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7 The Principle of Equality as Part of the Constitutional Foundations of the Union: A Case Study

7.1 Introduction

This Chapter is going to demonstrate that equality is one of the most important values on which the Union is founded, and as such capable of constraining Member States and Union institutions alike, whenever they act within the scope of Union law. In other words, it is part of the constitutional foundations of the Union, or part of its "very foundations", which Member States need to respect at all times, including when they act as primary law makers under Article 49 TEU. The reason why the case study in this Chapter is based on the principle of equality rather than other principles, such as that of legal certainty, loyal cooperation or proportionality, is quite obvious, yet worth repeating.

The proposed PSC in Turkey's Negotiating Framework would be directly discriminating on the basis of nationality. As important as other principles are, the most obvious and egregious breach in the case of the inclusion of a PSC on free movement of persons in the future Turkish Accession Agreement would be first and foremost that of the principle of non-discrimination. Hence, since there is an overlap between the potential future breach caused by the PSC and arguably, the most important value or principle on which the Union is founded, it is only logical to have a look at the area that would be most affected by the adoption of the contested clause. Moreover, the stronger and more entrenched a principle is, the greater constraining power it has on Member States whenever they act within the scope of the Treaties, i.e. another reason to focus on the principle of non-discrimination on the basis of nationality.

The principle of equality is a multi-faceted and complex legal concept,[1034] which has been a source of inspiration since ancient times. "Nothing is more fascinating and more deceptive than equality" according to Advocate General Lagrange.[1035] As interesting and inspiring the concept might be, the focus in this study is on the general principle of equality as manifested in EU

1034 J. Wouters, "Constitutional Limits of Differentiation: The Principle of Equality," in *The Many Faces of Differentiation*, ed. B. de Witte, D. Hanf, and E. Vos (Intersentia, 2001), 302.

1035 Opinion of AG Lagrange in *Case 13/63 Italy v Commission*, [1963] ECR 190.

law,[1036] and more specifically on the principle of non-discrimination on the basis of nationality. Since the Court ruled that the non-discrimination rules of the Treaty constitute "merely a specific enunciation of the general principle of equality, which is one of the fundamental principles of Community law",[1037] and that the 'principle of equal treatment' and the 'principle of non-discrimination' "are simply two labels for a single general principle of Community law",[1038] those two 'labels' are used interchangeably throughout this study.[1039] As to the content of the principle of equality, the Court established that it "prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment".[1040] This is also known as the Aristotelian notion of equality which dictates that likes be treated alike, while unalikes be treated unalike in proportion to their unalikeness, i.e. also know as formal equality.[1041]

The aim of the following section is to demonstrate the central and defining role the principle of non-discrimination played in establishing the internal market, the historical core of the integration project. It argues that equality constitutes part of its "very foundations" and the latest Treaty revisions are merely an illustration of the further entrenchment of this central position. Moreover, equality is a principle that has been identified as "superior rule

1036 Davies explains the centrality of the term "advantage" to the definition of discrimination in EU law as follows: "Whereas Aristotle regarded discrimination simply as different treatment of similar situations, EU law has narrowed the concept slightly and, in most of its written definitions, finds discrimination only to exist where there is an advantage created for one group or another." Hence, he argues that treatment that is different, but not advantageous does not constitute discrimination in EU law. See, G. Davies, "Discrimination and Beyond in European Economic and Social Law," *Maastricht Journal of European and Comparative Law* 11, no. 1-2 (2011): 15.

1037 *Joined Cases 117/76 and 16/77 Ruckdeschel*, [1977] ECR 1753, para. 7; *Case C-122/95 Commission v Germany*, [1998] ECR I-973, para. 62; *Joined Cases C-364/95 and C-365/95 T. Port GmbH & Co.* , [1998] ECR I-1023, para. 81.

1038 *Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH*, [2005] ECR I-791, para. 33.

1039 For comments on the relationship between the concepts of equality and discrimination see, C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerpen – Oxford: Intersentia, 2005). 40; G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003). 10.

1040 *Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH*, para. 33. The Court refers to, inter alia, *Case C-442/00 Rodríguez Caballero* [2002] ECR I-11915, para. 32 and the cases cited therein.

1041 C. Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, ed. A. Rosas, E. Levits, and Y. Bot (Asser Press and Springer, 2012), 459; A. Numhauser-Henning, "EU Equality Law – Comprehensive and Truly Transformative?," in *Labour law, fundamental rights and social Europe*, ed. M. Rönnmar (Hart Publishing, 2011), 114; Davies, "Discrimination and Beyond in European Economic and Social Law," 10. For a critical analysis of the principle as defined above, see P. Westen, "The Empty Idea of Equality," *Harvard Law Review* 95, no. 3 (1982): 537-96.

of law" by the Court,[1042] which means that it would not only act as a constraint on Member States in negotiating the Accession Agreement, but would also influence the interpretation of the PSC in case of its adoption. The latter aspect concerning the interpretation of the PSC is not dealt with here, as it remains outside the scope delineated for this study.[1043]

This Chapter starts by discussing the market origins of the principle of non-discrimination on the basis of nationality. It describes how indispensable and how instrumental the principle has been, and still is, in the construction as well as regulation of the internal market. Its significance is discussed with reference to Treaty provisions containing the principle, as well as with reference to its use by the Court of Justice in deciding cases in which it was invoked.

The brief discussion of the origins and role of the principle is followed by a discussion demonstrating how the principle was embedded deeply into Union law. By now, it constitutes one of the most firmly entrenched principles in the constitutional foundations of the Union. The following sections describe the process of entrenchment, which was instigated by the Court and reinforced by Member States' approval. It is discussed with reference to Treaty provisions, which according to the Court are merely specific expressions of the general principle of equality.[1044] An overview of the Court's case law is provided from past to present with a view to demonstrating how the principle has evolved over time to acquire many additional roles to play, the role as a fundamental right being one among the most significant.

The role of the principle of non-discrimination as a fundamental right was further strengthened by the introduction of Union citizenship. Section 7.3.2 studies the relationship between the principle and the concept of Union citizenship as developed by the case law of the Court of Justice. Next, follows an examination of its entrenchment in the Treaties as well a discussion illustrating its importance and ever-wider scope of application. Subsequently, the place of the principle in the CFR is discussed, in addition to some other relevant provisions with implications for the PSC. Last but not least, to complete the picture on equality, after examining its relevance and importance for individuals, the final section focuses on its significance for Member States of the Union.

1042 See, *Case 156/78 Frederick H. Newth*, [1979] ECR 989, para. 13; *Case T-489/93 Unifruit Hellas*, [1994] ECR II-1201, para. 42.

1043 It is worth mentioning again that the purpose of this thesis is to identify the constraints on Member States at the point when they act as primary law makers drafting an Accession Agreement. The issues a PSC would raise in the post-ratification stage of the latter Agreement and the way the Court of Justice could deal with them are of different nature (though interrelated, the issue of constraints is more theoretical as opposed to the issue of how the Court deals with an existing PSC, which is more practical), and hence not covered here. They will be the topic of a future study.

