IMC-RP 2021/1

EU competences and "genuine links" in Citizenship-by-Investment

INVESTMENT MIGRATION COUNCIL

"The European Union can only act in those areas where its member countries have authorised it to do so, via the EU treaties. The treaties specify who can pass laws in what areas: the EU, national governments or both."[1]

[1] https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en

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Introduction

Introduction

The role of the 'genuine link' requirement in international law and EU law has been explained by many distinguished scholars. For instance, **Spiro**, has discussed extensively the development of the 'genuine link' requirement in international law and the role of that requirement in citizenship matters. In the context of ICJ's *Nottebohm's* decision and the 'genuine link' requirement, Spiro concludes that:

> '*Nottebohm* is the most famous decision of an international tribunal relating to the subject of nationality, but the ruling is famous because it was and is infamous, at least among the college of international lawyers studying nationality law. The decision was discontinuous with pre-existing law'.[1]

Sarmiento has analysed EU competencies in the field of nationality in general, and in relation to investment migration programmes in particular, concluding the following:

> 'the EU's competence to introduce measures in [the field of nationality] to introduce a more uniform approach by the Member States, is problematic. Since its creation the EU has been based on a principle of conferred powers, but no power has been granted to the EU in the field of nationality'.[2]

Referring to the Report on investment migration programmes of the European Commission,[3] **Tratnik and Weingerl**, conclude that 'with its appalling approach to the question of the

[1] Peter J Spiro, 'Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion' IMC-RP 2019/1 <https://investmentmigration.org/wp-content/uploads/2020/10/IMC-RP-2019-1-Peter-Spiro.pdf> last accessed 7 July 2021, 9.
[2] Daniel Sarmiento, 'EU Competence and the Attribution of Nationality in Member States' IMC-RP2019/2 <https://investmentmigration.org/wp-content/uploads/2020/09/IMC-RP-2019-2-Sarmiento.pdf> last accessed 7 July 2021, 31.
[3] European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions' COM(2019) 12 final.

compatibility of investment migration schemes with EU law […], the Commission itself could legitimately be seen as in breach of the principle of sincere cooperation, which is closely linked to the principle of conferral'.[4]

Kochenov analysed the Report of the European Commission and the launch of infringement proceeding against Cyprus and Malta on 20 October 2020 further, noting that: 'the Commission's decision to misrepresent the law and go against the non-discrimination essence of EU citizenship to attempt to enlarge own Competences is but a dangerous political game'.[5]

The full articles of Spiro, Sarmiento, Tratnik and Weingerl, and Kochenov have been compiled in this work for better understanding of the problematic aspects associated with the EU's approach and actions towards investment migration programmes.

EU's approach towards investment migration

EU's approach towards investment migration programmes is largely shaped by negative sentiment and glorification of citizenship.

Investment migration refers to obtaining citizenship or residential rights by individuals in return for a financial investment or other contributions to the host country. Citizenship by investment specifically refers to the acquisition of citizenship for a financial or other contribution. Citizenship[6] is closely related to the territorial sovereignty of states. States have broad

[4] Matjaž Tratnik and Petra Weingerl, 'State Autonomy and Relevant Links under international and EU Law' (previously 'Investment Migration and State Autonomy: A Quest for the Relevant Link') IMC-RP2019/4 <https://investmentmigration.org/wp-content/uploads/2020/09/IMC-RP-2019-4-Tratnik-and-Weingerl.pdf> last accessed 7 July 2021.

[5] Dimitry Vladimirovich Kochenov, 'Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union' (2021) 25(1) Studies in European Affairs (Centre for Europe, University of Warsaw), 56 last accessed 7 July 2021.

[6] The term 'citizenship' is often interchangeably used with 'nationality', Article 2(a) European Convention on Nationality (adopted 6 November 1937, entered into force 1 March 2000) ETS No. 166 stipulates: 'For the purpose

discretion, if not complete exclusivity, in deciding who qualifies as their citizens and under what circumstances. Indeed, states' competence in the field of citizenship matters is only limited by binding rules of international law. Yet, the one and only rule that has been recognised as such is the element of voluntariness on the part of the individual acquiring the citizenship, which precludes non-consensual naturalisation.[7] While other requirements have also been often discussed in the context of possible constraints on state sovereignty in the field of citizenship, none of them has developed into binding international law which may affect states' competence in citizenship matters.[8]

One of the most commonly discussed cases that has been wrongly brought into connection with acquisition of citizenship is the *Nottebohm* case of the International Court of Justice (ICJ), which concerned the 'genuine link' requirement. As further explained, the 'genuine link' requirement has a very little significance in citizenship matters. Having said that, the European Commission recently brought 'genuine link' into connection with acquisition of citizenship despite the fact that the EU case law preserves the exclusive competence of Member States to regulate their citizenship matters, with the only exception being instances where it is necessary to ensure effective and uniform protection of the rights of EU citizens.[9]

The arguments, as well as motives, of the European Commission are problematic if not completely incompatible with the EU law.[10] The launch of infringement procedures against Malta and Cyprus by the Commission is largely motivated by politics rather than law. Yet, agreeing with Kochenov, 'law and politics follow different rationales and are most likely to

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of this Convention: a "nationality" means the legal bond between a person and a State and does not indicate the person's ethnic origin'. These two terms are used interchangeably here, understood simply as a classification of a natural person belonging to a particular State.

[7] *See*, e.g. Peter J Spiro, 'Citizenship Overreach' 38(2) Michigan Journal of International Law (2017) 167, 175-176.

[8] Ibid, 174 et seq.

[9] *See* e.g. Martijn van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?' RSCAS 2020/76 <https://cadmus.eui.eu/bitstream/handle/1814/68979/RSCAS%202020_76.pdf?sequence=1&isAllowed=y> last accessed 7 July 2021.

[10] *See* more extensively Kochenov, 'Policing the Genuine Purity of Blood'.

come into conflict when simultaneously regulating the same issue. One naturally tends to undermine the achievements of the other'.[11]

International law

In the *Nottebohm* case, the ICJ referred to the Article 1 Hague Convention limitation on recognition of nationality and described 'nationality' as a legal bond based on 'a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[12] In that particular case, the ICJ discussed the 'genuine link' requirement in the context of diplomatic protection, rather than assessing whether such requirement should be imposed by states as a criterion for acquisition of citizenship, emphasising that:

> 'International practice provides many examples of acts performed by [s]tates in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other [s]tates or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a [s]tate which it is sought to invoke in another [s]tate'.[13]

The ICJ further noted, that:

> 'in order to be capable of being invoked against another [s]tate, nationality must correspond with the factual situation. […] It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected

[11] Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law Intl, Alphen aan den Rijn 2008) 324.
[12] ICJ, *Liechtenstein v Guatemala* [1955] ICJ Rep 18, 4 (*Nottebohm*).
[13] *Nottebohm*, 21.

> with the population of the [s]tate conferring nationality than with that of any other [s]tate'.[14]

In other words, in the case of *Nottebohm*, the ICJ clarified that states are not obliged to recognize the nationality conferred on an individual by another state in the absence of a genuine connection/link ('genuine link'). While proponents of the 'genuine link' requirement often try to invoke such a link in connection with acquisition of citizenship, it is important to note that the ICJ did not interfere in states' sovereign right to determine the criteria for acquisition of citizenship. Quite the contrary – it confirmed states' exclusive competence in the field. The question that the ICJ discussed in the case of *Nottebohm* was about recognition of the effects of citizenship in international law. A distinction should, therefore, be made between the contexts in which the 'genuine link' as applied in *Nottebohm* is discussed – for recognition of nationality is one thing, and acquisition quite another.[15] More importantly, however, the decision in the *Nottebohm* case **does not amount into an obligation for states to rely on the 'genuine link' requirement** in order to recognise the effects of a citizenship granted by another state. It has rarely been applied by international tribunals, and only in the context of dual nationality.[16] Indeed, the *Nottebohm* judgment may be more **helpful in the context of dual nationality**, and in particular in instances where it should be decided on a 'dominant' and/or 'effective' nationality of individuals holding the nationality of both states who are involved in a claim process, than in other citizenship-related matters.[17] For the purposes of citizenship, therefore, the *Nottebohm* judgment has a very limited importance, which, if any, is limited to specific contexts of dual nationality. And so does the residence, or the physical presence requirement, which is often wrongly connected with the criteria for acquisition of citizenship in relation to the *Nottebohm's* 'genuine link' requirement. The residence, or the physical presence requirement for the purposes of acquisition of citizenship has never developed into a binding rule of international law which could be invoked as a

[14] *Nottebohm*, 23.
[15] van den Brink, 'Revising Citizenship Within the European Union'.
[16] E.g. Spiro, 'Nottebohm and "Genuine Link"', 9.
[17] Ibid.

derogation from the principle of state sovereignty and, accordingly, the rights of states to determine the requirements for acquisition of citizenship.[18]

EU law

Currently, there are two active formal citizenship by investment programmes in Europe – in Montenegro, and Turkey. Other European states, including EU Member States (e.g. Austria),[19] allow discretionary naturalization on the grounds of 'special achievements' (or similar notions) – including economic achievements – of applicants. Reportedly, 22 EU Member States allow discretionary naturalisation,[20] or have untypical citizenship by investment programmes (e.g. Bulgaria,[21] and Malta[22] more recently). The presence of investment programmes in Europe has triggered the interest of EU policymakers. This is not entirely surprising since, indeed, EU citizenship and the rights conferred by it are at the heart of the EU. Having said that, there is a very strong negative sentiment in the EU towards investment migration in general, and citizenship by investment in particular.

Investment migration has attracted strong criticism from EU institutions ever since the launch of the Maltese citizenship by investment programme, which triggered proactive EU involvement. Many institutions called for phasing out of the investor programmes at some point and, in October 2020, the European Commission opened infringement procedures against Malta and Cyprus over their citizenship by investment programmes, pointing out that these allegedly

[18] Ibid.
[19] Austria has never had a structured, formal citizenship by investment programme. That country has instead developed a practice of granting citizenship to suitable foreign investors on the basis of exceptional contributions, based on the Act on Austrian Citizenship.
[20] EUI Globalcit database – information under 'Mode A24, Special Achievements' <http://globalcit.eu/acquisitioncitizenship/> last accessed 7 July 2021.
[21] Bulgaria does not have a typical citizenship by investment programme, as the country requires two to five years (depending on the invested amount) of residence for the main applicant, although no continuous physical presence is required.
[22] After reaching its quota, Malta discontinued its Individual Investor Programme in 2020, and on 20 November 2020 replaced it with the Maltese Citizenship by Naturalisation for Exceptional Services by Direct Investment Programme, changing the residence requirements for citizenship by investment applicants.

undermine the essence of EU citizenship. In its Press Release on the matter, the European Commission stated that it:

> 'considers that the granting by these Member States of their nationality – and thereby EU citizenship – in exchange for a pre-determined payment or investment and without a genuine link with the Member States concerned, is not compatible with the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union. This also undermines the integrity of the status of EU citizenship provided for in Article 20 of the Treaty on the Functioning of the European Union'.[23]

In other words, the Commission is of the opinion that Cyprus and Malta failed to fulfil their obligations under Article 4(3) TEU and Article 20 TFEU by granting nationality in exchange for payment or investment and without 'genuine link'.

This **argument is problematic** for at least four reasons:

1. The granting of citizenship is **the exclusive competence of individual Member States** and EU competencies in citizenship matters are minimal and related to instances where it is necessary for the EU to ensure effective and uniform protection of rights of EU citizens.[24] In other words, the EU would normally interfere in citizenship matters where Member States have enacted measures that restrict rights of EU citizens, while it is for the EU Member States only to regulate who qualifies as a national, having due regard to EU law.

[23] *See* <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925> last accessed 7 July 2021.
[24] van den Brink, 'Revising Citizenship within the European Union'. *See* also Sarmiento, 'EU Competence and the Attribution of Nationality'.

2. As explained above, the 'genuine link' has not developed into obligatory rules or principles of international law. In the EU, **the 'genuine link' requirement has even been specifically rejected by the European Court of Justice.**[25]

3. Article 4(3) TEU on which the Commission relies, concerns the achievement of EU objectives and genuine compliance with EU law. Yet, none of these seem to be related with these investment programmes.

4. EU infringement procedures against Cyprus and Malta on the basis of the above arguments **put into question the genuine intention of the European Commission to protect the EU law** given that no infringement procedures have been initiated against other Member States providing for citizenship through investment on discretionary basis (rather than through specific and transparent investment programmes). If the Commission was concerned with the application of the principle of sincere cooperation in the context of investment migration, it should have extended the infringement proceedings to all Member States that allow for discretionary naturalisation on the basis of investment or other special interest in the absence of 'genuine link', rather than chasing only states with citizenship by investment programmes.

The above reasons lead to a conclusion that the infringement procedures against Cyprus and Malta, as well as other actions taken by EU institutions, such as the EU Parliament, in relation to investment programmes **are motivated by politics rather than law**.

This was heavily implied by the European Commissioner for Justice, Didier Reynders, who in the context of the recently reformed investment programme of Malta commented that: 'It is nice to see some additional safeguards, but at the end of the day, it seems to be the same

[25] Case C-369/90 *Micheletti* [1992] ECR I-4239, I-4262.

process'.[26] He further noted that 'at the end of the day, we are analysing the situation to see whether it is normal to organise such a process, even with those safeguards',[27] emphasising that 'we do not want to have European values for sale and certainly not citizenship'.[28] In other words, **EU law has been simply ignored**, if not heavily misinterpreted and misused, in the context of investment migration simply because citizenship by investment programmes are unpopular with the EU. Safeguards related to the 'genuine link' requirement recently introduced by Malta are also hardly relevant because the proclaimed main aim of phasing-out the programmes would still not be achieved. Thus, the Commission more recently issued 'an additional letter of formal notice to expand the concerns set out in the letter of formal notice to [the] new scheme operated by Malta'[29] and issued a reasoned opinion to Cyprus for failing to address its concerns. In particular, '[w]hile Cyprus has repealed its scheme and stopped receiving new applications on 1 November 2020, it continues processing pending applications'.[30] In other words, the Commission will be satisfied with nothing less but complete and definitive discontinuation of the citizenship by investment programmes even if such programmes are not incompatible with the EU law and are also practiced by other Member States, albeit in different form and in a more discretionary manner. Yet, **pretending to be protecting the law to achieve a goal motivated by other reasons takes the European Commission on a very slippery slope, particularly in an area where the EU does not have competence.**

As with other industries that involve large financial transactions, there are certain risks that are inherent to investment migration programmes. These include possible money laundering, tax evasion, corruption and other illegal activities. However, such risks (and measures to tackle these) are one thing, and acquisition of residence or citizenship through investment quite

[26] Jacob Borg, 'Brussels 'not convinced' about passport sale reforms - EU Justice Commissioner' (*Times of Malta*, 24 March 2021) <https://timesofmalta.com/articles/view/brussels-not-convinced-about-recent-passport-sale-reforms.860002> last accessed 7 July 2021.
[27] Ibid.
[28] Ibid.
[29] *See* 'June infringements package: key decisions' (9 June 2021) <https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_2743> last accessed 7 July 2021.
[30] Ibid.

another. Acquisition of citizenship through investment is not and has never been incompatible with EU law. The 'genuine link' requirement has never developed into binding rules in international law and has been specifically rejected in the context of EU law. The attempt of the European Commission to phase-out the investment programmes by misinterpreting the law rather than protecting it would not do any good.

Indeed, rather than being guardian of the Treaties, the European Commission got caught up in politics, defending the indefensible. Promoting politics rather than defending the law certainly has the potential to undermine the credibility of the European Commission and of the EU in general. The EU needs more dedication to rule of law, as much as it demands this – rightly so – from its Member States.

Nottebohm and 'Genuine Link: Anatomy of a Jurisprudential Illusion

Peter J. Spiro

Nottebohm and 'Genuine Link': Anatomy of a Jurisprudential Illusion

Peter J. Spiro[1]

ABSTRACT: The ICJ's 1955 decision in the Nottebohm Case famously set forth an aspirational conception of nationality requiring a "genuine link" between an individual and a state for purposes of international law. The formulation was controversial from its inception as a departure from the prevailing rule that states enjoy sovereign discretion over nationality practices. At no time has "genuine link" represented a general rule of international law. The putative doctrine has a poor track record in subsequent international proceedings (including before the European Court of Justice), effectively limited to supplying secondary support for the "dominant nationality" approach in the narrow context of international claims involving dual nationals. "Genuine link" is even less appropriately applied in the wake of globalisation, in which states have increasingly enabled the conferment of nationality to individuals with tenuous connections to the state, for example, through ancestral descent. Although some political theorists have deployed the "genuine link" label to advance a liberal nationality agenda, Nottebohm has been rejected by a growing consensus of legal scholars.

KEYWORDS: nationality, citizenship, international law, Nottebohm, naturalization, dual nationality

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1. Introduction

Nationality practices have generally fallen outside the ambit of international law. No other major element of governance has been so untouched by international constraints. This is surprising given the place of nationality (now conceived as citizenship) in the determination of rights, but perhaps it is not so surprising. Nationality is supremely important to the state project, insofar as it is the boundary delimitation – more so even than territory – which constitutes the state. Nationality is the starting point for self-determination. In that respect it allows for minimal external imposition. In the wake of the human rights revolution, international law has made some limited inroads into what was largely within the state's sole discretion.[2] But these inroads have been targeted almost exclusively at the denial or revocation of nationality. International law may be looking to put citizenship attribution to work as part of a broad agenda to expand human rights.

However, there are no such international law trends with respect to the consensual attribution of citizenship. If anything, international law has come to regard citizenship attribution as an unmitigated good, assuming a willing recipient. This destination is the product of the historically entrenched discretion afforded states over nationality practices now buttressed by the rights agenda. Both point to the grant of citizenship as one which should not be subject to external assessment or interference.

Among the very few derogations from this overarching rule of non-interference – real or attempted – looms the International Court of Justice's 1955 decision in the *Nottebohm Case*.[3] It looms large in part because there have been so few broadly expressed rulings relating to the attribution of nationality. It looms large because its facts, stylised as they are, could have been written for a law school test paper. And, finally, the case looms large because the Court's opinion is broadly framed, exploring the elusive nature of the citizen–state relationship.

But none of the elements engendering *Nottebohm*'s notoriety add weight to its decisional authority; perhaps the contrary. The case is most famous for articulating a supposed requirement that an individual must have a 'genuine link' to a state asserting the individual's interest at the international plane. The putative 'genuine link' requirement for the allocation of citizenship is loosely bandied about in some legal and policymaking circles as if it were a hard-and-fast rule of international law. In fact, the 'genuine link' test has been vigorously contested since its first articulation in *Nottebohm*. To the extent that 'genuine link' commanded any compliance pull at all, it has been in narrow application with no salience to CBI programs. 'Genuine link' makes even less sense in the wake of globalisation than it did in the world of the mid-twentieth century. As individuals become more highly mobile and are enabled to maintain multiple citizenships, the prospect of sorting supposedly authentic citizenship from instrumental citizenship is a fool's errand. A chorus of academic commentary

[2] See Peter J. Spiro, A New International Law of Citizenship, 105 American Journal of International Law 694 (2013).
[3] Nottebohm (Liech. v. Guat.), 1955 ICJ Rep. 4 (Apr. 6).

has declared 'genuine link' a dead letter. International law is not now about to start constraining states in their allocation of citizenship among willing recipients.

In short, 'genuine link' is not and never was a requirement for international recognition of the attribution of nationality.

2. The historical backdrop

'Genuine link' must first of all be situated against a pre-existing legal backdrop in which international law imposes almost no limitation on state sovereign discretion with respect to nationality practice. States could – and did – set the terms of birthright citizenship, naturalisation and expatriation as they saw fit. States could be restrictive in their grants of nationality, as was the case among some continental states such as Germany, or liberal, as was true of the United States and its nearly absolute territorial birthright citizenship rule. At the other end of the spectrum, states could strip individuals or whole communities of their nationality. Totalitarian expatriations were a moral abomination but they did not run afoul of any rule of international law.

As stated in the opening article of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 'It is for each State to determine under its own law who are its nationals', provided that such determinations were 'recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality'. The Polish jurist Szymon Rundstein declared in 1926 that '[t]here can be no doubt that nationality questions must be regarded as problems which are exclusively subject to the internal legislation of individual States […] It is, indeed, the sphere in which the principles of sovereignty find their most definite application'.[4]

States could, of course, and sometimes did consent to constrain nationality practices in bilateral or multilateral agreement with other states. The Hague Convention itself supplied one such example, along with the Bancroft treaties that the United States entered into with various European states during the late nineteenth century. These comprised conventional international law limitations, undertaken by states voluntarily. But these conventional international constraints were flimsy through the mid twentieth century. This is notable given the serious frictions among states which resulted from conflict of nationality laws, especially where the conflicts gave rise to conflicting claims to individuals (in others words, gave rise to dual nationals). These frictions sometimes resulted in armed conflict, including the War of

[4] *See* League of Nations Committee of Experts for the Progressive Codification of International Law, Nationality, 20 American Journal of International Law 21, 23 (Special Supp. 1926) ('There is no rule of international law, whether customary or written, which might be regarded as constituting any restriction of, or exception to' the exclusive jurisdiction of individual states); see also, e.g., Paul Weis, Nationality and Statelessness in International Law 101 (2d ed. 1979) ('The power of a state to confer its nationality is derived from its sovereignty. It is an attribute of territorial supremacy').

1812.[5] Notwithstanding these serious consequences, states failed to harmonise nationality laws on their own or through other, general international law constraints. In other words, even though there was very good cause to put international law to work in the area, there was little progress towards that end.[6] Some difficulties were resolved through discretionary state policies. For example, many states came to terminate their nationality upon a national's naturalisation in another state, thus eliminating a major source of dual nationals.[7] That was permissive for states – there was no rule of international law which required the practice. Multilateral efforts such as the Hague Convention fell well short of correcting the source of the conflicts, both in terms of substance and in terms of the low number of accessions.

But for purposes of custom and generally recognised principles – those rules which apply to states even when their consent is merely notional – states were subject only to one clear constraint: they could not naturalise an individual without his consent. This norm was established through a series of nineteenth and twentieth century cases in which Latin American states purported to naturalise nationals of the United States and European states automatically by operation of law after a certain period of residence. The laws were aimed not just at naturalising the individuals but also at depriving them of their home-state nationality and attendant diplomatic protection. These efforts were vigorously protested by the United States, in the face of which the Latin American countries backed down. The norm precluding non-consensual naturalisation was recognised by a consensus of nationality experts, whose opinions in that era were understood to stand as authoritative sources of international law itself. As the mid-century nationality scholar Paul Weis observed, 'the acquisition of a new nationality must contain an element of voluntariness on the part of the individual acquiring it, that it must not be conferred against the will of the individual'.[8]

Otherwise, it was understood that customary international law – the form of binding international law established through state practice – had no place in constraining state

[5] For myriad examples of the sort of disputes generated by nationality-based conflicts, see volume 6 of James Bassett Moore's *A Digest of International Law* (1906) as well as Edwin Borchard's *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915).

[6] It was not for lack of trying. Nationality law was one of only three subjects on the table at the 1930 Hague Codification Conference. In the run-up to that negotiation, John D. Rockefeller, Jr., commissioned a blue-ribbon initiative to study the issue and make recommendations for rationalising nationality practice. Research in International Law of the Harvard Law School, The Law of Nationality, 23 American Journal of International Law 1, 21 (Special Supp. 1929). Nationality laws had been a major target for the newly emerged networks of legal policymakers in the late nineteenth century, who repeatedly lamented the failure to reach international agreement on the subject. See e.g., James Brown Scott, Observations on Nationality 6 (1931) (framed as a 'plea' for states to harmonise their nationality practices to avoid dual nationality).

[7] See e.g., Richard W. Flournoy, Naturalization and Expatriation, 31 Yale Law Journal 702 (1922).

[8] Weis, supra, at 110; see also H.F. van Panhuys, The Role of Nationality in International Law: An Outline 156 (1959) ('[…] it would be hard to defend that the conferment of nationality on a person who has no connection whatsoever with the State in question may ever produce nationality within the meaning of international law'). See also Peter J. Spiro, Citizenship Overreach, 38 Michigan Journal of International Law 167 (2017).

discretion over the allocation of nationality. Decisions of international tribunals were in concurrence, as were commentators. Speaking of 'matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law', the Permanent Court of International Justice declared in the *Nationality Decrees in Tunis and Morocco*, 'questions of nationality are, in the opinion of this Court, in principle within this reserved domain'. In this reserved domain, 'each State is sole judge'.[9]

To the extent that there were other limitations placed on the recognition of nationality, it was entirely in the context of dual nationality, the source of serious friction in state-to-state relations as each of two sovereigns laid claim to individuals representing military and economic manpower. The flashpoint was invariably the exercise of diplomatic protection, where one state would intervene on behalf of its nationals with another state which also claimed the individual as its own. The decision to exercise diplomatic protection was itself a matter of sovereign discretion. Disputes arose where one state refused to accept the legitimacy of the other's intervention. These disputes mostly occurred outside the context of formal processes and claims resolution, as when European-born naturalised US citizens returned to visit their homelands, only to find themselves facing military conscription or penalties for its evasion.[10]

However, disputes relating to dual nationals also arose in the context of the many arbitration settlement processes established by the mutual consent of states to resolve a number of nineteenth-century bilateral conflicts involving economic loss to private individuals. In some of these processes, arbitral bodies rejected the possibility that an individual holding the nationality of both establishing states could bring a claim against either, in the face of the dictum (rooted in sovereign equality) that international law could not hear an individual's claim against his own state of nationality. This rule was reflected in the 1930 Hague Convention, which provided that 'A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses'. (Some states, notably the United Kingdom, adopted it as an operating principle in most contexts, beyond the espousal of claims.)

But other tribunals developed a doctrine of 'dominant' and/or 'effective' nationality to in effect designate a sole nationality to individuals holding the nationality of both states involved in a claims process. In other words, individuals could bring claims against one state they held nationality of once their 'dominant' nationality was shown to be of the other.[11] This approach considered the individual's relative connections to each of the two states. Although the test was in theory multi-factored, typically the state of habitual residence was deemed the dominant one. The 'dominant nationality' test supplied a mechanism for managing the conflicts rooted in the failure to eradicate dual nationality. While the approach had the effect of disregarding one of an individual's nationalities, the inquiry into an individual's ties to a state

[9] Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) no. 4, at 24 (Feb. 7)
[10] See Peter J. Spiro, At home in Two Countries: The Past and Future of Dual Citizenship ch. 2 (2016).
[11] For citations to the many arbitral tribunals adopting the dominant nationality approach, see Report of the International Commission: Draft Articles on Diplomatic Protection with Commentaries, UN Doc A/61/10 (2006), at 34 n. 79.

of nationality was limited to the context of dual nationality only, and then only when addressing a claim by an individual holding one nationality against another state in which he also held nationality. These cases were not about second-guessing nationality determinations generally, only about enabling claims which would otherwise have been blocked by typically vestigial nationalities in former homelands. In other words, the dominant nationality test expanded the universe of potential claims in arbitration proceedings, allowing some individuals to bring claims who would otherwise have faced the categorical bar of the Hague Convention approach against nationals bringing claims against a state of nationality.

3. The *Nottebohm* case

It was against this backdrop that the International Court of Justice issued its decision in *Nottebohm*. The facts will be familiar to any international lawyer. Born in Germany in 1881, Friedrich Nottebohm moved to Guatemala in 1905, where he participated in several profitable businesses, including the country's second largest coffee producer. He did not naturalise as a Guatemalan, notwithstanding decades of residence there, maintaining his German birth nationality. With the approach of the Second World War, in 1939 he naturalised in Liechtenstein, where his brother lived but Nottebohm himself had never resided. A three-year residency requirement was waived upon the payment of a naturalisation fee and an undertaking to pay an annual tax to Liechtenstein. Refusing the recognise the legitimacy of the naturalisation, Guatemala detained Nottebohm in 1943 as an enemy alien after declaring war on Germany, also expropriating his properties in Guatemala. (Guatemala turned Nottebohm over to the United States, where he was interned.)[12] Liechtenstein subsequently sought to exercise diplomatic protection on behalf of its national. Liechtenstein argued that the detention and expropriation were wrongful because Nottebohm was a national of Liechtenstein, a neutral state in the war, and therefore not classifiable as an enemy alien.

The majority opinion denied Liechtenstein's capacity to bring the claim. The Court found Nottebohm's naturalisation not to have international effect for the purposes of founding the claim against Guatemala. The Court explored the nature of the Liechtenstein's naturalisation decision to consider whether Nottebohm's acquisition of Liechtenstein nationality was 'real and effective'. '[N]ationality is a legal bond having as its basis a social fact of attachment', the Court observed in a much-quoted formulation, 'a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[13] In the Court's view Nottebohm failed the test, 'his actual connections with Liechtenstein [being] extremely tenuous'. His naturalisation had 'the sole aim of […] coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, [or] its way of life'.

[12] On the complex parallel proceedings between the Nottebohm family and the United States (including the detention of his Guatemalan national nephews), see Cindy G. Buys, Nottebohm's Nightmare: Have We Exorcised the Ghosts of WWII Detention Programs or Do They Still Haunt Guantanamo?, 11 Chicago-Kent Journal of International and Comparative Law 1 (2011). The US government eventually returned assets to the family that had been frozen during the War, with a concession that Nottebohm was a 'non-enemy'. See Kunz, supra, at 554.
[13] Nottebohm at 23-24.

The naturalisation 'was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance'. This 'link theory' of nationality had not been proposed to the Court by Guatemala or any other party before it. Guatemala had argued that Nottebohm had obtained naturalisation in Liechtenstein through fraud.

But the Court was careful to limit its inquiry to the international effect of Nottebohm's nationality and to preserve the state's discretion over nationality determinations for the purposes of municipal law. The Court refrained from confronting the validity *vel non* of Nottebohm's naturalisation. 'It is for Liechtenstein', the Court observed, 'as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality'. Noting that 'for most people' nationality has 'its only effects within the legal system of the State conferring it', the Court affirmed 'the wider concept that nationality is within the domestic jurisdiction of the State'.[14] The decision had nothing to say about Nottebohm's status in Liechtenstein, only that his nationality could not be deployed against another state.[15] As J. Mervyn Jones noted in an early commentary on the case, 'In the result it seems clear that [Nottebohm] did in fact become a Liechtenstein national, and the Court in its judgment did not question this fact'. In other words, the majority was not denying the legitimacy of Nottebohm's nationality in Liechtenstein. Rather, it was purporting to distinguish among its nationals, recognising the country's capacity to assert claims for some nationals but not for others.

The Canadian jurist John Erskine Read issued a lengthy dissenting opinion to the decision, perhaps among the most notable dissents in ICJ history. Noting the Bancroft treaties entered into by the United States with a range of states (not including Liechtenstein) governing the diplomatic protection of naturalised citizens who returned to their homelands, Judge Read argued that there would be no cause to devise such treaty arrangements if they were already supplied by customary law.[16] If states wanted to limit their capacity to represent nationals in the claims context, they had the means to do so, but such limitation should not be read into generally applicable international law. He distinguished decisions of arbitral tribunals as implicating dual nationality, 'an essentially different kind of relationship', in particular where states refused to recognise the naturalisation of nationals before other states, on the obvious basis that no such conflicting claims to nationality were implicated in Nottebohm's case. In any case, Read rejected the salience of Nottebohm's motivation for naturalisation. Even if

[14] *Id.* at 20.
[15] J. Mervyn Jones, *The Nottebohm Case*, 5 International & Comparative Law Quarterly 230, 234 (1956); *see also* Josef L. Kunz, The Nottebohm Judgment, 54 American Journal of International Law 536, 550 (1960) ('The judgment does not adjudicate upon the validity of the acquisition of Liechtenstein nationality by Nottebohm'); Robert D. Sloane, Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality, 50 Harvard International Law Journal 1, 16 (2009) (*Nottebohm* 'did not establish a new rule limiting the internal competence of states to confer their nationalities').
[16] *Nottebohm*, supra, at 41.

Nottebohm had naturalised to avoid the possibility of detention and expropriation, this would in his view not have affected Liechtenstein's ability to oppose his naturalisation.

Judge Read also refused to recognise Nottebohm's lack of residence in Liechtenstein as a decisive factor. He observed:

> Most States regard non-resident citizens as a part of the body politic. In the case of many countries such as China, France, the United Kingdom and the Netherlands, the non-resident citizens form an important part of the body politic and are numbered in their hundreds of thousands or millions. Many of these non-resident citizens have never been within the confines of the home State. I can see no reason why the pattern of the body politic of Liechtenstein should or must be different from that of other States.[17]

'Unable to disregard what really did happen', Read highlighted that after the war, Nottebohm established residence in Liechtenstein. Among the more curious aspects of the *Nottebohm* decision is the fact that as of the date of the Court's decision in 1955, Nottebohm had been resident in Liechtenstein for almost a decade.[18]

4. *Nottebohm*'s errors

Nottebohm is the most famous decision of an international tribunal relating to the subject of nationality, but the ruling is famous because it was and is infamous, at least among the college of international lawyers studying nationality law. The decision was discontinuous with pre-existing law. On the facts, the decision was riddled with contradictions and was chiefly directed at a problem which was not before the Court, that of dual nationality. It was only in that context that the ruling was applied thereafter, and then only sporadically. The 'genuine link' concept, meanwhile, has come under increasingly withering attack from respected international law scholars.

Turning to the decision's contradictions, it is not clear what nationality the ICJ was ascribing to Nottebohm on application of its approach. The Court did not question the operation of German law, under which his German nationality terminated upon naturalisation in Liechtenstein.[19] In any case, Nottebohm's ties with Germany had been attenuated through his

[17] Id. at 44.
[18] See L.F.E. Goldie, The Critical Date, 12 International & Comparative Law Quarterly 1251 (1963). The Nottebohm majority suggested that his residence in Liechtenstein was explained by Guatemala's refusal to allow his return to the country in 1946. See Nottebohm at 25.
[19] Although there was nothing in the Court's opinion questioning the termination of his German nationality, the Court may have been influenced by contingencies relating to German law and policy in the months leading up to the outbreak of the War. A July 1939 German Foreign Office circular urged Germans in Latin America to seek a foreign citizenship, assured of having it restored in peace. The 1913 Reich nationality law also provided for the readmission of former German nationals. These background facts may have contributed to the 'bad cases make bad law' take on the judgment. Weis, supra, at 180.

more than thirty years' residence in Guatemala. If the 'social fact of attachment' were the appropriate metric, Nottebohm would have been a national of Guatemala. But he had not naturalized there, and there could be no question of imputing Guatemalan nationality in the absence of his consent (and although that would have barred Nottebohm's claims in an international tribunal, it would have undercut Guatemala's basis for expropriating his property in the first place). In this sense the ICJ denominated Nottebohm as stateless, at least for the purposes of diplomatic protection. 'The judgment prevented justice from being done to Nottebohm', observed Josef Kunz, 'making him, for all practical purposes, a stateless person and depriving him of the only legal remedy he had'.[20]

The decision cannot be framed as having treated Nottebohm in effect as a German national, against whom expropriation would have been appropriately undertaken. The opinion would have applied to any other claim that Liechtenstein attempted to bring on Nottebohm's behalf, even if it were completely unrelated to international law as it related to enemy aliens. Say, for example, that Nottebohm had been wrongfully detained by some other state on a basis having nothing to do with his German origins. The logic of the *Nottebohm* decision would have denied Liechtenstein's capacity to intervene on behalf of its national in that case. Although Nottebohm's German origins may have driven the facts in the case before the Court, this element of the case cannot support the 'genuine link' rationale for denying the admissibility of Liechtenstein's intervention.

