

Investment Migration Working Papers

EU Competence and the Attribution of Nationality in Member States

Daniel Sarmiento

IMC-RP 2019/2

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AUTHOR, TITLE, INVESTMENT MIGRATION WORKING PAPER NO./YEAR [URL]

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ISSN 2504-1541

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EU Competence and the Attribution of Nationality in Member States

Daniel Sarmiento*

ABSTRACT: The EU's limited competences in the field of immigration introduce significant limits on the EU's ability to harmonize or introduce uniform rules in the laws of nationality of its Member States. This paper will portray the EU's competences in the field, as well as the Court of Justice's position in the matter. It will be argued that the cases in which EU law can interfere in Member State's laws on nationality concern cases of restrictions of EU rights, but not cases in which the attribution of nationality is a source of EU rights for the individual. It will be argued that the EU can only introduce measures in this area of national law on the grounds of Article 352 TFEU, and even in this case it must comply with strict requirements, such as the existence of a genuine need to improve the goals in the Treaties, as well as a unanimous vote in the Council.

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 the powers of an international organisation are the result of an explicit and unequivocal transfer enacted by its Member States and enshrined in its foundational 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. The EU needs to act at times by 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, 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 which empowered the EU to deploy its policies 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, along with the far-reaching case law of the Court of Justice in the field of EU citizenship. The refugee crisis which ensued in 2016, the migratory pressure in southern Europe and the appropriation of the migration discourse as part of the European far-right political discourse, have forced the EU to confront the issue with a broader and more holistic

approach, in contrast with its hitherto piecemeal approach.² In parallel, the development of the 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 It can at once be argued that immigration policy lies at the heart of the EU's concerns, and the competence constraints imposed by the Treaties will be exploited imaginatively to allow the EU to develop an ambitious immigration agenda.

Despite these developments, the principle of conferral is still a major limit to the EU's scope of manoeuvre 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 in the 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 confirm Member State autonomy reinforces the normative stance of the Member States in defence of their autonomy in the field of nationality law.

This paper will analyse the terms under which the EU has indirectly and cautiously conditioned Member State nationality laws and how the Court of Justice has developed such limited review. The case law will be depicted in detail to explain the complex balance used by the Court of Justice to authorise 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 at the current state of integration, the EU lacks the powers to interfere in its Member States' nationality policies through the imposition of requirements for the

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.

acquisition of nationality, unless objective difficulties arise and are properly argued by the EU to take measures by way of Article 352 TFEU.

2. The principle of conferral and the allocation 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 recognised 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 the EU's international action.⁵ In the late eighties a consensus emerged as to the need to codify the principle, as was actually done 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'. The second paragraph 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

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

⁴ Rodriguez Iglesias, G.C., 'Reflections on the General Principles of Community Law', McKenzie Stuart Lectures, 1997/1998, pp. 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, pp. 346 et seq.; Barents, R., 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation', *Common Market Law Review*, (1993) pp. 85–91, and Bradley, K., 'The European Court and the Legal Basis of Community Legislation', *European Law Review* (1988), pp. 379–385.

requires a unanimous vote in the Council, in which every Member State will thus have a right of veto. Accordingly, 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 of 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 in 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 commercialisation).⁹ In fields with no direct link with an economic activity in the internal market, Article 114 TFEU is not a viable option to surmount the limits of the principle of

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 *Ibid.*

conferral.¹⁰

Finally, the Court of Justice has made limited use of the principle of implied powers, particularly in areas pertaining to the internal functioning of the EU. In *Spain v. 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 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 the 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 Justice, provide an implicit power to EU Institutions to make use of the implementing measures necessary to enforce EU law properly. 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 of *and* limit to policy action. It can be interpreted pragmatically to fulfil 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 impingement 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, does it grant 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 fields of citizenship and migration

The exercise of EU competence relies on the existence of a legal base in the Treaties defining the powers of the legislative and executive EU Institutions. Each area of policy is subject to a type of

¹⁰ Lenaerts, K. and Van Nuffel, P., *European Union Law*, Sweet & Maxwell, 2011, pp. 111–114.

¹¹ *Spain v. Council*, C-521/15, EU:C:2017:982.

