case 299/01 *Commission v Luxemburg* [2002] I-05899** (guaranteed minimum income)

Those provisions preclude the **requirement of a five-year period** of residence in the territory of Luxembourg in order to **benefit from the guaranteed minimum income**, since that requirement constitutes **indirect discrimination**.

- **Case 386/02 *Baldinger* [2004] ECR I-08411** (Compensation for ex-prisoners of war)

Article 7(2) of Regulation (EEC) 1612/68 must be interpreted as **not precluding national legislation which refuses to grant an allowance in favour of former prisoners of war** on the ground that the applicant did not hold the nationality of the Member State involved when the application was made, but that of another Member State. Such an allowance does not fall within the category of advantages granted to national workers principally because of their status as workers or national residents and, as a result, does not fulfil the essential characteristics of the 'social advantages' referred to in Article 7(2) of Regulation (EEC) 1612/68.

- **Case 212/05 *Hartmann* [2007] I-06303** (frontier worker; transfer of residence to another Member State; child-raising allowance not granted to non-working spouse)

A national of a Member State who, while maintaining his employment in that State, has transferred his residence to another Member State and has since then carried on his occupation as a frontier worker can claim the **status of migrant worker** for the purposes of Regulation 1612/68.

Article 7(2) of Regulation (EEC) 1612/68 precludes the spouse of a migrant worker carrying on an occupation in one Member State, who does not work and is resident in another Member State, from being **refused a child-raising allowance** on the ground that he does not have his **permanent or ordinary residence** in the former State. The grant of such an allowance to a worker's spouse, since it benefits the family as a whole, whichever parent it is who claims the allowance, is capable of **reducing that worker's obligation to contribute to family expenses**, and therefore constitutes for him or her a social advantage.

Such a residence condition must be regarded as **indirectly discriminatory if it is intrinsically liable to affect migrant workers or their spouses, who more often reside in another Member State, than to affect national workers, and if there is a consequent risk that it will place the former at a particular disadvantage**.

In the context of national legislation pursuing family policy objectives, granting the child-raising allowance to persons who have established **a real link with national society** and under

which a **substantial contribution to the national labour market** also constitutes a valid factor of **integration into society**, the allowance in question cannot be refused to a couple who do not live in the national territory, but one of whom works full-time in that State.

- **Case 213/05 *Geven* [2007] ECR I-06347** (frontier worker; child-raising allowance)

Article 7(2) of Regulation (EEC) 1612/68 **does not preclude the exclusion**, by the national legislation of a Member State, of a national of another Member State who resides in that State and is in **minor employment** (less than 15 hours per week) in the former State from receiving a social advantage such as a child-raising allowance on the ground that he **does not have his permanent or ordinary residence in the former State**.

Social policy is a matter for the Member States, which have a wide discretion in exercising their powers in that respect. However, that wide discretion cannot have the effect of **undermining the rights granted to individuals by the provisions of the Treaty in which their fundamental freedoms are enshrined**.

In the context of national legislation pursuing aims of **family policy**, granting the child-raising allowance to persons who have a **sufficiently close connection with national society**, without reserving that allowance exclusively to persons who reside in national territory, the fact that a **non-resident worker does not have a sufficiently substantial occupation in the Member State concerned is capable of constituting a legitimate justification for a refusal grant the social advantages**.

- **Case 269/07 *Commission v Germany* [2009] ECR I-07811** (savings-pension bonus; full liability to tax)

National legislation may not deny cross-border workers and their spouses the right to the **savings-pension bonus**, unless they are fully liable to tax in that Member State or prohibit cross-border workers from using the subsidised capital for the acquisition or construction of an owner-occupied dwelling unless the property is situated in the host Member State, and provide that the bonus be reimbursed on termination of full liability to tax in that Member State.

- **Case 542/09 *Commission v Netherlands* [2012] ECLI:EU:C:2012:346** (study grants)

Funding for higher educational studies pursued outside the territory of the Member State where a migrant worker performs economic activity constitutes social advantage within the meaning of Article 7(2) of Regulation (EEC) 1612/68. According to the ECJ, Article 7(2) of Regulation (EEC) 1612/68 requires that, where a Member State gives its national workers the opportunity of pursuing education or training provided in another Member State, it must **extend that opportunity to EU workers** established within its territory.

- **Case 206/10 *Commission v Germany* [2011] ECR I-03573** (benefits for the blind, the deaf and the disabled; residence condition)

The equal treatment rule which appears in Article 7 of Regulation (EEC) 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. Unless it is objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. That is the case of a residence condition laid down in national legislation for the grant of **benefits for the blind**, **the deaf and the disabled**, which can be **more easily satisfied by national workers than by those from other Member States**.

- **Case 20/12 *Giersch and Others* [2013] EU:C:2013:411** (study grants)

Article 7(2) of Regulation (EEC) 1612/68 must be interpreted as precluding, in principle, legislation of a Member State which makes the grant of financial aid for higher education studies conditional upon residence by the student in that Member State and gives rise to a **difference in treatment, amounting to indirect discrimination**, between persons who reside in the Member State concerned and those who, not being residents of that Member State, are the children of frontier workers carrying out an activity in that Member State.