Nottebohm's logic seemed targeted at another problem altogether, that of dual nationality. The decision purports to isolate the 'social fact of attachment' as the fulcrum of nationality. But the opinion translates this threshold for nationality as 'the juridical expression of the fact that the individual upon whom it is conferred […] is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.[21] Short of the ICJ claiming the power to adduce nationality – which would be entirely inconsistent with state sovereign discretion – the test works only where an individual has more than one nationality. *Nottebohm*'s approach was ill-suited to the facts of the case, where the question was not which of multiple nationalities to prefer for international purposes, but whether to validate his sole nationality for those purposes. As Robert Sloane notes, 'The logic and propriety of transposing, by what amounts to *ipse dixit*, the "criteria designed for cases of double nationality to an essentially different type of relationship" is questionable'.[22] In this respect *Nottebohm* was squarely in the tradition of the dominant-nationality approach to claims in which an individual brought claims against one of two states of nationality.

[20] Kunz, supra, at 566; see also Clyde Eagleton, Ferment or Revolution?, 50 American Journal of International Law 916, 920 (1956) (decision 'could produce a new class of "stateless persons"'); Jack H. Glazer, Affaire Nottebohm (Liechtenstein v. Guatemala): A Critique. 44 Georgetown Law Journal 313, 323 (1956) (characterising this consequence of the decision as 'manifestly bad' and 'exceedingly harsh').
[21] Nottebohm, at 23.
[22] Sloane, supra, at 15

At the same time, *Nottebohm* was by its own terms limited to the context of diplomatic protection and international claims. That had been been central to controversies implicating nationality and dual citizenship. One state seeks to bring a claim against another state on behalf of an individual who is a national of both. In that case, as described above, international tribunals (before and after *Nottebohm*) have in some cases sought to determine which nationality is 'dominant', supported by an 'effective link'. Mid-century nationality scholar Paul Weis accepts *Nottebohm*'s validity on this basis only. 'The Court did not pronounce either on the general validity of the naturalization under international law', he observed. 'It merely held that Nottebohm's nationality was not opposable by Liechtenstein against Guatemala in international judicial proceedings'.[23] Sloane agrees. '[T]he rationale for the rule limits its application to the classical context of diplomatic claims espousal'.[24]

Nottebohm was controversial from its inception. Jack H. Glazer called it 'disturbing', 'a hollow triumph of form'.[25] Writing in the influential American Journal of International Law, Josef L. Kunz noted that the 1955 judgment had 'already provoked a vast literature', much of which was 'highly critical'.[26] On the judgment's 'genuine link' dictum, Kunz noted that the Court 'was unable to quote a single judicial precedent in favor of the genuine link theory as constituting positive international law'. Mervyn Jones characterised it as an 'entirely new theory of international claims', 'a novel principle'.[27]

5. *Nottebohm* in practice

The *Nottebohm* judgment has not fared well in practice. There are no important decisions from international tribunals which have adopted its rationale. In a jurisprudential sense, it was dead on arrival.

In the 1958 *Flegenheimer Case* before the Italian–United States Conciliation Commission – the first major consideration of *Nottebohm* in a claims tribunal – *Nottebohm* and 'genuine link' was brushed aside.[28] The United States sought recovery of losses incurred by Flegenheimer, a US national, on account of the sale of capital stock made at depressed prices in the face of anti-Semitic Italian legislation. Flegenheimer, who was Jewish, had been born in Germany to a father who was a return migrant from the United States. He had inquired about the possibility that he was a US citizen *jure sanguinis*, but was rebuffed by various US officials in the 1930s and 1940s, even as he was stripped of his nationality under German law in 1940. Only in 1952 was his US citizenship confirmed. Italy asserted that Flegenheimer did not qualify as a US national for purposes of the claims process at relevant dates in 1943 and 1947, and 'in view of the fact that, during half a century, the individual concerned was considered as and considered himself to be a German national by his conduct, his sentiments, his interests'. '[N]ationality is

[23] Weis, supra, at 179.
[24] Sloane, supra, at 29.
[25] Glazer, supra, at 325.
[26] Kunz, supra, at 537–38, 553.
[27] Jones, supra, at 243, 231.
[28] Flegenheimer (US v. Italy), 14 R.I.A.A. 327 (Italian-US Conciliation Commission 1958).

not effective when it confines itself to establishing a nominal link between a State and an individual', Italy argued, citing *Nottebohm*, 'and is not supported by a social solidity resulting from a veritable solidarity of rights and duties between the State and its national'.[29]

The tribunal rejected the application of *Nottebohm*: 'it is doubtful that the International Court of Justice intended to establish a rule of general international law in requiring, in the *Nottebohm Case*, that there must exist as effective link between the person and the State in order that the latter may exercise its right of diplomatic protection in behalf of the former'.[30] The tribunal effectively limited *Nottebohm* to its facts. The tribunal proceeded to stress that the doctrine of effective nationality was limited in application to cases in which an individual held the nationality of each of the two states party to a claims resolution process. Since there was no allegation that Flegenheimer was an Italian national, the tribunal had no basis to reject recognition of Flegenheimer's US nationality, however nominal it may have been. So long as the citizenship was 'regularly acquired' (that is, acquired in accordance with the nationality law of the state in question), the tribunal would otherwise defer to the 'unquestionable principle of international law according to which every State is sovereign in establishing the legal conditions which must be fulfilled by an individual in order that he may be considered to be vested with its nationality'.

Perhaps the only major litigation in which *Nottebohm* was accepted as a putative rule for decision was in the Iran–US claims tribunal case *A/18*.[31] The question there was whether dual nationals could file claims before the tribunal. The claims tribunal was enabled to hear claims by nationals of the United States or Iran. The tribunal interpreted *Nottebohm* to allow an inquiry into the 'real and effective nationality based on the facts of a case, instead of an approach relying on more formalistic criteria'.[32] However, the approach was deployed to soften the bar on claims by dual nationals as nationals of one state where they also held the nationality of the state against which a claim was being made.[33] The tribunal was thus putting *Nottebohm* to work not in its own context (which of course did not involve dual nationality) but rather in order to validate the 'dominant and effective' approach to claimants holding the nationalities of both states party to a claims settlement process. *A/18* only involved dual nationals, and then only in the specific context of claims processes resolving disputes between the two states of nationality. It would not have applied to a US national with no social connection to the United States if his other state of nationality were, for instance, the United Kingdom. The ruling applied only to dual Iranian–US nationals. In that respect it was applying *Nottebohm* only

[29] Id. at 375.
[30] Id. at 376.
[31] Iran v. United States, Case No. A/18, 5 Iran-US Claims Tribunal Reporter 251 (184).
[32] Id. at 263.
[33] As the tribunal noted, 'This trend toward modification of the Hague Convention rule of non-responsibility by search for the dominant and effective nationality is scarcely surprising as it is consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals'; in other words, A/18 put *Nottebohm* to work to expand the universe of tenable claims, not restrict it. Id. at 265.

orthogonally, applying it to a conceptually distinct constellation of facts. In this respect, *A/18* 'repurposed' *Nottebohm* in service of the doctrine of dominant nationality, a doctrine into which (but for the fact that Nottebohm lacked dual nationality) the judgment much more comfortably fits.[34]

Closer to home, the European Court of Justice demurred from applying *Nottebohm* in the *Micheletti* case. Micheletti, a national of Italy and Argentina, sought to establish a dental practice in Spain. In the case of dual nationals, Spanish law recognised the nationality of the last state of residence, in Micheletti's case, Argentina, and denied his right to establish a practice. Advocate General Tesauro asserted that the Spanish law violated Micheletti's rights as a national of a Member State, namely Italy. The Advocate General found it 'clear that possession of the nationality of a Member State is the only prerequisite which an individual must satisfy in order to be able to exercise the right'. The Advocate General rejected the application of 'effective nationality, whose origin lies in a "romantic period" of international relations and, in particular in the concept of diplomatic protection'; in other words, the concept was overblown and limited. The opinion in the same breath rejected invocation of *Nottebohm* itself, 'the well known (and, it is worth remembering, controversial)' judgment of the ICJ.[35] The European Court of Justice followed the Advocate General's recommendation in deeming the Spanish law inconsistent with EU commitments.

There are other contexts in which *Nottebohm* has been demoted or cast aside. Arbitration panels established under the ICSID Convention 'have disavowed the principle of the genuine link with a view to recognizing the primacy of the domestic rules on nationality'.[36] The panels have generally accepted nationality determinations by states except where they do not appear to conform with positive legal requirements. A panel rejected the claim of Italian nationality notwithstanding supporting official documentation where an individual had apparently not complied with a requirement to request the retention of Italian nationality upon naturalisation in another state. However, another panel accepted the attribution of nationality by descent to reject a claim even where the individual had no other connection with the state. Assessing these and other cases, Robert Sloane concludes that ICSID tribunals 'have shown little inclination to search for robust substantive bonds of the sort stressed in *Nottebohm*. This casts further doubt on the descriptive accuracy of the genuine link theory as a general doctrine of international law'.[37]

Nottebohm has also been rejected by the International Law Commission, whose work (while not qualifying as an authoritative pronouncement of the United Nations) is afforded substantial weight as the work of a collective expert body. The Draft Articles on Diplomatic Protection adopted by the ILC in 2006 provide that 'a State of nationality means a State whose nationality

[34] Rayner Thwaites, The Life and Times of the Genuine Link, 49 Victoria University Wellington Law Review 645, 657 (2018).
[35] Opinion of AG Tesauro in Case C-369/90 *Micheletti* [1992] ECR I-4239, para. 5.
[36] Alice Sironi, Nationality of Individuals in Public International Law: A Functional Approach, in The Changing Role of Nationality in International Law 53, 57 (Alexandra Annoni & Serena Forlati eds, 2013).
[37] See Sloane, supra, at 39.

that person has acquired, in accordance with the law of that State […] not inconsistent with international law'.[38] The accompanying commentary explains that this provision 'does not require an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case'. The commentary found it appropriate 'to limit *Nottebohm* to the facts of the case in question' and concluded that the ICJ 'did not intend to expound a general rule'. As a general point, the ILC observed that the burden of proof should be on any state challenging a person's nationality given that 'the State conferring nationality must be given a "margin of appreciation" in deciding upon the conferment of nationality and that there is a presumption in favour of the validity of a State's conferment of nationality'.[39]

As for the dominant nationality approach to claims by dual nationals against one state of nationality itself, the doctrine continued to have traction through the mid-century. In the *Mergé* decision from the Italian-US Conciliation Commission, nearly contemporaneous to *Nottebohm*, the tribunal weighed the efforts of a US-born claimant who had assiduously taken steps to maintain her US citizenship against her habitual residence in Italy to find the latter dominant and thus preclusive of a claim against Italy.[40] As described above, the *A/18* ruling is more appropriately situated in this line of decisions than in any universalized conception of 'genuine link'. Article 7 of the ILC Draft Articles on Diplomatic Protection accepts the dominant nationality approach as a default rule. More recently, there appears to be a retreat from even this limited context in which duly conferred nationality is disregarded, in recognition of the cumbersome nature of the dominant nationality determination. The UN Compensation Commission, established in the wake of Iraq's 1991 invasion of Kuwait, considered claims from dual nationals holding Iraqi citizenship, so long as the other citizenship was bona fide, which was interpreted as meaning that the other nationality had been acquired prior to the beginning of the military conflict in August 1991.

In a general sense, international law has made some inroads into the near-complete discretion that states previously enjoyed with respect to nationality determinations. There has been some suggestion that states cannot discriminate in their nationality practices on the basis of suspect classifications, and there is some convergence in state practice toward adopting double *jus soli*.[41] But these norms are provisional – they have clearly not hardened into binding customary international law. With limited exceptions,[42] they affect only the denial or withdrawal of nationality, not its conferment. Otherwise, the traditional rule that states have discretion over

[38] ILC Draft Articles, supra, article 4.
[39] ILC Draft Articles, supra, at 30.
[40] Mergé (US v. Italy), 14 R.I.A.A. 236 (Italian-US Conciliation Commission 1955).
[41] See Spiro, supra, at 729–30. Double *jus soli* implicates the extension of nationality to the children of parents also born on state territory.
[42] In some cases international organisations have refused to recognise the attribution of nationality where it was with the purpose of securing advantage as an employee of the organisation. See Sironi, supra, at 65–66. This is a minor derogation from the general rule of non-interference. Of course, the longstanding norm that states may not naturalise individuals on a non-consensual basis stands. See Open Society Justice Initiative, Human Rights in the Context of Automatic Naturalization in Crimea (2018), https://www.opensocietyfoundations.org/sites/default/files/report-osji-crimea-20180601.pdf

their nationality practices is largely intact. The first article of the 1997 European Convention on Nationality, for example, provides that 'Each State shall determine under its own law who are its nationals', and that such determinations shall be accepted by other States as far as they are consistent with treaty obligations, customary international law and 'principles of law generally recognized with regard to nationality'. This formulation is almost identical to the lead provision of the 1930 Hague Convention. There is simply no credible argument that *Nottebohm* and 'genuine link' have risen to the level of customary international law or of a general principle of law relating to nationality.[43] On the contrary, *Nottebohm*'s star, to the extent it had ever risen, has fallen rather far.

6. 'Genuine link' in the face of globalisation

From a functional perspective, if *Nottebohm*'s 'genuine link' analysis made little sense in the context of the mid-twentieth century, it makes even less sense today. The *Nottebohm* period reflected perhaps the height of national loyalties and identities, that 'romantic period' of nationality set as it was in the inter-state military conflict of the Second World War. Nottebohm's cosmopolitan identity was relatively uncommon for the period, restricted to wealthy elites who could afford the expense of frequent inter-continental travel.

Of course, there were business persons of Nottebohm's profile who actively maintained their homeland identity while having permanently resettled in far-flung lands. It is not a coincidence that these were the stock characters in international claims cases implicating nationality disputes. More typically, migrants transferred their citizenship along with their centre of social gravity, so that their new nationality was their 'dominant' one. Or they returned to their homeland and the former nationality reverted, as was provided for under the Bancroft treaties. Dual nationality was suppressed, although in many cases the interaction of non-harmonised nationality laws left individuals with the nationality of both the country of origin and that of resettlement. That explained why tribunals undertook the dominant nationality inquiry in some cases, even though the individual in many cases would have had 'genuine links' to both his country of origin and resettlement.

Today the 'genuine link' inquiry looks absurd in the face of proliferating multiple nationalities and the dramatically enhanced capacity for individuals to maintain social connections with multiple countries. Multiple nationality is now a fact of globalisation. The number of states accepting the status has dramatically increased. *Nottebohm* seems perhaps no more dated in this respect than in its conception of naturalisation, which the Court framed as involving the 'breaking of a bond of allegiance'.[44] Leaving aside the question of whether it is appropriate to speak of 'allegiance' in the context of the state, it is only in a distinct minority of cases today that naturalisation in a state requires termination of one's citizenship of origin.

[43] See, e.g., Weis, supra, at 201 (Nottebohm approach 'can hardly […] be regarded as forming part of customary international law')
[44] Nottebohm, at 24.

This has normalised the attribution of nationality on the basis of a range of social connection. In many cases, the connections and identities will be substantial, as in the case of migrants, who will typically have deep connections to both their country of origin and their country of resettlement. But in other cases, acceptance of dual citizenship enables the attribution of nationality on the basis of thin ties.

For example, many individuals claim the nationality of a grandparent or an even more distant forbearer. Nationality based on ancestry may be meaningful in a sociological sense, or it may not be. The range will be on the one extreme those who deeply identify with the nationality of their ancestors, even if it has been centuries since the territorial link was broken. Some Sephardic Jews still closely identify with their Spanish and Portuguese roots more than half a millennium after their expulsion from the Iberian Peninsula.[45] This will also often be the case with identification with the states from which a parent or grandparent emigrated. But it will also often be the case that the child or grandchild of an immigrant – never mind a more distant relation – identifies only weakly with the state of origin. An increasing number of countries are relaxing the *jus sanguinis* basis for allocating birth citizenship. None of them subjects individuals who acquire citizenship on that basis to any sort of integration test and few retain any sort of residency requirement for *jus sanguinis* citizens born abroad. They are not required to own property in their state of ancestral citizenship, maintain any other kind of vested interest, or even to have visited. States thus do not sort for sociological connections – call it 'social fact of attachment' – among citizens by descent.

The same holds true in some cases of those born with *jus soli* citizenship. In states such as the United States which extend citizenship to those born on national territory on a near-absolute basis, there will be many cases in which a person does not sustain a connection to the state of birth into adulthood.[46] That is true of the birth tourist, of course, but it is also true of the child born to the graduate student or business person on temporary assignment. As a result, a growing number of individuals will have formal citizenship in a state with few and often no other ties to that state.[47]

The tenuous connection many individuals have with a state of birth citizenship brings *Nottebohm* into question in rather obvious ways. The critique is not original, to say the least. As noted by the ILC commentary on diplomatic protection, the genuine link theory would by its terms 'exclude literally millions of persons from the benefit of diplomatic protection. In today's world of economic globalisation and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by birth, descent

[45] H.U. Jessurun d'Oliveira, Iberian Nationality Legislation and Sephardic Jews, 11 European Constitutional Law Review 13 (2015.
[46] See Spiro, Citizenship Overreach, supra.
[47] See e.g., Sloane at 18 ('The unquestioned validity of both jus soli and jus sanguinis as bases for the ascription of nationality casts doubt on the genuine link theory, at least in the robust form expounded by the ICJ').

or operation of law of States with which they have the most tenuous connection'.[48] To the extent that a 'genuine link' test is applied only to naturalised citizens, moreover, it tends to discriminate against them. Only the nationality of the naturalised citizen is subject to scrutiny, where the birth citizen gets a pass, even if unjustified.[49]

This can be true even of those who naturalise in states imposing a residency requirement. Residency requirements do not typically imply continuous presence. In the wake of immensely intensified communications networks and the reduced cost of travel, migrants can maintain homeland ties on a near-continuous, virtual basis. The homeland connection is compounded where there are co-ethnic migrant concentrations. One can live a fully functional professional and social existence in most world capitals in one's own language among others from one's country of origin. Of course, many states apply other requirements to test for cultural integration. But short of minutely inspecting a person's beliefs, friends and daily interactions, these conditions are incapable of measuring a naturalisation applicant's actual connection to the existing community.

The *Nottebohm* majority spoke of Nottebohm's relationship to Liechtenstein as one of not 'becoming wedded to its traditions, its interests, [or] its way of life'. This was an almost comically nostalgic conception of nationality, if not at the time it was decided then certainly from a contemporary perspective. States no longer have unitary traditions, interests or ways of living to which citizens hew. To apply a 'genuine link' test of this sort to all individuals would result in a great many losing their citizenship; likewise with respect to the ICJ's calling Nottebohm out for not 'assuming the obligations – other than fiscal obligations – and exercising the rights pertaining to' nationality. Most of the millions of individuals who live outside their countries of citizenship assume no obligations relating to their nationality – not even fiscal ones. (The only country in the world which taxes non-resident citizens is the United States.) Even those who live within a country of nationality are unlikely to assume many citizenship-delimited obligations, most of which, like taxes, are imposed on the basis of residency, not citizenship.

Nor are there many rights which are exercised on a citizenship-delimited basis. Those which are – voting in national elections representing the prime example – are abjured by many citizens. No one would suggest making the recognition of citizenship contingent on the exercise of rights today.

These observations apply today, more or less, to almost every state in a globalised world. Almost every state these days will have some number of citizens who would fail the 'genuine connection' test as conceived by the *Nottebohm* judges. To the extent that states do not police the boundaries of their own citizenships, they are hardly in a position to police the boundaries set by other states, for international purposes or otherwise.

[48] ILC Draft Articles, supra, at 30.
[49] Weis, supra, at 181. See also European Convention on Nationality article 5(2) ('Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently').

Moreover, 'genuine link' seems infinitely elastic in a world in which establishing connections of various descriptions has been dramatically facilitated by the compression of space which has come with globalisation. The threshold for demonstrating links with a state, its people and its economy are categorically lower than they have been ever been in the past. This adds additional complexity to the task of any state or other entity seeking to second-guess the attribution of nationality by another state. As Judge Read noted in his *Nottebohm* dissent, '[n]ationality, and the relation between a citizen and the State to which he owes allegiance, are of such a character that they demand certainty […] There must be objective tests, readily established, for the existence and recognition of the status'. Any move to second guess the nationality decisions of other countries would inevitably implicate a subjective element, undermining the reliance value that millions of individuals place in their nationality to facilitate their movement through the globalised world. There are other mechanisms available to states to police any perceived abuses in the attribution of nationality, for example, by modulating visa requirements for all nationals of a particular state.

7. *Nottebohm* today: a dead letter

Nottebohm may be among the ICJ's most famous opinions, but it is also surely among its least respected. 'Among legal scholars who take *Nottebohm* seriously as jurisprudence', writes Audrey Macklin, 'there is strong consensus that it was wrong then, and may be even more wrong now'. She concludes that it is time to 'retire' *Nottebohm*.[50] Dimitry Kochenov concludes that the decision is an 'entirely arbitrary and potentially harmful rule of international law',[51] the genuine link model 'incoherent and logically inexplicable'.[52] Robert Sloane finds that the 'sociopolitical, romanticist vision of nationality articulated by the *Nottebohm* majority has […] become increasingly anachronistic and misplaced today'.[53] Rayner Thwaites similarly characterises *Nottebohm* as a 'dead letter'. Thwaites dismisses *Nottebohm* as a '"one-off" […] confined to the facts of the case'.[54] Annemarieke Vermeer-Künzli concludes that the *Nottebohm* case 'has been criticized rather strongly, and rightly so'.[55] And so on.[56]

[50] Audrey Macklin, Is It Time to Retire *Nottebohm*?, 111 AJIL Unbound 492 (2018).
[51] Dimitry Kochenov, Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters, in Globalisation, Migration, and the Future of Europe (Leila Simona Talani ed., 2012).
[52] Dimitry Kochenov, Citizenship Without Respect: The EU's Troubled Equality Ideal, Jean Monnet Paper No. 8/10 (NYU Law School, 2010).
[53] Sloane, supra, at 5.
[54] Thwaites, supra, at 661.
[55] Annemarieke Vermeer-Künzli, Nationality and Diplomatic Protection: A Reappraisal, in The Changing Role of Nationality in International Law 77 (Alexandra Annoni & Serena Forlati eds, 2013).
[56] See also Oliver Dorr, Nottebohm, Max Planck Encyclopedia of Public International Law (Nottebohm 'was not successful […] in setting up the requirement of a genuine connection for the exercise of diplomatic protection in cases of nationality conferred through naturalization. Its reasoning in this respect was unconvincing, and the consequences of the genuine link rule were seen to be disadvantageous for the position of individuals in international law'); Matjaz Tratnik, Limitations of National Autonomy in Matters of Nationality in International and EU Law, in From an Individual to the

Nottebohm remains part of the discourse in two ways, neither of which live up to its mostly underserved reputation as constraining the conferment of nationality.

First is a creative application through which some advocates press states to extend citizenship to individuals with genuine links to a state, a kind of 'reverse Nottebohm'.[57] In other words, some are arguing that a state must grant citizenship to individuals with genuine links to it. This is to challenge states when they deny citizenship, not grant it. There are interesting developments consistent with this argument, under which states might have a qualified obligation to extend citizenship to those with a genuine link.

But this use of *Nottebohm* is not much more than a branding exercise. The level of genuine link required to activate the norm would obviously be higher than the level of genuine link needed to satisfy the *Nottebohm* test in the context of recognising a grant of citizenship. Indeed, nothing less than habitual residence would be required to trigger an obligation to grant citizenship. In other words, it has nothing really to do with its original doctrinal meaning, nor does it validate that original doctrinal meaning in any way.

Similarly, some political theorists have latched onto the 'genuine link' formulation in an effort to shore up the state as a location for the redistribution of resources and the protection of rights. These liberal nationalists – Ayelet Shachar and Rainer Bauböck most prominently among them – have centred 'genuine links' as part of their programme to limit the citizenry to those who have a common interest in collective governance and as a counterpoint to the rise of what Shachar calls call 'nominal heirs', those who are allocated citizenship in countries in which they have never lived.[58]

However, this turn, while powerfully argued, veers heavily to a nostalgic and romanticised view of the relationship between the individual and the state. 'Hollow citizenship' is everywhere and irreversible. 'Genuine links' as deployed by the theorists does not translate into a practical standard for the allocation of nationality. As Bauböck suggests, 'genuine links' can serve as 'a critical standard for assessing the strength of ties between and individual and a particular polity'. But he concedes that 'this strength cannot be measured in a uniform way either as a subjective sense of belonging or though objective indicators such as duration of residence or family ties in the territory'.[59] In other words, it is variable in a way that cannot supply a doctrinal metric. Perhaps the most that can be said of 'genuine link' is that it supplies a heuristic for thinking about idealised conceptions of the state,[60] and perhaps there is a reason

European Integration Discussion on the Future of Europe 507 (S. Kraljic & J. Klojcnik eds., 2018) (Nottebohm 'is largely overestimated' and 'belongs in the past').

[57] See Spiro, supra, at 723; Macklin, supra, at 496.

[58] See Ayelet Shachar, The Birthright Lottery 166–71 (2009).

[59] Rainer Bauböck Democratic Inclusion: A Pluralist Theory of Citizenship, in Democratic Inclusion: Rainer Bauböck in Dialogue 3, 44 (David Owen ed., 2018).

[60] See Sloane, supra, at 26 ('genuine link became a kind of mantra').

that *Nottebohm* is popular with the political theorists at the same time that it is being abandoned by legal scholars.

8. Conclusion

Nottebohm is a remarkable decision in one respect only: there may be no other judgment of an international tribunal which has had so much purchase on the imagination at the same time as it has so little traction on the ground. Better than any other judicial pronouncement it captures the liberal nationalist ideal of the relationship between the individual and the state. Perhaps it is something to aspire to, though the prevailing trends point in other directions. Whether *Nottebohm* reflects admirable aspirations of social organisation, it does not supply a workable frame for addressing nationality and its place in the relations among states.

EU Competence and the Attribution of Nationality in Member States

Daniel Sarmiento

EU Competence and the Attribution of Nationality in Member States

Daniel Sarmiento[1]

ABSTRACT: Foreign investor programmes have flourished in several Member States, raising concerns as to their conformity with EU law. The main criticism is based on the absence of genuine links between the investor and country at the time of acquiring the nationality of a Member State, which gives immediate access to EU citizenship. However, the EU's competence to introduce measures in this field, in order to introduce a more uniform approach by Member States, is problematic. The EU is based on a principle of conferred powers since its creation, but no power has been granted to the EU in the field of nationality. Although the Court of Justice has rendered decisions that indirectly condition nationality law of the Member States, these rulings are mostly based in situations that entailed the restriction or loss of the status of nationality, not its acquisition.

The paper will review the Court of Justice's case-law in this field and it will analyze it in the broader context of international law, which has struggled to balance the notion of "meaningful nationality" with the evolution of a globalized community. It will be argued that international law does not provide clear criteria which EU law can use in order to interpret the Treaties accordingly. Furthermore, international law cannot act as a source to enlarge the EU's competence in a field in which Member States retain full powers.

Finally, the paper will argue that the EU, despite the shortfalls of its competences in the field of nationality, could find a way forward to enact measures to introduce more uniform criteria among the Member States. However, this course is limited and subject to strict conditions laid down in Article 352 of the Treaty on the Functioning of the European Union and the case-law of the Court of Justice interpreting this provision. The EU must argue that its intervention is necessary and coherent with the goals that the Treaties have conferred on it. Furthermore, measures under Article 352 TFEU require unanimous voting in the Council and the approval of the European Parliament, two institutional hurdles that will require the acquiescence of the Member States that currently have enacted foreign investor programmes.

KEYWORDS: Nationality, EU competence, Micheletti, Rottmann, EU citizenship, Immigration

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1. Introduction

The division of competence between the European Union ("EU") and its Member States is a central constitutional issue of EU law. The EU is subject to the principle of conferral, according to which, and in line with traditional standards of international law, all powers of an international organization are the result of an explicit and unequivocal transfer enacted by its Member States and enshrined in the Treaties. As a rule, the EU does not hold implied powers, but only those conferred by its Member States. The challenges to clearly determine the scope of this principle are not only intellectual, but also practical. The EU is a major institutional actor in charge of large areas of policy facing complex challenges. At times, the EU needs to act taking measures with a loose or only indirect connection with its competence. As a result, the principle of conferral has been subject to a pragmatic interpretation by the Court of Justice, in order to facilitate the enforcement of EU policy, whilst balancing such needs with the principle of conferral.

Immigration policy is a relatively novel area of EU competence, having gradually evolved since its official recognition in the Treaties as a result of the Maastricht Treaty in 1992, and its inclusion among the community policies in the Amsterdam Treaty in 1997. Furthermore, immigration became an EU policy through the pre-Lisbon pillar structure and in a piecemeal, fragmented way that empowered the EU to deploy its policy in specific areas only, such as asylum or visas for third country nationals. The EU has not been granted a fully-fledged immigration policy to tackle the entire range of issues traditionally linked to this field.

However, the needs to embrace ambitious goals and subsequent migration challenges have moved the EU forward, together with a far-reaching case-law of the Court of Justice in the field of EU citizenship. The refugee crisis that ensued in 2016, the migratory pressure in southern Europe and the assumption of the migration discourse as part of the European far-right political discourse, have forced the EU to face the issue with a broader and holistic approach, in contrast with the traditional piecemeal approach.[2] In parallel, the development of rights and duties of EU citizens gradually evolved in the case-law of the Court of Justice in order to benefit their family members, including nationals of third countries.[3] At the present time, it can be argued that immigration policy is at the center of the EU's concerns, and the competence constraints imposed by the Treaties will be exploited in an imaginative way in order to allow the EU to develop an ambitious immigration agenda.

[2] Den Heijer, M., Rijpma, J. and Spijkerboer, T., "Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System" (2016) 53 *Common Market Law Review*, Issue 3, pp. 608 et seq.

[3] See, *inter alia*, a line of rulings of the Court of Justice that transformed the scope of EU citizenship rules by extending part of its protection to third country nationals, in Case C-60/00 Carpenter, EU:C:2002:434, paragraph 38; Case C-459/99 MRAX, EU:C:2002:461, paragraph 53; Case C-157/03 Commission v Spain, EU:C:2005:225, paragraph 26; Case C-503/03 Commission v Spain EU:C:2006:74, paragraph 41; Case C-441/02 Commission v Germany EU:C:2006:253, paragraph 109; and Case C-291/05 Eind EU:C:2007:771, paragraph 44.

Despite these developments, the principle of conferral is still a major limit to the EU's scope of maneuver in handling its immigration policy. No matter how far-reaching the goals of the EU's immigration strategy are intended to be, the Treaties keep playing a key role in defining the EU's margin of action in this field. This is the case of acquisition and loss of nationality, a traditional area of competence of Member States in which the EU has interfered in highly singular ways so far. As a result of a long-standing principle of international law according to which it is up to sovereign States to decide on their nationality policies, the EU has been cautious not to overstep into this sensitive domain. The fact that the Treaties only refer to this matter in order to reinstate Member State autonomy, reinforces the normative stance of the States in support of their autonomy in the field of nationality law.

This paper will analyze the terms under which the EU has indirectly and cautiously conditioned Member State nationality laws and the way the Court of Justice has developed such limited review. The case-law will be depicted in detail, in order to explain the complex balance used by the Court of Justice in order to authorize indirect EU measures having a collateral impact on domestic nationality policies. The case-law will be put into perspective by exploring the current concerns with the so-called "foreign investor programmes" of some Member States, and the willingness of some voices within the Institutions to impose requirements on these programmes by way of EU law duties. It will be argued that, in the current state of integration, the EU lacks the powers to interfere in Member State's nationality policy through the imposition of requirements for the acquisition of nationality, unless objective difficulties arise and are properly argued by the EU in order to take measures by way of Article 352 TFEU.

2. The principle of conferral and the distribution of powers between the EU and its Member States

The principle of conferral of powers is currently enshrined in the Treaties, but for many years it acted as an implicit but unanimously recognized limit on the powers of the European Communities.[4] In 1992, the Court of Justice ruled that the principle must be observed also with respect to international action of the EU.[5] In the late eighties, a consensus emerged as to the need to codify the principle, as it actually occurred in 1992 when the Maastricht Treaty introduced a provision defining the principle, a text that is currently enshrined in Article 5(1) TEU, according to which "the limits of Union competences are governed by the principle of conferral". Paragraph two of the same Article adds that "under [the principle of conferral], the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein", and, on the other, that "competences not conferred on the Union in the Treaties remain with the Member States".[6]

[4] Rodriguez Iglesias, G.C., "Reflections on the General Principles of Community Law", McKenzie Stuart Lectures, 1997/1998, pgs. 13 and 14.
[5] Opinion 2/94, EU:C:1996:140 (Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms), paragraph 24.
[6] See, inter alia, Lenaerts, K., *Le juge et la constitution aux États-Unis d'Amérique et dans l'ordre juridique européen,* Bruylant, Brussels, 1988, pgs. 346 et seq.; Barents, R., "The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation", Common Market Law

The principle of conferral is subject to limitations, but always in restrictive terms and ensuring a close involvement of the Member States. Good proof of this is Article 352 TFEU, which empowers the EU to enact measures that "should prove necessary", but for which the Treaties have not provided the necessary powers. This provision allows the EU to act beyond the principle of conferral, but it must be noted that such action must take place "within the framework of the policies defined in the Treaties, and it must serve "to attain one of the objectives set out in the Treaties". Furthermore, action on the grounds of Article 352 TFEU requires a unanimous vote in the Council, in which every Member State will thus have a right of veto. Thus, any action based on this provision requires a broad agreement among all the Member States, facilitating EU action without the need to amend the Treaties, but in a way that is respectful with the principle of conferral. As the Court of Justice stated in the landmark Opinion 2/94, on the accession of the European Communities to the European Convention of Human Rights and Fundamental Freedoms,

> "[Article 352 TFEU], being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article [352] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose".[7]

Other legal bases in the Treaties play similar roles to Article 352 TFEU, but in more confined terms. For example, Article 114 TFEU empowers the EU to enact measures for the approximation of laws, with the goal of ensuring "the establishment and functioning of the internal market". This legal base does not require a unanimous vote in the Council, but it is confined to measures with a direct link with the functioning of the internal market, and it provides Member State with additional powers to introduce more protective measures on specific grounds, as is the case of health, safety, environmental protection and consumer protection.[8] The Court of Justice has reviewed the EU's use of this legal base and it has used a pragmatic approach, empowering the EU in areas with loose links with the internal market, but with relevant indirect consequences in its functioning (financial stability and securities markets; tobacco commercialization).[9] In fields with no direct link with an economic activity

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Review, (1993) pgs. 85-91, and Bradley, K., "The European Court and the Legal Basis of Community Legislation", European Law Review (1988), pgs. 379-385.

