IL DIRITTO DELL'UNIONE EUROPEA

Direttore ANTONIO TIZZANO



G. Giappichelli Editore

Rivista trimestrale - VI - 2020

Estratto

www.dirittounioneeuropea.eu

2/2020

Framing the Principle of Non-Discrimination on Grounds of Nationality. Art. 18(1) TFEU in the ECJ case law

Lucia Serena Rossi

SUMMARY

I. Introduction. – II. Genesis and development of the PNDN. – III. First condition of applicability of the PNDN under Art. 18(1) TFEU: "within the field of application of the Treaties". – IV. The (ongoing) relations with EU policies other than citizenship. – V. Second condition: the residual nature of the PNDN and its relation with other special provisions. –VI. The direct effect of Arts. 18(1) TFEU and 21(2) CFR. – VII. The recent ECJ case-law: assessing the "connecting factor".

This article aims at exploring the boundaries of the principle of non-discrimination on grounds of nationality (hereafter, the 'PNDN') in light of the recent developments in the EU Court of Justice (hereinafter 'ECJ' or the 'Court') case law.

The PNDN was particularly useful before the introduction of the EU citizenship by the Treaty of Maastricht and it is still referred to in the ECJ case law, in cases where the situation falls beyond the scope of the abovementioned legislation. The ECJ has significantly contributed to the shaping of two main aspects of the PNDN: its conditions of applicability and its legal effects in the national legal orders. The next sections will, therefore, focus on these two aspects, in turn.

First, the analysis will address the scope of the PNDN and investigate how the ECJ has interpreted its twofold condition of applicability. On the one hand, the article will clarify the notion of the "scope of application of the Trea-ties" within the meaning of Art. 18(1) TFEU (§ III.) and how the exercise of EU citizenship's rights and fundamental freedoms (§ IV.) may impact such notion. On the other hand, the analysis will focus on the issue of the interplay between this principle with special prohibitions of discrimination (and the corresponding derogations) laid down by secondary legislation (§ V.).

Second, the article will examine the question of the legal effects of the

PNDN (§ VI.). To begin with, the vertical direct effect of the PNDN, also in para-public situations, will be presented. The analysis will then shift to the possible horizontal direct effects of the principle. Special attention will be devoted to the second legal basis of the PNDN, Art. 21(2) of the Charter of Fundamental Rights of the European Union (hereafter the 'Charter' or 'CFR') and the general limitations to its applicability. Finally, some open questions surrounding the limits to the application of the PNDN will be discussed (§ VII.). More particularly, the paper will explain a recent case-law of the ECJ that provides some criteria helping to frame the PNDN.

II. The PNDN is for the EU legal order more than just an expression of the general principle of non-discrimination [1]. In fact, this principle has constituted the first core of the citizenship of the European Union [2]. The first formulation of the PNDN dates back to the Treaty of Rome. According to Art. 7 EEC [3], "within the scope of application of [the EEC Treaty], and

[1] The literature on the general principle of non-discrimination under EU law is abundant; see, among others, T. TRIDIMAS, The General Principles of EU Law, Oxford, 2006, p. 59; E. MUIR, EU Equality Law: The First Fundamental Rights Policy of the EU, Oxford, 2018; G. BIAGIONI, I. CASTANGIA (Eds.), Il principio di non discriminazione nel diritto dell'Unione europea, Napoli, 2011; F. SPITALERI, Le discriminazioni alla rovescia nel diritto dell'Unione Europea, Perugia, 2010; M. BELL, Anti-Discrimination Law and the European Union, Oxford, 2002, p. 37 ff.; A. DASHWOOD, S. O'LEARY, The Principle of Equal Treatment in E.C. Law., London, 1997; M. BENEDETTELLI, Il giudizio di eguaglianza nell'ordinamento giuridico delle Comunità europee, Padova, 1989;K. LENAERTS, L'égalité de traitement en droit communautaire, Cah. Dr. europ., 1991, p. 3 and ff.; ID., Union citizenship and the principle of non-discrimination on grounds of nationality, in Festskrift til Claus Gulmann – Liber Amicorum, København, Forlaget Thomson A/S, Albuquerque, 2006, p. 289; C. BARNARD, The Principle of Equality in the Community Context: P, Grant, Kalanke and Marschall: Four Uneasy Bedfellows?, Cambridge Law Journal, 1998, p. 352; E. CANNIZZARO, "Producing 'Reverse Discrimination' through the Exercise of EC Competences, Yearbook Europ. Law, 1997, p. 29; B. DE WITTE, The end of EU Citizenship and the Means of non-discrimination, Maastricht Journal Europ. Comp. Law, 2011, p. 86; E. MUIR, The Essence of the Fundamental Right to Equal Treatment: Back to the Origins, German Law Journal, 2019, p. 817; G. BARRETT, Re-examining the Concept and Principle of Equality in EC Law, Yearbook Europ. Law, 2003, p. 117; E. PALICI DI SUNI, Il principio di eguaglianza nell'Unione Europea, A. LUCARELLI AND A. PATRONI GRIFFI (Eds.), Dal Trattato costituzionale al Trattato di Lisbona. Nuovi studi sulla Costituzione europea, Napoli, 2009; C. FAVIL-LI, La non discriminazione nell'Unione Europea, Bologna, 2008.

[2] See L.S. ROSSI, I Cittadini, in A. TIZZANO (ed.), Il diritto privato dell'Unione europea, Torino, 2006, p. 97.

[3] Among the first comments on this provisions, see B. SUNDBERG – WEITMAN, Discrimination on Grounds of Nationality – Free Movement of Workers and Freedom of Establish-

without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

This provision has never substantially been revised in the course of the integration process and retained the same wording in all the successive versions of the Treaties, up until the current Art. 18 TFEU[4]. Its content has thus been progressively clarified by the ECJ and is now the subject of settled case law.

At the time of the EEC Treaty, the field of application of primary law was limited to economic matters and essentially consisted of the single market and its four fundamental freedoms. Art. 7 EEC was included among the "principles" of the Community[5] and was one of the few individual rights recognized, albeit implicitly and negatively, by the Treaties[6]. This also helps explaining why the PNDN has been one of the essential legal tools used by the ECJ to expand the material and personal scope of rights and freedoms that were originally conceived as a 'benefit' for economic operators acting in the single market – thus, not for ordinary 'persons'.

A significant example, in this respect, is the judgment rendered by the ECJ in 1989 in Cowan[7], few years before the introduction of EU citizenship. In that case, the PNDN, originally intended to complement the four fundamental freedoms, was applied by the Court to a situation in which the functional connection with one of these freedoms was very limited. Mr Cowan was, in fact, a British tourist, assaulted at the exit of a metro station in Paris. Having suffered physical injury from unidentified assailants, he

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ment under the EEC Treaty, Amsterdam, 1977; G. SCHIAVONE, Articolo 7, in R. QUADRI, R. MONACO, A. TRABUCCHI (Eds.), Commentario del Trattato istitutivo della Comunità Economica Europea, Milano, 1965.

[4] On Art. 18 TFEU see: I. MARTIN, Art. 18, in M. KELLERBAUER, M. KLAMER, AND J. TOMKIN (Eds.), The EU Treaties and the Charter of Fundamental Rights, Oxford, 2019, p. 412; S. AMADEO, Articolo 18, in A. TIZZANO (Eds.), Trattati dell'Unione Europea, Milano, 2014, p. 463; I. VIARENGO, Articolo 18, in F. POCAR AND C. BARUFFI (Eds.), Commentario Breve ai Trattati dell'Unione Europea, Padova, 2014, p. 203; A. VON BOGDANDY, Art 18, E. GRABITZ, M. HILF, AND M. NETTESHEIM (Eds), Das Recht der Europäischen, Munich, 2010, Vol. I, No. 1.

[5] See, in this respect, judgment of 21 June 1974, 2/74, Reyners, EU:C:1974:68, para. 15.

[6] According to the ECJ, Art. 6 EC "confers directly, within the scope of application of the Treaty, the right to non-discrimination on grounds of nationality"; see, to this effect, Judgment of 23 September 2008, C-427/06, Bartsch,EU:C:2008:517, para. 20 and, in the same vein, albeit with reference to the "right to equal treatment laid down by the first paragraph ofArt. 7 [EC]", judgment of 20 October 1993, C-92/92 and C-326/92, Phil Collins e.a., EU:C:1993:847, para. 33, on which, see L.S. ROSSI, "Principio di uguaglianza e diritto d'autore", Foro it., 1994, IV, p. 315, p. 319 ff.

[7] Judgment of 2 February 1989, 186/87, Cowan, EU:C:1989:47.

asked for compensation from the State, but, because he was a foreign national without a residence permit, his request was refused. Based on the fact that he was a recipient of services in the host Member State, the ECJ started from the premise that "by prohibiting any discrimination on grounds of nationality Art. 7 of the [EEC] Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State" [8]. The Court then found that the protection against the risk of assault and the corresponding right to obtain financial compensation, both granted to the citizens residing in the host Member State, were a "corollary" of the freedom of movement of persons guaranteed by Union law [9]. Hence, both protections fell within the scope of the PNDN, even though the protection and the right for compensation were governed by rules of criminal procedure falling within the residual national competences [10]. As a result, the ECJ held that PNDN precluded France from making the right to obtain compensation conditional on nationality or residence requirements [11].

According to the Court, it was therefore clear that, by simply purchasing a public transport ticket, all Member States'citizens could enjoy the free movement rights as "recipients of services" and, as a result, benefit from the applicability of the PNDN. This judgment actually laid, albeit implicitly, the first foundations for the free movement of persons.

With the entry into force of the Treaty of Maastricht, in 1993, the PNDN was moved to Art. 6 EC, near to – but separated from – the new provisions dedicated to the EU citizenship. The field of application of the principle remained linked to the first, Community, pillar. The other two pillars (the common foreign and security policy and the police and judicial cooperation in criminal matters) were therefore excluded from the scope of the PNDN, thus reaffirming its strong functional relationship with the fundamental freedoms. Both the positions with respect to EU citizenship provisions and its limited scope of application were maintained by the Treaty of Amsterdam (under Art. 12 EC) and the Treaty of Nice.

