


Principle of non-discrimination in the European Union

Michael Siman
EUROIURIS – European Legal Center



Principle of non-discrimination

= prohibition of discrimination
= principle of equal treatment

Principle of non-discrimination

- primary law
 - general prohibition of any discrimination based upon nationality (art. 18 TFEU)
„Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.“

Principle of non-discrimination

- primary law
 - special provisions on the prohibition of discrimination within the EU internal market
 - free movement of goods (art. 110 TFEU)
 - free movement of workers (art. 45 TFEU)
 - right to establishment (art. 49 TFEU)
 - freedom of providing services (art. 56 TFEU)
 - equal remuneration (art. 157 TFEU)

Principle of non-discrimination

- primary law
 - Charter of Fundamental Rights of the European Union (art. 21)
 - „1. 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.
 - 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.“

Principle of non-discrimination

- secondary law
 - Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
 - Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
 - Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Principle of non-discrimination

- secondary law
 - Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes
 - Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions
 - Proposal for a Council Directive COM/2008/426 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

Principle of non-discrimination

- case-law of the ECJ
 - The principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (SPM, T-128/05, 13.11.2008, par. 164; IATA, C-344/04, 10.1.2006, ECR p. I-403, par. 95; Beltrante, T-48/89, 26.9.1990, ECR p. II-493, par. 34; Racke, 283/83, 13.11.1984, ECR p. 3791, par. 7).

Principle of non-discrimination

- case-law of the ECJ
 - A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment (Arcelor Atlantique, C-127/07, 16.12.2008, par. 47; Altmann, T-177 a 377/94, 12.12.1996, ECR p. II-2041, par. 121-123).

Internal market – discriminative measures

- **direct discrimination measures**
 - based on the nationality of a MS (natural persons), on the seat in a MS (legal persons) or on the origin of a MS (goods)
 - applies only to legal entities or goods coming from another MS, or leaving domestic MS territory (cross-border element)
- **indirect discrimination measures**
 - based on other grounds (than nationality or country of origin) that, in fact, handicap legal entities or goods from another MS

Indirect discrimination

- **indirect discrimination**
 - for example art. 56 TFEU (freedom of providing services) requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services (napr. prípady C-369 a 376/96, Arblade, 23.11.1999 ECR p. I-8453, par. y 33 až 39; C-76/90, Säger, 25.7.1991, ECR p. I-4221, par. 12; C-43/93, Vander Elst, 9.8.1994, ECR p. I-3803, par. 14; C-3/95, Reisebüro Broede, 12.12.1996, ECR p. I-6511, par. 25; C-222/95, Parodi, 9.7.1997, ECR p. I 3899, par. 18; C-272/94, Guiot, 28.3.1996, ECR p. I-1905, par. 10).

Justification of discriminative measures

- **1st condition – ground of general interest**
- **direct discrimination measures**
 - can be justified only if motivated by public policy, public security or public health (as a ground of general interest)
- **indirect discrimination measures**
 - can be justified if motivated also by other grounds of general interest (except for public policy, public security, public health, public morality): e.g. protection of life of humans, animals or plants; protection of national treasures, protection of industrial and commercial property, protection of tax or social security system, consumer or employee protection, ...

Justification of discriminative measures

- 2nd condition – principle of subsidiarity
 - the pursued objective (i.e. protection of the ground of general interest) cannot be sufficiently achieved by other means, only by adopting a discriminative measure
- 3rd condition – principle of proportionality
 - the adopted measure shall not go beyond what is necessary to achieve the pursued objective
- all 3 conditions have to be fulfilled simultaneously

Direct discrimination

- **direct discrimination** (directly on grounds of nationality or company seat)
 - only exceptions – public policy, public security, public health:
 - free movement of workers (art. 45 par. 3 TFEU)
 - right to establishment (art. 52 par. 1 TFEU)
 - freedom of providing services (art. 62 TFEU)

Questions & Cases