[7] Opinion 2/94, paragraph 30.

[8] See judgments in Germany v Parliament and Council, C-376/98, EU:C:2000:544, paragraphs 84 and 95; British American Tobacco (Investments) and Imperial Tobacco, C-491/01, EU:C:2002:741, paragraphs 59 and 60; Arnold André, C-434/02, EU:C:2004:800, paragraph 30; Swedish Match, C-210/03, EU:C:2004:802, paragraph 29; Germany v Parliament and Council, C-380/03, EU:C:2006:772, paragraph 37; and Vodafone and Others, C-58/08, EU:C:2010:321, paragraph 32

[9] *Ibidem*.

in the internal market, Article 114 TFEU is not a viable option to surmount the limits of the principle of conferral.[10]

Finally, the Court of Justice has made a limited use of the principle of implied powers, particularly in areas pertaining to the internal functioning of the EU. In Spain/Council, the Court of Justice allowed the Council to enact non-legislative measures through implementing acts different to the ones enshrined in Article 291 TFEU.[11] In order to justify this power, the Court of Justice deduced from the wording of the Treaties that in cases in which no implementing measures can be taken by Member States, it is for the EU to enact them through the means it deems necessary within the Treaties, but not only through Article 291 TFEU.[12] Therefore, the Treaties, as interpreted by the Court of Justices, provide an implicit power to EU Institutions to make use of the implementing measures necessary to properly enforce EU law. This is an implied power confined to implementation tasks, and it therefore cannot entail the creation or definition of new lines of EU policy action.

Overall, the principle of conferral is the EU's main source *and* limit of policy action. It can be interpreted in pragmatic ways in order to fulfill the EU's goals in areas of policy in which a competence has already been conferred. However, when the principle is put under strain, the Treaties and the case-law introduce significant provisos to preclude any unjustified limitations on the Member State's prerogatives. Limitations on the principle of conferral are interpreted strictly, and only when the Treaty explicitly allows the EU to act under broad legal bases, as is the case of Article 114 TFEU, it grants the EU Institutions a wider margin of action. That is not the case of immigration policy, which, as it will now be explained, is subject to limited legal bases in specific areas of policy action, and with considerable supervisory and veto powers of Member States.

3. EU competence in the field of citizenship and migration

The exercise of EU competence relies on the existence of a legal base in the Treaties, in which the powers of the legislative and executive EU Institutions are defined. Each area of policy is subject to a type of competence (exclusive, shared or coordination)[13] and to the conditions laid in the legal base of each area of policy.[14] For example, environmental policy is a shared competence, and its legal bases are enshrined in Articles 191 to 193 TFUE, in which the Treaty provides the scope of the competence, the type of legislative procedure available, the voting rule applicable in the Council and any other relevant conditions. The same rationale applies in the field of citizenship and immigration, in terms which considerably reinforce the role and influence of Member States *vis-à-vis* EU Institutions.

[10] Lenaerts, K. and Van Nuffel, P., European Union Law, Sweet & Maxwell, 2011, pgs. 111-114.
[11] Spain/Council, C-521/15, EU:C:2017:982.
[12] Spain/Council, *ibidem*, paragraphs 45-53.
[13] See Articles 2-8 TFEU. For a broad description of the typology of competences and its effects, see Schütze, R., "Supremacy without preemption? The very slowly emergent doctrine of Community preemption" (2006) Common Market Law Review, pgs. 1024-1033.
[14] See Germany v Parliament and Council, C-376/98, EU:C:2000:544, paragraphs 79-81.

EU Immigration policy is primarily focused on the access of third country nationals to the territory of the Union. However, immigration issues also appear in the context of the EU's citizenship policy, inasmuch the acquisition of citizenship can be the result of national immigration policies. Also, EU citizens can enter into partnerships or marriages with third-country nationals who will acquire derived rights from EU citizens. Therefore, in order to better portray the full scope of EU immigration policy, it is important to focus on both areas involved: citizenship and immigration.

3.1. EU competence in the field of citizenship and migration

EU citizenship is the result of being a national of a Member State. As Article 20 TFEU states, "every person holding the nationality of a Member State shall be a citizen of the Union". EU citizenship does not supersede the nationality of a Member State, it only acts as an *additional* legal and political individual statute that complements the rights and duties derived from Member State nationality. As the Court of Justice has stated repeatedly, EU citizenship is "intended to be the fundamental status of nationals of the Member States",[15] but this is a gradual and evolutionary process in which the EU evolves cautiously, respecting the fact that, at the current time, it is the national link with a Member State that carries the main weight in the individuals' status.[16]

Good proof of the embryonic state in which EU citizenship still lies is the fragmented content of EU citizenship rights. Article 20 TFEU enumerates the rights of the citizens of the Union, which include, *inter alia*, the right to move and reside freely within the territory of the Member States,[17] the right to vote and to stand as candidates in European and municipal elections,[18] and the right to enjoy diplomatic and consular protection, as well as the right to petition.[19] Article 25 TFEU, paragraph 2, recalls that the Council, acting unanimously, may strengthen "or add" further rights to the list in Article 20 TFEU. This power is also conditioned to the approval by the Member States "in accordance with their respective constitutional requirements". To date, no such addition has been enacted and the rights attached to the status of EU citizenship are the ones enumerated in Article 20(2) TFEU. However, the status comprises not only the

[15] Grzelczyk, C-184/99, EU:C:2001:458, paragraph 31. See Novak, M., "Gleichbehandlung bei sozialen Vergünstigungen für Unionsbürger", European Law Reporter 2001; Lhernould, J.-P., "L'accès aux prestations sociales des citoyens de l'Union européenne", (2001) Droit social; David, F., "La citoyenneté de l'Union, statut fondamental des ressortissants des Etats members", Revue trimestrielle de droit européen 2003 p.561, and Iliopoulou, A. and Toner, H., Case Note, (2002) Common Market Law Review p. 609.
[16] See Kochenov, D., "*Ius Tractum* of Many Faces" (2009) 15 Columbia Journal of European Law 169-237..
[17] Article 20(2)(a) TFEU.
[18] Article 20(2)(b) TFEU.
[19] Article 20(2)(c) and (d) TFEU.

rights enshrined in Article 20 TFUE, but also other Treaty rights, as well as rights developed by way of instruments of secondary law.[20]

The legal bases governing EU citizenship are defined in Articles 21 to 25 TFEU. The rights enumerated in Article 20 TFEU have direct effect, but the EU has powers to legislate in the field in order to better define the terms under which EU citizens can exercise their rights in all the Member States. Therefore, Article 21 TFEU entitles the Council and the European Parliament to enact legislative measures "with a view to facilitating the exercise of the rights" in Article 20 TFEU. For the purpose to ensure the right to vote in European and municipal elections, Article 22 establishes a legal base empowering the Council to enact "detailed arrangements", but acting unanimously and providing, if necessary, derogations "warranted by problems specific to a Member State".[21] In the field of diplomatic and consular protection, the Council may adopt directives, but only to establish "the coordination and cooperation measures necessary to facilitate such protection".[22]

Overall, EU citizenship provides an array of rights with direct effect,[23] but the Union's power to enact legislation establishing the terms and conditions under which such rights must be exercised requires high levels of Member State participation. This close monitoring role of the Member States can take place either by way of unanimous voting in the Council, a domestic ratification process through national "constitutional requirements", or a limited scope of the measures themselves. It is important to highlight this feature of EU citizenship policy, because despite the fact that citizenship entitles the EU to review Member State action that may undermine the status of EU citizens, Member States retain a significant margin of action in order to ensure the EU does not overstep the powers it has been granted under Articles 21 to 25 TFEU. The system works in a balanced way that ensures the effectiveness of EU citizenship and the protection of Member State autonomy.

3.2. Competence and Immigration Policy

EU immigration policy is structured in three areas: border checks, asylum and immigration, as enshrined in Articles 77 to 80 TFEU. These legal bases in the three mentioned areas are the

[20] Sharpston, E., "Citizenship and Fundamental Rights – Pandora's Box or a Natural Step towards Maturity?", in Cardonnel, P, Rosas, A. and Wahl, N. (eds), Constitutionalising the EU Judicial System, Hart Publishing, 2012, and Iglesias Sánchez, S., "Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?" (2014) 20 European Law Journal 464.
[21] Article 22(1) and (2) TFEU.
[22] Article 23, second paragraph TFEU.
[23] Baumbast and R, C-413/99, EU:C:2002:493, paragraph 84. See comments by Menéndez, A.J., "European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?", The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, Hart Publishers, 2010; Azoulai, L., Revue des affaires européennes 2001-02; Timmermans, C., "Martínez Sala and Baumbast revisited", The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty 2010, Hart Publishers, 2010, and Dougan, M. and Spaventa, E., "Educating Rudy and the (non-)English Patient: A double-bill on residency rights under Article 18 EC", European Law Review 2003 p. 699.

result of a long process of evolution of EU competence that began in the 1990's, followed by a gradual integration of policy, first through inter-governmental decision-making and finally, as a result of the Lisbon Treaty, full inclusion in the common family of EU policies subject to the traditional community method.[24] This gradual and piecemeal approach towards the inclusion of immigration policy among the EU's legal bases has resulted in three areas of policy in which Member States still have the ability to intervene decisively in most of the key decisions in the field. The approach used throughout the process confirms what Article 5(2) TEU states in general terms: competences not conferred upon the Union in the Treaties remain with the Member States. As it will be seen, that is the case of acquisition and revocation of nationality of the Member States.

In the area of border checks, as defined in Article 77 TFEU, the EU can develop a policy to ensure controls on persons crossing internal and external borders, as well as to introduce an integrated management system for external borders. To this purpose, Article 77(2) TFEU introduces a detailed list of measures that can be enacted by the European Parliament and Council by qualified majority, but it also sets a clear limit by stating that these powers "shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law".

Article 78 TFEU enshrines a legal base to develop a common policy on asylum, subsidiary protection and temporary protection. To this purpose, the Treaty provides what is probably the most ambitious array of legislative powers in the field of immigration. These powers include a mandate to adopt measures comprising a uniform status of asylum for nationals of third countries, common procedures, standards and partnerships with third countries. Article 78 TFEU also includes a mechanism to impose solidarity measures among the Member States in case of being confronted by an emergency situation characterized by a sudden inflow of nationals from third countries.[25]

Finally, specific powers are granted to the EU in order to develop a common immigration policy. However, the legal base in Article 79 TFEU is limited to four areas: conditions of entry and residence, the definition of the rights of third-country nationals residing legally in a Member State, illegal immigration and combating trafficking in persons. Immigration policy is thus limited to a tightly knit array of decisions in Article 79 TFEU, which paragraph 5 limits furthermore by setting explicit limits to the EU's action: irrespective of the four areas in which the EU has powers to act, these provisions "shall not affect the right of Member States to

[24] On the historical evolution of EU immigration policy, see, inter alia, Peers, S., EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law, Fourth Edition, Oxford University Press, 2016, pgs. 9 et seq.

[25] On this provision, see the judgment of the Court of Justice in the case of Slovak Republic and Hungary/Council, Joined Cases C-643/15 and C-647/15, EU:C:2017:631. See De Witte, B. and Tsourdi, Evangelia, L., "Confrontation on relocation - The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: Slovak Republic and Hungary v. Council", (2018) Common Market Law Review, Vol. 55 nº 5, and Maupin, E., "La CJUE valide le mécanisme provisoire de relocalisation des migrants", L'actualité juridique; Droit administratif 2017.

determine volumes of admission of third-country nationals coming from third countries to their territory to seek work, whether employed or self-employed".

3.3. Citizenship, Immigration and the Limits to the Union's Competence

Citizenship and immigration are currently two intertwined fields of policy shaped incompletely by the Treaties. This outcome is the result of the evolutionary nature of European integration, which has gradually developed an autonomous body of law to effectively transform EU citizenship into the fundamental status of nationals of the Member States.[26] However, as in other areas of European policy, the goals underlying citizenship and immigration are objectives, not means. Member States agreed to increase the powers of the EU in the sensitive field of citizenship upon the condition that such transfer would be gradual and on a step-by-step basis. The creation of a European immigration policy has proved equally challenging for Member States, and the assumption of powers by the EU in this field is limited by a piecemeal approach in which the EU and Member States share competence, but with the center of gravity still tilting in favor of the latter.

The evolutionary nature of citizenship and immigration policy is also the result of the shared nature of the competences involved. In typical EU fashion, policies subject to shared competences evolve gradually, whilst the trial and error approach paves the way to future transfers of competence to the EU, or additional initiatives on the grounds of Article 352 TFEU. At times, the exercise of EU competence can prove excessively contingent and, as a result, the Commission or the Member States may decide to abandon the use of a legal base. That has been the case of Article 78(3) TFEU, a legal base empowering the Council to impose solidarity measures in case of sudden inflows of nationals of third countries, used for the first time in 2015 as a result of the sudden and massive arrival of Syrian nationals fleeing from the civil war. The quota system enacted in Decision 2015/1601 was openly rejected by several Member States, it was taken (unsuccessfully) to the Court of Justice and eventually was left unenforced and finally abandoned due to the tensions created between Member States.[27]

Furthermore, the logic of shared competence empowers the EU to make use of the legal bases it has been granted by the Treaties, but Member States retain competence in two scenarios: first, as long as the EU does not make use of a shared competence; and second, in all the areas

[26] On EU citizenship at its early stages, see O'Leary, S., The Evolving Concept of Community Citizenship, The Hague/London/Boston, Kluwer Law International, 1996, and Closa, C., "The Concept of Citizenship in the Treaty on European Union", (1992) Common Market Law Review. On the current developments of EU citizenship, see Kochenov, D. (ed.), EU Citizenship and Federalism. The Role of Rights, Cambridge University Press, 2017.

[27] See the judgment in Slovak Republic and Hungary/Council, Joined Cases C-643/15 and C-647/15, EU:C:2017:631, and Niemann, A. and Zaun, N., "Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives", Volume 56, January 2018, and Slominski, P. and Trauner, F., "How do Member States Return Unwanted Migrants? The Strategic (non-)use of 'Europe' during the Migration Crisis", Volume 56, January 2018.

of policy which are not a part of a shared competence (unless assumed by the EU by way of Article 352 TFEU, but subject to the conditions thereunder). The prior enumeration of legal bases in the Treaties proves that Member States still retain relevant powers in the field of citizenship and immigration. The EU is still far from developing all the legal bases currently in the Treaties, thus leaving such areas of policy, for the time being, in the hands of Member States. But above all, the piecemeal structure of EU citizenship and immigration policy leaves Member States in full control of major fields of policy, including, as it will be explained in the following section, the attribution and loss of nationality.

4. EU competence and the attribution of nationality of a Member State

4.1. The Treaties

To date, the Treaties remain silent on the EU's competence to condition or determine the terms for the attribution and/or loss of nationality of a Member State. Article 20 TFEU clarifies that European citizenship does not entail the suppression or alteration of Member State nationality, as a reminder of the EU's limited powers in the field of nationality. However, these references are not attributions of competence to the EU, but a limit on the exercise of powers by the EU. Conferring European citizenship to the nationals of the Member States was originally conceived as a symbolic act of empowerment on the grounds of new EU rights, but it did not weaken, nor was it intended to weaken, the rights or status of Member State nationality.

In fact, the absence of any reference to EU competence in this sensitive field came hand in hand with a significant array of Declarations to reinforce the powers of Member States. To this end, the three Declarations concerned were the result of three individual situations of three Member States, but they all have in common the intention of the signatory parties of the Treaties to clarify that the attribution of nationality is a competence of the Member States. As it will be explained, these Declaration have been taken duly into account by the Court of Justice in its case-law.[28]

First, Declaration N° 2 on nationality of a Member State, annexed by the Member States to the final act of the TEU, was the result of the European Council of Edinburgh of December 1992, which intended to provide guarantees to Denmark in order to ratify the TEU. According to the Declaration,

> "The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member

[28] See the detailed analysis of the leading ruling in this field, Kaur, by Shah, P., "British Nationals under Community Law: The Kaur Case", European Journal of Migration and Law (2001) and Hall, S., "Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now", Legal Issues of Economic Integration (2001).

> State will be settled solely by reference to the national law of the Member State concerned".

Although this Declaration was not included in the Treaties following the entry into force of the Lisbon Treaty, it was duly recalled in Protocol 22 on the position of Denmark by way of an explicit reference in its recitals. The Declaration was also referred to by the Court of Justice in its judgment in Rottmann, delivered on 2010, once the Treaty of Lisbon had entered into force.[29]

Secondly, the United Kingdom ("UK") has traditionally demanded a strict interpretation of the term "nationals" in EU law, in order to adjust it to the array of status under UK law. As a result, the UK's Declaration on the definition of the term "nationals" is currently included among the unilateral Declarations by Member States in the following terms:

> "In respect of the Treaties and the Treaty establishing the European Atomic Energy Community, and in any of the acts deriving from those Treaties or continued in force by those Treaties, the United Kingdom reiterates the Declaration it made on 31 December 1982 on the definition of the term "nationals" with the exception that the reference to "British Dependent Territories Citizens" shall be read as meaning "British overseas territories citizens".

The Declaration of 31 December 1982 amended the Declaration of 1973 annexed to the Treaty of Accession, due to the entry into force of the British Nationality Act of 1981. The 1982 Declaration, in force today as a result of the explicit referral in the unilateral Declaration annexed to the Treaties, is worded as follows:

> "As to the United Kingdom of Great Britain and Northern Ireland the term 'nationals, 'nationals of Member States' or 'nationals of Member States and overseas countries and territories' wherever used in the Treaty establishing the European Economic Community([3]), the Treaty establishing the European Atomic Energy Community([4]) or the Treaty establishing the European Coal and Steel Community([5]) or in any of the Community acts deriving from those Treaties, are to be understood to refer to:
>
> (a) British citizens;
> (b) Persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control;
> (c) British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.

[29] In Rottmann (C-135/08, EU:C:2010:104, paragraphs 3 and 40), the Court of Justice explicitly referred to Declaration Nº 2 in the definition of the legal framework applicable to the case and in construing the reasoning of the ruling.

> The reference in Article 6 of the third Protocol([6]) to the Act of Accession of 22 January 1972, on the Channel Islands and the Isle of Man, to 'any citizen of the United Kingdom and Colonies' is to be understood as referring to "any British citizen."

The UK Declaration was taken into account by the Court of Justice in Kaur.[30] To date, the Declaration has driven the case-law to confirm that Member State law is the sole relevant criterion in establishing the conditions of attribution and loss of nationality, thus confirming the competence of Member States in this field.[31]

Third and finally, the Federal Republic of Germany included a Declaration annexed to the TEU, according to which the German Government stated that "[a]ll Germans as defined in the Basic Law for the Federal Republic of Germany shall be considered nationals". According to Article 116(1) of the Basic Law, not only persons holding Germany "nationality" but also those who held that status on 31 December 1937 are to be considered "Germans", in an indirect but clear reference to nationals of the Democratic Republic of Germany.[32]

Advocate General Tesauro, in his Opinion in the Micheletti case,[33] referred to the German and British Declarations to highlight the importance of domestic criteria in determining the conditions of acquisition of nationality. These criteria are taken into account by EU law, irrespective of other criteria which might be of interpretative relevance in international law. In the words of the Advocate General:

> "Finally, I would remind the Court of the Declarations made by the German Government and the United Kingdom, which are annexed to the Treaty and relate to the definition of persons who are to be regarded as their nationals for Community purposes, that is to say persons who are subject to Community law inasmuch as they are regarded by those two Governments as German and British nationals respectively. Apart from any legal effects which may arise from those declarations, they show that those two States have construed the expression 'national of a Member State', for the purposes of the relevant Community legislation, as being very wide in scope, certainly far wider than the circumstances of the present case; for instance, even individuals who do not have any personal or territorial link with the existing Republic of Germany and do not in any event meet the requirements of effective nationality laid down in the *Canevaro* judgment, still less those laid down in the *Nottebohm* judgment, are regarded as German nationals".[34]

[30] Kaur, C-192/99, EU:C:2001:106.
[31] Simmonds, "The British Nationality Act 1981 and the Definition of the Term 'National' for Community Purposes" (1984) Common Market Law Review.
[32] Bleckmann, A. "German nationality within the meaning of the EEC Treaty", (1978) Common Market Law Review, and Hailbronner, K., "Germany", in Bauböck, R., Ersboll, E., Groenendijk, K. and Waldrausch, H. (eds.), Acquisition and loss of nationality: Policies and Trends in 15 European Countries. Volume 2: Contry Analyses", Amsterdam University Press, 2006.
[33] Opinion of Advocate General Tesauro in the case of Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, C-369/90, EU:C:1992:47.
[34] Ibidem, point 7.

However, the competence of Member States in the field of nationality is not absolute. Other provisions of EU law indirectly deploy their effects in several spheres of Member State competence, including the field of nationality. That is the case of rules on European citizenship in case of deprivation of the rights included in Article 20 TFEU. In the same vein, Member States cannot introduce unilateral criteria for the recognition of the attribution of nationality by another Member State. These limits on the powers of Member States are the result of an evolving case-law of the Court of Justice, mostly focused on the effects of Member State action on *restrictive* limitations on the rights attached to the status of nationality. However, such limits have never reached the point of imposing on Member States specific duties when determining the conditions of acquisition of nationality. As it will be argued, the case-law of the Court of Justice is focused on the effectiveness and uniformity in the protection of EU rights, not on the distribution of tasks between the EU and the Member States.

4.2. The case-law of the Court of Justice

The approach of the case-law to the issue of nationality is a balanced one, in which the Court of Justice has struggled to attain an equilibrium between the effectiveness of EU law and Member State autonomy. It should be stressed from the outset that the case-law has not dealt with the issue as a matter of competence only. In contrast with other areas of the case-law, in which the Court exclusively addressed the division of tasks between the EU and its Member States, in the field of nationality the tension between the two competing legal orders has put its focus on two different variables: the effectiveness of EU rights, on the one hand, and the autonomy of Member States, on the other.

The result of the case-law is one in which Member States retain the core of their competence in the field of nationality, subject to provisos that intend to ensure the exercise of EU rights. As a result, the case-law promotes Member State autonomy if it is instrumental for the development of EU rights, but it restricts national action that acts as a limit on EU citizen's rights. Consequently, when it comes to the *attribution* of Member State nationality, the case-law has taken a deferent approach towards national autonomy, in contrast with decisions on loss of nationality, which are subject to the scrutiny of the Court of Justice.

a) Variable 1: Promoting the effectiveness of EU rights

The first principled decision of the Court of Justice is Micheletti,[35] a landmark case dealing with the refusal of the Spanish authorities to recognize the Italian nationality granted to an Argentinian national intending to establish himself in Spain as an Italian national. The Spanish authorities argued that the Italian nationality was merely an instrumental means to circumvent domestic immigration laws, and therefore only took into account the applicant's Argentinian nationality. According to the Spanish authorities, for a Member State to legitimately attribute

[35] Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, C-369/90, EU:C:1992:295.

nationality and have it recognized in other Member States, the applicant must have previously resided in the Member State.

The Court of Justice ruled on the case in light of Article 49 TFEU (then Article 52 TEEC) on freedom of establishment, ruling out Spain's arguments. According to the Court of Justice, the acquisition and loss of nationality is a competence of each Member State. If other Member States had the power to impose additional conditions for the recognition of the nationality in another Member State, the exercise of free movement rights would vary from one Member State to another. Therefore, a Member State cannot subject the recognition of the status of EU citizenship "to a condition such as the habitual residence of the person concerned in the territory of the first Member State".[36]

Micheletti is a landmark judgment on several counts. First, it indirectly introduces an autonomous concept of EU citizenship which would later be confirmed in Rottmann[37] and Ruiz Zambrano.[38] Although the judgment refers to the conditions for the acquisition of nationality in each Member State, it also underlines the importance of a common definition of "Community nationality", an embryonic conception of what would ultimately become EU citizenship. Second, it recognizes Member State autonomy in defining the terms of acquisition of nationality, but as a means of attribution of EU rights. Inasmuch Member State nationality is the precondition for the exercise of EU rights, such as freedom of movement and establishment, any additional restriction by another Member State entails a fragmentation of EU rights that refrains citizens from making use of them. And third, although the judgment refers to the autonomy of Member States "under international law", Micheletti confirms that any condition that might have been set in international law is subject to EU law, and not the other way around. If international law requires specific conditions for the attribution of nationality, such as "meaningful nationality", as is the case of habitual residence, EU law trumps such conditions and prevails with the aim of ensuring effective exercise of EU rights. The notion of autonomy of EU law deploys its effects both internally as well as internationally, but above all it imposes limits to national or international when they undermine the basic values enshrined in the Treaties.[39]

[36] Ibidem, paragraph 11.
[37] See footnote 29.
[38] Ruiz Zambrano, C-34/09, EU:C:2011:124.
[39] See, inter alia, Kadi y Al Barakaat International Foundation/Consejo y Comisión (C-402/05 P, EU:C:2008:461) and Opinion 2/13, EU:C:2014:2454 (EU Accession to the European Convention of Human Rights and Fundamental Freedoms).

This line of reasoning was further expanded in the cases of García Avello[40] and Chen,[41] in which the conditions of attribution of nationality were questioned in another Member State with the overall effect of restricting the ability of EU citizens to exercise rights. In García Avello the restriction entailed the impossibility of registering the name of a child in accordance with the rules of the Member State of nationality, in a case in which the child held dual nationality. The Court of Justice ruled that such restriction breached the freedom of movement of persons.[42] In Chen, a Member State questioned the means of acquisition of the nationality of another Member State (extraterritorial rules, as was the case of Irish law for the born in Northern Ireland), with the purpose of refusing derived residence rights to the parents of the child. The Court of Justice once again striked out the attempt to limit EU rights, recognizing the autonomy of each Member State to develop the terms and conditions of acquisition of nationality.[43]

However, the same logic applies to reverse situations, in which the national measures under scrutiny do not question the acquisition of nationality, but entail a *deprivation* of such. In Rottmann,[44] the Court of Justice faced a situation in which a Member State (Germany) revoked an attribution of nationality to a former Austrian national on the grounds of false statements provided in the application. As a result, Mr. Rottmann was not only deemed to become state-less, but also deprived of his EU citizenship. In a landmark judgment, the Court of Justice confirmed that EU law can review Member State decisions to revoke nationality, particularly in light of the principle of proportionality. In the case at hand, the Court of Justice took into account the fact that, under international law, statelessness is admitted in nationality was conferred on the grounds of false statements by the applicant.[45] Considering the circumstances

[40] Garcia Avello, C-148/02, EU:C:2003:539. See comments by Requejo Isidro, M., "Estrategias para la "comunitarización": descubriendo el potencial de la ciudadanía europea", Diario La ley 2003 nº 5903; De Groot, G.-R., "Towards European Conflict Rules in Matters of Personal Status", Maastricht Journal of European and Comparative Law 2004; Quiñones Escámez, A., "Ciudadanía europea, doble nacionalidad y cambio de los apellidos de los hijos: autonomía de la voluntad y conflicto positivo entre las nacionalidades de dos estados miembros", Revista Jurídica de Catalunya 2004, and Ackermann, T., (2007) Common Market Law Review.

[41] Zhu and Chen, C-200/02, EU:C:2004:639.

[42] García Avello, paragraph 28.

[43] Chen, paragraphs 37-41. See Kochenov, D. and Lindeboom, J., "Breaking Chinese Law - Making European One", in EU Law Stories, Cambridge University Press, 2017; Barnard, C., "Of Students and Babies", The Cambridge Law Journal 2005; Kunoy, B., "A Union of National Citizens: the Origins of the Court's Lack of Avant-Gardisme in the Chen Case", Common Market Law Review 2006; Tryfonidou,A., "Further Cracks in the "Great Wall" of the European Union?", European Public Law 2005; Hofstötter, B., "A cascade of rights, or who shall care for little Catherine? Some reflections on the Chen case", European Law Review 2005.

[44] See footnote 29. See Iglesias Sánchez, S., "¿Hacia una nueva relación entre la nacionalidad estatal y la ciudadanía europea?", Revista de Derecho Comunitario Europeo 2010 nº 37; Seling, A., "Towards a direct "droit de regard"?, Maastricht Journal of European and Comparative Law 2010 Vol. 17 nº 4; Kochenov, D.: Case Note, (2010) Common Market Law Review; Jessurun d'Oliveira, H.U., "Decoupling Nationality and Union Citizenship?", European Constitutional Law Review 2011 Vol. 7 Issue 1.

[45] Rottmann, paragraph 57.

of the case, the Court of Justice confirmed the existence of a restriction to Article 20 TFEU, but it then argued that the restriction was justified and proportionate. [46]

In Rottmann the Court of Justice came full circle in its balancing exercise between effectiveness of EU rights and Member State autonomy. In cases of loss of nationality, the effect on EU rights is significantly intense, even more than in cases of additional burdens to the acquisition of nationality. As a result, the Court of Justice is willing to closely scrutinize Member State action, but only for the purposes of ensuring that EU rights are not undermined. Shortly after Rottmann, in the following landmark case of Ruiz Zambrano, the Court of Justice argued that the status of EU citizenship comprises a substance of rights that cannot be restricted or deprived unilaterally by a Member State. That substance of rights which makes up the statute of EU citizenship is what the Court of Justice was preserving in the case of Rottmann, at the cost of entering and restricting the autonomy of Member States in the sensitive field of nationality.

b) Variable 2: Respecting the autonomy of Member States

The second variable which is present in the case-law of the Court of Justice is the imperative of Member State autonomy in the field of nationality. To this end, the Court of Justice has come to length in recognizing the broad scope of action of Member States in determining the terms and conditions for the acquisition and loss of nationality.

As it was previously portrayed, in Micheletti it was explicitly stated that "under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality".[47] The Court of Justice interpreted this passage in Kaur,[48] the case of a Kenyan of Asian origin with the status of British Overseas Citizen, a status of British nationality that did not grant a right of entry or residence in the United Kingdom. In Kaur the Court of Justice took closely into account the fact that the United Kingdom had submitted a unilateral Declaration to the accession Treaty which clearly stated that British Overseas Citizens were not to be considered "nationals" under EU law. Despite the fact that the Declaration was unilateral, the Court of Justice argued that it "must be taken into consideration as an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty ratione personae".[49] As a result, it ruled that Ms. Kaur was not a national of a Member State and therefore she was not subject to the rules of entry and residence enshrined in EU law.

[46] *Ibidem*.
[47] Micheletti, paragraph 10.
[48] See footnote 30. On Kaur, see Cosi, A. R., "Cittadinanza dell'Unione e cittadinanza di uno Stato membro: il caso della British Overseas Citizenship", Diritto pubblico comparato ed europeo 2001; Toner, H., Case Note, (2002), Common Market Law Review 2002, and Gautier, Y., Europe 2001 Avril Comm. nº 119.
[49] Kaur, paragraph 24.

When dealing with the restrictive effect of this ruling, the Court of Justice was careful to point out that the rationale of its case-law was still in force. The judgment in Kaur impeded the applicant from exercising EU rights, but the Court of Justice state that its decision was not having the effect of depriving any person from the exercise of rights. On the contrary, "the consequence was rather that such rights never arose in the first place for such a person".[50] Since no rights had been initially ever conferred on Ms. Kaur, there was no restriction being imposed on such rights. Therefore, the autonomy of the Member State to determine who is and who is not a national, was the premiss to determine, in a second stage, under what terms can a Member State restrict citizenship rights.

c) A balanced approach

Contrary to the opinion of some critical authors,[51] the approach of the case-law reaches a reasonable outcome in balancing the effectiveness of EU rights and the autonomy of Member States. When reviewing Member State action in the field of nationality, the Court of Justice only verifies if the measures at hand have a restrictive effect on the rights granted by EU law in primary or secondary law instruments in the exercise of EU competence. The main concern in the case-law is avoiding a Member State circumvention of EU law on the grounds of exclusive national competence. If EU law creates rights for EU citizens, those rights must be enforced in a uniform manner throughout the Member States. If national competence is used to the effect of creating an asymmetrical protection of EU rights, such competence can only be justified in terms that are adequate and proportionate to the achievement of legitimate goals. That is the approach of the Court of Justice, which refuses to transfer competences in the field of nationality to the EU, but strives to ensure a uniform protection of rights of EU citizens.

Therefore, it can be argued that the case-law preserves the sphere of autonomy of Member States as a question of competence. However, specific inroads into that field are justified with the purpose of ensuring effective and uniform protection of rights of EU citizens. Member States enacting measures that disproportionately affect the terms and conditions in which EU citizens make use of their rights, will come under EU scrutiny. However, measures that do not restrict the rights of EU citizens remain within the sphere of competence of Member States. EU

[50] Kaur, paragraph 25.

[51] See, inter alia, Džankić, J., "Investment-based citizenship and residence programmes in the EU", RSCAS 2015/08, Robert Schuman Centre for Advanced Studies EUDO Citizenship Observatory, pg. 20. According to this author, "The perils of both the discretionary naturalization and the investor programmes are twofold. First, they have the potential to distort the relationship between national and of EU citizenship. Having in mind the market logic of competitiveness, treating citizenship as a product that can be exchanged for money, has already started to show a 'race to the bottom'. […] Second, these programmes reflect not only a tension within EU citizenship itself, but also a problem regarding the Member States' approach to national membership. That is, the rights attached to EU citizenship, based on values of mutual trust and sincere cooperation, create an opportunity structure for the Member States to offer rights beyond their borders. In other words, while the Member State governments appear to commodify their own passport (the status of citizenship) on grounds of access to EU-wide rights, they also open up the question of rights of citizenship that the respective status entitles the individual to enjoy (nationally and EU-wide)."

intervention in such areas will require an exercise of EU competence at the legislative level or a Treaty reform.

5. Physical presence and "meaningful nationality"

If Member States remain the sole masters of their competence in the field of nationality, subject only to specific EU review in case of restriction of rights of EU citizens, it is now worth reflecting on the powers of the EU to review Member State policy regarding the *acquisition* of nationality. In case of loss of nationality, as was the case of Rottmann, there is a clear restrictive effect on the rights of EU citizens that justifies EU review. In the case of non-recognition of nationality by another Member State, as in Micheletti, there is again another restrictive effect that merits review in light of EU law. However, when a Member State decides to grant the status of nationality to a national of a third country, can EU law limit that competence? The acquisition of nationality entails the acquisition of EU citizenship as well, which is a conferral of a statute which comprises significant rights for the individual. To what extent can the EU impose conditions or limits on Member State policy regarding the acquisition of nationality?