While the objective of increasing the proportion of residents with a higher education degree in order to **promote the development of the economy** of that same Member State is a **legitimate objective** which can justify such a difference in treatment and while a condition of residence, such as that provided for by the national legislation at issue in the main proceedings, is appropriate for ensuring the attainment of that objective, such a **condition** nevertheless **goes beyond what is necessary in order to attain the objective pursued,** to the extent that it precludes the taking into account of other elements potentially representative of the actual degree of **attachment of the applicant for the financial aid with the society or with the labour market** of the Member State concerned, such as the fact that one of the **parents**, who continues to support the student, is a **frontier worker** who has stable employment in that Member State and has already **worked there for a significant period of time**.

- **Case 46/12 *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* [2013] ECLI:EU:C:2013:97** (Derogation from the principle of equal treatment for maintenance aid for studies consisting in student grants or student loans)

A European Union citizen who pursues a course of studies in a host Member State whilst at the same time pursuing effective and genuine employment activities such as to confer on him the status of '**worker'** within the meaning of Article 45 TFEU **may not be refused maintenance aid for studies** which is granted to the nationals of that Member State. The fact that the person entered the territory of the host Member State with the principal **intention of pursuing a course of study is not relevant for determining whether he is a worker** and, accordingly, whether he is entitled to that aid under the same terms as a national of the host Member State under Article 7(2) of Regulation 1612/68.

11.2. Case law on Article 7(2) of Regulation (EU) 492/2011

- **Case 238/15 *Bragança Linares Verruga and Others* [2016] ECLI:EU:C:2016:949** (restricted access to portable study finance for migrant student)

Article 7(2) of Regulation (EU) 492/2011 must be interpreted as precluding legislation of a Member State, with the aim of **encouraging an increase in the proportion of residents with a higher education degree**, makes the grant of financial aid for higher education studies to a non-resident student conditional on at least one of that s**tudent's parents having worked in that Member State for a minimum and continuous period of five years at the time the application for financial aid** is made, **but which does not lay down such a condition in respect of a student residing in the territory of that Member State**.

- **Joined Cases 401/15 to 403/15 *Depesme and Kerrou* [2016] ECLI:EU:C:2016:955** (restricted access to portable study finance for mobile student)

Article 45 TFEU and Article 7(2) of Regulation 492/2011 must be interpreted as meaning that a child of a frontier worker, who is able to benefit indirectly from the social advantages referred to in the latter provision, such as study finance granted by a Member State to the children of workers pursuing or who have pursued an activity in that Member State, means not only a child who has a child-parent relationship with that worker, but also a **child of the spouse or registered partner of that worker, where that worker supports that child**. The latter requirement is the result of a **factual situation**, which it is for the national authorities and, if appropriate, the national courts, to assess, and it is not necessary for them to determine the reasons for that contribution or make a precise estimation of its amount.

- **Case 410/18 *Aubriet* [2019] ECLI:EU:C:2019:582** (study grant)

Article 45 TFEU and Article 7(2) of Regulation (EU) 492/2011 must be interpreted as precluding legislation of a Member State which makes the grant of financial aid for higher education studies to non-resident students subject to the condition that, **at the date of the application for financial aid, one of the parents of the student has been employed or carried on an activity in that Member State for a period of at least five years** in the course of a reference period of seven years calculated retroactively from the date of that application for financial aid, in so far as it does not permit the existence of any connection with the labour market of that Member State to be understood in a sufficiently broad manner.

- **Case 447/18 *Generálny riaditeľ Sociálnej poisťovne Bratislava* [2019] ECLI:EU:C:2019:1098** (Legislation of a Member State restricting the grant of an 'additional benefit for sportspersons who have represented the State' to the citizens of that State)

Article 7(2) of Regulation (EU) 492/2011 must be interpreted as precluding legislation of a Member State which makes **receipt of an additional benefit introduced for certain high-level sportspersons** who have represented that Member State or its legal predecessors in international sporting competitions **conditional upon**, in particular, the person applying for the benefit **having the nationality of that Member State**.

- **Case 181/19 *Jobcenter Krefeld* [2020] ECLI:EU:C:2020:794** (Special non-contributory cash benefits)

Article 7(2) of Regulation 492/2011 must be interpreted as precluding legislation of a Member State which provides that a national of another Member State and his or her minor children, all of whom have, in the former Member State, a right of residence, by virtue of those children attending school in that State, are **automatically and in all circumstances excluded from entitlement to benefits to cover their subsistence costs**.

- **Case 830/18 Landkreis Südliche Weinstraße/PF [2020] ECLI:EU:C:2020:275** (system for reimbursement of school transport costs)

Article 7(2) of Regulation (EU) 492/2011 must be interpreted as meaning that national legislation which makes the **payment of school transport costs** by a Land subject to a **requirement of residence** in the territory of that Land constitutes **indirect discrimination**, in that it is intrinsically liable to affect frontier workers more than national workers. **Practical difficulties linked to the effective organisation of school transport** within a Land **do not constitute an overriding reason in the public interest** that is capable of justifying a national measure categorised as indirect discrimination.