¹² *Spain v. Council*, *ibid.*, paragraphs 45–53.

competence (exclusive, shared or coordination)¹³ and to the conditions laid in the legal base for each policy area.¹⁴ For example, environmental policy is a shared competence and its legal bases are enshrined in Articles 191 to 193 TFEU, in which the Treaty provides the scope of the competence, the type of legislative procedure available, the voting rules applicable in the Council and any other relevant conditions. The same rationale applies in the fields of citizenship and immigration, in terms which considerably reinforce the role and influence of the Member States *vis-à-vis* the EU Institutions.

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. EU citizens can also enter into partnerships or marriages with third-country nationals who will acquire derived rights from EU citizens. Therefore, in order better to 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 fields 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 which 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

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*, pp. 1024–1033.

¹⁴ See *Germany v. Parliament and Council*, C-376/98, EU:C:2000:544, paragraphs 79–81.

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 membres', *Revue trimestrielle de droit européen* 2003 p. 561, and Iliopoulou, A. and Toner, H., Case Note, (2002) *Common Market Law Review* p. 609.

current time, it is the national link with a Member State which carries the main weight in an 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 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(2) TFEU recalls that the Council, acting unanimously, may strengthen 'or add' further rights to the list in Article 20 TFEU. This power is also conditioned on 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 rights enshrined in Article 20 TFEU, 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 to define better 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 of ensuring 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

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.

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.

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 be effected either by way of unanimous voting in the Council, a domestic ratification process through national 'constitutional requirements', or through the 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 which may undermine the status of EU citizens, Member States retain a significant margin of action 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 which 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 result of a long process of evolution of EU competence which began in the 1990s, followed by a gradual integration of policy, first through inter-governmental decision making and finally – as a result of the Lisbon Treaty – to 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

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.

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, pp. 9 et seq.

Member States. As will be seen, that is the case for the 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 end, Article 77(2) TFEU introduces a detailed list of measures which 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, and common procedures, standards and partnerships with third countries. Article 78 TFEU also includes a mechanism for imposing solidarity measures among the Member States in when confronted by an emergency situation characterised by a sudden inflow of nationals from third countries.²⁵

Finally, specific powers are granted to the EU 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 of persons. Immigration policy is thus limited to a tightly-knit array of decisions in Article 79 TFEU, paragraph 5 of which sets further 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 determine volumes of admission of

²⁵ On this provision, see the judgment of the Court of Justice in the case of *Slovak Republic and Hungary v. 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 n° 5, and Maupin, E., ‘La CJUE valide le mécanisme provisoire de relocalisation des migrants’, *L’actualité juridique; Droit administratif* 2017.

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 transform EU citizenship effectively 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 on 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 the 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 centre of gravity still tilting in favour 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. The exercise of EU competence can at times prove excessively contingent and the Commission or the Member States may decide to abandon the use of a legal base as a result. 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 third-country nationals, 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

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.

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 of policy which are not a part of a shared competence (unless assumed as such 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 remains far from developing all the legal bases currently in the Treaties, thus leaving such areas of policy in the hands of Member States, for the time being. But above all, the piecemeal structure of EU citizenship and immigration policies leaves Member States in full control of major areas, 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 have remained 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.

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.

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 underline the powers of Member States. To this end, the three Declarations concerned were the result of three individual situations in three Member States, but they all share 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 Declarations 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 to support its government's effort 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 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, after 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, to align it with the array of statuses 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:

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).

²⁹ In *Rottmann* (C-135/08, EU:C:2010:104, paragraphs 3 and 40), the Court of Justice explicitly referred to Declaration N° 2 in the definition of the legal framework applicable to the case and in construing the reasoning of the ruling.

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 being explicitly referred to 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.

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 source for 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 Tesauero, in his Opinion in *Micheletti*,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

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 Tesauero in the case of *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, C-369/90, EU:C:1992:47.

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

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 for 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 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 achieve 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 alone. 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 drawn its focus to two different variables: the effectiveness of EU rights, and the autonomy of Member States.

³⁴ Ibid., point 7.