This question is currently subject to an interesting debate, as a result of the investment programmes enacted by several Member States, with the aim of attracting investors by means of special immigration schemes. Among the measures available to investors, specific routes for the acquisition of nationality are available, mostly through significant investments in the Member State.[52] As a result, critics have denounced the existence of a "sale" of nationality by these Member States, which do not require genuine links with their territories, only a significant investment.[53]

The question of "genuine links" as a requirement for the acquisition of nationality has been present in international law since the judgment of the International Court of Justice in the case of Nottebohm.[54] International law has given relevance to the existence of personal ties to the country of naturalization, particularly when an individual requests international protection from his or her State of nationality. For that purpose, "meaningful nationality" acts as a prerequisite in order to bind States under international law when providing and ensuring international protection. However, as Peter Spiro has convincingly argued, "meaningful

[52] Surak C., "Global Citizenship 2.0. The Growth of Citizenship by Investment Programs", Investment migration working paper, 2016/3, 2016; Shaw, J., "Citizenship for Sale: Could and Should the EU Intervene?", in Bauböck, R. (ed.), Debating Transformations of National Citizenship, IMISCOE Research Series, 2018; Džankić, J. "Ius pecuniae: investor citizenship in comparative perspective", EUDO/RSCAS Working Paper 14/2012; and Shachar, A. and Bauböck, R. (eds.) "Should Citizenship be for Sale?" 11-12. EUDO/RSCAS Working Paper 01/2014.

[53] On the overall situation of investment programmes, see Džankić J., "Immigrant investor programmes in the EU', Journal of contemporary European studies", 26-1, 2018 and Sumption M., Hooper K., "Selling visas and citizenship: policy questions from the global boom in investor immigration", Migration Policy Institute, October 2014, p.4.

[54] ICJ, Nottebohm Case (Liechtenstein v. Guatemala) [1955] ICJ Reports 4.

nationality" is not a general requirement under international law that falls on all States.[55] To date, international law has not created binding and positive obligations on States to ensure specific conditions for the acquisition of nationality.[56]

Therefore, is the EU competent to demand from Member States the compliance with specific requirements under international and EU law when it comes to the conferral of nationality? Physical presence is the most frequent requirement coming up in discussions and consultations, whether it is prior or following the acquisition of nationality. In the following section it will be argued that the EU lacks competence to impose on Member States a condition of physical presence as a requirement for the acquisition of nationality of a Member State. This conclusion relies both on international and EU law. In addition, the paper will suggest a way forward in case the EU decides to engage in a policy of this kind.

5.1. Physical presence as a requirement of EU law

In the absence of any reference in the Treaties to EU competence in the field of nationality, it is submitted that the competence remains within the powers of the Member States. However, the extensive development of secondary EU law in the area of immigration could provide relevant insight as to the EU's use of competence to date. The exercise of competence in this field could be interpreted as a sign of the EU and the Member State's intention to assume powers in order to harmonize or to introduce uniform rules in the area of nationality.

Under EU law, physical presence, in the form of legal residence, can be considered to play a relevant role as a criterion to determine permanent residence under Directive 2004/38.[57] A five year time-period of *uninterrupted* legal residence gives the right to request permanent residence in the host Member State, thus linking physical presence with the conferral of residence rights.[58] In other fields of secondary law, as is the case of access to social services, physical presence can also trigger EU rights, mostly in cases which require a specific link justifying certain benefits.[59] The rationale underlying this criterion is frequently linked to fiscal fairness: ongoing physical presence results in deeper integration in a host Member State,

[55] Spiro, P.J., "Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion" (2019) Investment Migration Working Papers, No. 1/2019.
[56] See Tratnik, M., Limitations of National Autonomy in Matters of Nationality in International and EU Law, in Kraljic & J. Klojcnik (eds.), From Individual to the European Integration. Discussion on the Future of the EU: Liber Amicorum for Silvo Devetak, University of Maribor Press, Maribor 2018, pg. 515 and 516.
[57] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
[58] Article 16 of Directive 2004/38, and rulings of the Court of Justice in cases, inter alia, Dias, C-325/09, EU:C:2011:498 and O. and B., C-456/12, EU:C:2014:135.
[59] See Article 24 of Directive 2004/38 and the Court of Justice's ruling in the case of Dano, C-333/13, EU:C:2014:2358.

including the fulfillment of fiscal obligations. By contributing to the financial integrity of the Member State, EU citizens are thus entitled to benefit from financially burdensome rights. Consequently, in order to become a legal resident and enjoy the effects of EU principles such as non-discrimination on the grounds of nationality, physical presence and eventually residence during a specific period of time, provide sufficient guarantees to the host Member State as to the degree of integration and fiscal commitment of the moving EU citizen.

However, the provisions imposing a link with the host Member State in the field of immigration in EU law are conceived as *residence* requirements for *moving* EU citizens. They deal with moving EU citizens intending to reside in another Member State, or hoping to receive services in another Member State. However, no provisions under EU law require physical presence as a requirement for the acquisition of nationality. This is mostly due to the rights derived by EU citizens once they exercise free movement, which include economic rights and thus require more intensive forms of integration in a host Member State. However, in the case of the acquisition of nationality such concerns are missing, inasmuch a naturalized citizen in a Member State does not, as such, earn residence rights in another Member State. The naturalized citizen exercising free movement in another Member State must be economically active or self-sufficient and, in order to attain permanent residence, he or she must prove five years of uninterrupted residence in a host Member State. The condition of physical presence would therefore apply in full to the naturalized EU citizen if he or she wishes to exercise free movement in another Member State, just like any other EU citizen from birth. No EU provision imposes physical presence as a requirement to acquire the nationality of a Member State.

Therefore, there is no clear indication whatsoever of the EU's intention to exercise competence in the field of nationality. Quite the contrary, the use of competence in the field of immigration, together with the Treaty's red lines ensuring the autonomy of Member State competence, confirm the EU's brittle powers when touching the sensitive issue of nationality law in the Member States. The Declarations to the Treaties also provide important provisos as to the willingness of Member States to keep that area of law outside the scope of competence of the EU.

However, as it has been argued, EU law can review national provisions or practices in the field of nationality, as long as such action restricts the effectiveness of the EU rights conferred on EU citizens. It is therefore necessary to inquire if Member States restrict EU rights by developing a nationality policy that does not require physical presence prior or after the acquisition of nationality. If it is proved that such restriction exists, Member States would be subject to the Micheletti and Rottmann conditions.

The absence of a requirement of physical presence does not entail any restriction on the effectiveness of the rights of an EU citizen. Quite the contrary, by waiving such a requirement, a Member State is granting to a third-country national a swift and less restraining course of access to EU citizenship and to the exercise of the rights attached therein. In stark contrast with the cases of Micheletti and Rottmann, in which Member States were introducing measures to refuse recognition of the acquisition of nationality, or depriving an EU citizen of the status

of a national of a Member State, a waiver of physical presence facilitates exactly the opposite result. It is therefore questionable whether EU law can scrutinize Member State action, as long as the measures under review are facilitating the conferral and exercise of EU rights to its citizens.

It could be argued that a disproportionately generous policy of acquisition of nationality could entail fraud and an abuse of Article 20 TFEU. However, the case-law of the Court of Justice has not been sensitive to this approach, as long as EU rights were not subject to restrictions. In the case of Chen, the acquisition of Irish nationality by means of an extraterritorial rule of attribution of nationality was recognized by the Court of Justice as a legitimate course to acquire nationality and, thus, EU citizenship[60]. As long as Member States waive physical presence requirements in accordance with their internal constitutional arrangements, EU law does not interfere in the implementation of a legal internal policy of a Member State. To date, investment programmes are enacted in Parliamentary Acts, statutory instruments and are subject to clear and transparent criteria. Under such standards, these practices cannot be considered to entail a fraud or an abuse of EU law.

5.2. Physical presence as a requirement of international law, imposed by way of EU law

In Michelletti, the Court of Justice stated that the acquisition of nationality is a competence of the Member States, but subject to "international law". In light of decisions such as Nottebohm, it could be argued that EU law has a duty to uphold standards of "meaningful nationality" on Member States, as a standard of international law that binds the EU.

This argument raises serious doubts for several reasons.

First, it is questionable whether the Nottebohm standard is current international practice beyond the area of international protection, which is the perimeter in which the decision was rendered and developed. As it is argued by Peter Sapiro,

> "Nottebohm is a remarkable decision in one respect only: there may be no other judgment of an international tribunal that has some much purchase on the imagination at the same time as it has so little traction on the ground".[61]

Such standards are not currently a customary practice of international law as a general point of principle. As Advocate General Tesauro pointed out in his Opinion in Micheletti, Nottebohm belongs to the "romantic era" of international law and it is doubtful whether the principle stands in its entirety to this day.[62] Therefore, the compliance by the EU of international law

[60] Chen, paragraph 40.
[61] Spiro, P.J., "Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion" (2019) Investment Migration Working Papers, No. 1/2019.
[62] "I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a "romantic period" of international

standards must be referred to clearly defined rules of written or customary international law, which currently is not the case of the Nottebohm doctrine.

Second, even if it was accepted that the Nottebohm standard is a clear and consolidated principle of general international law, it is questionable to assume that international law can trigger new competences in favor of the EU. The compliance of general international law is a principle enshrined in Article 3(5) TEU when governing the EU's "relations with the wider world", but not as a means to transfer new competence to the EU, or to facilitate the exercise of competence in fields in which the Treaties provide no clear attribution of powers.

Furthermore, the Nottebohm standard stands at odds with the Court of Justice's approach towards naturalization policies. Michelletti is a sound example of how the Court of Justice defers on Member States the relevant criteria for the determination of a naturalization procedure. In the same vein, in Chen the Court of Justice deferred once again on the criteria laid down under Irish law for cases of extraterritorial attribution of nationality. The same outcome can be observed in cases such as Ruiz Zambrano, in which the terms under which the minor infants acquired Belgian nationality could have been questioned, but not as a matter of EU law. Meaningful nationality of a Member State is a category that is foreign to the theory and practice of the case-law of the Court of Justice, precisely to ensure an effective enjoyment of the substance of the rights attached to the status of EU citizenship. A reversal of this approach on the grounds of a decision of the International Court of Justice rendered in 1955, and seriously questioned at this time in international law, is a departure of past precedent that would undermine decades of significant developments in the field of EU citizenship.

5.3. The way forward

There are legitimate reasons for the EU to intervene in a way that introduces common standards on the acquisition of nationality, if such standards contribute to a more effective exercise of EU citizenship rights. The Commission would have to find the proper arguments to justify such a policy, something that it has not achieved thus far. But it is nevertheless appropriate to ask if the EU could ever, in the current Treaty framework, have the appropriate powers to intervene in the field of nationality.

First and foremost, this author takes the stance that the Treaties confer no competence to the EU to legislate and condition the terms of acquisition of nationality of the Member States. Such competence has not been transferred to the EU and, as a result, it remains in the sphere of autonomy of the Member States to date. The absence of any provisions under EU law governing such conditions confirms that the EU's legislative institutions share that interpretation.

relations and, in particular, in the concept of diplomatic protection; still less, in my view, is the well known (and, it is worth remembering, controversial) Nottebhom judgment of the International Court of Justice of any relevance. Nor, above all, is it necessary, in my opinion, to view the problem in terms of a choice of the applicable law from the standpoint of private international law." Opinion of Advocate General Tesauro in Micheletti, point 5.

However, Article 352 TFEU provides a legal base that could at some point prove relevant in enacting a measure of the kind. According to this provision, the EU can enact legislative measures "if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers". Despite the broad language of the provision, the Court of Justice has stated that this legal base cannot be used by the Council to enact measures in areas of competence not transferred to the EU by its Member States.[63] But if the EU is competent in the area of policy to which the measure is addressed, Article 352 TFUE can provide, subject to unanimous vote in the Council and prior consent of the European Parliament, a legal base.

The setting of basic common rules at the EU level on the acquisition and/or loss of nationality could fulfill the conditions required by Article 352 TFEU. Action by the Union could prove necessary if the Commission succeeds in making the argument that differentiation and fragmentation poses a risk for the proper enforcement of EU rights and EU immigration policy. As to whether the measure lies "within the framework of the policies defined in the Treaties", it is clear that citizenship and immigration are areas of EU policy that have been transferred by the Member States to the EU as a shared competence. Finally, and as it has been argued in this paper, the Member States "have not provided the necessary powers" to the EU to enact measures in the field of nationality. Therefore, the Council, on a unanimous vote and prior consent of the European Parliament, could introduce common standards on acquisition and/or loss of nationality by means of Article 352 TFEU. These standards would of course be subject to review by the Court of Justice and, besides having to comply with the conditions set in Article 352 TFEU, they must be compatible with the principles of proportionality and subsidiarity. Thus, competence under Article 352 TFEU would only be justified if the case is convincingly made, and the terms under which the measures are enacted do not intrude unnecessarily in the competence of the Member States, under the terms of the principles of proportionality and subsidiarity.

7. Conclusion

Nationality and EU citizenship are twin statuses that co-exist and depend mutually in granting the individual a powerful range of rights and duties, including free movement, non-discrimination and political fundamental rights. EU citizenship depends on the existence of Member State nationality, but the status of nationality is enhanced as a result of EU citizenship. The two categories do not interfere in the rights that each one grants to the individual, but their autonomous nature also provides them with a certain degree of protection from each other. Although it might be true that EU citizenship is destined to become the fundamental status of nationals of the Member States, it is equally true that both statuses remain fundamental to each other.

[63] See footnote 5.

Irrespective of the which status is deemed to become fundamental in the future, EU law has set clear standards on how both categories must interact, and the priority has been duly set by ensuring, first and foremost, the effectiveness of EU rights. The interplay between EU citizenship and nationality must operate in a way that favors and facilitates the enjoyment of the rights granted by EU law. As a result, Member States must recognize all forms of attribution of nationality as long as it is performed in accordance with the appropriate legal requirements set by the Member State. Also, Member States must not disproportionately interfere in the status of EU citizenship by depriving the individual of such status in an arbitrary way. Both statuses remain autonomous, but EU law will review any attempt by a Member State to fragment, weaken or restrict the effectiveness of the rights belonging to the status of EU citizenship.

Besides the cases of mutual interference, the division of tasks between the EU and its Member States in the field of nationality remains clear: it is a competence of the Member States particularly reinforced in the Treaties as a result of Declarations and provisos in the legal bases governing EU citizenship and immigration policy. The significant leeway that Member States retain in this field has been confirmed by the case-law of the Court of Justice by repeatedly relying on the specificities of Member States and recognizing such specificities as a legitimate source that ensures national autonomy. In fact, in the case of Kaur the Court of Justice introduced a distinction between national rules that *limit* the exercise of rights as a result of being a national of a Member State, and the national rules that grant *access* to the status of nationality. The former are subject to the criteria set in landmark judgments like Micheletti and Rottmann. The latter recognize the sphere of autonomy of Member States when deciding on the criteria to acquire or lose nationality (and thus EU citizenship). To date, only the case of loss of nationality has deserved EU review due to the restrictive consequences of the measures on the individual's status.

As long as Member States comply with standards of legal certainty and predictability, conditions for the acquisition of nationality remain in their hands. The introduction of conditions such as physical presence is a question that each Member State must determine, but in the present stage of integration, EU law has no jurisdiction to impose such criteria on its Member States. It is true that Member States have a duty to comply with international standards and with the EU principle of sincere cooperation, but the notion of "meaningful nationality" is foreign to the logic of EU law, which has traditionally operated under much laxer terms in order to facilitate the effectiveness of EU rights. As Jessurun d'Oliveira has argued in a recent paper,

"Union law is from my point of view not yet allowed to interfere with the competence of the member states to determine who are or who are not their nationals. There is no competence in the treaties to deal directly with the laws on nationality of the member states. The idea that the obligation for sincere cooperation can be used as an argument that the member states should allow inroads into their laws on nationality is not convincing".[64]

[64] Jessurun d'Oliveira, H.U., "Union citizenship and beyond", LAW 2018/15, EUI Working Papers, pg. 7.

Only if the EU would come to the realization that nationality policy in the Member States is undermining the objectives of its policies (visa policies with third countries, for example), the need to introduce common EU standards would surface. In that case, the Commission would have to make a powerful case in order to fulfil the conditions of Article 352 TFEU. It will be for the Council to decide, on a unanimous vote which must include the support of the Member States with generous nationality policies, the scope and terms of such standards. This is the sole course of action that would allow the EU to overcome the severe limitations that the Treaties have set in order to enter in the sensitive field of nationality. Only time will tell if the EU has the appetite to explore measures of the kind, or whether the genuine need for common standards is really worth the fuss.

State Autonomy and Relevant Links under international and EU Law

Matjaž Tratnik and Petra Weingerl

State Autonomy and Relevant Links under International and EU Law

Matjaž Tratnik* and Petra Weingerl**

ABSTRACT: The paper explores limitations imposed on State autonomy in matters of nationality by international law and EU law and its implications for investment migration. State autonomy is in international law to a large extent unlimited, although it may not encroach upon international obligations in the area of protection of human rights. In the EU, Member States are (by their nationality rules) gatekeepers to the EU citizenship. When exercising their national autonomy they must observe EU law, most notably the principle of proportionality and the principle of sincere cooperation. The principle of proportionality plays a more important role in cases of loss than in cases of acquisition of nationality, as the cases *Rottmann*, *Kaur* and *Tjebbes* have demonstrated. Yet, the role of EU law is very limited. The principle of sincere cooperation may play an important role as regards defining the grounds for the acquisition of Member State nationality, and thus also for the investment migration. If a Member State lays down rules that enable citizenship by investment, the EU institutions might react, as the Maltese example shows. So far only the political institutions have reacted in this matter, without sensible legal arguments, though. Most recently, the Commission in its 2019 Report deployed a genuine link-based narrative that is at odds with established principles of international and EU law and highly problematic from the viewpoint of the principle of sincere cooperation. When and if the matter reaches the CJEU, the Court should be very restrained when assessing national investment migration rules. To this end, bringing a 'romantic' 19th century genuine link-like criteria into the realm of EU law is not desired.

KEYWORDS: EU Citizenship, Nationality, National Autonomy, Proportionality Principle, Principle of Sincere Cooperation, Genuine Link, Relevant Link, Investment Migration

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1. Introduction

Every State has its own citizens. This means that it must establish rules on the acquisition and loss of its citizenship (nationality).[1] Under international law, it belongs in principle to the reserved domain of each State to decide who its citizens are.[2] In other words, States are free to establish rules on acquisition and loss of their citizenship. This principle of so-called national autonomy has been codified in international conventions[3] and confirmed by the Permanent Court or International Justice (PCIJ),[4] the International Court of Justice (ICJ),[5] as well as the Court of Justice of the EU (CJEU).[6]

A number of Member States operate some sort of investor citizenship and/or residence schemes that enable privileged naturalization or residence[7] status to non-EU investors.[8] In this paper we

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[1] Despite their manifold definitions, the terms nationality and citizenship are used as synonyms.

[2] cf James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 509; Alice Sironi, 'Nationality of Individuals in Public International Law' in Alessandra Annoni and Serena Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013) 54; Ruth Donner, *The Regulation of Nationality in International Law* (2nd edn, Transnational Publishers 1994) 2.

[3] See Article 3(1) of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (LNTS Vol. 179, 89) and Article 3 of the 1997 European Convention on Nationality (CETS 166).

[4] See PCIJ Advisory Opinion of 7 February 1923 on *Nationality Decrees Issued in Tunis and Morocco*, Series B No 4 (1923).

[5] See ICJ, *Nottebohm Case* (*Liechtenstein v. Guatemala)* [1955] ICJ Reports 4 (*Nottebohm*).

[6] See Case C-369/90, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295 (*Micheletti*). See, *e.g.*, Hans Ulrich Jessurun d'Oliveira, 'Case C-369/90, M.V. Micheletti and others v Delegación del Gobierno en Cantabria, Judgment of 7 July 1992' (1993) 30(3) Common Market Law Review 623–637.

[7] Residence-based programs are more broadly accepted as they have the potential to generate multiannual tax revenues. Allison Christians, 'Buying in: Residence and Citizenship by Investment' (2017) 62 St. Louis University Law Journal 51. See also Martijn van den Brink, 'Investment Residence and the Concept of Residence in EU Law Interactions, Tensions, and Opportunities' (2017) Investment Migration Working Paper IMC-RP 1/2017. Van den Brink argues that the EU rights investors in residence are able to benefit from are relatively modest. See also Owen Parker, 'Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes' (2016) 55(2) JCMS 7.

[8] Dimitry Kochenov estimates that app. 20 Member States operate either citizenship or residence scheme. Dimitry Kochenov, 'Investor Citizenship and Residence: the EU Commission's Incompetent Case for Blood and Soil' (*VerfBlog*, 23 January 2019) <https://verfassungsblog.de/investor-citizenship-and-residence-the-eu-commissions-incompetent-case-for-blood-and-soil/> accessed 1 August 2019. Jelena Džankić claims that each Member State has at least one legal mechanism for granting residence or citizenship rights in exchange for investment. Jelena Džankić, 'Immigrant Investor Programmes in the European Union' (2018) 26(1) J. Contemp. Eur. Stud. 64. See also Jelena Džankić, *The Global Market for Investor Citizenship* (Palgrave Macmillan 2019) 180.

will focus on the former. Privileged naturalizations for investors are often possible through naturalization in 'national interest'. This national interest is in most cases unspecified and also applies mainly to sportsmen, important scientists and artists. In some Member States the economic or commercial interest is expressly recognised as a national interest.[9] Such discretionary provisions enable Member States to waive some or all of the naturalisation conditions applicable to other applicants. Only Bulgaria, Cyprus and Malta have introduced specific Citizenship by investment programmes. Thus far only Malta has caught attention of the EU political institutions when the government announced an amendment to the Maltese Citizenship Act to introduce the so-called Individual Investor Programme (IIP).[10] Under this programme foreigners and their families would be granted the Maltese citizenship in exchange for a considerable donation to the State or investment in the country, without any residence requirement. The European Parliament and the Commission called upon Malta to bring its current citizenship scheme into line with the EU's values.[11] The European Parliament stressed that 'such outright sale of EU citizenship undermines the mutual trust upon which the Union is built' and highlighted the importance of the principle of sincere cooperation, codified in Article 4(3) TEU.[12] Although matters of residency and citizenship are the competence of the Member States, the European Parliament called on the Member States 'to be careful when exercising their competences in this area and to take possible side-effects into account'.[13] Under the threat of an infringement procedure under Article 258 TFEU, the Maltese authorities reached an agreement with the DG Justice of the European Commission about some amendments to the

[9] Austria, Bulgaria, Slovenia and Slovakia. See Commission, 'Investor Citizenship and Residence Schemes in the European Union' (Report) COM(2019) 12 final 3, fn. 10; Džankić, *The Global Market* (n 8) 181.

[10] See extensively over this issue Christian H. Kälin, *Ius Doni in International Law and EU Law* (Brill/Nijhoff 2019) 136–143; 190–195. See also Sergio Carrera Nuñez, 'How much does EU Citizenship Cost? The Maltese Citizenship-for-Sale affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union?' in Sergio Carrera Nuñez and Gerard-René de Groot (eds), *European Citizenship at the Crossroads: The Role of the European Union on Loss and Acquisition of nationality* (Wolf Legal Publishers 2015) 293–326; Guayasén *Marrero González, Civis Europaeus sum? Consequences with regard to Nationality Law and EU Citizenship Status of the Independence of a Devolved Part of an EU Member State (Wolf Legal Publishers 2015)* 171–173. cf Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018) 51-55; Sofya Kudryashova, 'The Sale of Conditional EU Citizenship: The Cyprus Investment Programme under the Lens of EU Law' (2019) Investment Migration Research Paper 2019/3 14.

[11] In this resolution was expressly stated, that '*this way of obtaining citizenship in Malta, as well as any other national scheme that may involve the direct or indirect outright sale of EU citizenship, undermines the very concept of European citizenship.*' European Parliament, 'Resolution of 16 January 2014 on EU citizenship for sale' (Resolution) (2013/2995(RSP). See also Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 9) 2; Hans Ulrich Jessurun d'Oliveira, 'Union citizenship and Beyond' (2018) EUI Working Paper Law 2018/15 8.

[12] European Parliament, 'Resolution of 16 January 2014 on EU citizenship for sale' (n 11) paras G, 4.

[13] ibid, para 6.

IIP (in particular the inclusion of an effective residence criterion).[14] However, in the beginning of 2019, the Commission went one step further in the political attack from the EU institutions on citizenship by investment schemes. The European Commissioner for Justice, Consumers and Gender Equality, Věra Jourová said that '[p]eople obtaining an EU nationality must have a genuine connection to the Member State concerned'.[15] At the same time, the Commission published a Report on investor citizenship and residence schemes in the EU (2019 Report), where it severely criticises such schemes, *i.a.* invoking the so-called 'genuine link' principle of international law that supposedly would not allow for acquisition of nationality of a State if the person in question has no or only a very weak 'genuine' connection with that State.[16]

However, it must be underlined that it belongs to the core of Member States' autonomy in matters of nationality to choose and implement those grounds for the acquisition of their nationality that the Member States deem relevant, therefore also to introduce citizenship by investment schemes. Consequently, such schemes must in principle be considered compatible with international and EU law. Conversely, the national autonomy is not unlimited, thus we will explore the limitations of Member States autonomy in general and specifically with the focus on the freedom of the Member States to introduce and operate citizenship by investment schemes. To this end, we will first analyse the principle of State autonomy together with the (in)famous *Nottebohm* case,[17] where the ICJ supposedly imposed the genuine link criterium which the Commission relies upon in its 2019 Report. In section 2 limitations of State autonomy in international law will be explored, since States, when exercising this competence, need to observe a number of important rules deriving from international law. Already the PCIJ, in its advisory opinion on *the Nationality Decrees Issued in Tunis and Morocco (French Zone)*, almost a century ago, took into account the possibility that limitations of the national autonomy would be developed in international relations and international law:

> 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.'[18]

Therefore, the question arises as to what extent the national autonomy has been limited by developments in international law in the past century, especially in the period following the establishment of the United Nations and the Council of Europe. Therefore we will try to identify and map the limitations of the national autonomy in matters of nationality in the sources of

[14] See the Joint Press Statement of 29 January 2014 issued by the European Commission and the Maltese Authorities, <http://europa.eu/rapid/press-release_MEMO-14-70_en.htm> accessed 1 August 2019.
[15] Commission, 'Commission reports on the risks of investor citizenship and residence schemes in the EU and outlines steps to address them' (Press release, 23 January 2019) <https://europa.eu/rapid/press-release_IP-19-526_en.htm> accessed 1 August 2019.
[16] Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 9).
[17] *Nottebohm* (n 5).
[18] P.C.I.J. Series B, No. 4, para. 40.

international law, namely international conventions, customary international law and general principles.[19]

The third section explores limitations of Member State autonomy in matters of nationality in the law of the European Union (EU). The EU is an international organization that has developed itself in a specific way that is distinct from the 'usual' international organizations.[20] It has a specific character, mainly because its legal order imposes certain limitations on the sovereignty of its Member States. These limitations of sovereignty exist only in areas where the Member States conferred competences on the EU in accordance with Article 5 of the Treaty on the European Union (TEU).[21] In accordance with the TEU and the Treaty on the Functioning of the European Union (TFEU),[22] the Member States have not conferred competences on the EU in the area of citizenship. However, in 1992, the Treaty of Maastricht[23] introduced the concept of the citizenship of the Union as a new category, which exists next to, and not in place of, the citizenship (nationality) of the Member States.[24] Yet, both citizenship concepts are closely connected, as the EU citizenship is acquired and lost through the acquisition or loss of the citizenship of a Member State.[25] This means that the Member State rules on acquisition of their nationality dictate the scope of persons that will enjoy the rights granted by the EU citizenship. These rights become especially important when an EU citizen lives and/or is economically active in another Member State, *i.e.* not in the Member State of his/her nationality. Thus, *e.g.* Malta's rules on citizenship determine the circle of beneficiaries of rights granted by EU law in Germany, France or any other Member State. This especially could be the main reason for the distrust of other Member States and of the EU institutions as regards citizenship by investment schemes. However, political arguments are to be distinguished from legal arguments. To this end, we will try to give an answer to the question whether or not citizenship by investment schemes are compatible with international and EU law.

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[19] Article 38 of the Statute of the ICJ. Some of these limitations are, *e.g.* prohibition of gender discrimination in citizenship practice, constraints on the termination of citizenship, the emergence of norms that require the extension of territorial birthright citizenship in some cases and that limit discretion concerning naturalization thresholds. See Peter J Spiro, 'A New International Law of Citizenship' (2011) 105(4) The American Journal of International Law 695.

[20] See, *e.g.*, decision of the CJEU in Case 26/62, *van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

[21] Consolidated version of the Treaty on the European Union [2016] OJ C 202.

[22] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 203.

[23] Treaty on European Union [1992] OJ C 191.

[24] See the Danish declaration on the occasion of the ratification of the Maastricht Treaty below (n 95).

[25] This is not expressly provided by the TFEU and according to some authors it might be possible that EU citizenship is detached from the Member State citizenship, which would mean that a person could remain an EU citizen in case of loss of his/her (only) Member State citizenship. Jessurun d'Oliveira, 'Union citizenship and Beyond' (n 11); chapters in Liav Orgad and Jules Lepoutre (eds), *Should EU Citizenship Be Disentangled from Member State Nationality?* (EUI Working Papers RSCAS 2019/24); Theodora Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4(4) The Journal of Political Philosophy 337. See also Martijn van den Brink and Dimitry Kochenov, 'Against Associate European Citizenship' (2019) 57 JCMS, early view available at <https://onlinelibrary.wiley.com/doi/abs/10.1111/jcms.12898> accessed 1 September 2019.

1. Excursus: two aspects of the State autonomy in matters of nationality and the irrelevance of the genuine link

As abovementioned, the State autonomy in matters of citizenship is not absolute, as it is limited by rules of international law. Before we embark on an examination of these limitations, it must be noted that the State autonomy in matters of nationality has two aspects: an internal (national)[26] one and an international one. The first aspect refers to the right of States to autonomously lay down the rules on acquisition and loss of their nationality in their domestic legal orders.[27] The latter refers to the question of effects of the grant of nationality of a State as against other States. To put it in other words, the international aspect of the national autonomy concerns the question whether and in how far other States have the obligation to recognize the grant or loss of the nationality of a certain State.

States, by granting their citizenship, thus exercising their internal autonomy, actually decide who will enjoy rights that are attached to citizenship in their internal legal systems. Hence, States are normally not affected by citizenship rules of other States. These rules are to a large extent irrelevant for other States. Under international law, this indifference changes especially in cases of diplomatic protection.[28] However, in the EU context, where an internal aspect of national autonomy serves as a mean to obtain the EU citizenship, the internal and international aspects of the national autonomy have become conflated and this is the main reason for the aforementioned interventions of EU political institutions in the citizenship by investment schemes.

Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws[29] provides that other States must recognize a foreign nationality 'in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.' Accordingly, a grant of citizenship could be contrary to international law and in such a case other States need not to recognize such citizenship.[30]

The two aspects of national autonomy can be illustrated by the (in)famous *Nottebohm* case.[31] Nottebohm was a German citizen, born in Germany in 1881, who immigrated to Guatemala in 1905 and continued to live there but never took the Guatemalan citizenship. After the beginning

[26] While we acknowledge different local, regional, state and supra-state forms of citizenship, we limit our discussion to nationality of Member States (and the related Union citizenship).
[27] *cf* Crawford (n 2) 510.
[28] Other examples are multilateral and bilateral treaties in the area of international trade granting rights to nationals of the States Parties.
[29] LNTS Vol. 179, 89.
[30] *E.g.*, a State would grant its nationality to all or a considerable part of nationals of another State living on the territory of the latter and without its consent.
[31] *Nottebohm* (n 5). See recently about this decision Peter J Spiro, '*Nottebohm* and 'Genuine Link': Anatomy of a Jurisprudential Illusion' (2019) Investment Migration Working Papers IMC-RP 2019/1 1–23. See also Kälin (n 10) 88–93.

of the Second World War, while on a visit to Europe, he obtained Liechtenstein nationality in 1939 and later returned to Guatemala and was registered by the authorities there as a Liechtestein national and had an appropriate visa in his Liechtenstein passport. [32] The acquisition of the Liechtenstein nationality entailed in automatic loss of his German nationality under Art. 25 of the German *Reichs- und Staatsangehorighkeitsgesetz* 1913.[33] In 1943, he was arrested in Guatemala as an enemy (German) citizen and his property was confiscated. In 1951, Liechtenstein, acting on behalf of Nottebohm, brought a suit against Guatemala before the ICJ. Guatemala objected the claim, because it did not recognize his Liechtenstein nationality. The ICJ made a clear distinction between the validity of the grant of nationality to Nottebohm (corresponding to the internal aspect of the national autonomy) and the effects of this grant *vis à vis* Guatemala (corresponding to its international aspect).

As to the first issue, the Court recognized the principle of national autonomy:

> 'It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation.'

But the Court took the view that a grant of nationality can only have effect as against third States if it is a manifestation of a *genuine link* between the State and the person in question. It described somewhat poetically this genuine link as follows:

> '[…] nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.'

Due to a lack of genuine link between Liechtenstein and Nottebohm, Guatemala did not have the obligation to recognize his nationality, and the claim of Liechtenstein to grant diplomatic protection to Nottebohm vis-à-vis Guatemala was not admissible because the requirement of nationality of the claim[34] was not fulfilled.

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[32] However, it did not really matter to the Guatemalan authorities whether he entered the country as a Liechtensteiner or as a German, their immigration and residence rules were applicable in both cases. The issue of lack of genuine link arose first as regards the permissibility of the exercise of diplomatic protection by Liechtenstein. Yet, the principle of estoppel might have been invoked by Liechtenstein.

[33] Spiro, 'Nottebohm' (n 31); Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel. Eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit* (T.M.C. Asser Instituut 1988) 73.

[34] Nationality of the claim is one of the basic requirements for diplomatic protection. See Article 44(a) of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 18 January 2018.

Obviously inspired by *Nottebohm* decision, some authors take the view that a State should not grant its nationality to a person in the absence of a genuine link between this person and the State,[35] and that it would violate customary international law to do so.[36]

The question arises what is to be considered as a genuine, factual or effective link? The ICJ stated that different factors are taken into consideration in determining 'real and effective nationality', e. g. the habitual residence of the individual concerned (*ius domicilii*), the centre of his interests, his family ties (e. g. *ius sanguinis, ius matrimonii, ius concubinatus)*, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.[37] In the same vein, in its 2019 Report, the Commission asserted that '[t]he "bond of nationality" is traditionally based either on a genuine connection with the people of the country (by descent, origin or marriage) or on a genuine connection with the country, established either by birth in the country or by effective prior residence in the country for a meaningful duration'.[38] Other bases of genuine link could be birth on a State's territory (*ius soli*), having been educated in that State (*ius educationis*), derivation – *ius tractum*,[39] and even making a considerable investment in that State (*ius investitionis, ius pecuniae, ius doni*). And what to think about privileged naturalisations of important scientists and sportsmen?[40] It may be obvious that a genuine link is very elastic, especially if the grant of nationality serves the interests of a State. As Spiro rightly noted, as 'individuals become more highly mobile and are enabled to maintain multiple citizenships, the prospect of sorting supposedly authentic citizenship from instrumental citizenship is a fool's errand'.[41] We can therefore not agree with the view that States should not grant their citizenship in absence of a 'genuine' link, as the Commission asserted in its 2019 Report.

