

Investment Migration Working Papers

Investment Residence and the Concept of Residence in EU Law Interactions, Tensions, and Opportunities

Martijn van den Brink

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 2017
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 Editor

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

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

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

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

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

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

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

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

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

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

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

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

Christian Joppke
Chair in General Sociology,
University of Bern

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

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The editors welcome unsolicited submissions of previously unpublished material that will advance knowledge in the field of investment migration.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-RP2017/1

Investment Residence and the Concept of Residence in EU Law: Interactions, Tensions, and Opportunities

Martijn van den Brink*

ABSTRACT: Immigration regimes around the world are increasingly tailored to attract highly desired individuals. A number of Member States have offered preferential access to the ultra-rich. Certain Member States have tried to attract high net-worth individuals by offering them privileged residence rather than citizenship. This paper examines investment residence from the perspective of EU law and examines what benefits under EU law are available to persons who have acquired residence through investment. Do residence regimes raise the same issues, again from an EU perspective, as those schemes which offer citizenship in exchange for money? Contrary to what has been suggested by certain law firms, this paper explains that the EU rights investors in residence are able to benefit from are relatively modest.

KEYWORDS: investment residence; long-term residence; EU law; Schengen; Blue-Card.

* Martijn van den Brink is PhD Researcher at the European University Institute, Florence
martijn.vd.brink@gmail.com.

Contents

1. Introduction	1
2. The race for talent and money	2
3. Investment residence within the EU	4
4. National residence and EU law	10
5. Residence on the basis of EU law	19
6. Conclusion	21

1. Introduction

Immigration regimes around the world are increasingly tailored to attract highly desired individuals, be they the very intelligent, the most creative or – the subject of this paper – the ultra-rich. The practice of ‘Olympic citizenship’ – attracting the ‘best and brightest’ through favourable citizenship conditions² – has thus been extended to attract not just those with exceptional skills, but also those with exceptionally deep pockets. Many of the EU Member States have adopted regimes which target global talent. A somewhat lower, but still substantial number of Member States have offered preferential access to the ultra-rich.³

The practice of offering citizenship for sale has become infamous, and in particular, among EU lawyers at least, the programme adopted by Malta. An investment of a little over EUR 1,000,000 could buy one Maltese nationality, regardless of that person’s links with Malta, and with that, the status of EU citizenship and all the rights EU citizens benefit from.⁴ Due to the excessive focus on the Maltese investment scheme, the literature has not always paid sufficient attention to others, both investment citizenship and investment residence regimes. This paper examines investment residence from the perspective of EU law.

Certain Member States have tried to attract high net-worth individuals by offering them privileged residence rather than citizenship.⁵ Those countries doing so, or the law firms acting as their intermediaries, at times promise privileges to those who acquire residence through investment very similar to those offered for acquiring citizenship in exchange for monetary

² Ayelet Shachar and Ran Hirschl, ‘On Citizenship, States and Markets’ (2014) 22 *The Journal of Political Philosophy* 231.

³ For an overview of many of these programmes: Sergio Carrera, ‘How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the union?’ (2014) CEPS Paper No 64; Alan Gamlen, Christopher Kutarna and Ashby Monk, ‘Re-thinking Immigrant Investment Funds’ (2016) *Investment Migration Working Papers* No 2016/2 IMC, Geneva, Annex.

⁴ For the Maltese Citizenship Act: <<http://iip.gov.mt/wp-content/uploads/2014/02/LN-47-2014.pdf>> (last visited: 26-6-2016).

⁵ See again Carrera (n 2).

transfers.⁶ The question therefore arises from the perspective of EU law, to what extent are the benefits of investment residence schemes similar to those of investment citizenship? Do residence regimes raise the same issues, again from an EU perspective, as those schemes which offer citizenship in exchange for money?

This paper does not offer a normative take on the practices of investment citizenship and residence as such.⁷ Instead, it offers an inquiry into the precise interaction between national investment residency regimes and EU legislation regulating residence for third-country nationals – the EU definition for those not in the possession of EU citizenship status – and with that, the opportunities EU law provides for investors in residence and the tensions created thereby. To this end, the first section provides a little context by briefly describing the global race for talent which has emerged recently. The section which follows explains how similar trends are discernible within the EU. That those with very limited connections to a particular country can acquire residence rights raises the question of how these investment residence schemes interact with EU legislation on residence. Does the acquisition of residence through investment also allow the investor, on the basis of EU legislation, to move to and settle in other Member States? In other words, what are the benefits offered by EU law to those who acquire national residence rights through investment? Law firms involved in the sale of residence have at times suggested that these benefits are substantial. I will explain in the third section that the EU rights investors in residence are able to benefit from are relatively modest. The fourth section explains that EU legislation aspiring to attract desirable individuals is also not a feasible alternative to national investment schemes.

2. The race for talent and money

A global ‘race for talent’ has emerged in recent decades.⁸ Realising that human capital is a scarce commodity, countries in need of highly skilled individuals have begun to attract the ‘best and brightest’ by providing them fast-track access to permanent residence and at times even citizenship.⁹ The ‘citizenship factor [has thus become] an important recruitment tool for

⁶ See section 3 of this paper.

⁷ For some normative perspectives, see: Shachar and Hirschl (n 1) and the contributions in Rainer Bauböck and Ayelet Shachar (eds) ‘Should Citizenship be for Sale?’, *RSCAS Working Paper* 2014/01.

⁸ Ayelet Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes’ (2006) 81 *NYU L Rev* 148.

⁹ Shachar and Hirschl (n 1).

all advanced industrial policies'.¹⁰ While the focus most recently has been on the direct sale of citizenship, providing accelerated access to residence and membership is not a new practice. Ong noted years before the most recent investment schemes that 'nation-states seeking wealth-bearing and entrepreneurial immigrants do not hesitate to adjust immigration laws to favour elite migrant subjects, especially professionals and investors'.¹¹ What we have thus witnessed is the rise of immigration regimes which differ from more 'ordinary' immigration policies in that they at their 'core [are] managerial, economistic, and restrictive, focusing on the potential economic and social contributions by immigrants to host societies'.¹²

Increasingly, states have added to their immigration arsenal policies which try to attract not only human capital, but also capital per se¹³ – a shift from 'talent for citizenship'¹⁴ to 'money for citizenship'.¹⁵ With that, barriers to the acquisition of permanent residence and nationality have also been lowered. Traditionally, many of the regimes which focus on human capital allow the status of the temporary resident to be transposed into one of permanent residence or even citizenship only upon fulfilment of the requirements which also apply to ordinary citizens. However, those countries interested in attracting not just the 'best and brightest', but also the 'rich and famous', have made these statuses also available to investors in the absence of their residence within the country.¹⁶ The difference with what could be characterised as more traditional programmes is thus twofold: the focus has shifted away from human capital to capital, and access to permanent residence or citizenship has also become available in certain countries for those without any strong connections to that country.¹⁷

Taken together, these policies demonstrate that worldwide 'countries keen on recruiting the new breed of desired migrants – the highly skilled, the entrepreneurial innovators, the creative

¹⁰ Shachar (n 7) 165.