As this point, it was therefore left to the ECJ to shed some light on the relation between the newly established EU citizenship and the PNDN, particu-

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[8] Judgment of 2 February 1989, 186/87, Cowan,EU:C:1989:47, para. 10 (emphasis added).

[9] Ibid., para. 17.

[10] Ibid., paras. 17 to 19.

[11] Ibid., paras. 13 and 20.

larly as regards the influence of the former on the material scope of application of the latter. This has notably been done by the Court in the seminal Grzelczyk ruling of September 2001 [12], concerning direct discrimination on grounds of nationality.

After pointing out that the discrimination was prohibited by Art. 6 EC (the current Art. 18 TFEU), in Grzelczyk the Court went on affirming that this provision was to "be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application" [13]. EU citizenship was then regarded by the Court as "destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for" [14]. This implied that "a citizen of the European Union, lawfully resident in the territory of a host Member State, can rely on Art. 6 of the Treaty in all situations which fall within the scope ratione materiae of Community law" [15]. These situations include "those involving the exercise of the fundamental freedoms guaranteed by the Treaty" but also "those involving the exercise of the right to move and reside freely in another Member State" [16].

The concept of the EU citizenship as the 'enabling clause' for Member States'nationals to enjoy equal treatment vis-à-vis the host Member State's citizens or residents under the PNDN has been repeatedly reaffirmed by subsequent ECJ case law, prior and after the entry into force of the Treaty of Lisbon [17].

With the Treaty of Lisbon, the PNDN now figures under Art. 18 TFEU. This article is no longer comprised among the 'principles' listed in the first part of the Treaty, which is now limited to the provisions on the competences and the horizontal clauses, including the principle of non-discrimination on grounds other than nationality, laid down by Art. 10 TFEU. Art. 18 TFEU is, however, the first of the series of articles on

[12] Judgment of 20 September 2001, C-184/99, Grzelczyk,EU:C:2001:458.

[13] Ibid., para. 30.

[14] Ibid., para. 31.

[15] Ibid., para. 32.

[16] Ibid., para. 33.

[17] See, respectively, judgment of 15 March 2005, C-209/03, Bidar,EU:C:2005:169, paras. 31 to 33, and judgments of 6 September 2016, C-182/15, Petruhhin, EU:C:2016:630, paras. 30-31, of 13 November 2018, C-247/17, Raugevicius, EU:C:2018:898, para. 27 and of 13 June 2019, C-22/18, TopFit and Biffi, EU:C:2019:497, paras. 28-29.

'non-discrimination and citizenship of the Union', to emphasize the increasingly strong link between the principle of non-discrimination and EU citizenship.

Although the wording of the PNDN has never changed, its scope has evolved, with the entry into force of the Treaty of Lisbon, in two respects.

To begin with, the material scope of application of the PNDN is now wider than before. On the one hand, the principle is now determined with reference to "the Treaties" and may, therefore, cover both the provisions of the TFEU and those of the TEU and the EAEC Treaty. On the other hand, and more importantly, with the disappearance of the pillar structure, the PNDNs now applies also to the area of freedom, security and justice, and, more particularly, to the judicial cooperation in criminal matters.

According to the first paragraph of Art. 18 TFEU, "any discrimination on grounds of nationality shall be prohibited" "within the scope of application of the Treaties, and without prejudice to any special provisions contained therein". The second paragraph of Art. 18 TFEU adds that "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination".

Art. 18(2) TFEU, therefore, provides a legal basis for positive action at the EU level, through harmonization of the national legislations. But even in the absence of such harmonization, the prohibition laid down by the first paragraph still applies, provided that the two conditions set out by the same Art. 18(1) TFEU are fulfilled. First, the situation must fall within the scope of application of the Treaties and, second, no other provision contained therein shall be applicable.

Furthermore, with the new legal status attributed to the Charter by the Lisbon Treaty [18], the PNDN acquired a second primary legal basis. This principle is now enshrined in Art. 18 TFEU, but is also set out, in the same wording, by the second paragraph of Art. 21 CFR, a provision that, in its first paragraph, contains a general and universal prohibition of all other types of discrimination [19]. The dual legal basis reiterates the special importance of the

[18] See, to this effect, Art. 6(1) TEU; on the notion of "same legal value as the Treaties" within the meaning of this provision, cf. L.S. ROSSI, *Same Legal Value as the Treaties*? *Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights*, *German Law Journal*, 2017, p. 771-798.

[19] According toArt. 21(1) CFR: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."; see further E. BRIBOSIA, C. RORIVE, "*Article 21 – Non-*

PNDN in the structured network of principles binding the Union and its Member States. Its exclusion from the part of the TFEU containing 'principles' has not affected in any way its legal status. As the Court has recently pointed out [20], the PNDN remains a general principle of Union law.

The PNDN applies to natural but also legal persons, tackling discriminations based on their main centre of activity [21], and covers both direct and indirect, overt and covert forms of discrimination. From this point of view, the NDN prohibits the application of any distinguishing criteria liable to lead to the same discriminatory result [22].

Despite being of residual application, the implications of the PNDN may be very far-reaching, as will be shown below. The definition of both the conditions of applicability and, conversely, of the permissible restrictions to this principle play a significant role in furthering the reach of this principle. The following sections will, therefore, explore both issues. However, the present contribution will take into exam not all the ECJ case-law relating the PNDN, but the most significant judgements that precisely show such a far-reaching effect of the principle.

III. The first condition of application of the PNDN under Art. 18(1) TFEU is that a situation should fall "within the scope of application of the Treaties". This condition has been very broadly interpreted by the Court, as comprising "all situations which fall within the scope ratione materiae of [Union] law" [23].

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discrimination", in F. PICOD, VAN DROOGHENBROECK (Eds.), Charte des droits fondamentaux de l'Union européenne. Commentaire Article par Article, Bruxelles, 2018, p. 489; C. FAVILLI, F. GUARRIELLO, Commento all'Articolo 21, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, G. PAPPALARDO, AND E. RAZZOLINI (Ed.), Carta dei diritti fondamentali dell'Unione europea Milano, 2016, p. 412; F. KILPATRICK, Article 21 Non-Discrimination, in S. PEERS, T. HERVEY, J. KENNER, AND A. WARD (EDS.), The EU Charter of Fundamental Rights. A Commentary, Baden-Baden, 2014, p. 579.

[20] Cf. judgment of 2 June 2016, C-233/14, Commission v Netherlands, EU:C:2016:396, para. 80, where the Court held that: "the principle of non-discrimination on grounds of nationality, enshrined as a general principle in Art. 18 TFEU and laid down specifically in respect of Union citizens coming within the scope of Directive 2004/38 in Art. 24 thereof, prohibits, inter alia, direct discrimination on grounds of nationality" (emphasis added).

[21] Cf. judgment of 18 March 2014, C-628/11, International Jet Management, EU:C:2014:171, para. 64 and cited case law.

[22] See judgments of 30 June 2005, C-28/04, Tod's and Tod's France, EU:C:2005:418, para. 19 and of 18 June 2019, C-591/17, Austria v Germany, EU:C:2019:504, para. 42.

[23] Cf. judgment of 15 March 2005, C-209/03, Bidar, EU:C:2005:169, para. 32.

However, interestingly, the Court often applies the PNDN to situations falling within the scope of EU law, but for discriminations concerning matters of competence (a) falling beyond the scope of application of the specific provisions of the Treaties applicable to the situation, or (b) not yet covered by EU legislative acts and included as such in the scope of residual national competences [24].

This happens, first and foremost, where the situation at issue is connected with the citizenship's right to move and reside freely within the territory of the Member States. Both the previous and the post-Lisbon ECJ case law provides numerous examples in this regard.

As to the case-law prior to the Treaty of Lisbon, in Bressol the Court dealt with a Belgian rule establishing a numerus clausus for enrolling non-resident students in the undergraduate schools of the French Community. The Court stated that, whilst European Union law does not detract from the power of the Member States as regards the organization of their education systems and of vocational training [25], when exercising that power, Member States must comply with European Union law. Therefore, the students of another Member State (in this case those of French nationality) "may rely on Art. 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situations falling within the scope ratione materiae of European Union law, those situations including the exercise of the freedom conferred by Art. 21 TFEU to move and reside within the territory of the Member State" [26].

In Data Delecta [27], the Court was confronted with a rule of domestic civil procedure requiring legal persons established in another Member State to provide security for costs related to legal proceedings (cautio judicatum solvi). However, the same security was not required for State entities when lodging legal actions. The ECJ acknowledged that, in the absence of Community leg-

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[24] See L.S. Rossi, op. cit. supra note 2, 102-104; see in this sense also E. Martin, op. cit., supra note 4, 418-420 and M. BÖSE, Mutual recognition, extradition to third countries and Union citizenship: Petruhhin, Comm. Market Law Rev., 2017, p. 1781, at 1788-1789.

[25] Judgement of 13 April 2010, C-73/08, Bressol and Others, EU:C:2010:181 p.28. On the ECJ case-law applying the principle of equal treatment in the field of education see K. LENAERTS, The Principle of Equal Treatment and the European Court of Justice, in Cours du Master international Droit de l'Union européenne, Volume III. Droits fondamentaux et non-discrimination, Sofia, Faculté de Droit de l'Université de Sofia St. Clément d'Ohrid, 2014, 245-271.

[26] Ibidem, p. 31.

[27] Judgment of 26 September 1996, C-43/95, Data Delecta e Forsberg, EU:C:1996:357.

islation, the provision at issue fell within the national procedural autonomy.[28] Despite of this, since the national rule was liable to indirectly hinder the exercise of the free movement of goods and services by foreign legal persons, it was deemed to fall within the scope of the PNDN and was therefore considered by the Court to be in open conflict with such a principle[29].

Then, the PNDN was deemed by the ECJ to also apply to language requirements in the context of criminal proceedings, a very sensitive area of national competence. In Otto Bickel[30], the Court found that the exercise of a fundamental freedom (the free movement of services) could have been compromised if the citizens of the Union were not allowed to use a language other than the principal language of the State concerned with the administrative and judicial authorities[31]. The Court acknowledged that the adoption of legislation governing the language of criminal proceedings was the sole responsibility of Member States. However, the potential[32] obstacles to the free movement of persons were deemed sufficient by the Court to hold that such legislation had to comply with the PNDN[33]. Although not expressly recalled, it could be, therefore, argued that the judgment was "inspired" by the citizenship of the Union.