We argue that it is more appropriate to speak about a *relevant link* as the ground for acquisition and maintaining a certain nationality. Which links are *relevant* should be left to the State autonomy, *i.e.* for each individual State to decide. As long as the grant of nationality does not violate human rights,[42] there is no infringement of international customary law, even in case

[35] Gerard-René de Groot and Olivier Willem Vonk, *International Standards on Nationality Law* (Wolf Legal Publishers 2015) 35.
[36] Ko Swan Sik, 'Nationaliteit en het Volkenrecht in Nationaliteit in het Volkenrecht en het Internationaal Privaatrecht', *Preadvies voor de Nederlandse vereniging voor Internationaal Recth* (Kluwer 1981) 20, referred to by De Groot and Vonk, *International Standards* (n 35) 45.
[37] *Nottebohm* (n 5) 22.
[38] Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 9) 5.
[39] Dimitry Kochenov, '*Ius Tractum* of Many faces: European Citizenship and the Difficult Relationship Between Status and Rights' (2009) 15(2) Colum. J. Eur. L. 169.
[40] Slovenia even changed its Citizenship Act in 2017 in order to naturalise an American basketball player who lives and works in Spain, to enable him to play for the Slovenian national team that eventually won the European Championship 2017. See Article 13(2) of the Slovenian Citizenship Act, consolidated version, Official Gazette no. 40/17.
[41] Spiro, 'Nottebohm' (n 31) 2.
[42] The International Law Commission (ILC) Commentary gives as example possible infringement of Article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against

of a by common standards non-existent or very weak factual bond. It might however make a difference if a State would unilaterally grant its nationality to a large group of inhabitants (and citizens) or even to the whole population of another State.[43] There is almost no relevant case law to indicate when an acquisition of nationality would be incompatible with international law, which would mean that other States and international organizations do not have to recognize it. One odd and very specific example was the case where the United Nations Administrative Tribunal (UNAT) refused to recognize a change of nationality of a UN civil servant that had the exclusive purpose in obtaining a more favourable repatriation grant.[44]

It is for each State to decide what is relevant and in its national interest regarding the admittance of new members to its exclusive citizenship club. States often decide for privileged or discretionary naturalisation of persons with special contribution in the arts, science, sport, culture, academia, entrepreneurship, or – donations. As the Commission notes in its 2019 Report, countries where the legislation explicitly equates 'national interest' with the economic or commercial interest of the State are Austria, Bulgaria, Slovenia and Slovakia.[45] In the Commission's view, such naturalisation policies are not problematic if they are operated on a highly individualised and limited basis.[46] However, the Commission condemns investor migration schemes operated by Bulgaria, Cyprus and Malta as they systematically grant citizenship essentially on the same basis.[47] The Commission does not explain why one naturalisation policy is better than the other, especially in light of the State autonomy in this field, and backs its condemnation of investment migration schemes by the reliance on the disputed interpretation of the *Nottebohm* case and its alleged genuine link requirement,[48] although the CJEU expressly rejected this requirement in EU law in its case law discussed below.

The *Nottebohm* decision is largely overestimated.[49] This was a case about diplomatic protection (international aspect of national autonomy), not a case about citizenship in general (internal

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Women. Draft Articles on Diplomatic Protection with commentaries (2006) Yearbook of the International Law Commission, vol. II, Part Two, available at https://www.refworld.org/pdfid/525e7929d.pdf 33–34.

[43] *E.g.* a million new Italians in Argentina, a million of Hungarians across the borders in less than 5 years (10% of all citizens of the republic)... On Russian and Ukrainian 'threats' made in April this year, see, *e.g.*, Anne Peters, 'Passportisation: Risks for international law and stability – Part I' (2019) (*EJIL: Talk blog*, 30 May 2019) <https://www.ejiltalk.org/passportisation-risks-for-international-law-and-stability-response-to-anne-peters/> accessed 1 August 2019. However, this situation concerns facilitated naturalization and not an automatic acquisition of citizenship.

[44] UNAT, Case No. 1383, Judgment No. 1300 of 29 September 2006, UN Doc. AT/DEC/1300 para. VII. <http://untreaty.un.org/UNAT/UNAT_Judgements/Judgements_E/UNAT_01300_E.pdf> accessed 26 August 2019. See also Sironi (n 2) 65-66.

[45] Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 9) 3, fn 10.

[46] ibid.

[47] ibid.

[48] ibid.

[49] See also Spiro, 'Nottebohm' (n 31); Daniel Sarmiento, 'EU Competence and the Attribution of Nationality in Member States' (2019) Investment Migration Working Papers IMC-RP 2019/2 3; Robert D

aspect of national autonomy).[50] To this end, as Spiro argues, ''genuine link' is not and never was a requirement for international recognition of the attribution of nationality'.[51] Moreover, it was a case about measures during wartime, i.e. in very specific circumstances, and it was decided more than half a century ago, in times when migrations were not as common as they are today, especially in the EU context. It is today not uncommon that a person has a close connection to more than one State. Thus, the concept of genuine link in the *Nottebohm* decision was 'overblown and limited'.[52] It might even be considered as a false and unjust decision, since it was based on a misinterpretation of facts. By ignoring the fact that Nottebohm possessed only the Liechtenstein nationality, the ICJ put him in the situation of a stateless person. In our opinion, the decision in the *Nottebohm* case belongs to the past, as Advocate General Tesauro put it in the *Micheletti* case,[53] to the 'romantic period of international law'.[54] We share the view of Kochenov that the requirement of genuine connection is an 'entirely arbitrary and potentially harmful rule of international law.'[55] Thus, the Commission's reliance on such deceptive reading of the *Nottebohm* judgment, which supposedly justified its interference with matters of nationality, is misleading and is lacking solid legal grounds.

It must also be noted that the 2006 Draft Articles on Diplomatic Protection (Draft) prepared by the International Law Commission (ILC)[56] expressly rejected the genuine link criterium for the exercise of diplomatic protection:

Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2008) 50(1) Harvard International Law Journal 1; Sironi (n 2) 54, 67.

[50] The ILC stated that 'the judgment in the *Nottebohm* case only dealt with the admissibility of a claim for diplomatic protection and did not imply that a person could be generally treated as stateless.' Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries (1999) Yearbook of the International Law Commission, vol. II, Part Two, available at https://www.refworld.org/pdfid/4512b6dd4.pdf 40.

[51] Spiro, 'Nottebohm' (n 31) 2.

[52] ibid 14.

[53] *Micheletti* (n 6) para 5.

[54] See also Spiro, 'Nottebohm' (n 31); Sarmiento (n 49); Dimitry Kochenov, 'Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters' in Jo Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (2011) EUI RSCAS paper 5.

[55] Kochenov, 'Two Sovereign States' (n 54) 5; Sironi (n 2) 58.

[56] Available at <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf> accessed 21 January 2018. Pursuant to Article 3(1) of the 2006 Draft Articles on Diplomatic Protection (Draft) prepared by the ILC, the State entitled to exercise diplomatic protection is the State of nationality of the injured person. Article 4 further provides: 'For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.' The wording 'not inconsistent with international law' implies that the onus is on the party challenging the possession of the nationality of the injured person. See also Sironi (n 2) 57–58.

> 'if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.'

In cases of multiple nationalities, Article 7 of the Draft confirms the rule that a State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national. This rule has already been codified in Article 4 of the 1930 Hague Convention. However, the Draft provides for an exception for the case that the nationality of the claimant State is predominant, both at the date of injury and at the date of the official presentation of the claim.[57]

The genuine link requirement was disregarded also by the CJEU in its first decision in the field of nationality in the *Micheletti* case,[58] decided in 1990, thus before the Treaty of Maastricht introduced the concept of the EU citizenship. Mario Vicente Micheletti was a dentist, who was born, lived and studied in Argentina. Next to the Argentinian, he possessed also the Italian citizenship, because one of his grandparents was Italian. He immigrated to Spain and wanted to establish himself there, invoking his freedom of establishment under Article 44 TEC (now Article 50 TFEU). The Spanish authorities however, refused to recognise his Italian nationality. Pursuant to Article 9 of the Spanish *Código civil,* in cases of dual nationality, where neither nationality is Spanish, the nationality of the country of habitual residence before the arrival in Spain was to take precedence. This meant that Micheletti was treated as an Argentinean, and not an Italian national, and thus did not have the right of establishment on the basis of the Treaty. The CJEU found Spain to be in breach of Union law:

> '… it must be borne in mind that Article 52 of the Treaty grants freedom of establishment to persons who are 'nationals of a Member State'. Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.'

[57] The ILC Commentary enumerates several factors that are to be taken into account to decide which nationality is predominant, (while none of them is decisive), *i.a.* habitual residence, the amount of time spent in each country of nationality, date of naturalization; place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service (p. 46). See also Sironi (n 2) 58.
[58] *Micheletti* (n 6).

Since Italy has granted to Micheletti its nationality (the internal aspect of the national autonomy), Spain had to unconditionally recognise Micheletti's Italian nationality and treat him as an Italian national as regards his rights under EU law (the international aspect of the national autonomy). It could not restrict the effects of the acquisition of Italian nationality by imposing an additional condition for recognizing that nationality, such as the condition of habitual residence in Italian territory.[59]

It can be assumed that Micheletti did not have a genuine link with Italy, which would at least following the *Nottebohm* decision mean that under international law, his Italian nationality should not have effects as against third States. But the CJEU did not apply the genuine link test and the *Nottebohm* case was not mentioned, not even by Spain. In fact, there are no important decisions from international tribunals which have adopted its rationale. In a jurisprudential sense, *Nottebohm* was dead on arrival.[60] *Micheletti* was about the effects of his Italian nationality under EU law.

As to the (possible place) of the genuine link in EU citizenship law there are two situations to distinguish in our view, corresponding to the two aforementioned aspects of the national autonomy in matters of nationality: an internal (national) and an international or cross-border aspect. *First*, the international or cross-border aspect concerns the recognition of the grant of Member State A nationality by Member State B (*Micheletti*). In such a situation, EU law imposed the obligation of unconditional recognition on Member States.[61] Member State A is not allowed to require any kind of genuine link to recognise the nationality granted by Member State B in the exercise of its national autonomy. The CJEU has imposed a similar duty of recognition also for legal persons in the case of *Überseering*.[62] *Second*, the internal aspect concerns the acquisition and loss of a Member State nationality ('Malta situation', the *Tjebbes* case, discussed below). In such situations, the principle of national autonomy is of paramount importance. It is for each Member State to decide under which conditions its nationality is acquired and lost, *i.e.* which 'link' they consider relevant in this respect. Similarly, in the context of legal persons, the CJEU held in *Daily Mail* that 'companies are creatures of the law and, in the present state of Community law, creatures of national law'.[63] Consequently, a Member State may provide for the loss of its nationality in cases of (presumably) lost or non-existent 'genuine link'. Such is not inconsistent with EU law, provided that the proportionality test is duly carried out. On the other hand, in cases of acquisition of nationality, the very wide national autonomy might be restricted by the principle of sincere cooperation. Here indeed

[59] ibid, para 11.
[60] Spiro, 'Nottebohm' (n 31) 12.
[61] See also, *e.g.*, Nathan Cambien, 'Union Citizenship and Immigration: Rethinking the Classics?' (2012) 5(1) European Journal of Legal Studies 11.
[62] Where a company formed in accordance with the law of a Member State ('A') exercises its freedom of establishment in another Member State ('B'), Member State B has a duty to recognise the legal capacity of the company with the registered seat in Member State A. Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, ECLI:EU:C:2002:632, para 95.
[63] Case 81/87, *The Queen and H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust PLC*, ECLI:EU:C:1988:456, para 19.

exists the danger that genuine link would enter EU law as the situation with Malta has shown, however, one can for the time being only speculate what the position of the CJEU in such a situation would be. This means that the genuine link might be(come) relevant in EU law not in cases where the concerned person already possesses the rights attached to the EU citizenship (*Micheletti*) but in cases of their possible acquisition (Malta). A development, which would not be desirable in our view. Especially at present, when nationalistic and ethnicistic tendencies are growing in several Member States.[64]

It may be concluded, that the CJEU by imposing the unconditional obligation of recognition of other Member State's nationality not only confirmed, but even emphasised the principle of national autonomy. The grounds for the acquisition of the nationality of Member States are a matter of their national autonomy. Member States grant their nationality based upon 'links' that they consider relevant. No 'mystical' genuine link is needed. Yet, the CJEU also added a new restriction, namely, that it must be exercised with due regard to the Community (in post-Lisbon terminology Union) law, discussed below.[65]

2. Limitations of the national autonomy in international law

In this section, we will focus on the formal sources of international law, namely international conventions, customary international law and general principles of law in order to identify the limitations of the national autonomy in the area of nationality. Special attention will be paid to the international conventions, since it is hard to identify rules of customary law or general principles of law that are specific to citizenship.[66] The two main principles on which acquisition of nationality has traditionally been based are descent from a national (*ius sanguinis*) and birth within state territory (*ius soli)*. Yet, it cannot be concluded that general principles of international law require the States to grant their nationality either to children of their nationals or to children born on their territory, not even in cases where both conditions are fulfilled.

Still, certain general principles of law are also applicable to citizenship law. The first important principle is the prohibition of arbitrariness that amounts to the prohibition of arbitrary deprivation of citizenship, which can be considered as a restriction imposed by the human rights

[64] As Jessurun d'Oliveira rightfully observed, it '*would open up a Pandora's box of brands of ethnic nationalism*'. Jessurun d'Oliveira, 'Union citizenship and Beyond' (n 11) 8.
[65] Which seems to make the Member States autonomy a relative one.
[66] De Groot and Vonk, *International Standards* (n 35) 45. See *infra* 3.1.

law.[67] Another relevant principles are the principle of proportionality and the prohibition or racial discrimination.[68]

The equality of sexes and of illegitimate and legitimate children are not (yet) general principles of nationality law.[69] Nevertheless, numerous States have the obligation to respect both principles in their nationality laws on the basis of conventional rules.[70]

3.1. Limitations in international conventions on citizenship

Certain limitations of the national autonomy in questions of citizenship flow from international conventions. These can be specific international conventions on citizenship or more general conventions that, *inter alia*, address some issues of citizenship. As soon as States undertake certain commitments as regards the questions of citizenship, they voluntarily accept the limitations that a convention imposes on their autonomy. The reduction of statelessness has been one of the aims of all the international conventions on citizenship.

The first multilateral international convention on citizenship was the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.[71] The convention is formally binding only on 21 States. Articles 1 and 2 confirm the principle of national autonomy, Article 3 provides that in case of multiple nationalities States Parties can, on their own territory, give precedence to their own nationality (the principle of exclusivity).[72] Article 4 relates to multiple nationalities and the exercise of diplomatic protection against the (other) national State(s) of the person concerned. Article 6 limits the freedom of States to deny the renunciation of citizenship in certain cases. Articles 8 – 11 limit the effects of marriage as to the nationality of

[67] There is substantial authority for a general recognition of the principle of prohibition of arbitrary deprivation of nationality as part of customary international law. The principle is laid down in a number of conventions on human rights. Kay Hailbronner, 'Nationality in Public International Law and European Law' in Rainer Bauböck, *Acquisition and loss of nationality: Policies and trends in 15 European States* (Amsterdam Univ. Press 2006).
[68] De Groot and Vonk, *International Standards* (n 35) 45. This is further discussed *infra* 3.2; Crawford (n 2) 522. See, *e.g.*, David Fitzgerald, 'The History Of Racialized Citizenship' in Ayelet Shachar, Rainer Bauboeck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 129. See also Dimitry Kochenov, *Citizenship* (The MIT Press 2019, forthcoming) 8, stating that citizenship 'has always played a crucial role in policing strict arbitrary boundaries of exclusion, particularly on the basis of race and sex'.
[69] De Groot and Vonk, *International Standards* (n 35) 45.
[70] New York Convention on the Elimination of All Forms of Discrimination against Women (UNTS Vo1. 249, 13); 1989 Convention on the Rights of the Child (UNTS Vol. 1577, 3); Articles 8 and 14 of the European Convention of Human Rights (ECHR). See *Genovese v. Malta*, Application no. 53124/09. Sironi (n 2) 60.
[71] LNTS Vol. 179, 89.
[72] Consequently, the principle of exclusivity may be also regarded as a confirmation of national authonomy. If a State does not have to recognize a foreign nationality of its own national, it will not interest it on which grounds this foreign nationality was acquired.

married women.[73] It is also important to observe that Article 15 contains the obligation of State Parties to grant their nationality to children of parents having no nationality or having unknown nationality, born on their territory, if they would otherwise be rendered stateless.

The second important convention on citizenship was the 1957 New York Convention on the Nationality of Married Women.[74] This convention that has 75 State parties[75] forbids automatic changes of citizenship caused by marriage with a foreigner or the dissolution thereof. It was followed by the 1961 New York Convention on the Reduction of Statelessness[76] that is binding on 73 States.[77] Similarly to the Hague Convention, it stipulates in Article 1 that children born in the territory of a State Party have the right to acquire the nationality of the State of their birth, if they would otherwise become stateless. Articles 5 – 9 (subject to certain exceptions) forbid the loss of nationality if the person concerned would be rendered stateless as a consequence.

In 1963, the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality with protocols was concluded within the framework of the Council of Europe.[78] The conclusion of the European Convention on Nationality (ECN)[79] followed in 1997, being the first comprehensive convention on citizenship ever concluded. It is regarded as the most modern source of international law in the area of citizenship. The ECN has 20 State parties, 15 of them being EU Member States. The convention is of paramount importance also for States that are not (yet) parties, *e.g.* Slovenia, since it may be considered as an example of good practices. Furthermore, many convention provisions do not represent a novelty, but are rather a systemization of pre-existing rules of customary international law.

Those international conventions do no limit State autonomy as regards the possible grounds for attribution of nationality and do not impose any genuine link requirement. Their aim is not to curb State autonomy in the direction of more exclusive citizenship rules, but to the contrary – they limit State autonomy with the aim of introducing more inclusive rules with a focus on the reduction of statelessness.

[73] They were superseded by the specific and more largely accepted 1957 New York Convention on the Nationality of Married Women (UNTS Vol. 309, 65), see the following paragraph.
[74] UNTS Vol. 309, 65.
[75] <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVI-2&chapter=16&Temp=mtdsg3&clang=_en> accessed 9 August 2019.
[76] UNTS Vol. 989, 175.
[77] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en> accessed 9 August 2019.
[78] UNTS Vol. 643, 221.
[79] CETS 166.

3.2. Development of international human rights law and citizenship

The right to citizenship was proclaimed as a human right already in Article 15(1) of the Universal Declaration of Human Rights (UDHR).[80] Though the binding character of this declaration has been disputed, a large part of the declaration has been codified in international conventions and/or has become international customary law. Article 15(1) UDHR has no binding force under international law.[81] Its main shortcoming is that it does not impose the obligation to confer citizenship on any State. The situation would be different if Article 15(1) would provide for a right to the citizenship of the State of birth or to the citizenship of the parents.[82]

Article 15(1) UDHR can be regarded as a political statement, proclaiming that no one should become stateless, either because he or she would not acquire any citizenship by birth, or because he or she would lose the only citizenship he or she possesses. This compels States to draft their citizenship rules in such a way that statelessness would not occur, or at least that it would only occur in some very limited cases. Since the guarantees against statelessness in the abovementioned conventions do not 'reach' a large number of States, at least not as direct conventional obligations, it is important to note that the UDHR has been the fundament of several international conventions in the area of human rights, with a considerable number of State parties. Various international human rights conventions contain provisions regarding nationality, such as the 1966 International Covenant on Civil and Political Rights,[83] with 173 State parties,[84] the 1979 Convention on the Elimination of All Forms of Discrimination against Women[85] having 189 State parties,[86] and the 1989 Convention on the Rights of the Child[87] that has 196 State parties.[88]

Even the European Convention on Human Rights (ECHR), which does not contain the right to citizenship, has implications for the citizenship regulations of the Member States of the Council of Europe. It follows from the decision of the European Court of Human Rights in the case *Genovese v. Malta*[89] that legitimate and illegitimate children must be treated equally as regards the access to nationality. Genovese was an illegitimate child of a British mother and a Maltese

[80] General Assembly Resolution 217 A of December 10th 1945. See over the right to nationality Sironi (n 2) 58-61.
[81] Mirna Adjami and Julia Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27(2) Refugee Survey Quarterly 93; De Groot and Vonk, *International Standards* (n 35) 41.
[82] cf ibid, and the literature cited by those authors.
[83] UNTS Vol. 999; 171.
[84] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 9 August 2019.
[85] UNTS vol. 1249, 13.
[86] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en> accessed 9 August 2019.
[87] UNTS 1577 vol. 3.
[88] <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 9 August 2019.
[89] *Genovese v. Malta*, Application no. 53124/09.

father. According to Maltese rules on the acquisition of nationality, Genovese did not acquire Maltese nationality by birth, because he was born out of wedlock, meanwhile a legitimate child of a Maltese father acquired Maltese nationality *ex lege* by birth. The Court ruled that those rules infringed the right to *private life* under Article 8 and the *prohibition of discrimination* under Article 14 ECHR.

It can be concluded that human rights law considerably supplemented the relatively scarce body of specific conventions on nationality, especially as regards the attempts to fight statelessness. To this end, as aforementioned, the prohibition of arbitrary[90] deprivation of citizenship is regarded as a limitation of State autonomy in the field of nationality imposed by international human rights law. This prohibition has already been governed by Article 15(2) UDHR, and has been confirmed by the UNCHR 'Tunis Conclusions' 2014 that considered it as part of international customary law. It follows from the prohibition of arbitrary deprivation of nationality that any loss of nationality must be established by law that is applied in a non-discriminatory way, must serve a legitimate purpose and be proportionate. The procedure leading to the decision on the loss of nationality must comply with requirements of due process of law under international human rights law and the decision must be subject to effective legal remedies.[91] Thus, also limitations of State autonomy imposed by international human rights law require more inclusive, and not exclusive, national rules on citizenship.

4. EU Citizenship and its relationship with the citizenship of the Member States

The citizenship of the Union was first introduced in the Maastricht Treaty concluded in 1992,[92] though it had been the result of a longer process embedded in the history of free movement of workers.[93] Article 8(1) of the Treaty Establishing European Community (TEC) read: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union'.

The concept of citizenship *of* the Union, as introduced by the Maastricht Treaty, has been referred to as 'a purely symbolic status, redolent of rights without identity, and of access without belonging'.[94] Nevertheless, the 'codification' of the EU citizenship in the Treaty raised

[90] See also Crawford (n 2) 522 – 523.
[91] De Groot and Vonk, *International Standards* (n 35) 46.
[92] Treaty on the European Union [1992] OJ C191.
[93] On EU citizenship, see *e.g.* Dimitry Kochenov, 'The Cherry Blossoms and the Moon of European Citizenship' (2013) 62 International and Comparative Law Quarterly 97; Dimitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 European Law Review 369; Dora Kostakopoulou, 'European Union Citizenship: Writing the Future', (2007) 13(5) European Law Journal 623; Francis G. Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13 European Law Journal 591; Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 International and Comparative Law Quarterly 97–136.
[94] Jo Shaw, 'Citizenship: contrasting dynamics at the interface of integration and constitutionalism' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 276; Willem

concerns in several Member States that the EU citizenship would encroach upon their national autonomy in matters of citizenship. Therefore a Declaration on Nationality of a Member State was attached to the Maastricht Treaty that read: '... the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.'[95]

Denmark, that appeared to have the biggest concerns about the EU citizenship, which allegedly contributed to the initial Danish rejection of the Maastricht Treaty,[96] made a specific declaration on the occasion of the ratification of the Maastricht Treaty, making clear that 'Citizenship of the EU is a political and legal concept which is entirely different from the concept of citizenship' in Denmark and that there is no Treaty basis for the creation of 'citizenship of the Union in the sense of citizenship of a nation-state.'

The European Council reacted with a statement that confirmed the principle already stated in the Declaration on Nationality of a Member State. These declarations made it clear that the EU Citizenship was not intended to replace the citizenship of the Member States, but was a mere consequence of the possession of a Member State citizenship. The Amsterdam Treaty,[97] a second sentence to the (renumbered) Art. 17(1), reading: 'Citizenship of the Union complements and does not replace national citizenship.' While the Treaty of Nice did not change the wording of the citizenship of the EU provision, the Intergovernmental Conference in Nice still brought an important novelty for the concept of the citizenship of the EU – the proclamation of the (still non-binding at the time) Charter of Fundamental Rights of the EU. It contains a special Chapter on citizens' rights, comprising both free movement rights and political rights enumerated by the Treaty.[98]

The Charter of Fundamental Rights of the EU became legally binding almost a decade later with the entry into force of the Lisbon Treaty. At the same time, Article 17 TEC became Article 20 of the Treaty on the Functioning of the EU (TFEU). The wording of this provision was changed again and now reads:

Maas, 'Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union' (2009) 15(2) Colum. J. Eur. L. 265.

[95] Declaration (No 2) on Nationality of a Member State, annexed to the Treaty on European Union [1992] OJ C191/98.

[96] Daniel Thym, 'The Evolution of Citizens' Rights in Light of the EU's Constitutional Development' in Daniel Thym (ed), *Questioning EU Citizenship* (Hart Publishing 2017) 111–134.

[97] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts [1997] OJ C340.

[98] On the relation between EU citizenship and EU fundamental rights, see, *e.g.*, Sara Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 ELJ 464; Martijn van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39(2) Legal Issues of Economic Integration 273-290; Gareth Davies, 'The Right to Stay at Home: A Basis for Expanding European Family Rights', in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 468. For an early account, see Siofra O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32(2) CML Rev 519.

> 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'

This is reiterated in Article 9 TEU. In the wake of these changes, the aforementioned Declaration on Nationality of a Member State as attached to the Maastricht Treaty was removed as an annex to the TEU with the Lisbon Treaty's entry into force.

EU law does not govern any rules on the acquisition and loss of the EU citizenship (the internal aspect of State autonomy). It is entirely dependent on the possession of the nationality of a Member State. Thus, Article 20 TFEU gives Member States the power to control access to Union citizenship. By expressly replacing the 'complementary nature' of the citizenship of the EU with 'being additional' to national citizenship, Member States stressed that the citizenship of the EU shall not be understood as a concept which is independent of national citizenship. Against this background, the EU citizenship has been seen as 'paradoxical in its nature', since it is constitutionalised in the EU's treaty framework, yet dependent upon the nationality of a Member State 'to provide the gateway' or 'a connecting factor'[99] to membership.[100] Therefore, it has been referred to also as a '*ius tractum*', and thus as a 'derivative status'.[101] However, in its decisions, the Court keeps repeating that EU citizenship is 'destined to be' or 'intended to be' *the fundamental status of nationals of the Member States*.[102] Yet, the substance and meaning of this fundamental status is difficult to grasp from the CJEU's judgments. Academics have questioned its true added value to the existing general prohibition of discrimination and four freedoms of the internal market.[103]

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[99] Jessurun d'Oliveira, 'Union citizenship and Beyond' (n 11).
[100] Jo Shaw, 'EU citizenship: still a fundamental status?' (2018) EUI Working Paper RSCAS 2018/14 1.
[101] Kochenov, '*Ius Tractum*' (n 39) 169.
[102] See Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2000:518, para 31; Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*, ECLI:EU:C:2007:771, para 32; Case C-50/06 *Commission v. the Netherlands*, ECLI:EU:C:2007:325, para 32. See Gerard-René De Groot, 'Towards a European Nationality Law' in Hildegard Schneider (ed), *Migration, Integration and Citizenship: A Challenge for Europe's Future*. Volume I (Forum Maastricht 2005) 28–230; Cambien, 'Union Citizenship' (n 61) 15.
[103] Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2911) 17(1) ELJ 1; Dimitry Kochenov, 'The Right to Have What Rights?' (2013) 19(4) ELJ 502–516; Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47(6) CML Rev 1597; Martijn van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test', in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 85. cf. Koen Lenaerts and José A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears', in Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017); Annette Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?' (2008) 15(1) Maastricht Journal of European and Comparative Law 55.

Although Member States used cautious wording in the Treaties to shield their competence in nationality matters, linking the EU citizenship to the nationality of Member States had been a voyage into unchartered waters. As the *Rottmann* case disclosed, 'tying Union citizenship to national citizenship was not just an act of legal dependency, but also one of legal colonialism, allowing the Court of Justice to engage and supervise yet another field of national law.'[104]

In essence, the catalogue of rather limited rights tied to the EU citizenship comprises two sets of rights: the free movement rights and political rights of EU citizens. The list of rights found in TFEU confirms an older trend in the EU citizenship or part of the pre-history of the EU citizenship: its market citizenship legacy.[105] Thus, it has been mostly ascribed to *mobile* EU citizens.[106] The impact of EU citizenship on nationals of the Member States who have not exercised their free movement rights is to a great extent still unclear.[107] The Court expressly recognized in *Grzelczyk* that the basis or essence of Union citizenship in law has been an equal treatment law or the non-discriminatory approach.[108]

Interestingly, the introduction of the concept of Union citizenship brought a significant change in the traditional dichotomy between own citizens and foreigners. In the EU, the nationality has (to a large extent) lost its primary function, that is to serve as the criterion for the differentiation between privileged own citizens and non (or considerably less) privileged foreigners. The really relevant distinction is between EU citizens and third country nationals. The gap between these two categories has become even larger. Numerous third country nationals permanently residing in the EU are excluded from the status of EU citizens and they are largely left within the realm of the national law of the Member States.[109] Also the access

[104] Damian Chalmers, Gareth Davies and Giorgio Monti, *Euroepan Union Law* (CUP 2016) 474, referring to Karolina Rostek and Gareth Davies, 'The impact of Union citizenship on national citizenship policies' (2006) 10 European Integration Online Papers <http://eiop.or.at/eiop/pdf/2006-005.pdf> accessed 1 August 2019; Dimitry Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) EUI Robert Schuman Centre for Advanced Studies Paper No 23/201.

[105] For the problematization 'of the inescapable commodification of the individual at play in the context of the framing of the key personal legal status in EU law as 'Market Citizenship'', see Dimitry Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019) 217–230. For earlier accounts on market citizenship, see Nic Shuibhne, 'The Resilience' (n 103) and the Opinion of Advocate General Poiares Maduro in case C-446/03, *Marks & Spenser plc v. Halsley*, ECLI:EU:C:2005:201, para 37, claiming that the successful EU integration presupposes the need 'to reconcile the principle of respect for state competences and the safeguarding of the objective of establishing an internal market in which the rights of citizens are protected'.

[106] Dora Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56(4) JCMS 856.

[107] See also Shaw, 'Citizenship: contrasting' (n 94) 576.

[108] *Grzelczyk*, para 31; Shaw, 'Citizenship: contrasting' (n 94) 576.

[109] cf Kochenov, 'Rounding up the Circle' (n 104) 12, 22; see also, e.g. Theodora Kostakopoulou, 'Nested 'Old' and 'New' Citizenships in the European Union: Bringing out the Complexity' (1999) 5

to the Member State nationality of their residence, and therewith to the EU citizenship, is more difficult for third country nationals than for citizens of other Member States.[110]

5. Limitations of national autonomy in EU law

The citizenship of the EU and the nationality of the Member States are two independent legal concepts, yet they are closely connected.[111] The EU does not provide for its own rules on the acquisition and loss of the Union citizenship, it is 'dependent' on the national laws of the Member States. It is the Member States that indirectly, through the application of their own citizenship rules, decide about the acquisition and loss of the EU citizenship. Consequently, the Member States by their national rules on nationality do not only decide to whom they will grant the rights attached to the nationality in their internal legal systems, but also who will enjoy the rights under EU law, attached to the possession of the EU citizenship. This is a significant difference as compared to national citizenship rules in international law.

As it was explained above, the Member States were very reluctant to confer to the EU institutions any part of their sovereign rights as regards nationality. Therefore, at least on the level of the primary and secondary legislation, EU law does not encroach upon the national autonomy of the Member States because of the lack of competence, unless, as argued by Sarmiento, 'objective difficulties arise and are properly argued by the EU to take measures by way of Article 352 TFEU'.[112] Yet it would be desirable to adopt at least common minimum standards for the acquisition and loss of the Member States nationalities at the EU level to

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Colum. J. Eur. L. 389; Matthew J Gibney, 'The Rights of Non-citizens to Membership' in Caroline Sawyer and Brad K Blitz (eds), *Statelessness in the European Union* (CUP 2011) 41; Daniel Thym and Margarite Zoeteweij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill/Nijhoff 2015). Some examples of EU secondary acts important for the third country nationals are Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16, and Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251.

[110] See *infra* 5.4. However, Sara Iglesias Sánchez has shown that the EU competences framework allows for a deeper involvement of EU law in the determination of the rights of third country nationals than of the rights of Union citizens. Sara Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15(2) European Journal of Migration and Law 137–153.

[111] cf the Opinion of AG *Poiares Maduro* in the *Rottmann* case, ECLI:EU:C:2009:588, para 23. For early accounts, see Carlos Closa, 'The Concept of Citizenship in the Treaty of European Union' (1992) 29(6) CML Rev 1137. EU citizenship could be described as a bundle of rights that should not be compared to national citizenship. As argued by Rainer Bauböck, 'The Three Levels of Citizenship within the European Union' (2014) 15(5) German Law Journal 751, is a constitutive element or a prerequisite of EU citizenship and therefore cannot serve as an external standard of comparison.

[112] Sarmiento (n 49) 3. According to this provision, the EU can enact legislative measures 'if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers'.

ensure that some minimum guarantees are observed in granting a ticket to equal treatment in all other Member States.[113] Such a harmonization would be a limitation of sovereign rights of the Member States, but at the same time, it might serve their interests as well.

It is true that the acquisition of national citizenship is not entirely autonomous, as the Member State need to lay down rules subject to due regard to EU law (see *infra* 4.3.). This requirement comprises also the observance of the principle of sincere cooperation (Article 4(3) TEU) and the respect of the Union's fundamental values listed in Article 2 TEU that need to be observed by Member States.

Against this background, the European Parliament and the Commission stressed that selling of a Member State citizenship, and thus EU citizenship, violates these values.[114] In what follows, EU law limitations on the national autonomy in matters of citizenship will be examined to determine whether investment migration schemes are compatible with EU law.

5.1. Unconditional recognition of Member State nationality

The aforementioned CJEU's decision in *Micheletti* seems to impose on the Member States an unconditional obligation to recognise any grant of nationality by another Member State.[115] It is noteworthy to repeat that the CJEU did not apply the genuine link test and the *Nottebohm* case was not mentioned even by the parties. Thus, the CJEU emphasised the principle of State autonomy in matters of citizenship and implicitly rejected the genuine link criterium, which the Commission obviously refuses to see. In the 2019 Report, the Commission does not even mention the principle of State autonomy or the question of competence in citizenship matters in the EU, but refers to inapposite concepts 'genuine link', 'genuine connection' or 'genuine bond' several times.[116] Thus, the Commission creates a narrative that is at odds with established principles of international and EU law.

