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ARTICLES

EQUALITY AND NON-DISCRIMINATION IN THE LAW OF THE EUROPEAN UNION

Richard Plender[†]

Few general principles of the law of the European Union¹ are better established than the principle of equality or non-discrimination, and few are more widely abused. It is now to be considered as axiomatic that the principle of equality, and the cognate principle of non-discrimination, form part of the general framework of the law to be applied by the Court of Justice of the European Communities (hereinafter "Court of Justice") and by other courts concerned with the administration of the

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¹ The European Union was established by the TREATY ON EUROPEAN UNION [MAASTRICHT TREATY], Maastricht, Feb. 7, 1992, 12 U.K.T.S. Cm. 2485 (1994). It comprises three "pillars." The first pillar consists of the three European Communities: the Coal and Steel Community (TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY] Paris, Apr. 18, 1951, 261 U.N.T.S. 140); the Atomic Energy Community (TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY [EURATOM TREATY] Rome, Mar. 25, 1957, 298 U.N.T.S. 167); and the European Economic Community (TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], Rome, Mar. 25, 1957, 298 U.N.T.S. 11. For the text of the EC Treaty as amended by the Maastricht Treaty, see 1 COMMON MKT. L. REV. 573 (1992). For further reading see L. COLLINS, EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM, (4th ed. 1990); R. PLENDER & J. USHER, CASES AND MATERIALS ON THE LAW OF THE EUROPEAN COMMUNITIES (3d ed. 1993); D. WYATT & A. DASHWOOD, EUROPEAN COMMUNITY LAW (3d ed. 1993); L.N. BROWN & T. KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (4th ed. 1994); T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (3d ed. 1994).

law of the Union.² In *W. Ferrario and Others v. Commission of the European Communities*,³ the Court of Justice stated

the general principle of equality is one of the fundamental principles of the law of the Community civil service. That principle requires that comparable situations shall not be treated differently unless such differentiation is objectively justified.⁴

In *Sermide v. Cassa Conguaglio Zuccheri and Others*⁵ the Court of Justice noted that:

under the principle of non-discrimination between Community producers or consumers, which is enshrined in the second subparagraph of Article 40(3) of the EEC Treaty and which includes the prohibition of discrimination on grounds of nationality laid down in the first paragraph of Article 7 of the EEC Treaty, *comparable situations* must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (emphasis added).⁶

The principles of equality and non-discrimination apply in numerous and disparate contexts. As regards the staff of the European institutions, these principles require that there should be no distinction based on gender in respect of payment of expatriation allowances;⁷ or in respect of pensions benefits;⁸ and that interviews should not be fixed inflexibly so as to place

² There is attached to the Court of Justice the Court of First Instance, with jurisdiction, subject to appeal to the Court of Justice, to deal with issues of Community law other than actions against Member States and references from national courts and tribunals of questions of Community law for resolution by means of preliminary rulings. Issues of Community law commonly arise before national courts and tribunals in the Member States, which are obliged to give relief notably where that law "produces direct effect" on which individuals may rely. In courts of other States, issues of Community law arise as foreign law.

³ Joined Cases 152, 158, 162, 166, 170, 173, 175, 177 to 179, 182 & 186/81, *W. Ferrario and Others v. Commission of the European Communities*, 1983 E.C.R. 2357.

⁴ *Id.* at 2367.

⁵ Case 106/83, *Sermide v. Cassa Conguaglio Zuccheri and Others*, 1984 E.C.R. 4209. See also Case 139/77, *Denkavit Futtermittel GmbH v. Finanzamt Warendorf*, 1978 E.C.R. 1317, 1333; Case 106/81, *Julius Kind v. European Economic Community*, 1982 E.C.R. 2885, 2919.

⁶ *Sermide*, 1984 E.C.R. at 4231.

⁷ Case 20/71, *Luisa Sabbatini née Bertoni v. European Parliament*, 1972 E.C.R. 345.

⁸ Joined Cases 75 & 117/82, *C. Razzouk and A. Beydoun v. Commission*, 1984 E.C.R. 1509.

at a disadvantage prospective candidates whose religious convictions would not permit them to attend on a given date.⁹ In the context of steel industry regulation, these principles produce the consequence that the Commission of the European Communities ("Commission") is bound to demonstrate consistency in imposing fines on undertakings which exceed their production quotas.¹⁰ In the area of trade regulation, these principles imply that a regulation will be invalidated if it establishes more rigorous standards for the determination of the origin of cotton yarn than for that of other cloth and fabrics.¹¹ These principles also have a particular importance in the agricultural sector, for the EEC Treaty provides that:

[t]he common organization established in accordance with paragraph 2 of this Article may include all measures required to achieve the objectives set out in Article 39, in particular price controls, subsidies for the production and distribution of various products, stock-piling and carry-over systems and common arrangements for stabilisation of imports and of exports. The common organization shall confine itself to pursuing the objectives set out in Article 39 *and shall exclude any discrimination between producers or consumers within the Community* (emphasis added).¹²

Thus in the "Quellmehl" cases¹³ and in the "Gritz" cases¹⁴ the Court of Justice held that the Council of the European Communities ("Council") had infringed the general principle of equality by abolishing production refunds on maize used to make quellmehl and gritz while continuing to pay refunds on maize used in the manufacture of starch.¹⁵ The Court referred to Article 40(3) of the Treaty and commented:

While this wording undoubtedly prohibits any discrimination between producers of the same product, it does not refer in such

⁹ Case 130/75, *Vivien Prais v. Council*, 1976 E.C.R. 1589.

¹⁰ Case 234/82, *Ferrieredi Roe Volciano*, 1983 E.C.R. 3921.

¹¹ Case 162/82, *Paul Cousin and Others*, 1983 E.C.R. 1101.

¹² EEC TREATY, *supra* note 1, art. 40(3) as amended.

¹³ Joined Cases 117/76 & 16/77, *Albert Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v. Hauptzollamt Hamburg-St Annen*, 1977 E.C.R. 1753.

¹⁴ Joined Cases 124/74 & 20/77, *SA Moulins et Huileries de Pont-à-Mousson v. Office National Interprofessionnel des Céréales, Société Coopérative "Providence Agricole de la Champagne" v. Office National Interprofessionnel des Céréales*, 1977 E.C.R. 1795.

