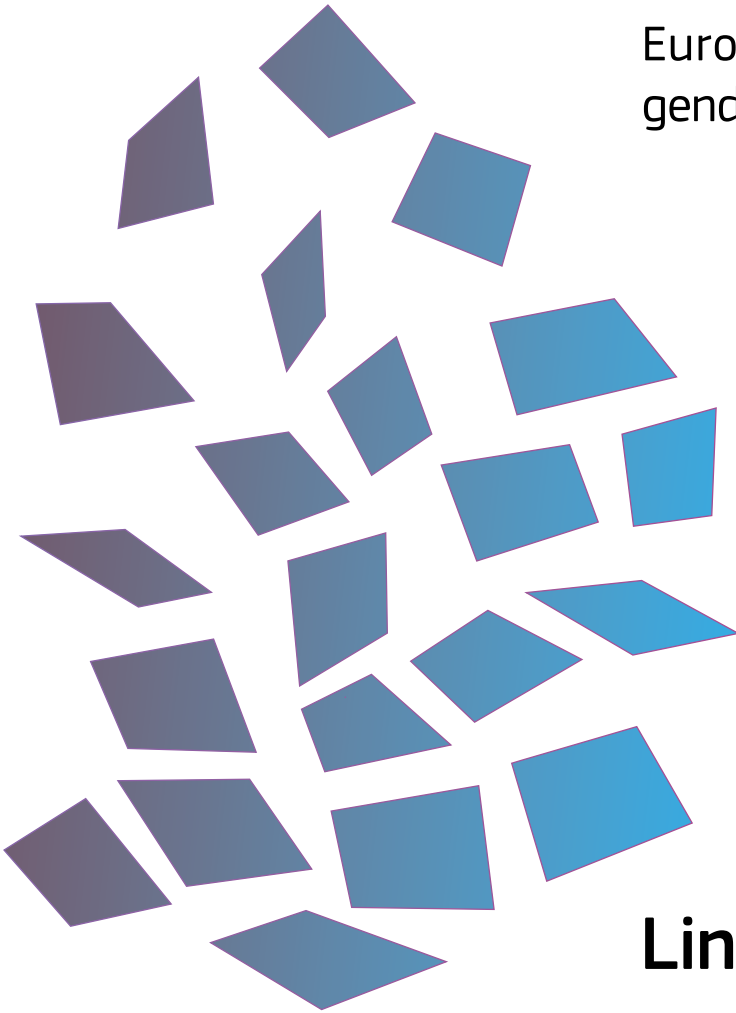




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European network of legal experts in
gender equality and non-discrimination



Links between migration and discrimination

A legal analysis of the situation
in EU Member States

Including summaries in English,
French and German

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Equality
Unit JUST/D1

*European Commission
B-1049 Brussels*

Links between migration and discrimination

Written by Olivier De Schutter

July 2016

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Luxembourg: Publications Office of the European Union, 2016

ISBN 978-92-79-61905-2

Doi:10.2838/133658

Catalogue number DS-04-16-770-3A-N

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Executive summary

This report, an update of a report initially published in 2009, aims to describe the links between nationality and protection from discrimination under EU and international law as well as in the domestic legal systems of EU Member States. Protection from discrimination should be seen as a key component of the current strategies for the integration of third-country nationals, which the European Commission pledged to support in the Action Plan it announced in June 2016.¹ Such strategies are particularly important today, as the situation of the 20 million third-country nationals living in the EU-28 Member States, representing about 4 % of the total population of the EU, has been figuring prominently in the public debate, and as the European Union has witnessed a significant rise in the inflow of refugees since 2015.

Against this background, the purpose of this report is to identify whether third-country nationals, once they enter the European Union, are protected from discrimination on grounds of nationality and from discrimination on grounds of race, ethnic origin or religion in situations where nationality is used as a proxy for these grounds. Article 3(2) common to both the Racial Equality and Employment Equality Directives states that these instruments ‘do [...] not cover difference of treatment based on nationality’. However, this clause does not imply that all differences of treatment on grounds of nationality are permissible. Such differences in treatment may result in indirect discrimination on grounds of race, ethnic origin or religion. They may also be in violation of other rules of EU law, including both EU secondary legislation and the general principle of equal treatment, which applies in the field of application of EU law.

The integration of immigrants can succeed only if these individuals are adequately protected from discrimination: therefore, the principle of equality of treatment is a key component of the Union’s immigration policy, launched at the Tampere European Council in 1999 and announced by a 2000 communication of the European Commission. Indeed, by stipulating in Article 15(3) that ‘Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union’, the EU Charter of Fundamental Rights, proclaimed in December 2000, itself makes a contribution in this regard. Yet, the position of nationals of EU Member States remains much more advantageous than that of third-country nationals. The provisions of the Treaty on the Functioning of the European Union which prohibit discrimination on grounds of nationality, whether in general (‘within the scope of application of the Treaties’: Article 18 TFEU (ex-Art. 12 EC)) or in the specific contexts of the freedom of movement of workers (Article 45(2) TFEU (ex-Art. 39(2) EC)) or of freedom of establishment (Article 49 TFEU (ex-Art. 43 EC)), have been interpreted to protect only the nationals of Member States. The scope of application of Article 18 TFEU is still limited to nationals of EU Member States, and it covers neither differences of treatment between EU citizens and third-country nationals nor differences of treatment between the nationals of different third countries.

This report describes how the protection afforded to third-country nationals has improved in recent years as a result of developments both in EU law and in international human rights law. Anti-discrimination law is thus supporting efforts at integration at a time when there is broad agreement that we need to move to more inclusive societies, both for the sake of social cohesion and for economic reasons: as long as migrants’ access to work or education is impeded by prejudice or discrimination, the potential of their contribution to the prosperity and well-being of society will not be fully tapped. The requirement of non-discrimination on grounds of nationality has been significantly strengthened under international and European human rights law and under national constitutions, as well as under the ordinary domestic legislation of EU Member States, including legislation implementing the Racial Equality and Employment Equality directives. This both supports and strengthens the adoption of new legal instruments in the EU,

¹ Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *Action Plan on the integration of third-country nationals*, COM(2016)377 of 7.6.2016.

improving the status under Union law of third-country nationals staying in the EU Member States. Some contentious issues remain, however. This is in part because the progress made by EU law in this area has been patchy, as equal treatment with nationals has been extended to distinct categories of migrants, such as long-term residents, Blue Card holders or seasonal workers, rather than to third-country nationals in general. But it is also because of the absence of a sufficient consensus on certain questions – particularly concerning the rights of third-country nationals who are not regularly residing in an EU Member State, whose arrival may be too recent or whose status may be too fragile to justify granting certain advantages concerning, for instance, access to social security (including old-age pension and child allowances, for instance) or to healthcare benefits (beyond emergency medical assistance). The report, in that sense, illustrates the convergence that is occurring between developments of Union law and developments in general human rights law, as well as the fact that such convergence is still incomplete. At the same time, the report provides strong support for basing the emerging EU immigrant integration policy on the principle of equal treatment with the nationals of the Member State in which they reside. This principle is increasingly seen as more than a political commitment and as a useful tool for effective integration: it is understood as a legal requirement imposed on the EU and its Member States. Although the principle of equal treatment does not imply that *any* difference in treatment on grounds of nationality is necessarily prohibited, it does require that such differences in treatment be carefully scrutinised and justified as proportionate to the fulfilment of a legitimate aim: in the language of the European Court of Human Rights, only ‘very weighty reasons’ may now still justify differences of treatment based exclusively on citizenship.

In Chapter 1, the concepts of ‘nationality’, ‘race’ and ‘ethnic origin’ are described, and they are related to the concept of ‘national origin’, which also appears in human rights instruments adopted at international and European levels and in EU law. This chapter also explains the potential relationship between nationality-based discrimination, on the one hand, and discrimination on other grounds such as race, ethnic origin or religion, on the other hand.

Chapter 2 then discusses how discrimination on grounds of nationality is addressed in the framework of EU law. The provisions of the Treaty on the Functioning of the European Union which prohibit discrimination on grounds of nationality cover only nationals of EU Member States. These provisions therefore prohibit neither differences of treatment between the citizens of the EU – who have the nationality of a Member State – and third-country nationals, nor differences of treatment between nationals of different third countries on grounds of nationality. Yet steps have been taken to overcome the exclusion of third-country nationals from free movement rights as granted in the EU Treaties to nationals of EU Member States. This is the purpose of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,² the scope of which was extended by Directive 2011/51/EU to the beneficiaries of international protection.³ Another important step was the adoption in 2009 of the Blue Card Directive.⁴ This initiative aims to attract highly qualified workers seeking to work in the EU, and includes a number of areas in which EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card. Other instruments were adopted on the basis of Article 79(2) of the Treaty on the Functioning of the European Union, which allows the EU to define the rights of third-country nationals residing legally in a Member State. They include the 2011 Single Permit Directive, which defines a common set of rights benefiting third-country workers legally residing in a Member State;⁵ Directive 2014/36/EU, which defines the rights of seasonal workers;⁶ Directive 2014/66/EU on

2 OJ L 16 of 23.1.2004, p. 44.

3 Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132, 19.5.2011, p. 1.

4 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17.

5 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, p. 1.

6 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375.

the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer;⁷ and Directive 2016/801, which covers a heterogeneous group of people (students, exchange pupils, volunteers and scientific researchers), the arrival of whom in the EU from outside the Union is seen as potentially contributing to the Union's economic progress.⁸

Thus, in a number of areas, and for the benefit of a number of categories of third-country nationals, the principle of equality of treatment with the nationals of the host State (in working conditions, in access to certain branches of social security, or in access to goods and services and the supply of goods and services made available to the public, for example) was affirmed for the benefit of third-country nationals legally authorised to stay in that State's territory. In parallel to these advances, the Court of Justice of the European Union took the view in *Tümer*, a case on which it delivered its judgment in 2014,⁹ that instruments protecting workers in general should be presumed to extend their protection to third-country nationals, even in cases where they are not legally authorised to work. The extension of national treatment to third-country nationals in the Union is thus making progress through different channels, favouring their integration in the host society and ensuring that Union law aligns itself with the development of international human rights law.

Association and partnership and cooperation agreements concluded between the European Union and third countries also offer to the nationals of the States Parties to such agreements a certain degree of protection from nationality-based discrimination. While these agreements do not provide for the freedom of nationals of these countries to enter the EU in order to seek employment, they may contain provisions which prohibit discrimination on grounds of nationality, for instance in access to employment or in working conditions, and sometimes as regards social security benefits, between nationals of the EU (or EEA) Member States on the one hand and nationals of the third country with which the agreement is concluded on the other hand. They also contribute, therefore, to the general movement towards the removal of differences of treatment on grounds of nationality – differences of treatment which are increasingly seen as discriminatory in the absence of adequate justification.

Finally, the 2011 Qualification Directive (Recast) (Directive 2011/95/EU)¹⁰ guarantees persons in need of international protection a minimum level of benefits in all EU Member States. This directive aligns the situation of refugees and persons granted subsidiary protection either with the situation of nationals of the host State in which they reside or with the situation of other third-country nationals legally residing in that State, in a limited number of areas: they are granted the right to access employment, social assistance, education and healthcare under the same conditions as nationals, as well as a right to access accommodation and freedom of movement within the receiving State under the same or equivalent conditions as those applicable to third-country nationals residing in that State.

Important though they are, these developments do not ensure full equality of treatment between third-country nationals and nationals of the EU Member States as regards protection from nationality-based discrimination. Nor does the Charter of Fundamental Rights change this situation since, on this issue, the Charter merely reaffirms the existing situation under EU primary law.

7 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157 of 27.5.2014, p. 1.

8 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions and entry of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132 of 21.5.2016, p. 21.

9 Case C-311/13, *Tümer*, judgment of 5 November 2014 (ECLI:EU:C:2014:2337).

10 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337 of 22.12.2011, p. 9. This instrument recasts Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, p. 12.

Chapter 3 examines the contribution of international and European human rights law to combating discrimination on grounds of nationality. The requirements of the International Covenant on Civil and Political Rights, of the Convention on the Rights of the Child and of the Council of Europe European Convention on Human Rights cannot be ignored since these instruments are a source of inspiration for the Court of Justice of the European Union in identifying the fundamental rights that it protects within the EU legal system as part of the general principles of EU law. This chapter also discusses the position of the Council of Europe European Social Charter and of the International Covenant on Economic, Social and Cultural Rights on this issue, although the status of these instruments in the development of the case law of the European Court of Justice is less clear. In addition, Chapter 3 presents the contributions made to the issue of nationality-based discrimination by the 1951 Geneva Convention relating to the Status of Refugees and by the 1954 Convention relating to the Status of Stateless Persons.

A comparison of these instruments leads us to the conclusion that differences of treatment on grounds of nationality are increasingly treated as suspect in international human rights law: as already mentioned, only 'very weighty reasons', in the view of the European Court of Human Rights, could justify differences of treatment based exclusively on the criterion of nationality; moreover, both the European Court of Human Rights and the European Committee of Social Rights (in this case, setting aside the apparently clear wording of the Appendix to the European Social Charter concerning the scope of application *ratione personae* of the Charter) have considered that, in principle, a person should not be denied the human rights that are accorded to everyone simply because he or she is irregularly staying on a given State's territory. This jurisprudence leads to the conclusion that, although they might still be acceptable in the exercising of political rights narrowly defined, differences of treatment between EU nationals and third-country nationals are becoming more difficult to justify in areas such as social security, access to education and healthcare, both because these are areas which are directly related to the socio-economic integration of migrants and to their enjoyment of basic rights and because they are less connected to the State's sovereign powers in law enforcement.

The implication is that, in the future, the situation of third-country nationals who are legally residing in EU Member States may have to be more closely aligned with that of the nationals of other EU Member States; the mere fact that EU Member States have decided to establish among themselves a new legal system and to create a 'citizenship of the Union' should not be considered as sufficient justification for the maintenance of such differences beyond the narrow list of political rights currently attached to citizenship of the Union. Indeed, as regards at least the enjoyment of fundamental rights, even differences of treatment based on the administrative situation of individuals – particularly differences of treatment between legally resident migrants and migrants who are in an irregular situation – may be challenged.

Finally, Chapter 4 asks whether third-country nationals are protected from differences of treatment on grounds of nationality in the domestic legal systems of EU Member States. Two questions are asked. First, are third-country nationals protected from differences of treatment on grounds of nationality which may be discriminatory in themselves? Secondly, are they protected from such differences in treatment to the extent that these measures may constitute indirect discrimination on grounds of race, ethnic origin or religion, whether this is the intent of the author of the measures (who deliberately uses nationality as a proxy for race, ethnicity or religion) or whether this is the result of such measures (differences of treatment on grounds of nationality leading to a particular disadvantage for members of certain racial or ethnic groups or for the members of a particular religious faith)? The answers are sought in the constitutions and the domestic legislation of EU Member States. The study shows that, although only two States explicitly provide, in their respective constitutions, for a prohibition of discrimination on grounds of nationality, in the overwhelming majority of EU Member States, the courts enforcing constitutional equality clauses could impose such a prohibition, since in most Member States such clauses are drafted in terms broad enough to extend to the prohibition of any discrimination on grounds of nationality. Protection from discrimination under domestic laws is, of course, additional to, and not instead of, protection already granted through international and European human rights law as described in Chapter 3. However, the rise of nationality as a suspect ground of discrimination in international human rights law may encourage

a reading of domestic constitutional provisions which protects foreigners from discrimination on grounds of their nationality, and this may lead national courts, constitutional courts in particular, to demand that the situation of third-country nationals be aligned with that of nationals and with that of nationals of other EU or EEA Member States.

Chapter 5 concludes that the prohibition of discrimination on grounds of nationality is emerging as a general principle of international and European human rights law, and that it is recognised already by a significant number of EU Member States, to the extent that it can be considered as a general principle of EU law, for which the Court of Justice of the European Union may in the future seek to ensure respect. This does not mean that the European legislator should necessarily equate the situation of third-country nationals legally residing on the territory of an EU Member State with that of nationals of other EU Member States, for example as regards access to social benefits such as health, education or job placement services. It may imply, however, that, when implementing EU law, Member States should take into account the need not to establish or maintain differences in treatment between different categories of foreign nationals (in particular between nationals of other EU Member States and nationals of third countries), nor to establish or maintain differences in treatment between nationals and foreigners, unless such differences can be justified as measures that may be adopted in the pursuance of legitimate objectives and that are proportionate to such objectives. This should not be seen as announcing the gradual dissolution of the privileges attached to being a citizen of the Union when one exercises one's free movement rights by travelling in an EU Member State other than the State of one's nationality. It should be seen, rather, as signalling that integration of third-country nationals in their host societies must be built on a robust understanding of the right of these foreigners to equal treatment with the nationals of the host country. This reasoning was at the heart of the very definition of freedom of movement for workers from other Member States when the European Economic Community was established. It is a reasoning that is still valid 50 years later. But it must now extend beyond citizens of the Union alone.

Résumé

Le présent rapport, qui met à jour un rapport initialement publié en 2009, vise à décrire les liens entre la nationalité et la protection contre la discrimination conférée par le droit européen et international ainsi que par les ordres juridiques internes des États membres de l'UE. La protection contre la discrimination doit être considérée comme un élément essentiel des stratégies actuelles d'intégration des ressortissants de pays tiers, que la Commission européenne s'est engagée à soutenir dans son plan d'action annoncé en juin 2016.¹ Ces stratégies revêtent aujourd'hui une importance toute particulière, étant donné que la situation des 20 millions de ressortissants de pays tiers vivant dans l'UE-28 (soit 4 % environ de l'ensemble de sa population) occupe une place centrale dans le débat public, et que l'Union européenne connaît depuis 2015 un afflux de réfugiés en forte croissance.

C'est dans ce contexte que le présent rapport cherche à déterminer si les ressortissants de pays tiers bénéficient dès leur entrée dans l'Union européenne d'une protection contre la discrimination fondée sur la nationalité et contre la discrimination fondée sur la race, l'origine ethnique ou la religion lorsque la nationalité sert de substitut à ces motifs. La directive sur l'égalité raciale et la directive relative à l'égalité en matière d'emploi disposent toutes deux en leur article 3, paragraphe 2, qu'elles «ne visent pas les différences de traitement fondées sur la nationalité», mais cette clause n'implique pas que toutes les différences de traitement fondées sur la nationalité puissent être justifiées. Ces différences peuvent se traduire par une discrimination indirecte fondée sur la race, l'origine ethnique ou la religion. Elles peuvent également enfreindre d'autres règles du droit de l'UE, en ce compris tant la législation européenne dérivée que le principe général de l'égalité de traitement qui vaut pour l'ensemble du domaine d'application du droit de l'UE.

L'intégration des immigrants ne pouvant réussir que si ceux-ci bénéficient d'une protection adéquate à l'encontre des discriminations, le principe de l'égalité de traitement constitue une composante clé de la politique d'immigration de l'UE initiée par le conseil européen de Tampere en 1999 et annoncée par une communication de la Commission européenne en 2000. En effet, en stipulant en son article 15, paragraphe 3, que «Les ressortissants des pays tiers qui sont autorisés à travailler sur le territoire des États membres ont droit à des conditions de travail équivalentes à celles dont bénéficient les citoyens ou citoyennes de l'Union», la Charte des droits fondamentaux de l'UE, proclamée en décembre 2000, apporte elle-même une pierre à l'édifice. Or la situation des ressortissants des États membres de l'Union reste beaucoup plus avantageuse que celle des ressortissants de pays tiers. Les dispositions du traité sur le fonctionnement de l'Union européenne qui interdisent la discrimination fondée sur la nationalité, que ce soit de manière générale («dans le domaine d'application des traités»: article 18 TFUE (ex-article 12 TCE)) ou dans les contextes spécifiques de la libre circulation des travailleurs (article 45, paragraphe 2, TFUE (ex-article 39, paragraphe 2, TCE)) ou de la liberté d'établissement (article 49 TFUE (ex-article 43 TCE)), ont été interprétées comme protégeant exclusivement les ressortissants des États membres. Le champ d'application de l'article 18 TFUE se limite encore toujours aux ressortissants des États membres de l'UE, et ne couvre ni les différences de traitement entre citoyens de l'UE et ressortissants de pays tiers ni les différences de traitement entre ressortissants de pays tiers différents.

Le rapport ci-après décrit l'amélioration de la protection octroyée aux ressortissants de pays tiers intervenue ces dernières années par suite de l'évolution à la fois du droit de l'UE et du droit international relatif aux droits de l'homme. La législation antidiscrimination étaye donc les efforts déployés en faveur de l'intégration à l'heure où s'est forgé un large consensus quant à la nécessité de s'orienter vers des sociétés davantage inclusives, à la fois dans un souci de cohésion sociale et pour des raisons

1 Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions, *Plan d'action pour l'intégration des ressortissants de pays tiers*, COM(2016)377 du 7.6.2016.

économiques: aussi longtemps que l'accès des migrants au travail ou à la formation restera entravé par des préjugés ou des discriminations, leur contribution potentielle à la prospérité et au bien-être de la société ne sera pas pleinement valorisée. L'interdiction de discrimination fondée sur la nationalité a été considérablement renforcée au titre du droit international et européen relatif aux droits de l'homme, des constitutions nationales et de dispositions législatives internes des États membres de l'UE, y compris la législation transposant les directives relatives à l'égalité raciale et l'égalité en matière d'emploi – ce qui favorise et consolide à la fois l'adoption de nouveaux instruments juridiques européens améliorant, en vertu du droit de l'UE, la situation des ressortissants de pays tiers séjournant dans les États membres. Certains points restent cependant litigieux du fait notamment que les avancées réalisées en la matière par le droit de l'UE sont fragmentaires: ainsi l'égalité de traitement a-t-elle été étendue à des catégories distinctes de migrants tels que les résidents de longue durée, les titulaires de la carte bleue européenne ou les travailleurs saisonniers plutôt qu'à des ressortissants de pays tiers en général. Ces points litigieux peuvent cependant découler également d'une absence de consensus suffisant sur certaines questions – en rapport plus particulièrement avec les droits des ressortissants de pays tiers qui ne résident pas régulièrement dans un État membre de l'UE ou dont l'arrivée est trop récente, ou le statut trop précaire, pour justifier l'octroi de certains avantages en termes d'accès à la sécurité sociale (y compris la pension de vieillesse et les allocations familiales, par exemple) ou de prestations de soins de santé (au-delà de l'aide médicale d'urgence) notamment. Dans ce sens, le rapport illustre à la fois la convergence observée entre les évolutions du droit de l'Union et celles du droit général relatif aux droits de l'homme, et le caractère inachevé de cette convergence. Le rapport appuie parallèlement et sans équivoque l'élaboration d'une politique européenne d'intégration des immigrants qui se fonde sur le principe d'une égalité de traitement avec les ressortissants de l'État membre dans lequel ils séjournent. Ce principe est de plus en plus largement envisagé comme étant davantage qu'un engagement politique et un instrument utile à une intégration effective: il est perçu comme une exigence légale imposée à l'UE et à ses États membres. Sans impliquer que toute différence de traitement fondée sur la nationalité est nécessairement interdite, le principe de l'égalité de traitement exige que ces différences de traitement soient attentivement examinées et qu'elles soient justifiées en tant que moyen proportionné d'atteindre un but légitime: selon les termes utilisés par la Cour européenne des droits de l'homme, seules des «raisons très sérieuses» peuvent encore justifier aujourd'hui des différences de traitement exclusivement fondées sur la citoyenneté.

Le premier chapitre du rapport s'attache à préciser les concepts de «nationalité», de «race» et d'«origine ethnique » et à les mettre en rapport avec le concept d'«origine nationale», lequel apparaît également dans des instruments relatifs aux droits de l'homme adoptés aux niveaux international et européen ainsi qu'en droit de l'UE. Ce chapitre explique aussi le lien potentiel entre la discrimination fondée sur la nationalité, d'une part, et, de l'autre, la discrimination fondée sur d'autres motifs tels que la race, l'origine ethnique ou la religion.

Le deuxième chapitre analyse ensuite la manière dont la discrimination fondée sur la nationalité est abordée dans le cadre du droit de l'UE. Les dispositions du traité sur le fonctionnement de l'Union européenne interdisant la discrimination fondée sur la nationalité couvrent exclusivement les ressortissants des États membres de l'UE: elles n'interdisent donc ni les différences de traitement entre les citoyens de l'UE – ayant la nationalité d'un État membre – et les ressortissants de pays tiers, ni les différences de traitement fondées sur la nationalité entre ressortissants de pays tiers différents. Des mesures ont toutefois été prises pour empêcher que les ressortissants de pays tiers soient exclus des droits à la libre circulation conférés aux ressortissants des États membres de l'UE par les traités européens. Tel est le but de la directive 2003/109/CE du Conseil du 25 novembre 2003 relative au statut des ressortissants de pays tiers résidents de longue durée,² dont le champ d'application a été étendu par la directive 2011/51/UE aux bénéficiaires d'une protection internationale.³ Une autre étape importante a été franchie en 2009 avec

2 JO L 16 du 23.1.2004, p. 44.

3 Directive 2011/51/UE du Parlement européen et du Conseil du 11 mai 2011 modifiant la directive 2003/109/CE du Conseil afin d'étendre son champ d'application aux bénéficiaires d'une protection internationale, JO L 132 du 19.5.2011, p. 1.

l'adoption de la directive relative à la carte bleue européenne.⁴ Cette initiative vise à attirer des travailleurs hautement qualifiés désireux de travailler dans l'UE, et prévoit un certain nombre de domaines dans lesquels les titulaires de la dite carte bleue jouissent d'une égalité de traitement avec les ressortissants de l'État membre qui l'a délivrée. D'autres instruments ont été adoptés sur la base de l'article 79, paragraphe 2, du traité sur le fonctionnement de l'Union européenne, qui autorise l'Union à définir les droits des ressortissants de pays tiers en séjour régulier dans un État membre. Il s'agit de la directive de 2011 relative au permis unique, qui définit un socle commun de droits pour les travailleurs issus de pays tiers qui résident légalement dans un État membre⁵; de la directive 2014/36/UE, qui fixe les droits des travailleurs saisonniers⁶; de la directive 2014/66/UE établissant les conditions d'entrée et de séjour des ressortissants de pays tiers dans le cadre d'un transfert temporaire intragroupe⁷; et de la directive 2016/801, qui couvre un groupe hétérogène de personnes (étudiants, élèves participant à un programme d'échange ou volontaires, et chercheurs scientifiques), dont l'arrivée dans l'UE en provenance de pays situés hors de celle-ci est considérée comme une contribution potentielle au progrès économique de l'Union.⁸

Ainsi donc, dans un certain nombre de cas et au profit d'un certain nombre de catégories de ressortissants de pays tiers, le principe de l'égalité de traitement avec les ressortissants de l'État d'accueil (en ce qui concerne les conditions de travail, l'accès à certaines branches de la sécurité sociale ou l'accès aux biens et aux services et la fourniture de biens et de services à la disposition du public, par exemple) a été affirmé en faveur des ressortissants de pays tiers légalement autorisés à séjourner sur le territoire de l'État en question. Parallèlement à ces avancées, la Cour de justice de l'Union européenne a estimé dans l'arrêt qu'elle a rendu en 2014 dans l'affaire *Tümer*,⁹ que les dispositions protégeant les travailleurs en général doivent être présumées étendre leur protection aux ressortissants de pays tiers, même lorsque ceux-ci ne sont pas légalement autorisés à travailler. L'élargissement du traitement national aux ressortissants de pays tiers progresse donc par des voies diverses au sein de l'Union, ce qui favorise leur intégration dans la société d'accueil et fait en sorte que le droit européen suive l'évolution du droit international relatif aux droits de l'homme.

Les accords d'association et les accords de partenariat et de coopération conclus entre l'Union européenne et des pays tiers assurent également aux ressortissants des États parties à ces accords un certain niveau de protection à l'encontre d'une discrimination fondée sur la nationalité. Si ces accords ne confèrent pas aux ressortissants de ces pays le droit d'entrer librement dans l'UE pour y chercher un emploi, ils peuvent comporter des dispositions interdisant la discrimination fondée sur la nationalité en matière d'accès à l'emploi ou de conditions de travail notamment, voire en matière de prestations de sécurité sociale, entre les ressortissants des États membres de l'UE (ou de l'EEE), d'une part, et les ressortissants du pays tiers avec lequel l'accord est conclu, d'autre part. Ils contribuent donc eux aussi au mouvement général en faveur de la suppression des différences de traitement fondées sur la nationalité, lesquelles sont de plus en plus souvent perçues comme discriminatoires en l'absence de justification adéquate.

4 Directive 2009/50/CE du Conseil du 25 mai 2009 établissant les conditions d'entrée et de séjour des ressortissants de pays tiers aux fins d'un emploi hautement qualifié, JO L 155 du 18.6.2009, p. 17.

5 Directive 2011/98/UE du Parlement européen et du Conseil du 13 décembre 2011 établissant une procédure de demande unique en vue de la délivrance d'un permis unique autorisant les ressortissants de pays tiers à résider et à travailler sur le territoire d'un État membre et établissant un socle commun de droits pour les travailleurs issus de pays tiers qui résident légalement dans un État membre, JO L 343 du 23.12.2011, p. 1.

6 Directive 2014/36/UE du Parlement européen et du Conseil du 26 février 2014 établissant les conditions d'entrée et de séjour des ressortissants de pays tiers aux fins d'un emploi en tant que travailleur saisonnier, JO L 94 du 28.3.2014, p. 375.

7 Directive 2014/66/UE du Parlement européen et du Conseil du 15 mai 2014 établissant les conditions d'entrée et de séjour des ressortissants de pays tiers dans le cadre d'un transfert temporaire intragroupe, JO L 157 du 27.5.2014, p. 1.

8 Directive (UE) 2016/801 du Parlement européen et du Conseil du 11 mai 2016 relative aux conditions d'entrée et de séjour des ressortissants de pays tiers à des fins de recherche, d'études, de formation, de volontariat et de programmes d'échanges d'élèves ou de projets éducatifs et de travail au pair, JO L 132 du 21.5.2016, p. 21.

9 Affaire C-311/13, *Tümer*, arrêt du 5 novembre 2014 (ECLI:EU:C:2014:2337).

Enfin, la directive 2011/95/UE (refonte)¹⁰ garantit un niveau minimum de prestations dans tous les États membres de l'UE aux personnes ayant besoin d'une protection internationale. Cette directive aligne la situation des réfugiés et des bénéficiaires d'une protection subsidiaire soit sur la situation des ressortissants de l'État d'accueil dans lequel ils résident, soit sur la situation d'autres ressortissants de pays tiers résidant légalement dans ledit État, dans un nombre limité de domaines: ils jouissent d'un droit d'accès à l'emploi, à l'aide sociale, à l'éducation ou aux soins de santé aux mêmes conditions que les ressortissants nationaux, et d'un droit d'accès au logement et de libre circulation à l'intérieur de l'État d'accueil à des conditions identiques ou équivalentes à celles appliquées aux ressortissants de pays tiers résidant dans ledit État.

Aussi importantes soient-elles, ces évolutions ne garantissent pas la pleine égalité de traitement entre les ressortissants de pays tiers et les ressortissants des États membres de l'UE en termes de protection contre la discrimination fondée sur la nationalité. Et la Charte des droits fondamentaux ne modifie pas davantage cette situation dans la mesure où elle se contente de réaffirmer sur ce point la situation en place en vertu du droit primaire de l'UE.

Le troisième chapitre s'intéresse à la contribution du droit international et européen relatif aux droits de l'homme à la lutte contre la discrimination fondée sur la nationalité. Les obligations découlant du Pacte international relatif aux droits civils et politiques, de la Convention des Nations unies relative aux droits de l'enfant et de la Convention européenne des droits de l'homme du Conseil de l'Europe ne peuvent être ignorées dans la mesure où la Cour de justice de l'Union européenne s'inspire principalement de ces instruments lorsqu'elle détermine des droits fondamentaux qu'elle protège dans le cadre du système juridique de l'UE en tant que principes généraux du droit européen. Ce troisième chapitre examine également les positions respectives de la Charte sociale européenne du Conseil de l'Europe et du Pacte international relatif aux droits économiques, sociaux et culturels à cet égard, même si le rôle de ces instruments dans le développement de la jurisprudence de la CJUE est moins clair. Ce chapitre expose en outre les apports de la Convention de Genève de 1951 relative au statut des réfugiés et de la Convention de 1954 relative au statut des apatrides à la problématique de la discrimination fondée sur la nationalité.

Une comparaison entre ces instruments conduit à conclure que les différences de traitement fondées sur la nationalité sont de plus en plus largement considérées comme suspectes au titre du droit international relatif aux droits de l'homme: comme déjà indiqué, la Cour européenne des droits de l'homme estime que seules des «raisons très sérieuses» peuvent justifier des traitements différenciés exclusivement basés sur le critère de la nationalité; de surcroît, tant la Cour européenne des droits de l'homme que le Comité européen des droits sociaux (mettant de côté ici le fonctionnement apparemment explicite de l'Annexe à la Charte sociale européenne concernant le champ d'application *ratione personae* de la Charte) ont considéré qu'en principe une personne ne devrait pas être privée des droits fondamentaux accordés à tous du simple fait qu'elle se trouve en séjour irrégulier sur le territoire d'un État donné. Cette jurisprudence conduit à conclure que tout en pouvant rester admissibles dans l'exercice de droits politiques définis de manière étroite, les différences de traitement entre ressortissants de l'UE et ressortissants de pays tiers deviennent de plus en plus difficiles à justifier dans des domaines tels que la sécurité sociale, l'accès à l'éducation ou les soins de santé car il s'agit de domaines qui sont directement liés à l'intégration socioéconomique des migrants et à la jouissance par ceux-ci de leurs droits fondamentaux, et qui relèvent moins de la souveraineté de l'État en matière d'application du droit.

10 Directive 2011/95/UE du Parlement européen et du Conseil du 13 décembre 2011 concernant les normes relatives aux conditions que doivent remplir les ressortissants des pays tiers ou les apatrides pour pouvoir bénéficier d'une protection internationale, à un statut uniforme pour les réfugiés ou les personnes pouvant bénéficier de la protection subsidiaire, et au contenu de cette protection, JO L 337 du 22.12.2011, p. 9. Il s'agit d'une refonte de la directive 2004/83/CE du Conseil du 29 avril 2004 concernant les normes minimales relatives aux conditions que doivent remplir les ressortissants des pays tiers ou les apatrides pour pouvoir prétendre au statut de réfugié ou les personnes qui, pour d'autres raisons, ont besoin d'une protection internationale, et relatives au contenu de ces statuts, JO L 304 du 30.9.2004, p. 12.

Il en résulte que la situation des ressortissants de pays tiers en séjour régulier dans un État membre de l'UE devra sans doute s'aligner davantage à l'avenir sur celle des ressortissants d'autres États membres; le simple fait que les États membres de l'Union aient décidé d'instaurer entre eux un nouveau système juridique et de créer une «citoyenneté de l'Union» ne devrait pas être considéré comme une justification suffisante du maintien des différences en question en dehors de la liste étroite des droits politiques actuellement attachés à la citoyenneté de l'Union. Il se pourrait en effet, du moins en ce qui concerne la jouissance des droits fondamentaux, que même des différences de traitement fondées sur la situation administrative de personnes – et en particulier des différences de traitement entre migrants en séjour régulier et migrants en situation irrégulière – puissent être contestées.

Enfin, le quatrième chapitre pose la question de savoir si les ressortissants de pays tiers sont protégés à l'encontre de différences de traitement fondées sur la nationalité par les ordres juridiques internes des États membres de l'UE. La question est double: premièrement, les ressortissants de pays tiers sont-ils protégés à l'encontre de différences de traitement fondées sur la nationalité pouvant s'avérer intrinsèquement discriminatoires? Et, deuxièmement, sont-ils protégés de différences de traitement de ce type dans la mesure où les dispositions visées peuvent constituer une discrimination indirecte fondée sur la race, l'origine ethnique ou la religion – qu'il s'agisse d'une intention de l'auteur des dispositions en cause (lequel utilise délibérément la nationalité comme substitut au motif de la race, de l'origine ethnique ou de la religion) ou qu'il s'agisse de l'effet de ces dispositions (les différences de traitement fondées sur la nationalité donnant lieu à un désavantage particulier pour les membres de certains groupes raciaux ou ethniques ou pour les membres d'une confession religieuse particulière)? Les réponses à ces questions sont à chercher dans les constitutions et les législations nationales des États membres de l'UE. L'étude montre que, si deux États seulement prévoient explicitement une interdiction de discrimination fondée sur la nationalité dans leurs constitutions respectives, les cours et tribunaux de l'écrasante majorité des États membres pourraient, en faisant respecter les clauses constitutionnelles sur l'égalité, imposer cette interdiction, étant donné que, dans la plupart des États membres, les clauses en question sont libellées en termes suffisamment larges pour étendre l'interdiction à toute discrimination fondée sur la nationalité. La protection contre la discrimination conférée par les lois nationales vient, de toute évidence, compléter et non remplacer la protection d'ores et déjà octroyée par le droit international et européen en matière de droits fondamentaux décrit au troisième chapitre. La montée de la nationalité en tant que motif suspect de discrimination en droit international relatif aux droits de l'homme pourrait inciter à interpréter ces dispositions constitutionnelles nationales comme protégeant les étrangers à l'encontre d'une discrimination fondée sur leur nationalité, ce qui pourrait conduire à son tour les juridictions nationales, et les cours constitutionnelles en particulier, à requérir que la situation des ressortissants de pays tiers soit alignée sur celle des ressortissants nationaux et sur celles des ressortissants d'autres États membres de l'UE ou d'États de l'EEE.

Le cinquième chapitre conclut que l'interdiction de discrimination fondée sur la nationalité s'affirme peu à peu comme un principe général du droit international et européen relatif aux droits de l'homme, et qu'elle est déjà reconnue par un nombre non négligeable d'États membres au point de pouvoir être considérée comme un principe général du droit de l'UE dont la Cour de justice de l'Union européenne pourrait veiller désormais à assurer le respect. Cela ne signifie pas que le législateur européen doive nécessairement procéder à une égalisation de la situation des ressortissants de pays tiers en séjour régulier sur le territoire d'un État membre avec celle des ressortissants d'autres États membres de l'UE en ce qui concerne, par exemple, l'accès à des prestations sociales telles que la santé, l'éducation ou les services de placement. Mais cela pourrait impliquer une obligation pour les États membres, lorsqu'ils mettent en œuvre le droit de l'UE, de veiller à ne pas instaurer ou maintenir de différences de traitement entre catégories différentes de ressortissants étrangers (en particulier entre les ressortissants d'autres États membres de l'UE et les ressortissants de pays tiers), et à ne pas instaurer ou maintenir de différences de traitement entre ressortissants nationaux et étrangers à moins que ces différences puissent être justifiées en tant que mesures pouvant être adoptées dans la perspective d'objectifs légitimes et qu'elles soient proportionnées aux dits objectifs. Il convient de ne pas envisager cette évolution comme l'annonce d'une dissolution progressive des privilèges attachés au statut de citoyen de l'Union lorsqu'une personne exerce

son droit à la libre circulation en se déplaçant dans un autre État membre de l'UE que celui dont elle a la nationalité: il convient plutôt de l'envisager comme une indication que l'intégration des ressortissants de pays tiers dans leurs sociétés d'accueil doit s'appuyer sur une compréhension rigoureuse du droit à l'égalité de traitement de ces étrangers par rapport aux ressortissants du pays d'accueil. Ce raisonnement était au cœur de la définition même de la libre circulation des travailleurs d'autres États membres au moment de la mise en place de la Communauté économique européenne. Il conserve toute son actualité cinquante ans plus tard. Mais il doit désormais s'étendre au-delà des seuls citoyens de l'Union.

Zusammenfassung

Ziel dieses Berichts, bei dem es sich um die aktualisierte Fassung eines 2009 veröffentlichten Berichts handelt, ist es, die Zusammenhänge zwischen Staatsangehörigkeit und dem Schutz vor Diskriminierung zu beschreiben, der im Rahmen des Unionsrechts, des internationalen Rechts und der innerstaatlichen Rechtsordnungen der EU-Mitgliedstaaten besteht. Schutz vor Diskriminierung sollte als ein Schlüsselement der derzeitigen Strategien zur Integration von Drittstaatsangehörigen gesehen werden, die zu unterstützen sich die Europäische Kommission in ihrem im Juni 2016 angekündigten Aktionsplan verpflichtet hat.¹ Diese Strategien sind gerade heute besonders wichtig, da die Situation der 20 Millionen Drittstaatsangehörigen, die in den 28 EU-Mitgliedstaaten leben und etwa 4 % der Gesamtbevölkerung der Union ausmachen, großen Raum in der öffentlichen Diskussion einnimmt und die Europäische Union seit 2015 einen starken Anstieg des Flüchtlingszustroms erlebt.

Vor diesem Hintergrund ist es Zweck dieses Berichts herauszufinden, ob Drittstaatsangehörige, wenn sie in die Europäische Union einreisen, vor Diskriminierung aus Gründen der Staatsangehörigkeit und – in Fällen, in denen Staatsanhörigkeit stellvertretend für diese Merkmale verwendet wird – vor Diskriminierung wegen der rassischen oder ethnischen Zugehörigkeit bzw. der Religion geschützt sind. In Artikel 3 Absatz 2 sowohl der Antirassismus- als auch der Gleichbehandlungsrahmenrichtlinie heißt es, dass diese Richtlinien „nicht unterschiedliche Behandlungen aus Gründen der Staatsangehörigkeit“ betreffen. Dies bedeuten jedoch nicht, dass jede unterschiedliche Behandlung aus Gründen der Staatsangehörigkeit zulässig ist. Eine unterschiedliche Behandlung kann zu mittelbarer Diskriminierung aufgrund der rassischen Zugehörigkeit, der ethnischen Herkunft oder der Religion führen. Sie kann auch gegen andere Vorschriften des Unionsrechts – sowohl gegen EU-Sekundärrecht als auch gegen den allgemeinen Gleichbehandlungsgrundsatz, der bei der Anwendung des Unionsrechts gilt – verstoßen.

Die Integration von Zuwanderern kann nur gelingen, wenn diese Personen ausreichend vor Diskriminierung geschützt werden: Der Grundsatz der Gleichbehandlung ist daher ein zentrales Element der EU-Einwanderungspolitik, die 1999 beim Europäischen Rat in Tampere ins Leben gerufen und 2000 in einer Mitteilung der Europäischen Kommission bekanntgegeben wurde. Die EU-Grundrechtecharta, die im Dezember 2000 proklamiert wurde, leistet dazu einen Beitrag, indem sie in Artikel 15 Absatz 3 festlegt, dass „die Staatsangehörigen dritter Länder, die im Hoheitsgebiet der Mitgliedstaaten arbeiten dürfen, ... Anspruch auf Arbeitsbedingungen [haben], die denen der Unionsbürgerinnen und Unionsbürger entsprechen“. Trotzdem sind Staatsbürgerinnen und -bürger der EUMitgliedstaaten noch immer in einer wesentlich vorteilhafteren Position als Drittstaatsangehörige. Die Bestimmungen des Vertrags über die Arbeitsweise der Europäischen Union, die jegliche Diskriminierung aus Gründen der Staatsangehörigkeit – sowohl allgemein („in ihrem [der Verträge; A.d.Ü.] Anwendungsbereich“: Art. 18 AEUV (ex-Art. 12 EGV)) als auch im spezifischen Kontext der Freizügigkeit der Arbeitnehmer (Art. 45 Abs. 2 AEUV (ex-Art. 39 Abs. 2 EGV) und der Niederlassungsfreiheit (Art. 49 AEUV (ex-Art. 43 EGV)) – verbieten, wurden dahingehend ausgelegt, dass sie nur die Staatsangehörigen von Mitgliedstaaten schützen. Der Anwendungsbereich von Artikel 18 AEUV ist immer noch auf Staatsangehörige der EU-Mitgliedstaaten beschränkt und berücksichtigt weder die unterschiedliche Behandlung von EU-Staatsbürgern und Drittstaatsangehörigen noch die unterschiedliche Behandlung von Staatsangehörigen unterschiedlicher Drittstaaten.