¹¹ Aihwa Ong, '(Re)Articulations of Citizenship' (2005) 38 *Political Science and Politics* 697, 698.

¹² Georg Menz, *The Political Economy of Managed Migration: Nonstate Actors, Europeanization, and the Politics of Designing Migration Policies* (OUP 2008) 2.

¹³ Shachar and Hirschl (n 1) 251.

¹⁴ Shachar (n 7) 164.

¹⁵ Such investment policies can be found within the EU, but also beyond. Countries outside the EU famous for selling citizenship are Antigua and Barbuda, and St Kitts and Nevis, which both offer citizenship for a USD 400,000 investment in real estate. See for further information: <<http://stkitts-citizenship.com/>> and <<http://cip.gov.ag/>> (both visited on 12-09-2016).

¹⁶ Manuela Boatcă, 'Commodification of Citizenship: Global Inequalities and the Modern Transmission of Property', in Immanuel Maurice Wallerstein, Christopher K Chase-Dunn and Christian Suter (eds), *Overcoming Global Inequalities* (Paradigm Publishers 2014) 12.

¹⁷ Those programmes thus depart radically from the *Nottebohm* doctrine, according to which the grant of nationality must be based on a 'genuine connection' with the state. *Liechtenstein v Guatemala (Nottebohm)* 1955 ICJ 1.

class, and in some places, the ultra-rich – are engaged in a high-stakes competitive scramble to attract and retain them’.¹⁸ These developments raise interesting questions: empirically, how they fit in the broader ‘commercialization of international migration’ and,¹⁹ normatively, whether these new regimes are just a logical continuation of the policies designed to attract talented individuals or a more problematic deviation therefrom.²⁰ These issues are beyond the scope of this paper, which will instead focus on more recent developments within the EU and the consequences of such regimes for EU law.

3. Investment residence within the EU

Those who have noticed the commotion surrounding the Maltese investment citizenship programme would be forgiven for thinking that the practice of granting citizenship to contributors is an entirely new phenomenon.²¹ This would be a mistake. While the scale of the schemes introduced recently is indeed relatively unprecedented, a large number of Member States permit the conferral of citizenship on the grounds of national interest. In 2015, Džankić noted that twenty-two out of twenty-eight EU Member States permit discretionary naturalisation of those with noteworthy cultural, athletic, scientific achievements, or attainments of any other kind.²² If something is new it is the less discretionary nature of recently introduced programmes. Citizenship is offered to anyone able and willing to make an investment.²³

¹⁸ Shachar and Hirschl (n 1) 235.

¹⁹ Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (Routledge 2013).

²⁰ Those who regard all those regimes as being a form of selling citizenship/residence will treat those regimes as normatively equally (un)desirable. For such views: Shaheen Borna and James M Stearns, ‘The Ethics and Efficacy of Selling National Citizenship’ (2002) 37 *Journal of Business Ethics* 193; Dimitry Kochenov, ‘Citizenship for Real: It’s Hypocrisy, Its Randomness, Its Price’, in Rainer Bauböck and Ayelet Shachar (eds) *Should Citizenship be for Sale?* RSCAS Working Paper 2014/01. Others have suggested that there is a need to distinguish between regimes developed for the attraction of human capital and policies which focus on capital only. See Shachar and Hirschl (n 1).

²¹ Malta is not the only EU Member State with such an investment citizenship programme. Cyprus, Bulgaria and Austria also offer citizenship for sale. Austria itself denies that it has ever sold citizenship, but unofficially appears to have a scheme. For further information see: Jelena Džankić, ‘The Pros and Cons of *Ius Pecuniae*: Investor Citizenship in Comparative Perspective’ (2012) *RSCAS EUI Working Papers* 2012/14.

²² Jelena Džankić, ‘Investment-based citizenship and residence programmes in the EU’ (2015) *RSCAS EUI Working Papers* 2015/08, 5–6.

²³ Though countries with citizenship by investment programmes do conduct background checks to verify that the investor has no criminal background. Madeleine Sumption and Kate Hooper, ‘Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration’ (October 2014) *Migration Policy Institute* 17.

Programmes which offer fast-track access to residence to sought-after individuals are also not new. After the turn of the millennium, immigration reforms were initiated in many EU Member States in order to attract highly-skilled immigrants.²⁴ In 2002 the UK adopted its Highly-Skilled Migrants Programme (repealed in 2008),²⁵ which introduced a points system for the selection of highly-skilled individuals.²⁶

In the same period Germany overhauled its highly restrictive immigration regime so as to facilitate the admission and residence of highly-skilled individuals.²⁷ Numerous other EU Member States introduced similar policies.²⁸ Such programmes are still in place. Italy, for example, has created a start-up visa regime to attract innovative entrepreneurs, providing those who qualify with priority access to the country.²⁹ The Netherlands also facilitates the stay of those who wish to start a business by issuing special residence permits for entrepreneurs if the ‘business activities serve an essential Dutch interest’.³⁰ Such entrepreneurial residence permits are also available for directors and major company shareholders.³¹ The Netherlands and Italy

²⁴ It was not only the EU Member States individually, but also their concerted action which resulted in new immigration policies. In 2000 the EU adopted the Lisbon Agenda, in which the EU committed itself to becoming ‘the most competitive and dynamic knowledge-based economy in the world’. See Presidency Conclusions of the Lisbon European Council of 23 and 24 March 2000, available at <http://www.europarl.europa.eu/summits/lis1_en.htm> (last visited: 12-09-2016). Among the concrete policy implications of the Lisbon strategy was the adoption of legislation which would foster the admission of those able to contribute to the EU’s knowledge-based economy. The Blue Card Directive, which seeks to foster the admission of highly-skilled individuals, is the best example. See Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly-qualified employment (OJ 2009 L 155/17). For an elaborate analysis see Steve Peers, ‘Legislative Update: EC Immigration and Asylum Law. Attracting and Deterring Labour Migration: The Blue Card and the Employer Sanctions Directive’ (2009) 11 *EuJML* 387; Anja Wiesbrock, *Legal Migration in the European Union* (Brill 2010).

²⁵ Replaced by the Tier 1 visa scheme. For a detailed overview see Gina Clayton, *Textbook on Immigration and Asylum Law* (OUP 2014) chapter 9.