¹⁵ *Albert Ruckdeschel*, 1977 E.C.R. at 1757; *SA Moulins*, 1977 E.C.R. at 1811.

clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products. This does not alter the fact that the prohibition of discrimination laid down in the provision cited is merely a specific enunciation of the general principle of equality which is one of the fundamental provisions of Community law. This principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified.¹⁶

The proposition that comparable situations should not be treated differently, in the absence of objective justification,¹⁷ is more easily stated than applied. For a significant element of subjectivity is involved in asserting that situations are "comparable," that treatment is "different," or that such differences are objectively justified.¹⁸ An understanding of the meaning of this principle may begin with an appreciation of the fact that it is not a creature of the law of the European Union. Like others of the general principles commonly proclaimed as the progeny of the European Court, it is an adopted infant, originating in national and public international law.¹⁹

This paper reviews the law of the discrimination as it has developed in the European Union. Two parts organize this discussion. The first part outlines the law of equality in public international law and the second deals with the application of these general principles in the law of the European Union.

I. EQUALITY AND NON-DISCRIMINATION IN PUBLIC INTERNATIONAL LAW

A brief review of public international law shows that the law of equality is embodied in several sources. To begin with, the International Law Commission ("ILC") has on several occa-

¹⁶ *SA Moulins*, 1977 E.C.R. at 1810.

¹⁷ *Case 147/79, Hoechst v. Court of Justice*, 1980 E.C.R. 3005, 3019; *Case 810/79, Überschar v. Bundesversicherungsanstalt für Angestellte*, 1980 E.C.R. 2747, 2764-5.

¹⁸ On the subject, see generally F. CAPOTORTI, *LE PRINCIPE DE L'ÉGALITÉ EN DROIT ÉCONOMIQUE* (1984); C. Schmitthof, *The Doctrines of Proportionality and Non-Discrimination*, 2 EUR. L. REV. 329 (1977); B. Sundberg-Weitman, *Addressees of the Ban on Discrimination Enshrined in Article 7 of the EEC Treaty*, 10 COMMON MKT. L. REV. 71 (1973); J. Schwarze, *Der Schutz des Gemeinschaftsbürgers durch allgemeine Verwaltungsrechtsgrundsätze im EG Recht*, 1986 N.J.W. 1067.

¹⁹ See P. Pescatore, *The Doctrine of Direct Effect: An Infant Disease of Community*, 8 EUR. L. REV. 155 (1983).

sions expressed the view that there exists as a matter of public international law a principle of non-discrimination. It has characterized this as a "general rule which flows from the equality of States,"²⁰ and as a "general rule inherent in the sovereign equality of States."²¹ Dealing with most-favored-nation clauses, the ILC has referred to "the general principle of non-discrimination" which "may be considered as a general rule that can always be invoked by any State."²² Numerous multilateral treaties prepared by the ILC encompass a duty to refrain from discrimination: among these are the Vienna Convention on Diplomatic Relations,²³ the Vienna Convention on Consular Relations,²⁴ and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.²⁵

Additionally, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations²⁶ proclaims that:

[s]tates have a duty to cooperate with one another, irrespective of differences in their political, economic and social systems, in the various spheres of international relations, in order to . . . promote . . . international cooperation free from discrimination based on such differences.²⁷

Several of the central provisions of the General Agreement on Tariffs and Trade ("GATT") are devoted to the abolition of discrimination.²⁸ Under other conventions, States have a duty

²⁰ [1958] 2 Y.B. INT'L L. COMM'N 105, U.N. Doc. A/CN.4/SER.A/1958.

²¹ [1961] 2 Y.B. INT'L L. COMM'N 128, U.N. Doc. A/CN.4/SER.A/1961.

²² [1978] 2 Y.B. INT'L L. COMM'N 2, 11, U.N. Doc. A/CN.4/SER.A/1978.

²³ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 47, Cmnd. 2565, 500 U.N.T.S. 95.

²⁴ Vienna Convention on Consular Relations, Apr. 24, 1963, art. 72, Cmnd. 5219, 596 U.N.T.S. 261.

²⁵ Convention on the Representation of States in their Relations with International Organisations of a Universal Character, Mar. 14, 1975, U.N. Doc. A/Conf. 67/16; 69 Am.J. Int'l. L. 730 (1975).

²⁶ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/8082 (1970); 65 Am. J. Int'l L. 244 (1971).

²⁷ *Id.* at 248.

²⁸ GENERAL AGREEMENT OF TARIFFS AND TRADE, Geneva, Oct. 30, 1947, Cmnd. 7258, art. I, XIII & XIV, 55 U.N.T.S. 194. See generally E. MCGOVERN, *INTERNA-*

to refrain from discrimination between individuals within their jurisdiction. Among the most notable of the United Nations ("U.N.") conventions imposing such an obligation are the International Covenant on Civil and Political Rights,²⁹ the International Covenant on Economic, Social and Cultural Rights,³⁰ and the International Convention on the Elimination of All Forms of Racial Discrimination.³¹ Indeed, the late Dr. McKean concluded "that the principles of equality and non-discrimination, in view of their nature as fundamental constituents of the international law of human rights, are part of the *jus cogens*" (emphasis in original).³²

It is also clear, however, that the principle of equality in public international law constitutes no obstacle to the granting of special favours or dispensations by one State to another. In the words of the ILC: "States are free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature."³³

Indeed, treaties may create special obligations on States to discriminate in favor of other contracting parties as in the case of Commonwealth preferences in international trade.³⁴ Discrimination in favor of less developed countries is a feature of several multilateral legal instruments concluded in recent years, among which may be cited the Charter of Economic Rights and Duties of States³⁵ and the Lomé Conventions be-

TIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY, (2d ed. 1986).

²⁹ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, New York, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 2, 3, 4, 6, 14, 16, & 23-27, Cmnd. 6702, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967). In particular, Article 26 provides that "all persons are equal before the law" and that "the law shall prohibit discrimination."

³⁰ International Covenant on Economic, Social and Cultural Rights, New York, Dec. 16, 1966, art. 2-7 & 10, Cmnd. 6702, G.A. Res. 2200 (XXX).

³¹ International Convention on the Elimination of All Forms of Racial Discrimination, New York, Mar. 7, 1966, art. 2-5, 7 & 10, Cmnd. 4108, 660 U.N.T.S. 195.

³² MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 283 (1983). Support for this view is found in the judgment of the International Court of Justice in the *Barcelona Traction, Light and Power Company Case*, 1970 I.C.J. 33-4, and in its Opinion in *Namibia*, 1971 I.C.J. 131. See also I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 598-601 (4th ed. 1990).

³³ [1978] 2 Y.B. INT'L L. COMM'N 12, 24, U.N. Doc. A/CN.4/SER.A/1978.

³⁴ See J.H. JACKSON, WORLD TRADE AND THE LAW OF GATT 264-72 (1969).