Finally, in Garcia Avello, the Court interpreted the PNDN, applied in conjunction with the EU citizens'right to free movement, as precluding national authorities of the host Member States from refusing to change the surname of minor children resident in that State and having dual nationality. Under the PNDN, the parties of the case could bear the surname to which they were entitled according to the law of the Member State origin[34]. Ac-

[28] Ibid., para. 12.

[29] Ibid., paras. 13-15 and 22.

[30] Judgment of 24 November 1998, C-274/96, Bickel and Franz, EU:C:1998:563.

[31] Ibid., paras. 15-16.

[32] Contrary to the previous judgment of 28 November 1989, C-379/87, Groener, EU:C:1989:599, in Otto Bickel, the link with the exercise of fundamental freedom was only indirect and potential; indeed, in its previous case, the Court was asked to assess the compatibility with the freedom of movement for workers of national rules making appointment to a public vocational school conditional upon proof of knowledge of the Irish language; the ECJ has clarified (see, in particular, paras. 19-23) that the Treaties do not prohibit such a requirement, as part of a broader policy for the promotion of the national language, but only to the extent to which it was applied in a non-discriminatory manner vis-à-vis nationals of other Member States, such as not to hinder the fundamental freedom of movement of workers.

[33] Ibid., paras. 17-18.

[34] Judgment of 2 October 2003, C-148/02, Garcia Avello, EU:C:2003:539, para. 45.

cording to the ECJ, the fact of having divergent surnames under the two legal systems was indeed liable to cause serious private and professional inconveniences to those children, specific to their situation, which distinguish them from persons holding only the nationality of the host Member State [35]. Here again, the ECJ had no competence on the rules governing surnames. However, due to the link with Community law deriving from the exercise of their free movement right, the children were nonetheless able to rely on the right set out in Art. 12 EC (now Art. 18 TFEU) not to suffer discrimination on grounds of nationality in regard to the rules governing their surname [36].

After the entry into force of the Treaty of Lisbon, the Court has returned to the issue of the scope of application of the Treaties pursuant to Art. 18(1) TFEU. This more recent case law confirmed the broad interpretation of the scope of application of the PNDN as interpreted under Art. 12 TEC; it further extended this principle to matters falling within the residual competences of the Member States, using EU citizenship's rights as 'vessels'.

To begin with, the Court has applied the PNDN, through the rules on EU citizenship, to a situation concerning the exercised of amateur sports activities. According to a constant jurisprudence of the Court, the practice of sport was subject to EU law – hence, to the PNDN – only insofar as it constituted an economic activity, that is, as a form of professional activity in return of a remuneration, irrespective of the nature of the employment relationship [37]. Yet, based on the need to integrate EU citizens in the society of the Member States in which he had moved – an objective which the EU citizenship promotes – the Court has recently found in TopFit and Biffi[38] that the PNDN was also applicable to an amateur athlete. Since the practice of an amateur sport allows the EU citizen to create (or consolidate) "bonds with the society" of the host Member State, that citizen can rely on Art. 18 TFEU against rules of a national sports association limiting the participation of non-nationals to championships [39].

Another significant area of national competence to which the PNDN was deemed applicable in connection with EU citizenship is extradition towards non-EU countries[40]. The ECJ recently issued a series of judgments in this

[35] *Ibid*., paras 35-

[36] Ibid., paras 25-29.

[37] See judgment of 12 December 1974, 36/74, Walrave and Koch, EU:C:1974:140, paras. 5-7 and judgment of 15 December 1995, C-415/93, Bosman,EU:C:1995:463, para. 73.

[38] Judgment of 13 June 2019, C-22/18, TopFit and Biffi,EU:C:2019:497.

[39] Ibid., paras. 29-30 and 34-35.

[40] On the scope of application of the PNDN with regard matters for which the Member

field, which are relevant for two reasons. On the one hand, these decisions constitute the 'borderline' situations for the applicability of the PNDN, since the latter is applied to citizens of other Member States to extend the guarantees offered to nationals against the punitive power of third States. Such guarantees are a matter of quintessential importance to national sovereignty. On the other hand, these judgments relate the PNDN and the Charter: the free movement of EU citizens brings the situation within the scope of application of both the PNDN and the CFR so that the latter can 'increment' the non-discrimination protection granted to the Union citizen.

In Petruhhin [41], the case concerned an extradition request issued by the Russian authorities and addressed to the Latvian ones in relation to an Estonian national, accused of organized drug-trafficking. Mr Petruhhin appealed the extradition decision on the ground that he enjoyed the same right to be protected against extradition to Russia granted to Latvian nationals under the applicable bilateral agreements concluded by Latvia. Even if, in the absence of an international agreement between the EU and the third country concerned, the rules on extradition fell within the competence of the Member States, the ECJ nonetheless considered the situation to be falling within the scope of application of the Treaties by virtue of the exercise of the freedom to move under Art. 21 TFEU [42]. According to the Court, national rules gave rise to discrimination on grounds of nationality under Art. 18 TFEU, which could be justified but only if "all the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law" were applied, including the issuing of a European arrest warrant [43]. Moreover, the Court held that, insofar as the situation at issue "comes within the scope of Art. 18 TFEU and Art. 21 TFEU and, therefore, of EU law for the purposes of Art. 51(1) [CFR]", the national decision shall also comply with Art. 19 CFR and, to this end, the na-tional authorities were bound to assess the existence of a risk of inhuman or degrading treatment in the third State requesting extradition [44].

States have retained their competence, see Böse, op. cit. supra note 22, at 1788; on the ECJ case law on extradition see also F. LEIDENMÜHLER AND S. GRAFENEDER, Civis europaeus sum! – Current legal issues relating to the extradition of citizens of the Union to third States, The European Legal Forum. 2016, p. 57; D. REBUT, Principe de non-extradition des nationaux et liberté de circulation: la Cour de justice "hors sol", Rev. Aff. Europ., 2016, p. 511.

[41] Judgment of 6 September 2016, C-182/15, Petruhhin, EU:C:2016:630.

[42] Ibid., paras. 30-31.

[43] Ibid., paras. 37-50.

[44] Ibid., paras. 52, 53 and 58.

A similar question arose in the case Pisciotti [45], in connection with an extradition request issued by the United States authorities and approved by the German officials, against an Italian national arrested while in transit in Germany. The EU had concluded an extradition agreement with the United States and the situation was therefore falling within the scope of EU law. The specificity of this case derives from the fact that the EU-USA extradition agreement allows the Member States to invoke a ground for refusing extradition provided for in a bilateral treaty or a constitutional rule, for the benefit of its own nationals [46]. The ECJ held that such discretionary decision had to be taken in accordance with EU law and, more particularly, with Art. 18 TFEU [47]. Since any unequal treatment in relation to the personal scope of application of the refusal of extradition was liable to affect the freedom of movement of EU citizens, the national decision should have therefore been subject to the same conditions outlined in Petruhhin [48].

Finally, in the case Raugevicius [49], an application for extradition concerning a national possessing Lithuanian and Russian citizenship was issued by Russian authorities and addressed to Finnish ones. Based on Micheletti [50], the ECJ first ruled that holding the nationality of the third country which made the extradition request "cannot deprive the person concerned of the freedoms he derives from EU law as a national of a Member State", including the right to free movement within the EU. This right could be restricted as a result of an unequal treatment on grounds of nationality [51]. The Court then applied the Petruhhin test to determine whether the restriction was legitimate, even if the case concerned an extradition request, not for the purpose of prosecution, but to enforce a sentence[52].

[45] Judgment of 10 April 2018, C-191/16, Pisciotti, EU:C:2018:222; on this case, see S. COUTTS, From Union citizens to national subjects: Pisciotti, Comm. Market Law Rev., 2019, p. 521; P. Mori, L'estradizione di un cittadino UE verso uno Stato terzo: il caso Pisciotti dinanzi alla Corte di giustizia, in this Review, 2018, p. 595; D. BERLIN, Discrimination et convention bilatérale ou comment éviter le problème!, La Semaine Juridique – édition générale, 2018, Issue 17, 820 and ff.

[46] See judgment of 10 April 2018, C-191/16, Pisciotti,EU:C:2018:222, para. 41.

[47] Ibid., para. 43.

[48] Ibid., paras. 45-46 and 51-52.

[49] Judgment of 13 November 2018, C-247/17, Raugevicius, EU:C:2018:898.

[50] Judgment of 7 July 1992, C-369/90, Micheletti and Others, EU:C:1992:295, para. 15.

[51] Judgment of 13 November 2018, C-247/17, Raugevicius, EU:C:2018:898, paras. 29-30.

[52] Ibid., paras. 31-33, 39-40 and 49.

In this case, however, given the particular circumstances of the case, the ECJ limited the benefit of equal treatment to nationals of other Member States who were permanently resident in the host Member State and who "demonstrate[d] a certain degree of integration into the State's society"[53], leaving to the referring court the task of determining whether Mr Raugevicius fell within this category. The 'bond of integration' is in fact intrinsically linked to the objective of reintegration and social rehabilitation of the convicted person, which usually determines the choice of the State in which to serve the sentence[54]. In the absence of such degree of integration, an EU citizen would not have been in a situation comparable to that of Finnish nationals for the purpose of applying Art. 18 TFEU and his extradition should have been decided based on the applicable national or international law[55].

Here emerges what could, at first sight, appear to be an exception to the settled jurisprudence of the Court on the exercise of fundamental freedoms. In the latter context, the ECJ has in fact held that a requirement of a sufficient connection to the society shall be regarded as indirect discrimination, which may be objectively justified if proportionate[56]. On the contrary, in Raugevicius the integration requirement was instead regarded as a precondition for considering the situation of an EU citizen comparable with that of the host Member State's citizens and thus caught by Art. 18 TFEU.

In order to understand such a different attitude, it is useful to recall, in this respect, that the condition of integration into the host society had already been called into question in the abovementioned judgment TopFit and Biffi to justify the application of the principle of non-discrimination. Both

[53] Ibid., para. 46.