²⁶ For an overview of the changes to UK immigration law implemented during this period, see Clayton (n 24); Don Flynn, ‘New borders, new management: The dilemmas of modern immigration policies’ (2005) 28 *Ethnic and Racial Studies* 463. For a critical perspective on points-based immigrant selection systems, see Demetrios G Papademetriou and Madeleine Sumption, ‘Rethinking Points Systems and Employer-Selected Immigration (2011) Migration Policy Institute, Washington <<http://www.migrationpolicy.org/sites/default/files/publications/rethinkingpointssystem.pdf>> (last visited: 26-12-2016).

²⁷ This remarkable change has been aptly summarised by Veysel Oezcan, ‘Germany: Immigration in Transition’ (2004) Migration Information Source, available at <<http://www.migrationpolicy.org/article/germany-immigration-transition>> (last visited: 31-08-2016). See also Shachar (n 7) 188–190; Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992).

²⁸ See further: Shachar (n 7) 186–187; Stephen Castles, ‘Guestworkers in Europe: A Resurrection?’ (2006) 40 *International Migration Review* 741; Petra Zaletel, ‘Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration’ (2006) 12 *European Law Journal* 613; Jeroen Doomernik, Rey Koslowski, Dietrich Tränhardt, ‘The Battle for the Brains: Why Immigration Policy is not Enough to Attract the Highly Skilled’ (2009) *GMF Paper Series*, GMF, Washington.

²⁹ For information on this programme see <<http://italiastartupvisa.mise.gov.it/#landing-section>> (last visited: 23-6-2016).

³⁰ For further information <<https://ind.nl/EN/individuals/residence-wizard/work/working-on-a-self-employed-basis>> (last visited: 23-6-2016).

³¹ Ibid.

are certainly not the only two EU Member States with visas for entrepreneurs, the self-employed or other economically interesting individuals.³² EU Member States, in other words, are also involved in the scramble for human capital.³³

If there is controversy about national immigration policies which facilitate admission and offer beneficial residency rights, it is most likely not about programmes like these.³⁴ This is for two reasons. First, these policies prefer to attract those with talent and knowledge advantageous to the development of the country – human capital – not on the attraction of capital investments alone.³⁵ Second, and perhaps more importantly, those benefitting from such regimes as a general rule need to fulfil additional criteria, often as substantive as the ones fulfilled by ordinary migrants, before gaining access to permanent residence or citizenship.³⁶ These programmes thus facilitate admission, but in order to acquire permanent residence rights or even citizenship, successful applicants need to have sufficiently close links to the state.

This, I explained in the previous section, is increasingly changing. A large number of Member States now have established regimes which hope to attract wealthy individuals by offering residence for sale: in exchange for a mere investment, individuals acquire residence rights which they can convert into permanent residence and often even citizenship status without significant further requirements. In particular the Member States hit the hardest by the financial and sovereign debt crises and hence faced with the most impossible task to attract sufficient foreign investment and other sources of revenue to reduce the deficit, have found such programmes attractive,³⁷ though more affluent European countries also offer residency for

³² See for example the UK scheme for entrepreneurs <<https://www.gov.uk/tier-1-entrepreneur/overview>> (last visited: 23-6-2016). For a more detailed analysis, see Madeleine Sumption, 'Visas for Entrepreneurs: How Countries are Seeking Out Immigrant Job Creators', available at <<http://www.migrationpolicy.org/article/visas-entrepreneurs-how-countries-are-seeking-out-immigrant-job-creators>> (last visited: 23-6-2016).

³³ This cannot surprise, of course, for 'the resource that is in greatest scarcity is human capital'. Ayelet Shachar, 'Selecting by Merit: The Brave New World of Stratified Mobility', in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016) 176.

³⁴ Though such programmes have also been criticised, for example because they erode the rights of those who do not qualify as highly skilled immigrants. Flynn (n 25).

³⁵ According to Shachar and Hirschl (n 1), there is a normative distinction between programmes which provide privileged access to persons based on their human capital, and those which grant admission for financial abilities.

³⁶ For an overview of some of the schemes available, see Sumption and Hooper (n 22).

³⁷ Owen Parker, 'Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes' (2016) *JCMS* 7 (early view article). For the specific case of Portugal: Annette Bongardt and Miguel Santos Neves, 'The Chinese Business Community at a Crossroads Between Crisis Response and China's Assertive Global Strategy: The Case of Portugal' (2014) *EUI Migration Policy Centre Research Report* 2014/02 29; Joaquim Ramos Silva, 'Foreign Direct Investment in the Context of the Financial Crisis and Bailout: Portugal' in Béla Galgóczi and others (eds), *Foreign Investment in Eastern and Southern Europe after 2008: Still a Lever of Growth?* (ETUI 2015) 271.

sale.³⁸ These programmes thus offer investors the ability to acquire such statuses without being resident within the country and having to fulfil the requirements which exist for ordinary migrants.³⁹

Such investment residency schemes exist in diverse forms and a detailed overview of all individual Member States would exceed the scope of this paper.⁴⁰ Instead, what follows explains that the trends described in the previous section have also been witnessed within the EU. The investment residency schemes which have emerged more recently differ from more traditional programmes in two ways. First, these schemes' ultimate purpose is to attract capital investment. In addition, investors can acquire such statuses without being resident in the country and having to fulfil the requirements applicable to ordinary migrants.

There are numerous schemes now aim to attract capital. As Sumption and Hooper explain, the countries which have adopted such policies are interested either in investments in the private sector or transactions between the country's government and the investor, and some allow for both.⁴¹ Private sector investments can be made in local business and/or investments in private property. In the Netherlands, Portugal and France, investors in local business, from EUR 1 million in Portugal up to EUR 10 million in France,⁴² qualify for temporary visas. Some countries also count direct evidence of the creation of new jobs as proof of local investment: in Portugal, the creation of ten new jobs permits the acquisition of a residence permit.⁴³ Those countries whose housing sectors were hit hardest by the crisis have, instead or in addition, tried to attract property investors by offering them residence. Temporary residence visas are on offer

³⁸ For an overview of the programmes in place, see European Migration Network, 'Ad-Hoc Query on Wealthy Immigrants (update)' (2014) available at <http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/residence/528_emn_ahq_wealthy_immigrants_update_wider_dissemination.pdf> (last visited: 13-09-2016).

³⁹ Boatcă (n 15) 12.

⁴⁰ For a number of useful overviews on the regimes currently in place, see European Migration Network (n 37); Carrera (n 2); Gamlen, Kutarna and Monk (n 2).

⁴¹ Sumption and Hooper (n 22).