Der Bericht beschreibt, wie sich der Schutz, der Drittstaatsangehörigen gewährt wird, in den letzten Jahren aufgrund von Entwicklungen im Unionsrecht und in den internationalen Menschenrechtsbestimmungen verbessert hat. Das Antidiskriminierungsrecht unterstützt also die Bemühungen um Integration in einer Zeit, in der breite Übereinstimmung darüber herrscht, dass wir uns zu integrativeren Gesellschaften hin

¹ Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, *Aktionsplan zur Integration von Drittstaatsangehörigen*, KOM(2016)377 vom 7.6.2016.

bewegen müssen, und zwar sowohl im Interesse des sozialen Zusammenhalts als auch aus wirtschaftlichen Gründen: Solange der Zugang von Zuwanderern zu Arbeit und Bildung durch Vorurteile und Diskriminierung behindert wird, kann das Potenzial ihres Beitrags zum Wohlstand und Wohlergehen der Gesellschaft nicht voll ausgeschöpft werden. Das Gebot der Nichtdiskriminierung aus Gründen der Staatsangehörigkeit wurde im Rahmen internationaler und europäischer Menschenrechtsvorschriften, nationaler Verfassungen sowie der normalen innerstaatlichen Gesetzgebung der EU-Mitgliedstaaten, darunter auch der Rechtsvorschriften zur Umsetzung der Antirassismus- und der Gleichbehandlungsrahmenrichtlinie, deutlich aufgewertet. Dadurch wird die Einführung neuer EU-Rechtsinstrumente, die den unionsrechtlichen Status von Drittstaatsangehörigen in den EU-Mitgliedstaaten verbessern, unterstützt und gestärkt. Nach wie gibt es jedoch einige kontroverse Punkte. Zum Teil ist dies darauf zurückzuführen, dass die Fortschritte des Unionsrechts in diesem Bereich uneinheitlich waren, da die Gleichbehandlung mit den inländischen Staatsbürgern nicht auf Drittstaatsangehörige im Allgemeinen, sondern auf unterschiedliche Kategorien von Zuwanderern (langfristig Aufenthaltsberechtigte, Inhaber einer Blauen Karte, Saisonarbeiternehmer usw.) ausgeweitet wurde. Ein weiterer Grund ist jedoch, dass in bestimmten Fragen kein ausreichender Konsens besteht – vor allem was die Rechte von Drittstaatsangehörigen betrifft, die sich in keinem EU-Mitgliedstaat regulär aufhalten, deren Einreise möglicherweise nicht lange genug zurückliegt oder deren Status zu unsicher ist, um die Gewährung bestimmter Vergünstigungen wie z. B. den Zugang zu den Systemen der sozialen Sicherheit (Altersrente, Kindergeld usw.) oder zu Gesundheitsleistungen (die über medizinische Notfallhilfe hinausgehen) zu rechtfertigen. In diesem Sinne verdeutlicht der Bericht sowohl die Annäherung, die im Zuge der Entwicklungen des Unionsrechts und der allgemeinen Menschenrechtsnormen stattfindet, als auch die Tatsache, dass diese Annäherung noch immer unvollständig ist. Gleichzeitig liefert der Bericht starke Argumente dafür, die künftige Unionspolitik zur Integration von Zuwanderern auf den Grundsatz der Gleichbehandlung mit den Staatsbürgerinnen und Staatsbürgern des Mitgliedstaats zu stützen, in dem sie wohnen. Dieser Grundsatz wird zunehmend nicht mehr nur als ein politisches Bekenntnis und ein nützliches Instrument zur wirksamen Integration gesehen: Er wird als eine der EU und ihren Mitgliedstaaten auferlegte gesetzliche Vorgabe verstanden. Der Grundsatz der Gleichbehandlung bedeutet zwar nicht, dass *jegliche* unterschiedliche Behandlung aus Gründen der Staatsangehörigkeit zwangsläufig verboten ist, er verlangt aber, dass eine solche unterschiedliche Behandlung sorgfältig geprüft wird und im Hinblick auf ein legitimes Ziel als verhältnismäßig gerechtfertigt ist: Um mit den Worten des Europäischen Gerichtshofs für Menschenrechte zu sprechen, können heutzutage nur noch „sehr gewichtige Gründe“ eine ausschließlich auf Staatsbürgerschaft basierende unterschiedliche Behandlung rechtfertigen.

Teil 1 des Berichts beschreibt die Konzepte „Staatsangehörigkeit“, „rassische Zugehörigkeit“ und „ethnische Herkunft“ und setzt diese in Beziehung zum Konzept der „nationalen Herkunft“, das in verschiedenen internationalen und europäischen Menschenrechtsinstrumenten und im Unionsrecht ebenfalls auftaucht. Außerdem wird der potenzielle Zusammenhang zwischen Diskriminierung aus Gründen der Staatsangehörigkeit einerseits und Diskriminierung aus anderen Gründen – etwa rassistische Zugehörigkeit, ethnische Herkunft oder Religion – andererseits erläutert.

In Teil 2 geht es um die Frage, wie Diskriminierung aus Gründen der Staatsangehörigkeit im Rahmen des Unionsrechts angegangen wird. Die Bestimmungen des Vertrags über die Arbeitsweise der Europäischen Union, die Diskriminierung aus Gründen der Staatsangehörigkeit verbieten, beziehen sich nur auf Staatsangehörige der EUMitgliedstaaten. Sie verbieten also weder eine unterschiedliche Behandlung von Unionsbürgern – die Staatsangehörige eines Mitgliedstaats sind – und Drittstaatsangehörigen noch eine unterschiedliche Behandlung aus Gründen der Staatsangehörigkeit von Staatsangehörigen unterschiedlicher Drittstaaten. Es wurden jedoch Schritte unternommen, um den Ausschluss von Drittstaatsangehörigen von den Freizügigkeitsrechten, die den Unionsbürgerinnen und -bürgern in den EU-Verträgen eingeräumt werden, abzubauen. Dies ist der Zweck der Richtlinie 2003/109/EG des Rates vom 25. November 2003 betreffend die Rechtsstellung der langfristig aufenthaltsberechtigten Drittstaatsangehörigen,² deren Anwendungsbereich im Zuge der Richtlinie 2011/51/EU auf Personen

2 ABl. L 16 vom 23.1.2004, S. 44.

erweitert wurde, die internationalen Schutz genießen.³ Ein wichtiger Schritt war die Verabschiedung der sogenannten Hochqualifizierten-Richtlinie im Jahr 2009.⁴ Ziel dieser Richtlinie, die eine Reihe von Bereichen enthält, in denen Inhaber der Blauen Karte EU mit den Staatsangehörigen desjenigen Mitgliedstaats, der die Karte ausstellt, gleichgestellt sind, ist es, die EU für gut ausgebildete Fachkräfte attraktiv zu machen. Andere Rechtsakte wurden auf der Grundlage von Artikel 79 Absatz 2 des Vertrags über die Arbeitsweise der Europäischen Union erlassen, der es der Union erlaubt, die Rechte von Drittstaatsangehörigen, die sich rechtmäßig in einem Mitgliedstaat aufhalten, festzulegen. Dazu gehören die sogenannte Single-Permit-Richtlinie, die ein gemeinsames Bündel von Rechten für Drittstaatsarbeitnehmer festlegt, die sich rechtmäßig in einem Mitgliedstaat aufhalten,⁵ die Richtlinie 2014/36/EU, in der die Rechte von Saisonarbeitnehmern geregelt werden,⁶ die Richtlinie 2014/66/EU über die Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen im Rahmen eines unternehmensinternen Transfers⁷ und die Richtlinie (EU) 2016/801, die verschiedene Gruppen (Studierende, Austauschschüler, Freiwillige und Forscher) betrifft, deren Einreise in die EU als potenzieller Beitrag zu deren wirtschaftlicher Entwicklung gesehen wird.⁸

In verschiedenen Bereichen und für verschiedene Gruppen von Drittstaatsangehörigen wurde der Grundsatz der Gleichbehandlung mit den Staatsangehörigen des Aufnahmelandes (z. B. bei den Arbeitsbedingungen, beim Zugang zu bestimmten Bereichen der sozialen Sicherheit oder beim Zugang zu und bei der Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen) für Drittstaatsangehörige, die sich rechtmäßig im Hoheitsgebiet des jeweiligen Staates aufhalten, somit bestätigt. Parallel dazu hat der Gerichtshof der Europäischen Union in der Rechtssache *Tümer*, in der 2014 das Urteil erging,⁹ die Ansicht vertreten, dass davon auszugehen sei, dass Vorschriften, die Arbeitnehmer im Allgemeinen schützen, sich auch auf Drittstaatsangehörige erstrecken, und zwar auch dann, wenn diese keine reguläre Arbeitserlaubnis haben. Die Ausweitung der Inländerbehandlung auf Drittstaatsangehörige in der Union macht also über verschiedene Kanäle Fortschritte, wodurch die Integration von Drittstaatsangehörigen in die jeweilige Aufnahmegesellschaft begünstigt und gewährleistet wird, dass sich das Unionsrecht den Entwicklungen der internationalen Menschenrechtsnormen anpasst.

Auch die zwischen der Europäischen Union und Drittstaaten geschlossenen Assoziierungs-, Partnerschafts- und Kooperationsabkommen bieten den Staatsangehörigen der durch diese Abkommen gebundenen Staaten einen gewissen Schutz vor Diskriminierung aus Gründen der Staatsangehörigkeit. Zwar sehen solche Abkommen nicht vor, dass die Staatsangehörigen dieser Länder frei in die EU einreisen können, um dort Arbeit zu suchen; je nachdem enthalten sie aber Bestimmungen, die es verbieten, dass Staatsangehörige von Mitgliedstaaten der EU (bzw. des EWR) einerseits und Staatsangehörige des Drittstaates, mit dem das Abkommen geschlossen wurde, andererseits aufgrund ihrer Staatsangehörigkeit unterschiedlich behandelt werden (etwa beim Zugang zu Beschäftigung, bei den Arbeitsbedingungen

3 Richtlinie 2011/51/EU des Europäischen Parlaments und des Rates vom 11. Mai 2011 zur Änderung der Richtlinie 2003/109/EG des Rates zur Erweiterung ihres Anwendungsbereichs auf Personen, die internationalen Schutz genießen, ABl. L 132 vom 19.5.2011, S. 1.

4 Richtlinie 2009/50/EG des Rates vom 25. Mai 2009 über die Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen zur Ausübung einer hochqualifizierten Beschäftigung, ABl. L 155 vom 18.6.2009, S. 17.

5 Richtlinie 2011/98/EU des Europäischen Parlaments und des Rates vom 13. Dezember 2011 über ein einheitliches Verfahren zur Beantragung einer kombinierten Erlaubnis für Drittstaatsangehörige, sich im Hoheitsgebiet eines Mitgliedstaats aufzuhalten und zu arbeiten, sowie über ein gemeinsames Bündel von Rechten für Drittstaatsarbeitnehmer, die sich rechtmäßig in einem Mitgliedstaat aufhalten, ABl. L 343 vom 23.12.2011, S. 1.

6 Richtlinie 2014/36/EU des Europäischen Parlaments und des Rates vom 26. Februar 2014 über die Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen zwecks Beschäftigung als Saisonarbeitnehmer, ABl. L 94 vom 28.3.2014, S. 375.

7 Richtlinie 2014/66/EU des Europäischen Parlaments und des Rates vom 15. Mai 2014 über die Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen im Rahmen eines unternehmensinternen Transfers, ABl. L 157 vom 27.5.2014, S. 1.

8 Richtlinie (EU) 2016/801 des Europäischen Parlaments und des Rates vom 11. Mai 2016 über die Bedingungen für die Einreise und den Aufenthalt von Drittstaatsangehörigen zu Forschungs- oder Studienzwecken, zur Absolvierung eines Praktikums, zur Teilnahme an einem Freiwilligendienst, Schüleraustauschprogrammen oder Bildungsvorhaben und zur Ausübung einer Au-pair-Tätigkeit, ABl. L 132 vom 21.5.2016, S. 21.

9 Rechtssache C-311/13, *Tümer*, Urteil vom 5. November 2014 (ECLI:EU:C:2014:2337).

und manchmal auch bei den Sozialleistungen). Damit tragen auch sie zu der allgemeinen Entwicklung bei, Ungleichbehandlungen aus Gründen der Staatsangehörigkeit, die ohne stichhaltige Rechtfertigung zunehmend als diskriminierend angesehen werden, zu beseitigen.

Schließlich garantiert die Qualifikationsrichtlinie (Neufassung) von 2011 (Richtlinie 2011/95/EU)¹⁰ Personen, die internationalen Schutz benötigen, ein Mindestmaß an Leistungen in allen EU-Mitgliedstaaten. Im Zuge dieser Richtlinie wird die Stellung von Flüchtlingen und Personen, denen subsidiärer Schutz zuerkannt wurde, in einer begrenzten Zahl von Bereichen entweder der Stellung von Staatsangehörigen des Aufnahmelandes, in dem sie sich aufhalten, oder der Stellung anderer Drittstaatsangehöriger, die sich rechtmäßig in diesem Land aufhalten, angeglichen: Sie bekommen ein Recht auf Zugang zu Beschäftigung, Sozialhilfe, Bildung und medizinischer Versorgung unter den gleichen Bedingungen wie Inländer sowie ein Recht auf Zugang zu Wohnraum und auf Freizügigkeit innerhalb des Aufnahmelandes unter gleichen oder vergleichbaren Bedingungen wie Drittstaatsangehörige, die sich rechtmäßig in dem betreffenden Land aufhalten.

So wichtig diese Entwicklungen sind, sie gewährleisten nicht die völlige Gleichbehandlung von Drittstaatsangehörigen und Staatsbürgern der EU-Mitgliedstaaten, was den Schutz vor Diskriminierung aus Gründen der Staatsangehörigkeit betrifft. Daran ändert auch die Charta der Grundrechte nichts, da sie in diesem Punkt lediglich den Ist-Zustand, wie er sich im Primärrecht der Europäischen Union darstellt, bekräftigt.

Teil 3 des Berichts untersucht den Beitrag, den die internationalen und europäischen Menschenrechtsbestimmungen zur Bekämpfung von Diskriminierung aus Gründen der Staatsangehörigkeit leisten. Die Bestimmungen des Internationalen Pakts über bürgerliche und politische Rechte, des Übereinkommens über die Rechte des Kindes und der Europäischen Menschenrechtskonvention des Europarats dürfen nicht außer Acht gelassen werden, da diese Übereinkünfte für den Gerichtshof der Europäischen Union eine Quelle der Inspiration sind, wenn es darum geht, die Grundrechte zu ermitteln, die er im Rahmen der EU-Rechtsordnung als Teil der allgemeinen Grundsätze des Unionsrechts schützt. Dieser Teil des Berichts geht auch auf die Position der Europäischen Sozialcharta des Europarats und des Internationalen Pakts über wirtschaftliche, soziale und kulturelle Rechte in dieser Frage ein, wobei der Stellenwert dieser Übereinkünfte in der Entwicklung der Rechtsprechung des Europäischen Gerichtshofs jedoch weniger klar ist. Außerdem stellt Teil 3 die Beiträge vor, die das Genfer Abkommen über die Rechtsstellung der Flüchtlinge von 1951 und das Übereinkommen über die Rechtsstellung der Staatenlosen von 1954 zum Thema Diskriminierung aus Gründen der Staatsangehörigkeit leisten.

Ein Vergleich dieser Übereinkünfte führt zu dem Ergebnis, dass Ungleichbehandlungen aus Gründen der Staatsangehörigkeit in den internationalen Menschenrechtsvorschriften als zunehmend fragwürdig gelten: Wie bereits erwähnt, können nach Ansicht des Europäischen Gerichtshofs für Menschenrechte nur "sehr gewichtige Gründe" Unterschiede in der Behandlung rechtfertigen, die ausschließlich auf dem Kriterium der Staatsangehörigkeit basieren; außerdem haben sowohl der Europäische Gerichtshof für Menschenrechte als auch der Europäische Ausschuss für soziale Rechte (in diesem Fall unter Beiseitelassung der offensichtlich eindeutigen Formulierung im Anhang zur Europäischen Sozialcharta betreffend den persönlichen Geltungsbereich der Charta) die Auffassung vertreten, dass Menschenrechte, die allen gewährt werden, einer Person grundsätzlich nicht allein deshalb verweigert werden dürfen, weil diese sich unrechtmäßig im Hoheitsgebiet eines Staates aufhält. Diese Rechtsauslegung hat zur Folge, dass Unterschiede in der Behandlung von EU-Bürgern und Drittstaatsangehörigen, die in der Ausübung

10 Richtlinie 2011/95/EU des Europäischen Parlaments und des Rates vom 13. Dezember 2011 über Normen für die Anerkennung von Drittstaatsangehörigen oder Staatenlosen als Personen mit Anspruch auf internationalen Schutz, für einen einheitlichen Status für Flüchtlinge oder für Personen mit Anrecht auf subsidiären Schutz und für den Inhalt des zu gewährenden Schutzes, ABl. L 337 vom 22.12.2011, S. 9. Diese Richtlinie ist eine Neufassung der Richtlinie 2004/83/EG vom 29. April 2004 über Mindestnormen für die Anerkennung und den Status von Drittstaatsangehörigen oder Staatenlosen als Flüchtlinge oder als Personen, die anderweitig internationalen Schutz benötigen, und über den Inhalt des zu gewährenden Schutzes, ABl. L 304 vom 30.9.2004, S. 12.

eng umgrenzter politischer Rechte vielleicht noch akzeptabel sind, in Bereichen wie soziale Sicherheit, Zugang zu Bildung oder medizinischer Versorgung immer schwieriger zu rechtfertigen sind, da dies Bereiche sind, die unmittelbar mit der wirtschaftlichen und sozialen Integration von Zuwanderern und ihrer Ausübung von Grundrechten zusammenhängen und die weniger mit den hoheitlichen Befugnissen des Staates bei der Rechtsdurchsetzung zu tun haben.

Daraus folgt, dass die Stellung von Drittstaatsangehörigen, die sich rechtmäßig in einem EU-Mitgliedstaat aufhalten, in Zukunft der Stellung von Staatsangehörigen anderer EU-Mitgliedstaaten möglicherweise stärker angeglichen werden muss; allein die Tatsache, dass die EU-Mitgliedstaaten beschlossen haben, untereinander ein neues Rechtssystem zu etablieren und eine „Unionsbürgerschaft“ zu schaffen, sollte nicht als hinreichende Rechtfertigung dafür dienen, diese Unterschiede über die begrenzte Liste der derzeit mit der Unionsbürgerschaft verbundenen politischen Rechte hinaus aufrechtzuerhalten. Tatsächlich können, zumindest was die Ausübung von Grundrechten betrifft, sogar unterschiedliche Behandlungen aufgrund des Aufenthaltsstatus – insbesondere Unterschiede in der Behandlung von rechtmäßig aufhaltenden Zuwanderern und solchen mit irregulärem Status – in Frage gestellt werden.

In Teil 4 wird abschließend untersucht, ob Drittstaatsangehörige im innerstaatlichen Recht der EU-Mitgliedstaaten vor Ungleichbehandlungen aus Gründen der Staatsangehörigkeit geschützt werden. Zwei Fragen werden gestellt. Erstens: Sind Drittstaatsangehörige vor Ungleichbehandlungen aus Gründen der Staatsangehörigkeit, die an sich diskriminierend sein können, geschützt? Zweitens: Sind sie vor Ungleichbehandlungen insoweit geschützt, als diese eine mittelbare Diskriminierung aufgrund von rassischer Zugehörigkeit, ethnischer Herkunft oder Religion darstellen – einerlei, ob dies von der Person, von der die fragliche Behandlung ausgeht (die Staatsangehörigkeit bewusst stellvertretend für rassische Zugehörigkeit, ethnischen Ursprung oder Religion benutzt), beabsichtigt oder Folge dieser Behandlung ist (Ungleichbehandlung aus Gründen der Staatsangehörigkeit, die dazu führt, dass Angehörige bestimmter rassischer oder ethnischer Gruppen bzw. Angehörige einer bestimmten Religionszugehörigkeit besonders benachteiligt werden)? Zur Beantwortung dieser Fragen wurden die Verfassungen und nationalen Rechtsvorschriften der EU-Mitgliedstaaten untersucht. Die Untersuchung zeigt, dass zwar nur zwei Staaten in ihrer Verfassung ein ausdrückliches Verbot von Diskriminierung aus Gründen der Staatsangehörigkeit verankert haben, dass in der überwiegenden Mehrzahl der EU-Mitgliedstaaten aber die Gerichte, die verfassungsrechtliche Gleichheitsgebote durchsetzen, ein solches Verbot verhängen könnten, da die entsprechenden Bestimmungen in den meisten Mitgliedstaaten ausreichend weit gefasst sind, um das Verbot jeglicher Diskriminierung aus Gründen der Staatsangehörigkeit abzudecken. Der Schutz vor Diskriminierung nach inländischem Recht gilt natürlich zusätzlich zu – und nicht anstelle von – dem Schutz, der, wie in Teil 3 beschrieben, im Rahmen der internationalen und europäischen Menschenrechtsvorschriften bereits gewährt wird. Die Tatsache, dass Staatsangehörigkeit in den internationalen Menschenrechtsbestimmungen zunehmend als möglicher Diskriminierungsgrund gilt, kann jedoch eine Auslegung nationaler Verfassungsbestimmungen befördern, die Ausländer vor Diskriminierung aufgrund ihrer Staatsangehörigkeit schützt, und dies kann dazu führen, dass nationale Gerichte, insbesondere Verfassungsgerichte, künftig fordern, die Stellung von Drittstaatsangehörigen der von Inländern und der von Staatsangehörigen anderer EU- bzw. EWR-Mitgliedstaaten anzugleichen.

Teil 5 zieht den Schluss, dass sich das Verbot von Diskriminierung aus Gründen der Staatsangehörigkeit allmählich zu einem allgemeinen Grundsatz der internationalen und europäischen Menschenrechtsnormen entwickelt und dass es von einer erheblichen Zahl von EU-Mitgliedstaaten bereits anerkannt wird, so dass es als allgemeiner Grundsatz des Unionsrechts gelten kann, für dessen Durchsetzung der Europäische Gerichtshof sich zukünftig einsetzen sollte. Dies bedeutet nicht, dass der europäische Gesetzgeber Drittstaatsangehörigen, die sich rechtmäßig im Gebiet eines EU-Mitgliedstaats aufhalten, zwangsläufig die gleiche Stellung einräumen muss wie Staatsangehörigen anderer EU-Mitgliedstaaten, etwa im Hinblick auf den Zugang zu Sozialleistungen in den Bereichen Gesundheit, Bildung oder Arbeitsvermittlung. Es kann aber bedeuten, dass die Mitgliedstaaten bei der Umsetzung des Unionsrechts darauf achten müssen, weder zwischen verschiedenen Gruppen ausländischer Staatsangehöriger (insbesondere zwischen Staatsangehörigen anderer EU-Mitgliedstaaten und Drittstaatsangehörigen) noch zwischen In-

und Ausländern Unterschiede in der Behandlung zu etablieren oder aufrechtzuerhalten, sofern solche Unterschiede nicht als Maßnahmen gerechtfertigt werden können, mit denen rechtmäßige Ziele verfolgt werden und die zur Erreichung dieser Ziele angemessen sind. Dies sollte nicht als Ankündigung verstanden werden, dass die Privilegien sich allmählich auflösen, die damit verbunden sind, Bürger oder Bürgerin der Union zu sein, wenn es darum geht, das Recht auf Freizügigkeit auszuüben und in ein anderes EU-Land zu reisen, dessen Staatsangehörigkeit man nicht besitzt. Vielmehr sollte es als Signal dafür verstanden werden, dass die Integration von Drittstaatsangehörigen in ihren Aufnahmegesellschaften auf einem robusten Verständnis des Rechtsanspruchs dieser Personen auf Gleichbehandlung mit den Staatsbürgerinnen und Staatsbürgern des Aufnahmelandes fußen muss. Dieser Gedanke stand im Mittelpunkt der Definition von Freizügigkeit für Arbeitnehmer aus anderen Mitgliedstaaten, als die Europäische Wirtschaftsgemeinschaft gegründet wurde. Es ist ein Gedanke, der auch 50 Jahre später noch Gültigkeit hat – er muss aber heute über die Bürgerinnen und Bürger der Europäischen Union hinausgehen.

Introduction

The role of immigration in European societies has been highly visible in public debate for many years, and it played a major role in the recent campaign on the United Kingdom's membership of the European Union.¹ On 1 January 2015, 19.8 million third-country nationals were living in the EU-28 Member States, representing 3.9 % of the total population of the EU. In addition, 34.3 million people living within the EU were born outside the EU, and it may therefore be said that 6.75 % of the population in the EU is of foreign origin.² The distribution is highly uneven across the EU Member States, however. Luxembourg presented the highest proportion of non-nationals in its population (46 %), although high proportions of non-nationals were also found in Cyprus, Latvia, Estonia, Austria, Ireland and Belgium: in all these countries, more than 10 % of the population is of foreign origin, ranging from 17.1 % in Cyprus to 11.6 % in Belgium. Much of the immigrant population in Luxembourg and in Cyprus originates from other EU Member States, however, and even in Austria, Ireland and Belgium, most migrants come from Europe; as to the presence of Estonia and Latvia in the list of EU Member States with a large proportion of non-nationals in their population, this is to a significant extent attributable to the fact that these countries include in their population former citizens of the Soviet Union who, although they permanently reside in Latvia or Estonia, have not acquired the nationality of these countries. For the purposes of this report, the most significant figures concern Greece and Italy, and to a lesser extent Spain: in these countries, while the proportion of migrants within the total population is not particularly high (7.6 % in Greece, 8.2 % in Italy and 9.6 % in Spain), most of the migrants are from non-EU Member States, representing 5.7 % of the total population in Greece, 5.8 % in Italy and 5.4 % in Spain. Barring the particular cases of Latvia and Estonia, only Austria finds itself in a situation that compares to that of these Mediterranean countries: in Austria, where 13.2 % of the population is of foreign origin, almost half of the immigrants (6.6 % of its population) are third-country nationals; although Germany (with 5.0 % of its total population composed of third-country nationals) comes close.

Recent developments have instilled a sense of urgency in this area. The rights of asylum seekers and beneficiaries of international protection in particular have been a particular focus of attention in 2015 and 2016, as a result of the increased number of refugees fleeing conflict arriving at the borders of EU Member States: in 2014 alone, even before the recent increase in migration flows, Eurostat figures estimate that 1.9 million immigrants arrived in the EU-28 from non-member countries.

It is in this context that the present report has been commissioned. This report updates a publication initially presented in 2009. Its aim is to examine the protection of third-country nationals from discrimination in EU Member States and to document trends in the extension of the principle of equal treatment to benefit migrants. The report addresses in particular the question of whether differences of treatment on grounds of nationality may constitute a form of prohibited discrimination under EU law, under international and European human rights law, or under the domestic legislation of EU Member States. Differences of treatment on grounds of nationality fall under three categories: such differences may be created (a) between the nationals of one Member State and foreigners (including both nationals from other EU Member States and third-country nationals); (b) between nationals of one Member State and nationals of other EU Member States on the one hand and nationals of third countries on the other; and (c) between nationals of different third countries. Thus, in order to assess the current status of differences of treatment on grounds of nationality, we must not only examine in general whether the measures establishing such differences are acceptable (and if so, under what conditions), but also specifically whether the differences of treatment between citizens of the Union on the one hand and other foreigners on the other are allowable – in other terms, it will be important to assess whether the creation of a citizenship of the EU

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- 1 See for example Han Entzinger (2007), *The Social Integration of Immigrants in the European Union* in *JILPT International Symposium 'Migration Policy and Society in Europe'*, 17 January 2007, available at: http://www.jil.go.jp/foreign/event/symposium/sokuho/documents/20070117/Entzinger_e.pdf.
 - 2 According to Eurostat data – see: http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics.

and the preferential treatment afforded to nationals of others EU Member States may be justified as legitimate and proportionate under international and European human rights law.

In addition, differences of treatment based on nationality may be discriminatory under two distinct lines of reasoning, which must be analysed separately. First, such differences in treatment may constitute direct discrimination on grounds of nationality. 'Nationality' has become a suspect ground in international and European human rights in recent years, and this development cannot fail to influence the reading of general equality provisions in national constitutions or legislation. One of the aims of this report is to document this development, which is described in detail in Chapter 3. Secondly, however, differences of treatment on grounds of nationality may constitute a form of indirect discrimination on grounds of race, ethnic origin or religion, either where 'nationality' is deliberately used as a proxy for these prohibited grounds of distinction (in order to achieve indirectly what cannot be done directly) or where the impact of differences of treatment on grounds of nationality is such that it puts persons of a defined race, ethnic origin or religion at a disadvantage or affects them disproportionately. These two lines of argument are dealt with separately in the description of the evolving international and national legal framework.

The report is divided into five chapters. Chapter 1 describes the scope of the report. The concepts of 'nationality', 'race' and 'ethnic origin' are described, and they are related to the concept of 'national origin', which also appears in human rights instruments adopted at international and European levels and in EU law. An attempt is made to relate these different concepts to one another and to explain how they can interact in anti-discrimination law. Chapter 2 discusses how discrimination on grounds of nationality is addressed in the framework of EU law. Although the provisions of the EU Treaties which prohibit discrimination on grounds of nationality cover only nationals of EU Member States, EU law has sought during the past decade to improve the protection of third-country nationals legally residing on the territory of EU Member States. The initial exclusion of third-country nationals from free movement rights, as recognised in the EC Treaty for the benefit of nationals of EU Member States, has been overcome in part by the introduction of a particular status for third-country nationals who are long-term residents. The situation of refugees and other persons deserving international protection has also been aligned, in certain fields, with that of the nationals of the EU Member State in which they reside. Minimum standards have been set for the status of third-country nationals or stateless persons who are recognised as refugees or as persons in need of international protection. Such standards partly assimilate the situation of refugees and persons granted subsidiary protection either with the situation of the nationals of the host State in which they reside or with the situation of other third-country nationals legally residing in that State in a limited number of areas. Workers who are third-country nationals and have been authorised to stay in an EU Member State, as well as seasonal workers, have also been granted certain rights that are harmonised across the EU, including a right to equality of treatment with the nationals of the Member States in which they are staying. Finally, association and partnership agreements concluded between the European Union and third countries also offer the nationals of the States Parties to such agreements a certain degree of protection from nationality-based discrimination.

The gradual extension to third-country nationals of rights accorded to the nationals of the EU Member State in which they reside was made possible by the choice made in the 1997 Treaty of Amsterdam, which entered into force on 1 May 1999, to attribute to the European Union powers in an area – asylum and immigration and the status of third-country nationals – that had hitherto been left to loose forms of intergovernmental cooperation. The launch of an EU policy on the integration of third-country nationals was further encouraged by the adoption of the *Common Basic Principles for immigrant integration policy*, agreed by the Justice and Home Affairs Council in November 2004.³ Building on the Tampere Programme adopted by the European Council in 1999 – which in fact launched the establishment of an area of freedom, security and justice in the EU – the *Common Basic Principles* note the important contribution of equality of treatment and the fight against discrimination in any integration policy, underlining that: 'Access for immigrants to institutions, as well as to public and private goods and services, on a basis

3 Council of the EU, doc. 14615/04.

equal to national citizens and in a non-discriminatory way is a critical foundation for better integration'. The implication, the document states further, is that, 'If immigrants are to be allowed to participate fully within the host society, they must be treated equally and fairly and be protected from discrimination. ... Access also implies taking active steps to ensure that public institutions, policies, housing, and services, wherever possible, are open to immigrants'.

Consistent with this consensus, which the Justice and Home Affairs Council reaffirmed at its meeting of 5-6 June 2014, the Commission emphasises in its Action Plan on the integration of third-country nationals that:

Ensuring that all those who are rightfully and legitimately in the EU, regardless of the length of their stay, can participate and contribute is key to the future well-being, prosperity and cohesion of European societies. In times when discrimination, prejudice, racism and xenophobia are rising, there are legal, moral and economic imperatives to upholding the EU's fundamental rights, values and freedoms and continuing to work for a more cohesive society overall. The successful integration of third-country nationals is a matter of common interest to all Member States.⁴

This is not about ideology, nor is it only about the values on which the EU is founded: it is also about facts. Already in 2010, the European Commission noted that, 'without net migration, the working-age population would shrink by 12 % in 2030 and by 33 % in 2060 compared with 2009. Yet, skilled migrant workers too often occupy low skill low quality jobs, underlining the need for a better management of these migrant workers' potential and skills'.⁵ This is a potential that European societies are still far from having fully reaped: in 2015, the employment rate of third-country nationals was 12.4 % lower than that of nationals of the host countries (and even lower for female migrants). This is partly the result of educational underachievement by migrants (educational underachievement was 42 % among first-generation migrants and was still 34 % among second-generation migrants, as compared with 20 % among students with native-born parents). But it can also be explained by the obstacles that third-country nationals face in entering the labour market, even when they have acquired qualifications: underemployment rates are high among people in this category, even when they have university diplomas.⁶

Despite this, various studies show that, provided they have access to education and the obstacles to their inclusion in the employment market are removed, migrants from third countries can nevertheless contribute significantly to the sustainability of EU countries' social security schemes, particularly as these countries face the challenge of an ageing population and as they make a positive net fiscal contribution.⁷ Thus, there are strong arguments – even beyond the need to act consistently with national values and human rights obligations – to encourage policies that would strengthen the integration of third-country nationals by deepening the requirement of equality of treatment with the nationals of the host country.

Against this background, the purpose of Chapter 3 is to examine whether the current situation, in which differences of treatment remain between nationals of the host country on the one hand and third-country nationals on the other hand, is compatible with the evolving requirements of international and European human rights. This chapter reviews a number of instruments adopted at international and European levels, including not only human rights instruments but also conventions on the status of refugees and on stateless persons. The conclusion arising from this review is that differences of treatment on grounds of nationality are increasingly treated as suspect in international human rights law.

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on the integration of third-country nationals, COM(2016) 377 final of 7.6.2016, p. 2.

5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An Agenda for new skills and jobs: A European contribution towards full employment, COM(2010) 682 final of 23.11.2010.

6 Action Plan on the integration of third-country nationals, cited above, p. 2.

7 Id.

Chapter 4 then examines how differences of treatment on grounds of nationality are addressed in the domestic legal systems of EU Member States. This chapter is divided into two parts. First, it examines whether the domestic legal systems of EU Member States include provisions which protect foreigners from being discriminated against directly on grounds of their nationality. Secondly, this chapter examines whether the protection against discrimination on grounds of race or ethnic origin (or, perhaps more seldom, on grounds of religion or belief) may be relied upon in order to challenge differences of treatment on grounds of nationality, since nationality may be used as a proxy for race or ethnic origin or for religion or belief. The interpretation of general anti-discrimination clauses in national constitutions or in ordinary legislation may be influenced in the future by developments in international and European human rights law, as described in Chapter 3. In particular, open-ended non-discrimination clauses which do not list prohibited grounds exhaustively may in the future increasingly be interpreted as including a prohibition of discrimination on grounds of nationality, and the justifications offered for differences in treatment on that ground may be subject to more searching scrutiny.

Chapter 5 offers a brief conclusion. The prohibition of discrimination on grounds of nationality is emerging as a general principle of international and European human rights law. It does not follow that the European legislator should necessarily equate the situation of third-country nationals legally residing on the territory of an EU Member State with that of nationals of other EU Member States, for example as regards access to social advantages such as health, education or job placement services. The prohibition of discrimination does not prohibit all differences in treatment, but only those which cannot be validly justified as reasonable and proportionate to the fulfilment of their legitimate aims. It may imply, however, that differences in treatment between nationals and foreigners should be subject to scrutiny, and that when implementing EU law, Member States should take into account the need to avoid establishing or maintaining differences in treatment between different categories of foreign nationals (in particular, between nationals of other EU Member States and nationals of third countries).

1 Scope

1.1 Nationality

1.1.1 Definition of nationality

'Nationality' is understood here as the link between a State and an individual whom that State recognises as its citizen (or 'national'). In international law, nationality is attributed by each State according to its own national rules, although that attribution may only be opposable to other States if there exists a genuine link between the State concerned and the individual whom that State considers to be its national, for instance for the purposes of diplomatic protection.⁸ In the 1992 *Micheletti* case, the European Court of Justice confirmed this rule in the context of EU law when asked to interpret the provisions of the European treaties which attribute certain rights to nationals of other Member States, who are therefore considered to be citizens of the Union. According to the Court, the rule implies that it is not permissible for the legislation of a Member State 'to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty'.⁹ In the *Micheletti* case, an individual with dual Argentinean and Italian nationality arrived in Spain wanting to exercise his right to freedom of establishment as guaranteed at the time under Article 52 of the EC Treaty (now Art. 49 TFEU) (which grants freedom of establishment to persons who are 'nationals of a Member State') and to practise as an orthodontist. He was refused a residence permit by the Spanish authorities because in such instances Spanish legislation refers to the applicant's latest or effective country of residence (in this case Argentina) in order to determine nationality. The ECJ ruled that nationality of one of the Member States was sufficient and that a citizen does not have to choose between the two nationalities.

In the *Micheletti* case, neither of the two nationalities held by the applicant was contested. Indeed, as noted by AG Tesouro in his Opinion to the Court, 'both are based on criteria which are universally applied and recognised, namely the *ius soli* and the *ius sanguinis* respectively'.¹⁰ Thus, a different solution could not be excluded if the nationality invoked were entirely fictitious, i.e. did not correspond to the existence of any link between the individual and the State whose nationality that individual claimed to possess. However, the opinion of AG Tesouro confirms that, in principle, each Member State is free to decide whom should be considered its national, and that there is an obligation on all the other Member States to recognise this nationality, even in situations which might not correspond to the 'genuine link' criterion set forth by the International Court of Justice in the *Nottebohm* case: in other words, only in the most exceptional circumstances could it be imagined that the nationality attributed by one Member State may be set aside by another Member State in order to deny to an individual a right accorded to citizens of the Union.

The *Micheletti* case left open the reverse question, however, namely whether a Member State may be in violation of its obligations under EU law by refusing to attribute its nationality to an individual in conditions which are arbitrary or discriminatory (or by depriving an individual from his or her nationality), thus depriving that person from the rights benefiting the citizens of the Union. In the 2010 judgment delivered in the case of *Janko Rottmann*, in which it delivered a preliminary ruling at the request of the

8 International Court of Justice, the *Nottebohm Case (Liechtenstein v. Guatemala)*, judgment of 6 April 1955, 1955 I.C.J. 4 (noting that 'nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national').

9 Case C-369/90, *Micheletti*, [1992] ECR I-4239, para. 10. See also Case 136/78, *Ministère Public v. Auer* [1979] ECR 437, paragraph 28.

10 Para. 5 of the Opinion delivered on 30 January 1992.

German courts, the Court of Justice confirmed that the freedom of appreciation of the EU Member States was not unlimited in this regard.¹¹ Although the Court considered that this is not, in principle, contrary to European Union law, in particular to Article 17 EC (now Article 20 TFEU, establishing the citizenship of the Union), for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, it took the view that the decision to withdraw should comply with the principle of proportionality, taking into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. The Court cited in this regard international instruments prohibiting the arbitrary deprivation of a person's nationality, a rule stipulated in the Universal Declaration of Human Rights (Article 15(2)) as well as in the 1977 European Convention on nationality (Article 4(c));¹² it also noted that, whereas the 1961 Convention on the Reduction of Statelessness¹³ in principle prohibits depriving a person of his or her nationality if that would make him or her stateless, the convention allows for a deprivation of nationality if that nationality was obtained by misrepresentation or fraud (Article 8(2)(b)). The important lesson is that, although Member States are in principle allowed to define their own nationals, they are not entirely free in this regard, since attributing a person the State's nationality, or depriving a person of that status, affects that person's citizenship of the Union: Union law therefore requires, at a minimum, that such decisions comply with general international law.

1.1.2 'Nationality' and 'national origin'

In international human rights law, 'nationality' refers to the country of citizenship, whereas 'national origin' refers to the country of origin, whether the country of birth or the country of which the parents are nationals. 'National origin' is traditionally included among the prohibited grounds of discrimination. It is a concept close to, and at times indistinguishable from, racial or ethnic discrimination. Thus, for instance, Paragraph 1 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination¹⁴ defines 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on *race, colour, descent, or national or ethnic origin* which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' [author's italics]. Paragraph 2 of Article 1 excepts from this definition actions by a State Party which differentiate between citizens and non-citizens.¹⁵ Paragraph 3 of Article 1 qualifies Paragraph 2 of Article 1 by declaring that, among non-citizens, States Parties may not discriminate against any particular nationality.

Paragraph 1 of Article 2 of the International Covenant on Civil and Political Rights obliges each State Party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognised in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status' [author's italics]. Article 26 entitles all persons to equality before the law as well as to equal protection by the law. It also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination 'on any ground such as race, colour, sex, language, religion, political or other opinion, *national or social origin*, property, birth or other status' [author's italics].

11 Case C-135/08, *Rottmann v. Freistaat Bayern*, judgment of 2 March 2010 (ECLI:EU:C:2010:104). For a comment, see H. van Eijken, 'European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals', *Merkourios (Utrecht Journal of International and European Law)*, vol. 27 (2010), issue 72, pp. 65-69.

12 European Convention on nationality, opened for signature on 6 November 1997, in force since 1.3.2000. On this instrument, see further below, chapter 1.4. (text corresponding to Chapter 1.1.4, notes 41-42).

13 Convention on the Reduction of Statelessness, done at New York on 30.8.1961, in force since 13 December 1975.

14 Adopted and opened for signature and ratification by UN General Assembly Resolution 2106 (XX) of 21 December 1965; entered into force on 4 January 1969.

15 This provision states that the Convention 'shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'. However, this clause has been to a large extent rendered moot by the position adopted since 2004 by the Committee on the Elimination of Racial Discrimination. See below, text corresponding to Chapter 3, notes 173-175.

As we shall see, however, under both the International Convention on the Elimination of Racial Discrimination and under the International Covenant on Civil and Political Rights, the prohibition of discrimination has been extended beyond discrimination on grounds of national origin to discrimination on grounds of nationality (or citizenship).¹⁶

1.1.3 'Nationality' and 'national minorities'

In a number of Central and Eastern European States, 'nationality' is understood as distinct from 'citizenship', and it refers to the membership of a group (whether or not a national minority) defined by ethnic characteristics in the broad sense (ethnicity, language, religion): this is what corresponds to the notion of '*rahvus*' in Estonian (in practice synonymous to ethnicity, '*etniline päritolu*'), '*nemzetiség*' in Hungarian, '*narodowość*' in Polish, '*nacionalnost*' in Slovenian, '*narodnost*' in Slovak, or '*Volksgruppe*' in Austria.

A number of instruments clearly prescribe that every person should be protected from discrimination on the ground of his/her membership of a national minority. Article 14 of the European Convention on Human Rights mentions 'association with a national minority, language and religion' among the prohibited grounds of discrimination in the enjoyment of the rights and freedoms set forth in this instrument'.¹⁷ The Council of Europe Framework Convention for the Protection of National Minorities (FCNM), which was opened for signature on 1 February 1995 and entered into force on 1 February 1998, prohibits discrimination against members of national minorities. Although neither the FCNM¹⁸ nor other legally binding instruments define authoritatively the notion of 'national minority', such a definition is provided by the Parliamentary Assembly of the Council of Europe in its Recommendation 1201 (1993), which is generally considered to be authoritative on the European continent.¹⁹ According to this definition, a national minority is a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that state or of a region of that state, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language. In the domestic constitutions or legislation which prohibit discrimination on grounds of membership of a national minority, it is this definition which is normally relied upon. In the Czech Republic, for instance, Paragraph 1 of Article 3 of the Charter of Fundamental Rights and Freedoms²⁰ states that no discrimination in the enjoyment of fundamental rights may be based, *inter alia*, on affiliation with a national or ethnic minority (*narodnost*), and Czech legislation further defines members of a national minority as persons who 'differ from other citizens by common ethnic origin, language, culture and traditions, create a minority of inhabitants and at the same time show a will to be regarded as a national minority in order to preserve their own identity, language and culture and to express and protect interests of the historically created community.'²¹

Under existing EU Law, the members of ethnic and religious minorities are to a large extent already protected from discrimination. Directive 2000/43/CE of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality

16 See below, Part IV.

17 These criteria are also listed by Article 1(1) of Protocol No.12 to European Convention on Human Rights, which contains a general anti-discrimination clause.

18 See the Explanatory Report of the FCNM: 'It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States' (Paragraph 12).

19 Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights.

20 No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms.

21 *Zákon č. 273/2001 Sb, o právech příslušníků národnostních menšin a o změně některých zákonů* [Law no. 273/2001 Coll., on Rights of National Minority Members (Collection of laws no. 2001, No. 104 p. 6461)]. In practice, a declaration by an individual that s/he is a member of a national minority would be regarded as satisfactory to meet the requirements of this definition.