[54] See, by analogy, the case law on the grounds for optional non-execution of the European Arrest Warrant underArt. 4(6) of Framework Decision 2002/584, where the latter is issued for the purposes of execution of a custodial sentence concerning a person staying in, national or a resident of the executing Member States undertaking to execute the sentence in accordance with its domestic law; it its judgments of 6 October 2009, C-123/08, Wolzenburg,EU:C:2009:616, para. 68 and of 5 September 2012, C-42/11, Lopes Da Silva Jorge, EU:C:2012:517, paras. 40-42, the Court held, on the one hand, that the executing Member States are required to comply with Art. 18 TFEU, but, on the other hand, recognized their faculty to make the invocability of this grounds of non-execution conditional upon the existence of a sufficient degree of integration into the host Member State's society, in the form of a condition of residence of a continuous period of five years, based on the objective of increasing the requested person's chances of reintegrating into society.

[55] Ibid., paras. 46 and 48.

[56] See, most recently, judgment of 10 July 2019, C-410/18, Aubriet, EU:C:2019:582, paras. 32-34.

cases respond to the same logic, that is, to require a form of connection between the EU citizen and the host Member State as one of the conditions of applicability of the PNDN. This requirement seems to acquire more relevance in cases where the situation falls within the scope of application of EU citizenship, but the targeted discrimination on grounds of nationality relates to matters pertaining to the residual competences of the Member States.

IV. In the logic of the Treaty of Lisbon, the PNDN may be considered as a corollary of the citizenship of the European Union, and notably of the right to move and reside freely stemming from the latter. It follows that Art. 18 TFEU is applied in most cases in conjunction with Art. 21 TFEU.

However, the link with EU citizenship is not exclusive. Even after the entry into force of that Treaty, Art. 18 TFEU continues to be applied by the ECJ also in conjunction with Treaty provisions other than those governing the exercise of the rights stemming from Art. 21 TFEU.

In the recent ECJ case-law, Art. 18 TFEU is referred to by the Court in connection with Union sectoral competences, such as the transport policy. In the case International Jet Management [57] the ECJ was called to determine whether the PNDN was applicable to a situation in which a first Member State required an air carrier, operating private flights from a third country under a license issued by a second Member State, to obtain an authorization to enter its airspace, although such an authorization was not required for carriers holding a license issued by the first Member State. The Court observed that the air transport services were provided from a third country and the EU legislature had not exercised the power to liberalise that type of service under Art. 100(2) TFEU [58]. As a result, Member States were entitled, under the special legal regime governing transport services pursuant to Art. 58(1) TFEU, to impose restrictions on the provision of such services [59]. Nevertheless, since the provision of air transport service between the Member States as a whole was regulated by secondary legislation, according to the Court the situation fell within the scope of application of the Treaties and therefore of the PNDN [60]. As a result, the national provision in question constituted a form of indirect discrimination, not proportionate to the legitimate safety objective pursued [61].

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[57] Judgment of 18 March 2014, C-628/11, International Jet Management, EU:C:2014:171.

[58] Ibid., paras. 38-39

[59] Ibid. paras. 36 and 59.

[60] Ibid. para. 53 and 59.

[61] Ibid., paras. 65-66, 69 and 74.

Furthermore, the PNDN continues to be invoked with reference to legal persons, in connection with the Treaty rules on fundamental freedoms, for those forms of discrimination on grounds of nationality that fall within their material scope but are not covered by the specific prohibitions laid down by these Treaty provisions [62].

A recent case, Austria v Germany [63], concerned two German legislative measures, introduced on the same date: a first measure levying an infrastructure use charge on passenger vehicles; a second granting to owners of vehicles registered in Germany a relief from motor vehicle tax in an amount at least equivalent to the amount of the use charge paid.

The reasoning of the Court in that case was structured in two steps. First, the ECJ verified the existence of a "sufficiently close connection" between the two national measures, whose combined effect would have given rise to discrimination. The connection between the two measures would have justified their "joint assessment" with regard toArt. 18 TFEU [64]. Second, the Court proceeded to verify the existence of indirect discrimination based on nationality, identifying a difference in treatment resulting from the combined effect of the national measures at issue [65]. In this regard, the ECJ reaffirmed the principle according to which the absence of harmonization in the field of taxation of motor vehicles and infrastructure financing does not preclude verifying the existence of discrimination, to the extent that Member States are required to exercise their competence in a way that is compatible with EU law, thus having due regard for the principle of equal treatment [66].

Interestingly enough, after having declared the existence of discrimination under Art. 18 TFEU, the Court then continued the examination of the aspects of the German legislative measures at issue falling within the scope of the special prohibitions of direct and indirect discrimination laid down by Articles 34, 56 and 92 TFEU. The ECJ considered the national measures as having equivalent effect to quantitative restrictions on the free movement of goods, liable to restrict the access to the German service market and negatively impacting the situation of the foreign carriers in relation to that of the German carriers, respectively [67].

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[62] Cf. E. MARTIN, op. cit. supra note 4, at 414.

[63] Judgment of 18 June 2019, C-591/17, Austria v Germany, EU:C:2019:504.

[64] Ibid, para. 46.

[65] Ibid., paras. 48-52.

[66] Ibid., paras. 54-57 and 60.

[67] Ibid., paras. 119-150 and 158-164.

V. The second condition of applicability of the PNDN provides that Art. 18 TFEU applies "without prejudice to any special provisions contained [in the Treaties]". In other words, as the Court has consistently held, the "general prohibition of all discrimination on grounds of nationality, applies independently only to situations governed by EU law for which the Treaty lays down no specific rules of non-discrimination" [68].

The PNDN, therefore, constitutes a general and not special clause, intended to apply only in the absence of specific prohibitions of discrimination, like those contained in the Treaty provisions on fundamental freedoms [69].

Art. 45(2) TFEU, in particular, is relevant in this respect. According to this provision, the freedom of movement of workers affirmed by the first paragraph "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." The Court has therefore consistently held that "Art. 18 TFEU, which enshrines the general principle of non-discrimination on grounds of nationality, is intended to apply independently only to situations governed by EU law in respect of which the Treaty lays down no specific prohibition of discrimination" [70]. To the extent to which "Art. 45(2) TFEU provides, in favour of employees, for specific rules governing non-discrimination on the basis of nationality in re-

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[68] Judgment of 22 June 2017, C-20/16, Bechtel, EU:C:2017:488, para. 30 and of 26 October 2010, C-97/09, Schmelz, EU:C:2010:632, para. 44.

[69] With regard to the relationship between the PNDN and the fundamental freedoms, cf. E. Muir, op. cit. 2019, supra note 1, at 823; Adinolfi, "I lavoratori", Tizzano, Trattati dell'Unione Europea (Giuffrè, 2014), 669-717; Krenn, "A missing piece in the horizontal effect "Jigsaw"", 49 Common Market Law Review (2012), 177-216, at 192 ff.; Prechal and De Vries, "Seamless web of judicial protection in the internal market?", 34 European Law Review (2009), 5-24; Kotschy, "Le "test discrimination" dans les libertés fondamentales – retour en arrière ou concept systématique bien ciblé ? ", Revue du droit de l'Union Européenne (2008), pp. 117-145; Davies, "Any Place I hang My Hat?" or: Residence is the New Nationality", 11 European Law Journal (2005), 43-56; Davies, Nationality Discrimination in the European Internal Market (Kluwer, 2002); Somek, "A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law", 5 European Law Journal (1999), 243-271; Martin, "«Discriminations», «entraves» et «raison impérieuses»", dans le Traité CE: trois concepts en quete d'identité", Cahiers de droit européen (1998), 275 ff.

[70] See judgment of 18 July 2017, C-566/15, Erzberger, EU:C:2017:562, para. 25; see also, along the same line; judgments of 4 September 2014, C-474/12, Schiebel Aircraft, EU:C:2014:2139, para. 20; of 25 October 2012, C-367/11, Prete, EU:C:2012:668, para. 18; of 11 January 2007, C-40/05, Lyyski, EU:C:2007:10, para. 33 and of 26 November 2002, C-100/01, Oteiza Olazabal, EU:C:2002:712, para. 25.

spect of employment conditions", it follows that "the situation [at issue] must be examined solely on the basis of Art. 45 TFEU" [71].

Conversely, the fact that the special prohibition of discrimination on grounds of nationality provided for under Art. 45(2) TFEU is expressly limited to three aspects of free movement of workers – i.e. employment, remuneration and other conditions of work and employment, which are exhaustively listed by this provision – has significant implications for the applicability of Art. 18 TFEU. In fact, it implies that the general PNDN laid down by the latter provision continues to apply to all discriminations based on nationality that occur in employment relationships covered by the fundamental freedom of movement of workers, other than those falling within the scope of Art. 45 (2) TFEU [72].

These conclusions are not limited to Treaty rules laying down a specific prohibition of discrimination, such as Art. 45(2) TFEU. So far, the Court has applied the same reasoning also where such a prohibition is not expressly provided for by the Treaty itself but has rather been derived by the ECJ itself by way of interpretation, as in the case of the other fundamental freedoms laid down by Articles 49, 56 and 63 TFEU [73].

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[71] See judgment of 18 July 2017, C-566/15, Erzberger, EU:C:2017:562, paras. 26-27; see also, along the same line, judgments of 4 September 2014, C-474/12, Schiebel Aircraft, EU:C:2014:2139, paras. 21-22; of 25 October 2012, C-367/11, Prete, EU:C:2012:668, paras 19-20; of 11 January 2007, C-40/05, Lyyski, EU:C:2007:10, para. 34 and of 26 November 2002, C-100/01, Oteiza Olazabal, EU:C:2002:712, paras. 24-25.

[72] In this sense see again Martin, op. cit. supra note 4, at 414.