⁴² See Article 6 of Order No. 1661-A/2013, available on <<http://www.sef.pt/documentos/35/11820-A-2012.pdf>> (last visited: 13-09-2016). More information about the Dutch regime is available on <<https://ind.nl/EN/individuals/residence-wizard/wealthy-foreign-national>> (last visited: 13-09-2016). For France, see Article L 314-15 of the Code de l'entrée et du séjour des étrangers et du droit d'asile.

⁴³ Article 7(2) of Order No. 1661-A/2013, available on <<http://www.sef.pt/documentos/35/11820-A-2012.pdf>> (last visited: 13-09-2016).

for people willing to invest around EUR 250,000 in real estate in Greece,⁴⁴ Latvia,⁴⁵ and Malta,⁴⁶ or EUR 500,000 in Portugal and Spain.⁴⁷

The alternative is a direct transaction with the government.⁴⁸ These transactions can either be direct transfers of money to the national governments or the buying of government bonds. Malta famously combines the various options, where a EUR 650,000 lump-sum, a property purchase of at least EUR 350,000 and the purchase of EUR 150,000 in government bonds provides residency status,⁴⁹ followed by citizenship after twelve months. Hungary, Ireland and the UK have opted for regimes which attract wealthy investors by offering them visas in return for investments in government bonds. Those investments range from EUR 250,000 in Hungary to EUR 2 million in the UK.⁵⁰

The programmes' second aspect of interest is that several – though not all⁵¹ – allow those who have acquired residence through capital investment to acquire permanent residency and at times even citizenship without actually being resident within the country and without needing to comply with the requirements which exist for ordinary migrants.⁵² Permanent residence or even fast-track citizenship are offered to those without a sufficiently strong connection to the country of residence. Such investment residence regimes thus have much in common with the more

⁴⁴ For a summary of the Greek legislation, see <http://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf> (last visited: 13-09-2016).

⁴⁵ Latvian Immigration Law, Chapter IV, Section 23(29). An English translation is available at <http://webcache.googleusercontent.com/search?q=cache:4SBNgg_dwEwJ:www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Immigration_Law.doc+&cd=1&hl=nl&ct=clnk&gl=it> (last visited: 13-09-2016).

⁴⁶ In Malta, this sum is between EUR 220,000 and EUR 275,000, depending on the location. Alternatively, between EUR 8,750 and EUR 9,600 in annual rent, also depending on the location, obtains residence <<https://www.henleyglobal.com/residence-malta/>> (last visited: 23-6-2016).

⁴⁷ For Portugal, see Article 3(4) of Order No. 1661-A/2013, available on <<http://www.sef.pt/documentos/35/11820-A-2012.pdf>> (last visited: 13-09-2016). For Spain, see Chapter II of Law 14/2013.

⁴⁸ Sumption and Hooper (n 22).

⁴⁹ An English version of the Maltese law on investment citizenship is available here <<http://iip.gov.mt/wp-content/uploads/2014/02/LN-47-2014.pdf>> (last visited: 26-6-2016).

⁵⁰ See Section 28 of Act II of 2007 for the Hungarian rules. For an unofficial translation <http://helsinki.hu/wp-content/uploads/Act_II_of_2007_on_the_admission_and_right_of_residence_of_third-country_nationals.pdf> (last visited: 13-09-2016). Article 245 EE of the UK immigration Rules, available at <<https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-6a-the-points-based-system#pt6a-investor>> (last visited: 13-09-2016).

⁵¹ Indefinite leave to remain (permanent residence) in the UK is available after either five years (with a GBP 2 million investment in government bonds), three years (with a GBP 5 million investment), or two years (with GBP 10 million investment), but the right is lost if the applicant is absent from the UK for more than 180 days in any calendar year during the qualification period. For detailed guidelines: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/514081/T1_I_Guidance_04_2016.pdf> (last visited: 13-09-2016).

⁵² Boatča (n 15) 12.

notorious investment citizenship regimes, in the sense that residence and membership rights are offered to those who can afford so, regardless of their ties to that country.⁵³ A EUR 250,000 investment in property, for example, will buy one a visa in Greece valid for five years. No additional minimum stay requirements are attached to this visa and the visa is renewable for as long as the property is retained.⁵⁴ Those who participate in Portugal's Golden Visa scheme need to be present only for seven days during the first year and for fourteen days during each subsequent period of two years.⁵⁵ If a Golden Visa is maintained for five years, the holder is entitled to permanent residence and, upon passing a basic language test, to Portuguese citizenship after six years.⁵⁶

The recent trends, while by no means uniform, are thus clear. First, the focus is increasingly on capital investment. While countries traditionally gave preferential access to those who had the skills and knowhow to produce economic value, increasingly many countries today are keen on attracting money. In addition, the degree of integration required for the acquisition of permanent residence has been diminished. Very little is required to obtain such residence permits, therefore, other than the possession of a fat wallet.

This is but one reason which explains the popularity of Golden Visas.⁵⁷ The residence schemes are interesting, particularly for those who possess the nationality of a state which precludes dual citizenship. Those individuals will not want to acquire an additional citizenship if they want to maintain their strong links with their home country. It should therefore come as no surprise that the investment resident schemes have been popular among Chinese investors: China strips its nationals of their citizenship upon the acquisition of citizenship elsewhere.

⁵³ This is problematic according to many normative accounts of citizenship. Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009); Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review* 2393.

⁵⁴ For a useful summary in English of the Greek legislation: <http://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf> (last visited: 26-06-2016).

⁵⁵ For an English translation of the Portuguese laws: <<http://www.sef.pt/documentos/35/11820-A-2012.pdf>> (last visited: 13-09-2016).

⁵⁶ See Article 6 of the Portuguese Nationality Act. For an English version see <[http://eudo-citizenship.eu/NationalDB/docs/POR%20Law%2037%2081%20as%20consolidated%20by%20Law%202%2006%20\(English\).pdf](http://eudo-citizenship.eu/NationalDB/docs/POR%20Law%2037%2081%20as%20consolidated%20by%20Law%202%2006%20(English).pdf)> (last visited: 13-09-2016).

⁵⁷ The popularity is probably best demonstrated by the Portuguese Golden Visa scheme, which has attracted over EUR 1 billion in investments, almost all of that in private property. *Financial Times*, 'Golden tickets underpin Portugal's property market revival' (4 December 2014) <<http://www.ft.com/intl/cms/s/0/4e83a148-52e8-11e4-9221-00144feab7de.html#axzz45gmySSsw>> (last visited: 26-6-2016).

