

Migration and Discrimination

Migration and Discrimination

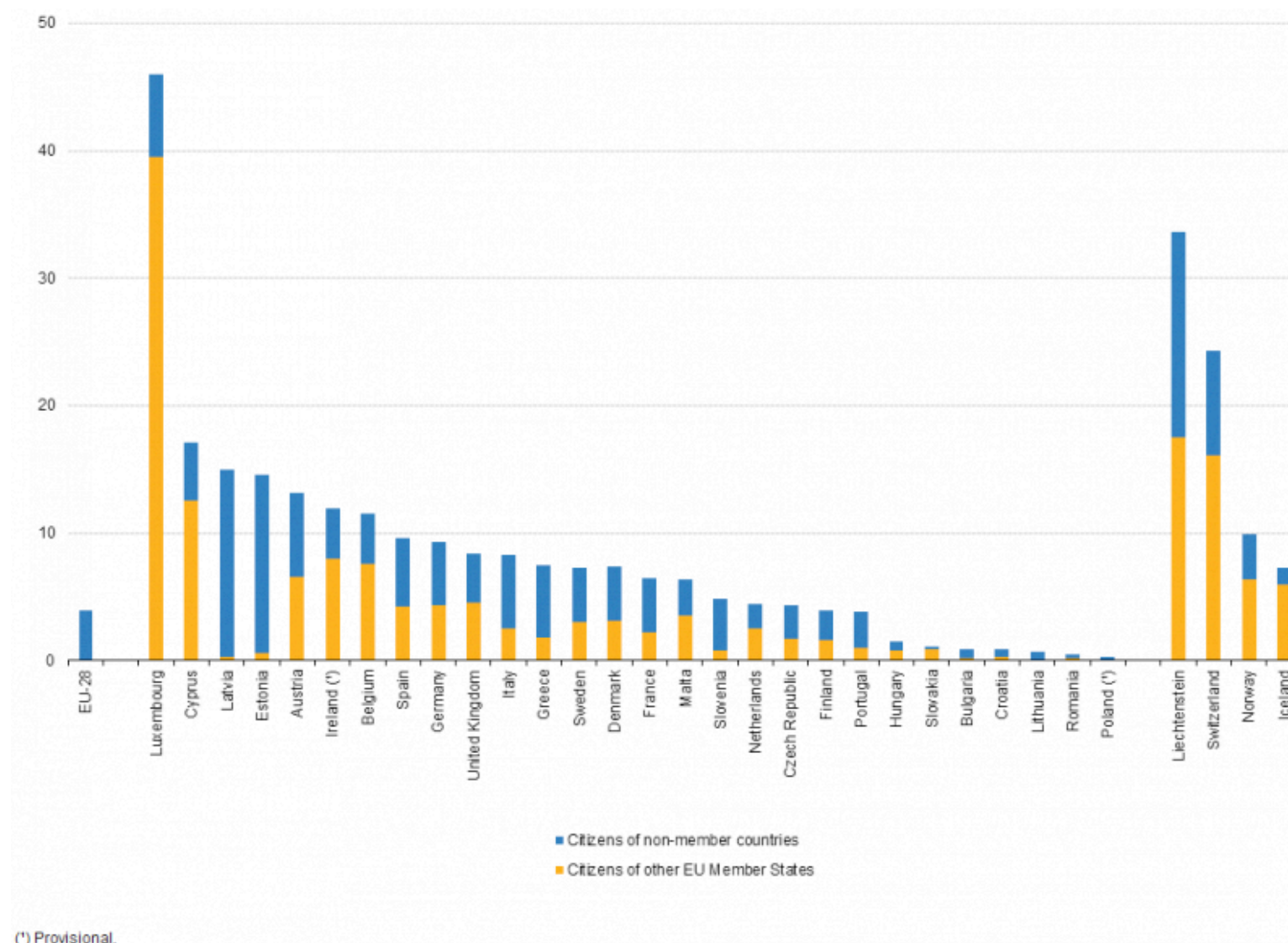
Olivier De Schutter

Migration Policy Group and European Commission - Brussels, 25 November 2016

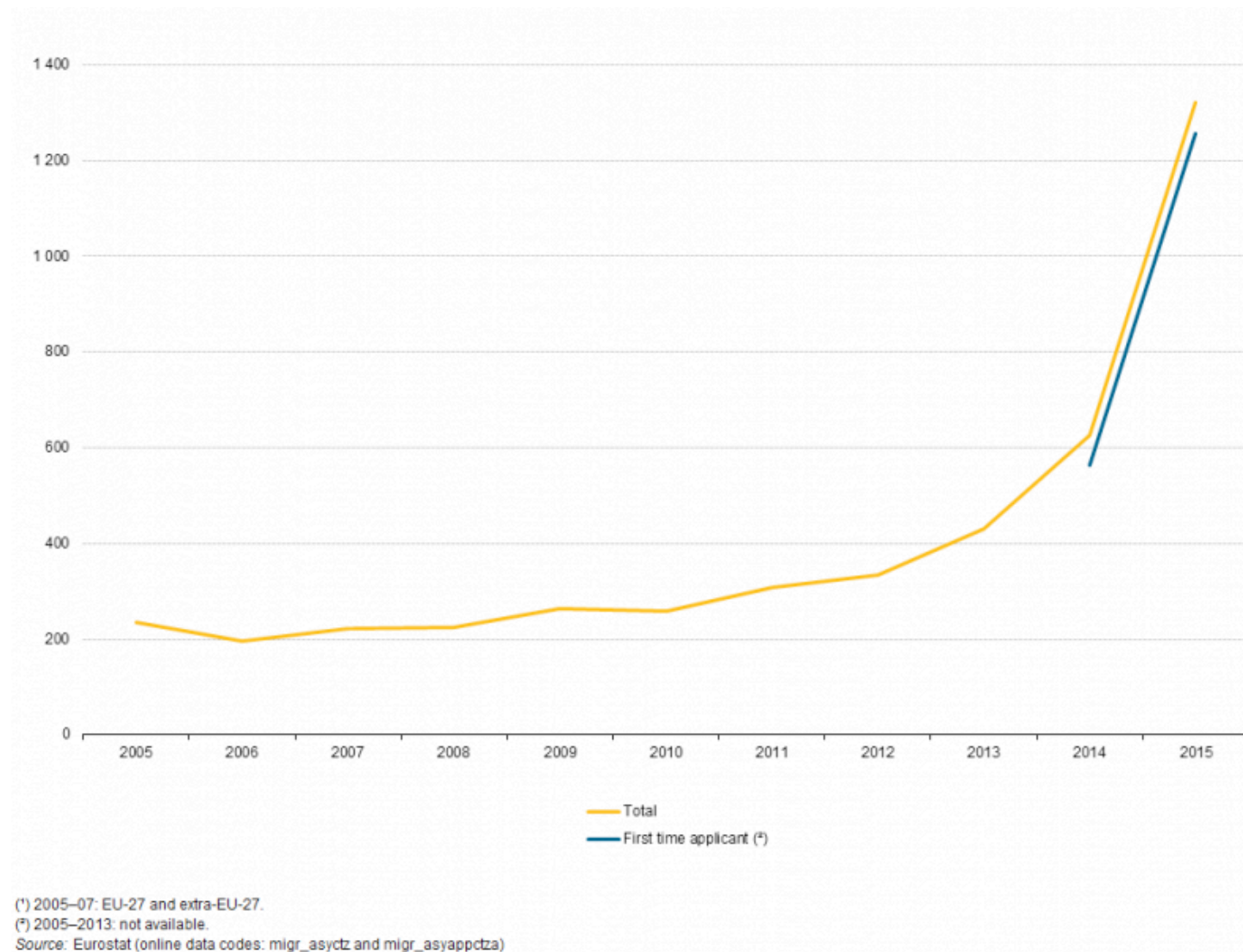
The context

1. On 1 January 2015, 19.8 million third-country nationals were living in the EU-28 Member States (3.9 % of the total population of the EU), and 34.3 million people living within the EU were born outside the EU (6.75 % of the population in the EU).
2. Highest percentage of immigrants from outside the EU: Austria, Greece, Italy, and Spain (barring special cases of Estonia and Latvia): in these countries, migrants from non-EU Member States represent 6.6% of the total population in Austria, 5.7 % in Greece, 5.8 % in Italy and 5.4 % in Spain (and 5.0% in Germany).
3. Growing concerns linked to recent waves of migrants / refugees (“mixed migration flows”)
4. Consensus that protection from discrimination is key to successful integration: *Common Basic Principles for immigrant integration policy*, agreed by the Justice and Home Affairs Council in November 2004 (‘Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration’).