Directive)²² and Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive)²³ protect against certain forms of direct or indirect discrimination exercised in particular on the ground of racial or ethnic origin or religion. In addition, equality and the prohibition of discrimination are recognised in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union,²⁴ and Article 21(1) of the Charter explicitly prohibits discrimination based on membership of a national minority, ethnic origin, language or religion. We shall not dwell further in the remainder of this report on the protection of members of national minorities, since this is a question distinct from that of protection from discrimination based on nationality understood as citizenship.

1.1.4 Outstanding problems in the attribution of nationality in EU Member States

While the principles recalled above are well established, certain situations remain problematic within the EU Member States. Two such situations deserve particular attention: both illustrate the difficulty of simply trusting the Member States in the attribution of their nationality – and thus of the rights granted to citizens of the EU.

An initial problematic situation concerns the status of residents of the former Socialist Federative Republic of Yugoslavia (SFRY) who were not citizens of the Republic where they resided at the time when that Republic achieved independence. The SFRY consisted of six Republics, and its citizens had both federal citizenship and citizenship of one of the Republics. However, since the latter was of little consequence in the federal State, people were often unaware of their republican citizenship and it did not matter to them, in practice, if they had a citizenship of the Republic where they lived or of the Republic of their origin. This changed, however, after the respective Republics gradually gained independence. Slovenia gained independence in 1991. The following year, thousands of former Yugoslav citizens were removed from the Slovenian population registry. Non-governmental organisations²⁵ and specialist human rights bodies²⁶ have expressed their concern about this issue, colloquially referring to it as the issue of the ‘erased’.²⁷ These individuals were citizens of other former Yugoslav republics who had been living in Slovenia but did not obtain Slovenian citizenship after Slovenia became independent. The Slovenian Constitutional Court recognised that the removal of these persons from the population registry constituted a violation of the principle of equality and, in those cases where the individuals concerned had to leave Slovenia, that it had given rise to a violation of their rights to a family life and to freedom of movement. As noted in particular by Amnesty International, such a removal of persons from population registries may also give rise to violations of social and economic rights: in some cases, the individuals concerned lost their employment and pension rights.

Slovenia addressed these concerns in 1999 by adopting the Act Regulating the Permanent Registry Status of All Citizens of the Successor States of the former Socialist Federal Republic of Yugoslavia (further amended in 2010), allowing persons who had been removed or ‘erased’ from the Slovenian registry of permanent residents in 1992 to re-establish their permanent residency status; in addition, the 2013 Act Regulating Compensation for Damage Sustained as a Result of Erasure allowed for compensation to be provided for the damage suffered as a result of erasure from the registry. Though this progress is commendable, UN human rights treaty bodies still note that ‘there are currently no avenues for restoring

22 OJ L 180 of 19.7.2000, p. 22.

23 OJ L 303 of 2.12.2000, p. 16.

24 OJ C 303 of 14.12.2007, p. 1.

25 Amnesty International, Europe and Central Asia, Concerns in Europe and Central Asia, July – December 2003, AI Index: EUR 01/001/2004.

26 Committee on the Rights of the Child, Concluding Observations: Slovenia, CRC/C/15/Add.230.

27 For a systematic treatment of this issue, see Neza Kogovsek Salamon, *Erased: Citizenship, Residence Rights and the Constitution in Slovenia*, Peter Lang Academic Research, 2016.

the legal status of a significant number of 'erased' persons since the expiry in 2013 of the 1999/2010 Act, and that only a limited number of persons have received compensation'.²⁸

A similar situation arose in Croatia after Croatian independence, also proclaimed in 1991. Persons who did not have citizenship of the Croatian republic at the time of independence became aliens in Croatia. While ethnic Croats in the same situation were granted citizenship (the Croatian Citizenship Act provided that any member of the Croatian People (ethnic Croats) would be considered as Croatian citizens), no automatic or facilitated granting of Croatian citizenship was provided for other ex-SFRY citizens who were permanent residents in Croatia; they had to fulfil all the numerous requirements for citizenship as real foreigners, in accordance with Article 8 of the Croatian Citizenship Act, which defines the conditions for the acquisition of Croatian citizenship through naturalisation.²⁹ The impacts of the legislation were particularly felt on the Roma, since they faced a problem in fulfilling the residency requirement (minimum five years of uninterrupted permanent residence) and/or the requirement of being 'proficient in the Croatian language and Latin script' and/or that of showing an 'attachment to Croatian culture' and/or 'respect for the legal system'. The result is that, 20 years after independence, in the 2011 census, 2 886 persons stated that they were still without or of 'unknown' citizenship; many of them were Roma.

A second problematic situation is more widely discussed. In Estonia, 'non-citizens' are stateless former Soviet citizens ('persons with undefined citizenship'). On 31 October 2003 there were 162 890 'non-citizens' on the country's territory, representing 12 % of the total population; according to the population registry of the Minister of the Interior, this figure had halved, to 80 967, by 1 June 2016. But this still represents 6 % of the total population of 1 350 457 living in Estonia today.³⁰ The slow pace of progress achieved led the UN Committee on the Elimination of Racial Discrimination to reiterate in 2014 its concern at 'the persistently high number of persons with undetermined citizenship', and to recommend that Estonia facilitate the procedures for the acquisition of Estonian nationality³¹ – a recommendation to which the Committee attaches 'particular importance'.³² This recommendation has been addressed to Estonia on a number of occasions by various human rights bodies. The UN Committee on Economic, Social and Cultural Rights, for instance, recommended that Estonia 'intensify its effort to facilitate the acquisition of Estonian citizenship by persons with the status of 'non-citizens' and to address obstacles encountered by applicants, including by softening the official language qualifications required for those who have long residence in the country and by granting Estonian citizenship to children born in the families of those persons', and it urged the country 'to amend its legislation on citizenship so as to ensure that all citizens are treated equally irrespective of the mode of acquisition of the citizenship, in conformity with the obligation of non-discrimination under article 2 of the [International Covenant on Economic, Social and Cultural Rights]'.³³

28 Human Rights Committee, Concluding Observations: Slovenia, CCPR/C/SVN/CO/3 (2016), para. 21. See also, urging Slovenia to 'simplify the procedures for the issuance of permanent residence permits to all persons who were deleted from the register of permanent residents in 1992; the Concluding Observations adopted in 2015 by the Committee on the Elimination of Discrimination against Women (CEDAW/C/SVN/CO/5-6, paras. 25-26).

29 According to Article 8, para. 1, of the Croatian Citizenship Act: 'A foreign citizen who files a petition for acquiring Croatian citizenship shall acquire Croatian citizenship by naturalization if he or she meets the following prerequisites:
1. that he or she has reached the age of eighteen years and that his or her legal capacity has not been taken away.
2. that he or she has had his or her foreign citizenship revoked or that he or she submits proof that he or she will get a revocation if he or she would be admitted to Croatian citizenship [although this requirement is waived for persons who are stateless: Art. 8, para. 2].
3. that before the filing of the petition he or she had a registered place of residence for a period of not less than five years constantly on the territory of the Republic of Croatia.
4. that he or she is proficient in the Croatian language and Latin script.
5. that a conclusion can be derived from his or her conduct that he or she is attached to the legal system and customs persisting in the Republic of Croatia and that he or she accepts the Croatian culture.'

30 Another 84.2 % (1 250 085 persons) were Estonian citizens. 6.7 % (90 770 persons) were Russian citizens; the remainder were foreigners with the nationality of another country.

31 Concluding Observations of the Committee on the Elimination of Racial Discrimination: Estonia (UN doc. CERD/C/EST/CO/10-11, 22.9.2014), para. 11.

32 Id., para. 24.

33 Committee on Economic, Social and Cultural Rights, Concluding Observations: Estonia (UN doc. E/C.12/EST/CO/2, 16 December 2011), para. 9. See also Committee on the Elimination of Racial Discrimination, Concluding Observations:

'Non-citizens' in Estonia exercise some of the rights linked to nationality, but not all of them. They cannot take part in parliamentary elections, although (provided they are permanent residents in the country) they can vote in elections for local municipalities. They do not possess the nationality of another State, but they are not fully recognised as citizens in Estonia and their situation is best described as that of stateless persons with permanent residence in the host country. This category of residents is not even protected as a national minority. The current official definition of national minority, provided under the Law on Cultural Autonomy of National Minorities of 1993, excludes non-citizens, including stateless persons with long-term residence in Estonia. The lack of citizenship deprives these persons of a number of rights and carries an increased risk of social exclusion. The slow pace of naturalisation in the past could be attributed to two factors: first, the continuing difficulties experienced by some in passing the examinations required for Estonian citizenship, and secondly, the relatively limited motivation of some non-citizens to seek naturalisation. In order to address this situation, Estonia passed a new law ensuring that from 2016 nobody will be born stateless. Additionally, all children up to the age of 15 who were born stateless in Estonia will acquire nationality, and elderly stateless people will find it easier to do the same.

A similar challenge arises in Latvia, where 'permanently resident non-citizens' (*'nepilsoņi'*) still constitute around 280,000 persons, about 14 % of the total population. This proportion has hardly decreased since 2008, when 16 % of the population were *'nepilsoņi'*, although the absolute number did fall by a quarter.³⁴ Under the 1995 Law on the status of citizens of the former USSR who are not citizens of Latvia or any other country, such non-citizens are neither citizens, nor foreigners, nor stateless persons. A great proportion of the large Russian-speaking population of the country falls within this category, which is unknown in public international law. Differences of treatment based on the status of non-citizens are increasingly considered with suspicion in Latvia, but certain such distinctions remain. For instance, Article 1 of the transition provisions of the Law on State Pensions provides for different pension calculations for Latvian citizens and non-citizens as well as for foreigners and stateless persons who have worked outside Latvia before 1991: years worked are taken into account in the calculation for citizens but not for the other categories. This provision was challenged in the Constitutional Court, but the Court declined to find this situation in violation of the Constitution: it took the view that, since non-citizens are not mentioned in this provision (which only expressly deals with citizens, foreigners and stateless persons), the action challenged a legislative omission which it could not decide upon.³⁵

A number of international bodies expressed their concern at this situation. Thus in 2003, the Committee for the Elimination of Racial Discrimination recommended that non-citizens be allowed to take part in local elections.³⁶ In its Comments on the Concluding Observations of the Human Rights Committee, the Government of Latvia acknowledged that 'currently, a large proportion of the population are treated as a specific and distinct category of persons with long-standing and effective ties to Latvia. The Government regards them as potential citizens;'³⁷ In 2009, the European Court of Human Rights found Latvia to have committed discrimination against Ms Natālija Andrejeva, a 'permanently resident non-citizen' who was previously a national of the former USSR, and who, because she did not have Latvian citizenship, was denied pension rights: the fact of her having worked for an entity based outside Latvia despite her physical presence on Latvian territory did not constitute 'employment within the territory of Latvia' within the meaning of the State Pensions Act.³⁸

The Citizenship Law was amended in 2013 in order to answer some of these concerns, simplifying the acquisition of citizenship and naturalisation procedures for children under 15 years of age. As noted

Estonia (CERD/C/EST/CO/10-11 (2014)), para. 11.

34 On 1 January 2008, it was estimated that the 'permanent residents who are non-citizens' were 372 421 in number, out of a total of 2 276 282 inhabitants.

35 Judgment of 26.6.2001 delivered in case no. 2001-02-0106, available online at http://www.satv.tiesa.gov.lv/wp-content/uploads/2001/02/2001-02-0106_Spriedums_ENG.pdf.

36 UN document CERD/C/63/CO/8, 22 August 2003, paragraph 15.

37 UN document CCPR/CO/79/LVA/Add.1, 16 November 2004.

38 Eur. Ct. HR (GC), *Andrejeva v. Latvia* (Appl. No. 55707/00), judgment of 18 February 2009.

by the UN Committee on the Rights of the Child, however,³⁹ the amendments still do not provide for automatically granting citizenship to children born in Latvia to parents with 'non-citizen' status or to parents who are unable to transmit their citizenship to the child, but they require that one parent formally submit a request for citizenship at the time when the birth is registered.

While the difficulties described above may be extreme, they are not isolated. As illustrated by the case of *Biao v. Denmark* discussed below,⁴⁰ it is not unusual for instances of discrimination on grounds of race, ethnic origin or religion to occur in the process of attribution of citizenship. Arguably, just as they may be examined under Article 26 of the International Covenant on Civil and Political Rights, under the International Convention for the Elimination of All Forms of Racial Discrimination, or under Article 1 of Protocol No. 12 to the ECHR, such instances could fall under the scope of application of the Racial Equality or Employment Equality Directives, to the extent at least that citizenship is defined as a condition of access to certain forms of employment or to education, housing or social advantages to which the requirements of the Racial Equality Directive apply.

Indeed, was especially in order to avoid discrimination in matters relating to nationality that the European Convention on Nationality was concluded in 1997 under the auspices of the Council of Europe.⁴¹ This instrument has been ratified by 12 EU Member States,⁴² although unfortunately not by the countries where the problem seems most pressing, such as Latvia, Estonia and Slovenia. While recognising that it is for each State to determine under its own law who are its nationals (Article 3(1)), the European Convention on Nationality nevertheless notes that such choices 'shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality' (Article 3(2)). In particular, in determining its own rules on nationality, each State Party should ensure that such rules do not 'contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin' (Article 5(1)). With a view to avoiding situations of statelessness, this convention also contains a number of rules relating to the acquisition of nationality, including a rule according to which 'Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory' (Article 6(3)).

Although it is for EU Member States to define the criteria according to which they attribute their nationality, situations such as those described above result in certain permanent residents with strong links to one Member State in fact being deprived of the advantages of being a national of a Member State and thus a citizen of the Union. As illustrated by the *Janko Rottmann* case of 2010, discussed above, this may be in violation of EU law where the States act arbitrarily, in disregard of international principles regarding the attribution and removal of nationality.⁴³

1.2 Race and ethnic origin

Neither Article 19 TFEU nor the Racial Equality Directive use the concept of 'national origin', despite the fact that this constitutes a traditionally prohibited ground of discrimination in international law. As to the concepts of 'race' and 'ethnicity', they tend to be blurred to a certain extent, due to the recognition that both race and ethnic origin are social or cultural constructs that do not correspond to an objective 'reality' independent from either self-identification by the individual concerned or labelling by external

39 Concluding Observations of the Committee on the Rights of the Child: Estonia (UN doc. CRC/C/LVA/CO/3-5, 14 March 2016), paras. 34-35.

40 See hereafter, text corresponding to Chapter 3.2.1.a, notes 221-227.

41 ECTS., no. 166. Opened for signature in Strasbourg on 6 November 1997, entered into force on 1 March 2000.

42 These are Austria, Bulgaria, the Czech Republic, Denmark, Finland, Germany, Hungary, the Netherlands, Portugal, Romania, the Slovak Republic, and Sweden. Eight other EU Member States have signed the convention, but have not ratified it: these are Croatia, France, Greece, Italy, Latvia, Luxembourg, Malta and Poland.

43 Case C-135/08, *Rottmann v. Freistaat Bayern*, judgment of 2 March 2010 (ECLI:EU:C:2010:104). For a comment, see H. van Eijken, 'European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals', *Merkourios (Utrecht Journal of International and European Law)*, vol. 27 (2010), issue 72, pp. 65-69.

observers: ‘Race and ethnic groups, like nations, are imagined communities. People are socially defined as belonging to particular ethnic or racial groups, either in terms of definitions employed by others, or definitions which members of particular ethnic groups develop for themselves.’⁴⁴ Indeed, the Racial Equality Directive specifies in its preamble that the ‘European Union rejects theories which attempt to determine the existence of separate human races. The use of the term “racial origin” in this Directive does not imply an acceptance of such theories.’⁴⁵

Yet the fact that both ‘race’ and ‘ethnic origin’ are used alongside one another in Article 19 TFEU and in the Racial Equality Directive suggests that they should not be treated as synonymous. The clear intent of the drafters of the 1997 Amsterdam Treaty was to distinguish ‘race’ from ‘ethnic origin’ as separate grounds of prohibited discrimination. In the original text presented at the Dublin summit by the Irish Presidency of the EU in the framework of the intergovernmental conference preparing what would become the Treaty of Amsterdam, the wording proposed was: ‘Within the scope of application of this Treaty and without prejudice to any special provisions contained therein, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to prohibit discrimination based on sex, racial, ethnic or social origin, religious belief, disability, age, or sexual orientation.’⁴⁶ This wording thus mentioned racial, ethnic and social origin as three different grounds in an apparent attempt to be as all-encompassing as possible in combating ‘racial discrimination’ in all its forms; the reference to ‘social origin’ was removed from the final version, not in order to narrow down the scope of the protection but because it was considered an exceedingly vague and open-ended term (despite the term being present in the Universal Declaration of Human Rights), and especially because it was considered redundant, its intended meaning of membership of a group defined by its common culture being covered by the expression ‘racial and ethnic origin’.⁴⁷

Apart from the fact of being social constructs, ‘race’ and ‘ethnic origin’ are also both grounds of ‘racial discrimination’ as understood in international human rights law, and both refer to a broader notion of ‘origin’. Nevertheless, their coexistence in Article 19 TFEU and in the Racial Equality Directive indicates an intention to make clear that discrimination is prohibited not only when it is based on physical characteristics but also when it is based on cultural traits. The fact is that the prohibition of discrimination on grounds of membership of an ‘ethnic group’ coexists with the prohibition on grounds of ‘race’ and thus results in a dual form of protection, as has been recognised explicitly by certain jurisdictions, such as the New Zealand Court of Appeal in *King-Ansell v. Police*⁴⁸ and the United Kingdom House of Lords in the 1983 case of *Mandla v. Dowell Lee*.⁴⁹ At the same time, we should be careful not to attempt to draw clear-cut distinctions between ‘race’ and ‘ethnic origin’. Such attempts might paradoxically validate a biological understanding of ‘race’ in contrast with the ‘cultural’ understanding to be given to the concept of ‘ethnic

44 M. Bulmer and J. Solomos, ‘Introduction: Re-thinking Ethnic and Racial Studies’ (September 1998) 21(5) in *Ethnic and Racial Studies* pp. 819-837, at p. 822. D. I. Kertzer and D. Arel consider, on the other hand, that both ‘race’ and ‘ethnicity’ are based on a similar – mistaken – belief that identity can be somehow ‘objectively determined through ancestry’ (D.I. Kertzer and D. Arel, ‘Censuses, identity formation, and the struggle for political power’ in D.I. Kertzer and D. Arel (ed.), *Census and Identity – The Politics of Race, Ethnicity, and Language in National Censuses* (Cambridge, Cambridge University Press, 2002) pp. 1-42, at p.11). On the relationship between the concepts of ‘race’ and ‘ethnicity’, see also A. Morning, ‘Ethnic Classification in Global Perspective: A Cross-National Survey of the 2000 Census Round’ (April 2008) 27(2) in *Population Research and Policy Review*, pp. 239-272.

45 Preamble, Recital 6.

46 European Union Today And Tomorrow – Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future – A general outline for a draft revision of the treaties, CONF 2500/96, 5 December 1996, p.16.

47 Some authors have argued that ‘social origin’ was intended to refer to the Roma (see L. Flynn, ‘The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination be More Equal than Others?’ (1999) 36 *CMLRev* pp. 1127-1152, at p. 1132). This position seems untenable in the light of the unanimous understanding by European institutions that Article 13 EC (now Article 19 TFEU) when referring to ‘ethnic origin’ includes in particular protection against discrimination based on membership of the Roma community.

48 [1979] 2 N.Z.L.R. 531 (C.A.). This court held that the Jews of New Zealand were an ‘ethnic group’ so as to permit prosecution of the leader of the National Socialist Party of New Zealand for intentionally exciting ill-will against them; indeed, the statute protected groups identifiable on the basis of ‘colour, race, or ethnic or national origins’.

49 [1983] IRLR 209 (defining the conditions which are to be satisfied in order for a community of individuals to be considered as an ‘ethnic group’ for the purposes of applying the Race Relations Act 1976).

origin'. In its judgment of 13 December 2005 in *Timishev v. Russia*, the European Court of Human Rights addressed the distinction between 'race' and 'ethnic origin' in the following terms:

'Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.'⁵⁰

Although 'race' and 'ethnicity' are both social constructs referring to the 'origin' of the individual, they remain distinct concepts within the meaning of antidiscrimination law, in Europe at least. 'Race' is used primarily to refer to situations where persons are discriminated against based on physical characteristics which may be observed externally. 'Ethnicity', on the other hand, refers rather to membership of a group that has certain shared common characteristics, such as language, a shared history or tradition, and a common descent or geographical origin. As some authors put it, the constitution of a 'racial group' results from a negative process since it is discrimination, past or present, that brings it into existence, whereas an ethnic group is based on features such as practices, lifestyles, and traditions which define a community positively, independently of discrimination; albeit inherited, these features are supported and continued by community members who find in them a source of identification.⁵¹

1.3 The relationship between nationality and race, ethnic origin, and religion

The Racial Equality Directive (Directive 2000/43/EC) and the Employment Equality Directive (Directive 2000/78/EC) provide that the prohibition of discrimination based on race or ethnic origin, religion or belief, disability, age or sexual orientation in the areas covered by those instruments also applies to nationals of third countries. Both add, however, that this prohibition 'does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation'; nor does it cover 'any treatment which arises from the legal status of the third-country nationals and stateless persons concerned'.⁵²

A literal reading of these provisions of the directives would imply that, even if it were to appear that differences in treatment on grounds of nationality or on grounds of the status of third-country national put persons of a particular racial or ethnic origin or holding a particular religion or belief at a particular disadvantage compared with other persons, this cannot be challenged under these instruments. According to the wording of these directives, this exemption would concern not only differences in treatment between third-country nationals and citizens of the EU. It also would seem to extend to differences in treatment between different nationalities, and between those who possess a nationality on the one hand and stateless persons on the other.

It is reassuring, however, that, in implementing the EU anti-discrimination directives, the EU Member States have frequently gone beyond this narrow reading of their prescriptions. As described in greater detail in Chapter IV of this report (Chapter 1.2.), at least seven Member States have opted to explicitly extend the prohibition of discrimination to discrimination on grounds of nationality in the domestic legislation implementing the Racial Equality Directive (alone or with the Employment Equality Directive), and in at least four other Member States, although nationality is not explicitly listed among the prohibited grounds

50 Eur. Ct. HR, (2nd section), *Timishev v. Russia*, judgment of 13 December 2005 (Appl. Nos 55762/00 and 55974/00), at para. 55. The circumstances were that Timishev, a Chechen lawyer, had his car stopped at a checkpoint and was refused entry by officers of the Inspectorate for Road Safety. The refusal was based on an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin.

51 J. Dahan, J. Stavo-Debaugue and D. Thomas-Hislaire, *The Fight Against Discrimination and the Promotion of Equality: How to Measure Progress Done*, European Commission, DG for Employment, Social Affairs and Equal Opportunities (2008) at p.18.

52 13th Recital of the Preamble and Article 3(2) of the Racial Equality Directive; 12th Recital of the Preamble and Article 3(2) of the Employment Equality Directive.

of discrimination in the domestic legislation implementing the Racial Equality and Employment Equality directives, the said legislation provides a non-exhaustive list of prohibited grounds of discrimination, thus allowing courts to extend the protection of the law to prohibit nationality-based discrimination; indeed, such an extension is possible in most other Member States (except for three Member States in which nationality is explicitly excluded from the criteria of differentiation that can be challenged under the domestic legislation implementing the EU's antidiscrimination directives), even where the list of prohibited grounds of differentiation is a closed one, by the interpretation of expressions such as 'national origin' or even 'race or ethnic origin'.

It is indeed important to acknowledge that nationality or status in certain cases may serve as a proxy for race or ethnic origin or for religion or belief. For instance, as highlighted most clearly in the context of counter-terrorism measures, the exclusion from certain positions or from access to the national territory of persons who hold a nationality included on a list of Middle Eastern countries might be a way of targeting Muslims.⁵³ The Council of Europe's European Commission against Racism and Intolerance noted in this regard that 'as a result of the fight against terrorism engaged since the events of 11 September 2001, certain groups of persons, notably Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, certain visible minorities and persons perceived as belonging to such groups, have become particularly vulnerable to racism and/or to racial discrimination across many fields of public life including education, employment, housing, access to goods and services, access to public places and freedom of movement', and it therefore urged States to 'review legislation and regulations adopted in connection with the fight against terrorism to ensure that these do not discriminate directly or indirectly against persons or groups of persons, notably on grounds of "race", colour, language, religion, *nationality or national or ethnic origin*, and to abrogate any such discriminatory legislation' (emphasis added).⁵⁴

Similarly, the exclusion of non-nationals from certain positions or advantages may in fact be a means of obfuscating racial discrimination: the Committee on the Elimination of Racial Discrimination, for instance, has recognised the close relationship between racial, ethnic or national origin discrimination and discrimination on the basis of nationality, noting that in some cases discrimination on the basis of nationality may actually be a proxy for discrimination on the basis of race.⁵⁵ A judgment delivered in the Netherlands by the District Court of Haarlem on 8 May 2007 may illustrate this.⁵⁶ The court found that the prohibition of discrimination on grounds of race stipulated in Article 1 of the Dutch Constitution had been violated after the City Administration of Haarlem had ordered a specific investigation into the legal residency and right to receive welfare benefits of Somali inhabitants who were receiving such benefits. These Somali inhabitants were thus clearly targeted by the investigation that had been ordered. The Court found no sufficient objective justification for what it considered to constitute a clear infringement of the prohibition of discrimination on the ground of race. The City Administration advanced the justification that there were indications that a considerable number of Somalis had moved to the United Kingdom without de-registering from the City's administrative system and were still receiving benefits.

53 See, in particular, Center for Human Rights and Global Justice, *Irreversible Consequences: Racial Profiling and Lethal Force in the 'War Against Terror'* (New York: NYU School of Law, 2006).

54 European Commission against Racism and Intolerance, General Policy Recommendation N°8: Combating racism while fighting terrorism (adopted on 17 March 2004).

55 Committee on the Elimination of Racial Discrimination, *Ziad Ben Ahmed Habassi v. Denmark*, Communication No. 10/1997, U.N. Doc. CERD/C/54/D/10/1997 paras. 9.3 – 9.4 (1997) (the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid; the Committee notes, however, that 'nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that [...] it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis-à-vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the [International Convention on the Elimination of All Forms of Racial Discrimination], are being applied').

56 LJI: BA5410.

There are other examples of the interaction between nationality, on the one hand, and race or ethnic origin, on the other hand, as prohibited grounds of discrimination. Thus, it has been established that the exclusion of members of the Roma minority from a number of public services and essential social benefits is the result of their precarious administrative situation and often their statelessness, resulting in a lack of administrative documents attesting their legal status. This is also among the key findings of a 2003 Council of Europe report: 'Many Roma lack identity cards, birth certificates and other official documentation of their legal status. Such documents are often required to access public services. Statelessness, and the lack of status within the State of residence, as well as problems with documentation impede access to a range of rights including access to health care. These situations are created by a variety of factors, including information and financial barriers, eligibility criteria that have a disproportionate impact on Roma, and discrimination by local authorities. There is need for greater awareness among authorities of the situation of Roma, and greater flexibility in application of legal status requirements for Roma (as for other discriminated groups) in order that they may enjoy equal access to public services.'⁵⁷

The close interaction between nationality and race or ethnic origin also explains why nationality may be used as a proxy for race or ethnic origin in positive action schemes aimed at combating racial discrimination or at counteracting its effects. In Belgium, because of the strict restrictions imposed on the processing of personal data relating to an individual's race or ethnic origin,⁵⁸ the Flemish Region has chosen to implement 'diversity plans' not by using the criteria of racial or ethnic origin directly, but instead by relying on the far less sensitive criterion of nationality. The Executive Regulation adopted on 30 January 2004 by the Flemish Government to implement certain provisions of the Decree of 8 May 2002,⁵⁹ which seeks both to prohibit direct and indirect discrimination on the grounds listed in Article 19 TFEU⁶⁰ and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made), details the procedures for implementing 'diversity plans', which aim to ensure progress towards proportionate representation in the employment market of identified 'target groups' with a view to combating discrimination on grounds of race and ethnic origin in particular. Though closely inspired by the Racial Equality and Employment Equality directives, this Regulation refers (in Article 2 paragraph 2, 1°) not to workers' race or ethnic origin but instead – as a substitute for race or ethnic origin – to 'allochtones'. These are defined as adult citizens legally residing in Belgium whose socio-cultural background is of a country that is not part of the European Union, who may or may not have Belgian nationality, who have arrived in Belgium either as foreign workers or through family reunification, who have obtained the status of refugee, who are asylum seekers whose claims to asylum have not been considered inadmissible or who have a right to residence in Belgium because their situation has been regularised, and who, because of their poor knowledge of the Dutch language and/or their weak socio-economic position, whether or not this is reinforced by a poor level of education, are disadvantaged. The absence of any reference to the 'racial' or 'ethnic' background of the individual in such a definition of the 'target group' is remarkable if we recall that these plans

57 Council of Europe, *Breaking the Barriers – Romani Women and Access to Public Health Care*, 2003, p. 12.

58 See Opinion no. 7/93 adopted on 6 August 1993 by the Commission for the Protection of Privacy (*Commission de protection de la vie privée*), which offers a strict interpretation of the limits imposed by the Belgian Federal Act of 8 December 1992 on the protection of private life vis-à-vis the processing of personal data. See www.privacycommissie.be.

59 *Besluit van 30 Januari 2004 van de Vlaamse regering tot uitvoering van het decreet van 8 mei 2002 houdende evenredige participatie op de arbeidsmarkt wat betreft de beroepskeuzevoorlichting, beroepsopleiding, loopbaanbegeleiding en arbeidsbemiddeling* (Executive Regulation of 30 January 2004 of the Flemish Government concerning the execution of the Decree of 8 May 2002 on proportionate participation in the employment market concerning professional orientation, vocational training, career guidance and the action of intermediaries on the labour market), *Moniteur belge*, 4 March 2004, p. 12050. This implements the Decree of 8 May 2002 on proportionate participation in the employment market adopted by the Flemish Region/Community (*Decreet houdende evenredige participatie op de arbeidsmarkt*) (*Moniteur belge*, 26 July 2002, p. 33262), which seeks both to prohibit direct and indirect discrimination on the grounds listed in Article 19 TFEU and to encourage the integration of target groups into the labour market by positive action measures (preparation of diversity plans and annual reports on progress made).

60 This limitation to the seven grounds listed in Article 19 TFEU is the result of an amendment to the Decree adopted on 9 March 2007 in order to take into account the decision of the Constitutional Court of 2004 regarding the list of criteria set out by the Federal Act adopted in 2003 (Decree of 9 March 2007 modifying the Decree on proportionate participation in the employment market (*Décret modifiant le décret du 8 mai 2002 relatif à la participation proportionnelle sur le marché de l'emploi*), *Moniteur belge*, 6 April 2007).

seek to implement the principle of equal treatment on the grounds of, *inter alia*, race and ethnic origin. However, processing of data on the race or ethnic origin of any individual would be in violation of the requirements of the Data Protection Act according to the Commission for the Protection of Private Life, which has proven to be particularly sensitive to this issue, relying on an interpretation of the requirements of data protection that, in this respect at least, goes beyond the requirements of EU legislation: this makes reliance on this kind of proxy inevitable in the Belgian context.

Although the reference to '*allochtones*' now seems less attractive,⁶¹ at the time it adopted the 2004 Regulation, the Flemish Region was heavily influenced by the developments which had taken place a decade earlier in the Netherlands. While 'ethnic minorities' remains the central notion used in Dutch public policy, the term '*allochtoon*' has appeared in administrative practice following the 1989 report on '*Allochtonen policy*' (*Allochtonenbeleid*) issued by the governmental academic advisory body,⁶² and in 1995 the category *allochtonen* was introduced into official statistics to designate individuals with a foreign background living in the Netherlands. It was formally defined by the national statistics agency (the *Centraal Bureau voor de Statistiek* or CBS) in 1999 as including 'every person living in the Netherlands of whom at least one parent was born abroad.' This category therefore conflates foreigners and Dutch citizens with foreign origins. People are classified as *allochtonen* by the CBS on the basis of information available in municipality-level administrative systems (*Gemeentelijke Basisadministratie*). Since 1999 a further distinction has been made by the CBS between 'Western *allochtonen*' (who come from European countries [with the exception of Turkey], North America, and Oceania as well as Japan and Indonesia) and 'non-Western *allochtonen*' (those with Turkish, Asian [except for Japanese and Indonesian], African or Latin American origins). The third generation of immigrants is automatically classified as 'autochtonous' as opposed to *allochtoon*. However, although the CBS has avoided using the term *allochtonen* with respect to third-generation immigrants since 2000, it has started to collect figures on the third generation of 'non-Western *allochtonen*', i.e. persons with at least one grandparent who was born in Morocco, Turkey, Suriname or the Antilles.

Finally, it cannot be ruled out that the conditions for granting nationality may constitute racial or ethnic discrimination prohibited by the Racial Equality Directive, where access to nationality constitutes a condition for access to certain forms of employment, to housing, to social protection or to education in particular. Whereas each Member State of the EU may in principle determine who are its own nationals and thus has exclusive competence to define the rules according to which nationality may be attributed, Council Directives 2000/43/EC and 2000/78/EC apply to all persons without distinction as to their nationality, and they therefore also protect third-country nationals. According to Recital 13 of the Preamble of Directive 2000/43/EC, the prohibition of all direct or indirect discrimination on grounds of racial or ethnic origin does not concern differences in treatment on grounds of nationality. Yet, where they create differences in treatment between certain categories of persons, the conditions for granting nationality do not create a difference in treatment between nationals and non-nationals; rather, they do so between different categories of foreigners (some being eligible for citizenship, others not), which arguably places these differentiations under the scope of Directive 2000/43/EC.

61 In contrast to the Executive Regulation of 30 January 2004, the more recent Flemish Executive Regulation of 7 June 2013, which concerns the allocation of subsidies in support of diversity policies, refrains from using the word '*allochtone*' (foreign-born people). Instead, it refers to 'people who have foreign roots' (*Moniteur belge*, 23 July 2013, p. 45964 (*Besluit van de Vlaamse Regering van 7 juni 2013 tot vaststelling van de criteria, de voorwaarden en de nadere regels voor het verlenen van subsidies ter ondersteuning en uitvoering van het loopbaan- en diversiteitsbeleid*)).

62 *Wetenschappelijke Raade voor Regeringsbeleid* (WRR) 1989.

2 The framework of EU law with regard to discrimination on the ground of nationality⁶³

While differences of treatment on grounds of nationality *as such* are not covered by the prohibition of discrimination established by the Racial Equality and Employment Equality Directives (according to Article 3(2) common to both directives) – which does not necessarily imply that indirect discrimination on grounds of race, ethnic origin or religion escapes the prohibition for the simple reason that it results from a difference of treatment based on nationality – this chapter examines the other instruments of EU law that relate to the prohibition of discrimination on grounds of nationality.

2.1 The prohibition of discrimination on grounds of nationality within the scope of application of the EC Treaty

The provisions of the EC Treaty which prohibit discrimination on grounds of nationality, whether in general ('within the scope of application of [the Treaties]': Article 18 TFEU) or in the specific context of the freedom of movement of workers (Article 45(2) TFEU) or of freedom of establishment (Article 49 TFEU), have been interpreted to protect only the nationals of the Member States.⁶⁴ Although third-country nationals could benefit indirectly from these provisions when they fall under the remit of Union law – in particular as family members of a citizen of the Union – the scope of application of Article 18 TFEU is in principle limited to nationals of EU Member States. It does not cover differences of treatment between EU citizens and third-country nationals. Nor does it cover differences of treatment between nationals from different third countries. In Case 238/83, the European Court of Justice confirmed that Article 39 EC (then Article 48 EEC, now Article 45 TFEU) guarantees free movement only to workers from the Member States, and that the scope of application *ratione personae* of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families was similarly restricted.⁶⁵ In Case C-147/91, the Court confirmed that the rules of the EC Treaty on freedom of establishment and provisions of secondary legislation implementing this freedom may be relied on 'only by a national of [an EU Member State] who seeks to establish himself in the territory of another Member State or by a national of the Member State in question who finds himself in a situation which is connected with any of the situations contemplated by [Union law].'⁶⁶ Thus, the fundamental economic freedoms guaranteed in the Treaty on the Functioning of the European Union benefit only nationals of EU Member States. The same restriction applied when freedom of movement within the EU was extended to the non-economically active in the EU, under Directives 90/364 (nationals of Member States who do not enjoy the right of residence under other provisions of Community law and their dependents),⁶⁷ 90/365 (persons having ceased their professional activity),⁶⁸ and 93/96 (students).⁶⁹ This was later confirmed by the adoption of Directive 2004/38/EC 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,⁷⁰ which recast these earlier directives and regulations into one single instrument. Directive 2004/38 confirms the link between

63 See also E. Bribosia, E. Dardenne, P. Magnette and A. Weyembergh (eds), *Union européenne et nationalité. Le principe de non-discrimination et ses limites*, Bruxelles, Bruylant, 1989.

64 On this theme, see Kees Groenendijk, 'Are third-country nationals protected by the Union law prohibition of discrimination on grounds of nationality?', in: K. Barwig & R. Döbbelstein (eds), *Den Fremden akzeptieren, Festschrift für Gisbert Brinkmann* (Nomos Gesellschaft, Schriften zum Migrationsrecht, Baden-Baden, 2012), nr. 6, pp. 131-142.

65 It follows, according to the Court, that 'Neither Regulation No. 1408/71 nor Article 48 of the Treaty prevents family allowances from being withdrawn pursuant to national legislation on the ground that a child is pursuing its studies in another Member State, where the parents of the child concerned are nationals of a non-member country or are not employed' (Case 238/83, *Caisse d'allocations familiales v. Meade* [1984] ECR 2631, para. 10).

66 Case C-147/91, *Criminal proceedings against Ferrer Laderer* [1992] ECR I-4097, para. 7.

67 Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ L 180, 13.7.1990, p. 26.

68 Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180, 13.7.1990, p. 28.

69 Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ L 317, 18.12.1993, p. 59.

70 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC,

the status of citizens of the Union and the enjoyment of the right to move freely within the EU. At the same time, it does attribute certain rights to family members of a Union citizen who exercises his/her freedom of movement in order to preserve the unity of the family.

Even the single legislative measure specifically aimed at facilitating the integration of migrant workers – Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers⁷¹ – benefits only workers who are nationals of other EU Member States. In order to ensure the possibility of future reintegration in the State of origin, this directive obliges both the migrant worker's host State and their State of origin to adopt 'appropriate measures to promote the teaching of the mother tongue and of the culture of the country of origin' to the children of migrant workers. In practice, the directive, which has been very unsatisfactorily transposed by Member States, has not been effective;⁷² moreover, it is not considered to place binding obligations on the Member States.⁷³ It is nevertheless significant that even this instrument was not aimed at facilitating the integration of migrant workers from third countries; although this may be explained by the fact that at the time when the directive was adopted immigration was not part of the competences of the European Community, it provides a further illustration of the gap between the protection of nationals of EU Member States on the one hand and that of third-country nationals on the other. That is not to say that no progress has been made to align, to a certain extent, the status of third-country nationals with that of nationals of EU Member States. Part two of this chapter reviews the progress that has been made in this regard.

Nationals of other EU Member States, therefore, enjoy a clear advantage, as regards access to measures promoting their integration in the host society, over third-country nationals: such, after all, is one of the consequences of the establishment of the citizenship of the Union. Nevertheless, certain prohibitions imposed on EU Member States in order to ensure that they will not discriminate against EU nationals may indirectly benefit third-country nationals by removing conditions which might otherwise affect them negatively. For instance, under the rules pertaining to the free movement of workers in the EU, language requirements which cannot be defended as pursuing a legitimate objective and as being proportionate to that objective may be denounced as indirectly discriminatory against the nationals of other Member States.⁷⁴ To the extent that such requirements have to be removed since they may constitute a violation of Articles 18 and 45 TFEU, the employment of third-country nationals in the sectors concerned may as a result be made possible, unless a formal condition related to nationality (reserving such positions to the nationals of the host Member State or nationals of EU Member States) is imposed. Similarly, the European Court of Justice considered, for instance, that the children of a Spanish national and a Belgian national residing in Belgium and holding dual Belgian and Spanish nationality should not be treated in the same way as persons who have only Belgian nationality as regards the right to change surnames and in particular the right to opt for a surname consisting of the first surname of the father followed by that of the mother in accordance with Spanish law, rather than using the father's surname as in Belgian administrative practice applicable to Belgian nationals.⁷⁵ Although based on Article 12 EC (to which Article 18 TFEU now corresponds), this case law will indirectly benefit third-country nationals residing in Belgium as the change in the rules relating to surnames will be extended to them.

90/365/EEC and 93/96/EEC, J L 229, 29.6.2004, p. 35. See also the corrigenda, OJ L 229, 29.6.2004, p. 35, and OJ L 204, 4.8.2007, p. 28.

71 OJ L 199 of 6.8.1977, p. 32.

72 See European Commission, *Green Paper – Migration & mobility: challenges and opportunities for EU education systems*, SEC(2008) 2173, COM(2008)423 final of 3.7.2008, especially para. 4.3. (also asking about the relevance of the directive's approach in a context in which the main questions concerning the education of children of migrant workers arise as regards workers who are third-country nationals).

73 Statement by Commissioner Reding, reply to written question E-1336/02, 8 May 2002, OJ C 277 E of 14.11.2002, p. 190.

74 Case C-379/87, *Groener* [1989] ECR 3967, paragraphs 19 and 23.

75 Case C-148/02, *Carlos Garcia Avello* [1997] ECR I-11613, judgment of 2 October 2003.

2.2 The progressive alignment of the status of third-country nationals with that of nationals of EU Member States

2.2.1 Introduction

Steps have been taken to overcome the exclusion of third-country nationals from the free movement rights as granted in the EU Treaties to nationals of EU Member States, and to implement the principle of equal treatment between third-country nationals legally staying and working in the EU and nationals of the host State. Indeed, a strong political will has emerged towards the gradual assimilation of various categories of third-country nationals to the nationals of the host EU Member States since the EU's immigration policy emerged in the late 1990s.

This is not a new idea. Already in 1991, the European Economic and Social Committee had adopted an own-initiative opinion on the status of migrant workers from third countries in which it stated unambiguously that 'A Community policy of integration and free movement should be founded on the principle of equal rights and equal opportunities for legally resident immigrant workers from third countries', and proposed that the 1989 Community Charter of Fundamental Social Rights of Workers be complemented by a list of rights applying to third-country workers employed in the EU Member States.⁷⁶ Even at the time, this was not a particularly revolutionary position to take. The ILO Migration for Employment Convention (No. 97), in its 1949 version,⁷⁷ already provided that each State Party would 'apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals' in respect of 'remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, the work of women and young persons; membership of trade unions and enjoyment of the benefits of collective bargaining; accommodation; social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme (...); employment taxes, dues or contributions payable in respect of the person employed; and legal proceedings relating to the matters referred to in [the Migration for Employment Convention]'.⁷⁸ That convention had already been ratified by eight EU Member States (out of a total of 12 EU Member States at the time) when the EESC adopted its opinion.⁷⁹ In 1975, the Migrant Workers (Supplementary Provisions) Convention (No. 143) was adopted within the International Labour Organization.⁸⁰ The first part of this instrument lists a number of commitments linked to the need to combat the illegal employment of migrant workers, but it also importantly states that, provided 'he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment', and that he therefore 'shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining'.⁸¹ The second part of the Migrant Workers (Supplementary Provisions) Convention, however, is focused entirely on equal treatment, taking as its departure point (in Article 10) that:

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and

76 Opinion of the European Economic and Social Committee on the status of migrant workers from third countries, adopted on 24 April 1991, OJ C 339 of 31.12.1991, p. 82.

77 Convention concerning Migration for Employment (revised 1949), in force since 22 January 1952.

78 Article 6(1).

79 The Convention concerning Migration for Employment (revised 1949) was ratified by Belgium (for which it entered into force in 1953), France (1954), Germany (1959), Italy (1952), The Netherlands (1952), Portugal (1978), Spain (1967) and the United Kingdom (1951).

80 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, in force since 9 December 1978.