Eighty percent of those who have used the Portuguese Golden Visa scheme are Chinese.⁵⁸ It has even been suggested that the numbers of all foreign nationals in Portugal having decreased during Portugal's crisis years except for the Chinese is precisely due to the popularity of Portugal's investment residence scheme among the Chinese.⁵⁹ It is, however, not just nationals from countries which ban dual nationality that have eagerly used the available opportunities. Around 90% of the investor visa applicants in Latvia possess the citizenship of the Russian federation,⁶⁰ a country whose constitution recognises dual nationality.⁶¹ Special historical relationships between countries and their people also thus determine the popularity of a particular regime.

4. National residence and EU law

The popularity of investment residence schemes is even more readily understood on consideration of the benefits and privileges which are available to those able and willing to make an investment. Many of the rights and benefits provided by investment citizenship are also available to those who invest in residence. Bear in mind that those investing in the schemes adopted by EU Member States are interested in more than the benefits provided by EU law. It is not only about buying EU rights.⁶² Investment schemes offer legal and financial security to investors, an aspect which has been suggested as being even more important than access to the EU market.⁶³ The acquisition of citizenship on top also offers visa-free travel to many non-EU countries.⁶⁴

Still, one of the dominant rationales behind investing in one of the Golden Visa schemes adopted by the Member States appears that it provides the investor and her or his relatives with access to the EU market. The acquisition of a Member State nationality provides the individual with all the rights and privileges of EU citizenship, but the acquisition of EU Member State

⁵⁸ Bongardt and Santos Neves (n 36).

⁵⁹ Maria Beatriz Rocha-Trindade, 'Portuguese Migration: Responding to the New Crisis?' (2014) 12 *AEMI Journal* 96, footnote 9.

⁶⁰ Sanita Jemberga and Inga Sprinģe, 'Latvia Torn Between Money and Fear of Russia' (19 February 2015) <<http://www.eurasianet.org/node/72166>> (last visited 26-6-2016).

⁶¹ Article 62(1) of the *Russian Constitution*.

⁶² See for example the reactions of the European Parliament to the Maltese investment citizenship scheme: European Parliament resolution on *EU citizenship for sale*, 2013/2995 *RSP* (16 January 2014).

⁶³ Bongardt and Santos Neves (n 36) 29.

⁶⁴ The extent of travel freedom is now being used to measure the quality of nationality around the world. See the Quality of Nationality Index at: <<https://www.nationalityindex.com/>> (last visited: 14-09-2016).

visas also grants the recipient privileged access to other EU Member States. Problematically, however, it is not fully evident to what extent investment residence provides investors with access to and rights in the EU market: that is, to what extent the acquisition of residence through investment actually enables investors to travel freely to other Member States. Some might be interested merely in economic opportunities, but non-economic ones such as educational opportunities for their children also are among the reasons why affluent individuals have decided to acquire residence rights within EU Member States.⁶⁵ To what extent investment residence offers the same benefits as the acquisition of EU citizenship depends on the precise interaction between national residence rights and the concept of residence within EU law. This section will address some of the current confusion by offering an analysis of two different of EU law which offer more-or-less elaborate free movement and residence rights: (1) Schengen (2) and permanent residency status under EU law.

4.1 Schengen

What is beyond dispute is that those in the possession of national residence rights are entitled to the benefits offered by the Schengen, if the Member State is also part of the Schengen zone. Those who have acquired residence in one of those Member States will benefit from visa-free travel throughout the Schengen zone. Third-country nationals with valid residence permits will enjoy the right to travel freely in the Schengen area for periods not exceeding 90 days within a six-month period.⁶⁶ For those investors who regularly travel to the EU and are interested in circumventing the burdensome visa procedures, visa-free travel in the Schengen zone will be an attractive benefit.

Because not all EU Member States are Schengen members,⁶⁷ the acquisition of residence rights in a Schengen country does not allow for visa-free travel to all EU Member States. The United Kingdom and Ireland have opted out from the Schengen regime and hence, travel to those countries cannot be undertaken without valid visas.⁶⁸ Cyprus, Romania, Bulgaria and Croatia

⁶⁵ Bongardt and Santos Neves (n 36) 27–28.

⁶⁶ Regulation (EC) No 810/2009 establishing a Community Code on Visas (13 July 2009) L243/1.

⁶⁷ And certain non-EU Member States are Schengen members, namely: Iceland, Norway, Switzerland and Liechtenstein.

⁶⁸ The UK and Ireland are exempt from the Schengen requirements, unless they ‘request to take part in some or all of the provisions of the Schengen acquis’. See Article 4 of Protocol 19 TEU. For a more detailed overview of the territorial scope of Schengen, read: Steve Peers, Elspeth Guild and Jonathan Tomkin, *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition – Volume 1: Visas and Border Controls* (Martinus Nijhoff 2012) 21–25.

are candidate-Schengen countries and are thus for now outside the Schengen area.⁶⁹ Third-country nationals who have invested in residence in a non-Schengen country, therefore, do not qualify for visa-free travel.⁷⁰ This will put the Cyprus investment residence programme at a comparative disadvantage, therefore, when compared to Golden Visa schemes adopted by Schengen Member States.⁷¹ Most EU Member States which have adopted Golden Visa schemes, however, do and will consequently attract those who regularly travel to and within the EU and want to avoid regular Schengen visa applications.

4.2 Long-term residence

In comparison with EU citizenship, what is offered by Schengen is of course rather modest. For those interested in the benefits of EU citizenship, acquiring the nationality of one of the EU Member States will be a much more attractive perspective than purchasing residence if visa-free travel is all which is offered by residence through investment. The EU, however, has created a form of *quasi*-EU citizenship for many third-country nationals residing within the EU.⁷² Because, in other words, the rights of EU citizens have been partially extended to legally resident third-country nationals, the question which arises is whether those who have acquired investment through residence could benefit from the legislation adopted to bring third-country nationals in a position similar to EU citizens.

During the 1999 European Council meeting in Tampere, it was decided that:

The legal status of third-country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted

⁶⁹ For a clear overview of Schengen countries: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm> (last visited: 23-6-2016).

⁷⁰ Decision No 565/2014/EU of the European Parliament and of the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania (2014 OJ L157/23) however, allows Cyprus, Romania, Bulgaria and Croatia to recognise the documents issued by Schengen members. In other words, those in the possession of a Schengen visa can travel to those EU Member States without having to apply anew for a visa of one of those four countries. This Decision also allows Cyprus, Romania, Bulgaria and Croatia mutually to recognise their documents as issued, thus facilitating travel between the four.

⁷¹ On comparative advantages and mutual patterns between countries: Shachar (n 7) 166; Carrera (n 2) 15.