[73] See, in general, with reference to all fundamental freedoms, the judgments of 18 June 2019, C-591/17, Austria v Germany, EU:C:2019:504, paras 39-40 and of 5 March 2009, C-222/07, UTECA,EU:C:2009:124, paras. 37-38; with regard to the individual fundamental freedoms other than the freedom of movement of workers, see, as to freedom of movement of goods under Articles 34 and 36 TFEU, judgment of 8 June 2017, C-296/15, Medisanus, EU:C:2017:431, paras. 62-65; as to the freedom to provide services under Art. 56 TFEU, judgments of 19 June 2014,, C-53/13 and C-80/13, Strojírny Prostějov and ACO Industries Tábor EU:C:2014:2011, para. 32; of 18 December 2007, C-341/05, Laval un Partneri, EU:C:2007:809, para. 55; of 11 December 2003, C-289/02, AMOK, EU:C:2003:669, paras. 25-26 and of 28 October 1999, C-55/98, Vestergaard, EU:C:1999:533, para. 17; as to the freedom of establishment and freedom of movement of capitals provided for, respectively, in Articles 49 TFEU and 63 TFEU, see judgments of 10 January 2006, C-222/04, Cassa di Risparmio di Firenze and Others, EU:C:2006:8, para. 99 and of 4 September 2014, C-474/12, Schiebel Aircraft, EU:C:2014:2139, paras. 20-22 (with reference to both freedoms); judgments of 11 March 2010, C-384/08, Attanasio Group, EU:C:2010:133, para. 37 and of 5 February 2014, C-385/12, Hervis Sport– és Divatkereskedelmi, EU:C:2014:47, paras. 25-26 (relating to the sole freedom of establishment); and judgment of 1 December 2011, C-

The special prohibition of non-discrimination laid down by Art. 45(2) TFEU shall apply instead of the general PNDN [74]. It is with regard to the former specific provision that the ECJ, in Angonese [75], acknowledged the horizontal direct effect of the prohibition of discriminations on grounds of nationality.

The Court started from a threefold premise, rooted in its previous jurisprudence concerning the vertical direct effect of this special rule of non-discrimination.

First, based on its previous Walrave and Koch judgment, the ECJ underlined the fact that the principle of non-discrimination set out in the then Art. 48 EC (the current Art. 45 TFEU) was not specifically addressed to the Member States. Therefore, the principle applied also to "rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services" [76]. Second, the Court considered, by recalling the same Walrave and Koch and the subsequent Bosman judgments [77], that "obstacles resulting from the exercise of […] legal autonomy by associations or organizations not governed by public law" could neutralize the removal of State barriers for persons, thus compromising the abolition of obstacles to the free movement [78]. Third, to the extent to which "agreements and other acts concluded or adopted by private persons" govern working conditions in the Member States, the Could held that "limiting application of the prohibition of discrimination based on nationality to acts of a public authority risk[ed] creating inequality in its application" [79].

250/08, Commission v Belgium, EU:C:2011:793, paras. 30-32 (with regard to the freedom of movement of capitals).

[74] According to E. MUIR (2019), op. cit. supra note 1, 823, the rules prohibiting discrimination on grounds of nationality in relation to the four freedoms "can therefore be understood as giving expression to the prohibition of discrimination spelled out in Art. 18(1) TFEU".

[75] Judgment of 6 June 2000, C-281/98, Angonese, EU:C:2000:296; see, along this line, the more recent Judgments of 17 July 2008, C-94/07, Raccanelli, EU:C:2008:425, paras. 41-48 and of 28 June 2012, C-172/11, Erny, EU:C:2012:399, para. 36; on this case law cf. A. ADINOLFI, op. cit. supra note 1, p. 672 and I. KRENN, op. cit. supra note 67, 177-216.

[76] Judgment of 6 June 2000, C-281/98, Angonese, EU:C:2000:296, paras. 30-31 and judgment of 12 December 1974, 36/74, Walrave and Koch, EU:C:1974:140, paras. 17 and 21.

[77] Judgment of 15 December 1995, C-415/93, Bosman, EU:C:1995:463.

[78] Judgment of 6 June 2000, C-281/98, Angonese, EU:C:2000:296, para. 32; of 12 December 1974, 36/74, Walrave and Koch, EU:C:1974:140, para 18 and of 15 December 1995, Bosman, C-415/93, EU:C:1995:463, para. 83.

[79] Judgment of 6 June 2000, C-281/98, Angonese, EU:C:2000:296, para. 33; of 12 De-

The Court added to these premises the conclusions drawn on their basis in Defrenne v Sabena [80], in relation to the general principle of EU law of equal pay for men and women, enshrined in the current Art. 157 TFEU. In the latter judgment, the Court held that "prohibition of discrimination applied equally to all agreements intended to regulate paid labor collectively, as well as to contracts between individuals" [81].

The ECJ then found that "such considerations must, a fortiori, be applicable to Art. [45(2) TFEU], which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination", designed, much like that under Art. 157 TFEU, "to ensure that that there is no discrimination on the labour market" [82]. Based on these assumptions, the Court thus concluded that the provision "must be regarded as applying to private persons as well" and therefore to requirements, such as those in the main proceedings, imposed by private employee for admission to a recruitment competition [83].

The abovementioned case law is limited to situations that can be qualified as a form of "gainful employment". It, therefore, does not clarify whether the PNDN, in its general or specific formulation, can also be invoked in other disputes between private individuals, outside any employment relations.

More in general, the question arises as to whether the notion of "special provisions contained [in the Treaties]" within the meaning of Art. 18 TFEU also covers specific prohibitions of discrimination laid down by secondary law to implement the abovementioned primary law provisions.

Two scenarios can be identified, in this respect. In the first one, the secondary legislation specifies the (general or special) prohibition of non-discrimination laid down by primary law, acting as a lex specialis. In the second scenario, the legislative act may have an 'exclusionary effect'on the principle of non-discrimination.

In the first scenario, EU legislation intended to give effect to primary law

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cember 1974, 36/74, Walrave and Koch, EU:C:1974:140, para 19 and of 15 December 1995, Bosman, C-415/93, EU:C:1995:463, para. 84.

[80] Judgment of 8 April 1976, 43/75, Defrenne, EU:C:1976:56.

[81] Judgment of 6 June 2000, C-281/98, Angonese, EU:C:2000:296, para. 34; of 8 April 1976, 43/75, Defrenne, EU:C:1976:56, para. 31 and 39; see also judgment of 12 December 1974, 36/74, Walrave and Koch, EU:C:1974:140, para. 19.

[82] Judgment of 6 June 2000, C-281/98, Angonese, EU:C:2000:296, para. 35; of 8 April 1976, 43/75, Defrenne, EU:C:1976:56, para. 31 and 39; see also judgment of 12 December 1974, 36/74, Walrave and Koch, EU:C:1974:140, para. 19.

[83] Judgment of 6 June 2000, C-281/98, Angonese, EU:C:2000:296, para. 36.

provisions on non-discrimination essentially constitutes a form of implementation of the prohibition of discrimination on grounds of nationality provided for by the Treaty, acting 'in the wake' of Articles 18 TFEU or the provisions on fundamental freedoms. The hierarchically superior norm thus reinforces the binding nature of the secondary legislative provision. The latter, in turn, specifies the content of the former, thus expanding the number of situations attracted within the scope of application of the prohibition of non-discrimination.

An example of such interaction between the PNDN and secondary legislation can be found with regard to the free movement of workers. In this context, the ECJ has held that "the general prohibition of discrimination on grounds of nationality enshrined in Art. [18] of the Treaty is implemented and given specific expression, as regards workers, by Arts. [45 to 48] of the Treaty and by the measures adopted by the Community institutions on the basis thereof, in particular by Regulation 1408/71" [84]. The secondary legislation therefore essentially complements the negative obligation of non-discrimination laid down by the Treaty provision with a positive obligation of equal treatment, which together constitutes the non-discrimination guarantees of the migrant worker. It must be noted, however, that a number of relevant legislative acts explicitly exclude from their scope of application the issue of prohibition of discriminations on grounds of nationality. This is the case, for example, of directive 2000/78 on equal treatment in employment and occupation, which clarifies that it is not intended to "cover differences of treatment based on nationality" [85]. In such cases, the special primary law provision will, therefore, remain the sole benchmark.

Under the second scenario, on the contrary, rather than reinforcing the prohibition of non-discrimination, EU secondary law expressly derogates from the PNDN, 'carving out' specific legal situations from its scope of application. This is notably the case with the secondary legislation adopted to give effect to Art. 21 TFEU, such as the directive 2004/38 and regulation No 883/2004. In this hypothesis, the "more specific expression" of the PNDN provided for by secondary law [86] replaces the general provision as the source of the

[84] Judgment of 7 March 1991, C-10/90, Masgio, EU:C:1991:107, paras. 12-13 (emphasis added).

[85] See Art. 3(2), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/2000, p. 16-22.

[86] Such as, in particular, the provisions on equality of treatment underArt. 24, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rig ht of citizens of the Union and their family members to move and reside freely within the territory

prohibition of non-discrimination [87]. As a result, other secondary law provisions may provide derogations to the prohibition of non-discrimination on grounds of nationality. This is the case of Art. 24(2) of directive 2004/38, providing derogations from the principle of equal treatment laid down by the first paragraph of the same provision, under certain conditions, for social assistance or student grants or loans [88].

At first sight, the second scenario described above might look like an illegitimate exception to the PNDN, in open contradiction with the principle of hierarchy of norms. At a closer look, however, this exception should rather be traced back to – and thus, be regarded as legitimated by – the Treaty itself. Indeed, as the Court has repeatedly underlined [89], it is the Treaty itself, under Arts. 20(2) and 21(1) TFEU, that allows limitations and conditions to be imposed on the rights conferred on Union citizens not only by the Treaty but also by the measures adopted thereunder. In this specific case, it can thus be argued that the derogations to the PNDN provided for by secondary legislation found their legal basis (and justification) in the Treaty.

VI. The above analysis shows that the PNDN has a vertical direct effect, being invokable by private parties against Member States before national courts. Art. 18(1) TFEU is in fact a clear, precise and unconditional norm that applies first and foremost against the Member States and imposes national authorities the duty to recognize equal treatment for citizens of another Member State with respect to their own nationals.

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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, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123 and Art. 4, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166/2004, p. 1-123.

[87] See judgment of 11 November 2014, C-333/13, Dano, EU:C:2014:2358, paras. 61-62.

