

Investment Migration Working Papers

Investment Migration and State Autonomy: A Quest for the *Relevant* Link

Matjaž Tratnik and Petra Weingerl

IMC-RP 2019/4

All rights reserved.
No part of this paper may
be reproduced in any form
without a proper citation.

Publications in this Working Paper Series should be cited as:
AUTHOR, TITLE, INVESTMENT MIGRATION WORKING PAPER NO./YEAR [URL]

© The Author 2019
ISSN 2504-1541

Editorial Board

Co-Editors

Dimitry Kochenov
Chair in EU Constitutional Law,
University of Groningen

Madeleine Sumption
The Migration Observatory,
University of Oxford

Deputy Editors

Roxana Barbulescu
University Academic Fellow,
University of Leeds

Martijn van den Brink
PhD Researcher,
European University Institute

Advisory board

Vincent Chetail
Professor of International law
and Director of the Global
Migration Centre, Graduate
Institute, Geneva

Gareth Davies
Professor of European Law,
Department of Transnational
Legal Studies,
VU University,
Amsterdam

Eberhard Eichenhofer
Professor of Social Law and
Civil Law,
Friedrich Schiller
University Jena

Marc Morjé Howard
Professor of Government,
Georgetown University and
Professor of Law,
Georgetown University
Law Center

Christian Joppke
Chair in General Sociology,
University of Bern

Paul Kalinichenko
Chair in European Law,
Kutafin State Law University,
Moscow

Will Kymlicka
Professor of Philosophy and
Canada Research Chair in
Philosophy,
Queen's University,
Kingston, Canada

Michael Olivas
William B. Bates
Distinguished Chair of Law,
University of Houston
Law Center

Antonello Tancredi
Professor of Public
International Law,
Faculty of Law,
University of Palermo

Peter Spiro
Charles Weiner Chair in
International Law,
Temple University
Beasley School of Law

Yasemin Soysal
Professor of Sociology,
Department of Sociology,
University of Essex

John Torpey
Professor of Sociology and
History and Director of
Ralph Bunche Institute for
International Studies at the
Graduate Center, CUNY

Fernand de Varennes
Dean, Faculty of Law,
Université de Moncton,
Canada

Antje Wiener
Chair of Political Science,
Especially Global Governance,
Faculty of Social Sciences,
University of Hamburg

Information for prospective authors

The editors welcome unsolicited submissions of previously unpublished material that will advance knowledge in the field of investment migration. The Papers do not take copyright, encouraging the authors to republish material elsewhere, provided the text mentions that it has previously appeared in the Investment Migration Papers. Research papers should be between 6,000 and 15,000 words in length, including the references. The Policy Briefs should start at 3,500 words.

Submissions should be made electronically to the following email: 2016academic@ investmentmigration.org. The following information should be included at submission: authors full name, postal address, e-mail and institutional affiliation, and a statement that the text has not been previously published elsewhere. The submission should contain an abstract of up to 200 words and 5–10 key-words. All papers are reviewed by the members of the editorial board. We publish fast.

Investment Migration Working Papers

IMC-RP2019/4

Investment Migration and State Autonomy: A Quest for the *Relevant* Link

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

* PhD, Professor of International, EU and Comparative Law, University of Maribor, Faculty, Faculty of Law.

** DPhil (Oxon), MJur (Oxon), Assistant Professor of the Department of European and International Law and International Cooperation, University of Maribor, Faculty of Law.

Contents

1. Introduction	1
2. Excursus: two aspects of the State autonomy in matters of nationality and the irrelevance of the genuine link	5
3. Limitations of the national autonomy in international law	14
3.1 Limitations in international conventions on citizenship	15
3.2 Developments of international human rights law and citizenship	17
4. EU citizenship and its relation with the citizenship of the Member States	19
5. Limitations of national autonomy in EU law	23
5.1 Unconditional recognition of Member State nationality	25
5.2 The principle of proportionality	26
5.3 The principle of sincere cooperation	33
5.4 Indirect influence of EU law on the national autonomy of the Member States	38
6. Conclusion	41

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 conventions³ and confirmed by the Permanent Court of 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 residence⁷ status to non-EU investors.⁸ In this paper we

* Parts of this paper were published by Matjaž Tratnik in a chapter in Suzana Kraljić and Jasmina Klojčnik (eds), *From an individual to the European integration: discussion on the future of Europe: liber amicorum in honour of prof. emer. dr. Silvo Devetak on the occasion of his 80th birthday* (University of Maribor Press 2019) 507–534.

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 Dmitry Kochenov estimates that app. 20 Member States operate either citizenship or residence scheme. Dmitry 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 IIP (in particular the inclusion of an effective

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.

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:

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).

‘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 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 Maastricht²³ 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

¹⁸ P.C.I.J. Series B, No. 4, para. 40.

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).

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.

2. 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.

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.

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.