⁷² Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-Derivative *Quasi*-Citizenship Rights of Third-Country Nationals in the EU', in 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).

in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the state of residence. The European Council endorses the objective that long-term legally resident third-country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.⁷³

In the many years which have followed since, several pieces of legislation have been adopted to improve the legal status of third-country nationals and thereby to close the legal gap between EU citizens and long-term residents.⁷⁴ The most relevant for present purposes is Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.⁷⁵

Upon the introduction of the long-term residents Directive, all third-country nationals who have legally resided for a continuous period of five years in one Member State are granted long-term resident status⁷⁶ upon fulfilment of the other conditions in the Directive, these being: stable and regular resources;⁷⁷ sickness insurance;⁷⁸ and not being a threat to public policy and security.⁷⁹ One may fairly assume that these will be satisfied by those who have acquired residence through investment.⁸⁰

Those in the possession of long-term resident status may reside ‘in the territory of Member States other than the one which granted him/her the long-term resident status, for a period exceeding three months’,⁸¹ for reasons including economic activity or studies and training.⁸² Additionally, those free movement rights come with a set of elaborate equal-treatment rights which long-term residents should enjoy with the nationals of the Member States in which they

⁷³ Presidency Conclusions, Tampere European Council 15, 16 October 1999.

⁷⁴ For an elaborate overview, see Kochenov and van den Brink (n 71).

⁷⁵ Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44). For a meticulous analysis of the Directive, see Diego Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill 2011); Wiesbrock (n 23).

⁷⁶ Article 4(1) Directive 2003/109/EC.

⁷⁷ Article 5(1)(a) Directive 2003/109/EC.

⁷⁸ Article 5(1)(b) Directive 2003/109/EC.

⁷⁹ Article 6(1) Directive 2003/109/EC.

⁸⁰ Further, the criterion of not being a threat to public policy and security for those applying for a Golden Visa will be subject to screening to guarantee the credibility of the investment programmes. See Article 6 Directive 2003/109/EC.

⁸¹ Article 14(1) Directive 2003/109/EC.

⁸² Article 14(2) Directive 2003/109/EC.

reside. The Directive provides non-discrimination rights – among a longer list – in the area of ‘education and vocational training, including study grants in accordance with national law’⁸³ and social and tax benefits,⁸⁴ even though the Member States ‘may limit equal treatment in respect of social assistance and social protection to core benefits’.⁸⁵ These rights, while certainly not fully replicating those attached to the status of EU citizenship, definitely resemble EU citizenship rights and may thus offer investors in residence an attractive alternative to EU citizenship, if the residence they acquired through investment fulfils the criteria laid down in the Directive.

It is precisely on the latter point which disagreement exists, as the criteria to be fulfilled are not entirely clear. It should come as no surprise that those involved in the business of selling residence have suggested that long-term resident status can be acquired once third-country nationals have held national residence permits for a continuous period of five years. La Vida, one of the firms providing advice on residence and citizenship planning suggests that:

[w]hichever country an investor targets for citizenship, there are sometimes faster, cheaper and easier options to gain permanent residency allowing them to live, work and study in that country by gaining entry through an alternative EU country.⁸⁶

It has been suggested by another firm that permanent residence acquired by investment in Bulgaria ‘gives the client a “foot in the door” to other EU countries’ through Directive 2003/109.⁸⁷ And Hungary, according to another firm advising on investment migration, offers ‘fast-track to permanent residency in the EU in 4 weeks’.⁸⁸ The subsequent analysis will demonstrate why these claims rest upon a misreading of EU law, which at times is so evident that we could wonder whether these firms are genuinely interested in providing a truthful overview of the options offered by national residence regimes within the EU.

A better view has been presented by Carrera, who has suggested that it is unlikely that Member States can ‘instrumentalise [EU long-term residence] status to get donations to their treasuries

⁸³ Article 11(1)(b) Directive 2003/109/EC.

⁸⁴ Article 11(1)(d)&(e) Directive 2003/109/EC.

⁸⁵ Article 11(4) Directive 2003/109/EC.

⁸⁶ <<http://www.goldenvisas.com/category/investor-visa/citizenship>> (last visited: 26-6-2016).

⁸⁷ <<http://www.key2europe.com/en/FAQ>> (last visited: 26-6-2016).

⁸⁸ <<http://www.artoncapital.com/industry-news/fast-track-permanent-residency-eu-4-weeks/>> (last visited: 26-6-2016).

from rich third-country nationals'.⁸⁹ The following builds upon but also complements Carrera's arguments to demonstrate to what extent investment residence schemes and the EU's long-term residents Directive interact.

What should be evident is that people who acquire permanent residence under national law before the five-year period is complete cannot benefit from the long-term residents Directive. The Directive is clear as to the extent it determines 'the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto'.⁹⁰ If Member States decide to grant someone a permanent residence visa when the conditions in the Directive have not yet been fulfilled, that remains without consequences in EU law. This follows most evidently from Article 13 of the Directive, which states that:

Member States may issue residence permits of permanent or unlimited validity on terms that are more favourable than those laid down by this Directive. Such residence permits shall not confer the right of residence in the other Member States as provided by [...] this Directive.

Hence, the acquisition of permanent residence based on national law through investment or otherwise, does not bring the third-country national within the scope of the Directive for as long as the requirements in the Directive have not been satisfied.⁹¹ This alone demonstrates why permanent residence within the EU is not available within four weeks. A Member State may offer permanent legal residence to investors after such exceptionally brief periods, but this does not bring the investor within the scope of the long-term residents Directive.

The real subject of the debate is likely to be of a different nature, however; this concerns those who have had national residence rights for a period of five years and hence ostensibly satisfy the five-year residence period in the Directive. It is with respect to those individuals that Carrera questions whether they should be able to benefit from the rights and privileges reserved for those falling within the scope of the long-term residents Directive. In other words, do people

⁸⁹ Carrera (n 2) 18.

⁹⁰ Article 1(a) Directive 2003/109/EC.

⁹¹ See also Steve Peers, Elspeth Guild et al, *EU immigration and Asylum Law (Text and Commentary): Second Revised Edition – Volume 2: EU Immigration Law* (Martinus Nijhoff 2012) 305.

who have possessed national residence rights for a period of five years also automatically fulfil the conditions laid down in the Directive?