1044 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.

7.2 Internal market origin of the principle of non-discrimination

The aim of this section is to illustrate the centrality of the principle of non-discrimination to the Union legal order in general and to the free movement of persons in particular. The analysis begins by examining the function and role of the principle in the Community legal order, as well as its evolution over the decades to establish how fundamental and indispensable the principle has been and still is for what has now become the European Union. Its importance has only increased over time.

It should be noted that the analysis and discussion contained in this section is in no way novel or original. This should come as no surprise, as briefly discussed above, the four freedoms constitute the core of the internal market, and as such they have been always at the centre of scholarly attention. That has only increased with the introduction of the concept of Union citizenship.[1045] Given the inextricable link between the free movement of persons and the principle of non-discrimination on the basis of nationality, that link has been extensively studied.[1046] What is provided here is a fresh look on that relationship from a new lens: that of the PSC. This new lens provides an additional insight as to the nature of that relationship. It is hoped that the new

1045 See W. Maas, "Equality and the Free Movement of People: Citizenship and Internal Migration," in *Democratic Citizenship and Free Movement of People*, ed. W. Maas (Koninklijke Brill, 2013), 9-30; Guild, "The evolution of the concept of union citizenship after the Lisbon Treaty," 3-15; Jacobs, "Citizenship of the European Union – A Legal Analysis," 591-610; D. Kochenov, "A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe," *Columbia Journal of European Law* 18(2011): 55-109; S. Kaldenbach, "Union Citizenship," in *Principles of European Constitutional Law*, ed. A. Von Bogdandy and J. Bast (Hart Publishing and Verlag CH Beck, 2010); S. O'Leary, "Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship," *Yearbook of European Law* 27, no. 1 (2008): 167-93; M. Condinanzi, A. Lang, and B. Nascimbene, *Citizenship of the Union and Free Movement of Persons*, Immigration and Asylum Law and Policy in Europe (Leiden, Boston: Martinus Nijhoff Publishers, 2008); R. C. A. White, "Free Movement, Equal Treatment, and Citizenship of the Union," *International and Comparative Law Quarterly* 54(2005): 885-906; S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law International, 1996).

1046 For few examples, see C. Hilson, "Discrimination in Community free movement law," *European Law Review* 24(1999): 445-62; N. Bernard, "Discrimination and Free Movement in EC Law," *International and Comparative Law Quarterly* 45, no. 1 (1996): 82-108; E. Johnson and D. O'Keeffe, "From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989-1994," *Common Market Law Review* 31, no. 6 (1994): 1313-46; Davies, *Nationality Discrimination in the European Internal Market*; Barnard, *Substantive Law of the EU: The Four Freedoms*; B. Wilkinson, "Towards European CItizenship? Nationality, Discrimination and Free Movement of Workers in the European Union," *European Public Law* 1, no. 3 (1995): 417-37; Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach."

lens reveals whether the principle of non-discrimination is part of the "very foundations" of the Union. If so, the implication would be that Member States could not act as they wish in their role as primary law makers in the context of enlargement. Accordingly, they would be precluded from introducing a PSC on free movement of persons in the future Turkish Accession Agreement, or any other Accession Agreement for that matter.

In short, this section of the thesis tells the same story from a different angle and recapitulates some of our previous findings, this time with the spotlight placed on the principle of non-discrimination. The length and depth of the following analysis has been determined in the light of what has already been discussed in previous Chapters, as well as taking account of the relevance of various aspects of the principle in assessing its compatibility with the controversial PSC on free movement of persons.

There is no way to overemphasize the importance of the role played by the principle of non-discrimination in eradicating obstacles standing in the way of establishing the internal market. Equality is said to be "one of the foundations on which the primary pillars of Community law are built."[1047] Tridimas speaks of the principle as "the keystone of economic integration".[1048] According to Tobler, it could be said "to form a normative core in Community law".[1049] Scholars agree on "the instrumental" or "market-unifying" role of the principle,[1050] which is examined below.

7.2.1 Its place in the Treaties

The principle of non-discrimination has permeated many areas of EU law, but our main concern here is its relationship with the rules on the four freedoms and more specifically the free movement of persons. To begin with the general prohibition of discrimination on the ground of nationality in the EEC Treaty, Article 7 EEC (now Article 18 TFEU) provided that "[w]ithin the scope of appli-

1047 L. Waddington, "The Expanding Role of the Equality Principle in European Union Law," in *Policy Paper Series on Constitutional Reform in the EU 2003/04* (Italy: European University Institute, Robert Schuman Centre of Advanced Studies, 2003), 2.

1048 T. Tridimas, *The General Principles of EC Law* (OUP, 1999). 45; cited in Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*: 35.

1049 A. Numahuser-Henning, "Introduction: Equal Treatment – A Normative Challenge," in *Legal Perspectives on Equal Treatment and Non-Discrimination Law*, ed. A. Numahuser-Henning (The Hague: Kluwer Law International, 2001), 21.

1050 For the former role see, G. De Búrca, "The Role of Equality in European Community Law," in *The Principle of Equal Treatment in EC Law*, ed. A. Dashwood and S. O'Leary (Sweet & Maxwell, 1997), 14 and 30; for the latter see, G. More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?," in *The Evolution of EU Law*, ed. P. Craig and G. de Búrca (OUP, 1999); see also, Waddington, "The Expanding Role of the Equality Principle in European Union Law," 2.

cation of the this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." It was further specified in what is now Article 45 (2) TFEU, which provided that freedom of movement for workers "shall entail the abolition of any discrimination based on nationality between the workers of the Member States as regards employment, remuneration and other conditions of work and employment." The principle is implicit in the other free movement provisions, as they have been formulated differently.[1051] The provisions on the freedom of establishment (Article 49 TFEU), freedom to provide services (Article 56 TFEU) and free movement of capital (Article 56 TFEU) prohibit any "restrictions" on those freedoms. The concept of "restrictions" is wider than non-discrimination and catches also non-discriminatory measures that constitute obstacles in front of establishing a unified market.[1052]

The most basic and most important weapon in identifying as well as fighting the obstacles in front of the free movement of the four factors of production has been the principle of non-discrimination based on nationality. According to Van den Bogaert the principle "lies at the heart of the application of [Union] provisions on the free movement of workers, the freedom of establishment and the freedom to provide services".[1053] The fact that the Treaty provisions on the four freedoms have been formulated differently seems to obscure this fact.[1054] However, once we look at the Court's analysis of cases dealing with the freedoms, the importance of the principle becomes more obvious.

1051 According to Davies, one explanation for that might be the fact that the concept of discrimination "seems to sit more comfortably with situations involving people than those involving goods and services". See, Davies, *Nationality Discrimination in the European Internal Market*: 56.