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 Laws²⁹ 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 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 Liechtenstein 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

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.

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.

German *Reichs- und Staatsangehörigkeitsgesetz* 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

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.

protection to *Nottebohm* vis-à-vis Guatemala was not admissible because the requirement of nationality of the claim³⁴ was not fulfilled.

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

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.

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.

‘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 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

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 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.

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 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

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 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.

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:

‘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

⁵³ *Micheletti* (n 6) para 5.

⁵⁴ See also Spiro, ‘*Nottebohm*’ (n 31); Sarmiento (n 49); Dmitry 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.

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

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.’

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

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).

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

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.

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 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

3. 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

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.

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 law.⁶⁷ Another relevant principles are the principle of proportionality and the prohibition of 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.

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 Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 129. See also Dmitry 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 Vol. 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.

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 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 parties⁷⁵ 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 Statelessness⁷⁶ 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

⁷¹ LNTS Vol. 179, 89.

⁷² Consequently, the principle of exclusivity may be also regarded as a confirmation of national autonomy. 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.

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.

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 not 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.

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

⁷⁸ UNTS Vol. 643, 221.

⁷⁹ CETS 166.

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.

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 Women⁸⁵ having 189 State parties,⁸⁶ and the 1989 Convention on the Rights of the Child⁸⁷ 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 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 arbitrary⁹⁰ deprivation of citizenship is regarded as a limitation of State autonomy in the field of nationality imposed by international human rights

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.

⁹⁰ See also Crawford (n 2) 522 – 523.

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 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

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

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

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.

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:

‘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

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.

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

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 uncharted 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*

¹⁰³ Ferdinand Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 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.

¹⁰⁴ Damian Chalmers, Gareth Davies and Giorgio Monti, *European 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 & Spencer 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.

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 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

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 *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 Zoetewij-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.

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 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.

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’.

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.

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 Convention as well as in national legislations.¹¹⁷ However, the CJEU decided in the *Garcia Avello* case¹¹⁸ 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

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).

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*).

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

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 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

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

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.

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 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,

¹²⁶ *Rottmann* (n 121) paras 56–58.

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.

¹³² Jessurun d'Oliveira, 'Union citizenship and Beyond' (n 11) 1–8.

¹³³ 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.

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 2003¹³⁴ 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.

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 period¹³⁸ and because it is for former Dutch citizens relatively easy to regain their nationality by taking residence in the Kingdom of

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.

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

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.’

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

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.

¹⁴¹ *Tjebbes* (n 132) para 45.

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 2015¹⁴⁵ 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

¹⁴² Especially if he or she lives in the country of the other nationality. Many countries allow for renouncing their nationality only in case 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 some¹⁴⁸ 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.

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).

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 called a loyalty clause¹⁵²) 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 mother¹⁵⁵ had the right to live in

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.

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

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

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 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.

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 Kälén,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 naturalizations¹⁶³ and where a Member State would without prior 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 scale¹⁶⁵ 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

¹⁶¹ *ibid* 9-10.

¹⁶² Kälén (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; Kälén (n 10) 144.

¹⁶⁴ Carrera Nuñez (n 9); AG Maduro in *Rottmann* (n 163); Kälén (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.

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 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

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.

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.

down in those two countries but rather serves as a ‘free ticket’ to Germany or Austria. Kälín¹⁷² 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.

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

¹⁷² Kälín (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); Kälín (n 10) 159-164. Kälín 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.

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.

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 requires

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

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 Member States retain over the

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.

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

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 Directive 2004/38), leading to a reverse discrimination which is not precluded as a matter of EU law. Tryfonidou, 'Reverse Discrimination' (n 183); Miguel Poiarés 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 européen 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.

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 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

6. 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

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.

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.

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.

Investment Migration Papers is a multi-disciplinary peer-reviewed academic publication dedicated to the analysis of the proliferation of citizenship and residence by investment around the world. The series aims to advance understanding of the law, politics, economics and history of investment migration, including residence and citizenship by investment. The papers analyse the processes and long-term implications of investment migration and examine how investment migration programmes function in different countries around the globe.

Two types of papers are published:

Research papers provide a venue for communicating high quality academic research in the field of investment migration.

Policy briefs provide a venue for practitioners and analysts to share their insights regarding relevant developments in a particular country/region of interest to the readers of the Papers.

Investment Migration Papers are published by the Investment Migration Council (IMC). The IMC is the worldwide association for Investor Immigration and Citizenship-by-Investment, bringing together the leading stakeholders in the field and giving the industry a voice. The IMC sets the standards on a global level and interacts with other professional associations, governments and international organisations in relation to investment migration. The IMC helps to improve public understanding of the issues faced by clients and governments in this area and promotes education and high professional standards among its members.

Investment Migration Council
16 rue Maunoir
1211 Geneva
Switzerland
+41 22 533 1333
info@investmentmigration.org