³⁵ Charter of Economic Rights and Duty of States, New York, Dec. 12, 1974, G.A. Res. 3281 (XXIX). See J.F. Dorsey, *Preferential Treatment: A New Standard*

tween the European Communities and the African-Caribbean-Pacific (ACP) States.³⁶

Thus, mere differences of treatment do not constitute breaches of the rule against discrimination. As a matter of public international law, discrimination occurs "where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way."³⁷ Dealing with discrimination as an aspect of human rights, Dr. McKean stated as follows:

[i]t is now generally accepted that the provision of special measures of protection for socially, economically or culturally deprived groups is not discrimination, so long as these special measures are not continued after the need for them has disappeared The other type of protective measure which is permissible is the provision of special rights for minority groups to maintain their own languages, culture and religious practices and to establish schools, libraries, churches and similar institutions . . . 'Discrimination' is defined under international law to mean only unreasonable, arbitrary or invidious distinctions, and does not include special measures of protection of the two types described above The principle of equality of individuals under international law does not require mere formal or mathematical equality but a substantial and genuine equality in fact.³⁸

for *International Economic Relations*, 18 HARV. INT. L. J. 109 (1977); S.J. Rubin, *The Charter of Economic Rights and Duties of States*, 69 PROC. A.S.I.L. 225 (1975); S.A. Tiewul, *The United Nations Charter of Economic Rights and Duties of States*, 10 J. INT. LAW & ECON. 645 (1975); J.C. Vanzant, *The Charter on Economic Rights and Duties of States: A Solution to the Development-Aid Problem?*, 4 GA. J. INT. & COMP. L. 441 (1974).

³⁶ Lomé Convention, Dec. 15, 1989, U.K.T.S. No 47 of 1992; Cm. 1999; 1991 O.J. (L 229) 287. The Lomé Convention provides for the more favourable treatment of ACP States than of other States generally, subject to a prohibition of discrimination between the various ACP States; but special treatment is accorded to the "least-developed ACP States" as defined in Article 257 of the Lomé Convention. By Article 132 of the EEC Treaty, Member States of the EEC are to apply in their trade with the ACP States the same treatment as they accord to each other pursuant to the EEC Treaty; and each ACP State is to apply to its trade with the Member States and with the ACP States the same treatment as it applies to the European State with which it has special relations.

³⁷ 1 R. JENNINGS & A. WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 378 (9th ed. 1992).

³⁸ MCKEAN, *supra* note 32, at 288.

The final words of Dr McKean's formulation are, of course, derived from those of the Permanent Court of International Justice in its Advisory Opinion in *Minority Schools in Albania*.³⁹

Thus, the prohibition of discrimination in public international law is allied to the concept of *abus de droit*: it is an aspect of the avoidance of arbitrariness.⁴⁰ It is in this sense that the prohibition has been understood both by the European Court of Human Rights and by the Inter-American Court. The former has concluded that discrimination exists if there is a difference of treatment without an "objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."⁴¹ The Inter-American Court followed a similar approach.⁴²

II. BASIS OF THE PROHIBITION OF DISCRIMINATION IN THE LAW OF THE UNION

Article 7 of the Treaty establishing the European Economic Community provided that "[w]ithin the scope of application of this Treaty, and without prejudice to any special conditions contained therein, any discrimination on grounds of nationality shall be prohibited."⁴³ That Article affords an insufficient basis for the general principle of equality as it has developed in European Community law, for it applies only to discrimination on grounds of nationality and it is limited by the two opening clauses, particularly the words "within the scope of application of this Treaty."⁴⁴

³⁹ *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64, at 19 (April 6), cited by Mr Advocate General Lagrange in Case 13/63, *Italy v. Commission* 1963 E.C.R. 165, 190. See further the Dissenting Opinion of Judge Tanaka in the *South West Africa Cases (Second Phase)*, 1966 I.C.J. 6, 250 at 284.

⁴⁰ See *X v. Conseil d'Etat du Canton de Zurich*, 72 I.L.R. 574 (1974); *Turkish National Detention on Remand Case*, 72 I.L.R. 263 (1971).

⁴¹ *James*, 75 I.L.R. 396, 429-430 (1986); *Belgian Linguistics Case*, 45 I.L.R. 114, 164-5 (1968).

⁴² *Proposed Amendments to the Naturalisation Provisions of the Political Constitution of Costa Rica*, 79 I.L.R. 282, 299-300 (1984).

⁴³ EEC TREATY, *supra* note 1, art. 7.

⁴⁴ On this aspect of the subject, see generally B. SUNDBERG-WEITMAN, *DISCRIMINATION ON GROUNDS OF NATIONALITY: FREE MOVEMENT OF WORKERS AND FREEDOM OF ESTABLISHMENT UNDER THE EEC TREATY* (1977); R. Herdegen, *The Relations between the Principles of Equality and Proportionality*, 22 COMMON MKT. L. REV. 683 (1985).

The European Court has however taken the view that this Article is merely a "specific expression"⁴⁵ or "specific enunciation"⁴⁶ of the general principle of equality. Accordingly, it contains a general prohibition which must be applied in every respect and in all the circumstances governed by Community law to any person established in a Member State.⁴⁷ Thus, the general principle of equality is not derived from the Treaty; rather, the rule in Article 7 of the Treaty is derived from a wider and more ancient principle, which applies to all situations comprehensively.⁴⁸ As in the case of public international law, the principle of equality denotes a form of abuse or disproportionate conduct, normally (but not invariably) on the part of public authorities, including Community institutions, entailing an objectively unjustified distinction between like cases, or an objectively unjustified failure to distinguish between dissimilar cases.⁴⁹

⁴⁵ See among other examples Joined Cases 103 & 145/77, *Royal Scholten-Honig (Holdings) Limited v. Intervention Board for Agricultural Produce*; *Tunnel Refineries Limited v. Intervention Board for Agricultural Produce*, 1978 E.C.R. 2037, 2081; Joined Cases 116 & 124/77, *Amylum NV and Tunnel Refineries Limited v. Council and Commission*, 1979 E.C.R. 3497, 3557; Case 138/79, *Roquette Frères v. Council*, 1980 E.C.R. 3333, 3353; Case 139/79, *Maizena v. Council*, 1979 E.C.R. 3393, 3416; Joined Cases 201 & 202/85, *Marthe Klensch v. Secrétaire d'Etat à l'Agriculture et à la Viticulture*, 1986 E.C.R. 3477, 3507; Joined Cases 279, 280, 285 & 286/84, *Walter Rau Lebensmittelwerke and Others v. Commission*, 1987 E.C.R. 1069, 1124; Joined Cases C-267 to C-285/88, *Wuidart and Others v. Laiterie coopérative eupenoise*, 1990 E.C.R. I-467, 480; Case C-177/90, *Ralf-Herbert Kuhn v. Landwirtschaftskammer Weser-Ens*, 1992 E.C.R. I-35, 64.