1052 Van den Bogaert confirms the latter argument by pointing out to the definition of the concept "restrictions" laid down in the General Programmes for the abolition of restrictions on the freedom of establishment and freedom to provide services of 18 December 1961, OJ Eng. Spec. Ed. Second Series IX, 7 and 32, as well as to early case law of the Court (see, *Case 33/74 Van Binsbergen*, [1974] ECR 1299, para. 25; and *Case 2/74 Reyners,* [1974] ECR 631). Restrictions are defined as "any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as a result of the application of such a provision, or of administrative practices, prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned. Moreover, "any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by foreign nationals" are also to be regarded as restrictions (Title III). See, S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (The Hague: Kluwer Law International, 2005). 122-23.

1053 Ibid., 124.

1054 Hilson, "Discrimination in Community free movement law," 445-46.

Before looking into the role of the principle in the Court's case law, it should be noted from the outset that as important as the four freedoms are, they have never been absolute. The drafters of the Treaty have specified grounds on which Member States are able to derogate from them. In the area of free movement of persons, these grounds are "public policy, public security or public health",[1055] and in the area of free movement of goods there is a longer list of grounds laid down in Article 36 TFEU.[1056] However, the fact that Member States take measures on one of these grounds do not give them free hand in doing whatever they like. The Court interprets these grounds very restrictively.[1057] Moreover, against the possibility of abusing those grounds,[1058] there is precaution in the Treaties themselves. The last sentence of Article 36 TFEU demonstrates that clearly by providing that the prohibitions or restrictions on one of the grounds provided by the article itself shall not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". The Court has made the test even stricter by adding a proportionality test whereby it checks whether the objective of the measure tested could be attained in a less restrictive way.

7.2.2 Its development in the case law of the Court

It soon became clear that as important as it was to fight discriminatory measures, this was only a modest first step in dismantling the barriers fragmenting the internal market. Thus, the Court in its case law moved to fight also non-discriminatory measures, also called indistinctly applicable or equally applicable measures, under the broader label of "restrictions".[1059] However, it soon became equally clear that the list of grounds enumerated in the Treaties

1055 See, Article 45(3) TFEU for free movement of workers, and Article 52(1) TFEU for freedom of establishment and freedom to provide services. For further details see also, "Chapter VI – Restrictions on the right to entry and the right to residence on grounds of public policy, public security or public health" of Directive 2004/38/EC.

1056 The grounds listed in Article 36 TFEU are "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national reassures possessing artistic, historic or archeological value; or the protection of industrial or commercial property".

1057 *Case 41/74 Van Duyn*, [1974] ECR 1337, para. 18; *Case C-348/96 Donatella Calfa*, para. 23; *Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri*, [2004] ECR I-5257, para. 65.

1058 There is secondary law in the area of free movement of persons clarifying how exactly those grounds are to be interpreted and applied by Member States. See, Chapter VI of Directive 2004/38/EC of 29 April 2004, OJ L 158/77, 30.04.2004, which replaced Council Directive 64/221/EEC. See respectively, notes 837 and 450 above.

1059 The first case on free movement of workers in which "a genuinely non-discriminatory measure was involved" was *Case C-415/93 Bosman*. For an in-depth discussion see, Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*: 130. For a general discussion on "restrictions", see Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*: 75-77.

on which Member States could derogate from the freedoms was far from meeting their needs. There were many more legitimate interests, which the States would wish to protect, such as the environment, the consumers' interests, culture, fundamental rights etc., but were not able to under the limited number of grounds listed in the Treaties. Acknowledging the need for additional grounds of derogation first in the area of free movement of goods, in its ground breaking *Cassis de Dijon* ruling,[1060] the Court created new exceptions, initially called "mandatory requirements", to the free movement provisions. However, these exceptions would apply only if the measure concerned was not discriminatory, pursued a legitimate aim in the public interest and was proportionate.

What the creation of the additional grounds of derogation meant for the Court's analysis in identifying and classifying different types of measures, was that it was mainly the fact whether the measure concerned was discriminatory or not which determined whether or not and how it could be justified.[1061] Thus, after asking the very first question, which is whether a measure is a quantitative restriction or measure having an equivalent effect in the area of free movement of goods, or whether it constitutes a "restriction" regarding the other freedoms, next, the Court asks whether the measure is discriminatory or put differently "distinctly applicable". It is the answer given to that question that determines whether the measure can be justified under the Court created exceptions mentioned above or not.[1062] While non-discriminatory measures can be justified under both Treaty provided and Court created exception grounds, discriminatory measures can be justified only under the limited grounds provided in the Treaty.

In other words, the fact whether there is discrimination on the grounds of nationality between products, workers, services, or capital is essential in how the Court resolves each and every case. It was in *Gebhard* that the Court unified its approach to the Court created exceptions regarding all the freedoms, and the fact that non-discrimination is the very first condition that needs be fulfilled clearly demonstrates how important the principle is in the functioning of the freedoms. To look at the whole test, the Court in *Gebhard* provided that:

> '…national measures liable to hinder or make less attractive the exercise of *fundamental freedoms* guaranteed by the Treaty must fulfil four conditions: they must be applied in a *non-discriminatory* manner; they must be justified by imperative

1060 *Case 120/78 Cassis de Dijon*.

1061 Hilson, "Discrimination in Community free movement law," 451.

1062 Unfortunately, the Court's case law has not always been consistent in this respect. There are cases in which the Court evades discussing whether the restrictive measure is discriminatory or not. For such an example, see *Case C-28/09 Commission v Austria*, [2011] ECR I-13525. For the relevance of discrimination in the Court's analysis and a critique of the Court's inconsistent approach, see S. Weatherill, "Free Movement of Goods," *International and Comparative Law Quarterly* 61, no. 2 (2012): 543-45.

> requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'[1063]

The Court's analysis illustrates the crucial role played by the principle of non-discrimination in the proper functioning of the freedoms, as the internal market needs to be equally accessible to goods, services, and persons originating from different parts of the market. As Waddington puts it, equality "lies at the heart of the four fundamental freedoms of movement".[1064] The principle was so central to the functioning of the internal market that to increase its effectiveness, the Court had to broaden the prohibition to cover also "indirect discrimination" or what has also been called "covert discrimination".[1065]

The concept of indirect discrimination is well established and well known. It suffices to briefly mention here that it was intended to catch "*seemingly neutral differentiation criteria with a disproportionate impact* or effect upon a group (or object) that is protected by an explicit prohibition of discrimination".[1066] It takes place, for instance, when a measure does not formally discriminate on the basis of nationality, but on other seemingly neutral ground such as place of residence or possession of a particular qualification available only domestically, and as a result "is liable to have such [discriminatory] an effect".[1067] The fact that the Court does not require proof of discrimination, but accepts the mere likelihood of such effect,[1068] demonstrates both the importance of the principle as well as the Court's efforts to increase the effectiveness of the prohibition of non-discrimination via its case law.

7.3 Embedding equality deeper into Union law

The following sections aim to demonstrate that the importance of the principle of equal treatment has continuously increased and evolved over time, as has its power of constraint on Member States. As mentioned above, the Court recognized equal treatment as one of its general principles of law. It contributed further to pushing the principle up in the hierarchy of norms, by

1063 Emphasis added. *Case C-55/94 Gebhard*, para. 37. The Court refers to *Case C-19/92 Kraus*, para. 32.

1064 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 2.