Migration and Discrimination



Share of non-nationals in the resident population, 1 January 2015. Source: Eurostat.

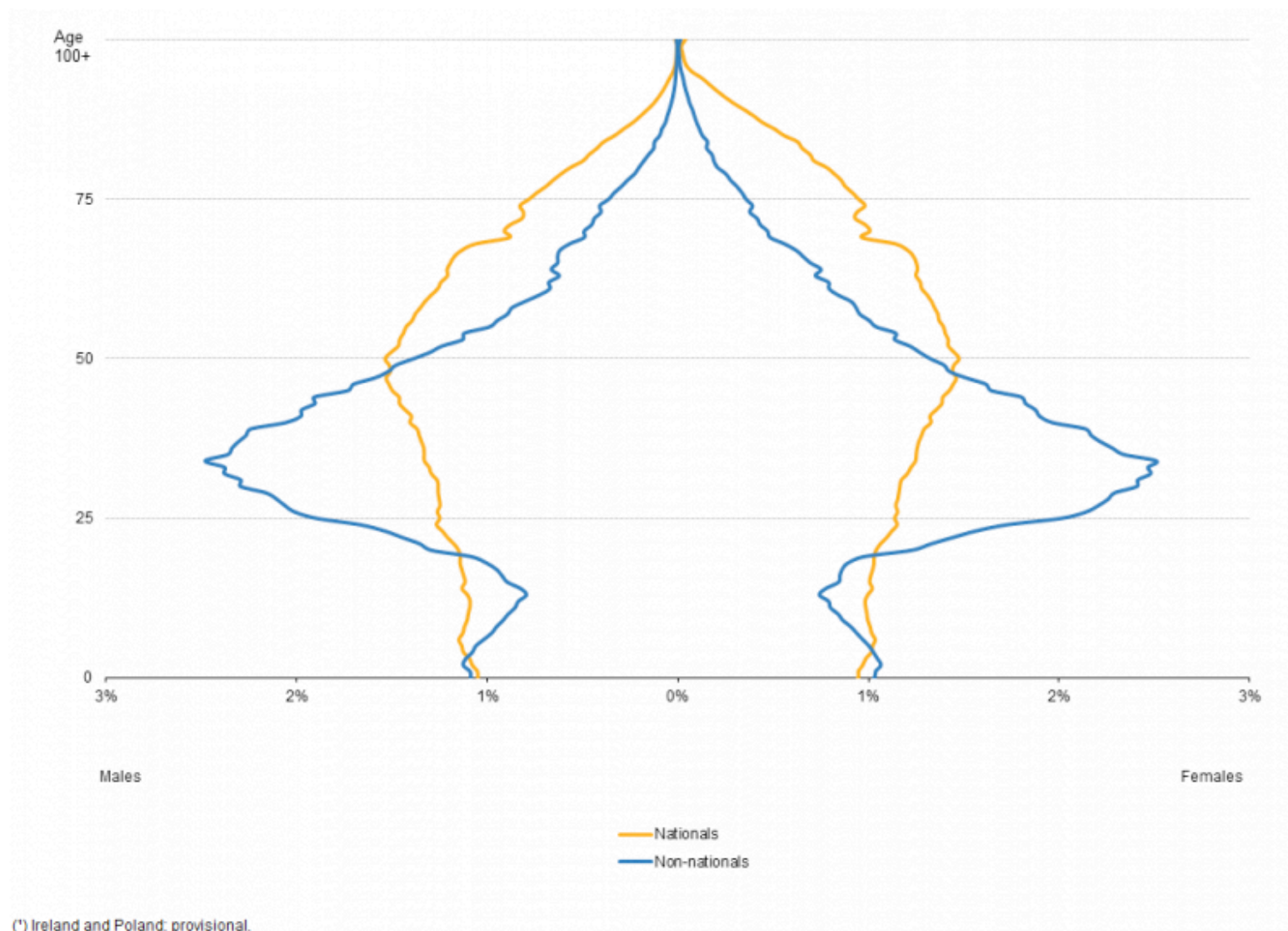


Asylum applications (non-EU) in the EU-28 Member States, 2005–15. Source: Eurostat.