⁴⁶ See among other examples, Joined Cases 124/76 & 20/77, *SA Moulins*, 1977 E.C.R. at 1811; Case 245/81, *Edeka Zentrale AG v. Federal Republic of Germany*, 1982 E.C.R. 2745, 2754; Case 281/82, *Société à responsabilité limitée Unifrex v. Commission and Council*, 1984 E.C.R. 1969, 1986; Case 167/88, *Association générale des producteurs de blé et autres céréales (AGPB) v. Office national interprofessionnel des céréales (ONIC)*, 1989 E.C.R. 1653, 1684; Case C-44/89, *Georg von Deetzen v. Hauptzollamt Oldenburg*, 1991 E.C.R. I-5119, 5155.

⁴⁷ Case 36/75, *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219, 1229; Case 137/85, *Ministère public v. Mutsch*, 1985 E.C.R. 2681, 2695.

⁴⁸ Joined Cases 66, 127 & 128/79, *Amministrazione delle Finanze dello Stato v. Salumi*, 1980 E.C.R. 1237, 1262; Case 131/73, *Giuliano and Adriano Grosoli*, 1973 E.C.R. 1555, 1566; Case 199/84, *Procuratore della Repubblica v. Tiziano Migliorini and Tibor Tiburzio Fischl*, 1985 E.C.R. 3317, 3331; *John Friedrich Krohn v. Bundesanstalt für Landwirtschaftliche Marktordnung*, 1985 E.C.R. 3997, 4022-4023.

⁴⁹ *Italy v. Commission*, 1963 E.C.R. at 177-8.

A. *The Concept of Discrimination*

The earliest of the cases in which the European Court was called upon to define the concept of "discrimination" were those presented to it in the context of Articles 2, 3, 4, 60 and 67 of the European Coal and Steel Community ("ECSC") Treaty.⁵⁰ The first of these arose from the situation in Luxembourg, where the Office Commercial du Revitaillement⁵¹ maintained a monopoly in the importing of solid fuels.⁵² That Office acted in conjunction with the Caisse de Compensation⁵³ which levied charges on imported industrial coal in order to subsidize domestic fuels.⁵⁴ The question before the Court was whether the levy, representing a price rise for consumers of industrial coal and an advantage for domestic users, was a measure or practice constituting discrimination contrary to Article 4(b) of the ECSC Treaty.⁵⁵ The Court concluded that it was not. The Court reasoned that the increase in price imposed by the Caisse de Compensation was applied in Luxembourg to all solid fuels for non-domestic use regardless of their origin.⁵⁶ As such, it affected all Community producers who sold in Luxembourg coal for non-domestic use "just as it would affect producers of the Grand Duchy of Luxembourg if coal mines were to be discovered and worked

⁵⁰ The second paragraph of Article 2 requires States to bring about progressively conditions which will ensure the most rational distribution of production and to take care not to provoke disturbances in the economies of Member States. Article 3(b) requires Community institutions to ensure that comparably placed consumers in the common market have equal access to sources of production. Article 60 prohibits pricing practices contrary to Articles 2 and 3, in particular discriminatory practices involving, within the common market, the application by a seller of dissimilar conditions to comparable transactions, especially on grounds of the nationality of the buyer. Article 4(b) provides that among the measures recognized as incompatible with the common market are "measures or practices which discriminate between producers." Article 67 requires Governments of Member States to bring to the knowledge of the High Authority any action by the State which is liable to have appreciable repercussions on conditions of competition in the coal or steel industries. It authorises the High Authority to take steps where the Member State's action is liable to provoke a serious disequilibrium.

⁵¹ The General Supplies Office is a statutory body which at the material time was the sole importer of coal into Luxembourg.

⁵² Joined Cases 7 & 9/54, *Industries Sidérurgiques Luxembourgeoises v. High Authority*, 1954-6 E.C.R. 175, 197.

⁵³ The Compensation Fund is an institution attached to the Office Commercial de Ravitaillement by a Luxembourg Ministerial Order dated March 8, 1954.

⁵⁴ *Industries Siderurgiques Luxembourg*, 1954-6 E.C.R. at 195.

⁵⁵ *Id.* at 194.

⁵⁶ *Id.* at 197.

there.”⁵⁷ Although the decision may appear formalistic, it can be defended on the ground that Article 26 of the ECSC Treaty preserves each Member State’s liberty to conduct its own economic policy.⁵⁸

A few years later, however, the Court of Justice offered a wide definition of “discrimination” as the term appears in Articles 2, 3(b), 60 and 67 of the ECSC Treaty:⁵⁹

[t]here may be considered as discriminatory in principle and, accordingly, prohibited by the Treaty, *inter alia*, measures or interventions, even those emanating from the High Authority, which are calculated, by substantially increasing differences in production costs, otherwise than through changes in productivity, to give rise to an appreciable disequilibrium in the competitive positions of the undertakings concerned. In other words, any intervention attempting to distort or actually distorting competition artificially and significantly must be regarded as discriminatory and incompatible with the Treaty, while measures which take into account the internal organization of an undertaking and the use by it of its own resources cannot be regarded as discriminatory.⁶⁰

In that case the applicant company sought the annulment of certain letters sent by the High Authority to the Caisse de Péréquation des Ferailles Importées and the Office Commun des Consommateurs de Feraille. It appeared from those letters that the High Authority did not regard as part of a company’s “own resources” (exempted from charges in favor an the equalization fund) ferrous scrap supplied by a works run under another company name. This was so even where there were close financial or administrative links between the user and supplier.⁶¹ The Court concluded that the High Authority’s position was lawful since the later was not participating in the ferrous scrap market which gave rise to the charge in favor of the equalization fund but the consumption of ferrous scrap. The Court rejected the argument that the High Authority had acted unlawfully in

⁵⁷ *Id.* at 195-96.

⁵⁸ See Case 8/55, *Fédération Charbonnière de Belgique v. High Authority*, 1954-6 E.C.R. 245; Case 9/55, *Société des Charbonnages de Beeringen, Société des Charbonnages de Houthalen, Société des Charbonnages de Helchteren et Zolder v. High Authority*, 1954-6 E.C.R. 311.

⁵⁹ Joined Cases 32 & 33/58, *Société Nouvelle de Pontlieue Aciéries du Temple v. High Authority*, 1959 E.C.R. 127, 143.

⁶⁰ *Id.* at 142.

⁶¹ *Id.* at 143.

drawing a distinction between bought ferrous scrap and its own resources.⁶² The distinction did not give rise to unlawful discrimination since “[t]he use of its own arisings by a single undertaking producing steel and using ferrous scrap amounts to a production recycling of one of its by-products.”⁶³ Presumably the Court took the view that the use by one company of another company’s by-products could not be described as “recycling,” where the supplier was legally independent, even though it was financially and administratively linked to the user.