[88] According to Art. 24(2) of Directive 2004/38: "by way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Art. 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families"; see, as to the (broad) interpretation of this derogation, judgment of 15 September 2015, C-67/14, Alimanovic, EU:C:2015:597, paras. 58-63 and, on the interplay between the PNDN and equal treatment guaranteed by secondary law, E. MUIR (2019), op. cit. supra note 1, 825 ff.

[89] Since its judgment of 19 September 2013, C-140/12, Brey, EU:C:2013:565, para. 46.

However, the question remains as to whether this principle can also have horizontal direct effect, that is, whether it may be invoked before national courts in disputes between private individuals [90].

As anticipated, in the area of freedom of movement of workers, the Court has already responded positively to this question, albeit with regards to the specific non-discrimination clause laid down by Art. 45(2) TFEU [91].

In a separate line of cases, the Court has also acknowledged the direct effect of the PNDN under Art. 18(1) TFEU in cases concerning situations involving the presence of a quasi-public authority falling outside the scope of Art. 45(2) TFEU and linked in different ways – and to various extent – to the exercise of a certain public power or regulatory authority [92].

This case-law has its roots in Sacchi [93], where the Court recognized the possibility for private individuals to invoke the PNDN before national courts against a public company acting on behalf of the State. The case concerned the compatibility with the Treaty of national legislative provisions reserving to a State-owned company the exclusive right to operate television broadcasts, including for commercial advertising

[90] On the possible horizontal direct effect of the PNDN see R. LANE, N. NIC SHUIBHNE, Case 281/98, Roman Angonese v. Cassa di Risparmio di Bolzano SpA, Judgment of 6 June 2000, Comm. Market Law Rev., 2000, p. 1237; S. VAN DEN BOGAERT, Horizontality: The Court attacks?, in C. BARNARD, J. SCOTT (Eds.), The Law of the Single European Market, Unpacking the Premises, Oxford, 2002, p. 123; and I. KRENN, op. cit. supra note 67, 177-216; more generally, on the horizontal direct effect of fundamental rights in EU law see E. FRANTZIOU, The Horizontal Effect of Fundamental Rights in the European Union. A Constitutional Analysis Oxford, 2019; D. LECZYKIEWICZ, Horizontal application of the Charter of Fundamental Rights, Europ. Law Rev., 2013, p. 479; E. DE MOL, The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?, Maastricht Journal Comp. Law. 2011, p. 109; CC. MURPHY, Using the EU Charter of Fundamental Rights Against Private Parties after Association De Médiation Sociale, Europ. Human Rights Law Rev., 2014 p. 170 ff.; E. URÍA GAVILÁN, ¿Los Principios de la Carta de Derechos Fundamentales de la Unión Europea Pueden ser Invocados en Litigios Entre Particulares?: Comentario a la Sentencia del Tribunal de Justicia (gran sala) de 15 de Enero de 2014 en el Asunto C-176/12 Association de Médiation Sociale, Revista General de Derecho Europeo, 2014, p. 1696; E. KERIKMÄE, EU Charter: Its Nature, Innovative Character, and Horizontal Effect, in KERIKMÄE (Ed.), Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights, Berlin, 2013.

[91] SEE S. PRECHAL AND I. DE VRIES, op. cit. supra note 67, p. 15 ff.; I. MARTIN, Article 45", in M. KELLERBAUER, M. KLAMER, AND J. TOMKIN (Eds.), The EU Treaties and the Charter of Fundamental Rights, Oxford, 2019, p. 607, at 617-618.

[92] In this regard, as to the so-called regulatory effect doctrine, see S. VAN DEN BOGAERT, op. cit. supra note 78, 125 ff. and D. LECZYKIEWICZ, op. cit. supra note 78.

[93] Judgment of 30 April 1974, 155/73, Sacchi, EU:C:1974:40.

purposes. The Court started from the premise that the existence of such a monopoly did not constitute, per se, a breach of the PNDN under the then Art. 7 EEC. However, the Court held that discriminatory acts on the part of undertakings enjoying such exclusive rights with regard to nationals of Member States by reason of their nationality – or, in the same vein, in favor of national material, products, trade channels or commercial operators – would have been incompatible with the general and special (i.e. relating to the free movement of goods) prohibitions of discrimination on grounds of nationality laid down by the Treaty [94].

Subsequently, in Donà [95], the ECJ reached the same conclusions as to the applicability of the Art. 7 EEC – but also of the current Arts. 45(2) and 56(1) TFEU, without, however clarifying which of these provisions should have been applied to the case in question – to a situation involving the adop-tion of collective rules by a sports association. The Court held, in particular, that "rules or a national practice, even adopted by a sporting organization, which limit the right to take part in football matches as professional or semi-professional players solely to the nationals of the State in question" were in-compatible with the PNDN, unless justified [96].

In Ferlini [97] the Court was confronted with the application to European Commission's officials of hospital care fees higher than those applicable to residents affiliated to the Luxembourg social security scheme. This differ-ence in treatment was deemed by the ECJ to be discriminatory and incom-patible with the then Art. 6 EC, precisely because the group of service pro-viders "exercises a certain power over individuals and is in a position to im-pose on them conditions which adversely affect the exercise of the funda-mental freedoms guaranteed under the Treaty" [98].

More recently, in TopFit and Biffi[99], the Court has reaffirmed the ap-plicability of its pre-Lisbon case-law according to which the PNDN, also in

[94] Ibid., paras. 7, 8 and 20.

[95] Judgment of 14 July 1976, 13/76, Donà, EU:C:1976:115.

[96] Ibid., para. 19.

[97] Judgment of 3 October 2000, C-411/98, Ferlini, EU:C:2000:530; on this case see M. THILL, Un nouvel aspect du système des soins de santé luxembourgeois sur la sellette. L'affaire Ferlini ou l'application des tarifs médicaux différenciés devant la Cour de Justice des Communautés européennes, Codex, 2000, p. 312-321; G. FRIDEN, Cour de justice des communautés européennes. Discrimination et "effet direct" dans le contexte de l'accès aux soins médicaux: l'arrêt Ferlini, Annales du droit luxembourgeois, 2000, p. 292.

[98] Judgment of 3 October 2000, C-411/98, Ferlini, EU:C:2000:530, para. 50.

[99] Judgment of 13 June 2019, C-22/18, TopFit and Biffi, EU:C:2019:497.

its general formulation by Art. 18 TFEU, may be invoked in disputes be-tween private parties, subject to the condition that those parties must be ex-ercising a form of 'regulatory authority'. As already mentioned above, the case concerned an amateur runner of Italian nationality residing in Germany, who was a member of a German sports association, TopFit. Mr Biffi had been allowed to participate to national senior championships only 'without classification' due to a nationality requirement set out by the German athlet-ics association, despite fulfilling all of the participation conditions. The Court was therefore asked to assess the compatibility of this condition with arts. 18, 21 and 165 TFEU. After having established the possibility for Mr Biffi to rely on Art. 18 and 21 TFEU in relation to his practice of a com-petitive amateur sport, the Court was faced with the issue of "whether the rules of national sports associations are subject to the rules of the Treaty in the same way as they are subject to the rules of the State of origin" [100].

Since Mr Biffi was a self-employed worker established in the host Member State, the answer could not be found in the abovementioned case law on the direct effect of the special rules on non-discrimination laid down by the Trea-ty, such as Art. 45(2) TFEU. The Court therefore held that the "group or or-ganization exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the funda-mental freedoms guaranteed under the Treaty" [101]. These conditions include also "rules of a national sports association [governing] the access of EU citi-zens to sports competitions", which are therefore subject to Art. 18 TFEU [102].

All in all, it appears that the Court has regarded the situations at issue in the abovementioned cases as being in a 'grey area' between vertical and hor-izontal direct effect, underlying the capacity of the athletics association to impose general rules governing the access to an activity relevant to the exer-cise of the EU citizenship.

From Sacchi to TopFit and Biffi, all these judgments have in common a certain continuity of approach with the ECJ case law on the direct effect of directives. This approach may recall the series of judgments in which, faced with the impossibility of recognizing horizontal direct effect to directives, the Court has progressively extended the notion of "Member State within the meaning of the (current) Art. 288(3) TFEU [103].

[100] Ibid., para. 36.

[101] Ibid., para. 39.

[102] Ibid., para. 40.

[103] To begin with, the Court ruled out, in its judgment of 26 February 1986, Marshall,

On the contrary, both pre – and post-Lisbon ECJ case law leave open the question of the direct effect of the PNDN in horizontal situations which are neither quasi-public nor related to employment relations covered by Art. 45(2) TFEU.

Although Art. 18 TFEU is worded in such a way as to have general application, acknowledging direct effects to the principle of non-discrimination under this provision in purely horizontal situations should be assessed case by case, in the light of the peculiar nature of the PNDN.

As it emerges from the above analysis, Art. 18 TFEU has a particularly broad scope, since it can also strike discriminations pertaining to matters which, although related to situations falling within the scope of application of the Treaty, are not (or not yet) covered by Union law or constitute the exercise of residual national competences. Precisely because of the peculiarities highlighted above, and in particular given its potentially unlimited scope, if applied horizontally, the general principle of non-discrimination can produce unforeseeable legal effects with regard to private parties, natural or legal persons, including new positive obligations entailing significant legal or economic consequences. In this respect, the general PNDN differs from the special prohibition of non-discrimination on grounds of nationality in the area of free movement of workers under Art. 45(2) TFEU. The latter provision, which the Court has recognized as having horizontal direct effect, can in fact be applied in a clearer and more predictable manner to bilateral contractual rela-tions, in order to guarantee to migrant workers the same rights already at-tributed to other employees, nationals of the host Member States.

Moreover, a doubt may arise as to whether the reasoning followed by the Court, although with regard to directives, in Popławski II should be applied by analogy to the PNDN, given the fact that Art. 18(1) TFEU operates in the absence of any measure of harmonization adopted under Art. 18(2) TFEU.