1065 See, *Case 152/73 Sotgiu*, [1974] ECR 153, para. 11; *Case C-111/91 Commission v Luxembourg*, [1993] ECR I-817, para. 9; *Case C-419/92 Scholz*, [1994] ECR I-505, para. 7.

1066 Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*: 57. For the definition of the concept of "indirect discrimination", see also Davies, *Nationality Discrimination in the European Internal Market*: 15-16.

1067 *Case C-237/94 O'Flynn*, [1996] ECR I-2617, para. 21.

1068 See *Case C-175/88 Biehl*, [1990] ECR I-1779, para. 14; *Case C-204/90 Bachmann*, [1992] ECR I-249, para. 9; *Case C-237/94 O'Flynn*, para. 18.

naming it "superior rule of law",[1069] acknowledging it constitutes part of the "fundamental personal human rights" which it protects,[1070] and by making it an integral part of the concept of Union citizenship.[1071]

The first two sections discuss the Court's role in the constitutionalisation of the general principle by embellishing it with new important roles, and by making it an integral component of the concept of Union citizenship. The following two sections demonstrate the formal constitutionalisation of the principle by its inclusion into Treaties and the Charter by consecutive Treaty reforms. Both processes have created a virtuous circle reinforcing the importance as well as the constraining force of the principle. Moreover, it is argued that the principle has been constitutionalised not only formally, by being acknowledged as part of primary law, but also in other two senses of the term.

To begin with the first sense of the term, constitutionalisation can be summarized as "a process where the norm is entrenched and accorded higher legal status".[1072] This implies that its position in the system is consolidated in the sense that it is less vulnerable to change or repeal. Moreover, it also means that where conflicts between legal norms arise, those that are constitutionalized will be given greater weight.[1073] Even if the process might not be complete, it is widely acknowledged that the principle of equal treatment has been undergoing a process of constitutionalisation in this first sense of the term.[1074]

Constitutionalisation in its second sense is borrowed from the German legal order. It is not about hierarchy or superiority, but about the penetration or permeation of the principle of equal treatment in our case (or fundamental rights in the case of Germany) into the entire legal order.[1075] Constitutionalisation of the principle in this latter sense of the term in the Union legal order became especially visible after the inclusion of the horizontal provisions or "Provisions Having General Application" under Title II of the TFEU. Accordingly, Articles 8 and 10 TFEU require all Union activities to be informed by and be in line with the principle of non-discrimination.

It should be noted that this process(es) of constitutionalisation of the principle of equal treatment should not be seen as its complete transformation,

1069 *Case 156/78 Frederick H. Newth*, para. 13; *Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 HNL and Others*, [1978] ECR 1209, paras. 4-5; *Case T-489/93 Unifruit Hellas*, para. 42.

1070 *Case 149/77 Defrenne III*, [1978] ECR 1365, paras. 25-26.

1071 See section 7.3.2 above.

1072 M. Bell, "The Principle of Equal Treatment: Widening and Deepening," in *The Evolution of EU Law*, ed. Paul Craig and Gráinne de Búrca (OUP, 2011), 625.

1073 Ibid., 625-26.

1074 Ibid., 629-31; More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?," 535-40; Waddington, "The Expanding Role of the Equality Principle in European Union Law," 11-24; Wouters, "Constitutional Limits of Differentiation: The Principle of Equality," 306.

1075 A. von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union," *Common Market Law Review* 37(2000): 1333-34.

but rather as a process whereby it acquires roles additional to the ones already mentioned above.[1076] To use Reich's Russian doll analogy,[1077] these roles are the different dresses the principle puts on depending on the occasion and the general climate determined by Treaty changes, legislative action as well the Court's interpretation. However, unlike the dresses of a Russian doll these roles/dresses are not cut in wood or stone. They evolve in order to adjust to the vagaries of the legal climate. As such, the constitutional dress is the latest addition to the expanding wardrobe of the principle of equality.

In short, the following sections highlight some of the important developments contributing to the process of constitutionalisation of the principle of equality and demonstrate how deeply embedded it is into the Treaty structures. This demonstration aims to bolster the argument that the inclusion of a PSC, breaching such a fundamental principle or core value of the EU legal order into an Accession Agreement, would be precluded.

7.3.1 Equality as an established general principle of EU law

The principle of non-discrimination in EU law derives directly from the Treaties. It was initially enshrined in Article 7 EEC, (*ex* Article 6 EC, *ex* Article 12 EC, now Article 18 TFEU), and has always had its more specific manifestations in other provisions of the Treaties.[1078] However, according to the Court, those latter provisions are "only a specific expression of the general principle of equality which is one of the fundamental principles of [Union] law and which requires that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified".[1079] The Court established further that the general principle of non-discrimination embodied in Article 18 TFEU applies only in the absence of more specific provisions in a

1076 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 29.

1077 For a more detailed description, see N. Reich, "A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law," *European Law Journal* 3, no. 2 (1997): 133.

1078 In the area of free movement of goods, see Articles 36-37 TFEU; in the area of agriculture, see Article 40(2) TFEU; in the area of free movement of workers, see Article 45(2) TFEU; in the area of free movement of capital, see Article 65(3) TFEU; in the area of transport, see Article 95(1) TFEU; in the area of competition, see Article 107(2)(a) TFEU; in the area of social policy, see Article 157(2) TFEU; in the area of external relations (humanitarian aid), see Article 214(2) TFEU. This list merely provides examples of the specific manifestations of the principle of non-discrimination in various parts of the Treaties. It is not exhaustive.

1079 *Case C-280/93 Germany v Council*, [1994] ECR I-4973, para. 67. See also, *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7; *Case 281/82 Unifrex*, [1984] ECR 1969, para. 30. For a more extensive list of cases and discussion, see Schermers and Waelbroeck, *Judicial Protection in the European Union*: 88; and Lenaerts et al., *European Union Law*: 156-57.

relevant field.[1080] Non-discrimination is "one of the fundamental principles of the Treaty which must be observed by any court".[1081] Due to its prevalent appearance in the Treaties and its foundational character, Usher has defined the principle of non-discrimination as "an underlying general principle of [Union] law".[1082]

General principles of EU law refer to "unwritten, judicially driven norms"[1083] that may be codified at one point. They are not precise or well-defined and have an overarching scope, i.e. their application goes beyond a specific field of law.[1084] According to Usher "the express prohibition of discrimination on the grounds of nationality set out in Article 6 [now Article 18 TFEU] is so wide as to preclude the development of any wider general principle".[1085] In the same vain, Tobler confirms that it is "[o]nly the prohibition of discrimination on grounds of nationality under Article 18(1) TFEU and the specific provisions reserved by it [that] applies in all fields of Union law", while almost all other non-discrimination provisions have a more limited scope.[1086] In line with our analogy above, the principle of non-discrimination based on nationality is the "black dress" that can be worn everywhere, it is deemed appropriate for all occasions, i.e. the joker, while the other dresses (other specific manifestations of the principle of non-discrimination), are suitable only on an number of limited occasions.