The Court elaborated on that reasoning in *Klöckner v. High Authority*.⁶⁴ There, the company argued that the contested Decisions put it in an unfavourable position in relation to similarly-placed competitors by subjecting to the equalization levy deliveries of ferrous scrap by one company within the Klöckner-Werke AG Group to another. The applicant company stated that at the material time it was in an identical situation, as regards production, to that of competing undertakings in the form of a single legal person comprising different branches. The Court did not accept that its situation was identical for the purposes relevant to the levying of the charge:

[f]or the High Authority to be accused of discrimination it must be shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others, without such difference being justified by the existence of substantial objective differences. On the other hand, in this case, in spite of identical circumstances as regards production, the applicants by reason of their legal structure incorporating several undertakings were not in a similar position to that of their competitors who formed a single legal entity. This difference *is of importance in law and is therefore capable of justifying different treatment* (emphasis added).⁶⁵

The Court therefore declared itself unconvinced by the arguments advanced by the applicant, stressing the close ties between the parent and subsidiary companies within the Klöckner-Werke AG Group. The Court considered that the practice followed by the High Authority could be defended on

⁶² *Id.* at 148.

⁶³ *Société Nouvelle*, 1959 E.C.R. at 143.

⁶⁴ *Joined Cases 17 & 20/61, Klöckner v. High Authority*, 1962 E.C.R. 325.

⁶⁵ *Id.* at 344.

grounds of practicability and certainty. To extend the exoneration to supplies between separate legal entities having administrative and financial links would produce uncertainty, in view of the infinite variations in the financial and administrative links between companies. The Court therefore concluded that the applicant had failed to show "that the criterion adopted in the basic Decisions is either irrelevant or purely arbitrary or that in itself it involves discrimination."⁶⁶

The lesson to be drawn from these cases is that there is no discrimination within the meaning of the relevant Articles of the ECSC Treaty where the undertakings subjected to different treatment can be said to be objectively in different situations, and the difference in their situations is one of which account may properly be taken. A similar lesson can be drawn from cases decided on the basis of the EEC Treaty. Thus in *Sotgiu v. Bundespost*⁶⁷ the Court considered with extreme caution the permissibility of treating workers within the German Post Office differently, in respect of the grant of a separation allowance, according to their places of residence. It restated its well known proposition that the rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation 1612/68⁶⁸ forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. Therefore, the use of criteria, such as place of residence, *could* amount to a disguised means of discriminating contrary to Community law. This would not be the case, however, where the criterion was designed to take account of objective differences which the situation of workers involves. The Court stated that

[i]n any case it is not possible to state that there is discrimination contrary to the Treaty and the Regulation, if it is apparent from a comparison between the two schemes of allowances taken as a whole that those workers who retain their residence abroad are not placed at a disadvantage by comparison with those whose residence is established within the territory of the State concerned.⁶⁹

⁶⁶ *Id.* at 345.

⁶⁷ Case 152/73, *Sotgiu v. Bundespost*, 1974 E.C.R. 153, 165.

⁶⁸ Council Regulation 1612/68 on Freedom of Movement for Workers within the Community, 1968 O.J. (L 257) 2.

⁶⁹ *Sotgiu*, 1974 E.C.R. at 164.

Similarly in a social security case⁷⁰ the Court reasoned that the principle of equality did not render unlawful a difference, indisputably created in German law, between, on the one hand, German workers and foreigners residing on the territory of the Federal Republic of Germany and, on the other, workers from other Member States. The variations in the financial burdens from one individual case to another were in fact the result of objectively different factual situations in which insured persons might find themselves depending on the changes and chances of working life.

In the light of this case law, Jürgen Schwarze has concluded that "for discrimination of the kind prohibited under Community law to be present, 'arbitrary' discrimination must have taken place . . . public authorities commit discrimination only when they discriminate arbitrarily."⁷¹

B. *Comparable Situations*

The obligation to ensure that comparable rates and conditions shall be offered to comparably placed undertakings is made explicit in the first paragraph of Article 70 of the ECSC Treaty. In an early case, it was contended that comparison between undertakings must take into account "all the circumstances in which they are placed, in particular the place of production, the profitability of the deposits worked and the fact of being located in a less favoured region."⁷² The contention was rejected by the Court, not only for textual reasons,⁷³ but also on more general grounds. The concept of "discrimination" could not be so narrowly interpreted as to require comparability of undertakings in identical situations. Such a construction would lead to the absurd result that an undertaking is only comparable with itself. Rather, it appeared from Article 4 of the Treaty that the intention of the authors was to eliminate distortions in the Common Market by the harmonization of transport

⁷⁰ Case 810/79, *Überschär v. Bundesversicherungsanstalt für Angestellte*, 1980 E.C.R. 2747, 2765.

⁷¹ SCHWARZE, J. *EUROPEAN ADMINISTRATIVE LAW* 625 (1992).

⁷² *Joined Cases 3-18, 25 & 26/58, Barbara Erzbergbau v. High Authority*, 1960 E.C.R. 173, 191.

⁷³ The provision appeared in the chapter headed "Transport." It was therefore necessary to interpret the expression "comparably-placed" as referring in principle to the comparability of situations from the point of view of transport.

rates and conditions.⁷⁴ The conclusion to be drawn was that in the case of international transport, Article 70 required the abolition of discrimination based on the point of departure or destination; and in the case of internal transport, it required that in drawing up their tariff provisions the States should consider transport conditions alone.

Undertakings or persons are said to be comparably placed, for the purposes of the principle of equality, where the relevant Treaty Article or statutory provision prohibits discrimination in a particular respect in which the undertakings are placed comparably or where an obligation to refrain from discrimination can be inferred, as a general principle, in a particular context in which undertakings or persons are comparably placed. Thus in *Société des Fonderies de Pont-à-Mousson v. High Authority*⁷⁵ reliance was placed on Article 3(b) of the ECSC Treaty, which requires that Member States should ensure that comparably-placed consumers in the common market should have equal access to the sources of production. In that context, "comparably-placed consumers" meant consumers of coal or steel in competition with one another.⁷⁶

[d]iscrimination consisting of the dissimilar treatment of comparable situations presupposes that there is a duty to treat all interested parties on the same footing and the possibility of so doing. In this case the High Authority could only discriminate in the manner alleged by the Applicant if it was empowered and bound either to make the latter's *competitors* subject to equalization or to exempt the applicant therefrom.⁷⁷

In that case, integrated steel foundries and independent steel foundries were not in a comparable situation, for they were not in a competitive relationship.⁷⁸

Subsequently in the "Quellmehl" cases⁷⁹ the Court posed the question "whether quellmehl and starch are in a compara-

⁷⁴ For this method of interpretation see Plender, *The Interpretation of Community Acts by Reference to the Intentions of the Authors*, 2 Y.B. EUR. L. 57, 58 and 71 (1982).