152/84, EU:C:1986:84, para. 49, that the capacity in which the State acted, whether em-ployer or public authority, was relevant for an individual to rely on a directive against the State; then, the ECJ extended the category of public authorities, so as to include a number of bodies that were either "organizations or bodies which were subject to the authority or control of the State" or "had special powers beyond those which result from the normal rules applicable to relations between individuals"; at first, these covered public bodies separated from national authorities, including decentralised authorities (judgment of 22 June 1989, 103/88, Costanzo, EU:C:1989:256, para. 31), independent authorities respon-sible for safety (judgment of 15 May 1986, 222/84, Johnston, EU:C:1986:206, para. 57) and public health services providers (judgment of 26 February 1986, 152/84, Marshall, EU:C:1986:84, para. 49), but then in the judgment of 12 July 1990, C-188/89, Foster and Others, EU:C:1990:313, para. 20, the ECJ found that private parties could also bring for-mer state-owned companies made responsible for providing a public service, such as Brit-ish Gas Corporation, to Court.

According to that judgment, "even a clear, precise and unconditional provision of a directive does not allow a national court to disapply a provision of its national law which conflicts with it, if, in doing so, an additional obligation were to be imposed on an individual" [104]. The Court emphasizes that the underlying rationale for denying the horizontal direct effect of directives is precisely that the EU may enact obligations for individuals with immediate effect only where it is empowered to do by the Treaties [105].

The horizontal direct effects of Art. 18(1) TFEU, in the absence of positive harmonization under Art. 18(2) TFEU, remains therefore an open – and delicate – question whose answer pertains, case by case, to the ECJ. The Court will consider with particular care all the elements of the situation and of the alleged discrimination.

It also remains to be seen if the PNDN can derive its horizontal direct effect from the Charter, whose Art. 21(2) replicates Art. 18(1) TFEU [106]. In the overall logic of Art. 21 CFR, the principle of non-discrimination on grounds of nationality enshrined in its second paragraph is a lex specialis, i.e. a spec-ification of the general, universal and multifaceted principle of non-discrimination, affirmed in the first paragraph. By its codification in the Charter, the PNDN therefore acquires a double purpose: on the one hand, it represents a fundamental and general right of EU citizens, instrumental to the exercise of other rights stemming from the citizenship of the Union; on the other hand, it constitutes a specification of the more general principle of non-discrimination enshrined in the Charter.

Some of the grounds of non-discrimination listed in Art. 21(1) CFR have already been interpreted by the ECJ as having direct effect [107]. Initially, the Court has acknowledged the vertical direct effect of the prohibition of dis-crimination on grounds of disability [108]. Then, more

[104] Judgment of 24 June 2019, C-573/17, Popławski, EU:C:2019:530, para. 67, and cited case-law.

[105] Cf. ibid., para. 66 and cited case-law.

[106] On the relationship between Art. 21(2) CFR and Art. 18(1) TFEU, see Muir (2019), op. cit. supra note 1, at 821.

[107] See K. LENAERTS, L'invocabilité du principe de non-discrimination entre particuliers, in P. GOSSERIES & M. MORSA (eds), Le droit du travail au XXIe siècle. Liber Amicorum Claude Wantiez, Bruxelles, 2015, p. 89; ID, The European Court of Justice and the horizon-tal application of the principle of non-discrimination" in Tribunal Constitucional. Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos, Volume 1, Coimbra, 2016, 1105-1120.

[108] Cf. judgment of 22 May 2014, C-356/12, Glatzel, EU:C:2014:350, para 43 and judgment of 9 March 2017, C-406/15, Milkova,EU:C:2017:198, paras 55 and 64.

recently, in Egenberger [109] and Cresco [110], the ECJ has found that the prohibition of discrimi-nation on grounds of religion or belief may be relied upon in disputes be-tween private parties [111]. Interestingly enough, to this end the Court has tak-en as a point of reference "the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimina-tion derives from contracts between individuals" and stressed that the provi-sions of the Charter at issue, much like these Treaty provisions, were "man-datory as" – and not, despite being a – "general principle of EU law". More in general, the fact that some provisions of the Charter may have horizontal direct effect has been confirmed in Max Planck, where the Court declared that the right to a period of paid annual leave, affirmed by Art. 31(2) CFR, "is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter" [112].

Even so, it seems difficult to argue that Art. 21(2) CFR provides a stronger legal basis than Art. 18 TFEU for the horizontal direct effect of the PNDN. On the one hand, Art. 52(2) CFR states that "rights recognized by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties". Ac-cording to the Explanations relating to the Charter, Art. 21(2) CFR "corre-sponds to the first paragraph of Art. 18 TFEU and must be applied in com-pliance with that Article".

On the other hand, and more generally, the application of Art. 21(2) CFR seems to meet even greater obstacles and limitations with respect to those surrounding the application of Art. 18 TFEU. According to the settled ECJ case law, Art. 51(1) CFR excludes the applicability of the Charter to situations "lying outside the scope of European Union law" [113]. Although the sit-

[109] Judgment of 17 April 2018, C-414/16, Egenberger, EU:C:2018:257. P.76.

[110] Judgment of 22 January 2019, C-193/17, Cresco Investigation, EU:C:2019:43.

[111] See judgment of 22 January 2019, C-193/17, Cresco Investigation, EU:C:2019:43, para. 76.

[112] See judgments of 6 November 2018, C-569/16 and C-570/16, Bauer and Willmeroth, EU:C:2018:871, paras 84-86 and of 6 November 2018, C-684/16, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, EU:C:2018:874, paras 73-75, respectively. See L. S. ROSSI, The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations", available at <http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html>.

[113] Judgments of 26 February 2013, C-617/10, Åkerberg Fransson, EU:C:2013:105, para. 19 and of 13 June 2019, C-646/17, Moro, EU:C:2019:489, para. 66; on the interpretation of Art. 51 CFR see A. TIZZANO, L'application de la Charte des droits fondamentaux dans les

uations governed by EU law for the purpose of applying the CFR also include national derogations to fundamental freedoms and rights guaranteed by the Treaty [114], this could hardly cover the cases where the PNDN under Art. 18(1) TFEU applies - independently from other specific rules on non-discrimination pro-vided for by the Treaties - in situations falling within the scope of application of the Treaties, but extends to matters that are not covered by an (exercised) Union competence. In such cases, in fact, the Member States are not implementing Union law within the meaning of Art. 51(1) CFR, but are rather exercising their own residual national competences, which are such precisely because they insist on matters not (or not yet) covered by EU law. It follows that, in these cases, as opposed to Art. 18 TFEU, which still constitutes a general limit to the exercise of the Member States'competences, Art. 21(2) CFR is not applicable as such.

This would be, for instance, the case of a minimum harmonization directive affirming the principle of equal treatment only for specific hypothe-ses expressly and exhaustively listed therein, without prejudice to the possi-bility for Member States to extend this principle to other cases. Any discrim-ination on grounds of nationality in respect of these latter cases could be caught by Art. 18(1) TFEU, since it would concern matters falling within the scope of application of the Treaties. The same discrimination would instead fall outside the scope of Art. 21(2) CFR, given that it would insist on situations that the EU legislator itself has intended to exclude from harmonization and, therefore, of the corresponding national legislation adopted to implement such legislation [115].

Etats membres à la lumière de sonArt. 51, paragraphe 1, in this Review, 2014, p. 429; F. PICOD, Article 51. – Champ d'application", in F. PICOD AND J. VAN DROOGHENBROECK (Eds.), Charte des droits fondamentaux de l'Union européenne. Commentaire Art. par Art., Bruxelles, 2018, p. 1059 ff.; N. LAZZERINI, La Carta dei diritti fondamentali dell'Unione europea: i limiti di applicazione, Bologna, 2018; E. SPAVENTA, "The interpretation of Art. 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures", Study for the Petition Committee, PE 556.930, 2016; M. DOUGAN, Judicial Review of Member State Action under the General Principles and the Charter: Defining the Scope of Union Law, Comm. Market Law Rev., 2015, p. 1201; A. WARD, Article 51: Field of Application, in S. PEERS, T. HERVEY, J. KENNER, AND A. WARD (EDS.), The EU Charter of Fundamental Rights. A Commentary, Baden Baden, 2014, p. 1418 ff.; P. EECKHOUT, The EU Charter of Fundamental Rights and the Federal Question, Comm. Market Law Rev., 2002, p. 945.

[114] Judgments of 21 May 2019, C-235/17, Commission v Hungary (Usufruct over agricultural land)EU:C:2019:432, para. 65 and of 21 December 2016, C-201/15, AGET Iraklis, EU:C:2016:972, para. 64.

[115] Neither could Art. 21(2) CFR be used to circumvent the derogations to the PNDN set

Finally, Art. 52(1) CFR includes the "need to protect the rights and freedoms of others" within the proportionality test to be performed by the Court itself to justify limitations to the rights protected therein [116]. When applying such test, the Court's balancing of competing fundamental rights at issue will be even more delicate, by virtue of the wide-ranging and unexpected legal consequences that its horizontal application could determine to third parties, and should examine the establishment of positive obligations on natural and le-gal persons against whom the equal treatment is invoked; and this is even more so in all cases of indirect discrimination.

VII. This contribution has highlighted the peculiar nature of Art. 18(1) TFEU. While applying only in situations falling within the scope of application of the Treaties (such as, for example, the free movement of persons), this provision is capable of guaranteeing equal treatment to EU citizens in the host Member State, prohibiting discriminations in areas not – or not yet – covered by other provisions of EU law.

The PNDN requires a two-step reasoning, based on two preconditions (applied in a logical sequence) and a conclusion. First, it must be assessed whether the situation falls within the scope of application of the Treaties. Second, no other more specific provision of EU law should be able to target the discrimination at issue. If these two preconditions are met, then the PNDN comes into play and makes it possible to strike all forms of discrimination that stem from national legislation or practices. As is shown by the ECJ case law, such reasoning is capable of affecting unequal treatments in fields going beyond the boundaries of the EU competences and thus falling

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out in secondary legislation, and in particular, as anticipated, by directive 2004/38, since these derogations are ultimately based on the Treaty, and in particular on Art. 20(2) and 21(1) TFEU (see § 3.2.), they extend to the corresponding CFR provision. In fact, according to Art. 52 (2) CFR, "rights recognized by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." See, in this respect, E. BRIBOSIA AND S. RORIVE, op. cit. supra note 19, at 501-502, and C. FAVILLI AND F. GUARRIELLO, op. cit. supra note 19, at 422; on a more general note, cf. S. PEERS AND S. PRECHAL, Article 52: Scope and Interpretation of Rights and Principles, in S. PEERS, T. HERVEY, J. KENNER, AND A. WARD (EDS.), The EU Charter of Fundamental Rights. A Commentary, Baden-Baden, 2014, p. 1455 and D. VAN DROOGHENBROECK AND S. RIZCALLAH, Article 52-1. – Limitations aux droits garantis, in Picod and Van Drooghenbroeck (Eds.), Charte des droits fondamentaux de l'Union européenne. Commentaire Art. Pa rArt., Bruxelles, 2018, p. 1083 ff.