81 Article 8.

practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Although much more poorly ratified than the Migration for Employment Convention (No. 97) – only two EU Member States, Italy and Portugal, were parties to the Convention in 1991, and the number has hardly increased since – the Migrant Workers (Supplementary Provisions) Convention (No. 143) of 1975 nevertheless expresses a consensus at international level that the principle should be that migrant workers who are legally employed in a State should benefit from equal treatment with the nationals of the host country in all matters related to employment and social security.

The same principle was affirmed in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the UN General Assembly on 18 December 1990.⁸² This convention lists the rights that, being accorded under other international human rights instruments to all individuals under the jurisdiction of the State in which they find themselves, should also benefit migrant workers (engaged in a remunerated activity in a State of which they are not a national)⁸³ and members of their families. It adds:

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:
 - (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;
 - (b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.
2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.
3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

Other provisions of the Convention on the Rights of Migrant Workers and the Members of their Families also are relevant to understand the scope of the principle of equal treatment with the nationals of the host State. Article 26 allows migrant workers and their family members to join in the activities of unions and to seek the protection of unions, and Article 30 provides that 'Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned'; Article 27 stipulates their right to enjoy the benefits of social security, although equal treatment in this regard shall apply 'in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties'. Moreover, whereas the other rights stipulated in the Convention benefit all migrant workers, whether or not they are staying legally on the territory (as this was seen as a means to protect undocumented migrant workers from abuse and exploitation), migrant workers who are documented or are in a regular situation in the State concerned are accorded certain supplementary rights, including the right to equality of treatment with nationals of the State of employment in relation to: (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned; (b) Access to vocational guidance and placement services; (c) Access to vocational training and retraining facilities and institutions; (d) Access to housing, including social housing schemes, and protection against exploitation in

82 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003; U.N.T.S., vol. 2220, p. 3.

83 Article 2(1).

respect of rents; (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met; (f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned; (g) Access to and participation in cultural life'.⁸⁴

It is true that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is poorly ratified in general, and that OECD countries in particular have been reluctant to accept it: although it has been opened for accession since 1990 and has been in force since 1 July 2003, not a single EU Member State has agreed to join. Although a recent study presented to the European Parliament concluded that ratification by the EU Member States poses no 'insurmountable barriers', and that 'the decision on ratification is largely driven by political choice rather than by an objective scrutiny',⁸⁵ this instrument may hardly be invoked, therefore, as demonstrating the existence of a consensus across European countries as regards the rights that should be accorded to migrant workers and their family members. Nevertheless, it does provide a supplementary illustration of the international trend towards improving the situation of migrants in their host countries, and the central role that equality of treatment with nationals plays in supporting migrants' integration in areas such as access to employment, housing, social security and education.⁸⁶

2.2.2 *The status of long-term residents*

But how could European Union law accommodate this trend? An initial push was given by the European Council at its special meeting in Tampere on 15 and 16 October 1999, when it stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a certain period of time and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents⁸⁷ is the outcome of this political commitment. The directive provides that the Member States should grant long-term resident status to third-country nationals who have resided legally and continuously within their territory for five years, on the condition that third-country nationals seeking to acquire that status prove that they have, for themselves and for dependent family members, stable and regular resources which are sufficient to maintain themselves and the members of their family without recourse to the social benefit system of the Member State concerned as well as health insurance in respect of all risks normally covered for the nationals of the Member State concerned. Although Article 3(2)(e) of the directive excludes from its scope of application third-country nationals who 'reside solely on temporary grounds', in particular 'in cases where their residence permit has been formally limited', the EU Member States cannot escape their obligations under the directive by indefinitely renewing short-term residence permits without such limitations preventing the long-term residence of the third-country nationals concerned, as this would

84 Article 43(1). Although equality of treatment benefits documented migrant workers in these areas, the members of the families of these migrants are also granted equality of treatment in most of the fields listed: see Article 45 of the Convention.

85 *Current challenges in the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, study prepared by Kristina Touzenis and Alice Sironi at the request of the European Parliament's Subcommittee on Human Rights, EXPO/B/DROI/2013/05 (July 2013). See also R. Plaetevoet and M. Sidoti, *Ratification of the UN Migrant Workers Convention in the European Union. Survey on the Positions of Governments of Civil Society Actors*, 18 December and EPRMW (December 2010).

86 See generally, R. Cholewinski, P. de Guchteneire and A. Pécoud (eds.), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, Cambridge University Press, Cambridge, 2009.

87 OJ L 16 of 23.1.2004, p. 44.

deprive the directive of its effectiveness.⁸⁸ In 2011, it was estimated that the directive benefited more than half a million third-country nationals in 24 EU Member States.⁸⁹

a) Equal treatment of long-term residents

Long-term residents are to enjoy equal treatment with nationals as regards, *inter alia*, access to employment and self-employed activity and conditions of employment and working conditions; social security, social assistance and social protection as defined by national law; taxation; and access to housing. Although, under Article 11(4) of Directive 2003/109, 'Member States may limit equal treatment in respect of social assistance and social protection to core benefits', the Court of Justice has made it clear that such 'core benefits' include, at a minimum, those benefits that have allowed beneficiaries to enjoy the rights and principles recognised in the Charter of Fundamental Rights, such as the right to housing assistance.⁹⁰

In addition, under certain conditions, long-term residents have the right to reside in the territory of Member States other than the one which granted them long-term residence beyond the period of three months to which they are normally restricted; they then have access to the labour market in that Member State and they are to be treated equally with nationals in a number of areas, including those mentioned above. Finally, when the long-term resident exercises his/her right of residence in a second Member State, provided the family was already constituted in the first Member State, family members who fulfil the conditions referred to in Article 4(1) of the Family Reunification Directive (2003/86/EC)⁹¹ are authorised to accompany or join the long-term resident.

b) The requirement to comply with 'integration conditions'

There is one potentially contentious limitation to the rights granted under this Directive, however. Similarly to Article 7(2) of the 2003 Family Reunification Directive, Article 5(2) of Directive 2003/109 provides that 'Member States may require third-country nationals to comply with integration conditions, in accordance with national law', before granting the status of long-term resident to a third-country national. Indeed, a number of EU Member States in recent years have developed 'tests' based, for instance, on language or on an understanding of the values and legal system of the host State, which are then imposed on third-country nationals as a condition for the right to permanent residence on the host State's territory: according to a Commission review, this was the case in 2011 in Austria, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal and Romania;⁹² Denmark and the United Kingdom, too, have introduced such tests, though they have chosen not to participate in Directive 2003/109.⁹³ There is no European consensus on this matter. The idea of integration tests was dropped from the European Pact on Immigration and Asylum approved by EU Member States in July 2008, although it was initially included in the French Presidency's proposal for such a pact. However, the imposition of such 'integration conditions' forms part of the set of measures favouring the integration of migrants set out by the broader

88 The Court of Justice clarified in a case referred to it by a Dutch court that Article 3(2)(e) of the directive did not allow the EU Member States to deny the status of long-term residents to third-country nationals by granting short-term residence permits whose validity 'may be extended indefinitely without however offering any prospect of a residence permit of indefinite duration where such a formal limitation does not prevent the long-term residence of the third-country national in the Member State concerned'. See Case C-502/10, *Mangat Singh*, judgment of 18 October 2012 (ECLI:EU:C:2012:636).

89 Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2011) 585 final of 28.9.2011.

90 Case C-571/10, *Kamberaj*, judgment of 24 April 2012 (ECLI:EU:C:2012:233) (noting that 'Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources', the Court considers that: 'It follows that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109' (para. 92)).

91 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

92 Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC, cited above, p. 3.

93 For a review, see S. Carrera, 'Integration of Immigrants in EU law and Policy', in L. Azoulay, K. de Vries (eds), *EU migration Law: Legal Complexities and Political Rationales* (Oxford, Oxford University Press, 2014).

The Hague Programme: strengthening freedom, security and justice in the European Union, Paragraph 1.5 of which refers to the integration of migrants as implying 'respect for the basic values of the European Union and fundamental human rights' and as requiring 'basic skills for participation in society'.⁹⁴ Such measures arguably come under the understanding of the integration of legal immigrants as a 'two-way process' in the Common Basic Principles on Integration adopted in 2004,⁹⁵ which holds that integration must be improved through greater efforts by host Member States and a contribution from the immigrants themselves.

The imposition of 'integration conditions', for instance, the proficiency of the language of the host Member State or a knowledge of its history or values – as well as the imposition, in some cases, of 'tests' to assess whether such conditions have been fulfilled – has come under academic and NGO scrutiny in recent years.⁹⁶ When it assessed the application of Directive 2003/109 in 2011, the Commission warned that, in imposing integration conditions, Member States should ensure they remain 'in line with the purpose of the Directive and take due account of the general principles of EU law, such as the principle of preserving its effectiveness (*effet utile*) and the proportionality principle. In order to perform such an assessment, the nature and level of the knowledge expected from the applicant, also by comparison to the knowledge of the host society, the cost of the exam, the accessibility of the integration training and tests, the comparison between the integration requirements imposed on a prospective [long-term resident] and those applied to prospective citizens (which are expected to be higher), are all valuable indicators.'⁹⁷

It was not until 2015, however, that the Court of Justice had to address the issue under Directive 2003/109.⁹⁸ In the *P & S* case, the Court was asked to examine the Dutch policy of obliging third-country nationals already in possession of long-term resident status to sit a civic integration examination, or else face a fine. This fine could be set at a maximum level of EUR 1 000, and it could be imposed repeatedly ad infinitum, every time the prescribed period for sitting the test elapsed without the requirement being fulfilled; moreover, the fee for sitting the examination (EUR 230) had to be borne by the individual concerned.⁹⁹ The civic integration test in the case presented to the Court was not a condition for acquiring the status of long-term resident; it was a tool, rather, to support the effective integration of third-country nationals who had already been granted that status into Dutch society. While acknowledging that, in addition to facilitating access to employment and vocational training programmes, 'the acquisition of knowledge of the language and society of the host Member State greatly facilitates communication between third-country nationals and nationals of the Member State concerned and, moreover, encourages interaction and the development of social relations between them', the Court nevertheless added that

94 Council of the EU, doc. 16054/04, 13 December 2004.

95 Council Document 14615/04 of 19 November 2004.

96 D. Acosta Arcarazo, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership', *European Law Journal*, vol. 21(2) (March 2015), pp. 200-219; R. Van Oers, *Deserving Citizenship. Citizenship Tests in Germany, the Netherlands and the United Kingdom* (Wolf Legal Publishers, 2013); S. Morano-Foadi, M. Malena (eds), *Integration for third-country nationals in the European Union, the Equality Challenge* (Edward Elgar Publishing, 2012); Human Rights Watch, *The Netherlands: Discrimination in the Name of Integration Migrants' Rights under the Integration Abroad Act* (Human Rights Watch, New York, 2008).

97 Report from the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC, cited above, p. 3.

98 The issue was also raised under the 2003 Family Reunification Directive: see Case C-173/14, *K & A*, judgment of 9 July 2015 (ECLI:EU:C:2015:453). Article 7(2)(1) of the Family Reunification Directive (2003/86) provides that a Member State may require third-country nationals to comply with integration measures, in accordance with national law. The Court considers that 'the measures which the Member States may require on the basis of that provision can be considered legitimate only if they are capable of facilitating the integration of the sponsor's family members' (para. 52), and that civic integration examinations would be applied disproportionately if they were 'systematically to prevent family reunification of a sponsor's family members where, despite having failed the integration examination, they have demonstrated their willingness to pass the examination and they have made every effort to achieve that objective' (para. 56). The Court also notes that the conditions set should not impose disproportionate obstacles on the exercise of the right to family reunification: such was the case in the main proceedings, since the integration conditions, as applied by the Dutch authorities, did not make it possible to have regard to any special circumstances objectively forming an obstacle to the applicants passing the examination, nor did they maintain the examination fees at a reasonable level; they therefore made the exercising of the right to family reunification 'impossible or excessively difficult'.

99 Case C-579/13, *P & S*, judgment of 4 June 2015 (ECLI:EU:C:2015:369).

the imposition of an integration examination on third-country nationals should not jeopardise the very purpose of facilitating their integration in the host society, 'having regard, in particular, to the level of knowledge required to pass the civic integration examination, to the accessibility of the courses and material necessary to prepare for that examination, to the amount of fees applicable to third-country nationals as registration fees to sit that examination, or to the consideration of specific individual circumstances, such as age, illiteracy or level of education'.¹⁰⁰ While leaving it to the domestic court to assess whether 'the payment of a fine penalising failure to comply with the obligation to pass the civic integration examination, in addition to payment of the costs incurred in relation to the examinations sat, is liable to jeopardise the achievement of the objectives pursued by Directive 2003/109 and, therefore, deprive it of its effectiveness',¹⁰¹ the Court left little doubt as to its position that such a policy should be considered as disproportionate.

The *P & S* case also raised the issue of non-discrimination between third-country nationals who were long-term residents and nationals. The Court takes the view that, since the integration measures at issue consisted of 'the obligation to acquire and/or demonstrate oral and written proficiency in the Dutch language and knowledge of Netherlands society', and since 'it may be presumed that nationals have such proficiency and knowledge, that is not the case as regards third-country nationals', 'the situation of third-country nationals is not comparable to that of nationals as regards the usefulness of integration measures such as the acquisition of knowledge of the language and society of the country'. Therefore, concludes the Court, 'since those situations are not comparable, the fact that the civic integration obligation at issue in the main proceedings is not imposed on nationals does not infringe the right of third-country nationals who are long-term residents to equal treatment with nationals, in accordance with Article 11(1) of Directive 2003/109'.¹⁰²

The reasoning adopted by the Court is surprising for two reasons. First, although the Court states that the situation of third-country nationals cannot be considered as comparable to that of nationals as regards the verification of integration conditions, it nevertheless goes on to examine whether the measures are not disproportionate. Secondly, although these conditions are not imposed on EU nationals of other Member States who have exercised their right to free movement in the Netherlands, it is clear that the presumption benefiting nationals cannot benefit them: there is, indeed, no reason to suppose that an Italian or a Bulgarian national moving to the Netherlands will have knowledge of the Dutch language or of Dutch social values. It may be surprising that the question of potential discrimination between third-country nationals and nationals of other EU Member States was not raised in the proceedings, despite the existence in Union law of a general principle of non-discrimination.¹⁰³

2.2.3 Other categories of third-country nationals

The establishment of a specific status for third-country nationals who are long-term residents was only an initial, albeit important, step towards the implementation of the principle of equal treatment for the benefit of workers from third countries legally staying in the EU. Further initiatives were taken to align the status of certain categories of third-country nationals with that of nationals of the host Member State, often with a view to making immigration in the EU more attractive to certain categories of workers whose contribution to the economy was valued and to ensure that employers in the EU could have access to the most highly desired qualifications.¹⁰⁴ This objective was initially put forward as part of the 1999 Tampere

100 *Id.*, paras. 47 and 49.

101 *Id.*, para. 54.

102 *Id.*, paras. 42-43.

103 The Court of Justice also declines to answer this question in *Kamberaj*, since it was unrelated to the facts of the case: the housing benefit that Mr Kamberaj was denied was not denied due to the fact that he did not comply with a condition imposed on him, as a third-country national, and that would not be imposed in a similar situation on a citizen of the Union residing in the host Member State: Case C-571/10, *Kamberaj*, judgment of 24 April 2012 (ECLI:EU:C:2012:233), paras. 51-54.

104 This is a major theme in the Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility*, COM(2011) 743 final of 18.11.2011. On the follow-up to this communication, see European Commission, *Report on the*

Programme adopted by the European Council¹⁰⁵ and of the 'Community Immigration Policy' proposed by the European Commission in 2000.¹⁰⁶ By stipulating in Article 15(3) that 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union', the EU Charter of Fundamental Rights itself, which was proclaimed in December 2000, confirms the role of equal treatment in this regard. The first important legislative step in this regard, however, was the adoption in 2009 of the Blue Card Directive,¹⁰⁷ aimed at attracting highly qualified workers seeking to work in the EU for periods of more than three months, for a salary that, in principle, should be above a threshold set at at least 1.5 times the average gross annual salary in the Member State concerned. In addition to defining the conditions of admission of such third-country nationals and the procedure for the delivery of the Blue Card, the directive stipulates certain areas in which the Blue Card holder shall be guaranteed treatment equal to that enjoyed by nationals of the host State. After two years of employment, a period during which the Blue Card holder is restricted to the exercising of paid employment activities which meet the conditions for being granted the status in the first place (including the condition related to the level of their gross salary), the host Member State may grant the persons concerned equal treatment with nationals as regards access to highly qualified employment.¹⁰⁸ Beyond access to the labour market, the directive identifies a number of areas in which EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card: these areas include working conditions, involvement in the activities of unions, education and vocational training (although restrictions can be imposed as regards study and maintenance grants and loans or other grants and loans regarding secondary and higher education and vocational training), recognition of diplomas and qualifications, access to social security (in the branches of social security as defined in Regulation (EEC) No 1408/71, now Regulation (EC) 883/2004), old-age pensions, access to goods and services and the supply of goods and services made available to the public (including procedures for obtaining housing, unless the Member State restricts this), as well as information and counselling services provided by employment offices and freedom of movement within the territory of the host Member State.

Further progress was made following the entry into force of the Treaty of Lisbon. Article 79(2) of the Treaty on the Functioning of the European Union allows the EU to adopt, through the ordinary legislative procedure, instruments defining the conditions of entry and residence of third-country nationals, as well as standards on the issuance by Member States of long-term visas and residence permits. It also allows the Union to define the rights of third-country nationals residing legally in a Member State. A number of initiatives have been taken in this regard, largely inspired by the status of the EU Blue Card holders as defined by the 2009 directive mentioned above.

a) The Single Permit Directive

With a view to simplifying and harmonising the rules applicable to third-country nationals seeking to enter the EU Member States in order to take up employment, the 2011 Single Permit Directive¹⁰⁹ establishes

implementation of the Global Approach to Migration and Mobility 2012-2013, COM(2014) 96 final of 21.2.2014, as well as European Migration Network, *Attracting Highly Qualified and Qualified Third-Country Nationals*, 2013; and S. Carrera, E. Guild and K. Eisele (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies* (Brussels, CEPS, 2014).

105 Tampere European Council, 15-16 October 1999, Presidency Conclusions, SN 200/99.

106 Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, COM(2000) 757 final of 22.11.2000. The communication notes in particular that EU immigration policy must 'incorporate steps to ensure that migrants benefit from comparable living and working conditions to those of nationals. Failure to provide the resources necessary to ensure the successful integration of such migrants and their families will in the longer term exacerbate social problems which may lead to exclusion and related problems such as delinquency and criminality. While many legally resident migrants have integrated successfully and make an important contribution to the economic and social development of their host countries, social exclusion affects migrants disproportionately and they are often the victims of racism and xenophobia' (under para. 5.3. (Integration of third-country nationals), p. 19).

107 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, p. 17.

108 Article 12.

109 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, p. 1. The Member

a single application procedure for issuing a single permit for third-country nationals to reside for the purpose of work in the territory of the Member States, and it defines a common set of rights benefiting third-country workers legally residing in a Member State, based on equal treatment with nationals of the Member State concerned (Art. 1(1)). The directive aims to facilitate legal migration where it meets the needs of the EU labour market.¹¹⁰ It does not harmonise admission conditions for labour immigrants, however: the directive expressly reserves the powers of the Member States concerning the admission of third-country nationals to their labour markets.¹¹¹

One key aim of the Single Permit Directive is to reduce the unfair competition between nationals and third-country workers resulting from the possible exploitation of the latter.¹¹² With that objective in mind, third-country nationals who apply to reside in a Member State for the purpose of work or those who have been admitted to a Member State for purposes other than work but have been allowed to work and hold a residence permit under Regulation No 1030/2002 enjoy equal treatment with the nationals of the Member State in which they reside in a number of areas, including with regard to: working conditions; freedom of association and union rights; the recognition of diplomas and professional qualifications; tax benefits; access to goods and services and the supply of goods and services made available to the public (although this may be accorded only to workers in employment, and access to housing may be restricted); and advice services provided by employment agencies.¹¹³

The right to national treatment also extends to education and vocational training, although Member States may restrict this to workers who are employed or who have been employed and are registered as unemployed, and although workers specifically admitted to enter the country concerned for the purposes of studies, pupil exchange, unremunerated training or voluntary service¹¹⁴ may be excluded; moreover, the Member States may exclude study and maintenance grants and loans or other grants and loans for whose benefits equal treatment is granted, and they may impose specific requirements, including language proficiency requirements and the payment of tuition fees for access to university and post-secondary education and vocational training not directly linked to the specific employment activity.¹¹⁵ Finally, although the right to national treatment extends in principle to social security benefits, there are two exceptions to this general rule: the Member States may restrict this except as regards workers who are employed or who had been employed for a period of at least six months and are now registered as unemployed; and family benefits may be denied to foreign workers who have been admitted for the purpose of study or who are allowed to work on the basis of a visa.¹¹⁶

States were expected to transpose the directive by 25 December 2013. A first report on the application of the directive is expected to be presented by the Commission by 25 December 2016.

110 For a general assessment, see Y. Pascouau and S. McLoughlin, *EU Single Permit Directive: a small step forward in EU migration policy*. ECP Policy 2012, EPC Policy Brief (24 January 2012).

111 Art. 1(2) of the Single Permit Directive.

112 Preamble, Recital 19. Of course, another tool to address this issue concerns the fight against the employment of third-country nationals who are illegally staying in the EU Member State, a situation which entails both a risk of exploitation of these individuals (since they shall be reluctant to appeal to the authorities for protection in cases of abuse, and shall generally not be able to threaten to leave their job), and a risk of unfair competition with local workers, whether these are nationals of the host Member State or legally staying third-country nationals. Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168 of 30.6.2009) seeks to address this by partly harmonising the sanctions applied by the EU Member States against such unscrupulous employers. On the issue of the exploitation of undocumented migrant workers in the EU – see in particular the report of the European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union, States' obligations and victims' rights*, Vienna, 2016.

113 For the full list, see Art. 12(1) of the Single Permit Directive. For a detailed analysis, K. Groenendijk, 'Equal Treatment of Workers from Third Countries: The Added Value of the Single Permit Directive', *ERA Forum* (2015) 16: 547 (also presented in a longer version in P. Minderhoud and T. Strik (eds), *The Single Permit Directive: Central Themes and Problem Issues*, Oisterwijk, Wolf Legal Publishers, 2015, 31).

114 This refers to the category of migrants defined by Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004, p. 12.

115 Art. 12(2), a), of the Single Permit Directive.

116 Art. 12(2), b), of the Single Permit Directive.

b) Special categories of workers: seasonal workers, intra-corporate transferees, researchers, and others

The Single Permit Directive therefore extends the national treatment principle to workers who are not long-term residents in the meaning of the above-mentioned Directive 2003/109/EC, with the privileged status that such residents enjoy. It does not apply, however, to seasonal or temporary workers, although they are often in the most vulnerable situation. In order to fill this gap, Directive 2014/36/EU was adopted a few years later to define the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.¹¹⁷ Directive 2014/36 defines seasonal workers as third-country nationals who, while retaining their principal place of residence in a third country, temporarily stay in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts. In principle, the directive guarantees seasonal workers a right to equal treatment in a number of branches of social security (sickness benefits, maternity/paternity benefits, invalidity benefits, old-age pension, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits, and family benefits).¹¹⁸ Due to the temporary nature of the stay of seasonal workers, however, the Member States are allowed to exclude family benefits and unemployment benefits from equal treatment between seasonal workers and their own nationals; they may also limit the application of equal treatment in relation to education and vocational training as well as tax benefits.

Intra-corporate transferees, whom a multinational corporation moves from one branch to another and wishes to have employed in the territory of an EU Member State, form a second category of third-country nationals whose employment in the EU is facilitated, in particular, by the extension of the national treatment principle in certain domains. Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer¹¹⁹ seeks to facilitate the entry, stay and intra-EU mobility of third-country workers (managers, specialists and trainee employees) being posted by a group of companies based outside the EU to an entity based on EU territory for periods exceeding 90 days. The directive is premised on the idea, expressed by the Stockholm Programme adopted by the European Council on 11 December 2009, that labour immigration can improve competitiveness such that, 'in the context of the important demographic challenges that will face the Union in the future and, consequently, an increased demand for labour, flexible immigration policies will make an important contribution to the Union's economic development and performance in the longer term'.¹²⁰

With those objectives in mind, as well as in order to attract investment in the EU and to facilitate the management by multinational corporate groups of their human resources, the directive harmonises the conditions under which such third-country nationals may be admitted to the State where they are to be posted. Article 18 of the directive guarantees to intra-corporate transferees that, whatever law is applicable to the employment relationship (it follows from the 'Rome I' Regulation that the law applicable will generally be the law of the State of origin, where the employment contract was concluded),¹²¹ they shall enjoy the key guarantees attached to the employment relationship under the laws of the State where

117 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375.

118 These are the branches of social security listed in Article 3 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, corrig. OJ L 200 of 7.6.2004, p. 1.

119 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157 of 27.5.2014, p. 1.

120 Preamble, para. 4.

121 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177 of 4.7.2008, p. 6 (although affirming the principle of freedom of choice of the law applicable to the employment contract, the Regulation provides that 'To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract [or, where the applicable law cannot be determined by reference to such criteria, by the law of the country where the place of business through which the employee was engaged is situated: Art. 8(3)]. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country'. (Article 8(2))).

the work is performed, as listed by Article 3 of the Posted Workers Directive:¹²² these are the guarantees related to (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions for the hiring-out of workers, in particular the supply of workers by temporary employment firms; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination. Article 18 of Directive 2014/66 moreover guarantees to intra-corporate transferees a right to equal treatment with nationals of the Member State where the work is carried out as regards union rights, the recognition of diplomas and professional qualifications, and social security in the areas already referred to above with regard to Directive 2014/36 on seasonal workers (although the law of the country of origin, alternatively, could apply, if a bilateral agreement or the national law of the Member State where the work is carried out provides for that solution). The principle of equal treatment also applies in principle to the payment of old-age, invalidity and statutory death pensions based on the intra-corporate transferee's previous employment and acquired by the intra-corporate transferee moving to a third country, or by the survivors of an intra-corporate transferee residing in a third country deriving rights from that intra-corporate transferee, under the same conditions and at the same rates as the nationals of the Member State concerned when they move to a third country. The principle extends, finally, to access to goods and services and the supply of goods and services made available to the public, although there are two exceptions: such transferees are not to benefit automatically from the availability of procedures for obtaining housing as provided for by national law, nor from the services provided by public employment offices.

Finally, a last category of third-country nationals whose special status includes the enjoyment of national treatment in certain areas is the heterogeneous group covered by Directive 2016/801:¹²³ these are students, exchange pupils or volunteers formerly covered by Directive 2004/114,¹²⁴ or scientific researchers, to which Directive 2005/71 applied.¹²⁵ The objective is, again, to facilitate the arrival of these categories of migrants, thus fulfilling the Stockholm Programme's aim of approximating national legislation on the conditions for entry and residence of third-country nationals to encourage immigration from outside the Union as a source of highly skilled people, particularly students and researchers who can contribute to the Union's economic progress. The recognition of equal treatment rights is seen, again, as contributing to this objective: Article 22 of Directive 2016/801 stipulates that researchers, trainees, volunteers and au pairs (when they are considered to be in an employment relationship in the Member State concerned) and students shall be entitled to equal treatment with nationals of the Member State concerned as provided for in Article 12 (1) and (4) of the Single Permit Directive (2011/98/EU), albeit with various restrictions,¹²⁶ '[t]rainees, volunteers, and au pairs, when they are not considered to be in an employment relationship in the Member State concerned, and school pupils shall be entitled to equal treatment in relation to access to goods and services and the supply of goods and services made available to the public, as provided for by national law, as well as, where applicable, in relation to recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures'.¹²⁷

122 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18 of 21.1.1997, p. 1.

123 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions and entry of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ L 132 of 21.5.2016, p. 21.

124 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375 of 23.12.2004, p. 12.

125 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research, OJ L 289 of 3.11.2005, p. 15.

126 See Article 22, (1) to (3).

127 Article 22(4).

2.2.4 Conclusion

This report cannot provide a comprehensive analysis of the relevant provisions in EU secondary legislation that define equality of treatment with nationals as part of the integration component in the Union's immigration policy.¹²⁸ The various initiatives described above do illustrate, however, the key role of equal treatment with nationals in this regard – although, as illustrated by the case of intra-corporate transferees, the application of the principle of equal treatment with nationals to shorter-term employment may be only partial, since it is combined with rules applicable to the employment contract that may refer to the law of the State of origin (in the case of posted workers: the law of the State where the contract is habitually carried out or where the employer is domiciled).

In parallel to these advances, the Court of Justice of the European Union has made it clear that instruments protecting workers in general should be presumed to extend their protection to third-country nationals, even in cases where they are not legally authorised to work. That, in substance, was the position adopted by the Court in 2014 in the *Tümer* case.¹²⁹ The Dutch authorities considered that they could exclude from the protection of the 1980 Directive on the protection of employees in the event of the insolvency of their employer¹³⁰ a Turkish national, whose right to stay in the Netherlands had expired at the time of the insolvency concerned. The Court disagreed. It seemed to be convinced by an argument raised in the case by Advocate General Bot, who noted that excluding workers who are third-country nationals from protective measures applicable to employees who are nationals of a Member State of the European Union would 'sit ill with the purposes of the European Union's social policy as set out in the first paragraph of Article 136 EC [now Article 151 TFEU], not least because such exclusion could encourage the practice of recruiting foreign labour in order to reduce wage costs'.¹³¹ Although the judgment does not allude to the requirement of non-discrimination on grounds of nationality or legal status, this argument was also made by AG Bot in his opinion,¹³² and it is likely that it too has influenced the Court.

At the same time, international human rights law has made progress towards defining nationality as a suspect ground, which would justify differences of treatment only in exceptional cases, in the presence of 'very weighty reasons'. In that sense, the developments of immigration policy in Union law follow a trend that is not limited to the process of European integration, nor is it the simple result of a political choice in favour of the integration of migrants – increasingly, it is a requirement of international law. Cooperation or association agreements concluded by the Union have also contributed to this development.

2.3 The impact of international agreements concluded by the EC/EU

The European Community has concluded a number of agreements with third countries, which contain provisions extending a right to equal treatment to the nationals of these countries once they are employed in an EU Member State.

The first of these agreements is the 1963 EEC-Turkey Association Agreement, complemented by the 1970 Additional Protocol.¹³³ The Agreement and its Protocol remain of limited utility as regards the free

128 For a detailed examination, see Herwig Verschueren, *Employment and social security rights of non-EU labour migrants under EU law: an incomplete patchwork of legal protection*. Paper presented at the ReMarkLab Conference (Stockholm, 19-20 May 2016).

129 Case C-311/13, *Tümer*, judgment of 5 November 2014 (ECLI:EU:C:2014:2337).

130 Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23), as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 270, p. 10).

131 See Opinion of AG Bot delivered on 12 June 2014, para. 52.

132 *Id.*, paras. 70-89.

133 Agreement establishing an Association between the European Economic Community and Turkey signed at Ankara on 12 September 1963, on the one hand, by the Republic of Turkey and, on the other, by the Member States of the EEC and the Community, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 133, p. 1); and Additional Protocol signed at Brussels on 23 November 1970 and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972

movement of Turkish workers and the members of their families, in the absence of implementation measures. Although this Association Agreement contains a number of provisions relating to the progressive securing of freedom of movement for workers (Article 12), to the abolition of restrictions on freedom of establishment (Article 13) and to the freedom to provide services (Article 14), and although Article 36 of the 1970 Additional Protocol provides that freedom of movement shall be secured by progressive stages, in accordance with Article 12 of the Agreement, through rules to be decided by the Council of Association, the Court of Justice already considered in the 1987 *Demirel* case that these provisions 'essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers' or implied rights, such as the right to family reunification that was at stake in that case.¹³⁴ Thus, the 1963 Association Agreement and its 1970 Additional Protocol do not encroach upon the competence retained by Member States to regulate both the entry into their territories of Turkish nationals and the conditions under which they may take up their first employment.¹³⁵ It follows, according to the Court, that 'a Turkish national's first admission to the territory of a Member State is governed exclusively by that State's own domestic law, and the person concerned may claim certain rights under Community law in relation to holding employment or exercising self-employed activity, and, correlatively, in relation to residence, only in so far as his position in the Member State concerned is regular.'¹³⁶

However, the provisions of the Association Agreement and its Additional Protocol do provide for the gradual removal of the restrictions to freedom of movement, freedom of establishment, and the freedom to provide services between the Union and Turkey. As regards Article 41(1) of the Additional Protocol, for instance, which is a 'standstill' clause in the area of freedom of establishment,¹³⁷ the Court of Justice considered, in the 2014 case of *Dogan*, that this provision prohibited the introduction by Germany of new conditions concerning the exercise of the right to family reunification, whose purpose or effect would be to make the exercise by a Turkish national of the freedom of establishment in the country subject to conditions that were more restrictive than those applicable on the date of entry into force of the Additional Protocol, unless these new conditions could be justified by an overriding reason in the public interest, were suitable to achieve the legitimate objective pursued and did not go beyond what was necessary in order to attain it. Such was not the case, according to the Court, regarding the introduction of new rules imposing on family members wishing to join the sponsor in the host Member State concerned a need to demonstrate beforehand that they had acquired basic knowledge of the official language of that Member State.¹³⁸

Moreover, and of even greater relevance to this report, the Council of Association established by the EEC-Turkey Association Agreement adopted Decision No. 1/80 of 19 September 1980 on the development of the Association which, as regards Turkish workers already lawfully integrated in the labour force of a Member State, prohibits any further restrictions on the conditions governing access to employment. Article 37 of the Additional Protocol provides that: 'As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community'; and Article 10(1) of Decision No 1/80 of the Association Council provides: 'As regards remuneration and other conditions of work, the rules which the Member States of the Community apply to Turkish workers duly registered as belonging to their labour forces shall not in any way discriminate on grounds of nationality between such workers and Community workers.' In a case concerning Mr Kahveci, a Turkish national recruited in Spain as a professional football player by

(OJ 1973 C 113, p. 17). For a discussion focusing on the theme of this report, see K. Groenendijk, 'The Court of Justice and the Development of EEC-Turkey Association Law', in: G. Jochum, W. Fritzemeyer & M. Kau (Hrsg.) *Grenzüberschreitendes Recht – Crossing Frontiers, Festschrift für Kay Hailbronner* (C.F. Müller, Heidelberg, 2013), pp. 413-428.

134 Case 12/86, *Demirel*, judgment of 30 September 1987 (ECLI:EU:C:1987:400), at para. 23.

135 See, in particular, Case C-171/95, *Tetik v. Land Berlin* [1997] ECR I-329, para. 21.

136 Case C-37/98, *Savas* [2000] ECR I-2927, para. 65.

137 Article 41(1) of the Additional Protocol provides that 'The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.'

138 Case C-138/13, *Naime Dogan*, judgment of 10 July 2015 (ECLI:EU:C:2014:2066).

the club Real Sociedad, the Court of Justice took the view that these provisions could be given direct effect, as they laid down 'in clear, precise and unconditional terms a prohibition precluding the Member States from discriminating, on the basis of nationality, against Turkish migrant workers duly registered as belonging to their labour force as regards remuneration and other conditions of work'.¹³⁹ Mr Kahveci and his employer could thus challenge, on the basis of the requirement of equal treatment with the nationals of EU Member States as regards conditions of employment, sporting rules limiting the number of players from non-member States who may be fielded in national competitions, which in the case of *Bosman* had been considered to be in violation of the freedom of movement of workers.¹⁴⁰

The judgment in the *Kahveci* case is fully consistent with earlier judgments of the Court of Justice, delivered respectively in 2003 and in 2005, in which association agreements concluded, respectively, with the Slovak Republic¹⁴¹ and with the Russian Federation,¹⁴² containing similarly worded clauses, were construed as prohibiting the application, to professional sportsmen of Slovak and Russian nationality respectively, of rules established by national sports federations limiting the number of players from countries that are non-members of the European Economic Area who could be fielded in official competitions.¹⁴³

While the cases mentioned above present clear instances of direct discrimination, the Court has extended its protection from discrimination on grounds of nationality to indirect discrimination on the basis of similarly worded clauses. For instance, in the *Pokrzeptowicz-Meyer* case,¹⁴⁴ it held that a provision of the EC-Poland Association Agreement¹⁴⁵ prohibiting discrimination on grounds of nationality between workers of Polish nationality legally employed in the territory of a Member State and the nationals of that Member State as regards working conditions, remuneration or dismissal precluded the application to Polish nationals of a provision stating that positions for foreign-language assistants could be filled using fixed-term employment contracts whereas, for other teaching staff performing special duties, recourse to such contracts had to be individually justified by an objective reason. Such a provision had already been considered to constitute indirect discrimination on grounds of nationality when applied to nationals of EU Member States legally employed in Germany;¹⁴⁶ the Court simply extended this reasoning to Polish workers covered by the Association Agreement.

In sum, while the association or partnership and cooperation agreements do not provide for the freedom of nationals of the countries concerned to enter into the EU in order to seek employment, they may contain provisions which prohibit discrimination on grounds of nationality, for instance in access to employment or in working conditions, and sometimes, as regards social security benefits, between nationals of the EU Member States (or of the EEA) on the one hand and nationals of the third country with which the agreement has been concluded on the other. That is not the case for all such agreements, however, so a careful analysis of their wording would be required before determining whether or not the right to equal treatment may be directly invoked before domestic courts. H. Verschuere notes, for instance, that a

139 Case C-152/08, *Real Sociedad de Fútbol SAD and Nihat Kahveci*, Order of 25 July 2008 (ECLI:EU:C:2008:450), para. 29.

140 Case C-415/93, *Bosman* [1995] ECR I-4921.

141 Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, signed in Luxembourg on 4 October 1993 and approved on behalf of the Communities by Decision 94/909/EC, ECSC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1993 L 359, p. 1).

142 Article 23(1) of the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, signed in Corfu on 24 June 1994 and approved on behalf of the Communities by Decision 97/800/EC ECSC, Euratom: Council and Commission Decision of 30 October 1997 (OJ 1994 L 327, p. 1).

143 Case C438/00, *Deutscher Handballbund* [2003] ECR I4135; Case C265/03, *Igor Simuntenkov* [2005] ECR I-2579 (where the Court notes that 'the Partnership Agreement between EC and Russia lays down, in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating, on the grounds of nationality, against Russian workers, vis-à-vis their own nationals, so far as their conditions of employment, remuneration and dismissal are concerned').

144 Case C-162/00, *Land Nordrhein-Westfalen v. Pokrzeptowicz-Meyer* [2002] ECR I-1049.

145 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1).

146 Case C-272/92, *Spotti* [1993] ECR I-5185.

number of partnership and cooperation agreements concluded with Eastern European countries refer to the commitment of the EU Member States to 'endeavour to ensure' equal treatment as regards working conditions,¹⁴⁷ a wording which, he contends, would not seem to comply with the conditions set forth by the Court of Justice to give them direct effect, and which may even have been deliberately drafted with a view to avoiding the equal treatment provisions being directly invoked by claimants.¹⁴⁸

Where the international agreements concluded by the EU do include equal treatment provisions that are unconditional and sufficiently precise, however, they shall be given direct effect, and a third-country national who is legally employed in one EU Member State shall therefore have to be treated equally, without discrimination on grounds of nationality, with the national of the host EU Member State.¹⁴⁹

The well-known case of *Yousfi*¹⁵⁰ illustrates this in the context of the EEC-Morocco Cooperation Agreement.¹⁵¹ The Court of Justice was requested to interpret Article 41(1) of the Agreement, according to which workers of Moroccan nationality and any members of their families living with them are to enjoy treatment in the field of social security that is free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed. The Court had already found this provision to have a direct effect.¹⁵² In its *Yousfi* judgment of 20 April 1994, it confirmed that this provision precluded Belgium from refusing to grant a disability allowance, provided under its legislation to nationals residing in that State for at least five years, to a Moroccan national suffering permanent incapacity for work following an industrial accident occurring in Belgium who had resided in Belgium for more than five years on the ground that the person concerned was of Moroccan nationality.¹⁵³

Although the 1976 EEC-Morocco Cooperation Agreement has now been superseded by the new generation of Euro-Mediterranean Agreements (concluded respectively with Tunisia in 1995, with Morocco in 1996, and with Algeria in 2002),¹⁵⁴ the logic followed by the Court of Justice in *Yousfi* remains valid.¹⁵⁵ The respective agreements guarantee to workers who are nationals of the countries concerned a right to equal treatment with the nationals of the host Member State with regard to working conditions, remuneration

147 He lists the following examples: Partnership and Cooperation Agreement of 28 November 1994 with Moldova (OJ 1998 L 181/3; Art. 23); Partnership and Cooperation Agreement of 23 January 1995 with Kazakhstan (OJ 1999 L 196/3; Art. 19); Partnership and Cooperation Agreement of 9 February 1995 with the Kyrgyz Republic (OJ 1999 L 196/48; Art. 19); Partnership and Cooperation Agreement of 22 April 1996 with Georgia (OJ 1999 L 205/3; Art. 20); Partnership and Cooperation Agreement of 22 April 1996 with Azerbaijan (OJ 1999 L 246/3; Art. 20); Partnership and Cooperation Agreement of 22 April 1996 with Armenia (OJ 1999 L 239/3; Art. 20); Partnership and Cooperation Agreement of 21 June 1996 with Uzbekistan (OJ 1999 L 229/3; Art. 19); Partnership and Cooperation Agreement of 11 October 2004 with Tajikistan, (OJ 2009 L 350/3; Art. 17).

148 Verschuere, *Employment and social security rights of non-EU labour migrants under EU law: an incomplete patchwork of legal protection*, cited above (citing, on the latter point, K. Eisele, *The External Dimension of the EU's Migration Policy. Different Legal Positions of Third-Country Nationals in the EU*, Wolf Legal Publishers, Oisterwijk, 2013, pp. 274, 281 and 294-285).

149 See, for instance, concerning the EEC-Turkey Association Agreement, Case C-317/01 *Abatay and others* [2003] I-12301, para. 58-59; Case C-373/02, *Sakir Ozturk* [2004] I-3605, para. 68; Case C-275/02, *Engin Ayaz* [2004] I-8765, para. 47-48; Case C-136/03, *Georg Dörr & Ibrahim Ünal* [2005] I-4759, para. 66-69; Case C-374/03, *Gaye Guro* [2005] para. 22-23, 26, 42-45, Case C-373/03 *Ceyhun Aydinli* [2005] para. 32; Case C-383/03, *Ergül Dogan* [2005] para. 25.

150 Case C-58/93, *Yousfi v. Belgian State* [1994] ECR I-1353.

151 Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed at Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 19).

152 See Case C-18/90, *Kziber* [1991] ECR I-199. In *Kziber*, the Court also found that the reference to social security made in this provision had to be construed as being analogous with the subject matter covered by Council Regulation (EEC) no. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and to self-employed persons and to members of their families moving within the Community, as codified in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

153 See also, to the same effect, Case C-18/90, *Kziber* [1991] ECR I 199, paragraphs 15 to 23; and, following the case of *Yousfi*, Case C-126/95, *Hallouzi-Choho* [1996] ECR I-4807, paragraphs 19 and 20; the orders in Case C23/02, *Alami* [2003] ECR I-1399, paragraph 22; and Case C358/02, *Haddad* [2004] ECR I-1563, paragraph 26.

154 Agreement with Tunisia of 17 July 1995 (OJ 1998 L 97/1); the Agreement with Morocco of 26 February 1996 (OJ 2000 L 70/1) and the Agreement with Algeria of 22 April 2002 (OJ 2005 L 265/1).