Micheletti had dual citizenship; one of a Member State and one of a non-Member State. What if the person concerned has citizenships of two or more Member States? Under general international law, each of the national States may treat such a person as if he or she would be only its citizen. This so-called principle of exclusivity was codified in Article 3 of the 1930 Hague

[113] Matjaž Tratnik, *Pravo državljanstva* (GV Založba 2018) 98–99. For the discussion on limited possibilities for such harmonization due to the lack of EU competence, see Sarmiento (n 49). cf Jelena Džankić, 'What's in the EC's report on investor citizenship?' (GLOBALCIT, 23 January 2019) <http://globalcit.eu/whats-in-the-ecs-report-on-investor-citizenship/> accessed 1 September 2019. Džankić claims that defining basic minimum standards for residence, harmonisation of security screening, and scrutiny of non-public bodies involved in nationality acquisition is a reflection of the ideas of solidarity and due regard to EU law stipulated in the Treaties, although there is no legal basis in the Treaties for such EU action.

[114] For different perspectives on 'citizenship for sale', see Bauböck, *Debating* (n 10), chapters under Part I.

[115] See also, *e.g.*, Cambien, 'Union Citizenship' (n 61) 11.

[116] See Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 9).

Convention as well as in national legislations.[117] However, the CJEU decided in the *Garcia Avello* case[118] that this does not apply in the EU context. The case was about the surname of two children of a Belgian mother and a Spanish father and possessed Belgian and Spanish citizenship. The Belgian authorities registered the surname of the children pursuant to compulsory Belgian rules, and denied the request to change the surnames of the children, *inter alia* by invoking Article 3 of the 1930 Hague Convention. The Court ruled that Belgium infringed Articles 12 and 17 TEC [now 18 and 20 TFEU], which preclude a refusal to grant an application of a minor having dual nationality to bear 'the surname to which they are entitled according to the law and tradition of the second Member State.' As to Article 3 of the Hague Convention, the Court ruled that it does not contain an obligation but only stipulates the option that States parties give precedence to their own citizenship.

5.2. The principle of proportionality

It follows from the dictum 'due regard to European Union law' from the *Micheletti* decision that Union law sets direct limitations to the competence of the Member States to determine their rules on nationality. Such is true, both with regard to their competence to lay down rules concerning acquisition of nationality as well as to their competence to lay down rules concerning loss of nationality. Since there are no express rules or limitations in the primary and secondary EU legislation, it must be the principles of Union law that provide for limitations of the national autonomy. Even though the Court kept repeating its enigmatic dictum in several decisions,[119] it had not clarified its meaning. It remained unclear which principles of Union law must Member States respect as regards their nationality laws. It also never found a Member State's nationality legislation to be in breach of Union law.[120] The issue remained unclear for almost twenty years, namely until the CJEU decision in the *Rottmann* case in 2010.[121]

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[117] See *e.g.* Article 2 of the Slovenian Citizenship Act (n 40).
[118] Case C-148/02, *Carlos Garcia Avello v Belgian State*, ECLI:EU:C:2003:539 (*Garcia Avello*).
[119] Case C-179/98, *Belgian State v Fatna Mesbah*, ECLI:EU:C:1999:549; Case C -192/99, *The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur*, ECLI:EU:C:2001:106; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, ECLI:EU:C:2004:639 (*Zhu and Chen*). See, e.g., Bernhard Hofstotter, 'A Cascade of Rights, or Who Shall Care for Little Catherine? Some Reflections on the Chen Case' (2005) 30 European Law Review 548. In *Kaur*, the claimant claimed that the UK deprived African Asians of EU and *de facto* UK citizenship in violation of international law and human rights principles. Kochenov and Plender argued that '[a]lthough this is well-documented common knowledge, especially following the United Kingdom's defeat in Strasbourg on this issue and a subsequent public apology by the UK Prime Minister in front of such people as Mrs Kaur (brought several years after Kaur was decided but demonstrating the extent of the problem), the ECJ did not take any human rights arguments into account in the case.' Kochenov and Plender (n 93) fn 123.
[120] Such might have been the case with Malta in 2014, if it had not adapt its Citizenship-for-sale-programme in accordance with the requirements of the European Commission.
[121] Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, ECLI:EU:C:2010:104 (*Rottmann*). For the case annotations see, *e.g.*, Dimitry Kochenov, 'Case C-135/08, Janko Rottmann v Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) CML Rev 1831–1846; Gerard

Dr. Janko Rottmann was an Austrian citizen by birth. In 1995, criminal proceedings were initiated against him in Austria, because of major frauds. In the same year he moved to Germany and in 1999 acquired the German citizenship by naturalisation. Pursuant the Austrian law he automatically lost his Austrian citizenship.[122] A short time after the naturalisation the Austrian authorities informed the German authorities about the criminal proceedings against Rottmann in Austria, and the competent German authority (the *Freistaat Bayern*) withdrew Rottmann's naturalisation with retroactive effect, since he obtained the German citizenship by fraud. Rottmann appealed against the withdrawal, because it would render him stateless, meanwhile the criminal proceedings in Austria would make it extremely difficult to regain the Austrian citizenship.[123] The CJEU had to answer the question whether the loss of the German citizenship which would cause statelessness was in accordance with EU law and in particular with the rules on the EU citizenship. The view of the German and Austrian Government, as well as of the European Commission, was that this case falls out of the scope of EU law because it was a purely internal situation between the German State and its citizen. The Court, however, dismissed this argument, stating:

> 'The situation of a citizen of the Union who [...] is faced with a decision withdrawing his naturalisation [...] placing him [...] in a position capable of causing him to lose the status conferred by Article 17 EC [now 20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.'[124]

The Court found that deprivation of citizenship that has been acquired by fraud is not contrary to EU law and in particular to Article 17 EC [now 20 TFEU] even if it amounts to statelessness. Such is also allowed under the general international law.[125] It stressed, however, that the authorities of a Member State taking a decision in such a case, must observe the principle of proportionality under Union law, and where applicable, under national law.[126]

Since the withdrawal of the German nationality was not final, and no decision about the recovery of Rottmann's original nationality has been adopted in Austria, the Court could not answer the question whether or not Austria is under EU law obliged to interpret its domestic

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René de Groot and Anja Seling, 'Decision of 2 March 2010, Case C-135/08, Janko Rottmann v Freistaat Bayern – Case Note II – The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters' (2011) 7 European Constitutional Law Review 150–60; Hans Ulrich Jessurun d'Oliveira, 'Decision of 2 March 2010, Case C-135/08, Janko Rottmann v Freistaat Bayern – Case Note I – Decoupling Nationality and Union Citizenship?' (2011) 7 European Constitutional Law Review 138–49.

[122] See Article 27(1) of the Austrian *Staatsbürgerschaftsgesetz* (BGBl. 1985, 31).

[123] Only the normal naturalisation procedure was possible, but his criminal past would be an obstacle for the naturalisation. See Article 10(1) of the Austrian *Staatsbürgerschaftsgesetz*.

[124] *Rottmann* (n 121) para 42.

[125] Namely under Article 15(2) UDHR, Article 8(2)(b) of the 1963 Convention on the Reduction of Statelessness and Article 4(c) ECN.

[126] *Rottmann* (n 121) paras 56–58.

legislation in order to avoid the loss of EU citizenship by allowing him to recover the Austrian nationality. Although, if the Austrian authorities would have to adopt a decision on this issue, they would have to observe the principle of proportionality. [127] The German *Bundesverwaltungsgericht* decided on November 11th 2011, [128] applying the test of proportionality, that the withdrawal of the German citizenship was final.

The decision was extensively discussed in the doctrine. Some authors welcomed it,[129] some found that the Court overstretched the reach of EU law, [130] meanwhile others found that it did not go far enough.[131]

While the *Rottmann* case was about the proportionality of a loss of nationality through a *decision of a State organ*, nine years later, the proportionality of a *Member State's legislation* on the loss of nationality was at issue in the *Tjebbes* case.[132] It concerned four applicants who were Dutch citizens, but possessed also the Swiss,[133] Canadian and Iranian nationality. When they applied for the (renewal of) Dutch passports, the Dutch authorities refused to issue them, because they established that these persons lost their Dutch nationality *ex lege*. Pursuant to Art. 15(1)(c) of the Dutch Nationality Act 1983 (hereinafter DNA), Dutch nationality is automatically lost by an adult, who possesses another nationality after having permanent residence *outside* the Kingdom of the Netherlands (which also includes the six Dutch Caribbean Islands), for an uninterrupted period of 10 years. Pursuant to a 2003[134] amendment, the Dutch nationality is not lost if the concerned person lives in another Member State of the EU. The same exception should be logically provided for as to residence in countries as to which also the principle of free movement applies, namely the EEA countries (Norway, Iceland, Liechtenstein) and Switzerland. Oddly, it is not! One of the applicants in the *Tjebbes* case, Mrs. Koopman, was born Dutch woman who exercised her free movement rights to emigrate to Switzerland by marrying a Swiss husband. If she would emigrate to Aruba and reside in the largely English speaking community in San Nicolas and marry a non-Dutch resident there, she and her daughter would remain Dutch.

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[127] *Rottmann* (n 121) para 60-63.
[128] BverwG, Case 5 C 12.10. See Carrera Nuñez and De Groot (n 10) 383–394 and their commentary on the decision, 395 – 396.
[129] Gerard-René de Groot and Anja Seling, 'The Consequences of the Rottmann Judgement on Member State Autonomy – the Court's Avant-gardism in Nationality Matters' in Shaw, *Has the European Court* (n 54) 27–31; 27–29.
[130] Jessurun d'Oliveira, 'Union citizenship and Beyond' (n 11) 1028-1033.
[131] Dimitry Kochenov, 'Two Sovereign States vs. A Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters' in Shaw, *Has the European Court* (n 54) 27–31; 27–29.
[131] Jessurun d'Oliveira, 'Union citizenship and Beyond' (n 11) 1–8.
[132] C-221/17, *Tjebbes and Others*, ECLI:EU:C:2019:189 (*Tjebbes*).
[133] Dutch/Swiss mother and her Dutch/Swiss daughter who was under age.
[134] See for the history of this amendment Gerard-René de Groot, 'Een nieuwe poging tot wijziging van de Rijkswet op het Nederlanderschap' in Hans Ulrich Jessurun d'Oliveira (ed), *Trends in het nationaliteitsrecht* (SDU 1998) 103-106; Gerard-René de Groot, 'Verder op weg naar een hernieuwd nationaliteitsrecht' (1999) Migrantenrecht 13–22.

Under Art. 16(1)(d) DNA, the Dutch nationality is also lost by minors whose father or mother lost his/her nationality under Art. 15(1)(c).[135] The 10 years period can be interrupted by the issuing of a declaration regarding the possession of Dutch nationality, a travel document or a Dutch identity card. In such cases, new period of 10 years starts to run as from the day of issue.[136] This exception is only available to adults.

The Dutch *Raad van State* (Council of State) stayed the proceedings and asked the CJEU for a preliminary ruling as regards the question whether or not the described provisions of the Art. 15 and 16 DNA that provide for an automatic loss of nationality without an individual examination, based on the principle of proportionality, are compatible with Art. 20 and 21 TFEU and Art. 7 of the Charter.[137]

AG Mengozzi found that Art. 15 is compatible with EU law mainly because the concerned person has several possibilities to interrupt the 10 years period[138] and because it is for former Dutch citizens relatively easy to regain their nationality by taking residence in the Kingdom of Netherlands, under Art. 6(1)(f).[139] Thus, he believed that these rules are compatible with the principle of proportionality. As to minors, the AG found that they should have the same right to block the loss of their nationality as their parents. Therefore he concluded to incompatibility of Art. 16(1)(d) and (2) DNA with Article 20 TFEU and Article 24 of the Charter.[140]

The Court departed partially from the Opinion of the AG. It ruled that Article 20 TFEU, read in the light of Articles 7 and 24 of the Charter, does not preclude such national legislation

> 'in so far as the competent national authorities, including national courts where appropriate, are in a position to examine, as an ancillary issue, the consequences of the loss of that nationality and, where appropriate, to have the persons concerned recover their nationality *ex tunc* in the context of an application by those persons for a travel document or any other document showing their nationality.'

In the context of that examination, it must be determined whether the loss of the nationality of the Member State concerned, when it entails the loss of the EU citizenship, 'has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of each person concerned and, if relevant, for that of the members of their family, from the point of view of EU law.'

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[135] As to minors certain exceptions provided for in Art. 16(2) are applicable.
[136] Art. 15(4) DNA.
[137] *Tjebbes* (n 132) para 27.
[138] See paras 94-97 of the Opinion of AG Mengozzi in C-221/17, *Tjebbes*, ECLI:EU:C:2018:572
[139] See para 101 of the Opinion of AG Mengozzi (n 138). This might be a realistic possibility for Canadian or Swiss citizens, but almost impossible for Iranians or nationals of other Islamic countries, as De Groot rightfully comments. See Gerard René de Groot, Verlies van de nationaliteit wegens langdurig verblijf in het buitenland: Beschouwingen over de Tjebbes uitspraak van het Hof van Justitie van de Europese Unie, Asiel- & Migrantenrecht (2019) 200.
[140] *Tjebbes* (n 132) para 149.

It is obvious, that the possibility of an individual assessment and, where appropriate, the recovery of the nationality *ex tunc* are the most important safeguards that keep a Member State's rules on the loss of nationality by the operation of the law compatible with EU law. As regards the individual assessment, the loss of nationality must be consistent with the right to family life (Article 7 of the Charter) and with the obligation to take into consideration the best interests of the child (Article 24).[141] The individual circumstances to be considered are possible limitations to the exercise of the right to move and reside freely within the territory of the Member States, in particular difficulties in continuing to travel to the Netherlands or to another Member State in order to retain genuine and regular links with family members, to pursue professional activity or to undertake the necessary steps to pursue that activity. It is moreover relevant that the person concerned might not have been able to renounce the nationality of a non-EU country,[142] and whether there is a 'serious risk, that his or her safety or freedom to come and go would substantially deteriorate because of the impossibility for that person to enjoy consular protection under Article 20(2)(c) TFEU in the territory of the third country of residence.[143] As has been rightfully pointed out by de Groot,[144] the circumstances enumerated by the Court are considerably more important for the Dutch/Iranian applicant than for the Dutch/Swiss and the Dutch/Canadian. Consequently, the end result of the case at hand might be that out of the four applicants only the Dutch/Iranian will be able to retain the Dutch nationality.

So far, for example, the Dutch Supreme Court (*Hoge Raad*) in its decision of March 27th 2015[145] rejected the appellants claims that the Dutch regulation violates EU law and the proportionality principle that should be observed as part of an individual assessment.[146] If the Dutch authorities and courts have not been entirely convinced by principles developed in *Rottmann*, *Tjebbes* gives a clear signal that the Dutch approach has been incompatible with EU law.

As regards minors, the administrative and judicial authorities must take into account the possibility that loss of nationality 'fails to meet the child's best interests as enshrined in Article 24 of the Charter because of the consequences of that loss for the minor from the point of view of EU law.'[147]

[141] *Tjebbes* (n 132) para 45.
[142] Especially if he or she lives in the country of the other nationality. Many countries allow for renouncing their nationality only in case t of residence abroad. Fulfilment of military obligations is often required, as well.
[143] Para 46. On consular protection of EU citizens, see Patrizia Vigni, 'The Right of EU Citizens to Diplomatic and Consular Protection: A Step Towards Recognition of EU Citizenship in Third Countries?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism* (CUP 2017) 584612.
[144] De Groot, Asiel- & Migrantenrecht (n 139) 200.
[145] Hoge Raad, Decision of 27 March 2015, 14/01858, ECLI:NL:HR:2015:761.
[146] ibid, para 3.7.
[147] *Tjebbes* (n 132) para 47.

The decision has been, similarly to *Rottmann*, approved by some[148] and (severely) criticised by others.[149] The CJEU has sent a clear signal to the Netherlands (and to other Member States, as well) that it would not tolerate an automatic loss of a Member State nationality, without an individual assessment of the specific situation of the person in question, as it established already in *Rottmann*. In fact, the Dutch Government must abolish the rules on automatic loss and introduce the possibility of deprivation of nationality in cases that are now covered by Art. 15(1)(c) DNA, and guarantee a fair trial. On another positive note, the CJEU underlined the importance of the fundamental rights guaranteed by the Charter as part of this individual assessment and the related examination of proportionality. The CJEU referred specifically to the right to respect for family life (Article 7 of the Charter), read in conjunction with the obligation to take into consideration the best interests of the child (recognised in Article 24(2) of the Charter).[150]

When criticizing the decision, it is important to distinguish between the Dutch regulation and the decision of the CJEU as such. The Dutch regulation, no matter how bad, unreasonable and disproportional one might consider it, is a matter of national autonomy and is in principle off limits for the CJEU. One cannot blame the CJEU for it. Moreover, the CJEU cannot decide on issues where it lacks jurisdiction. It can only interpret EU law, with regard to national legislation. Several scholars are of the opinion that the CJEU already went too far in cases regarding citizenship.[151]

Some scholars have warned against the ghost of 'bad old *Nottebohm*' finding its way into EU law. We argue that this fear is unfounded. The Court held (in English translation) that 'it is legitimate for a Member State to take the view that nationality is the expression of a genuine link between it and its nationals' and that its absence or loss can lead to the loss of nationality. Thus, the Court confirmed the principled (internal aspect of the) national autonomy in matters of nationality. This passage should not be understood as reinstating the *genuine link* criterion that the Court obviously rejected in the *Micheletti* case, as discussed above.

5.3. The principle of sincere cooperation

Next to the proportionality principle, other principles of EU law could also be infringed either by rules on the acquisition and loss of nationality of a Member State or by the application of the national nationality rules in practice. In his opinion in the *Rottmann* case, Advocate General Poiares Maduro expressly mentioned the duty to respect fundamental rights, the principle of legitimate expectations, the principle of sincere cooperation (now Article 4(3) Article TEU, also

[148] Steve Peers, 'Citizens of Somewhere else? EU Citizenship and loss of Member State Nationality' (*EU Law Analysis blog*, 27 March 2019) <http://eulawanalysis.blogspot.com/2019/03/citizens-of-somewhere-else-eu.html> accessed 1 August 2019; De Groot, Asiel- & Migrantenrecht (n 139) 197–203.
[149] Dimitry Kochenov, 'The Tjebbes Fail' (2019) 4 European Papers 1–18 and for entirely different reasons Martijn van den Brink, 'Bold, but Without Justification? *Tjebbes*' (2019) European Papers, Insight 1–7.
[150] *Tjebbes* (n 132) para 45.
[151] See *e.g.* Van den Brink, 'Bold' (n 149).

called a loyalty clause[152]) and the freedom of movement and residence (now Article 21(1) TFEU). The principle of legitimate expectations and the duty to respect fundamental rights, as Cambien argued, 'feed' the principle of proportionality in the sense that a measure concerning nationality will be more likely to be disproportionate if it infringes one of them'.[153] Thus, they are used by EU citizens as a shield against the Member States' measures affecting their nationality.

On the other hand, the principle of sincere cooperation can be used as a shield against national measures affecting nationality by other Member States and by the EU itself.[154] In this context, an Irish example sparks interest. Ireland has, after the decision of the CJEU in the *Zhu and Chen* case, changed its Nationality and Citizenship Act, because it was deemed to be too lenient. According to the old rule, everyone who was born on the island of Ireland (in the Republic Ireland or in Ulster) became an Irish citizen (so-called *birthright citizenship*). A highly pregnant Chinese woman went to Belfast to give birth to her daughter and soon after the birth they went to live in England. The CJEU ruled that the child, being an EU citizen, and her non-EU mother[155] had the right to live in the UK. After this decision, Ireland rapidly changed its legislation, also after consulting the UK. Now the Irish citizenship is only acquired if the mother has lived three years in Ireland before the birth of the child.[156] The Irish example shows that Ireland, as a Member State, also took into account interests of the UK, which was probably most affected by the former Irish citizenship regime. This can be seen as a *political* expression of the principle of sincere cooperation. While this principle also encompasses a concrete *duty* of sincere cooperation, a duty to change legislation that allows for birthright citizenship cannot be derived neither from primary or secondary EU legislation nor from the case law of the CJEU. It is the same under international law.[157]

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[152] Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

[153] Cambien, 'Union Citizenship' (n 61) 15. See also Martijn van den Brink, 'EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems' (2019) 25(1) European Law Journal 21–36; Eleanor Sharpston, 'Citizenship and Fundamental Rights - Pandora' s Box or a Natural Step Towards Maturity?' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System* (Hart Publishing 2012) 245; Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019).

[154] Costello argues that Art. 4(3) TEU 'incorporates the type of good faith considerations that under public international law may be covered under the abuse of rights doctrine'. Cathryn Costello, 'Citizen of the Union: Above Abuse?' in Rita de la Feria and Stefan Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011) 323. See also Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff & Noordhoff 1979) 110; Sironi (n 2) 54.

[155] Because the child was completely dependent on the mother (primary carer). The Court held that the mother had the right to reside with, and care for her child, as this was necessary for the child in practice to enjoy the benefit of her EU citizenship.

[156] See Section 6A(1) as amended by Act No. 38 of 2004. Hans Ulrich Jessurun d'Oliveira, 'Nudging in Europees nationaliteitsrecht' in Olivier Vonk et al (eds), *Grootboek, Liber Amicorum prof. mr. Gerard-René de Groot* (Wolters Kluwer 2016) 218.

[157] As Sloane argued, 'The unquestioned validity of both jus soli and jus sanguinis as bases for the ascription of nationality casts doubt on the genuine link theory, at least in the robust form expounded by the ICJ'. Sloane (n 49). Moreover, international law would normally limit the statelessness of

Could the principle of sincere cooperation be interpreted as empowering the EU and other Member States to claim that the acquisition of a Member State nationality has not been in accordance with EU law, and thus deny equal treatment to certain persons?[158] Based on the analogy with the reasoning of the CJEU in the cases of *Rottmann* and *Tjebbes*, discussed above, it is for national authorities and courts to ensure that in granting nationalities EU law is observed – and thus also the principle of sincere cooperation and values enshrined in Article 2 TEU. If other Member States believe that EU law has not been observed in a certain case, they could initiate the infringement proceeding against a Member State that is deemed to violate EU law with granting its nationality (either based on Arts. 258 or 259 TFEU), *e.g.* through investment migration schemes.[159]

The Commission claims in its 2019 Report that the principle of sincere cooperation could be infringed if a Member State awards nationality 'absent any genuine link to the country or its citizens'.[160] Thus, citizenship by investment schemes could possibly be incompatible with the principle of sincere cooperation, because other Member States have to grant EU citizenship rights to persons, who acquired their Member State nationality under such schemes.[161] This issue is extensively discussed by Kälin, [162] where he convincingly argues that no such incompatibility exists. We would like to draw attention to some more arguments that shed light on the Commission's inconsistent approach to State autonomy in matters of nationality.

Firstly, the only examples of attribution of Member State nationality incompatible with EU law that can be found in the doctrine and in the opinions of Advocates General (the CJEU never mentioned one) are mass naturalizations[163] and where a Member State would without prior

children under the 1961 Convention on the Reduction of Statelessness, thus requiring states to follow the *ius soli* rule in the case of all children who have not acquired any nationality at birth. See Kochenov, *Citizenship* (n 68) 69.

[158] For a discussion in the context of investment migration schemes, see Jo Shaw, 'Citizenship for Sale: Could and Should the EU Intervene?' in Bauböck, *Debating* (n 10) 63-64; see also Kudryashova (n 10).

[159] See Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 9). See a detailed analysis of this report by Kochenov, Kochenov, 'Investor Citizenship' (n 8). Kudryashova persuasively argues that investment migration schemes do not necessarily violate EU Law. Kudryashova (n 10). See very extensively about investment migration schemes Kälin (n 10).

[160] Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 8) 6, fn. 31.

[161] ibid 9-10.

[162] Kälin (n 10) 136–141.

[163] cf the Opinion of AG Poiares Maduro in *Rottmann*, ECLI:EU:C:2009:588, para 30. An example of a 'justified' mass naturalisation could be the reunification of the two German States after the fall of the Berlin wall, as argued by Jessurun d'Oliveira. De Groot disagrees with his opinion and claims that based on the German Declaration on nationality made in 1957, the entire population of DRG already belonged to the group of persons that were German for EU purposes. See De Groot, 'Towards' (n 10) 26. This situation could be roughly compared to the situation of Turkish Cypriots, who are considered citizens of the EU as the EU considers them Cypriot citizens. See, *e.g.*, <https://ec.europa.eu/cyprus/about-us/turkish-cypriots_en> accessed 1 August 2019; Shaw, 'Citizenship for Sale (n 158) 33; Kälin (n 10) 144.

consultation confer its citizenship to a large, disproportionate number of non-EU citizens.[164] Citizenship by investment schemes obviously do not fit in the described frame. They are operated on a very small scale[165] and also the total numbers of naturalizations per 1,000 inhabitants remain low. In 2017 Malta issued 4.2 citizenships per 1,000 inhabitants, and Cyprus issued 6.4 citizenships, which was less than Luxemburg (8.4) and Sweden (6.9) who were at the top of the list.[166]

Secondly, investment migration schemes are based on the economic relevance of a certain foreigner for the naturalizing State. When discussing such schemes, one must also take into account that several other Member States apart from Cyprus, Malta and Bulgaria provide for a privileged naturalization in 'national interest' of scientists and other persons that are important for the naturalizing Member State for some reasons, including economic.[167]

Thirdly, since the main legal argument against citizenship by investment schemes is that privileged naturalization is offered to persons with no or very weak connection with the naturalizing Member State (persons with no 'genuine link'), it should be stressed again that genuine link is not a requirement for the attribution of nationality under international nor under EU law.[168] This fits squarely with the opinion of Advocate General Poiares Maduro that '[c]itizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of peoples of the Union'.[169] Moreover, there are other grounds for naturalization of persons, lacking 'genuine link', that have raised no concern thus far. Several Member States provide for the acquisition of nationality *iure sanguinis* if one of the parents is a national of that Member State, even by birth abroad.[170] In cases of emigrants

[164] Carrera Nuñez (n 9); AG Maduro in *Rottmann* (n 163); Kälin (n 10) 144.
[165] In 2018, the total number of approvals since 2014 was 961. See <https://www.ccmalta.com/news/malta-citizenship-by-investment-programme-statistics-2018> accessed 1 August 2019.
[166] Eurostat, 'Acquisition of citizenship statistics' (2019) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Acquisition_of_citizenship_statistics> accessed 1 August 2019.
[167] See *e.g.* Art. 10(6) of the Austrian Nationality Act, Art. 12 of the Croatian Nationality Act, Art. 10 of the Estonian Nationality Act, Art. 21-12 and 21-26 of the French Nationality Act, Art. 4(7) of the Hungarian Nationality Act, Art. 8(2)(d) of the Romanian Nationality Act, Art 7(2)(b) of the Slovakian Nationality Act; Art 13(1) of the Slovenian Nationality Act.
[168] See supra sections 2 and 5.1. See as regards Malta the obviously juridically and politically incorrect statement of ex vice-president of the Commission Vivianne Reding, in its speech 'Citizenship must not be up for sale', Plenary Session debate of the European Parliament on 'EU citizenship for sale', Strasbourg, 15 January 2014 <https://europa.eu/rapid/press-release_SPEECH-14-18_en.htm> accessed 1 August 2019.
[169] Opinion of Advocate General Poiares Maduro in Case C–499/06, *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, ECLI:EU:C:2008:132, para 23.
[170] See *e.g.* Art. 7 of the Austrian Nationality Act, Art. 8 of the Bulgarian Nationality Act, Art. 3(a) of the Czech Nationality Act, Art. 3(1) of the Dutch Nationality Act, Art. 8 of the French Nationality Act, Art. 1(1)(a) of the Italian Nationality Act, Art. 5(2)(b) of the Romanian Nationality Act, Art. 17(1)(a) of the Spanish Nationality Act.

overseas, the nationality of a Member State may pass over to their grandchildren or even to more distant descendants, with absolutely no real link to the Member State in question. Micheletti for example, 'inherited' his Italian and EU citizenship from his grandfather.

In fact, several Member States provide for fast track naturalizations of 'co-ethnics', *e.g.* descendants of emigrants from those Member States, members of their national minorities outside the EU (*e.g.* Hungarians from Serbia, Germans from Eastern Europe, Bosnian Croats, *etc.*).[171] Obviously, naturalization in Hungary or in Croatia would not be sought with the intention to settle down in those two countries but rather serves as a 'free ticket' to Germany or Austria. Kälin[172] speaks about over 3 millions of 'new' Germans mainly from Soviet Union, over a million Italians from Argentina, hundreds of thousands of 'new' Hungarians living in Ukraine, Romania, Serbia and other countries. All those cases have raised no objections.

Lastly, the objections against investment migration schemes are to a considerable extent fed by fears of other Member States that such schemes serve to evade taxation, and also enable 'problematic' persons (*e.g.* with criminal background) to acquire EU citizenship that enables such persons to settle down anywhere in the EU.[173] However, such schemes are carried out with due diligence and on a small scale.[174] Moreover, Member States do not have the obligation to accept on their territory everybody possessing the EU citizenship. Directive 2004/38 enables them to refuse entry and/residence in certain cases.[175]

In this context, the anxiety of some European political institutions regarding citizenship by investment seems to be an attempt to regulate national rules on the acquisition of citizenship despite both lack of competence and of a legitimate aim.

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[171] See *e.g.* Art. 116 of the German Constitution, Art. 15(1) of the Bulgarian Nationality Act, Art. 16 of the Croatian Nationality Act, Art. 21-20 of the French Nationality Act, Art. 4(3) of the Hungarian Nationality Act, Art. 17bis of the Italian Nationality Act, Art. 10(1) of the Romanian Nationality Act, Art. 12 and 13 of the Slovenian Nationality Act, Art. 22 of the Spanish Nationality Act. On extraterritorial naturalization see Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction' (2010) German Yearbook of International Law 53.

[172] Kälin (n 10) 144.

[173] See European Parliament, 'Resolution of 16 January 2014 on EU citizenship for sale' (n 11) paras J, L.

[174] See Kudryashova (n 10); Kälin (n 10) 159-164. Kälin highlights that Malta has some of the strictest due diligence standards of any immigrant investor program in the world, using Interpol and engaging sources also from the International Criminal Court.

[175] See, *e.g.*, Niamh Nic Shuibhne, 'Derogating from the Free Movement of Persons: When Can EU Citizens Be Deported?' (2006) 8 Cam. YB Eur. L. 187. Kochenov argues that 'EU law, through the European Arrest Warrant, deactivated what is usually perceived of as one of the last remaining purely citizenship — as opposed to human — rights: the right not to be deported.' Dimitry Kochenov, 'The Citizenship of Personal Circumstances in Europe' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Bloomsbury/Hart 2017) 49.

Back to the 2019 Commission report. It should be noted that with its appalling approach to the question of the compatibility of investment migration schemes with EU law in its Report, the Commission itself could legitimately be seen as in breach of the principle of sincere cooperation,[176] which is closely linked to the principle of conferral.[177] The Commission has omitted any reference to the principle of State autonomy in matters of citizenship under international law or to the question of competences in the nationality matters in the EU, while at the same time it relied heavily on the genuine link criterium that has not been applied by the CJEU in its case law and has been also rejected in the international law context.

The Commission built a narrative that is not underpinned by valid legal arguments. This narrative is then used to justify the Commission's encroachment on the matters that are not in the competence of the EU, and in so doing, to selectively attack certain national rules on investment migration schemes. By employing the genuine link rhetoric, the Commission tries to depict these schemes as an example of a grave violation of EU law. In so doing, it could be seen as extending the EU's constitutional tactic of humiliating the Member States, as articulated by Gareth Davies.[178]

5.4. Indirect influence of EU law on the national autonomy of the Member States

Until now the question was discussed in how far the national autonomy of the Member States in matters of nationality is limited by obligations arising from EU law. In what follows, the extent to which the Member States let EU law, the concept of EU citizenship especially, influence their national rules, will be analysed. Does the fact that the Member States are closely connected, and dependent on each other through EU citizenship, also influence their rules on the acquisition and loss of nationality? One might expect, for example, that the Member States naturalisation requirements would be more favourable for EU citizens than for nationals of third countries.[179] Some Member States have indeed facilitated the naturalisation of EU citizens. Italy

[176] See also Kochenov, 'Investor Citizenship' (n 8).
[177] The Lisbon Treaty introduced a new Article 13(2) TEU which underlines the horizontal application of loyalty and expressly requires the EU institutions to display loyalty when exercising their powers, using the same language as provided in Article 4 (3) TEU on the mutual duties of Member States and Union institutions. Another similarity with Article 4(3) TEU is the principle of conferred powers stated in both provisions. Klamert (n 152) 12.
[178] Gareth Davies, 'The Humiliation of the State as a Constitutional Tactic', in Fabian Amtenbrink and Peter van den Berg (eds), *The Constitutional Integrity of the European Union* (Springer 2010) 147.
[179] See Dimitry Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality' in Niamh Nic Shuibhne and Laurence W. Gormley (eds), *From Single Market to Economic Union* (OUP 2012), stating that 'as long as the importance of European integration is growing it becomes much less important whether the Union actually has competence in regulating a certain area, since the national regulation by the Member States will necessarily take the changing reality into account, adapting national law to the Internal Market.' See also Andrew Evans, 'Nationality Law and European Integration' (1991) 16 European Law Review 190. See also Gerard René de Groot, 'The Relationship between Nationality Legislation of the Member States of the European Union and European Citizenship' in Massimo la Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International

requires residence of only four years instead of ten, Romania residence of four years instead of eight.[180] Austria knows similar rules.[181] Another benefit awarded to the EU citizens are loosened requirements as regards the renunciation of the original nationality that can be found in the Nationality Acts of Germany, Latvia and Slovenia.[182]

Also traditional grounds for the loss of nationality such as public service in another State or even military service in another State might not cause the loss of nationality if this service is in another Member State. Similar can be said as to the voluntary acquisition of the nationality of another Member State. Above has already been mentioned the example of the Netherlands that amended its Nationality Act as regards the loss of citizenship due to long-term residence abroad if the residence is taken in another Member State.

Another indirect influence of EU law on national legislation, albeit not related to national rules on the loss/acquisition of nationality of a Member State, is reflected in its spill-over effect on national rules that interfere with the rights of EU citizens.[183] There is a clear link between the status of EU citizenship referred to in Article 20 TFEU and the rights of free movement and residence, governed by Article 21 TFEU, and further specified by the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[184] To this end, as argued by Bauböck, 'the control that the

1998) 115; Rostek and Davies (n 104); Richard Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12 Citizenship Studies 598.

[180] See Article 9(1)(d) of the Italian Act No. 91/92 (L. 5 February 1992, n. 91, as amended by Act No. 94/2009) Article 8(2)(b) of the Law on Romanian Citizenship no. 21/1991 (as amended by L. nr.112/2010, 17 June 2010)

[181] To nationals of all Member States of the EEA, a period of 6 instead of 10 years applies. See Art. 11(4)(2) of the Austrian *Staatsbürgerschaftsgesetz*.