Carrera answers this question to the negative. He claims that the requirement of having resided '*legally and continuously*' for a period of five years indicates that this requirement 'cannot be manipulated so that wealthy third-country nationals do not have the inconvenience of having to actually live in the host member state for five years'.⁹² To put it more simply, the Directive requires actual presence for a continuous period of five years. To suggest otherwise, Carrera argues, would undermine the purpose of the Directive. In support of this claim, the Directive's preamble is invoked, according to which:

[h]armonisation of the terms for acquisition of long-term resident status promotes mutual confidence between Member States. Certain Member States issue permits with a permanent or unlimited validity on conditions that are more favourable than those provided for by this Directive. The possibility of applying more favourable national provisions is not excluded by the Treaty. However, for the purposes of this Directive, it should be provided that permits issued on more favourable terms do not confer the right to reside in other Member States.⁹³

The resemblance between the preamble's text and the just-quoted Article 13 of the Directive is obvious: both serve the same purpose, namely to indicate that only satisfying the conditions set out in the Directive will permit a person to benefit from the rights enshrined in the Directive. Therefore, like Article 13, the preamble gives further support to the claim I just defended: the attainment of permanent residence on the basis of national law does not immediately also make a person a long-term resident under EU law.⁹⁴

This, however, does not conclusively answer the question just posed: is the possession of a national residence permit for a continuous period of five years alone sufficient for the fulfilment of the conditions set out in the Directive? At first glance this is not wholly evident. On the one hand, we could plausibly argue, like Carrera, that the Directive requires us 'to actually live in

⁹² Carrera (n 2) 18.

⁹³ Recital 17, Preamble to Directive 2003/109/EC.

⁹⁴ The EU also provides a special long-term residents permit. Article 8 Directive 2003/109/EC.

the host member state for five years'.⁹⁵ A glance at the Court's case law, on the other hand, could be taken as indication that the 2003 Directive does not require physical presence within the territory of a Member States. According to the Court, after all:

Directive 2003/109 does not lay down the conditions which the residence of those nationals must satisfy for them to be regarded as legally resident in the territory of a Member State. It follows that those conditions are governed by national law alone.⁹⁶

In addition, so was decided by the Court:

In accordance with Article 4(1) of Directive 2003/109, Member States are to grant long-term resident status to those nationals who, *in accordance with their national law*, have resided legally and continuously within their territory for five years immediately prior to the submission of the relevant application.⁹⁷

As such, there seems very little which stands in the way of Member States deciding that people who are rarely present in their territory may also be granted residence rights and that periods of absence may also count towards completion of the five-year rule.

Such a reading would be difficult to square, however, with other provisions in the Directive. After all, Article 4(3) specifies that '[p]eriods of absence from the territory of the Member State concerned shall not interrupt the [five-year period of continuous and legal residence] where they are shorter than six consecutive months and do not exceed in total 10 months'.⁹⁸ The question is whether this merely precludes the Member States from denying long-term resident status to those who have been absent for periods shorter than six consecutive months or 10 months in total, or whether this also mandates them to deny this status to those who have not been physically present for longer periods.

If the correct interpretation is the former, that is, that Member States are precluded from denying long-term resident status to those who have been away for periods shorter than those

⁹⁵ Carrera (n 2) 18.

⁹⁶ Case C-40/11 *Iida*, ECLI:EU:C:2012:691, para 36.

⁹⁷ *Ibid* para 37 (italics added).

⁹⁸ Article 4(3) Directive 2003/109/EC.

prescribed by the Directive, but left free otherwise to decide whether to grant those who have held national residence permits for over five years long-term resident status in accordance with the Directive, then investing in residence might become a very lucrative option. After all, this interpretation would allow Member States to provide investors who have been in possession of Golden Visas for over five years with the status of long-term EU resident, even in the absence of physical presence. This interpretation would enable investors to fulfil the criteria laid down in the Directive with relative ease.

To provide an example, a EUR 250,000 investment in property will buy you a visa in Greece valid for five years. No additional minimum stay requirements are attached to this visa.⁹⁹ If legal and continuous residence only need to be in accordance with national law, Greece could make its Golden Visa additionally attractive by determining that the possession of a Golden Visa equals legal and continuous residence, thereby guaranteeing that those who acquire an investment visa will become long-term permanent residents under EU law automatically after five years. Since an investor can include children in the family application,¹⁰⁰ they can also acquire EU long-term permanent residency status and thereby benefit from the non-discrimination rights in the Directive, including ‘education and vocational training, including study grants in accordance with national law’.¹⁰¹ That these rights allow those in possession of this status to enjoy, among others, lower university fees, demonstrates that the return on such an investment could be considerable were investment residence and the long-term residents Directive to interact in this way.

An alternative and more plausible interpretation of the Directive is available, however, namely that Member States are required to deny the status of EU long-term resident to people who have not been physically present for sufficiently long periods. The Directive’s purpose is to promote the ‘mutual confidence between Member States’.¹⁰² This purpose would arguably be undermined if it is left completely to national law to decide to what extent third-country nationals must be physically present within the territory of a Member State during the five years preceding the request for a long-term resident status. This is certainly the case if

⁹⁹ For an English summary of the Greek legislation: <http://www.mfa.gr/missionsabroad/images/stories/missions/uae/docs/permit_ependytes_en.pdf> (last visited: 26-06-2016).

¹⁰⁰ Ibid.

¹⁰¹ Article 11(1)(b) Directive 2003/109/EC.

¹⁰² Recital 17 Directive 2003/109/EC.

investment residence, as in the example above, grants easy access to publicly financed benefits in other Member States.

Uncertainty is likely to remain for as long as no further clarity is provided. Contributing to existing ambiguities is the discretion left to the Member States to derogate from the periods during which absences are allowed. This allows them in cases ‘of specific or exceptional reasons of a temporary nature and *in accordance with their national law* [to] accept that a longer period of absence [...] shall not interrupt the period’ of five years of legal and continuous residence.¹⁰³ It might be interesting to see how far Member States are willing to push the discretion left to them and also to use it to grant long-term resident status to those not present within their territory for periods exceeding six consecutive months and a total of ten months during the five years preceding the request for permanent legal residence. Furthermore, since the request for long-term resident status must be lodged with the authorities of the Member State of residence,¹⁰⁴ that is, the Member State in which the applicant has invested, Member States might very well be incentivised to find and stretch the limits.

5. Residence on the basis of EU law

In addition to national law, EU law also provides avenues to the acquisition of residence within a Member State. Henley & Partners,¹⁰⁵ one of the dominant law firms in the field of investment citizenship, has suggested as an alternative to the Golden Visa programmes, the EU’s Blue Card regime,¹⁰⁶ which has been adopted to ‘attract and retain highly qualified third-country workers’.¹⁰⁷ Before discussing the Blue Card Directive in more detail, first an important remark on an essential difference between this regime, established by the EU, and the EU legislative acts discussed in the previous section: the Blue-Card Directive allows a person to acquire accelerated entry and residence rights on the basis of EU law, not, as with the type of investment residence discussed thus far, on the basis of national law. This difference is far from insignificant because it removes the need to examine the interaction between national residence rights and residence as defined by EU law. Since the Blue-Card Directive has been suggested

¹⁰³ Article 4(3) Directive 2003/109/EC.

¹⁰⁴ Article 7(1) Directive 2003/109/EC.