⁷⁵ Case 14/59, *Société des Fonderies de Pont-à-Mousson v. High Authority*, 1959 E.C.R. 215.

⁷⁶ *Id.* at 231.

⁷⁷ *Id.*

⁷⁸ *Id.* at 232.

⁷⁹ *Albert Ruckdeschel*, 1977 E.C.R. at 1753.

ble situation, in particular in the sense that starch can be substituted for quellmehl in the specific use to which the latter product is traditionally put."⁸⁰ On that issue there was a conflict: the plaintiffs asserting that the opportunities for substitution were no greater in 1977 than in 1974 (when Community legislation⁸¹ was adopted on the basis that the two products were comparable); and the Council and Commission asserting that information recently made available to those institutions led them to take a different view on the issue of substitutability. The Court concluded:

[i]t has not . . . been established that, so far as the Community system of production refunds is concerned, quellmehl and starch are no longer in comparable situations. Consequently, these products must be treated in the same manner unless differentiation is objectively justified.⁸²

The Court established comparability by similar tests in the "Gritz" cases⁸³ and in the "Isoglucose" cases.⁸⁴

The prohibition of discrimination on grounds of nationality in Article 7 of the EEC Treaty gives rise to several special difficulties, two of which deserve attention in the present context.⁸⁵ First, it has long been established that Article 7 does not aim at the complete elimination of differences resulting from national laws.⁸⁶ From this it follows that the application to traders in one Member State of legislation more onerous than that imposed on similar traders in another Member State is not necessarily prohibited. The two traders are not taken to be in a "comparable situation." In other words, differences in treat-

⁸⁰ *Id.* at 1770.

⁸¹ Council Regulation 1125/74, 1974 O.J. (L 128) 12, amending art. 11 of Council Regulation 120/67. O.J. Eng. Spec. Ed., 1967, 33 on the common organization of the market in cereals.

⁸² *Albert Ruckdeschel*, 1977 E.C.R. at 1770.

⁸³ *SA Moulins*, 1977 E.C.R. at 1795. The court's words were "the possibility of interchangeability." *Id.* at 1812.

⁸⁴ *Royal Scholten*, 1978 E.C.R. at 2037. The Court noted that "as the markets in sugar and isoglucose are closely linked . . . any Community decision on one of those products necessarily affects the other." *Id.* at 2078.

⁸⁵ On the subject see A. TOT, *THE OXFORD ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW* 190 (1990); 1 D. VAUGHAN, *LAW OF THE EUROPEAN COMMUNITIES SERVICE* ¶ 2.310 (1990).

⁸⁶ See Rt. Hon. Lord Slynn of Hadley, in 1 D. VAUGHAN, *LAW OF THE EUROPEAN COMMUNITIES SERVICE* ¶ 2.310 (1990).

ment which result from divergencies between the laws of the Member States are not necessarily contrary to the principle of equal treatment so long as the provision of national law in question affects all persons subject to it in accordance with objective criteria and without regard to their nationality.⁸⁷ Likewise a difference in treatment resulting from natural phenomena does not amount to unlawful discrimination. In the Court's words:

[d]ifferences, which are due to natural phenomena, cannot be described as 'discrimination' within the meaning of the Treaty; the latter regards only differences in treatment resulting from human activity, and especially from measures taken by public authorities, as discrimination. Moreover, it should be pointed out that even if the Community has in some respects intervened to compensate for natural inequalities, it has no duty to take steps to eradicate differences in situations such as those contemplated by the national court.⁸⁸

Second, Article 7 gives rise to the problem of so-called "reverse discrimination."⁸⁹ The question is whether a national of a Member State is entitled as a matter of Community law to be treated by the authorities of that State no less favorably than that State is bound by Community law to treat a national of another Member State. Stated more generally, the issue is whether a national of a Member State is, in his relations with that State, in a "comparable situation" with a national of an-

⁸⁷ Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, 1969 E.C.R. 1, 16; Case 223/86, *Pesca Valentia v. Minister for Fisheries and Forestry*, 1988 E.C.R. 83. The Court has also ruled that treatment which works to the detriment of national products as compared with imported products and which is put into effect by a Member State in a sector which is not subject to Community rules or in relation to which there has been no harmonization of national laws does not come within the scope of Community law. Case 355/85, *Driancourt v. Cognet*, 1986 E.C.R. 3231; Case 98/86, *Ministère Public v. Mathot*, 1987 E.C.R. 819, 822.

⁸⁸ Case 52/79, *Procureur du Roi v. Marc Debaue and Others*, 1980 E.C.R. 833, 858.

⁸⁹ F. BURROWS, *FREE MOVEMENT IN EUROPEAN COMMUNITY LAW* 1189 (1987); C. GREENWOOD, *Nationality and the Limits of the Free Movement of Persons in Community Law* 7 Y.B. EUR. L. 185 (1987); M. HOCKBAUM, *DAS DISKRIMINIERUNGS UND SUBVENTIONSVERBOT IN DER EGKS UND EINS* (1962); S. KON, *Aspects of Reverse Discrimination in Community Law*, 6 EUR. L. REV. 75 (1981); D. PICKUP, *Reverse Discrimination and Freedom of Movement for Workers*, 23 COMMON MKT. L. REV. 135 (1986). See generally H. SCHLACHTER, *DISCRIMINATION A REBOURS: DIE IN-LÄNDERDISKRIMINIERUNG NACH DER RECHTSPRECHUNG DER EUGH UND DAS FRANZÖSISCHEN CONSEIL D'ÉTAT* (1984).

other Member State. In *Saunders*⁹⁰ the Court of Justice contemplated that the rights conferred on workers by Article 48 may lead the Member States to amend their legislation, where necessary, even with respect to their own nationals. In *Morson and Jhanjan*⁹¹ the Court added:

Article 7 and Article 48 may be invoked only where the case in question comes within the area to which Community law applies, which in this case is that concerned with freedom of movement of workers within the Community. Not only does that conclusion emerge from the wording of those articles, but it also accords with their purpose, which is to assist in the abolition of all obstacles to the establishment of a common market in which the nationals of the Member States may move freely within the territory of those States in order to pursue their economic interests. It follows that the Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law.⁹²

It was not until July 1992 that the Court finally determined, in the case of *Surinder Singh*,⁹³ that Community law required a Member State to grant leave to enter to the spouse, of whatever nationality, of a national of *that State*, who has gone with that

⁹⁰ Case 175/78, Vera Ann Saunders, 1979 E.C.R. 1129, 1135. For antecedent case law, see Case 39/72, Commission v. Italy, 1973 E.C.R. 101; Case 57/72, Westzucker v. Einfuhr-und Vorratsstelle fur Zucker, 1973 E.C.R. 321; Case 78/76, Steinicke und Wesseling v. Federal Republic of Germany, 1977 E.C.R. 595; Case 115/78, Knoors v. Secretary of State for Economic Affairs, 1979 E.C.R. 399; Case 136/78, Ministère Public v. Auer, 1979 E.C.R. 437. See also Case 246/80, Broeckmeulen v. Huisarts Registratie Commissie, 1981 E.C.R. 2311, 2327; Case 180/83, Moser v. Land Baden-Wurtemberg, 1984 E.C.R. 2539; Case 298/84, Iorio v. Azienda Autonoma delle Ferrovie dello Stato, 1986 E.C.R. 251, 255; Joined Cases 297/88 & 197/89, Massam Dzodzi, 1990 E.C.R. 3783.