As already mentioned, the Court established that the general principle of equality is "one of the fundamental principles of Community law".[1087] It often used the concepts of non-discrimination and equality interchangeably, and sometimes together. It laid down that "[f]undamental rights include the general principle of equality and non-discrimination".[1088] Similarly, it ruled that the principle of equal treatment "constitutes a fundamental right".[1089] It also referred to it as "the general principle of equal treatment".[1090] According to the Court, 'the principle of equal treatment' and the 'principle of non-discrimination' "are simply two labels for a single general principle of Community law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons

1080 *Case C-18/93 Corsica Ferries Italia*, [1994] ECR I-1783, para. 19; *Case C-22/98 Becu*, [1999] ECR I-5665, para. 32; *Case C-55/98 Vestergaard*, [1999] ECR I-7641, para. 16.
1081 *Case 8/78 Milac*, [1978] ECR I-1721, para. 18.
1082 Usher, *General Principles of EC Law*: 12.
1083 C. Semmelmann, "General Principles in EU Law between a Compensatory Role and an Intrinsic Value," *European Law Journal* 19, no. 4 (2013): 461.
1084 Ibid.
1085 Usher, *General Principles of EC Law*: 20.
1086 Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 447.
1087 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.
1088 *Case C-442/00 Rodríguez Caballero* para. 32.
1089 *Case C-37/89 Weiser*, [1990] ECR I-2395, para. 13.
1090 *Case C-144/04 Mangold*, [2005] ECR I-9981, para. 76.

for such treatment".[1091] In other words, in addition to its 'instrumental' and 'market-unifying role', in time, the principle has also acquired an additional role or status as a fundamental right.

To provide an example of the process in which the principle of non-discrimination acquired new roles over time, one notices that in the early case law the Court established that the abolition of discrimination was needed "in order to ensure the free movement of workers which is *essential to the common market*".[1092] Next, the Court moved to a phase, in which it confirmed the economic rationale underlying the principle, however, it also acknowledged its social role. *Defrenne II* is a good example, as the Court recognized that Article 157 TFEU pursued a double aim: economic and social. In addition to the economic aim,[1093] the Court established that the "provision forms part of the social objectives of the Community, which is not merely an economic Union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples".[1094]

The following important stage in the development of the principle of non-discrimination was the Court's recognition in *Defrenne III* that the prohibition of non-discrimination based on sex forms part of the "fundamental personal human rights", the observance of which it ensures.[1095] With the transfer of new competences to the Union and the creation of the status of Union citizenship, the situation had changed to such an extent by the beginning of the new millennium that the Court concluded that "the economic aim pursued by [Article 157 TFEU], namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right".[1096]

The cases cited above illustrate clearly the emergence and rise of the additional roles of the principle of non-discrimination over its original role linked to the establishment of an internal market. The social role of the principle, and above all that of a fundamental individual right is now clearly the robe in fashion. The 'instrumental' and 'market unifying' dress is still in use and part of the wardrobe, however, not as popular as before.

1091 *Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH*, para. 33.
1092 Emphasis added. *Case 15/69 Ugliola*, [1969] ECR 363, para. 3.
1093 See, *Case 43/75 Defrenne II*, para. 9.
1094 Ibid., para. 10.
1095 *Case 149/77 Defrenne III*, paras. 26-27.
1096 *Case C-50/96 Deutsche Telekom AG*, [2000] ECR I-743, para. 57.

7.3.2 Equality as part of citizenship

The most important development that increased the prominence of the principle of equal treatment even further was the introduction of the concept of Union citizenship into the Treaties, and at least as important was the Court's interpretation of it. As discussed in detail in sub-section 6.3.2.3 above, the Court broadened the scope of the prohibition of non-discrimination based on nationality laid down in Article 18 TFEU, by extending its application to *all* Union citizens resident lawfully in the territory of a host Member State.[1097] The result was the decoupling of the principle from the economic activity requirement, which was previously necessary for its application. Being a Union citizen lawfully resident in a host Member State became sufficient to bring a person within the personal scope of the Treaty and claim a right to equal treatment with nationals of that State. While initially the Court would extend the right to equal treatment to situations and benefits that fall within the material scope of EU law,[1098] in its later case law it extended the right also to benefits that fell within the competence of Member States, when it was of the opinion that Member States had not exercised their competence in line with EU rules.[1099]

There is no need to repeat the case law on citizenship discussed above, however, it is worth emphasising the central role of the principle of equality that has become an integral part of the citizenship concept. As argued by AG Jacobs, "[f]reedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship."[1100] In the same vain, a decade later, AG Maduro reiterated that "[t]he prohibition of discrimination on the basis of nationality is no longer merely an instrument at the service of freedom of movement; *it is at the heart of the concept of European citizenship*".[1101] Scholars confirm that after the introduction of citizenship there has been "a reconceptualization of, or a qualitative change in, the relationship between the right to free movement and the right to non-discrimination".[1102] The umbilical cord between the two has been cut. Now they are no longer linked to one another, "[r]ather,

1097 *Case C-85/96 Martinez Sala*, para. 63.

1098 Ibid.

1099 The benefits at stake in this case were benefits for civilian war victims. See, *Case C-192/05 Tas-Hagen and Tas*, paras. 21-22.

1100 Opinion of AG Jacobs in *Case C-274/96 Bickel and Franz*, para. 24.

1101 See Opinion of AG Maduro in *Case C-524/06 Huber*, [2008] ECR I-9705, para. 18.

1102 A. P. Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," *Maastricht Journal of European and Comparative Law* 11, no. 1-2 (2011): 72. See also, H. De Waele, "The ever-evolving conccept of EU citizenship: Of paradigm shifts, quantum leaps and Copernican revolutions," in *Globalisation, Migration, and the Future of Europe: Insiders and Outsiders*, ed. L. S. Talani (Routledge, 2012), 101-207.

they are separately and directly linked to the fundamental status of Union citizenship".[1103]

The decoupling of the application of the non-discrimination principle from the performance of an economic activity in the Court's citizenship case law was indeed revolutionary.[1104] Now, the principle applies not because one is a worker, entrepreneur, service provider or recipient, but simply by virtue of being a Union citizen legally resident in another Member State. Thus, it is argued that the principle of equality between EU citizens has assumed "a constitutional character subject to strict judicial scrutiny".[1105] The inclusion and further elaboration of the principle in the Treaties and the Charter, which is briefly discussed below, contributed further to the constitutionalisation of the principle. What is especially notable in the Lisbon Treaty revision, and which could also be interpreted as a tacit approval of the Court's case law by the Member States, is the placement of the Treaty provisions on non-discrimination and citizenship in Part Two of the TFEU, under one title, namely "Non-Discrimination and Citizenship".