11.3. Discrimination on the grounds of nationality of a Czech sportsperson

In order to demonstrate that non-discrimination on grounds of nationality is also relevant for workers with Czech nationality for claiming social and tax advantages, the case **UB v Generálny riaditeľ Sociálnej poisťovne Bratislava** brought to the ECJ, is especially highlighted:

In the present case, *UB v Generálny riaditeľ Sociálnej poisťovne Bratislava*[270], a Czech national who lives in Slovakia and had obtained gold and silver medals in the Ice Hockey European and World Championships respectively as a member of the national team of the Czechoslovak Socialist Republic, was refused an additional benefit introduced for certain high-level sportspersons who have represented Slovakia, because he did not have Slovak nationality. In addition, at the time of the accession of the Slovak Republic and the Czech Republic to the EU, the person concerned was employed in a primary school and continued in that post following that accession.

The Court found that the Czech citizen concerned, is in the same situation as a migrant worker. The Court held that the additional benefit at issue in the present case is covered by the concept of a 'social advantage' for the purposes of Article 7(2) of Regulation (EU) 492/2011. Against that background, it found that the possibility of a migrant worker being compensated in the same way as workers who are nationals of the host Member State for exceptional sporting results which he or she has obtained while representing that Member State or its legal predecessors may **contribute to the integration of that worker into that Member State** and thus to achieving the objective of **freedom of movement for workers**. The Court emphasised that the additional benefit at issue in the main proceedings has the effect not only of providing its recipients with financial security intended, inter alia, to compensate for the fact that they were unable to fully integrate into the labour market during the years dedicated to practising a sport at a high level, but also, chiefly, of conferring on those recipients a particular level of social prestige because of the sporting results which they obtained in the context of that representation. Consequently, the Court found that a Member State which grants such a benefit to its national workers cannot refuse to grant it to workers who are nationals of other Member States without discriminating on the basis of nationality.

[270] Case 447/18 *UB v Generálny riaditeľ Sociálnej poisťovne Bratislava* [2020] ECLI:EU:C:2019:1098.

The European Court of Justice held that Article 7(2) of Regulation (EU) 492/2011 precludes legislation of a Member State which makes **receipt of an additional benefit** paid to certain high-level sportspersons who have represented that Member State or its legal predecessors in international sporting competitions, c**onditional upon the person applying for the benefit having the nationality of that Member State**.

12. Conclusion

12.1. The scope of non-discrimination

The substantive scope of the right to equal treatment in cross-border situations, including the right to not be discriminated against based on one's nationality, has become wholly unlimited. The mere possession of Union citizenship plus the presence of a cross-border element suffices for equality of treatment in relation to any substantive right or benefit to the exclusion of, arguably, none. The non-discrimination rule extends to, or can be invoked for, any right or benefit, regardless of the policy areas they stem from and their positive or negative impact om freedom of movement.

12.2. The discrimination test

National rules or acts making direct or indirect distinctions between own nationals and nationals of other Member States can only be maintained if they can pass the non-discrimination test. Whenever the legal concept of indirect discrimination is applied in practice, the examination of the case at hand will have to involve a three-step analysis relating to the scope of the law, the nature of the measure as amounting to apparent indirect discrimination, and the objective justification.

12.3. Equal access of EU migrant workers to social and tax advantages

The overwhelming amount of ECJ cases on the interpretation of Article 7(2) of Regulation (EU) 492/2011 demonstrates that the right to non-discrimination on grounds of nationality remains a present issue in legal disputes and is not losing its relevance.

Social advantages within the meaning of Article 7(2) of Regulation (EU) 492/2011 are to be understood as *all advantages, whether or not linked to a contract of employment, that are generally granted to national workers primarily because of their objective status as workers, or by virtue of the mere fact of their residence on the national territory, and the extension of which to workers who are nationals of other Member States seems likely to facilitate their mobility within the EU*. Social advantage within the meaning of Article 7(2) of Regulation (EU) 492/2011 includes e. g. minimum subsistence benefits[271], child-raising allowances[272], study

[271] Case 249/83 *Hoeckx* [1985] ECR -00973.
[272] Case 85/96 *Martinez Sala* ECLI:EU:C:1998:217.

grants[273], public transport fare reductions for large families[274], the right to have legal proceedings in own language and funeral payments[275].

Although direct taxation is an exclusive national competence, Member States may not introduce tax legislation that discriminates directly or indirectly on the basis of nationality, i. e. tax benefits may not only be reserved to residents of a Member State. National tax rules deterring a national of a Member State from exercising his right to free movement constitutes an obstacle to free movement when not objectively justified. Examples of tax advantages are tax deductions in relation to contributions for an occupational pension, private sickness and invalidity insurance.

[273] Case 542/09 *Commission v Netherlands* [2012] ECLI:EU:C:2012:346.
[274] Case 32-75 *Cristini v SNCF* [1975] ECR 1085.
[275] Case 237/94 *O'Flynn v Adjudication Officer* [1996] ECR 2617.

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