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 which acts to limit EU citizen's rights. Consequently, when it comes to the *attribution* of Member State nationality, the case law has adopted a deferential 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 recognise the Italian nationality granted to an Argentinian national intending to establish himself in Spain as an Italian national. The Spanish authorities argued that 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 attribute nationality legitimately and have it recognised 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 Member States had the power to impose additional conditions for the recognition of the nationality of other Member States, 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

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

³⁶ *Ibid.*, paragraph 11.

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 recognises Member State autonomy in defining the terms of acquisition of nationality, but as a means of attribution of EU rights. Inasmuch as 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 which 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 the effective exercise of EU rights. The notion of autonomy of EU law deploys its effects both internally and internationally, but above all it imposes limits to national or international law when they undermine the basic values enshrined in the Treaties.³⁹

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 of dual nationality in accordance with the rules of one Member State of nationality. The Court of Justice ruled that

³⁷ See footnote 29.

³⁸ *Ruiz Zambrano*, C-34/09, EU:C:2011:124.

³⁹ See, inter alia, *Kadi and Al Barakat International Foundation v. Council and Commission* (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).

⁴⁰ *García 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 n° 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.

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 under Irish law for a child born in Northern Ireland), with the purpose of refusing derived residence rights to the child's parents. The Court of Justice again struck out the attempt to limit EU rights, recognising the autonomy of each Member State to develop the terms and conditions for the 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 considered 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 rendered stateless, 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 that case the Court of Justice took into account the fact that under international law, statelessness is allowed if nationality was conferred on the grounds of false statements by the applicant.⁴⁵ Considering the circumstances 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 the effectiveness of EU rights and Member State autonomy. In cases of loss of nationality, the effect on EU rights is significantly more intense, even more so than in cases of additional burdens to

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 n° 37; Seling, A., 'Towards a direct "droit de regard"?', *Maastricht Journal of European and Comparative Law* 2010 Vol. 17 n° 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.

⁴⁶ *Ibid.*

the acquisition of nationality. As a result, the Court of Justice is willing to scrutinise Member State action closely, 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 *Rottmann*, at the cost of intruding on 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 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 elaborated at length on recognising the broad scope of action of Member States in determining the terms and conditions for the acquisition and loss of nationality.

As previously described, 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 paid close attention to the fact that the United Kingdom had submitted a unilateral Declaration to its accession Treaty which clearly stated that British Overseas Citizens were not to be considered ‘nationals’ under EU law. Despite the Declaration being 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.

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. n° 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 stated that its decision did not have 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 ever been conferred on Ms Kaur, there was no question of a 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 premise for determining at a second stage the terms under which a Member State can 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 the Member States. When reviewing Member State action in the field of nationality, the Court of Justice only verifies whether 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 achieve the asymmetric protection of EU rights, such competence can only be justified in terms which are adequate and proportionate to the achievement of legitimate goals. That is the approach of the

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, p. 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)’.

Court of Justice, which refuses to transfer competences in the field of nationality to the EU, but strives to ensure the uniform protection of rights of EU citizens.

It can therefore 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 which disproportionately affect the terms and conditions in which EU citizens make use of their rights will come under EU scrutiny. However, measures which do not restrict the rights of EU citizens remain within the sphere of competence of the Member States. EU intervention in such areas will require an exercise of EU competence at the legislative level or 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 in *Rottmann*, there is a clear restrictive effect on the rights of EU citizens which justifies EU review. In the case of non-recognition of nationality by another Member State, as in *Micheletti*, there is again another restrictive effect which 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 also entails the acquisition of EU citizenship, 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. Investors are thereby offered specific routes for the acquisition of

nationality, 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 *Nottebohm*.⁵⁴ International law has given relevance to the existence of personal ties to the country of naturalisation, particularly when an individual requests international protection from his or her State of nationality. For that purpose, ‘meaningful nationality’ acts as a prerequisite to bind States under international law when providing and ensuring international protection. However, as Peter Spiro has convincingly argued, ‘meaningful nationality’ is not a general requirement under international law which 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 arising in discussions and consultations, whether it is prior or following the acquisition of nationality. In the following section will argue 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.

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.

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, pp. 515 and 516.

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 into 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 intentions to assume powers to harmonise or to introduce uniform rules in the area of nationality.