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

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

2. ...which remains untapped : in 2015, the employment rate of third-country nationals was 12.4 % lower than that of nationals of the host countries (and even lower for female migrants)



(*) Ireland and Poland: provisional.

Age structure of the national and non-national populations, EU-28, 1 January 2015. Source: Eurostat.

Which protection of third-country nationals from discrimination (i) on grounds of nationality, or (ii) on grounds of ethnic origin?

1. Extension of the guarantee of equal treatment without discrimination on grounds of nationality: secondary legislation, case-law of the Court of Justice, Association and Partnership and Cooperation Agreements, and the (Recast) Qualification Directive -- however, the extension of equal treatment remains incomplete.
2. International and European human rights law increasingly treats as suspect differences of treatment on grounds of nationality
3. At domestic level, only two States explicitly provide, in their respective constitutions, for a prohibition of discrimination on grounds of nationality. But in the overwhelming majority of EU Member States, the courts enforcing constitutional equality clauses could impose such a prohibition, since in most Member States such clauses are drafted in terms broad enough to extend to the prohibition of any discrimination on grounds of nationality.
4. The Racial Equality and Employment Equality Directives may be interpreted in order to protect TCNs from discrimination on grounds of nationality

Extension of the guarantee of equal treatment without discrimination on grounds of nationality

TFEU provisions prohibiting discrimination on grounds of nationality ('within the scope of application of the Treaties': Article 18 TFEU (ex-Art. 12 EC) or in the specific contexts of the freedom of movement of workers (Article 45(2) TFEU (ex-Art. 39(2) EC)) or of freedom of establishment (Article 49 TFEU (ex-Art. 43 EC)), protect only the nationals of Member States – though third-country nationals may benefit indirectly. However:

1. A range of **directives** guarantee equal treatment to specific categories of TCNs in working conditions, access to certain branches of social security, or access to goods and services and the supply of goods and services made available to the public
2. Case C-311/13, *Tümer*, judgment of 5 November 2014 : instruments protecting workers in general should be **presumed to extend their protection to third-country nationals**, even in cases where they are not legally authorised to work
3. **Association and Partnership and Cooperation Agreements**
4. **2011 Qualification Directive (Recast) (Directive 2011/95/EU)**

Instruments extending free movement rights and associated protection from discrimination to TCNs:

- Directive 2003/109/EC of 25.11.2003 concerning the status of third-country nationals who are **long-term residents** (extended by Dir. 2011/51/EU to the beneficiaries of international protection)
- Directive 2009/50/EC of 25.05.2009 on the conditions of entry and residence of third-country nationals for the purposes of **highly qualified employment (« blue card »)**
- Directive 2011/98/EU of 13.12.2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (**« Single Permit Directive »**)
- Directive 2014/36/EU of 26.2.2014 on **seasonal workers**
- Directive 2014/66/EU of 15.5.2014 on the conditions of entry and residence of third-country nationals in the framework of an **intra-corporate transfer**
- Directive (EU) 2016/801 of 11.5.2016 on the conditions and entry of third-country nationals for the purposes of **research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing**

Extension of the guarantee of equal treatment without discrimination on grounds of nationality

Case C-311/13, *Tümer*, judgment of 5 November 2014 :

1. The Dutch authorities considered that they could exclude from the protection of the 1980 Directive on the protection of employees in the event of the insolvency of their employer a Turkish national, whose right to stay in the Netherlands had expired at the time of the insolvency concerned.
2. Advocate General Bot, who noted that excluding workers who are third-country nationals from protective measures applicable to employees who are nationals of a EU Member State would 'sit ill with the purposes of the European Union's social policy as set out in the first paragraph of Article 136 EC [now Article 151 TFEU], not least because such exclusion could encourage the practice of recruiting foreign labour in order to reduce wage costs'.
3. Court concludes that instruments protecting workers in general should be **presumed to extend their protection to third-country nationals**, even in cases where they are not legally authorised to work

Association and Partnership and Cooperation Agreements:

- do not provide for the freedom of nationals of these countries to enter the EU in order to seek employment
- but may contain provisions which prohibit discrimination on grounds of nationality, for instance in access to employment or in working conditions, and sometimes as regards social security benefits, between nationals of the EU (or EEA) Member States on the one hand and nationals of the third country with which the agreement is concluded on the other hand
- Interpretation consistent with international human rights law, see e.g. Case C-336/05, *Ameur Echouikh*, Order of the Court of 13 June 2006 (excluding from social security benefits claimants who have voluntarily acquired another nationality is in violation of Article 65(1) of the Euro-Mediterranean (Association) Agreement between the EC and Morocco, moreover 'is consistent with the requirements of Article 14 of the ECHR and Article 1 of the Protocol, as interpreted by the ECHR in its judgment of 16 September 1996 *Gaygusuz v. Austria*, so that the Court is providing the national court with all the criteria necessary for it to assess the conformity of the national legislation at issue with the fundamental rights the observance of which the Court ensures, such as those guaranteed by the ECHR'.

2011 Qualification Directive (Recast) (Directive 2011/95/EU) (recasts Directive 2004/83/EC of 29.4.2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted):

- persons in need of international protection are granted a right to access employment, social assistance, education and healthcare under the same conditions as nationals, and
- a right to access accommodation and freedom of movement within the receiving State under the same or equivalent conditions as those applicable to third-country nationals residing in that State

Which protection of third-country nationals from discrimination (i) on grounds of nationality, or (ii) on grounds of ethnic origin?

1. Extension of the guarantee of equal treatment without discrimination on grounds of nationality: secondary legislation, case-law of the Court of Justice, Association and Partnership and Cooperation Agreements, and the (Recast) Qualification Directive -- however, the extension of equal treatment remains incomplete.
2. **International and European human rights law increasingly treats as suspect differences of treatment on grounds of nationality**
3. At domestic level, only two States explicitly provide, in their respective constitutions, for a prohibition of discrimination on grounds of nationality. But in the overwhelming majority of EU Member States, the courts enforcing constitutional equality clauses could impose such a prohibition, since in most Member States such clauses are drafted in terms broad enough to extend to the prohibition of any discrimination on grounds of nationality.
4. The Racial Equality and Employment Equality Directives may be interpreted in order to protect TCNs from discrimination on grounds of nationality

International Covenant on Civil and Political Rights

- **General Comment No. 15, 'The position of aliens under the Covenant' (1986):** 'in general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.'
- ***Karakurt v. Austria*, Communication No. 965/2000, decision of 4 April 2002** (Turkish national who could not stand for election to work councils in Austria since Section 53(1) of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) limited eligibility for such work councils to Austrian nationals or members of the European Economic Area (EEA))

European Convention on Human Rights

- **Eur. Ct. HR (3rd sect.), *Koua Poirrez v. France* (Appl. n° 40892/98), judgment of 30 September 2003** (French resident of Ivory Coast nationality denied the *allocation d'aide aux handicapés*): 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.'
- **Eur. Ct. HR (2nd sect.), *Anakomba Yula v. Belgium* (Appl. No 45413/07), judgment of 10 March 2009** : differences of treatment between foreigners based on their right to be present on the territory – i.e. between irregular migrants on the one hand, and other people, whether nationals or legally residing migrants, on the other hand – may be discriminatory, in the exercise of certain rights such as the right of access to justice
- **Eur. Ct. HR (4th sect.), *Ponomaryoni v. Bulgaria* (Appl. No 5335/05), judgment of 21 June 2011** : States may have 'legitimate reasons for curtailing the use of resource-hungry public services ... by short-term and illegal immigrants, who, as a rule, do not contribute to their funding' and they 'may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory'

European Convention on Human Rights

- Eur. Ct. HR (2nd sect.), *Dhahbi v. Italy*, judgment of 8 April 2014 (Appl. No. 17120/09) : family allowance scheme treating third-country nationals less favourably than EU workers, violates Article 14 ECHR in combination with Article 8 ECHR – concerns the implementation of the EU-Tunisia Association Agreement, for the benefit of a claimant legally residing in Italy and who had contributed to the National Institute for Social Security
- As regards the rights related to employment, to education, to social security and healthcare, to housing, or to access to and the supply of goods and services, **differences on treatment based exclusively on nationality have become very difficult to justify**: the choice made by the EU Member States to create a ‘citizenship of the Union’ certainly cannot be considered, in and of itself, as a sufficient justification for creating or maintaining such differences of treatment.
- **‘Europe for All’** : any progress achieved for the benefit of the integration of the nationals of EU Member States in the host State, in order to facilitate free movement across the EU and to encourage them to exercise such freedom, shall have to be extended so as to also benefit third-country nationals who are staying in that State.