[182] See Jessurun d'Oliveira, 'Nudging' (n 156) 222–223.

[183] While these rules used to be conceptualised as rules that applied in purely internal situations, under the new approach, as argued by Kochenov, it is the intensity of the Member States' interference with the rights of EU citizens, and not the borders, which triggers the application of EU law. Dimitry Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18 Colum. J. Eur. L. 55. See also, *e.g.*, Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 39(4) CMLRev 731; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35(1) Legal Issues of Economic Integration 43, 44; Sara Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) 14(1) European Constitutional Law Review 7–36; Koen Lenaerts, '"Civis europaeus sum": From the Cross-Border Link to the Status of Citizen of the Union' (2011) 3 Electronic Journal of the Free Movement of Workers in the European Community 6.

[184] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004. Some rights granted to mobile EU citizens on the basis of the EU citizenship can put nationals of other Member States in a more favourable position than nationals of a certain Member State (*e.g.* rules on family reunification derived from the

Member States retain over the acquisition and loss of EU citizenship is exposed to a powerful force operating at a transnational level: the right to free movement inside the territory of the Union'.[185] However, the Court ruled in Ruiz Zambrano that Art. 20 TFEU can be invoked by EU citizens, even if they have never exercised their free movement rights, if national measures 'have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status.'[186]

In the CJEU's subsequent judgements, this criterion was further qualified as relating to situations 'where [Union citizens] would have to leave the territory of the Union.'[187] In essence, the EU citizenship can shield individuals against potentially unwanted effects of national measures of a Member State of his or her nationality if otherwise the *effet utile* of the rights connected to the EU citizenship would be undermined.[188] However, the practical relevance of the 'substance of rights test' was limited by the CJEU's case law to the situation of minor citizens with third-country national family members.[189]

The *effet utile* reasoning has also underpinned the interpretation of rights of dual nationals. In *Lounes*, the CJEU held that the situation of a national of one Member State, who has exercised his or her freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person

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Directive 2004/38), leading to a reverse discrimination which is not precluded as a matter of EU law. Tryfonidou, 'Reverse Discrimination' (n 183); Miguel Poiares Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in Calire Kilpatrick, Tonia Novitz, and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart, Oxford 2000) 117; Kochenov, 'Member State Nationalities' (n 179).

[185] Bauböck, 'The Three Levels' (n 111) 757. cf. Gareth Davies, 'Any Place I Hang My Hat? ' or: Residence is the New Nationality' (2005) 11(1) European Law Journal 43, claiming that 'residence is the new nationality' and that this 'challenges directly the idea that the national enjoys a permanent bond with his home country, wherever he may go'.

[186] C-34/09, *Ruiz Zambrano v Office national de l'emploi*, ECLI:EU:C:2011:124, para 42. Niamh Nic Shuibhne, '(Some of) The Kids Are All Right' (2012) 49(1) CML Rev 349, 350–352; Kochenov, 'A Real European Citizenship' (n 183) 55; Sébastien Platon, 'Le champ d'application des droits du citoyen européen après les arrêts Zambrano, McCarthy et Dereci' (2012) 48(1) Revue trimestrielle de droit europeen 23–52; Hanneke van Eijken and Sybe A. de Vries, 'A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano' (2011) 36 European Law Review 704–721; Michael A.Olivas and Dimitry Kochenov, Case C-34/09 Ruiz Zambrano: A Respectful Rejoinder (2012) University of Houston Law Center Working Paper No. 1989900.

[187] Case C-434/09, *McCarthy*, ECLI:EU:C:2011:277 (*McCarthy*); Case C-256/11, *Dereci*, ECLI:EU:C:2011:734 (*Dereci*). Spaventa argues that the CJEU relies on subjective presumptions that cannot apply in a predictable way. Eleanor Spaventa, 'Earned citizenship - understanding Union citizenship through its scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 204.

[188] Stanislas Adam and Peter Van Elsuwege, 'Citizenship rights and the federal balance between the European Union and its Member States: Comment on Dereci' (2012) 37(2) E.L. Rev. 179; see also Peter van Elsuwege and Dimitry Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13(4) European Journal of Migration and Law 443-466.

[189] *McCarthy* (n 187); *Dereci* (n 187). For an overview, see Kochenov, 'The Right' (n 103) 502-516.

concerned has, while resident in the host Member State, acquired the nationality of that State in addition to her nationality of origin.[190] The CJEU recalled its judgement in the case of *Freitag* in which it held that there is a link with EU law with regard to nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals.[191] Thus, an individual who is a national of two Member States and has, in her or his capacity as a Union citizen, exercised her or his freedom to move and reside in a Member State other than her or his Member State of origin, may rely on the rights pertaining to EU citizenship, in particular the rights provided for in Article 21(1) TFEU, also against one of those two Member States.[192]

These cases depict the CJEU's anxiety to preserve the effectiveness (*effet utile)* of Articles 20 and 21 TFEU, *i.e.* the effectiveness of the very essence of the EU citizenship. Thus, the Member States remain 'the sole masters of their competence in the field of nationality, subject only to specific EU review in case of restriction of rights of EU citizens'.[193]

7. Conclusion

As follows from the foregoing, States enjoy a very large autonomy in regulating the acquisition and loss of their citizenship under international law (the internal aspect of State autonomy). This is easy to explain. Firstly, the rules about the 'membership of the club' belong to the very core of State sovereignty; they are one of the four elements of Statehood. Secondly, States attach to their citizenship certain rights and duties in their internal legal systems. It is more than logical that States may enjoy the upmost freedom in deciding to whom they will confer or withdraw those rights, as long as their rules do not violate human rights law. Consequently, States must draft their rules on the acquisition of nationality in such a way that statelessness will not occur. The loss of citizenship is in principle only permitted if the concerned person already possesses or will obtain another citizenship. Deprivation of citizenship may not be arbitrary, even if it does not amount to statelessness. Moreover, the rules on acquisition and loss of citizenship must be drafted and applied in a non-discriminatory manner. To this end, limitations encroaching on State autonomy in matters of nationality require inclusive rules on citizenship, *e.g.* when the issue of statelessness or discrimination is in question. However, these limitations do not impose restraints on States as regards the possible grounds for the attribution of citizenship.

[190] Case C-165/16, *Lounes*, ECLI:EU:C:2017:862, para. 49. For an extensive discussion of the treatment of dual citizens in EU law in the wake of the case *Lounes*, see David A J G de Groot, 'Free Movement of Dual EU Citizens' (2018) 3(3) European Papers. See also Dimitry Kochenov, 'Double Nationality in the EU: An Argument for Tolerance' (2011) 17 European Law Journal 323; Peter J Spiro, *At Home in Two Countries: The Past and Future of Dual Citizenship* (New York University Press 2015); Peter J Spiro, 'Dual Citizenship as Human Right' (2010) 8 International Journal of Constitutional Law 111.
[191] Case C-541/15, *Freitag*, EU:C:2017:432, para 34.
[192] *Lounes* (n 190) para 51. See also De Groot 'Free Movement' (n 190) 23.
[193] Sarmiento (n 49) 21.

As regards the external dimension of State autonomy, other States may only refuse the recognition of foreign acquired nationality if it is acquired in violation of international law. Here the external aspect of State autonomy meets the internal one. It has been established in the foregoing that with the exception of a few very specific cases, there is no relevant case law to demonstrate some examples of acquisitions of nationality that would be in violation of international law. Opposite to what some authors and the Commission mistakenly contend, the criterion of genuine link in *Nottebohm* was only applied as regards the recognition of the Liechtenstein nationality for the purpose of diplomatic protection. As to the attribution, the ICJ expressly recognized the right of Liechtenstein to naturalize Nottebohm or any other person by its own nationality rules. Nonetheless, when speaking of diplomatic protection as the most important application of the external aspect of State autonomy, it has been established above that the *Nottebohm* case has lost all its relevance (if it ever had some in this respect). The ILC Draft Articles on Diplomatic Protection do not impose any concrete requirements to a grant of nationality that would qualify for diplomatic protection. The genuine link criterion has been expressly rejected by several prominent scholars, as well as by the ILC. The only real limitation is that in cases of multiple nationalities, diplomatic protection cannot be exercised against the other national State(s) of the injured person. Moreover, the principle of exclusivity allows States to disregard foreign nationalities that their nationals might also possess, when exercising jurisdiction on their own territory. It may be concluded from the foregoing that international law does not affect the power of (Member) States to adopt citizenship by investment programmes and at the same time requires from other (Member) States to recognize under such programmes acquired nationality.

In the EU context, the function of the rules on nationality is different than in (general) international law. The individual Member States do not only decide to whom they will grant the rights attached to nationality in their internal legal systems, but even more importantly, they decide to whom the *other Member States* will have to grant rights provided for in EU law. These specific circumstances have consequences for the Member States granting their nationality, as well as for the Member States hosting EU citizens from other Member States. The first do enjoy in principle their national autonomy in granting their nationality, but they must exercise it with due regard to Union law, as has been underlined by the CJEU. They, being the 'gatekeepers' to the EU citizenship, must bear in mind that they are not granting only their own internal citizenship but also the EU citizenship. This means that they are imposing on other Member States the obligation to respect the rights emanating from the EU citizenship. Similarly, when drafting and applying the rules on the loss of nationality, they must bear in mind that the person in question will not only lose his or her Member State nationality but also the citizenship of the EU. Here the principle of proportionality plays the most important role.

Since the 'receiving' Member States have the obligation to grant the EU citizens rights under EU law, they cannot unilaterally decide which nationality to recognize in case of multiple nationalities. If the person concerned has their nationality and the nationality of another Member State, they are, following the *Garcia Avello* case, not allowed to treat such person as being exclusively their own citizen, even though such right is expressly recognized in international law. In cases, where the person concerned has the nationality of another Member

State and of a non-Member State like Micheletti, Member States are not free to decide which nationality they will recognize and which not. They may also not rely on the genuine link and the notion of prevailing or effective nationality.

In the EU, the Member States' autonomy in matters of citizenship is more limited. In addition to the limitations imposed by international law, they must observe general principles of EU law, most notably the principle of proportionality. This principle seems to play a more important role in case of loss than in case of acquisition of nationality, as the cases *Rottmann*, *Kaur* and *Tjebbes* have demonstrated. Yet, the role of EU law and of the CJEU is very limited. The *Rottmann* and even much more evidently the *Tjebbes* case have shown that even when required to apply the proportionality test, the Member States enjoy a very large portion of autonomy in choosing the grounds for the loss of their nationality.

The principle of sincere cooperation plays a role as regards defining the grounds for the acquisition of Member State nationality. It is therefore necessarily connected with citizenship by investment programmes. As it has been elaborated above, acquisition of nationality under such programmes form only a very small segment of the total naturalizations in those Member States and if carried out with due diligence they cannot be seen as incompatible with the principle of sincere cooperation. Most importantly, it follows from the very core of the Member States autonomy in matters of nationality to define the relevant links that are the basis for the attribution of their nationality. It is therefore their sovereign right to decide that making a considerable investment in that Member State is one of the relevant links. This part of their sovereignty was not transferred to the EU. Hence, the reactions of the European Parliament and the Commission might be considered overblown. Though, only these two political EU institutions have reacted so far, while the position of the CJEU, if it will ever be confronted with the question of compatibility of citizenship by investment programmes, remains to be seen. In our view, the Court should be very restrained. To this end, bringing a 'romantic' 19th century genuine link-like criteria into the realm of EU law is prone to letting the ghost out of the bottle.

With its appalling approach to the question of the compatibility of investment migration schemes with EU law in the 2019 Report, the Commission itself can rightly be criticized for the breach of the principle of sincere cooperation. In our view, there is a pressing need for the Commission to change this menacing narrative. While it could be desirable to adopt at least common minimum standards for the acquisition and loss of the Member States nationalities at the EU level to ensure that some minimum guarantees are observed in granting a ticket to equal treatment in all other Member States, it should not be grounded on the legally irrelevant genuine link requirement. If any kind of a link, the concept of relevant link should be employed. It is compatible with the principle of State autonomy in matters of nationality, as it does not interfere with their right to freely decide on the grounds for attribution of citizenship.

Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union

Dimitry Vladimirovich Kochenov

Policing the Genuine Purity of Blood: The EU Commission's Assault on Citizenship and Residence by Investment and the Future of Citizenship in the European Union

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Abstract: This article provides a brief critical assessment of the European Commission's January 2019 'Report on Investor Citizenship and Residence Schemes in the European Union'. Since it is the first detailed document by the Commission outlining this institution's position on the matters of investment residence and citizenship, and given the Commission's recently articulated intentions to take Cyprus and Malta to Court over their investment migration law and practice, the Report in question is of paramount importance. The document sets the legal-political context of the regulation of the migration of wealthy third-country nationals in Europe. It is also deeply flawed. Rather that summarising the document, this article focuses on five core deficiencies of the Commission's embarrassing product and demonstrates how the Commission failed to get the EU's own law right, in addition to showing a poor understanding of international law on the matter. Ripe with nationalist assumptions not rooted in the Treaties or the secondary law of the Union and showcasing a timid, convoluted and inconsistent analysis of the issues it purports to address, the Report has unsurprisingly failed to change the landscape of regulation in the field of investment citizenship and residence in the EU or anywhere else in the world. What it did make clear, however, was that the mere political suspicion of a particular type of naturalisation is enough for the European Commission to set aside the law and misinform the public, underlying once again the problematic tension between the growing political nature of this institution and its key task as guardian of the Treaties. There is a burning need for the Commission to take a more careful, coherent and informed approach to its actions, an approach indispensable for the preservation of the rule of law in the Union.

Keywords: CBI, RBI, Investment migration, Citizenship by investment, Rule of law

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Introduction: Citizenship Law and the Moral Panics of Innate 'Native' Superiority

Not only are the refugees and asylum seekers 'flooding Europe' routinely demonised and subjected to intense prejudices.[2] Millionaires can also be a problem for 'Fortress Europe', especially if they 'buy' the sacred privileges of Europeanness, instead of winning them in the 'birthright lottery'[3] or 'earning' them by humbly waiting and enduring routine humiliation like all the other 'others' whom the European Union (EU) is carefully calibrated to keep at bay.[4] Being vocal about the absoluteness of 'native' superiority can be extremely costly, however, as the marketisation of citizenship and residence can bring billions of euros to the Member States' crisis-stricken budgets.[5] This dilemma lies at the core of the ongoing debate surrounding the phenomenon of investment migration in Europe.[6] In this article I focus precisely on this dilemma and the moral panic it provokes: if EU citizenship is sacred and rooted in the native possession of pure European blood providing a 'genuine link' to Europe, how come someone can buy it, thus foregoing the necessary humiliation of ordinary naturalization? As we will see, the European Commission had a lot to say on this matter in its 2019 'Report on Investment Citizenship and Residence Schemes in the European Union'[7] – and proved willing to sacrifice the free movement of persons in the internal market and the basic principles flowing from the key Court of Justice of the European Union (ECJ) case law in this area, on the altar of the obscurantist nativism that the EU was precisely designed to destroy by outlawing discrimination on the basis of nationality.[8] In outlining five core flaws of the Commission's Report, this article

[2] On the attitudes to refugees in Europe, see e.g. K. Bansak, J. Hainmueller and D. Hangartner, *How Economic, Humanitarian, and Religious Concerns Shape European Attitudes toward Asylum Seekers*, 354 (6309) *Science* 2016, p. 217.
[3] A. Shachar, *The Birthright Lottery,* Harvard University Press 2009.
[4] On the problematic ideology of 'integration', see e.g. S. Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie*, Paris 2021. It is worth keeping in mind that the EU is the only advanced constitutional system in the world, where third country nationals are not entitled to benefit from *any* of the core rights offered to citizens, including, especially, being part of the EU's internal market. EU law is thus the only law in the world elevating nationality discrimination to the absolute: without the 'right' nationality the EU disappears as a territory and as a horizon of opportunities: D. Kochenov, M. van den Brink, *Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU*, in *Degrees of Free Movement and Citizenship,* ed by D. Thym, M. Zoetewij-Turhan, Leiden 2015, p.66.
[5] J. Lindeboom, S. Meunier, *Foreign Direct Investment and Investment Migration Programmes in the European Union*, in *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* ed. by D. Kochenov, K. Surak, Cambridge 2021 (forthcoming).
[6] For an in-depth analysis, see: *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* , ed by D. Kochenov, K. Surak, Cambridge 2021 (forthcoming).
[7] European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions COM(2019) 12 final. Cf. Questions and Answers on the Report on Investor Citizenship and Residence Schemes in the European Union available from https://europa.eu/rapid/press-release_MEMO-19-527_en.htm accessed 01 August 2020.
[8] W. Maas, *Creating European Citizens*, Boston 2007; G. Davies, *Nationality Discrimination in the Internal Market*, The Hague 2003, Cf. J.H.H. Weiler, *Europe: The Case against the Case of Statehood* "European Law Journal" 4/1998, p. 61.

is in full agreement with Ulli Jessurun d'Oliveira's analysis:[9] Member State competence on the matter of granting citizenship reigns supreme unless they start deploying nationalist ideologies of citizenship in order to humiliate Europeans and deprive them of rights related to the citizenship status, which are provided by EU law. Moreover, as Martijn van den Brink has convincingly argued, EU law cannot be deployed to enforce any 'genuine link' requirements[10] – that without defeating the purpose of EU citizenship, as will be analysed also below. Consequently, the Commission needs to be more humble to do less harm in this fundamentally important field. What we can observe, however, is the exact opposite of humbleness, as the Commission deployed the flawed reasoning of its 2019 Report dissected below as a base for a direct action against Cyprus and Malta, communicated on 20 October 2020.[11]

Alongside the UK with its Tier 1 visa,[12] the US with its EB-5[13] and formerly Canada,[14] the EU is among the world leaders in investment migration,[15] reaping the benefits of the desire of wealthy people around the world either to establish themselves in the EU, or to acquire EU citizenship, which is of much higher quality than the majority of world nationalities.[16] Every year a handful of billionaires and thousands of millionaires acquire citizenship and residence

[9] H.U. Jessurun d'Oliveira, *Union Citizenship and beyond*, in *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges*, ed by N. Cambien, D. Kochenov, E. Muir, Boston 2020.
[10] M. van den Brink, *Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?*, "EUI Working Papers" RSCAS 76/2020, p. 17.
[11] European Commission (press release), Investor Citizenship Schemes: European Commission Opens Infringements against Cyprus and Malta for "Selling" EU Citizenship, Brussels, 20 Oct. 2020 https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925. For brief analyses, see: *Investment Migration Insider interview with Dimitry Kochenov*, D. Kochenov: *Commission Would Likely Be "Humiliated", If CIP-Matter Goes to Court over "Genuine Links"*, "Investment Migration Insider" 23 Oct. 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3718328 (access 18.12.2020); M. van den Brink, *Investor Citizenship and EU Law: Much to Do about Nothing ?*, GlobalCit blog, 30 Oct. 2020, https://globalcit.eu/investor-citizenship-and-eu-law-much-to-do-about-nothing/ (access 18.12.2020).
[12] M. Sumption, K. Hooper, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration*, Washington DC. 2014. Cf. *Transparency International UK, Gold Rush*, London 2015; A. Tryfonidou, *Investment Residence in the UK: Past and Future*, "Investment Migration Policy Brief" 1/2017.
[13] L.K.L. Thiele, S.T. Decker, *Residence in the United States through Investment: Reality or Chimera* , "Albany Government Law Review", 3/2010, p. 103; E.C. Kendall, *Green Cards as the Ultimate Dividends: Why Improving the US Investment Visa Program Will Encourage the Economic Recovery by Increasing Foreign Investment and Creating Jobs for Americans*, "Georgetown Immigration Law Journal" 27/2013, p. 580.
[14] M. Cohen, *The Re-Invention of Investment Immigration in Canada and Constructions of Canadian Citizenship*, "Investment Migration Research Papers" 2/2017.
[15] Cf. C. Kälin, *Ius Doni*, in: *International and European Law*, Brill-Nijhoff 2019; K. Surak, *Citizenship 4 Sale*, Cambridge 2021 (forthcoming), Cf. *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, ed. by D. Kochenov, K. Surak.
[16] D. Kochenov, J. Lindeboom, *Empirical Assessment of the Quality of Nationalities*, "European Journal of Law and Governance", 4/2017, p. 314.

through investment or donation on both sides of the Atlantic.[17] A whole industry has emerged around this, as it has around other areas of migration and modes of citizenship acquisition.[18] A small but opinionated body of moral panic literature has also mushroomed around the issues of whether citizenship – a randomly allocated status of totalitarian domination[19] should be 'for sale'.[20] Naturalisation through investment has even been compared to the 'passport trade',[21] a trade which does not exist, strictly speaking, outside of the clandestine Pacific passport markets[22] and other criminal circles providing counterfeited official documents.[23] Nonetheless, distributing citizenship – an arbitrarily assigned and commonly inherited legal status best compared to feudal privilege[24] – through this particular route has been loudly pronounced non-kosher, immoral, if not illegal, by scholars and politicians alike.[25] The Commission, with its 2019 Report and the 20 October 2020 action against Malta and Cyprus, has joined this high

[17] Cf. e.g. A. Solimano, *Global Mobility of the Wealthy and Their Assets: An Overview*, "Investment Migration Research Papers" 2/2018; V. Popov, *Why Some Countries Have More Billionaires than Others? Explaining Variety in the Billionaire Intensity of GDP*, "Investment Migration Research Papers" 3/2018.
[18] K. Surak, *Global Citizenship 2.0 – The Growth of Citizenship by Investment Programmes*, "Investment Migration Research Papers" 3/2016. In other fields specialized agencies help persons with low-quality citizenships to learn the relevant languages for the upgrade of the personal legal status; trace the necessary documents to establish the 'right' ancestry leading to a European document, or facilitating giving birth abroad in the *ius soli* jurisdictions offering high-quality nationalities: Y. Harpaz, *Citizenship 2.0: Dual Nationality as a Global Asset*, Princeton 2019.
[19] D. Kochenov, *Citizenship*, Cambridge 2019.
[20] A. Shachar, *Dangerous Liasons: Money and Citizenship*, in: *Debating Transformations of National Citizenship*, ed R. Bauböck, Berlin 2018, p. 7; A Tanasoca, *Citizenship for Sale: Neomedieval Not Just Neoliberal*, "European Journal of Sociology" 57/2016, p. 169. Cf. also J. Džankić's writings on this matter.
[21] See, e.g. D. Kochenov, *"Passport Trade": The Vicious Circle of Nonesense in the Netherlands*, *Verfassungsblog*, 8 June 2020, https://verfassungsblog.de/passport-trade-a-vicious-cycle-of-nonsense-in-the-netherlands/ (access 1.08.2020).
[22] A. Van Fossen, *Citizenship for Sale: Passports of Convenience from Pacific Island Tax Havens*, "Commonwealth and Comparative Politics" 45/2007, p. 138.
[23] G. Gotev, *Thousands obtained EU citizenship for €5000 in Bulgarian scam*, "Euractiv", 30 October 2018, www.euractiv.com/section/justice-home-affairs/news/thousands-obtained-eu-citizenship-for-e5000-in-bulgarian-scam/ (access 21.06.2020).
[24] J. Carens, *The Ethics of Immigration*, Oxford 2013; J. Carens, *Aliens and Citizens: The Case for Open Borders*, "Review of Politics", 49/1987, p. 251. Cf., most ironically, Tanasoca, who takes an openly pro-feudal stance, denying the presumption of equal human worth and the principle of dignity, and preaching the moral superiority of aristocracy over the 'common' people: A Tanasoca, *Citizenship for Sale: Neomedieval not Just Neoliberal*, "European Journal of Sociology" 57/2016, p. 169. For a criticism, see: R. Suryaprati, *The "Streetlight Effect" in Commentary on Citizenship by Investment*, in: *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, ed by D. Kochenov, K. Surak, Cambridge 2021 (forthcoming).
[25] European Parliament, Resolution of 16 January 2014 on EU citizenship for sale (Resolution) (2013/2995(RSP); A. Shachar, *Citizenship for Sale?*, in: *The Oxford Handbook of Citizenship*, ed. by A. Shachar et al., Oxford 2019, p. 795; A Tanasoca, Citizenship for Sale: *Neomedieval Not Just Neoliberal*, "European Journal of Sociology" 57/2016, p.169; S. Carrera, *The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters*, "CEPS Policy Brief", 2015.

morality camp demonstrating what Carl Baudenbacher characterised as 'fragwürdige Aktionismus'.[26]

Pronouncements of 'immorality' of citizenship 'sales' do not constitute the only available approach to understanding the issue of investment migration, as the overwhelming popularity of investment migration among the EU Member States testifies. Indeed, acquiring residence and/or citizenship in exchange for investment or donation is a historically mainstream practice[27] conducted entirely through the law and in full compliance with it.[28] In any event, the tone and often the content of the engagement of numerous of my colleague scholars and politicians with this subject is reminiscent of fighting Stanley Cohen's 'folk devils' – not mods or rockers in this case, but the 'sellers of citizenship'.[29] There is also a facet of this debate which can act as a mirror – one of great importance to European societies – as investment migration unquestionably underlines citizenship's absurdity,[30] by allowing those who emerged as losers in the global 'birthright lottery'[31] – members of the absolute majority of the world's population[32] – to buy what others got assigned to them for free by blood, but at once also to be singled out as having uniquely undeservedly acquired this status. When the (high) price of citizenship for the randomly unlucky is made clear, the hypocrisy of citizenship's essence is instantly laid bare.[33] It therefore necessarily challenges the glorificatory nationalist paradigm of contemporary citizenship regulation and citizenship studies long noted by Linda Bosniak and other scholars.[34] This is where the Commission decided to start its intervention, releasing on 23 January 2019 a Report on the practice of investment migration entitled 'Report on Investor Citizenship and Residence Schemes in the European Union.'[35]

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[26] C. Baudenbacher, *"Goldene Pässe" – fragwürdige Aktionismus des EU-Kommission*, "Neue Züricher Zeitung", 4 Dec. 2020, p. 19.
[27] M. Prak, *Citizens without Nations*, Cambridge 2018.
[28] E.g. P. Weingerl, M. Tratnik, *Relevant Links: Investment Migration as an Expression of State Autonomy in Matters of Nationality*, in: *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, ed by D. Kochenov and K. Surak, Cambridge 2021 (forthcoming).
[29] S. Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers*, London 1972.
[30] D. Kochenov, *Citizenship for Real: Its Hypocrisy, Its Randomness*, Its Price, in: *Debating Transformations of National Citizenship*, ed. R. Bauböck, Berlin 2018, p. 51; P. Spiro, *Cash-for-Passports and the End of Citizenship*, in: *Debating Transformations of National Citizenship*, ed. R. Bauböck, Berlin 2018, p. 17.
[31] A. Shachar, *The Birthright Lottery*, Cambridge 2009.
[32] D. Kochenov, *Citizenship*, Cambridge 2019; *Kälin and Kochenov's Quality of Nationality Index*, ed by D. Kochenov, J. Lindeboom, Oxford 2020.
[33] D. Kochenov, *Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price*, in: *Debating Transformations of National Citizenship*, ed R. Bauböck, Berlin 2018, p. 51.
[34] L. Bosniak, *The Citizen and the Alien*, Princeton 2006, pp. 5-9; and further J. Tully, *On Global Citizenship*, London 2014. See also crucially Christian Joppke's work, virtually all of which could stand as an illustration of this point.
[35] European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions COM(2019) 12 final.

It continued on 20 October 2020 by warning Cyprus and Malta that it is of the opinion that these countries are in breach of EU law as they grant citizenship with no regard to 'genuine links', which is purportedly in breach of the duty of loyalty. Disloyalty here could be to nothing else but the purity of European blood in one's veins – *limpieza de sangre* 21st century style. In the absence of unconditional ius soli, there is no way to read the Commission differently, since the whole point of 'genuine links' can only be relevant in the case of those whose blood is presumed impure to provide such a link genuinely and easily in the first place.[36] Purity of blood money cannot buy, hence, 'European citizenship should not be for sale' – the opening line of the Commission's solemn moral panic hymn. Whether fuelling moral panics is among the tasks of the guardian of the Treaties is an open question for a larger debate, directly linked to Europe's justice deficit[37] and the political nature of the Commission.[38] Or is it simple Russophobia and the suspicion of the Chinese – the core clientele of the citizenship by investment programmes – as Baudenbacher suggested?[39] Numerous questions arise. What we will focus on in what follows is the substance of the Commission's legally unsound claims.

Investment Migration in the EU

As opposed to a clandestine 'passport trade', investment migration – which is achieved through the acquisition of citizenship by investment (CBI) or residence by investment (RBI, often eventually leading to citizenship) – is a completely legal practice and is widespread in the EU. In a world where states themselves decide on who their citizens are (1930 Hague Convention, Article 1), cashing in on rich foreigners coming from countries issuing low-quality citizenships is an attractive prospect.[40] It is not surprising that the rich are more than ready to pay a lot of money for a more dignified, more useful and often less abusive status, given the role which citizenship plays in our lives, as Branko Milanovic, *inter* many *alia*, shows in his work.[41]

[36] An American descendant of a Greek great grandfather is Greek and European, she unquestionably has genuine links with Greece, since the blood is pure. An American descendent of a Greek great grandmother, on the other hand cannot boast purity of blood and has no genuine links with Greece (where citizenship is passed, until a certain point, only via the male line) and thus no genuine links with the European Union either. To preserve and reinforce this core understanding is what the Commission, essentially, hopes to deploy the duty of loyalty for. Getting her the right to be considered a European like the first American above through investment is immoral, we are told – but an Irish grandfather would be fine.

[37] Cf. *Europe's Justice Deficit?*, ed by D. Kochenov, G. de Búrca, A. Williams, Oxford 2015.

[38] Cf. The contributions in *Holding the Political Commission Accountable*, ed M. Dawson, Verfassungsblog debate, September 2018, https://verfassungsblog.de/category/debates/holding-the-political-commission-accountable-debates/ (access 1.08.2020).

[39] C. Baudenbacher, *"Goldene Pässe" – fragwürdige Aktionismus des EU-Kommission*, "Neue Züricher Zeitung", 4 Dec. 2020, 19.

[40] K. Surak, *Millionaire Mobility and the Sale of Citizenship*, "Journal of Ethnic and Migration Studies" 1/2021.

[41] B. Milanovic, *Global Inequality*, Cambridge 2018.

Citizenship is an effective legal tool of harsh arbitrary punishment and exclusion[42] – and the particular mode of its acquisition cannot possibly alter its essence.[43]

In the EU alone, direct citizenship by investment is available in Austria, Bulgaria, Cyprus (currently suspended to be reopened soon), Malta and potentially other Member States where naturalizations by parliament or the executive are exceptionally possible. As for residence, Bulgaria, Cyprus, the Czech Republic, Estonia, Greece, Spain, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal, Romania and Slovakia offer (permanent) residence statuses for investment, which are often convertible into the citizenship of those Member States. In short, investment migration is practiced by the absolute majority of the EU's Member States. Once again, 'Fortress Europe', alongside the US, Canada, the UK, Turkey and many Caribbean states, is a world-leading example of this type of marketised sovereignty, though others abound, from Jordan to Vanuatu and Moldova. Given the randomness of citizenship distribution,[44] opposing any particular route to naturalisation would be pure hypocrisy,[45] just as is citizenship itself.[46] Dora Kostakopoulou is absolutely right to take issue with naturalisation's very essence,[47] just as Joseph Carens has done with the idea of the ethical core of citizenship and migration boundaries.[48] In a world of random citizenship, naturalisation is inescapably a ritual which has purifying deficient 'others', thus their humiliation, at its essence.[49] Ironically for the moral panicking few, enabling the purchase of a citizenship, in this context, is unquestionably and infinitely more respectful of the 'other' than the culture and language tests imposed for other naturalisation routes, which assume by default the deficient nature of the newcomer's language and culture.[50]

Naturalisations of those, who are not 'natural born' citizens including a sub-type of investment naturalisations, fall squarely within the realm of what is legal worldwide, including in the EU. From Hans Ulrich Jessurun d'Olivera,[51] Peter Spiro[52] and Jo Shaw,[53] to Matjaž Tratnik and Petra

[42] D. Kochenov, *Citizensihp*, Cambridge 2019.
[43] *Ibid.*; D. Kochenov, *Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price*, in: *Debating Transformations of National Citizenship*, ed R. Bauböck, Berlin 2018, p. 51.
[44] D. Kochenov, *Citizenship*, Cambridge 2019.
[45] D. Kochenov, *Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price*, in: *Debating Transformations of National Citizenship*, ed R. Bauböck, Berlin 2018, p. 51.
[46] Ibidem.
[47] D. Kostakopoulou, *Why Naturalization?*, "Perspectives on European Politics and Society", 4/2003, p 85.
[48] J. Carens, *The Ethics of Immigration*, Oxford 2013.
[49] D. Kochenov, *Mevrouw De Jong Gaat Eten: EU Citizenship and the Culture of Prejudice*, "EUI RSCAS Working Paper", 6/2011.
[50] Ibidem (and the literature cited therein).
[51] H.U. Jessurun d'Oliveira, *Union Citizenship and beyond*, in: *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges*, ed. by N. Cambien, D. Kochenov, E. Muir, Boston 2020.
[52] P. Spiro, *Nottebohm and "Genuine Link": The Anatomy of Jurisprudential Illusion*, "Investment Migration Research Paper" 1/2019.
[53] J. Shaw, *Citizenship for Sale: Could and Should the EU Intervene?*, in: *Debating Transformations of National Citizenship*, ed R. Bauböck, Berlin 2018, p. 61.

Weingerl[54] and Daniel Sarmiento,[55] the consensus is well articulated and undisputed. In the EU it is confirmed unequivocally by the case law of the Court of Justice:[56] from *Micheletti* and *Zhu & Chen*[57] to *Tjebbes*.[58] If a Member State wants an investment migration programme, it can have one: the division of competences is crystal clear.[59]

The Commission's 2019 Report: Pretending There Is No Law

On 23 January 2019, the Commission released its 'Report on Investor Citizenship and Residence Schemes in the European Union.'[60] The Report, containing not a single word on the benefits of investment migration to explain why the practice is widespread in the majority of the Member States and saying little about the Commission's lack of competence in the matter, criticised investment migration and investment citizenship in particular, on totally unsubstantiated grounds, misrepresenting the law of the EU as well as international law and coming to questionable conclusions in direct conflict with the case law of the Court of Justice. The Report is thus a puzzling example of a political document produced not only in oblivion of, but in direct contradiction to the law.