155 See, among many other examples, Case C-336/05, *Ameur Echouikh*, Order of the Court of 13 June 2006 (ECLI:EU:C:2006:394), paragraph 40.

and dismissal, and they guarantee a right to equal treatment in the field of social security.¹⁵⁶ The main exceptions are that the right to receive family benefits is limited to the members of the workers' families who reside in the territory of an EU Member State;¹⁵⁷ moreover, the agreements explicitly exclude from the scope of application of their provisions the nationals of the countries concerned who reside or work illegally in the territory of the host Member State.¹⁵⁸

Of course, whether this latter restriction of the ability to invoke the right to equal treatment to workers who are nationals of the States concerned should be disapplied following the doctrine set out in the 2014 *Tümer* case remains to be seen. It may be relevant in this regard to note that the non-discrimination provisions that were included in the Euro-Mediterranean Agreements (as they have been in other association or cooperation and partnership agreements of the EU) may be seen as implementing requirements of international human rights law. In the *Echouikh* case of 2006, a Moroccan national who had served in the French army between 1949 and 1964 was claiming an invalidity services pension. He challenged the rule set out in the French *Code des pensions militaires d'invalidité et des victimes de la guerre* (Armed Services Invalidity and Victim of War Pensions Code) that refused the benefit to claimants who had voluntarily voluntarily acquired another nationality. Because it excluded an individual from social security benefits *solely* on account of that individual's nationality, this rule was found discriminatory by the French *Conseil d'Etat* in 2001 and was thus amended in 2002, but Mr Echouikh still had not been compensated and was denied the payment of any default interest. In its Order of 13 June 2006, the Court of Justice found that the French legislation was incompatible with the principle of non-discrimination set out in the first paragraph of Article 65(1) of the Euro-Mediterranean (Association) Agreement between the EC and Morocco. Noting, however, that 'fundamental rights form an integral part of the general principles of law the observance of which the Court ensures' and that 'measures which are incompatible with observance of the human rights thus recognised and guaranteed are not acceptable in the Community', it adds:

[T]he interpretation which this order lays down as regards the first subparagraph of Article 65(1) of the Association Agreement is consistent with the requirements of Article 14 of the ECHR and Article 1 of the Protocol, as interpreted *inter alia* by the European Court of Human Rights in its judgment of 16 September 1996 *Gaygusuz v. Austria* (*Reports of Judgments and Decisions* 1996-IV, p. 1129), so that the Court is providing the national court with all the criteria necessary for it to assess the conformity of the national legislation at issue with the fundamental rights the observance of which the Court ensures, such as those guaranteed by the ECHR.¹⁵⁹

This illustrates the interaction between developments in international human rights law and rules applicable within the EU legal order (in this case, through the conclusion of association agreements) that guarantee a right to equal treatment. In fact, it may be anticipated that certain restrictions to the right to equal treatment of third-country nationals working and staying in the European Union (such as the inability to invoke directly the equal treatment guarantees where the agreements are formulated in conditional terms ('endeavour'), or the failure to extend the right to equal treatment to the field of social security) shall gradually be disapplied, under the pressure of the non-discrimination requirement contained in international law instruments such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights.

156 See Articles 64-65 of the Agreement with Tunisia; Articles 64-65 of the Agreement with Morocco; and Articles 67-68 of the Agreement with Algeria.

157 See, for instance, Article 65(3) of the Agreement with Tunisia ('The workers in question shall receive family allowances for members of their families who are resident in the Community'). Similar provisions are found in Article 65(3) of the Agreement with Morocco; and in Article 68(3) of the Agreement with Algeria.

158 Article 66 of the Agreement with Tunisia; Article 66 of the Agreement with Morocco; and Article 69 of the Agreement with Algeria.

159 Case C-336/05, *Ameur Echouikh*, Order of the Court of 13 June 2006, paragraph 65.

2.4 The status of refugees and other persons in need of international protection

Partly to limit the secondary movements of asylum seekers between EU Member States and partly to strengthen the implementation of the 1951 Geneva Convention on the Status of Refugees¹⁶⁰ by Member States, the Council adopted Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.¹⁶¹ The Qualification Directive has now been recast, following a number of amendments, by Directive 2011/95/EU.¹⁶²

The Qualification Directive includes provisions which either ensure that refugees or persons granted a subsidiary form of international protection¹⁶³ are treated equally with nationals in certain areas, or – at a minimum – provide for treatment equal to that of other third-country nationals legally residing on the host State's territory. Thus, under Article 26 (1) and (2), Member States must authorise beneficiaries of international protection to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, and they must ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of international protection under equivalent conditions to nationals. Beneficiaries of international protection shall be guaranteed equal treatment with the nationals of the host Member State as regards rights linked to employment: 'The law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply' (Article 26(4)).

As regards access to education, Article 27(1) provides that Member States shall grant full access to the education system to all minors granted international protection under the same conditions as nationals. Finally, the Member States are to ensure equal treatment between beneficiaries of international protection and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications (Article 28(1)). As regards social welfare and healthcare, including for categories of beneficiaries who have special needs, people who have been granted international protection must receive, in the Member State that has granted such status, the necessary social assistance or access to healthcare as provided to nationals of that Member State (Articles 29 and 30). As regards the beneficiaries of subsidiary protection, however – although their status has been almost completely aligned with that of (recognised) refugees under the 2011 (Recast) Qualification Directive¹⁶⁴ – the provision of social assistance may still be restricted to 'core benefits which will then be provided at the same level and under the same eligibility conditions as [for] nationals' (Article 30(2)).¹⁶⁵

160 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967.

161 OJ L 304, 30.9.2004, p. 12.

162 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted (recast), OJ L 337 of 20.12.2011, p. 9.

163 Subsidiary protection refers to the status granted to third-country nationals or stateless persons who, although they do not qualify as refugees in the meaning of Article 1 of the Geneva Convention on the Status of Refugees, cannot return to their country of origin or the country of their former habitual residence, because there are substantial grounds to believe that, if returned to that country, they would face a real risk of suffering serious harm, and therefore are unable or, owing to such risk, unwilling to avail themselves of the protection of that country. See Article 2(f) of the Qualification Directive (Recast).

164 It is noteworthy, in particular, that the EU Member States were still accorded a certain margin of appreciation under the original 2004 Qualification Directive as regards access of the beneficiaries of subsidiary protection to employment and access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience (Article 26 (3) and (4) of the 2004 Qualification Directive).

165 The Charter of Fundamental Rights should in principle provide guidance as to what such 'core benefits' may consist of, as illustrated by the *Kamberaj* case in the context of the interpretation of the status of third-country nationals who are long-term residents in the EU: see Case C-571/10, *Kamberaj*, judgment of 24 April 2012 (ECLI:EU:C:2012:233), and the comments provided above. However, the Qualification Directive (Recast) mentions that, as regards access to accommodation, 'Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent

While the provisions cited above require that beneficiaries of international protection are guaranteed equal treatment with the nationals of the Member States in which they reside, this is not the case for access to accommodation and freedom of movement within the host Member State, where it is only required (by Articles 32 and 33 respectively) that they be granted equal treatment with other third-country nationals legally residing in that Member State. The same is true for access of adults who are granted international protection status to the general education system, further training or retraining (Article 27(2)).

As regards refugees, the (Recast) Qualification Directive to a large degree implements the provisions of the 1951 Convention on the Status of Refugees,¹⁶⁶ which all the EU Member States have ratified and which the EU Treaties refer to as having to be complied with in the development of the Common European Asylum System.¹⁶⁷ The Geneva Convention, however, is in certain regards ambiguous, because of the absence of a clear definition of the concepts of ‘present lawfully’, ‘staying lawfully’, or ‘residing lawfully’, so that Contracting States are in practice granted considerable discretion in according rights to refugees. Indeed, the Convention provides that rights (including rights to equal treatment with nationals of the host State) accrue to refugees incrementally depending on the legality of their situation in their host country and the duration of their stay there:

(i) Certain rights apply merely on the basis of presence within a State Party’s territory, even if this presence is illegal. Such rights include freedom of religion (Article 4), property rights (Article 13), the right to primary education (Article 22), the right to access to the courts (Article 16(1)), and a limited right to move freely, subject to justifiable restrictions (Article 31(2)).

(ii) Other rights are to be granted when refugees are ‘lawfully present’ in the host state (for example while their asylum claim is processed), including the right to self-employment (Article 18) and the right to move freely, subject to regulations applicable to aliens in general (Article 26).

(iii) Finally, a third set of rights apply when refugees are ‘lawfully staying’ in the territory of a State Party, an expression that is usually understood as applying to refugees who have formally been recognised as such in the host State. These rights include the right to receive *the same treatment as nationals of the receiving country* with regard to: free exercise of religion and religious education; free access to the courts, including legal assistance; access to elementary education; access to public relief and assistance; protection provided by social security; protection of intellectual property, such as inventions and trade names; protection of literary, artistic and scientific work; and equal treatment by taxing authorities. The right to paid employment, on the other hand, is to be guaranteed *under conditions no less favourable than for other aliens*.¹⁶⁸ The same obligation, to grant to refugees *the same treatment as that accorded to aliens generally*, applies to: the right to choose their place of residence; the right to move freely within the country; free exercise of religion and religious education; free access to the courts, including legal assistance; access to elementary education; access to public relief and assistance; protection provided by social security; protection of intellectual property, such as inventions and trade names and protection of literary, artistic and scientific work; equal treatment by taxing authorities. Finally, refugees must also

conditions as other third-country nationals legally resident in their territories’, rather than in conditions of equal treatment with the nationals of the host Member State (Article 32(1)). Thus, there is a tension between the definition of ‘core benefits’ as having to include, in particular, accommodation, since Article 34 of the Charter provides that the Union ‘recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources’, and the explicit provisions of the directive.

166 Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950, entered into force on 22 April 1954.

167 Article 78(1) TFEU states that ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’. This is a binding obligation, such that the Court of Justice would be justified in striking down any EU secondary legislation that violated the Geneva Convention on the Status of Refugees.

168 Article 17; the right to work without any restriction accrues only after a period of three years’ extended residence (Article 17(2)).

receive *the most favourable treatment possible, which must be at least as favourable to that accorded to aliens generally in the same circumstances*, with regard to: the right to own property; the right to practise a profession and the right to self-employment; access to housing; and access to higher education.

This study returns below to the Geneva Convention on the Status of Refugees, putting this instrument in context. The Qualification Directive, for the most part, goes beyond the minimum prescriptions of that instrument, and it usefully dissipates some of the ambiguities that it still contains.

2.5 Conclusion

Under EU law there remain significant differences of treatment between nationals of EU Member States and nationals of third countries, although these differences are attenuated either for third-country nationals who obtain the status of long-term resident in one Member State or for the nationals of countries with which the EU has concluded association or partnership and cooperation agreements. The Charter of Fundamental Rights of the European Union¹⁶⁹ does of course prohibit all forms of discrimination on whatever ground, including nationality (Article 21(1)). However, as regards discrimination on grounds of nationality, this is only 'within the scope of application of the Treaties and without prejudice to any of their specific provisions' (Article 21(2)). Although the non-discrimination clause of the Charter has occasionally been invoked either to justify the extension of the provisions of EU social law to third-country nationals residing in a Member State (and even illegally residing, as in the case of *Tümer*),¹⁷⁰ or to strengthen the reading of equal treatment provisions in association or partnership and cooperation agreements entered into by the EU with third countries (as illustrated by the *Echouikh* case),¹⁷¹ its potential still remains underexplored in this regard. In the field of nationality-based differences of treatment, the dominant interpretation of Article 21 of the Charter of Fundamental Rights remains a conservative one, according to which this provision does not seek to extend protection from discrimination beyond what is provided by Article 12 EC, either through the provisions of the treaties or through secondary legislation guaranteeing economic freedoms without discrimination on grounds of nationality for the sole benefit of nationals of Member States. Yet, it is this interpretation that may now have to be revisited. The Charter of Fundamental Rights is to be interpreted in the light of the evolving jurisprudence of international human rights law, as explicitly acknowledged, with respect to the Charter's provisions that correspond to those of the European Convention on Human Rights, under Article 52(3) of the Charter.¹⁷² It is to the developments in international human rights law that we now turn.

169 OJ C 303 of 14.12.2007, p. 1.

170 Case C-311/13, *Tümer*, judgment of 5 November 2014 (ECLI:EU:C:2014:2337).

171 Case C-336/05, *Ameur Echouikh*, Order of the Court of 13 June 2006 (ECLI:EU:C:2006:394).

172 This states: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

3 The framework of international and European human rights law with regard to discrimination on grounds of nationality

The rise of the prohibition of differences of treatment on grounds of nationality in international and European human rights law is such that the position of EU law as described in the preceding chapter may have to be revised in the future. Indeed, as recalled by the UN Committee on the Elimination of Racial Discrimination in its General Recommendation 30 on Discrimination against Non-citizens, although some fundamental rights such as the right to participate in elections, to vote and to stand for election may be confined to citizens, ‘human rights are, in principle, to be enjoyed by all persons. States Parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law.’¹⁷³ Indeed, the Committee on the Elimination of Racial Discrimination has frequently recommended to the States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination that they abstain from any discrimination on grounds of nationality: in the view of the Committee, differential treatment based on nationality and national or ethnic origin constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportionate to the achievement of this aim.¹⁷⁴ This prohibition extends to indirect discrimination on grounds of nationality, for instance when regulations are directed at newly established residents in a country without explicitly targeting foreigners. In its 2006 Concluding Observations relating to Denmark, for instance, the Committee thus expressed its concern that, under Act No. 361 of June 2002 (a piece of legislation that has been repealed since), social benefits for persons newly arrived in Denmark have been reduced in order to entice them to seek employment, a policy which ‘has reportedly created social marginalisation, poverty and greater dependence on the social welfare system for those who have not become self-sufficient.’ The Committee acknowledged that the new regulation applied to both citizens and non-citizens, yet it noted ‘with concern that it is foreign nationals who are mainly affected by this policy.’¹⁷⁵

It cannot be excluded that this may influence developments within EU law itself. Since the late 1970s, the European Court of Justice has considered that fundamental rights are part of the general principles of law for which it is the duty of the Court to ensure respect. Fundamental rights recognised as general principles of law are binding both on the institutions of the Union and on the Member States acting in the scope of application of Union law.¹⁷⁶ The Court sees equality of treatment in particular as a general principle of law with which it should ensure compliance.¹⁷⁷ The principle of equal treatment requires that comparable situations are not treated differently and that different situations are not treated in the same way unless such treatment is objectively justified by the pursuit of a legitimate aim and provided that it is appropriate and necessary in order to achieve that aim.¹⁷⁸ In that sense, the directives adopted on the basis of Article 19 TFEU may be said to embody a general principle of equal treatment which predated their adoption and which the Court of Justice imposed in the field of application of European Union law.¹⁷⁹

173 General Recommendation 30 adopted at the 64th session of the Committee on the Elimination of Racial Discrimination (CERD/C/64/Misc.11/rev.3) (1 October 2004), para. 5.

174 See for example Committee on the Elimination of Racial Discrimination, Concluding Observations: Denmark, UN doc. CERD/C/DEN/CO/17, 19 October 2006, para. 19 (the Committee therefore expresses its regret that in 2002, the municipalities’ obligation to provide mother-tongue courses for bilingual students from other countries was repealed and that municipalities no longer receive financial support for that purpose).

175 Committee on the Elimination of Racial Discrimination, Concluding Observations: Denmark, UN doc. CERD/C/DEN/CO/17, 19 October 2006, para. 18.

176 See for example Case 36/75, *Rutili*, [1975] ECR 1219; Joined Cases 201/85 and 202/85, *Klensch* [1986] ECR 3477; Case 5/88, *Wachauf/Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609; Case C-260/89, *ERT*, [1991] ECR I-2925.

177 Case C-55/00, *Gottardo* [2002] ECR I-413, para. 34; Case C-442/00, *Caballero* [2002] ECR I-11915, paras. 30 to 32; Joined Cases 201/85 and 202/85, *Klensch* [1986] ECR 3477, paras. 9 to 10; Case C-351/92, *Graff* [1994] ECR I-3361, paragraphs 15 to 17; and Case C-15/95, *EARL de Kerlast* [1997] ECR I-1961, paras. 35 to 40.

178 Case C-56/94, *SCAC* [1995] ECR I-1769, para. 27; Case C-15/95, *EARL de Kerlast* [1997] ECR I-1961, para. 35; Case C-354/95, *National Farmers’ Union and Others* [1997] ECR I-4559, para. 61; and Case C-292/97, *Karlsson* [2000] ECR I-2737, para. 39.

179 See Case C-144/04, *Mangold v. Helm*, [2005] ECR I-9981 (judgment of 22 November 2005 delivered upon a request for a preliminary ruling from the Arbeitsgericht München (Germany)), at paras. 74-75 (noting that ‘Directive 2000/78 does not

Having been asked to identify if certain fundamental rights are worthy of protection as general principles of EU law, the European Court of Justice is currently examining whether the right in question is included either in the European Convention on Human Rights, whose ‘special significance’ it has long recognised in its case law,¹⁸⁰ or in any other international instrument for the protection of human rights to which the Member States have all agreed. The canonical formula used by the Court is that it ‘draws inspiration [...] from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.’¹⁸¹ In practice, the only instruments other than the European Convention on Human Rights on which the Court relies are the 1966 International Covenant on Civil and Political Rights¹⁸² and the 1989 Convention on the Rights of the Child.¹⁸³ In addition, the Union has been a party to the 2006 United Nations Convention on the Rights of Persons with Disabilities¹⁸⁴ since 2011, and the provisions of that convention are therefore an integral part of the European Union legal order.¹⁸⁵

The Court has been much less keen to rely on international human rights instruments other than those cited above, whose specific position in the EU’s fundamental rights landscape is generally acknowledged. Yet, it is at least arguable that instruments such as the International Covenant on Economic, Social and Cultural Rights, or the European Social Charter, should also constitute a source of inspiration for the identification of fundamental rights as part of general principles of Union law, given that they have been ratified by all the EU Member States (although in the case of the European Social Charter, which allows to a certain extent for an *à la carte* approach, with variable levels of acceptance of its provisions). Indeed, the Court of Justice of the European Union has itself remarked as much in the 2007 case of *Kiiski*:¹⁸⁶ notwithstanding the uneven character of their commitments, all EU Member States have pledged to ‘accept [the European Social Charter] as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the ... rights and principles [listed in Part II of the European Social Charter] may be effectively realised’.¹⁸⁷ The EU Member States have ‘confirm[ed] their attachment to fundamental social rights as defined in the European Social Charter’ in the Preamble of the Treaty on European Union,¹⁸⁸ and they further pledged to build on the European Social Charter in Article 151 of the Treaty on the Functioning of the European Union, as well as in the Preamble of the EU Charter of Fundamental Rights.

itself lay down the principle of equal treatment in the field of employment and occupation (. . .) the source of the actual principle underlying the prohibition of those forms of discrimination being found (. . .) in various international instruments and in the constitutional traditions common to the Member States’). This case concerned an instance of age-based discrimination; however, the very same reasoning could apply to forms of discrimination based on race, ethnicity, or religion or belief, all of which are prohibited under the Racial Equality Directive or the Employment Equality Directive but also under the general principle of equal treatment.

- 180 Case C-260/89, *ERT* [1991] ECR I-2925, para. 41; Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 33; Case C-274/99 P, *Connolly v. Commission* [2001] ECR I-1611, para. 37; Case C-94/00, *Roquette Frères* [2002] ECR I-9011, para. 25; Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 71; Case C-36/02, *Omega* [2004] ECR I-9609, para. 33. Article 6(2) of the EU Treaty only refers to the European Convention on Human Rights, neglecting a reference to other human rights treaties to which the Member States have collaborated on or signed (an omission retained by the Reform Treaty in Article 6(3) of the EU Treaty, as amended).
- 181 Case 4/73, *Nold KG v. Commission*, [1974] ECR 491. The wording has not evolved greatly. See e.g. Case C-94/00 *Roquette Frères* [2002] ECR I-9011.
- 182 999 UNTS 171. Case 249/96, *Grant v. South West Trains Ltd* [1998] ECR I-621, para. 44 relating to ICCPR, Article 2(1); Case C-60/92, *Otto BV v. Postbank NV* [1993] ECR I-5683, para. 11 relating to ICCPR, Article 14; Case 374/87, *Orkem v. Commission* [1989] ECR 3283, para. 31 relating to ICCPR, Article 14.
- 183 Case C-540/03, *Parliament v. Council*, [2006] ECR I-5769, para. 37.
- 184 The EU’s accession to the Convention on the Rights of Persons with Disabilities was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35).
- 185 Case C-356/12, *Glatzel*, judgment of 22 May 2014 (ECLI:EU:C:2014:350), para. 66.
- 186 See Case C-116/06, *Sari Kiiski*, judgment of 20 September 2007, paras. 48-49 (where the Court relies on the European Social Charter in order to support its interpretation of the requirements of Council Directive 92/85/EEC on the improvement to safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding).
- 187 This is the definition of the undertaking of States Parties under both the 1961 and the 1996 versions of the European Social Charter.
- 188 See 5th preambular paragraph of the EU Treaty, OJ C 83 of 30.3.2010, p. 13.

This chapter examines the status of non-discrimination on grounds of nationality in international and European human rights law.¹⁸⁹ The question of differences of treatment on grounds of nationality is first examined under the International Covenant on Civil and Political Rights, under the Convention on the Rights of the Child and under the two most important instruments of the Council of Europe, the European Convention on Human Rights and the European Social Charter. These instruments deserve particular attention¹⁹⁰ because they are the main source of inspiration for the European Court of Justice when identifying the fundamental rights that are part of the general principles of law for which it ensures respect, although references to the European Social Charter of the Council of Europe are still timid and seem to be limited to the provisions of this instrument which inspired the drafting of the Charter of Fundamental Rights of the European Union.¹⁹¹ In addition, this chapter presents the contributions made to the issue of nationality-based discrimination by the conventions relating to the status of refugees (1951) and stateless persons (1954).

3.1 United Nations Human Rights Treaties

3.1.1 *The International Covenant on Civil and Political Rights (ICCPR)*¹⁹²

As stated in its General Comment No. 15, 'The position of aliens under the Covenant', which was adopted in 1986, the view of the Human Rights Committee is that 'in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.'

The above statement only refers to the right of foreigners not to be discriminated against in the enjoyment of the rights set out in the Covenant: as stipulated in Article 2 of this instrument, each State Party is bound 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*' [author's italics], including therefore nationality. But the Covenant also contains a general non-discrimination provision in Article 26, which states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee

189 See also, for a recent study of certain human rights instruments under this angle, S. Saroléa, *Droits de l'homme et migrations. De la protection du migrant aux droits de la personne migrante*, Bruxelles, Bruylant, 2006, chapter III.

190 That is not to say that in the future the International Convention on the Elimination of All Forms of Racial Discrimination will not be treated on a par with those instruments. See, for a discussion of whether this is a plausible scenario in future case law, I. de Jesus Butler and O. De Schutter, 'Binding the EU to International Human Rights Law', *Yearbook of European Law*, vol. 27 (2008), pp. 277-320.

191 Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, [2007] ECR I-10779, para. 43 (judgment of 11 December 2007); and Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, [2007] ECR I-11767, para. 90 (judgment of 18 December 2007). See in particular the seemingly decisive Opinion of AG Mengozzi, para. 78.

192 See generally O. De Schutter, 'L'interdiction de la discrimination sur base de la nationalité dans le Pacte international relatif aux droits civils et politiques', in *L'étranger et le droit. Actes des journées juridiques Jean Dabin* (Bruylant, Bruxelles, 2009), pp. 151-192; Lord Lester of Herne QC & Sarah Joseph, 'Obligations of Non-Discrimination', in D. Harris & S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford, Clarendon Press, 1995, at p. 563; Torkel Opsahl, 'Equality in Human Rights Law. With Particular Reference to Article 26 of the International Covenant on Civil and Political Rights', in *Festschrift für Felix Ermacora: Fortschritt im Bewußtsein der Grund- und Menschenrechte*, Kehl am Rhein, Engel Verlag, 1988, pp. 51-65; Bertrand Ramcharan, 'Equality and Non-discrimination', in Louis Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights*, New York, Columbia Univ. Press, 1981, pp. 246-268; Frédéric Sudre, 'Le droit à la non-discrimination dans la jurisprudence du Comité des droits de l'homme des Nations Unies', in Frédéric Sudre (éd.), *La protection des droits de l'homme par le Comité des droits de l'homme des Nations Unies. Les constatations individuelles*, Montpellier, IDEDH, 1995, pp. 32-60; Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia, Antwerpen-Oxford, 2005, p. 293.

to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Article 26 of the Covenant imposes the prohibition of discrimination in all fields, whether or not they are covered by other substantive provisions of the instrument. This also applies to discrimination on grounds of nationality. In the case of *Ibrahima Gueye and Others v. France*,¹⁹³ the Human Rights Committee was asked to find that France had violated its obligations under the Covenant after retired soldiers of Senegalese nationality who had served in the French Army prior to Senegal's independence in 1960 were denied pension rights from which French nationals in the same situation benefited in accordance with a law enacted in December 1974, which introduced a distinction between retired members of the French Army on grounds of nationality. The Committee considered that differences of treatment on grounds of nationality could, in principle, be prohibited by Article 26 of the Covenant, since this provision prohibits differences in treatment on any grounds '*such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*' [author's italics]. The Committee concluded that the difference in treatment of the authors of the communication was not based on reasonable and objective criteria and constituted discrimination prohibited by the Covenant, since 'it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past. They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese' (paragraph 9.5). Since this decision, the French administrative courts have aligned themselves with the position of the Human Rights Committee.¹⁹⁴ As we have seen, a very similar reasoning was followed in the case of *Echouikh*¹⁹⁵ by the Court of Justice of the European Union, albeit on the basis of the equal treatment clause of the EC-Morocco Association Agreement rather than by direct application of international human rights law.

The Human Rights Committee has adopted further decisions finding discrimination on grounds of nationality or on grounds of the status of permanent resident.¹⁹⁶ In the case of *Karakurt v. Austria*, the author of the communication complained that because of his Turkish nationality he could not stand for election to work councils in Austria since Section 53(1) of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) limited eligibility for such work councils to Austrian nationals or members of the European Economic Area (EEA). The Committee concluded that this difference in treatment between, on the one hand, Austrians and nationals of EU Member States or EEA Member States, and nationals of other countries on the other hand,¹⁹⁷ constituted discrimination prohibited under Article 26 of the International Covenant on Civil and Political Rights: '...the State party has granted the author, a non-Austrian/EEA national, the right to work in its territory for an open-ended period. The question therefore is whether there are reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone. [...] With regard to the case at hand, the Committee

193 *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989).

194 See *Conseil d'Etat*, 30 November 2002, No. 212179, 212211 Diop.

195 Case C-336/05, *Ameur Echouikh*, Order of the Court of 13 June 2006 (ECLI:EU:C:2006:394).

196 See Communication n° 516/1992, *Simunek v. Czech Republic*, Decision of 19 July 1995, CCPR/C/54/D/516/1992; Communication n° 586/1994, *Adam v. Czech Republic*, Decision of 23 July 1996, CCPR/C/57/D/586/1994.

197 Upon its ratification of the Covenant on 10 September 1978, Austria entered a reservation to the effect, *inter alia*, that: 'Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination.' According to the majority of the Committee, this would have precluded the Committee from examining the communication should the alleged discrimination have been between Austrians and persons of other nationalities. This reading of the Austrian reservation was challenged in their partly dissenting individual opinion by two members of the Committee, Sir Nigel Rodley and Mr Martin Scheinin, who considered that the Austrian reservation, since it explicitly referred to the International Convention on the Elimination of All Forms of Racial Discrimination, merely precluded the Committee from examining nationality-based differences of treatment as potentially discriminatory *on grounds of 'race, colour, descent or national or ethnic origin'*, but that it was not an obstacle to examining whether such differences in treatment were discriminatory *in their own right*, i.e. as discriminatory *on grounds of nationality*.

has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions [...]. In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality' (Paragraph 8.4.).

Of course, the difference in treatment of which Mr Karakurt complained had its source in the obligation imposed on Austria by European Union law and by the Agreement on the European Economic Area (EEA) not to establish any discrimination on grounds of nationality between Austrian nationals on the one hand, and nationals of other EU Member States or of EEA Member States, on the other hand.¹⁹⁸ But this, in the view of the Committee, did not preclude it from finding discrimination. Although its earlier case law seemed to suggest that the existence of an international agreement that conferred preferential treatment to nationals of a State Party to that agreement might constitute an objective and reasonable ground for differentiation,¹⁹⁹ the Committee stated in *Karakurt* that 'there is no general rule to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant. Rather, it is necessary to judge every case on its own facts.' It follows that differences in treatment between nationals of EU Member States and third-country nationals may be considered discriminatory, despite the fact that they result from the establishment of a new legal order by the EC/EU Treaties and that they take the form of the creation of a citizenship of the Union.

The ICCPR allows for certain differences of treatment on grounds of nationality. In particular, Article 25 states that

'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.'

This provision thus suggests that differences in treatment on grounds of nationality in these areas (the right to vote, the right to be elected, and the right to have access to public service employment) are not in principle to be considered discriminatory. Therefore, although no discrimination is allowed in the exercise of these rights – for instance, distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalisation may raise questions of compatibility with the Covenant – it is in principle allowable for States to reserve these rights to individuals having their nationality.²⁰⁰

3.1.2 The Convention on the Rights of the Child

All EU Member States have ratified the 1989 Convention on the Rights of the Child. Article 2(1) of this instrument provides that 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other

198 The European Court of Justice concluded in a judgment of 16 September 2004 that, by excluding EU nationals employed in Austria from standing for election to the Chamber of Labour (*Arbeiterkammer*), Austria had violated its obligations under European Community law to grant equal conditions of employment without discrimination based on nationality to workers who are nationals of other Member States; the same obligation was violated with respect to non-EU nationals for whom special agreements between the Community and non-Member States were applicable (Case C-465/01, *Commission v. Austria*, [2004] ECR I-8291 (judgment of 16 September 2004)).

199 Communication n° 658/1995, *Jacob and Jantina Hendrika van Oord v. The Netherlands*, Decision of 23 July 1997, UN doc. CCPR/C/60/D/658/1995.

200 See Human Rights Committee, General comment No. 25: Article 25 (Participation in public affairs and the right to vote), para. 3 ('In contrast with other rights and freedoms recognised by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of 'every citizen').

opinion, national, ethnic or social origin, property, disability, birth or other status'. Although this provision only imposes a prohibition of discrimination in the enjoyment of the rights listed in the Convention, the list of these rights is such that this non-discrimination clause in fact has a very broad scope of application: the Convention on the Rights of the Child lists all basic civil and political rights as well as economic, social and cultural rights, whose implications for children the Convention seeks to make explicit.

In its recommendations to the States Parties to the Convention, the Committee on the Rights of the Child has recommended in particular that States systematically collect data about the situation of different groups of children in order to better target their policies in fields such as health, education and housing. For instance, in Concluding Observations relating to Latvia, the Committee recommends that the Latvian authorities 'undertake measures to develop a systematic and comprehensive collection and disaggregation of data that is consistent with the Convention, and can be used for the development, implementation and monitoring of policies and programmes for children. Particular emphasis should be placed on gathering data relating to children who need special attention, including non-citizens, stateless and refugee children, and children of minorities.'²⁰¹ Similarly, in Concluding Observations on Hungary, the Committee recalls 'that the availability of statistical data is essential in order to identify and combat direct and indirect discrimination as well as devise and implement targeted positive action programmes and subsequent measures for monitoring progress achieved'; and it expresses its concern that 'the Data Protection Act impedes the compilation of disaggregated statistics, especially with regard to most vulnerable groups of children, such as minority children; in particular Roma, disabled children, asylum-seeking children and children in conflict with the law.'²⁰² Similar recommendations are addressed to France, among others, in Concluding Observations adopted in 2016 by the Committee on the Rights of the Child.²⁰³ They have become routine.

The importance of the Convention on the Rights of the Child may stem primarily from the tendency of courts applying this instrument to protect foreign children from discrimination, particularly in circumstances where a difference of treatment is made between children who are illegally residing on the territory of a Member State and other children who, although also foreigners, are in a regular situation. Indeed, differences of treatment between these two categories may be especially difficult to justify when they affect children, who bear no responsibility for the choices of the parents, for example as regards their choice to remain on the territory in an irregular situation.²⁰⁴ In its 2016 Concluding Observations related

201 Committee on the Rights of the Child, Concluding Observations/Comments: Latvia (UN doc. CRC/C/LVA/CO/2, 28 June 2006), para. 17. At the same time, the Committee 'welcomes the declaration of the State party that all children in Latvia enjoy the same rights irrespective of their citizen-status as well as the decision to remove the mandatory requirement to record ethnic origin in passports' (para. 20).

202 Committee on the Rights of the Child, Concluding Observations: Hungary (UN doc. CRC/C/HUN/CO/2, 17 March 2006), para. 15.

203 Committee on the Rights of the Child, Concluding Observations: France (UN doc. CRC/C/FRA/CO/5, 23 February 2016), paras. 15-16.

204 For instance, the Belgian Constitutional Court, while allowing the legislator to deny social and medical assistance to adults irregularly staying in Belgium, expressed a reservation as regards the situation of their children, referring explicitly in this regard to the Convention on the Rights of the Child. In judgment No. 44/2006 of 15 March 2006, the Court noted thus: '...le fait qu'une personne adulte en séjour illégal n'ait pas droit, pour elle-même, à une aide sociale complète n'est pas contraire aux articles 10 et 11 de la Constitution [equality and non-discrimination]. Dès lors que l'enfant de cette personne a droit à une aide pour lui-même, les articles 2.2 et 3.2 de la Convention internationale relative aux droits de l'enfant ne sont pas violés' [...the fact that an adult residing illegally does not for himself have the right to full social assistance is not contrary to Articles 10 and 11 of the Constitution [equality and non-discrimination]. Since the child of such a person has for himself the right to social assistance, Articles 2.2 and 3.2 on the International Convention on the Rights of the Child are not violated.] The Constitutional Court later confirmed that adults irregularly staying on Belgian territory may be denied social benefits granted to others: see for instance judgment No. 66/2006 of 3 May 2006, B.6.3.: 'Lorsque le législateur entend mener une politique en matière d'étrangers et impose à cette fin des règles auxquelles il y a lieu de se conformer pour séjourner légalement sur le territoire, il utilise un critère de distinction objectif et pertinent s'il lie des effets aux manquements à ces règles, lors de l'octroi de l'aide sociale. La politique en matière d'accès au territoire et de séjour des étrangers serait en effet mise en échec s'il était admis que, pour les étrangers qui séjournent illégalement en Belgique, la même aide sociale soit accordée que pour ceux qui séjournent légalement dans le pays. La différence entre les deux catégories d'étrangers justifie que ce ne soient pas les mêmes obligations qui incombent à l'Etat à leur égard'. [When the legislator wishes to carry out a policy in relation to foreign nationals and for this reason imposes rules with which it is necessary to comply in order to legally reside on the territory, it uses an objective and relevant distinguishing criterion if it

to France, for instance, the Committee on the Rights of the Child expressed its concern at the fact that ‘migrant children without a valid residence permit continue to experience difficulties in exercising their right to health services’, and it recommended that France ‘increase the necessary resources to ensure that all children, including unaccompanied children and migrant children without a valid residence permit, have access to basic health care’.²⁰⁵

3.2 The Council of Europe: the European Convention on Human Rights and the European Social Charter

3.2.1 The European Convention on Human Rights

a) The rise of nationality as a suspect ground of differentiation

Article 14 of the European Convention on Human Rights provides that the rights and freedoms set forth in the Convention ‘shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ While this provision does not create independent protection from discrimination – it may only be invoked in combination with another substantive provision of the European Convention on Human Rights or of one of its additional Protocols²⁰⁶ – the expansive reading given to the right to property (under Article 1 of the First Additional Protocol to the ECHR) or to the right to respect for private and family life (under Article 8 ECHR) imply, in fact, that the individual is protected from discrimination in the wide range of fields on which social inclusion depends, from access to education to social security, and from housing to family reunification.²⁰⁷ That is not to say that the expansion of the scope of application of the non-discrimination clause of Article 14 ECHR is without limits, of course,²⁰⁸ but the situations that do not fall within its perimeter seem increasingly marginal.

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- makes a connection with the effects of failure to comply with these rules when granting social assistance. Policy on access to the territory and the residence of foreign nationals would fail if it was accepted that the same social assistance would be given to foreigners residing illegally in Belgium as to those residing legally in the country. The difference between these two categories of foreign national justifies the fact that the State does not have the same obligations in their regard.]’
- 205 Committee on the Rights of the Child, Concluding Observations: France (UN doc. CRC/C/FRA/CO/5, 23 February 2016), paras. 61-62. See also, for instance, Committee on the Rights of the Child, Concluding Observations: Ireland (UN doc. CRC/C/IRL/CO/3-4, 1 March 2016), para. 68 (‘Emphasizing that all children are entitled to the full protection and implementation of their rights under the Convention, the Committee urges the State party to ensure that the rights enshrined in the Convention are guaranteed for all children under the State party’s jurisdiction, regardless of their migration status or that of their parents, and to address all violations of those rights’).
- 206 The European Court of Human Rights formulates this restriction by stating that ‘Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter’. See for example Eur. Ct. HR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94, p. 35, § 71; Eur. Ct. HR, *Inze v. Austria* judgment of 28 October 1987, Series A no. 126, p. 17, § 36; *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A no. 291-B, p. 32, § 22; Eur. Ct. HR, *Van Raalte v. the Netherlands*, judgment of 21 February 1997, Reports of Judgments and Decisions 1997-I, p. 184, § 33; Eur. Ct. HR, *Petrovic v. Austria*, 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 585, § 22; Eur. Ct. HR, *Haas v. the Netherlands* (Appl. N° 36983/97), judgment of 13 January 2004, § 41.
- 207 We have seen that Article 14 ECHR has been successfully invoked in a wide range of situations involving, for instance, the right to social security benefits considered as part of the right to property (Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, p. 1141; Eur. Ct. HR (2nd section), *Koua-Poirrez v. France* (Appl. No. 40892/98), judgment of 30 September 2003); it has also been successfully invoked in the granting of a parental leave allowance, which the Court links to the enjoyment of the right to respect for private and family life (Eur. Ct. HR, *Petrovic v. Austria* (Appl. No. 20458/92), judgment of 27 March 1998, §§26–7).
- 208 In particular, most instances of discrimination in access to employment would not be considered to fall under the scope of application of Article 14 ECHR, although in certain extreme cases where across-the-board prohibitions are imposed, the individual’s inability to have access to certain professions may constitute an interference with the right to respect for private life (see Eur. Ct. HR (2nd sect.), *Sidabras and Dziutas v. Lithuania* (Appl. Nos. 55480/00 and 59330/00), judgment of 27 July 2004, §48). Furthermore, the European Court of Human Rights has considered that public authorities were not obliged under Article 8 ECHR to take measures in order to facilitate the social or professional integration of persons with disabilities, for instance by ensuring the accessibility of private sea resorts (Eur. Ct. HR, *Botta v. Italy*, judgment of 24 February 1998) or public buildings to persons with limited mobility (Eur. Ct. HR, *Zehlanova and Zehnal v. Czech Republic*,

In order to move beyond the limits of Article 14 ECHR, Protocol No. 12 to the Convention,²⁰⁹ adopted in 2000 and in force since 1 April 2005 for the States Parties to this instrument, contains a *general* prohibition of discrimination: 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status' (Article 1(1)). Although this provision concerns only the 'enjoyment of any right set forth by law', the protection from discrimination thus afforded by the Protocol goes beyond that afforded by Article 14 ECHR.²¹⁰ Social security matters being covered under Article 1 of Additional Protocol No. 1 to the ECHR since *Gaygusuz*, the areas concerned by this extension shall be, in particular, access to public places, access to goods, provision of services, access to nationality, and in certain cases access to employment. Where the discrimination is based on grounds other than the exercise of rights protected under the ECHR, the European Court of Human Rights may rely on Protocol No. 12 in order to extend its jurisdiction to those situations which, presently, are not covered under Article 14 ECHR.

Since the 1990s, differences in treatment on grounds of nationality have been increasingly treated as suspect in the case law of the European Court of Human Rights. The case of *Gaygusuz v. Austria* has already been referred to.²¹¹ The applicant in this case, a Turkish national who had worked in Austria with certain interruptions from 1973 until October 1984, was denied an advance on his pension in the form of emergency assistance (*Antrag auf Gewährung eines Pensionsvorschusses in Form der Notstandshilfe*) after his entitlement to unemployment benefits expired in 1987. He complained before the European Court of Human Rights of the Austrian authorities' refusal to grant him emergency assistance on the ground that he did not have Austrian nationality, which was one of the conditions laid down in Section 33(2)(a) of the 1977 Unemployment Insurance Act for entitlement to an allowance of that type. He claimed to be a victim of discrimination based on national origin, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 to the Convention, which guarantees the right to property ('Every natural or legal person is entitled to the peaceful enjoyment of his possessions').

The Court agreed. It noted in the first place that 'Mr Gaygusuz was legally resident in Austria and worked there at certain times (...), paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals.' It observed therefore that the Austrian authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality as required by Section 33(2)(a) of the 1977 Unemployment Insurance Act, since 'it has not been argued that the applicant failed to satisfy the other statutory conditions for the award of the social benefit in question. He was accordingly in a like situation to Austrian nationals as regards his entitlement thereto.' The Court concluded that 'the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance, of which Mr Gaygusuz was a victim, is not based on any "objective and reasonable justification", and that it was therefore discriminatory.'²¹²

In *Gaygusuz*, the Court had formulated its doctrine thus: '...a difference of treatment is discriminatory, for the purposes of Article 14, if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with

decision of 14 May 2002 (Appl. No. 38621/97)) or by providing them with certain equipment which would diminish their dependency on others (Eur. Ct. HR, *Sentges v. Netherlands*, decision of 8 July 2003 (Appl. No. 27677/02)). The Court concluded that, because Article 8 ECHR was inapplicable in such cases, Article 14 ECHR could not be invoked either.

209 E.T.S., n° 177.

210 See generally, J. Schokkenbroek, 'A New European Standard Against Discrimination: Negotiating Protocol No. 12 to the European Convention on Human Rights' in J. Niessen and Isabelle Chopin (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Leiden: Martinus Nijhoff, 2004), pp. 61–79.

211 Eur. Ct. HR, *Gaygusuz v. Austria* (Appl. No. 17371/90), judgment of 16 September 1996, Reports 1996-IV.

212 Ibid., paras. 46-51.

the Convention.²¹³ In other words, similarly to birth out of wedlock,²¹⁴ sex,²¹⁵ or sexual orientation,²¹⁶ nationality is considered to constitute a 'suspect' ground, requiring that any difference of treatment grounded on nationality be justified by particularly strong reasons, which must be strictly necessary to achieve the objectives pursued.²¹⁷

This was confirmed in the case of *Koua Poirrez v. France*. The applicant, a national of Côte d'Ivoire who had failed to obtain French nationality because he had applied after his eighteenth birthday, had been physically disabled since the age of seven. He had been adopted by Mr Bernard Poirrez, a French national. In May 1990 he applied for a 'disabled adults' allowance (*allocation aux adultes handicapés* – AAH), stating in support of his application that he was a French resident of Ivory Coast nationality and the adopted son of a French national residing and working in France. His application was rejected on the ground that, as he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France in respect of the AAH, he did not satisfy the relevant conditions laid down in Article L. 821-1 of the Social Security Code. The Court found this to constitute discrimination on grounds of nationality. It reiterated that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.'²¹⁸ This has been restated in the case of *Andrejeva v. Latvia*, referred to above.²¹⁹ In this latter case, the Court dismissed the Latvian Government's argument that the applicant could have applied to become a Latvian citizen through the process of naturalisation in order to avoid being treated differently as a 'permanently resident non-citizen' in Latvia and to receive the full amount of the pension claimed. The Court said: 'The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance.'²²⁰

The recent case law of the European Court of Human Rights confirms and deepens this approach; it also illustrates how, in some cases, discrimination on grounds of nationality is difficult to distinguish from

213 Ibid., para. 42.

214 Eur. Ct. HR, *Inze v. Austria*, judgment of 28 October 1987, Series A n° 126, § 41; Eur. Ct. HR (3d sect.), *Mazurek v. France* (Appl. N° 34406/97), judgment of 1 February 2000, § 49; Eur. Ct HR (GC), *Sommerfeld v. Germany* (Appl. N° 31871/96), judgment of 8 July 2003, § 93 ('very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of or within wedlock can be regarded as compatible with the Convention (see *Mazurek v. France*, no. 34406/97, § 49, ECHR 2000-II, and *Camp and Bourimi v. the Netherlands*, no. 28369/95, §§ 37-38, ECHR 2000-X). The same is true for a difference in the treatment of the father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship').

215 See Eur. Ct. HR, *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *Petrovic v. Austria*, judgment of 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 587, § 37.