Under EU law, physical presence in the form of legal residence can be considered as playing a relevant role as a criterion to determine permanent residence under Directive 2004/38.⁵⁷ A five-year period of *uninterrupted* legal residence grants the right to request permanent residence in a 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, including the fulfilment 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, 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 over a specific period, 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

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 *Dano*, C-333/13, EU:C:2014:2358.

moving EU citizens intending to reside in another Member State, or hoping to receive services in another Member State. 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, such concerns are absent from the acquisition of nationality, inasmuch as a naturalised citizen in a Member State does not, as such, earn residence rights in another Member State. The naturalised 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 naturalised EU citizen if he or she sought 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 for the acquisition of 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, along 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 the Member States to keep that area of law outside the scope of competence of the EU.

However, as has long 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 whether Member States restrict EU rights by developing a nationality policy which does not require physical presence prior to or after the acquisition of nationality. If such restriction were proved to exist, 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 a third-country national a swift and less restrictive route to accessing

EU citizenship and to the exercise of the rights attached therein. In stark contrast with *Michelletti* and *Rottmann*, in which the 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 scrutinise 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 encourage 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 recognised by the Court of Justice as a legitimate course for acquiring 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 Member State's internal legal policy. To date, investment programmes are enacted as Parliamentary Acts, statutory instruments subject to clear and transparent criteria. Under such standards, these practices cannot be considered as entailing 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 which 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

⁶⁰ *Chen*, paragraph 40.

and developed. As 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 had so much purchase on the imagination at the same time as it has had 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 standards must be referred to clearly defined rules of written or customary international law, which is not currently 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 favour of the EU. The compliance with 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 competences 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 naturalisation policies. *Michelletti* is a sound example of how the Court of Justice defers on Member States the relevant criteria for the determination of a naturalisation procedure. In the same vein, in *Chen* the Court of Justice deferred 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 minor infants acquired Belgian

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 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) Nottebohm 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.

nationality could have been questioned, but not as a matter of EU law. Meaningful nationality of a Member State is a category foreign to the theory and practice of the case law of the Court of Justice, precisely to ensure the 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 which 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 which it has not achieved so far. However, it is nevertheless appropriate to enquire whether the EU could ever, in the current Treaty framework, have the right powers to intervene in the field of nationality.

First and foremost, I believe that the Treaties confer no competence on 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.

However, Article 352 TFEU provides a legal base which 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

⁶³ See footnote 5.

the area of policy to which the measure is addressed, Article 352 TFEU 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 fulfil 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 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, voting unanimously and with prior consent of the European Parliament, could introduce common standards on the 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 would have to be compatible with the principles of proportionality and subsidiarity. Competence under Article 352 TFEU would thus 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.

6. Conclusion

Nationality and EU citizenship are twin statuses which coexist and depend mutually on 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 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.

Irrespective of the which status is deemed to become fundamental in the future, EU law has set clear standards for how both categories must interact, the priority of which is determined by ensuring, first and foremost, the effectiveness of EU rights. The interplay between EU citizenship and nationality must operate in a way which favours and facilitates the enjoyment of the rights granted by EU law. As a result, Member States must recognise all forms of attribution of nationality as long as it is performed in accordance with the appropriate legal requirements set by the Member State. Member States must also not disproportionately interfere in the status of EU citizenship by depriving the individual of such status arbitrarily. 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.

Beyond 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 recognising such specificities as a legitimate source which ensures national autonomy. In fact, in *Kaur* the Court of Justice introduced a distinction between national rules which *limit* the exercise of rights as a result of being a national of a Member State, and national rules which grant *access* to the status of nationality. The former are subject to the criteria set in landmark judgments such as *Micheletti* and *Rottmann*. The latter recognise the sphere of autonomy of Member States when deciding on the criteria for the acquisition or loss of 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

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

⁶⁴ Jessurun d’Oliveira, H.U., ‘Union citizenship and beyond’, LAW 2018/15, EUI Working Papers, p. 7.

Executive Summary

Foreign investor programmes have flourished in several EU 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 the 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 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. Although the Court of Justice has rendered decisions which indirectly condition the nationality laws of the Member States, these rulings are mostly based on situations which 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 analyse it in the broader context of international law, which has struggled to balance the notion of 'meaningful nationality' with the evolution of a globalised 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 which will require the acquiescence of the Member States which have currently enacted foreign investor programmes.

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