Which protection of third-country nationals from discrimination (i) on grounds of nationality, or (ii) on grounds of ethnic origin?

1. Extension of the guarantee of equal treatment without discrimination on grounds of nationality: secondary legislation, case-law of the Court of Justice, Association and Partnership and Cooperation Agreements, and the (Recast) Qualification Directive -- however, the extension of equal treatment remains incomplete.
2. International and European human rights law increasingly treats as suspect differences of treatment on grounds of nationality
3. **At domestic level, only two States explicitly provide, in their respective constitutions, for a prohibition of discrimination on grounds of nationality. But in the overwhelming majority of EU Member States, the courts enforcing constitutional equality clauses could impose such a prohibition, since in most Member States such clauses are drafted in terms broad enough to extend to the prohibition of any discrimination on grounds of nationality.**
4. The Racial Equality and Employment Equality Directives may be interpreted in order to protect TCNs from discrimination on grounds of nationality

Which protection of third-country nationals from discrimination (i) on grounds of nationality, or (ii) on grounds of ethnic origin?

1. Extension of the guarantee of equal treatment without discrimination on grounds of nationality: secondary legislation, case-law of the Court of Justice, Association and Partnership and Cooperation Agreements, and the (Recast) Qualification Directive -- however, the extension of equal treatment remains incomplete.
2. International and European human rights law increasingly treats as suspect differences of treatment on grounds of nationality
3. At domestic level, only two States explicitly provide, in their respective constitutions, for a prohibition of discrimination on grounds of nationality. But in the overwhelming majority of EU Member States, the courts enforcing constitutional equality clauses could impose such a prohibition, since in most Member States such clauses are drafted in terms broad enough to extend to the prohibition of any discrimination on grounds of nationality.
4. **The Racial Equality and Employment Equality Directives may be interpreted in order to protect TCNs from discrimination on grounds of nationality**

Directive 2000/43/CE of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) and Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive)

1. The prohibition of discrimination ‘does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation’; nor does it cover ‘any treatment which arises from the legal status of the third-country nationals and stateless persons concerned’.

2. However

- a) May protect against contain forms of direct or indirect discrimination exercised in particular on the ground of racial or ethnic origin or religion
- b) Implementation by the EU Member States of the Antidiscrimination directives: may extend to discrimination on grounds of nationality

The Racial Equality and Employment Equality directives may protect against contain forms of direct or indirect discrimination exercised in particular on the ground of racial or ethnic origin or religion

- European Commission against Racism and Intolerance : nationality as a proxy for race or ethnic origin, differences of treatment based on nationality may be direct racial discrimination
- Committee on the Elimination of Racial Discrimination : same
- Ex. District Court of Haarlem, 8 May 2007: the prohibition of discrimination on grounds of race stipulated in Article 1 of the Dutch Constitution is violated by the City Administration of Haarlem which had ordered a specific investigation into the legal residency and right to receive welfare benefits of Somali inhabitants who were receiving such benefits.

Implementation by the EU Member States of the Antidiscrimination directives: may extend to discrimination on grounds of nationality

1. at least seven Member States have opted to **explicitly extend the prohibition of discrimination to discrimination on grounds of nationality** in the domestic legislation implementing the Racial Equality Directive (alone or with the Employment Equality Directive)
2. in at least four other Member States, although nationality is not explicitly listed among the prohibited grounds of discrimination in the domestic legislation implementing the Racial Equality and Employment Equality directives the said legislation provides a **non-exhaustive list of prohibited grounds of discrimination**, thus allowing courts to extend the protection of the law to prohibit nationality-based discrimination
3. such extension may occur even where the list of prohibited grounds of differentiation is a closed one, by the **interpretation of expressions such as 'national origin' or even 'race or ethnic origin'** (with the exception of three States which explicitly exempt differences of treatment on grounds of nationality from the prohibition of discrimination)