216 Indeed, in part for the same motive that interference with an individual's sexual life will only be justified by very serious reasons as it is related to the most intimate aspects of one's personality and such matters should in principle not concern the outside world (see for example Eur. Ct. HR, *Smith and Grady v. the United Kingdom* (Appl. No. 33985/96 and 33986/96), judgment of 27 September 1999; *Lustig-Prean and Beckett v. the United Kingdom* (Appl. N° 31417/96 and 32377/96), judgment of 27 September 1999; and Eur. Ct. HR (3d sect.), *A.D.T. v. the United Kingdom* (Appl. N° 35765/97), judgment of 31 July 2000, ECHR 2000-IX, § 37), the Court has considered that differences based on sexual orientation require particularly serious reasons by way of justification: see Eur. Ct. HR (1st section), *L. and V. v. Austria* (Appl. N° 39392/98 and 39829/98), judgment of 9 January 2003, § 45 ('Just like differences based on sex (...), differences based on sexual orientation require particularly serious reasons by way of justification'); Eur. Ct. HR, *S.L. v. Austria* (Appl. N° 45330/99), judgment of 9 January 2003, § 36; Eur. Ct. HR (1st sect.), *Karner v. Austria* (Appl. N° 40016/98), judgment of 24 July 2003, § 37.

217 It has been suggested that a new approach to dealing with protection against discrimination under the Convention should be adopted, based on more clearly delineated variations in the strictness of scrutiny: see Oddný Mjöll Arnadóttir, *Equality and non-discrimination under the European Convention on Human Rights*, Martinus Nijhoff Publ., International studies in human rights n° 74, The Hague, 2003, 265 pages; and J. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases' in *N.I.L.R.*, 2004, pp. 135-183.

218 Eur. Ct. HR (3rd sect.), *Koua Poirrez v. France* (Appl. n° 40892/98), judgment of 30 September 2003 (final on 30 December 2003), para. 46.

219 Eur. Ct. HR (GC), *Andrejeva v. Latvia* (Appl. No. 55707/00), judgment of 18 February 2009, para. 87.

220 Para. 91.

discrimination on grounds of ethnic origin, although in principle the two grounds are treated differently in the case law. In *Biao v. Denmark*, the Grand Chamber of the European Court of Human Rights was asked to assess the Danish rules on the right to family reunification in the light of the non-discrimination requirement of the European Convention on Human Rights.²²¹ At issue was section 9, subsection 7, of the Aliens Act, which imposed a so-called 'attachment requirement' as a condition for the right to family reunification, providing that the right of a spouse to join the other spouse in the country could only be granted if both spouses were over 24 years old and if their aggregate ties to Denmark were stronger than the spouses' attachment to any other country. Following an amendment to the Aliens Act, however, the attachment requirement was lifted for persons who had held Danish citizenship for at least 28 years or for those who had resided lawfully in Denmark for 28 years after having been born in Denmark or having arrived in Denmark as small children. This amendment was introduced by Act no. 1204 of 27 December 2003, and entered in force on 1 January 2004. It was justified by the need to ensure that Danish expatriates, having resided abroad for many years and having started a family while away from Denmark, would not be affected by the attachment requirement.²²²

The first applicant before the Court, Mr Biao, was a Danish national of Togolese origin. He had arrived in Denmark in 1993 aged 22 after having spent his youth in Togo and Ghana, and was able to acquire Danish nationality in 2002 after nine years of residence in Denmark. The second applicant was his spouse, a Ghanaian national, whom the first applicant had married in Ghana in 2003. The couple was denied the right to stay in Denmark in 2004. The Danish authorities took the view that the applicants' aggregate ties to Denmark were not stronger than their ties to Ghana and that the family could settle in Ghana, as that would only require that the first applicant obtain employment there. The decision was upheld by the Danish Supreme Court on 13 January 2010, a majority of which cited the case law of the European Court of Human Rights to the effect that 'nationals of a country do not have an unconditional right to family reunion with a foreigner in their home country, as factors of attachment may also be taken into account in the case of nationals of that country. It is not in itself contrary to the Convention if different groups of nationals are subject to statutory differences in treatment as regards the possibility of obtaining family reunion with a foreigner in the country of their nationality'. The main issue in *Biao* concerned the fact that, for Danish nationals who were not nationals by birth but had acquired Danish nationality by naturalisation (as did the first applicant), the 28-year rule relaxing the attachment requirement could be seen as resulting in a form of indirect discrimination based on ethnic origin, since the 28-year period was much more difficult to attain when the nationality was acquired late (for instance, as in the case of Biao, at the age of 31, so that the rule would only benefit him in his 59th year), and the majority of Danish-born nationals would be ethnically Danish. The applicants argued in that connection that the introduction of the '28-year rule' amendment to the Aliens Act, in force as of 1 January 2004, which removed the attachment requirement for those who had held Danish citizenship for at least 28 years, 'resulted in an unjustified difference in treatment between two groups of Danish nationals: namely those born Danish nationals and those, like Mr Biao, who acquired Danish nationality later in life, and also Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin'.²²³

In its judgment of 24 May 2016, the Court notes that only 'very weighty reasons' could justify differences of treatment based exclusively on nationality, and that an even stronger degree of scrutiny should apply to differences of treatment on grounds of ethnic origin: 'no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society'.²²⁴ The 28-year rule however 'had the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish'.²²⁵ The Court therefore concluded that the Danish legislation was indirectly discriminatory

221 Eur. Ct. HR (GC), *Biao v. Denmark* (Appl. No. 38590/10), judgment of 24 May 2016.

222 The 28-year period was reduced to 26 years in 2012.

223 *Id.*, para. 62.

224 *Id.*, paras. 93-94.

225 *Id.*, para. 113.

towards individuals of non-Danish ethnic origin. Although the Government sought to justify the '28-year rule' by considerations related to the need to grant family reunification only to the couples who were proven to be well integrated in Danish society (a requirement that could be presumed to be satisfied by those who had been Danish nationals for 28 years), the Court considered that this was 'based on rather speculative arguments, in particular as to the time when, in general, it can be said that a Danish national has created such strong ties with Denmark that family reunion with a foreign spouse has a prospect of being successful from an integration point of view'.²²⁶ It found that article 14 ECHR, in combination with the right to respect for family life of article 8 ECHR, had been violated, since 'having regard to the very narrow margin of appreciation in the present case, ... the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. That rule favours Danish nationals of Danish ethnic origin, and places at a disadvantage, or has a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish'.²²⁷ The case is significant in the context of this report, because it illustrates both the high sensitivity of the European Court of Human Rights to any discrimination on grounds of ethnic origin (differences of treatment on grounds of ethnic origin are absolutely prohibited, and only very weighty reasons could justify rules or practices that have a disproportionate impact on persons of a certain ethnic origin), and the interplay between nationality-based and ethnicity-based discrimination.

Another dimension of the case law of the European Court of Human Rights is that it also views differences of treatment between foreigners based on their right to be present on the territory – i.e. between irregular migrants on the one hand, and other people, whether nationals or legally residing migrants, on the other hand – as potentially discriminatory, particularly in the exercise of certain rights such as the right of access to justice.²²⁸ Yet, the Court also acknowledges that States may have 'legitimate reasons for curtailing the use of resourcehungry public services – such as welfare programmes, public benefits and health care – by shortterm and illegal immigrants, who, as a rule, do not contribute to their funding' and that they 'may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory', for instance to extend to citizens of the EU advantages granted to nationals, in accordance with the requirements of the EU Treaties.²²⁹

The case of *Bah v. the United Kingdom* provides an illustration.²³⁰ The applicant was a national from Sierra Leone whose claim to asylum had been denied but who was granted an indefinite leave to remain in the UK. She subsequently chose to have her son join her in the UK, under the condition that she would not rely on public funds in order to support him. She subsequently was forced to leave her privately rented apartment. She then filed a request to benefit from social housing, but was denied priority processing of her request because she was not a 'priority person', since her son had the immigration status of a 'restricted person', being subject to immigration control within the meaning of the Asylum and Immigration Act 1996. She alleged that she was thus a victim of discrimination in access to housing, in violation of Article 14 ECHR in combination with Article 8 ECHR. The European Court of Human Rights noted that the UK should be accorded a broad margin of appreciation in such a situation, given both 'the element of choice involved in immigration status', so that 'while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of

226 Id., para. 125.

227 Id., para. 138.

228 Eur. Ct. HR (2nd sect.), *Anakomba Yula v. Belgium* (Appl. No 45413/07), judgment of 10 March 2009.

229 Eur. Ct. HR (4th sect.), *Ponomaryoni v. Bulgaria* (Appl. No 5335/05), judgment of 21 June 2011 (final on 28 November 2011), para. 54 (concerning the duty of aliens without a permanent residence permit to pay school fees). The Court found, however, taking into account the role of secondary education and the fact that the applicants had not illegally entered the country in order to benefit from its educational system, that in the specific circumstances of the case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified, and that there had therefore been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 guaranteeing the right to education.

230 Eur. Ct. HR (4th sect.), *Bah v. the United Kingdom* (Appl. No 56328/07), judgment of 27 September 2011 (final on 27 December 2011).

a distinction based, for example, on nationality', and given moreover that 'the subject matter of this case – the provision of housing to those in need – is predominantly socio-economic in nature'.²³¹ Ms Bah had brought her son into the United Kingdom 'in full awareness of the condition attached to his leave to enter', i.e. that she would not have recourse to public funds in order to support her son, and the British legislation 'pursued a legitimate aim, namely allocating a scarce resource fairly between different categories of claimants'.²³² The Court concluded that the difference in treatment complained of was proportionate to the fulfilment of that aim, and was therefore not discriminatory.

In such cases, differences in treatment between different categories of persons shall depend on a range of factors, among which the most important are the ground on which the distinction is made and the nature of the rights at stake. Whereas differences of treatment based on ethnic origin are treated as highly suspect and can never be justified, only 'compelling' or 'very weighty reasons' can justify differences of treatment on grounds of nationality alone; the Court is more flexible as regards differences of treatment based on immigration status, particularly where such status contains an element of choice: differences in treatment may be justified in such cases, provided they can be explained by 'legitimate reasons' and remain proportionate to that end.²³³ As regards the nature of the rights concerned, guaranteeing the enjoyment of socio-economic rights (such as housing, social protection or education) is generally seen as belonging to the socio-economic policy of the State, for which it has a broad margin of appreciation. However, as discussed in greater detail below in this chapter (see c)) certain rights (such as the right to have access to primary-level education, access to legal aid on which access to justice depends or the right to protection from homelessness) are considered more fundamental, because they are explicitly protected under the Convention and because they are inherent to the ability to live a dignified life, and differences of treatment leading to deny enjoyment of such rights to certain categories of persons will therefore be considered with suspicion.

b) The relevance of citizenship of the Union: free movement rights and political rights

The elevation of nationality to the status of a suspect ground of differentiation leads to the questioning of most distinctions based on nationality in the other areas concerned. Differences of treatment between two different categories of foreigners – nationals of other EU Member States, on the one hand, and third-country nationals, on the other hand – may not be immune from this general movement towards equality without distinction as to nationality. Initially, the European Court of Human Rights seemed to accept that citizens of the Union may be treated better by Member States of the Union than third-state nationals where this is justified by the creation between Member States of a special legal order implicating certain citizenship rights. This was the position of the Court in the early cases of *Moustaquim* and *Chorfi*, where the applicants complained that they were not as well protected from expulsion as nationals from other Member States of the Union would have been in similar circumstances.

In the case of *Moustaquim*, the Court considered that the applicant, a Moroccan national, had not faced discrimination in the enjoyment of his private and family life despite the fact that an EU citizen might have been better protected from the risk of expulsion for reasons of public order. It stated: 'As for the preferential treatment given to nationals of the other member States of the Communities, there is an objective and reasonable justification for it as Belgium belongs, together with those States, to a special

231 Id., para. 47.

232 Id., para. 50.

233 That is not to say that such differences of treatment shall always be justified as being introduced through proportionate means for the fulfilment of legitimate means. See for instance Eur. Ct. HR (4th sect.), *Niedzwiecki v. Germany* (Appl. no. 58453/00), judgment of 25 October 2005 (final on 15 February 2006), para. 33. The European Court of Human Rights takes the view that there are no sufficient reasons justifying a difference of treatment with regard to the child benefits of aliens who were in possession of a stable residence permit on one hand and those who were not on the other. This follows the position of the German Federal Constitutional Court (*Bundesverfassungsgericht*) as expressed after the close of the litigation related to the applicant's situation (see decision of 6 July 2004 (1 BvL 4/97, 1 BvL 5/97, 1 BvL 6/07)).

legal order.²³⁴ This was repeated in the judgment of the Court in the case of *C. (Chorfi) v. Belgium*, where the Court added a reference to the notion of citizenship of the Union.²³⁵

Yet the authorisation to establish differences in treatment between nationals of EU Member States and third-country nationals is not without limits. As the later cases of *Gaygusuz* (1996) and *Koua-Poirrez* (2003) show,²³⁶ the notion of Union citizenship may not be invoked to justify differences in treatment between individuals who are citizens of the Union and nationals of third countries who are similarly placed, where the advantage denied to them presents no relationship to the notion of citizenship – a concept which, arguably, should only justify differences in treatment in areas such as the right to vote and to be elected, certain rights to political participation, or perhaps – as in *Moustaquim* and *Chorfi* – the right to remain in one country. The differences in treatment established by one EU Member State between nationals of other EU Member States on the one hand and third-country nationals on the other hand are therefore only allowable under the European Convention on Human Rights in a limited set of situations.

Let us first consider the right not to be removed from the national territory. It may be tempting to argue that offering a higher level of protection from expulsion to Union citizens than to third-country nationals may be justified in reference to the right of nationals of a State Party to Protocol no. 4 to the ECHR, under Article 2 of that Protocol, not to be expelled from their country, applied per analogy. This indeed was the position adopted by Belgium in the *Moustaquim* and *Chorfi* cases, where the applicants complained that they were victims of discriminatory treatment since they could be expelled under conditions less strict than if they had been nationals of another EU Member State. However, this justification for the preferential treatment granted to Union citizens in comparison with third-country nationals is rather tautological, since it amounts to saying that nationals of other EU Member States are granted such preferential treatment because they are assimilated to nationals of the host Member States in accordance with the rules of the EU Treaties. In addition, this justification is not particularly convincing. Just like third-country nationals in situations such as those in which *Moustaquim* and *Chorfi* found themselves, nationals of EU Member States may be expelled for reasons of public order and public security.²³⁷ In other words, the real dividing line in this matter remains between nationals and non-nationals, rather than between nationals of EU Member States and third-country nationals.

As to the difference in treatment between nationals and foreigners in the field of political rights broadly conceived, which (beyond the right to vote and to seek to be elected) includes freedoms of expression and assembly, as well as the freedom to form political parties, this would at first appear to be compatible with the ECHR, Article 16 of which states that the provisions of the Convention relating to freedom of expression or association, or those which prohibit discrimination in the enjoyment of such freedoms, shall not be regarded as ‘preventing the High Contracting Parties from imposing restrictions on the political activity of aliens’. In the 1995 case of *Piermont v. France*, the European Court of Human Rights seemed to adopt the view that this provision could justify certain restrictions being imposed on third-country nationals, even though it might not be applicable to nationals of EU Member States.²³⁸

234 See Eur. Ct. HR, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A n°193, para. 49.

235 *C. (Chorfi) v. Belgium*, 7 August 1996, Rep. 1996-III, para. 38.

236 Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, ECHR 1996-IV, p. 1142, para. 42; Eur. Ct. HR (3rd sect.), *Koua Poirrez v. France* (Appl. n° 40892/98), judgment of 30 September 2003 (final on 30 December 2003), para. 46. In *Koua Poirrez*, the Court is explicit about its overruling of the precedent established in *Moustaquim*. It states in para. 49: ‘The difference in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was not based on any ‘objective and reasonable justification’ (see, conversely, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 20, § 49)’.

237 See for example Case C-100/01, *Oteiza Olazabal* [2002] ECR I-10981; and Chapter VI of Directive 2004/38/EC, cited above.

238 Eur. Ct. HR, *Piermont v. France* (Appl. Nos. 15773/89 and 15774/89) judgment of 27 April 1995. This judgment is difficult to interpret, however, since the applicant in the case was not only a national of Germany who could not exercise certain political activities in the French overseas territories of French Polynesia and New Caledonia, but was also a Member of the European Parliament. The Court took the view that ‘Mrs Piermont’s possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 of the Convention to be raised against her, especially as the people of the [Overseas Territories] take part in the European Parliament elections’ (para. 64).

However, Article 16 of the Convention has been frequently criticised and is only seldom invoked even in situations where it would be obviously applicable.²³⁹ A distinction should be made, however, between different sets of rights enumerated in Article 16 of the Convention. The exercise of civil liberties such as freedom of expression or freedom of assembly cannot be reserved to nationals only, or to the citizens of the Union: as stated by the UN Human Rights Committee, human rights are in principle to be enjoyed by all individuals under the jurisdiction of the State.

As regards political rights *stricto sensu* (the right to vote, the right to stand for elections and the right to form or join political parties), the situation may be different. The exercise of such rights is so closely bound to the concept of citizenship that it may be allowable to reserve these rights to nationals. Indeed, while Article 3 of Protocol No. 1 to the European Convention on Human Rights²⁴⁰ provides that the States Parties 'undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature', there has never been a suggestion that the right to vote should be extended to non-nationals. But even this may be changing, at least as regards local elections. Article 3 of the 1992 Convention on the participation of foreigners in public life at local level²⁴¹ obliges each Party to that instrument to undertake 'to guarantee to foreign residents, on the same terms as to its own nationals [the right to freedom of expression and] the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of their interests (...)'. The adoption of this instrument and the growing consensus about the need to improve integration of immigrants by allowing them to participate in the local political life of the State in which they reside may lead this rule to evolve in the future.

c) Differences of treatment between nationals of EU Member States and other foreigners: rights supporting socio-economic integration

Although perhaps still acceptable in the spheres outlined above, the differences of treatment between EU nationals and third-country nationals are becoming more difficult to justify in areas such as social security, access to education and healthcare, both because these are areas which are directly related to the socio-economic integration of migrants and to their enjoyment of basic rights, and because they are less connected to the State's sovereign powers in law enforcement.

A first indication that the European Court of Human Rights may be taking a harder look at differences of treatment on grounds of nationality, including where nationals from EU Member States are given preferential treatment in comparison with third-country nationals, came from the twin cases of *Fawsie* and *Saidoun*, both against Greece.²⁴² Ms Fawsie and Ms Saidoun were Syrian and Lebanese nationals respectively, and both had been accorded the status of refugee in Greece, in 1998 and 1995. When they applied for the allowances granted under Greek legislation to mothers of large families, their requests were denied, since neither they nor their children had Greek nationality or the nationality of one of the member States of the European Union or were refugees of Greek origin: at the material time (Greek legislation was amended in 2008 to remove this condition), this meant they did not qualify. Recalling that only very strong considerations could lead the Court to consider a difference in treatment exclusively based on nationality to be compatible with the Convention, the Court found in both cases that the refusal of the authorities to award a large family allowance to the applicants had not been reasonably justified. It noted that the attitude of the Greek authorities was inconsistent regarding the beneficiaries of the allowance: the jurisprudence was not consistent; from 1997 onwards, the status of beneficiary of the

239 It is notable, for instance, that neither in *Cissé v. France* (Appl. n° 51346/99, judgment of 9 April 2002 (forced evacuation of the Saint-Bernard church in Paris, occupied for more than two months by undocumented aliens and their supporters)) nor in *Zaoui v. Switzerland* (Appl. n° 41615/98, non-admissibility decision of 18 January 2001 (Algerian national whose means of communication had been confiscated to deprive the applicant of the possibility of diffusing international propaganda in favour of the Algerian opposition party, the *Front Islamique du Salut*)) was Article 16 ECHR invoked by the defending State.

240 Opened for signature in Paris on 2.3.1952.

241 ETS no. 144, opened for signature in Strasbourg on 5.2.1992.

242 Eur. Ct. HR (1st sect.), *Fawsie v. Greece* (Appl. No. 40080/07), judgment of 28 October 2010 (final on 28 Jan. 2011); Eur. Ct. HR (1st sect.), *Saidoun v. Greece* (Appl. No. 40083/07), judgment of 28 October 2010 (final on 28 Jan. 2011).

allowance had been granted to nationals of European Union Member States, then from 2000 to nationals of States Parties to the European Economic Area, and finally, from 2008, after the facts that gave rise to the application, to refugees such as the applicants. The Court noted finally that under Article 23 the Geneva Convention on the Status of Refugees, to which Greece was a party, States had to grant to refugees staying lawfully in their territory the same treatment with respect to public relief and assistance as was accorded to their own nationals. The judgments of 28 October 2010 delivered in these cases are discreet, however, concerning the differences in treatment between nationals from EU Member States, on the one hand, and third-country nationals who are not of 'Greek origin', on the other hand.

The case of *Ponomaryovi v. Bulgaria* represented another turning point in the jurisprudence of the European Court of Human Rights. Two Russian brothers, both close to finishing high school, were required by the Bulgarian authorities to pay fees to have continued access to secondary education.²⁴³ They would not have had to pay such fees had they been Bulgarian nationals or children of EU migrant workers: in preparation of Bulgaria's accession to the European Union, the 1991 National Education Act had been amended in 2006, in line with Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers, in order to provide secondary education free of charge for children whose parents work in Bulgaria and are nationals either of a member State of the European Union or the European Economic Area, or of Switzerland.

The Court concluded that the applicants had been victims of discrimination. It noted that 'a State may have legitimate reasons for curtailing the use of resourcehungry public services – such as welfare programmes, public benefits and healthcare – by shortterm and illegal immigrants, who, as a rule, do not contribute to their funding' and that '[it] may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member States of the European Union – some of whom were exempted from school fees when Bulgaria acceded to the Union (...) – may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship'.²⁴⁴

However, according to the Court, such arguments could not simply be transposed 'without qualification' to the field of education, 'one of the most important public services in a modern State'.²⁴⁵ Indeed, like healthcare, pensions or child benefits, education 'is a right that enjoys direct protection under the Convention'; it is also 'a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions'.²⁴⁶ Whereas secondary education occupies an intermediate position between university education ('which to this day remains optional for many people', and for which 'higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified') and primary schooling (which 'provides basic literacy and numeracy – as well as integration into and first experiences of society – and is compulsory in most countries'),²⁴⁷ high school education 'plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned. Indeed, in a modern society, having no more than basic knowledge and skills constitutes a barrier to successful personal and professional development. It prevents the persons concerned from adjusting to their environment and entails far-reaching consequences for their social and economic well-being'.²⁴⁸

Such considerations, said the Court, 'militate in favour of stricter scrutiny by the Court of the proportionality of the measure affecting the applicants'.²⁴⁹ The Court emphasised the need to take into account the specific

243 Eur. Ct. HR (4th sect.), *Ponomaryovi v. Bulgaria*, judgment of 21 June 2011 (Appl. No. 5335/05) (final on 28 Nov. 2011).

244 Id., para. 54.

245 Id., para. 55.

246 Id., para. 55.

247 Id., para. 56.

248 Id., para. 57.

249 Id., para. 58.

situation of the applicants, who 'were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling', and whom the authorities never had the intention of deporting, so that 'any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case'. The Court also remarked that 'It was not [the applicants'] choice to settle in Bulgaria and pursue their education there; they came to live in the country at a very young age because their mother had married a Bulgarian national', and in any event they 'could not realistically choose to go to another country and carry on their secondary studies there'. Yet, despite these various elements, the Court noted that there was no provision allowing for an exemption from the payment of school fees, to take into account individual circumstances.²⁵⁰ Therefore, 'in the specific circumstances of the present case the requirement for the applicants to pay fees for their secondary education on account of their nationality and immigration status was not justified. There has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.'²⁵¹

The 2011 judgment in *Ponomaryovi v. Bulgaria* was still very cautious: the Court merely stated that the treatment had been discriminatory because the imposition of school fees on children of a foreign nationality was a requirement that could not be waived, even when circumstances would have dictated that an exemption be granted. The Court went further in the 2014 case of *Dhahbi v. Italy*. There, the European Court of Human Rights found that a family allowance scheme, which treated third-country nationals less favourably than EU workers, violated Article 14 ECHR in combination with Article 8 ECHR.²⁵² The applicant, a Tunisian national, had applied in 2001 for a family allowance, which he claimed he had a right to under the EU-Tunisia Association Agreement. He was denied the allowance, however, and he claimed that this resulted in discrimination on grounds of nationality: although he was legally residing in Italy and had contributed to the National Institute for Social Security, he had been denied an advantage that would have been granted to an EU national in the same situation. The European Court of Human Rights found, unanimously, that this amounted to discrimination, as nationality was the sole factor on which the difference of treatment was based. The Court reiterated that only very weighty considerations could induce it to regard a difference in treatment exclusively based on nationality as compatible with the Convention. Notwithstanding the national authorities' wide margin of appreciation in the social security field and the budgetary arguments put forward by Italy, the Court considered that the difference in treatment was disproportionate, making the impugned difference of treatment incompatible with the requirements of Article 14 of the Convention.

The outcomes in *Ponomaryovi* and in *Dhahbi* stand in sharp contrast to other cases, in which the Court rejected a claim of discrimination on grounds of nationality between, on the one hand, a third-country national, and on the other hand, the nationals of the host EU Member State or nationals of other EU Member States. In *Bigaeva v. Greece*, the Court took the view that the applicant, a Russian national who had been residing in Greece for 16 years and had obtained a Greek law degree, could be denied admission to the Athens bar on grounds of nationality: although EU nationals in her situation would have been granted access to the profession, the Court considered that the Greek authorities should be granted a broad margin of appreciation, since the profession of a lawyer, although a liberal profession, involves the exercise of certain public functions relating to the administration of justice.²⁵³

d) Conclusion

The growing sensitivity of the European Court of Human Rights towards differences of treatment that are based exclusively on nationality (especially where, as in the *Biao* case, differential treatment on

250 Id., para. 62.

251 Id., para. 63.

252 Eur. Ct. HR (2nd sect.), *Dhahbi v. Italy*, judgment of 8 April 2014 (Appl. No. 17120/09) (final on 8 July 2014).

253 Eur. Ct. HR (2nd sect.), *Bigaeva v. Greece*, judgment of 28 May 2009 (Appl. No. 26713/05) (final on 28 August 2009) (the Court notes: 'l'avocat est un auxiliaire de la justice, ce qui entraîne des obligations spécifiques dans l'exercice de ses fonctions' (the judgment is only available in French)).

grounds of nationality is intertwined with ethnic discrimination) does not condemn all forms of differential treatment between nationals of EU Member States and third-country nationals. In other terms, the specific rights that derive from the conception of Union citizenship may still be justified in certain areas in which their symbolic value is highest – such as the right to vote and stand as candidate in municipal or European elections, the right to freedom of movement between the EU Member States, or the right to diplomatic or consular protection.²⁵⁴ However, as regards the rights related to employment (including both access to employment and the enjoyment of working conditions, such as remuneration and health and safety requirements), to education, to social security and healthcare, to housing, or to access to and the supply of goods and services, differences on treatment based exclusively on nationality have become very difficult to justify: the choice made by the EU Member States to create a ‘citizenship of the Union’ certainly cannot be considered, in and of itself, as a sufficient justification for creating or maintaining such differences of treatment. The important implication is that any progress achieved for the benefit of the integration of the nationals of EU Member States in the host State, in order to facilitate free movement across the EU and to encourage them to exercise such freedom, shall have to be extended so as to also benefit third-country nationals who are staying in that State. The assimilation may have to come about gradually, but it does appear inevitable, taking into account the general direction in which European case law has evolved: the deepening of integration within the EU shall go hand in hand with greater integration of migrants, by extending to them the guarantee of national treatment in the areas which play the most decisive role for their inclusion within the host society.

3.2.2 *The European Social Charter*

The European Social Charter was initially signed on 18 October 1961 to complement the European Convention on Human Rights in the field of economic and social rights. The initial list of 19 rights protected was expanded by the adoption of the Additional Protocol of 1988, which added four rights closely inspired by developments in the social legislation of the European Community. On 3 May 1996, the Revised European Social Charter further expanded the list of rights to cover an increasingly large number of issues going beyond the protection of workers and their families, including the right to protection against poverty and social exclusion and the right to housing. In addition, Article E was included in Part V of the Revised Charter. This article contains ‘horizontal’ clauses applicable to the generality of the Charter’s substantive clauses. According to Article E:

‘The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.’

Although this general, non-limitative list of prohibited grounds of discrimination might lead one to conclude that differences of treatment on grounds of nationality should be carefully scrutinised under the Charter, there is an important proviso. Paragraph 1 of the Appendix to the Revised European Social Charter (which is identical to the Appendix to the original European Social Charter) provides that a wide range of social rights protected under the Charter, including for instance the right to social and medical assistance (Paragraph 1 of Article 13) and the right to the protection of the child (Article 17), cover foreigners ‘only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.’ Thus, rather unusually for a human rights treaty, the applicability of the Charter is in principle subject to a condition of reciprocity: it benefits only the nationals of the other States Parties to the Charter, and only if the individuals concerned are lawfully residing on the host State’s territory.

254 See, respectively, Articles 39, 40, 45 and 46 of the Charter of Fundamental Rights. The other rights listed under Title V of the Charter (Citizens’ Rights) are in fact extended also to natural persons residing in the European Union: they include the right to good administration, the right of access to documents, and the right to address the European Ombudsman or to petition the European Parliament.

Although its scope of application is thus restricted *ratione personae*, the (Revised) European Social Charter contains provisions which seek to ensure full equality between the nationals of the host State and the nationals of other States Parties to the Charter who are residing on the host State's territory. Article 19 of the Charter relates to the right of migrant workers and their families to protection and assistance. It lists a number of guarantees benefiting migrant workers. For instance, Paragraph 7 of Article 19 of the Revised European Social Charter provides, for the States Parties which have accepted this provision, that these States undertake to 'secure for [migrant workers] lawfully residing within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article [concerning the right of migrant workers and their families to protection and assistance]'.²⁵⁵

Article 12(4) of the Revised European Social Charter imposes on the States which have accepted that provision an obligation to 'take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, to ensure: equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties; the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.' In Estonia, family benefits are granted to residents, whether permanent or temporary, on condition that family members are residing in Estonia. Benefits are not paid in respect of family members who already receive family benefit from other countries. The European Committee of Social Rights in its 2004 Conclusions on Estonia considered that the fact that child allowances were not paid in respect of children not residing with the claimant parent in Estonia (except where studying abroad was involved) constituted a case of indirect discrimination prohibited by Article 12(4) of the Revised European Social Charter.

We shall not detail these provisions, since although they do encourage the States Parties to the (Revised) European Social Charter to extend certain guarantees afforded to their nationals to the nationals of the other States Parties, they do not apply to all third-country nationals who are present or legally residing on the territory of the State concerned. This restriction to the scope of application *ratione personae* of the European Social Charter was challenged in the case of *FIDH v. France*,²⁵⁶ however. The complaining non-governmental organisation considered that the Revised European Social Charter had been violated by France, since French law excluded the children of undocumented migrants on French territory from being provided medical assistance, except regarding treatment for emergencies and life-threatening conditions. In its decision on the merits of 8 September 2004, the European Committee on Social Rights – the body of experts charged with interpreting the Charter – noted that, 'as a human rights instrument to complement the European Convention on Human Rights', the Charter should be read, in accordance with the Vienna Convention on the Law of Treaties, as 'a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity'. It also noted that the restriction to the scope of application *ratione personae* of the Charter 'treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being', and that it 'impacts adversely on children who are exposed to the risk of no medical treatment.' Since 'health care is a prerequisite for the preservation of human dignity', it concluded that 'legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if

255 To give one example of the impact of this paragraph: the situation in Sweden was considered not to be compatible with this clause as, according to the Swedish Legal Aid Act, although all persons *domiciled* in Sweden have the right to legal aid whatever their nationality, non-Swedish citizens who are not domiciled in the country may receive legal aid only when international conventions and bilateral agreements have been concluded to that effect, even if they are *lawfully present* within the Swedish territory. The European Committee of Social Rights considered in its conclusions regarding the Swedish report in 2004 that Paragraph 7 of Article 19 (equality in legal proceedings) of the Revised European Social Charter 'obliges states parties to secure the same treatment for nationals of other states parties as for their own nationals, independently of any international agreement.'

256 European Committee of Social Rights, *International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004.

they are there illegally, is contrary to the Charter.’ The reference to ‘human dignity’ and to the Charter as a human rights instrument therefore allowed the Committee to circumvent the clear stipulations of the Appendix to the Charter.

The *FIDH v. France* decision indicates that differences of treatment based on status (for instance, between third-country nationals legally residing on the territory of the host State and third-country nationals who are there illegally) are now also treated with suspicion as regards situations where fundamental values such as the ‘dignity’ of the individual and the right to life are at stake. This is quite a natural development as regards the enjoyment of fundamental rights, which in principle are to be granted to all without discrimination on grounds of nationality or administrative situation; and it is equally unsurprising that this decision of the European Committee of Social Rights was adopted in a case relating to the situation of children in which the Committee heavily relied on the 1989 Convention on the Rights of the Child referred to above. Indeed, it may be noted that, although differences of treatment on grounds of status (legal resident or not) are extremely common throughout the Member States, this has been questioned by certain national courts. In Spain, the Law on the rights and duties of aliens (Organic Law 4/2000) requires foreigners to be in a regular situation in order to enjoy full protection of their rights in the labour market, education and training, social protection, social advantages, and access to and supply of goods and services. But several Constitutional Court (TC) judgments in late 2007 overturned the distinction made by OL 4/2000 between residents with legal status and illegal immigrants in access to fundamental rights. The Court ruled on a number of occasions²⁵⁷ that the enjoyment of freedom of assembly, freedom of association, the right to non-obligatory education, the right to organise, the right to strike and the right to free legal assistance, among others, could not be made to depend on administrative status.

The *FIDH v. France* decision has been confirmed on a number of occasions since it was initially adopted. In particular, following a complaint filed by the Conference of European Churches (CEC), the European Committee of Social Rights found the Netherlands to be in violation of a number of provisions of the Charter, due to the limited access to welfare rights of irregular migrants:²⁵⁸ since the large majority of irregular adult migrants without resources are generally not provided with accommodation and are denied medical assistance in legislation and practice, the Committee found the situation not to be in conformity with either Article 13§4 (right to social and medical assistance) or Article 31§2 (right to housing) of the Charter. The Committee reached this conclusion as regards The Netherlands by setting aside the restriction to the scope of application *ratione personae* set out in the Appendix to the Charter, as it had in earlier decisions following the lead of *FIDH v. France*.²⁵⁹ Meanwhile, the Committee had addressed to all States Parties to the Charter a letter (dated 13 July 2011) inviting them to make a declaration extending the personal scope of the rights enshrined in the Charter since ‘such a limitation is hardly consistent with the nature of the Charter’. The Dutch Government answered on 14 October 2011 that it could not accept such an extension of the personal scope of the Charter. The Committee was not deterred. It answered that:

‘When human dignity is at stake, the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter, nor to impair their fundamental rights, such as the right to life or to physical integrity or human dignity’.²⁶⁰

257 TC Judgments 236/2007 of 7 November 2007, 259/2007 of 19 December 2007, and 260, 261, 262, 263, 264 and 265/2007, all of 20 December 2007.

258 European Committee of Social Rights, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, decision on the merits of 1 July 2014.

259 European Committee of Social Rights, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, decision on the merits of 23 October 2012, para. 28.

260 *Id.*, para. 66.

Therefore,

‘... in certain cases and under certain circumstances, the provisions of the Charter may be applied to migrants in an irregular situation. The application of the Charter to migrants in an irregular situation is justified solely where excluding them from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights, and would consequently place the foreigners in question in an unacceptable situation regarding the enjoyment of these rights, as compared with the situation of nationals or foreigners in a regular situation’.²⁶¹

Thus, the Committee chose to extend the scope of protection of the European Social Charter, in the specific circumstances where the dignity of the person is at stake due to the ‘seriously detrimental consequences for their fundamental rights’ that could result from the benefit of the Charter rights being denied to them, beyond the wording of paragraph 1 of the Appendix to the European Social Charter, which would include foreigners among the beneficiaries of a number of provisions of the Charter ‘only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned’.

In addition, in a general statement on the rights of refugees under the European Social Charter, the Committee reads paragraph 2 of the Appendix, which essentially states that refugees (as understood by the 1951 Geneva Convention on the Status of Refugees and its 1967 New York Protocol) should be treated by the States Parties ‘as favourably as possible’,²⁶² as implying that ‘the rights contained in the Charter should as far as possible be guaranteed to refugees on an equal footing with other persons subject to the jurisdiction of the host State. It is therefore incumbent upon them to take meaningful steps towards the achievement of equality for refugees under each article of the Charter by which they are bound’. This, the Committee notes, will ensure that the guarantees listed in the European Social Charter will ‘promote and ... firmly establish the prompt social integration of refugees in the host societies’.²⁶³ It is to this question, of the rights that should be extended to refugees and stateless persons, that this study turns next.

3.3 The situation of refugees and stateless persons

3.3.1 *The Geneva Convention relating to the Status of Refugees*

The contribution of the 1951 Convention relating to the Status of Refugees to the implementation of the principle of equal treatment between refugees and nationals of the host State (or, for certain rights, between refugees and other foreigners lawfully present in the host State) has already been discussed above in order to assess the position of the so-called Qualification Directive as recast in 2011. A few more remarks are in order, however. Article 7 of the 1951 Geneva Convention provides that, at a minimum, the States Parties to this Convention ‘shall accord to refugees the same treatment as is accorded to aliens generally.’ This minimum requirement is without prejudice to more favourable provisions contained in this same Convention. In Chapters II and IV of the Convention, which define the juridical status of refugees and contain provisions relating to welfare, a number of articles state that the refugee shall benefit in his/her State of habitual residence from equal treatment with nationals. This is the case for instance as regards the protection of industrial property and artistic rights (Article 14), access to courts (Article 16), rationing (Article 20), elementary education (Article 22), and public relief (Article 23). This also applies to labour legislation and social security, including remuneration, family allowances where these form part

²⁶¹ *Id.*, para. 71.

²⁶² Paragraph 2 of the Appendix to the Charter reads: ‘Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees.’

²⁶³ European Committee of Social Rights, *Conclusions 2015 – General Introduction*, para. 20 (The rights of refugees under the Charter). The statement on the rights of refugees was originally published in October 2015.

of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, the work of women and young persons, and the enjoyment of the benefits of collective bargaining on remuneration, in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities (Article 24).

In two other domains, the right of association (Article 15) and the right to engage in wage-earning employment (Article 17), the refugee must be granted the 'most favourable treatment accorded to nationals of a foreign country, in the same circumstances.' The question whether this obliges EU Member States to ensure to refugees residing on their territory treatment as favourable as that afforded to nationals from other EU Member States remains controversial. Are citizens of the Union 'nationals of a foreign country', meaning that refugees must benefit from the same privileged position in conditions of equality? Or are they instead to be considered as nationals of the host State due to the specific nature of Union citizenship, meaning that the position of refugees does not have to be equated with that of nationals of the other EU Member States as regards freedom of association and the right to be employed? Legal opinion is divided.²⁶⁴ In practice, the impact of this controversy is limited: EU Member States generally go beyond the minimum requirements of the Geneva Convention, by granting refugees under their jurisdiction equal treatment with nationals in most areas of social life,²⁶⁵ moreover, as seen above, the Qualification Directive (recast in 2011) requires that refugees and other beneficiaries of subsidiary protection benefit from equal treatment with the nationals of the Member States in which they reside in a number of areas.

There is one significant exception, however: refugees are considered to be third-country nationals under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.²⁶⁶ The implication is that they are not assimilated to Union citizens as regards the exercise of the right to seek employment in a Member State other than their State of residence:²⁶⁷ they are, like other third-country nationals, subject to the five-year residency requirement. It may be asked whether this is compatible with Article 17 of the Geneva Convention on the Status of Refugees: if indeed refugees are to be granted the right to engage in wage-earning employment according to the 'most favourable treatment accorded to nationals of a foreign country, in the same circumstances', should their assimilation to citizens of the Union not be complete, and extend to the right to circulate freely in order to seek employment in another Member State?

3.3.2 *The Convention relating to the Status of Stateless Persons*

The 1954 Convention relating to the Status of Stateless Persons²⁶⁸ has been ratified by all EU Member States with the exception of Cyprus, Malta, Poland and, perhaps most troubling, Estonia.²⁶⁹ It provides that, at a minimum, the States Parties shall accord to stateless persons the same treatment as is accorded to aliens generally under their jurisdiction (Article 7(1)). In addition, however, the States Parties must

264 In favour of the former reading, see Jean-Yves Carlier, 'Droit d'asile et des réfugiés. De la protection aux droits' in *Recueil des cours de l'Académie de droit international de La Haye*, t. 332 (2007), pp. 274-280. In favour of the latter, see D. Alland and C. Teitgen-Colly, *Traité du droit de l'asile*, Paris, P.U.F., 2002, p. 555.

265 D. Alland and C. Teitgen-Colly, *Traité du droit de l'asile*, cited above, p. 554.

266 OJ L 16, 23.1.2004, p. 44. The Commission has proposed an extension of this directive in order to allow the beneficiaries of subsidiary international protection to have access to the status of long-term residents. See Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection, COM(2007) 298 final of 6.6.2007.

267 Refugees and other beneficiaries of international protection are guaranteed a right to engage in employed or self-employed activities under the conditions stipulated in Article 26 of the 2011 Qualification Directive (Recast) (which extends the right of access to employment on the part of the beneficiaries of subsidiary protection to that accorded to refugees under Article 26 of the original Qualification Directive (2004/83)).

268 United Nations, Treaty Series, vol. 360, p.117. Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526 A(XVII) of 26 April 1954, entered into force on 6 June 1960.

269 The EU Member States that did ratify the Convention are Austria (2008), Belgium (1960), Bulgaria (2012), Croatia (1992), the Czech Republic (2004), Denmark (1956), Finland (1968), France (1960), Germany (1976), Greece (1975), Hungary (2001), Ireland (1962), Italy (1962), Latvia (1999), Lithuania (2000), Luxembourg (1960), the Netherlands (1962), Portugal (2012), Slovakia (2000), Spain (1997), Sweden (1965), and the United Kingdom (1959).

accord to stateless persons within their territories treatment 'at least as favourable as that accorded to their nationals' with respect to freedom to practise their religion and freedom as regards the religious education of their children (Article 4), the protection of artistic rights and industrial property (Article 14), access to the courts, including legal assistance and exemption from *cautio judicatum solvi* (Article 16(2)), rationing (Article 20), elementary education (Article 22(1)), public relief (Article 23), labour legislation and social security, including remuneration, family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, the minimum age of employment, apprenticeship and training, the work of women and young persons, and the enjoyment of the benefits of collective bargaining on remuneration, in so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities (Article 24).

3.4 Conclusion

As regards the acceptability of differences of treatment on grounds of nationality, the evolution of the International Covenant on Civil and Political Rights and the European Convention on Human Rights – the international human rights instruments most influencing EU law – are strikingly similar. Under both treaties, such differences of treatment are increasingly being treated as suspect, and they now require particularly weighty justifications in order to be allowable. This fits within the broader development of international human rights law. Thus, as this study noted earlier, the 1990 Migrant Workers Convention contains a number of provisions which prohibit discrimination between migrant workers and host State nationals.²⁷⁰ The UN Committee for the Elimination of Racial Discrimination, which considers that 'differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim',²⁷¹ has subjected differences of treatment on grounds of nationality to increasingly demanding scrutiny in its monitoring of compliance with the International Convention for the Elimination of All Forms of Racial Discrimination.²⁷² The European Social Charter, as we have seen, points in the same direction.

This evolution does not mean that differences in treatment between nationals of the EU Member States, on the one hand, and third-country nationals, on the other hand, are necessarily considered discriminatory. But the tautological reasoning behind early cases decided by the European Court of Human Rights such as *Moustaquim* and *Chorfi* seems more and more untenable. In these judgments, the European Court of Human Rights had seemed to allow for the preferential treatment of nationals of EU Member States (in comparison to third-country nationals) on the basis of the mere idea of a European citizenship, as if this were sufficient to provide the differentiation with an objective and reasonable justification. As more recent cases show – including *Karakurt*, decided by the Human Rights Committee, but also cases such as *Ponomaryoni* and *Dhahbi*, decided in 2011 and 2014 respectively by the European Court of Human Rights – this circular reasoning should not be enough: only where a difference in treatment on grounds of nationality can be explained by a legitimate objective and does not go beyond what is necessary to fulfil that objective should it be allowed.