⁹¹ Joined Cases 35 & 36/82, Elestina Esselina Christina Morson v. Netherlands; Sewradjie Jhanjan v. Netherlands, 1982 E.C.R. 3723, 3736.

⁹² *Id.* at 3736.

⁹³ Case 370/90, R. v. Immigration Appeal Tribunal and Surinder Singh ex parte the Secretary of State for the Home Department, 1992 E.C.R. I-4265. On the same date the Court of Justice resolved a related issue, which had also been the subject of some long-standing controversy, in ruling that "[t]he provisions of Community law on freedom of establishment preclude a Member State from deying a national of another Member State who possesses at the same time the nationality of a non-member country, entitlement to that freedom on the ground that the law of the host State regards him as a national of the non-member country." Case 369/90, Micheletti and Others v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239.

spouse to another State in order to work there as an employed person and returns to establish himself in the State of which he is a national.

National courts initially showed some reluctance to conclude that they were confronted with a factor linking the case to any of the situations envisaged by Community law;⁹⁴ but the dam was broken in the case of *Surinder Singh*⁹⁵ and it now appears likely that several novel issues of reverse discrimination will present themselves both nationally and at the European level.⁹⁶

C. *Objective Justification*

The different treatment of comparably-placed persons or undertakings entails no breach of the principle of equality if such difference is objectively justified. The Court of Justice's case law on the issue of "objective justification" does not reveal a series of discrete principles.⁹⁷ Nevertheless, the guiding principle appears to be two-fold: 1) the distinction drawn between comparably-placed persons or undertakings must be based on

⁹⁴ Hof van Cassatie, Belgium, Dec. 14, 1976, *Oppenbaar Ministerie v. Herman Le Compte*, 1977 (1) Pas. Belge 430; High Court, London, Nov. 30, 1979, *R v. Governor of Brixton Prison ex parte Budlong*, [1980] 2 C.M.L.R. 125; Court of Appeal, London, Mar. 7, 1980, *Narinder Singh Virdee*, [1980] 1 C.M.L.R. 709; Immigration Appeal Tribunal, London, Oct. 29, 1981, *Gobind Singh Mansukhani v. Secretary of State* [1981] Imm. A.R. 184; Conseil d'Etat, Belgium, Mar. 4, 1982, *Canoot v. Belgian State*, Rec. Conseil d'Etat (1982) 474; *Cour d'Appel*, Luxembourg, Mar. 27, 1986, *Gaston Vergel v. Conseil de l'Ordre du Barreau de Diekirch*, 26 Pas. Lux. 333 (1986); *Cour d'Appel*, Caen, Feb. 2, 1987, *Ministère Public v. Patrick Dupong* (unreported); *Symvoulia tis Epikrateias*, Mar. 24, 1988, *Ionnis Spiropoulos v. Ygeias Ypourgon*, [1989] *Armenopoulos* 919; Court of Appeal, London, Apr. 21, 1988: *R v. Secretary of State ex parte Tombofa*, [1988] 2 C.M.L.R. 609; *Cour de Cassation*, Paris, May 10, 1988, *Patrick Dupont*, 1988(4) J.C.P. 2417; Conseil d'Etat, Luxembourg, 8 November 1989, *Michèle Maret v. Ministère de l'éducation*, *Cour d'Appel*, Luxembourg, Mar. 27, 1986.

⁹⁵ *Surinder Singh*, 1992 E.C.R. at I-4265. The determination of the Immigration Appeal Tribunal was made on Aug. 17, 1989.

⁹⁶ See Stephanie Grant, *The Incoming Tide*, 142 NEW LAW J., 1167 (1992).

⁹⁷ However, Professor Toth states that different treatment of comparably-placed persons or undertakings is objectively justified where (i) it is justified by the aims which Community institutions lawfully pursue as part of Community policy; (ii) its purpose is to obviate special difficulties in one sector of industry; (iii) it is not arbitrary in the sense that it does not exceed the broad discretion enjoyed by Community institutions; (iv) it is based on objective differences arising from the economic circumstances underlying the common organization of the market in the relevant products. TOOTH, *supra* note 85, at 193.

rational considerations and, 2) in drawing the distinction the Member State or Community institution must not exceed the bounds of the discretion reserved for it or conferred on it by the applicable Community rule.

Thus in an early case the Court of Justice considered the legitimacy of the different treatment of German exporters who enjoyed the benefit of the system of monetary compensatory amounts from German exporters who did not have such a benefit.⁹⁸ The Court stated:⁹⁹

[a]s regards the comparison made with German exporters of goods which had had the benefit of this compensatory system from the start, the different treatment of which the applicant complains would not be a violation of the principle of non-discrimination *unless it appeared to be arbitrary*. It should be noted that in applying the last sentence of Article 1(2) of Regulation No 974/71¹⁰⁰ the Commission has *wide powers of appraisal* in judging whether the monetary measures contemplated by the said regulation could lead to disturbances in trade in agricultural products. (emphasis added).

A few years later in *Denkavit*¹⁰¹ the Court had to consider the justification for a distinction drawn by German tax law between agricultural livestock breeders and keepers on the one hand and industrial livestock breeders and keepers, on the other. The latter were, in effect, excluded from the grant of aids for which the former were eligible. The Court noted that Article 40(3) of the EEC Treaty prohibits discrimination but stated that "different treatment could be regarded as constituting discrimination only if it appears to be arbitrary."¹⁰² The Court then examined the basis for the distinction drawn by the German law:

[i]t appears from the case file *inter alia* that, because they use fodder which is mostly their own farm produce, agricultural livestock breeders and keepers within the meaning of German tax law are subject in particular to the risks inherent in working the soil. On the other hand, industrial livestock breeders and keepers

⁹⁸ Case 43/72, *Merkur v. Commission*, 1973 E.C.R. 1055, 1073.

⁹⁹ *Id.* at 1073.

¹⁰⁰ Council Regulation 974/71, on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States; 1971 O.J. (L 106) 1.