If one is to go back to the two manifestations of constitutionalisation mentioned above, that is hierarchical superiority and ubiquity (presence/penetration in various fields of law), the hierarchical superiority of the principle of equality was never in doubt, as the Court consistently repeated over the years that it constitutes "a superior rule of law".[1106] That position has been consolidated further with the added boost of Union citizenship. As to the gradual expansion of the scope of the principle, as well as its proliferation into wider areas of Union law, which is also discussed in the following section, those were developments enabled by the creation of the Union citizenship status as well as continued transfer of new competences to the Union. As argued by Van der Mei, citizenship and non-discrimination have fuelled each other. Not only has the gradual expansion of the prohibition of non-discrimination provided substance to Union citizenship, but the latter status has also served "as a source to strengthen the right to equal treatment of nationality".[1107] In other words, the central place of the principle in the Union legal order was consolidated further over time.

1103 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 72.

1104 For a more detailed account of the development of the Court's case law on Union citizenship, see De Waele, "The ever-evolving conccept of EU citizenship: Of paradigm shifts, quantum leaps and Copernican revolutions," 191-207; S. Currie, "The Transformation of Union Citizenship," in *50 Years of the European Treaties: Looking Back and Thinking Forward*, ed. Michael Dougan and Samantha Currie (Hart Publishing, 2009), 365-90.

1105 Bell, "The Principle of Equal Treatment: Widening and Deepening," 614.

1106 *Case 156/78 Frederick H. Newth*, para. 13; *Case 50/86 Les Grands Moulins de Paris*, [1987] ECR 4833, para. 10; *Case T-489/93 Unifruit Hellas*, para. 42; *T-93/94 Becker*, [1996] ECR II-141, para. 26.

1107 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 85.

Many scholars argue that the transformation of the principle or the completion of its constitutionalisation process could not be considered over as long as the concepts of "internal situations" and "reverse discrimination" continue to exist.[1108] As far as it relates to citizenship, the constitutional dress of the principle of equality is still seen as "work in progress", and perhaps it is so. However, as suggested by Van der Mei, and his interpretation of the Court's ruling in *Zambrano*, the Court does not view "reverse discrimination" as a problem of discrimination, "but rather as one of disrespecting substantive EU rights involved".[1109] Hence, going back to our wardrobe of rights, it might be perhaps useful to specify that the constitutional garment in our wardrobe is not strictly speaking a "dress", but rather a coat. A coat is a protective garment worn on top of others. It is a garment that normally one does not need (or wear) at home, i.e. in their Member State of origin. One needs it once he or she steps outside the confines of the known and familiar, i.e. in our context once a national frontier is crossed.

Hence, the argument that the process of constitutionalisation of the principle of non-discrimination on the ground of nationality would be complete once it applies to all Union citizens irrespective of what they do and in which part of the Union they reside, might be erroneous. As Europeans possess a rich wardrobe of rights, they are already protected at many levels: national (local level), constitutional (Member State level), and European (at regional level by the EU and the ECHR). As argued by Weiler, in this case the problem is not a shortage of rights, but rather their abundance.[1110] In short, in the European context, what to wear, or which specific principle of equality one should be protected by, is more a problem of luxury rather than dire need.

Moreover, for our purposes the principle is as strong and authoritative as it can be in its new "constitutional garment". Since the proposed PSC would infringe both the right to free movement as well as the principle of non-discrimination based on nationality, there is not much that the further decoupling of the two will add to our discussion. AG Colomer's Opinion in *Petersen* also demonstrates clearly how inextricably linked citizenship and free movement are at the moment. According to the AG General:

1108 Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism," 596-97; Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?," 769-70. It should be noted however, that there are those who think, "the internal situation doctrine is a suitable instrument to meet the constitutional necessity of respecting the division of powers between the Union and its Member States". See, D. Hanf, "'Reverse Discrimination' in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?," *Maastricht Journal of European and Comparative Law* 11, no. 1-2 (2011): 57.

1109 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 81.

1110 J. H. H. Weiler, "Editorial: Individuals and Rights – The Sour Grapes," *European Journal of International Law* 21, no. 2 (2010).

> 'Cases such as *Carpenter, Baumbast and R, Bidar, Tas-Hagen and Tas* and *Morgan and Bucher* demonstrate a tendency towards protecting individuals, a concern with the personal situation of those who exercise a right under the Treaties which in the past was much less evident. Thus, the free movement of persons acquires its own identity, imbued with an essential nature that is more constitutional than statutory, transforming it into a freedom akin to the dynamics of the fundamental rights.'[1111]

It should be emphasised again that it was the addition of citizenship provisions and the case law of the Court that enabled free movement of persons to acquire its own identity. That would not have been possible if it had not been coupled with the principle of equal treatment. In other words, "the coat" (the constitutional protection against discrimination in cross-border situations) is arguably the EU's most significant contribution to the wardrobe of Union citizens. It is so fundamental and defining, that a wardrobe without it would not qualify as one belonging to a Union citizen. Hence, it can be argued that Member States should be precluded from withholding it from Union citizens, who will acquire that status in the future.

7.3.3 Expanding scope of equality in the Treaties

The fact that "general principles of Community law have constitutional status",[1112] as well as the fact that the principle of equality constitutes a general principle, which is one of the fundamental principles of the EU legal order,[1113] were already emphasised above. This means that the principle of equality or non-discrimination played a constitutional role, long before scholars had acknowledged it. What made that role more prominent or visible in recent years, were the Treaty changes that mirrored and confirmed the Court's case law.

As to the expansion of the scope of the prohibition of non-discrimination beyond nationality, the most important development to that effect was the inclusion of Article 13 EC by the Amsterdam Treaty. It has now been replaced and extended by Article 19 TFEU as a legal basis for the adoption of measures covering discrimination on the following grounds: "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Even though the provision did not impose any specific obligation on Member States to take action, and as such did not have direct effect, it increased the visibility of the principle and widened the Union's power in the field of anti-discrimination law.[1114] A series of Directives were enacted based on Article 13 EC;[1115]

1111 See Opinion of AG Colomer in *Case C-228/07 Petersen*, [2008] ECR I-6989, para. 17.
1112 *Case C-101/08 Audiolux*, [2009] ECR I-9823, para. 63.
1113 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.
1114 Tridimas, *The General Principles of EU Law*: 64.

however, since they do not deal with discrimination based on nationality, and have no implications for the PSC, they will not be discussed in any detail here.

The most significant developments came with the Lisbon Treaty revision. Not only was equality embedded more deeply in the Union's "basic constitutional charter, the Treaty",[1116] but the document devoting it an entire chapter (Chapter III), namely the Charter of Fundamental Rights of the EU, was elevated to acquire the same legal value as the Treaties.[1117] To begin with the additions to the Treaties, both "equality" and "non-discrimination" were explicitly named in the respective two paragraphs of Article 2 TEU, as constituting foundational values of the Union as well as of its Member States. Article 3(3) TEU instructs the Union to "combat social exclusion and discrimination". Moreover, Article 9 TEU dictates the Union to "observe the principle of equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".