Differences of treatment on grounds of nationality will be particularly difficult to justify when they affect the enjoyment of rights related to employment, education, housing, social security or healthcare, all of which are key for the integration of third-country nationals, and the extension of which to this category of beneficiaries fits in with the Common Immigration Policy of the Union, as defined since the

270 See Arts. 25 and 43.

271 General Recommendation No. 30: Discrimination Against Non Citizens, cited above, 1 October 2004.

272 See for example the Concluding Observations on Bahrain, CERD/C/BHR/CO/7 (14 April 2005), para. 14; or the Concluding Observations on Azerbaijan, CERD/C/AZE/CO/4 (14 April 2005), para. 12; or the Concluding Observations on Denmark, CERD/C/DEN/CO/17 (19 October 2006), para. 19. In these conclusions, the Committee notes that there exists an 'obligation under the Convention not to discriminate against persons on the basis of their national or ethnic origin or against any particular nationality'. In its view, 'differential treatment based on nationality and national or ethnic origin constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim'.

1999 Tampere European Council. Beyond the socio-economic sphere, however, a number of rights are attributed by EU law exclusively to citizens of the Union. These rights include the right to vote and to stand as a candidate at elections to the European Parliament²⁷³ and at municipal elections,²⁷⁴ freedom of movement and residence²⁷⁵ and the right to diplomatic and consular protection.²⁷⁶ Which differences of treatment between nationals of EU Member States and third-country nationals in these areas are legitimate according to the emerging consensus in international human rights law? A distinction should be made between political rights, on the one hand, and freedom of movement and residence, on the other. Nationality-based restrictions on the exercise of economic freedoms such as the freedom to move across EU Member States to seek employment seem increasingly challenged by developments in international human rights law. In contrast, at least at its present stage of evolution, international human rights law allows States to make the enjoyment of political rights conditional upon nationality, and this would seem to justify that certain rights of a political nature be granted to nationals of EU Member States in the name of the citizenship of the Union, without their extension to third-country nationals.

Even in this latter area, however, a nuanced appreciation is required since we may be witnessing an evolution towards a strengthened requirement of equality. The Convention on the Participation of Foreigners in Local Public Life, opened for signature in the Council of Europe on 5 February 1992,²⁷⁷ stipulates that States Parties to that instrument undertake in principle 'to grant all foreign residents the right to vote and to stand as candidates in local elections, provided that they fulfil the same conditions as those which apply to national citizens and, in addition, have resided legally and regularly in the State in question during the five years preceding the elections' (Article 6(1)). As the European Commission noted in its 2005 Communication on 'A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union':²⁷⁸

'The participation of immigrants in the democratic process, particularly at the local level, enhances their role as residents and as participants in society. Providing for their participation and for the exercise of active citizenship is needed, most importantly at the political level and especially at the local level. Political rights provide both a means of expression and also bring with them responsibilities. [...] Information is [...] needed about the state of participation of immigrants both in the political process and in the development of integration policies in the different Member States. Such a mapping exercise will contribute to ongoing reflections at EU level on the value of developing a concept of civic citizenship as a means of promoting the integration of immigrants who do not have national citizenship. Problems of identity lie at the heart of the difficulties which many young immigrants in particular seem to face today. Further exploration of these issues at EU level may therefore be helpful.'

This is not an isolated view. In its Opinion of 14 May 2003 on Access to European Union Citizenship, the European Economic and Social Committee asked the European Convention in charge of preparing a Draft Treaty establishing a Constitution for Europe that the right to vote and to stand as a candidate in elections, derived from European citizenship, in municipal as well as in European elections, be extended to third-country nationals who are stable or long-term residents in the European Union.²⁷⁹ This opinion followed on from references to a form of 'civic citizenship' made at the time by the Commission in its

273 Article 39 of the Charter of Fundamental Rights. Article 22(2) TFEU (formerly Article 19, paragraph 2, EC) provides that every Union citizen residing in a Member State of which he or she does not have nationality has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State where he or she is residing. This provision has been implemented by Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in elections to the European Parliament for citizens of the European Union residing in a Member State of which they are not nationals (OJ L 329 of 30/12/1993, p. 34)).

274 Article 40 of the Charter of Fundamental Rights.

275 Article 45 of the Charter of Fundamental Rights.

276 Article 46 of the Charter of Fundamental Rights.

277 ETS n° 144. The Convention came into force on 1 May 1997.

278 COM(2005) 389 final, of 1.9.2005.

279 Opinion CES SOC/41 of 14 May 2003 on Access to European Union citizenship.

proposals for gradually aligning the status of third-country nationals with that of nationals of the Member States.²⁸⁰ Statements such as these bear witness to the fact that, even as regards the core set of political rights – rights traditionally associated with citizenship such as the right to vote and to stand for elections – traditional differences of treatment on grounds of nationality are breaking down and are increasingly being challenged as obstacles to the integration of immigrants into the community of the host State.

280 Communication of the Commission on a Community Immigration Policy, COM(2000) 757 final; see also COM(2001)127 final. The Communication of 17 June 2008 on A Common Immigration Policy for Europe is vaguer on this point, but it does recommend that the EU Member States ‘explore increased participation at local, national and European levels to reflect the multiple and evolving identities of European societies’.

4 Protection from discrimination on grounds of nationality in EU Member States

This chapter is divided into two parts. First, it examines whether the domestic legal systems of EU Member States include provisions which protect foreigners from being discriminated against on the grounds of their nationality. Secondly, this chapter examines whether protection against discrimination on grounds of race or ethnic origin (or, perhaps more seldom, on grounds of religion or belief) may be relied upon in order to challenge differences in treatment on grounds of nationality, since nationality may be used as a proxy for race or ethnic origin, or for religion or belief.

4.1 Discrimination on grounds of nationality

4.1.1 *Prohibition of nationality-based discrimination through international treaties or in constitutional provisions*

a) International treaties

All EU Member States are parties to the International Covenant on Civil and Political Rights, to the Convention on the Rights of the Child, and to the European Convention on Human Rights, and nine of them are parties to Protocol no. 12 of the European Convention on Human Rights, which, since its entry into force on 1 April 2005, extends the scope of non-discrimination requirements under this instrument beyond the enjoyment of the rights and freedoms listed therein.²⁸¹ Through different modalities and with some exceptions, these instruments, especially the European Convention on Human Rights, are directly applicable by national courts.²⁸² The implication is that, in all areas where differences of treatment on grounds of nationality are established, they can be challenged before domestic courts, either under Article 26 of the International Covenant on Civil and Political Rights (which is a free-standing, generally applicable non-discrimination clause) or under Protocol n°12 to the ECHR (which, although it relies on a less detailed understanding of equality of treatment, also guarantees equality in all spheres of public or social life), or under Article 14 ECHR: although this latter provision only provides for non-discrimination in the enjoyment of the rights and freedoms of the Convention, we have seen that its scope of application has in fact significantly expanded over the years. This is significant, since only ‘very weighty reasons’ would be accepted as a justification for measures that create differences of treatment based solely on nationality.

b) Domestic constitutions

The comparative analysis prepared for this report²⁸³ shows that, among the EU-28 Member States, only two explicitly prohibit nationality-based discrimination in their constitutions. In Austria, Article I of the Federal Constitutional Act on the Elimination of All Forms of Racial Discrimination prohibits discrimination, *inter alia*, on grounds of ‘national origin’, which has been interpreted to prohibit discrimination on grounds of nationality; and in Belgium, Article 191 of the Constitution in principle extends to all foreigners on Belgian territory the protection granted to persons or property (apart from the exceptions enshrined in the law), requiring that differences of treatment on grounds of nationality be justified as necessary and proportionate to the fulfilment of a legitimate aim. The fact that so few Member States explicitly prohibit nationality-based discrimination may be explained by the fact that, until the mid-1990s, differences of treatment on grounds of nationality were not treated as suspect – no more so than, for instance, differences of treatment on grounds of disability or sexual orientation.

281 The EU Member States which are parties to Protocol n°12 to the ECHR are Croatia, Cyprus, Finland, Luxembourg, Malta, the Netherlands, Romania, Slovenia and Spain.

282 See Robert Blackburn and Jörg Polakiewicz, *Fundamental Rights in Europe. The ECHR and Its Member States, 1950-2000*, Oxford University Press, 2001.

283 The Appendix to this report provides a table describing the situation in the 28 EU Member States.

Courts shall have a decisive role to play, therefore, in filling this gap. In the overwhelming majority of EU Member States, they are equipped to do so, since most Member States have general equality clauses in their national constitutions that are drafted in terms broad enough to extend to the prohibition of any discrimination on grounds of nationality. Only in five States, in fact, would the equality clause of the constitution appear drafted in such a way (relying on a closed list of prohibited grounds of discrimination) that courts cannot, even by an interpretative effort, extend the prohibition of discrimination to nationality-based discrimination. These States are Bulgaria,²⁸⁴ Denmark, Ireland, Malta²⁸⁵ and Romania.²⁸⁶ Denmark is a special case in this regard, since the Constitution²⁸⁷ does not even contain a general equality clause. Section 71(1) of the Constitution provides that 'No Danish subject shall in any manner whatever be deprived of his liberty because of his political or religious convictions or because of his descent.' This section therefore only covers Danish citizens, although foreigners are to some extent protected by Section 70 of the Constitution, which provides that 'no person shall be denied the right to full enjoyment of civil and political rights by reason of his creed or descent; nor shall he for such reasons evade any common civil duty.' Yet it would appear from a judgment delivered in 2002 by the Supreme Court²⁸⁸ that only Parliament may create differences of treatment on grounds of nationality; such distinctions remain allowable, provided they are prescribed by law and are not disproportionate, such as in the case submitted to the Court where third-country nationals were prohibited from acquiring a licence to drive a taxicab.²⁸⁹ In Ireland, the Constitution (*Bunreacht na hÉireann*) of 1937 contains an equality clause in Article 40.1 which states: 'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.' In addition, the Constitutional Courts have held that some of the protections of the Constitution can be extended to non-citizens.²⁹⁰ To date however, the Irish Supreme Court has been disinclined to rigorously enforce the equality provision.²⁹¹ The Constitution Review Group has stated that the provision 'has too frequently been used by the courts as a means of upholding legislation by reference to questionable stereotypes, thereby justifying discrimination.'²⁹²

Even in this handful of States whose constitutions do not empower courts to prohibit discrimination on grounds of nationality, however, courts may rely on the international instruments to which these States are parties, as recalled above; moreover, where constitutional equality clauses prohibit discrimination on grounds of ethnic origin or on grounds of membership of a national minority (often referred to as 'nationality' in Central and Eastern European States), differences of treatment based on nationality (understood as citizenship) could be challenged as indirectly resulting in such forms of ethnic discrimination.

20 other Member States have equality clauses that allow courts to prohibit, in varying degrees, discrimination on grounds of nationality.²⁹³ In six of these States, in fact, courts – generally constitutional courts – have

284 In Bulgaria, Article 6(2) of the 1991 Constitution bans discrimination on grounds of, exhaustively, race, national origin, ethnicity, sex, origin, religion, education, conviction, political affiliation, personal or public status, and property status – indeed, the Constitution explicitly allows differences in treatment on grounds of nationality, stating that foreigners who reside in Bulgaria do not have the rights for which the laws require Bulgarian nationality (Article 26(2)). It would appear, however, that the Executive is not allowed to use the criterion of nationality in the absence of a law adopted in Parliament specifically allowing this.

285 Article 45 of the Constitution of Malta prohibits discrimination on grounds of, *inter alia*, 'place of origin', however nationality as such is not included in the exhaustive list of prohibited grounds of discrimination. The Maltese courts have confirmed that the list of prohibited grounds of discrimination cannot be extended beyond the exhaustive list of Article 45: see *Dr Walter Cuschieri et vs. The Hon. Prime Minister et noe*, judgment of the Constitutional Court of 30 November 1977.

286 The 1991 Constitution (as amended by Law No 429/2003) only protects Romanian nationals from discrimination, and uses a closed list of prohibited grounds.

287 Lov 1953-06-05 No. 169 Danmarks Riges Grundlov.

288 Danish Law weekly 2002 page 1789 Supreme Court (UfR. 2002. 1789.H).

289 Bill no. 329 of 14 May 1997 provided that, in future, only persons of Danish nationality and persons from EU member countries may obtain a licence as a taxicab owner. The bill was changed in 1999 so that Danish nationality is now no longer a condition for obtaining such a licence.

290 *The State (Nicolaou) v. An Bord Uchtála*, [1966] IR 567.

291 Casey, *Constitutional Law in Ireland*, 3rd Ed Dublin 2000.

292 Government of Ireland, (1996) *Report of the Constitution Review Group*, at 228.

293 In contrast to the other EU Member States, the United Kingdom has no written constitution; the protection from discrimination is well established, however, through the common law. The situation of the United Kingdom is discussed below in greater detail.

explicitly confirmed that the constitution should be interpreted to prohibit such discrimination. In Croatia, for instance, the Constitutional Court confirmed that the provisions of the 1990 Constitution, which protect against discrimination using an open-ended list of prohibited grounds (Art. 14(1)) and which provide a general guarantee of equality before the law (Art. 14(2)), could offer protection from discrimination on grounds of nationality.²⁹⁴ In France, Article 1 of the Constitution of 1958 states that: 'France guarantees equality before the law to all citizens without distinction based on origin, race or religion.' The Declaration of the Rights of Man and of the Citizen of 1789, which is also part of the 'constitutional block' of texts whose principles are considered binding, states in Article 1: 'Men are born and remain free and equal in rights. Social distinctions can have no other basis than common utility.' The list of discriminatory criteria listed in the Constitution has not been deemed to be exhaustive by the Constitutional Council, who decided that the list of grounds was open and subject to evolution.²⁹⁵ Moreover, the supreme administrative court, the Council of State (*Conseil d'Etat*), has stated on various occasions that it would be unacceptable, in the recognition of pensioners' rights, to draw differences of treatment based exclusively on the grounds of nationality.²⁹⁶ In Germany, the Federal Constitutional Court confirmed that the general equality clause of Article 3.1 of the German Basic Law (*Grundgesetz*) extends to the prohibition of discrimination on grounds of nationality, in a case concerning exclusion on grounds of nationality from state education benefits under the Bavarian State Education Benefits Act.²⁹⁷ Similar developments have occurred in Italy, in Portugal²⁹⁸ and in Slovenia.²⁹⁹

In most EU Member States, the constitution includes an equality clause that contains an open-ended list of prohibited grounds of discrimination, however courts still have to confirm that this will make it possible to assess differences of treatment based on nationality: this is the case in Cyprus, the Czech Republic, Estonia, Finland, Greece,³⁰⁰ Hungary, Latvia, Lithuania,³⁰¹ Luxembourg, the Netherlands, Poland, Spain, Slovakia³⁰² and Sweden. (The Czech Republic is in a rather distinct situation, however, since its

294 See case no. U-III-1290/03 (decision of 19 June 2009).

295 Mélin-Soucranian, *Le principe d'égalité dans la jurisprudence du Conseil constitutionnel*, *RFDA*, Economica, 1997, 92. *Conseil d'Etat, Sur le principe d'égalité*, La documentation Française, 1998.

296 See *Conseil d'Etat*, 30 November 2002, No. 212179, 212211 *Diop*; and see the references to the relevant jurisprudence in Case C-336/05, *Ameur Echouikh*, Order of the Court of 13 June 2006, paragraph 65.

297 BVerfG, judgment of 07.02.2012, 1 BvL 14/07.

298 In Portugal, although only Art. 59(1) explicitly refers to the prohibition of discrimination on grounds of citizenship and does so in the limited context of the enjoyment of core labour rights, the Constitutional Court has considered that differences of treatment on grounds of nationality and immigration status (access to social aid (social insertion income RSI) conditional for foreigners upon having three years of lawful residence within Portugal) could be struck down if they were disproportionate: see Ruling No. 296/15 of 25 May 2015.

299 Constitutional Court Decision No. U-I-371/96 of 23.9.1998 (Official Gazette No. 68/1998) (concerning the 1996 Redress of Injustices Act, which reserved certain rights to Slovenians).

300 It could be argued in fact that Greece should be classified amongst EU Member States where the courts have explicitly prohibited discrimination on grounds of nationality, despite the ambiguous position of the Constitution in this regard. In addition to a reference to the general principle of equality in Article 4.1, the Constitution provides in Article 25 that 'the rights of man as an individual and as a member of society and the principle of the constitutional welfare state', which the State must guarantee, must be complied with not only by the agents of the State but also in relationships between private parties. The Court of First Instance of Thessalonica in its Decision no. 5251/2004 declared that Article 25 of the Greek Constitution entitles foreigners to equal treatment as that right is granted to nationals in the field of human rights, explaining that the phrase 'human rights' includes foreigners who reside in Greece as well as nationals. These rights include not only the respect of human dignity and the free development of personality but also the right to work and equal pay as well as to welfare benefits, namely all the rights that nationals enjoy. The same decision recognised that, in matters related to principles of equality and human rights, reciprocal recognition of these rights by the foreign national's state of origin could not be required.

301 The situation in Lithuania is contested, however. Article 29 of the Constitution (adopted by referendum on 25 October 1992 and in force since 2 November 1992) declares that all people are equal before the law, the courts and other state institutions and officers. A person's rights may not be restricted in any way and s/he may not be granted any privileges on the basis of his or her sex, race, 'nationality' (understood as referring to membership of a national minority), language, origin, social status, religion, convictions or opinions. However, it also adds that 'no one may be granted any privileges on the grounds of [...] origin'.

302 Art. 12(2) of the 1992 Constitution prohibits discrimination on grounds, *inter alia*, of national or social origin (*národný alebo sociálny pôvod*), affiliation to a nation (*príslušnosť k národnosti*), or 'any other status'. The prohibition of discrimination, however, only applies in connection with the protection of fundamental rights and freedoms listed in the Constitution (Constitutional Court of the Slovak Republic, ref. No I. ÚS 17/99 of 22 September 1999).

Constitution³⁰³ lacks a specific provision prohibiting discrimination. A general anti-discrimination clause can be found in the Charter of Fundamental Rights and Freedoms,³⁰⁴ which prohibits discrimination in regard to basic rights and freedoms in respect of sex, race, colour, language, religion or belief, political or other orientation, national or social origin, adherence to national or ethnic minority, property, birth *or any other status*. The Charter forms part of the constitutional order, which has precedence over ordinary laws.)³⁰⁵

This comparison illustrates that most equality clauses contained in constitutions do not include nationality among the prohibited grounds of discrimination: this reflects the fact that nationality has only emerged in recent years as a suspect ground of differentiation. Yet, the open-ended list of grounds contained by these constitutions allows courts to include discrimination on grounds of nationality. They are encouraged to do so by the international human rights instruments referred to above,³⁰⁶ which are clearly moving towards the recognition of nationality as a suspect ground. In addition, while the fact that certain grounds of discrimination benefit from better protection than others does not constitute a violation of the international law of human rights *per se*, differences in treatment between different categories of persons as to the degree of protection they are afforded will only be acceptable if these differences are reasonably and objectively justified, which requires that they pursue a legitimate aim and that there exists a reasonable relationship of proportionality between the means employed and the aim sought to be realised.³⁰⁷

Since the United Kingdom does not have a written constitution – although there are a number of ‘constitutional conventions’ – it deserves specific comment. There is a general principle according to which legislation may not create ‘partial and unequal treatment as between different classes’.³⁰⁸ This general principle has a scope of application that goes beyond non-discrimination in the enjoyment of fundamental rights. As stated by Lord Steyn in a lecture that he gave on 18 September 2002 in honour of Lord Cooke of Thorndon: ‘The anti-discrimination provision contained in Article 14 of the European Convention is parasitic in as much as it serves only to protect other Convention rights. There is no general or free-standing prohibition of discrimination. This is a relatively weak provision. On the other hand, the constitutional principle of equality developed domestically by English courts is wider. The law and the government must accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which must be applied without fear or favour. Except where compellingly justified distinctions must never be made on the grounds of race, colour, belief, gender or other irrational ground. Individuals are therefore comprehensively protected from discrimination by the principle of equality. This constitutional right has a continuing role to play. The organic development of constitutional rights is therefore a complementary and parallel process to the application of human rights legislation.’³⁰⁹

303 1/1993Sb., *Ústava České republiky* [No. 1/1993 Coll., Constitution of the Czech Republic (Collection of Laws 1993, no.1 p. 001)].

304 2/1993 Sb., *Listina základních práv a svobod* [No.2/1993 Coll., the Charter of Fundamental Rights and Freedoms (Collection of Laws 1993, no. 1 p. 017)].

305 Newly approved constitutional laws must be in accordance with the Constitution and the Charter. Although the Charter is regarded as a part of the constitutional order, it is not possible to challenge the Constitution or any constitutional law for being inconsistent with the Charter. There are no provisions giving guidance on interpretation in the event of conflicts between the Charter and Constitution or constitutional laws. Public authorities, including the courts, are not permitted to apply any laws that contradict any of the basic rights guaranteed by the Charter.

306 For example, the Latvian Constitutional Court has adopted the doctrine that the norms of the Constitution have to be interpreted in the light of international human rights standards binding upon Latvia: Constitutional Court 30 August 2000 judgment in case No.2000-03-01, available in English at http://www.satv.tiesas.gov.lv/wp-content/uploads/2000/03/2000-03-01_Spriedums_ENG.pdf.

307 Eur. Ct. HR (GC), *Burden v. the United Kingdom*, Appl. No. 13378/05, judgment of 29 April 2008, para. 60.

308 *Kruse v. Johnson* [1898] 2 QB 91.

309 Quoted in *Pahalam Gurung and Others v. Ministry of Defence*, [2002] EWHC 2463 (Admin.) (leading opinion by Mr Justice McCombe), para. 36.

In the case of *ABCIFER v. Secretary of State for Defence*,³¹⁰ a claim had been filed by British civilian subjects who were neither born in the United Kingdom nor had a parent or grandparent who had been born there after it was announced that a scheme providing compensation to 'British civilians' who were interned as prisoners of war by the Japanese during the Second World War would benefit only those born in the UK or whose parents or grandparents had been born there. Although this constituted a clear case of a difference of treatment on grounds of national origin, the claim failed because the judge was unable to conclude that the imposition of a requirement of a link to the United Kingdom on the part of the civilian claimants was irrational and that the distinction should therefore be considered discriminatory. He pointed to the wide category of persons who were 'British subjects' in the 1940s but who were now nationals of independent states. He held that it was reasonable for the Government to take the view that the scheme should be limited to persons with some close connection with the United Kingdom and, following that, to determine the criteria for qualification. The *ABCIFER* case was distinguished in *Pahalam Gurung and Others v. Ministry of Defence*, however, where the Court (McCombe J.) decided that the exclusion of Gurkha soldiers from a scheme of compensation payments awarded to former prisoners of war held in Japanese prison camps in the Second World War was based on *de facto* racial distinctions, which were contrary to the common-law principle of non-discrimination.³¹¹ While no case could be identified where a difference of treatment on grounds of nationality was considered to be 'irrational' and thus to constitute discrimination, it cannot be excluded that such distinctions will be successfully challenged in the future under this common-law principle.

In sum, including the United Kingdom, 23 out of 28 EU Member States protect non-nationals from discrimination on grounds of nationality by rules that have been adopted at a constitutional level. This protection remains fragile in certain States, however. In Cyprus, for instance, the legislator is explicitly authorised to adopt specific legislation on foreigners, which may lead the courts to presume differences of treatment on grounds of nationality to be compatible with the Constitution. In most cases, moreover, protection from discrimination on grounds of nationality is the result of a judicial interpretation of generally worded equality provisions. Although there are no clear examples in the case law of some Member States of the general equality clauses of the relevant constitutions being interpreted in order to protect foreigners from nationality-based discrimination, such interpretation is nevertheless increasingly plausible when we take into consideration developments in international human rights law and the tendency of domestic courts to seek to interpret provisions of national law in accordance with the international obligations of the States of which they are an organ.

There is no doubt, for all these reasons, that the requirement of non-discrimination on the grounds of nationality has developed into a general principle of law which the Court of Justice of the European Union may rely upon in the future in order to identify the fundamental rights for which it ensures respect in the scope of application of EU law. Indeed, the general principle of equal treatment has already been accorded this status, as this comparison shows; protection from discrimination on grounds of nationality is part both of the international human rights instruments to which EU Member States are parties and of their common constitutional traditions. The implication is that, in implementing EU law, EU Member States may not establish differences of treatment on grounds of nationality unless they can provide proper justification for this, i.e. unless such distinctions are in pursuance of a legitimate aim and are necessary for the achievement of that aim. This may lead in the future to the extension of rights presently reserved to nationals of other EU Member States (citizens of the Union) to all non-nationals who are legally present on the territory of the EU Member State concerned.

310 [2002] EWHC 2119 (Admin).

311 [2002] EWHC 2463 (Admin.).

4.1.2 Prohibition of nationality-based discrimination in ordinary legislation

In at least seven Member States, domestic legislation implementing the Racial Equality Directive (alone or with the Employment Equality Directive) explicitly extends the prohibition of discrimination to discrimination on grounds of nationality:

- In Belgium, the 2007 Racial Equality Federal Act (Federal Act amending the Act of 30 July 1981 criminalising certain acts inspired by racism or xenophobia)³¹² defines nationality as a prohibited ground; a judgment of 26 March 2007 of the President of the First Instance Labour Court (*Tribunal du travail*) of Ghent in the case of *Caliskan Murat and Centre for Equal Opportunities and Opposition to Racism v. Delgouffe Yves and Euro-Lock* provides a good illustration of the use of this prohibition.³¹³ However, the nature of this prohibition is slightly more flexible than for the other grounds covered by the Act (alleged race, colour, descent, ethnic or national origin). Whereas for the latter grounds differences in treatment may only be justified in certain exhaustively enumerated situations and are otherwise subject to an absolute prohibition (Article 7 § 1), differences of treatment based on nationality may be justified if they seek to fulfil legitimate objectives by means which are both appropriate and necessary (Article 7 § 2, al. 1), unless this would be in violation of the prohibition of discrimination on grounds of nationality under EU law (Article 7 § 2, al. 2). As regards the measures adopted at sub-national level, all legislative instruments adopted by the Regions and Communities to ensure the implementation of the Racial Equality and Employment Equality directives also include such a prohibition, with one exception.³¹⁴
- In Bulgaria, the 2006 Protection Against Discrimination Act treats nationality in principle as a protected ground, banning all forms of discrimination based on it in all fields of life.³¹⁵ It makes a significant exception, however, for differential treatment based on nationality, which is provided for under primary legislation.³¹⁶ Executive and local government bodies, as well as private parties, are therefore not allowed to treat non-nationals differently based on their nationality, unless Parliament has authorised such treatment by law. Under the Protection Against Discrimination Act, both nationality and statelessness are included in the concept of nationality as a protected ground.³¹⁷
- In Finland, the initial Non-Discrimination Act, adopted in 2004 [*yhdenvertaisuuslaki* 21/2004], provided that ‘no-one shall be discriminated against on the basis of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or any other reason related to a person’ (section 6(1)). In the fields of employment and education, the Non-Discrimination Act thus prohibited discrimination also on the grounds of national origin and nationality.³¹⁸ Section 8 of the new Non-Discrimination Act of 2014 confirms this solution.³¹⁹
- In Ireland, the Employment Equality Act 1998-2015 specifically extends the prohibition of discrimination on the ground of race to include the ground of nationality, although different treatment on the basis of nationality is explicitly recognised as acceptable in relation to fees for admission or attendance

312 *Moniteur belge*, 30.5.2007.

313 In this case, the defendant firm Euro-Lock was found to be in violation of the Federal Anti-discrimination Act of 25 February 2003, applicable at the time, after it had refused to hire someone because of his national origin. This was held to be directly discriminatory by the President of the Labour Court of Ghent in an injunction procedure (*action en cessation*).

314 The exception concerns the implementation of the anti-discrimination directives in the area of vocational training – including vocational guidance, learning, advanced vocational training and retraining (*orientation, formation, apprentissage, perfectionnement et recyclage professionnel*) – for which the French-speaking Community (Communauté française) is competent on the territory of the Region of Brussels-Capital. Indeed, the Decree Cocof (Commission communautaire française) of 22 March 2007 on equal treatment between persons in vocational training (*Décret relatif à l'égalité de traitement entre les personnes dans la formation professionnelle*), implementing Directives 97/80/EC, 2000/43/EC, 2000/78/EC, 2002/207/EC and 2006/54/EC in this field in the Region of Brussels-Capital (*Moniteur belge*, 16 September 2008), prohibits discrimination only on grounds of ‘national and ethnic origin’ and not on the ground of nationality itself.

315 Cap. Amend. SG issue, No. 68 of 2006, Article 4(1).

316 Article 7(1.1).

317 Article 7(1.1) expressly exempts legal differences of treatment based on lack of nationality, as well as nationality.

318 For the Åland Islands, however, the Provincial Act on the Prevention of Discrimination does not prohibit discrimination on the basis of nationality.

319 Act 1325/2014, in force since 1.1.2015) [*Yhdenvertaisuuslaki*].

at any vocational or training course, where different treatment is permitted for citizens of Ireland or nationals of other Member States of the European Union;³²⁰ so does the Equal Status Act 2000-2015 as regards the prohibition of discrimination in access to goods and services (section 3(2)(h)), although with important exceptions concerning access to housing and access to education. In the past, nationality was also included among the prohibited grounds of discrimination in the Employment Equality Act 1998-2004 and the Equal Status Act 2000-2004.³²¹

- In the Netherlands, Article 1 of the General Equal Treatment Act (GETA) (*Algemene Wet Gelijke Behandeling*)³²² defines 'direct distinction' as 'distinction between persons on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or marital status.' The GETA thus prohibits discrimination on grounds of nationality. However, Article 2(5) GETA³²³ adds that this prohibition shall not apply if the distinction is based upon *generally binding rules* (i.e. statutory legislation and subordinate legislation passed by the administration, such as governmental decrees) or on *written or unwritten rules of international law*,³²⁴ nor does this prohibition apply where 'nationality' is a determining factor (e.g. nationality requirements imposed upon players for the national football team).³²⁵
- In Portugal, Law 7/2009 of 12 February 2009 adopting the new Labour Code implements Directives 2000/43 and 2000/78 in Article 2 (i) and (j).³²⁶ However, Article 24 of the new Labour Code extends the prohibition of discrimination in employment beyond the grounds listed in Article 19 TFEU by prohibiting direct or indirect discrimination *inter alia* on grounds of nationality. Article 3(2) of Law 18/2004 of 11 May 2004, which transposes the Racial Equality Directive into Portuguese law,³²⁷ also goes beyond the directive as it prohibits discrimination based on nationality and skin colour.
- In the United Kingdom, Section 9(1)(b) of the Equality Act 2010 (applicable to Great Britain) defines 'race' to include nationality, and nationality therefore receives the same level of protection as ethnicity, national origins and colour.

In at least four other Member States, although nationality is not explicitly listed among the prohibited grounds of discrimination in the domestic legislation implementing the Racial Equality and Employment Equality directives, the said legislation provides a non-exhaustive list of prohibited grounds of discrimination, thus allowing courts to extend the protection of the law to prohibit nationality-based discrimination:

- In Hungary, the Equal Treatment Act does not explicitly mention nationality as a prohibited ground of discrimination, however the list of prohibited grounds is open-ended, as it refers to 'grounds other than' those mentioned; it may therefore include nationality (i.e., citizenship).³²⁸ In case 56/2007. for example, the Equal Treatment Authority took the view that a financial services company had committed direct discrimination because it refused a loan to a Romanian citizen, arguing that the risks of non-repayment were too high.
- In Romania, Article 2 of Governmental Ordinance 137/2000 (implementing the 2000 directives) defines discrimination as: 'any difference, exclusion, restriction or preference based on race, nationality³²⁹, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age,

320 See section 6(2)(h) and section 12(7).

321 Section 3(2)(a-j) Equal Status Act 2000-2004 and section 6(2)(a-i) Employment Equality Act 1998-2004.

322 Staatsblad 1994, 230.

323 Article 2(5) GETA reads: 'The prohibition on discrimination on the grounds of nationality contained in this Act shall not apply: (a) if the discrimination is based on generally binding regulations or on written or unwritten rules of international law and (b) in cases where nationality is a determining factor.' This clause is generally understood in such a way that immigration law and nationality law in particular are exempted from equal treatment legislation.

324 See e.g. ETC Opinion 2002-61, 1998-81 and 1997-13.

325 See e.g. ETC Opinion 1996-77.

326 *Lei n.º 7/2009 de 12 de Fevereiro de 2009, aprova a revisão do Código do Trabalho*. Its text can be read at: <http://www.dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

327 *Lei n.º 18/2004 de 11 de Maio de 2004, transpõe para a ordem jurídica nacional a Directiva n.º 2000/43/CE do Conselho, de 29 de Junho, que aplica o princípio da igualdade de tratamento entre as pessoas, sem distinção de origem racial ou étnica, e tem por objectivo estabelecer um quadro jurídico para o combate à discriminação baseada em motivos de origem racial ou étnica.*

328 Article 8 Point t) of Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities (2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról).

329 The expression should be understood in this context as referring to national minorities or to a national minority ethnicity.

disability, chronic disease, HIV positive status, or *belonging to a disadvantaged group or any other criterion*, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the political, economic, social and cultural field or in any other fields of public life.³³⁰ This open-ended formulation suggests that differences of treatment on grounds of citizenship (nationality in the meaning in which the expression is used in this report) may be challenged under this legislation. Indeed, on the basis of Article 2(3) of GO 137/2000,³³¹ a Syrian citizen, B.A., filed a complaint with the national equality body – the *Consiliul Național pentru Combaterea Discriminării* [National Council for Combating Discrimination (NCCD)] – on the basis that the requirements established by Law 306/2005 on exercising the profession of medical doctor were discriminatory. This legislation restricted the right to obtain authorisation to freely practise medicine to Romanian citizens, citizens of the EU Member States, spouses or descendants of EU citizens and long-term residents (but not to spouses of Romanian citizens as in the case of the claimant). The NCCD concluded that such conditions amounted to indirect discrimination on grounds of nationality.³³²

- In the Slovak Republic, Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection Against Discrimination (the Anti-discrimination Act) contains an open-ended list of prohibited grounds of discrimination, thus implicitly allowing for the Act to be relied upon to challenge differences of treatment on grounds of nationality.
- In Slovenia, earlier legislation implementing the Racial Equality and Employment Equality directives relied on a non-limited list of prohibited grounds of discrimination: the Act Implementing the Principle of Equal Treatment, which entered into force on 7 May 2004 and was amended in 2007,³³³ ensured that equal treatment is guaranteed irrespective of personal circumstances such as gender, ethnicity, race or ethnic origin, religion or belief, disability, age, sexual orientation, or other personal circumstance.³³⁴ Article 6 § 1 of the 2002 Employment Relations Act, which entered into force on 1 January 2003 and was further amended on 29 October 2007,³³⁵ prohibited discrimination in employment on grounds of ethnicity, race or ethnic origin, national and social origin, gender, skin colour, state of health, disability, religion or belief, age, sexual orientation, family status, membership in a trade union, financial situation or other personal circumstance. The second-generation set of legislative measures implementing the EU equal treatment directives rely on the same technique: both the 2016 Protection against Discrimination Act (Article 1) and the 2013 Employment Relationship Act (Article 6(1)), in addition to prohibiting discrimination on grounds of ethnic origin (*nacionalnost*), prohibit discrimination on grounds of ‘any other personal characteristic’.

In the other EU Member States, the implementation of the Racial Equality and Employment Equality directives has not led to the inclusion of nationality among the prohibited grounds of discrimination. Sometimes the exclusion is explicit: in Croatia, the Anti-discrimination Act specifies (in Article 9(2)(9)) that placing a person in a less favourable position on the grounds of nationality (citizenship) in accordance with specific regulations does not constitute discrimination according to the meaning of the Act; in Lithuania, the 2003 Law on Equal Treatment explicitly exempts differences based on nationality from discrimination, apparently depriving courts from any freedom of interpretation in this regard;³³⁶ in Malta, both the Equal Treatment in Employment Regulations, Regulation 1(5)(a) of Legal Notice 461 of 2004 and the 2007 Equal Treatment of Persons Order, two major pieces of legislation implementing the Racial

330 Emphasis added.

331 Article 2(3) of GO 137/2000 prohibits ‘any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected grounds from para.(1) [race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic disease, HIV positive status, belonging to a disadvantaged group or any other criterion], unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary.’

332 NCCD, *B.A. v. Ministry of Health and the College of Doctors*, 31.08.2005.

333 This act was amended on 22 June 2007; the amendments entered into force on 25 July 2007.

334 *Zakon o uresničevanju načela enakega obravnavanja – Uradno prečiščeno besedilo* [Act Implementing the Principle of Equal Treatment – Official Consolidated Version], Official Journal of the Republic of Slovenia, No. 93/2007.

335 These amendments came into force on 28 November 2007.

336 Article 2(7) of the 2003 Law on Equal Treatment (No. 114-5115).

Equality and Employment Equality directives, explicitly state that differences of treatment on grounds of nationality are not covered by the prohibition of discrimination.

In other countries, the exclusion is more implicit, and may allow courts to gradually include the prohibition of nationality-based discrimination, even though the list of prohibited grounds is a limitative one. They may do so particularly by the interpretation of expressions such as 'national origin' or even 'race or ethnic origin', which of course these implementation measures must include. Austria and Sweden provide typical examples. In Austria, the Equal Treatment Act³³⁷ has been interpreted as prohibiting discrimination on grounds of nationality, although this ground is not explicitly mentioned: as further detailed below, differences of treatment on grounds of nationality are seen as a form of discrimination on grounds of ethnic origin. Similarly in Sweden, courts treat nationality-based discrimination as an instance of ethnic discrimination.³³⁸ In Greece also, the anti-discrimination law (Law n. 3304/2005) prohibits discrimination on grounds of race, ethnic origin, language, religion, political or other beliefs, sex, disability, age and sexual orientation, without mentioning nationality as such among the prohibited grounds of discrimination. It appears, however, that, in practice, nationality (or national origin) is not clearly distinguished from race and ethnic origin, as illustrated by decisions of the Supreme Administrative Court, namely n. 957/2003, 3057/1999, 3832/1992 and 3603/1991. Moreover, it may occur that, although the domestic legislation transposing the Racial Equality or Employment Equality directives does not itself prohibit discrimination on grounds of nationality, the equality bodies established as part of the implementation package do include the combating of such discrimination within their mandate: in Cyprus, the law establishing the Equality Body allows it to address alleged discrimination on grounds prohibited by national and international law, including Protocol No. 12 to the ECHR;³³⁹ similarly, in Estonia, whereas the 2008 Equal Treatment Act³⁴⁰ does not include nationality (*kodakondsus*) among the prohibited grounds of discrimination, the Chancellor of Justice may deal with claims alleging nationality-based discrimination as an ombudsman and equality body.³⁴¹

Moving beyond legislation adopted specifically to implement the EU Racial Equality or Employment Equality directives, a number of EU Member States prohibit discrimination on grounds of nationality in specific fields under their domestic legislation; some go beyond sector-specific legislation, for instance by defining discrimination as a criminal offence or, in the cases of Italy, Lithuania or Spain, by including a general prohibition on the use of nationality as a ground for differences in treatment in a law relating to the status of foreigners in the country. Here are some examples:

- In Austria, administrative penal law protects social groups characterised by their 'race', ethnicity, national origin (*nationale Herkunft*), religion and (since 1997) disability against disadvantage.³⁴² Although most authors still consider that the reference to national origin should be distinguished from a reference to nationality (citizenship), a reading of this provision in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination could lead to a different conclusion in the future.
- In France, where the legislation implementing the Racial Equality and Employment Equality Directives does not extend the prohibition of discrimination to discrimination on grounds of nationality,³⁴³ the criterion of nationality has been held in criminal cases to be a form of direct discrimination based

337 *Gleichbehandlungsgesetz des Bundes* (BGBl I Nr. 66/2004, last amended by BGBl. I Nr. 34/2015).

338 Göta Court of Appeal, Judgment 2010-02-25, case T 1666-09, Equality Ombudsman v. Skårets fastigheter AB.

339 The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law, N. 42(I)/ 2004.

340 *Võrdse kohtlemise seadus* (11 December 2008, RT I 2008, 56, 315).

341 Chancellor of Justice Act (*Õiguskantsleri seadus*), 25 February 1999, RT I 1999, 29, 406.

342 Article III par. 1 lit. 3 Introductory Law to the Administrative Procedures Code 1925 [*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1925*, EGVG]. Until 1997 the offence covered only public disadvantage. Since 1997 also non-public disadvantage is an offence (Federal law Gazette I 63/1997).

343 See *Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*

on origin as the Criminal Code refers to discrimination based on the link with a nation,³⁴⁴ while the Labour Code also contains a prohibition of discrimination on grounds of nationality.³⁴⁵ Similarly, Article 158 of the Law of 17 January 2002 amended Article 1, para. 2, of Law No. 89-462 of 6 July 1989 on relations between landlords and tenants to prohibit discrimination in rented housing, referring to the same list of grounds as Art. 225-1 of the Penal Code. There have also been some interesting developments in case law, showing increased protection from differences of treatment on grounds of nationality. A decision adopted on 18 December 2007 by the *Conseil d'Etat* (the highest administrative court) is worth mentioning in this regard. By ministerial instruction of 28 September 2007, the Minister of Foreign Affairs granted consular and diplomatic authorities abroad the ability to refuse to register civil partnerships (PACS) between French nationals and foreigners, thereby preventing these couples from prevailing themselves of the corresponding spousal residential rights in France. This instruction was adopted on the ground that same-sex couples were prohibited by law in certain countries and in consideration of the fact that registration of the PACS might put the persons concerned at risk in their country of residence. The *Conseil d'Etat* quashed this ministerial instruction on the ground that the alleged risks were more related to the spouses' cohabitation than to the registration of their partnership, and that the institution of a differential practice according to whether the two spouses were of French nationality or one was of foreign nationality would be contrary to the principle of equality. That is not to say, of course, that differences of treatment on grounds of nationality will necessarily be judged to constitute discrimination: they may be allowed, as long as they may be objectively and reasonably justified and they respect the principle of proportionality.³⁴⁶ But this decision by the *Conseil d'Etat* is by no means isolated. For example, a judgment of 16 March 2005 took the view that, since Article L312-1 of the Monetary and Financial Code, which defines the conditions governing the right to a bank account, does not foresee any obligation to prove legal residence in France before opening a bank account, the *Banque de France* could not be authorised to refuse illegal and non-resident

- 344 See Article 225-1 of the Criminal Code as amended by Law n°2006-340 of 23 March 2006 (Article 13), JORF 24 March 2006: '*Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur sexe, de leur situation de famille, de leur grossesse, de leur apparence physique, de leur patronyme, de leur état de santé, de leur handicap, de leurs caractéristiques génétiques, de leurs moeurs, de leur orientation sexuelle, de leur âge, de leurs opinions politiques, de leurs activités syndicales, de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée*'. [Any discrimination made between natural persons for reason of their origin, sex, family situation, pregnancy, physical appearance, family name, state of health, disability, genetic characteristics, lifestyle, sexual orientation, age, political opinions, trade union activities or their membership or non-membership, real or supposed, of an ethnic group, nation, race or certain religion, amounts to discrimination.]
- 345 See Article 1132-1 of the Labour Code (Code du travail), as amended by Article 6 of *Loi n° 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*: '*Aucune personne ne peut être écartée d'une procédure de recrutement ou de l'accès à un stage ou à une période de formation en entreprise, aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte, notamment en matière de rémunération, (...), de mesures d'intéressement ou de distribution d'actions, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat en raison de son origine, de son sexe, de ses moeurs, de son orientation sexuelle, de son âge, de sa situation de famille ou de sa grossesse, de ses caractéristiques génétiques, de son appartenance ou de sa non-appartenance, vraie ou supposée, à une ethnie, une nation ou une race, de ses opinions politiques, de ses activités syndicales ou mutualistes, de ses convictions religieuses, de son apparence physique, de son nom de famille ou en raison de son état de santé ou de son handicap*'. [No person may be excluded from a recruitment procedure or from access to a placement or a period of training in a company, no employee may be disciplined, dismissed or subjected to a discriminatory measure, direct or indirect, in particular regarding remuneration, (...) from measures of profit-sharing or share distribution, training, redeployment, appointment, qualification, classification, career promotion, or change or renewal of his contract for reason of his origin, sex, lifestyle, sexual orientation, age, family situation or pregnancy, genetic characteristics, membership or non membership, real or supposed, of an ethnic group, nation or race, political opinions, trade union or mutualist activities, religious convictions, physical appearance or family name or for reason of his state of health or disability.]
- 346 See, e.g., CE, 30 October 2001, no 204909, Association française des sociétés financières: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008016670&dateTexte=>. The *Conseil d'Etat* quashed a deliberation of the National Commission on Data Collection and the Protection of Personal Data (CNIL) of 22 December 1998, which had forbidden, on grounds of discrimination, the use of a person's nationality as a criterion in credit assessments. The *Conseil d'Etat* took the view that, as long as nationality was merely one element in an automatic calculation that did not itself determine a credit decision made by a financial institution, the criterion of nationality was not discriminatory under the terms of Article 13 EC and the Criminal Code. Nationality may be relevant as to the likelihood of a debtor leaving the country and, as a result, failing to repay a loan. It is therefore an admissible criterion and applicants for a loan may lawfully be required to provide it.

non-nationals the right to open a bank account.³⁴⁷ The *Conseil d'Etat* also annulled Articles 4 and 5 of the Decree of 27 August 2004 modifying the decree of 27 May 1999 and Article 2 of the Decree of 27 August 2004, since these provisions imposed a condition of nationality on the rights to be elected and to vote in the Chamber of Commerce, restricting these rights to the holders of citizenship of France or another EU Member State.³⁴⁸

- In Germany, ordinary legislation sometimes prohibits discrimination including nationality as a forbidden ground. According to Section 75.1 of the Work Constitution Act (*Betriebsverfassungsgesetz*), employers and work councils are under an obligation to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities or attitudes, sex or sexual identity.³⁴⁹ Section 27.1 of the Law on Bodies of Executives (*Sprecherausschussgesetz*) contains an equivalent provision for executives. Section 67 of the Federal Employee Representation Law (*Bundespersönalvertretungsgesetz*) obliges employers and employees in the public sector to ensure that all employees are treated in conformity with the principles of law and fairness, and in particular that nobody is discriminated against because of race or ethnic origin, parentage or other origin, nationality, religion or belief, disability, age, political or union activities, attitude, sex or sexual identity.³⁵⁰ There are laws which either allow public authorities to act against certain forms of discrimination in the private sector or require equal treatment of clients in specific market segments where specific market conditions apply. For example, insurance premiums must not be calculated on the basis of nationality or ethnic origin.³⁵¹ In addition, unequal treatment on the basis of nationality can be considered a breach of the general provisions of private law.
- In Greece, Presidential Decrees nos. 358/1997 and 359/1997 confer equal employment rights on Greek citizens and all foreign nationals legally working in Greece without discrimination, racial or otherwise; in addition, it has been inferred from Article 4 of the Civil Code, which stipulates that aliens enjoy the same civil law rights as Greek nationals, that aliens legally employed or working in Greece are subject to Greek labour law according to the same conditions as Greek nationals. More recently, Law 4356/2015 on civil partnership, the exercise of rights and penal and other provisions³⁵² has made it a criminal offence to refuse to provide goods or services, *inter alia*, on grounds of race, colour or national or ethnic origin. This may be understood to prohibit differences of treatment on grounds of nationality; it was in fact adopted in response to the practice of Golden Dawn activists who distributed food supplies upon presentation of an identity document proving that the beneficiary was a Greek orthodox.
- In Ireland, the Unfair Dismissals Act 1977-1993 – although not specifically outlawing discrimination on grounds of nationality³⁵³ – was occasionally used by the courts in order to protect non-nationals from unfair practices by employers. In *17 Complainants v. Eamonn Murray t/a Kilnaleck Mushrooms*,³⁵⁴ the complainants were employed as mushroom pickers. In January 2006 they left their employment due to a dispute and contacted their local SIPTU office.³⁵⁵ The Employment Appeals Tribunal determined that the employees had been unfairly dismissed because they had joined a trade union. The dismissals were held to be blatantly unfair due to the employees being non-nationals with limited English who had been brought to Ireland specifically to pick mushrooms. The Tribunal awarded the maximum award of two years' salary, EUR 26 000, in addition to varying amounts of compensation for lack of notice and annual leave/holiday pay to the 13 employees who proceeded with their claims.