¹⁰¹ *Denkavit*, 1978 E.C.R. at 1317.

¹⁰² *Id.* at 1333.

within the meaning of German tax law are not exposed to the same risks, as they buy the feeding-stuffs needed for their animals mostly on either the national or the international market, and if their national currency is revalued, they are able to obtain them abroad at advantageous prices. Accordingly the distinction between agricultural livestock breeders and keepers and industrial livestock breeders and keepers, which German tax law makes in laying down a ratio between the head of livestock and the utilized agricultural area, and which the Government of the Federal Republic of Germany adopted as an objective, albeit unmodulated, criterion as regards the granting of aid which it is empowered to grant . . . cannot be regarded as discriminatory.¹⁰³

A similar approach has been followed under the ECSC Treaty. In *Finsider*¹⁰⁴ the applicant complained of a Commission Decision¹⁰⁵ which introduced discrimination against undertakings which had received national aid intended to offset operating losses, by making it possible for undertakings which had received other forms of national aid to obtain additional steel quotas. The Court concluded that the distinction drawn between the two categories of recipients of national aid was based on "an objective and substantial criterion with regard to the aims which the Community may lawfully pursue as part of its industrial policy."¹⁰⁶ This was because aid other than that intended to cover losses (investment aid or aid for closure or research and development) is in fact likely to encourage restructuring and improvement of productivity.¹⁰⁷

In the case of the prohibition of discrimination between men and women with respect to pay, the European Court has ruled that the application of a criterion other than sex whose effect is such that most male employees are treated more favourably than most female employees is not prohibited in so far as the different treatment "is attributable to factors which are objectively justified and are in no way related to any dis-

¹⁰³ *Id.* at 1333.

¹⁰⁴ Case 250/83, *Finsider v. Commission*, 1985 E.C.R. 131.

¹⁰⁵ Commission Decision 2748/83, 1983 O.J. (L 269) 55.

¹⁰⁶ *Finsider*, 1985 E.C.R. at 153.

¹⁰⁷ Since those were aims to be pursued by Community institutions as part of industrial policy, the pursuit of those aims did not disclose a *détournement de pouvoir*.

crimination based on sex.”¹⁰⁸ In that case the Court appeared to contemplate that two distinct tests are to be applied. The national court was first to ascertain that the use of the apparently neutral criterion was not designed to camouflage the employer’s object of treating men more favorably than women: that is what is meant by the words “in no way related to any discrimination based on sex;” then it was to determine whether there was an objective economic justification for the action of an employer, innocent of any discriminatory objective, who rewards workers in such a way that more members of one sex than of another are likely to benefit.¹⁰⁹ The particular case envisaged by the Court is that of the employer endeavoring on economic grounds which may be objectively justified to encourage full-time work irrespective of the sex of the worker.¹¹⁰ In the result, a national court will apparently substitute its own judgment for that of an employer on the question whether there is an objective economic justification for the employer’s policy with respect to pay, where the incidental effect of the policy is to favor members of one sex.

III. CONCLUSION

In a series of cases the Court of Justice has proclaimed that the principle of equality or non-discrimination is a fundamental rule of Community law. This was stated in the “Quellmehl” cases where the Court stated, for the first time, that the prohibition of discrimination in the relevant legislation was “merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.”¹¹¹ The Court repeated this language in the “Isoglucose” cases¹¹² and thereafter.¹¹³ The Court’s statement not only emphasizes the weight to be attached to the principle: it also indicates that it is

¹⁰⁸ Case 96/80, *Jenkins v. Kingsgate (Clothing Productions) Ltd*, 1981 E.C.R. 911.

¹⁰⁹ *Id.* at 925.

¹¹⁰ See Plender, *Equal Pay for Men and Women: Two Recent Decisions of the European Court*, 30 AM. J. COMP. L. 627 (1982).

¹¹¹ *Albert Ruckdeschel*, 1977 E.C.R. at 1769.

¹¹² *Royal Scholten-Honig*, 1978 E.C.R. at 2083.

¹¹³ See Case 245/81, *Edeka Zentrale AG v. Federal Republic of Germany*, 1982 E.C.R. 2745, 2754; Case 59/83, *Biovilac NV. v. European Economic Community*, 1984 E.C.R. 4057, 4075; Case 215/85, *Bundesanstalt für Landwirtschaftliche Marktordnung v. Raiffeisen Hauptgenossenschaft eG*, 1987 E.C.R. 1279, 1300.

applicable, as a general principle of law, even where there is no specific statutory rule requiring the equal treatment of persons or undertakings in material respects.¹¹⁴

The principle is therefore not based primarily upon statutory formula. It is derived from a comparative examination of national laws, in the same way as the corresponding general principle of public international law.¹¹⁵ Differences in treatment deriving from natural phenomena cannot be considered contrary to the principle of equality,¹¹⁶ nor are differences resulting from divergencies between national laws in conflict with this principle.¹¹⁷ Moreover, there is no general principle on which natural persons may rely requiring the Community to afford equal treatment in all respects to third countries.¹¹⁸ The development of the principle remains in its infancy. The formula repeatedly used by the Court of Justice is that similar situations shall not be treated differently in the absence of objective justification; but the principle so expressed barely conceals the qualitative judgments inherent in it: the assertion that situations are similar and the equally qualitative assertion that differences are (or are not) objectively justified.

Even as so expressed, the principle has close relations with rules of public international law, whose existence can no longer be questioned (even if their character as norms of *jus cogens* remains to be proven). Although the principles at issue are general, it is necessary that they should attain greater definition. This indeed is required by another of the general principles adopted by the Court of Justice: that of legal certainty. To achieve definition it is appropriate to develop further characteristics from the existing rules of public international law, and of course from the laws of the Member States. There may also be a strong case for adopting principles from the law of the United States, at least in certain aspects of the rules relating to equal-

¹¹⁴ Case 265/78, *H. Ferwerda BV. v. Produktschap voor Vee en Vlees*, 1980 E.C.R. 617, 628; Joined Cases 66 & 127-128/79, *Amministrazione delle Finanze dello Stato v. Meridionale Industria Salumi Srl and Others*, 1980 E.C.R. 1237, 1263.

¹¹⁵ SCHWARZE, *supra* note 71, at 673.

¹¹⁶ Case 52/79, *Procureur du Roi v. Debauve*, 1980 E.C.R. 833, 858.

¹¹⁷ Case 41/84, *Pinna v. Caisse d'Allocations Familiales*, 1986 E.C.R. 1, 24.

¹¹⁸ Case 55/75, *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, 1976 E.C.R. 19.

ity. The Court of Justice has already done so in the field of equal treatment of men and women¹¹⁹ and could with profit do so in other areas as well.

¹¹⁹ Plender, *supra* note 110, at 652.