While one cannot help but wonder how the Union is to ensure its institutions give equal attention to all Union citizens, and whether that will be in line with the premises of the principle itself, Bell argues that the precise interpretation of rights conferred by constitutional texts is of lesser significance. What counts is the presence or absence of principles such as equality.[1118] Similarly, Shaw underlines the "undoubtedly foundational character of constitutional law and discourse for any polity".[1119] She claims constitutional texts offer "a privileged frame of reference for questioning the boundaries, nature and purpose of any given polity".[1120] As such, it can be argued that they have both normative power, and perhaps also transformative potential, as an entity that claims to be bound by certain principles will also need to abide by those principles, or at least provide convincing justifications for not being able to do so. In other words, the more visible and constitutionalized the principle of equality in the EU legal order is, the more difficult it becomes for the Union and Member States to deviate from it.

1115 See, Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22, 19.07.2000; Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, 2.12.2000; Directive 2002/73/EC amending Directive 76/207/EEC 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, OJ L 269/15, 5.10.2002; Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37, 21.12.2004.

1116 *Case 294/83 Les Verts*, para. 23.

1117 See Article 6(1) TEU.

1118 Bell, "The Principle of Equal Treatment: Widening and Deepening," 626.

1119 J. Shaw, "The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalized?," *Feminist Legal Studies* 10(2002): 215.

1120 Ibid.

While the inclusion of "equality" and "non-discrimination" in Article 2 TEU symbolises their place at the top of hierarchy of constitutional norms, their inclusion in Article 8 TFEU (ex Article 3(2) EC)[1121] and especially the newly introduced Article 10 TFEU is a clear illustration of the effort to deeply entrench those principles in all the activities of the Union, i.e. constitutionalisation in the second sense of the term as defined in this Chapter. It provides as follows: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Article 8 and 10 TFEU are to be found under Title II "Provisions having general application". They are among the so-called horizontal or mainstreaming provisions, which require the Union and its institutions to systematically scrutinise its measures and policies by taking into account their possible effects on the grounds identified under the provisions of Title II.[1122]

Last, but not least follows the examination of the principle of equality as it appears in the Charter. Article 6(1) TEU proclaims that "[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which *shall have the same legal value as the Treaties*."[1123]

7.3.4 Equality as enshrined in the Charter

As to the Charter, its entire Chapter III is devoted to "Equality". It contains seven articles. Our focus will be on the first two general articles, which have "a traditional justiciable and constitutional form",[1124] while the other five are more specific and aspirational.[1125] To begin with Article 20, which provides that "[e]veryone is equal before the law", the Explanations on the Charter clarify that the provision "corresponds to a general principle of law which is included in all European constitutions and has also been recognized by the Court of Justice as a basic principle of Community Law".[1126] The

1121 It reads as follows: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."

1122 For "gender mainstreaming", see S. Fredman, "Transformation or Dilution: Fundamental Rights in the EU Social Space," *European Law Journal* 12, no. 1 (2006): 53-55.

1123 Emphasis added.

1124 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 23.

1125 The more specific articles deal with: cultural, religious, and linguistic diversity (Article 22); equality between men and women (Article 23); the rights of the child (Article 24); the rights of the elderly (Article 25); the integration of persons with disabilities (Article 26).

1126 See, Explanations Relating to the Charter of Fundamental Rights, OJ C 303/24, 14.12.2007.

Court interpreted Article 20 CFR in line with its Explanations and confirmed that it enshrines the general principle of equal treatment, which "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".[1127] This definition leads Tobler to convincingly argue that "Article 20 is not about 'equality before the law' understood in a traditional sense (i.e. equal application of the law to all, whatever the content of the law) but indeed the broad principle as previously recognized in its case-law".[1128]

Article 21(1) CFR contains an open-ended list of prohibited discrimination grounds, which include "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". It draws on Article 13 EC (now 19 TFEU), Article 14 ECHR and Article 11 of the Convention on Human Rights and Biomedicine.[1129] According to Tobler, it corresponds to the general principles of equality with respect to particular discrimination grounds.[1130] Its more relevant part for our purposes is its second paragraph, which prohibits discrimination on grounds of nationality. The Explanations provide that it corresponds to Article 18 TFEU and that it should be applied in compliance with it.[1131] Waddington notes that Article 21 CFR reveals a hierarchy, with the prohibition of discrimination on the ground of nationality being *primus inter pares*, as it applies in all fields of EU law.[1132] Second come the grounds covered by Article 19 TFEU and the non-discrimination Directives, which have their own internal hierarchy.[1133] Lastly, come the remaining grounds in which the Union is not entitled to adopt any legislation.

1127 *Case C-149/10 Chatzi*, [2010] ECR I-8489, paras. 63-64. See also, *Case C-208/09 Sayn-Wittgenstein*, [2010] ECR I-13693, para. 89.

1128 Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 455.

1129 See, Explanations Relating to the Charter of Fundamental Rights, OJ C 303/24, 14.12.2007.

1130 Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 456. To that effect, see the references to the general principle of non-discrimination on the grounds of age and Article 21 CFR, *Case C-447/09 Prigge and Others*, [2011] ECR I-8003, para. 38; *Joined Cases C-297/10 and C-298/10 Hennings and Mai*, [2011] ECR I-7965, para. 47.

1131 See, Explanations Relating to the Charter of Fundamental Rights, OJ C 303/24, 14.12.2007.

1132 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 24. Tobler also notes the limited field of application of almost all non-discrimination provisions. She notes that only the prohibition of non-discrimination based on nationality as laid down under Article 18 TFEU applies in all fields of Union law. See, Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 446.

1133 See, E. Howard, "The case for a considered hierarchy of discrimination grounds in EU law," *Maastrict Journal of European and Comparative Law* 13, no. 4 (2007): 445-70; E. Howard, "Equality: A Fundamental Right in the European Union?," *International Journal of Discrimination and Law* 10(2009): 29-32.

Although, strictly speaking, it does not fall under the title "Equality and the Charter", another obvious provision in the Charter capable of constraining Member States as primary law makers, which is worth mentioning here, is Article 45(1) CFR. It is situated under Chapter V of the Charter titled "Citizens' Rights", and it provides as follows: "Every citizen of the Union has the right to move and reside freely within the territory of the Member States"; whereas paragraph 2 provides that "[f]reedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State". What is striking when one compares those two paragraphs is the absolute formulation of the right to move and reside freely for Union citizens. Unlike the corresponding formulation of this right in the Treaties, there is no qualification attached to the effect that the right concerned "shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder".[1134]

As soon as one checks the explanations relating to Article 45(1) of the Charter one is informed that the right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) TFEU, which means "that "[i]n accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties". Undoubtedly, Charters and Declarations of Rights contain more ambitious goals and pompous language. However, that should not be a reason to brush them aside. The ideals they set and the discourse they establish are more important than their precise interpretation, as argued above. They have transformative potential, as the ideals they set are usually perceived as something to strive for, something to achieve in the long run. Hence, it makes perfect sense to establish an ideal of an unconditional right to free movement for Union citizens in a Charter of Fundamental Rights, which leads one to the expectation of the creation of an ever stronger and more absolute right to free movement of persons over the years. That expectation is undoubtedly strengthened by the Union's prospect (and above all, obligation under Article 6(2) TEU) to accede to the ECHR.