[116] According to Art. 52(1) CFR, "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others".

within the Member States'residual competences, such as national rules concerning surnames, access to education, civil procedures, language requirements in criminal proceedings, amateur sports activities or extradition towards third countries.

As far as the first precondition is concerned, thanks to the broad interpretation given by the Court of Art. 18(1) TFEU, all situations of current or po-tential exercise of fundamental freedoms fall within the scope of application of the Treaties and, therefore, of the general PNDN. This explains why Art. 18(1) TFEU is mostly coupled withArt. 21(2) TFEU or other primary (or secondary) EU law provisions. The application of Art. 18(1) TFEU is in fact triggered by those provisions, extending its reach to matters not covered by the latter.

With regard to the second precondition, the PNDN does not apply in all cases where the discrimination on grounds of nationality falls into the scope of the specific prohibitions of discrimination laid down by other rules of EU law, and in particular by Art. 45(2) TFEU. However, in cases involving the free movement of workers, the latter provision can nevertheless be supple-mented by Art. 18(1) TFEU, where the discrimination at issue fall outside the three hypotheses exhaustively listed in Art. 45(2) TFEU.

The PNDN is a powerful instrument to boost the citizenship of the EU – It can be argued that the PNDN operates as a sort of 'general clause' that plays an incremental function with respect to EU citizens'rights expressly provided for by the Treaties and the Charter. This principle may therefore have a general 'gap-filling' function that is potentially unlimited in scope and capable to produce unexpected consequences in cases where such a le-gal gap does not seem to exist at first sight.

The present article highlighted the tendency to recognize a direct effect to the general PNDN under Art. 18(1) TFEU. This tendency finds expression in particular through the progressive expansion of the notion of "Mem-ber States" – or public authorities –, aimed at extending the reach of the PNDN to quasi-public situations involving the exercise of a form of regula-tory authority by private parties.

However, this contribution also underlined that in some cases the application of the PNDN, because of the extremely far-reaching nature of the latter, raises delicate issues that only the ECJ could resolve. These issues are notably linked to the unforeseeable – and potentially unlimited – legal effects that the application of the PNDN could entail for natural and legal persons, such as those deriving from new positive obligations of equal treatment imposed on them as a result of the horizontal direct effect of the principle. A

better framing of the PNDN – aiming to make its application more foreseeable– could perhaps pave the way to the application of the principle also in horizontal situations.

In its recent case-law, the ECJ provides some precisions for a more fine-tuned application of the PNDN.

Firstly, the alleged discrimination must be analyzed in the light of the specific situation. The reasoning in Petruhin, Raugevicius and TopFit and Biffi seems to imply – a contrario – that the absence of a sufficient connection with the host Member State could justify an exception to the PNDN. Such a justification must be submitted, on a case-by-case basis, to a strict proportionality test. Member States may in fact invoke only justifications that are "based on objective considerations independent of the nationality of the persons concerned" and are "proportionate to the legitimate objective of the national provisions" [117]. Already in Bidar, the ECJ [118] had accepted that "the additional condition that students are entitled to assistance to cover their maintenance costs only if they are also settled in the host Member State could admittedly, like the requirement of three years'residence referred to in the preceding paragraph, correspond to the legitimate aim of ensuring that an applicant for assistance has demonstrated a certain degree of integration into the society of that State."

Although the Court has not yet fully clarified this aspect, it could be argued that the requirement of a certain degree of integration as a condition for invoking he PNDN could be justified insofar as the 'bond of integration' required from the host EU citizen affects the precondition of the applicability of the PNDN. According to the jurisprudence of the ECJ, the concept of discrimination implies that "comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified" [119]. If the recognition of equal treatment presupposes that the situation of the host EU citizen and that of nationals of the host Member State are effectively comparable, that could not al-

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[117] See judgment of 25 January 2011, C-382/08, Neukirchinger, EU:C:2011:27, para. 35 and judgment of 18 June 2019, C-591/17, Austria v Germany, EU:C:2019:504, para. 73.

[118] Judgement of 15 march 2005, C-209/03, The Queen(on the application of Dany Bidar) EU:C:2005:169, p. 61.

[119] See judgments of 18 May 1994, C-309/89, Codorniu v Council, EU:C:1994:197, para. 26; of 2 October 2003, C-148/02, Garcia Avello, EU:C:2003:539, para. 31 and of 16 December 2008, C-524/06, Huber, EU:C:2008:724, para. 75; on the comparability of the situations see S. AMADEO, op. cit. supra note 4, 470-471; and, more generally on the structure of the principle, M. BENEDETTELLI, op. cit. supra note 1, 123 ff. and 187 ff.

ways be the case of all situations where the PNDN is invoked [120].

Secondly, in the very recent case √TÜV Rheinland LGA Products and Allianz IARD [121], in order to ascertain whether a situation falls within the scope of the EU law within the meaning of Art. 18(1) TFEU, the ECJ, in absence of har-monization, looked for a sufficient connection with EU Law.

More particularly, in this case, a clause, stipulated in a contract between an insurance com-pany and a manufacturer of medical devices, limiting the geographical ex-tent of the insurance coverage against civil liability arising from those de-vices to harm that has occurred in the territory of the Member State of the producer, was considered a situation falling beyond the scope of EU law. To this end, the Court found that there was no "specific connecting factor" linking the particular situation that gave rise to the alleged discrimination and the pro-visions of the TFEU on the various freedoms of movement [122], notably those relating to the free movement of persons, the free movement of goods or the freedom to provide services.

This recent case-law shows that the application of the PNDN does not come into play in an automatic way, but can be modulated taking into account all the specif-ic characteristics of the situation at issue. This more refined analysis can be particu-larly useful for concretely assessing the applicability of the PNDN in cases of indirect discriminations or in horizontal situations, where the far-reaching nature of the PNDN could produce totally unexpected legal consequences.

ABSTRACT

Il principio di non discriminazione sulla base della Nazionalità (PNDN), enunciato dagli articoli 18(1) TFUE e 21(2) CFR impone agli Stati membri dell'Unione un generale divieto di discriminare i cittadini degli altri Stati membri. Previsto sin dalla versione originaria dei Trattati istitutivi, ha costituito il primo nucleo ante litteram, della citta-dinanza dell'Unione. Il principio appare svolgere una funzione incrementale rispetto ai diritti dei cittadini dell'Unione sanciti dai Trattati e dalla Carta. Il presente articolo esplora l'evoluzione del principio in questione, alla luce della giurisprudenza della CGUE. Viene sottolineata l'interpretazione estensiva data dalla Corte con riferimento alle due condizioni di applicazione del principio e si sottolinea la crescente tendenza a conferire allo stesso effetti diretti. L'articolo si

[120] For a similar reasoning see K. LENAERTS, *Union citizenship and the principle of non-discrimination on grounds of nationality,* in *Festskrift til Claus Gulmann*, cit., p. 307-309.

[121] Judgement of 11 June 2020, C-581/18, EU:C:2020:453.

[122] *Ibid.,* pp. 46, 49, 54, 56 and 57.

sofferma sui casi in cui il principio si applica a situazioni che ricadono nell'ambito di applicazione del diritto dell'Unione, ma con riferimento a discriminazioni che toccano materie non disciplinate o addirittura soggette alla competenza di quest'ultima. Alcune questioni rimangono tuttavia aperte, in particolare per quel che riguarda le discriminazioni indirette e le situazioni orizzontali. Date le conseguenze imprevedibili che l'applicazione di un principio di così ampia portata può produrre in certe situazioni, alcune eccezioni potrebbero essere giustificate, nei limiti di un rigoroso test di proporzionalità. In proposito si sottolinea come dalla recente giurisprudenza della CGUE emerge che l'applicazione del PNDN possa essere subordinata alla verifica dell'esistenza, da un lato, di una connessione sufficiente fra l'individuo e lo Stato ospite, e dall'altro di un di "fattore specifico di collegamento" fra la situazione ed il diritto dell'Unione.

PAROLE CHIAVE

Diritto dell'Unione europea – Principio di non discriminazione sulla base della nazionalità – Art.18 .1 TFUE – Art. 21.2 Carta dei Diritti Fondamentali – Cittadinanza dell'Unione – Competenze residuali – Effetti diretti

ABSTRACT

The principle of non-discrimination on grounds of nationality ('PNDN') under Art. 18(1) TFEU and Art. 21(2) CFR imposes a general prohibition to Member States to the benefit of the citizens of other Member States. Included into the founding Treaties as the first, ante litteram, core of the European citizenship, it appears to play an 'incremental function' with respect to EU citizens'right provided for by the Treaties and the Charter. The present contribution aims at exploring the evolving boundaries of the NDN principle, in light of the ECJ case law. It highlights the broad interpretation of its two conditions of applicability, given by the Court, and investigates the growing ten-dency to recognize direct effect to the NDN principle. The Article dwells upon those cases in which the principle applies to situations falling within the scope of EU law, but with regard to forms of discriminations concerning matters stretching beyond the scope of application of the specific EU law provisions and therefore covered, as such, by re-sidual national competences. Some questions regarding the PNDN, notably with regard to indirect discrimination and horizontal application, remain nonetheless still open. Given the unforeseeable legal consequences that such extremely far-reaching principle may produce in certain cases, some limitations might be justified, submitted to a pro-portionality test. In this respect, it is maintained that in its recent case-law the Court as-sesses the existence the existence, on the one hand, of a "sufficient connection" between the individual and the host State and, on the other, a "specific connecting factor" between the situation and the EU law.

KEYWORDS

Law of the European Union – Principle of non-discrimination on grounds of nationality – Art. 18 TFEU – Art. 21(2) CFR – EU citizenship – National Residual Competence – Direct Effect