¹⁰⁵ <<https://www.henleyglobal.com/residence-portugal-golden-eu-blue-card/>> (last visited : 26-6-2016).

¹⁰⁶ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly-qualified employment (OJ 2009 L 155/17).

¹⁰⁷ Recital 3, Preamble to Directive 2009/50/EC.

as an alternative route to access the EU, it is interesting nonetheless to examine what options this Directive provides to those interested in more than visa-free travel in the Schengen zone.

The Blue-Card Directive is part of a more comprehensive package of laws which regulate the admission of specific groups of individuals to the EU. In addition to the Directive discussed here, the sectoral legislation adopted includes Directives on the admission and free movement of researchers,¹⁰⁸ students,¹⁰⁹ seasonal workers,¹¹⁰ workers in the possession of a single permit,¹¹¹ and incorporate transferees.¹¹² All these Directives extend the rights granted to EU citizens to third-country nationals who fall within the categories of these Directives.¹¹³ Of interest here is the Blue Card Directive; not only because those who are able to acquire an investment residence permit under national law are most likely to qualify for this Directive, when compared with the purpose and scope of the other Directives, but also because the rights granted by the Blue Card Directive are most elaborate and most likely to interest those who are willing to acquire residence through investment.

The Blue Card Directive allows highly qualified employees to obtain a Blue Card, which provide their holders in turn with a set of rights. Blue Card holders enjoy a set of fairly elaborate family reunification rights¹¹⁴ and are granted equal treatment rights with nationals in areas such as working conditions, educational and vocational training, and certain branches of social security. Because some of these fields are subject to derogations, the scope of the equal treatment rights is narrower than that of EU long-term residents. For example, the latter group, in addition to enjoying equal treatment with respect to social security, is also entitled to social

¹⁰⁸ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ 2005 L 289/15).

¹⁰⁹ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375/12).

¹¹⁰ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (OJ 2014 L 94/375).

¹¹¹ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343/1).

¹¹² Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L 157/1).

¹¹³ For more analysis: Kochenov and van den Brink (n 71); Wiesbrock (n 23).

¹¹⁴ This is not the place to provide an elaborate discussion of these rights. Note, however, that the derogations from Directive 2003/86 on family reunification for third-country nationals, as specified in Article 15 of the Blue Card Directive, provides Blue Card holders with more extensive family reunification rights than ordinary third-country nationals. For an analysis: Kochenov and van den Brink (n 71).

assistance on an equal basis.¹¹⁵ Furthermore, EU long-term residents, contrary to Blue Card holders, also enjoy equal access to self-employed activities, while the equal treatment rights of those in the possession of a Blue Card only encompass access to employment.¹¹⁶

Having said that, there are more prominent reasons why I think it is unlikely that the Blue Card Directive is of any interest to individuals who can acquire residence under national law through investment. Note, first of all, that Blue Card holders are provided with the right to move to another Member State, '[a]fter eighteen months of legal residence in the first Member State as an EU Blue Card holder [...] for the purpose of highly qualified employment'.¹¹⁷ The fact that the Directive, more generally, covers only those who meet the requirements of highly qualified employees¹¹⁸ will disqualify affluent individuals who are interested in acquiring residence through a financial transaction, rather than employment. Furthermore, many of the individuals who can benefit from the national schemes established to attract human capital will also fall outside the scope of the Directive. The Directive is limited to employment activities only and hence does not cover self-employment. Entrepreneurs who are granted privileged access to residence under national law will therefore not benefit from the Blue Card Directive.

In sum, it is indisputably true that the Blue Card Directive offers an additional avenue to the acquisition of legal residence within a Member State and to limited free movement rights, but the Directive does not seem to provide a feasible alternative to national investment schemes. Many of the individuals targeted by national programmes are unlikely to fall within the ambit of the Directive and cannot therefore benefit from the EU's programmes which aspire to attract human capital.

6. Conclusion

Investment residence programmes are widespread and some of them have proven extremely popular. The benefits offered by them are numerous and the removal of restrictions to travel within the EU is one of them. However, compared to the acquisition of national citizenship through investment, buying national residence rights offers only fairly modest EU rights. Those

¹¹⁵ Article 11(d) Directive 2003/109/EC.

¹¹⁶ Article 12 Directive 2009/50/EC.

¹¹⁷ Article 18(1) Directive 2009/50/EC.

¹¹⁸ The conditions for highly qualified employment are set out in Article 2(b) Directive 2009/50/EC.

who purchase national residence rights are indeed entitled to the benefits offered by the Schengen regime, if at least the Member State of residence also is part of the Schengen zone. The acquisition of permanent residence under national law, however, does not grant access to the benefits offered by the long-term residents Directive if all the criteria set out in the Directive are not also fulfilled. Fulfilling these conditions will be problematic for those absent for long periods from the EU Member State of residence. Opportunities created by EU law to become resident within the EU, such as the Blue Card Directive, are also unlikely to be of any avail to many of those who could acquire national residence rights through investment.

This tells us a number of things. First, that a number of firms involved in the practice of providing advice on citizenship and residence planning promise their clients that the return on an investment in national residence rights is the acquisition of substantial rights under EU law indicates at best that the legal situation is far from clear and at worst that these firms are not transparent about the real benefits. Furthermore, to explain the popularity of national investment residence regimes, we need to take into account factors other than access to the EU market. Of course, visa-free travel under the Schengen regime is likely to be among the interesting benefits offered, but certainly not the only one. Lastly, that investment residence programmes have not attracted the same scrutiny is comprehensible if, in line with this paper's findings, these programmes have fewer cross-border implications than investment citizenship. Whereas the latter provide the investor with EU citizenship status and the full package of EU citizenship rights, the acquisition of a national residence permit through investment provides investors with rights only minimally resembling those of EU citizens.

Publications in the Investment Migration Working Papers

Research Papers

Gamlen A., C. Kutarna and A. Monk. *Re-thinking Immigrant Investment Funds*, IMC-RP 2016/1.

Fu, Q. *'Internal' Investment Migration: The Case of Investment Migration from Mainland China to Hong Kong*, IMC-RP 2016/2.

Surak, K. *Global Citizenship 2.0. The Growth of Citizenship by Investment Programs*, IMC-RP 2016/3.

Strumia, F. *New-generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State*, IMC-RP 2016/4.

Van den Brink, M. *Investment Residence and the Concept of Residence in EU Law: Interactions, Tensions, and Opportunities*, IMC-RP 2017/1.

Policy Briefs

Poleshchuk, V. *'Making Estonia Bigger': What E-residency in E-Estonia can do for you, what it can do for Estonia*, IMC-BP 2016/1.

Tryfonidou, A. *Investment Residence in the UK: Past and Future*, IMC-PB 2017/1.

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