347 *Tribunal d'arrondissement de Paris*, 16 March 2005, No. 0502805/9 (www.gisti.org/doc/actions/2005/bnf/arret.html).

348 *Conseil d'Etat*, no 274664, 18/07/2006, GISTI, AJDA n° 33, 09/10/2006, p. 1833-1838 (<https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008254273>).

349 *Rasse, ethnische Herkunft, Abstammung oder sonstigen Herkunft, Religion, Nationalität, Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität*.

350 *Rasse, ethnische Herkunft, Abstammung oder sonstige Herkunft, Nationalität, Religion oder Weltanschauung, Behinderung, Alter, politische oder gewerkschaftliche Betätigung oder Einstellung, Geschlecht, sexuelle Identität*.

351 Section 81e Insurance Supervision Law (*Versicherungsaufsichtsgesetz*).

352 OJ 181 A/24.12.2015.

353 Section 6(2) prohibits discrimination in respect of union membership, religious affiliation, political opinions, taking an action against the employer, race, colour, sexual orientation, age or membership of the Traveller community.

354 UD155/200.

355 SIPTU; The Services, Industrial, Professional and Technical Union is one of the largest trade unions in Ireland.

- In Italy, while Decree 2003/215 transposing Directive 2000/43/EC does not extend to differences of treatment on grounds of nationality, Article 43 of the 1998 Immigration Act³⁵⁶ prohibits direct and indirect discrimination on grounds of race and colour, ethnic origin, 'religious beliefs and practices' (*le convinzioni e le pratiche religiose*), and nationality (national origin). The antidiscrimination provisions of the 1998 Immigration Act were relied upon by a court of first instance in Milan to declare void a regulation on public housing adopted by the city council that gave priority to Italian citizens.³⁵⁷ On 19 May 2005, the court of first instance of Padua (*Tribunale di Padova*) issued an order (*ordinanza*) against a company which owned a bar as it was proved that higher prices were applied to persons of non-Italian origin as a way of decreasing the number of clients perceived as *extracomunitari* ('non community citizens', a term usually used to refer to immigrants of non-Western or 'remote' origin). The order was issued on the basis of the summary procedure foreseen under the 1998 Immigration Act.³⁵⁸
- In Lithuania, Article 2 of the 2002 Labour Code lists among the principles that regulate employment relations the 'equality of subjects of employment law irrespective of their sex, sexual orientation, race, ethnic origin, language, social origin, citizenship and social status, religion, marital and family status, age, opinions or views, membership of a political party or public organisation and factors unrelated to the employee's professional qualities.' Foreigners are guaranteed a right to equal treatment under Article 3 of the Law on the Legal Status of Aliens in the Republic of Lithuania,³⁵⁹ which states that foreigners are equal before the law regardless of their race, sex, colour, language, religion, political or other convictions, national or social origin, the fact that they belong to a national minority, their property, place of birth or any other status.
- In Luxembourg, Article 454 of the Penal Code states: 'any difference of treatment applied to natural persons on grounds of their racial or ethnic origin, skin colour, sex, sexual orientation, family situation, age, state of health, disability, customs, political or philosophical opinions, trade union activities, their membership, actual or supposed, of an ethnic group, nationality, race or specific religion shall constitute discrimination.' However, differences of treatment in relation to recruitment for employment on grounds of nationality are permissible where being of a specific nationality constitutes a determining condition for employment or the exercise of a professional occupation, in accordance with statutory provisions regarding the public service, regulations applicable to the exercise of certain professions and provisions on the right to work.
- In Portugal, discrimination based on nationality is specifically prohibited in labour law by the Labour Code³⁶⁰ and in general by Article 3(2) of Law 18/2004 of 11 May 2004.
- In Spain, Article 23.2 of Organic Law 4/2000³⁶¹ defines 'indirect discrimination' in the sphere of immigration and treats 'nationality' and 'race or ethnic origin' as equivalent when prohibiting discriminatory acts 'against a foreign citizen merely because of his condition as such or because he belongs to a particular race, religion, ethnic group or nationality.' Moreover, the Criminal Code (Organic Law 10/1995) contains a number of offences of violation of fundamental rights, including Article 314, which defines 'serious discrimination in a public or private workplace against any person by reason of his ideology, religion or beliefs, ethnic group, race or nationality, gender, sexual orientation, family background, illness or disability, legal or trade-union representation of workers, family relationship with

356 Legislative Decree 286/1998, Consolidated text of provisions on the regulation of immigration and the status of foreign citizens (*Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*). The 1998 Act is studied in detail by G. Scarselli, 'Appunti sulla discriminazione razziale e la sua tutela giurisdizionale', in *Rivista di diritto civile*, 2001, I, pp. 804 ff., and from the point of view of religion by P. Cavana, 'Pluralismo religioso e modelli di cittadinanza: l'azione civile contro la discriminazione', in *Il diritto ecclesiastico*, 2000, I, pp. 165 ff.

357 *Tribunale di Milano, sez. I, sentenza 20/21 3.2002 n. 3624*, published in *Diritto, Immigrazione e Cittadinanza*, 4, 2002, with a commentary by Alessandro Simoni.

358 See http://www.unar.it/unar/portal/wp-content/uploads/2014/01/EROGAZIONE_SERV_PUBBL_ESERCIZI_Tribunale_di_Padova_ord_6_ottobre_2005.pdf.

359 *Lietuvos Respublikos įstatymas 'Dėl užsieniečių teisinės padėties'*, Official Publication *Valstybės žinios*, 1998, No. 115-3236.

360 The new Labour Code explicitly states that discrimination on the grounds of nationality is forbidden (Article 24(1)). In addition, the same provision refers to equal treatment in access to employment and work. Article 4 of the same code in principle grants foreign workers equal rights to Portuguese citizens, provided they are legally permitted to work in the country.

361 Organic Law 4/2000 (Ley Orgánica 4/2000, 11 enero, sobre derechos y libertades de los extranjeros en España y su integración social).

other employees, or use of any of the official languages within the State of Spain...' as a punishable offence.

- In the United Kingdom, the 1997 Race Relations (NI) Order (Article 5) (applicable to Northern Ireland) defines 'racial grounds' as grounds of race, colour, nationality³⁶² and ethnic or national origins. Thus, under Northern Ireland legislation, discrimination on grounds of nationality – across the full scope of the RRO – is prohibited in the same manner as race discrimination was before the 2000 Race Directive was implemented.³⁶³ The original (pre-2000 Directives) definition of indirect discrimination included in RRA section 1(1)(b) therefore continues to apply where discrimination on grounds of nationality is alleged. According to this definition:

'1(1)(b) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but –

- a) Which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- b) Which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
- c) Which is to the detriment of that other because he cannot comply with it.'

The legislative prohibition of nationality-based discrimination which pre-dated the implementation of the 2000 directives has been left untouched, but it lacks the enhanced protection given against racial discrimination by the 2000 Racial Equality Directive and the 2003 RRO (which includes a more expansive definition of indirect discrimination, a more onerous objective justification test and a tighter set of exceptions). Protection against discrimination on the basis of nationality is therefore currently less developed than protection against discrimination on the basis of race, ethnicity or national origin.

In addition, as regards differences of treatment on grounds of nationality in the United Kingdom, Section 191 of the Equality Act 2010 and Article 40(1) of the RRO allow such differences to be established where this is done under statutory authority (to comply with primary or secondary legislation or as a requirement imposed by a Minister by virtue of an enactment). The UK has strengthened the exceptions in Schedule 23 to the Equality Act 2010 and RRO Article 40(2), which permit discrimination not only on grounds of nationality but also in relation to a person's place of ordinary residence or to the length of time a person has been present in the UK, if this is done under statutory authority or in pursuance of any arrangements made or approved by a Minister of the Crown or in order to comply with any condition imposed by a Minister of the Crown. This exception applies in relation to legislation passed at any time.

c) Existing differences of treatment on grounds of nationality

Whether stipulated under domestic constitutions or ordinary legislation, the prohibition of discrimination on grounds of nationality does not imply that any difference of treatment on that basis will necessarily be found invalid; only those differences in treatment which cannot be objectively or reasonably justified as pursuing a legitimate objective and as proportionate are treated as discriminatory. As we have seen, this is also the position of human rights bodies in general and in particular of the European Court of Human Rights, the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination. Indeed, in a number of Member States, certain differences of treatment on grounds of nationality are

362 S.78/Article 2 defines 'nationality' as including citizenship.

363 However, the legislative prohibition on nationality-based discrimination lacks the enhanced protection given against racial discrimination by the 2000 Racial Equality Directive and the 2003 Race Relations Order, which include a more expansive definition of indirect discrimination, a more onerous objective justification test and a tighter set of exceptions. Protection against nationality-based discrimination is therefore currently less developed than protection against discrimination on the basis of race, ethnicity or national origin.

stipulated in the Constitution itself. In Belgium, where the Constitution prohibits discrimination on any ground (therefore including nationality), exceptions as regards differences of treatment on grounds of nationality concern the exercise of political rights (Article 8 al. 2 of the Constitution) and access to public service employment (Article 10 of the Constitution). In Cyprus, although Part II of the Constitution states explicitly that fundamental rights are guaranteed to all individuals, with no distinction or differentiation between citizens and non-citizens of the Republic, Article 32 of the Constitution adds that nothing in that Part 'shall preclude the Republic from regulating by law any matter relating to aliens in accordance with International Law'. The Estonian Constitution also explicitly permits differential treatment of non-citizens in certain social fields (Articles 28, 29, 31).

Aside from constitutional provisions, differences of treatment on grounds of nationality are quite common even in fields other than access to public service jobs or the exercise of political rights. For instance, in Estonia a non-citizen cannot be a sole proprietor who provides security services, a security officer or head of an in-house security unit (Article 22(2) of the Law on Security Services).³⁶⁴ In France, the law reserves access to specific professions and jobs (about 7 000 named jobs), subjecting them to conditions of citizenship, whether national or European Union; this concerns in particular access to jobs in the public service (Article 5 of Law no. 83-634 of 13 July 1983).³⁶⁵ In Germany, differences in treatment between nationals and non-nationals exist in various spheres such as residence rights, work permits and some social security rights.³⁶⁶ Some professions are open only to Germans and specified groups of non-Germans such as EU citizens and stateless people.³⁶⁷ In Latvia, all employment in the civil and intelligence services as well as military service is restricted to Latvian citizens; the Law on the Bar restricts access to the legal profession to Latvian citizens and – recently – also to EU nationals admitted to the bar in other EU Member States; Article 1 of the transition provisions of the Law on State Pensions provides for different calculations of pensions for Latvian citizens and non-citizens as well as for foreigners and stateless persons who worked outside Latvia before 1991. In Lithuania, citizenship of the country is required to join the civil service, intelligence services, police and armed forces. In Luxembourg, Article 457 § 3 of the Penal Code as amended by the Law of 28 November 2006 explicitly allows differentiation of treatment in relation to recruitment for employment on grounds of nationality where being of a specific nationality constitutes a determining condition for employment or the exercise of a professional occupation in accordance with statutory provisions regarding the public service, with regulations applicable to the exercise of certain professions and with provisions on the right to work. In Poland, a number of professional occupations are reserved to Polish citizens or nationals of other EU Member States: they include public notaries, medical doctors and two categories of teachers – nominated and certified (*mianowany* and *dplomowany* respectively). Similarly, a range of professions are reserved to nationals in the Slovak Republic.³⁶⁸ In the United Kingdom, the Equality Act 2010 (Sched. 22) and RRO (Article 71) permit rules which restrict employment in the civil service or by prescribed public bodies

364 *Turvaseadus*, RT I 2003, 68, 461. An in-house security unit is a unit of an enterprise, state authority or local government authority which guards property owned or possessed by the enterprise, state authority or local government authority (Article 18(1)).

365 See Groupe d'études et de lutte contre les discriminations (GELD), publication no 1. on legal discrimination and jobs inaccessible to foreigners (2000) and, for the text of the law of 1983, see <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068812&dateTexte=20090823>. However, the list of professions which are not accessible to third-country nationals has been shortened since the date of publication by the GELD.

366 Some examples: the federal scheme to support educational costs through grants is open not only to Germans, but also to non-Germans of various legal statuses as well as persons entitled to asylum, refugees, long-term legal residents and persons enjoying exceptional leave to remain; see Section 8.1 No. 2 – No. 7; 8.2 Federal Law on Promotion of Education (*Bundesausbildungsförderungsgesetz*). See also Sections 63.1 and 63.2 of the Social Code III (*Sozialgesetzbuch III*).

367 See Section 3.1 No. 1 of the Federal Medical Regulation (*Bundesärzteordnung*): admission to medical practice only for German citizens according to Article 116 of the Basic Law (*Grundgesetz*), citizens of EU Member States, contractual parties to the Treaty on the European Economic Area, and other contractual partners in this respect or stateless people; there are similar regulations in other areas, for example pharmacists, see Section 2.1 Nr. 1 of the Law on Pharmacies (*Apothekengesetz*); Section 4.2 No. 2 of the Law on the Trade of Chimney Sweeps (*Gesetz über das Schornsteinfegerwesen*): permission to work as a chimney sweep is only granted to German citizens according to Article 116 of the Basic Law (*Grundgesetz*), citizens of EU Member States, and contractual parties to the Treaty on the European Economic Area.

368 Highly placed state officials, prosecutors, constitutional judges, judges, police officers, customs officers, members of the fire and rescue service, members of the mountain rescue service, and professional soldiers.

to persons of particular birth, nationality, descent or residence; in addition, while the Government had indicated its intention to review this restriction, there remains a long list of 'reserved posts' in the civil service that are open to UK citizens only.

4.2 Differences of treatment on grounds of nationality as indirect discrimination on grounds of race or ethnic origin, or religion or belief

A distinct question is whether domestic legislation prohibiting discrimination on grounds other than nationality – particularly on grounds of race or ethnic origin, or on grounds of religion or belief – extends, or might be interpreted to extend, to differences of treatment on grounds of nationality where this may amount to indirect discrimination on these other grounds. As we have seen, in their implementation of the Racial Equality Directive and of the Employment Equality Directive, only a minority of EU Member States have extended protection from discrimination on grounds of race or ethnic origin or on the other grounds listed in Article 19 TFEU to nationality-based discrimination: seven Member States have done so explicitly, and such an extension seems a realistic possibility in four other States since the legislation implementing the directives in these States provides an open list of prohibited grounds of discrimination. In this respect, most EU Member States have implemented the directives *a minima*, not going beyond their minimal requirements as regards the list of grounds protected.

Sometimes, race and ethnic origin and nationality are used quasi interchangeably in case law. In Belgium, in the judgment of 26 March 2007 in the case of *Caliskan Murat and Centre for Equal Opportunities and Opposition to Racism v. Delgou e Yves and Euro-Lock*, the President of the First Instance Labour Court (*Tribunal du travail*) of Ghent found that the defendant had violated the Federal Anti-discrimination Act because they had refused to hire a Turkish national, in the language of the Court, 'because of his ethnic origin *and/or* nationality'.³⁶⁹ This was held to be directly discriminatory by the President of the Labour Court of Ghent in an injunction procedure (*action en cessation*). Both ethnic origin and nationality were at stake in this case.

The assimilation of nationality to race or ethnic origin is also common in situations where the foreign nationality means a greater vulnerability to abuse, due to the precarious right to reside in the host country, or – even more suspect – due to the fact that the individual concerned is irregularly staying on the territory and thus has reasons to fear expulsion. Such was the background of the *Dos Santos* case presented to the French Court of Cassation in 2011,³⁷⁰ where a woman originating from the Cape Verde Islands and illegally residing on French territory was hired by a couple as a domestic employee to take care of their house and children over a period of nine years. The Court of Appeal ordered the couple to pay EUR 50 000 in damages for discrimination on the ground of origin. The Court of Cassation rejected the petition of the defendants alleging absence of comparative evidence to establish discrimination and reiterated that evidence of discrimination did not require comparative evidence. The abuse related to the exploitation of the claimant's predicament connected with her status on French territory, which resulted in a negation of her legal and contractual rights. It was a detrimental situation in comparison with the situation of employees benefiting from the protection of labour law, and resulted in indirect discrimination on the ground of origin. Given evidence regarding her working conditions and the weekly number of hours she worked, the Court of Cassation considered that the claimant was entitled to claim the highest level of employment under the collective agreement for domestic workers in order to calculate the wages owed by her former employer, as well as non-material damages. Similarly, in Ireland, the case of *17 Complainants v. Eamonn Murray t/a Kilnaleck Mushrooms*³⁷¹ described above applied the Unfair Dismissals

369 Labour Court of Ghent, *Caliskan Murat and Centre for Equal Opportunities and Opposition to Racism v. Delgou e Yves and Euro-Lock*, 26 March 2007, available via the following link: <http://unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-travail-de-gand-selon-les-formes-du-refere-26-mars-2007>.

370 Court of Cassation, 3 November 2011, *Dos Santos*, n° 10-20765, <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqlid=1975217984&fastPos=1>.

371 UD155/2006.

Act 1977-2015 – although not specifically outlawing discrimination on grounds of nationality³⁷² – in order to protect non-nationals from unfair practices by employers, as in the *Dos Santos* case before the French courts, despite the fact that it was not easy to disentangle ethnicity-based discrimination from discrimination based on nationality and the complainants' precarious residency status, both of which favoured exploitative conditions of employment. The complainants were employed as mushroom pickers.

In certain cases, the prohibition of indirect discrimination on grounds of race or ethnic origin or on grounds of religion or belief will extend to situations where nationality is used as a proxy for race, ethnicity or religion or belief, and where, therefore, differences of treatment on grounds of nationality will be found in violation of legislation prohibiting discrimination on those grounds. For instance, in a deliberation of 18 September 2006,³⁷³ the HALDE (the *Haute Autorité de la Lutte contre les Discriminations et pour l'Égalité*, the French equality authority at the time) took the view that the condition of French nationality should not be set for access to a discount card for families of three children or more, since this would constitute indirect discrimination on grounds of race or ethnic origin, contrary to the requirements of the Racial Equality Directive. The HALDE therefore recommended that this condition be removed from the existing regulations. Indeed, as was remarked by an Irish court, positive duties to accommodate the specific needs of non-nationals may be required in order to ensure that they are not placed at a disadvantage, for instance in disciplinary proceedings. In *Campbell Catering Ltd., v. Rasaq*,³⁷⁴ the Labour Court highlighted the difficulties faced by migrant workers, and stated:

'It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with difficulties of language and culture. In the case of disciplinary proceedings, employers have a positive duty to ensure that all workers fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence including the right to representation ... Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilities and guidance in making a defence.'

As is further explained below, this may lead to the use of certain languages in the working environment being treated as indirect discrimination on grounds of ethnic origin.

Similarly, also in Ireland, the Equality Officer expressed concern in a claim under the Employment Equality Acts 1998 and 2004 that an employer engaged a large number of foreign workers without making translations of the contracts available, and then proceeded to make unlawful deductions from their wages and to permit some of them to work hours in breach of the Organisation of Working Time Act. The Equality Officer found that the employer had made no adequate provision for the employment of foreign workers and had failed in its duty of care to them as employees.³⁷⁵

Such cases stand in contrast to a much more narrow understanding of what may constitute indirect discrimination on grounds of race and/or ethnic origin, which excludes that differences in treatment on grounds of nationality could constitute such discrimination. In Denmark, for instance, the Board of Equal Treatment received a complaint from a national of another EU Member State temporarily residing in Denmark.³⁷⁶ The complainant had wanted to buy some electronic equipment in a store, but had been told by the cashier that he had to show valid Danish ID. Although the complainant showed his passport and driving licence from another EU country as well as his Danish National Health Insurance Card, the store rejected his identification and told the complainant that he had to present Danish ID if he wanted to buy

372 Section 6(2) prohibits discrimination in respect of union membership, religious affiliation, political opinions, taking an action against the employer, race, colour, sexual orientation, age or membership of the Traveller community

373 Deliberation no. 2006-192.

374 EED 048.

375 Equality Tribunal DEC – E2006 – 050 *Five Complainants v. Hannon's Poultry Export Ltd, Roscommon*.

376 Board of Equal Treatment, Decision No. 160/2014 of 17 September 2014.

goods in their store. The complainant argued that it was unlawful discrimination to reject his access to goods because of the fact that he was not a Danish citizen and because of the fact that he could 'only' present a passport and a driving licence issued in another EU country. In the case, the board argued that the Act on Ethnic Equal Treatment prohibits direct and indirect discrimination on account of race and ethnic origin and that the Act does not encompass discrimination because of nationality. The board found that the complaint, in substance, dealt with discrimination because of nationality, as the complainant was treated differently than other customers solely because of the fact that he could not present a Danish passport. The board concluded that the case was not covered by the Act on Ethnic Equal Treatment and thus that it could not hear the case. It is, however, noteworthy that, in other cases, the same board was much more open to claims alleging that differences of treatment on grounds of nationality could result in ethnic discrimination. For instance, in a complaint concerning the financing of a loan for a car,³⁷⁷ the board found that it was a violation of the Act on Ethnic Equal Treatment to require additional documentation for citizenship or a residence permit in connection with the loan on the basis that the applicant for the loan was not born in Denmark. The complainant was thus awarded compensation of DKK 10 000 (EUR 1 350) for indirect discrimination because of ethnic origin. These cases, combined, illustrate the level of confusion that still persists concerning the relationship between nationality-based discrimination and discrimination on grounds of race and/or ethnic origin.

Which factors may favour a reading of the prohibition of indirect discrimination on the grounds listed in anti-discrimination legislation such as ethnic origin or religion or belief as prohibiting nationality-based discrimination, where the ground of nationality as such is not included in the list?

1. A first factor that may be identified is that domestic legislation implementing the Racial Equality or Employment Equality Directives may be interpreted in accordance with the requirements of the International Convention on the Elimination of All Forms of Racial Discrimination. This suggests that differences of treatment on grounds of nationality could potentially constitute indirect discrimination on grounds of race or ethnic origin. As explained above, the ICERD contains, in Article 1(1), a prohibition of discrimination on the grounds of 'race, colour, descent, or national or ethnic origin', a prohibition which has been interpreted to extend to a prohibition of indirect discrimination on those grounds, *inter alia* by nationality-based differences of treatment.³⁷⁸ It cannot be excluded, therefore, that domestic legislation adopted in order to implement the Article 19 TFEU directives could be read broadly, in line with the other obligations imposed under international law on the EU Member States. In Austria, for instance, the Vienna Court of Appeal ruled in the case of *Hayet B. v. Ferdinand S.* that a woman of Tunisian origin who had been physically removed from a fashion store with the words 'we do not sell to foreigners' in Vienna had been a victim of discrimination and harassment on the ground of ethnic affiliation.³⁷⁹ It stated that it was irrelevant whether the claimant was in fact a foreigner or an Austrian citizen of Tunisian origin. While the difference of treatment was openly based on the nationality of the victim, this did not stop the Court from finding discrimination on the grounds of ethnic origin.

This broad interpretation of the prohibition of discrimination on grounds of race and ethnic origin – as extending to indirect discrimination by the use of nationality-based differences in treatment – would be even more clearly justified where domestic legislation that had been adopted in order to implement the International Convention on the Elimination of All Forms of Racial Discrimination is concerned, since such an interpretation should naturally follow the reading of the Committee on the Elimination of Racial Discrimination. In Austria, this would justify extending Figure 3 of Paragraph 1 of Article IX of the Introductory Provisions to the Code of Administrative Procedure,³⁸⁰ which (as seen above) provides for

377 Board of Equal Treatment, Decision No. 115/2010 of 10 December 2010.

378 See the case of *Ziad Ben Ahmed Habassi v. Denmark*, presented to the Committee on the Elimination of Racial Discrimination, referred to above, in note 55.

379 Ref. Nr. 35R68/07w (35R104/07i, date: 30.03.2007, available on the searchable database www.ris.bka.gv.at; commentary (in German) at: <http://www.klagsverband.at/fall/gericht2.pdf>.

380 Federal law Gazette 50/1991 as last amended by Federal law Gazette I Nr. 63/1997 (Article IX Abs. 1 Z, 3 EGVG, *Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*, BGBl 50/1991 idF. BGBl I Nr. 63/1997).

an administrative criminal sanction for discrimination against a person due to his/her race, skin colour, national or ethnic origin, religious faith or disability. This prohibition extends to indirect discrimination on any of these grounds, for instance through the use of differential treatment on grounds of nationality. In France, the Court of Cassation has treated discrimination based on nationality as a source of apparent indirect discrimination in civil cases, thus obliging the employer relying on that criterion to justify its use.³⁸¹

The possibility that domestic legislation implementing the Racial Equality or Employment Equality Directives will be interpreted to prohibit differences of treatment on grounds of nationality as a form of indirect discrimination on grounds of race or ethnic origin is left open by the wordings chosen in certain Member States.

In Austria, the explanatory notes to the Equal Treatment Act state that §§ 17(2) and 31(2) of this Act, which provide that the principles of equal treatment 'do not cover difference of treatment based on citizenship nor the treatment which arises from the legal status of the third-country nationals or stateless persons', adding that 'different treatment based on citizenship is not prohibited when it is based on objective reasons, but not where racist behaviour is the aim. This exception cannot be used to legitimate discrimination on the grounds covered in this act.' This suggests that, where reliance on the criterion of nationality appears to be used a disguised means to effect discrimination on grounds of race or ethnic origin, the courts may find that the prohibition of discrimination on those grounds has been violated. In Cyprus, the Equality Body appears to consider discrimination based on nationality as prohibited by international laws; on some occasions nationality and ethnic origin have been used interchangeably, in the sense that when cases at issue have clearly related to discrimination based on nationality, decisions have also invoked the provisions of the laws transposing the anti-discrimination directives. Thus, the Equality Body found that the exclusion of non-Cypriot EU citizens from a scheme granting heating allowances amounted to discrimination on the basis of race or ethnic background and of national background under Protocol No. 12 to the ECHR.³⁸² It further considered that denying EU citizens access to the electoral register for the purpose of voting at local elections was discriminatory on the basis of race or ethnic origin.³⁸³ The Equality Body also found that the refusal of public assistance to an asylum seeker because of his nationality amounted to indirect discrimination on the ground of race or ethnic origin in the area of social protection and social welfare.³⁸⁴

Similarly, in Finland, the former national Discrimination Tribunal, acting on the basis of the (now repealed) Non-Discrimination Act (21/2004), had taken the view that discrimination on the grounds of (foreign) nationality may constitute indirect ethnic discrimination, since the majority of foreign nationals have an ethnic origin other than Finnish.³⁸⁵ The former Discrimination Tribunal has interpreted the concept of ethnic origin to implicitly include nationality when applying the repealed Non-Discrimination Act (21/2004). This is also the practice of the Ombudsman in Greece. In Germany, under the General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz (AGG)*), which has been in force since 18 August 2006, discrimination on the basis of nationality is generally regarded as possible indirect discrimination on the basis of race or ethnic origin and as such is forbidden.

2. A second factor that could lead to such an evolution is where the domestic legislation includes a reference to certain grounds that, in effect, may be seen as a proxy for nationality, so that differences in treatment on grounds of nationality will be treated as suspect – if not as absolutely prohibited, at least as requiring to be justified by the pursuance of legitimate aims by necessary and proportionate means.

381 Cass. Soc., n° 03-47720, 09/11/2005, Soc ESRF c/ M. X., confirmed in another matter against ESRF on 17 April 2008 (Soc; 819 FS-P+B).

382 Files AKP 22/2004, AKP 42/2004, AKP 43/2004, AKP 44/2004, AKP 49/2004, AKP 58/2004.

383 Files AKP 75/2005 and AKP 78/2005.

384 Files AKI 131/2005 and AKI 8/2005.

385 See e.g. the decision of the Tribunal of 28 August 2006, available at: http://yvtltk.fi/material/attachments/ytaltk/sltkntapausselosteet2006/lj1hQO2MR/42294_SLTK-tapausseloste_28082006_L.pdf; or The National Discrimination Tribunal decision of 17.6.2014, 2014/746, http://yvtltk.fi/material/attachments/ytaltk/sltkntapausselosteet2014/bnA2fi0BD/54535_SLTK-tapausseloste-17_6_2014-S-pankki.pdf.

Among the grounds that could play a role in this regard are 'national origin', 'nationality' with the meaning of 'membership in a national minority / ethnic group' as the term is used in many Central and Eastern European countries, and 'language'.

A number of EU Member States have included 'nationality' or 'national origin' as a prohibited ground in their anti-discrimination legislation, referring in this regard to a prohibition against practising discrimination against members of certain national minorities. Although this, in principle, might be relied upon by courts in order to prohibit discrimination indirectly on grounds of nationality (understood as citizenship), such a development appears unlikely given the clear distinction made between the notions. In Estonia, for instance, the Equal Treatment Act³⁸⁶ does not provide protection against discrimination on the basis of citizenship (Article 1(1)). Moreover, it is accompanied by an explanatory note in the preparatory works, specifying that ethnicity or ethnic origin ('*rahvus*'), as a protected ground, should not be confused with nationality/citizenship ('*kodakondsus*').

'Language', like 'nationality' when understood as membership of a national minority, may occasionally serve to prohibit discrimination that is in fact directed at third-country nationals. In the United Kingdom, for instance, it has been found that the use of languages other than English can amount to race/ethnic origin/nationality discrimination. Thus, courts have established that it may be direct discrimination for an employer to instruct an employee not to use their own language at work, or to use instances when this happens as a reason to discipline or dismiss someone.³⁸⁷ In increasingly multinational and multilingual working environments, a balance may have to be found between the conflicting claims of employees, each of whom may have a right to expect that their use of language in the employment relationship shall not result in obstacles to his/her recruitment, performance or subsequent promotion. In *P F Franco v. Fyffes Group Limited*, a case presented to the Employment Tribunal in 2012, a Portuguese employee alleged that he was put at a disadvantage and suffered indirect race discrimination because his line managers, who were Polish, spoke in Polish. The claim failed. The employment tribunal judge found that 'to allow people who share a mother tongue to communicate in it is generally likely to lead to clearer communication and efficient management, and no sensible employer would try to suggest that two Polish workers should not speak in Polish between themselves. Of course it is quite different when someone who does not speak that language is also party to the conversation.'

For the moment, it seems premature to draw general conclusions about the question of whether the prohibition of discrimination on grounds of race, ethnic origin or religion may lead to the questioning of certain differences of treatment on grounds of nationality where such distinctions may put persons of a particular race, ethnic origin or religion at a particular disadvantage. Such an interpretation of the requirements of the Racial Equality and Employment Equality Directives cannot be excluded on the basis of the shared Article 3(2) of these directives, although the exact implications of this clause – according to which the directives 'do [...] not cover difference of treatment based on nationality' – remain a matter of dispute. A reading of the requirements of the directives adopted on the basis of Article 13 EC in accordance with developments in international human rights law would certainly favour an interpretation according to which this clause does not exclude challenging nationality-based differences of treatment in situations where such distinctions lead to indirect discrimination on grounds of race, ethnicity or religion. This controversy is of limited practical significance as regards situations which fall under the scope of application of EU law; in such cases, the national authorities are in any case bound to comply with the general principle of equality, which is part of the general principles of law for which the European Court of Justice ensures respect, and which, as we have seen, should be interpreted as including a prohibition of discrimination on grounds of nationality. But this question of interpretation of the directives does matter where the situation concerned presents no links to EU law save for the fact that it is covered by one of these directives.

386 Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 11 December 2008, RT I 2008, 56, 315.

387 *Dziedziak v. Future Electronics Limited* Appeal No. UKEAT/0270/11/ZT http://www.bailii.org/uk/cases/UKEAT/2012/0270_11_2802.html.

4.3 Conclusion

This study demonstrates that the prohibition of discrimination on grounds of nationality is emerging as a general principle of international and European human rights law, and that it is already recognised by a significant number of EU Member States. It may therefore be considered as a general principle of EU law for which the Court of Justice of the European Union may in the future seek to ensure respect. This does not mean that the European legislator should necessarily equate the situation of third-country nationals legally residing on the territory of an EU Member State with that of nationals of other EU Member States, for example as regards access to social advantages such as health, education or job placement services. Indeed, the Court of Justice generally takes the view that, although the EU Member States must implement EU law in conformity with the requirements of fundamental rights included among the general principles of EU law, it is not for the European legislator to ensure such compatibility: all that is expected of EU secondary legislation is that it does not impose on the EU Member States an obligation to violate such fundamental rights. In the case of *Parliament v. Council*,³⁸⁸ for example, the Court rejected the action for annulment filed by the European Parliament by noting that, 'while the [2003 Family Reunification] Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights.'³⁸⁹ Thus, secondary legislation is compatible with the requirements of fundamental rights provided that it does not compel Member States to violate such rights, even where it does not establish clear safeguards against such risk.³⁹⁰ This suggests that Union legislation will be valid as long as it can be interpreted in conformity with general principles: there is no requirement whereby Union law denies scope to a Member State to exercise its discretion under EU legislation in such a way as to violate human rights standards.³⁹¹

Yet the emergence of the prohibition of discrimination on grounds of nationality as a general principle of law does imply that Member States, when implementing EU law, should take into account the need not to establish or maintain differences in treatment between different categories of foreign nationals (in particular, between nationals of other EU Member States and third-country nationals), nor to establish or maintain differences in treatment between nationals and foreigners, unless such differences can be justified as measures that may be adopted in the pursuance of legitimate objectives and that are proportionate to such objectives.

The conditions under which such justifications may be provided are increasingly restrictive. The enjoyment of fundamental rights cannot be restricted to nationals only, or to nationals of the State concerned and nationals of other EU Member States: they must be extended to all without discrimination, as required by Article 14 of the European Convention on Human Rights – indeed, this extends even beyond nationals who are legally present on the territory of the State concerned to all non-nationals, whatever their administrative status. Even outside the area of fundamental rights, the principle of equality leads courts to treat with suspicion any differences of treatment on grounds of nationality in social and economic life. This includes freedom of movement, which is clearly bound to access to employment without discrimination in EU Member States. The only area in which differences of treatment imposing

388 Case C-540/03, *Parliament v. Council*, [2006] ECR I-5769.

389 Para. 104.

390 This corresponds also to the position adopted by AG Kokott in her opinion in this case. Her view as expressed in paras. 89-92 of her opinion was that the contested provisions of the Family Reunification Directive must be examined 'in order to determine *whether there is sufficient scope for them to be applied in conformity with human rights* [author's italics]'. Otherwise put, 'Community provisions are compatible with fundamental rights if they are *capable of being interpreted in a way which produces the outcome which those rights require*. [...] [What] matters is not what rules Member States might be minded to adopt in order to take full advantage of the latitude which the contested provisions afford, but rather what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights [author's italics]'.
 391 This is consistent with the approach in the *Lindqvist* case, where the ECJ stated that it was for the national authorities to ensure that they did not adopt an interpretation of Community law that conflicted with the general principles of law, but that the directive in question was not invalid merely for allowing a Member State discretion which could be exercised in this manner: Case C-101/01, *Lindqvist* [2003] ECR I-12971, paras. 84-88.

disadvantages on non-nationals are still common, and are seemingly widely accepted, is that of political rights – the right to vote and to stand for elections and the right to access public service employment. The fact that even this privilege is now being challenged, particularly at local level, bears testimony to the vitality of the principle of equality and to the strength of the movement towards increased inclusion of third-country nationals in our societies.

ANNEX 1. Excerpts of the main provisions of international law pertaining to non-discrimination

I. United Nations

International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 (entry into force 4 January 1969)

Article 1

1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (entry into force 23 March 1976)

Article 2(1)

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal

and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

II. Council of Europe

Convention for the Protection of Human Rights and Fundamental Freedoms, originally signed in Rome on 4 November 1950, as amended by Protocol No. 11

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 177), opened for signature in Rome on 4 November 2000, entered into force on 1 April 2005

Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

European Social Charter (revised), signed in Strasbourg, 3 May 1996

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Appendix to the European Social Charter (Revised): Scope of the Revised European Social Charter in terms of persons protected

1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 [of the European Social Charter (revised)] include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.
This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.
2. Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees.
3. Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons.

Framework Convention for the Protection of National Minorities (CETS No. 157), signed on 1 February 1995 (entry into force: 1 February 1998)

Article 4

1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

ANNEX 2. Summary tables

Protection against discrimination on the ground of nationality (as in citizenship)

	Constitution	Anti-discrimination legislation	Other legislation
Austria	E	Jl	E
Belgium	I	E	-
Bulgaria	-	E	-
Croatia	I	-	-
Cyprus	I	Jl	E
Czech Republic	E	E	E
Denmark	I	Jl	-
Estonia	I	-	-
Finland	I	E	I
France	I	Jl	E
Germany	Jl	Jl	E
Greece	Jl	E	E
Hungary	I	I	I
Ireland	Jl	E	Jl
Italy	Jl	Jl	Jl
Latvia	Jl	I	Jl
Lithuania	Jl	Jl	E
Luxembourg	I	-	E
Malta	I	I	I
Netherlands	I	E	-
Poland	I	I	-
Portugal	E	E	E
Romania	Jl	I	I
Slovakia	I	I	I
Slovenia	I	I	I
Spain	I	I	E
Sweden	I	I	I
United Kingdom	-	E	I

E: Explicitly

I: Implicitly ('any other ground', etc.)

Jl: Through judicial interpretation

List of cases (International Courts or Expert Bodies)

I. Court of Justice of the European Union (formerly Court of Justice of the European Communities)

Case 4/73, *Nold KG v. Commission*, [1974] ECR 491
Case 36/75, *Rutili*, [1975] ECR 1219
Case 136/78, *Ministère Public v. Auer* [1979] ECR 437
Case 238/83, *Caisse d'allocations familiales v. Meade* [1984] ECR 2631
Joined Cases 201/85 and 202/85, *Klensch* [1986] ECR 3477
Case 374/87, *Orkem v. Commission* [1989] ECR 3283
Case C-379/87, *Groener* [1989] ECR 3967
Case 5/88, *Wachauf / Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609
Case C-260/89, *ERT*, [1991] ECR I-2925
Case C-18/90, *Kziber* [1991] ECR I-199
Case C-369/90, *Micheletti*, [1992] ECR I-4239
Case C-147/91, *Criminal proceedings against Ferrer Laderer* [1992] ECR I-4097
Case C-60/92, *Otto BV v. Postbank NV* [1993] ECR I-5683
Case C-272/92, *Spotti* [1993] ECR I-5185
Case C-351/92, *Graff* [1994] ECR I-3361
Case C-58/93, *Yousfi v. Belgian State* [1994] ECR I-1353
Case C-415/93, *Bosman* [1995] ECR I-4921
Opinion 2/94, *Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759
Case C-56/94, *SCAC* [1995] ECR I-1769
Case C-15/95, *EARL de Kerlast* [1997] ECR I-1961
Case C-171/95, *Tetik v. Land Berlin* [1997] ECR I-329
Case C-354/95, *National Farmers' Union and Others* [1997] ECR I-4559
Case 249/96, *Grant v. South West Trains Ltd* [1998] ECR I-621
Case C-292/97, *Karlsson* [2000] ECR I-2737
Case C-37/98, *Savas* [2000] ECR I-2927
Case C-274/99 P, *Connolly v. Commission* [2001] ECR I-1611
Case C-55/00, *Gottardo* [2002] ECR I-413
Case C-94/00, *Roquette Frères* [2002] ECR I-9011
Case C-112/00, *Schmidberger* [2003] ECR I-5659
Case C-162/00, *Land Nordrhein-Westfalen v. Pokrzepowicz-Meyer* [2002] ECR I-1049
Case C-438/00, *Deutscher Handballbund* [2003] ECR I-4135
Case C-442/00, *Caballero* [2002] ECR I-11915
Case C-100/01, *Oteiza Olazabal* [2002] ECR I-10981
Case C-317/01 *Abatay and others* [2003] I-12301
Case C-465/01, *Commission v. Austria*, [2004] ECR I-8291
Case C-36/02, *Omega* [2004] ECR I-9609
Case C-148/02, *Carlos Garcia Alvello* [1997] ECR I-11613
Case C-275/02 *Engin Ayaz* [2004] I-8765
Case C-373/02 *Sakir Ozturk* [2004] I-3605
Case C-467/02 *Inan Centikaya* [2004] ECJ I-10895
Case C-265/03 *Igor Simutenkov* [2005], I-2579
Case C-144/04, *Mangold v. Helm*, [2005] ECR I-9981
Case C-540/03, *Parliament v. Council*, [2006] ECR I-5769
Case C-336/05, *Ameur Echouikh*, Order of the Court of 13 June 2006 (ECLI:EU:C:2006:394)
Case C-152/08, *Real Sociedad de Fútbol SAD and Nihat Kahveci*, Order of 25 July 2008 (ECLI:EU:C:2008:450)
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