Given the ongoing moral panic and the resultant emotive and negative attention that the whole issue of investment citizenship and residence has been receiving from the powers that be in the European Union – be it the European Parliament[61] or the individual Commissioners, from Reding's 'EU citizenship should not be for sale'[62] from several years ago, to Commissioner

[54] M. Tratnik, P. Weingerl, *Investment Migration and State Autonomy: The Quest for the Relevant Link*, "Investment Migration Research Papers" 4/2019.
[55] D. Sarmiento, *EU Competence and the Attribution of Nationality in Member States*, "Investment Migration Research Paper" 2/2019.
[56] See, for the general analyses, D. Kochenov, J. Lindeboom, *Pluralism Through its Denial*, in: *Research Handbook on Legal Pluralism and EU Law* ed. by G.T. Davies, M. Avbelj, Cheltenham 2018; H.U. Jessurun d'Oliveira, *Union Citizenship and beyond*, in: *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges*, ed by N. Cambien, D. Kochenov, E. Muir, Boston 2020.
[57] Case C-200/01 Zhu and Chen, *ECLI*:EU:C:2004:639.
[58] Case C-221/17, Tjebbes, ECLI:EU:C:2018:572. Cf. D. Kochenov, *The Tjebbes Fail*, "European Papers", 4/2019, p. 319; H.U. Jessurun d'Oliveira, *Tjebbes en aanhangend nationaliteit*, "Nederlands Juristenblad", 2019, p. 37; K. Swider, *Legitimising Precarity of EU Citizenship: Tjebbes*, "Common Market Law Review" 57/2020, p. 1163.
[59] On the specific issue of investment residences please see: M. van den Brink, *Investment Residence and the Concept of Residence in EU Law: Interactions, Tensions, and Opportunities*, "Investment Migration Research Paper", 1/2017.
60 European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions COM(2019) 12 final. For an insightful analysis, see: C. Margiotta, *Ricchi e poveri alla prova della cittadinanza europea. Annotazioni sulla Relazione della Commissione europea sui programmi di cittadinanza per investitori*, "Ragion Pratica" 2/2020, p. 513.
[61] European Parliament, Resolution of 16 January 2014 on EU citizenship for sale (2013/2995(RSP).
[62] V. Reding, *Citizenship Must Not be Up for Sale*, European Commission Speech 14/18, http://europa.eu/rapid/press-release_SPEECH-14-18_en.htm (access 1.08.2020)

Jourová's more recent proclamations[63] – lawyers and policymakers could justifiably have expected much more from the Commission's treatment of this much inflated but hugely important topic. Though substantially fewer than 1% of all citizenships and residences granted in the EU are investment-based – a fact, which the Commission never mentions, strongly indicating that the weight given to the issue is most likely inflated – its characterisation as being of overwhelming economic and social importance clearly indicates that it deserves very serious and clear-eyed analysis. The Commission's Report fails abundantly on this count and the reasons – beyond banal political bias, overshadowing even EU law – are difficult to formulate.

The Report, which is clearly a result of a huge log-rolling exercise, will definitely not be entered on the roll of documents the Commission could even be vaguely proud of. Rather than providing a clear, rule-based analysis of the forces underlying the moral panic behind offering 'for sale' the sacred status of belonging, the Report turns against the key achievements of the Union and misrepresents EU citizenship law as a nineteenth-century *Blut und Boden* myth, rather than a modern, globalised, forward-looking status. The Union emerging from the pages of the Report is nothing short of Hamsunian, full of 'nature', 'genuine links' and 'real' citizenships, based on long-dead, repugnant ideals and thus impossibly dull. Given that there is no legal basis in the TEU or TFEU for the pursuit of a 'natural' citizenship myth as it once was – as discussed by Spiro,[64] Joppke[65] and others, it does not come as a surprise that the Commission resorts to obsolete legal authority and abundant, flawed legal reasoning to sell the untenable position that it has no legal basis properly to defend. One wonders why the legal service did not get a chance to see the document in draft: the Commission's position, in assuming 'genuine links' between states and citizens, is not only flawed in terms of international law – as will be discussed below – but it also falls short of the 'market citizenship' standard, however criticized.[66] If conditioned on such 'genuine links', free movement of EU citizens would be endangered, if not impossible, which is precisely the reason why AG Tesauro laughed at the embarrassing position embraced by the Commission in the ancient *Micheletti* case.[67]

The Report is correct on many of the facts it communicates: 20 or more (i.e., more than 70%) Member States opted for a policy which the Commission has no direct competence to regulate,[68]

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[63] E.g. Answer of Commissioner Jourová on behalf of the Commission on written question, E-005960/2017.

64 P. Spiro, *Cash-for-Passports and the End of Citizenship*, in: *Debating Transformations of National Citizenship*, ed R. Bauböck, Berlin 2018, p. 17.

[65] C. Joppke, *Citizenship and Immigration*, Cambridge 2010; C. Joppke, The Instrumental Turn of Citizenship, "Journal of Ethnic and Migration Studies", 44/2018, p. 1.

[66] See, for the best available analysis: C. O'Brien, *Unity in Adversity*, Oxford 2017. See also D. Kochenov, *The Oxymoron of "Market Citizenship" and the Future of the European Union*, in: *The Internal Market and the Future of European Integration : Essays in Honour of Laurence W. Gormley* ed. by F. Amtenbrink et al., Cambridge 2019, p. 217 (and the literature cited therein).

[67] Opinion of AG Tesauro in Case C-369/90 Micheletti [1992] ECR I-4239, para 5.

68 D. Sarmiento, *EU Competence and the Attribution of Nationality in Member States*, "Investment Migration Research Paper" 2/2019.

but tackles in the Report. This alone makes the Commission's take on investment migration worth looking at in some detail: what is on the Commission's mind? The analysis that the Commission provides is flawed on at least five levels, briefly dealt with below. The outcomes are instructive: as the Member States have largely ignored this pas by the Commission, the institution has been toning down its most absurd claims in the months that followed the Report's release, as Luuk van der Baaren reports.[69] This toning down phase proved to be short-lived, however, as the moral panic report parading as law provided the foundation of the 20 October 2020 action by the Commission against two of the smallest Member States among dozens practicing investment migration. All the flaws found in the Report and dissected below thus left the realm of relatively abstract scribbles and are being turned by the Commission into the tools to bully the smallest Member States. The bullying tools are referred to as such here simply because what the Commission lists are not legal arguments. Worse still, should these be legal arguments, a successful operation of EU citizenship and the fundamental principle of non-discrimination on the basis of nationality in the internal market would need to be set aside in favour of high nationalism ideals where blood is 'pure' and citizenship is 'natural'.

Flaw no. 1: Framing investment uniquely as a risk, rather than an opportunity

Undoubtedly, there is a fundamentally important issue to hand: investment migration is capable of bringing huge gains, but also brings with it potential risks. The Commission is dead silent on the former, presumably deferring to the over 70% of the Member States on this crucial issue, but is absolutely right about mentioning the latter. When practiced in non-transparent and corrupt ways, investment migration – like any other enterprise – will certainly generate problems that have to be tackled. These precisely involve corruption, money laundering and tax evasion – not naturalisation as such. The Commission's Report fails to make this basic distinction. On this count, banking, mining or gambling – to name but a few corruptible enterprises – could be frowned upon – yet when we regulate banks, casinos or mines, we do not presume that these activities should be outlawed; precisely the presumption the Commission harbours in the Report on investment migration and pushes in its action against Cyprus and Malta. It presents the whole issue of investment migration uniquely as a risk, rather than as an opportunity. In particular, the Commission speaks of the risks regarding 'security, money-laundering, tax evasion and corruption'.[70]

The fact that twenty Member States offer residence, residence leading to citizenship or citizenship directly, for donations or investments, as the Commission correctly reports, makes

[69] L. van der Baaren, *Investor Citizenship and State Sovereignty in International Law*, in: *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, ed. by D. Kochenov, K. Surak, Cambridge 2021 (forthcoming).

[70] Commission's Report, p. 2. Crucially, research shows that unlike reversing the key EU citizenship law of the ECJ, which the Commission hints at in the report when invoking 'genuine links', it has full competence to address money laundering, tax evasion, corruption threats and other issues usually mentioned in the context of the moral panics surrounding investment migration: D. Sarmiento, M. van den Brink, *EU Competence and Investor Migration*, in: *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, ed by D. Kochenov, K. Surak, Cambridge 2021 (forthcoming).

it clear that the cost and benefit analysis has been conducted differently by at least twenty governments which have opted to introduce the schemes with the benefits to be reaped in mind.[71] This makes the Commission's complete silence on the potential benefits of such schemes in terms of investment very problematic. It is certainly a field worth studying. It could definitely be the case that there is no flow of FDI triggered specifically by an investment migration scheme in certain countries. Sumption and Hooper have shown,[72] for instance, that UK Tier 1 visas – incidentally, like the one revoked from Roman Abramovich and leading to the loss of inter alia a billion pounds of investment into a new stadium – a visa type which formally requires the purchase of government bonds, do not affect the country's economic performance. This statement cannot be true for all the twenty jurisdictions, however. Consider applying this analysis to countries requiring a *donation*, such as Malta, rather than an investment, with its expected return. While in Cyprus, for instance, it could indeed be the case – however doubtful the hypothesis – that for some reason, even more Russian or Chinese money would have passed through the island's banks without it having citizenships on offer, in the case of Malta it is absolutely clear that the contributions, which are paid in exchange for citizenship, would not under any circumstances whatsoever, have been made without the Malta Individual Investment Programme offering the service for which the money is paid.

To put it differently, what the Commission chose not to mention or quantify is a share of Malta's GDP and the results of the analyses conducted by the twenty Member States of the EU which underpinned their respective decisions to introduce investment migration programmes in national law. In other words, the complete silence concerning the benefits which the overwhelming majority of the EU Member States either receive or believe to be receiving from investment migration, unquestionably casts the Commission's work in a deeply biased light. The Commission's suggestion seems to be that twenty Member States are all behaving deeply irrationally, which is implausible and thus absurd on its face. Without denying the potential risks, which are rightly pointed out by the Commission, it is nevertheless possible to assert that the aim of the Report is the misrepresentation of investment migration, given that, notwithstanding the fact that the title of the Report mentions citizenship and investor residence schemes, it is entirely silent, precisely, on the *raison d'être* of both – investments – something that should have rather been the starting point of any serious analysis. This is the first count on which the Commission has failed.

Flaw no. 2: an incompetent hymn to blood and soil

The Commission claims to have discovered what citizenship is about, writing that citizenship 'is traditionally based on […] *ius sanguinis* and […] *ius soli*'.[73] This is all correct, but the Devil,

[71] This being said, what amounts to a 'success' of an investment migration programme is, of course, a complex and multi-faceted issue: M. Sumption, *Can Investor Residence and Citizenship Programmes Be a Policy Success?* in: *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* , ed by D. Kochenov, K. Surak, Cambridge 2021 (forthcoming).
[72] M. Sumption, K. Hooper, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration*, Washington DC 2014.
[73] Commission's Report, p. 3.

as is only so frequently the case, is in the details. In giving its 'golden standard', the Commission does not make it clear that:

a) it does not have the power to regulate this area;
b) the reality is much more complex than what its selective summary purports to demonstrate.

The combination of the two is extremely problematic, befogging the crucial issue of citizenship acquisition rules to a great degree and enabling the Commission to squeeze in several bizarre, legally obscurantist claims into the text of the Report only for these to reappear in the context of probing the legal action against two of the smallest Member States.

Referring to citizenship by investment, the Commission writes that, in essence, such 'citizenship is granted under less stringent conditions than under ordinary naturalization regimes'.[74] What is crucial here is to mention the different ways that the citizenship law of all the Member States rationally accommodate enabling the acquisition of citizenship by different categories of applicants. Also of importance is the sovereignty/competence aspect of this story. Starting with the latter, states are free to confer citizenship on those whom they consider qualified under the Hague Convention of Nationality (Article 1) and, unquestionably, under EU law – as Shaw,[75] myself[76] and most recently, Jessurun d'Oliveira,[77] Sarmiento[78] and Tratnik and Weingerl[79] have demonstrated. By extension, this applies to EU citizenship, which is a derivative – *ius tractum* – citizenship.[80] No sane academic voice would be able to argue that the EU has competence to legislate here, which is why the Report is not a legislative proposal and will never become one. It will not surprise the reader to learn that France still decides on who is French and retains all the rights to do so, just as Malta decides on who is Maltese and Finland on who is Finnish. The law is crystal-clear, just like the fact that all the Member States find the continuation of this approach vital to their interests – which makes the Commission's Report look like a poorly orchestrated attempted power-grab. It is impossible to propose the rigid framework that the Report purports to have found (ius sanguinis + ius soli + 'genuine links') for establishing any mode of acquisition of citizenship, in an area where the Commission has no say in law, but the aspiration is clear. To present Malta, Cyprus or Bulgaria as breaching the fundamental principles of EU law would have been going too far: they use their legal

[74] Ibid, p. 2 (emphasis added).
[75] J. Shaw, *Citizenship for Sale: Could and Should the EU Intervene?*, in: *Debating Transformations of National Citizenship*, ed. R. Bauböck, Berlin 2018, p. 61.
[76] D. Kochenov, *Rounding up the Circle: The Mutation of Member States Nationalities under Pressure from EU Citizenship*, "EUI RSCAS Working Paper", 23/2010.
[77] H.U. Jessurun d'Oliveira, *Union Citizenship and beyond*, in: *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges*, ed. by N. Cambien, D. Kochenov, E. Muir, Boston 2020.
[78] D. Sarmiento, *EU Competence and the Attribution of Nationality in Member States*, "Investment Migration Research Paper", 2/2019.
[79] M. Tratnik, P. Weingerl, *Investment Migration and State Autonomy: The Quest for the Relevant Link*, "Investment Migration Research Papers" 4/2019.
[80] D. Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, "Columbia Journal of European Law", 15/2009, p. 169.

competence to naturalise third-country nationals in strict accordance with the law. This is exactly why the Commission merely uses a negative tone to refer to these activities, instead of explaining what is wrong with them. The answer is: nothing is wrong and the tone is unacceptable. Consequently, the reasons for mentioning that 'these schemes are explicitly advertised as a means of acquiring EU citizenship'[81] are unclear, since the schemes are precisely *created* to make new EU citizens – nothing more and nothing less.

EU law is funny in a way – and this is its unquestionable, pluralist strength.[82] A US kid able to find a Greek great-great-grandfather can become an EU citizen automatically without ever visiting Greece; the spouse of a Frenchman in Vietnam can naturalise without ever having lived in France or Europe, an EU citizen does not need to renounce her original nationality when naturalising in Germany, unlike any Turk or a Russian with no EU citizenship, and a Catholic dignitary retiring from the Vatican becomes an Italian automatically and immediately, all of them not under 'less stringent conditions', but because these are groups treated differently by immigration and citizenship law in the Member States concerned.

Perusal of any citizenship law book makes as much clear: when we speak about the acquisition of citizenship, differentiated treatment of different cases is key. It is an essential and characteristic part of nationality regulation. Member States establish what is desirable and while Italy has decided that asking an ailing Japanese Cardinal – stateless upon retirement from Vatican service – to wait the usual 10 years to become Italian is undesirable, replacing it with zero years instead, and the Dutch government has decided that asking asylum seekers to wait as long as others to naturalise would be unkind, the Maltese government makes the grant of nationality conditional on a significant donation to drive the economy of the island. In the light of the existing differences in procedure, underpinned by great disproportion in the numbers, where hundreds of thousands became EU citizens through extremely remote ancestry or other ways having nothing to do with the state or its 'culture' through the laws of Bulgaria, Greece, Ireland, Italy, Romania and other states, stating that investment citizenship is 'less stringent', as the Commission does, is an absurd misrepresentation.

To drive this point home, it is even more absurd than it first seems at least for two reasons. Most importantly, all other ways to acquire citizenship do not require a significant investment. An American kid, like the son of a Venezuelan friend, searching through archives for any Greek connections so as to avoid paying US-rate tuition fees at Bologna Medical School, is not bringing several million to Greece. To imply that undying Greekness can persist across six generations, however much ethno-nationalist and passé a notion this might be, is a decision for the Greek government to take, which fits the general international trends, as Christian Joppke has shown.[83]

[81] Commission's Report, p. 2.
[82] D. Kochenov, J. Lindeboom, *Pluralism Through its Denial*, in: ed by G.T. Davies, M. Avbelj, *Research Handbook on Legal Pluralism and EU Law*, Cheltenham 2018.
[83] C. Joppke, *Citizenship between De- and Re-Ethnicization*, "European Journal of Sociology" 44/2003, p. 429.

So the Cypriot choice to create citizens through investment is at least as rational (or irrational) as the Greek, but not to a protestor in the 'Macedonia is Greece' crowds of course,[84] which our US kid, thankfully, will never join. The question of what is 'legal' does not arise, since it is not up to the Commission to ask or comment on and given that international law, just like European law, is clear: Member States will decide as they see fit. So for Malta EUR 650,000 was more important than nationalism, while for Greece the opposite is true. Some would applaud this choice: 'Greek blood is important!' To suggest, however, that some other choice is somehow 'less legal' cannot be correct. And morality has never played a role in citizenship law, especially in the EU, with its colonial past[85] and essentially race-based exclusion from EU citizenship[86] approved by the ECJ in *Kaur*.[87] Globally the picture is no different: citizenship is the main tool for the preservation of global inequality at the moment, as Branko Milanovic, once again, has explained.[88]

Secondly, and equally importantly, 'ordinary conditions' – as opposed to the frowned-upon 'less stringent' ones – imply a level of due diligence which is significantly lower than what investment citizenship promises: the entirety of one's finances and business connections, as well as your entire life history would not normally be dug up by independent due diligence providers, unless you are an investor naturalising on that ground.[89]

This is only right: different applicants require different standards. The absurdity of implying, as the Commission does, that investing several million and going through deep scrutiny is less stringent than finding a Greek man whom you have never met in one's ancestry (citizenship has traditionally been sexist, of course),[90] speaks for itself. This begs the conclusion that the 'context' of citizenship acquisition, to which the Commission dedicated a whole section in its Report,[91] is misleading: forgetting to mention 'difference' amounts to failing to tell a true story. The Commission has thus failed at the most basic level, and is unable to present the fundamental rules for the acquisition citizenship.

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[84] Z. Rahim, *Athens riots: Clashes as 60,000 protesters march in Greece against Macedonia name change*, "*Independent*", 2019, https://www.independent.co.uk/news/world/europe/athens-protests-violence-riots-police-officers-macedonia-name-change-prespes-agreement-a8737581.html (access 22.06.2020).
[85] P. Hansen, S. Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism*, London 2014.
[86] Lord A. Lester, *Thirty Years on: The East African Case Revisited*, "Public Law", 47/2002, p. 52.
[87] *Case C-192/99 Kaur [2001] ECR I-01237; H. Toner, Annotation Case C-192/99 Kaur [2001]*, "Common Market Law Review", 39/2002, p. 881. Cf. D. Kochenov, *Ius Tractum of Many Faces* "Columbia Journal of European Law", 15/2009, p. 169.
[88] B. Milanovic, *Global Inequality*, Cambridge 2016.
[89] M. Corrado, K. Marsh, *Investment Migration and the Importance of Due Diligence: Examples of Canada, Saint Kitts and Nevis, and the EU*, in: *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, ed. by D. Kochenov, K. Surak, Cambridge 2021 (forthcoming).
[90] J. Abrams, *Examining Entrenched Masculinities in the Republican Government Tradition,* "West Virginia Law Review", 114/2011, p. 165.
[91] Commission's Report, Section 2.1, pp. 3, 4.

Flaw no. 3: Flawed reasoning rooted in obsolete authority of 'genuine links'

The third main flaw of the Report after misrepresenting the investment migration it purports to describe and failing to summarise the basics of citizenship acquisition rules, is the Commission's failure to come to terms with the basic meaning of citizenship in law as an abstract legal status. Rogers Brubaker famously defines citizenship as an 'object and instrument of closure',[92] that is: selecting those who 'belong' from the available number of bodies and guarding the selected few from those who do not 'belong'. It means that not caring about the county and its purported 'values' will not make you less of a citizen in the eyes of the law, just as caring a lot about some officially endorsed 'culture' or language will *not* make you a citizen, unless you are named as such by law. Pretending that this is not the case – and many countries go to absurd lengths with this – like my own Kingdom[93] – is deeply unhelpful. It is, nevertheless, what citizenship is designed to do – presented to us as 'natural' a legal status which deprives those not endowed with it of any voice, discarding their dignity in the majority of cases, and which shields those who proudly and officially 'belong' of any trifling criticism from the status quo. When the Commission informs us that 'the study looked at other factors […] which might arguably create a link between the applicant for citizenship and the country concerned',[94] a citizenship lawyer reading it might well be puzzled. It is fundamental to realise that only *citizenship* can be such a link. To present citizenship – an abstract legal status – as something that requires more than *itself* in order to be enjoyed is not faithful to the letter and the spirit of global citizenship law as it stands today. The Commission's analysis carries with it a whiff of the totalitarianism of nineteenth century approaches to allegiance.[95]

It is impossible, with recourse to the law in force, to justify the Commission's position, since it would mean that all that the EU stands for: liberal values, non-discrimination on the basis of nationality, human dignity and equality, can be undone on the basis of tired and unambiguous nationalist tropes such as 'links' with states and 'cultures' pre-approved by the powers that be. The whole point of the text of the Report which emerges is the Commission's apparent desire to play handmaiden to such a totalitarianism: is this Maltese a 'real' Maltese? What if he has never visited the European Union? And what about this Irishwoman?[96] And this Brit?[97] This Dutch?[98] This is where the obsolete case law of the International Court of Justice(!) – expressly

[92] R. Brubaker, *Citizenship and Nationhood in France and Germany*, Cambridge 1992.
[93] D. Kochenov, *Mevrouw De Jong Gaat Eten: EU Citizenship and the Culture of Prejudice*, "EUI RSCAS Working Paper" 6/2011. Please note that the situation has become much worse since the paper has been written, as the level of absurdity and humiliation to which those willing to get the local documents are subjected has risen sharply.
[94] Commission's Report, p. 5.
[95] Cf. Kochenov, *Citizenship*, Cambridge 2019.
[96] Case C-434/09 McCarthy v Secretary of State for the Home Department [2011] ECR I- 3375.
[97] Case C-192/99 Kaur [2001] ECR I-1237.
[98] C-221/17, Tjebbes and Others, ECLI:EU:C:2019:189; D. Kochenov, *The Tjebbes* Fail, "European Papers", 4/2019, p. 319; K. Swider, *Legitimising Precarity of EU Citizenship: Tjebbes*, "Common Market Law Review", 57/2020, p. 1163.

overruled by the EU's own Court of Justice – comes into play: the Commission refers quite extensively to the *Nottebohm* theory of 'genuine links'.[99]

It could of course be possible that the Commission's desk officers might be unaware of the fact that the case was opposed immediately after it was decided by Jones, Kunz, Panhuys, and Weis – the list of authorities could be continued *ad infinitum* – and later dismissed by René de Groot, Jessurun d'Olivera, Macklin, Sloane, Thwaites, Vermeer-Kunzli and many others, as Spiro has splendidly summarised.[100] What they could not overlook, however, is that 'genuine links' are incompatible with a world which has moved on, at least officially, from perpetual allegiance and glorious mystifications of blood nationalism, as the Court of Justice confirmed in *Micheletti*.[101] As per Advocate General Tesauro, the 'romantic period of international relations'[102] is over. It is thus quite unacceptable, in the respectful opinion of this author, to provide a reference to 'genuine links' and *Nottebohm* in an official Report of the European Commission as a reference to the necessity to have nationality acquired by naturalisation recognized in the 'international arena'.[103] The reference is flawed, since the Court of Justice of the European Union has *expressly prohibited* the Member States from relying on *Nottebohm* in dealing with each other's nationals. The Report contradicts itself, of course, since this fact is mentioned in footnote 30.[104] You cannot have a rule of recognition 'in the international arena', which is at the same time expressly prohibited by the highest EU Court, with the immediate effect, of course, of blocking *Nottebohm* in the territory of the EU. This point is absolutely crucial: the Commission's Report knowingly *misrepresents EU law*.

References to the obsolete authority only start the Commission's puzzling campaign of putting legal reasoning to sleep. The Report essentially claims that since checking 'genuine links' is expressly prohibited by EU law in *Micheletti* (again, mentioned correctly in a footnote),[105]

[99] *Nottebohm* (Judgment) [1955] ICJ Rep 4. The citizenship of Lichtenstein held by Mr Nottebohm was not recognised by Guatemala, the latter state treating Mr Nottebohm as a German citizen – a status he did not hold. The ICJ agreed with this restrictive vision, ruling that nationality is a 'legal bond having as its basis a social fact of attachment, a genuine connection of experience, interests and sentiments, together with the existence of reciprocal rights and duties'. The ICJ failed to mention, however, that in the absence of any other nationality but that of Liechtenstein and with 'genuine link' only to Guatemala, precisely the state aggressing him, Mr Nottebohm was deprived of any remedy as a result of the controversial decision, even if limited only to the recognition of nationality for the purposes of diplomatic protection. To see the incoherence of the judgement, see the Dissenting Opinion of Judge Klæstad and the dissenting opinion of Judge Read. For analysis see the literature recommended in A. Bleckmann, *The Personal Jurisdiction of the European Community*, "Common Market Law Review" 17/1980, p. 467, 477 and note 16.

[100] P. Spiro, *Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion*, "Investment Migration Research Paper" 1/2019. Please see the extensive literature cited therein.

[101] Case C-369/90 Micheletti [1992] ECR I-4239, I-4262.

[102] Opinion of AG Tesauro in Case C-369/90 Micheletti [1992] ECR I-4239, I-4262.

[103] Commission's Report, pp. 5, 6.

[104] *Ibidem.*, p. 7.

[105] *Ibidem.*, p. 6.

Member States *have to ensure* that such links exist.[106] A *prohibition* is turned into *an implied obligation*. In outlawing any such links in *Micheletti* the Court of Justice has apparently instructed someone – in the mind of the Commission – to check whether the 'genuine links' are there. This could not be further from the truth. Quite to the contrary, the Court has in fact clarified that 'genuine links' do not apply in the context of the EU and that *Nottebohm* is bad law: the desk officers should check a textbook (any from this millennium would do). It is settled case law that no residence in any Member State is required in order for EU citizens to use the free movement rights protected by EU law. The Commission is trying, in its Report, to use precisely the *prohibition* against checking 'genuine links' unequivocally expressed directly by the Court of Justice itself as a pretext to imply that there is an obligation to check the existence of such links, presumably on the quiet. Harry Frankfurt's 'On Bullshit'[107] is at least only a philosophical joke, even though not more than mildly entertaining, while the Commission's text purports to be a serious effort aimed at informing policy decisions. *Nottebohm is* unquestionably bad law and the Commission was *obliged to know this to be the case*. The Commission's reasoning amounts to trying to undermine the internal market, established case law on the free movement of persons, and the rule of EU law established in *Micheletti*. The Commission thus knowingly attempts to mislead the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, to whom the Report is addressed, for political reasons. It could even be regarded as an example of the violation of the duty of loyalty, were the Report more convincing.[108]

Flaw no. 4: Curious assumptions about the connection between residence, citizenship, and security

It is when looking for possible solutions to the risks identified in terms of security, tax evasion and money laundering, however, that the Report reaches the level of the truly esoteric, which becomes scary, rather than entertaining. The Commission's analysis seems to be based on the assumption, which is nowhere explained or defended properly, that presence in one of the Member States for a period of time before naturalisation is likely to alleviate the security risks posed by a naturalised person. It is impossible to make a convincing argument that going through the one particular naturalisation procedure the Commission might have in mind makes one a less dangerous person. In fact, for as long as newly created Maltese billionaires do not stab people at Christmas markets or ram vans into crowds, the assumption entertained by the Commission rests unproven.

This also undermines the appeal of the Commission's findings that 'this means that applicants can acquire citizenship of Bulgaria, Cyprus or Malta – and hence EU citizenship – without ever having resided in practice in the Member State'.[109] The only answer to this is 'of course!' in a

[106] *Ibidem*.
[107] H. Frankfurt, *On Bullshit*, Princeton 2005.
[108] The duty of loyalty does not only apply to the Member States, but is owed equally by the Commission to the EU and other organs and institutions. Cf. e.g. M. Klamert, *The Principle of Loyalty in EU Law*, Oxford 2014.
[109] Commission's Report, p. 5.

situation where hundreds of thousands of EU citizens have never been to the EU in their lives and there is no legal requirement, either in the EU or in International law, to bother to visit one's country of citizenship. Indeed, not everyone is fond of their grandparents' graves. Even moving beyond this obvious reality is ground well-known to the Commission: EU citizenship does not have independent grounds of acquisition. This means that – just as with the Greek, Irish or French citizenship that it would be derived from – it is entirely incorrect to imply that it requires any residence anywhere in particular. What it requires in fact, is the observance of the law – French, Irish, or Cypriot – democratically passed by the relevant Parliament. Moreover, the continued possession of citizenship is not dependent, unlike the global practice until half a century ago, on residence in any particular territory.[110] EU citizens born in Chicago with this status will remain EU citizens even if they never visit the EU. If they do, no due diligence or security checks will be conducted to ascertain their right to retain their citizenship, of course. This is the most basic context in which all citizenships in the world operate: citizenship does not require residence and residence does not mean that someone is somehow rendered less of a threat. The Commission's flawed analysis is thus consistent throughout in its absolute ignorance of the subject matter of the Report that the institution has published.

Flaw no. 5: Other important misrepresentations of EU Law

Lastly – throughout the Report the Commission underlines the risks related to the freedom of movement between the Member States of these new citizens after their naturalisation. There is a problem here. Framing the use of the most important *right* of citizenship under EU law uniquely as a *risk* is not entirely correct. What could be mentioned – following Christian Kälin[111] – is that all the individuals naturalised through citizenship by investment are in fact ideal EU citizens in the light of Directive 2004/38: they will never be a burden on the social security systems of the host Member States and will obviously have comprehensive health insurance – the two core requirements to be met in order to benefit from the free movement right under Article 21 TFEU. Also the Report's wording about 'circumventing certain nationality requirements'[112] is unhelpful and is no doubt a misunderstanding: naturalisation by investment makes one a citizen of Malta, i.e. it is a vehicle for *meeting the requirement* of nationality, not circumventing it. Becoming a citizen – either through marriage to a Dutch lady or serving in the French foreign legion or retiring from the Vatican – cannot be equated with circumventing a requirement of nationality. Most worryingly, the Commission seems to hint at discrimination on the basis of how citizenship was acquired, which is prohibited in EU law since the *Boukhalfa*

[110] This being said, possessing two or more nationalities can suddenly activate this old rule to punish multiple citizens for being themselves, something that the Court of Justice is absolutely fine with, as Tjebbes has demonstrated: D. Kochenov, *The Tjebbes Fail*, "European Papers", 4/2019, p. 319. For an analysis of the possible broader negative implications of holding multiple nationalities in the context of EU law, see, D.A.J.G. de Groot, *Free Movement of Dual EU Citizens*, in: *European Citizenship under Stress: Social Justice, Brexit, and Other Challenges*, ed by N. Cambien, D. Kochenov, E. Muir, Boston 2020.
[111] C. Kälin, *Ius Doni in International and European Law*, Boston 2019.
[112] Commission's Report, p. 17.

case law,[113] which it does not cite, not to mention the European Convention on Nationality, on which it is equally silent.

Leaving *Boukhalfa* aside, the Commission has had problems brushing up on its knowledge of Directive 2003/109 as well, it appears, as several Member States are implicitly criticised for establishing an easier way to access their *national* Permanent Residence than the requirement of that Directive provides.[114] This criticism is unacceptable, since Directive 2003/109 states unequivocally in Article 13 that: *'Member States may issue residence permits of permanent or unlimited validity* on terms that are *more favourable than those laid down by this Directive' (emphasis added)*. To be absolutely clear: to imply that the Directive establishes the *minimum* threshold for defining permanent residence in the EU – as Sergio Carrera quite embarrassingly has done[115] – is absolutely incorrect, since the text of the provision above is quite clear. It is of course true that national requirements, which are more lenient that those set out in Directive 2003/109 will not produce EU-level rights for the holders of these permits, a point covered in the literature by Martijn van den Brink,[116] but this is not the general point the Report seems to be making. The Report is taking issue, erroneously, with the low physical presence thresholds under national legislation on investment residence in Malta, Greece and Bulgaria. Once again: this criticism is moot, since the Directive expressly allows the Member States to set the presence requirement at zero ('0') days. This is the law the Commission is there to respect, uphold and promote. In fact, it is unclear why it is criticising the decisions legitimately taken by three Member State governments clearly within their realm of competence and breaching no legal rules while showing no evidence whatsoever of any abuse of the law besides its own relentless ignorance.

Conclusion: Berlaymont is taking us for a ride

The Commission has proven Harry Frankfurt right: 'One of the most salient features of our culture is that there is so much bullshit'.[117] It has taken us for a ride, nineteenth century style, telling twenty Member States that they are most likely doing it wrong, while enjoying no competence to regulate the field and demonstrating rather poor command of the matter in question. There are excellent lawyers at the Commission and the matter of 'genuine links' belongs to the dullest footnotes of old textbooks, which point in one direction: the

[113] Case C-214/94 Boukhalfa ECLI:EU:C:1996:174. Although the Report recognises the importance of non-discrimination on this ground, it is written based on the presumption of the necessity to discriminate, which follows from its questionable 'genuine links' logic in the context of granting nationalities acquired by naturalisation an effect. Under this approach, outlawed by the Court of Justice, Miss Boukhalfa could have had no genuine links with Germany to allow her to be protected from discrimination.
[114] Commission's Report, pp. 8, 9.
[115] S. Carrera, *The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters*, "CEPS Policy Brief", 2014, p. 18.
[116] M. van den Brink, *Investment Residence and the Concept of Residence in EU Law: Interactions, Tensions, and Opportunities*, Investment Migration Research Paper 1/2017.
[117] H. Frankfurt, *On Bullshit*, Princeton 2005, Introduction.

Commission's decision to misrepresent the law and go against the non-discrimination essence of EU citizenship to attempt to enlarge own Competences is but a dangerous political game. On 20 October 2020 the Commission started to push even harder, by waving threats to go to Court in a case it knows is a flop.

Many will no doubt be surprised by this – is this really what the Commission is for? – while Blood and Soil communitarians of all sorts will cheer. Beyond the haphazard argumentation and wilful misinformation concerning citizenship in general and EU citizenship in particular, the Report, just as the 20 October 2020 press release sends a very clear message: the Commission wants to regulate citizenship, telling France who is a Frenchmen and Estonians who has 'genuine links' to Estonia. It is quite offensive of course, given the values the Union stands for, and not merely disappointing, that the Commission could believe in 'genuine links', and express itself to be ready to sacrifice the core principles that the EU is based on. Yet, the Commission might be wrong thinking that it is too big and powerful next to Cyprus and Malta to be worried about losing face over a trivial matter of who might properly be regarded as European and who is owed dignity and respect in the EU. In the Union priding itself as an embodiment of integration through law pretending that the law does not exist or matter only to further the political interests underpinning a moral panic is a game which is much more dangerous than it would seem at the first glance. EU citizenship is as valuable as it is fragile and interpreting it in the despicable *Blut und Boden* way of 'genuine links', i.e. by denying its bearers human dignity, will kill it.

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