7.4 Principle of equality of Member States

What was discussed so far, was how important and foundational the principle of equality was for the nationals of Member States and the integration project, as well as how it evolved over time to acquire a broader scope and penetrate deeper into all fields of Union law. This section deals with the same principle, however this time as far as it relates to the Member States themselves. Equality

1134 Article 20(2) TFEU.

of Member States has always been a constitutional principle of Union law,[1135] which has also been acknowledged by the Court.[1136]

Member States of the EU have committed themselves to treat both each other as well as their citizens equally. While previously the principle of equality of States was an unwritten principle of EU law, after the Lisbon Treaty revisions one finds it expressly laid down in Article 4(2) TEU, which provides that "The Union shall respect *the equality of Member States before the Treaties* as well as their national identities …" [emphasis added]. Including clauses that have not existed in any other Accession Agreement allowing other Member States to suspend the free movement rights of the nationals of an acceding State, and of that State only, will put a serious question mark on both the "equality" of that State *vis-à-vis* other Member States, as well as on the equality of its citizens with other nationals of Member States. The possible inclusion of "specific arrangements" or additional PSCs concerning agriculture or structural policies would obviously also not serve promoting the equality of a new Member State with old ones.[1137]

The case *Commission v. UK* discussed in Part II above, provides a good illustration of how the Court could deal with a contentious PSC. Given the tenets laid down in the judgment, which could easily be transposed from goods to people, one could argue that Member States would be constrained from including the PSC, as the existing case constitutes a basis for a prospective sanction by the Court. Since *Commission v. UK* concerned free movement of goods and more specifically "the elimination of quantitative restrictions", and our primary concern throughout this study was the inclusion PSC on "free movement of persons", the Court could easily replace the crossed out phrases with those in brackets and establish that "[i]n *a matter as essential for the proper functioning of the common market as* [free movement of persons], *the Act of Accession cannot be interpreted as having established for an indefinite period* [at the expense of] *the new Member States a legal position different from that laid down by the Treaty for the original Member States*."[1138] Thus, even if "it was justified for the [acceding] Member States *provisionally to accept such inequalities*, it would

1135 Wouters, "Constitutional Limits of Differentiation: The Principle of Equality," 315-16; De Witte, "The Impact of Enlargement on the Constitution of the European Union," 247.

1136 *Case 231/78 Commission v UK*, para. 17; *Case 39/72 Commission v Italy*, [1973] ECR 101, para. 24.

1137 It is worth reminding that point 12, para. 4 of Turkey's Negotiating Framework reads as follows: "Long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture."

1138 Emphasis added. *Case 231/78 Commission v UK*, para. 17.

be *contrary to the principle of equality of the Member States before Community law* to accept that such inequalities could continue *indefinitely*."[1139]

In short, equality of Member States is a constitutional principle of EU law, which has also been recently codified in the Treaty. It is a principle derived from the principle of the sovereign equality of States,[1140] one the fundamental principles of public international law.[1141] Even though what is of primary importance for our purposes is the principle of equality of Member States, since drafting of an Accession Treaty takes place within the scope of Article 49 TEU, which is within the scope of EU law, it is also worth mentioning the relevance of the public international law principle, since the end product (the Accession Treaty) after its ratification, is also an international agreement.

7.5 Conclusion

To recap, the principle of non-discrimination based on nationality is perhaps the most deeply embedded principle into the Union legal order. It has been cemented into its "very foundations" both by the Treaties as well as the case law of the Court of Justice. It has played a crucial role in integrating the various national markets into what was to be re-named as the "internal market". Scholars confirm that "[t]he very genesis of an internal Community trade law is firmly based on the principle of non-discrimination which is one of the cornerstones of the whole quasi-constitutional structure of the Union".[1142]

The Court established it is a superior rule of law, a fundamental right and a general principle of EU law of constitutional status. It is a right linked to "the fundamental status" of every Union citizen, though still to be mainly enjoyed in the existence of cross-border elements bringing the situation within the scope of Union law. The "fundamental and inalienable value which is equality"[1143] is perhaps even more fundamental and more inalienable after its inclusion into the core aims and values on which the Union claims to be

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1139 Emphasis added. Ibid.

1140 The principle has been explicitly acknowledged in Article 2(1) of the UN Charter, which provides that "The Organisation is based on the principle of the sovereign equality of all its Members." See also the elaboration of the principle in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Annex to Resolution 2625 (XXV) of the UN General Assembly of 24 October 1970. For the contents of 'sovereign equality' see point 2. under, 'VI. The principle of sovereign equality of States.

1141 I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: OUP, 1998). 289.

1142 D. O'Keeffe and A. F. Bavasso, "Four Freedoms, One Market and National Competence: In Search of a Dividing Line," in *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley*, ed. D. O'Keeffe (The Hague: Kluwer Law International, 2000), 542.

1143 See the Opinion of AG Tesauro in *Case C-13/94 P v S*, [1996] ECR I-2143, para. 20.

founded.[1144] The Treaty of Lisbon acknowledges the principle at both Member State and individual levels. The Charter, which is elevated to primary law status, further consolidates the cardinal position of the principle in the EU legal order. As argued by Bell, the principle has been both widening and deepening over the years.[1145]

A PSC enabling Member States to suspend the free movement rights of Turkish nationals, as Union citizens in the future would be in violation of the principle of equality on many different levels. It would violate the principle of equality of Member States, of individuals as Union citizens, as workers, service providers, service recipients, self-employed or self-sufficient. It would trample on one of the core values on which the Union is founded. Given the fact that many of the developments mentioned in this Chapter were part of a grand legitimacy-building exercise, such as the Court's case law on fundamental rights, the introduction of the concept of Union citizenship and drafting of the CFR, it is not difficult to see how the inclusion of the PSC concerned would put a question mark on these achievements as well as on the credibility of the Union.

Moreover, as discussed in the previous Chapter, free movement of persons occupies a special place in the Court's case law, "as it straddles both the general principle of equal treatment and that of respect for fundamental rights".[1146] Both free movement and equality have been strengthened by the introduction of Union citizenship, its interpretation by the Court, and last but not least by their unequivocal codification in the CFR, which is now part of primary law.

In short, the principle of non-discrimination on the basis of nationality is of "functional and foundational or existential value"[1147] for the Union legal order. Without it, "the EU would probably not even exist or survive".[1148] Hence, it is argued that as the most powerful and entrenched principle of the Union legal order, the principles of non-discrimination in combination with the right to free movement linked to the status of Union citizenship, would constrain Member States from including a PSC directly discriminating against Turkish nationals and restricting their freedom of movement as EU citizens in the future.

1144 See Articles 2 and 3(3) TEU.
1145 See Bell, "The Principle of Equal Treatment: Widening and Deepening."
1146 Ibid., 626.
1147 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 63.
1148 Ibid.